Circuit Court for Montgomery County
Case No. 433722-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 02568

September Term, 2017

CONCERNED CITIZENS OF CLOVERLY, *et al.*,

v.

MONTGOMERY COUNTY PLANNING BOARD, *et al.*

Meredith,
Graeff,
Berger,

JJ.

Opinion by Graeff, J.

Filed: March 14, 2019

This appeal arises from the decision (the "Resolution") of appellee, the Montgomery County Planning Board (the "Board") of the Maryland-National Capital Park and Planning Commission ("M-NCPPC"), to approve a preliminary subdivision plan submitted by Jesus House, DC ("Jesus House"). The Concerned Citizens of Cloverly, appellants, filed a petition for judicial review in the Circuit Court for Montgomery County, which affirmed the Resolution.

On appeal to this Court, appellants present the following questions for this Court's review[1], which we have consolidated and rephrased as follows:

[1] Appellants present the following questions:

1. Under conditions established by County Council Resolution 14-334 for a water and sewer connection for the use of the subject property, did the Planning Board improperly fail to determine the acreage necessary for the on-site septic system that would be needed for the applicant's intended use of the property absent the water and sewer connections?

2. Did the Planning Board improperly fail to consider and resolve conflicts in material evidence relevant to proper determination of the requisite set-aside acreage?

3. Was the circuit court correct in refusing to consider on judicial review these materials:

A. Parts of the legislative history of County Council Resolution No. 14-334, whose purpose, intent and effect are central to the septic system acreage calculation?

B. A drawing submitted by the intervenor's engineer material to the septic system acreage calculation and reviewed by staff, but excluded from the record submitted to the circuit court?

1. Did the Board abandon its responsibility to make a final decision whether there were adequate public facilities for the preliminary subdivision plan by determining that it was bound by the conclusions of the Montgomery County Department of Permitting Services ("DPS") and the Montgomery County Department of Environmental Protection ("DEP") regarding septic area calculations relating to approval of the preliminary plan?

2. Did the circuit court err in granting Jesus House's motion to strike material that was not included in the record?

For the reasons set forth below, we shall reverse the judgment of the circuit court and remand to that court to remand to the Board for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

A.

The Preliminary Plan and Resolution 14-334

On August 14, 2015, Jesus House filed Preliminary Plan No. 120160040 (the "Preliminary Plan") with the M-NCPPC, seeking "to create one lot for a 1,600-seat religious assembly and associated 350-student private school" on 15.55 acres of land located in the Cloverly area of Montgomery County (the "Property"). The Preliminary Plan proposed construction of a 185,000 square foot structure, to be used for a "church and associated uses," including a sanctuary, administrative spaces, a multi-purpose center,

C. The complete, documented written version of oral testimony given at the board hearing by one of the appellants who, contemporaneous with her oral testimony, submitted the written testimony, which inexplicably was not included in the record submitted to the circuit court?

classrooms, a gymnasium, 400 parking spaces, and a playing field.[2] The school would operate during the week and the sanctuary would "primarily be used for two services on Sundays and the multi-purpose center on weekends and on weekdays after peak hours."

The Property is in the RE-2 zone, Residential Estate – 2, meaning one house per two acres. Montgomery County Zoning Ordinance §§ 59-2.1.3(C)(1)(a)(i) and 59-4.4.4(B). "The intent of the RE-2 zone is to provide designated areas of the County for large-lot residential uses. The predominant use is residential in a detached house." § 59-4.4.4(A). The Cloverly Master Plan (the "Master Plan") in effect in 1999, and still in effect as of the date of this dispute, recommends that RE-2 zoned properties not be connected to public water or sewer services.

In 1999, the former owners of the Property, Michael and Patricia Grodin, requested a water and sewer category change for the Property in anticipation of the sale of the Property to the Southern Asia Seventh Day Adventist Church (the "Church"), which was planning to construct a 750-seat church on the Property. The owners' stated reason for the change was as follows:

> My property abuts the existing main. . . . In order to protect the sensitive environmental feature of the forest stand in the headwaters of the Northwest Branch. Installation of an extensive underground septic field would require the destruction of seven acres of mature forest stand. This can be prevented by allowing a connection to the abutting sewer line.

[2] At the time Jesus House submitted its Preliminary Plan to the Board, there was one single-family home on the Property.

