

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 722

September Term, 2015

IN THE MATTER OF SARA A.
SHOEMAKER, ET AL

v.

BOARD OF APPEALS FOR ANNE
ARUNDEL COUNTY

Eyler, Deborah S.,
Leahy,
Kenney, James. A., III
(Senior Judge, Specially Assigned),
JJ.

Opinion by Kenney, J.

Filed: February 22, 2017

Appellants, Sara A. Shoemaker and Laura Scolise (“Protestants”), seek judicial review of appellee Board of Appeals for Anne Arundel County’s (“the Board’s”) approval of appellee Elm Street Development’s (“Elm Street’s”) Sketch Plan,¹ Bonus Plan, and request for certain modifications to the requirements of the Odenton Town Center Master Plan (“Master Plan”) for development of approximately six acres of land (“Property”) in Odenton. The Protestants present one question for review, which we have modified slightly:

Did the Board legally err when it ruled that “Requirements” set forth in Chapter 3, Section 3.4 of the Master Plan regarding the preservation and retention of historic buildings are not binding on Elm Street?²

FACTUAL AND PROCEDURAL BACKGROUND

Elm Street sought Sketch Plan approval for forty-eight townhouses, three single family dwellings, and the preservation-in-place of a historic house located on the Property. The Property is located in the Village Sub-Area and the Odenton Historic District special designation area (“Historic District”) of the Odenton Town Center. The 2009 Master Plan envisions “a vital community where some live and work and others

¹ Section 17-1-101(80) of the Ann Arundel County Code, (2005) defines “Sketch plan” as “the application and materials submitted with an application for sketch plan review.” It is an early step in the development review process.

² The question, as presented in Protestants’ brief, asks:

Whether the Board erred legally when it ruled that “Requirements” set forth in Chapter 3, section 3.4 of the Odenton Town Center Master Plan that “The Odenton Historic District . . . shall be preserved and retained in accordance with the guidelines for retention of historic buildings outlined in Chapter 4, Section 9.1” are not binding on the Developer.

(Alteration in original).

come for the shopping, entertainment, cultural enhancement and transportation access . . . ” that will bring “the diverse population of the Odenton area together as a community.” The Village Sub-Area “is the historic center of the community” and the “[d]esign and historic preservation standards are provided to help ensure that new development will complement the traditional architecture, yards, and street character.”

The “Overview” of the Master Plan explains that,

[i]n addition to providing general planning guidance to be used in making land use, development review, zoning, and public improvements decisions, this plan has regulatory standing. As a result, the planning guidance throughout this plan is organized into two parts—Intent and Requirements. All text labeled ‘Requirements’ constitutes regulatory directives.

Property in the Odenton Town Center may be developed under either the “standard method” or the “optional method.” The standard method of development is reviewed under the zoning regulations “in place prior to adoption of the 2003 Odenton Town Center Master Plan;” the optional method is reviewed under the standards of the Master Plan. *See* Odenton Town Center Master Plan December 2009, Chapter 3, § 2.0 “Land Use Planning Controls” (Effective May 2, 2010) (“Master Plan, Chapter 3, § 2.0”). Chapter 6 of the Master Plan provides a Bonus Program rewarding a developer who “build[s] in accordance with the requirements of the Optional Method of Development.” The rewards, given to “property owners for creating high quality projects by exceeding the minimum development requirements of the [Master] Plan,” include “additional development capacity.” Master Plan, Chapter 6. The Bonus Program is triggered by incentive proffers from the developer that are “consistent with and shall further the intent

of the [Master Plan].” Master Plan, Chapter 6, § 3. The Bonus Program is administered by the Office of Planning and Zoning (“OPZ”). *Id.* Bonus Awards, subject to prescribed limitations, include flexibility in the land use mix, additional floor area ratio (“FAR”), additional building height, and reduction in open area requirements. Master Plan, Chapter 6, § 4. The Bonus Program is particularly useful to developers seeking to modify the requirements of the Master Plan, which provides:

[Developers] submitting development plans for projects in the OTC may [also] request modifications to the requirements of [the] Master Plan . . .

[And,] the Planning and Zoning Officer may approve an application for a modification to [the] Master Plan, upon finding that:

- a) practical difficulties or unnecessary hardship will result from strict application of this Master Plan;
- b) the purposes of this Master Plan will be served by an alternative proposal;
- c) the modification is not detrimental to the public health, safety, or welfare or injurious to other properties; and
- d) the modification does not have the effect of nullifying the intent and purpose of th[e] Master Plan.

[] An application for a modification may be denied if requested solely because compliance would add significantly to development costs or if requested solely for the convenience of the developer, such as when the land is not usable because of error or poor assumptions on the part of the developer.

[] In granting a modification, the Planning and Zoning Officer may require conditions to secure the objectives of the provision that has been modified.

Modifications may be granted to the following provisions of [the] Master Plan . . .

- a) Land Use Mix Classification Requirements;
- b) Road and Streetscape Design Standards;
- c) Height and FAR Development Regulations;
- d) Open Area Requirements . . . ;

- e) Design Standard Requirements related to Urban Form, Streetscape, Parking, Landscaping, Site Design, Architecture, Signage, and Historic Preservation.

[A developer] seeking [such] relief . . . [is] encouraged to explore the use of the optional Bonus Program, as described in Chapter 6, as a mechanism for achieving enhanced design aspects or community benefits in exchange for relief from the desired development requirements.

Master Plan, Chapter 5, § 1.3.

