Circuit Court for Prince George's County
Case No. CAL14-32333
Hon. Herman C. Dawson

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2177

September Term, 2015

FRIENDS OF CROOM CIVIC ASSOCIATION, *et al.*

v.

PRINCE GEORGE'S COUNTY PLANNING BOARD OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *et al.*

Krauser, C.J.,
Woodward,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: May 8, 2017

This appeal involves the preliminary plans to create a development, known as Stephen's Crossing at Brandywine, in Prince George's County. After a decision by the Prince George's County Planning Board to approve the Preliminary Plan of Subdivision, the Appellants filed (1) a motion for reconsideration and, before that motion was heard by the Planning Board, (2) a petition for judicial review to the Circuit Court for Prince George's County. Because Appellants filed the petition for judicial review, the Planning Board determined it did not have jurisdiction to hear the motion for reconsideration and forwarded the case to the circuit court for review. The circuit court determined that the issues raised in the petition for judicial review had not been raised before the Planning Board (and, therefore, were not properly before the circuit court) but, as an alternative ground, also reviewed those issues and determined that there was substantial evidence to support the Planning Board's decision to approve the Preliminary Plan of Subdivision. Thus, for both reasons, the circuit court affirmed the decision of the Planning Board. For the reasons that follow, we will affirm.

BACKGROUND

In 2014, a Conceptual Site Plan was approved by the Prince George's County Planning Board.[1] Following that approval, the developers filed a Preliminary Plan of

[1] The general order of approvals required for a development, when a conceptual site plan is required, are:

(1) Zoning;

Subdivision. The Planning Board held a public hearing on the Preliminary Plan of Subdivision at which it reviewed staff reports and discussed two letters submitted by neighboring community associations. One of the letters, submitted by the Brandywine/TB Southern Region Neighborhood Coalition ("Brandywine/TB"), generally supported the plan. The other letter, from the Greater Baden Aquasco Citizens Association ("GBACA"), discussed some topics of concerns and initial impressions, but did not directly oppose the project.[2] After the discussion of the staff reports and these two letters, the Planning Board

(2) Conceptual Site Plan;
(3) Preliminary Plan of Subdivision;
(4) Detailed Site Plan;
(5) Final Plat of Subdivision;
(6) Grading, building, use and occupancy permits.

Prince George's County Code of Ordinances, § 27-270. All citations to the Prince George's County Code of Ordinances will be to the September 24, 2014 version available at: https://www.municode.com/library/md/prince_george's_county/codes/code_of_ordinances.

[2] The right to judicial review of an agency decision is available only for *parties* who are aggrieved by the agency decision. Maryland Code Ann., State Government ("SG") Article, § 10-222(a). Although it is not a high bar to become a party, one must "clearly identify himself to the agency for the record as having an *interest in the outcome* of the matter being considered." *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59, 72 (2003) (emphasis added); *Morris v. Howard Research & Dev. Corp.*, 278 Md. 417, 423 (1976) (stating that anyone may identify to the agency that he or she has an interest in the outcome by—among others—submitting a letter of protest, submitting their name(s) in writing as a protestant, or attending hearings). Here, none of the civic associations attended the Planning Board hearing or otherwise indicated that they had an interest in the outcome of the proceedings. Thus, these letters are the only submission to the Planning Board that

decided to approve the Preliminary Plan of Subdivision and issued a resolution adopting that decision. The Planning Board mailed notice of the resolution to the parties on October 28, 2014.

Just a few days later, on November 4, 2014, the Friends of Croom Civic Association ("Friends of Croom") and GBACA filed a motion for reconsideration of the decision to approve the Preliminary Plan of Subdivision with the Planning Board.[3] Before the Planning Board heard the motion for reconsideration, however, Friends of Croom and GBACA, now joined by the Indian Head Highway Area Action Council and Brandywine/TB filed a petition for judicial review of the Planning Board's approval of the Preliminary Plan of Subdivision in the circuit court.

