Circuit Court for Montgomery County
Case No. 475066-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 508

September Term, 2020

BETTYE CAROL JOHNSON, et al.

v.

MAYOR AND CITY COUNCIL OF GAITHERSBURG, et al.

Fader, C.J.,
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 31, 2021

On May 1, 2019, appellee/cross-appellant 1788/405/Trojan Investments, LLC c/o 1788 Holdings, LLC ("1788 Holdings") filed an application for Schematic Development Plan SDP-8174-2019 (the "Plan") to construct a Wawa convenience store and automobile filling station at 405 S. Frederick Avenue in Gaithersburg, Maryland (the "Property").[1] The application was opposed by appellants/cross-appellees, who consist of adjoining or nearby property owners, taxpayers, and business owners (the "Opponents").[2] On October 7, 2019, the Mayor and City Council of Gaithersburg (the "City Council") voted 4 to 1 to approve the Plan, adopting Resolution R-68-19 (the "Resolution") which explained its findings and rationale in approving the Plan. Opponents then timely sought judicial review of the Resolution in the Circuit Court for Montgomery County.

Following a hearing, the circuit court issued a written order on May 29, 2020, affirming in part and reversing in part the City Council's Resolution. Specifically, the circuit court concluded: 1) that the City Council failed to make specific findings pursuant to the City of Gaithersburg Code of Ordinances (the "Code") regarding whether the plan was consistent with the "residential character as required by the master plan," and 2) that the City of Gaithersburg Planning Commission (the "Planning Commission") was required to allow Opponents a reasonable opportunity to cross-examine two witnesses, Christopher

[1] 1788 Holdings is a "real estate investment and development company based out of Bethesda."

[2] The named appellants in this case are: Bettye Carol Johnson, Jennifer Jackson, Shanika Whitehurst, Troy Parcelles, C.W.P. Inc., Lamm Corporation, Michael Smith, Bruce Wang, Kathryn Cousins, Monica Lozada, Athena Johnson, Timothy Smith, Walter Umana, and Sabine Umana.

Hoffman and William Zied, "limited solely to their testimony which was given at the September 4, 2019 Planning Commission Meeting[.]"

Following a hearing on 1788 Holdings' timely motion to alter or amend, the circuit court issued an Amended Order on June 30, 2020, in which it effectively rescinded its previous decision regarding the City Council's failure to make specific findings, but affirmed its position that the Planning Commission was required to allow Opponents to cross-examine Mr. Hoffman and Mr. Zied regarding the testimony they provided at the September 4, 2019 Planning Commission meeting. Opponents timely noted an appeal, and both 1788 Holdings and the City Council timely noted cross-appeals.

Opponents raise the following four issues in their appeal:

1. Whether the [City Council's] decision that the [Plan] meets the requirements of Section 24-160G.7 of the Code is based upon substantial evidence in the record, or is arbitrary, capricious and unreasonable.

2. Whether the [City Council's] decision is erroneous as a matter of law because it does not contain required findings of fact.

3. Whether the [City Council's] decision is erroneous as a matter of law because the proposed use in the [Plan] (automobile filling station) is not a permitted use in the CD zone and may only be approved as a conditional use.

4. Whether the [City Council's] decision is erroneous as a matter of law because the process utilized to approve the [Plan] did not comport with due process requirements.

1788 Holdings and the City Council, as cross-appellants, raise a single issue for our review, which we have slightly rephrased as follows: Whether Opponents were denied their right to due process regarding their opportunity to cross-examine Mr. Hoffman and Mr. Zied at the September 4, 2019 Planning Commission meeting.

We reject Opponents' allegations of error, and agree with appellees that the circuit court's Amended Order erred to the extent it required the Planning Commission to provide Opponents an opportunity to cross-examine Mr. Hoffman and Mr. Zied. Accordingly, we reverse the circuit court and remand with instructions to affirm the City Council's adoption of the Resolution.

FACTUAL AND PROCEDURAL BACKGROUND

The Property at issue consists of approximately 1.84 acres, is zoned Corridor Development ("CD") in the City of Gaithersburg, and at the time 1788 Holdings filed its application, was used as an antique shop. According to Code Sec. 24-160G.1, some of the purposes of the CD Zone are to "enhance the economic vitality," encourage development and redevelopment, and renovate declining or underused properties within the corridor.

In addition to the Code, the Property is also subject to the City of Gaithersburg's 2001 Frederick Avenue Corridor Land Use Plan (the "Master Plan"). The Master Plan describes the relevant area surrounding and including the Property as follows:

> **Designate** [the Property and relevant surrounding area] as **commercial-office-residential**. These parcels, along the east side of South Frederick Avenue, are an area of mixed[-]use development, including an existing funeral home, multi-family apartment buildings, two single-family dwellings that currently contain businesses, and a small retail center. The two houses are zoned Residential Buffer (RB) and currently contain uses that are consistent with that zone. However, due to use and design constraints of the RB Zone, these properties have experienced difficulty maintaining their viability given their location. *This new land use designation, with corresponding CD zoning, will allow for the upgrade of the housing stock and permit redevelopment of the area to either multi-family units, light commercial uses, or office uses. Development is recommended to be in keeping with the residential character of this portion of the Corridor. Offices, light retail or live-work units in low-rise buildings are examples of*

> *what is envisioned.* Strict adherence to the *Frederick Avenue Corridor Plan* in redevelopment scenarios is a must. While the new land use designation is not meant to alter the existing pattern of land uses, some increased density and first floor commercial and/or retail development in the residential buildings is acceptable and may spur redevelopment.