On July 17, 2013, Larry R. Tom, the Planning and Zoning Officer, granted conditional approval of Elm Street's Sketch Plan by letter to Terry L. Shuman of Bay Engineering, Inc. Regarding the Bonus Program application, Mr. Tom wrote:

The Bonus Program application proffers new pedestrian plazas, public art, park benches, connection to the train station, off-site hiker/biker improvements, and native plantings as incentive for approval to your request to modify the Land Use Mix requirement. This site is subject to the Residential Mix Land Use Category and must have at least two land uses with a residential use max of 80%. The Bonus Program application was evaluated and found to be consistent with the [Master Plan], the proposed proffers provide public access to uses and amenities, community benefit, compatibility and quality of design, pedestrian and vehicular access and circulation and environmental enhancement.

This office acknowledges that you and your team have been working closely with the Development Division and the Odenton Town Center Oversight Committee to ensure that the proposed development meets the intent of the [Master Plan] Historic Preservation guidelines. A significant reduction in density from what was initially proposed is being provided on the site, as a result of this collaborative effort. In-lieu of the initial proposals of 4-story stacked condominium and multi-family concepts throughout the entire site, the existing historic house located along North Patuxent Road will be retained and placed under a preservation easement. Additionally, three 2-story single family homes will be provided along North Patuxent Road and near the site entrance, in an effort to preserve the streetscape view along North Patuxent Road and near the site entrance, in an effort to preserve the streetscape view along North Patuxent Road and to be in scale with the existing homes along that road. The applicant will

continue to coordinate with the County Historic Resources Department to ensure that the proposed architectural design and scale of the townhomes and single family homes will be compatible with and compliment the existing adjacent development located in the Odenton Historic District. Due to the unique circumstances surrounding the site and given the current market, this office and the Oversight Committee agree that retail may not be the best use for this site and will allow for a reduction in retail with the provision of live/work units to be used as retail.

This office will allow for flexibility with the land use mix requirements and hereby approve the proposed 127,200 sq. ft. of total floor area of which 2,500 sq. ft. or 2% is office and 124,700 sq. ft. or 98% is residential with the applicant's provision of the following proffers:

- *New pedestrian Plazas – Applicant proposes to design and construct a pedestrian plaza at the terminus of Becknel Avenues (extended) for residents, transit commuters and nearby neighbors to enjoy.*
- *Art Installation – Applicant proposes to incorporate an art piece into the pedestrian plaza where it can be seen and appreciated by the public. Applicant should coordinate this effort with the citizens of Odenton and the Odenton Heritage Society to select a piece or artist that is representative of the area.*
- *Hardscapes – Applicant proposes to add park benches along the realigned pedestrian path that connects North Patuxent with the train station parking lot.*
- *Connection to Train Station – Applicant proposes to design and construct a vehicular access to the train station parking lot (if approved by MARC). The additional access point would improve the traffic flow into and out of the commuter lot.*
- *Off-Site Hiker/Biker Improvements – Applicant proposes to improve the hiker/biker connection along existing Becknel Avenue from Piney Orchard Parkway to the project site by adding bike lane striping, repairing crumbling asphalt and adding wayfinding signage.*
- *Native Plantings – Applicant proposes that the site landscaping will be comprised of at least 50% native species as listed in the County Landscape manual.*

The conditional approval was subject to Elm Street satisfying specified agency concerns or comments prior to Final Plan approval.

On the same date as the conditional Sketch Plan approval, Mr. Tom addressed Elm Street's modification request:

This letter is written in response to your request to modify the provisions of 1. Article 17-6-303(b)(5) to allow for the removal of two specimen trees, 2. Article 17-7-810 to allow for a minor modification to the [Master Plan] Figure 3-6: Roadways and Streetscape Design Standards, 3. Article 17-6-603 to allow for a reduced drive aisle width, 4. Article 17-6-303(b)(6) to allow for a reduction of the minimum conservation easement area and width requirement, and 5. Article 17-6-201 to allow for a reduction in landscape buffer width requirements.

* * *

Based on the information provided, this office finds that the request is consistent with the criteria noted in Article 17-2-108 of the Anne Arundel County Code. Your request will not have the effect of nullifying the intent and purpose of the General Development Plan, the Zoning Article, the Subdivision and Development Article, or other pertinent rules, regulations, or ordinances and will grant your request with the following comments and conditions to be addressed prior to Final Plan and/or Grading Permit approval:

1. Specimen Trees ST-1 & ST-2 may be replaced with native trees in a quantity equal to the value of the trees removed as determined by a certified member of the International Society of Arboriculture.
2. In lieu of reforestation on-site, a fee shall be paid to the forest conservation fund in the amount of the value of the trees based on their value as determined in #1 above.
3. A combination of #1 and #2 above are acceptable to Anne Arundel County and must be fully addressed prior to plat approval.

4. The plans shall be revised to show adequate separation between the 10' hiker/biker trail and the curb to remove impending signage impediment and ensure pedestrian and biker safety.
5. Reforestation shall be provided to the maximum extent practicable adjacent to the proposed easement along the railroad R/W and the easement shall be expanded to encompass this planted area outside of other easements. A reforestation agreement will be required prior to Plat approval.
6. DPW approval for proposed planting within the public ROW will be required prior to Final Plan approval.
7. Owner authorization shall be provided for proposed development at [MARC] Station access.
8. In addition to enhanced landscaping being provided, a 6' high non-degenerative board-on-board fence shall be provided along the property boundary between parcels 12 & 13.
9. A combination of architectural and project entry design shall be provided and shall meet side yard buffer requirements of Lot #3 outlined by three objectives noted in section V.J. pg 33 of the Landscape Manual.

