Circuit Court for Anne Arundel County
Cases No. C-02-CV-19-000170 and C-02-CV-19-00167

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 160

September Term, 2022

IN THE MATTER OF CALVARY TEMPLE OF BALTIMORE, INC., ET AL.

Nazarian,
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: August 22, 2023

* 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 to Rule 1-104(a)(2)(B).

** During the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This marks the second appeal taken from the decision by the Anne Arundel County Board of Appeals (the "Board") on the application for a special exception and two variances filed by Appellee, Lumenary Memory Care at St. Stephen's Church, LLC ("Lumenary"), to permit construction of a memory-care facility at the corner of Brandy Farms Lane and St. Stephen's Church Road in Millersville, Maryland. In the party's first appeal, we reversed the Circuit Court for Anne Arundel County, Maryland's decision that the Board erred in granting administrative standing to appellant, Pastor James LaRock, Sr., to appeal the decision of an administrative hearing officer granting Lumenary's requested special exception and variances. *Calvary Temple of Baltimore, Inc., et al. v. Anne Arundel County, Maryland et al.*, ("*Calvary Temple I*") No. 1574, Sept. Term 2019, slip op. at 3-4 (filed Jun. 28, 2021). We explained that, because he resides on the adjacent property owned by Calvary Temple of Baltimore, Pastor LaRock had standing because he is specially aggrieved as "he possesses a significant, long-term interest in the Calvary property and lives in close proximity to the site of Lumenary's project." *Id.* at 4. Accordingly, we remanded the case to the circuit court to consider the merits of Pastor LaRock's petition for judicial review. *Id.* at 47. On remand, the circuit court affirmed the decision of the Board to grant Lumenary's requested special exception and variances. Pastor LaRock returns to this Court and presents five questions for our review, which we have condensed and reordered as follows:[1]

[1] In his opening brief, Pastor LaRock's questions appear as follows:

(continued)

I. Was the decision of the Circuit Court for Anne Arundel County upholding the grant of a special exception use to Lumenary by the Board of Appeals for an assisted-living facility erroneous as a matter of law?

II. Does Anne Arundel County Code Section 18-16-305 violate the limitations established in Section 4-206 of the Land Use Article for the granting of a variance?"

III. Was the decision of the Circuit Court for Anne Arundel County upholding the grant of a 12.79% area variance to Lumenary by the Board of Appeals for an assisted-living facility legally correct and supported by substantial evidence?"

For the reasons that follow, we hold that the Board did not err in granting the special exception and approving the variance requests, and that its findings were supported by substantial evidence in the record. Accordingly, we affirm the judgment of the circuit court.

I. "Does Anne Arundel County Code Section 18-16-305 violate the limitations established in Section 4-206 of the Land Use Article for the granting of a variance?"

II. "Can Anne Arundel County Code Section 18-16-305 be applied so as to conform to Section 4-206 of the Land Use Article and applicable case law and common law for the granting of a variance?"

III. "Was the decision of the Circuit Court for Anne Arundel County upholding the grant of a 12.79% area variance to Lumenary by the Board of Appeals for an assisted-living facility erroneous as a matter of law?"

IV. "Was the decision of the Circuit Court for Anne Arundel County upholding the grant of a 12.79% area variance to Lumenary by the Board of Appeals for an assisted-living facility supported by substantial evidence before the Board of Appeals?

V. "Was the decision of the Circuit Court for Anne Arundel County upholding the grant of a special exception use to Lumenary by the Board of Appeals for an assisted-living facility erroneous as a matter of law?"

BACKGROUND

The Application

The subject property consists of 8.709 acres of undeveloped land located at the corner of Brandy Farms Lane and St. Stephen's Church Road in Millersville, Maryland. It is identified as Land Unit 2 within Lot 1 of Parcel 71 in Block 8 on Tax Map 37 in the Brandy Farms subdivision (hereinafter "the Property"). The Property is part of a larger 16.04-acre parcel that is split-zoned. The 8.709-acre Property is zoned Residential Low Density ("RLD"), on which Lumenary, the contract purchaser, proposes to construct a 75-bed assisted living facility. The remaining acreage, which has a different owner, is zoned commercial-C2.

In 2017, after purchasing the Property, Lumenary applied for a special exception, as required under the Anne Arundel County Code in order to construct a memory-care facility in an RLD zone. Lumenary also requested two variances: one from the minimum lot size of ten acres, and one to allow an eighteen-month extension of time to obtain a building permit. Lumenary's proposed facility would serve individuals suffering from various levels of memory impairment and would be constructed as a "village" geared towards providing residents with "a quality, active lifestyle." To provide a sense of community, the facility would have "75 units in a multi-family structure" with common kitchens and dining areas. A hair salon and a small convenience store would be included on the ground level of the facility for the use of the residents and their guests.

Applicable Zoning Provisions

The Anne Arundel County Code, as it was effective during the pendency of Lumenary's application, delineates the requirements for obtaining a special exception and variances.[2] As a general matter, to obtain a special exception, an applicant must demonstrate the following:

> (1) The use will not be detrimental to the public health, safety, or welfare;
> (2) The location, nature, and height of each building, wall, and fence, the nature and extent of landscaping on the site, and the location, size, nature, and intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district in which it is located;
> (3) Operations related to the use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other uses allowed under this article;
> (4) The proposed use will not conflict with an existing or programmed public facility, public service, school, or road;
> (5) The proposed use has the written recommendations and comments of the Health Department and the Office of Planning and Zoning;
> (6) The applicant has presented sufficient evidence of public need for the use;
> (7) The applicant has presented sufficient evidence that the use will meet and be able to maintain adherence to the criteria for the specific use;
> (8) The application will conform to the critical area criteria for sites located in the critical area; and
> (9) The administrative site plan demonstrates the applicant's ability to comply with the requirements of the Landscape Manual.

AA Code § 18-16-304.

[2] As the parties note, the Anne Arundel County Code was revised in 2018 to add criteria for the granting of a special exception. Bill No. 18-18. Yet, by its own terms, the changes enacted by Bill No. 18-18 do not retroactively apply to applications filed before the effective date of the legislation. Accordingly, throughout this Opinion, we present the relevant provisions of the Anne Arundel County Code as they appeared prior to Bill No. 18-18 because they govern the instant proceeding.

More specifically, with respect to obtaining a special exception to construct an assisted living facility, the Anne Arundel County Code provides, in relevant part:

> An assisted living facility shall comply with all of the following requirements.
> (1) **In RLD Districts, the facility shall be located on a lot of at least 10 acres**. In R1 and R2 Districts, the facility shall be located on a lot of at least 10 acres, except that a facility that abuts a collector or higher classification road may be located on a lot of at least five acres. In other districts, the facility shall be located on a lot of at least five acres.
> (2) **For an assisted living facility in an RLD Distric**t:
> (i) **the property in the RLD District shall abut property that is zoned C2 or C3 and that will be part of the assisted living facility**; and
> (ii) the C2 or C3 property comprising part of the facility shall be served by public water and sewer.
> (3) For an assisted living facility that consists of land located outside the critical area in more than one zoning district:
> . . .
> (iv) **the developer shall demonstrate unified control of the entire assisted living facility and the capability to provide for completion and continuous operation and maintenance of the facility**.

AA Code § 18-11-104. (Emphasis added).

Finally, to approve a variance, the Board must make affirmative findings that, inter alia, "the variance is the minimum variance necessary to afford relief" and "the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located." AA Code § 3-1-207(e). The Board also must find that:

> (1) because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape, or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with Article 18 of this Code; or
> (2) because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical

> difficulties or unnecessary hardship, and to enable the applicant to develop the lot.

