Circuit Court for Talbot County
Case No. C-20-CV-17-000210

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 590

September Term, 2019

MARK EPPARD, ET AL.

v.

RDC HARBOURTOWNE, LLC, ET AL.

Berger,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 8, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from a decision by the Talbot County Board of Appeals ("the Board"), approving a special exception and variances filed by Appellees, RDC Harbourtowne, LLC and RDC Melanie Drive, LLC ("RDC"). RDC is involved in the redevelopment and operation of a golf course known as "Links at Perry Cabin" ("the Links") in Talbot County, Maryland.[1] RDC sought to relocate a driving range to real property located in a subdivision known as Swan Point, which is adjacent to the existing Links golf course. RDC applied for a special exception to permit the driving range in the Swan Point subdivision, as well as for two variances authorizing encroachment into the shoreline development buffer. Mark Eppard, Patricia Eppard, and Madelaine Homes, Appellants ("the Homeowners"), own residential property within the Swan Point subdivision. The Homeowners challenged the special exception and variances before the Board and argued that the proposed driving range was prohibited by the Swan Point Restrictive Covenants.

The Board granted the special exception and variances and the Homeowners sought judicial review in the Circuit Court for Talbot County. The Circuit Court for Talbot County remanded the case to the Board to provide a factual basis for certain findings. The Homeowners again sought judicial review of the Board's decision in the Circuit Court for Talbot County which affirmed the decision of the Board.

The Homeowners raise three issues on appeal, which we have rephrased as follows:

[1] Talbot County has filed a brief as an interested party.

I. Whether the requirements of the Talbot County Zoning Code § 190-5 A (2) required the Talbot County Board of Appeals to consider the impact of the restrictive covenants applicable to the subject property.

II. Whether the Talbot County Board of Appeals's decision to grant two variances was supported by substantial evidence and premised upon accurate conclusions of law.

III. Whether the circuit court erred in denying the Homeowners' motion to consolidate this case with a related declaratory judgment case and denying a motion to stay final judgment in the judicial review case, until it was prepared to rule on the declaratory judgment case.

For the reasons stated herein, we hold that the Board was not required to consider the impact of the restrictive covenants and that the Board's decision to grant the variances was supported by substantial evidence and premised upon accurate conclusions of law. Further, we hold, that the circuit court did not abuse its discretion in denying Homeowners' motion to consolidate or the motion to stay. We, therefore, affirm the decision of the Circuit Court for Talbot County.

FACTS AND PROCEDURAL HISTORY

The Property

RDC Harbourtowne, LLC and RDC Melanie Drive are engaged in the redevelopment and operation of the Links, a golf course located at 9489 Martingham Drive, St. Michaels, in the Martingham subdivision. The Links, formerly known as the Harbourtowne Golf Course, was originally developed in the 1970s and was acquired by RDC in March of 2015. The course is now associated with the Inn at Perry Cabin, a

luxury resort near St. Michaels.[2] In connection with the redevelopment of the Links, RDC sought to relocate a driving range to a waterfront property at 9599 Melanie Drive, St. Michaels ("the Property"), which is adjacent to the Martingham Drive property.

The 29.711-acre Property is designated as Lot 6 of the Swan Point subdivision. The Homeowners own residential properties within the Swan Point subdivision. The proposed driving range would occupy approximately 13 upland acres of the Property. The Property is shown as Lot 6 of Parcel 90 on Tax Map 23 in the Swan Point subdivision and would be consolidated into the adjacent golf course parcel shown as Parcel l on Tax Map 23. Previously, the property was used as a spray field for the treated effluent from the Martingham subdivision. Because the Martingham subdivision is now served by a public sewer, it is no longer necessary to use the Property as a spray field for treated effluent. The property is partially located in a Critical Area on lands designated as a Resource Conservation Area.[3]

[2] The Links is an existing non-conforming use.

