Circuit Court for Anne Arundel County
Case No. C-02-CV-18-002979

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1156

September Term, 2019

ANNE ARUNDEL COUNTY

v.

808 BESTGATE REALTY LLC

Kehoe,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: May 18, 2021

*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.

When the Anne Arundel County Board of Appeals ("Board") denied its request for impact fee credits under Anne Arundel County Code § 17-11-207(c) for certain road improvements, 808 Bestgate Realty LLC ("Bestgate") sought judicial review in the Circuit Court for Anne Arundel County. That court reversed the Board's decision to deny the requested credits, and Anne Arundel County ("County") now appeals to this Court, asking two questions:

I. Whether a development project that has no transportation mitigation requirements under § 17-11-405 of the Anne Arundel Code is eligible for unpaid fee credits § 17-11-207 of the Code.

II. Whether the County's agreement to an impact fee credit agreement is a prerequisite to the granting of such credits.

We answer the first question in the affirmative, the second in the negative, and remand to the Board for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Bestgate is redeveloping a 9.4-acre site on Bestgate Road in Annapolis that will include a medical office building and veterinary clinic. A study performed on behalf of Bestgate by Traffic Concepts, Inc. ("Traffic Concepts") determined that the development passed the test for adequate road facilities under the County's Adequate Public Facilities Ordinance ("APFO") without the need for mitigation.[1]

[1] Article 17. Subdivision and Development, Title 5. Adequate Public Facilities, Subtitle 4. Adequate Road Facilities of the County Code provides in pertinent part:

> **§ 17-5-401. Standards.**
> (a)**Generally.** Except as provided in subsections (b) and (c) and in § 17-6-504(9), a development passes the test for adequate road facilities if in the

Even though mitigation was not required to satisfy the APFO, Traffic Concepts recommended an off-site median break and traffic signal on Bestgate Road across from the entrance to the project. In a May 2, 2017 letter to Larry R. Tom at the Office of Planning and Zoning, Kenneth W. Schmid, a Vice President of Traffic Concepts, explained that "if the site was to retain the existing right-in/right-out access, vehicles entering the site from eastbound Bestgate Road would be forced to make a U-turn at the Medical Parkway intersection in order to enter the development," which would increase the "morning peak hour critical lane volume at that intersection to '956.'" With the median break and traffic signal, however, the critical volume would be reduced to "816," which would both increase capacity and improve safety by eliminating the "weaving moving requirement to attempt a U-turn movement." In that letter, Mr. Schmid requested approval of impact fee credits for the "total cost of design and installation of the median break and traffic light."

> scheduled completion year of the development it creates 50 or fewer daily trips or if:
> (1) the road facilities in the impact area of the proposed development will operate at or above the minimum of 'D' level of service after including the traffic generated by the development; and
> (2) road facilities in the impact area of the proposed development will have an adequacy rating of not less than 70 as defined by the Anne Arundel County road rating program or, if not rated by the Anne Arundel County road rating program, have been found by the County to be adequate with respect to road capacity, alignment, sight distance, structural condition, design, and lane width, except that the requirements of this subsection (a)(2) do not apply to development in a commercial revitalization area, to scenic or historic roads in the impact area of the proposed development, or to roads other than those that front on the cluster lots in a cluster development in an RA or RLD District; or
> (3) the developer has an approved mitigation plan under §§ 17-5-901 et seq.

At the hearing before the Board, Mr. Schmid testified that the proposed improvements would eliminate both potential and existing U-turns and that the development would add to the intersection of Severn Grove Road and Bestgate Road where U-turns are being made by people going to the existing veterinary clinic:

> And then we would be adding more left turns and U-turns onto that intersection by our site. So when we eliminate all those potential U-turns and the existing U-turns, we provide extra capacity at the intersection of Severn Grove and Bestgate Road. Now, it's acceptable capacity today, but we are providing additional capacity to that intersection by diverting that traffic away. We're also providing extra capacity to the un-signalized U-turn movement up at Gate Drive, which was the other U-turn exit. And that wasn't a studied intersection in our analysis, but by not pushing traffic up there and making U-turns, you're providing capacity for that intersection.

