

Circuit Court for Prince George's County
Case No.: 15-16087

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2112

September Term, 2015

WENDALL J. DUNCAN, et al.

v.

CITY OF LAUREL, MARYLAND, et al.

Woodward, CJ
Arthur,
Reed,

JJ.

Opinion by Reed, J.

Filed: March 15, 2018

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

This appeal comes to us after the Circuit Court for Prince George’s County affirmed the decision of the City of Laurel Board of Appeals (the “Board”) in the case of Special Exception Application No. 841 (the “Special Exception Request”). Appellee Kimco Laurel, Inc. (“Kimco”) requested a special exception to construct a Wawa gas station complex on a pad site located in Laurel, Maryland. After conducting a hearing on the Special Exception Request, at which all interested parties were permitted to speak, the Board approved the request. The appellants filed a Petition for Judicial Review in the Circuit Court for Prince George’s County, where the decision was affirmed. They filed a timely appeal and present three questions for our review, which we have rephrased and combined:

1. Whether the Board’s decision that the proposed gas station complex meets the “necessity” requirements of Section 20-22.41 of the Laurel Unified Land Development Code (“ULDC”) is based upon substantial evidence in the record.
2. Whether the Board’s adoption of the Staff Report and admittance of the Site Plan renders its decision erroneous as a matter of law.

We answer the first question in the affirmative, the second in the negative, and affirm the decision of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellee, Kimco, filed a Special Exception Request on December 9, 2014, requesting approval to construct a Wawa gas station and convenience store (“gas station complex”). The property for the proposed use is a 2 acre C-G (Commercial General) zoned

parcel located in the northeast quadrant of the intersection of Maryland Route 198 (Fort Meade Road) and Maryland Route 197 (Laurel-Bowie Road). The proposed gas station complex was to consist of a 4,670 square foot convenience store, fifty accessory parking spaces, and six multi-product gasoline dispensers with twelve fueling positions under a lit canopy. The proposed hours of operation are twenty-four hours a day, seven days per week. Primary access to the property will be through the existing shopping center, Laurel Plaza, which provides ingress and egress access from Maryland Route 198 and Irving Street, a city road. The appellants in this case are a combination of nearby property owners, business owners, and businesses operating in Laurel, Maryland.¹

To support the Special Exception Request, Kimco submitted a Need Analysis examining evidence of the public need for a gas station complex at this location.² Among other things, the Need Analysis defines the trade area served by the proposed gas station complex and quantifies the demand for gasoline services within that trade area. The trade area is defined as the geographic area within a drive time of approximately ten minutes from the property, as estimated by Environmental Systems Research Institute (ESRI).³ The

¹ The appellants are: Wendall J. Duncan, Duncan Services, Inc., Iftikhar Ahmad, ABY, Inc., Shirley Levy, Isaac Allal, Laurel Gasoline, LLC, Sajjad Warraich, Impel Services, Inc., Richard J. Janicki, Majid Hussain, NEHMAT, LLC, Arshad Tahir, Bubaloo & Jamal Corporation, Sawattie Reddy, S. REDDY, Inc., Shahzad Raja, Taimur, Inc., Chaudhary I. Ahmad, Laurel Mart, Inc., Sam Khoury, Khoury's Laurel, LLC, Curtis Lance Accipiter, Accipiter's, Inc., Vijay Kumar Patel, and Vijayshree, Inc.

² The Need Analysis was prepared by Senior Managing Director Joe Cronyn of Valbridge Property Advisors, a real estate consulting and appraisal firm.

³ ESRI is a national demographic and economic research firm.

report stated that there were twenty-seven gas stations in the trade area, and there is an estimated unmet consumer demand within the trade area of approximately 6.53 million gallons per year. The Need Analysis further found that there was an insufficient number of modern gas station complexes within Laurel, since most existing stations are older and functionally obsolete. The report concludes that the proposed gas station complex would be “convenient and useful to the public” because it “meets the public’s need for a modern gas station and convenience store with easy access and a broad selection of consumer goods.”

The Department of Community Planning & Business Services submitted a Technical Staff Report (“Staff Report”) recommending approval of the Special Exception Request on the condition that Kimco is responsible for any improvements required by the Maryland State Highway Administration.⁴ The Staff Report provided that Kimco complied with the applicable provisions of the ULDC. The Board adopted the findings of fact and conclusions of law made in the Staff Report.

