UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0774

September Term, 2013

MONTGOMERY COUNTY PLANNING BOARD OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

v.

DANY SMITH

Meredith,
Graeff,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: June 2, 2015

Appellee Dany Smith owns residential property in the Fairhill Subdivision in Montgomery County, Maryland. Two separate easement areas encumber the Smith property under a forest conservation plan for the Fairhill subdivision. Mr. Smith received a violation notice, which he protested, for cutting grass and for building a shed on areas of his property encumbered by the forest conservation easement. Following two separate hearings, Appellant Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission ("Planning Board") issued a decision requiring that Mr. Smith undertake numerous corrective measures to remediate these violations. Mr. Smith petitioned for judicial review of the Planning Board's decision in the Circuit Court for Montgomery County, contending, as he did before the Planning Board, that the *Accardi* doctrine barred the enforcement of a forest conservation easement not recorded on the record plat and that the Planning Board lacked the statutory authority to order corrective actions for forest conservation easement violations. The circuit court, relying on *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), found, *inter alia*, that the Planning Board was precluded from enforcing a conservation easement not shown on the record plat and reversed the Planning Board.

Appellant Planning Board presents several questions, which we have rephrased and reordered:

I. Was Mr. Smith time-barred from challenging the Planning Board's long settled decision not to show a conservation easement on a plat?

II. Did the circuit court improperly apply the *Accardi* doctrine to prevent the Planning Board from enforcing the forest conservation easement in this case?

III. Did the Planning Board act within its authority in ordering Mr. Smith to take certain corrective actions?

Recently, this Court decided a case involving an adjacent property in the Fairhill subdivision. In *McClure v. Montgomery County Planning Board of the Maryland-National Capital Park & Planning Commission*, 220 Md. App. 369, 386 (2014), this Court held that Chapter 50 of the Montgomery County Code imposed no duty on the Planning Board to direct developers to *re*-plat subdivision lots to indicate the presence of a forest conservation easement. Applying the holding in *McClure*, we hold that the *Accardi* doctrine did not bar the Planning Board's actions in this case. Further, we are satisfied that the Planning Board's decision was based on substantial evidence, and its order for corrective actions was within its authority and was not arbitrary and capricious. Accordingly, we reverse the judgment of the Circuit Court for Montgomery County.

BACKGROUND

In 1980, the Montgomery County Planning Board approved the Fairhill Subdivision—consisting of 27 buildable lots and 19 outlots—in Laytonsville, Maryland. A preliminary plan for the subdivision bearing the identification number 1-74019R was recorded in the county land records at Plat 13190. At that time, the subdivision was not covered by a forest conservation plan. In 1992, however, Montgomery County enacted a forest conservation law to be enforced by the Planning Director of the Montgomery County Planning Division of the Maryland-National Capital Park and Planning Commission (M-NCPPC). Montgomery Cnty., Md., Code ("MCC") §§ 22A-1 *et seq.* The new law required, among other things, that subdivisions have forest conservation plans "intended to

govern conservation, maintenance, and any afforestation or reforestation requirements which apply to the site." MCC § 22A-10(c)(1). The primary objective of the forest conservation plan is to retain existing forest and trees. MCC § 22A-12(b)(1). A typical plan will designate certain tree conservation areas and employ long-term measures—such as conservation easements, deed restrictions and covenants—to protect these areas. MCC § 22A-12(h)(2).

The Bozzutto Group, doing business as Fairhill Partners Limited Partnership ("Developer"), sought in 1996 to convert five of the original Fairhill outlots into subdivided, buildable lots. This process triggered the need to comply with the 1992 forest conservation law.[1] Following a public hearing, the Planning Board approved Preliminary Plan 1-96071 in an opinion with a mailing date of July 17, 1996. That plan required the Developer to record a revised "final record plat for all property delineated on the approved preliminary plan."