It was his view that the proposed improvements would "be a safety improvement, an operational improvement, a capacity improvement that satisfies the requirement of the County law." [E 168] And, that the improvements were "fixing a problem that could or would exist" if they "strictly followed the minimum standards of the APFO."

At the Board hearing, Philip Robert Hager, the County's Planning and Zoning Officer, testified in regard to his October 26, 2017 response to Bestgate's request for impact fee credits:[2]

[2] In that letter, the credits were denied for four reasons:

> 1. The claim of increased capacity at the referenced intersection is based on the reduction in U-turns provided by the new median break and signal at the access to your property. The intersection currently operates at a Level of Service A prior to construction of this project and Level of Service A post-project. There does not appear to be any benefit to the county in this scenario.

> I believe the letter succinctly sets forth the reasons why the Office of Planning and Zoning denied the applicant's request in this particular instance. First of all, there does not appear to be any benefit to the county, only to the applicant. The county did not request the median break. They did not request the construction of the traffic control device. No inadequacies are being remedied in this particular case. The work that was performed by the applicant at this site was not part of something that was required by the adequacy of facilities requirements. In addition, there is no other project in the area that's been identified in any of our planning or transportation related studies, whether they be functional master plans, needs assessments or otherwise that identify a problem with regards to the need to actually construct this type of project, to cure some type of an existing deficiency. So it was based upon those factors that it was not found to be any reasonable use, reasonable benefit to the taxpayers to have their funds utilized in this manner.

In cross-examination, Mr. Hager was asked about the Board's grant of transportation impact fee credits to Walmart in a previous case:[3]

> [Bestgate's Counsel]: So those were improvements to a state road. So that wasn't part of a required traffic mitigation to satisfy the county standards, correct?

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2. The work associated with the project was not conducted as part of any required traffic mitigation to satisfy Adequacy of Facilities requirements.
3. There are no CIP projects in the corridor related to transportation or traffic movement that this proposal could benefit of be tied to satisfy Adequacy of Facilities. There are no planned projects or studies related to the "contribution" provided by the applicant.
4. There are no identified deficiencies within the TIS study area.

[3] In Case No. BA2414A, Walmart appealed a decision of the Planning and Zoning director denying impact fee credits. Walmart was developing a retail store to replace and enlarge another development that had access to a State road and to a County road. The State required improvements to the State road including related utility and traffic signal modifications. Walmart, noting that the State required improvements were not required to meet APFO requirements, argued that it was entitled to transportation impact fee credits for the cost of those improvements. The Board, in a four-member decision, three other members not participating, found the language of § 17-11-202(c) "clear, unambiguous, and mandatory" and the improvements to the State road to be "over and above" the APFO requirements. The language of § 17-11-202(c) remains the same since that decision.

[Mr. Hager]: That was a state road.

* * *

[Bestgate's Counsel]: Okay. Now, I will refer back to the Walmart decision in which this Board referred to section 17.11.207[(]c[)]; are you familiar with that section of the Code?

[Mr. Hager]: Yes.

[Bestgate's Counsel]: And doesn't that state, transportation impact fee credits shall be allowed for transportation improvements providing transportation capacity over and above the adequate road facility requirements for a development project as set forth in this Code?

[Mr. Hager]: I'm reading it here now as you're stating it. I've read this previously. What is your question, counsel?

[Bestgate's Counsel]: Well, the determination was the word "shall" would be an obligation, right, to grant credits? Would you interpret as a Planning and Zoning Officer, if you are reading a Code section that you "shall," that would be mandatory as opposed to discretionary?

* * *

[Mr. Hager]: Yes. And I would interpret that that way. Except there is a couple of points in that passage that bear further scrutiny in terms of when that "shall" shall actually apply.