On November 2, 1999, the County Council adopted Resolution 14-334, which approved the water and sewer category change, approving the use of public water and sewer for the Property. The approval of the sewer category change was "restricted to private institutional facility use only," with three conditions. The condition relevant to this appeal is: "[T]he church will establish a covenant preserving the forested area which would have been used for the on-site septic system."

The Church was never constructed, and the Property subsequently was sold to Jesus House. Jesus House's Preliminary Plan proceeded on the premise that it was entitled to the category change granting conditional approval of a sewer extension to the Property. Staff for the Board similarly proceeded on the premise that the sewer category changes "run with the land as the land is transferred," and therefore, Jesus House properly utilized the 1999 sewer category change. Appellants state that, for purposes of this appeal, they do not dispute that Jesus House was entitled to the 1999 sewer category change.

B.

Assessment of Forested Set-Aside Acreage Requirement

Jesus House retained Raztec Associates, Inc. ("Raztec") to analyze the number of acres that were required to be set aside to meet the County Council's 1999 conditional approval of the sewer connection. In an unsigned memorandum dated November 9, 2016, Raztec concluded that a hypothetical septic system would require 4.82 acres, and "[t]herefore, 4.82 acres of existing forest area will be preserved to satisfy the existing sewer category change."

The report noted that there were 1,600 proposed seats for the church and the school would have 350 students, K-12. The report set forth "Regulations/Requirements," [3] as follows:

> 1. 10,000 square feet of septic area for each 500 gallons of water flow per day.
> 2. Church Use with warming Kitchen: 5 Gallons Per Day (GPD)/Seat.
> 3. Septic trenches are laid out based on topography. Therefore the amount of space required for a septic system is also dependent on topography.
> 4. Each additional 10,000 square feet of absorption area or portion must be established on 15,000-40,000 square feet or proportional area depending on percolation rates.

The report then set out the calculations and conclusions as follows:

[3] Chapter 27A.00.01.08(A)(2) of the Code of Montgomery County Regulations ("COMCOR") provides, in pertinent part:

> 2. In any subdivision the density of sewage disposal trenches for on-site disposal areas must meet the following criteria:
>
> a. All lots proposed for . . . churches, . . . schools . . . , must have sufficient area for the initial absorption area and at least three recovery absorption areas. The total absorption area must be at least 10,000 square feet of useable area per 500 gallons of water flow per day or enough area for the initial and three recovery absorption areas, whichever is greater. . . .
>
> b. When the total required absorption area exceeds 10,000 square feet for lots proposed for subdivision approval, including areas proposed or established as easements, each additional 10,000 square feet of absorption area or portion, must be established on 15,000-40,000 square feet or proportional area depending on percolation rates. *See* 27A.00.01.05K for specific criteria.

CALCULATIONS:[4]

1. Determine the required gallons per day based on a 1,600 seat church with a warming kitchen;

5GPD/seat x 1,600 seats = 8,000 GPD

Determine the area of septic required, based on 10,000 square feet of septic area for each 500 GPD of water flow.

8,000 GPD/500 = 16 X 10,000 = 160,000 Square Feet (3.67 Acres)

2. Determine the required gallons per day based on a [sic] 350 Students;

30 GPD/student x 350 students = 10,500 GPD

Determine the area of septic required, based on 10,000 square feet of septic area for each 500 GPD of water flow.

10,500 GPD/500 = 21 x 10,000 = 210,000 Square Feet (4.82 Acres)

[4] The Maryland Department of Energy's *Guidance of Wastewater Flows for Use in Designing On-Site Systems* (Revised June 2011), suggests that the number of gallons per day ("GPD") per unit for a "Church-Assembly Hall" and for "Schools and Colleges (Per Student)" would be:

ESTABLISHMENT	**GPD PER UNIT**
CHURCH-ASSEMBLY HALL	
Per sanctuary seat	3
With private kitchen (members only)	5
With commercial kitchen (open to general public[)]	
With Food Service License: see "Food and Beverage Service Facility"	
Classroom space or meeting rooms intended for daily use, per seat	15
SCHOOLS & COLLEGES (PER STUDENT)	
Without food or showers	15
Add for food	5
Add for showers	10
Boarding	100
Day care, per student	15

> Conclusion: Since the uses for the site are not simultaneous, then the highest daily use will be used. In this case that is for the school use. Therefore, 4.82 acres of existing forest area will be preserved to satisfy the existing sewer category change.

Mike Razavi, owner of Raztec Associates, subsequently testified that the calculations they prepared were "purely based on requirements of DPS of Montgomery County on how to provide a septic system for a project." They had not designed the septic system for the project because such an exercise was unnecessary when no septic system was actually going to be built.

