

IN THE MATTER OF	*	IN THE CIRCUIT COURT
CHESAPEAKE BAY	*	FOR HARFORD COUNTY
FOUNDATION, INC. ET AL.	*	
	*	Case No. C-12-CV-20-000022

* * * * *

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on remand from the Maryland Court of Appeals, now known as the Supreme Court of Maryland. That Court reversed a decision from the Court of Special Appeals, now known as Appellate Court of Maryland, that affirmed this Court’s decision to dismiss the Petitioner’s Petition for Judicial Review that was issued on October 22, 2020 and directed that a Merits Hearing be held on the Petition for Judicial Review. On January 4, 2023, this Court held a Merits Hearing on the Petition for Judicial Review.

I. Procedural History and Background

This matter concerns a proposed development and construction of a mixed-use business park along Interstate 95 between Edgewood Road and Abingdon Road in Harford County. The project, known as Abingdon Business Park, proposed to span across nine lots, which total approximately 330 acres of mostly forested land, as well as several acres of non-tidal wetlands. A tributary (known as the HaHa Branch) traverses the site. The site is known as Abingdon Woods. The area is currently zoned Commercial Industrial. It is sought to be developed by BTC III I-95 Logistics Center LLC and Harford Investors LLP. (“Developers”). Because of the current status of the land, it is subject to the Harford County Forest and Tree Conservation Plan Regulations and also subject to a Forest Stand Delineation as outlined in Harford County Code §267-37 and Md. Code Ann., Nat. Res. § 5-1605. A Forest Conservation Plan was submitted to

the Harford County Department of Planning and Zoning and, after several revisions, was approved on December 9, 2019.

The Developers initially proposed to build multiple large warehouses, some of which are over one million square feet, retail space, restaurants, and a hotel. The Developers prepared a forest conservation delineation which identified 85 specimen trees.¹ The Developers submitted a plan that would require the removal of over 200 acres of forested land and involve the removal of 49 specimen trees from the lot.

On December 9, 2019, Harford County Department of Planning and Zoning (“the Agency”) approved a Forest Conservation plan that allowed the Developers to remove over 219 acres of forest and 49 specimen trees from the proposed construction site.

On January 8, 2020, Petitioners Chesapeake Bay Foundation, Inc., along with several individuals (“Petitioners”), filed a Petition for Judicial Review of the Forest Conservation Plan with this Court. Pursuant to Md. Rule 7-202 and Harford County Code § 268-28, the Petitioners requested judicial review of the decision of the Harford County Director of Planning and Zoning (the “Planning Director”). The Planning Director’s decision, dated December 9, 2019, approved the Forest Conservation Plan for Abingdon Business Park.

The Respondents, Developers and the Agency, jointly filed a Motion to Dismiss the Petition for Judicial Review, alleging that the decision that approved the Forest Conservation Plan was not a final decision that was subject to judicial review.

This Court granted the Respondents’ Motion to Dismiss on October 22, 2020. The Petitioners filed an appeal to the Maryland Court of Special Appeals, now known as the Maryland Appellate Court. That Court affirmed this Court’s decision in an opinion filed on

¹ A “specimen tree” is defined as “a tree having a diameter measured at 4/5 feet above the ground of 30 inches” Md. Annot. Code, Nat Res 5-1607 §(c)(2)(iii)(a). See also Harford Co. Code §267-39(d)(3).

September 8, 2021. *Chesapeake Bay Foundation, Inc. v. CREG Westport I, LLC*, 252 Md. App. 470 (2021). The Petitioners appealed to Maryland Court of Appeals, now known as the Supreme Court of Maryland. The Supreme Court of Maryland reversed the decision of the Maryland Appellate Court, by opinion dated August 26, 2022, and remanded the matter to the Maryland Appellate Court, which in turn remanded the matter to this Court for a determination on the original Petition for Judicial Review. *Chesapeake Bay Foundation, Inc., et al v. CREG Westport I, LLC, et al* 477 Md. 148 (2022).

