Circuit Court for Anne Arundel County
Case No. C-02-CV-23-001034

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2408

September Term, 2023

IN THE MATTER OF
CRAB CREEK CONSERVANCY, INC.,
ET AL.

Nazarian,
Tang,
Kehoe, S.,
JJ.

Opinion by Tang, J.

Filed: April 24, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal involves the Forest Conservation Act under Chapter 21.71 of the Code of the City of Annapolis (the "City Code") and exemptions from its requirements.

Appellees Katherine Properties, Inc.; Katherine Properties, LLC; AIC Forest, LLC; AIC Forest II, LLC; Campus Drive, LLC; EAJ Forest Drive, LLC; 1623 Forest, LLC; and The Village at Providence Point, Inc. (collectively, the "Developer") filed with the City's Department of Planning and Zoning an application for approval of a preliminary forest conservation plan (FCP2017-006), a subdivision application (SUB2017-004), and a planned development application (PD2019-001) for the development of a mixed-use retirement community called The Village of Providence Point (the "Village") at the intersection of Forest Drive and Spa Road in the City of Annapolis. In connection with the development, the Developer proposes to clear about twenty-seven acres of contiguous forest on the development site and sixty-four significant trees scattered throughout this forest.

The Department of Planning and Zoning recommended conditional approval of the development plan in a staff report. After a series of hearings, the City's Planning Commission issued an opinion and order approving the development applications with conditions.

Crab Creek Conservancy, Inc. ("Crab Creek") and others petitioned for judicial review in the Circuit Court for Anne Arundel County (Case No. C-02-CV-22-000730). After a hearing, the court vacated and remanded the portion of the Planning Commission's opinion and order relating to forest conservation. Thereafter, the Planning Commission

issued a supplemental opinion and order. It reaffirmed its approval of the development applications but clarified its opinion concerning the proposed disturbance to the contiguous forest and the removal of sixty-four significant trees.

Appellants Crab Creek and most of the same individuals who petitioned earlier (collectively, the "Citizens") petitioned for judicial review, challenging the Planning Commission's supplemental opinion and order, which the court ultimately affirmed (Case No. C-02-CV-23-001034). They then appealed to this Court.[1] The Citizens present five issues that we have consolidated into two:[2]

[1] The individuals who petitioned for judicial review for the second time in Case No. C-02-CV-23-001034 were appellants Forrest Mays, Mary Reese, Valerie Casasanto, Christine Dunham, Hans-Michael Hurdle, and Cynthia Cootauco. After filing their principal brief in this Court, Mr. Hurdle and Ms. Cootauco voluntarily dismissed their individual appeal.

[2] The issues presented by the Citizens in their brief are:

1. Whether the Commission or [the Department] had the authority to approve the [Developer's] Priority Forest Variance.
2. Whether the Commission erred legally when it concluded that Priority Forest Variances do not require "approval pursuant to Code § 21.71.170" and instead, "the method of review for determining whether proposed disturbance to priority forest and priority areas 'qualified for a variance' is left to the discretion of the Department."
3. Assuming arguendo that [the Department] had the authority to approve the [Developer's] Priority Forest Variance, whether the [Department] in fact approved the Priority Forest Variance and adequately articulated the basis of its decision.
4. Whether the Commission erred legally when it concluded that Priority Forest and Significant Trees in and of themselves can make the Subject Property unique without any comparison to any other property.

1. Did the Planning Commission err in approving the Developer's proposed disturbance of the contiguous forest on the development site?
2. Did the Planning Commission err in approving the Developer's request to remove sixty-four significant trees from the development site?

For reasons explained below, we affirm the Planning Commission's decisions.

I.

OVERVIEW OF RELEVANT LAW

Before summarizing the factual and procedural history leading to this appeal, it will be helpful to provide an overview of the Maryland Forest Conservation Act and its implementation under Chapter 21.71 of the City Code.

A.

Maryland Forest Conservation Act

The Forest Conservation Act, which became effective on July 1, 1991, is codified in the Maryland Code (2023 Repl. Vol., 2024 Supp.), Natural Resources Article ("NR") § 5-1601, *et seq*. *See* 1991 Md. Laws, Ch. 255. The Act's primary objective "is to minimize the loss of forest land in connection with development activity and ensure that priority areas for forest retention and forest planning are identified and protected prior to development." *Chesapeake Bay Found., Inc. v. CREG Westport I, LLC*, 481 Md. 325, 329

5. Whether the Commission erred legally when it concluded that the [Developer] would experience an unwarranted hardship that is not self-created when the [Developer] could have located the proposed development on the unforested portions of the Subject Property.

(2022). The Act is administered by the Maryland Department of Natural Resources ("DNR") but is implemented primarily by local jurisdictions. *Id.*

i. Forest Stand Delineation and Forest Conservation Plan

To achieve its purpose, the Act "established standards for local jurisdictions with planning and zoning authority to enforce during development." *Id.* Under the Act, "a person making application for subdivision or grading or sediment control permits on areas greater than 40,000 square feet must submit a forest stand delineation" to be "used during the preliminary review process to determine the most suitable and practical areas for forest conservation." NR § 5-1604(a)–(b)(1).

A forest stand delineation is "the methodology for evaluating existing vegetation on a site proposed for development, taking into account the environmental elements that shape or influence the structure or makeup of a plant community." NR § 5-1601(p). "It is submitted at the initial stages of a subdivision or site plan approval, or before a sediment control application is submitted." *CREG*, 481 Md. at 329–30. "When a forest stand delineation is completed and approved, the information that it provides can then be used to prepare the forest conservation plan." *Id.* at 330; *see* NR § 5-1605(a).

"A forest conservation plan indicates the limits of disturbance for the proposed project and how the existing forested and sensitive areas will be protected during and after development." *CREG*, 481 Md. at 330. The Act authorizes DNR, through the adoption of regulations, or the local authority to impose "[a]ny other requirement" for the contents of the plan. NR § 5-1605(c)(10). Both the forest stand delineation and forest conservation

plan must be prepared by a Maryland licensed forester, a Maryland licensed landscape architect, or other qualified professional. NR §§ 5-1604(a), 5-1605(b).

ii. Retention of Resources

The Act prioritizes the retention and protection of certain trees, shrubs, plants, and specific areas that must be left in an undisturbed condition, unless the applicant has demonstrated, to the satisfaction of the State or the local authority, that reasonable efforts have been made to protect them and that the plan cannot be reasonably altered. NR § 5-1607(c)(1) provides:

> (c)(1) The following trees, shrubs, plants, and specific areas shall be considered priority for retention and protection, and they shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the State or local authority, that reasonable efforts have been made to protect them and the plan cannot reasonably be altered:
>
> (i) Trees, shrubs, and plants located in sensitive areas including 100-year floodplains, intermittent and perennial streams and their buffers, coastal bays and their buffers, steep slopes, and critical habitats; and
>
> (ii) *Contiguous forest* that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site.

NR § 5-1607(c)(1) (2012 Repl. Vol.) (emphasis added).[3] For convenience, we will refer to these types of trees, shrubs, plants, and specific areas as "C.1 Resources."

The Act also prioritizes the retention and protection of other types of trees, shrubs, plants, and specific areas that must be left in an undisturbed condition, unless the applicant

[3] We cite the version of NR § 5-1607(c)(1) in effect at the time the application was pending. Subsection (c)(1) was amended in 2024 to include other types of trees, shrubs, plants, and specific areas that are not at issue in this appeal.

has demonstrated, to the satisfaction of the State or the local authority, that the applicant qualifies for a variance under NR § 5-1611. NR § 5-1607(c)(2) provides:

> (c)(2) The following trees, shrubs, plants, and specific areas shall be considered priority for retention and protection, and they shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the State or local authority, that the applicant qualifies for a variance under § 5-1611 of this subtitle:
>
> (i) Trees, shrubs, or plants identified on the list of rare, threatened, and endangered species of the U.S. Fish and Wildlife Service or [DNR];
>
> (ii) Trees that are part of a historic site or associated with a historic structure or designated by [DNR] or local authority as a national, State, or local Champion Tree; and
>
> (iii) Trees having a diameter measured at 4.5 feet above the ground of:
>
> 1. 30 inches; or
>
> 2. 75% of the diameter, measured at 4.5 feet above the ground, of the current State Champion Tree of that species as designated by [DNR].

Again, for convenience, we will refer to these types of trees, shrubs, plants, and specific areas as "C.2 Resources."

iii. Variance Policy and Procedure

The Act "authorizes DNR and local authorities to create a variance process—which enables an applicant to avoid the strict application of a requirement in the Act—in certain circumstances where the applicant can demonstrate that the applicant can satisfy certain criteria." *CREG*, 481 Md. at 340. NR § 5-1611 provides:

> (a) In the preparation of the State or local forest conservation programs, the State and local authorities shall provide for the granting of variances to the requirements of this subtitle, where owing to special features of a site or other circumstances, implementation of this subtitle would result in unwarranted hardship to an applicant.
>
> (b) Variance procedures adopted under this section shall:

> (1) Be designed in a manner consistent with the spirit and intent of this subtitle; and
>
> (2) Assure that the granting of a variance will not adversely affect water quality.

NR § 5-1611.[4]

For a development site with significant forest cover, a forest conservation plan, as well as any variance or waiver granted by the approving agency from the strict application of the provisions of the Act or local forest conservation program, may ultimately dictate the scope, location, and placement of the proposed building footprint and structures on the site. *CREG*, 481 Md. at 330.

B.

COMAR and Model Ordinance

To facilitate the implementation of the Act by local governments, DNR adopted regulations under the Code of Maryland Regulations ("COMAR") 08.19.01–.06. *CREG*, 481 Md. at 339; *see* NR § 5-1609(a). Units of government with planning and zoning authority were directed to formally adopt a forest conservation program "consistent with the intent, requirements, and standards" of the Act. *CREG*, 481 Md. at 349 (quoting NR § 5-1603(a)(1)). Local forest conservation programs, which had to be approved by DNR, had to meet or be more stringent than the requirements and standards of the Act. *CREG*, 481 Md. at 340; NR § 5-1603(c)(1).

[4] The Act does not define "variance" or "unwarranted hardship."

DNR promulgated a model ordinance, the purpose of which is to "assist and guide in the development" of a local forest conservation program. COMAR 08.19.03.01 (2019); *see also* 18 Md. Reg. 2540 (Nov. 15, 1991). DNR contemplated that "[s]ome local authorities may be able to adopt this Ordinance with only minor changes appropriate to each jurisdiction." *Id.*

The model ordinance outlines the criteria for a forest stand delineation. *See* COMAR 08.19.03.01, Article V. It also sets forth the requirements of a forest conservation plan.[5] *See* COMAR 08.19.03.01, Article VI.

i. Requirements of a Forest Conservation Plan

The model ordinance requires an applicant to prepare a preliminary forest conservation plan and a final forest conservation plan. *See* COMAR 08.19.03.01, Article VI, §§ 6.2 and 6.3. The preliminary forest conservation plan is reviewed concurrently with the review of the preliminary site plan, *see id.* § 6.2(C), and the final forest conservation plan is reviewed concurrently with the review of the final subdivision or project plan, grading permit application, or sediment control application associated with the project, *see id.* § 6.3(D).

[5] The State Forest Conservation Technical Manual provides recommendations, references, and guidance on the preparation of forest stand delineations and forest conservation plans. COMAR 08.19.01.02.B.

In connection with preparing a forest conservation plan, COMAR provides that "[i]f existing forest on the site subject to a forest conservation plan cannot be retained, *the applicant shall demonstrate to the satisfaction of the [local] Department*:"[6]

> (1) How techniques for forest retention have been exhausted;
>
> (2) Why the priority forests and priority areas specified in [NR] § 5-1604*(c)(1)*[7] [C.1 Resources, above] cannot be left in an undisturbed condition:
>
> > (a) If priority forests and priority areas cannot be left undisturbed, how the sequence for afforestation or reforestation will be followed in compliance with [NR] § 5-1607[;]
> >
> > (b) Where on the site in priority areas afforestation or reforestation will occur in compliance with [NR] § 5-1607[;] and
>
> (3) How the disturbance to the priority forests and priority areas specified in § 5-1607*(c)(2)* [C.2 Resources, above] *qualifies for a variance*.

COMAR 08.19.03.01, Article VI, § 6.1(B) (emphasis added).