[3] The General Assembly enacted the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program (the "Critical Area Program") in order to "establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats." Md. Code (1984, 2018 Repl. Vol.), § 8-1801 of the Natural Resources Article ("NR"). The Critical Area Program was enacted to implement a cooperative program "between the State and affected local governments." *Id.* A Resource Conservation Area is an area characterized by "[n]ature dominated environments, such as wetlands, surface water, forests, and open space[], and [] [r]esource-based activities, such as agriculture, forestry, fisheries, or aquaculture." NR § 8-1802(a)(22). Generally, "[l]ocal Critical Area programs are to accord special protection to 'buffer' areas along the shoreline." *Assateague Coastal Tr.,*

Critical Area Variance and a Special Exception Application

On May 12, 2017, RDC submitted a Critical Area Variance and a Special Exception Application for the driving range. RDC framed its application as a request for a special exception to expand the existing golf course to an adjacent property. The Talbot County Code ("TCC") § 190-56 proscribes the following standards for granting a special exception, which the Board must find by a preponderance of the evidence: [4]

1. The use will be consistent with the purposes and intent of the Talbot County Comprehensive Plan.

2. The use will comply with the standards of the zoning district in which it is located except as those standards may have been modified by the granting of a variance.

3. The scale, bulk and general appearance of the use will be such that the use will be compatible with adjacent land uses and with existing and potential uses in its general area and will not be detrimental to the economic value of neighboring property.

4. The use will not constitute a nuisance to other properties and will not have significant, adverse impacts on the surrounding area due to trash, odors, noise, glare, vibration, air and water pollution, and other health and safety factors or environmental disturbances.

5. The use will not have a significant adverse impact on public facilities or services, including roads, schools, water and sewer facilities, police and fire protection or other public facilities or services.

Inc. v. Schwalbach, 448 Md. 112, 118 (2016) (citing NR §§ 8-1801(a)(2), 8-1801(a)(4), 8-1806(b), 8-1808(c)(1)(iii)).

[4] The Talbot County Code was amended in September, 2018. With the exception of TCC § 190-5, we shall cite to the updated version of the code. The substance of the relevant provisions remains unchanged.

6. The use will not have a significant adverse effect upon marine, pedestrian or vehicular traffic.

7. The use will not produce traffic volumes which would exceed the capacity of public or private roads in the area or elsewhere in the County, based on the road classifications established in Chapter 134, the Talbot County Roads and Bridges Ordinance, and other applicable standards for road capacity.

8. Any vehicle access to proposed off-street parking areas and drive-in facilities will be designed to minimize conflicts between vehicular, bicycle and pedestrian traffic and to minimize impacts on adjacent properties and on public or private roads. In addition, any resulting commercial and truck traffic should not use a residential street nor create a hazard to a developed residential area.

9. The use will not significantly adversely affect wildlife with respect to the site's vegetation, water resources, or its resources for supplying food, water, cover, habitat, nesting areas, or other needs of wildlife.

10. The use will not significantly adversely affect adjacent existing agricultural uses.

Additionally, TCC § 190-48.3(E) allows for the expansion of a golf course through the grant of a special exception if the following criteria are met:

> E. Expansion of a golf course in the RC District shall be permitted if the new "in play" expansion area is:
>
> 1. Limited to no more than 20% of the total "in play" area of the course located within the RC District as of August 13, 1989;
>
> 2. Set back a minimum of 300 feet from tidal water or tidal wetlands;
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> 3. Set back a minimum of 150 feet from edge of tributary streams; and

> 4. If accessed by cart paths, the cart paths shall be designed to minimize environmental impacts, including the number, location, configuration and construction of the crossings.

RDC's application also requested two variances to permit encroachments into the Shoreline Development Buffer ("Buffer"). The first requested variance was to allow a 230-square-foot encroachment into the Buffer for a golf cart path that is necessary to access the proposed driving range. The driving range and the Links golf course are currently separated by a "linear nontidal wetland feature," or, a ditch. The variance would permit a path over the ditch for access. At its closest point the encroachment will be 324 feet from Mean High Water ("MHW"). The second variance would allow a 25-square-foot encroachment into the buffer for a required stormwater management outfall feature, or a drain pipe. The variance would facilitate proper drainage for the site. At its closest point, the encroachment would be 700 feet from MHW.