C.

M-NCPPC Staff Recommendation

On March 17, 2017, M-NCPPC staff recommended that the Preliminary Plan be approved with conditions.[5] Relevant to this appeal, staff noted that the sewer category change approved by the County Council in 1999 required Jesus House to preserve the area of forest that would have been removed for a septic system. The report discussed this condition, as follows:

> The sewer category change had three conditions of approval which are documented in County Council Resolution 14-334. The condition, for this mostly forested property, which impacts this application significantly requires "preserving the forested area which would have been used for the on-site septic system." Community members have insisted that the County

[5] The summary in the M-NCPPC staff's approval recommendation document also noted that the Preliminary Plan:

- Meets requirements of Chapter 22A, Forest Conservation Law.
  - Substantially conforms to the 1997 *Cloverly Master Plan*, including the recommendation to maintain a subwatershed impervious level of below 15 percent.

> Council required or intended to require the preservation of 7 acres of forest via the sewer category change. However, no documentation related to a specific amount, requirements or intent has surfaced except for the approved resolution by the County Council. As a result, [M-NCPPC] Staff and the staff of the [DEP] have agreed that no specific acreage of forest preservation was required by the conditions of the sewer category other than that which would have been removed to accommodate a septic system and reserve area for a church on the property.
>
> To confirm compliance with the County Council resolution, Staff and [DEP] required the applicant to submit wastewater calculations for the church and the private school proposed under this application to determine how much area would be required for a septic system to service the highest daily wastewater generator. The results of this analysis were confirmed by the Montgomery County Department of Permitting Services—Well and Septic section, determined that the private school is the highest wastewater generator (more so than the church) and would require a septic field of 4.82 acres if it were to be constructed. Thus, the preservation of 4.82 acres of existing forest satisfies the conditions of the sewer category change resolution. In addition, the requirements of the Forest Conservation Law have been applied to this application for the preservation of all the additional forest beyond the 4.82 acres. A Category I Forest Conservation easement will be the legal mechanism to preserve the forest required by the Forest Conservation Law and the sewer category change.
>
> The application substantially meets the recommendations of the 1997 Cloverly Master Plan.

The staff report noted that there was "considerable public opposition" to the Preliminary Plan, noting multiple citizen concerns, including traffic and property values. It continued:

> Much of the citizen concern has focused on the validity of the 1999 sewer category change approved by the County Council. Multiple citizens contend that the County Council intended to preserve 7 acres of forest on-site [when passing the 1999 Resolution]. However, the County Council resolution indicates no such intent that would be enforceable by Staff. Furthermore, citizens do not believe it is appropriate for the Applicant to be able to build a larger church than originally approved in the sewer category change. However, the sewer

> category change is not limited to the original applicant nor does Montgomery County code limit building size as part of a sewer category unless specified in the conditions of approval. Staff has deferred the interpretation of the sewer category change and how it relates to the current Application to [DEP]. [DEP]'s finding related to this Application are documented in their March 2, 2017 letter (Attachment 13).[6]

In conclusion, the report states:

> The Application[] meet[s] all requirements established in the Subdivision Regulations and the Zoning Ordinance. Access and public facilities will be adequate to serve the proposed lots, and the Application [has] been reviewed by other applicable county agencies, all of whom have recommended approval of the plan. Staff finds the Applicant has adequately addressed the recommendations in the 1997 Cloverly Master Plan, and has made a good faith effort to be responsive to the concerns raised [by] Staff and the community. Staff recommends approval of this Application, with the conditions as enumerated in the Staff Report.

D.

Public Hearing Before the Board and Subsequent Approval

On March 30, 2017, the Board held a public hearing regarding the Preliminary Plan. The Board confirmed that Jesus House would be hooking up to public water and sewer. The Board heard testimony from several members of the community, set forth below, in part, as relevant to this appeal.

One local resident, Michele Albornoz, testified that the community was concerned because it believed Jesus House had submitted conflicting information regarding what type

[6] The Montgomery County Department of Environmental Protection ("DEP") agreed that 4.82 acres "is what would have been required for a septic system to serve the project."

of kitchen it planned to construct. Although the report by Raztec indicated that the church would have a kitchen, the plans for the property, included "a very large and high intensity facility including large religious assemblies, a day school, a multipurpose facility," as well as "a banquet facility," and serving the homeless, and Ms. Albornoz suggested that a commercial kitchen would be sought at some point. She stated that "an accurate disclosure of the long term plan is essential to the upfront calculations of how much of the existing forest area needs to be conserved. This also impacts the determination of how much acreage the applicant can actually develop." Ms. Albornoz asserted that "the Board should not approve the plan until more information is known about the applicant's current and planned food preparation and service operations."