AA Code § 3-1-207(a).

AHO Grants the Special Exception and Variances

Applying those standards, an Administrative Hearing Officer ("AHO") granted Lumenary's request for a special exception and variances by memorandum opinion and order dated September 29, 2017, after hearings in which Pastor LaRock, on behalf of both Calvary and himself, participated. *Calvary Temple I*, slip op. at 2, 5 (filed Jun. 28, 2021). As we explained in *Calvary Temple I*, the AHO "decided that [t]he property is 87% of the 10-acre lot size required by the [AA] Code" and "given that the application meets all other requirements, the area variance will be granted.'" *Id.* at 6 (internal quotation marks omitted). With respect to the time variance, the AHO determined that it should be granted because "[i]t is well known that a project of this complexity can take far longer than 18 months to move through the permitting stage." *Id.* The AHO then addressed the special exception requirements and concluded that "Lumenary's application for special exception should be granted because it complied with all requirements, with the exception of the 10-acre lot requirement, for which a variance would be granted." *Id.*

Pastor LaRock Appeals to the Board and Lumenary Moves to Dismiss

Following the AHO's initial determination, "Pastor LaRock and eight other individuals timely filed a Notice of Appeal to the Board, stamped as received on October

26, 2017."[3] *Id.* Calvary, however, was "not listed by name anywhere on the Notice." *Id.* n.8. Lumenary responded on November 13, 2017, with a motion to dismiss for lack of standing, arguing that Pastor LaRock was not aggrieved by the AHO's decision and that "although Calvary is the owner of the land on which Pastor LaRock lives, 'Calvary Temple is not listed on the Notice of Appeal and is thus not a party to the proceeding before the Board.'" *Calvary Temple I*, slip op. at 7 (filed Jun. 28, 2021).

The Board held hearings on February 15 and February 22, 2018, to address the standing issues raised in Lumenary's motion to dismiss. *Id.* at 7. With respect to Calvary's standing, Pastor LaRock argued that he was authorized to represent the institution as its pastor and claimed that its absence from the notice of appeal was his own technical oversight. *Id.* at 8-9. Ultimately, the Board voted 5 to 1 to deny Calvary admission as a protestant in the proceedings. *Id.* at 9. Pastor LaRock, however, was permitted as a protestant because—although not *prima facie* aggrieved since he did not own the church property—the Board determined that he was specially aggrieved because he resided in the parsonage of the church for the past 18 years. *Id.* at 10-12. Accordingly, the Board voted, again by a margin of 5 to 1, to grant standing to Pastor LaRock. *Id.* at 12.

Merits Hearings

After resolving the standing issues, the Board held four hearings on the merits of Lumenary's application on April 3, July 5, July 12, and August 1, 2018. *Calvary Temple*

[3] The other individuals were "Oliver Bell, MaryAnn Hinchley, James LaRock, Jr., Henry Powell, Mary Ann LaRock, Linda Andrus and Steve and Regina Smith." *Calvary Temple I,* slip op. at 6 n.8 (filed Jun. 28, 2021).

I, slip op. at 12 n. 12 (filed Jun. 28, 2021). Over the course of the hearings, the parties presented testimony from seven principal witnesses. The Board also heard public comment from attendees, the majority of whom testified against Lumenary's project due to concerns over traffic and preserving the rural character of the neighborhood.

Gina DeStefano

Gina DeStefano, a member of Lumenary, testified first in support of Lumenary's application. Ms. DeStefano explained that Lumenary is comprised of six individual members, each of whom had family members suffering from memory impairment. She noted that, although other assisted living facilities in Anne Arundel County had beds for memory care patients, "they are, sort of, an afterthought." Accordingly, the Lumenary project was intended to provide an option catered specifically to memory-care patients. According to Ms. DeStefano, the proposed facility was needed because of the county's aging population and the lack of existing options in the marketplace.

Ms. DeStefano noted that, to comply with the County Code, Lumenary searched for a site of at least five acres "near a residential area" where it would be easy for family to visit. That search culminated in Lumenary purchasing the Property because of its central location in the County. Ms. DeStefano noted that the proposed facility would consist of a two-story structure fronting St. Stephen's Church Road. The main entrance to the facility would be off of St. Stephen's Church Road, while deliveries and employees would access the site from Route 3 by crossing through the adjacent commercial-zoned property.

Ms. DeStefano described Lumenary's plans for development in coordination with the neighboring C2-zoned parcels. She explained that the Property, Land Unit 2, "would be part of a three-unit condominium regime, Land Units 1, 2, and 3" and that Lumenary would be a member of the council of unit owners. She claimed that, as a member, Lumenary would have control over common areas, such as the access point to Route 3 through Land Unit 1 for Lumenary's employees and deliveries. Ms. DeStefano further noted that "we have cross-parking between all of the Land Units, so that no Land Unit owner can tell another Land Unit owner not to allow [sic] a user of their business to park their car in a parking space." Lastly, she explained that Lumenary possessed public utility easements across the neighboring properties for its stormwater flow as well as the right to enforce restrictions on uses of the C2 properties that would produce "noxious noises, odors, or dust[.]"

Gayle Bremer

Ms. Bremer, another member of Lumenary, testified next regarding Lumenary's plans for resident care and overall vision for the facility. Ms. Bremer explained that the facility was designed to allow the residents to "feel like they are in a village, in a town" with open spaces to socialize and perform their daily activities. She described Lumenary's plans to build out a series of walking trails for use by Lumenary residents accompanied by a family member or staff member, as well as by local residents in the surrounding area. She also explained that the facility would have a "small store" for a "resident to go with someone in the household and buy their provisions for dinner that evening."

Ms. Bremer also delineated Lumenary's efforts to minimize the impact of the facility on the surrounding neighborhood. She noted that trash pickups and other services would only occur during daytime hours and that employees would have staggered shifts to avoid a rush of traffic into the facility in the mornings. She estimated that the facility would have around twenty employees working at "the high of the day shift" and that the facility would be able to accommodate parking for all of them. Ms. Bremer further clarified that delivery and trash trucks would not be routed down St. Stephen's Church Road and would instead enter the facility through the adjacent commercial zoned property.

Ronald Johnson

Mr. Johnson, Lumenary's proffered engineering expert, testified next regarding the design of the site. Mr. Johnson explained that the site plan, in compliance with the Anne Arundel County Code, called for setbacks of 100 feet to the front and to the rear, 300 feet to the East, and 200 feet to the West. The plan also would leave approximately 75 percent open space, well in excess of the 60 percent requirement under the County Code. With respect to parking, the plan would accommodate up to 35 employees and would meet the requirement of two parking spaces for every ten resident units, with plenty of room for additional parking to be constructed if necessary. Mr. Johnson also explained that the site would be served by public water and sewer as well as electric provided by BG&E.

Next, Mr. Johnson noted that Lumenary would provide planted buffers of 45 feet in the rear, 95 feet along Brandy Farms Lane, and 15 feet along St. Stephen's Church Road. Mr. Johnson offered his expert opinion that the project would not "be detrimental to the

safety or welfare of the general public." On cross, Mr. Johnson noted that the site was "somewhat shallow from the front to the back" but otherwise was simply rectangular in shape with gentle rolling hills. He summed up the site as, from a physical standpoint, "a pretty average lot."