When the Planning Board met on December 4, 2014, to consider the motion for reconsideration, the motion for reconsideration and the petition for judicial review were both pending in the Planning Board and the circuit court, respectively. The Planning Board determined that the pending petition for judicial review divested it of jurisdiction to hear the motion for reconsideration and, as a result, voted not to grant the motion for reconsideration. Several months later, the circuit court held a hearing on the petition for

indicated that the civic associations had an interest in the outcome of the proceedings and, therefore, are the only basis by which the civic associations may claim status as a "party."

[3] The Planning Board issued a Corrected Resolution, correcting technical errors, on November 17, 2014, while the motion for reconsideration was pending.

judicial review and found that: (1) the issues raised in the petition for judicial review were not properly raised before the Planning Board and, therefore, could not be raised on appeal in the circuit court; and (2) on the merits, there was substantial evidence to support the decision of the Planning Board to approve the Preliminary Plan. Therefore, the circuit court affirmed. The four civic associations, to whom we will refer collectively as Friends of Croom, appealed.[4]

DISCUSSION

Friends of Croom decided to oppose this development project too late to be effective. While the administrative record was still open at the Planning Board, Friends of Croom did nothing. Only after the Planning Board had decided to approve the development did Friends of Croom identify three issues about which it wishes it had complained to the Planning Board: (1) the status of an unbuildable lot, which the parties refer to as Outlot W; (2) the adequacy of the transportation plan; and (3) the preservation of certain natural features. In a last ditch burst of activity, Friends of Croom filed, first, a motion for reconsideration in the Planning Board and before that was resolved, second, a petition for

[4] As noted, when referring to the four civic associations as the appellants in this case, and as the petitioners in the petition for judicial review, we will refer to them collectively as "Friends of Croom." When referring to actions taken by the civic associations individually, such as submitting letters to the Planning Board, we will refer to each association by name.

judicial review in the circuit court. While we will untangle the exact procedural defects with their efforts, the real root of Friends of Croom's problem is that it started too late.

First, Friends of Croom argues that the Circuit Court erred by finding that the Planning Board was correct in refusing to consider Friends of Croom's motion for reconsideration. The purpose for this argument is plain: if the Planning Board should have allowed reconsideration, Friends of Croom is allowed a complete "do over." The law is clear, however, that a petition for judicial review divests an administrative agency of jurisdiction to reconsider its decision. *Lawrence N. Brandt, Inc. v. Montgomery Cnty. Comm'n on Landlord-Tenant Affairs*, 39 Md. App. 147, 160 (1978) (adopting 73 C.J.S. Public Administrative Bodies and Procedure § 156) (holding that an agency may only rehear and reconsider a decision "before an appeal from its original order has been lodged in the courts."); *see also Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 665 n.14 (2015) (an "administrative body *may not* reconsider an order after an appeal has been lodged in the courts.") (emphasis in original) (citing *Lawrence N. Brandt Inc.*, 39 Md. App. at 160). Therefore, we hold that the Planning Board was correct in declining to consider the motion for reconsideration and the circuit court was correct to affirm that decision.

Second, Friends of Croom figures that even if the motion for reconsideration was procedurally defective that it was still part of the administrative record and the topics identified in the motion for reconsideration are thus preserved for further review. That

theory doesn't work either. A motion for reconsideration, as its name implies, means the reconsideration of issues already considered and decided. A motion for reconsideration cannot inject new issues. Prince George's Planning Board Rules of Procedure § 10e (stating that a motion for reconsideration may "only be granted if … the Board finds that an error in reaching the original decision was caused by fraud, surprise, mistake, inadvertence or other good cause."); *see also* Arnold Rochvarg, PRINCIPLES AND PRACTICE OF MARYLAND ADMINISTRATIVE LAW 176-77 (Carolina Academic Press, 2011) (hereinafter Rochvarg, Maryland Administrative Law) (discussing motions for reconsideration of administrative decisions generally). Moreover, "for the purposes of judicial review of an agency's final decision, the entire administrative record consists of all transcripts, documents, information, and materials that were before the final decision maker *at the time of* his or her decision." *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 60 (2001) (emphasis added). Friends of Croom's motion for reconsideration was not before the Planning Board at the time of its decision. Therefore, we hold that the motion for reconsideration did not serve to preserve the issues.