(First emphasis added).

As noted above, on May 1, 2019, 1788 Holdings filed an application for its Plan to construct a Wawa convenience store and automobile filling station at the Property. The Plan proposes a 5,060 square foot retail space, 46 parking spaces, and a maximum building height of 33 feet. Code Sec. 24-160.G.6 governs the procedure for application and approval. Code Sec. 24-160.G.6(c)(2) provides, in relevant part:

> c. The [City Council] shall conduct a public hearing or joint public hearing with the [Planning Commission] and shall after receiving the recommendation of the [Planning Commission] either approve the plan, with or without conditions or deny the plan.
>
> d. The [City Council] decision shall be in the form of a written opinion and resolution.

Under this scheme, the Planning Commission makes a recommendation to the City Council and the City Council provides the final agency decision that is subject to judicial review in the circuit court. *See* Code Sec. 24-199. The City Council is also authorized "to enact regulations to implement or carry out the provisions of any law or ordinance on any subject matter provided for in the City Charter, the [Code] or laws of Maryland." *See* Code Sec. 2-10(a).

Pursuant to the Code, on August 5, 2019, the City Council and the Planning Commission held a joint public hearing to receive public input on the Plan. At the hearing,

the City Council and the Planning Commission learned, among other things, that 1788 Holdings had made efforts to reduce light and noise spillage onto neighboring lots and intended to preserve a large buffer to the rear of the Property to promote harmony with the residential character of the development. At the close of the hearing, the Planning Commission approved a motion to hold open its public record until August 29, 2019, with an anticipated recommendation to the City Council on September 4, 2019. The City Council then moved to hold open its public record until September 19, 2019, anticipating policy discussion on October 7, 2019.

On September 4, 2019, the Planning Commission held a meeting in which it met with the City's professional Planning Staff and representatives for 1788 Holdings. After lengthy discussion and taking into consideration Planning Staff's recommendation for approval, the Planning Commission unanimously voted to recommend approval of the Plan with two conditions:

> 1. [1788 Holdings] must provide at least one additional tree island in the parking lot to break up the parking spaces, prior to final site plan submission; and
>
> 2. Prior to final site plan submission, [1788 Holdings] must examine the sidewalk connectivity along the south side of the [Property], between the [Property] and the Holbrook Shopping Center.

At the October 7, 2019 City Council meeting, the City Council considered the entire record of proceedings. By a 4 to 1 vote, the City Council approved the Plan. That same day, the City Council issued its Resolution, wherein it made required findings pursuant to

Code Sec. 24-160G.7(b) to support its approval of the Plan. The City Council's approval, however, was subject to three conditions:

> 1. [1788 Holdings] must provide at least one additional tree island in the parking lot to break up the parking spaces, prior to final site plan submission;
>
> 2. Prior to final site plan submission, [1788 Holdings] must examine the sidewalk connectivity along the south side of the [Property], between the [Property] and the Holbrook Shopping Center to consider a more direct pedestrian passage from the sidewalk to the building; and
>
> 3. Prior to final site plan submission, [1788 Holdings] must conduct additional traffic analysis to ensure adequacy of traffic queuing and stacking under the Traffic Impact Study Standards and Regulations.

Following the issuance of the City Council's Resolution on October 7, 2019, Opponents filed a Petition for Judicial Review in the Circuit Court for Montgomery County. After holding a hearing on May 18, 2020, the circuit court issued an Order on May 29, 2020, finding that the City Council failed to make a specific finding required by Code Sec. 24-160G.7(b)(3)—namely, "whether or not the application is in keeping with the residential character as required by the [Master Plan.]" Additionally, the circuit court determined that the Planning Commission was required to provide Opponents with "a reasonable opportunity to cross-examine Chris Hoffman and William Zied" at the September 4, 2019 Planning Commission meeting. Although the court affirmed the City Council's findings as adopted in the Resolution in all other respects, it remanded the case to the City Council for further proceedings.

1788 Holdings filed a timely motion to alter or amend the court's Order, and on June 29, 2020, the circuit court held a hearing on the motion. The following day, the court

issued an Amended Order wherein it only reversed the City Council's Resolution on the basis that the Planning Commission should have provided the Opponents a reasonable opportunity to cross-examine Mr. Hoffman and Mr. Zied. We shall provide additional facts as necessary in order to resolve the issues raised in this appeal.