RDC requested a recommendation from the Planning Commission on the proposed special exception and variances. On June 21, 2017, a staff memo for a critical area variance and special exception was submitted to the Board. The Department of Planning and Zoning made determinations based on the special exception and variance criteria in favor of RDC. The Department of Planning and Zoning recommended that the Board grant both variances.

Hearing and Decision of the Board

The Board held hearings on the matter on August 7, 2017 and August 21, 2017. Before the Board, the Homeowners argued that the restrictive covenants applicable to the

Swan Point subdivision (the "Covenants" or "Swan Point Covenants") prevented the Board from granting the special exception. Following the submission of legal briefs on the issue, the Board determined that it did not have the authority to consider the effects of or to enforce any private restrictive covenants that may impact the property. On August 7, 2017 the Board voted 4 to 1 to approve RDC's request for a special exception and 5 to 0 to approve the requested variances. In a written decision issued on November 17, 2017, the Board made the following findings:

> 1. All legal requirements pertaining to a public meeting were met.
>
> 2. The proposed use is consistent with the purposes and intent of the Talbot County Comprehensive Plan and complies with the standards of the land use district in which it is located. The Comprehensive Plan encourages the redevelopment and reinvestment in existing commercial centers. The neighboring property has been used as a large golf course and residential community for many years. The land suggested for use as a driving range was used by the Homeowners of that community as an effluent dispersal area until recently when public sewer system was expanded to the community.
>
> 3. The proposed use will comply with the standards of the zoning district in which it is located, except as those standards may have been modified by the granting of a variance. The proposed use is permitted by the Code as a special exception use.
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> 4. The scale, bulk and general appearance of the use will be such that the use will be compatible with adjacent land uses and with existing and potential uses in its general area, and will not be detrimental to the economic value of neighboring property. The proposed use is compatible with the nearby residential, commercial, maritime, and agricultural properties. The property is of sufficient size to accommodate

the proposed use and to provide effective visual and sound screening.

5. The use will not constitute a nuisance to other properties and will not have significant adverse impacts on the surrounding area due to trash, odors, noise, glare, vibration, air and water pollution, and other health and safety factors or environmental disturbances. The Applicant will not create any offensive noise or odor. Activities on the property will be during the day. The Applicant will not install lighting for evening use and the site's existing vegetation will provide effective screening between the activities on the site and nearby residential properties. The Applicant's site improvements will improve stormwater drainage.

6. The use will not have significant adverse impacts on public facilities or services including roads, schools, water and sewer facilities, police and fire protection, or other public facilities or services. Any traffic associated with the use will be minimal and can be accommodated by the existing public roads and driveway. Existing police and fire protection are sufficient for any foreseeable emergency needs created by the use.

7. The use will not have a significant adverse effect upon marine, pedestrian or vehicular traffic.

8. The use will not produce traffic volumes which would exceed the capacity of public or private roads in the area or elsewhere in the County, based on the road classifications established in Chapter l34, the Talbot County Roads and Bridges Ordinance, and other applicable standards for road capacity. Traffic associated with the proposed use will be light and periodic.

9. Any vehicle access to proposed off-street parking areas and drive-in facilities are designed to minimize conflicts between vehicular, bicycle and pedestrian traffic and to minimize impacts on adjacent properties and on public or private roads. Other than a golf cart parking area there are no vehicle parking areas or drive in facilities proposed for the site. Access to the range will be by golf carts and golf cart

pathway. Maintenance vehicles will use a separate and screened access pathway. The proposal will not result in a significant increase in commercial and truck traffic using residential streets and will not create a hazard to developed residential areas. There should be no commercial truck traffic associated with the range. All access to the property will be by way of privately maintained pathways.