The preliminary forest conservation plan must include "an explanation of how" the above provisions, among others, "have been met." COMAR 08.19.03.01, Article VI, § 6.2(B)(5). COMAR further provides that the final forest conservation plan must include these "substantive elements," among others. COMAR 08.19.03.01, Article VI, § 6.3(B)(6).

ii. Retention of Resources

Consistent with the Act, the model ordinance prioritizes the retention and protection of certain trees, shrubs, plants, and specific areas to be left in an undisturbed condition,

[6] Under the model ordinance, "Department" means the Department charged with implementing the local forest conservation program. COMAR 08.19.03.01, Article II, § 2.14.

[7] This subsection refers to NR § 5-160**4**. Subsection (c)(1) does not exist under NR § 5-160**4**, but it does under NR § 5-160**7**. This appears to be a typographical error.

unless the applicant has demonstrated, to the satisfaction of the local authority, that reasonable efforts have been made to protect them and that the plan cannot be reasonably altered. COMAR 08.19.03.01, Article VII. The model ordinance provides:

> The following trees, shrubs, plants, and specific areas are considered priority for retention and protection and shall be left in an undisturbed condition *unless the applicant has demonstrated, to the satisfaction of the [local] Department, that reasonable efforts have been made to protect them and the plan cannot reasonably be altered*:
>
> A. Trees, shrubs, and plants located in sensitive areas including the 100-year floodplain, intermittent and perennial streams and their buffers, coastal bays and their buffers, steep slopes, nontidal wetlands, and critical habitats; and
>
> B. *Contiguous forest* that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site.

COMAR 08.19.03.01, Article VII, § 7.2 (emphasis added). These types of trees, shrubs, and specific areas generally correlate with C.1 Resources.

Consistent with the Act, the model ordinance prioritizes the retention and protection of other types of trees, shrubs, plants, and specific areas that must be left in an undisturbed condition, unless the applicant has demonstrated, to the satisfaction of the local authority, that the applicant qualifies for a variance. The model ordinance provides:

> The following trees, shrubs, plants, and specific areas are considered priority for retention and protection and shall be left in an undisturbed condition *unless the applicant has demonstrated, to the satisfaction of the [local] Department, that the applicant qualifies for a variance in accordance with Section 14.1 of this article*:
>
> A. Trees, shrubs, or plants determined to be rare, threatened, or endangered under:
>
> (1) The federal Endangered Species Act of 1973 in 16 U.S.C. §§ 1531–1544 and in 50 CFR Part 17;

(2) The Maryland Nongame and Endangered Species Conservation Act, [NR] §§ 10-2A-01–10-2A-09[;] and

(3) COMAR 08.03.08 [threatened and endangered species];

B. Trees that:

(1) Are part of a historic site;

(2) Are associated with a historic structure; or

(3) Have been designated by the State or the [local] Department as a national, State, or county champion tree; and

C. Any tree having a diameter measured at 4.5 feet above the ground of:

(1) 30 inches or more; or

(2) 75 percent or more of the diameter, measured at 4.5 feet above the ground, of the current State champion tree of that species as designated by [DNR].

COMAR 08.19.03.01, Article VII, § 7.2-1 (emphasis added). These types of trees, shrubs, plants, and specific areas generally correlate with C.2 Resources.

iii. Variance Procedure

Consistent with the Act, the model ordinance outlines the variance procedure. It defines "variance" as "relief from" NR §§ 5-1601–5-1612 or the ordinance. COMAR 08.19.03.01, Article II, § 2.63.A. "Variance" "does not mean a zoning variance." *Id.* § 2.63.B.

The model ordinance sets forth the following procedure for requesting and granting a variance:

A. A person may request a variance from this Ordinance or the requirements of [NR] §§ 5-1601–5-1612 . . . , if the person demonstrates that enforcement would result in unwarranted hardship to the person.[8]

B. An applicant for a variance shall:

[8] The model ordinance does not define "unwarranted hardship."

> (1) Describe the special conditions peculiar to the property which would cause the unwarranted hardship;
>
> (2) Describe how enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas;
>
> (3) Verify that the granting of the variance will not confer on the applicant a special privilege that would be denied to other applicants;
>
> (4) Verify that the variance request is not based on conditions or circumstances which are the result of actions by the applicant;
>
> (5) Verify that the request does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property; and
>
> (6) Verify that the granting of a variance will not adversely affect water quality.
>
> C. The [local] Department shall make findings that the applicant has met the requirements in Subsections A and B of this article before the [local] Department may grant a variance.
>
> D. Notice of a request for a variance shall be given to [DNR] within 15 days of receipt of a request for a variance.
>
> E. There is established by this Ordinance the right and authority of [DNR] to initiate or intervene in an administrative, judicial, or other original proceeding or appeal in the State concerning an approval of a variance under [NR] §§ 5-1601–5-1612 . . . or this Ordinance.

COMAR 08.19.03.01, Article XIV.

C.

City's Forest Conservation Program

In 1992, the City adopted the Act, but not the model ordinance. The City adopted the state law by reference in Chapter 17.09 of the City Code (Trees in Development Areas), which had been approved by DNR. *See* Annapolis, Md., Ordinance O-22-16 (Sept. 26, 2016) ("WHEREAS the Forest Conservation Act was enacted by the State of Maryland in 1991 and the state law was adopted by reference in the city code (17.09.025B) in 1992").

However, operating under the Act proved problematic because the "application of the State Act lack[ed] specific reference to established City procedures and responsibilities." *Id.* Specifically, the "vagueness" of the Act "led to unpredictability, a waste of time and treasury as uncertain appeals have been filed, and minimum environmental standards enforced." Memo from Alderman Littmann to City Council (Sept. 21, 2016); *see* Letter from Planning Commission to City Council (June 15, 2016) (noting that review and approval of development activities under the Act lacked definition).[9]

As a result, the City Council formed a working group in 2012 to review the model ordinance and make recommendations for the implementation of the Act. *See* Letter from Department of Neighborhood and Environmental Programs to Planning Commission (Jan. 14, 2014). The process of developing the City's forest conservation act included tailoring the model ordinance provisions to fit the City's procedures and responsibilities. This involved reviewing different iterations of the proposed legislation, addressing recommended amendments from the Department of Planning and Zoning (the "Department") and the Planning Commission (the "Commission"), and holding various public hearings. *See* Letter from Planning Commission to City Council (June 15, 2016). Ultimately, in 2016, the City Council enacted legislation to comply with the requirements of the Act and codified its own forest conservation act under Chapter 21.71 of the City

[9] The City's legislative materials referenced in this section are available online at http://annapolismd.legistar.com/Legislation.aspx.

Code. The City Code incorporates the requirements of the Act and the model ordinance with certain amendments. *See* O-22-16.

Before discussing the relevant provisions of the City's forest conservation act under Chapter 21.71, it is important to explain how Chapter 21.71 relates to the application process for planned developments outlined in Chapter 21.24 of the City Code.

i. Chapter 21.24 - Planned Developments

All planned development applications must be submitted to the director of the Department and undergo a review process pursuant to Chapter 21.24 of the City Code. *See* City Code § 21.24.070(A)–(D) (2017). After the review process, the director prepares a staff report. City Code § 21.24.070(D)(2). In connection with the review of the final planned development application, the staff report is transmitted to the Commission prior to a required public hearing on the application. City Code § 21.24.070(D)(2)–(3). The Commission considers the staff report at the public hearing and, after the hearing, decides whether to approve the application, approve the application subject to specific conditions, or deny the application. City Code § 21.24.070(D)(4).

Compliance with the forest conservation act under Chapter 21.71 is one of several considerations given to a planned development application under Chapter 21.24.[10] *See* City

[10] This criterion was added in 2016 in connection with the enactment of the City's forest conservation act. *See* O-22-16 Amended at 3–4 (amending § 21.24.090 to add criteria and finding based on whether the "planned development complies with Chapter 21.71 of the Annapolis City Code."); *see also* Memo from Planning Commission to City Council (Apr. 15, 2015) (finding by the Commission that "the Forest Conservation Act review process should not control the wider planning process but, rather, should be a part and parcel of the planning process").

Code § 21.24.090(G). In deciding to approve a planned development application, the Commission must make written findings that "[t]he planned development complies with Chapter 21.71 of the Annapolis City Code" among other findings. City Code § 21.24.090(G).[11]

An appeal from a decision of the Commission approving the planned development plan must be made to the Circuit Court for Anne Arundel County. City Code § 21.24.130.

[11] Under City Code § 21.24.090, the Commission is also required to make findings that:

> A. The planned development is compatible with the character of the surrounding neighborhood and consistent with the Comprehensive Plan and the purposes of planned developments.
>
> B. The proposed locations of buildings, structures, open spaces, landscape elements, and pedestrian and vehicular circulation systems are adequate, safe, and efficient and designed to minimize any adverse impact upon the surrounding area.
>
> C. The planned development will promote high quality design and will not result in greater adverse impacts to the surrounding area compared to the development that may otherwise be permitted pursuant to the Zoning Code if a planned development were not approved.
>
> D. The planned development complies with the planned development use standards and bulk and density standards.
>
> E. The planned development complies with the Site Design Plan Review criteria provided in Section 21.22.080.
>
> F. The planned development plan includes adequate provision of public facilities and the proposed infrastructure, utilities and all other proposed facilities are adequate to serve the planned development and adequately interconnect with existing public facilities.

ii. Chapter 21.71 - Forest Conservation Act

Consistent with the model ordinance, Chapter 21.71 provides criteria for the preparation of the forest stand delineation and forest conservation plan by a qualified professional. *See* City Code §§ 21.71.060; 21.71.070(B)(1), (C)(1). The City implemented a Forest Conservation Technical Manual, modeled after the State's technical manual, that establishes the standards of performance required in preparing the forest stand delineation and forest conservation plans. *See* City Code § 21.71.020 (defining "Forest Conservation Technical Manual").[12]

Chapter 21.71 focuses on protecting and retaining "priority retention areas." In relevant part, priority retention areas include areas containing one or more "significant trees" and areas of "contiguous forest." City Code § 21.71.020 (defining "priority retention area"). A "significant tree" is:

> 1. A champion tree;
>
> 2. Or a tree which is at least seventy-five percent of the diameter of a State Champion Tree;
>
> 3. Or a tree which is of twenty-four inches DBH[13] or more and which has been determined by the Department Director to be of notable quality and/or high value because of its type, size, age, historical significance, canopy benefits, or which otherwise warrants special consideration for preservation.

[12] The City's Forest Conservation Technical Manual, which is incorporated by reference in the City Code, *see* City Code § 21.71.020 (defining "Forest Conservation Technical Manual"), is available online at https://www.annapolis.gov/DocumentCenter/View/12009/City-of-Annapolis-Forest-Conservation-Technical-Manual-First-Edition-March-2019 [https://perma.cc/JB6N-M3C8].

[13] "DBH" or "diameter breast height" means a "tree diameter measured at four and one-half feet above the ground." City Code § 21.71.020 (defining "DBH").

City Code § 21.71.020 (defining "significant tree").

A "contiguous forest" is "a forest of twenty acres or more that connects the largest undeveloped or vegetated tracts of land within, and adjacent to, a site." City Code § 21.71.020 (defining "contiguous forest").

a. Forest Conservation Plan Under § 21.71.070

In developing a forest conservation plan, the applicant must give priority to techniques for retaining existing forest on the development site. *See* City Code § 21.71.070(A)(4). If the existing forest on the site subject to the forest conservation plan cannot be retained, the applicant must demonstrate various criteria to the satisfaction of the Department, depending on whether the resources to be disturbed are C.1 or C.2 Resources. Consistent with the model ordinance, City Code § 21.71.070(A)(5) provides:

> 5. If existing forest on the site subject to a forest conservation plan cannot be retained, *the applicant shall demonstrate to the satisfaction of the Department*:
>
> i. How techniques for forest retention have been exhausted;
>
> ii. Why the priority forests and priority areas specified in [NR] § 5-1607*(c)(1)* [C.1 Resources] . . . , cannot be left in an undisturbed condition:
>
> a. If priority forests and priority areas cannot be left undisturbed, how the sequence for afforestation or reforestation will be followed in compliance with [NR] § 5-1607[;]
>
> b. Where on the site in priority areas afforestation or reforestation will occur in compliance with [NR] § 5-1607[;] and
>
> iii. How the disturbance to the priority forests and priority areas specified in [NR] § 5-1607*(c)(2)* [C.2 Resources] . . . , *qualifies for a variance*.

