

Circuit Court for Montgomery County  
Case No. 436463-V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1034

September Term, 2018

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BRADLEY BOULEVARD CITIZENS  
ASSOCIATION, ET AL.

v.

MONTGOMERY COUNTY PLANNING  
BOARD, ET AL.

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Friedman,  
Beachley,  
Wells,

JJ.

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Opinion by Friedman, J.

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Filed: December 6, 2019

\*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.

Toll Brothers Inc. applied to the Montgomery County Planning Board to develop a parcel of land known as the “WMAL Radio Transmission Site” located in Montgomery County. The Montgomery County Planning Board approved the application, a decision later challenged by the Bradley Boulevard Citizens Association and other petitioners in the Circuit Court for Montgomery County. The circuit court affirmed the Board’s approval. Before us now, the Citizens Association presents the following questions for our review: (1) whether the Board’s findings were supported by substantial evidence; (2) whether Toll Brothers’ application met the requirements for a variance under § 22A-21 of the Montgomery County Code; and (3) whether the Toll Brothers’ development plan conforms to the North Bethesda Master Plan. Because we hold that the Board’s findings were factually supported, legally correct, and in conformity with the Master Plan, we affirm.

### **FACTS**

Toll Brothers submitted a Preliminary Plan Application on June 21, 2016 to the Montgomery County Planning Board to develop an approximately 74.83-acre parcel of land. In its application, Toll Brothers described plans to build 309 residential lots, dedicate a 4.3-acre parcel of land to Montgomery County Public Schools (MCPS), and build connecting roadways and stormwater management systems. After receiving the application, the Montgomery County Planning Development Staff issued a report, recommending approval of the preliminary plan. The Board conducted a public hearing to gather evidence on the merits of Toll Brothers’ application. During the hearing, the Board

heard testimony about the development project from Toll Brothers, the Montgomery County Planning Development Staff, interested citizens, and community groups.

Opponents to the preliminary plan raised two environmental concerns during the public hearing. The first environmental issue presented was whether Toll Brothers would be able to satisfy the minimum retention clause of the Montgomery County Forest Conservation Law, codified at § 22A of the Montgomery County Code. The application of this clause requires 15.16 acres of forest to be retained under the project. Toll Brothers' preliminary plan application provided for retention of only 10.75 acres. Toll Brothers argued, however, that it was impracticable to retain 15.16 acres because of certain road connections requested by the Department of Transportation, as well as the demands of constructing noise mitigation structures. The second environmental issue concerned the anticipated removal of designated Specimen trees<sup>1</sup> from the property. These trees are flagged as a high priority for retention under the Forest Conservation Law and can only be removed if a variance is granted by the Board. Montgomery County Code § 22A-12(b)(3). Toll Brothers requested such a variance to remove 33 specimen trees.

The citizens' testimony raised concerns about forest conservation and how, in their view, the development scheme did not mesh with the surrounding area. The Bradley Boulevard Citizens Association asked the Board to deny the Toll Brothers' variance

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<sup>1</sup> The term "Specimen tree" refers to "any tree with a diameter, measured at 4.5 feet above the ground of 30 inches or more; or 75% or more of the diameter, measured at 4.5 feet above ground, of the current State champion tree of that species." Montgomery County Code § 22A-12(b)(3)(C).

request because more tree retention was possible, and removal of specimen trees would be inconsistent with the goals of the Master Plan.<sup>2</sup> Toll Brothers responded to these concerns, stating that removal of trees along the property's borders, including specimen trees, was necessary to build the connecting roadways required under the Master Plan.

After considering all the testimony, the Board unanimously approved the preliminary plan and approved a Resolution detailing its findings. The Citizens Association, along with other community groups, petitioned for judicial review in the Circuit Court for Montgomery County. The circuit court found that the Board's approval of the preliminary plan was supported by substantial evidence. The Citizens Association now appeals.

