

Circuit Court for Montgomery County  
Case No. 487649V

UNREPORTED\*  
IN THE APPELLATE COURT  
OF MARYLAND\*\*

No. 1094

September Term, 2022

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IN THE MATTER OF FRIENDS OF TEN  
MILE CREEK AND LITTLE SENECA  
RESERVOIR, *ET AL.*

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Kehoe,  
Shaw,  
Battaglia, Lynne A.,  
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Shaw, J.

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Filed: July 18, 2023

\*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.

\*\*At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellants,<sup>1</sup> Friends of Ten Mile Creek and Little Seneca Reservoir filed a petition for judicial review in the Circuit Court for Montgomery County, stemming from the Montgomery County Planning Board's approval of Pulte Home Company, LLC's Site Plan No. 820200160. Following a hearing, the court affirmed the Planning Board's decision. Appellants timely appealed and present the following question for our review:

1. Did the Planning Board err as a matter of law when it approved the Pulte Site Plan without determining that it substantially conforms with recommendations to protect existing stream conditions and limit impervious surface in two sensitive subwatersheds, as specified in the Clarksburg Master Plan, as amended, and as required by Chapter 59 of the Montgomery County Zoning Ordinance?

For the reasons discussed below, we affirm.

### **BACKGROUND**

In October 2019, Appellees, Pulte Home Company, LLC and Shiloh Farms Investments, LLC, filed a development application under Preliminary Plan No. 1200500, which sought the Montgomery County Planning Board's<sup>2</sup> approval of a residential development on 400+ acres located within the Ten Mile Creek Watershed in Clarksburg, Maryland. The development consisted of 117 single-family detached homes, 208 single-family townhomes, and the reconstruction of an existing single-family detached home. The Planning Board approved the Preliminary Plan on December 3, 2020. Pulte then submitted

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<sup>1</sup> Appellants are Friends of Ten Mile Creek and Little Seneca Reservoir, Jay Clinque, Anne Clinque, and Norman Mease.

<sup>2</sup> The Montgomery County Planning Board and the Montgomery County Planning Department are part of the State agency known as the Maryland-National Capital Park and Planning Commission.

its application for a Site Plan on March 4, 2020 as required, pursuant to Montgomery County Zoning Ordinance, Article 59-7, Division 7.3, Section 7.3.4(A)(8).

Staff from the Montgomery County Planning Department reviewed the application and issued a report recommending approval, subject to certain conditions. In November 2021, a memorandum was sent to the Planning Board with the staff's analysis. The staff found that the Site Plan Application met the Final Water Quality Plan requirements of Chapter 19 of the Montgomery County Code and the requirements of the Clarksburg West Environmental Overlay Zone. The staff concluded that the application was in conformance with the Montgomery County Planning Department's Environmental Guidelines and the Master Plan's environmental recommendations.

The report also addressed concerns related to imperviousness.

There are concerns that based on the Master Plan, the impervious surfaces should be limited to five percent (5%). However, the Master Plan and the Clarksburg West Environmental Overlay Zone are clear that there is a six percent (6%) impervious surface limit. The Master Plan only makes reference to 5 percent imperviousness in the non-binding discussion section that provides background information from studies that note that imperviousness as low as 5 percent may result in degradation of water quality (Master Plan, page 17), and that if imperviousness is kept as near to 5 percent as possible, stream conditions can be maintained in the good to excellent range (Master Plan, page 41).

However, the Master Plan goes on to provide specific recommendations for the creation of the Clarksburg West Environmental Overlay Zone with a 6 percent imperviousness limit noting that it is not possible to keep each subwatershed to a level at or below 5 percent without unreasonably restricting development. The Master Plan provides a combination of impervious surface limits, open space requirements, . . . to protect the watershed. . . . The impervious surface area resulting from the proposed residential development of just under 6 percent is consistent with the recommendations in the Master Plan and the Clarksburg West Environmental Overlay Zone which limits the development application to 6

percent imperviousness.