10. The proposed use will not adversely affect wildlife with respect to the site's vegetation, water resources, or its resources for supplying food, water, cover, habitat, nesting areas, or other needs of wildlife. The site is currently an undeveloped field. The Applicant will regrade the field to create a driving range. When regraded and replanted it will remain an open field covered in grasses compatible with a golf range. To the extent there is any wildlife on the property it will not be impacted by the proposed use.

11. The proposed use will not adversely affect any adjacent existing agricultural uses.

12. Special conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of the ordinance result in unwarranted hardship to the property owner. The variance will allow the Applicant to modify a very small portion of the property to allow access and promote proper drainage.

13. A literal interpretation of the ordinance will deprive the property owner of rights commonly enjoyed by other property owners in the same zone. The Applicant should be permitted reasonable access to the property and to provide for proper drainage.

14. The granting of the variance will not confer upon the property owner any special privilege that would be denied by the ordinance to other owners of lands or structures within the same zoning district. Given similar circumstances other property owners would likely have the same privilege.

15. The variance request is not based on conditions or circumstances which are the result of actions by the

> Applicant, including the commencement of development activity before an application for variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.
>
> 16. The granting of the variance will not adversely affect water quality or adversely impact fish, wild life, or plant habitat, and the granting of the variance will be in harmony with the general spirit and intent of the state Critical Area Law and the Critical Area Program. The requested variances will have little, if any, adverse environmental impact.
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> 17. The variance does not exceed the minimum adjustment necessary to relieve the unwarranted hardship.

Judicial Review and Remand to the Board

On December 13, 2017, the Homeowners submitted a petition for judicial review of the Board's decision. The Homeowners argued that the Board erred in failing to deny the application for a special exception because it represents a use that is not permitted under the Declaration of Covenants and Restrictions applicable to Lot 6 of the Swan Point subdivision. Further, the Homeowners averred that the Board erred in failing to provide a factual basis for its findings in granting of the special exception and the variances. Following a hearing on May 16, 2018, the Circuit Court for Talbot County found that the Board supplied reasons, however meager, that were supported by substantial evidence to support most of its findings. The circuit court, however, remanded the case to the Board to provide a factual basis to support its findings 7, 11, 15, and 17. The Board issued its decision on the remand issues on November 19, 2018, providing a factual basis to support its findings. The Homeowners sought judicial review

of the Board's decision for a second time. The Board's decision was affirmed again by the circuit court on May 6, 2019. The court found that the Board engaged in a thoughtful discussion of the statutory criteria and, in its discretion, found that the evidence presented by the Board supported the Board's findings.

Additional facts shall be added as they become relevant to the issues on appeal.

STANDARD OF REVIEW

"On appellate review of the decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision." *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012). "Our review 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.'" *Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 84 (2009) (quoting *United Parcel Serv., Inc. v. People's Counsel for Balt. Cnty.,* 336 Md. 569, 576 (1994)). "The substantial evidence test is defined as whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 210 (2018), *cert. denied*, *Paul v. Brandywine Senior Living*, 460 Md. 21 (2018) (citations and quotations omitted).

"An agency decision based on regulatory and statutory interpretation is a conclusion of law." *Kor-Ko Ltd. v. Md. Dep't of the Env't*, 451 Md. 401, 412 (2017). We review the agency's conclusions of law *de novo*. *Brandywine*, *supra*, 237 Md. at 211.

Indeed, "a decision of an administrative agency, including a local zoning board, is owed no deference when its conclusions are based upon an error of law." *People's Couns. for Balt. Cty. v. Loyola Coll. in Md.*, 406 Md. 54, 68 (2008). Nevertheless, "[e]ven when reviewing an agency's legal conclusions, an appellate court must respect the agency's expertise in its field." *Kor-Ko, supra, 451 Md. at 412* (quoting *Carven v. State Ret. & Pension Sys. of Md.*, 416 Md. 389, 406 (2010)). "When an agency interprets its own regulations or the statute the agency was created to administer, we are especially mindful of that agency's expertise in its field." *Id. (*quoting *Carven*, *supra*, 416 Md. at 406).