[Bestgate's Counsel]: Right. I understand. But the period is that -- and this is a section that was cited by this Board in the Walmart case, is that that language is clear, and unambiguous, and mandatory; you would agree with that?

[Mr. Hager]: Yes. In spite of that, we still interpret it differently, counsel.

[Bestgate's Counsel]: Okay. All right. So it states that you are providing transportation capacity over and above adequate road facility requirements, that would be an enhancement to the road system that would benefit the public?

> [Mr. Hager]: I think it's important to read item "A" above that which also talks about projects that may be allowed. And it's, it certainly seems clear to me that there has to be a public benefit to when that "shall" shall be applied.
>
> [Bestgate's Counsel]: Okay. And so would it be your interpretation that if your staff said that an improvement would increase capacity and safety would you agree then that impact fee credits would be justified in a situation because it's increasing capacity on the road system?
>
> [Mr. Hager]: No, sir. I disagree.
>
> [Bestgate's Counsel]: You disagree even if your own staff would advise you as to that, an improvement was going to increase capacity?
>
> [Mr. Hager]: There has to be an inherent public benefit to the utilization of the funds.

The Board, in a four-to-three decision denying the credits, explained that § 17-11-207(c) "contains two elements."

> First, the proposed improvements must involve transportation capacity over and above the APF requirements. Second, the County must allow the credits and memorialize the same in a written argument. Pursuant to Section 17-11-207(c), impact fee credits are mandated when capacity is provided over and above the adequate road facilities requirements. APF requirements refer to mandated mitigation when new development cannot pass APF tests, as a means of adding traffic capacity. § § 17-5-401(a)(3) and 17-5-901(h). If APF mitigation is not required, independent and additional improvements are not considered "above and beyond" the APF requirements. In this instance, all parties agree that the proposed development passed APF tests, and mitigation is not required; thus, there are no APF requirements to be mitigated. The proposed improvements are not "above and beyond" the APF requirements, and the Petitioner is not eligible for impact fee credits.

The Board minority disagreed. Finding "the language of the Code is clear and ambiguous," it concluded that § 17-11-207(c):

> mandates that a "transportation impact fee credit **shall** be allowed for transportation improvements providing transportation capacity over and above the [APF] requirements for a development. . ." (emphasis added). This

section does not mandate that mitigation must be a prerequisite to receiving impact fee credits. Mr. Schmid testified regarding the increased benefit to the citizens of the County, including reduced U-turns and weaving movements. The proposed road improvements adhere to Section 17-11-202[4] of the Code, which promotes the health, safety, and general welfare of the residents of the County. The road improvements are over and above the APF requirements. The County is mandated to allow the transportation impact fee credits. Thus, we would grant the Petitioner's request for the impact fee credits.

DISCUSSION

Standard of Review

We have explained that:

"On appellate review of the decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision." *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (citing *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 244 (2007)). "Our primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious." *Md. Dep't of the Env't v. Ives*, 136 Md. App. 581, 585 (2001) (citation omitted). In other words, "[w]e apply a limited standard of review and will not disturb an administrative decision on appeal 'if substantial evidence supports factual findings and no error of law exists.'" *Tabassi v. Carroll* [*Cty.*] *Dep't of Soc. Servs.*, 182 Md. App. 80, 86 (2008) (quoting *Howard* [*Cty.*] *v. Davidsonville Area Civic & Potomac River Ass'ns, Inc.*, 72 Md. App. 19, 34 (1987)).

[4] Section 17-11-202 provides:

> This title is adopted for the purpose of promoting the health, safety, and general welfare of the residents of the County by:
> (1) requiring all new development to pay its proportionate fair share of the costs for land, capital facilities, and other expenses necessary to accommodate development impacts on public school, transportation, and public safety facilities;
> (2) complementing the provisions of Title 5 by requiring that all new development pay its share of costs for reasonably attributable impacts; and
> (3) helping to implement the General Development Plan to help ensure that adequate public facilities for schools, transportation, and public safety are available in a timely and well planned manner.