(emphases added).

As pertinent here, the preliminary forest conservation plan must include "an explanation of how the provisions of Subsection A of [§ 21.71.070] have been met." City Code § 21.71.070(B)(2)(v); *see also* City Code § 21.71.070(B)(3) (as in the model ordinance, the review of the preliminary forest conservation plan is concurrent with the review of the preliminary site plan). The Department is required to post the preliminary forest plan on its website and hold a public meeting about the plan. City Code § 21.71.070(B)(4)–(5). During different stages of the review process, the preliminary forest conservation plan may be modified, provided the Department approves of the changes, and significant modifications must be posted for public review and comment. City Code § 21.71.070(B)(6).

The final forest conservation plan must "incorporate justification for any proposed disturbance of priority retention areas, including reasons why such priority retention areas cannot be retained and how the applicant shall replace proposed disturbed priority retention areas through afforestation and reforestation, in compliance with the requirements of" Chapter 21.71. City Code § 21.71.070(C)(2)(iv); *see also* City Code § 21.71.70(C)(4) (as in the model ordinance, the Department reviews the final forest conservation plan concurrent with the review of the final subdivision or project plan, grading permit application, or sediment control application associated with the project).

b. Retention of Resources Under § 21.71.080

"Retention" means "the deliberate holding and protection of existing trees, shrubs, or plants on the site according to established standards as provided in the Forest

Conservation Technical Manual." City Code § 21.71.020 (definition of "retention"). The City Code imposes a "rebuttable presumption that priority retention areas shall be retained." City Code § 21.71.070(A)(4). "The presumption can only be rebutted under the criteria in Section 21.71.080.B." *Id.*

Consistent with the model ordinance, City Code § 21.71.080(B) allows the disturbance of certain resources under the following circumstances:

> B. Retention.
>
> 1. The following trees, shrubs, plants, and specific areas are considered priority for retention and protection and shall be left in an undisturbed condition *unless the applicant has demonstrated, to the satisfaction of the Department, that reasonable efforts have been made to protect them and the plan cannot reasonably be altered*:
>
> i. Trees, shrubs, and plants located in sensitive areas including the 100-year floodplain, intermittent and perennial streams and their buffers, coastal bays and their buffers, steep slopes and their buffers, nontidal wetlands, and critical habitats.
>
> ii. *Contiguous forest* that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site.
>
> 2. The following trees, shrubs, plants, and specific areas are considered priority for retention and protection and shall be left in an undisturbed condition *unless the applicant has demonstrated, to the satisfaction of the Department, that the applicant qualifies for a variance in accordance with Section 21.71.170 of this chapter*:
>
> i. Trees, shrubs, or plants determined to be rare, threatened, or endangered under:
>
> a. The Federal Endangered Species Act of 1973 in 16 U.S.C. §§ 1531–1544 and in 50 C.F.R. 17,
>
> b. The Maryland Nongame and Endangered Species Conservation Act, [NR] §§ 10-2a-01–10-2a-09[,] and
>
> c. COMAR 08.03.08 [threatened and endangered species];
>
> ii. Trees that:

a. Are part of a site designated as historic by the Maryland Historic Trust, the National Park Service, or the City of Annapolis,

b. Are associated with a structure designated as historic by the Maryland Historic Trust, the National Park Service, or the City of Annapolis, or

c. Have been designated by the State, County, or the Department as a National, State, County or Municipality champion tree; and

iii. *Any tree*:

a. Having a DBH of thirty inches or more, or

b. *Which has been designated as a significant tree pursuant to this chapter*.

(emphases added).

Generally, the resources listed under § 21.71.080(B)(1) correspond to C.1 Resources, and those listed under subsection (B)(2) correspond to C.2 Resources, with one exception: subsection (B)(2)(iii)(b) includes significant trees, defined as those of "twenty-four inches DBH or more and which ha[ve] been determined by the Department Director to be of notable quality and/or high value because of [their] type, size, age, historical significance, canopy benefits, or which otherwise warrants special consideration for preservation." City Code § 21.71.020 (defining "significant tree"); *see also* NR § 5-1603(c)(1) (allowing local forest conservation programs, approved by DNR, to be more stringent than the requirements and standards of the Act).

c. Variance Procedure Under § 21.71.170

The City Code defines "variance" to mean "an exemption granted to an applicant from one or more requirements" of Chapter 21.71. City Code § 21.71.020 (defining "variance"). A variance "does not mean a zoning variance." *Id.*

The procedure for requesting a variance from requirements of Chapter 21.71 is set forth under City Code § 21.71.170 as follows:

> A. An applicant may request a variance from this chapter or the requirements of [NR] §§ 5-1601–5-1612, . . . , *if the applicant demonstrates that enforcement would result in unwarranted hardship to the applicant.*
>
> B. An applicant for a variance shall:
>
> 1. *Describe the special conditions peculiar to the property which would cause the unwarranted hardship*;
>
> 2. Describe how enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas;
>
> 3. Verify that the granting of the variance will not confer on the applicant a special privilege that would be denied to other applicants;
>
> 4. *Verify that the variance request is not based on conditions or circumstances which are the result of actions by the applicant or by any previous owner of the property*;
>
> 5. Verify that the request does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property; and
>
> 6. Verify that the granting of a variance will not adversely affect water quality.
>
> C. The Department shall make written findings that the applicant has met the requirements in Subsections A. and B. of this section before the Department may grant a variance.
>
> D. Notice of a request for a variance shall be given to [DNR] within fifteen days of receipt of a request for a variance.
>
> E. There is established by this chapter the right and authority of [DNR] to initiate or intervene in an administrative, judicial, or other original proceeding or appeal in the State concerning an approval of a variance under [NR] §§ 5-1601–5-1612, . . . , or this chapter.
>
> F. *Any variance must be submitted to the Planning Commission or the Zoning Board of Appeals, whichever the case may be, with the project or*

> *development plan application for final determination*.[14] If the variance is sought in connection with a site design plan application not requiring Planning Commission or Zoning Board of Appeals approval, the Department shall issue a final determination on the variance application.
>
> G. Variance can only be appealed as part of the final administrative decision or approval of the application.

(emphasis added). "Unwarranted hardship" means "the applicant has demonstrated that without a variance, the applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested." City Code § 21.71.020 (defining "unwarranted hardship").

With this statutory overview in mind, we summarize the relevant factual and procedural background.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A.

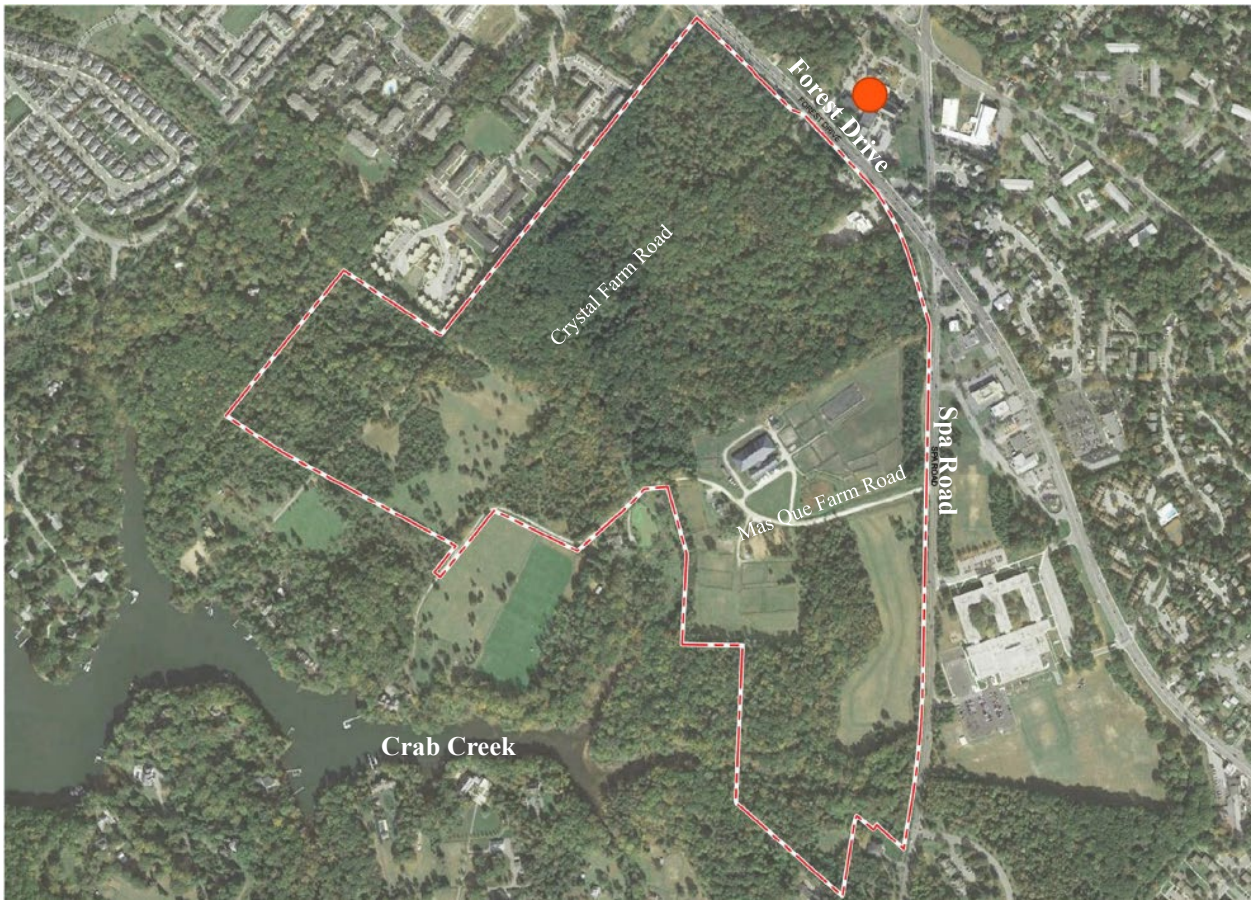
Developer's Applications

On July 25, 2017, the Developer filed, along with other applications, a Subdivision Application and Forest Conservation Approval Application with the Department. The applications were for the development of the Village, a mixed-use retirement community

[14] The Commission and Zoning Board of Appeals serve different functions. The Commission has the authority to "[h]ear and decide applications on planned developments" pursuant to Chapter 21.24. City Code § 21.08.030(E)(3). In contrast, the Zoning Board of Appeals has the authority to "[h]ear and decide applications" for special exceptions, variances from the terms of the zoning code, zoning district boundaries adjustments, physical alteration of a nonconforming use, among other matters. City Code § 21.08.040(E)(1)–(6). There is no dispute that the instant case involves the Commission's decision on the Developer's planned development application.

to be located on approximately thirty-four acres of a 175-acre parcel to the west/southwest of the intersection of Forest Drive and Spa Road in the vicinity of Crystal Spring Farm Road in the City of Annapolis.

The relevant part of the parcel in its current, undeveloped state is depicted below and annotated for clarity:



The parcel includes two farms, known as Crystal Spring Farm and Mas Que Farm; two commercial properties; and one residence adjacent to Forest Drive. Crystal Spring Farm is primarily forest and meadow land, while Mas Que Farm includes therapeutic horse-riding

facilities and the Wellness House of Annapolis.[15] Crystal Spring Farm Road, which serves a half a dozen homes on Crab Creek, bifurcates the site from Forest Drive. Mas Que Farm Road, from Spa Road, serves as access for the horse farm, Wellness House, and several homes also located on Crab Creek.

The proposed project area comprises forty-seven acres of forest designated by the City as Priority Forest.[16] Scattered throughout the existing forest are "significant trees." The Priority Forest also contains several pockets of nontidal wetlands and their associated twenty-five-foot buffers, approximately 1,000 linear feet of an intermittent stream and its

[15] The current farm owner, Janet Richardson-Pearson, purchased the two farms in 1995 and 1996. To preserve Mas Que Farm and its 1800s farmhouse from future development, Ms. Richardson-Pearson "realized she must develop part of the property [in] order to preserve the majority." In 2005, she decided to annex the property into the City of Annapolis "for the best use of the land." Ultimately, she decided on a program for continuing-care retirement living.