DISCUSSION

As we shall explain, we perceive no error in the City Council's adoption of Resolution R-68-19. Additionally, we hold that Opponents failed to preserve their arguments that they were denied due process—both at the August 5, 2019 joint public hearing and at the September 4, 2019 Planning Commission hearing. Accordingly, we reverse the judgment of the circuit court and remand with instructions to affirm the City Council's adoption of the Plan pursuant to its Resolution.

The parties essentially agree as to the relevant standard of review.

> When reviewing a decision of an administrative agency, we look through the circuit court's decision and evaluate the decision of the agency. 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. We conduct a two-fold inquiry, examining whether there is substantial evidence in the record to support the agency's findings and conclusions and whether the agency's decision is premised upon an erroneous conclusion of law. We will uphold the agency's decision as long as it is not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven. We review *de novo* an agency's conclusions of law. This includes questions of statutory interpretation.

Hayden v. Md. Dep't of Nat. Res., 242 Md. App. 505, 520-21 (2019) (internal citations and quotation marks omitted). Although we review an agency's conclusions of law *de novo*, we grant an agency great deference "when it interprets a regulation it promulgated, rather

than a statute enacted by the Legislature." *Bd. of Liquor License Comm'rs for Balt. City v. Kougl*, 451 Md. 507, 514 (2017) (citing *Md. Comm'n on Human Relations v. Bethlehem Steel Corp.*, 295 Md. 586, 593 (1983)). "Because an agency is best able to discern its intent in promulgating a regulation, the agency's expertise is more pertinent to the interpretation of an agency's rule than to the interpretation of its governing statute." *Id.* (citing *Bethlehem Steel Corp.*, 295 Md. at 593). Against this backdrop, we turn to Opponents' appellate arguments.

I. SUBSTANTIAL EVIDENCE

Opponents first argue that the Resolution must be reversed because the City Council's findings pursuant to Code Sec. 24-160G.7 were not based upon substantial evidence in the record, and were arbitrary, capricious, and unreasonable. Specifically, Opponents argue that the evidence failed to show that the Plan was in accord with the Master Plan as required by Code Sec. 24-160G.7(b)(3), and that the City Council erred by finding that the gas station use was "accessory" to the retail use. We shall reject these arguments in turn.

A. Accordance with the Master Plan

Opponents argue that the City Council erred in approving the Plan because it does not comport with the requirements of the Master Plan. According to Opponents, the Plan does not constitute a "light commercial use," nor is it consistent with the "residential character" required by the Master Plan. For reference, the Master Plan provides, in relevant part:

> This new land use designation, with corresponding CD zoning, will allow for the upgrade of the housing stock and permit redevelopment of the area to either multi-family units, **light commercial uses**, or office uses. **Development is recommended to be in keeping with the residential character of this portion of the Corridor. Offices, light retail or live-work units in low-rise buildings are examples of what is envisioned**.

(Emphasis added). According to Opponents, "a hypermarket automobile filling station and convenience store would be a *dramatic increase in the intensity of the use*, and would **not** be 'in keeping with the residential character of this portion of the Corridor.'" (Emphasis in original). We reject Opponents' contention as there was ample evidence in the record to justify the City Council's finding that the proposed use would be consistent with the Master Plan's requirements regarding light commercial use and residential character.

First, there was sufficient evidence to support the City Council's finding that the use at issue qualifies as "light commercial use." In its Resolution, the City Council expressly agreed with the findings of the Planning Commission and Planning Staff. Planning Staff, in its "Final Staff Analysis (Revised)," found that

> the proposed project is in conformance with the Master Plan, because the main use on the Property will be a single-story retail building and the gas station is the accessory use to said retail use. According to [1788 Holdings], the retail sales are expected to outpace the fuel sales and thus the majority of the commercial activity will take place in the retail store. The Wawa's retail operation can be categorized as the sale of food, beverages and other convenience items, which would be considered a light commercial use.

(Footnote omitted). In its Resolution, the City Council echoed these findings, stating:

> Based on testimony provided by Wawa and documentation provided by [1788 Holdings], the majority of the commercial activity will take place in the retail store and the retail sales are anticipated to outpace the fuel sales by a two-to-one margin. The proposed project is in conformance with the Master Plan, because the primary use on the Property will be a single-story

> small retail building which consists of a light commercial use rather than an auto service and repair center, general commercial or equipment rental and sales, and the gas station is accessory use to said retail use.

At the outset, we note that neither the Master Plan nor the Code defines the term "light commercial use." Nevertheless, there was substantial evidence in the record to support the City Council's findings. The evidence showed that Wawa's retail operation involves selling freshly prepared and pre-packaged food and beverages as well as other personal convenience items. The evidence also showed that 1788 Holdings expected these retail sales to outpace fuel sales by a margin of at least two to one. As the basis for its sales expectations, 1788 Holdings relied on the patterns of approximately 850 Wawa stores located throughout the Mid-Atlantic and Florida, where retail sales outpace fuel sales by a margin of at least two to one. Because retail sales are expected to outpace fuel sales, and because those retail sales simply involve the sale of food, beverages, and convenience items, there was substantial evidence in the record to support the City Council's finding that the proposed use would constitute "light commercial use." Indeed, this predominantly retail-oriented Wawa will be situated next to the Holbrook Shopping Center, which provides retail shopping, including a beer and wine store.

