

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PETITION OF: :

Concerned Citizens of Cloverly, et al. :

FOR JUDICIAL REVIEW OF THE DECISION : Case No. 433722-V
 OF THE MONTGOMERY COUNTY
 PLANNING BOARD :
 IN PRELIMINARY PLAN :
 NO. 120160040 FOR :
 RESOLUTION MCPB NO. 17019 :
 RCCG JESUS HOUSE :

ORDER

Upon consideration of the Petition for Judicial Review filed by Concerned Citizens of Cloverly, et al., and for the reasons set forth in the accompanying memorandum opinion, it is this 26th day of January, 2018, by the Circuit Court for Montgomery County, Maryland, hereby

ORDERED, that Jesus House, DC's Motion to Strike Supplemental Record (D.E. 20) is GRANTED; and it is further

ORDERED, that Jesus House, DC's Motion for Partial Dismissal of Petition (D.E. 21) is DENIED AS MOOT; and it is further

ORDERED, that Jesus House, DC's Motion to Strike Supplemental Record (D.E. 22) is GRANTED; and it is further

ORDERED, that the Montgomery County Planning Board's approvals of Planning Board Resolution No. 17-019, Preliminary Plan No. 120160040 and Preliminary Forest Conservation Plan No. 120160040 are AFFIRMED.

ENTERED

JAN 29 2018

Clerk of the Circuit Court
Montgomery County, Md.

SHARON V. BURRELL, Judge
Circuit Court for Montgomery County, Maryland

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MEMORANDUM OPINION

This matter came before the Court on December 12, 2017, on a petition for judicial review of the Montgomery County Planning Board's decision to approve the preliminary plan of subdivision submitted by Jesus House, DC. The Court has considered the record in this case, the memoranda filed by the parties, arguments of counsel, and applicable case law.

BACKGROUND

Jesus House, DC applied for approval of a preliminary plan of subdivision by the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission (the "Planning Board") on August 14, 2015. R. 161. The application sought the subdivision of 15.55 acres of land located at 15730 New Hampshire Avenue, Silver Spring, Maryland 20905, to construct a church and an accompanying private school.¹

The preliminary plan was referred to experts in Montgomery County's Department of Environmental Protection ("DEP") and Department of Permitting Services ("DPS"). After an analysis of the application and the recommendations provided by both DEP and DPS, the Planning

¹ The application later became referred to as Preliminary Plan 1201160040 (the "Preliminary Plan"). R. 161, 171.

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Department Staff of the Planning Commission recommended approval of Preliminary Plan No. 1201160040. The Planning Board held a public hearing on March 30, 2017, and voted unanimously to approve the Preliminary Plan, even in the face of strong opposition from Petitioners. R. 157-58. A Resolution of Approval, Resolution No. 17-019 (the "Resolution"), was issued on May 23, 2017, and the Resolution incorporated the approval of the Preliminary Plan.

Petitioners filed a request for reconsideration on June 2, 2017, primarily based upon extra-record documentation of discussions between County employees concerning the pivotal issue: the computation of the forest acreage set-aside. This documentation was obtained by Petitioners via a post-hearing Public Information Act request. The Planning Board denied the request for reconsideration on June 8, 2017. R. 715, 717. On June 22, 2017, Petitioners filed a Petition for Judicial Review of Montgomery County Planning Board Resolution No. 17-019, the approval of Preliminary Plan No. 120160040 and Preliminary Forest Conservation Plan No. 120160040, and the Planning Board's denial of Petitioner's request for reconsideration of Resolution No. 17-019.²

Discussion

Recognizing the expertise of administrative agencies in interpreting and applying their own rules and regulations, courts have uniformly held that the decision of an agency carries with it the presumption of validity. *Department of Human Resources v. Thompson*, 103 Md. App. 175, 189 (1995). As such, a reviewing court must review an agency's decision in the light most favorable to the agency. *Id.* A reviewing court may not overturn an agency's factual findings or its application of law to facts if the agency's decision is supported by substantial evidence. *Relay Improvement Association v. Sycamore Realty Co., Inc.*, 105 Md. App. 701 (1995). Substantial

² At the hearing, Petitioners raised no objection to the Board's denial of the request for reconsideration of Resolution No. 17-019, effectively withdrawing their appeal on the matter. Therefore, this portion of the appeal is moot.