Shepard Tullier

Mr. Tullier, Lumenary's land use and site planning expert, testified next. With regard to the surrounding neighborhood, Mr. Tullier explained that there are commercial uses along Route 3 to the west of the site, but that the neighborhood "gets more low density residential as you proceed to the east." He offered his expert opinion that the site was: (1) compatible with the appropriate and orderly development of the facility; (2) no more impactful than other allowed uses in the RLD district such as bowling alleys or skating rinks; (3) not in conflict with an existing public facility, school, or road; (4) consistent with the County's General Development Plan; and (5) responsive to a public need. On the request for a variance, Mr. Tullier offered his opinion that the facility would not alter the essential character of the neighborhood or impair the use of neighboring property because there were other commercial and institutional uses such as Calvary Temple, an Islamic learning center, and a bait shop in the RLD zone.

Mr. Tullier also explained that, in his opinion, exceptional circumstances existed to permit the granting of an area variance. According to Mr. Tullier, only seven other RLD lots abutting commercial-zoned property existed in the County and, of those, only two were served by public water and sewer, as required by AA Code § 18-11-104(3)(ii). Moreover,

those two alternative sites were much smaller than the Property and would have required "a variance three times the size of what is being requested[.]" Thus, Mr. Tullier concluded that exceptional circumstances existed because of the lack of any viable RLD sites meeting the ten-acre requirement. On cross-examination, however, Mr. Tullier noted that he did no analysis of viable sites for the project in the County's other residential zones where assisted living facilities are permitted by special exception: R1, R2, R5, R10, R15, or R22.

Kurtis Swope

Mr. Swope, Pastor LaRock's proffered expert in economics, testified next regarding the need for the facility. Mr. Swope, after reviewing Lumenary's market study, noted that it was not "inherently flawed" but concluded that "recent growth in the capacity in the market area" to provide dementia-related care "has been significantly higher than what they assumed[.]" Accordingly, Mr. Swope opined that there was an existing supply of 60 to 70 memory-care beds unaccounted for in the study, suggesting that the demand for those services was already being met. On cross, Mr. Swope acknowledged that these other facilities might not offer the same services as Lumenary and that "as an economist, I think choice in the marketplace is always good."

Pastor LaRock

Pastor LaRock testified next to delineate his reasons for opposing Lumenary's project. He explained that "I feel that this kind of development in our neighborhood very substantially alters [its] essential character." Specifically, Pastor LaRock noted that he had "very real and what I would consider to be legitimate concerns of traffic being generated

by the proposed use." Without citing any research, Pastor LaRock also stated that "sometimes these folks can not only wander off, but they can also be aggressive, sometimes even sexually aggressive." On cross, Pastor LaRock conceded that the Lumenary facility "would not interfere with [the community of the church] congregating" or to hold events such as its annual basketball camp, which drew over 600 attendees the previous year.

Sara Anzelmo

Finally, Ms. Anzelmo of the Anne Arundel County Division of Planning and Zoning testified and offered into evidence her report and recommendation in favor of granting Lumenary's request for a special exception and variances. Ms. Anzelmo emphasized that the County Council "has decided that this use is appropriate for an RLD zoning district . . . by allowing it by special exception[.]" Ms. Anzelmo also reminded the Board that "the question is whether the granting of the variance . . . would alter the essential character of the neighborhood[,]" not whether the special exception would do so. She minimized the significance of the requested variance by noting that a hypothetical enlargement of the site to meet the ten-acre requirement would not redress the concerns expressed by the protestants related to traffic and the rural character of the neighborhood.

More broadly, Ms. Anzelmo posited that "the site and the scenario appear to be exactly what they had in mind when they passed legislation" zoning the use. She suggested that the council intended "to locate these facilities in RLD districts when they abut commercial uses" to "transition from maybe a full commercial area to a residential area by having this debatable residential commercial use in the middle." She explained that, by

putting in the ten-acre requirement, that vision may have been unintentionally thwarted because "it appears quite possible, that Mr. Tullier's research is correct [as to] whether there is any property in the RLD district that meets all of these requirements." Ms. Anzelmo then staked out her view that Lumenary's project complied with all of the general requirements for granting a special exception, save for the insufficient acreage of the subject property. In particular, Ms. Anzelmo observed that there were "uses with similar impacts that would be allowed without special exceptions in the RLD district" such as hospice facilities, group homes, and religious facilities.

The Board Approves the Special Exception and Variances

On December 17, 2018, the Board approved Lumenary's request for a special exception to build a memory-care facility in an RLD zone as well as an area variance from the ten-acre lot size requirement and a time variance "to allow an additional 18-month extension of time to obtain a building permit[.]" *Calvary Temple I*, slip op. at 12 (filed Jun. 28, 2021). The Board's approval was conditioned on Lumenary ensuring that (1) the condominium regime is established and (2) it would address any comments from the County during the preliminary plan and site development process. In its memorandum opinion, the Board thoroughly summarized the testimony presented over the course of the hearings and meticulously analyzed each requirement for the requested special exception and variances under the County Code. Here, we delineate the Board's findings as relevant to the zoning provisions disputed on appeal.

Special Exception Findings

First, the Board found that "the location, size, nature, and intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district[.]" The Board found that the project would comply with all height, setback, and open space requirements and that the "proposed C1 uses that are interior to the facility, such as the hair salon and small store are limited to 10 percent of the square feet of the building." Moreover, "[p]rimary access to the site will be via MD 301/Route 3, which will reduce potential impact to the scenic and historic St. Stephen's Church Road." Accordingly, the Board, relying on Mr. Tullier and Ms. Anzelmo's testimony, concluded that the proposed assisted living facility would be a "reasonable and residential land use for this RLD parcel that provides an appropriate transition between the lower density residential community to the higher density uses along Route 3/301."

Next, the Board found that the proposed use will be "no more objectionable with regard to noise, fumes, vibration, or light" than other uses allowed in the RLD district. The Board emphasized that permitted and special exception uses in an RLD district "include hospice facilities, group homes, country and private clubs, religious facilities, schools, nurseries with landscaping and plant sales, [ ] commercial recreation facilit[ies], . . . swimming pools, volunteer fire stations, and commercial kennels." The Board observed that Lumenary's proposed facility, which it considered to be small in comparison to other assisted living facilities in the County, would simply be a place where "[f]ood will be cooked [and] residents will live," and that "with any use of property, emergency response

may be necessary." The Board concluded that the proposed use would not "unreasonably impact" the neighborhood and would not conflict with public facilities, services, schools or roads. It also concluded that the "area variance request" was "minimal and consistent with the comprehensive zoning scheme."

The Board found that the proposed facility satisfied the specific criteria for a special exception to construct an assisted living facility on an RLD lot. The Board highlighted that the Lumenary site abutted C2-zoned property which, in its view, would be "part of" the facility within the meaning of AA Code § 18-11-104(2)(i) because of the "shared access, shared parking, and stormwater management outfalls located within the General Common Elements of the condominium regime." The Board cited Ms. DeStefano's testimony that "the condominium regime demonstrates that the Petitioner, as contract purchaser of Land Unit 2, would have unified control over the entire area of the assisted living facility."

Area Variance Findings

Next, the Board addressed the request for an area variance, noting that "[a]s a threshold matter, an applicant must meet one of the two requirements under Section 3-1-207(a)." Specifically, the applicant must show that the requested variance is necessary based on either "unique, physical conditions on the property" or "exceptional circumstances other than financial considerations[.]" The Board qualified the proposed facility on the exceptional circumstances prong and, relying again on Mr. Tullier's testimony, found that such circumstances existed because "there were no available [RLD] parcels able to meet the adjacent commercial zoning and public sewer requirements" and

the only other parcel with public sewer would have required an even greater variance. Thus, the Board concluded that "the Code requirements have prevented the construction of an assisted living facility [on RLD-zoned land] in the County" and a variance was permitted based on those exceptional circumstances.

