Circuit Court for Prince George's County
Case No. CAL20-14095

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1563

September Term, 2021

BRADLEY E. HEARD

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Nazarian,
Reed,
Albright,

JJ.

Opinion by Nazarian, J.

Filed: August 5, 2022

This appeal involves a challenge to the Maryland-National Capital Park and Planning Commission's ("Planning Commission")[1] approval of a request for reconsideration regarding Subdivision No. 4-05068, known as the "Commons at Addison Road Metro, Parcel A" ("Parcel A"), in Prince George's County. The Preliminary Plan for Parcel A was finalized on March 23, 2006.

In 2018, 6301 Central Avenue LLC ("Applicant") bought the parcel and, in 2019, filed a request for reconsideration of one of the Parcel A's conditions, Condition 17b ("Condition"), which prohibited any left-hand turns into and from Parcel A. The Applicant also requested a waiver of the time limit allowable for appeals, which had lapsed fourteen years before it purchased Parcel A. The Prince George's County Planning Board ("Planning Board" or "Board") approved the waiver and, in a separate meeting, approved the request for reconsideration of the Condition before eventually approving of the change to allow for left-hand turns into Parcel A.

Bradley Heard, a nearby resident, sought judicial review in the Circuit Court for Prince George's County, which affirmed the Planning Board's decision. On appeal to this Court, Mr. Heard raises three procedural challenges to the Planning Board's decision. We affirm.

[1] The Planning Commission was established in 1927 by statute. It is made up of the Planning Boards of Prince George's County and Montgomery County. Both the Prince George's County Planning Board and the Montgomery County Planning Board are the quasi-judicial branch of the Planning Commission in their respective counties.

I. BACKGROUND

A. Overview Of The Planning Board Rules And Procedures.

We start with an overview of the Planning Board's rules and procedures. The Planning Board is one half of the Planning Commission. The rules and procedure of the Planning Board are set out in the Prince George's County Planning Board Rules of Procedure ("Rules of Procedure").

Section 10 of the Rules of Procedure lays out a two-step plan for the modification of a previously approved Preliminary Plan of a subdivision. *First*, the Planning Board must hold a "noticed public hearing" and find that circumstances exist to justify reconsidering its earlier decision. Section 10(e) states that "[r]econsideration may only be granted if, in furtherance of substantial public interest, the Board finds that an error in reaching the original decision was caused by fraud, surprise, mistake, inadvertence or other good cause." Section 10(a) allows a party of record to request reconsideration of a decision within fourteen days of the Planning Board having sent notice of its decision to the parties. But if the reconsideration request comes after the allotted period, Section 12(a) allows the Board to suspend any of the rules with "the concurrence of four (4) members of the Board." So if four members of the Board agree, then the time limit on reconsideration requests can be suspended and the reconsideration may be heard. *Second*, if reconsideration is approved, the Board then holds a second hearing on the merits of the proposal to ensure the proposed modification meets the requirements of Prince George's County Subdivision Regulations consistent with its authority granted in Section 24-105 of the Prince George's County Code of Ordinances.

B. The Property And Proceedings.

The property at issue is a 1.93 acre parcel of land at the intersection of Central Avenue and Addison Road South, directly across the street from the Addison Road-Seat Pleasant Metro Station parking garage. In 2006, Parcel A's original owner, Dawn Limited Partnership, filed an application for a mixed-used development with 162 multifamily dwelling units and 24,500 square feet of commercial and retail space. The application was approved on February 9, 2006. A final written decision memorializing the approval was filed on March 23, 2006. The plan itself was subject to eighteen conditions, including Condition 17b, which prohibits left-hand turns into and out of the Commons at the access point on Addison Road.[2] On October 20, 2009, a final subdivision plat, which incorporated the subdivision plan for Parcel A, was recorded in the Prince George's County land records.