Third, the circuit court also analyzed whether the letters submitted by Brandywine/TB and GBACA were sufficient to preserve the issues. *See Colao v. Cnty. Council of Prince George's Cnty.*, 109 Md. App. 431, 466 (1996) (for an issue to be considered on petition for judicial review it must have first been raised at the administrative agency). Although Friends of Croom does not address whether the letters preserve the

record, because the circuit court did, we feel obligated to do so as well as it is the only other means by which the record could have been preserved.[5]

The petition for judicial review raised three issues:

> (1) Does the proposed creation of Outlot W [("an unbuildable lot")] violate the Prince George's County Subdivision Regulations?
>
> (2) Did the applicant fail to meet the adequate transportation requirements of Prince George's County Subdivision Regulation § 24-124[6]?
>
> (3) Did the approved preliminary plan, by incorporating the grant of a variation allowing impacts to protected environmental features, fail to meet the requirements of the Prince George's County Subdivision Code that the applicant

[5] The circuit court found that none of the issues raised by Friends of Croom in the petition for judicial review were raised before the Planning Board and, as a result, could not be raised for the first time on appeal. In so holding, the circuit court found that the letters filed by GBACA and Brandywine/TB raised only general concerns and did not raise the specific issues addressed in the petition for judicial review.

We conduct our review *de novo* looking through the circuit court to the administrative level. This is in keeping with our usual practice of reviewing an administrative decision. *Baltimore Cnty. Licensed Beverage Ass'n, Inc. v. Kwon*, 135 Md. App. 178, 182 (2000) (noting that the Court of Special Appeals "function in reviewing an administrative decision, is precisely the same as that of the circuit court") (internal quotation and citations omitted).

[6] The text of § 24-124 is set out in full in the Appendix to this Opinion.

(a) Demonstrate preservation of regulated natural features to the fullest extent possible pursuant to Subdivision Code § 24-130,[7]

(b) Apply the proper standard of justification for assessing such preservation, and

(c) Apply other related standards for preservation in the relevant Master Plan, pursuant to Subdivision Code § 24-121?[8]

These three issues are detailed and technical. It is unnecessary for us to explain the nuances of each argument, however, because we conclude that it is clear that the very general letters submitted by Brandywine/TB and GBACA did not put the Planning Board on notice that the highly technical issues raised in the petition for judicial review were at issue.

The two letters reference transportation and natural features in only a very general way and do not discuss any areas within the proposed development that are not buildable (*i.e.*, an outlot). The GBACA letter generally states that it "would be wonderful and smart to save a farm field or two" and that the Brandywine development should be a "walkable, bikeable, and livable" space. The GBACA letter also states generally that "'[v]ariances' and 'variations' should not be granted" and that "[t]here is concern that the transportation patterns throughout the rural tier … will be adversely affected." The Brandywine/TB letter

[7] The text of § 24-130 is set out in full in the Appendix to this Opinion.

[8] The text of § 24-121 is set out in full in the Appendix to this Opinion.

is even more vague and general in its comments. The Brandywine/TB letter notes that adequate roads and transportation facilities should be constructed either "concurrently with development or within a reasonable time thereafter." The Brandywine/TB letter supported the entirety of the Staff Report and approval of the Preliminary Plan and asked that the "Staff require the appropriate and sufficient additional information be presented in order to fully support and make an informed decision as to the impacts" of the development. These general concerns in the letters are wholly insufficient to constitute notice to the Planning Board of the very specific issues raised in the petition for judicial review.

Having determined that none of the issues raised in the petition for judicial review were preserved for review, it is unnecessary to take the extra step (as the circuit court did) to analyze the merits of each issue. We, therefore, affirm the judgment of the Circuit Court for Prince George's County.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

APPENDIX

Prince George's Code of Ordinances:

Sec. 24-121. - Planning and design requirements.

(a) The Planning Board shall require that proposed subdivisions conform to the following:

(1) All lots shall be designed to be located wholly within the County and platted in conformance with all of the requirements of the Zoning Ordinance applicable to the subject property.

