

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1707

September Term, 2015

NORTH COURT ASSOCIATES, LLC

v.

CITY OF FREDERICK PLANNING
COMMISSION

Eyler, Deborah S.,
Nazarian,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: October 19, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Good fences may make good neighbors,¹ but removing a hedge apparently can sour a neighborly relationship. The Evangelical Reformed United Church of Christ (the “Church”) and North Court Associates, LLC (“North Court”) own perpendicularly adjoining properties in downtown Frederick. The Church wants to expand its complex, primarily by adding a multipurpose room beneath its current parking area, although the proposed project also includes several changes at the surface. North Court objected, ostensibly to the removal of a wall-like screening hedge in the northwest corner of the Church’s lot and to the stormwater management system the Church proposes to install. North Court claims that the local zoning authority, the City of Frederick Planning Commission (“the Commission”), erred by approving the Church’s site plan before final stormwater management plans were cleared by the City of Frederick (“the City”) engineers. North Court also claims the Commission erred by granting the Church’s request for a “modification” of the Land Management Code (“LMC”) to excuse the Church from replacing the screening hedge on the post-renovation parking lot and that the plan impairs North Court’s easement rights over the alley. The Circuit Court for Frederick County affirmed the Commission’s decision, and so do we.²

¹ See ROBERT FROST, *Mending Wall*, in NORTH OF BOSTON (3d ed., Henry Holt & Co. 1917).

² The Church apparently has submitted some proposed revisions to the site plan to the Commission, and North Court has filed a title-explanatory Motion for Leave to Make Additional Argument Based Upon New Evidence Not in the Record that May Make Some, But Not All of the Appeal Issues Moot (the “Motion”). The Church and the County have filed a Joint Response, and we deny the motion.

I. BACKGROUND

The Church and North Court own property on the same block in downtown Frederick. The Church occupies the south side of the block that fronts Church Street. In the southwest corner of its property, a driveway runs from Church Street to the northern (rear) portion of the Church's lot.

North Court's property sits on the west side of the block and fronts Court Street. The rear of North Court's property abuts the Church's northern boundary. An alley runs north-south to Second Street, which borders the north side of the block. The alley begins approximately at the middle of the Church's northern boundary, and North Court's property sits to its west in its southernmost part.

In the northwest corner of the Church's property, an east-west-running hedge divides a small area of pavement owned by the Church that abuts North Court's property and the boundary of the Church's parking lot. North Court uses the small area of pavement north of the hedge for parking. A chain, strung up on bollards, runs from the west side of the hedge, along the hedge, and across the southernmost part of the north-south alley to the alley's east edge in order to prevent cars from using the alley and church driveway to pass between Second Street and Church Street. This spot, where the alley ends,³ is the main area of dispute in this case.

³ Compare SHELL SILVERSTEIN, *Where the Sidewalk Ends*, in *WHERE THE SIDEWALK ENDS* (HarperCollins 1974):

There is a place where the sidewalk ends
And before the street begins, (continued...)

The dispute arises from the Church’s plans to expand its facilities. The main proposed improvement is a new multipurpose room, which would be built underground after excavating the rear portion of the property, then covered. The Church also proposes to replace the breezeway that currently connects its buildings with new structure that would continue out to the parking lot, add a parking space, rearrange the parking layout, and build a plaza with landscaping elements atop the new multipurpose room.

The Church’s property is zoned “Institutional (IST),” which requires the church to meet certain requirements in the City’s Land Management Code. Among these is a requirement that the Church buffer the area between the institutional property and neighboring properties with six-foot tall trees, a fence, or a wall. Land Management Code § 605(d)(2) (2015, 2016 Supp.) (“LMC”). The requirement is currently met by the screening hedge. As part of the project, though, the Church proposed to remove (and not

And there the grass grows soft and white,
And there the sun burns crimson bright,
And there the moon-bird rests from his flight
To cool in the peppermint wind.

Let us leave this place where the smoke blows black
And the dark street winds and bends.
Past the pits where the asphalt flowers grow
We shall walk with a walk that is measured and slow
And watch where the chalk-white arrows go
To the place where the sidewalk ends.

Yes we'll walk with a walk that is measured and slow,
And we'll go where the chalk-white arrows go,
For the children, they mark, and the children, they know,
The place where the sidewalk ends.

replace) the hedge because it would be incompatible with the underground multipurpose room and new parking lot design plans. As the Church's design team explained to the Commission, the expanded underground room will not provide sufficient vertical space to achieve the depth necessary for a planting bed, and planting new trees could eventually cause structural concerns for the lot's concrete foundation. Furthermore, the Church says, the addition of a parking space and reconfiguration of all of the spaces will require additional room so cars can turn around in the area where the hedge currently sits. As part of its request for approval of its site plan, the Church asked the Commission for a modification (effectively, an exemption) from the IST screening landscape requirement.