Several citizens testified that the intent of Resolution 14-334 in 1999 was to preserve seven acres of forested land that would have been destroyed by a septic system. Renee Chen testified that a category change was granted with a "restriction that the church would establish a covenant preserving the forested area that would have been used for the onsite septic system, which was seven acres." She stated that it was clear that the "Council's intent was to preserve seven acres of forested land on the property," noting that, "in 1999, the first applicant, they had a 750-seat sanctuary and was required to preserve seven acres. And today our applicant with a 1,600-seat sanctuary and a school now only needs to preserve 4.82 acres on the property."

Ms. Chen agreed "that septic systems have evolved. . . . [and] are smaller and more efficient." She disagreed, however, with the 4.82 calculation because it was "hypothetical"

and did "not take into account topography" and "percolation rates." She stated that, even if the calculations were correct, they still had to preserve more land.

Mitra Pedoeem testified that community members believed that the M-NCPPC staff report, which indicated that DPS confirmed the accuracy of the 4.82 acre figure, was "not correct." She stated that certain citizens met with DPS and DEP staff, who advised that they "simply relied on design[] requirements provided . . . by the applicant." "[N]o one from [the] county had verified the design requirements or had seen a sewer layout design to determine the size of [the] onsite septic system," and the "calculations [were] clearly incomplete and present a grossly incorrect conclusion." Ms. Pedoeem asserted that, to satisfy Resolution 14-334, the Board needed "to require the applicant to design a permitable sewer layout for an onsite septic system for a commercial facility based on actual site conditions and percolation tests including all the required preserve and setbacks." Hypothetical numbers did "not satisfy" the Council Resolution.

Attorney David Gardner testified on behalf of his client, Michael Grodin. Mr. Grodin owned the Property in 1999 and had asked for the sewer category change, which was approved in Resolution 14-334. Mr. Gardner explained that, in 1997, Mr. Grodin's engineer found that "seven acres needed to be preserved" to fulfill the pertinent sewer category change condition relating to the prior 750-seat church. Mr. Gardner posited that, to fulfill the conditions of Resolution 14-334, Jesus House needed to set aside 12.86 acres.[7]

[7] In discussing what he believed to be the proper septic area calculation, Mr. Gardner testified Raztec came up with a hypothetical calculation, which staff accepted "hook, line

He further testified that he believed M-NCPPC staff accepted Jesus House's Preliminary Plan application simply because "DEP accepted it and once DEP did, staff didn't question it."

After hearing the citizen testimony, Chair Anderson stated her understanding that "the jugular vein of this [hearing] is whether or not the interpretation by DEP of the conditions of the access to the public water and sewer system are appropriate." As such, she queried:

> [W]e just want to start with the question of what is the basis of our review of that determination [by DEP] or are we required to defer to them and does our staff represent that they agree with them or [do] you simply confer with your colleagues at DEP and allow them to make a judgment?

M-NCPPC staff member and Senior Planner Ryan Sigworth responded that M-NCPPC staff worked with DEP and the well and septic division of DPS in making its determination, "but ultimately it's interpreting and finding consistency with the County Council's resolution as it's a function of Council staff and that would be DEP." With respect to the Board's authority over the application regarding the sewer category change, he referred that to legal counsel.

David Lieb, the Board's attorney, stated that the County Council approved the water and sewer category change in 1999, and that was not something that the Board could "sit[]

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and sinker. They didn't require a concept drawing. They didn't require a permitable Site Plan to be done. What they did is they accepted Raztec's proposal." He noted that percolation tests and soil evaluations had not been done, and he challenged the idea that only the highest use should be considered. He argued that the church and school use were too big for the property to satisfy the condition imposed by the County Council.

in review of." He noted that Resolution 14-334 did not specify the number of acres that needed to be preserved, only that the private institutional facility would "establish [a] covenant preserving the forested area which would have been used for the onsite septic system." He stated that, "[w]ith respect to the question of sort of whose job it is to interpret that requirement, the water and sewer plan talks about DEP administering the water and sewer plan and I think, my understanding is that the staff has, you know, sort of correctly looked to DEP primarily to determine what the requirement was there." The following colloquy then ensued:

> CHAIR ANDERSON: . . . .You're saying that DEP determines whether or not the covenant has been satisfied and therefore that a water and sewer connection is permissible?
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> MR. LIEB: Well, I think, you know, again, it would be the Board that's going to require the covenant here in connection with this development. But I think in terms of what the, you know, sort of quantity of land that needs to be covered, yes, I think that that's something that was appropriately left to be determined by DEP.