The Board held a public meeting regarding the Special Exception Request on March 26, 2015. Kimco presented testimony of Geoff Glazer, Vice President of Kimco, who provided additional details regarding the proposed use, and three expert witnesses: Michael

⁴ The Staff Report also contained the following attachments: Kimco’s Statement of Justification; Special Exception Plan; Need Analysis; Washington Suburban Sanitary Commission (WSSC) Development Proposal Review; Maryland State Highway Administration (SHA) letter; City of Laurel Department of Public Works comments; Prince George’s County Health Department memorandum; Laurel Rescue Squad memorandum; Laurel Department of Parks and Recreation memorandum; and Traffic Impact Analysis prepared by Wells & Associates Transportation Consultants.

Workosky, a traffic engineer who addressed generally the traffic patterns associated with the property; Matthew Jones, a civil engineer who testified that the proposed gas station complex will have no greater impact at this location than any other location in the C-G zone; and Mr. Cronyn who prepared the Need Analysis.

During his testimony, Mr. Cronyn confirmed that his findings were based upon statistics and estimates:

Mr. Parsons: Is it correct, Mr. Cronyn, that your report is based on statistics and your estimates and not based upon actual sales data in this trade area?

Mr. Cronyn: In my experience, trying to get actual sales numbers out of gasoline station owners, especially when you're bringing in new competition, is virtually impossible. I'd say really impossible. So therefore, I have not relied on trying to survey the competition in this matter. I've used estimates that I've found to be reliable over the years and using good Census and other government data and can better predict what's going to happen in this particular market.

He also stated that his estimates were conservative because his data reflects only the residential population of Laurel and does not include those who work in Laurel or travel through the city.

Several people testified in opposition to the Special Exception Request. Appellant Wendall J. Duncan⁵ testified that although the Need Analysis reports twenty-seven gas stations within the trade area, there are thirty-five by his count. Mr. Duncan explained that on the morning of the hearing, he drove around and found thirty-five gas stations within a

⁵ Mr. Duncan has over twenty years' experience in the gas station business, and has two gas stations in north Laurel. He did not testify as an expert.

10 minute drive of the property. He prepared a map showing the additional eight stations and concluded that the existing gas stations in the area could meet any unmet demands.

Appellant Iftikhar Ahmad⁶ testified that gasoline sales have been declining over the last three years and that there are “more than enough” gas stations available to serve the existing population in Laurel. Appellant Sajjad Warraich⁷ testified that his business is down “around 30 percent . . . compared to 2002,” and agreed that there is no need for the proposed gas station complex. Lastly, several residents from the community, including appellants Richard Janicki and Shirley Levy, expressed their concerns regarding traffic patterns and congestion.

At the conclusion of the hearing, the Board voted 5-0-1 (one member abstaining) to approve the Special Exception Request with the conditions stated in the Staff Report and adopted its findings of fact and conclusions of law. Ultimately, the Board found that the expert testimony of Mr. Cronyn was “more persuasive on the issue of need than the testimony of the individual gas station owners, none of whom appeared before the Board with any evidence as to the numbers they asserted.” The resolution reflecting the Board’s decision states that “proposed use meets the definition and specific standards set forth in Section 20-22.41 of the City of Laurel Unified Land Development Code for gas station complexes . . .”

⁶ Mr. Ahmad testified on behalf of himself and his corporation, ABY, Inc., as owner and operator of Laurel Park Shell gas station.

⁷ Mr. Warraich owns a gas station on Laurel-Bowie Road and has been doing business there for 15 years.

Appellants filed a Petition for Judicial Review of the Board’s decision with the Circuit Court for Prince George’s County, and argument was heard on October 23, 2015. The court affirmed the decision of the Board, finding that the decision was supported by substantial evidence. Appellants timely filed this appeal.

DISCUSSION

A. Parties’ Contentions

Appellants argue that the proposed gas station complex does not meet the “necessity” requirements of §20-22.41. Under the ULDC, Kimco must show that “[a] necessity exists for the proposed retail sale of automotive fuel for service to the population in the community, considering the present availability of gas stations in the community” and that “[t]he necessity exists for the proposed retail sale of automotive fuel due to an insufficient number of gas stations presently available to serve existing population concentrations in the City.” §20-22.41(8). Appellants assert that there are more than a sufficient number of gas stations presently available to serve the existing population. Appellants insist that Kimco’s analysis to demonstrate “need” was fundamentally flawed because there are eight gas stations missing from it.

Appellants rely on *Lucky Stores Inc. v. Board of Appeals*, 270 Md. 513, 312 A.2d 758 (1973). There, the Court affirmed denial of the special exception determining that there was no need for another gas station when there were 25 gas stations within a radius of 3.8 miles already existing. Appellants argue that there are over 30 gas stations within a 3 mile radius in the case *sub judice*.