On August 28, 1997, the Developer executed the governing Conservation Easement Agreement, which established a forest conservation easement and delineated its location within the Fairhill subdivision. On March 13, 1998, the Agreement was recorded in the County's land records in Liber 15627 at Folio 293, but was not indexed against the

[1] Forest conservation plans must be submitted in conjunction with the review process for a development plan, project plan, preliminary plan of subdivision, site plan, special exception, mandatory referral, or sediment control permit. MCC § 11A-11(a)(1). The Planning Director must coordinate review of the plan with "the Director of Environmental Protection, the Director of Permitting Services, the Washington Suburban Sanitary Commission, other relevant regulatory agencies, and entities that will provide public utilities to the tract[.]" *Id.*

individual lots burdened by the easement. The Developer never amended and re-recorded the plats for existing lots to show the locations of the tree conservation easements.

In late 2000, Mr. Smith purchased Fairhill subdivision lot 9 at 21627 Ripplemead Drive. Lot 9 is one of the 27 lots initially approved for building in 1980. General Addendum 1 to Mr. Smith's signed contract of sale executed October 29, 2000, provides, in pertinent part:

> B. Preservation of Trees.
>
> Purchaser recognizes that conservation easements provided to purchaser have been established upon the Lot to preserve and protect trees located upon the Lot. Purchaser shall comply with all terms and conditions of all forest conservation plans and easements affecting the Lot. Purchaser shall remove only such trees upon the Lot as are permitted to be removed pursuant to applicable forest conservation plans and as are essential in connection with the construction of the home upon the Lots.

Mr. Smith signed a notice document on October 29, 2000, indicating that he had received from the listing broker a copy of the Fairhill Homeowner's Association documents, including a copy of the Conservation Easement Agreement for Fairhill subdivision. Schedule A, recorded in Liber 15627, Folio 303-330, sets out the bounds of the conservation easements in Fairhill subdivision. Moreover, Sketch Plat, parts 7, 8, & 9, recorded at Folio 328, clearly depicts the conservation easement on the eastern corner of Lot 9. Although the rendering is not completely clear, Mr. Smith also received and initialed a graphical representation of his lot labeled "Conservation Easement Plan Lot 9, Exhibit C," along with the documents provided with the contract of sale.

Mr. Smith maintains, however, that he was unaware of the correct location of the conservation easements on his property. In 2003, Mr. Smith decided to construct a shed on the property and obtained a permit for the construction from the Department of Permitting Services. However, the shed was constructed partially within one of the forest conservation easements on the lot.

Following several complaints, beginning in 2005, from a neighbor who objected to the construction of the shed, the Planning Board conducted an inspection in 2009 and discovered the easement violations. The Planning Board issued a Notice of Hearing to Mr. Smith in December of 2009. The Board heard the matter on February 1, 2010, and March 11, 2010.

Before the Planning Board on February 1, 2010, Mr. Smith testified that when he took possession of the lot, the two forest conservation easements were incorrectly marked off by the Developer with posts, barbed wire, and signs indicating the purported boundaries of the easements. The marked off areas were also bounded by silt fences, suggesting to Appellee, according to his testimony, that it was in those areas where no land disturbing activities could occur. Asked when he first became aware of the area subject to the forest on the northeastern corner of his lot, Mr. Smith testified:

> [W]hen we got the original contract there was both the forested area and supplemental planting within the contract. We went down and looked at the signs. We said obviously that's where its physically marked because that's where when we got the house built and the grading down the silt fence was put along there so we had assumed at that point in time that was where the conservation easement was.

Regarding the construction of the shed, Mr. Smith testified that when he first sought a building permit, the Department of Permitting Services revealed a conflict with an existing right-of-way easement on the record plat and the planned location of the shed. In response, the planned shed was re-located and he received an approved permit. Mr. Smith also affirmed that no trees on the property had been removed or harmed, and that he and his wife actually added approximately 33 trees to the lot. Nevertheless, there is no dispute as to the physical violation of the forest conservation easement.