## DISCUSSION

### I. FACTUAL FINDINGS OF THE MONTGOMERY COUNTY PLANNING BOARD

The Citizens Association first argues that the Board did not apply the correct legal standard in approving Toll Brothers' preliminary plan application.<sup>3</sup> In administrative law, it is common for an agency to engage in detailed factfinding to determine if an applicant has satisfied a statutorily-prescribed list of factors. *Ocean Hideaway Condominium Ass'n*,

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<sup>2</sup> See *infra* Part III.

<sup>3</sup> The Citizens Association also asserts that, in addition to the factual findings, the Montgomery County Planning Board's Resolution should have addressed each of the substantive arguments raised by the Citizens Association during the public hearing. Such an undertaking, however, is not required. *Ocean Hideaway Condominium Ass'n, et al. v. Boardwalk Plaza Venture*, 68 Md. App. 650, 660 (1986) (stating that "there is no requirement that the Board must set out in its findings of fact a discussion of all the evidence").

*et al. v. Boardwalk Plaza Venture*, 68 Md. App. 650, 656 (1986). In reviewing this process, we have held that it is insufficient for the agency to merely regurgitate a statutory list of factors and briefly observe that the facts support those factors. *Ocean Hideaway*, 68 Md. App. at 662. We expect the agency to provide a meaningful discussion of which facts support which factors. *Bucktail, LLC v. County Council of Talbot Cty.*, 352 Md. 530, 553 (1999). But we have never gone so far as to exercise editorial control over the method of presentation of those factual findings. Rather, it is sufficient for the administrative agency to list the governing statutory factors and then the facts it found. It is then the task of the reviewing court to determine if there were facts to support each factor. *Bucktail*, 352 Md. at 552-553.

An administrative agency's factual findings are entitled to a high degree of deference and will be upheld by a reviewing court if there is substantial evidence in the record to support the agency's conclusions. *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cty.*, 336 Md. 569, 576-577 (1994); *see also Ocean Hideaway*, 68 Md. App. at 655, 665 (reversing the decision of the administrative agency because it failed to "render a finding of fact" and therefore its decision was not supported by substantial evidence).

Here, to approve Toll Brothers' preliminary plan application, § 50.4.2.D of the Montgomery County Code required the Montgomery County Planning Board to find that:

1. the layout of the subdivision, including size, width, shape, orientation and density of lots, and location and design of roads is appropriate for the subdivision given its location and the type of development or use contemplated ...;
2. the preliminary plan substantially conforms to the master plan;

3. public facilities will be adequate to support and service the area of the subdivision;
4. all Forest Conservation Law ... requirements are satisfied;
5. all stormwater management, water quality plan, and floodplain requirements ... are satisfied;
6. any burial site of which the applicant has actual notice or constructive notice or that is included in the Montgomery County Cemetery Inventory and located within the subdivision boundary is approved ...; and
7. any other applicable provision specific to the property and necessary for approval of the subdivision is satisfied.

Montgomery County Code § 50.4.2.D.

The Montgomery County Planning Board's Resolution discussed how Toll Brothers' application satisfied each required finding of Montgomery County Code § 50.4.2.D. In support of these findings, the Board identified several facts, including:

- The proposed single-family lots are the appropriate size, width, shape and orientation for the location. The lots meet the requirements of the Subdivision Regulations in the county code and "public facilities will be adequate to serve the lots." These facts satisfy the first required finding.
- The preliminary plan details an interconnected street system, noise mitigation structures, and "new residential development consistent with the Master Plan." These factual findings support the second required finding.
- Toll Brothers' plan satisfied the Local Area Transportation Review (LATR) test conducted to evaluate how development would affect traffic patterns. Toll Brothers' development will be adapted to remain consistent with existing roadways and public roads to avoid increasing traffic congestion at busy intersections. These facts support the third required finding.

- It is not possible for Toll Brothers to meet the forest retention and afforestation requirements of the Forest Conservation Law. Toll Brothers, however, is making other modifications to promote the conservation goals of the law, such as working with the Montgomery County Department of Transportation (MCDOT) to reduce the pavement width along certain roads to “save as much forest as possible.” The Board found that these facts satisfy the fourth required finding and we agree.
- Toll Brothers plans to maintain and update existing stormwater management facilities. This factual finding supports the fifth required finding.
- The private roads and alleys facilitating roadway connections throughout the subdivision have met the minimum standards to “attain[] the status of public roads,” as required by § 50-29(a)(2) of the Subdivision Regulations of the County Code. This fact satisfies the last required finding as another “applicable provision specific to” the WMAL property.

