DETAILED SITE PLAN DET-2022-001 WESTPHALIA BUSINESS CENTER 1 AND 2	*	BEFORE THE
	*	DISTRICT COUNCIL
	*	FOR
AND	*	PRINCE GEORGE'S COUNTY
TCP2-029-12-16		

* * * * * * * * * * * * *

WRITTEN EXCEPTIONS AND REQUEST FOR ORAL ARGUMENT

Northpoint Realty Partners, LLC ("Applicant") applied for the approval of a Detailed Site Plan (DET-2022-001) and a Type 2 Tree Conservation Plan (TCP2-029-12-16) to develop two warehouse buildings for a total of 306,000 square feet of warehouse uses on two parcels on the west end of the Westphalia Town Center development, east of Machinists Place ("Subject Property"). Denise France-Steele, Rongalett D. Green, Jante Turner, Dr. Chinonye Nnakwe Whitley, Corryne Carter, Nicole McMichael, and Sharon Bostic (collectively "Citizen-Protestants") are Persons of Record and opposed DET-2022-001 and TCP2-029-12-16.

The Planning Board approved DET-2022-001 and TCP2-029-12-16 in Resolution 2023-24 dated March 9, 2023. Notice of the Planning Board's decision was mailed to all Persons of Record on March 14, 2023.

Citizen-Protestants appeal the Planning Board's decision to approve DET-2022-001 and TCP2-029-12-16, file these exceptions, and request oral argument.

QUESTIONS PRESENTED

1. Is the Planning Board permitted to approve a Detailed Site Plan for a use not approved in the applicable Conceptual Site Plan?

2. Does Prince George's County's grandfathering exception under ZO Section 25-119(g) violate the Maryland Forest Conservation Act?

3. Is the Planning Board's Resolution legally sufficient if it fails to analyze whether DET-2022-001 complies with the conditions of approval for CSP-07004-01 and copies virtually verbatim the Staff Report without providing any additional, independent analysis?

4. Did the Planning Board err when it approved the Applicant's requested variance to allow less dense development on the Subject Property?

5. Is the Planning Board's decision to approve DET-2022-001 supported by substantial evidence?

6. Is the Planning Board's decision to approve TCP2-029-12-16 supported by substantial evidence?

STANDARD OF REVIEW

When the Prince George's County Council, Sitting as the District Council ("District Council"), reviews the Planning Board's decision to approve a Specific Design Plan, the District Council exercises appellate, not original, jurisdiction. *See Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 569–70 (2015). When exercising appellate jurisdiction, the District Council must first ask, as a threshold matter, did the Planning Board's opinion meet the minimum requirements for articulating the facts found, the law applied, and the relationship between the two in the agency's written decision and without need for reference to the record? When exercising appellate review of the Planning Board's decision, the District Council, "may not uphold the agency order unless it is

sustainable on the agency's findings and for the reasons stated by the agency." *United Steelworkers of Am. AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984); *see also Relay Imp. Ass'n v. Sycamore Realty Co.*, 105 Md. App. 701, 714 (1995). If the answer is no, the District Council must vacate the Planning Board's decision and remand for further proceedings.

Second, if the agency's written findings are in accordance with the requirements of Maryland law, the District Council asks whether the agency premised its decision on an erroneous conclusion of law. *See Potomac Valley Orthopaedic Assocs. v. Md. State Bd. of Physicians*, 417 Md. 622, 635–36 (2011). The District Council does not afford any deference to the Planning Board's conclusions of law—reviewing conclusions of law *de novo. See e.g.*, *Hayfields, Inc. v. Valleys Planning Council, Inc.*, 122 Md. App. 616, 629 (1998) (quoting *People's Counsel v. Prosser Co.*, 119 Md. App. 150, 167–68 (1998)).

Third, if the agency premised its decision on correct conclusions of law, the District Council asks whether the record includes substantial evidence to support the agency's findings. *See Layton v. Howard Cnty. Bd. of Appeals*, 171 Md. App. 137, 173–74 (2006). If no, the District Council may reverse or vacate the Planning Board's decision.

EXCEPTIONS

I. The District Council must reverse the Planning Board's decision to approve DET-2022-001 because the Planning Board lacks the authority to approve a Detailed Site Plan for a land use not permitted under the Conceptual Site Plan applicable to the Subject Property, even if the land use is permitted under the applicable zone.

The Planning Board lacks the authority to approve DET-2022-001 when it proposes a land use not approved by the applicable Conceptual Design Plan.

Pursuant to ZO Section 27-3605(d)(7)(A), the Planning Board is delegated the authority to approve or deny Detailed Site Plan applications after conducting a public hearing. However, the Planning Board is only delegated authority to approve a Detailed Site Plan application if the application satisfies the standards set forth in ZO Section 27-3605(e) including that "the proposed development complies with all conditions of approval in any development approvals and permits to which the detailed site plan is subject." ZO § 27-3605(e)(2).