The case was appealed to the Board, which held ten hearings between October 23, 2013, and February 27, 2014. The Board issued its forty-six page Memorandum of Opinion and Order on September 10, 2014, approving the Sketch Plan, the Bonus Award, and the requested modifications. In addressing Protestants' concerns regarding the proposed townhouses and the applicable "Historic District Preservation requirements," the Board wrote:

The Protestants argue that the sketch plan cannot be approved since it fails to comply with the Historic District Preservation provisions of the

[Master Plan] as set forth in Chapter 4, Section 9.0. We disagree. Mr. Tom testified that there are two types of provisions outlined in the [Master Plan] – Intent and Requirements. The “text labeled ‘Requirements’ constitutes regulatory directives.” *See*, [Master Plan], Chapter 1 § 1.1. In contrast, “Intent” sections are not binding. The Historic Preservation section of the [Master Plan] contains both intent and requirement provisions. The intent section for the Historic Preservation guidelines is on page 153 of the [Master Plan]. The requirements begin on page 154 of the [Master Plan]. These requirements envision “[l]arge new buildings” to be designed with a “series of masses or building elements compatible with the immediate neighborhood.” [Master Plan], Ch.4, § 9.1, 2) a) iii) (*emphasis added*). New construction shall have “scale and massing similar to existing contributing buildings.” *Id.* 2) a). We find that the townhouses and the single family houses proposed have compliant massing. The Petitioner’s Exhibit 12 is particularly compelling on this point as was the testimony by Steve Horne and Darian Beverungen. Additionally, the scale and massing of the single family dwellings proposed “relate to the scale and massing of buildings on their respective streets (*Id.* 2) a) i)) and the “[c]orner buildings complete the street form” as shown on Petitioner’s Exhibits 15, 11, 12, 10, and 7, and County’s Exhibit 3. The sketch plan also properly locates parking to the rear of the site and proposed buildings and minimizes the impact of parking on the streetscape. *Id.* 1) a).

We did not find compelling the Protestants’ argument that townhouses are not permitted by the [Master Plan] in this Sub-Area—the Village. The [Master Plan], Figure 3-2, Permitted Uses designates townhouses as “P” or permitted in the Village. The land use designations established by the Sub-Areas are “by right” zones. *See*, [Master Plan], §1.1. If townhomes were meant to be prohibited in the Village (or Historic District), the County Council could have codified this restriction in the [Master Plan], but, instead, the Council permitted townhouses.

The remaining Historic District Preservation requirements focus on architectural features, including scale, massing, facade articulation, roofs, wall systems, windows, shutters, etc. These requirements are not applicable to the Sketch Plan approval process; but, must be addressed by the Petitioner prior to Final Plan approval as they relate to the design and architecture of the townhomes. Further, restrictions on a minimum lot size, density or height were not imposed in the Historic District. As testified by Mr. Tom, Ms. Wilson, and Ms. Beverungen, the review of the project under the Historic Preservation provisions of the [Master Plan] is an ongoing process as it relates to the design of the townhouses and the single family

homes. As stated by Ms. Beverungen, information has been supplied (County's Exhibit 3) and discussions have occurred with Mr. Steve Horne, the Petitioner's representative, regarding architectural features of existing homes in the Historic District and what may be appropriate for the design of the townhomes and the single family homes. The features to be addressed include fenestration, window style, dormers, porch columns, roofs, etc.

As to the Bonus Award, the Board stated:

The Bonus Program, which is permitted under the optional method of development, provides a developer with an opportunity to receive incentives or flexibility in development if proffers are provided that meet requirements as outlined in Chapter 6 of the [Master Plan]. If proffers are deemed adequate under § 2.0 of the Bonus Program, the OPZ Officer is authorized to award incentives and flexibility. The Petitioner applied to change the residential land use mix from 80 percent residential/20 percent retail or office to 98 percent residential and 2 percent retail or office. The Petitioner sought this relief because they did not feel that the location is viable for an increased office/retail type of use. This request is permitted under Chapter 6, § 4.0 of the [Master Plan], namely, flexibility in land use mix requirements. The Petitioner made the following proffers to obtain the requested flexibility: 1) the construction of a pedestrian plaza at the end of Becknel Avenue near the railroad tracks; 2) the installation of an art piece by a local artist within the pedestrian plaza; 3) installation of park benches; 4) construction of a possible connection from Becknel Avenue to the MARC train station commuter parking lot; 5) improvements to the existing hiker/biker trail along Becknel Avenue, and 6) the installation of 50 percent native species plantings for all on-site landscaping. Five of the six proffers will be located offsite and will be available to the general public.

To obtain approval, there are seven criteria that must be evaluated under Chapter 6, § 2.0: 1) the application is consistent with the [Master Plan]; 2) the proposed proffers provide public access to uses and amenities; 3) community benefit; 4) consistency with the current County Capital Program; 5) compatibility and quality of design; 6) pedestrian and vehicular access and circulation; and 7) environmental enhancements and mitigation. Ms. Wilson and Mr. Tom testified at length regarding the proffers and their ability to meet the Bonus Program criteria. The new pedestrian plazas will benefit the pedestrians in the community that walk to the MARC station by offering public art and a place to sit. Benches along the trailways will also benefit the community. The OPZ encourages interconnectivity between

sites such as those proposed by the Petitioner. The proffers will improve traffic and pedestrian flow for the MARC station and commuter lot. The striping on the bike lanes and refurbishing of the existing trailways are also a community benefit. The proposed native plantings are a benefit to the environment. The location of the Live/Work residential units (the 2% office/mixed use) near the commuter lot will best serve the community by focusing the commercial component where it is most useful and convenient to the public at large. Finally, by clustering the townhomes, the density is reduced for the proposed single family homes along North Patuxent, which better maintains the historic character of North Patuxent. Therefore, the Board finds that the proffers made by the Petitioner are compatible with the Bonus Program requirements and should be granted to modify the residential/office mix use from 80/20 to 98/2.