(2) In cases where the proposed subdivision is situated in a portion of the Regional District not planned to be served by public water and/or sewerage facilities, proposed lots shall be designed to meet the minimum lot size requirements for individual systems, as contained in Subtitle 22 of this Code and in the Comprehensive Ten Year Water and Sewerage Plan.

(3) When lots are proposed on land adjacent to an existing or planned roadway of arterial or higher classification, they shall be designed to front on either an interior street or a service road. As used in this Section, a planned roadway or transit right-of-way shall mean a road or right-of-way shown in a currently approved State Highway plan, General Plan, or master plan. If a service road is used, it shall connect, where feasible, with a local interior collector street with the point of intersection located at least two hundred (200) feet away from the intersection of any roadway of collector or higher classification.

(4) Residential lots adjacent to existing or planned roadways of arterial classification shall be platted with a minimum depth of one hundred and fifty (150) feet. Residential lots adjacent to an existing or planned roadway of freeway or higher classification, or an existing or planned transit right-of-way, shall be platted with a depth of three hundred (300) feet. Adequate protection and screening from traffic nuisances shall be provided by earthen berms, plant materials, fencing, and/or the establishment of a building restriction line, when appropriate.

(5) The preliminary plan and final plat shall conform to the area master plan, including maps and text, unless the Planning Board finds that events have occurred to render the relevant plan recommendations no longer appropriate or the District Council has not imposed the recommended zoning.

(6) When indicated by a master plan or the General Plan or when requested by a public agency, land may be placed in reservation, pursuant to Division 7 of this Subtitle.

(7) Provision shall be made for the eventual ownership of outlots or residue parcels by incorporating them into platted lots or into adjacent parcels or by other means deemed acceptable by the Planning Board.

(8) Corner lots shall be rounded with a radius of not less than twenty (20) feet or provided with an equivalent truncation.

(9) Walkways, with rights-of-way not less than ten (10) feet wide, shall be provided through all blocks over seven hundred fifty (750) feet long, when deemed necessary by the Planning Board.

(10) Generally, subdivisions shall be designed to avoid unnecessary and costly roads, utility extensions, grading, and energy consumption.

(11) Significant natural features which are impossible or difficult to reproduce, such as waterways, streams, hills, wooded lands, and specimen trees, should be preserved to the degree practicable.

(12) Lot size averaging may be permitted for preliminary plans accepted prior to July 1, 2006 in accordance with the Zoning Ordinance when the Planning Board finds that:

(A) The subdivision design provides for better access, protects or enhances historic resource or natural features and amenities, or otherwise provides for a better environment than that which could be achieved by the exclusive use of standard lots.

(B) The subdivision design provides for an adequate transition between the proposed sizes and locations of lots and the lots, or lot size standards, of any adjacent residentially zoned parcels.

(C) The subdivision design, where applicable, provides for an adequate transition between the proposed natural features of the site and any natural features of adjacent parcels.

(13) Generally, lots, except at corners, should have access to only one (1) street.

(14) If an entrance feature or gateway sign is proposed in a residential subdivision, it shall be identified on the preliminary plan on a separate Homeowners' Association parcel, or easement located on a homeowner's lot, and be designed in accordance with the standards in Section 27-624 of the Zoning Ordinance. A Homeowners' Association or other entity or person designated in a maintenance arrangement approved by the Department of Permitting, Inspections, and Enforcement, shall be responsible for the maintenance of the entrance feature or gateway sign.

(15) The Planning Board shall not approve a preliminary plan of subdivision until evidence is submitted that a stormwater management concept plan has been approved by the Department of Permitting, Inspections, and Enforcement or the municipality having approval authority, unless the Planning Board finds that such approval will not affect the subdivision.

(16) Except as indicated in Section 24-132, the subdivision shall be designed and platted in accordance with the provisions for woodland conservation and tree preservation contained in Subtitle 25.

(17) Historic resources should be preserved.

(18) Significant archeological sites identified in accordance with the Planning Board Guidelines for Archeological Review should be preserved in place, to the extent practicable and should be interpreted as appropriate.

(19) Condominium townhouse dwelling units approved after September 1, 2012 shall conform to the lot standards of this Subtitle and Subtitle 27 for possible future conversion to fee simple lots.