The Church submitted the initial sketch plans for its project to the Commission for approval on June 30, 2014. LMC § 309. Between June 30, 2014 and December 8, 2014, the date of the final plan approval hearing, the Church and its design team, North Court, the Commission, and related city departments exchanged documents, information, and positions regarding the Church's plan. Upon learning about the Church's request for a modification of the screening landscape requirement, North Court expressed strong concern (and opposition) to the Commission and related city departments about the modification and the plan's potential effect on North Court's easement over the alley.

North Court opposed the removal of the hedge because without one, it asserts, stormwater will run off of the Church's parking lot onto North Court's property and cause surface or underground damage to its property. In response, the Church proposed to install "permeable pavers"—high-tech materials that filter and drain stormwater from the surface

into an underground liner, then direct it into the city’s stormwater and sewer system—on the perimeter of the above-ground paved surface.

North Court also took issue with the planned absence of a fence or gate between the Church’s parking lot and the alley. North Court claims that after the renovation, the increased use of the alley by church participants and passers-through will impair its right to use the alley, and that if the parking lot is expanded northward, there may not be adequate turning radius for cars pulling into North Court’s garage on the east side of the alley.

On December 5, 2014, six Commission members took a “field trip” to the site. On December 8, the Commission’s staff sent its project approval recommendation to the Commission, and that evening, the Commission hosted a final public hearing on the improvement plan and voted to approve the project. The approved site plan required the Church to install the permeable paver system and replace the current bollard-and-chain arrangement with a substantially similar arrangement.

North Court filed a petition for judicial review of the Commission’s final determination in the Circuit Court for Frederick County, which affirmed the agency’s decision. North Court appealed.

II. DISCUSSION

North Court raises three issues in this Court.⁴ *First*, North Court contends that the Commission erred when it approved the Church’s request for a modification, and approved

⁴ North Court phrased the issues as follows in its brief:

(continued...)

the final site plan, before the stormwater management “development plan” was approved.

Second, North Court contends that the Commission improperly applied the three-prong

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1. Whether the Commission erred when it failed to follow the due process requirements of the City of Frederick Land Management Code and/or Storm Water Management Ordinance and prematurely reviewed the developer’s final site development plans containing a theoretical “Concept Plan” for storm water management (SWM), rather than wait until the second phase “Stormwater Development Plan was approved by the city engineering department as part of the required three phase review process, and then proceeded to approve the final site plans despite the SWM plan being in violation of the city’s SWM ordinance design location requirements.
 2. Whether the Commission, in order to accommodate the developer’s site design, incorrectly interpreted and applied the three pronged statutory test for waiver of the city zoning code site development standards requiring a landscaped screening buffer strip between the church’s parking lot and North Court’s property, and whether there was substantial evidence to support the Commission’s decision to take away North Court’s right to have the existing landscaped screening-buffer strip at the rear of the church replaced with a similar screening buffer rather than the ERUCC’s new storm water management system and new parking lot that will both run down the middle of easements and over property that belong to North Court.
 3. Did the Commission, after being advised by the assistant city attorney that it did not decide property issues and disputes, have the authority to approve site plans that served no public purpose for the construction of the ERUCC’s SWM system and parking lot on easements and property owned by North Court, and was there substantial evidence to support the Commission’s planning department staff representative’s finding that North Court will suffer relatively little harm by the approval of the site plans?

modification test in granting the Church’s request for a modification of the screening buffer requirements. *Third*, North Court alleges that the final site plan approval interferes with North Court’s easement rights in the alley and on the northwest corner of the Church’s lot.

A. Standard of Review

When reviewing the final decision of an administrative agency, we look through the circuit court’s decision and evaluate the decision of the agency directly. *People’s Counsel for Balt. Cty. v. Loyola Coll. In Md.*, 406 Md. 54, 66 (2008) (internal citations omitted). We review pure questions of law *de novo*, although an “agency’s interpretation of a statute may be entitled to some deference.” *Total Audio-Visual Sys., Inc. v. Dep’t of Labor, Licensing & Regulation*, 360 Md. 387, 394 (2000) (internal citations omitted). We review mixed questions of law and fact, in which an agency “has correctly stated the law and its fact-finding is supported by the record, but the question is whether it has applied the law to the facts correctly,” under the substantial evidence test. *Charles Cty. Dep’t of Soc. Servs. v. Vann*, 382 Md. 286, 296 (2004). Under the substantial evidence test, we determine whether substantial evidence in the record as a whole supports the agency’s findings and conclusions, and whether “the administrative decision is premised upon an erroneous conclusion of law.” *Cosby v. Dep’t of Human Res.*, 425 Md. 629, 638 (2012) (quoting *Bd. Of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)). If we find that the agency decision is based upon substantial evidence and that “reasoning minds could reach the same conclusion from the facts,” the agency decision must be affirmed. *Dept. of Labor, Licensing & Regulation v. Woodie*, 128 Md. App. 398, 406-07 (1999). It is not our role