The testimony of Planning Department inspector Mr. Josh Kaye also revealed that Mr. Smith violated the easement on the other side of the property by mowing grass in certain areas. In regard to the shed, Mr. Kaye testified that during the course of his inspection, he checked the county records and found that Mr. Smith had obtained a permit for the construction. Mr. Kaye acknowledged that he had no knowledge to suggest that the shed was constructed contrary to the terms of the building permit. Finally, Mr. Kaye testified that the forest conservation easements on Mr. Smith's lot do not appear on the record plat. Notwithstanding, counsel for the Planning Board argued that none of these attendant facts negate the forest conservation easement as an encumbrance that runs with the land.

At the enforcement hearing, Mr. Smith argued in response that the easements did not fall within the definition of a forest conservation easement within the jurisdiction of the Planning Board under Chapter 22A of the Montgomery County Code because they were not recorded on the record plat for the property. Therefore, Mr. Smith argued, the Planning Board could not enforce the easements through the mechanisms in Chapter 22A

and lacked the statutory authority to order corrective measures for a violation. Mr. Smith also argued that he was prejudiced by the failure to plat the easements at the time of their creation.

Montgomery County Department of Permitting Services zoning manager Susan Scala-Demby testified as an expert witness before the Planning Board and stated:

> If a reviewer or permit technician were to look at the site plan and see no evidence of the conservation easement or any easement that would have been interfered with, with the construction of a shed, and they looked at the plat and did not find any notation indicating a conservation easement that would be impeded by the shed, then they would have approved the review. Then the permit could be issued.

When questioned by the Board, "is there anything … that would have prompted your reviewers to look beyond a record plat in a standard [permit] review," Ms. Scala-Demby answered: "Typically not." Notably, Mr. Smith's permit application failed to indicate the presence of **any** forest conservations easements on his lot, despite his awareness of their existence. Further, the site plan drawing submitted along with Mr. Smith's application contains no hint of either conservation easement. As stated above, quoting Ms. Scala-Demby, a reviewer or permit technician looks first at the site plan drawing for evidence of an easement on the property. The Planning Department argued that the easements were fully effective because Mr. Smith had actual notice of their existence and locations, and that the Planning Board has authority to enforce all forest conservation easements. The Planning Department also maintained that no prejudice resulted from the failure to require the easements to be record on plat.

At the hearing on March 11, 2010, the Planning Board announced its decision:

> We disagree with [Mr. Smith] that the absence of a forest conservation easement from the record plat divests the Board of jurisdiction to enforce the easement.
>
> The definition of forest conservation easement in the Trees Technical Manual mentions that a forest conservation easement is shown on a plat, but the Board finds the definition to be descriptive of the typical case, rather than proscriptive.
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> * * *
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> Finally, the Board does not find that [Mr. Smith] was prejudiced by the absence of the forest conservation easement from the record plat. While [Mr. Smith] may be correct that the Department of Permitting Services would not have issued a building permit for his garage [sic] if the easement had been shown on the plat, that step in the permit review process is not intended to be the primary means of ensuring that easements are respected.
>
> It's incumbent on the property owner to observe the requirements of the easement.

More than two years later, on July 31, 2012, the Planning Board ordered that Mr. Smith undertake the following corrective actions:

> 1) No later than 90 days from the date of this Order, Mr. Smith must submit a limited preliminary plan amendment to modify the Forest Conservation Plan. The amendment must comply with the requirements of this Order; including by removing the area containing the shed from Easement Area One and compensating for the removal by adding appropriate and equivalent easement area elsewhere on the lot, and must be approved within six months of submittal. No later than 14 days after the Board approves the preliminary plan amendment, Mr. Smith must submit to the Planning Department a financial security sufficient to cover the cost of all required planting.
>
> 2) No later than 90 days after the Board approves the required preliminary plan amendment, Mr. Smith must record a new record plat reflecting all conservation easements.
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> 3) No later than 90 days after the Board approves the required preliminary plan amendment, Mr. Smith must install six-inch by six-inch posts marking all forest conservation easement boundaries.