We, therefore, hold that because the Board based its decision on a thorough discussion of the facts and did not merely parrot the factors under Montgomery County Code § 50.4.2.D, the Board’s approval was based on substantial evidence and must be affirmed.

## **II. IS “PECULIARITY” A NECESSARY ELEMENT TO A VARIANCE REQUEST?**

The Citizens Association next challenges whether the Montgomery County Planning Board applied the proper legal standard in granting Toll Brothers’ variance request. The variance sought to remove 33 specimen trees and disturb another 16 trees on the property designated as high priority for protection and retention under the Forest Conservation Law. The Citizens Association argues that to obtain a variance, Toll Brothers was required to make a threshold showing of peculiarity of the property that would result

in unwarranted hardship. In its Resolution, the Montgomery County Planning Board approved Toll Brothers' variance request without finding that Toll Brothers had shown any peculiarity of the WMAL property. The Citizens Association argues that this was in error.

The relevant provisions of the Montgomery County Code read as follows:

(a) *Written Request.* An applicant may request in writing a variance from this Chapter or any regulation adopted under it if the applicant shows that enforcement would result in unwarranted hardship. A request for a variance suspends the time requirements in Section 22A-11 until the Planning Board or Planning Director acts on the request.

(b) *Application Requirements.* An applicant for a variance must:

(1) describe the special conditions peculiar to the property which would cause the unwarranted hardship;

(2) describe how enforcement of this Chapter will deprive the landowner of rights commonly enjoyed by others in similar areas;

(3) verify that State water quality standards will not be violated and that a measurable degradation in water quality will not occur as a result of granting the variance; and

(4) provide any other information appropriate to support the request.

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(d) *Minimum Criteria.* A variance may only be granted if it meets the criteria in subsection (a). However, a variance must not be granted if granting the request:

(1) will confer on the applicant a special privilege that would be denied to other applicants;

(2) is based on conditions or circumstances which result from the actions by the applicant;

(3) is based on a condition relating to land or building use, either permitted or nonconforming, on a neighboring property; or

(4) will violate State water quality standards or cause measurable degradation in water quality.

Montgomery County Code § 22A-21.

As in all cases of statutory interpretation, our goal is to determine and apply the legislative intent, in this case, the intent of the Montgomery County Council. The first step in ascertaining legislative intent is examining the plain meaning of the statute. *Mayor & Town Council of Oakland v. Mayor & Town Council of Mountain Lake Park*, 392 Md. 301, 316 (2006). If the plain meaning is clear, then “we give effect to the statute as written.” *Id.* Here, the test for the Board’s grant of a variance is laid out in subsections (a) and (d) of § 22A-21 of the Montgomery County Code.

*First*, § 22A-21(a) allows an applicant to request a variance under the Forest Conservation Law “if the applicant shows that enforcement would result in unwarranted hardship.” Montgomery County Code § 22A-21(a). In the absence of language to the contrary, however, there is no requirement in § 22A-21(a) that to satisfy the unwarranted hardship criteria and grant a variance, the Board must first find that the applicant has proved the existence of peculiar features unique to the property that cause the unwarranted hardship. *See White v. North*, 356 Md. 31, 47-48 (1999) (differentiating between the St. Mary’s County Zoning Ordinance, which required an applicant requesting a variance to show conditions “peculiar to the land or structure involved,” and the Anne Arundel County

Code, which, having omitted any “uniqueness” requirement, kept unwarranted hardship as “the only prong of the variance consideration”); *see generally* Montgomery County Code § 22A-21.