Finally, the Board found that granting the variance "would not alter the essential character of the neighborhood." The Board explained that the surrounding area "is developed with single-family dwellings, religious facilities, a bait shop, and a specialty ham store." The Board emphasized that "the proposed facility's design will have an appearance and character of a residential building" with "landscaping and buffers to reduce the impact to the surrounding area." Accordingly, the Board concluded that the use will not "take away from the rural and residential character of the neighborhood," nor would it "alter [its] essential character[.]"

Petition for Judicial Review and First Appeal

On January 15, 2019, "Pastor LaRock, Calvary, and four others petitioned for judicial review in the Circuit Court for Anne Arundel County." *Calvary Temple I*, slip op. at 12-13 (filed Jun. 28, 2021). The petitioner asked the circuit court to review the

> decisions of [the Board], to grant a motion to dismiss [for lack of standing], to grant a special exception, to grant two variances and/or grant related relief to Lumenary Memory Care at St. Stephen's Church, LLC for construction and occupancy of an assisted living facility in a [RLD], on lot with less area than required by County law.

Id. at 13. The next day, the petitioners filed a second petition for judicial review clarifying that they also sought review of the Board's decision to deny standing to Calvary. *Id.* The two petitions were later consolidated. *Id.*

Thereafter, Lumenary moved to dismiss the consolidated petitions for judicial review and filed its own cross-petition claiming that the Board erroneously granted standing to Pastor LaRock. *Id.* at 13-14. On September 9, 2019, the circuit court heard arguments from the parties and ultimately granted Lumenary's cross-petition challenging Pastor LaRock's standing, thus rendering moot Lumenary's motion to dismiss. *Id.* at 15-16. First, the court found that Pastor LaRock was improperly granted standing before the Board because (1) he was not *prima facie* aggrieved since he was not the owner of the church property and (2) he was not specially aggrieved considering that his "tenancy in the parsonage and his enjoyment of the natural setting" failed to show "some personal interests different from all of the world." *Calvary Temple I*, slip op. at 16 (filed Jun. 28, 2021). Second, the court found that the Board properly denied standing to Calvary because Pastor LaRock failed to file a timely notice of appeal on its behalf. *Id.* at 16.

Pastor LaRock timely appealed and we, in an unreported opinion, affirmed in part and reversed in part the judgment of the circuit court. *Id.* at 47. We affirmed the circuit court's judgment as to Calvary; however, we reversed the court's judgment as to Pastor LaRock, holding that "property ownership is not an absolute requirement for a showing of aggrievement" and that the proper inquiry may focus on "whether a party can demonstrate that it has enough interest in a property such that the party will be personally and specially

affected by the decision of an administrative body in a manner that is different from the public generally." *Id.* at 38. Applying that standard, we considered Pastor LaRock to be specially aggrieved because "as a long-term resident and manager of the parsonage . . . Pastor LaRock presented substantial evidence of a significant property interest in the parsonage" and as a resident merely "forty feet from the Property . . . his interests will be affected in a way different than those of the general public." *Id.* at 45-46.

Accordingly, we remanded the case to the circuit court for it to render a decision on the merits of Pastor LaRock's petition for judicial review of the Board's decision to grant the special exception and variances. *Calvary Temple I*, slip op. at 47 (filed Jun. 28, 2021).

The Circuit Court Affirms on Remand

On remand, the circuit court reached the merits of Pastor LaRock's petition and affirmed the decision of the Board by memorandum opinion and order entered February 24, 2022. First, the court affirmed the Board's decision to grant an area variance, holding that the Board's finding that exceptional circumstances existed was supported by substantial evidence in the record. Specifically, the court noted that the "BOA reasonably deduced that the County did not intend to create a legal catch-22" by imposing a minimum acreage requirement for the special exception which created "a factual impossibility of building an assisted living facility in a RLD zone (an intended use created in statute) unless a size-variance is granted." Likewise, it found the Board's conclusion that the essential character of the neighborhood would not be altered was supported by substantial evidence.

Second, the circuit court affirmed the Board's decision to grant the special exception. Specifically, the court reasoned that there was substantial evidence to support the Board's conclusion that the abutting C2 property was "part of" the facility because it provided integral access, shared parking, and stormwater outfalls. Similarly, the court determined that the record supported the Board's finding that Lumenary exercised unified control over the facility. On the general requirements, the court found that substantial evidence supported the Board's conclusions that (1) "the intensity of use of access roads will be compatible with the orderly development of the district;" (2) the "use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other uses;" and (3) "there is sufficient evidence of public need for the use." In particular, the court credited Mr. Tullier's testimony regarding the impact of other allowed uses and Ms. Anzelmo's testimony that "the generous landscape buffer, conservation and setbacks would decrease the impact on neighboring properties."

On March 22, 2022, Pastor LaRock noted a timely appeal.

DISCUSSION

I.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, "this Court 'looks through' the decision of the circuit court, applying the same standards of review to determine whether the agency itself erred." *Matter of Homick*, 256 Md. App. 297, 307 (2022). We review "the Board's factual findings for whether they are supported by

substantial evidence in the record[.]" *Dan's Mountain Wind Force, LLC v. Allegany County Board of Zoning Appeals*, 236 Md. App. 483, 490 (2018). "The substantial evidence test is defined as 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 211 (2018) (quoting *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 48-49 (2007)). In applying the substantial evidence test, a reviewing court "should not substitute its judgment for the [e]xpertise of those persons who constitute the administrative agency from which the appeal is taken" and must "review the agency's decision in the light most favorable to the agency, since 'decisions of the agency are prima facie correct.'" *Mayor & City Council of Balt. v. ProVen Mgmt., Inc.*, 472 Md. 642, 667 (2021) (quoting *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 513 (1978)).

However, we "may not uphold an agency decision on any basis other than the findings or reasons stated by the agency[,]" meaning that "[w]hile a court's decision may be upheld as right for the wrong reason, an agency decision must be 'right for the right reason.'" *Comptroller of the Treasury v. Two Farms, Inc.*, 234 Md. App. 674, 697 (2017) (quoting *Mueller v. People's Couns. for Balt. Cnty.*, 177 Md. App. 43, 84 (2007)).

"Although this Court defers to the factual findings of agencies, we review their decisions regarding matters of law *de novo*, while still providing a degree of deference on some legal issues in accordance with the position of the agency." *Homick*, 256 Md. App. at 308. When reviewing an agency interpretation of a statute which the agency administers, as a general matter, the agency's "legal conclusions based on interpretations of the statutes

and regulations it administers are afforded 'great weight.'" *Blue Buffalo Co., Ltd. v. Comptroller of Treasury*, 243 Md. App. 693, 702 (2019) (quoting *Gore Enter. Holdings, Inc. v. Comptroller of Treasury*, 437 Md. 492, 505 (2014)). Nonetheless, "[w]hen a party challenges the agency's interpretation of a statute it administers, the court must determine 'how much weight to accord that interpretation, keeping in mind that it is always within the court's prerogative to determine whether an agency's conclusions of law are correct.'" *Md. Dep't of the Env't v. Assateague Coastal Trust*, ___Md.___, slip. op. at 52 (filed Aug. 9, 2023) (quoting *Maryland Dep't of the Env't v. County Comm'rs of Carroll County*, 465 Md. 169, 203 (2019)). The level of deference afforded is thus measured according to a "'sliding-scale approach'" that "will vary, depending on a number of factors" including whether "'the interpretation resulted from a process of reasoned elaboration by the agency, whe[ther] the agency has applied that interpretation consistently over time, or whe[ther] the interpretation is the product of contested adversarial proceedings or formal rule making.'" *Id.* at 52-53 (quoting *Comptroller of Maryland v. FC-GEN Operations Investments LLC*, 482 Md. 343, 363 (2022)).