We also reject Opponents' argument that the Plan will constitute a "hypermarket filling station" that does not comply with the designation of "light commercial use," an argument that appears in Opponents' August 29, 2019 "Analysis of the Proposed Wawa [at the Property]." Opponents assert that the Plan will constitute a "hypermart," which they describe as a "large combination convenience store[] with sit-down space and numerous

fueling positions." Not only does the Code not define the term "hypermarket filling station," but the Plan itself allows for "Zero" tables for in-store dining, and instead will only permit "takeout." Additionally, the Plan calls for six two-sided gas pumps as opposed to the typical eight at Wawa locations, making this project, according to Wawa, "on [the] smaller side." The issue is not whether the Plan constitutes a "hypermarket filling station"—a use not defined in the Code—but whether the proposed use qualifies as a light commercial use allowed in the zone. The City Council concluded that it did so qualify, and there was substantial evidence to support that conclusion.

We also reject Opponents' arguments concerning the "residential character" component of the Master Plan. Opponents raise two arguments on this point: first, they argue that the proposed Plan is not in keeping with the "residential character" required by the Master Plan; and second, they claim that the City Council erred by failing to make a separate finding regarding the Plan's "residential character." We reject both arguments.

According to Opponents, "The proposed use—a hyper marketer of motor fuels—is the *polar opposite* of 'in keeping with the residential character of this portion of the Corridor.'" The language of the Master Plan itself, however, shows that a use which meets the "light commercial use" requirement can satisfy the "residential character" component of the Master Plan:

> This new land use designation, with corresponding CD zoning, will allow for the upgrade of the housing stock and permit redevelopment of the area to either multi-family units, **light commercial uses**, or office uses. **Development is recommended to be in keeping with the residential character of this portion of the Corridor. Offices, light retail or live-work units in low-rise buildings are examples of what is envisioned**.

(Emphasis added). This language makes clear that light retail and "light commercial use" "is envisioned" and therefore consistent with residential character. In fact, as previously noted, the proposed Wawa site is located next to the Holbrook Shopping Center, which includes multiple retail outlets and is apparently also in the CD Zone.[3] We shall not second-guess the City Council's implicit recognition that the Plan would "be in keeping with the residential character of this portion of the Corridor."

Finally, we reject Opponents' assertion that the City Council was required to make a separate finding as to whether the Plan is "in keeping with the residential character." The Master Plan mentions no such requirement, and Opponents have failed to cite any authority for the proposition that the City Council was required to do so. In our view, the plain language of the Master Plan makes clear that "multi-family units, light commercial uses, or office uses" illustrate the types of uses that would be "in keeping with the residential character of this portion of the Corridor." Again, when the City Council approved the Plan as a light commercial use, it implicitly found that the Plan also met the required residential character in the zone.

[3] In a letter dated August 29, 2019, attorneys for 1788 Holdings responded to comments, questions, and testimony raised at the August 5, 2019 joint public hearing. In the letter, 1788 Holdings' counsel asserted that the Holbrook Shopping Center is "also a commercial use on a CD zoned property." We see no instance in the record wherein Opponents disputed that contention.

B. Gas Station as Accessory Use

Opponents also argue that the City Council erred in construing the gas station as "accessory" to the retail use. Code Sec. 24-1 defines an "Accessory use" as "A use on the same lot with, and of a nature customarily incidental and subordinate to, the principal use of the main building or lot." In *E. Serv. Ctrs., Inc. v. Cloverland Farms Dairy, Inc.*, this Court observed that an agency's "determination that the convenience store is an accessory use to the gasoline station is a finding of fact. Therefore, we review this finding with deference and evaluate whether the issue is fairly debatable or if reasoning minds could have reached the same conclusion." 130 Md. App. 1, 9-10 (2000).

In its Resolution, the City Council found that the gas station would be accessory to the retail use on the Property, stating,

> Based on testimony provided by Wawa and documentation provided by [1788 Holdings], the majority of the commercial activity will take place in the retail store and the retail sales are anticipated to outpace the fuel sales by a two-to-one margin. The proposed project is in conformance with the Master Plan, because the primary use on the Property will be a single-story small retail building which consists of a light commercial use rather than an auto service and repair center, general commercial or equipment rental and sales, and the gas station is accessory use to said retail use.

As noted above, the City Council received ample evidence showing that 1788 Holdings anticipated retail sales to outpace gas sales by a margin of two to one, and that this particular Wawa would have fewer gas pumps than most other locations. We defer to the

City Council's findings of fact and hold that "reasoning minds could have reached the same conclusion" that the gas station use was accessory to the retail use. *Id*. at 9-10.[4]

II. REQUIRED FINDINGS OF FACT

Opponents next argue that the Resolution is deficient because the City Council failed to resolve certain disputed issues of fact. In their opening brief, Opponents list four disputed issues of fact for which they claim the City Council failed to make specific findings. They are:

> 1. Whether the proposed [Plan] adequately addressed traffic and pedestrian safety concerns;
>
> 2. Whether the proposed [Plan] sufficiently mitigated the adverse environmental, noise, and lighting impacts that would result from the proposed use;
>
> 3. Whether the proposed use is "in keeping with the residential character of the Corridor" as required by the Master Plan; and
>
> 4. Whether the [Plan] would be in the public interest.