The Wellness House of Annapolis is described as a nonprofit organization that provides support, education, and services to help individuals and families who have been touched by cancer. The horse farm serves as a therapeutic riding facility that would be maintained in perpetuity. Mas Que Farm would be part of a seventy-five-acre conservation easement that Ms. Richardson-Pearson agreed to dedicate as part of the annexation. Two and a half acres of open field next to Spa Road would be dedicated for the future construction of a new facility for the Wellness House.

[16] Neither the City Code nor the City's Technical Manual defines "priority forest." However, the manual refers to "priority forests" in connection with forest retention areas: "Forest Retention Areas may be entire forest stands which are identified as *priority forests* in the Forest Stand Delineation or portions of stands." City of Annapolis Forest Conservation Technical Manual 31 (n.12 *supra*, emphasis added). In describing how to identify "Priority Areas for forest retention," the manual identifies forest stands in the priority areas as "sensitive areas," including contiguous forest and significant trees. *Id.*

fifty-foot stream buffer, and steep slopes.[17] The western portion of the project area also contains a nontidal wetland that has been designated as a vernal pool by the Maryland Department of the Environment. All these features represent some of the most environmentally sensitive areas on the site. A part of the 175-acre parcel is within the Chesapeake Bay Critical Area. However, lands within the Chesapeake Bay Critical Area are mostly located in the southern and western sections of the property that are not part of the project area.

On January 22, 2019, the Developer filed a Planned Development Application with the Department. After years of conceptual and preliminary design work through numerous iterations, the Developer proposes to configure the development west/southwest of the intersection of Forest Drive and Spa Road in the vicinity of Crystal Spring Farm Road as depicted in the image below:

[17] These are terms of art defined in City Code § 21.71.120. "Intermittent stream" means "a stream in which surface water is absent during a part of the year." "Stream buffer" means "all lands lying up to one hundred feet and no less than fifty feet, measured from the top of each normal bank of a perennial or intermittent stream." "Steep slope" means "a slope of fifteen percent or greater."

B.

Preliminary Forest Stand Delineation

Michael Klebasko, one of the Developer's qualified professional environmental consultants, prepared a preliminary forest stand delineation to evaluate and inventory existing vegetation on the property subject to the proposed development. Mr. Klebasko conducted a field study of about thirty-four acres located on the south side of Forest Drive and along the western edge of Spa Road. He noted that the property was located within the Crab Creek watershed, and an unnamed tributary of Crab Creek flowed southward along the southern portion of the study area.

Most of the study area consisted of mixed-hardwood forest, of which about twenty-eight acres qualified as "forest" under the City Code.[18] Mr. Klebasko categorized the forest on the site into forest stands and classified them in terms of priority for retention. He noted that no rare, threatened, or endangered species were observed during the study. The study revealed that jurisdictional waters of the U.S., including nontidal wetlands, existed within the study area, but a 100-year floodplain did not exist in the study area.

Mr. Klebasko noted the existence of 270 significant trees throughout the study area as depicted in the excerpt below. The footprint of the development site is outlined in red. Compared with the previous two images, this one correlates with the others except that it is rotated ninety degrees counterclockwise, which is the way it was presented in the record.

[18] "Forest" means "a biological community dominated by trees and other woody plants covering a land area of ten thousand square feet or greater." It includes areas that have at least one hundred live trees per acre with at least fifty percent of those trees having a two-inch or greater diameter at four and one-half feet above the ground and larger; and areas that have been cut but not cleared. City Code § 21.71.020 (defining "forest").

C.

Variance Request to Remove Sixty-Four Significant Trees

In a letter dated June 21, 2021, Mr. Klebasko, on behalf of the Developer, submitted to the Department a "Significant Tree Removal Variance Request," requesting to remove sixty-four significant trees in the development site pursuant to the variance procedure under City Code § 21.71.170. In the letter, he responded to each variance criterion under § 21.71.170(B). Regarding subsection (B)(1), Mr. Klebasko described the special conditions peculiar to the property which would cause the unwarranted hardship if the variance were not approved:

> Several conditions peculiar to this property cause an unwarranted hardship if the requested variances were not granted. First, this site contains over 250 significant trees, which are generally distributed throughout the property.

> Avoidance of all these trees would prevent any reasonable use of the property for which it is currently zoned, and preservation of the sixty-four (64) significant trees to be removed would also cause an unwarranted hardship through a significant loss of connected developable area. Furthermore, the design team, following advice from the team's arborist, the [Department], and other City staff, determined the best strategy for forest preservation on this site was the creation of large areas of contiguous forest, rather than the preservation of isolated forest stands localized around significant trees. In an effort to preserve much of the existing forest on the site, particularly those forested areas with sensitive habitats such as an intermittent stream and contiguous wetlands, development is concentrated at the front of the site near Forest Drive. Second, two (2) of the trees to be removed are in poor condition and one (1) is a 28-inch Virginia pine that would be prone to windthrow when surrounding trees are cleared. Given the overall poor health of these trees, preservation could be a safety hazard to people and any surrounding structures, further contributing to the unwarranted hardship that would result if the variance request is not approved.

Mr. Klebasko also described how enforcement of the requirements of the forest conservation law would deprive the Developer of rights commonly enjoyed by others in similar areas, *see* subsection (B)(2); that granting the variance will not confer on the Developer a special privilege that would be denied other applicants, *see* subsection (B)(3); that the variance request was not based on conditions or circumstances which are the result of actions by the Developer, *see* subsection (B)(4); that the requested variance does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring party, *see* subsection (B)(5); and that granting the variance will not adversely affect water quality, *see* subsection (B)(6).

D.

Justification for Disturbing Twenty-Seven Acres of Contiguous Forest

In a document dated June 26, 2021, Mr. Klebasko provided the Department with a "Justification for Disturbing Priority Forests and Priority Areas" under City Code § 21.71.070(A)(5). He explained that the project area comprised forty-seven acres of forest designated by the City as Priority Forest, which it also designated as "contiguous forest" under § 21.71.020. As noted earlier, the forest contained significant trees scattered throughout, pockets of nontidal wetland and associated buffers, an intermittent stream with its stream buffer, and a nontidal wetland designated as a vernal pool in the western portion of the project area.

Mr. Klebasko explained that the project was designed with most of the development activity close to Forest Drive and located away from significant environmental features like the nontidal wetlands, vernal pool, Chesapeake Bay Critical Area land, steep slopes, intermittent stream, and buffer in the central and rear sections of the property. The plan, he stated, minimized the total amount of development to a limited area and, as a result, limited the proposed forest clearing to about twenty-seven acres of forest.

Apparently, the Developer was uncertain whether it had to justify the disturbance of twenty-seven acres of contiguous forest under the variance standards of § 21.71.170 based on the language of § 21.71.070(A)(5)(iii)—which requires the applicant to demonstrate to the satisfaction of the Department how the disturbance to the priority forests and priority areas specified in NR § 5-1607(c)(2) "qualifies for a variance"—or the language in

§ 21.71.080(B)(2)—which requires the applicant to demonstrate to the satisfaction of the Department that the applicant "qualifies for a variance" specifically "in accordance with [§] 21.71.170."[19] "[O]ut of an abundance of caution," the Developer "elected to prepare its variance request to encompass all disturbances" to the contiguous forest on the development site and sought to "illustrate[] compliance with all Code criteria for such disturbances."

Mr. Klebasko proceeded to explain how techniques for forest retention had been exhausted and why the twenty-seven acres of contiguous forest could not be left in an undisturbed condition. Regarding how the disturbance to the contiguous forest qualified for a variance, he explained:

> This master plan has undergone numerous iterations to blend the notion of what a community can be while being sensitive to the existing environment and its core essence. Some of the moves are significant while other[s] are more nuanced, but together they are a powerful undertaking that has reduced the size of the project and overall site impact and creates a sense of place that is intimately tied to the natural spirit of the site. Because all of the existing forest on-site has been designated as Priority Forest, complete avoidance is not possible and denial of the variance would be an unwarranted hardship to the applicant. The applicant is requesting the minimum relief necessary to construct a facility that provides needed services to local residents. Furthermore, the proposed Project not only meets all Forest Conservation

[19] In a footnote, Mr. Klebasko, on behalf of the Developer, posited that § 21.71.070(A)(5)(iii) did not invoke the variance standards of § 21.71.170:

> Contiguous forest is defined as a "priority retention area" at 21.71.020, and 21.71.070 A.5.iii. says an applicant shall demonstrate to the satisfaction of the Department how "the disturbance to the priority forests and priority areas specified in [NR] § 5-1607(c)(2) . . . qualifies for a variance." It should be noted, however, that a variance is not required for disturbance to "priority retention areas" or "priority forests" or "contiguous forests" by either 21.71.080 B.2. of the City Code or by § 5-1607(c)(2) of the State Code.

requirements on-site, but development has been limited to primarily the "Lower Priority" Priority Forests.

E.

Department's Staff Report

On December 9, 2021, the Department, through its then-acting director, issued a thirty-nine-page staff report summarizing, among other things, the Village project's compliance with Chapter 21.71. The Department concurred with the Developer's explanation for how the planned development complied with the forest conservation requirements under Chapter 21.71, which was one factor for the Commission to consider under § 21.24.90(G):

> ***G. The planned development complies with Chapter 21.71 of the Annapolis City Code.***
>
> The Project is in compliance with the City's forest conservation requirements at Code, Chapter 21.71. Please see the revised Preliminary Forest Conservation & Reforestation Plan and associated materials, (Justification for Disturbing Priority Forests and Priority Areas, Significant Tree Removal Variance Request, and Tree Removal Plan).
>
> The design has been through many iterations, and, careful consideration for priority tree stands has been foremost in the overall site design. The entire Project has been moved north of the intermittent stream and maintains, at a minimum, a 150' undisturbed buffer around the stream (and often a much wider buffer). In addition, a 200-300' buffer is maintained bordering Forest Drive to provide a natural screening of the site from Forest Drive.
>
> The entire 175-acre property will include 143 acres of permanently conserved land (81%), with, tree preservation and retention areas as required, essentially eliminating any further future development on the site beyond the limits of the proposed Project. The area to be cleared for the planned development is approximately 27.3 acres, with special attention being given to retain certain priority tree areas within the Project's footprint. Otherwise, except for a relocated Wellness House, the land will be conserved and not available for future development. This amount of land conservation

> demonstrates the [Developer's] careful consideration of the natural environment and its concurrent preservation of forest to a high extent.

In a separate section of the report, titled "Compliance with Forest Conservation Variance Standards," the Department reviewed the request for removal of the sixty-four significant trees "for conformance with the variance standards" under § 21.71.170(B). The Department concurred with the Developer's responses to the standards set forth in the request for variance to remove the significant trees prepared by Mr. Klebasko. The Department reproduced the Developer's responses in Mr. Klebasko's letter request above, addressing each variance criterion under § 21.70.170(B). At the end of the report, the Department recommended approval of the development plan subject to various conditions.

F.

Commission's Opinion and Order

Between December 16, 2021, and February 17, 2022, the Commission held public hearings on the Developer's planned development plan and application. Regarding the preliminary forest conservation plan, the Developer presented statements consistent with the information in the materials submitted with the application for planned development, summarized above. According to the Developer, the proposed disturbance to the forest would be reforested, yielding no net loss of trees.

Written and oral statements from members of the public were also considered. Certain members of the public expressed concern that the loss of trees would be detrimental to the environment. In pertinent part, appellant Valerie Casasanto stated that the proposed development would have "disastrous consequences" on the environment, including

destruction of forest and wildlife. Likewise, appellant Christine Dunham raised concerns about wildlife habitats, climate change, water quality, tree canopies, and traffic. She also claimed that there was inadequate justification for the cutting down of trees, that there were other locations within the City where this development could be built, and that development at the current location should be closer to Forest Drive. Appellant Mary Reese raised concerns about traffic, loss of tree canopy, native wildlife, and pollution in Spa Creek.

Appellant Crab Creek and its representatives variously raised concerns, including climate change, wildlife, pollution, flooding, traffic, environmental impact, environmental equity and justice, economic equity, and tax revenues. Remarks were made that the property could be turned into a park and that it is not appropriate to compare the variance request in this case with other variances granted in the City. Other comments were that the development could be one-tenth of the proposed size, which would protect the trees and still provide for a facility consistent in size with other assisted-living facilities.