II.

Special Exception

A. Parties' Contentions

Pastor LaRock identifies four criteria of the Anne Arundel County Code that he claims the Board erroneously applied in approving Lumenary's request for a special exception. First, he points to AA Code § 18-11-104(2)(i), which requires that the portion

of a proposed assisted living facility in an RLD district "shall abut property that is zoned C2 or C3 and that will be part of the assisted living facility." Pastor LaRock contends that the site, although abutting property zoned C2, does not satisfy that requirement because the adjacent commercial property is not owned by Lumenary and will not be "part of" of the assisted living facility. He asserts that the commercial property's provision of shared access to Route 3, shared parking, and stormwater management rights pursuant to the condominium arrangement likewise "falls far short" of constituting a part of Lumenary's proposed facility.

Second, Pastor LaRock argues that the Board erred in concluding that Lumenary possessed "unified control of the entire assisted living facility" as required by AA Code § 18-11-104(3)(iv). He points out that, with respect to the C2 property that must be "part of" the assisted living facility, Lumenary possesses only a portion of control "as a 1/3 minority member of the condominium regime[.]" Thus, Pastor LaRock concludes that Lumenary "does not and cannot have *unified* control of the required C-2 portion" of the facility. (Emphasis supplied by Pastor LaRock).

Third, Pastor LaRock challenges the Board's finding that the intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district under AA Code § 18-16-304. Pastor LaRock stresses that the Board erroneously found that the main entrance to the facility would be from Route 3 rather than along St. Stephen's Church Road. Accordingly, he argues that "the proposed facility

will significantly intensify the use of the 'scenic and historic' St. Stephen's Church Road" in a way incompatible with the appropriate development of the district.

Finally, Pastor LaRock points to AA Code § 18-11-104 in challenging the Board's finding that the operations of the facility will be no more objectionable with regard to noise, fumes, vibration or light than other permitted operations in the RLD district. He objects to the Board's conclusory findings that other permitted uses such as hospice facilities, golf courses, and private clubs were just as, or more, intense than Lumenary's proposed memory-care facility. In particular, Pastor LaRock posits that the Lumenary facility will produce more noise from traffic and emergency vehicles, fumes, and light from grounds and parking lighting than other permitted uses.

Lumenary counters each of these assertions. First, Lumenary observes that the Board's finding that the abutting C2 property was "part of" the facility was supported by testimony from Ms. DeStefano and Mr. Johnson. Lumenary explains that, as part of the condominium agreement, the C2 property would provide integral parts of Lumenary's facility including "vehicular and pedestrian common access areas, stormwater discharge and cross-parking rights on and over the C2 zoned land units, and utility easements across the C2 zoned property to provide water and sewer service[.]"

Second, Lumenary urges that it maintains "unified control" over the portions of the C2 property that are "part of" the facility. Lumenary points to Ms. DeStefano's testimony that the owners of Land Units 1 and 3 had no right to terminate Lumenary's access rights

to the C2 zoned property and that Lumenary had the "absolute right to control and make sure the facility could operate."

Third and Fourth, Lumenary contends that the Board's findings as to the intensity of the use of access roads and the objectionable nature of the use in comparison to other permitted uses were supported by substantial evidence. Lumenary notes that, although the Board did erroneously conclude that the facility's main access point would be off Route 3, traffic would nonetheless be limited along St. Stephen's Church Road and would be "compatible with the appropriate and orderly development of the district." And, according to Lumenary, the Board's findings regarding the nature of the use were supported by testimony from Mr. Tullier and Ms. Anelzmo that Lumenary's relatively small facility would have less of an impact than many other permitted uses in the RLD district.

B. Disputed County Code Provisions

As previously explained, to obtain a special exception, an applicant must demonstrate the following, in relevant part:

> (2) The location, nature, and height of each building, wall, and fence, the nature and extent of landscaping on the site, and the location, size, nature, and intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district in which it is located;
> (3) Operations related to the use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other uses allowed under this article;

AA Code § 18-16-304.

Additionally, for an assisted living facility to qualify for a special exception, the Anne Arundel County Code requires, in relevant part:

> An assisted living facility shall comply with all of the following requirements.
>
> (2) For an assisted living facility in an RLD District:
>
> (i) **the property in the RLD District shall abut property that is zoned C2 or C3 and that will be part of the assisted living facility**; and
>
> (ii) the C2 or C3 property comprising part of the facility shall be served by public water and sewer.
>
> (3) For an assisted living facility that consists of land located outside the critical area in more than one zoning district:
>
> * * *
>
> (iv) the **developer shall demonstrate unified control of the entire assisted living facility and the capability to provide for completion and continuous operation and maintenance of the facility.**

AA Code § 18-11-104. (Emphasis added).[4]

C. Schultz v. Pritts

As always, the north star for our analysis of the grant of a special exception in any given case is the Maryland Supreme Court's[5] seminal opinion in *Schultz v. Pritts*, 291 Md. 1 (1981). Although "the *Schultz* analytical paradigm is not a second, separate test (in addition to the statutory requirements) that an applicant must meet" it provides a general standard "by which individual applications for special exceptions are to be evaluated by

[4] Section 18-11-104 is codified within Article 18 of the Anne Arundel County Code, which complies the County's zoning regulations and "applies to all land located in the County[.]" AA Code § 18-2-101(a). When we reference the County's "zoning ordinance" in this Opinion, we refer to Article 18 of the Anne Arundel County Code.

[5] During the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

the zoning body delegated with responsibility to consider and act on those applications in accordance with criteria promulgated in the zoning ordinance." *People's Counsel for Balt. Cnty. v. Loyola Coll. Md.*, 406 Md. 54, 69 (2008). Thus, "absent some clear legislative direction to the contrary, if a particular kind of impact is required to be taken into account in considering a special exception, the impact is to be measured by the test enunciated in *Schultz*[.]" *Harford Cnty. v. Earl E. Preston, Jr., Inc.*, 322 Md. 493, 500 (1991).

In *Schultz*, the Supreme Court of Maryland reviewed the denial of a special exception to applicants desiring to construct a funeral home on residential-zoned property. *Schultz*, 291 Md at 3-4. The Court traced the development of the standards governing the propriety of granting a special exception and summarized its jurisprudence in a frequently cited passage:

> These cases establish that a special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception use would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone. Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

Id. at 15.

Although some isolated language in *Schultz* seemed to suggest a requirement that the applicant for a special exception provide a comparative analysis of the proposed use both at the proposed location and elsewhere within similarly-zoned locations in the relevant

jurisdiction, the Court clarified in *People's Counsel* that the *Schultz* test is more narrow. Specifically, the Court explained that "[i]t is clear in examining the plain language of *Schultz*, and the cases upon which *Schultz* relies, that the *Schultz* analytical overlay for applications for individual special exceptions is focused entirely on the neighborhood involved in each case" and that "the adverse effect 'inherent' in a proposed use [is required to] be determined without recourse to a comparative geographic analysis." *People's Counsel for Balt. Cnty.*, 406 Md. at 102, 105. *People's Counsel* declares that the language in *Schultz* that seems to require such a comparison was merely a "backwards-looking reference" to underlying legislative findings that the special exception use was "compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place." *Id.* at 106.