As to the modification request, the Board stated:

To receive a modification to the [Master Plan] (or to the Code criteria for development under the optional method, as here), there are four requirements that must be met pursuant to Chapter 5, § 1.3: 1) practical difficulties or unnecessary hardship will result from strict application of the [Master Plan]; 2) the purposes of the [Master Plan] will be served by an alternative proposal; 3) the modification is not detrimental to the public health, safety or welfare, or injurious to other properties; and 4) the modification does not have the effect of nullifying the intent and purpose of the [Master Plan]. The Petitioner requested that the [Master Plan] guidelines for road and streetscape design be modified by reducing the width of the right of way for Becknel Avenue extension to 45 feet (from 54 feet), reducing the paved roadway to 22 feet wide (from 28 feet), allowing sidewalks to abut the curb and eliminate sidewalks along Becknel Avenue to allow improvements to be constructed within the right of way. The Petitioner also requested modifications to the County Code for the removal of the two “specimen” trees (Section 17-6-303 (b)(5)), reduction in the width of the internal drive aisles (Section 17-6-603), reduction of the perimeter landscape buffer (Section 17-6-201), and reduction of the forest conservation area minimum standards (17-6-303(b)(6)) along the western edge of the property adjacent to the proposed townhomes.

Regarding any practical difficulties or unnecessary hardship resulting from a strict application of the Master Plan, the Board wrote:

The subject property is unique. Development is constrained by the 66 foot BGE right of way dividing the southern third of the property from the remainder, the railroad tracks to the west, the MARC station railroad/commuter lot to the north and the inclusion of a historic home on the east side of the site. The OPZ is encouraging the Petitioner to cluster the development north of the power lines. We agree that the public's interest is best served by this cluster. The clustering provides a contiguous forest area in the southern portion of the site for recreation and a forest conservation easement, which is a benefit to the community, the environment and the forest dwelling species. The clustering would also reduce the impervious coverage from the development and reduce stormwater runoff. The clustering further benefits the public good by promoting walking to the MARC train station. These physical constraints (on three sides of the property) push the development toward Becknel Avenue. The need for clustering (due to the physical constraints) creates practical difficulties to the Petitioner in complying with the full width improvement of Becknel Avenue and an unwarranted hardship would result if strict application of the [Master Plan] was imposed. If the modifications to the Becknel right of way were not granted, the clustering would deteriorate and the area to the south of the BGE right of way could be targeted for development. Additionally, without the modification, the Petitioner's ability to improve the existing bike trail along Becknel Avenue (as set forth in the Bonus Program proffers) will be limited, further creating an unwarranted hardship or practical difficulty for the Petitioner. By permitting a contraction of the right of way improvements, the needed improvements (paving, sidewalk, bike path) will be supplied for the public and the modification will alleviate the undue hardship by permitting reasonable development north of the BGE line, east of the railroad and west of the historic structure. Similarly, the need to remove two specimen trees, reduce landscape buffers along Becknel Avenue, reduce interior drive aisle widths for the internal access roads and unit alleys is driven by the unique physical features of the site that compel the clustering. The requested modification for a reduced Forest Conservation Easement and minimum size is needed to provide the County and the citizens permanent assurance that the strip of land along the western edge of the property will be maintained as forest. There would be a practical difficulty in providing this assurance if the modification were denied.

* * *

The modifications will serve the purposes of the [Master Plan]. The [Master Plan] encourages, in part, transit-oriented development, smart

growth, protection of natural resources, quality land use, accessibility and community spaces (See, [Master Plan], page 9). Existing Becknel Avenue does not meet the standards of the [Master Plan]. The proposal to reduce the Becknel Avenue right of way width, pavement width, abut the sidewalks to the curb and not extend the sidewalks the full length of the right of way will enable the right of way to better serve the community with access and space. The right of way will be properly aligned with the existing roadway and will encourage accessibility, hiker/biker traffic and the orderly use of the MARC train station. The reduced right of way widths along Becknel and internal to the site will protect natural resources by decreasing impervious coverage. The clustering of the development will result in the removal of two specimen trees and reducing the landscape buffer from 15 feet to 5 feet along the Becknel frontage in front of the townhouses; however, the [Master Plan] goals will be enhanced by focusing the development to foster smart growth and quality development, and protect the natural resources—particularly the large forest zone to the south of the BGE right of way. Lastly, reduction of the forest conservation area minimum standards along the western edge of the property adjacent to the proposed townhomes will protect the natural resources—where there would be no protection. The Petitioner does not have to place the strip of forested area along the western property line into a Forest Conservation Easement, but the [Master Plan] will be well served by the permanent conservation of this area.

* * *

The modifications will not be detrimental to the public health, safety or welfare; or injurious to other properties. The reduction to the Becknel Avenue right of way width, pavement width, sidewalks abutting the curb and extension of the sidewalks the full length of the right of way will permit safe alignment with the existing Becknel Avenue improvements. The hiker/biker trail will be improved and straightened to provide safer, direct access to the commuter lot and MARC station. The sidewalk is not needed to be extended the full length of the right of way since no improvements can be proposed beyond its planned terminus—the railroad tracks prevent its further use. Indeed, it is safer to stop the sidewalk well short of the railroad right of way, rather than end it at the property line to discourage direct track access. The reduced right of way along Becknel Avenue and internal to the site will reduce impervious coverage—enhancing the environment. The removal of the two “specimen” trees and reduced perimeter landscape buffer along Becknel will be offset by the

preservation of the forest to the south of the BGE right of way, which provides an overwhelming public benefit. The reduction of the forest conservation area minimum standards along the western edge of the property adjacent to the proposed townhomes will provide enforceable preservation of this strip and enhances the public's health, safety, and welfare.