Chair Anderson then stated that, although she was "not sure that the merits of DEP's calculations are really appropriately for us to review," she wanted to give Alan Soukup, a DEP staff member, "a chance to defend [his] calculations." Mr. Soukup stated as follows:

> Well, first off, DEP did not do any calculation. We relied on [DPS] to take the information provided by the project engineer and either confirm or un-confirm whether or not the calculations that they had made followed state and county regulations. What we got back from them was that yes, they did follow state and county regulations, and on that basis, we determined that the applicant had met that particular requirement of the category change back in 1999.

Mr. Soukup then asked Jason Fleming, an employee of DPS in the well and septic section, to testify regarding the accuracy of the septic area calculations. Mr. Fleming explained that, pursuant to the Code of Maryland Regulations ("COMAR"), the Maryland Department of the Environment ("MDE") gives guidance to calculate wastewater flows for commercial or institutional applications. It "made a list of the amount of gallons per day [to] apply to particular situations in commercial applications." Mr. Fleming explained that they used those numbers, and he did not disagree with Raztec's calculations. He agreed that other calculations might be appropriate based on percolation tests and other soil analysis, but he stated that it was their understanding that it was not necessary actually to test the soil "to meet the idea of the County Resolution." With respect to one of the citizen's argument that the calculation of 10,000 square feet per 500 gallons was not appropriate, Mr. Fleming explained that, "once you get a septic system that requires more than 10,000 square feet in area, that then you have to make sure that your property or the land that the septic system is going to be located in is enough to start diluting the nitrate" levels to get them below the specified EPA levels, but the actual size of the septic area had "to be 10,000 square feet per 500 gallons."

The following exchange then occurred:

> CHAIR ANDERSON: [T]he church will establish covenant preserving the forested area which would have been used for the onsite septic system. That's kind of ambiguous actually, you could read it either way, you could read that to mean for the septic field narrowly or you could read to mean how much land they would have had to set aside that they couldn't build on.
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> MR. FLEMING: In any other application the septic area would be just the area in which you are putting the trenches, would be the treatment drain, the

> septic tank or the advanced treatment unit that would be required. Then supplying water to trenches in the ground. That would be considered the septic area.

Mr. Fleming further testified that, even if, due to weekday church services, the total water flow was greater than the school standing alone, the calculations derived were "very conservative in nature" because MDE released its suggestions regarding allotment of GPD in the 1970s, and beginning in 1992, Congress mandated that low flow fixtures be universally installed. Given the lower flow fixtures, they "were comfortable that the 10,500 gallons would cover the activities" presented.

With respect to the concern that Jesus House subsequently would do something that required a higher water usage, such as install a commercial kitchen, Mr. Fleming testified that DPS "looked at the calculations from the data that was presented to [it] from the facility that was proposed." It "did not go and start making assumptions about what's going to happen in the future."[8] Mr. Soukup further testified that, in analyzing septic set aside calculations, staff took into account the fact that there could be some overlap between school and church activities.

Richard Weaver, "Planning Area 3 Acting Chief," stated that the staff's "biggest concern was how big is that forest we need to save and that's why we looked to our sister

[8] In response to the warming kitchen versus commercial kitchen issue, counsel for Jesus House proposed that the Board include a condition with the Preliminary Plan approval that Jesus House was not permitted to apply for a full kitchen in the future. The Board did not include this extra condition as part of the Preliminary Plan approval.

government agencies to determine [it] for us." He stated that the Staff Report had all the findings that the Board needed to assess the request.

Chair Anderson asked Mr. Lieb whether the Board had authority to "second guess" the calculations by DEP and DPS, or whether it was "required to defer to [their] judgment." Mr. Lieb answered, "Yes," stating:

> The Board's decision in approving a Preliminary Plan is really limited with respect to sewer is really determining whether there is adequate sewer to serve the property and the Master Plan the sewer plan really answers that question. As to whether DEP and DPS have appropriately interpreted the condition that the Council placed on the sewer extension, my opinion is that the Board does not sit in review of that. It is up to the, you know, I think the Board defers to their decision. The sewer plan itself specifies that it is DEP that administers that Master Plan. The Planning Board does not, the Planning Board's role in that is limited to advising on these changes, these proposed changes when they go through, and it did so on this change.