4) No later than the second planting season after this Order is issued, Mr. Smith must compensate for any removed easement area at a ratio of one to one of onsite, planted forest in a recorded Category I conservation easement to conservation area removed. Further, Mr. Smith must plant trees in the approximately 4,583 square feet of Easement Area Two impacted by grass cutting. The precise number of trees to be planted will be determined with the limited preliminary plan amendment for forest conservation purposes required by this Order. Mr. Smith must also replace groundcover with native wildflower mix within the planted forest area.

On August 27, 2012, Mr. Smith petitioned the Circuit Court for Montgomery County for judicial review of the Planning Board's order. Before the circuit court, on February 8, 2013, the Planning Board argued that Mr. Smith was time-barred from challenging the Board's 1996 decision. Mr. Smith countered that the Planning Board has no authority to enforce easements not shown on the record plat, and that the Planning Board lacks statutory authority to order corrective actions for forest conservation easement violations. Additionally, Mr. Smith argued that because MCC § 22A-16 did not explicitly grant the Planning Board authority to order corrective actions prior to a 2013 amendment, the authority to order corrective actions was reserved solely to the Planning Director under MCC § 22A-17.

In a written Memorandum and Order issued on May 23, 2013, the circuit court agreed on all counts with Mr. Smith. The circuit court found that the Planning Board's failure to follow its own rules (*i.e.*, requiring that the easements be shown on the record plat in accordance with the preliminary plan approval) precluded the Planning Board from enforcing the easement. *Cf. United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and *Pollock v. Patuxent Institution Board of Review*, 374 Md. 463, 501 (2003).

Additionally, the court determined that the authority to order corrective measures under MCC § 22A-17 is reserved to the Planning Director and not granted to the Planning Board.[2] This timely appeal followed on June 21, 2013.

Additional facts will be presented as the discussion necessitates.

STANDARD OF REVIEW

"We review an administrative agency's decision under the same statutory standards as the Circuit Court." *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 449-50 (2002) (quoting *Gigeous v. ECI*, 363 Md. 481, 495 (2001)) (internal quotation marks omitted). "The circuit court's decision acts as a lens for review of the agency's decision, or in other words, 'we look not *at* the circuit court decision but *through* it.'" *McClure*, *supra*, 220 Md. App. at 379 (emphasis in original) (quoting *Emps. Ret. Sys. of Balt. Cnty. v. Brown*, 186 Md. App. 293, 310, *cert. denied*, 410 Md. 560 (2009)). We treat "the agency's decision [as] prima facie correct and presumed valid[.]" *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68 (1998) (quoting *CBS v. Comptroller*, 319 Md. 687, 698 (1990)). Our role in reviewing an agency's decision is narrow and "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determin[ing] if the administrative decision is premised upon an erroneous conclusion of law." *Banks*, 354 Md. at 67-68 (quoting *United Parcel v. People's Counsel*, 336 Md. 569, 576-77 (1994)) (internal quotation marks omitted).

[2] MCC § 50-41 defines "Planning Director" as "[t]he staff member in the Maryland-National Capital Park and Planning Commission who is in charge of all planning, zoning, and land development approval activities for the Commission in Montgomery County, and who reports directly to the Planning Board, or the Director's designee."

DISCUSSION

I.

A. Prior Decision

The Planning Board contends that its 1996 failure to require the re-platting of existing Fairhill subdivision lots to reflect the added forest conservation easements was a decision that must have been challenged within the 30 day period for judicial review of that decision; therefore, Mr. Smith is time-barred from asserting any challenge regarding that failure. Mr. Smith responds that no affirmative decision was made *not* to require the conservation easements for certain lots to be recorded on the plats. Mr. Smith also argues that the Planning Board has no authority to waive the requirements of law articulated in the Montgomery County Code and Regulations, and to do so would itself run afoul of the *Accardi* doctrine.