On September 9, 2021, the Planning Board held a public hearing, where Appellants voiced their opposition by presenting written and oral testimony. Appellants stated Pulte’s proposed “development plan would irreparably harm two of the highest quality streams in Montgomery County” because the plan would increase the impervious levels of subwatersheds LSTMs<sup>3</sup> 110 and 111, which are tributaries to the Ten Mile Creek. Appellants argued that such an increase is contrary to the language and intent found in the Ten Mile Creek Area Limited Amendment Clarksburg Master Plan and the Hyattstown Special Study Area (“Master Plan”).

The Master Plan<sup>4</sup>, relevant to the proposed development, was originally drafted in 1994 and amended and approved by the Montgomery County Council, sitting as the District Council, in July 2014. The Plan includes recommendations for both the Clarksburg

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<sup>3</sup> LSTM refers to “Little Seneca Ten Mile” subwatersheds. A watershed is “the total drainage area contributing runoff to a single point.” MCC § 19-1A. The Montgomery County Code defines a “stream channel” as “a part of a water course either naturally or artificially created which contains an intermittent or perennial base flow of groundwater origin.” MCC § 19-48(x). Essentially, a watershed is an area where the water above-ground and below-ground flows to the same body of water.

<sup>4</sup> “The Maryland-Washington Regional District Act, codified under Division II of the Land Use Article (“LU”) of the Maryland Code, established the Maryland- Washington Regional District.” LU § 20-101. This statute grants authority to the Maryland-National Capital Park and Planning Commission to regulate land use. *Id.* The Commission is “a state agency compris[ed] of ten commissioners, five of whom compose the Montgomery County Planning Board[.]” §§ 15-102, 20-201. As part of its authority, the Planning Board drafts and adopts various land use plans commonly referred to as “master plans.” § 21-101. The Planning Board and the Montgomery County Council “District Council” work in tandem to regulate land use and amend the county’s zoning laws. § 21-203; *see also* MCC § 19-33(a).

East Environmental Overlay Zone and the Clarksburg West Environmental Overlay Zone, which are separated by Interstate-270. “The Ten Mile Creek drains from portions of Clarksburg west of Interstate-270[.]” The Plan “sets different imperviousness levels for major properties on each side of I-270 to address the unique environmental conditions in the different subwatersheds and supports the Plan’s land use objectives of allowing development” in the community.

The Plan states, in part:

The degree of modeled impacts on stream flow volumes, the amount of imperviousness, and the impacts to natural resources in the most sensitive watersheds indicate the importance of recommending limits as part of this Plan Amendment to ensure that imperviousness does not increase above that which is protective of this very good quality stream system. It is not necessarily the impervious cover per se that causes observed degradation. While imperviousness has a direct impact, it is also the strongest, most detectable indicator available for the many correlated and contributing factors associated with urbanization.

High quality subwatersheds with very low impervious cover, such as LSTM 110 (1.6 percent) and LSTM 111 (1.2 percent), are more sensitive to changes in impervious cover than watersheds like LSTM 206 (16.6 percent) and LSTM 202 (11 percent), which already have a significant amount of existing impervious cover and are showing signs of degradation. . . .

This Plan recommends a six percent impervious surface cap for new development in the most sensitive subwatersheds to minimize risk as much as possible. While it is not possible to keep all the subwatersheds at this low level without unreasonably restricting development, this Plan provides a combination of imperviousness limits and required open space protection that would keep the overall watershed imperviousness level at slightly more than six percent, if all planned development occurs.

The Plan recommended, for the Clarksburg West Environmental Overlay Zone, where the Site Plan is located, an:

Impervious surface area limit of six percent of the area within a development

application; specific properties to be limited to zero percent (mostly government-owned or with easements, with a grandfathering provision for properties already exceeding the recommended impervious limit.

“Impervious Surface” is defined by the Montgomery County Ordinance as:

Any covering that prevents or significantly impedes the infiltration of water into the underlying soil, including any structure, building, patio, deck, sidewalk, compacted gravel, pavement, asphalt, concrete, stone, brick, tile, swimming pool, or artificial turf. Impervious surface also includes any area used by or for motor vehicles or heavy commercial equipment regardless of surface type or material, any road, road shoulder, driveway, or parking area.