Chair Anderson then expressed concern that, if the church subsequently adopted further uses, such as a commercial kitchen, there would be no remedy. She stated, however, that based on what Mr. Lieb said, she did not believe that the Board could "second guess DPS's assessment of that issue." Chair Anderson, as well as several other Commissioners, stated that the church was too big. She stated: "I think that it is the bargain that we are not in a position to untangle." She continued: "[T]he question is whether or not the water and sewer connection is appropriately approved and that's not our decision," noting that the Board did not "have a tool available to limit the size of the church." The Board then voted to approve the Preliminary Plan.

On May 23, 2017, the Board issued Resolution 17-019, approving Jesus House's Preliminary Plan application. In its written resolution, the Board stated that "sewer and

water are adequate to serve the proposed development." It noted that, ordinarily, "that would be the end of the Board's analysis of sewer adequacy. But the County Council conditioned its approval of the category change on the church to 'establish a covenant preserving the forested area which would have been used for the on-site septic system.'"

Resolution 17-019 stated that "opponents of the Application argued that the 4.82-acre calculation significantly understates the area that would be required for the septic system and, thus, the area of forest that the Applicant should be required to protect in compliance with the conditions of approval of the sewer extension." It continued:

> In reviewing a subdivision application, the question that the Board is tasked with answering with respect to sewer, is whether there is sewer – either public sewer or septic – to serve the property. Where a subdivision is to be served by septic, the Board would ordinarily rely on MCDPS to determine whether the septic system proposed for the site would be adequate. If the proposed development were to be served by public sewer, the Board would ordinarily look to the determination of MCDEP, which administers the County's water and sewer plan, that sewer would be available to serve the subject property. In this case, the plan opponents ask the Board to make its own determination about the proposed development's compliance with the County Council's conditional approval of the sewer extension and to look behind MCDPS and MCDEP analyses that led DEP to conclude that it does. Not surprisingly, the law does not clearly answer the novel question of whether the Board has the authority to enforce a condition under these unique circumstances. But given the respective roles of MCDPS, MCDEP, and the Board, the Board is not convinced that it has the authority to do so.

On June 2, 2017, appellants sent a request for reconsideration to the Board. On June 8, 2017, the Board denied appellants' request for reconsideration.

E.

Appeal to the Circuit Court

On June 22, 2017, appellants filed a petition for judicial review of Resolution 17-019 in the Montgomery County Circuit Court. Appellants filed a memorandum attaching documents that had not been part of the record before the Board. These documents included: (1) legislative history for Resolution 14-334; (2) a drawing prepared by Raztec that had been submitted to the Washington Suburban Sanitary Commission; and (3) the written testimony of Michele Albornoz. Jesus House subsequently filed a motion to strike these supplemental documents, which the Board joined.

On December 12, 2017, the circuit court held a hearing. Appellants maintained that the question before the court was whether the Board had "the authority and responsibility" to resolve the septic acreage set aside calculation "even when the dispute [was] over advice from one of the agencies that reports to the Board in the subdivision review process." Counsel for Jesus House argued that this case was not about legal error, but rather, substantial evidence. She stated:

> It is this Court's job to determine whether there was substantial evidence to support the Planning Board's decision and whether there was legal error, and as I note more fully in my brief, the Planning Board has more than ample authority to do what they did, to defer to the agencies that are charged with implementing the applicable regulations and that decision is entitled to bring deference under the law.

Counsel for the Board similarly contended that the Board's decision should be reviewed for substantial evidence rather than legal error.[9] When the circuit court asked counsel to explain the language in the Resolution stating that the Board did not have the authority to question DEP and DPS's calculations, Mr. Mills responded as follows:

> Yes, Your Honor, you obviously have accurately quoted [the language in the Resolution], however, the entire substance of the paragraph before that talks about the different evidence that was presented. It talks about the evidence from DPS, DEP, and the petitioners. So, weighing that evidence leads to that conclusion. So I think to put this in terms of us making a legal determination about whether or not we've had to defer this is not accurate. I think we weighed the evidence, we made the decision we made and then went from there because otherwise, we had no way to get there. If we had not considered the evidence from DEP and DPS, we would not have been able to approve this. We would not have been able to attach the conditions that related to it.
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> * * *
>
> I think this is a factual matter rather than a legal one, and as you know the facts are the Board's prerogative. They weighed it the way they did, they made the decisions they did. So, with that, Your Honor, unless you have any further questions, I'll submit.