* * *

Sec. 24-124. - Adequate roads required.

(a) Before any preliminary plan may be approved, the Planning Board shall find that:

(1) There will be adequate access roads available to serve traffic which would be generated by the proposed subdivision, or there is a proposal for such roads on an adopted and approved master plan and construction scheduled with one hundred percent (100%) of the construction funds allocated within the adopted County Capital Improvement Program, within the current State Consolidated Transportation Program, and/or such roads are incorporated in a specific public facilities financing and implementation program as defined in Section 27-107.01(186.1); and

(2) The traffic generated by the proposed subdivision will be accommodated on major intersections and major roadways within the established study area such that they will be functioning below the minimum peak-hour service levels adopted by the Planning Board in the "Guidelines for the Analysis of the Traffic Impact of Development Proposals," as may be amended from time to time (hereinafter the "study area" refers to major intersections and major roadways as defined in the "Guidelines"); or

(3) Roadway improvements or trip reduction programs fully funded by the subdivider or his heirs, successors, and assigns will alleviate the inadequacy as defined in the "Guidelines;" or

(4) Roadway improvements fully funded by the subdivider and the County and/or the State government which will alleviate any inadequacy as defined in the "Guidelines," and which will provide surplus capacity, may be eligible for the establishment of a Surplus Capacity Reimbursement Procedure, as defined in the "Guidelines," provided:

(A) The transportation facility improvements are identified in the Adopted County Capital Improvement Program or current State Consolidated Transportation Program, with an amount greater than zero percent (0%) but less than one hundred percent (100%) of the total cost to complete the improvements, and/or are incorporated in a specific public facilities financing and implementation program as defined in Section 27-107.01(186.1); and

(B) The total cost estimates to complete the improvements have been approved by the Planning Board upon acceptance by the appropriate public agency; and

(C) The necessary permits for construction of the transportation facility improvements have been issued by the appropriate public agency; and

(D) The subdivider agrees to fund the difference between the total cost to complete the improvements and the amount allocated for the improvements by the County or State government in the Adopted CIP or current CTP; or

(5) Roadway improvements participated in by the subdivider will alleviate any inadequacy as defined by the "Guidelines." Such participation shall be limited to improvements defined in paragraph (4), above, and with sufficient surplus capacity to adequately accommodate the subdivider's proposed traffic impact. The amount and timing of the subdivider's participation shall be determined by the Planning Board as defined in the "Guidelines;" or

(6) Consideration of certain mitigating actions is appropriate as defined in the approved "Guidelines for Mitigation Actions," and as provided below:

(A) Projected traffic service in the study area, which shall be based on existing traffic, traffic generated by other approved development, and growth in through traffic as defined in the "Guidelines," is calculated to be greater than the acceptable level of service; and

(B) The provisions for adequate roads, as described in Subparagraph (a)(1), above, are not met.

(i) Where projected traffic service is calculated to be greater than or equal to twenty-five percent (25%) above, the acceptable peak-hour service level threshold as defined in the "Guidelines," the Planning Board may require that any physical improvement or trip reduction programs participated in, or funded by, the subdivider or his heirs, successors, and assigns shall fully abate the impact of all traffic generated by the proposed subdivision in the study area. Following the development of the proposed subdivision and implementation of the approved mitigation action, the total traffic service will be reduced to no higher than twenty-five percent (25%) above the acceptable peak-

hour service level threshold as defined in the "Guidelines" (total traffic service shall be based on projected traffic and traffic generated by the proposed development); or

(ii) Where projected traffic service is calculated to be greater than but less than twenty-five percent (25%) above the acceptable peak-hour service level threshold as defined in the "Guidelines," the Planning Board may require that any physical improvements or trip reduction programs fully funded by the subdivider or his heirs, successors, and assigns shall fully abate the impact of one hundred and fifty percent (150%) of all traffic generated by the proposed subdivision in the study area. Following the development of the proposed subdivision and implementation of the mitigation action, the total traffic service within the study area will be reduced to no lower than the acceptable peak-hour service level threshold defined in the "Guidelines"; or

(C) Where existing traffic service in the service area is at the acceptable peak-hour service level threshold or better, as defined in the "Guidelines," and if the total traffic service in the study area is no greater than ten percent (10%) above the acceptable peak-hour service level threshold as defined in the "Guidelines" and the proposed subdivision generates less than twenty-five (25) A.M. or P.M. peak-hour trips, the Planning Board may require that the subdivider or his heirs, successors, and assigns shall be responsible for the pro rata cost of the physical improvements necessary to alleviate the inadequacy as defined in the "Guidelines."