The circuit court found that the administrative record showed no evidence of an affirmative decision by the Planning Board. The February 9, 1996, Planning Board Opinion approving Preliminary Plan 1-96071 does provide for recording the conservation easements in the County's land records and in a "disclosure statement to be provided to all p[ro]spective home buyers prior to contract ratification." However, the opinion also contemplates the "recording of plat(s) or MCDEP issuance of sediment and erosion control permit, as appropriate[,]" and states that "a final record plat for all property delineated on the approved preliminary plan must be recorded[.]"[3] The administrative record fails to

[3] Although approval of Preliminary Plan 1-96071 was contingent on the recordation of a final record plat that delineated the forest conservation easements on (continued…)

support the contention that the Planning Board made an affirmative decision not to require forest conservation easements that are added to existing Fairhill subdivision lots be recorded on plat. What the record does indicate is that: (1) the Planning Board approved the Preliminary Plan to be in accordance with Chapter 50 of the MCC, which, as discussed *infra*, indicates that conservation easements must appear on an initial subdivision record plat; (2) the Board required a bond from the developer until all conditions of the Preliminary Plan were met, including "a final record plat for all property delineated on the approved preliminary plan"; and (3) despite the failure to require re-platting of the subdivision to reflect the easements added to existing buildable lots, the Board released the bond. Finally, the circuit court noted that Mr. Smith was not challenging a prior decision of the Board. Rather, Mr. Smith was raising the prior inaction of the Board as a defense and alleging that it had been a contributing factor to his unintentional violation of the easements.

We agree with the circuit court. The omission by the Planning Board in 1996 was not an affirmative decision. The mere fact that no one at that time challenged the Planning Board's possible oversight does not now bar Appellee's challenge to the significantly more recent enforcement action.

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the lots, a final plat was never completed and recorded to reflect the forest conservation easements on certain lots. However, as we observed in *McClure*, it is Chapter 50 of the MCC, not the Board's order, that sets forth the requirements for the subdivision of land and, as discussed *infra*, the Planning Board was never required to order the developer to re-plat the approved Preliminary Plan. 220 Md. App. at 386.

B. Notice – Substantial Evidence

Earlier this term, we decided *McClure v. Montgomery County Planning Board of the Maryland-National Capital Park & Planning Commission*, which presented a nearly identical set of facts. 220 Md. App. at 369. In *McClure*, another homeowner of a property adjacent to the Smiths in the Fairhill subdivision, Mr. McClure, invoked the *Accardi* doctrine to challenge the efficacy of a forest conservation easement on his lot that was also never recorded on plat. *Id.* at 376-77. The issues in *McClure* arose when Mr. McClure received permits, began to construct a barn and fence on his property, and learned the boundaries of the forest conservation easement. At that time, the Planning Department received a complaint about unpermitted activity in the forest conservation easement. *Id.* at 376. A notice of violation was issued, alleging that Mr. McClure violated the easement by (1) cutting grass; (2) installing asphalt and stone; (3) storing and parking trailers; (4) grazing horses; and (5) installing a fence without prior approval. *Id.* at 377. The Planning Board ultimately found Mr. McClure responsible for four violations of the forest conservation easement on his lot. *Id.*

Mr. McClure sought judicial review in the circuit court, which disagreed with his challenge to the Planning Board's authority to enforce the forest conservation easement and found the forest conservation easement to be effective despite not appearing on record plat. *Id.* at 378. The circuit court found that the record established that when Mr. McClure purchased his lot, he received and signed several documents—the same as Mr. Smith in the matter *sub judice*—that provided notice of the existence and location of the forest conservation easement (*i.e.*, General Addendum 1, Notice of Easements, Schedule A, and

a graphical representation of his lot). *Id.* at 380-81, 383-84. As here, the forest conservation easement in *McClure* was also recorded in the County's land records. *Id.* at 380-81.

