

IN THE MATTER OF	*	BEFORE THE
CATHY HUDSON, et al.	*	HOWARD COUNTY
Appellants,	*	BOARD OF APPEALS
v.	*	BA Case No. 771-D
HOWARD COUNTY PLANNING	*	
BOARD, et al.	*	
Appellees	*	

DECISION AND ORDER

The Howard County Board of Appeals convened on September 29, 2019 to hear the Appellants, Cathy Hudson, Bradley and Michelle Kline, Robert and Kristy Mumma, Joshua and Diane Robinson and Brenda Schweiger serving as president and representative of the Gables at Lawyers Hill Association, Inc. and the Appellees, the Howard County Planning Board and interested parties, Edmund M. Pollard and Joyce E. Adcock argue the merits of the Appellants' Appeal of the Planning Board's decision to approve a Preliminary Equivalent Sketch Plan, SP-19-002 for 17 single-family detached lots and 1 open space lot in a Decision and Order dated December 9, 2019 in Planning Board Case No. 445. Due to the Covid-19 pandemic, the hearing was held remotely using the WebEx platform.

The Appellants were represented by counsel, G. Macy Nelson and Grant Amadeus Giel. The interested parties Edmund M. Pollard and Joyce E. Adcock were represented by counsel, Sang W. Oh. The Planning Board was represented by David R. Moore, Senior Assistant County Solicitor. Barry Sanders, Assistant County Solicitor served as Legal Advisor to the Board.

Board members Neveen Kurtom, William Santos, James Howard, Steven Hunt and Gene Ryan were present at the September 29, 2019 hearing. Chairperson Kurtom presided. Each Board member visited the subject property as required under the Howard County Zoning Regulations (the “regulations”). This case is an appeal on the record and the hearing was conducted in accordance with Section 2.210(b) of the Board’s Rules of Procedure.

The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the Petition of the Appellants, the Memorandum of the Appellants, the Memorandum of the Appellees, the Decision and Order of the Howard County Planning Board and record for Case No. 445, the General Plan for Howard County, the General Plan of Highways, and the administrative appeal petition were incorporated into the record by reference.

In an appeal on the record, the burden of proof is on the Appellants to show that the action by the Planning Board was clearly erroneous, and/or arbitrary and capricious, and /or contrary to law. Howard County Code, Section 2.210(b)(6).

The Board proceeded with hearing oral arguments on the instant appeal.

STATEMENT OF THE CASE

On December 9, 2019, the Howard County Planning Board issued a decision and order deciding the petition of Petitioners, Edmund M. Pollard and Joyce E. Adcock, approving Preliminary Equivalent Sketch Plan (“PESP”) SP19-002, for 17 single-family detached residential lots and 1 open space lot on the 8.76-acre R-ED-zoned subject property.

On January 7, 2020, an Administrative Appeal Petition was filed with the Howard County Hearing Authority from the Planning Board’s approval of the Preliminary Equivalent Sketch Plan.

STATEMENT OF FACTS

The detailed facts pertinent to this matter are summarized in the Planning Board Decision's Findings of Fact. The Board incorporates by reference the factual findings set forth in the Planning Boards' Decision and Order.

STANDARD Of REVIEW

This rule, that the Board of Appeals, acting as an on-the record reviewing body, should give considerable weight to the Planning Board's interpretations of law in this case, is based on the standard of review applicable to this case – Section 2.210(b)(6) of the Howard County Code. That provision provides that the “the burden of proof shall be on the appellant [in on-the-record appeals] to show that the action taken by the Administrative Agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law.” *Mortimer v. Howard Research and Development*, 83 Md. App. 432, 575 A.2d 750 (1990) held that the Board of Appeals standard of review in appeals based on the record is the same as the Maryland appellate courts and the circuit court, sitting as appellate courts.

Therefore, the standard of review in this case is that which has been commonly referred to as “the fairly debatable rule.” That rule provides that the appellate reviewing body, in this case the Board of Appeals, may not substitute its judgment for the agency whose decision is being reviewed, the review should be limited to whether a reasoning mind could have reached the factual conclusion the agency reached, if the conclusion is supported by substantial evidence, and substantial evidence is such evidence a reasonable mind might accept as adequate to support a conclusion. *Stansbury v. Jones*, 372 Md. 172, 812 A.2d 312 (2002).