On January 29, 2018, the circuit court issued its opinion and order. It granted Jesus House's motion to strike and affirmed the Board's Resolution approving Jesus House's Preliminary Plan application. The court found that "the Planning Board's decision, which relied on the determinations of DEP and DPS to find that water and sewer facilities were adequate to approve the Application, was legally sound." It stated that the Board deferred

[9] A new attorney had replaced Mr. Lieb as general counsel for the Board by the time the circuit court hearing occurred.

to the expertise of the agencies in accordance with Montgomery County Planning Board's Regulation on Administrative Procedures for Development Review § 50.10.01.02(B)(4).

This timely appeal followed.

STANDARD OF REVIEW

The Court of Appeals has explained the relevant standard of review for a Board's decision:

> Our review of an administrative agency's action generally is a narrow and highly deferential inquiry. *Trinity Assembly of God for Balt. City, Inc. v. People's Counsel for Balt. County*, 407 Md. 53, 78, 962 A.2d 404, 418 (2008) ("*Trinity Assembly of God*") (citing *People's Counsel for Balt. County v. Loyola College in Md.*, 406 Md. 54, 66, 956 A.2d 166, 173 (2008)); *United Parcel Serv., Inc. v. People's Counsel for Balt. County*, 336 Md. 569, 576, 650 A.2d 226, 230 (1994). "When reviewing the decision of a local [planning] body, . . . we evaluate directly the agency decision, and, in so doing, we apply the same standards of review as the circuit court and intermediate appellate court." *Trinity Assembly of God*, 407 Md. at 77, 962 A.2d at 418 (2008) (citing *Loyola College*, 406 Md. at 66, 956 A.2d at 173). Our review is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel Serv., Inc.*, 336 Md. at 577, 650 A.2d at 230; *see also Trinity Assembly of God*, 407 Md. at 78, 962 A.2d at 418; *People's Counsel for Balt. County v. Surina*, 400 Md. 662, 681, 929 A.2d 899, 910 (2007); *Lee v. Md.-Nat'l Capital Park and Planning Comm'n*, 107 Md. App. 486, 492, 668 A.2d 980, 983 (1995). "A conclusion by [the planning body] satisfies the substantial evidence test if 'a reasonable mind might accept as adequate' the evidence supporting it." *Trinity Assembly of God*, 407 Md. at 78, 962 A.2d at 418 (citing *Loyola College*, 406 Md. at 67, 956 A.2d at 174); *see also Surina*,400 Md. at 681, 929 A.2d at 910.
>
> We owe less deference, however, to "the legal conclusions of the administrative body and may reverse those decisions where the legal conclusions reached by that body are based on an erroneous interpretation or application of zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute." *Surina*, 400 Md. at 682, 929 A.2d at 911 (citing *Belvoir Farms Homeowners Ass'n, Inc. v.*

> *North*, 355 Md. 259, 267–68, 734 A.2d 227, 232 (1999)); *Trinity Assembly of God*, 407 Md. at 78, 962 A.2d at 419. Although we review the administrative body's legal conclusions with less deference than its factual findings, "[w]hen determining the validity of those legal conclusions . . . 'a degree of deference should often be accorded the position of the administrative agency' whose task it is to interpret the ordinances and regulations the agency itself promulgated." *Surina*, 400 Md. at 682, 929 A.2d at 911 (quoting *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169, 177 (2001)).

Maryland-Nat. Capital Park and Planning Com'n v. Greater Baden-Aquasco Citizens Ass'n, 412 Md. 73, 83–85 (2009) (footnote omitted).[10]

DISCUSSION

When an applicant files an application for approval of a preliminary plan, the Montgomery County Code requires the Board to send a copy to various agencies, including DPS, relating to septic systems, and DEP, relating to water and sewer adequacy, for their recommendation regarding the plan. Montgomery County Code, § 50.4.2 (hereinafter "Code"). To approve a preliminary plan, the Board must find, *inter alia*, that "public facilities will be adequate to support and service the area of the subdivision." Code § 50.4.2(D). In that regard, the Board must consider the "availability of water and sewage facilities to the subdivision." Code § 50.4.3(F)(1).[11]

[10] "The [Board], when acting in a quasi-judicial manner, such as in the present case, is considered a State agency." *Maryland-Nat. Capital Park and Planning Com'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83 n.10 (2009).