“to substitute [our] judgment for the expertise of [the agency].” *Bd. of Educ. of Montgomery Cty. v. Paynter*, 303 Md. 22, 35 (1985) (emphasis omitted).

B. The Commission’s Decision Did Not Need To Await City Approval Of The Stormwater Management Plan.

North Court contends *first* that the Commission erred when it approved the Church’s site plan before a final stormwater management development plan was approved by the City. Embedded in this argument is the notion that the Commission is the body responsible for ensuring that development plans comply with Frederick’s Stormwater Management Ordinance (the “Ordinance”) before approving them. Frederick City Code ch. 28 (1966, 2016 Supp.) (“FCC”).

LMC § 309(e) sets forth the criteria against which the Commission assesses proposed development site plans, and includes LMC § 309(e)(1), which states that the Commission must ensure that any proposed site plan complies with “all applicable requirements of Articles 4, 5, 6, 7, and 8 of this LMC.” Article 7 of the LMC begins with a prefatory statement:

Purpose: The Comprehensive Plan establishes a number of environmental goals and policies for the City. Pursuant to Policy EN.8, this Article streamlines environmental regulations by merging the Zoning environmental regulations, Subdivision environmental regulations, Storm Water Management regulations, Floodplain regulations, and Forest Conservation Ordinances into an Environmental Section of the City's development regulations.

North Court reads this language to mean that the Ordinance has been “merged by reference” into Article 7 of the LMC and thus falls within the Commission’s regulatory

and enforcement purview. As such, North Court argues, any requirement contained in Chapter 28 of the City Code, where the ordinance currently sits, is incorporated into Article 7 of the LMC. LMC art. 7; CITY OF FREDERICK, Md., 2004 COMPREHENSIVE PLAN EN. 8 (2004). And because the Ordinance requires that a stormwater development plan “must be approved prior to scheduling a Planning Commission hearing on an application for a site plan,” FCC § 28-13(c)(2)(A) (2015), North Court claims that the Commission violated this regulation when it approved the Church’s site plan at its December 8, 2014 hearing, when the Church had only an approved stormwater management *concept* plan.

Whether the Commission is charged with administering a particular city ordinance is an issue of law, *Lawson v. Bowie State Univ.*, 421 Md. 245, 256 (2011), and we disagree with North Court’s interpretation of the LMC. The Ordinance unambiguously places the responsibility for the Ordinance with the City Engineer and Director of Public Works, not the Commission. FCC § 28-4 (“The City Engineer is responsible for the administration of the development review and permit provisions of this Section. The Director [of Public Works] is responsible for enforcement of the provisions of this article.”). That’s the operative language; the preface to Article 7 is, well, a preface, and doesn’t have any substantive force, nor could the Commission—a zoning and planning body—carry out that function in any case.

Why, then, does the preamble to Article 7 mention a merger? We could look past this question, since “it is not appropriate to infer a different meaning based on the legislative history” when the language of a statute (or ordinance) is unambiguous. *Donati*

v. State, 215 Md. App. 686, 725 (2014). But we may still consult legislative history and surrounding circumstances “as a confirmatory process,” *State v. Rice*, 447 Md. 594, 623 (2016) (citation omitted), and the legislative history here confirms our reading of these provisions. The statement at the beginning of Article 7 describes the substance of the Article, and although it mentions a merger, the Article doesn’t go on to accomplish one—the substantive law relating to stormwater management is found in the Ordinance, where it has been since at least 2010. The City states in its brief that the reference in the Article 7 preface is a vestige of the City’s code revision process, and that explanation makes sense. But what matters is what the LMC required the Church to file and to provide as conditions of gaining approval of its site plan, and the LMC’s provisions relating to stormwater management stop short of requiring a fully approved plan. LMC § 1102(40) (requiring applicants to file their “[m]ethod of storm water management in accordance with City SWM Section. Site plan should include, at a minimum, location and method of practice, including preliminary sizing and grading information.”). The Commission staff report noted that the Church’s submission satisfied its filing obligation and that the Engineering Department had reviewed and approved the plan, and the Commission did not err in approving the Church’s site plan before the City approved a final stormwater management plan.