APPLICABLE LAW

It is a very basic principle of law that an administrative agency derives its power from the enabling statute passed by the legislative body, and an agency does not have any inherent powers beyond those delegated. *Adamson v. Correction Medical*, 359 Md. 238, 753 A.2d 501 (2000). The Planning Board is established under Howard County Code Section 6.328. Section 16.900(j) of the Code defines the duties and responsibilities of the Planning Board. Section 16.900(j)(2)(i) provides: “The planning board shall make decisions with respect to matters submitted to it pursuant to the laws, rules, regulations, and ordinances of the county.” In the instant case, the Planning Board’s decision-making authority is derived exclusively from Howard County Zoning Regulations Section 107.0.F.1. which provides “for developments in the R-ED District requiring a Sketch Plan, a preliminary equivalent sketch plan must be approved by the Planning Board.” Section 108.0.F.4 limits the Planning Board’s review to the specifics provided in Section 107.0.F.6. Howard County Zoning Regulations Section 107.0.F.6. provides only three criteria the Planning Board is permitted to use in evaluating preliminary equivalent sketch plans:

- a. The proposed lay-out of lots and open space effectively protects environmental and historic resources.
- b. Buildings, parking areas, roads, storm water management facilities and other site features are located to take advantage of existing topography and to limit the extent of clearing and grading.
- c. Setbacks, landscaped buffers, or other methods are proposed to buffer the development from existing neighborhoods or roads, especially from designated scenic roads or historic districts.

DISCUSSION

1. The issues raised by the Appellants are hereinafter addressed. Appellants initially contend that the Planning Board failed to properly determine whether the PESP effectively protected environmental and historic resources under Howard County Zoning Regulations Section 107.0.F.6.a. The Planning Board is required under Section 107.0.F.6.a. to determine if the PESP's "proposed lay-out of lots and open space effectively protects environmental and historic resources." Appellees argue that the Appellants inaccurately posit that the use of the term "historic resources" required an evaluation of off-site historic resources, including the entire Local Historic District itself. Additionally, they assert that the term "historic resources" includes landscaping and specimen trees in and of themselves. As support for their propositions, Appellants direct the Board's attention to sections of the Howard County Code, the Guidelines and provisions of State Law. Appellees contend that the Appellants confuse and conflate provisions of the Howard County Code and the Guidelines with the applicable Zoning Regulations. Appellants also contend that Planning Board erred as a matter of law in adopting former Department of Planning and Zoning Director Valdis Lazdins' solicited explanation that DPZ interprets historic resources to mean historic resources on-site and historic buildings. Appellees counter this argument stating that a comprehensive reading of Howard County Zoning Regulations Section 107.0.F and an evaluation of the Planning Board's prior decisions make clear that Mr. Lazdins' solicited explanation and the Planning Board's interpretation were legally correct. This Board agrees with the Appellees position that the Lawyers Hill Historic District is not an Historic Resource because such an interpretation would improperly require the Planning Board to extend its evaluation under Howard County Zoning Regulations Section 107.0.F.6.a. to off-site historic resources. It is well-settled principle that the primary objective of statutory

interpretation is to “ascertain and effectuate the intention of the legislature.” *Department of Human Resources v. Hayward*, 426 Md. 638, 649-50, 45 A.3d 224, 231 (2012). The legislative intent can be ascertained through analysis of the plain language of the statute and from consideration of its context within the statutory scheme as a whole. *Comptroller of Treasury v. Clyde’s of Chevy Chase*, 377 Md. 471, 833 A.2d 1014 (2003). In this case, that means one must examine Section 107.0.F. in its entirety, particularly subsection 3 thereof which delineates the information required to be submitted with the preliminary equivalent sketch plan for the Planning Board’s consideration in connection with its decision-making criteria pursuant to subsection 6. Section 107.0.F.3.a. requires that the information shall include “the existing environmental and *historic resources of the site....historic structures and their landscape setting; and the scenic qualities of the site.*” Section 107.0.F.3.h. requires that the information include “proposed open space, easements and other forms of permanent protection for ... *on-site resources such as historic structures and settings.*” Following these rules of statutory construction, the Planning Board interpreted the historic resources to be protected by the subdivision layout in the decision-making section to be the on-site ones for which information was required in the information section. As the administrative agency which administers the criteria of Section 107.0.F. of the Howard County Zoning Regulations, the Planning Board’s interpretation and application of Section 107.0.F. should ordinarily be given considerable weight by reviewing courts. *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169, 177 (2001). This Board finds that the Planning Board correctly found that that the Lawyers Hill Historic District is not an historic resource because such an interpretation would improperly require the Planning Board to extend its evaluation under Section 107.0.F.6.a. to off-site historic resources.