Zoning Ordinance Ch. 59, Division 1.4, Section 1.4.2.

In support of their position, Appellants relied on Chapter 59 of the Montgomery County Zoning Ordinance. They argued that the proposed development did not substantially conform with the Master Plan’s impervious level recommendations and, thus, it was in violation of the county ordinance. *see* MCC 7.3.4.(4). Appellees countered that the ordinance required *substantial* conformance and that the development application’s impervious levels did not exceed six percent.

The applicable zoning ordinance states:

A site plan provides a detailed overview of the applicant’s development. Site plan review will be used to determine if the proposed development satisfies current laws, regulations, and this Chapter, and substantially conforms with the recommendations of the applicable master plan and approved guidelines.

MCC 7.3.4.(4).

After reviewing the testimony and evidence presented, the Montgomery County Planning Board approved the Site Plan with a three to one vote. The Board issued a Resolution on October 14, 2021, that stated, in part:

BE IT FURTHER RESOLVED that having considered the recommendations and findings of its Staff as presented at the hearing and as set forth in the Staff Report, which the Board hereby adopts and incorporates by reference (except as modified herein), and upon consideration of the entire record, the Planning Board FINDS, with the conditions of approval, that:

\* \* \*

The Application complies with the requirements of Chapter 59. The residential development was reviewed for compliance with the dimensional requirements for the RNC [Rural Neighborhood Cluster], optional method (which is permitted when recommended by the Master Plan pursuant to Sect. 59.4.3.5.D.4), and Clarksburg West Environmental Overlay ones as specified in the Zoning Ordinance.

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In addition, the Application complies with the specific development standards of the Clarksburg West Overlay Zone set forth in 59.4.9.6.D as follows:

1. The Application provides a maximum impervious area of 6 percent.
2. No impervious surface area will be added within the conservation easement areas.

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5. Environmental buffer areas or natural resources recommended for protection in the Ten Mile Creek Area Limited Amendment to the Clarksburg Master Plan and Hyattstown Special Study Area have been properly regulated and protected.

Appellants timely filed a petition for judicial review in the Circuit Court for Montgomery County. During the judicial review hearing, both parties agreed that the Pulte site plan was less than the six percent required limit for the overall development. Appellants, however, argued that appellees failed to meet a specific requirement for the two sensitive subwatersheds.

The Circuit Court ruled:

[W]e know that in Montgomery County, that there was a recommendation adopted as an ordinance, in the Clarksburg West Environmental Overlay Zone, covering an area that included these sub-watersheds at issue, LSTM

110 and 111. And it states that one of the major elements of the Overlay zone is an impervious surface area with limit of six percent of the area within a development application. . . . Both parties agree that the impervious surface of limit of six percent within a development application in this case has been met, as it's 5.9 percent. Therefore, the Court finds that the Maryland-National Capital Park and Planning Commission did not error in its interpretation of law, by finding the application in substantial compliance. Therefore, the petition will be denied, and the decision of the Commission will be upheld.

Appellants timely appealed.

### STANDARD OF REVIEW

In an appeal from the judicial review of an agency action, “this Court looks through the circuit court’s decision and evaluates the decision of the agency” directly. *Wilson v. Md. Dept. of Env’t*, 217 Md. App. 271, 283 (2014) (internal quotation and citation omitted). “When we are asked to consider a statute or an ordinance that an agency is charged with administering, ‘[a]lthough we often will give considerable weight to the agency’s experience in interpreting a statute that it administers, it is within our prerogative to determine whether an agency’s conclusions of law are correct, and to remedy the situation if found to be wrong.’” *Anne Arundel Cnty. v. 808 Bestgate Realty, LLC*, 479 Md. 404, 419-20 (2022).

“Where findings of fact or discretionary judgments are involved, the scope of our review is narrow[.]” *HNS Dev., LLC v. People’s Couns. for Balt. Cnty.*, 425 Md. 436, 449 (2012). “We will uphold such decisions of the administrative agency so long as they are supported reasonably by ‘substantial evidence.’” *Id.* “The ‘substantial evidence’ test requires a reviewing court to decide ‘whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.’” *Clarksville Residents Against*



*Mortuary Def. Fund, Inc. v. Donaldson Properties*, 453 Md. 516, 532 (2017) (quoting *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68 (1999)). “[W]e have emphasized that a ‘court should [not] substitute its judgment for the *expertise* of those persons who constitute the administrative agency from which the appeal is taken.’” *Id.* at 533 (internal citations omitted) (emphasis in original).