D. Analysis

We return to the present case and examine the Board's grant of the special exception against the requirements of the County zoning ordinance set out above and within the *Schultz* analytical overlay. In so doing, we divide the errors alleged by Pastor LaRock into two categories by their correlating standards of review.

1. The Board's Legal Conclusions

First, we consider, through the lens of statutory interpretation, Pastor LaRock's challenges to the Board's conclusions that (1) the abutting C2 property was "part of" Lumenary's proposed facility and (2) Lumenary would exercise "unified control" over the facility. Pastor LaRock does not challenge the evidence that formed the basis for the

Board's ultimate conclusions—*i.e.*, that Lumenary would have shared access and parking as well as stormwater management and easement rights across the C2 property. Rather, he insists that those rights are insufficient to demonstrate that the C2 property would be "part of" Lumenary's facility and under its "unified control"; assertions which primarily depend on how broadly those statutory terms are construed. While we review pure questions of law without deference, the findings Pastor LaRock challenges are "legal conclusions based on interpretations of the statutes and regulations [the Board] administers," to which this Court affords "great weight." *Blue Buffalo Co., Ltd. v. Comptroller of Treasury*, 243 Md. App. 693, 702 (2019). However, such deference is limited by the "plain meaning" rule of interpretation; that is "where there is no ambiguity and the words of the statute are clear, we simply apply the statute as it reads." *Id.* (quoting *Frey v. Comptroller of Treasury*, 422 Md. 111, 182 (2011).

"When we review the interpretation of a local zoning regulation, we do so 'under the same canons of construction that apply to the interpretation of statutes.'" *Cremins v. Cnty. Comm'rs Washington Cnty.*, 164 Md. App. 426, 448 (2005) (quoting *O'Connor v. Baltimore Cnty.*, 382 Md. 102, 113 (2004)). Above all, in applying the canons of construction we seek to "ascertain and effectuate the real and actual intent of the Legislature." *State v. Williams*, 255 Md. App. 420, 439 (2022) (quoting *State v. Johnson*, 415 Md. 412, 421-22 (2010)). That search commences "with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology." *Id.* (quoting *Blackstone v. Sharma*, 461 Md. 87, 113 (2018)). When

"the plain language of the provision 'is clear and unambiguous, our inquiry ordinarily ends[.]'" *Cremins*, 164 Md. App. at 448 (quoting *Christopher v. Montgomery Cnty. Dep't of Health & Hum. Servs.*, 381 Md. 188, 209 (2004)). However, when the statutory language is susceptible of more than one reasonable meaning, "we consider the common meaning and effect of statutory language in light of the objectives and purpose of the statute and Legislative intent." *Williams*, 255 Md. App. at 439-40 (quoting *Blackstone*, 461 Md. at 113).

Here, we begin with the plain language of AA Code § 18-11-104(2)(i), which provides that a special exception to construct and operate an assisted living facility in an RLD zone may be granted if the "property in the RLD District shall abut property that is zoned C2 or C3 and that will be **part of** the assisted living facility[.]" The Board concluded that this language was broad enough to cover Lumenary's proposed facility because "the remaining units in the condominium regime are zoned C2" and would "provide shared access, shared parking, and stormwater management outfalls located within the General Common Elements of the condominium regime." In essence, the Board considered that these elements, although located on land which Lumenary did not and would not own, were nonetheless "part of" its proposed facility because they were important to the operation of the facility, which in turn was a component of the larger condominium regime.

On a blank slate, we would consider that to be a considerably strained interpretation of the phrase "part of." Indeed, the Board's view conflicts with well-established principles of property law governing the interests conferred by an easement. At its core, an easement

is simply a nonpossessory property interest which "involves primarily the privilege of doing a certain class of act on, or to the detriment, of another's land, or a right against another that he refrain from doing a certain class of act on or in connection with his own land[.]" *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 174 (2011) (quoting *Rau v. Collins*, 167 Md. App. 176, 185 (2006)). An easement does not confer any future or present ownership interest and merely "creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2(1) (AM. LAW INST. 2000).

In other words, a landowner's possession of an easement upon a road or path crossing through a parcel of land adjacent to their own does not incorporate the burdened road or path into the parcel as "part of" the easement holder's land. The *right to use that land* may be part of the easement holder's overall bundle of property rights, but the servient land itself remains a separate parcel, of which the holder "is entitled to make any use . . . that does not unreasonably interfere with enjoyment of the servitude." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1(1) (AM. LAW INST. 2000).

Nonetheless, we ordinarily give "great weight" to the Board's legal conclusions based on its interpretations of a statute that it administers, as is the case here with respect to the Board's duties in enforcing Anne Arundel County's zoning ordinance. *Blue Buffalo Co.*, 243 Md. App. at 702. We further recognize that the Board's interpretation is not foreclosed by the language of the ordinance; as defined by the Cambridge English

Dictionary, the word "part" means "a separate piece of something, or a piece that combines with other pieces to form the whole of something." *Part*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/dictionary/english/part?q=Part (last visited Apr. 11, 2023). In that broader sense, the shared access roads, parking lots, and water and sewer service provided by the C2 property could reasonably be viewed as "pieces" of Lumenary's proposed facility which, when combined with the RLD portion, operate to form the whole. As the Board observed, those shared elements were integral components of Lumenary's proposed facility, which could not function without water and sewer service and sufficient parking and access roads to accommodate its guests and employees. Accordingly, we shall defer to the Board's application of the phrase "part of" considering the broader thrust of the statute.[6]

Next, we turn to the language of AA Code § 18-11-104(3)(iv), which provides that "the developer shall demonstrate unified control of the entire assisted living facility and the capability to provide for completion and continuous operation and maintenance of the facility." In finding that this criterion was satisfied, the Board relied on Ms. DeStefano's testimony, noting that "Ms. DeStefano testified that the condominium regime demonstrates

[6] In doing so, we wish to make clear that our deference to the Board's conclusion is limited to the narrow confines of its application of this unique ordinance to this unique set of facts. This opinion should not be read as expressing any support whatsoever for the notion that holding an easement or a right of shared access over neighboring property makes the shared components of the neighboring property "part of" the easement holder's land. An easement holder has only the right to "limited use or enjoyment of the land in which the interest exists." RESTATEMENT (FIRST) OF PROPERTY § 450(A) (AM. LAW INST. 1944). Nothing more and nothing less.

that [Lumenary], as the contract purchaser of Land Unit 2, would have unified control of the entire area of the assisted living facility." At first glance, we agree with Pastor LaRock that this would also constitute a strained reading. In this context, "unified" generally means being "brought together as one" and implies control in a singular entity or person. *Unified*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/unified (last visited Apr. 11, 2023). As Pastor LaRock points out, the shared elements of the facility located on the adjacent C2 property—which in turn must be "part of" the facility under § 18-11-104(2)(i)—will be just that: *shared* by the members of the condominium regime and not under Lumenary's *exclusive* control. Pastor LaRock asserts that, as Lumenary is one member out of three, it holds a minority position with less than "unified control" of the shared access roads, parking, or water and sewer pipes.

Nonetheless, we perceive that "unified control" does not necessarily have to mean control vested solely in the developer of the site. For example, the common saying "united front" is generally understood as signifying "a group of people or organizations that join together to achieve a shared goal." *United Front*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/united%20front (last visited Apr. 11, 2023). A broader interpretation of the phrase "unified control" along those lines would align with the understanding that Lumenary, along with the other members of the proposed condominium regime, would exercise control as an organizational entity over the shared areas—with each member having rights to use and enjoyment thereof.