The Appellants contend that landscaping and specimen trees alone qualify as historic resources. The Appellees counter stating landscaping features and specimen trees on the subject property are not historic resources or structures under Section 107.0.F.6.a. and that the trees and other natural features are to be protected but as environmental, not historic resources. This Board finds that the Planning Board is the administrative agency with the legislatively granted authority to evaluate the PESP under the Howard County Zoning Regulations. Under that authority, the Planning Board has interpreted historic resources to not include landscaping and specimen trees in and of themselves. The Planning Board's interpretation of whether landscaping and specimen trees alone qualify as historic resources should be afforded deferential weight and is consistent with the testimony of the former Director of the Department of Planning and Zoning. *Clarksville Residents Against Mortuary Def. Fund, Inc.*, 453 Md. 516, 539, 162 A.3d 929, 942 (2017).

Additionally, this Board concludes that the Planning Board's consideration of the proposed subdivision was limited to the consideration of the criteria in Section 107.0.F.6. of the Howard County Zoning Regulations and could not be based on the numerous other provisions of law cited by the Appellants. To expand the scope of this review as Appellants propose would ignore the statutory limits of the role delegated to the Planning Board and intrude into a role fulfilled by the Historic Preservation Commission and the Department of Planning and Zoning.

This Board concludes that the Planning Board properly determined that the PESP effectively protected environmental and historic resources under Section 107.0.F.6.a. The testimony of Dr. Michael Hornum demonstrated that while the subject property is located in the Lawyers Hill Historic District, the structure that once constituted the property's primary contribution to the historic district no longer exists. July 25 Tr. 22-28. As Dr. Hornum testified,

the only remaining extant structure on the property of any significance is located in a proposed open space area and it will be adequately protected there from the development activities. July 25 Tr. 25-26. Dr. Hornum sought to locate any archaeological evidence that would support the site having any other basis for historical significance, but, as he testified, the only sign of a road that he could locate that once existed on the property is the remnants of the driveway for the previously existing house. July 25 Tr. 28-30. Based upon the unfortunately limited historic resources remaining on the site and the open space preservation designed to protect it, the Planning Board concluded that the site's historic resources will be adequately protected under the PESP. The plan does include extensive tree planting, both existing that will be preserved and a high ratio of mature replacement plantings, which will shield the property from the scenic road, the Gables and the surrounding district, protecting each of those off-site views by screening, as discussed in the testimony of J.J. Hartner from the Department of Planning and Zoning June 6 Tr. 2-4 and Frank Manalansan June 6 Tr. 21-27. Additionally, the entry road has been off-set such that traffic passing the property will see a road receding into the trees rather than the planned residences. As to environmental resources, the lots have been laid out to take advantage of and avoid problematic impact upon environmentally sensitive areas including the wetlands. June 6 Tr. 16-21. The County Code compliant roadway is located and to be constructed such that the trees may be preserved, and views remain undisturbed. June 6 Tr. 21-22. As such, this Board finds substantial evidence to support the Planning Board's conclusion that the PESP preliminary equivalent sketch plan effectively protected environmental and historic resources under Howard County Zoning Regulations Section 107.0.F.6.a.

2. Secondly, Appellants contend that the Planning Board erred as a matter of law in approving the PESP while the Applicants' alternative compliance waiver was pending for the removal of specimen trees on the property. Appellees counter stating that the criteria for the Planning Board review of a PESP are set forth in the Howard County Zoning Regulations Section 107.0.f., as addressed in the Planning Board's Decision and Order, including its Conclusions of Law. Appellees state that the Appellants are falsely equating the approval requirements for a final subdivision plan or site-development under the Howard County Code with the approval requirements of preliminary equivalent sketch plans under Howard County Zoning Regulations Section 107.0.F. Appellees also assert that in the instant matter, the Planning Board was evaluating a preliminary equivalent sketch plan under Section 107.0.F. of the Howard County Zoning Regulations and had no authority to deny the plan because the Applicants were awaiting approval from the Department of Planning and Zoning on alternative compliance. Additionally, Howard County Code Section 16.124(c) explicitly designates approval or denial of alternative compliance waivers to the Department of Planning and Zoning. This Board agrees with the Appellees that the Planning Board did not err in approving the PESP while the Applicants' alternative compliance waiver was pending with the Department of Planning and Zoning. The record and the Planning Board's Decision and Order demonstrate that the Planning Board applied all the Section 107.0.f criteria and had substantial evidence to conclude they were met.