We conclude that the clustering of the improvements north of the BGE right of way, together with these modifications, will not harm other properties in the area. The highest impact from this development occurs along the Becknel Avenue frontage. The property to the north is predominately the MARC commuter lot (there are also several residential properties with the home oriented towards Odenton Road and North Patuxent Avenue). The use of the lot will be enhanced by the modifications nearest that border (through enhanced access) and the unimproved residential lots will not be harmed. The modification to the forest conservation area along the western border of the site will enhance the community at large and will not impact the railroad right of way it bounds. The removal of the two specimen trees and reduction in drive aisle/alley widths will be internal to the site and not be injurious to other properties.

On September 22, 2014, the Protestants filed a Petition for Judicial Review in the Circuit Court for Anne Arundel County. In response to that petition, Elm Street and Anne Arundel County filed their intent to participate. The matter came before that court for hearing on May 4, 2015. In its Opinion and Order of June 1, 2015, the circuit court affirmed the Board.

In reference to the issues before it, the court noted:

In short, the parties protesting the development in front of the Board of Appeals argued that the construction of townhomes is not consistent with the historic nature of the area where construction is to take place. Their argument essentially centers on the lack of townhomes in the Odenton area prior to this development. A corollary to this same argument is the fact that the Odenton Historical Society (hereinafter the "OHS") believes that the development in question must comply with Section 9.1 of the [Master Plan]. The OHS is of the belief that historic preservation trumps the land use requirements found in the [Master Plan].

* * *

The appealing party’s argument is that under the [Master Plan], both the “Intents” and “Requirements” sections are both binding. This Court disagrees. On the first page of the [Master Plan], the language states that all sections of the [Master Plan] are essentially broken down into two different sections, both “intents” and “requirements.” The language on page 3 of the [Master Plan] states very specifically that “[a]ll test labeled ‘Requirements’ constitutes regulatory directives.” [Master Plan] at 3. The Court believes that the implication of this statement is that text found under the heading of “Intents” does not constitute regulatory directives, but rather provides guidance of what the [Master Plan] is attempting to achieve in this historic area. Thus it is clear to this Court that language found under “Intents” is not the same as that found under the heading “Requirements.”

Protestants turn to Chapter 3 § 3.4 of the [Master Plan] for support of their argument that all language found in § 9.1 is indeed required. § 3.4 states the following under the “Requirement” heading:

- 1) The Odenton Historic District as designated in Figure 3-11, Historic District Functional Plan, shall be preserved and retained in accordance with the guidelines for retention of historic buildings outline[d] in Chapter 4, Section 9.1. Public and private improvements planned within the historic district and on specific designated historic resource sites are required to comply with the historic preservation Design Standards, also found in Chapter 4.

The Court believes that this statement was provided in Chapter 3 so as to reference the intents and requirements found in the [Master Plan] in a later chapter, namely Chapter 4. Further, a plain reading of the language above states that § 9.1 contains “guidelines” and not the more strict language of “regulatory directives,” found on page 3 of the [Master Plan]. The Court believes that because the template of “Intent” sections and “Requirement” sections are delineated and prevail throughout the entire [Master Plan], and because page 3 of the [Master Plan] states that “Requirements” constitute regulatory directives, the two delineated sections are not equivalent. Even more so, had the County intended that both the “Intent” sections and “Requirement” sections mean the same thing, there would be no need to delineate these sections throughout the entire [Master Plan]. In fact, delineating them at all even though the intent was that they are both

required, would serve no other function but to confuse those charged with interpreting the document. This is not the case here.

DISCUSSION

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) (quoting *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008)). In our review, we “determine whether the agency’s decision is in accordance with the law or whether it is arbitrary, illegal, and capricious.” *Prigel Family Creamery*, 206 Md. App. at 274 (quoting *Md. Dep’t of the Env’t v. Ives*, 136 Md. App. 581, 585 (2001)). The agency’s decision carries the presumption of validity, and we review it in the light most favorable to the agency. *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998). “[I]f the issue before the administrative body is ‘fairly debatable’, . . . [we] will not substitute [our] judgment for that of the administrative body.” *Tabassi v. Carroll Cty. Dep’t of Soc. Servs.*, 182 Md. App. 80, 86 (2008) (quoting *Eger v. Stone*, 253 Md. 533, 542 (1969)).

When the issue is one of law, “‘our review is expansive, and we may substitute our judgment for that of the agency if there are erroneous conclusions of law,’ employing a de novo standard of review.” *Rojas v. Bd. of Liquor License Comm’rs for Balt. City*, 230 Md. App. 472 (2016) (quoting *Matthews v. Hous. Auth. of Balt. City*, 216 Md. App. 572, 582 (2014)). As to “an appraisal and evaluation of the agency’s fact finding,” we apply the substantial evidence test, instead of making “an independent decision on the

evidence.” *Tomlinson v. BKL York LLC*, 219 Md. App. 606, 614 (2014). We “may not uphold the agency order unless it is sustainable on the agency’s findings and for the reasons stated by the agency.” *E. Outdoor Advert. Co. v. Mayor & City Council of Balt.*, 128 Md. App. 494, 516 (1999).