*Second*, § 22A-21(d) lists the mandatory, minimum conditions that must be met for the Board to approve a variance request. The plain language of this subsection reiterates the criteria from subsection (a) as a requirement for a variance and describes four situations that, if met, give the Board grounds to deny a variance. § 22A-21(d)(1)-(4). In identifying those scenarios, the Montgomery County Council did not include a finding that no peculiarity exists on the property as a basis for denying a variance. *See generally* Montgomery County Code § 22A-21(d).<sup>4</sup> When read together with § 22A-21(a), we think it is clear that peculiarity is not required.

We acknowledge that, under § 22A-21(b)(1), an applicant is required to discuss “special conditions peculiar to the property.” Montgomery County Code § 22A-21(b)(1). This requirement, however, exists as part of the information the applicant must include in the variance request application, not part of the Board’s consideration. Peculiarity, therefore, becomes a separate and distinct consideration from the Board’s variance analysis under § 22A-21 and does not change our reading of subsections (a) and (d) of that section. Moreover, we conclude that while an applicant must discuss peculiarity (if it exists) and

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<sup>4</sup> We note that the italicized headings and captions included in the provisions of this section are not part of the code itself and exist only to “advise the reader of the content of each provision.” Montgomery County Code § 1-301(h).

the Board *may* consider it in the context of a variance request application, it is not a mandatory factor that must exist to grant a variance.

The Montgomery County Planning Board followed the framework of § 22A-21 when approving Toll Brothers’ variance request. The Board found that leaving the specimen trees on the WMAL site undisturbed would result in unwarranted hardship for Toll Brothers’ development project. The Court of Appeals has defined unwarranted hardship in similar contexts as the denial of “a use of the property that is both significant and reasonable.” *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 139 (2016). The Board used this definition as a guideline to find that without a variance, Toll Brothers would be denied “a reasonable and significant use of the Property.” Specifically, without a variance to remove or otherwise disturb specimen trees, the Board found that Toll Brothers would not be able to: make the road connections required by the Master Plan (including the connection between Greentree Road and Greyswood Road), build a noise wall, prepare the land for dedication of a school site, or construct housing in compliance with zoning regulations. Additionally, the Montgomery County Planning Board found that Toll Brothers’ request did not violate any of the prohibited conditions in § 22A-21(d). We hold, therefore, that the Montgomery County Planning Board applied the correct standard in granting Toll Brothers’ variance and we affirm.

### **III. NORTH BETHESDA MASTER PLAN**

The Citizens Association’s final argument is that Toll Brothers’ preliminary plan does not conform to the applicable Master Plan. Master Plans are comprehensive planning documents that guide the development and use of property in certain localities. *Maryland-*

*Nat'l Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 85 (2009). These plans identify many objectives that can, due to the nature of the specific property involved, exist in tension with each other. *Archers Glen Partners, Inc. v. Garner*, 176 Md. App. 292, 316 (2007) (recognizing that, depending on the property, the general “goals, objectives, policies, and strategies” of a Master Plan “cannot be literally complied with as to each property”).

The Citizens Association correctly identifies one goal of the Master Plan as “preserv[ing] and expand[ing] green areas and greenways ... for environmental protection.” *1992 Approved and Adopted North Bethesda/Garrett Park Master Plan*, THE MARYLAND-NAT'L CAPITAL PARK & PLANNING COMM'N 1, 52 (1992) <https://perma.cc/JB6B-8S6U>. Toll Brothers points out that the Master Plan also identifies turning the WMAL site into single family housing as an objective, and, as a countywide objective, increasing the availability of affordable housing. *Id.* at 52, 103.

The Montgomery County Planning Board found that despite the need to remove specimen trees, the preliminary plan will, in fact, increase the 20-year tree canopy from 21% to 25% and lead to 19.87 acres of forest, more than exists on the site today. Given this, we cannot find fault with the agency’s determination that approval of Toll Brothers’ preliminary application was consistent with the Master Plan even as it relates to the preservation of environmental resources. Moreover, we hold that the administrative agency did not err in finding that the plan was consistent with other, site specific objectives of the Master Plan, including the proposed redevelopment of the site for single family homes and the addition of affordable housing.

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