[4] In their opening brief, Opponents urge us to construe "customarily incidental" pursuant to *Cty. Comm'rs of Carroll Cty. v. Zent*, which defined the term to

> mean[] that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. . . . But "incidental," when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant[.]

86 Md. App. 745, 768 (1991) (quoting *Lawrence v. Zoning Bd. of Appeals of the N. Branford*, 264 A.2d 552, 554 (Conn. 1969)). 1788 Holdings correctly notes, however, that in *Cloverland Farms Dairy, Inc*., this Court noted that we "did not expressly adopt the restrictive standard described in [*Lawrence*]" regarding accessory uses. 130 Md. App. at 12 (citing *Zent*, 86 Md. App. at 767-68). Accordingly, we need not apply Opponents' proposed interpretation of the term "incidental."

According to Opponents, "The 'Evaluation and Findings' section of the Resolution is virtually a repetition of the findings of the Planning Staff as stated in the Final Staff Analysis (Revised)," leading Opponents to assert that the City Council "made no independent assessment of the Planning Staff's analysis, and there is no reference in the findings and analysis to any of the evidence offered by the [Opponents]."

We reject Opponents' contention that, to survive judicial scrutiny, an administrative agency must resolve every disputed fact in writing. We acknowledge that an agency's decisions must be based on findings of fact that are supported by the record:

> When the [administrative agency] merely states conclusions, without pointing to the evidentiary bases for those conclusions, such findings are not amenable to meaningful judicial review and a remand is warranted . . . . In contrast, . . . when the [administrative agency] refers to evidence in the record in support of its findings, meaningful judicial review is possible.

Critical Area Comm'n for the Chesapeake & Atl. Coastal Bays v. Moreland, LLC, 418 Md. 111, 134 (2011). This requirement, however, does not impose upon an agency the obligation to resolve every factual dispute in the record. Instead, Code Sec. 24-160G.7(b) governs the findings which the City Council must make before approving a schematic development plan. Even a cursory review of the Resolution shows that the City Council adhered to the requirements of Code Sec. 24-160G.7 by making all eight required findings. Nevertheless, the City Council also resolved the alleged factual disputes at issue here.

First, the record clearly shows that the City Council made findings of fact regarding traffic and pedestrian safety concerns. In its Resolution, the City Council noted that the Plan

> will create a more attractive and cohesive development by maintaining the existing sidewalk along South Frederick Avenue and include safe pedestrian connectivity from the public right-of-way to the retail building with the inclusion of new sidewalks. The Property was granted an easement agreement with the adjacent Holbrook Shopping Center property, which established a shared drive aisle on the Holbrook Shopping Center property to facilitate vehicular connectivity to the signalized intersection, which will adequately move vehicle traffic in and out of the subject Property.

These findings demonstrate that the City Council considered pedestrian and traffic safety issues in approving the Plan.

Next, the City Council made sufficient findings concerning the mitigation of environmental, noise, and lighting impacts. Although the Resolution did not specifically mention how the Plan would mitigate environmental, noise, and light impacts, it mentioned that the Plan would include "0.26 acres of afforestation area in the rear property along with a fence along the rear property line, which will provide a landscape buffer between the retail building and the existing adjacent residential neighborhood." The City Council noted that such a buffer would be "similar to the buffer provided at the adjacent Holbrook Shopping Center and other existing buildings along the Frederick Avenue corridor[,]" implying that it would satisfactorily resemble existing buffers.

Because we have already addressed the argument that the City Council failed to determine whether the proposed use is "in keeping with the residential character of the Corridor" in Part I. A., *supra*, we need not again address Opponents' argument on this point.

As to whether the Plan would be in the public interest, we note that Code Sec. 24-160G.1(a) and (c) respectively provide that the purpose of the CD Zone includes

"enhanc[ing] the economic vitality" of the corridor, and "encourag[ing] development and redevelopment and renovation of declining or underutilized properties along the corridor." In its Resolution, the City Council stated that

> The [Plan] will enhance the Property to facilitate a new business in the City, which will contribute to the City's overall economic health. . . . The new business will add landscaping and sidewalks to the front of the Property, creating an attractive appearance and promote pedestrian connections. . . . The Property will also create new employment opportunities in the City and generate additional tax revenues.

These economic and aesthetic benefits, coupled with the City Council's above-noted findings that the afforestation buffer area will limit the impacts to the surrounding neighborhood, unequivocally show that the City Council made sufficient findings as to whether the Plan would be in the public interest.