When the issue is one of ordinance or regulatory construction, our starting point is the plain language of the provision. *See 120 W. Fayette St., LLLP v. Mayor & City Council of Balt. City*, 413 Md. 309, 331 (2010) (“We construe local ordinances and charters under the same canons of statutory construction as we apply to statutes.”). If the regulatory language is “clear and unambiguous, we ordinarily ‘need not look beyond [its] provisions and our analysis ends.’” *Opert v. Criminal Injuries Comp. Bd.*, 403 Md. 587, 593 (2008) (alteration added) (quoting *Barbre v. Pope*, 402 Md. 157, 173 (2007)). Still, “[t]he meaning of the plainest language is controlled by the context in which it appears.” *Kaczorowski v. Mayor & City Council of Balt.*, 309 Md. 505, 514 (1987) (citation omitted) (internal quotation marks omitted). In other words, a statute “must be considered ‘in its entirety, in the context of the purpose underlying its enactment,’” and any interpretation must “seek to harmonize the statute as a whole.” *Potomac Valley Orthopaedic Assocs. v. Md. State Bd. of Physicians*, 417 Md. 622, 630 (2011) (citations omitted).

Contention of the Parties

The Protestants focus on the “Requirement” language of Chapter 3, Section 3.4 of the Master Plan that states the Historic District “shall be preserved and retained in

accordance with the guidelines for retention of historic buildings outlined in Chapter 4, Section 9.1” of the Master Plan, and more specifically, to the “bullet point” within the “Intent” portion of the guidelines “Preservation of a Cohesive Character in the Historic District,” which states that “[a]ll construction in the [Historic District] *shall be* compatible with the historic character and design of the area, and shall promote existing spatial and visual qualities of the area, including bulk, setbacks, height, scale, massing, facade, articulation, accessory structures, fences, and parking.” (Emphasis added). The use of “shall” in the Intent provision, they argue, makes the “Architectural Guidelines” of the “Requirements” portion mandatory and, most particularly, the provision that states, in part, “[n]ew construction . . . shall have scale and massing similar and compatible to existing contributing buildings.” They further point out that any more-intense development permitted under the optional method of development “shall conform to the requirements of [the Master Plan].” Master Plan, Chapter 4, Section 9.1. Therefore, Protestants contend that the Board’s determination that the “Intent” portion of Chapter 4, Section 9.1 was “aspirational” rather than a “mandatory obligation” was legal error.

The County contends that the Board did not legally err in ruling that “‘Requirements’ set forth in Chapter 3, § 3:4(1) of the . . . Master Plan that ‘[t]he [Historic District] . . . shall be preserved and retained in accordance with the guidelines for historic buildings outlined in Chapter 4, Section 9.1’ are not binding on the

Developer.” Citing Anne Arundel County Code, Section 17-2-104,³ the County asserts that the Master Plan is “a planning document” that is “administered and interpreted by the Planning and Zoning Officer [(Larry Tom)] and the Office of Planning and Zoning.” According to the County, Mr. Tom’s testimony regarding the difference under the Master Plan between the Intent provisions and the Requirements provisions is “entitled to great weight.”

The County rejects the Protestants’ reliance on the language in Chapter 3, Section 3.4(1) of the Master Plan that the Historic District “*shall* be preserved and retained in accordance with the guidelines for retention of historic buildings outlined in Chapter 4, Section 9.1.” (Emphasis added.) In its view, this sole and “brief mention” of historic preservation in Chapter 3 of the Master Plan, does not “transform[] the ‘Intent’ sections of § 9.1 [of Chapter 4] into binding ‘Requirements.’” It asserts that “[a] plain reading of the relevant sections indicates otherwise.” It also points out that Master Plan, Chapter 4, Guidelines for Retention of Historic Buildings, contains “specific directives for historical preservation, including four separate paragraphs of ‘Intent’ and over two pages of ‘Requirements.’” Characterizing “the one-paragraph mention of historic preservation

³ That provision provides:

§ 17-2-104. Administration and interpretation.

This article is administered and interpreted by the Planning and Zoning Officer and the Office of Planning and Zoning, except that the expedited review program established under § 17-2-111 may also be administered by the Director of Inspections and Permits and the Department of Inspections and Permits.

provisions in [Chapter 3] § 3.4(1) . . . [as] a ‘general’ provision,” the County argues that the more “specific provisions of § 9.1 would prevail.” And, if there is any ambiguity, it “should be resolved by deference to the legislative intent” expressed in the “distinct difference between the ‘Intent’ provisions and the ‘Requirements’ provisions, as demonstrated by the unambiguous language of [the Master Plan.]”

Elm Street rejects Protestants’ argument that, based on the word “shall,” the “Intent” provisions of Section 9.1 are “binding rather than aspirational.” It further contends that the provision requiring the Historic District to be “preserved” and “retained” in accordance with the “guidelines for retention of historic buildings outlined in [Master Plan,] Chapter 4, Section 9.1” is “applicable to existing structures only” and not to the construction of new dwellings. In other words, “[i]t is impossible to ‘preserve’ and ‘retain’ that which has not been built.”

Quoting Section 1.1 of the Master Plan,⁴ Elm Street argues that the language of Master Plan, Chapter 3, Section 3.4 “that requires compliance with the ‘Guidelines’ in Section 9.1 is nothing more than a reiteration that the ‘Guidelines’ contain both non-binding ‘Intent’ provisions and binding ‘Requirements.’” And, if the distinction between

⁴ Section 1.1 states, in relevant part,

In addition to providing general planning guidance to be used in making land use, development review, zoning, and public improvements decisions, this plan has regulatory standing. As a result, the planning guidance throughout this plan is organized into two parts — Intent and Requirements. All text labeled ‘Requirements’ constitutes regulatory directives.

non-binding “Intent” provisions and binding “Requirements” could be “obviated by a reference in Section 3.4 to follow the Section 9.1 Guidelines, there would [be] no need for any distinction at all to have been made.” Even if ambiguity could be assumed, the interpretation of Mr. Tom is entitled to “considerable weight,” and “the specific mandatory provisions [would] govern over the general intent provisions.” Elm Street also points out that of four “bullet points under ‘Intent’ in Section 9.1,” the first and third relate only to existing buildings, of which there is only one in the proposed development, and that building “will be preserved-in-place” without change. The second bullet point relates to historic buildings outside the Historic District.