Long Green Valley Ass'n v. Prigel Fam. Creamery, 206 Md. App. 264, 273–74 (2012).

In our review of an administrative agency decision, we look to the "grounds relied upon by the agency" and will affirm the decision only if it can be sustained on the agency's findings and for the reasons stated by the agency. *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001) ("[A]n appellate court will review an adjudicatory agency decision solely on the grounds relied upon by the agency."); *see Evans v. Burruss*, 401 Md. 586, 593 (2007) (citation omitted).

We interpret local ordinances "under the same canons of construction that apply to the interpretation of State statutes." *Young v. Anne Arundel Cty.*, 146 Md. App. 526, 573 (2002). As stated in *Young*:

> A cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. The primary source of legislative intent is . . . the language of the statute itself. In interpreting a statute, we assign the words their ordinary and natural meaning. Generally, we will not divine a legislative intention contrary to the plain language of a statute or judicially insert language to impose exceptions, limitations or restrictions not set forth by the legislature. Similarly, "[w]e neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in a forced or subtle interpretation in an attempt to extend or limit the statute's meaning." *Taylor v. NationsBank*, 365 Md. 166, 181 (2001); *see Mid–Atlantic Power Supply Assoc. v. Public Serv*[.] *Comm'n of Md.*, 361 Md. 196, 203–04 (2000) (recognizing that "we neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in a forced or subtle interpretation in an attempt to extend or limit the statute's meaning").

Id. at 574 (cleaned up).

Contentions

The County contends that § 17-11-207(c) "only permits impact fee credits for road improvements that provide transportation capacity over and above the adequate road

facilities requirements of the County Code" when the development has other transportation mitigation requirements to satisfy. In addition, the County asserts that, under § 17-11-207(a), impact fee credits "may only be granted when the County is willing to enter into transportation fee credit agreements" and that the County is not willing to enter into such an agreement for improvements that "will only serve [Bestgate's] site and not the general public."

Bestgate contends that "[t]he Code is clear: where a developer constructs transportation improvements that provide transportation capacity and safety over and above the requirements of the APFO, the County must grant that developer credits against transportation impact fees." In other words, required transportation mitigation and the County's consent to the credits are not "prerequisites" to receiving the credits.

Section 17-11-207(a) speaks to impact fee credits generally and provides:

> (a) **When allowed.** Any conveyance of land or construction received and accepted by the County or the County Board of Education from a developer . . . may be credited against the development impact fee due if the conveyance or construction meets the same needs as the development impact fee in providing expanded capacity over and above the requirements of this article. If the developer wishes to receive credit against the amount of the development impact fee due for such conveyance or construction, the developer shall enter into a written Impact Fee Credit Agreement with the County prior to such conveyance or construction. The Impact Fee Credit Agreement shall provide for establishment of credits and the procedure and time allowed for redemption of such credits. Development impact fee credits shall be claimed and applied at the time development impact fees are required to be paid.

Section 17-11-207(c), on the other hand, speaks specifically to transportation impact fee credits:

> Transportation impact fee credits *shall be allowed for transportation improvements providing transportation capacity over and above the adequate road facilities requirements for a development project set forth in this article*. The development providing the capital improvements shall be allowed transportation impact fee credits in the amount provided in the Transportation Impact Fee Credit Agreement. Credit may not be given for site-related transportation improvements.[5]

(Emphasis added).

The facts most pertinent to the Board's reasoning, and thus, our review, are not seriously disputed.[6] The proposed development did not require transportation mitigation for development approval because the traffic impact study indicated that Bestgate Road would continue to operate within the requirements of § 17-5-401 after it was completed. The appropriateness of the proposed median break with a traffic light and the construction details were agreed to and approved by the County. David Braun, then the Engineer Administrator for the County's Department of Public Works, testified that, as the Engineer Manager with the Department of Inspections and Permits, he had supervised the review of the traffic impact study and had approved the plans for construction of the improvements.