Placed in context, we do not conclude that the Board's view was unreasonable. Indeed, as the remaining portion of § 18-11-104(3)(iv) makes clear, the developer's control over the facility is correlated with its "capability to provide for completion and continuous operation and maintenance of the facility." In light of that objective, and considering Ms. DeStefano's clear testimony that Lumenary would have ongoing access and easement rights over the shared portions, we conclude that the Board's broader interpretation of the term "unified control" is in keeping with the overarching purposes of the statute to ensure continuous operation.

In fact, in many other respects, Lumenary's application met and even exceeded the special exception requirements by its proposed measures to reduce the impact of the assisted living facility on neighboring properties. For example, Mr. Johnson, Lumenary's engineering expert, testified that the site plan, in excess of § 18-11-104's requirement of 50-foot setbacks in all directions, called for setbacks of 100 feet to the front and the rear, 300 feet to the East, and 200 feet to the West. The plan also would leave approximately 75 percent open space, well more than the sixty percent requirement under § 18-11-104. Mr. Johnson also noted that Lumenary would provide planted buffers of 45 feet in the rear, 95 feet along Brandy Farms Lane, and 15 feet along St. Stephen's Church Road. The Board rightfully considered the statutory elements of § 18-11-104 as a whole "in light of the objectives and purpose of the statute and Legislative intent" and arrived at a broad reading. *Williams*, 255 Md. App. at 440.

Accordingly, we hold that the Board did not err in concluding that portions of the adjacent C2 property would be "part of" Lumenary's facility and that Lumenary would have "unified control" over its proposed memory-care facility.

2. The Board's Factual Findings

Second, we review the Board's factual findings regarding the use of the site's access roads and the impact of the proposed use in comparison to other permitted uses "for substantial evidence" and with deference where "the record reasonably supports the [Board's] conclusion." *Blue Buffalo Co., Ltd. v. Comptroller of Treasury*, 243 Md. App. 693, 702 (2019). Pastor LaRock objects primarily to the Board's finding that the main access point to the site would be off Route 3 rather than St. Stephen's Church Road. He also asserts that the Board made only conclusory findings regarding the impact of the facility as compared to other uses permitted in the RLD district.

Applying a deferential standard, we hold that the Board's overall findings easily satisfy the substantial evidence, even considering the Board's mistake concerning the primary access road. Pastor LaRock is correct that the Board's finding that "[t]he facility will be primarily accessed via Route 3" was ultimately not supported by the record. Ms. DeStefano clarified several times in her testimony that the main access point for the facility's guests and visitors would be located off St. Stephen's Church Road. Yet, at the same time, Ms. DeStefano also explained that deliveries and employees would access the site from Route 3 by crossing through the adjacent commercial-zoned property. Likewise, Ms. Bremer noted that deliveries would not be routed down St. Stephen's Church Road

and would instead enter the facility through the adjacent commercial zoned property. Thus, even if the Board misunderstood where the facility's main access point would be for visitors, we cannot say that its finding that the impact on St. Stephen's Church Road would be relatively muted was unsupported by evidence in the record. The Board summarized and credited all of this testimony in arriving at its conclusion that the site would be a "reasonable and residential land use for this RLD parcel that provides an appropriate transition between the lower density residential community to the higher density uses along Route 3/301."

Moreover, we remain cognizant of the principle that "if a particular kind of impact is required to be taken into account in considering a special exception, the impact is to be measured by the test enunciated in *Schultz*[.]" *Harford Cnty. v. Earl E. Preston, Jr., Inc.*, 322 Md. 493, 500 (1991) (referring to *Schultz v. Pritts*, 291 Md. 1 (1981)). *Schultz*, at its core, demands consideration of whether the "particular use proposed at the particular location proposed would have any adverse effects *above and beyond those inherently associated* with such a special exception use irrespective of its location within the zone." *Schultz*, 291 Md at 15. In other words, it is not enough for Pastor LaRock to simply assert that Lumenary's request for a special exception should be denied because it would generate more traffic on St. Stephen's Church Road. Of course it will do so; an increase in traffic in and around an assisted living facility in an RLD zone is an *inherent* byproduct of the facility's construction. The County Council understood that fact in permitting assisted living facilities to be constructed in RLD zones in the first place. What matters is whether

the proposed use would have particularly deleterious effects at the proposed location beyond those inherently associated with the permitted special exception use. Here, as explained, the evidence before the Board established that Lumenary planned to reduce the impact of its project on St. Stephen's Church Road by having employees and deliveries access the site from Route 3. It was not a stretch for the Board to rely on that evidence to determine that the site's impact was not incompatible with the orderly development of the district.

Substantial evidence also supports the Board's finding that the use would "be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties" than other permitted uses in the RLD district. In its memorandum opinion, the Board emphasized that permitted and special exception uses in an RLD district "include hospice facilities, group homes, country and private clubs, religious facilities, schools, nurseries with landscaping and plant sales, . . . bowling alley[s] or skating rink[s], swimming pools, volunteer fire stations, and commercial kennels." The Board, referencing Ms. Anzelmo's testimony, also observed that Lumenary's proposed facility, which it considered to be small in comparison to other assisted living facilities in the County, would simply be a place where "[f]ood will be cooked [and] residents will live." Accordingly, the Board concluded that the proposed use would not be more objectionable than other allowed uses even if emergency vehicles would occasionally need to enter the facility to provide care to the residents. Those findings were amply supported by testimony from Ms. Anzelmo and Mr. Tullier, the latter of whom opined that several of the other permitted uses would produce

more "noise, fumes, vibration, or light" than the 75-bed facility proposed by Lumenary. In sum, we hold that the Board's findings in granting the special exception in this case were supported by substantial evidence in the record.

III.

Conflict Between Local and State Law

A. Parties' Contentions

Pastor LaRock asserts that the Anne Arundel County Code is impermissibly inconsistent with state law regarding the necessary threshold showings to permit the grant of an area variance. In his view, Maryland Code, (2013, 2021 Repl. Vol.) Land Use Article ("LU"), § 4-206 mandates a two-step process whereby an applicant must first show that there are relevant "conditions peculiar to the [subject] property" before a variance may be granted. Pastor LaRock asserts that the Anne Arundel County Code creates an impermissibly "disjunctive" process by which an applicant may *either* show uniqueness *or* exceptional circumstances. He argues this looser requirement cannot substitute for what is mandated under LU § 4-206 because the County Code must yield to state law. Therefore, he asserts that the variance was improperly granted because the Property is not unique as that term has been defined under Maryland common law.

Lumenary responds that this claim of error is unpreserved for our review because it was not raised before the Board or the circuit court below. Even if we were to reach the issue, however, Lumenary points out that Anne Arundel County is a charter county and, as such, is not bound by the limitations set forth in LU § 4-206. Instead, according to

Lumenary, the approval of variances within Anne Arundel County, as a charter county, is controlled by the applicable standards in the County's own laws.

In reply, Pastor LaRock, to his credit, concedes that this issue was not raised below and is therefore unpreserved. He nonetheless urges that this Court review the issue to guide the Board on remand as to what standard to apply. On the merits, Pastor LaRock posits that even if LU § 4-206 is inapplicable to Anne Arundel County, it merely codified well-established Maryland common law creating the two-step process and that the County can and should interpret and apply its Code so as to conform to the common law test.