II. Motion to Dismiss

This Court held a hearing on January 4, 2023. The Court first heard a Motion to Dismiss the Petition for Judicial Review that had been filed by the Respondents and argued by the attorney representing the Agency. The Court denied the Motion to Dismiss, for reasons as stated on the record in open court. The Respondents argued that Harford County had approved a subsequent “Revised Forest Conservation Plan” on December 14, 2021. The Respondent Developers had submitted a revised forest conservation plan on November 30, 2021. The revised plan contained “minor changes” to the Forest Conservation Plan that is the subject of this review. Developers and the Agency and Harford County argued that the “revised” plan and approval of it rendered the Forest Conservation Plan of December 9, 2019, the subject of this judicial review, moot, and that the Petitioners should have filed a new Petition for Judicial Review of the December 2021 approval. The Respondents argued that since the Petitioners failed to do so, they waived any objection to the Forest Conservation Plan.

Petitioners argued that the Motion to Dismiss, filed on December 9, 2021, was untimely filed, and was done in bad faith. Petitioners cite to Rule 8-603(a)(4) which would have required

the Respondents to file their Motion to Dismiss within ten (10) days after the issue had become moot.

Respondents countered that they did not move for the dismissal of the December 9, 2019 Petition for Judicial Review because the decision involving the original dismissal had not yet been fully adjudicated by the appellate courts.

This Court reviewed the “revised Forest Conservation Plan” that was issued on December 14, 2021.² The language of the approval is nearly identical to the approval that is the subject of this Petition. The approval letter from the Harford County Office of Planning and Zoning for the “revised” plan states that “This plan revises the previously approved Forest Conservation Plan by reflecting minor changes due to final detained engineering. This revision is minor in nature. All conditions of the original approval shall remain unless specifically altered herein.” The remaining language of the approval letter is nearly identical to the approval letter that is the subject of this Judicial Review (December 9, 2019).

The Court ruled on the record, denying the Motion to Dismiss. The Court found on the record, and further finds, that the “revised” approval contains minor changes to the December 9, 2019 approval letter. The Harford County Department of Planning and Zoning did not rescind or revoke any part of its original approval in the December 9, 2019 approval letter. Therefore, the Court will again deny the Motion to Dismiss filed on behalf of the respondents.

III. Forest Conservation Plan – Applicable Law

The Maryland General Assembly first passed the Forest Conservation Act in 1991. The main purpose of the Maryland Forest Conservation Act (Natural Resources Article Section 5-1601 through 5-1613) enacted in 1991 was to minimize the loss of Maryland's forest resources

² The “revised plan” results in less than one acre of forest to be cleared from the previous plan and does not alter the number of specimen trees to be felled.

during land development by making the identification and protection of forests and other sensitive areas an integral part of the site planning process. Local jurisdictions are mandated to adopt their own processes pursuant to the Maryland Code. Harford County has codified the Forest Conservation Act in Harford Code § 267-34 to 48. The Harford County Department of Planning and Zoning is the local agency tasked with implementing the law and reviewing the forest conservation delineations and plans submitted for development sites in Harford County. (See Harford Code, *supra*).

The Harford Code mirrors the State code in that it requires that trees having a DBH (diameter at breast height) of 30 inches or more are to be considered priorities for retention and protection and shall be left in an undisturbed condition. (See Harford Co. Code 267-39 (d)(3)). The forest conservation plan submitted by the Developers identifies 85 of these trees on the development site. The forest conservation plan approved by Harford County allows for the removal of 49 of these trees.