3. Thirdly, Appellants contend that the Planning Board erred because it improperly relied on forest conservation regulations that were not compliant with state law. Appellees counter stating that the Planning Board's decision-making authority in this case is limited to the three criteria in Howard County Zoning Regulations Section 107.0.F.6. and that the Planning

Board does not have any power to evaluate the PESP under sections of the Howard County Code, including the forest conservation regulations. As such, the Planning Board could not have erred by relying on allegedly noncompliant forest conservation regulations that it had no authority to look to. This Board agrees with the Appellees' assertions that the Planning Board was exclusively authorized to determine if the PESP met the specific approval criteria in Section 107.0.F.6. and that compliance with forest conservation is separate and apart from the Planning Board's authority here and that compliance with forest conservation is determined by DPZ as part of the final submission plan.

4. Lastly, Appellants contend that the Planning Board erred by requiring a Type A buffer. Appellees counter stating the Howard County Landscape Manual requires a type A landscape buffer between single family detached development and all adjacent uses. Despite this, Applicants have voluntarily provided additional buffering around the subject property to ensure it is properly screened from Lawyers Hill Road and the neighboring properties. The Applicants are providing roughly 241 tree plantings to this end although only 124 are required. This additional screening is reflected on the approved PESP. Howard County Code Section 16.144(k) requires that the final subdivision or site development plan be "in accordance with the approved ... preliminary equivalent sketch plan." Appellees assert that the Applicant is agreeing and required based on the specifications of its approved PESP, to provide screening above and beyond that set as a condition by the Planning Board. The Planning Board's condition that a "class A" buffer must be required recites the obligation under law and in the context of this case set the floor for what it determined to be necessary based on the provisions of the Landscaped Manual. Appellee also states that any concern that the proffered buffering is not supported by the record is belied by the fact that Applicants have voluntarily committed to exceed a class A

buffer and there is an approved PESP that shows the enhanced class D buffer. This Board finds that the Planning Board did not err by requiring a Type A buffer.

CONCLUSIONS OF LAW

1. The Board reviewed the decision and record of the Planning Board in detail and determined that the record clearly and substantially supports the Planning Board's decision.

2. Section 107.0.F. of the Howard County Zoning Regulations mandates that the Planning Board base its decision upon a review of the specific criteria set forth in Section 107.0.F.6. The Planning Board did so. The Planning Board did not err as a matter of law when it confined its decision-making authority only to the criteria specified in Section 107.0.F.6. of the Howard County Zoning Regulations.

3. The Decision of the Howard County Planning Board in Case No. 445 dated December 9, 2019 is supported by substantial evidence in the record as a whole and is neither arbitrary or capricious, contrary to law, or clearly erroneous.

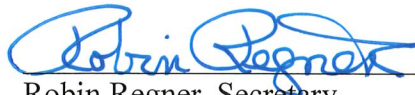
ORDER

Based upon the foregoing, it is this 30th day of November 2020, by the Howard County Board of Appeals, **ORDERED:**

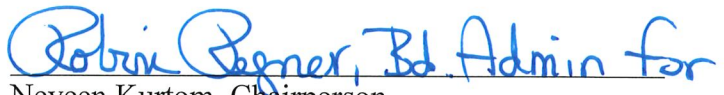
That the Planning Board's decision in Case No. 445 to approve a Preliminary Equivalent Sketch Plan, SP-19-002, for the subdivision of 17 single-family detached residential lots and 1 open space lot on 8.76 acres of land zoned R-ED in a Decision and Order dated December 9, 2019 be and the same hereby is, **AFFIRMED.**

ATTEST:

HOWARD COUNTY BOARD OF APPEALS

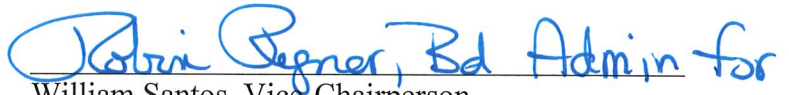


Robin Regner, Secretary



Nveen Kurtom, Chairperson

APPROVED AS TO FORM:



William Santos, Vice-Chairperson

HOWARD COUNTY OFFICE OF LAW

Gary W. Kuc
County Solicitor



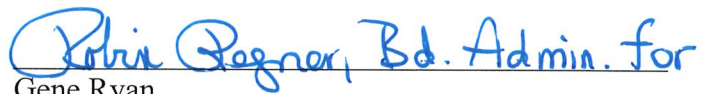
James Howard



Barry M. Sanders
Assistant County Solicitor



Steven Hunt



Gene Ryan