(D) Planning Board action on a mitigation action may be appealed to the District Council by the applicant or by any party of record. The appeal shall be filed with the Clerk of the Council within thirty (30) days following notice of action on the mitigation proposal by the Planning Board to all parties of record. The Planning Board shall give notice of its action by sending a copy to each party of record by first-class mail, postage prepaid. The appeal shall be based upon the record as made before the Planning Board and shall set forth the reasons for the appeal. In deciding an appeal of a mitigation action, the Council shall exercise original jurisdiction.

For any such appeal, the Council may, based on the record, approve, approve with conditions, remand, or deny the mitigation action; or

(7) There is a proposal for such roads on a plan being considered by the United States Department of Transportation and/or Federal Highway Administration, and which is funded for construction within the next ten years. The Planning Board may condition the approval of the subdivision on a construction schedule that minimizes any inadequacy.

(b) The Surplus Capacity Reimbursement Procedure shall be adopted by the Planning Board by resolution, at a regularly scheduled public meeting. Any transportation facility improvements that qualify for a Surplus Capacity Reimbursement Procedure are eligible for pro rata share contributions from all subsequent subdividers which the Planning Board determines will need the available surplus capacity to meet the requirements of this Section. The pro rata share contributions shall be indexed to account for changes in the estimated cost to complete the roadway improvements, using a cost index acceptable to the appropriate public agency. Within fifteen (15) calendar days after adoption of a Surplus Capacity Reimbursement Procedure, the Planning Board or its designee shall transmit to the County its adopted resolution and findings as to the portion of the total Surplus Capacity Reimbursement improvements cost which qualifies for prorated share contributions. Copies of the Planning Board resolution and the minutes of the Planning Board hearing shall be available for public inspection. Once the Planning Board determines that surplus capacity created by the Surplus Capacity Reimbursement improvements does not exist, the improvements no longer qualify for pro rata share contributions from subsequent subdividers. The Planning Board shall then transmit to the County a resolution closing the Surplus Capacity Reimbursement.

* * *

Sec. 24-130. - Stream, wetland, and water quality protection and stormwater management.

(a) Proposed subdivisions shall be designed to minimize the effects of development on land, streams and wetlands, to assist in the attainment and maintenance of water quality standards, and to preserve and enhance the environmental quality of stream valleys.

(b) The Planning Board shall require that proposed subdivisions conform to the following:

(1) The preliminary plan shall demonstrate adequate control of the increased runoff due to the ten (10) year storm or such other standards as State law or the County shall adopt.

(2) The stormwater control shall be provided on-site unless the Planning Board, on recommendation from the County, waives this requirement.

(3) The submission of a storm drainage and stormwater management concept plan, and approval thereof by the County, may be required prior to preliminary plan approval.

(4) Where a property is partially or totally within an area covered by an adopted Watershed Plan, the preliminary plan shall conform to such plan.

(5) Where a property is located outside the Chesapeake Bay Critical Areas Overlay Zones the preliminary plan and all plans associated with the subject application shall demonstrate the preservation and/or restoration of regulated environmental features in a natural state to the fullest extent possible consistent with the guidance provided by the Environmental Technical Manual established by Subtitle 25. Any lot with an impact shall demonstrate sufficient net lot area where a net lot area is required pursuant to Subtitle 27, for the reasonable development of the lot outside the regulated feature. All regulated environmental features shall be placed in a conservation easement and depicted on the final plat.

(c) The submission of a sediment control concept study, and approval thereof by the Soil Conservation District, may be required prior to final plat approval.

Prince George's County Code of Ordinances § 24-121, 24-124, 24-130.