In 2018, the Applicant bought Parcel A, which at the time was still undeveloped. On December 18, 2019, the Applicant requested reconsideration of Condition 17b to allow for left-hand turns into the property from the access point on Addison Road. On January 9, 2020, the Planning Board held a public hearing to vote on whether to reconsider Condition 17b. Because the request for reconsideration was filed well after the fourteen-day period allowed by Section 10(a),[3] the Planning Board voted first on whether to suspend the

[2] The Department of Public Works and Transportation asked that the Planning Board prohibit left turns *from* the Commons but did not specify a bar on left turns *into* the property.

[3] The parties don't dispute that the fourteen-day period for reconsideration has long since passed—it was closer to fourteen *years* since the Preliminary Plan for the Subdivision was finalized in 2006.

fourteen-day rule and allow the reconsideration request to be heard. This was consistent with Section 12(a) of the Planning Board's Rules of Procedure, which states that "[t]he suspension of any Rule shall require the concurrence of four (4) members of the Board." The Planning Board voted to suspend the time constraint and proceeded to hear the request for reconsideration.

In support of the request for reconsideration, the Applicant submitted a letter that pointed out the Planning Board's error in relying on projected traffic conditions that never came to fruition. The Applicant contended that an error had occurred at the time the Preliminary Plan was approved because "the analysis that was done back then was based on development projects in the area that . . . never got built." The Applicant admitted that further evaluation of the intersection was necessary to determine if Condition 17b was created in error and requested that another hearing be set to address the proposed change. Mr. Heard submitted a letter opposing the request for reconsideration on grounds that it violated the County's application procedures. The Planning Board agreed with the Applicant that there may have been an error in the 2006 approval of the Preliminary Plan and granted the request for reconsideration. Consistent with Section 10(e) of its Rules of Procedure, the Planning Board resolved to conduct a hearing on the merits of the reconsideration at a later date.

On April 9, 2020, the Planning Board held a remote hearing on the merits of reconsidering Condition 17b. In support of reconsideration, the Applicant presented a traffic impact study (which found that the proposed changes to the left-hand turn restriction

were appropriate), correspondence from the Department of Permitting, Inspections, and Enforcement ("DPIE"), and an analysis from the Planning Department's transportation division recommending approval of the modification. Additional testimony from The Traffic Group, a traffic engineering and traffic planning firm, supported the argument that adding a left-hand turn into the site from Addison Road would not affect existing traffic. The Traffic Group submitted its study to the DPIE and the State Highway Administration. Both agencies reported that "they had no problems with the left turn into" the site.

In opposition, Mr. Heard argued that the Planning Board lacked authority to approve the request for reconsideration in the first place. Mr. Heard didn't address the merits of reconsidering Condition 17b, but emphasized the invalidity of the procedure the Planning Board followed at the January 9, 2020 meeting:

> [T]he problem is this reconsideration petition is coming 14 years and not 14 days after the decision, which is the timeframe that's required under the Planning Board's Rules of Procedure.
>
> So I don't have a quarrel with the substantive testimony raised and had it been raised within 14 days of the Planning Board's subdivision decision in 2006, it might be relevant for purposes of reconsideration.

Mr. Heard contended that "all [he] ha[d] to say regarding this subdivision matter" was that: (1) the Applicant was not a party of record to the original Preliminary Plan proceeding in 2006 and therefore did not have standing to request reconsideration of the decision; (2) the Planning Board's Rules of Procedure, which do not allow for a reconsideration to occur after fourteen days of a decision, are binding and cannot be waived; (3) reconsideration cannot include new studies or newly reconsidered facts that

were outside of the original record;[4] and (4) because a final subdivision plat for Parcel A was already filed in the Prince George's County land records, reconsideration must be in the form of a new resubdivision petition, not a request for reconsideration. Mr. Heard acknowledged that "there are a lot of things that have occurred over the past 14 years that are worthy of reconsideration[,] . . . but there's a legal barrier to [the] Planning Board considering a reconsideration 14 years after the Preliminary Plan has been decided."