On review, we determined that there was substantial evidence in the record to support the existence of the recorded easement, and that Mr. McClure had both actual and constructive notice of the forest conservation easement. We stated:

> Mr. McClure's signature appears on several documents related to the settlement of Lot 7, all of which note the existence of a conservation easement. First, on the list that describes the documents he received from the listing broker, Mr. McClure acknowledges by signature the receipt of, among other documents, a copy of the Conservation Easement Agreement for Fairhill. Next, Item B in General Addendum I to his contract of sale states that conservation easements have been established on Lot 7 to preserve and protect the trees on the property. He acknowledged the [forest conservation easement] by signature on that document as well. In addition to those two documents, in Exhibit C to the contract of sale, there is depicted a diagram of the [forest conservation easement] on Lot 7, which Mr. McClure also acknowledged with his signature. We think all those documents are certainly demonstrative of actual notice.

Id. at 383-84. Equivalently, in the matter *sub judice*—where all the same documents and diagrams are present—there is substantial evidence in the record to support that Mr. Smith received actual notice of the forest conservation easements on his lot. Thus, Mr. Smith's lot, like Mr. McClure's, remains encumbered by the forest conservation easement recorded on March 13, 1998. *See id.* at 385.

II.

The *Accardi* Doctrine

Next, the Planning Board argues that the circuit court erred in determining that "the [Appellee] cannot be held liable for any violations of [the forest conservation] easements

because the Planning Board did not abide by its own rules and regulations with respect to [Appellee's] land," based on the *Accardi* doctrine. The Planning Board maintains that it is not precluded from enforcing an otherwise effective easement simply because it was not shown on the record plat. Mr. Smith counters that the failure of the Planning Board to ensure that the developer recorded new plats for the pre-existing lots following the Board's approval of the 1996 Preliminary Forest Conservation Plan 1-96071 was in violation of the agency's own regulations, and that prejudice manifested when Permitting Services—after checking the un-amended plat—granted Mr. Smith a permit to build a shed partially within the conservation easement. Further, the zoning manager for the Montgomery County Department of Permitting Services testified that had the conservation easement been recorded on the plat as required by law, the permit would have been declined. As the circuit court noted, the Planning Board's own opinion and order acknowledges that the error in recordation is the main reason for the violation of the easements. The Planning Board stated:

> [Appellee] argues that if the easement had been shown on the plat, the Department of Permitting Services would not have issued a building permit for a shed in the forest conservation easement, because Permitting Services checks the plat as part of the building permit review process. While this may be true and it would have been fortuitous if Permitting Services had blocked construction of the shed, it does not, as [Appellee's] argument implies, in any way relieve [the Appellee] of the obligation to comply with the terms of the forest conservation easement.

Indeed, as we recounted in the background *supra*, despite the fact that Mr. Smith clearly had notice, he failed to indicate the presence of any forest conservations easements on his lot either on the application itself or on the drawing submitted along with his application.

The regulations promulgated pursuant to Chapter 22A define a forest conservation easement as "a restriction on the land and the natural features on this land. This easement is shown on the record plat and its terms and conditions are recorded in the county's land records." Code of Montgomery County Regulations ("COMCOR") 22A.00.01.03.B6. The Trees Technical Manual, which lacks the force of law but has been incorporated in full as part of the COMCOR 22A regulations, defines a conservation easement as a "restriction on the land and the natural features on this land … shown on the record plat and its terms and conditions are recorded in the County's land records."[4] Both definitions incorporated into Chapter 22A contemplate a conservation easement as one shown on the record plat.