“In applying these standards, we review the record in the light most favorable to the agency and ‘defer to [its] fact-finding and drawing of inferences’ if supported by any evidence in the record.” *Mayor and Council of Rockville v. Pumphrey*, 218 Md. App. 160, 193-94 (2014) (quoting *Banks*, 354 Md. at 68). “When reviewing conclusions of law, however, no such deference is given to the agency’s conclusion.” *Anne Arundel Cnty*, 479 Md. at 419. “We review purely legal decisions *de novo*.” *Pumphrey*, 218 Md. App. at 194 (2014). “We will not uphold an ‘administrative decision which is premised solely upon an erroneous conclusion of law.’” *HNS*, 425 Md. at 449 (quoting *People’s Couns. for Balt. Cnty. v. Md. Marine Mfg. Co.*, 316 Md. 491, 497 (1989)).

## DISCUSSION

Appellants argue the Planning Board erred in approving the Site Plan. They contend that, under the Site Plan, the overall quality of “LSTM 110 and LSTM 111 will significantly degrade as LSTM 110’s impervious cover would increase from 1.6% to 6.9%” and “LSTM 111’s impervious cover would increase from 1.2% to 12.8%.” According to Appellants, this increase will create a significant risk to stream quality in those subwatersheds.

Appellants argue that the Site Plan must meet two requirements. First, they contend that the Master Plan, is specific as to the two subwatersheds, LSTM 110 and LSTM 111 and that it recommends “a six percent impervious surface cap for new development in the most sensitive subwatersheds to minimize risk as much as possible.” Thus, according to them, the Site Plan must include an impervious cover for these two subwatersheds of no more than six percent. The second requirement is that there must be substantial compliance with the Chapter 59 Zoning Ordinance that is specific to the overall development application and provides an impervious surface cap limit of six percent.

Appellants also argue that the “substantially conforms” language in the “Zoning Ordinance elevates the Master Plan to the level of a true regulatory device[.]” with binding effect. Appellants contend that, in essence, the Master Plan recommendation must be effectuated, and specific conformity is required. Appellants rely on *HNS Dev., LLC v. People’s Couns. for Balt. Cnty.* 425 Md. 439 (2012).

Appellees argue the Planning Board did not err. The Master Plan recommended an impervious surface area limit of six percent of the area “within a *development application*” and the impervious limit under the Site Plan’s development application is 5.9 percent. Appellees contend that the Master Plan’s six percent recommendation “does not mention LSTM 110 or LSTM 111, nor does it say that the six-percent limit there should be calculated differently than in the other LSTM areas.”

Appellees argue that if the Planning Board and District Council intended to “create a more granular protection and add additional restrictions limited only to subwatersheds LSTM 110 and LSTM 111, they easily could have established a third overlay zone for that

purpose. But they did not.” Rather, for the Clarksburg West Environmental Overlay Zone, where the Site Plan is located, the County Code implements the Master Plan, and provides “the maximum total impervious surface area for any development after August 4, 2014 is 6% of the total area under application for development.”

Master Plans are land use plans and are generally considered “long term and theoretical. They contain elements concerning transportation and public facilities, recommended zoning, and other land use recommendations and proposals.” They are “the result of work done by planning commissions and adopted by ultimate zoning bodies[.]” *Mayor and Council of Rockville v. Rylyns Enter., Inc.*, 372 Md. 514, 529 (2002). A master plan’s recommendations are, generally, advisory and have no binding legal effect. However, a master plan’s recommendations can rise to the level of a true regulatory device, which is legally binding, if a statute or ordinance links the master plan and zoning ordinance together.