Appellants also argue that the Board’s decision is erroneous as a matter of law. Appellants assert that the Board adopted an incorrect Staff Report and a Site Plan that does not comply with ULDC requirements. According to appellants, the Staff Report incorrectly states that the property of the proposed use does not abut residential property, and thus, “the Board’s findings were made without the required input from staff concerning whether the proposed use will ‘adversely affect the health, safety, or welfare of residents or workers in the area,’” as required by ULDC §20-21.1(a)(2). Arguing that the property does abut residential property, appellants contend that the Site Plan must comply with the screening requirements of ULDC §20-22.41(4) and driveway requirement of §20-22.41(7), which it currently does not.

Kimco and appellee City of Laurel argue that in consideration of the evidence presented, the Board appropriately found that the proposed use meets the necessity requirements of ULDC §20-22.41. Specifically, appellees compare their expert witness testimonies to the appellants’ lay opinion testimonies and conclude that there was sufficient evidence before the Board to approve the special exception request.

Appellees also assert that regardless of any inaccuracies in the Staff Report, the Board is required to incorporate the report into the application file. *See* ULDC §20-5.2(1). That incorporation, appellees note, does not relieve Kimco of meeting its burden of proof. *Id.* Because the Board based its decision upon “the totality of the evidence and testimony presented,” appellees conclude that the Board’s decision is not erroneous as a matter of law. Appellees also briefly argue that the proposed use property does not abut residential

property, and therefore the Staff Report is correct and the screening and driveway requirements do not apply.

B. Standard of Review

We have summarized the standard for appellate review of administrative agency decisions as follows:

“On appellate review of the decision of an administrative agency, this Court reviews the agency’s decision, not the circuit court’s decision. Our primary goal is to determine whether the agency’s decision is in accordance with the law or whether it is arbitrary, illegal, and capricious. In other words, we apply a limited standard of review and will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists.” *Long Green Valley Ass’n v. Prigel Family Creamery*, 206 Md. App. 264, 273-74 (2012).

In general, “[a] court’s role is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *United Parcel Serv., Inc. v. People’s Counsel*, 336 Md. 569, 577, 650 A.2d 226, 230 (1994). In this context, substantial evidence, has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119 (1978).

Furthermore, courts must review an agency’s decision in a light most favorable to the agency, since “decisions of administrative agencies are prima facie correct,” and “carry with them the presumption of validity.” *Id.* at 513 (quoting *Hoyt v. Police Comm’r*, 279 Md. 74, 88-89, 367 A.2d 924, 932 (1977)).

C. Analysis

The appellants' main argument is that the Board's decision is not based upon substantial evidence in the record, and instead it is arbitrary, capricious, and unreasonable. We do not agree. We hold that there is substantial evidence in the record to support the Board's decision.

As noted above, ULDC §20-22.41(a)(8) requires the Board to find by a preponderance of the evidence that:

- a. A necessity exists for the proposed retail sale of automotive fuel for service to the population in the community, considering the present availability of gas stations in the community, and
- b. The necessity exists for the proposed retail sale of automotive fuel due to an insufficient number of gas stations presently available to serve existing population concentrations in the City.

The Board found that such necessity exists here by relying on the Need Analysis prepared by Mr. Cronyn, reporting that there are twenty-seven gas stations within the trade area and that there is an unmet consumer demand for gasoline services. Appellants argue that the Need Analysis is incorrect because there are in fact thirty-five gas stations in the trade area, more than a sufficient number to handle any "unmet need."

Mr. Cronyn testified that he based his findings on statistics and estimates gathered from a national research firm, census information, and other government data. He also explained that he defined the trade area as "the geographic area within a drive time of approximately 10 minutes" from the property using a standard drive time considered reasonable for consumers seeking convenience services. Appellants counter this expert

testimony with the testimony of Mr. Duncan, a competing gas station owner. Mr. Duncan testified that he too drove the trade area, but found an additional eight gas stations not reported in the Need Analysis. There are many factors which could have contributed to Mr. Cronyn and Mr. Duncan both driving the trade area and reporting different figures, *i.e.* weather, traffic, speed. However, there is no need to address them. It was completely reasonable for the Board to accredit more weight to the testimony and analytical report of a professional supported by facts and figures.