MCC § 50-36(d) *Drawing*, provides:

> The Subdivision Record Plat must be accurately drawn to a scale approved by the Planning Board. The Mylar drawing should not be submitted until paper prints of the subdivision record plat, submitted with the application, have been reviewed by the appropriate Departments and agencies and have been returned to the licensed land surveyor. The subdivision record plat drawing must include the following items:

[4] In *McClure,* 220 Md. App. at 387, we addressed the same argument that Mr. Smith makes that the Trees Technical Manual is a regulation carrying the force of law:

> [T]he Trees Technical Manual is defined as "a guidance document, adopted by the Planning Board, which provides further *clarification* of the requirements of Chapter 22A of the Montgomery County Code and these regulations." COMCOR 22A.00.01.15(B) (2014) (emphasis added). COMCOR, therefore, makes explicit that the Trees Technical Manual is intended to clarify and remind parties of their duties under Chapter 22A and its associated regulations. It is evident that the manual is not a new set of rules carrying with them the force of law, but a reminder to the citizens of Montgomery County of their duties under the [Montgomery County Forest Conservation Law].

* * *

> (2) Subdivision Record Plat. All boundaries, street lines and lot lines, plus any other pertinent lines must be shown together with sufficient data, accurately calculated, to locate each line and property corner and to reproduce same upon the ground, as required by the Board. The Subdivision Record Plat must show the following items, as applicable in each case:
>
> * * *
>
> c. Existing and Proposed Encumbrances.
> (1) Existing. All recorded easements established or rights of way provided for public services, conservation purposes, or utilities in the subdivision, and any limitations of such easements, plus recordation reference.
> (2) Proposed. All easements or rights-of-way to be established by the Subdivision Record Plat and, as to each such encumbrance, the general purpose, the grantee and sufficient dimensions to identify the location.
> (3) Environmental. The most restrictive conservation easement must be shown and described, and all other conservation easements must be shown, including, without limitation, 100-year floodplain, 100-year floodplain building restriction line and forest conservation easement.

In *McClure*, we interpreted this language as requiring that an initial subdivision record plat "include references to any existing easements, and must have sufficiently illustrated and described [forest conservation easements]." 220 Md. App. at 386. However, we noted that "[n]otwithstanding these provisions for existing easements,[5] our review of Chapter 50 reveals no provision or language that would impose a duty on the Planning Board to direct developers to *re*-plat all the Fairhill lots to indicate the presence of [a forest conservation easement]." *Id.*

[5] Our analysis in *McClure* also looked at the following provisions of the MCC to determine whether re-platting to reflect an added forest conservation easement is required: MCC §§ 50-36 (reproduced in pertinent part *supra*), 50-37 (Record Plats-Procedure for Approval and Recording), 50-35A (Minor Subdivisions-Approval Procedure).

Certainly, "[i]t is well established that rules and regulations promulgated by an administrative agency cannot be waived, suspended or disregarded in a particular case as long as such rules and regulations remain in force." *Pollock*, 374 Md. at 485-86 (quoting *Maryland Transp. Auth. v. King*, 369 Md. 274, 282 (2002)) (internal quotation marks omitted). Under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954) and the Maryland Court of Appeals decision in *Pollock v. Patuxent Institution Board of Review*, 347 Md. 463, 501 (2003), when an agency has failed to follow its own rules, a party who has been prejudiced by that failure may challenge the agency's actions against it. However, the *Accardi* doctrine cannot invalidate the actions of the Planning Board where there were no relevant duties imposed by rule or regulation. *See McClure*, 220 Md. App. at 387 ("[T]he Planning Board cannot violate its own rules where the guidance document does not impose any new duties on the Board that carry the force of law."). Our analysis in *McClure* again controls the present matter:

> Given that neither the Trees Technical Manual nor Chapter 50 of the County Code indicate that re-platting is required, we do not see where a duty exists that mandates the re-platting of a subdivision to reflect [a forest conservation easement]. We defer to the agency's interpretation of its statute to determine that re-platting is not necessary.

Id. at 387-88 (citing *Haigley v. Dep't of Health & Mental Hygiene*, 128 Md. App. 194, 216 (1999)). Accordingly, we hold that where the applicable rules and regulations do not mandate the re-platting of a subdivision to show a later imposed or adopted forest conservation easement, the *Accardi* doctrine does not bar the Planning Board's enforcement of such an easement simply because it does not appear on the record plat.

III.