The fourth, which is the only one that relates to new buildings, requires that “‘building bulk, setbacks, height, scale, massing, façade articulation, accessory structures, fences and parking’ shall be ‘compatible’ with the historic character and design of the area and ‘promote’ existing spatial and visual qualities of the area[.]” Mr. Tom testified that compatibility is determined by compliance with the “requirements” that are “specific in terms of scale [and] mass[ing]” and also in particular the “facade treatment, materials, and windows.” Therefore, according to Elm Street, there is “no practical difference” whether this provision is deemed mandatory because “the general statements in the Intent

section are made specific in the Requirements section[,]” and the “specific mandatory provisions . . . control over the general statement of intent.”⁵

Analysis

The only argument Protestants briefed on appeal centers on the language of Chapter 3, Section 3.4 of the Master Plan.⁶ Chapter 3, Section 3.4, like others, is divided

⁵ Elm Street also contends that “Protestants’ argument that the Section 9.1 ‘Intent’ provisions are binding ‘Requirements’ was not made before the Board and is not preserved for appeal.” Although the “shall” argument could have been explicated more clearly, we are persuaded that the statement to the effect that the County had failed in “its duty to protect the historic district” by ignoring the “mandatory” provisions of “Section nine of Chapter four” was sufficient to preserve the issue for review. Certainly, the Board understood the Protestants’ argument to be that the “sketch plan cannot be approved since it fails to comply with the Historic District Preservation provisions of the [Master Plan] as set forth in Chapter 4, Section 9.0.” It disagreed with that argument based on Chapter 1 § 1.1 of the Master Plan, which states that “‘Requirements’ constitute regulatory directives,” but the “Intent” provisions “are not binding.”

⁶ On June 9, 2016, Elm Street filed a Line in support of its position at oral argument that, due to an amendment to the Ann Arundel County Code eliminating Chapter 3, Section 3.4 of the Master Plan, Petitioners’ appeal was moot:

In accordance with the representations made during oral argument in the above referenced matter on behalf of the Appellee, Elm Street Development, attached is a copy of Bill No. 20-16 of the County Council of Anne Arundel County, Maryland, which became effective June 6, 2016, and eliminates Chapter 3 §3.4 of the [Master Plan]. As presented in Appellee’s oral argument, because this provision served as the basis of the Appellants’ position on appeal, the appeal is now moot.

On June 16, 2016, Protestants filed an Opposition to Elm Street Development’s Line. According to Protestants, Elm Street’s argument should not be considered because Bill No. 20-16 is not in the record, and even if it were, the Bill “allows some development applications, like the one at issue in this case, to proceed under the [Master Plan].”

(Continued...)

into two general sections—Intent and Requirements. The Requirements section, in relevant part, provides that “the Odenton Historic District . . . *shall* be preserved and retained in accordance with the guidelines for retention of historic buildings in Chapter 4, Section 9.1.” (Emphasis added).

Section 9 of Chapter 4 (“Design Standards”) is titled “Historic Preservation,” and Section 9.1 is titled “Guidelines for Retention of Historic Buildings.” It, too, is divided into an “Intent” section and a “Requirements” section. The Intent section provides, in relevant part:

- In the Odenton Town Center Historic District:
All structures within the historic area shown on Figure 3-11 that contribute to the general and architectural history of Odenton shall be retained. A contributing resource in the Odenton historic district is a building or structure that has historic, architectural, cultural, or archaeological significance. The Office of Planning and Zoning will make the determination as to whether an existing structure is a contributing resource based on that criterion.
- Outside the Historic District:
Individual historic buildings located outside the Odenton Town Center Historic District and identified in Figure 3-11, are encouraged to be retained. However, relocation of a contributing historic building in this area to a designated area within the historic area will be permitted. . . .
- Preservation/Reuse of Historic Buildings:

(...continued)

We shall assume, without deciding, that the issue was not moot. Bill No. 20-16, however, was not part of the record and was not considered by the Board in reaching its conclusion. Therefore, we have not considered it in our review of the record or factored it into our analysis.

In order to preserve the historic character of the existing historic buildings, all exterior changes, alterations, additions, and/or reconstruction of these buildings shall comply with the *following* applicable design requirements.

- Preservation of a Cohesive Character in the Historic District:
In order to preserve the character of a cohesive district, all new buildings as well as all changes, alterations, additions, and/or reconstruction to existing structures not designated as historic shall comply with the following requirements. All construction in the Odenton Town Center Historic District shall be compatible with the historic character and design of the area and shall promote existing spatial and visual qualities of the area, including building bulk, setbacks, height, scale, massing, façade articulation, accessory structures, fences, and parking. Construction shall comply with the following applicable design requirements in addition to those defined in other sections herein.

(Emphasis added).

The “following” Requirements provisions extend over two pages and, for the most part, relate to historic buildings and historical contributing buildings and the preservation of original architectural features such as porches, chimneys, and store fronts, along with historic materials such as brick, stone, and wood siding.