DISCUSSION

I. TCC § 190-5(A)(2) did not require the Talbot County Board of Appeals to consider the Swan Point Covenants.

The parties dispute whether the Board had the authority to consider and interpret the Swan Point Covenants. TCC § 190-5 provides the following: [5]

> A. Conflicts.
>
> (1) Whenever any provision of this chapter conflicts with any other provision of law, rule, or regulation covering the same subject matter, whether set forth in this chapter or elsewhere, that provision which is more restrictive or imposes the higher standard or requirement shall govern.
>
> (2) If the provisions of this chapter are more restrictive or impose higher standards than an easement, covenant or other private agreement, the requirements of this chapter shall govern. If the provisions of an easement, covenant or other private agreement are more restrictive or impose higher

[5] The substance of TCC § 190-5 was unaltered when the Code was amended in 2018. The form, however, was changed. TCC § 190-5 now exists as 190-3.5(A) and 190-3.6. For consistency, we cite to the previous version of this code section only.

> standards than this chapter, the private agreement shall govern. The County will not be responsible for enforcing a private agreement.

The Homeowners contend that TCC §190-5 required the Board to consider the Covenants in order to determine whether they imposed higher standards than imposed by the zoning code, and therefore, barred the Board from granting the special exception and variances. RDC, in response, argues that the statute expressly indicates that the County will not be responsible for enforcing a private agreement.

The question before us is one of statutory construction. "The rules of statutory construction are well-established." *State v. Bey*, 452 Md. 255, 265 (2017). The Court of Appeals has articulated those rules as follows:

> The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature. A court's primary goal in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny.
>
> To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the statute. If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction. We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with "forced or subtle interpretations" that limit or extend its application.
>
> We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the

> statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope.
>
> Where the words of a statute are ambiguous and subject to more than one reasonable interpretation, or where the words are clear and unambiguous when viewed in isolation, but become ambiguous when read as part of a larger statutory scheme, a court must resolve the ambiguity by searching for legislative intent in other indicia, including the history of the legislation or other relevant sources intrinsic and extrinsic to the legislative process. In resolving ambiguities, a court considers the structure of the statute, how it relates to other laws, its general purpose and relative rationality and legal effect of various competing constructions.
>
> In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical or incompatible with common sense.

State v. Bey, *supra*, 452 Md. 255, 265–66 (2017) (quoting *State v. Johnson*, 415 Md. 413, 421–22 (2010)).

The Homeowners urge that the intent of the ordinance, apparent from its plain language, is that private restrictions encumbering land must be reviewed to determine the most restrictive provisions applicable. Moreover, they argue that the language in TCC § 190-5, which provides that the County is not responsible for enforcing a private agreement, does not prevent the Board from at least considering the Covenants. In response, RDC and Talbot County argue that the denial of the application based on the covenants would effectively be an "enforcement" of the Covenants, which is expressly

precluded by TCC § l90-5. Additionally, RDC and Talbot County, relying on *Perry v. Cnty. Bd. of Appeals for Montgomery Cnty.*, 211 Md. 294, 299 (1956), assert that the construction and enforcement of private covenants are matters for courts of equity, not the Board. We agree.

The plain language of TCC § 190-5 supports RDC and Talbot County's position that the Board did not have the authority to consider the Covenants. TCC § 190-5(A)(2) explicitly provides that "[t]he County will not be responsible for enforcing a private agreement." We are persuaded by RDC and Talbot County's argument that interpretation of the Covenants would be tantamount to the County enforcing the Covenants. If the Board considered the Covenants and determined that they were more restrictive than the zoning code, and, therefore, prohibited the special exception, the County would, in essence, enforce the terms of a private agreement. Although TCC § 190-5 provides that "[i]f the provisions of an easement, covenant or other private agreement are more restrictive or impose higher standards than this chapter, the private agreement shall govern," the language does not require the Board to consider those agreements. Indeed, there are other avenues for the interpretation and enforcement of restrictive covenants that are separate and apart from the decisions of a local zoning body.