Both the Maryland Forest Conservation Act and the Harford County permit the Director of Planning to grant a variance to the developer in the form of a waiver to the above requirement. The factors that the director must consider when granting a waiver are outlined in Harford Co. Code § 267-39 F:

The Director of Planning may grant a waiver from Subsection D above if the applicant has demonstrated to the satisfaction of the Department that enforcement would result in unwarranted hardship. The applicant shall:

- (1) Describe the special conditions peculiar to the property which would cause the unwarranted hardship;
- (2) Describe how enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas;
- (3) Verify that the granting of the waiver will not confer on the applicant a special privilege that would be denied to other applicants;

- (4) Verify that the waiver request is not based on conditions or circumstances which are the result of actions by the applicant;
- (5) Verify that the waiver request is not based on conditions relating to land and building use, either permitted or nonconforming, on a neighboring property; and
- (6) Verify that the granting of a waiver will not adversely affect water quality.

The County approved the Forest Conservation Plan submitted by the Developer. The County found that a hardship existed and permitted the removal of the specimen trees and clearing of the forest. The County granted a waiver pursuant to § 267-39F.

IV. The Hearing

The Court proceeded to hold a hearing on the merits as it was directed to do upon remand by the Supreme Court of Maryland. The Petitioners' argument was concise. Petitioners contend that the County did not fulfill its legal requirement pursuant to the Forest Conservation Act. The Petitioners argued that the County made no findings of fact that the Respondents would suffer an unwarranted hardship should the Forest Conservation Plan be denied. Petitioners argue that, absent any specific findings of fact, the reviewing court cannot make any determination as to whether the decision of the agency is supported by the record. The Petitioners argue that the approval contains "boiler plate" language. The Petitioners refer to the case of *Bucktail, LLC v. The County Council of Talbot County*, 352 Md. 530 (1999) in support of their position.

The Respondents argued that the agency made its findings of fact in a different way. The Respondents urged the Court to look at the record as a whole, and not limit its review to the final approval of December 9, 2019. Respondents contend that the factual findings of the County Department of Planning and Zoning are replete throughout the record and are contained in the prior findings where the agency sent the proposed forest conservation plan back to the Respondent developer to make changes, which it then did. The Respondents refer the Court to

the case of *West Montgomery County Citizens Association v. Montgomery Planning Board*, 248 Md. App. 314 (2020). The *West Montgomery County* case involved a permit process brought by landowner who wished to subdivide a lot into two lots to build a home on each lot. The plan required the removal of four (4) trees from the lot and to impact the critical root zone of one other tree. The proposal had been opposed by the owners of the adjoining lots.

Montgomery County approved the variance and the site plan. The adjoining homeowners filed a Petition for Judicial Review to the Circuit Court for Montgomery County, which affirmed the Agency’s decision. The Court of Special Appeals of Maryland also affirmed the decision. The Petitioner neighbors challenged, among other issues, the decision to grant the variance. The Agency had determined that the applicant would suffer an unwarranted hardship if the variance were denied. The Appellate Court reviewed the decision and found that the term “unwarranted hardship” means that, “without a variance, the applicant/property owner would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.” *Montgomery Co. Citizens Assn.*, 248 Md. App. at 346 (2020), citing *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112 (2016). The Court in *Assateague Coastal Trust* held:

[In] order to establish an unwarranted hardship, the applicant has the burden of demonstrating that, without a variance, the applicant would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance. 448 MD at 139.

The reviewing Court, then, must determine whether there is substantial evidence in the record as a whole to support the Agency’s decision to grant the variance or the waiver.

See *Assateague Coastal Trust, supra* at 124. Also see:

Our role in reviewing the final decision of an administrative agency, such as the Board of Appeals, is “limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion

of law.” In doing so, a reviewing court decides whether the Board's determination was supported by “such evidence as a reasonable mind might accept as adequate to support a conclusion.” Moreover, a reviewing court “must review the agency's decision in the light most favorable to it; ... the agency's decision is prima facie correct and presumed valid.” *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC*, 97 A.3d 135, 148-49 (Md. 2014)

V. Harford County’s Position

Midway through the hearing, the Attorney for Harford County requested a recess. Upon resuming the hearing, the Attorney for Harford County requested leave of Court to file a Supplemental Memorandum, which the Court granted over objection of the Developer.