[5] "Site-related transportation improvements" are defined under § 17-11-201(9) as:

> capital improvements and dedications and conveyances of rights-of-way for site driveways and roads, right and left turn lanes leading to and from site driveways, traffic-control measures for site driveways, frontage roads, acceleration and deceleration lanes, roads necessary to provide direct access to a development, local road improvements required by this article, and any other direct access improvements.

[6] Mr. Hager had "a personal belief" that improvements "might not improve safety" but acknowledged that he was not a traffic engineer.

Based on that information, he advised the County's Planning and Zoning Development Division:

> The benefit to the County, as outlined in the proposal, is providing additional capacity at Bestgate/Severn Road Grove Road intersection and improving safety due to the reduction in the number of U-turns.

Mr. Hager rejected the request for transportation impact fee credits and Bestgate appealed to the Board.

The Board stated that § 17-11-207(c) mandates impact fee credits for improvements that provide transportation capacity "over and above" the adequate road facilities requirements, but it interpreted the "adequate road facilities requirements" referred to in § 17-11-207(c) to be the "mandated mitigation" required to meet the adequate public facilities requirements. In the absence of mandated mitigation, any "independent and additional improvements are not considered 'above and beyond' the [adequate public facilities] requirements" and thus, they are "not eligible for impact fee credits."

The Code provisions at issue in this case are not necessarily a model of clarity. Over time, the Board, with different compositions of members, has, on at least two occasions, interpreted § 17-11-207(c) differently. In Case No. BA2414A, the Board concluded that transportation impact fee credits are mandated when transportation improvements provide capacity over and above the adequate road facilities requirements without a mitigation requirement. The Board in this case—BA53-17A—concluded that there can be no capacity "over and beyond" the adequate road facilities requirements if there are no mandated requirements.

In Maryland, the word "shall" in statutory materials generally constitutes a requirement or a duty. *Danaher v. Dep't of Labor, Licensing, & Regul.*, 148 Md. App. 139, 166 (2002) ("When the word "shall" appears in a statute, it generally has a mandatory meaning."). We stated in *Parker v. State*, 193 Md. App. 469, 502 (2010) that:

> The word "shall" is ordinarily construed as mandatory. *In re Najasha B.*, 409 Md. 20, 32–33 (2009) ("'in the absence of a contrary contextual indication, the use of the word "shall" is presumed to have a mandatory meaning . . . and thus denotes an imperative obligation inconsistent with the exercise of discretion'") (citation omitted); *see also Walzer v. Osborne*, 395 Md. 563, 580 (2006).

And, in regard to statutory interpretation of statutory provisions related to the same subject, we explained in *Parker* that:

> Ordinarily, "'when two statutes appear to apply to the same situation, the Court will attempt to give effect to both statutes to the extent that they are reconcilable.'" *Dixon v. Dep*[*'t*] *of Pub*[.] *Safety & Corr*[.] *Servs.*, 175 Md. App. 384, 421 (2007) (quoting *State v. Ghajari*, 346 Md. 101, 115 (1997)). But, "[i]f 'two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute.'" *Dixon*, 175 Md. App. at 421 (citation and internal quotations omitted). Therefore, "[t]o the extent of an irreconcilable conflict, 'the specific statute is controlling. . . .'" *Id.* (quoting *Ghajari*, 346 Md. at 116); *see also Anderson*, 395 Md. at 183, 194; *Mayor of Oakland v. Mayor of Mountain Lake Park*, 392 Md. 301, 316–17 (2006).

193 Md. App. at 501.

The Bestgate development did not require mitigation to pass the adequate road facilities test under § 17-5-401(a). The County argues that without required mitigation, there can be nothing "over and above" a particular development's requirements. We are not persuaded.