On March 31, 2022, the Commission issued an Opinion and Order. In pertinent part, the Commission evaluated the Developer's compliance with Chapter 21.71, in which it reproduced the pertinent section of the Department's report above. In a separate section, titled "Compliance with Forest Conservation Law and Variance Standards," the Commission considered the proposed removal of sixty-four significant trees. The Commission addressed each criterion under § 21.70.170(B) and concurred with the Department's concurrence with the Developer's responses to the standards. In the end, the

Commission determined that the findings and recommendation contained in the Department's report satisfactorily addressed the criteria of the planned development standards, the preliminary forest conservation plan, and the variances granted with that plan. Accordingly, the Commission approved all development applications associated with the project, subject to conditions.

G.

Commission's Supplemental Opinion and Order

On August 25, 2022, Crab Creek and others filed a petition for judicial review of the Commission's decision in the Circuit Court for Anne Arundel County (Case No. C-02-CV-22-000730).

On January 13, 2023, after a hearing, the court entered an order vacating the Commission's Opinion and Order pertaining to the forest conservation assessment and remanded the case to the Commission to (1) clarify its interpretation of the statute governing contiguous forests (specifically, which City agency—the Department or the Commission—evaluates and approves the forest variance); (2) chronicle the evidence that substantiates the Developer's grounds for a variance under City Code § 21.71.170(B); and (3) articulate the facts found, the law applied, and the relationship between the two as it pertains to both variances to disturb the contiguous forest and remove the sixty-four significant trees.

On April 26, 2023, the Commission issued a sixteen-page Supplemental Opinion and Order in compliance with the court's order. The Supplemental Opinion comprised two

main parts, which we will explain in greater detail in the next sections. For now, we summarize the two main parts. In the first part, the Commission clarified its interpretation of the statutes governing "contiguous forests and forest variances." The Commission determined that proposed disturbances to contiguous forests are not subject to the variance criteria under § 21.71.170. Regarding the roles of the Department and the Commission, it explained that the Department is vested with the responsibility of "compliance review" for a proposed disturbance to contiguous forests, whereas the Commission makes findings on whether the planned development complies with the forest conservation act under Chapter 21.71. Based on this interpretation, the Commission found that the materials submitted by the Developer substantiated the proposed disturbance to the contiguous forest.

In the second part of the Supplemental Opinion and Order, the Commission articulated the evidence substantiating approval of the Developer's variance request to remove sixty-four significant trees under the variance criterion of City Code § 21.71.170(B) and concluded that the criteria were satisfied.

On May 23, 2023, the Citizens filed a petition for judicial review in the circuit court (Case No. C-02-CV-23-001034). After hearing arguments, the court affirmed the Commission's Opinion and Order as well as its Supplemental Opinion and Order.

As noted, the Citizens challenge on appeal (1) the Commission's decision to approve the request to disturb the contiguous forest[20] and (2) its decision to approve the request to

[20] In their brief, the Citizens refer to the twenty-seven acres of forest the Developer seeks to disturb as "priority forest." At oral argument, they clarified that what they were referring to was "contiguous forest" as defined under the City Code.

remove the significant trees. According to the Citizens, because the Commission erred in approving these variances, the Commission, by extension, erred in approving the preliminary forest conservation plan (FCP2017-006), the subdivision application (SUB2017-004), and the planned development application (PD2019-001).[21]

III.

STANDARDS OF REVIEW

"When an appellate court reviews a decision of an administrative agency, we look through the decision of the circuit court and evaluate the agency's decision." *Cosgrove v. Comptroller of Md.*, 263 Md. App. 147, 158 (2024) (cleaned up).

"When reviewing factual findings and inferences drawn from those findings, we utilize the substantial evidence standard, 'by which the court defers to the facts found and the inferences drawn by the agency when the record supports those findings and

[21] The Developer's brief includes a motion to dismiss the appeal based on the Citizens' alleged failure to preserve the issues for appeal. We deny the motion to dismiss. Maryland Rule 8-131(a) provides that "[o]rdinarily, an appellate court will not decide any other issue unless it plainly appears *by the record to have been* raised in *or decided by* the trial court[.]" This "preservation requirement is equally applicable to administrative appeals." *Zakwieia v. Balt. Cnty., Bd. of Educ.*, 231 Md. App. 644, 649–50 (2017).

In its Supplemental Opinion and Order, the Commission decided issues that are the subject of this appeal. Even if the Citizens did not expressly raise the issues at the Commission hearing, the issues were "decided by" the Commission. *See* Md. Rule 8-131(a). Therefore, the issues have been properly preserved for our review. *See Colburn v. Dep't of Pub. Safety & Corr. Servs.*, 403 Md. 115, 135 n.13 (2008) (rejecting appellee's argument that issue was not raised below by appellants and thus not preserved when the administrative law judge addressed the issue in a written opinion). This, however, does not mean that all contentions raised in the Citizens' brief in support of these issues are preserved. *See infra*, Section V.B.

inferences.'" *Ben Porto & Son, Ltd. v. Montgomery Cnty.*, 262 Md. App. 323, 353 (2024) (citation omitted). We "consider whether a reasoning mind reasonably could have reached the [agency's] factual conclusion." *Id.* (alteration in original) (citation omitted).

"We also review an agency's decision for 'errors of law,' which we review '*de novo* for correctness.'" *Id.* (citation omitted). Categories of potential legal errors include, as relevant here, whether the agency correctly interpreted an applicable statute or regulation. *See Comptroller of Md. v. FC-GEN Operations Invs. LLC*, 482 Md. 343, 360 (2022). With this category, we occasionally apply agency deference when reviewing errors of law. *Id.* More weight is given to the agency's interpretation when it "resulted from a process of reasoned elaboration by the agency, when the agency has applied that interpretation consistently over time, or when the interpretation is the product of contested adversarial proceedings or formal rule making." *Md. Dep't of the Env't v. Assateague Coastal Tr.*, 484 Md. 399, 451–52 (2023) (citation omitted).

When the "error of law" involves an administrative agency's interpretation of its own rule or regulation, even more deference is in order. *In re Md. Off. of People's Couns.*, 486 Md. 408, 441 (2024). "It is well-settled that an administrative agency is entitled to deference in the interpretation of its own propounded regulations unless the agency's interpretation is clearly erroneous or inconsistent with the regulation." *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 389 (2013). "Because an agency is best able to discern its intent in promulgating a regulation, the agency's expertise is more pertinent to the interpretation of an agency's rule than to the interpretation of its governing statute." *Kor-Ko Ltd. v. Md.*

Dep't of the Env't, 451 Md. 401, 413 (2017) (citation omitted). "Put another way, the courts do not play the role of an über administrative agency in reviewing the actions of state or local administrative bodies, but, rather we exercise discipline in our review so as not to cross the separation of powers boundary." *Id.*

Mixed questions of law and fact "arise when an agency has correctly stated the law, its fact-finding is supported by the record, and the remaining question is whether the agency has correctly *applied* the law to the facts." *Crawford v. Cnty. Council of Prince George's Cnty.*, 482 Md. 680, 695 (2023). In other words, "mixed questions implicate '*how* an agency applied, as opposed to interpreted, a statute.'" *Id.* (citation omitted). A reviewing court applies "the deferential standard of review not only to [the agency's] fact-finding and its drawing of inferences, but also to its application of the law to the facts." *FC-GEN*, 482 Md. at 363 (alteration in original) (citation omitted). However, "if the [agency's] legal conclusions are wrong, a reviewing court may substitute the correct legal principles." *NCR Corp. v. Comptroller of the Treasury, Income Tax Div.*, 313 Md. 118, 134 (1988) (citations and internal quotation marks omitted).

IV.

CONTIGUOUS FOREST

In the first part of the Commission's Supplemental Opinion and Order, the Commission interpreted the relevant Code provisions as follows, the emphasized portion of which the Citizens challenge:

> The Commission has the power and duty to hear and decide applications on planned developments pursuant to the provisions set forth

under Chapter 21.24 of the Code. See Code § 21.08.030. In deciding on a planned development application, the Planning Commission must find that "[t]he planned development complies with Chapter 21.71 of the Annapolis City Code." Code § 21.24.090(G). Chapter 21.71 of the Code governs Forest Conservation.

Under Code § 21.71.020, "Contiguous forest" is defined to mean "a forest of twenty acres or more that connects the largest undeveloped or vegetated tracts of land within, and adjacent to, a site." Code § 21.71.080(B)(1)(ii), provides that "contiguous forest" areas "shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the Department, that reasonable efforts have been made to protect [the contiguous forest] and the plan cannot be reasonably altered." Notably, Code § 21.71.080(B)(1) does not require that proposed disturbances to "contiguous forest" obtain variance approval pursuant to Code § 21.71.170.

In comparison, Code § 21.71.080(B)(2) provides that three (3) categories of certain "trees, shrubs, plants, and specific areas . . . shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the Department, that the applicant qualifies for a variance in accordance with Section 21.71.170 of this Chapter." Notably, "Contiguous forest" is not contemplated under the three (3) categories of "trees, shrubs plants, and specific areas" governed under Code § 21.71.080(B)(2). Significant trees, however, are contemplated under Code § 21.71.080(B)(2), and therefore require variance approval in accordance with Code § 21.71.170.

The Commission interprets the Code to mean that disturbances to "Contiguous forest" does not require variance approval in accordance with Code § 21.71.170. The Planning Commission further interprets the Code to mean that proposed disturbance to "contiguous forest" is reviewed by the Department of Planning and Zoning, which evaluates and assesses the proposed disturbance to ensure "to the satisfaction of the Department" that "reasonable efforts" have been made to protect the contiguous forest and "the plan cannot be reasonably altered."

Code § 21.71.070(A)(5)(iii), however, provides that "if existing forest on the site subject to a forest conservation plan cannot be retained, the applicant shall demonstrate to the satisfaction of the Department . . . how the disturbance to the priority forests and priority areas specified in [NR] § 5-1607(c)(2) . . ., qualifies for a variance." Unlike Code § 21.71.080(B)(2), which specifically mandates a variance "in accordance with Section 21.71.170," Code § 21.71.070(A)(5)(iii) does not require that variance

approval be obtained pursuant to Code § 21.71.170. Notably, although [NR] § [5]-1607(c)(2) addresses certain "trees, shrubs, plants, and specific areas," neither "contiguous forest" nor "priority forests" are included among them. Further, neither "priority forests" nor "priority areas" are defined terms under Chapter 21.71.

The Commission interprets Code § 21.71.070(A)(5)(iii) to mean that it is within the province of the Department to evaluate and assess how proposed disturbances to priority forests and priority areas qualify for a variance. The variance referenced under (A)(5)(iii), however, does not mandate variance approval pursuant to Code § 21.71.170 – it merely requires that the applicant demonstrate, to the Department's satisfaction, how the proposed disturbance "qualifies for a variance." It is the Commission's opinion that the method of review for determining whether proposed disturbance to priority forest and priority areas "qualifies for a variance" *is left to the discretion of the Department and does not necessarily require consideration of the criteria provided under Code § 21.71.170.*

In accordance with its interpretations of the Code above, the Commission finds that compliance review as to whether proposed disturbance to contiguous forest or priority forest "qualifies for a variance" under Code §§ 21.71.080(B)(1) or 21.71.070(A)(5)(iii) *is vested with the Department.* However, under Code § 21.24.090(G) the Planning Commission must make findings on whether "[t]he planned development complies with Chapter 21.71" of the Code.

Accordingly, the Commission found that the planned development complies with Chapter 21.71 of the Code. Along with its Forest Conservation Application and its Preliminary Forest Conservation Plan, the [Developer] submitted a myriad of plans, reports, and memoranda to the Department in support of its proposed disturbance to the contiguous forest and priority forest, as well as its proposal to remove sixty-four (64) significant trees. Included among the [Developer's] submittal materials was a letter dated June 21, 2021, to the Director of the Department of Planning and Zoning addressing each of the variance criteria under Code § 21.71.170(B) in justification of the removal of the sixty-four (64) significant trees (the "Significant Tree Letter"), and a memorandum, dated June 21, 2021, titled Justification for Disturbing Priority Forests and Priority Areas (the "Justification"). Upon review of all forest conservation application materials, the Department has, in its discretion, issued a recommendation of approval for the project and all of its forest conservation elements, including the variance request to disturb contiguous forest and priority forest, as well as the variance to remove the sixty-four (64) significant trees.