B. The Issue is Unpreserved

Pursuant to Maryland Rule 8-131, this Court "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by" the tribunal below. Md. Rule 8-131(a). Moreover, "it is settled law in Maryland that a court ordinarily 'may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.'" *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 15 (2010) (quoting *Brodie v. Motor Vehicle Admin.*, 367 Md. 1, 4 (2001)). Accordingly, we decline Pastor LaRock's invitation to address his unpreserved claim of error regarding the purported conflict between the County Code and state law governing the process for approving a variance.

IV.

Area Variance

A. Parties' Contentions

Pastor LaRock identifies two provisions of the County Code that he claims the Board misapplied in granting Lumenary's requested area variance. First, he contends that Lumenary failed to make a threshold showing of exceptional circumstances pursuant to AA Code § 3-1-207(a)(2). In Pastor LaRock's view, no such circumstances existed because the parcel remained available for development for all other uses, the purported hardship was not unique to the subject property, and other sites were viable for Lumenary's project. Second, Pastor LaRock asserts that the proposed memory care facility ran afoul of AA Code § 3-1-207(e)(i) in that the granting of the variance would alter the essential character of the neighborhood, which is "residential low density[.]" He stresses that the facility is "designed to care for, house, feed, provide health services to, and shopping amenities for an on-premises population on a full-time year-round basis" and is "a clear deviation from the low-density residential, church and leaning center neighborhood[.]"

Lumenary responds that the Board's finding of exceptional circumstances was supported by testimony from Mr. Tullier that "although the County Council had authorized assisted living facilities within the RLD [zones] by special exception, there was no location in the County where it could be accomplished without a greater area variance[.]" Thus, Lumenary contends that due to "the impossibility to locate an assisted living facility in an RLD District," it carried its burden of proving exceptional circumstances permitting the

grant of a variance. Finally, Lumenary argues that the Board correctly found that the variance would "not alter the essential character of the neighborhood" due to the already-existing mix of uses in the neighborhood and the facility's design, large setbacks, and buffers.

B. Applicable County Code Provisions

As previously set forth, to approve a variance, the Board must make a finding that "the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located[.]" AA Code § 3-1-207(e)(2)(i). The Board also must find that:

> (1) because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape, or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with Article 18 of this Code; or
> (2) because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship, and to enable the applicant to develop the lot.

AA Code § 3-1-207(a).

C. General Standards for Area Variances

The standards for granting a variance have traditionally varied depending on the type of variance being requested. The first type of variance, an area variance, is a variance "from area, height, density, setback, or sideline restrictions, such as a variance from the distance required between buildings." *Montgomery Cnty. v. Rotwein*, 169 Md. App. 716, 728 (2009) (quoting *Anderson v. Bd. of Appeals, Town of Chesapeake Beach*, 22 Md. App.

28, 37 (1974)). The second type of variance, a use variance, "permit[s] a use other than that permitted in the particular district by the ordinance, such as a variance for an office or commercial use in a zone restricted to residential uses." *Id.* (quoting *Anderson,* 22 Md. App. at 38). "Because the changes to the character of the neighborhood are considered less drastic with area variances than with use variances, the less stringent 'practical difficulties' standard applies to area variances, while the 'undue hardship' standard applies to use variances." *Id.* at 728-29. As the Supreme Court of Maryland delineated in *McLean v. Soley*, 270 Md. 208 (1973), a zoning board examines three factors to determine whether practical difficulties exist:

> 1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
>
> 2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
>
> 3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Id. at 214-15 (cleaned up).

D. Analysis

Applying the foregoing precepts, we hold that substantial evidence supported the Board's findings that there were exceptional circumstances justifying the grant of a variance and that the variance would not alter the essential character of the neighborhood.

As we have noted, the substantial evidence test merely asks "'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 211 (2018) (quoting *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 48–49 (2007)). Here, that standard is met.

To start, in regard to the existence of exceptional circumstances, the Board pointed to the expert testimony of Mr. Tullier to support its conclusion. As he explained, only seven other RLD lots abutting C2 or C3 zoned property existed in the County and, of those, only two were served by public water and sewer, as required by AA Code § 18-11-304. Moreover, those two alternative sites were much smaller than the subject property and would have required a variance "three times the size of what is being requested" or greater. Based on that testimony, and on similar testimony from Ms. Anzelmo, the Board found that "there were no available [RLD] parcels able to meet the adjacent commercial zoning or public sewer requirements" and "the only other parcel that adhered to most of the requirements" would have required an even greater variance. Thus, the Board concluded that "the Code requirements have prevented the construction of an assisted living facility [on RLD-zoned land] in the County" and a variance was permitted based on those exceptional circumstances.

We discern no error in the Board's conclusion that the complete lack of available RLD parcels capable of meeting the special exception requirements constituted an exceptional circumstance. As Ms. Anzelmo testified, the County Council intended "to locate these facilities in RLD districts when they abut commercial uses" to "transition from

maybe a full commercial area to a residential area by having this debatable residential commercial use in the middle." Perceiving that overarching purpose, the Board reasonably concluded that exceptional circumstances existed that frustrated the Council's intent in enacting the special exception provision in the first place. And although Pastor LaRock stresses that there may have been available parcels in other residential zones, there is nothing in the zoning ordinance mandating such an inquiry. What matters is that an assisted living facility is a permitted special exception use in an RLD zone and that the Board found the paucity of available parcels capable of satisfying the special exception requirements to be a sufficient exceptional circumstance. That conclusion is certainly supported by substantial evidence in the record.[7]

[7] Although the Board did not specifically address the practical difficulties factors outlined in *McLean v. Soley*, 270 Md. 208 (1973), in the course of its analysis, we note that several of its findings tracked with those factors. Under the first factor, the Board examines whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property *for a permitted purpose* or would render conformity with such restrictions unnecessarily burdensome. *McLean*, 270 Md. at 214-15 (emphasis added). Here the Board found that there were no available RLD parcels capable of satisfying the special exception requirements based on Mr. Tullier's testimony that there were no 10-acre RLD lots abutting C2 or C3 property that were served by public water or sewer.

Under the second *McClean* factor, the Board examines whether granting the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners. *Id.* at 214-15. In this case, the Board found that (1) granting the variance would not "substantially impair the appropriate use or development of adjacent properties" because, among other things, "the facility will appear residential in nature, exceed the minimum setbacks, and there will be extensive buffers installed"; and (2) "the requested variance represents the minimum necessary to afford relief" because "even greater area variances would be required if this facility was developed elsewhere."

(continued)

Finally, we conclude that the evidence before the Board clearly supported its findings with respect to the essential character of the neighborhood. As the Board summarized, the surrounding area "is developed with single-family dwellings, religious facilities, a bait shop, and a specialty ham store." That finding was supported by testimony from Mr. Tullier, who explained that the facility would not alter the essential character of the neighborhood because there were other commercial and institutional uses such as the church, an Islamic learning center, and a bait shop in the RLD zone. Moreover, the Board emphasized, based on testimony from Ms. Bremer and Mr. Johnson, that "the proposed facility's design will have an appearance and character of a residential building" with "landscaping and buffers to reduce the impact to the surrounding area." Accordingly, we hold that substantial evidence supported the Board's finding that the use will not "take away from the rural and residential character of the neighborhood" and would not alter its essential character.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

In regard to the third factor—looking at whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured, *Id.* at 214-15—we note that the Board found that the facility "will be a benefit to the community by helping to meet a public need" and that "[t]he Petitioner has also contemplated and proposed measures that will reduce impact to the surrounding neighborhood."