Nothing in the plain language of § 17-11-207(c) conditions transportation fee credits on a mitigation requirement under Article 17 of the Code, or precludes the possibility of providing additional capacity and safety over and above the minimum standards or requirements of § 17-5-401(a). Rather than referring to the mitigation requirement of a particular project, we read § 17-11-207(c) to refer to the "adequate road facilities requirements" applicable to any development project. If non-site-related improvements provide "transportation capacity over and above those requirements," § 17-11-207(c) clearly states that impact fee credits "shall" be allowed for those improvements.

Section 17-11-207(a), which relates to impact fees generally, states that "land or construction received and accepted . . . from a developer . . . may be credited" against an impact fee obligation. When it is read with the more specific language of § 17-11-207(c), § 17-11-207(a) does not provide the County with discretion to deny transportation impact fee credits for improvements that otherwise qualify for such credits.[7] Rather, it provides the developer with the right to apply the credits and, in the context of the two subsections, the "received and accepted" language in relation to construction means that the County is in possession or has appropriate assurances of the receipt and that the improvements are

[7] The provision of § 17-11-207(a) that the "conveyance of land or construction received and accepted by the County . . . from a developer . . . may be credited against the development impact fee due if [it]meets the same needs as the development impact fee in providing expanded capacity over and above the requirements of this article." That is essentially the same requirement as the more specific provision for credits in § 17-11-207(c) and does not imply a different standard. In other words, impact fee credits earned under § 17-11-207(c) meet the same needs as the development impact fee and satisfy the § 17-11-207(a) language.

constructed in compliance with the approved plans. Read this way, there is no irreconcilable conflict between § 17-11-207(a) and § 17-11-207(c). But if there were, the more specific provisions of § 17-11-207(c) would control.

Nor are we persuaded that the County had to agree for Bestgate to receive the transportation impact fee credits for improvements that are not site-related. On the other hand, an agreement with the County prior to construction of the improvement is necessary to establish the amount of the credit based on the cost of the improvements or the value of donated land, the procedure and the time allowed to redeem. *See* § 17-11-207(a).[8] But that "agreement" relates to process and does not provide the County with the discretion to deny credits for eligible transportation improvements.

In short, we cannot affirm the Board for the stated reasons that it denied the impact fee credits—that the in absence of a mitigation requirement, independent and additional

[8] For example, the transportation impact fee agreement between the County and the Patel Associates, LLC, states that a developer was eligible for transportation impact fee credits for those improvements meeting the same needs as the transportation impact fees by "providing" expanded capacity over and above requirements of Article 17, Title 11 of the Code. The eligible improvements were limited to "off-site" improvements providing "new road capacity and safety." Part of the improvements were not required by the APFO but provided "capacity and other improvements" which made 44.2% of the total improvement costs eligible for impact fee credits. The agreement provides for an accounting when the application for a permit is made. Similar language regarding off-site improvements is found in the Creekstone Village agreement indicating that the parties wanted "to define the nature and amount" of the credits and stating applications for permits "shall be made no more often than quarterly." In the BWI Technology Park Phase III Agreement, it was agreed that "100% of the total improvement costs are attributable to off-site transportation improvements that provide new road capacity over and above the adequate road facilities requirements." It further provided that all credits had to be redeemed in 12 years. The above impact fee agreements were entered into evidence before the Board.

improvements cannot be considered "above and beyond the APF requirements," and that the requirement of a written agreement gave the County discretion to not "allow" the credits.

That said, § 17-11-202(c) denies credits for site-related transportation improvements. Counsel for the County, without specifically referencing the language of § 17-11-202(c), argued that the median break and traffic light "would serve only one use." Mr. Hager testified that the improvements served "just the appellant's project." And Mr. Braun testified that the improvements could "be viewed as the site's access."

The Board did not expressly address whether the proposed off-site improvements were "site-related" under § 17-11-201(9).[9] Because this issue must be first decided by the Board, we will remand for further proceedings not inconsistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART. REMAND TO THAT COURT TO REMAND TO THE BOARD OF APPEALS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.

[9] The prior impact fee credit agreements discussed above appear to treat off-site improvements providing additional capacity improvements to be eligible for impact fee credits.