Perry, *supra*, 211 Md. at 299, supports our construction of TCC § 190-5. In *Perry*, property owners in a residential community appealed the grant of a special exception for a care home in the community. *Id.* at 297-98. The Appellants argued that the Board had no authority to "grant a use of land that would violate restrictive covenants

binding the land." *Id.* at 298. The Court of Appeals explained the following in regard to the interplay between a zoning ordinance and restrictive covenants:

> The ordinance does not override or defeat whatever private rights exist and are legally enforceable, but neither is it controlled in its workings or effects by such rights. The enforcement of restrictive covenants is a matter for the exercise of the discretion of an equity court in the light of attendant circumstances. Many times the covenant relied on may not have been originally effective or for many reasons, may have ceased to be effective at the time relief is sought. 2 Rathkopf, The Law of Zoning and Planning, p. 387, says: 'The validity of the zoning ordinance, the grant of a variance or 'exception' should be considered independently of its effect upon covenants and restrictions in deeds.'

Id. at 299–300. The Court held that "the Board of Appeals was right in making its determination without reference to the restrictive covenants. Neither its action nor our approval of that action would have any effect on the decision in a proceeding in equity to enforce the covenant." *Id.* at 300. Thus, the Board is to consider the grant of a special exception independently from any applicable restrictive covenants. Although the interpretation and enforcement of restrictive covenants was beyond the authority of the Board, the Homeowners were free to file an action in the Circuit Court for Talbot County to enforce or interpret the Covenants, as they did. We, therefore, hold, that the Board did not err in failing to interpret or enforce the Swan Point Covenants.

II. The Board's decision to grant the variances was supported by substantial evidence and premised upon accurate conclusions of law.

Article 58 of the TCC governs the administration of variances. TCC §190-58 allows the Board or the Planning Director to authorize a variation or modification from

the bulk requirements or numerical parking standards proscribed by the zoning chapter. The Planning Director must make decisions on minor variances. Nevertheless, all other variances shall be heard and decided by the Board. TCC §190-58.1. Standards for variances to Critical Area provisions are defined in TCC § 190-58.4:

> A. Standards. In order to grant a variance to provisions of the Critical Area Overlay District, the Planning Director or Board of Appeals must determine that the application meets all of the following criteria:
>
> > 1. Special conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of this chapter would result in unwarranted hardship.
> >
> > 2. A literal interpretation of the Critical Area requirements will deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district.
> >
> > 3. The granting of a variance will not confer upon the property owner any special privilege that would be denied by this chapter to other owners of lands or structures within the same zoning district.
> >
> > 4. The variance request is not based on conditions or circumstances which are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.
> >
> > 5. The granting of the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat, and the granting of the variance will be in harmony with the general spirit and

> intent of the state Critical Area Law and the Critical Area Program.
>
> 6. The variance shall not exceed the minimum adjustment necessary to relieve the unwarranted hardship.
>
> 7. If the need for a variance to a Critical Area provision is due partially or entirely because the lot is a legal nonconforming lot that does not meet current area, width or location standards, the variance should not be granted if the nonconformity could be reduced or eliminated by combining the lot, in whole or in part, with an adjoining lot in common ownership.

The General Assembly, pursuant to the Critical Area Program, proscribes the following additional standards that a local jurisdiction must find in order to approve a variance in a Critical Area:

> (5) A variance to a local jurisdiction's critical area program may not be granted unless:
>
> (i) Due to special features of a site, or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the critical area program would result in unwarranted hardship to the applicant;
>
> (ii) The local jurisdiction finds that the applicant has satisfied each one of the variance provisions; and
>
> (iii) Without the variance, the applicant would be deprived of a use of land or a structure permitted to others in accordance with the provisions of the critical area program.

NR § 8-1808(d)(5).