C. The Church Satisfied The Standard For Modification Of The Buffer Requirement.

North Court argues *second* that the Planning Commission erred when it granted the Church’s request for a modification to the buffer-landscaping requirements contained in

LMC § 605. North Court characterizes the Commission’s decision as an “error of law,” but it’s really a mixed question of law and fact. *Montgomery Cty. v. Butler*, 417 Md. 271, 284 (2010) (“A court is faced with a mixed question of law and fact when a party challenges *how* an agency applied, as opposed to interpreted, a statute.”) (internal quotations and citation omitted). We review mixed questions of law and fact against the “substantial evidence” standard, *Vann*, 382 Md. at 296, which means we look at whether there is substantial evidence on the record as a whole to support the agency’s conclusions, and whether “reasoning minds could reach the same conclusion from the facts.” *Woodie*, 128 Md. App. at 407.

Section 309(j)(1) of the LMC authorizes the Commission to “modify certain designated site plan review criteria, subject to the standards established in this subsection.” For major site plans like this one, LMC § 309(j)(2) permits the Commission to modify any or all of eleven different elements of a site plan proposal, landscaping among them, “as more particularly described” in the corresponding section of the Code. LMC § 605(h)(1)(A) provides that the Code’s specific landscaping requirements, which include the Level II buffer requirement, “may be waived or modified at the . . . site plan review stage by the Planning Commission” where “compensating architectural, landscaping, or other site development features are utilized by the developer and approved by the Department or Planning Commission.” In addition, however, LMC § 309(j)(4) requires that all modifications satisfy an overarching three-part test:

Before granting a modification, the Commission or Department shall find that:

- A. The modification will not be contrary to the purpose and intent of the Code;
- B. The modification is consistent with the Comprehensive Plan; and
- C. The application includes compensating design or architectural features so as to meet overall objectives of the particular requirement.

1. The proposed modification is not contrary to the purpose and intent of the land management code.

We start with the landscaping section of the LMC, § 605, which focuses on visual aesthetics and screening “unsightly or distracting activity” from adjacent properties and the public:

The purpose of landscaping is to aid in reducing the harmful effects of noise, dust, glare of artificial light, and wind; to control storm water runoff, prevent soil erosion and allow surface water to be absorbed into the ground; to aid in making different land uses compatible by providing a buffer or screening effect between land uses; to enhance the natural environment by reducing the visual effect of unsightly activities; and to generally create an aesthetically pleasing appearance.

As a property in the Institutional zone, the Church is required to maintain “Level II Screening.” LMC § 605(d). As applied to the proposed site plan, this provision would have required that the Church plant five trees and build a six foot wall or fence “to provide an effective visual barrier at street level between an unsightly or distracting activity and adjacent properties or public ways to preserve property values and assure compatibility of uses.” LMC § 605. The Church’s design team found, however, that the requirement could not be met because replacement landscaping would be problematic for the new parking

arrangement and could eventually cause issues for the site's concrete foundation. In response to the Church's modification request, the Commission found, as a matter of fact, that the urban, downtown nature of the area and surrounding zoning dramatically reduced the need for visual barriers. These findings support the Commission's conclusion that relief from this requirement would result in minimal detriment to the surrounding area.

North Court's objection to the removal of the hedge doesn't stem only from a lack of screening, though. It argues that removing the hedge exposes its property to increased stormwater drainage, and it disputes whether the Church's permeable paver solution will work. The Commission explored this issue at length: the record contains extensive back-and-forth between city engineers, the Church's engineers, and the Commission regarding the technical approach and merit of the system, both before the hearing in correspondence and during the hearing. Most of the testimony supports the conclusion that the system, although relatively untested by developers familiar to the parties, is likely to be reliable—the Maryland Department of the Environment has accepted it, and the liner material has proven reliable in other settings. The testimony also demonstrates that the system is designed to funnel stormwater away from North Court's property, where previously it ran towards North Court's property with only the hedge to stop it. Additionally, testimony suggested that the paver layering system will perform a trapping function, holding the water for some period of time during a storm as it slowly filters down to the drain system, thereby reducing stress on the city's system.

North Court disputed these positions, but the record amply supports the Commission’s conclusion that the stormwater management system would serve purposes currently served by the hedge. The record also contains evidence supporting the Commission’s conclusion that that the plaza design and the landscaping are consistent with the downtown business environment surrounding the Church’s lot and will serve as compensating features.