Counsel for the Planning Board addressed Mr. Heard's challenges to the standing of the Applicant and the timeliness of the request for reconsideration. *First*, counsel acknowledged that the Applicant was not a party of record in 2006 when Parcel A was approved. They argued, however, that this was irrelevant because "the [A]pplicant is always referred to in all . . . application materials and all . . . approvals as the applicant, their heirs, successors and assigns." Therefore, "anytime an applicant comes to [the Planning Board] for any kind of development approval it's always the applicant, their heirs, successors and assigns that are subject to the conditions of the approval and that get the benefit of the approval as well."

Second, counsel for the Planning Board asserted that although the fourteen-day time limit is part of the Planning Board's Rules of Procedure, the Planning Board has the ability to suspend its rules "baked into [their] rules of procedure . . . ." Counsel argued, therefore, that the fourteen-day period was waived appropriately and the request for reconsideration was accepted appropriately at the January 9, 2020 proceedings.

[4] This is not at issue on appeal.

After considering the testimony of the Applicant, Mr. Heard, and its own counsel, the Planning Board voted unanimously to adopt the reasoning of its counsel and approve the Applicant's amendment to Condition 17b.

Mr. Heard filed a petition for judicial review in the Circuit Court for Prince George's County of the Planning Board's April 2020 decision to amend Condition 17b on July 30, 2020. Mr. Heard added a second challenge to his petition on November 13, 2020, opposing the Planning Board's January 9, 2020 decision to waive its rules and grant reconsideration.

The circuit court held a hearing on September 24, 2021 and affirmed the Planning Board's decision on November 9, 2021, deferring to the reasoning of the Planning Board's counsel regarding its ability to waive Section 10(a) and rule on the Applicant's request for reconsideration. This appeal followed.

II. DISCUSSION

On appeal, Mr. Heard challenges the Planning Board's approval of the December 18, 2019 request for reconsideration of the Planning Board's final decision on the Preliminary Plan of Subdivision No. 4-05068.[5] He argues that the Planning Board erred as

[5] Mr. Heard phrased his Question Presented as follows:

> Did the Planning Board err as a matter of law in granting Applicant's December 18, 2019, request for "reconsideration" of the Planning Board's March 23, 2006, final decision on Preliminary Plan of Subdivision No. 4-05068?"

The Planning Board phrased its Questions Presented as follows:

> I. Whether the Applicant, the current owner of the subject property, had standing to request reconsideration of the Planning Board's decision in PPS-4-05068.

a matter of law in granting the request for reconsideration because *first*, the Applicant lacked standing to bring the request for reconsideration; *second*, the reconsideration was not timely; and *third*, the 2006 preliminary subdivision plan was superseded by the 2009 recorded final plat of subdivision, which according to the Subdivision Regulations, could only be modified by the filing of a new Preliminary Plan. Mr. Heard argues that these issues barred the Planning Board from accepting the Applicant's waiver and approving the Applicant's request for reconsideration.

On appeal of a judicial review of an agency's actions we look through the circuit court rulings and review the decision and analysis of the Planning Board directly. *Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Props.*, 453 Md. 516, 532 (2017) (citations omitted). The "review of an administrative agency decision 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 on an erroneous conclusion of law." *Id.* (cleaned up). The record contains substantial evidence supporting the decision if "a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Id.* (cleaned up). The Court however,

> II. Whether the Applicant's reconsideration request was timely.
>
> III. Whether recordation of a final plat prohibited the Planning Board from granting reconsideration of a decision the Board made in approving Preliminary Plan of Subdivision 4-05068.

cannot "substitute its judgment" for that of the agency in reviewing findings of fact. *Id.* at 533. An agency's decision is presumed valid and given deference unless its decisions are based on errors of law. *Id.* But we owe less deference to an administrative agency's legal conclusions and may reverse where the legal conclusions are based on an erroneous interpretation or application of statutes, regulations, and ordinances relevant to the subject property. *Maryland-Nat'l Cap. Park & Plan. Comm'n v. Greater Baden-Aquasco Citizen's Ass'n*, 412 Md. 73, 84–85 (2009).