Finally, Opponents argue that the City Council failed to make the required findings pursuant to Code Sec. 24-222A regarding its issuance of parking waivers.[5] For context, the regulations currently only allow a maximum of 25 parking spaces, but 1788 Holdings requested and received four parking waivers to allow for a total of 46 spaces, some of which will exceed the length limitations set forth in the Code. According to Opponents, the City Council failed to make the requisite findings that that "such [waivers] would not be detrimental to the public health, safety and general welfare[,]" as specifically required by the Code. We summarily reject this contention. In the Resolution, the City Council

[5] Even though Opponents only listed four disputed issues of fact at the outset of their argument section in their opening brief, this argument appears at the conclusion of this section of their brief, and we shall therefore address it.

found that: the "additional parking spaces above the maximum permitted is required to adequately park both employees and customers; . . . the twenty (20) foot length parking spaces in the front and side of the retail building is necessary to improve visibility and promote safety for vehicles and pedestrians." By allowing for adequate parking and increasing the length of the spaces to "improve visibility and promote safety for vehicles and pedestrians[,]" the City Council rejected the notion that the parking waivers would be detrimental to public health, safety, and general welfare.

III. INTERPRETATION OF CODE SEC. 24-160G.2(a)

Because Opponents' third appellate argument concerns distinguishing between "permitted" and "conditional" uses pursuant to the Code, we note that, whereas a "permitted" use is generally allowed, a "conditional use refers to a permissive land use category authorized by a zoning or administrative body pursuant to the existing provisions of the zoning law and subject to guides, standard[s] and conditions for such special use which is permitted under provisions of the existing zoning law." *Mayor and Council of Rockville v. Rylyns Enters., Inc*., 372 Md. 514, 537 (2002) (quoting Stanley D. Abrams, *Guide to Maryland Zoning Decisions*, § 11.1 (3d ed., Michie 1992)).

Opponents argue that Code Sec. 24-160G.2(a), which governs the permitted uses in the CD Zone, does not allow an automobile filling station as a permitted use in the CD

Zone.[6] For reference, Code Sec. 24-160G.2(a) describes the permitted uses in a CD Zone as follows:

> "*Permitted uses*. All uses listed as permitted and not solely as special exceptions or conditional uses in all zoning districts unless otherwise prohibited except[. . . .]

The Code then goes on to list uses that are expressly prohibited in the CD Zone; none of those prohibitions are applicable here. *See* Code Sec. 24-160G.2(b).

Opponents construe the phrase, "All uses listed as permitted . . . in all zoning districts," as follows: the only permitted uses in a CD Zone are those uses that are permitted as of right in *every single zoning district* in the City of Gaithersburg. Opponents then note that "[a]n automobile filling station is not permitted in '*all* zoning districts'"—for example, it is expressly prohibited in the Commercial Office Park Zone per Code Sec. 24-103(2), and also prohibited in the Hotel-Motel Zone per Code Sec. 24-160E.3(g)(1). Because there are districts where an automobile filling station is prohibited, Opponents interpret the Code to mean that automobile filling stations cannot be permitted as of right in the CD Zone. Rather, Opponents claim that, pursuant Code Sec. 24-160G.2(a), the only way to approve an automobile filling station in the CD Zone is pursuant to a conditional use, which was not the avenue pursued by 1788 Holdings.

[6] Despite the City Council's finding that the primary use at the Property will be the retail store, Opponents refer to the accessory use—the automobile filling station—as if it were the primary use. For purposes of resolving this issue, it makes no difference whether the primary use is the retail store or the automobile filling station.

1788 Holdings and the City Council disagree. They interpret the above-quoted language in Code Sec. 24-160G.2(a) as follows: so long as the use is permitted as of right in *one* of the other districts in the City of Gaithersburg, that use is permitted as of right in the CD Zone. We agree with this interpretation.

The principles governing the interpretation of a zoning ordinance are well-established. "When presented with a question involving statutory interpretation, we begin with the words of the ordinance 'since the words of the [ordinance], construed according to their ordinary and natural import, are the primary source and most persuasive evidence of legislative intent.'" *Foley v. K. Hovnanian at Kent Island, LLC*, 410 Md. 128, 152 (2009) (quoting *Lanzaron v. Anne Arundel Cty*., 402 Md. 140, 149 (2007)). "We construe the ordinance so as to give effect to each word so that no word, clause, sentence or phrase is rendered superfluous or nugatory." *Id*. (citing *Kushell v. Dep't of Nat. Res*., 385 Md. 563, 577 (2005)). Furthermore, our interpretation of a statute must be reasonable and "not one that is absurd, illogical or incompatible with common sense." *Green v. Church of Jesus Christ of Latter-Day Saints*, 430 Md. 119, 135 (2013) (citing *Gardner v. State*, 420 Md. 1, 9 (2011)).

"A statute is ambiguous where two or more reasonable interpretations exist." *Stachowski v. Sysco Food Servs. of Balt., Inc*., 402 Md. 506, 517 (2007) (citing *Chow v. State*, 393 Md. 431, 444 (2006)). "When a statute is ambiguous, we consider the common meaning and effect of statutory language in light of the objectives and purpose of the statute and Legislative intent." *Id*. (citing *Stoddard v. State*, 395 Md. 653, 662 (2006)).