NR § 8-1808(d)(1) defines an "unwarranted hardship" to "mean[] that, without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested." The Homeowners argue that RDC provided no probative evidence or testimony to support the criteria for granting of a variance. Appellants concede that the variances are modest in terms of the scope of disturbance, but, nevertheless, contend that there was not substantial evidence to permit even "minor" variances. Further, the Homeowners aver that the Board incorrectly applied TCC § 190-58.4(A)(1), as a matter of law.

We first turn our attention to the legal application of TCC § 190-58.4(A)(1), which requires the Board to make a determination that "[s]pecial conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of this chapter would result in unwarranted hardship." Relying on *Assateague*, *supra*, 448 Md. at 138-39, the Homeowners contend that in order to prove an unwarranted hardship, RDC must prove that "without the variance, the applicant is denied 'a reasonable and significant use' that cannot be accomplished somewhere else on the property."

The Homeowners contend that RDC already had a driving range on the original golf course and that the Board had approved the expansion of the driving range. RDC, therefore, had no need dictated by special circumstances of its property to move the driving range to a place that required intrusion into the critical area buffer. Indeed, *Assateague* construes the meaning of an unwarranted hardship based on the language in

the applicable local ordinance, as well as NR 8-1808(d)(1). The Court of Appeals articulated the standard for an unwarranted hardship as follows:

> [I]n 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.

Assateague, s*upra*, 448 Md. at 139. We, however, disagree with the Homeowners that this standard requires RDC to demonstrate that the only location where it could construct a driving range is on Lot 6. Rather, RDC must prove that without the variances for access and drainage, it would be denied a use of Lot 6 that is both significant and reasonable. Further, RDC must prove that such a use cannot be accomplished elsewhere on Lot 6 without a variance. Therefore, the existence of the prior driving range on a separate property does not dictate the outcome of this test.

Our review of the record before the Board indicates that there was substantial evidence to support the Board's findings with respect to the variances, including TCC § 190-58.4(A)(1). Critically, the Department of Planning and Zoning's ("the Department") recommendations were admitted as exhibits during the hearing. The Department made favorable determinations based on each required criterion for the granting of a variance. The Department determined that the site location made it difficult for access to the proposed driving range, which necessitates the need for the cart path crossing. Further, the Department determined that stormwater management outfall was necessary for adequate drainage of the driving range facility. It determined that without the outfall

pipe, the stormwater would not be adequately diverted into the drainage ditch on the site. The Department further determined that, without the outfall pipe, the drainage would not meet zoning requirements, which address the quality and quantity of the runoff and streams that empty into the Chesapeake Bay. The Department determined that a literal interpretation of the Critical Area requirements would restrict the golfers' access to the driving range, which is a common amenity enjoyed at most golf resorts. Further, the Department concluded that proper drainage of the facility via outfall pipes was necessary for the functionality of the property and important to ensure proper stormwater drainage on a property to restrict drainage onto neighboring properties.

The Department concluded that no special privileges would be granted that would otherwise be denied to other property owners because access between two neighboring golf facilities is reasonable for overall functionality of the resort. The Department further determined that the necessity of the variance was not self-created. It explained that the course was constructed in the 1970s and that the variance was a result of an expanded buffer following a lineal nontidal wetland. Further, it advised the Board that there were no anticipated additional impacts on the environment, other than any potential impacts associated with encroachment into the nontidal wetland, which had already been authorized by the Maryland Department of the Environment.

The Department observed that the variance would not exceed the minimum adjustment necessary to relieve the unwarranted hardship. The cart path crossing would only impact 230 square feet of the nontidal wetlands according to designs provided by

RDC's project engineer. The Department lastly determined that the need for a variance to the Critical Area provision was due to its use which had been determined to be a legal nonconforming lot per the Certificate of Nonconformity issued by the Department on February 23, 2015.