A. The Applicant Had Standing To Request Reconsideration Of The Planning Board's Final Decision Regarding Condition 17b.

Mr. Heard *first* raises various arguments contesting the standing of the Applicant to seek reconsideration of the Planning Board's final decision regarding Parcel A. Section 10(a) of the Planning Board's Rules of Procedure states that reconsideration may be requested by a "party of record," and Mr. Heard argues that a "party of record" must have been present at the time of the original proceeding in 2006. In Mr. Heard's view, because the Applicant purchased Parcel A from Dawn Limited Partnership in fee simple in 2018 (which was "well after the time that the 2006 decision had become final and unappealable, and well after the final plat of subdivision for the subject property had been recorded"), they are "subject to all matters of record," and therefore subject to the terms of the original proceeding, without opportunity for review or revision. Although he concedes that "an agency's interpretation of its own administrative rules is ordinarily entitled to some deference," he argues that the Planning Board's present interpretation of who constitutes a party of record is inconsistent with the statutory scheme. Mr. Heard cites the subdivision

regulations of the Prince George's County Code ("PGCC"),[6] which he claims make a relevant "distinction between a 'subdivider' who presents a Preliminary Plan application to the Planning Board . . . and a 'present owner' of land that has already been legally subdivided . . . ."

The Planning Board counters that no statute or ordinance governs the Planning Board's power of reconsideration, but agrees with Mr. Heard that the Applicant, as the new owner of Parcel A in fee simple, is bound by the terms and conditions of the 2006 decision. According to the Planning Board, the terms and conditions of the resolution include the right to request reconsideration of any Planning Board decision that imposes conditions on the development of the property. Additionally, the Planning Board disagrees with Mr. Heard's definition of a "party of record," pointing instead to the definition from the zoning regulations of Prince George's County, which describes "a person or party of record" to include "[t]he owner, applicant, and correspondent[.]" PGCC § 27-107.01(a)(179)(A).

An agency's decision is presumed valid and afforded deference unless the decision is based on an error of law. *Clarksville Residents*, 453 Md. at 532–33. An administrative agency's interpretation of its own statutes and definitions "should ordinarily be given considerable weight by reviewing courts." *Marzullo v. Kahl*, 366 Md. 158, 172 (2001)

[6] Mr. Heard doesn't refer to definitions of "subdivider" and "present owner," but cites instead to the PGCC § 24-119(d) and § 24-111(a), which use the terms respectively in two different contexts. Section 24-119(d) sets out the procedure by which a subdivider presents a Preliminary Plan to the Planning Board. Section 24-111(a) refers to a procedure that should be followed by a present owner who wishes to make changes to the plat.

(*citing Lussier v. Md. Racing Comm'n*, 343 Md. 681, 696–97 (1996); *McCullough v. Wittner*, 314 Md. 602, 612 (1989)). Here, the Planning Board adopted and applied the definition of "party of record" from the zoning regulations of Prince George's County. The Planning Board's interpretation is consistent with the way it defines the term throughout its code and that standard applies readily to the Applicant, which indisputably is a successor-in-interest to the original applicant. Mr. Heard hasn't cited any authority, and we haven't found any, for the proposition that only the original filer may seek reconsideration. It's true that a lot of time had passed and that the typical fourteen-day window in the Rules of Procedure doesn't allow much opportunity for title to transfer. But there is nothing in the law that precludes a reconsideration request by a successor entity, at least if, as we consider next, the application is timely or otherwise allowed.

B. The Reconsideration Request Was Not Timely, But The Planning Board Did Not Exceed Its Authority In Allowing The Request To Be Heard.