We acknowledge that Code Sec. 24-160G.2(a) is inartful. Nevertheless, it is not so ambiguous as to allow two or more *reasonable* interpretations because, in our view, Opponents' interpretation is unreasonable.

As previously noted, Opponents interpret Code Sec. 24-160G.2(a) to mean that the only permitted uses in the CD Zone are those uses that are permitted in every single one of the other zones in the City of Gaithersburg. In their brief, the City Council notes that "there is no use that is permitted in all zoning districts." Applying Opponents' interpretation of the Code would result in there being no uses permitted as of right in the CD Zone, an illogical and untenable result. *Green*, 430 Md. at 135.[7]

Although the City Council did not explicitly interpret Code Sec. 24-160G.2(a) in its Resolution, at the October 7, 2019 City Council meeting, Council Vice President Robert Wu questioned City Attorney Lynn Board about this very issue:

> VICE PRESIDENT WU: . . . . I do have a question for [Ms. Board], with the question that was actually raised today, but it was also raised in the record, so it's valid to be considered. With respect to the by right uses of the CD zone, the language that was pointed to was that all uses that are permitted in all zones. I interpret that as being individual uses in the various zones because there are certain uses, for example, in the residential zone doesn't allow commercial uses, the commercial zones don't allow residential uses. *So if that*

[7] At oral argument, counsel for Opponents agreed that, under Opponents' proposed interpretation, there would be no uses permitted as of right in the CD Zone. Counsel suggested that this issue could be addressed by "text amendment."

	was taken to mean you had to have all uses in all zones, you would have no uses by right.
MS. BOARD:	Right, that is the way that I would interpret that and that's historically the way we've interpreted that provision of the code.
VICE PRESIDENT WU:	Okay. So that satisfies me as far as the legal requirements go.

(Emphasis added).

This colloquy shows that the Code interpretation issue was discussed, and that Opponents' interpretation of Code Sec. 24-160G.2(a) would yield an illogical result—that no uses would be permitted as of right in the CD Zone. In our view, it is much more reasonable to interpret Code Sec. 24-160G.2(a) as 1788 Holdings and the City Council suggest: all permitted uses in any other zone in the City of Gaithersburg are permitted in the CD Zone. In other words, if the use is permitted as of right in some other zone in the City of Gaithersburg, it is also permitted as of right in the CD Zone.

This construction comports with the Planning Staff's interpretation of 24-160G.2(a) in its Final Staff Analysis (Revised): "In the CD zone, all uses listed as permitted and not solely as a special exception or conditional use in all zoning districts are permitted. Automobile filling stations and retail uses are permitted in the C-1 (Local Commercial), C-2, (General Commercial) and C-3 (Highway Commercial) Zones." By approving the Plan, the City Council implicitly rejected Opponents' interpretation. We likewise reject Opponents' restrictive and illogical interpretation of Code Sec. 24-160G.2(a), which we

view as "incompatible with common sense." *Green*, 430 Md. at 135 (quoting *Gardner*, 420 Md. at 9). Because automobile filling stations and retail uses are permitted in the above-mentioned commercial zones, *a fortiori*, they are permitted in the CD Zone.

IV. DUE PROCESS

Opponents' final appellate argument concerns their claim that they were denied due process when they were not allowed to cross-examine any of 1788 Holdings' witnesses at the August 5, 2019 joint public hearing. These witnesses included: Philip Hummel, Esq., an attorney for 1788 Holdings; Larry Goodwin, a principal at 1788 Holdings; Christopher Hoffman, a real estate project engineer with Wawa; and Nicholas Speech, a civil engineer. At the August 5, 2019 hearing, all who opposed the Plan were given three minutes to speak, but were also allowed to submit written materials to the Planning Commission by August 29, 2019—the date the Planning Commission assigned for closure of its record. Although Opponents' counsel spoke at the August 5 hearing, he never contended that he should have been allowed to cross-examine 1788 Holdings' witnesses.

Instead, in a letter dated August 29, 2019, counsel argued that the Planning Commission should have treated the application as a "conditional use," because "Under [Code Sec. 24-10], a conditional use application is subject to public hearing before the [Planning Commission] and [City Council], and opportunity for cross[-]examination is permitted." Opponents argue that the circuit court should have remanded for an opportunity to cross-examine 1788 Holdings' witnesses at the August 5 hearing.

We hold that, by waiting more than three weeks to note an objection or complaint, Opponents waived their right to cross-examine 1788 Holdings' witnesses at the August 5 hearing. In *Hyson v. Montgomery Cty. Council*, 242 Md. 55, 59-60 (1966), the Court of Appeals rejected the argument that the opponents of a zoning reclassification were denied their due process rights. There, at a hearing concerning the reclassification of a property, counsel for the opponents declined to ask questions of the applicant's experts when given the opportunity during the applicant's presentation. *Id*. at 60. "When the opposition took over, [counsel for the opponents] stated that she 'would first like to request the right of cross examination on the material that has already been presented.'" *Id*. The agency denied her request, explaining that it was not the "practice" to do so. *Id*. On appeal, the opponents argued that they had been denied due process when the agency refused to allow cross-examination. *Id*. at 59, 61.