[11] § 50.4.3(F)(1) provides:

> 1. *General*. Before approving a preliminary plan, the Board must consider the availability of water and sewage facilities to the

In its May 23, 2017 Resolution, the Board found that public facilities would be "adequate to support and service the area of the approved subdivision," and "sewer and water [were] adequate to serve the proposed development." It noted that, ordinarily, "that would be the end of the Board's analysis of sewer adequacy." In this case, however, there also needed to be a finding that the forest area that Jesus House planned to retain, 4.82 acres, complied with the 1999 requirement that, in exchange for connection to the public sewer, the owner would preserve the forested area that otherwise would have been used for an on-site septic system.

At oral argument, both parties agreed that the Board had to determine if the 4.82 acres that Jesus House planned to retain complied with the 1999 resolution. Appellees argue that the Board properly deferred to the expertise of DPS regarding the acreage necessary for the septic set aside, and its approval of the preliminary plan was supported by substantial evidence. Appellants, on the other hand, argue that the Board did not merely defer to DPS' septic area calculations, but rather, the Board abandoned its responsibility to address asserted deficiencies in the DPS advice and disclaimed its authority to "second guess" the conclusions reached by DPS. Based on our review of the record, we agree with appellants.

> subdivision. The Board must consider the recommendation of the Washington Suburban Sanitary Commission and the County Department of Environmental Protection, as applicable, concerning the proper type of water supply and sewage disposal.

The Code states that the Board "must consider" Executive Branch recommendations regarding water supply, sewage disposal, and the adequacy of public facilities. Code § 50.4.3(F)(1) and § 50.4.3(J)(4)(b). It is the Board, however, that is tasked with the ultimate responsibility to determine whether the preliminary plan meets the requisite conditions and should be approved.

To be sure, the Board can rely on recommendations by others. Thus, the Court of Appeals has stated that a "Board's adoption of a substantial portion of a Staff Report does not give rise, in and of its mere adoption, to an adverse inference that the Board abdicated its task to exercise independent judgment." *Greater Baden-Aquasco Citizens Ass'n.*, 412 Md. at 83 n.9, 110. The Board, however, must expressly decide to accept the Staff analysis. *See Anselmo v. Mayor and City Council of Rockville*, 196 Md. App. 115, 127 (2010) (remanding a case where a Board relied on the findings made in a Staff Report because the Board "made no independent assessment on the record of the Staff's analysis").

Here, the record reflects that the Board did not rely on the analysis by DPS after making an independent assessment of this analysis. Rather, it concluded that it could not "second guess" DPS' analysis.[12]

In the Resolution, the Board made clear its belief that it did not have the authority to "second guess" DPS or make its own conclusion whether the proposed development satisfied the 1999 condition. The resolution stated:

[12] The Board's conclusion in this regard appeared to result from advice from then-counsel to the Board, who stated that the Board could not "sit in review" of DPS' conclusion that Jesus House had satisfied the 1999 condition.

> In this case, the plan opponents ask the Board to make its own determination about the proposed development's compliance with the County Council's conditional approval of the sewer extension and to look behind MCDPS and MCDEP analyses that led DEP to conclude that it does. Not surprisingly, the law does not clearly answer the novel question of whether the Board has the authority to enforce a condition under these unique circumstances. But given the respective roles of MCDPS, MCDEP, and the Board, the Board is *not convinced that it has the authority to do so*.

(Emphasis added.)

Because the record reflects that the Board determined that it lacked the power to independently assess the validity of the septic set-aside calculations to ensure that the Preliminary Plan conformed with the conditions required by Resolution 14-334, we agree that the Board committed an error of law. Accordingly, we must reverse and remand to the Board for further proceedings. *See Bereano v. State Ethics Com'n*, 403 Md. 716, 756 (2008) ("'When an agency has committed an error of law, . . . the court should remand the case to the agency for further proceedings designed to remedy the error.'") (quoting *Eaton v. Rosewood Ctr.*, 86 Md. App. 366, 376 (1991)).[13]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED WITH INSTRUCTIONS TO REMAND TO THE PLANNING BOARD FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.

[13] Given our resolution of the case, it was not necessary to review the materials subject to the motion to strike. Accordingly, we deny the motion to strike.