In *Rylyns*, the Supreme Court of Maryland, discussed regulatory devices and stated:

We repeatedly have noted that plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. Where the latter exist, however, they serve to elevate the status of comprehensive plans to the level of true regulatory device. In those instances where such a statute or ordinance exists, its effect is usually that of requiring that zoning or other land use decisions be consistent with a plan’s recommendations regarding land use and density or intensity.

372 Md. 514, 530-31 (2002).

In *HNS*, a developer challenged the decision of the County’s Board of Appeals that denied an amendment to a proposed development plan for noncompliance. 425 Md. at 443.

Certain provisions of the Baltimore County Code directed that the development of land conform to the “master plan.” *Id.* at 447. In that case, the Supreme Court of Maryland held that:

according to Baltimore County Code, the Master Plan is an inextricable part of the development regulations and, as such, compliance with its regulations is a binding regulatory requirement of the subdivision and development plan review process in the County. Thus, *nonconformity with the Master Plan can provide a valid and independent basis for denying approval of a proposed amended development plan*, compliance with the other requirements of the development regulations notwithstanding.

*Id.* at 448 (emphasis added). The court held that HNS’ amended development plan did not conform with the master plan’s development regulations and that the language of the master plan was “clear and unambiguous.” *Id.* at 453-54. The court “concluded that ‘when subdivision regulations require that a proposed subdivision comply with the master plan, an application for approval of a preliminary subdivision plan that fails to so comply must be rejected.’” *Id.* at 457 (quoting *Coffey v. Md.-Nat’l Cap. Park & Plan. Comm’n*, 293 Md. 24, 25 (1982)).

Here, the Montgomery County zoning ordinance created various overlay zones and established different developmental standards for each zone. MCC § 59-2.1.3(G). The zoning ordinance established the Clarksburg West Environmental Overlay Zone, and references the master plan as it relates to recommendations for natural resources and site plan review. The ordinance provides, “natural resources recommended for protection in the [master plan] must be regulated as environmentally sensitive areas,” § 4.9.6 (D)(5), and that site plans will be reviewed “to determine if the proposed development satisfies current

laws, regulations, and this Chapter, and substantially conforms with the recommendations of the applicable master plan and approved guidelines.” § 7.3.4(A)(4).

References to the master plan’s recommendations in the zoning ordinance consistently call for substantial conformance. Chapter 59, section 7.3.4.(E)(2)(g) specifies that the Planning Board must find that the proposed development “*substantially conforms* with the *recommendations* of the applicable master plan and any guidelines approved by the Planning Board that implement the applicable plan[.]” (emphasis added). We note that the operative words are “substantially conforms” and not “conforms” and “recommendation” and not “requirement.” Assuming arguendo, that this language does create a regulatory device, we need not decide that issue, because the statute plainly does not mandate strict conformance with a Master Plan.

Further, we have found no other language that imposes a six percent impervious limit on individual subwatersheds, as Appellants suggest. The Master Plan specifically acknowledges that “it is not possible to keep all the subwatersheds at this low level without unreasonably restricting development” and recommended that the Clarksburg West Environmental Overlay Zone have an “impervious surface area limit of six percent of the area within a *development application*[.]” which is consistent with the zoning ordinance. § 4.9.6.(D)(1) (emphasis added).

While we agree that the Master Plan recognized the potential impact of changes in imperviousness that might affect subwatersheds, there simply is no text in the Plan that requires individual limits for subwatersheds LSTM 110 or 111. As Appellees have noted, the subwatersheds west of I-270 are considered the most sensitive and are subject to the

more restrictive six percent cap, as compared to the East Overlay Zone, which limits coverage to 15 percent. The Master Plan recommends:

a six percent impervious surface cap for new development in the most sensitive subwatersheds to minimize risk as much as possible. While it is not possible to keep all the subwatersheds at this low level without unreasonably restricting development, this Plan provides a combination of imperviousness limits and required open space protection that would keep the overall watershed imperviousness level at slightly more than six percent, if all planned development occurs.

On this record, we hold the Board did not err in its analysis of the applicable law and we hold that its factual findings are supported by substantial evidence.

**JUDGMENT OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED; COSTS TO BE PAID BY  
APPELLANT.**