Appellants rely on *Lucky Stores Inc. v. Board of Appeals*, a Court of Appeals decision also involving a special exception for a gas station, to conclude that there is no need for another gas station. *Lucky Stores Inc. v. Board of Appeals*, 270 Md. 513, 312 A.2d 758 (1973). In *Lucky Stores*, the Board of Appeals of Montgomery County denied the special exception request because it found, “[u]pon consideration of the testimony and evidence of record, the Board cannot find that the petitioner has demonstrated a need for the proposed automobile filling station as required by Section 111-39.f. (now 59-124(f)) of the Zoning Ordinance inasmuch as there are already existing sufficient automobile filling stations equipped to serve the needs of vehicles traveling in each direction on Rockville.”) *Id.* at 521-22.

The Court found that there was substantial evidence in the record to support the denial and summarized that the opposition proved through witness and exhibits that there was no need for a new gas station. *Id.* at 536. Appellants argue that the evidence presented in *Lucky Stores*—an “extraordinary number” of gas stations, a downward trend in gasoline sales, and sufficient capacity by the existing stations to meet the demand—is precisely what

they presented to the Board here. However, unlike this case, the applicant in *Lucky Stores* offered “no studies or reports, possibly showing the number of residents in the marketing area, the average number of automobiles per household, the average number of gallons of gasoline consumed per vehicle in Maryland . . . in order to establish a possible need for an additional gasoline filling station.” *Id.* at 537. Kimco submitted all of this evidence and more through its Need Analysis and Mr. Cronyn’s testimony.⁸ Appellants, on the other hand, provided little evidence to support testimony presented at the hearing.

We hold that there is substantial evidence in the record to support the Board’s conclusion that the proposed gas station complex meets the necessity requirements of ULDC §20-22.41.

Appellants also argue that the Board’s decision is erroneous as a matter of law for two reasons: (1) it adopts a Staff Report that indicates the proposed use property does not adjoin residential properties; and (2) the Site Plan does not comply with the requirements of ULDC §20-22.41 concerning screening and access driveway width. Appellants contend that because the Staff Report states that the proposed gas station does not abut residential properties there was no “required” determination of whether the proposed use will “adversely affect the health, safety, or welfare of residents or workers in the area.” *See* ULDC §20-21.1(a)(2).

⁸ The Need Analysis reports that there are approximately 42,000 households in the trade area, the average household income is over \$93,000 a year, the average number of vehicles per household is 1.8 vehicles, and 87% of workers in the trade area drive or carpool to work (half of which have more than a thirty minute commute).

Without deciding whether the property abuts residential properties, we hold that the possible inaccuracy in the Staff Report does not render the Board’s decision erroneous as a matter of law. The Board is required by statute to incorporate the report from the Planning Commission in its application file. Section 20-5.2(1) provides:

For assistance in reaching decisions, relative to variances or special exceptions, **the Board may request** technical service, advice, data, or factual evidence from the Planning Commission and the City government or from other sources. The Board may at any time during the proceedings call any witness. The Planning Commission or its technical staff shall submit to the Board at least five (5) days prior to the date set for public hearing a report reviewing any petition for special exception, in accordance with a format and other requirements established by agreement of the Planning Commission and the Board of Appeals. The Board, at the request of the applicant, may waive the requirement herein that the report referred to herein be submitted at least five (5) days prior to the Board’s public hearing. **The Board shall incorporate** such report in the application file, and the report shall thenceforth be considered a part of the record of the application. **Nothing herein contained shall be construed to affect the applicant’s burden of proof and persuasion as provided for in this article.**

ULDC §20-5.2(1) (emphasis added). Accordingly, the Board was required to incorporate the Staff Report in the application file, regardless of its findings. Incorporating the report did not affect Kimco’s burden of proof. In its Resolution, the Board stated that it found the applicant met its burden of proof by considering “the totality of the evidence and testimony presented.” The Board also found “from a preponderance of the evidence on record,” that the proposed use “will not adversely affect the health, safety, or welfare of residents or workers in the area.”

Likewise, we hold that the Board's admittance of the Site Plan does not render its decision erroneous as a matter of law. There is substantial testimony in the record explaining that Kimco would be working with the State Highway Administration to narrow the width of the driveway onto Irving Street and make any other required improvements. In fact, the Board's approval of the Special Exception Request is conditioned on Kimco's compliance.

CONCLUSION

In reviewing the decision of an administrative agency, the scope of the court's review is narrow. *See United Parcel Service*, 336 Md. at 567. Taking into consideration all of the evidence in the record, we hold that there is substantial evidence to support the Board's findings. Therefore, we affirm the decision of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**