The Planning Board contends that the circuit court erred in determining that it lacks authority under Chapter 22A to order corrective measures to remedy a conservation easement violation. The Board further claims that because MCC § 22A-16(b) & (e) grant it "primary enforcement authority" to "address any alleged violation," the Board is empowered to order corrective actions to remedy violations under Chapter 22A. Mr. Smith responds that, prior to a 2013 amendment, the authority to order corrective actions was reserved to the Planning Director. MCC § 22A-17; 2013 Laws of Montgomery County, ch. 23, § 1.

Again, in *McClure*, we were asked to conduct this same analysis. We determined that such a limited reading of the Planning Board's enforcement authority "is highly selective and belies the plain meaning of the statute." 220 Md. App at 389. As explained in *McClure*, the Planning Board has express authority to enforce forest conservation easements created by deed, even if such easements are not shown on the recorded subdivision plat or indexed against the parcel. Because we have previously addressed this issue, and a subsequent clarifying bill has already been enacted by the Montgomery County Council—giving full effect to the Planning Board's construction and application of the statutes regarding its enforcement powers—we decline to address this argument again.

Alternatively, Mr. Smith protests that the Planning Board failed to consider certain statutorily mandated factors when determining what corrective actions to require.[6] Mr.

[6] MCC § 22A-16(d)(2) provides:
(continued…)

Smith asserts that the Planning Board made no reference in its order to the cost of corrective actions or his ability to pay. Further, Mr. Smith points out that there was no evidence presented of any damage to tree resources.

At the March 11, 2010, enforcement hearing, the Planning Board found that Mr. Smith had violated the easements on lot 9 and moved promptly to the issue of appropriate remedy. In conducting that inquiry, the Planning Board heard arguments and accepted evidence from both the Planning Department and Appellee. The Planning Board did note that there was no willful violation and that "[Appellee] sought a permit for the construction of the garage, and proceeded in good faith, thinking that he had done what needed to be done." Recognizing the lack of willful violation, the Planning Board decided against imposing a civil administrative penalty—finding it to be unwarranted and focusing instead on ordering corrective measures to achieve the aims of the forest conservation law. The

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> In determining the amount of the administrative civil penalty, or the extent of an administrative order issued by the Planning Director under Section 22A-17, the Planning Board or Planning Director must consider:
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> (A) the willfulness of the violations;
> (B) the damage or injury to tree resources;
> (C) the cost of corrective action or restoration;
> (D) any adverse impact on water quality;
> (E) the extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator;
> (F) any economic benefit that accrued to the violator or any other person as a result of the violation;
> (G) the violator's ability to pay; and
> (H) any other relevant factors.

Planning Board also discussed the nature of the protected forest areas and the costs associated with the proposed corrective actions.

The opinion and order of the Planning Board does not specifically delineate each factor considered in fashioning the ordered remedy. However, the record of the March 11, 2010, hearing adequately establishes that the Planning Board considered the relevant factors. We cannot say that the Board failed in its duty to consider the relevant factors before reaching its decision, nor do we conclude that the Planning Board's order was arbitrary or capricious.

CONCLUSION

In *McClure,* 220 Md. App. at 387-88, we held that Montgomery County Code Chapter 50 contains no provision or language that imposes a duty on the Planning Board to mandate the re-platting of a subdivision to show a later imposed or adopted forest conservation easement. Accordingly, the *Accardi* doctrine does not bar the Planning Board's enforcement of the un-platted forest conservation easement in this case. The Planning Board's decision to hold Mr. Smith liable for violations of the forest conservation easements on his property was not arbitrary and capricious and was supported by substantial evidence. For the foregoing reasons, the judgment of the Circuit Court for Montgomery County is reversed.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR THE ENTRY OF A JUDGMENT SUSTAINING THE ORDER OF THE MONTGOMERY COUNTY PLANNING BOARD OF THE MARYLAND-

NATIONAL CAPITAL PARK AND PLANNING COMMISSION.

COSTS TO BE PAID BY THE APPELLEE.