The Board additionally heard testimony on the proposed variances. William Stagg, a planning consultant with Lane Engineering with 40 years of experience in golf-related land planning, testified on behalf of RDC. Stagg testified to the necessity of the variance for the golf cart access path. Stagg further testified that several places of access for golf carts were explored, but the other options were not functional or resulted in unsafe conditions due to golfers hitting balls too close to the cart path. He also stated the path would be eight feet wide, about the minimum width that could be used for safe golf cart crossing and a small mower or two that may come across the path. He further testified that the path would be at a 90-degree angle, so that it minimized crossing over the nontidal wetland area. He stated that the Maryland Department of the Environment approved the wetland impacts and wetland buffer impacts for the crossing. Stagg stated that the path would be as far away from the tidal wetlands and tidal waters as possible, while still maintaining safe crossing conditions for the course and cart path users. Stagg further testified that the previous location of the driving range was too short for modern golfing equipment, resulting in golf balls being hit into neighboring properties. He explained that the new driving range was longer, safer, and farther from residential homes.

Stagg also testified that the drainage variance was essential. He stated that the proposed location for the drainage outfall was the only logical and practical location on the site because the site is flat and has very shallow ditches around it, except for the one ditch that RDC has proposed for the outfall. Stagg testified that there were no velocity issues and that there would not be any channel scouring. He further explained that the other drainage option would have had to go into the hundred-foot buffer to get enough elevation change for the pipe to outfall. Stagg felt that that an outfall point well back from tidal waters in this nontidal wetland area was a better option.

We, therefore, hold that the Board relied on substantial evidence in the record and accurate conclusions of law in approving both variances requested by RDC. Indeed, regarding TCC § 190-58.4(A)(1), the Board was presented with evidence that the driving range could not be accessed without the proposed variance for the golf cart path and that the proposed location was the least hazardous option. The Board was also presented with evidence that the site could not properly be drained without the variance for the drainage outfall and that there was no other location on the Property for the outfall. Without proper drainage and no access point to the driving range, RDC would be denied a significant use of the Property. The Board, therefore, was justified in concluding that RDC would sustain a substantial hardship without a variance.

III. The circuit court did not abuse its discretion in denying the Homeowners' motion to consolidate the instant case with the declaratory judgment case.

In light of the Board and the circuit court's conclusion that the Board did not have the authority to consider the Swan Point Covenants, the Homeowners filed a separate

declaratory judgment action requesting that the circuit court construe all applicable covenants.[6] The Homeowners filed a motion to consolidate the declaratory judgment case with this case, which was denied on February 27, 2019. Subsequent to the circuit court's final judicial review hearing on March 27, 2019, the Homeowners filed a motion to stay the issuance of the final decision of the instant case, pending a decision in the declaratory judgment case. The Court denied the motion to stay on April 15, 2019.

A trial court's ruling on procedural issues are given great deference, "and '[o]nly upon a clear abuse of discretion will a trial court's rulings in this arena be overturned.'" *Jenkins v. City of Coll. Park*, 379 Md. 142, 164 (2003). (quoting *Schmerling v. Injured Workers' Ins. Fund,* 368 Md. 434, 443–44 (2002) (alteration in original). Appellants acknowledge the court's discretion concerning the administration of its docket. Nevertheless, appellant argues that consolidation would have been more cost effective and efficient due to the overlap in the covenant issue.

Pursuant to the Court of Appeals's analysis in *Perry* and our interpretation of TCC § 190-5, the zoning issues in the instant case are separate and apart from the declaratory judgment case, which involved the construction of private covenants. Accordingly, the

[6] Following the first hearing before the Board, the Swan Point Covenants were amended. The declaratory judgment case requested judicial interpretation of all applicable covenants, including the amended covenants.

circuit court did not abuse its discretion in refusing to consolidate both cases or refusing to stay the outcome of the present case.[7]

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[7] Appellants, in the last paragraph of their brief, assert that the updated version of the TCC was amended to prohibit new driving ranges and that "the proposed driving range is a new driving range, and is not permitted." Appellants state that the TCC Amendment was overlooked by counsel until their brief was in its final assembly. Because Appellants have not briefed the issue, we decline to address this argument.