> Importantly, the Commission found that the evidence chronicled in its original Opinion and Order, as well as the evidence chronicled in this supplement thereto, substantiates approval of the variance to remove sixty-four (64) significant trees, and substantiates qualification for the variance to disturb contiguous forest and priority forest. It is clear that the two variances requested, albeit separate, are inherently similar since the sixty-four (64) significant trees sought to be removed are scattered throughout the contiguous forest itself. The Significant Tree Letter and the Justification, in addition to the exhaustive additional application materials submitted by the [Developer], detail how the facts which substantiate the removal of the sixty-four (64) significant trees additionally substantiate the proposed disturbance to the contiguous forest where such trees reside. Based on these materials, . . . the Commission finds that the Department was correct when it determined that it was satisfied that the [Developer] had demonstrated that it qualified for a variance to remove contiguous and priority forest at the property.

(emphasis added).

A.

Citizens' Contentions

The Citizens contend that the Commission erred in approving the disturbance to the contiguous forest because approval was not decided in accordance with § 21.71.170 and because approval was not decided by the Commission alone. They rely on § 21.71.070(A)(5)(iii) as the starting point. According to the Citizens, if an applicant wishes to disturb contiguous forest, the applicant must comply with § 21.71.070(A)(5)(iii), which provides that "[i]f existing forest on the site subject to a forest conservation plan cannot be retained, the applicant shall demonstrate to the satisfaction of the Department . . . How the disturbance to the priority forests and priority areas specified in [NR] § 5-1607(c)(2) . . . , *qualifies for a variance*." (emphasis added).

The Citizens contend that a request to disturb any priority area, including a contiguous forest, must be evaluated in accordance with § 21.71.170. They claim that the definition of "variance" correlates with § 21.71.170(A) (titled "Variances"), which "reaffirms" its meaning to require an applicant who requests a variance from the City's and State's forest conservation law to "demonstrate[] that enforcement would result in unwarranted hardship to the applicant." The Citizens highlight language in § 21.71.170(F) providing that "[a]ny variance must be submitted to the Planning Commission . . . for final determination" in connection with a planned development. Reading these provisions together, the Citizens conclude that "any variance" requested from a requirement of the City's and State's forest conservation law, including disturbances of contiguous forests, must be evaluated in accordance with § 21.71.170 and decided by the Commission alone, not the Department, in connection with a planned development.

According to the Citizens, their interpretation of these provisions harmonizes the provisions of Chapter 21.71 by delineating a clear process where all variances associated with planned developments before the Commission are reviewed and approved by the Commission simultaneously with the development plans. They contend the Commission's interpretation arbitrarily creates a separate procedure for assessing proposed disturbances of contiguous forest versus proposed disturbances to significant trees, even though both are associated with the same planned development.

B.

Analysis

Because the Citizens' contentions involve an interpretation of the Code provisions, we apply the principles of statutory interpretation. *See Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 298 (2015) ("When we construe an agency's rule or regulation, 'the principles governing our interpretation of a statute apply.'" (citation omitted)).

i. Citizens' Reliance on § 21.71.070(A)(5)(iii) and Definition of "Variance"

The Citizens' reliance on § 21.71.070(A)(5)(iii) is inapt. The section does not apply to contiguous forests; it specifically pertains to priority forests and areas "specified" in NR § 5-1607(c)(2) (C.2 Resources), none of which include contiguous forests. *See* NR § 5-1607(c)(2)(i)–(iii).

In addition, we are not persuaded by the Citizens' argument that the word "variance," when read together with § 21.71.170, means that a proposed disturbance of *any* priority forest or area is subject to the variance standards under § 21.71.170(A) (unwarranted hardship) and (B) (other variance criteria). "Variance" is broadly defined in Chapter 21.71 as an "exemption granted to an applicant from one or more requirements of this chapter." The definition does not contain any reference to unwarranted hardship or the other criteria under § 21.71.170.[22]

[22] Interestingly, in an earlier iteration of the proposed legislation, "variance" was defined as "an exemption to one or more requirements in this chapter when the requirement or requirements *would result in unwarranted hardship*, as defined by applicable law, to the person. . . ." *See* O-32-14 (emphasis added). The "unwarranted hardship" language in the

ii. Different Standards for Different Resources

The Citizens' interpretation that a request to disturb *any* priority forest or area, including contiguous forests, is subject to § 21.71.170 is not supported by the plain language of the relevant Code provisions. Rather, these provisions establish different standards for evaluating proposed disturbances, which vary based on the type of priority forest or area being affected. Sections 21.71.070(A)(5) (forest conservation plan) and 21.71.080(B) (requirements for retention) illustrate these different standards. We explain.

a. Forest Conservation Plan Under § 21.71.070(A)(5)

In the context of preparing a forest conservation plan under § 21.71.070(A)(5), the applicant claiming that existing forest on the site subject to the forest conservation plan cannot be retained must demonstrate to the satisfaction of the Department how techniques for forest retention have been exhausted. City Code § 21.71.070(A)(5)(i). The applicant must also make other showings depending on whether the area sought to be disturbed is a C.1 or C.2 Resource.

Under subsection (A)(5)(ii), if the priority forest or area sought to be disturbed is a C.1 Resource—contiguous forest being one of them—then the applicant must demonstrate "[w]hy [it] cannot be left in an undisturbed condition," "how the sequence for afforestation

definition was later removed in an amended draft. *See* O-32-14 (Amended). *See Leppo v. State Highway Admin.*, 330 Md. 416, 424 (1993) (reasoning that "amendments occurring as a bill progresses through the General Assembly fairly bear on the fundamental issue of legislative purpose or goal" in holding that the removal during the legislative process of a particular category of claims from a list of exempted claims was "strong evidence that the Legislature intended" for those claims to be subject to the requirements (citing *Kaczorowski v. Mayor of Balt.*, 309 Md. 505, 514–15 (1987))).

or reforestation will be followed," and "[w]here on the site . . . afforestation or reforestation will occur in compliance with [NR] § 5-1607." City Code § 21.71.070(A)(5)(ii). In contrast, under subsection (A)(5)(iii), if the priority forest or area sought to be disturbed is a C.2 Resource—contiguous forest not being one of them—the applicant must demonstrate how the disturbance "qualifies for a variance." City Code § 21.71.070(A)(5)(iii).

b. Requirements for Retention Under § 21.71.080(B)

Section 21.71.080(B), which provides for requirements for retention, also sets forth different standards for evaluating disturbances depending on the resource sought to be disturbed. Subsection (B)(1) provides that certain "trees, shrubs, plants, and specific areas"—contiguous forest being one of them—"are considered priority for retention and protection and shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the Department, *that reasonable efforts have been made to protect them and the plan cannot reasonably be altered*." (emphasis added).

In contrast, subsection (B)(2) provides that certain "trees, shrubs, plants, and specific areas"—significant trees being one of them, but not contiguous forest—"are considered priority for retention and protection and shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the Department, that the applicant *qualifies for a variance in accordance with Section 21.71.170 of this chapter*." (emphasis added).

Contrary to the Citizens' assertion, the plain language of § 21.71.080(B)(1) and (B)(2) unambiguously sets forth different standards for assessing proposed disturbances

depending on the type of trees, shrubs, plants, or specific areas sought to be disturbed. A review of the legislative history of the Act confirms this interpretation. *See State v. Roshchin*, 446 Md. 128, 140 (2016) (explaining that even "when the language is unambiguous, it is useful to review legislative history of the statute to confirm that interpretation and to eliminate another version of legislative intent alleged to be latent in the language").

As noted, the resources listed under § 21.71.080(B)(1) and (B)(2) generally correlate with those under NR § 5-1607(c)(1) and (c)(2) (C.1 and C.2 Resources, respectively), except for the more stringent requirement of significant trees noted earlier. Because the local forest conservation law must be consistent with the intent, requirements, and standards of the Act, *see* NR § 5-1603(a)(1), looking to the legislative history of NR § 5-1607(c)(1) and (c)(2) can be informative in discerning the intent behind the City Code provisions modeled after them. *See, e.g.*, *Balt. City Det. Ctr. v. Foy*, 461 Md. 627, 632–33 (2018) (where the legislature modeled the State Correctional Officers' Bill of Rights ("COBR") after the Law Enforcement Officers' Bill of Rights ("LEOBR"), looking to the LEOBR can be an "informative source" for interpreting the COBR's provisions).

When the Act was initially enacted in 1991, the original version of NR § 5-1607(c) applied the same standard for evaluating disturbances to C.1 and C.2 Resources. *See* 1991 Md. Laws, Ch. 255, at 2051–52. In the section's original iteration, C.1 and C.2 Resources were to be left undisturbed unless the applicant had demonstrated "to the satisfaction of the

State or local authority that reasonable efforts had been made to protect them and the plan could not be altered." *Id.* at 2051. Former NR § 5-1607(c) stated:

> (c) The following trees, shrubs, plants, and specific areas shall be considered priority for retention and protection, and they shall be left in an undisturbed condition unless the applicant has demonstrated, *to the satisfaction of the State or local authority that reasonable efforts have been made to protect them and the plan cannot reasonably be altered*:
>
> (1) Trees, shrubs, and plants located in sensitive areas including 100-year floodplains, intermittent and perennial streams and their buffers, coastal bays and their buffers, steep slopes, and critical habitats;
>
> (2) Contiguous forest that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site;
>
> (3) Trees, shrubs, or plants identified on the list of rare, threatened, and endangered species of the U.S. Fish and Wildlife Service or [DNR];
>
> (4) Trees that are part of a historic site or associated with a historic structure or designated by [DNR] or local authority as a national, State, or local Champion Tree; and
>
> (5) Trees having a diameter measured at 4.5 feet above the ground of:
>
> (i) 30 inches; or
>
> (ii) 75% of the diameter, measured at 4.5 feet above the ground, of the current State Champion Tree of that species as designated by [DNR].

NR § 5-1607(c) (2005 Repl. Vol.) (emphasis added).

In 2009, the General Assembly amended NR § 5-1607(c) to require a variance for the disturbance of certain vegetation and areas of land. *See* S.B. 666, 2009 Leg., 426th Sess. (Md. 2009). The purpose of the amendment was to "alter[] the standard that a person is required to meet to determine whether certain vegetation and areas of land may be disturbed." S.B. 666; *see also* DNR Bill Report (Feb. 24, 2009), S.B. 666, 2009 Leg., 426th

Sess., Bill File at 59 (Md. 2009) (explaining that Senate Bill 666 proposed modifications to the existing Act including "requiring a variance for disturbance of sensitive areas").[23]

In accordance with that purpose, the resources itemized under former subsections (c)(3) through (5) were placed under what is now subsection (c)(2). *See* 2009 Md. Laws, Ch. 298, at 1503. Subsection (c)(2) was amended to read:

> (c)(2) The following trees, shrubs, plants, and specific areas shall be considered priority for retention and protection, and they shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the State or local authority, that the applicant *qualifies for a variance under § 5-1611 of this subtitle*:
>
> (i) Trees, shrubs, or plants identified on the list of rare, threatened, and endangered species of the U.S. Fish and Wildlife Service or [DNR];
>
> (ii) Trees that are part of a historic site or associated with a historic structure or designated by [DNR] or local authority as a national, State, or local Champion Tree; and
>
> (iii) Trees having a diameter measured at 4.5 feet above the ground of:
>
> 1. 30 inches; or
>
> 2. 75% of the diameter, measured at 4.5 feet above the ground, of the current State Champion Tree of that species as designated by [DNR].

NR § 5-1607(c)(2) (2012 Repl. Vol.) (emphasis added). Under subsection (c)(1), proposed disturbances to contiguous forests remain subject to the standard of whether "reasonable efforts have been made to protect them and the plan cannot reasonably be altered." NR § 5-1607(c)(1)(ii).

[23] The amendment drew concerns from certain industry stakeholders, one of which expressed that the change "moves decisions about clearing priority forest from an administrative setting in the reviewing agency to an expensive and problematical quasi judicial variance test." *See* Letter from NAIOP to Chair of Senate Education, Health and Environmental Affairs Committee (Feb. 24, 2009), S.B. 666, 2009 Leg., 426th Sess., Bill File at 79–80 (Md. 2009).