The Commission carefully weighed the evidence in the record against the purposes and intent of the LMC, and substantial (indeed, more than substantial) evidence supports the Commission’s finding that the requested modification was not contrary to the purposes and intent of the Land Management Code. And because it is not our role to substitute our judgment for the Commission’s, we affirm its decision to approve the modification. *See Paynter*, 303 Md. at 36.

2. The proposed modification is consistent with the City’s Comprehensive Plan.

North Court contends next that the Commission erred by approving the modification without a “specific finding that . . . the modification is consistent with the city’s Comprehensive Plan.” And it’s true that the Commission did not make a finding, in so many words, that the modification is consistent with the City’s Comprehensive Plan (“the Plan”). Even so, the transcript reveals that the Commission staff and the Commission itself expressly considered relevant elements of the Plan in the course of considering the Church’s modification request, and thus that the Commission considered the Plan’s broader planning objectives in reaching its decision.

During the December 8 hearing, Gabrielle Collard, a Commission staff member, testified and took questions from the Commission on a host of concerns about the project, including the proposed modified requirements of LMC § 605 and the Plan. As part of her testimony, Ms. Collard explained how, when assessing a project, the staff balances the Plan’s competing considerations to determine whether to recommend it for approval. Moreover, both North Court and the Commission acknowledged at various points in the history of this dispute that the LMC itself is based on the Plan. The general provisions of the LMC state that “[t]he LMC is adopted with the intent that it will implement the policies of the Comprehensive Plan” and “[t]he Land Management Code has been prepared in accordance with, and is consistent with, the Comprehensive Plan.” LMC §§ 101, 104. We don’t mean to suggest that compliance or near-compliance with the LMC automatically means a proposal is consistent with the Plan. But at the same time, there is, by design, considerable (if not necessarily total) overlap between the two, and it is obvious from the record that the Commission staff, and then the Commission, considered and acknowledged the Plan as it considered and approved the Church’s modification request.

3. The Stormwater Management Plan furthers the purposes of the landscaping and screening requirements.

The final finding the Commission must make in order to approve a modification to the code is that the “the [total site plan] application includes compensating design or architectural features so as to meet overall objectives of the particular requirement.” LMC § 309(j)(4)(C). Like the Plan and the Code, these issues overlap: the permeable pavers are the primary compensating feature of the modification, and the record amply supports the

Commission’s conclusion that they will achieve the objectives of controlling stormwater runoff and permitting surface water to be absorbed in the ground. All parties involved clearly thought that stormwater runoff control is the most important objective affected by the absence of a screening hedge and the inclusion of the permeable paver system, and although North Court disputes the conclusion, the evidence in the record readily permits a reasoning minds to reach the same conclusion as the agency. *Woodie*, 128 Md. App. at 407.

D. The Commission Is Not Charged With Adjudicating Easement Disputes And Did Not Impact The Legal Rights Of The Parties With Respect To The Easement In Its Final Approval Decision.

North Court claims *third* that the Commission erred in approving the Church’s final plan because the planned improvements allegedly encroach on, or otherwise interfere with, North Court’s easement over the northwest corner of the Church’s lot and over the alley leading to Second Street. But the Commission is a zoning and planning agency, not a court—it is not the Commission’s role to adjudicate property rights in the course of making its zoning decisions, and any decisions it might purport to make have no legal significance.

In reviewing a petition for judicial review of an administrative decision, we examine the agency decision being challenged and the record on which the decision was based. *Hersl v. Fire & Police Emps.’ Ret. Sys.*, 188 Md. App. 249, 260-61 (2009). The criteria for the agency’s approval decision does not include an assessment of the property rights. *See* LMC § 309(e) (2015). The Commission is charged with reviewing a project’s “Site Plan” to ensure its compliance with the requirements of the City’s LMC, requirements stemming

from other zoning classifications or plans that may have already been imposed on the subject property, and requirements related to city services and utilities. *Id.* The Commission was not required, nor did it, consider North Court's easement in coming to its approval decision, or whether the improvements would violate North Court's rights under its easement, whatever they are.

At argument, North Court acknowledged that the disputed property rights issues are before the circuit court in a separate proceeding, and that issue, on which we express no views, must await a decision there. Nor do we offer any views on the tactical question of whether the Church should have sought a declaratory judgment resolving the property dispute before seeking approval of its site plan—that too depends on the outcome of the other case and is not before us.

**JUDGMENT OF THE CIRCUIT COURT
FOR FREDERICK COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**