Second, Mr. Heard argues that the Applicant's reconsideration request was untimely and that the Planning Board lacked authority to waive its Rules of Procedure to hear the request. He contends that even if the current owner had standing to request reconsideration, the request was untimely because the Rules of Procedure state that a reconsideration request "may be made . . . within fourteen (14) calendar days after the date of notice of the final decision." The Planning Board agrees that the fourteen-day period had lapsed—how could it not?—but counters that it had the authority to waive the time limit under the Rules of Procedure.

An agency "'must scrupulously observe rules, regulations or procedures which it

has established. When it fails to do so, its action cannot stand, and courts will strike it down.'" *Maryland Nat'l Cap. Park & Plan. Comm'n v. Friendship Heights*, 57 Md. App. 69, 81 (1984) (*quoting United States v. Heffner*, 410 F.2d 809 (4th Cir. 1970)). This principle, known as the *Accardi* doctrine, is designed "to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures." *Heffner*, 420 F.2d at 812.

In *Friendship Heights*, the Montgomery County Planning Board ("MCPB") approved a contested road without holding a public hearing, depriving its community members of the right to appeal the Board's site plan approval. 57 Md. App. at 81. We held that the MCPB's rules could not be "waived, suspended, or disregarded . . . ." *Id.* at 80. Because the MCPB's Rules of Procedure required that it hold a public hearing prior to altering a site plan, its decision to approve the new road was unlawful and needed to be reconsidered under the standards set by its own rules. *Id.* at 81.

This case is not like *Friendship Heights*. Here, the Planning Board followed its rules, which allowed it to suspend time limits under specific circumstances. Section 12(a) of the Rules of Procedure states explicitly that a rule may be suspended with the concurrence of four members of the Board. At the January 9, 2020 hearing, the Planning Board abided by that rule and the four members of the board voted unanimously to waive Section 10(a), the rule limiting reconsideration of an approved plan to applications filed within fourteen days of a final decision. We agree that the Planning Board had the authority, under Section 12(a), to suspend its rules "at any time for any reason, provided

that enough commissioners agree," and, in this instance, to waive the timeliness requirement and allow the reconsideration of the subdivision.

C. The Recordation Of The Final Plat Did Not Prohibit The Planning Board From Granting Reconsideration Of The 2006 Decision Regarding The Commons.

Lastly, Mr. Heard contends that because a final plat had been recorded, the Planning Board was barred from granting reconsideration and could only consider a change to Condition 17b if the Applicant filed a new application for the Preliminary Plan—in other words, if it restarted the subdivision process. Mr. Heard contends that PGCC § 24-111(a) bars the Planning Board from reconsidering conditions that affect the relationship between the lot and the street:

> In any case where land has been legally subdivided according to the law in existence at the time of such subdivision and the present owner desires to change the relationships between a lot and the street shown on the record plat, or between one lot and another, action by the Planning Board shall be governed by the same procedures, rules, and regulations as for a new subdivision . . . .

The Planning Board responds that Condition 17b does not implicate the relationship between the lot and the street and that the change at issue here only affects how automobiles use the access point leading into and out of the parcel. For that reason, the Planning Board says, it could reconsider Condition 17b without a new application for Parcel A.

This question turns on the meaning of "the relationship between a lot and the street." In interpreting an agency's statute, we start with the plain language of the statute. *County Council of Prince George's Cnty. v. Dutcher*, 365 Md. 399, 416 (2001); *Oaks v. Connors*, 339 Md. 24, 35 (1995). "[W]henever possible, a statute should be read so that no word,

clause, sentence or phrase is rendered superfluous or nugatory." *Dutcher*, 365 Md. at 417 (cleaned up). In discerning legislative intent, "absurd results in the interpretive analysis of a statute are to be shunned." *City of Bowie v. Prince George's Cnty.*, 384 Md. 414, 426 (2002) (cleaned up). Where the words of the statute leave room for interpretation regarding its meaning, we also will "give some weight to the construction given the statute by the agency responsible for administering it." *Magan v. Med. Mut. Liab. Ins. Soc'y of Md.*, 331 Md. 535, 546 (1991) (citations omitted). The weight given to the agency's interpretation "varies according to a number of factors, including whether the interpretation has resulted in a contested adversarial proceeding or rule-making process, whether the interpretation has been publicly established, and the consistency and length of the administrative interpretation or practice." *Id.* (citation omitted). And when the interpretation was reached through a "sound reasoning process" and as a result of a contested adversarial proceeding, the agency's interpretation is given great weight and "will be accorded the persuasiveness due to a well-considered opinion on an expert body." *Baltimore Gas & Electric Co. v. Pub. Serv. Comm'n of Md.*, 305 Md. 145, 161–62 (1986) (citations omitted).