Thereafter, and consistent with the amendments to the Act, DNR adopted amendments to COMAR and the model ordinance to require "a variance for any disturbance to specific priority areas for retention." 36 Md. Reg. 18 at 1385–86. DNR proposed amendments to Article VII (Afforestation and Retention) of the model ordinance, which were ultimately adopted. The italicized text below indicated new language, while the brackets indicated deleted text:

> 7.2 Retention. The following trees, shrubs, plants, and specific areas are considered priority for retention and protection and shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the Department, that reasonable efforts have been made to protect them and the plan cannot reasonably be altered:
>
> A. Trees, shrubs, and plants located in sensitive areas including the 100-year floodplain, intermittent and perennial streams and their buffers, coastal bays and their buffers, steep slopes, nontidal wetlands, and critical habitats; *and*
>
> B. Contiguous forest that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site**[**;**]**.
>
> *7.2-1 Retention. The following trees, shrubs, plants, and specific areas are considered priority for retention and protection and shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the Department, that the applicant qualifies for a variance in accordance with Section 14.1 of this article:*
>
> **[**C.**]** *A.* — **[**E.**]** *C.* (text unchanged)

36 Md. Reg. 18 at 1387 (Aug. 28, 2009); *see* 36 Md. Reg. 22 at 1723 (Oct. 23, 2009) (adopting amendments effective Nov. 2, 2009). The resources listed under "**[**C.**]** *A.* — **[**E.**]** *C.* (text unchanged)" refers to:

> C. Trees, shrubs, or plants determined to be rare, threatened, or endangered under:
>
> (1) The federal Endangered Species Act of 1973 in 16 U.S.C. §§ 1531–1544 and in 50 CFR Part 17;

(2) The Maryland Nongame and Endangered Species Conservation Act, [NR] §§ 10-2A-01–10-2A-09[;] and

(3) COMAR 08.03.08 [threatened and endangered species];

D. Trees that:

(1) Are part of a historic site;

(2) Are associated with a historic structure; or

(3) Have been designated by the State or the Department as a national, State, or county champion tree; and

E. Any tree having a diameter measured at 4.5 feet above the ground of:

(1) 30 inches or more; or

(2) 75 percent or more of the diameter, measured at 4.5 feet above the ground, of the current State champion tree of that species as designated by [DNR].

18 Md. Reg. 23 at 2545–46 (Nov. 15, 1991). Thus, the legislative history of NR § 5-1607(c)(1) and (c)(2), which served as the basis for the model ordinance later adopted by the City Council in § 21.71.080(B)(1) and (B)(2), confirms that different standards apply to disturbances in priority forests and areas, depending on the type of resource impacted. We conclude, based on the plain language and legislative history, that the disturbance of the contiguous forest is not subject to the variance standards in accordance with § 21.71.170, whereas the disturbance of significant trees is.

The Citizens argue that even if the proposed disturbance to the contiguous forest does not need to satisfy the variance criteria under § 21.71.170, the disturbance must still meet the "minimum requirements" outlined in the variance policy and procedures of NR § 5-1611. We disagree. As explained, the Act established different standards for evaluating proposed disturbances based on the resource being affected. NR § 5-1607(c)(2), which

requires an assessment of whether the proposed disturbance "qualifies for a variance under § 5-1611," does not categorize contiguous forests as a C.2 Resource for which this standard applies.

iii. Roles of the Department and Commission

The Department has distinct yet overlapping roles under Chapters 21.24 and 21.71. Under Chapter 21.24, the Department, through its director, must review the planned development application and prepare a staff report to be transmitted to the Commission for consideration. *See* City Code § 21.24.070(D). Given that compliance with Chapter 21.71 is a factor that the Commission must consider in deciding on a planned development application, *see* § 21.24.090(G), it is understandable that the Department reviews compliance with Chapter 21.71 as part of its staff report and its assessment of whether to recommend to the Commission approval of the planned development application.

Under Chapter 21.71, the Department reviews and assesses proposed disturbances pursuant to §§ 21.71.070(A)(5) and 21.71.080(B). These provisions require the applicant to demonstrate "to the satisfaction of the Department" specific criteria, depending on the areas affected. The phrase "to the satisfaction of" is inherently discretionary. *See Rahman v. Bondi*, 131 F.4th 399, 407 (6th Cir. 2025) (explaining that the majority view among circuits is that the phrase "to the satisfaction of" is "inherently discretionary") (citations omitted); *see also Poh v. Nielsen*, No. PWG-17-3825, 2019 WL 1002596, at *4 (D. Md. Mar. 1, 2019) (examining the dictionary definitions of "to the satisfaction of" and concluding that the "ordinary meanings suggest that 'to the satisfaction of' is a subjective,

or discretionary, concept"). Given the Department's interconnected roles under Chapters 21.24 and 21.71, it is expected that the staff report will include a review and assessment of the applicant's compliance with Chapter 21.71, as well as an evaluation of proposed disturbances under §§ 21.71.070(A)(5) and 21.71.080(B).

Ultimately, however, the Commission is responsible for making the final decision on whether to approve the planned development. In reaching this decision, the Commission must provide written findings that evaluate, among other factors, the compliance of the planned development with Chapter 21.71. *See* § 21.24.090(G). Implicitly, this evaluation includes determining if the applicant has demonstrated various criteria to the Department's satisfaction, depending on the area the applicant seeks to disturb. Additionally, the Commission must make a final determination as to whether the applicant qualifies for a variance under § 21.71.170, provided that the requested variance falls within the scope of § 21.71.170. *See* City Code § 21.71.170(F) ("Any variance must be submitted to the Planning Commission . . . with the project or development plan for final determination.").

Contrary to the Citizens' assertion, the provisions under Chapter 21.71 do not establish separate procedures for evaluating proposed disturbances to contiguous forests and significant trees. While such assessments involve different standards, as previously discussed, they are conducted under one unified procedure in the context of a planned development. In the first part, the Department fulfills its responsibilities under Chapters 21.24 and 21.71. This includes reviewing and assessing proposed disturbances under §§ 21.71.070(A)(5) and 21.71.080(B), as well as § 21.71.170 when these variance criteria

are invoked. In the second part, the Commission reviews the planned development application to ensure compliance with Chapter 21.71, which implicitly includes the Department's assessment of proposed disturbances under §§ 21.71.070(A)(5) and 21.71.080(B). The Commission then makes a final determination regarding the planned development application, including any variance request subject to § 21.71.170. *See* City Code § 21.71.170(F).

For the reasons stated, we conclude that the Commission did not err in interpreting the relevant provisions of Chapter 21.71 in the Supplemental Opinion and Order, above.[24]

V.

SIGNIFICANT TREES

As stated, a request to remove significant trees is subject to variance procedures under § 21.71.170. Under subsection (A), an applicant may request a variance from Chapter

[24] Assuming *arguendo* that the Department had authority to "approve" or make a final determination regarding the proposed disturbance to the contiguous forest, the Citizens argue that the Commission did not demonstrate that the Department actually approved the disturbance. According to the Citizens, the Department failed to approve the disturbance, as the recommendation for approval in the staff report did not constitute formal approval. Furthermore, even if the staff report's recommendation was considered formal approval, the Citizens contend that the Department should have, but did not, make written findings to show that the variance criteria were met in accordance with § 21.71.170(C) ("The Department shall make written findings that the applicant has met the requirements of Subsections A. and B. of this section before the Department may grant a variance.").

These alternative arguments assume that § 21.71.170 applies to proposed disturbances to contiguous forest and that the Department made a final determination on this proposed disturbance. However, as explained, § 21.71.170 does not apply to such disturbances, and it is the Commission that makes a final determination on the planned development application, including variance requests that are subject to § 21.71.170.

21.71 or the Act if the applicant demonstrates that enforcement would result in "unwarranted hardship" to the applicant. City Code § 21.71.170(A). In addition, under subsection (B), an applicant for a variance must address six requirements: (1) describe the special conditions peculiar to the property that would cause the unwarranted hardship; (2) describe how enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas; (3) verify that the granting of the variance will not confer on the applicant a special privilege that would be denied to other applicants; (4) verify that the variance request is not based on conditions or circumstances which are the result of actions by the applicant or by any previous owner of the property; (5) verify that the request does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property; and (6) verify that the granting of a variance will not adversely affect water quality. City Code § 21.71.170(B).

The Citizens challenge the Commission's application of the criterion in subsection (B)(1), which relates to the "special conditions peculiar to the property" that would cause unwarranted hardship to the applicant. They also challenge the Commission's finding of unwarranted hardship alongside applying the criterion in subsection (B)(4), which assesses whether the variance request is based on conditions or circumstances resulting from the applicant's actions. We address them in turn.

A.

Special Conditions Peculiar to the Property

Under subsection (B)(1), the Commission found "special conditions peculiar to the property which, without the requested variance, would deny the [Developer] of a reasonable and significant use of the property." It explained as follows:

> The Commission finds that the property is unique in size – evidence before the Commission demonstrated that this 180-acre parcel is one of the largest undeveloped, yet developable, tracts of land in the City. The Commission additionally accepted that the entire property is predominately covered by priority forest, including more than 250 significant trees scattered throughout. The Commission is persuaded by Mr. Klebasko's testimony and finds that the property cannot be developed for a reasonable use while avoiding all significant trees. The [Developer's] forest stand delineation materials, including the Supplemental Forest Stand Delineation Report, make this quite clear. The Natural Resources Inventory details where the high priority forest exists on the property, and the [Developer's] request for the variance to remove sixty-four (64) significant trees appears to be a direct result of its attempt to retain the 'highest' of the high-priority forest and to not disturb long-standing environmental features on other parts of the property. As a result, the [Developer] must cluster the development where the 'lowest' of the high-priority forest is located, and it has[.]
>
> * * *
>
> Along with the [Developer's] Forest Conservation Plan materials, these reports, as well as testimony from the [Developer's] professionals, additionally evidence the existence of and location of certain natural features, including vernal pools, wetlands and intermittent streams which are unique to the property and demonstrate that a variance to the significant trees is necessary in order to avoid unwarranted hardship.
>
> Further, the Commission acknowledges that the Comprehensive Plan identifies the property as part of the Forest Drive Opportunity Area,[25] and

[25] Opportunity Areas in the City are selected based on where the character of the area is expected or desired to change. There are four Opportunity Areas in the City of Annapolis. The project site is a major piece of the Forest Drive Opportunity Area. One of the goals for the Forest Drive Opportunity Area is that the intense development of the site should be clustered and closer to Forest drive to preserve the majority of the existing site.

goes so far as to expressly recognize that the property possesses two unique features: substantial acreage and unified ownership. The Commission gives great weight to the Comprehensive Plan in favor of these criteria, and finds that these unique characteristics to the Property, in combination with how the local legislature has determined the property should be used, adequately demonstrates conditions peculiar to this property which cause an unwarranted hardship without the requested variance to remove significant trees.

The Commission also considered the [Developer's] commitment to the design and construction of Skipper's Lane through the site. Skipper's Lane is [a] small street parallel to Forest Drive, which the City has, for many years, desired to continue through the [Developer's] site. The [Developer] has committed to donate land, fund the purchase of off-site land, and to fund the design and construction of the extension of Skipper's Lane through the project to Spa Road. The Commission finds that this opportunity, and commitment by the [Developer], constitutes a unique characteristic of the Property that will mitigate negative traffic impacts on Forest Drive and will create a safe, low stress avenue for people who cannot or choose not to drive to access nearby amenities, including the Safeway, the Annapolis Middle School, and the City recreation centers. Absent the requested variance to remove sixty-four (64) significant trees, the [Developer] would suffer an unwarranted hardship which frustrates the needs of the City.

The Commission additionally finds that a substantial portion of the property proposed for development lies close to Forest Drive and is covered by contiguous forest, including the sixty-four (64) significant trees. Accordingly, to deny the requested variance would force the development into the less forested areas of the property, nearer to Crab Creek and its tributaries, and into the Chesapeake Bay Critical Area where development is critically limited. Accordingly, it is the Commission's opinion that if the [Developer] were denied the variance to remove sixty-four (64) significant trees, it would be denied a reasonable and significant use of its property to develop the proposed Institution for the Care of Aged. The Commission finds that to deny the requested variance would cause the development to be so discontiguous as to be impractical for the proposed use.

In sum, each of the above-described conditions are unique to this property and evidence the existence of special conditions peculiar to the property, each of which, alone, would create an unwarranted hardship for the [Developer]. And to be sure, the Commission finds that taken together, the above-described evidence demonstrates a special set of conditions unique to the subject property which satisfies this same variance criteria.

i. "Variance" "Does Not Mean Zoning Variance"

The Citizens argue that the Commission erred when it concluded that the property was unique based on factors that do not relate to the land itself, such as unified ownership of the property, zoning for commercial/retail and higher-density residential development on the property, designation of the property in an opportunity area, proximity of the property to Forest Drive, and the proposal to construct an extension to Skippers Lane.