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evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Thompson*, 103 Md. App. at 189. Further, pursuant to Maryland Rule 7-206(b), the record the court reviews includes the transcript of testimony and all exhibits and other papers filed in the agency proceeding. Under Maryland Rule 7-208(d), the reviewing court may not consider additional evidence in support of or against the agency’s decision unless permitted by law.

A. WHETHER EVIDENCE THAT WAS NOT PART OF THE ADMINISTRATIVE RECORD BEFORE THE PLANNING BOARD SHOULD BE STRICKEN

In a separate pleading, Jesus House, DC moves to strike the entire section of Petitioners’ Memorandum that has been labeled “Post-Hearing Disclosure of Prehearing Internal Agency Deliberations” as well as all accompanying exhibits.³ Respondent argues that the Memorandum improperly attaches and relies upon evidence that was not made part of the administrative record before the Planning Board. Therefore, any information that has been submitted to the Court that was not submitted in the original administrative hearing should not be considered and should be stricken from the record. *See Arking v. Montgomery County Planning Bd.*, 215 Md. App. 589 (2013). Specifically, Jesus House, DC argues that Exhibits B, C, and D of Petitioners’ Memorandum, as well as the Supplement to the Administrative Record, should be stricken in their entirety, as these documents were not entered into the record at the Planning Board’s hearing and played no role in the Planning Board’s decision.

The Court agrees with the arguments raised by Jesus House, DC. Maryland Rule 7-206(b) specifies that the record shall “include the transcript of testimony and all exhibits and other papers

³ The Maryland-National Capital Park and Planning Commission (“the Commission”) included a motion to strike in a footnote, which is not sufficient pleading. But the Commission also indicates that it supports the Motion to Strike filed by Jesus House, DC.

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filed in the agency proceeding.” Appellate review of administrative decisions is limited to those issues and concerns raised before the administrative agency. *Arking*, 215 Md. App. at 596. Therefore, since Exhibits B, C, and D of Petitioners’ Memorandum, as well as the Supplemental Record, consist of materials that were not before the Planning Board when it made its decision, this Court will not consider these materials in its review of the parties’ arguments in this appeal. Accordingly, this Court grants Jesus House, DC’s Motion to Strike.

B. WHETHER THE BOARD’S DECISION WAS MADE IN ACCORDANCE WITH THE LAW AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Review of a local planning body’s decision is limited to determining whether there is substantial evidence in the record as a whole to support the agency’s findings and conclusions. *Maryland-Nat. Capital Park and Planning Comm’n v. Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73 (2009). As part of the Preliminary Plan approval, the Planning Board reviewed and approved the Applicant’s proposal, holding that it is in compliance with the County Forest Conservation Act, Chapter 22A, Montgomery County Code. To this end, Planning Board Staff concluded, and the Board concurred, that 4.68 acres of forest had to be retained in order to avoid a reforestation requirement due to forest clearing. R.14.

The Commission and Jesus House, DC both contend that the Planning Board’s decision was based on substantial evidence, although Petitioners aim to have the Court undertake an independent analysis of the evidence. The Commission argues that upon receipt of Jesus House, DC’s Preliminary Plan, the Planning Board referred the Preliminary Plan to various County agencies in accordance with standard Board procedures and regulations. It is the Board’s usual practice to defer to DEP concerning water and sewage adequacy determinations and to DPS for necessary septic field determinations. Petitioners claim that they presented evidence to the Planning Board conflicting with that provided by Jesus House, DC. In light of this conflicting

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evidence, Petitioners argue that despite the discharge of responsibility to the various County agencies, when the situation involves disputed facts, the responsibility of the Planning Board remained with the Planning Board – not another entity – to further investigate and resolve any potential inconsistencies.

This Court does not agree with Petitioners' argument. Pursuant to Chapter 50 §4.2(A) of the Montgomery County Code, after accepting an application, the Director must send a copy to the Development Review Committee and other reviewing bodies, requesting each agency to submit a recommendation concerning the plan. The Director must send copies as needed to the Department of Permitting Services and the Department of Environmental Protection regarding water supply and sewage disposal facilities. From there, the Planning Board may approve the plan if it conforms "to the purposes and other requirements of [Chapter 50]" of the Montgomery County Code. Montgomery County Code, Ch. 50, §4.2(C)(a). However, in accordance with §4.2(B)(2)(b-c), the Planning Board cannot approve a preliminary plan without the approval of DPS concerning lots with individual wells or septic systems, the well, and septic plan, as well as storm water management concept and floodplain delineation. Further, pursuant to §4.3(F)(1), before approving a preliminary plan, the Planning Board must consider the recommendation of DEP.