The Court of Appeals rejected the opponents' argument, stating:

> the record does not present a clean-cut denial of the right to cross-examination. There was no request to cross-examine any specific witness or witnesses, either at the time any witnesses [were] testifying, or when it came time for the presentation of the opposition. . . . *The only reference to cross-examination was made after the applicants had concluded their case, and the opponents had begun theirs*.

Id. at 61 (emphasis added). Although the Court recognized that, at an administrative agency's public hearing, "a reasonable right of cross-examination must be allowed the parties[,]" *id.* at 67, the Court nevertheless held that "we are unable to find a denial of appellants' request to cross-examine any specific witness or 'material[,]'" *id.* at 68. The Court explained the rationale for its decision: "One of the primary purposes of requiring

an objection in a trial court or other reviewable proceeding is to afford that court or the body conducting the proceeding an opportunity of correcting possible errors, thereby saving time and expense. We hold that no prejudicial error has here been shown." *Id.* at 68.

In *Hyson*, the opponents waived their right to cross-examination by failing to request cross-examination at the appropriate time during the relevant hearing. *Id*. at 60. Here, Opponents waited more than three weeks to argue that they should have been allowed to cross-examine 1788 Holdings' witnesses, and also failed to identify whom they wished to cross-examine and why. Pursuant to *Hyson*, we hold that Opponents waived their right to cross-examine witnesses at the August 5, 2019 hearing.

Lastly on this point, we reject Opponents' interpretation of the Planning Commission's Rules of Procedure governing the right of cross-examination. For reference, Section 5 of these Rules provides, in relevant part: "The Chair, upon request, shall permit any party to a case to cross-examine a witness at the conclusion of that witness'[s] testimony." In their brief, Opponents argue, "That Section does not state that the *request* for cross-examination must be made at the conclusion of the witness's testimony, it just states that *upon request*, the cross examination shall be permitted, and the cross-examination occurs at the conclusion of the witness's testimony." Opponents construe the phrase "at the conclusion of that witness'[s] testimony" to mean "at any time after the conclusion of that witness' testimony." We summarily reject Opponents' expansive interpretation of the Commission's Rule. We construe "at the conclusion of that witness's

testimony" to mean just that—the request for cross-examination must come at the moment that constitutes the conclusion of that witness's testimony. *Hyson* instructs that a party may not wait three weeks after the conclusion of the hearing to request cross-examination. Opponents therefore waived any right to cross-examination of witnesses at the August 5, 2019 hearing.

CROSS APPEAL

Having rejected all of the allegations of error in Opponents' appellate brief, we now turn to the cross-appeal. As noted above, 1788 Holdings and the City Council appeal the circuit court's amended order which remanded the Resolution because Opponents were denied an opportunity to cross-examine two witnesses at the September 4, 2019 Planning Commission Hearing.

Simply put, as in Part IV, *supra*, Opponents did not lodge any objection or request an opportunity to cross-examine the witnesses at the September 4, 2019 hearing. Rather, Opponents only raised this issue in their September 18, 2019 letter, two weeks after the hearing. In this letter, Opponents stated:

> The proceedings before the Planning Commission also reinforced the issue raised in [our] letter of August 29, 2019 regarding due process concerns. [We], and the public, were only allowed three (3) minutes each to speak at the joint meeting before the [City Council] and the Planning Commission, and there was no opportunity to cross examine any of the applicant's witnesses. At the Planning Commission meeting, Staff simply parroted the applicant's August 29, 2019 submission, and did not alert the Planning Commission to the issues raised in [our] August 29 letter. [We], and other members of the public, were not allowed to speak at the Planning Commission meeting. As a result, the only subject of discussion at that meeting was the Staff's recommendations, and the applicant's answers to questions from the Planning Commission members.

First, we note that Opponents failed to specifically allege that they were denied an opportunity for cross-examination at the September 4, 2019 hearing. Furthermore, there is no reference in this letter that Opponents wanted an opportunity to cross-examine Mr. Hoffman and Mr. Zied. Indeed, despite the concerns expressed in their August 29, 2019 letter concerning the lack of cross-examination available at the August 5, 2019 hearing, Opponents' August 29, 2019 letter failed to specifically request an opportunity for cross-examination at the upcoming September 4, 2019 hearing. Moreover, Opponents never made a request for cross-examination during the September 4, 2019 hearing.

Pursuant to *Hyson*, Opponents waived their opportunity to cross-examine witnesses at the September 4, 2019 hearing, and the circuit court erred in remanding on this basis. We shall therefore reverse the judgment of the circuit court as to its decision ordering cross-examination, but otherwise affirm the circuit court's approval of the City Council's adoption of R-68-19.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED IN PART AND AFFIRMED IN PART. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE MAYOR AND CITY COUNCIL'S ADOPTION OF R-68-19 IN ITS ENTIRETY. COSTS TO BE PAID BY APPELLANTS.