The Citizens rely on *Cromwell v. Ward*, 102 Md. App. 691 (1995), and its progeny cases of *King v. Helfrich*, 263 Md. App. 174 (2024), *Dan's Mountain Wind Force, LLC v. Allegany County Board of Zoning Appeals*, 236 Md. App. 483 (2018), and *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, 407 Md. 53 (2008), for the proposition that the determination of uniqueness must be based on inherent characteristics not shared by other properties in the area, including exceptional narrowness, shallowness, or unusual shape of a specific property or exceptional topographic conditions or another extraordinary situation or special condition of the property.

The Citizens' reliance on these cases is misguided because the cases assess uniqueness in the context of zoning variances, not variances under forest conservation law. *See Bhargava v. Prince George's Cnty. Plan. Bd.*, --- Md. App. ---, No. 659, Sept. Term, 2023, slip op. at 20 (filed Apr. 1, 2025) ("Consideration of a forest conservation plan (and by extension a variance from the forest conservation requirements) is a separate regulatory process from zoning considerations.").

Chapter 21.71 expressly states that "variance" under the City's forest conservation law "does not mean a zoning variance." City Code § 21.71.020 (defining "variance"). To be sure, the City Code utilizes a different procedure for permitted zoning variances, which the Board of Appeals decides. *See* City Code § 21.28.010 (stating that the Board of Appeals is authorized to determine and vary the regulations of the zoning code); § 21.28.040 (providing for variances from the regulations of the zoning code for setbacks and building heights, among others). Section 21.28.050 sets forth the required considerations in granting a zoning variance. Among them are:

> A. Because of the particular physical surroundings, shape or topographical conditions of the specific property involved, a particular hardship to the owner would result as distinguished from a mere inconvenience if the strict letter of the regulations were to be carried out.
>
> B. The conditions upon which a petition for a variation is based are unique to the property for which the variance is sought, and are not applicable, generally, to other property within the same zoning classification.

City Code § 21.28.050. The plain language of the zoning code requires consideration of unique physical features related to the land not mentioned in § 21.71.170(B)(1). *See, e.g.*, *Bhargava*, slip op. at 21 (highlighting the "statutory separation between variances" under the municipality's zoning ordinance and forest conservation law).

In § 21.71.170(B)(1), the phrase "special conditions peculiar to the property" is not defined within the Code, nor are the individual words defined. "When statutory terms are undefined, we often look to dictionary definitions as a starting point, to identify the 'ordinary and popular meaning' of the terms . . . ." *Westminster Mgmt., LLC v. Smith*, 486 Md. 616, 644 (2024). The definition of "special" includes "distinguished by some unusual

quality," "readily distinguishable from others of the same category," "being other than the usual," or "designed for a particular purpose or occasion." *Special*, Merriam-Webster, https://www.merriam-webster.com/dictionary/special. Webster's Dictionary indicates that "unique" is synonymous with "special." *Id.*

The word "conditions" (plural) refers to "attendant circumstances." *Conditions*, Merriam-Webster, https://www.merriam-webster.com/dictionary/conditions. The word "peculiar" means "characteristic of only one person, group, or thing," or "different from the usual or normal." *Peculiar*, Merriam-Webster, https://www.merriam-webster.com/dictionary/peculiar. Taken together, an evaluation of "special conditions peculiar to the property" is not limited to unique physical features of the land; it may also encompass other circumstances. This interpretation aligns with the variance policy outlined in NR § 5-1611(a), which provides that local authorities shall provide for the granting of variances to the requirements of the Act, "where owing to *special features of a site or other circumstances,* implementation of the Act would result in unwarranted hardship to the applicant." (emphases added).

Furthermore, the zoning code and forest conservation law serve distinct purposes. The City's zoning code aims to establish adequate standards of light, air, and open space; prevent the overcrowding of land and buildings; maintain and protect residential, business, commercial, and manufacturing areas alike from harmful encroachments; ensure that land designated for specific uses is not repurposed for inappropriate activities; set reasonable

standards to which buildings and structures shall conform; and manage the location of unavoidable nuisance-producing uses. *See* City Code § 21.02.030(A)–(V).

In contrast, the primary goal of the Act, and by extension Chapter 21.71, is to "minimize the loss of forest land in connection with development activity and ensure that priority areas for forest retention and forest planning are identified and protected prior to development." *CREG*, 481 Md. at 329. Thus, the zoning code centers on the relationship between property owners and the public, while forest conservation law focuses on the relationship between the proposed development and the environment.

ii. Consideration of Environmental Features Entitled to Protection

The Citizens argue that the Commission erred in concluding that the property was unique because the contiguous forest and significant trees limited the developable area on the property. The Citizens contend that uniqueness cannot be established based on the "existence" of environmental features that the Act is designed to protect. The Citizens maintain that taking into account the "existence" of protected areas would contradict the legislative intent of the Act, which aims to "minimize the loss of forest land in connection with development activity and ensure that priority areas" are protected prior to development. *Id.* They further argue that if an applicant can prove uniqueness based on the "existence" of the environmental features protected by the Act, then every applicant seeking a variance would satisfy the uniqueness criterion, making it meaningless. We disagree.

First, the Commission did not conclude that the mere "existence" of the contiguous forest and significant trees constituted special conditions peculiar to the property. Instead, it specifically described the spatial distribution of these areas and their location in relation to other environmental features that contributed to the property's uniqueness.

Second, as explained earlier, considering "special conditions peculiar to the property" is broad. The plain language of subsection (B)(1) does not exclude consideration of the priority forests and areas entitled to protection. If the City Council had intended to prohibit consideration of these areas, it could have easily included provisions in Chapter 21.71. *See Bowen v. City of Annapolis*, 402 Md. 587, 613 (2007) ("In construing the plain language, '[a] court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application.'" (alteration in original) (citation omitted)).

Finally, the legislative purpose of "minimizing" forest loss does not mean eliminating it. The provisions of the Act permit the disturbance of priority forests and areas so long as specific requirements are met. *See, e.g.*, NR § 1605(c) (preparation of a forest conservation plan to address how designated areas for afforestation or reforestation will be maintained); NR § 5-1606 (establishing formulas for afforestation and reforestation); NR § 5-1607 (providing for a preferred sequence for afforestation and reforestation); NR § 5-1610 (establishing fee that may be paid in lieu of planting requirement, which is paid into

the State or local forest conservation fund). In other words, the Act balances natural resource preservation and economic development.

The Commission identified several factors unique to this property, which pertain to features of the site and other circumstances that constitute "special conditions peculiar to the property." We conclude that there was substantial evidence to support the Commission's conclusion that the conditions described in its findings were "special conditions peculiar to the property which, without the requested variance, would deny the [Developer] of a reasonable and significant use of the property."

B.

Unwarranted Hardship and Self-Created Hardship

To establish whether denying a variance under the forest conservation law would cause "unwarranted hardship," the applicant has the burden of demonstrating that, "without a variance, the applicant would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance." *W. Montgomery Cnty. Citizens Ass'n v. Montgomery Cnty. Plan. Bd. of the Md.-Nat'l Cap. Park & Plan. Comm'n*, 248 Md. App. 314, 347 (2020) (quoting *Assateague Coastal Tr., Inc. v. Schwalbach*, 448 Md. 112, 139 (2016)).

The Citizens contend that the Commission erroneously concluded that the Developer would experience unwarranted hardship if the request to remove the significant trees were denied and that this alleged hardship was not self-created. They specifically

contend that the Developer would not experience undue hardship since it could position the proposed development in the currently unforested area occupied by the equestrian facility and the Wellness House, making removal of the significant trees unnecessary. Therefore, the Citizens assert that denying the variance would not hinder reasonable use of the property, as the Developer is already utilizing it. The Citizens also argue that the property itself did not create the alleged hardship, as the Commission found. Instead, the Developer's "need for the variance, and thus the alleged hardship, derives from [its] desire to expand the existing uses on the Subject Property to include more profitable enterprises."

We conclude that the Citizens have not preserved these arguments for appellate review. A reviewing court "may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001). "The 'primary purpose' of this rule 'is to give the administrative agency the opportunity to decide the issue' because, 'when an appellate court is the first to decide an issue, it deprives the agency of that opportunity.'" *Concerned Citizens of Cloverly v. Montgomery Cnty. Plan. Bd.*, 254 Md. App. 575, 600 (2022) (citation omitted). "[A] passing reference to an issue, without making clear the substance of the claim, is insufficient to preserve an issue for appeal, particularly in a case with a voluminous record." *Id.* at 603.

After scouring the voluminous record,[26] we could not find any arguments from the Citizens suggesting that the development site could be placed in the unforested area occupied by the equestrian facility and Wellness House. Nor did the Commission address any suggestion that the development site could be placed there. Instead, the Commission seemed to understand the opposition to the project to mean that the development could be located on the meadow in an unforested area to the southeast of the proposed site, rather than in the location the Citizens are now advocating on appeal.

In that regard, the Commission was not persuaded by the suggestion to place the development on the meadow to the southeast of the proposed site. It explained that this meadow was closer to the headwaters of Crab Creek, and developing in this area would leave very little buffer for stormwater before it flowed directly into the creek. The Commission accepted statements indicating that reforesting the meadow would significantly enhance the "contiguity" of the forest and canopy on the property. Additionally, the large contiguous forest and large meadow running alongside Spa Road past the equestrian center and the wetlands with enhanced buffers would provide diverse habitat features for wildlife.

We also could not find any argument that the Developer's need for the variance derived from its desire to expand the existing uses on the property to include more profitable enterprises. Nor did the Commission address this specific argument.

[26] The record included the Developer's and the City's exhibits offered at the hearings before the Commission, written comments from members of the public, and transcripts of multi-day hearings before the Commission, all of which spanned over 2,000 pages.

Accordingly, we decline to address these arguments for the first time on appeal. *See Ben Porto & Son, Ltd.*, 262 Md. App. at 370–72 (declining to address an argument for the first time on appeal that was not presented before the Tax Court).

As stated, the Commission determined that without the requested variance to remove sixty-four significant trees, the Developer would suffer an unwarranted hardship under subsection (B)(1). Additionally, under subsection (B)(4), the Commission found that the variance request was not based on conditions or circumstances resulting from the Developer's action. The Commission explained:

> In its Staff Report, the Department determined that this variance is not the result of actions by the [Developer]. The significant environmental features throughout the site (i.e. significant trees, contiguous forest, non-tidal wetlands, 25-foot wetland pools, intermittent stream, and an MDE-designated vernal pool and its 100-foot buffer) limit where development can occur.
>
> Jon Arason [the Developer's land use consultant] testified during the February 3, 2022 public hearing. Mr. Arason testified that the fact that a property owner wants to do something does not mean that they have taken an action that has resulted in their need for a variance. This request is based upon the condition of the property; heavily wooded with sensitive features and not any actions that have been taken by the property owner past or present. Mr. Arason further testified that the current property owners have owned the property for approximately 30 years and haven't been able to develop it, and that a lot of the trees that need variances now wouldn't have needed that 20 or 30 years ago.
>
> The unique conditions existing on this site are outlined in the [Developer's] Supplemental Forest Stand Delineation Report and the Waters of the U.S. (Including Wetlands) Delineation Report; both of which were prepared by the [Developer's] environmental consultant, Mr. Klebasko. As shown in these reports, the unique features of the property (i.e., the soils, slopes, forest stands, wetland, and streams) have existed for and remained in a substantially undisturbed state for decades. The Commission finds that neither this [Developer], nor any prior property owner, have caused these conditions. The Commission agrees that the fact that a property owner

> intends to do something on their property does not in and of itself mean that the owner has taken any action causing a need for a variance, and finds that to be the case here. Further, there was no evidence before the Commission which, in the Commission's opinion, outweighed these findings and favored a conclusion that the [Developer] caused any condition or circumstance upon which the [Developer's] variance to remove sixty-four (64) significant trees is now based.

We conclude there was substantial evidence to support the Commission's conclusion that the Developer would experience unwarranted hardship without a variance and that the variance request was not based on conditions or circumstances resulting from the Developer's actions.

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