Reviewing the record, it is clear that the Planning Board took into consideration the recommendations and approvals of the agencies as mandated by Chapter 50 of the Montgomery County Code. The record also makes clear that the decision by the Planning Board was made after a review, by both the Planning Board and relevant agencies, of substantial evidence presented by the parties. Specifically, the Planning Board noted that a condition of the category change with regard to the sewer reclassification required the establishment of a covenant preserving the forested area which would have been used for the on-site septic system. R. 11. The Planning Board also

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described its process for determining compliance with the category change condition, noting that its staff and DEP, in conjunction with DPS, requested wastewater calculations on a gallons-per-day basis for the 1,600-seat church and the 350-student private school to determine how large of a septic system would have been necessary to serve the proposed development. R. 11. The Planning Board then relied on a letter issued by DEP confirming Jesus House, DC's wastewater calculations and the consistency of the Preliminary Plan with the County's Comprehensive Water and Sewer Plan, as well as Sewer Category Change WSCCR 99A-CLO-02 in County Council Resolution 14-334. Thus, it is clear that the Planning Board not only itself considered the impact of this condition in its review of the Preliminary Plan, but also relied on the determination of DEP and DPS in finding that, based on substantial evidence, the proposed water and sewer facilities were adequate to approve the Preliminary Plan.

In summary, the Board considered the evidence presented and agency recommendations provided making its decisions as required by the Montgomery County Code. Accordingly, this Court affirms the decisions of the Board.

C. WHETHER THE BOARD WAS LEGALLY INCORRECT IN DEFERRING ITS AUTHORITY TO OTHER AGENCIES

Petitioners requested at the administrative hearing that the Planning Board make its own determination about the Preliminary Plan's compliance with the County Council's conditional approval of the sewer extension. The Planning Board declined to do so, pointing to the respective roles of DPS and DEP:

In this case, the plan opponents ask the Board to make its own determination about the proposed development's compliance with the County Council's conditional approval of the sewer extension and to look behind the MCDPS and MCDEP analyses that led DEP to conclude that it does. Not surprisingly, the law does not clearly answer the novel question of whether the Board has the authority to enforce a condition under these unique circumstances. But

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given the respective roles of MCDPS, MCDEP, and the Board, the Board is not convinced that it has the authority to do so.

R. 12.

Petitioners allege that under §4.3(F) of Chapter 50 of the Montgomery County Code, the Planning Board may only approve a preliminary plan when it finds that the public facilities are adequate to serve the subdivision. Petitioners argue that the Planning Board was presented with conflicting evidence about the accuracy of the information relied upon by DPS and DEP to conduct their calculations, as well as other substantive deficiencies in their conclusions. Petitioners maintain that the Planning Board made no attempt to resolve these inconsistencies and reached an erroneous conclusion in relying solely on the recommendations that were provided by the County agencies.

This Court finds that the Planning Board's decision, which relied on the determinations of DEP and DPS to find that water and sewer facilities were adequate to approve the Application, was legally sound. The Planning Board acknowledged the respective roles of the agencies and deferred to their expertise. This was in accordance with County law and regulation, with its lead agency protocol, and with its practice. *See* Montgomery County Planning Board's Regulation on Administrative Procedures for Development Review §50.10.01.02(B)(4).

Although Petitioners argue that the Planning Board should have taken greater responsibility in coming to its final decision, the Board was not required to do so. DEP and DPS made their recommendations and approvals based upon substantial evidence. In coming to its decision, the Planning Board considered these recommendations and approvals, as well as its own analysis of the evidence presented. Thus, this Court finds that the Planning Board did not commit an error of law.

CONCLUSION

For the reasons set forth above, the decisions of the Planning Board as to the Montgomery County Planning Board Resolution No. 17-019, the approval of Preliminary Plan No. 120160040 and Preliminary Forest Conservation Plan No. 120160040 are AFFIRMED.


A separate order will be entered.

January 26, 2018



Sharon V. Burrell, Judge
Circuit Court for Montgomery County, Maryland

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