In *Baltimore Gas & Electric Co.*, the Public Service Commission ("PSC") interpreted a statute that allowed electric companies to raise rates by a reasonable level to recover costs caused by forced outages. *Id.* at 152. Shortly after the statute was adopted, the PSC held a series of public hearings to interpret the phrase "reasonable level." *Id.* at 159. The PSC summarized its interpretation and the procedure through which it would apply that interpretation in an official public order. *Id.* at 160. In later years, the PSC

applied its interpretation of the statute to applications submitted by BGE, finding that the company's practices compared favorably with the industry practices but ultimately concluding that BGE was ineligible for the rate increase for other reasons. *Id.* at 163-64. Although the data revealed objectively that BGE's practices were acceptable under the statute, we found that the PSC was entitled to adjust its initial interpretation of the statute and reach a different conclusion about the permissibility of a rate increase so long as the interpretation's evolution is an offshoot of the "orderly growth and development of legal principles . . . ." *Id.* at 165. We found that because the PSC had not departed from past practices of considering both BGE data and relevant industry developments, the later, contested decisions of the PSC were entitled to considerable weight. *Id.*

Here, Mr. Heard argues that PGCC § 24-111(a) requires the Applicant to submit an entirely new proposal for Parcel A. He bases his reading of the statute on his interpretation of what constitutes a "relationship between the lot and the street." He asserts that changing Condition 17b to allow left-hand turns into the parcel is the very definition of a change that affects the relationship between the lot and the street. Additionally, Mr. Heard contends that a final plat is just that, final, and can't be revisited once it is recorded.

In contrast, the Planning Board asserts that the final plat of a subdivision doesn't "merge[], supersede[], or extinguish[]" the preliminary plan of a subdivision upon recording. Instead, the final plat merely consists of "an archival quality drawing, prepared in black ink on transparent mylar (or the equivalent), incorporating the features of the approved preliminary plan and any conditions imposed by the Planning Board," *Dutcher*,

365 Md. at 424 (*citing* PGCC § 24-120(b)), and does not contain all the conditions imposed by the Planning Board's 2006 resolution. The Planning Board's interpretation means that the final plat is not as final as Mr. Heard contends. Additionally, the Planning Board argues that because rights run with the land, the Applicant has the right to ask for reconsideration because the original owner would have had that right as well. To decide otherwise, the Board asserts, would effectively "extinguish all of the Applicant's existing rights and obligations" in a manner contrary to the design of the Subdivision Regulations, which aims for the "orderly, planned, efficient, and economic development of the County." PGCC § 24-013(a).

Mr. Heard's interpretation may well be reasonable. But it's not Mr. Heard's opinion that carries the most weight here—it's the Planning Board's interpretation of the statute. As in *Baltimore Gas & Electric Co.,* the Planning Board held an adversarial hearing and considered testimony from both the Applicant and Mr. Heard before deciding that it to reconsider the plan for Parcel A. The Planning Board's interpretation is the one that will prevent the "absurd result" of abrogating the Applicant's rights as the owner of Parcel A. Even if the statute could reasonably be read to support Mr. Heard's position, the Planning Board's reading is logical and entitled to deference, especially since it reached that conclusion after conducting an appropriate proceeding. The Planning Board's approval of

the request to reconsider Condition 17b of the Applicant's subdivision was within its authority, and we affirm the judgment affirming it.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.