In terms of new construction, the Requirements section of Chapter 4, Section 9.1 provides:

2) *Architectural Guidelines*

- a) Scale and Massing: New construction, expansion of existing buildings, and all rehabilitation or alteration of existing buildings shall have scale and massing similar and compatible to existing contributing buildings.
 - i) On corner and through-lots, the building elevations (facades) facing the street shall relate to the scale and massing of buildings on their respective streets. Corner buildings shall complete the street form.

- ii) Additions to existing contributing historic buildings shall be subordinate to the main structure in mass, height, scale and detail.
 - iii) Large new buildings shall be designed as a series of masses or building elements compatible with the immediate neighborhood.
- b) Façade Articulation: New construction and alterations and additions to existing contributing buildings shall be compatible with the historic character and design of the contributing buildings within the historic area. Alterations which return an historic contributing building to its original design are encouraged.

Protestants assert legal error in the Board’s conclusion that the language in the Requirement section of Chapter 3, Section 3.4, which states that the Historical District “shall be preserved and retained in accordance with the guidelines for retention of historic buildings outlined in Chapter 4, Section 9.1,” was not binding on Elm Street. More specifically, they argue that the Intent section of Chapter 4, Section 9 has been transformed into a Requirement. It appears that their concern has centered on the approval of townhouses, which, in their view, do not preserve “a cohesive historic district,” as would single detached dwellings.⁷ When we look at the language in the context of the Master Plan as a whole, we are not persuaded.

Our search for legislative intent on the issue before us begins and is guided by Chapter 1, Section 1.1. The Master Plan has certain “regulatory standing,” and therefore, “the planning guidance throughout [the Master Plan] is organized into two parts—Intent and Requirements. All text labeled ‘Requirements’ constitutes regulatory directives.” The

⁷ Townhouses are a permitted use in the Village Sub-Area. *See* Master Plan, Figure 3-2.

Requirements provision of Chapter 3, Section 3.4, which applies to “both new development and improvements,” recognizes the Historic District as the area of the “most concentrated and cohesive area of historic resources within old Odenton.” And, it further states that the Historic District “shall be preserved and retained in accordance with the guidelines for retention of historic buildings outlined in Chapter 4, Section 9.1.” But, in short, when read in the context of the overall plan, we see nothing in the plain language of Chapter 3, Section 3.4 to suggest a legislative intent to override the two-part organizational structure of the Master Plan, under which only the provisions “labeled ‘Requirements’ constitute[] regulatory directives.”

The Requirements language of Section 3.4 that the Historic District “shall be preserved and retained in accordance with the guidelines for historic buildings outlined in Chapter 4, Section 9.1” and the Design Standards of Chapter 4, Section 9.1, indicates that it is through the retained historic structures and any new construction working together that the “character” of the Historic District will be preserved. Bullet point four of the Intent provisions of Chapter 4, Section 9 speaks directly to preserving “Cohesive Character in the Historic District.” We agree with Elm Street that even if the Intent provision of Chapter 3, Section 3.4 could be deemed mandatory, only the fourth bullet point is applicable to new construction. To the extent it could be considered a mandate, it merely requires that new construction “be compatible with the historic character and design” of the Historic District and “promote existing spatial and visual qualities of the area, including building bulk, setbacks, height, scale, massing, façade articulation,

accessory structures, fences, and parking.” The construction itself is to comply with the “applicable design requirements [in the Requirements section] in addition to those in other sections.”⁸

Compatibility does not equate to sameness; it is the existing together of different things in harmony with one another. *See Wahler v. Montgomery Cty. Council*, 249 Md. 62, 69 (1968) (concluding that a particular land use may “effect some change” and still be “compatible with the residential character of the neighborhood”). The testimony of Mr. Tom and Ms. Katherine Mahood (who was called as an expert of architectural history)⁹ support the Board’s conclusion that compatibility does not mean that townhouses, which are a permitted use, are per se incompatible. Guided by scale, massing, and architectural features, the development’s ultimate compatibility must be addressed, not at the Sketch Plan stage, but before Final Plan approval.

⁸ “Massing” is defined in the Master Plan as “the shape of the volume created by a building’s configuration.” “Façade” is defined as “the primary front, side, or rear walls of a building.”

⁹ Mr. Tom testified that “these particular requirements . . . provide us guidance . . . [and] [t]hey’re relatively specific in terms of such things as scale and massing, and also in particular the façade treatment.” In terms of “germane to any kind of historic preservation” he spoke of “the types of materials that’s being used . . . the roof forms, the amount of windows and how they’re articulated, the relationship of the windows to the solid mass of the wall.” Mr. Tom’s testimony was supported by Ms. Beverungen, a historic site planner with the Cultural Resources division of Anne Arundel County. The Board summarized Ms. Mahood’s rebuttal testimony, stating that “[c]ompatibility between old and new is achieved by applying basic architectural principals such as size, scale, setback, rhythm, height, roof shape, and proportion as well as the selection of appropriate materials and colors.”

We have reached our decision based on the plain language of the Master Plan as written and without deference to the Planning and Zoning Officer, Mr. Tom. But, had we concluded that there was ambiguity in the language, we would reject Protestants' argument that Mr. Tom's opinion as to a regulatory provision that he is to administer and interpret would be entitled to no deference. *See* Section 17-2-104 of the Ann Arundel County Code (2005) (This article is administered and interpreted by the Planning and Zoning Officer and the Office of Planning and Zoning.).

In sum, we perceive no legal error in the Board's decision and its approval of the Sketch Plan, the Bonus Programs Awards, and the requested modifications was "fairly debatable" and supported by the record.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY AFFIRMED. COSTS
TO BE PAID BY APPELLANTS.**