The Harford County Office of Law filed a Supplemental Memorandum in which it requested that this Court remand the matter to the County Department of Planning and Zoning to review the record and make additional findings of fact.

VI. Findings

This Court has reviewed the entire record and has also reviewed the decision of the Harford County Department of Planning and Zoning that approved the Forest Conservation Plan and granted the waiver to remove 49 specimen trees from the site. (p. 00139 of the record). The record from the Agency shows that the issue of a waiver request was raised by the Director of Development when the County approved the Forest Stand Delineation (8/2/2019, p 00136 of record). The Agency required the Developer to “include details about the size, health of the tree, and a justification for removal”.

The waiver request was submitted by the Developer in a letter dated September 27, 2019 (pp. 00161-00168), and in a subsequent letter dated October 7, 2019. (pp. 00153- 00160). The letters include a description of the specimen trees that are proposed to be felled, and an outline of the justification for the waiver.

The Agency addressed the waiver request and determined to grant the waiver and allow the “impact” on the forty-nine (49) specimen trees. The section of the decision that granted the waiver is contained on page 000139 of the record:

A total of eighty-five (85) specimen trees were identified on-site. The consultant has requested a waiver from the Harford County Zoning Code, Section 267-39 D (3) (a) to allow the removal of forty-nine (49) identified specimen trees. The Department has worked with the consultant to further refine impacts to specimen trees, reduce limits of clearing and disturbance and re-align the road network to avoid and minimize the impacts to the specimen trees identified in previous plan submittals and the waiver request. The consultant has identified specific special conditions of the site including the Land Use classification and zoning, existing road networks and utilities and the existing streams and non-tidal wetlands networks. Denial of the waiver would deprive the property owner's rights commonly enjoyed by others. The granting of the waiver would not confer any special privilege on the Owner/Developer, which would be denied to others. The waiver is necessary due to the specific site conditions and not a result of actions of the owner/developer. The waiver has not arisen from a condition on a neighboring property. The removal of these trees will not adversely affect water quality. The developer will be required to provide Stormwater Management, Environmental Site Design practices and erosion and sediment control in accordance with the latest versions of Harford County's Stormwater Management ordinance and Maryland Department of Environment (MDE) standards and specification for soil erosion and sediment control and MDE's enhance best Management practices for Tier II waters to ensure no reduction or adverse impacts to water quality. Given these specific conditions. the Director of Planning and Zoning hereby grants the waiver to impact forty-nine (49) specimen trees identified with this Forest Conservation Plan.

The Court has reviewed the record that was transmitted from the agency. The Developer is correct, that the Forest Conservation Plan was returned to the Developer by the Agency, which resulted in at least four (4) alterations being made to the Forest Conservation Plan. The Court has also reviewed the waiver requests made to the Agency by the Developer. These documents do not contain any evaluation of the components of the hardship waiver by the Agency.

The Court has also reviewed the final determination of the Agency, granting the waiver request. (Record, 000139). The Court finds that the conclusions contained therein, granting the requested waiver, do not contain any specific findings of fact. The determination to grant the

waiver of Section 267-39D(3)(a) is a mere recitation of the factors contained in the code. As the Court of Appeals ruled in *Bucktail, LLC, supra*, “findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions. It is not permissible for the Department or any administrative body, simply to parrot general statutory requirements or rest on broad conclusory statements.” The Harford County Department of Planning and Zoning made no specific findings of fact to support its determination to grant the waiver to the developer. The Department merely parroted the requirements of the code in granting the waiver. This Court is unable to review the factual findings to determine whether they are substantially supported by the record because the factual findings are lacking.

Therefore, the Court will remand the matter to the agency, the Harford County Department of Planning and Zoning, to review its findings and provide findings of fact that support its granting of a waiver to the Developer to impact and remove forty-nine specimen trees identified in the Forest Conservation Plan.

May 9, 2023
DATE


DIANE ADKINS-TOBIN, JUDGE

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