Here, DET-2022-001 is subject to the conditions of approval in Conceptual Site Plan (CSP) 07004-01 including Condition 1 which requires that the uses in the Westphalia Town Center be limited to residential, retail, office, or hotel uses. Staff Report 12. DET-2022-001 does not propose a residential or hotel use. Furthermore, Staff found that the proposed use in DET-2022-001 "is neither retail nor office use." Staff Report 13. Thus, DET-2022-001 indisputably does not comply "with all conditions of approval in any development approvals and permits to which the detailed site plan is subject." *See* ZO § 27-3605(e)(2).

Since the Planning Board has the power to approve Detailed Site Plans **only when** the plan meets the required criteria under ZO Section 27-3605(e), the Planning Board lacks the authority to approve a Detailed Site Plan when it is indisputable that the Detailed Site Plan does not satisfy all of the required criteria under ZO Section 27-3605(e). Therefore, the Planning Board erred legally when it approved DET-2022-001 when DET-2022-001 does not satisfy ZO Section 27-3605(e)(2).

The Planning Board, in its Resolution, justified this fatal deficiency by providing that "the current Zoning Ordinance does not recognize a CSP as a required application, therefore, the subject DET does not have to conform to the requirements of this approval, as it is no longer applicable." Resolution 4. The Staff Report justified this fatal deficiency in DET-2022-001 by noting that "While [the proposed development] is neither retail nor office use, the distribution warehouse use is permitted under the current TAC-E Zone." Staff Report 13. Neither the Planning Board's nor the Technical Staff's justification is sufficient to overcome the fatal flaw in DET-2022-001.

Under the prior Zoning Ordinance, property owners were permitted to restrict the types or amounts of land uses on their property through a Conceptual Site Plan application. Once a Conceptual Site Plan is approved for a property, all subsequent development applications for that property are required to conform to any limitations imposed by the Conceptual Site Plan—even when the limitations imposed by the Conceptual Site Plan are more stringent than the limitations imposed by the underlying zone. If a property owner wants to develop their property in a manner different than that approved under the

Conceptual Site Plan, then the property owner's only recourse is to submit a new Conceptual Site Plan. *See e.g.*, ZO § 27-1704(e); ZO § 27-1703(g). No provision of the new Zoning Ordinance renders previously approved Conceptual Site Plans invalid. Instead, the Zoning Ordinance specifically provides that "approval …for a CSP… shall remain valid for twenty years from April 1, 2022." *See* ZO § 27-1704(a).

Here, CSP-07004-01 limits the type and amount of uses permitted on the property contained therein, including the Subject Property, to only residential, hotel, retail, and office uses. Whether a warehouse use is permitted in the TAC-E Zone is entirely irrelevant. Instead, ZO Section 27-3605(e)(2) requires that any development proposed on the Subject Property consist of land uses specifically approved by CSP-07004-01. If the Applicant wishes to develop the Subject Property with a use not permitted by the CSP-07004-01, then the Applicant is required by law to submit a new or amended Conceptual Site Plan application. *See e.g.*, ZO § 27-1703(g); ZO § 27-1704(e).

The District Council must reverse the Planning Board's decision to approve DET-2022-001 because DET-2022-001 does not and cannot comply with the conditions of approval of CSP-07004-01 and the Planning Board lacks the authority to approve Detailed Site Plans that do not comply with every applicable condition of approval of prior applications.

II. The District Council must reverse the Planning Board's decision to approve TCP2-029-12-16 because Planning Board erroneously relied on the grandfathering clause to exempt the Applicant from the variance requirement of the County's forest conservation program in violation of Maryland's Forest Conservation Act.

Maryland's Forest Conservation Act requires units of local government to adopt a local forest conservation program "which meets or is more stringent than the requirements and standards of" the State's Forest Conservation Act. MD NAT RES § 5-1603(c)(1). However, the Planning Board's decision to approve TCP2-029-12-16 without requiring the Applicant to apply for a variance to remove specimen trees on the Subject Property, in reliance on the Prince George's County grandfathering clause, violates the Maryland Forest Conservation Act.

Maryland's Forest Conservation Act requires that trees having a diameter, measured at 4.5 feet above the ground, of 30 inches or 75% of the diameter of the current State Champion Tree of that species as designated by the Department 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." MD NAT RES § 5-1607(c)(2).

Maryland's Forest Conservation Act provides an exhaustive list of activities exempt from the requirements of the Maryland Forest Conservation Act. *See* COMAR 08.19.01.04. Relevant here, preliminary plans or grading or sediment control permits approved before July 1, 1991, are exempt from the requirements of the Forest Conservation Act. COMAR 08.19.01.04(A)(13). Conversely, all development plans, on areas 40,000 square feet or

greater, submitted after January 1, 1993, are subject to the requirements of the Maryland Forest Conservation Act. COMAR 08.19.01.04(B).

Although Maryland's Forest Conservation Act allows local jurisdictions to create local forest conservation programs, the local programs must be, at minimum, as rigorous as the State's Forest Conservation Act. *See* MD NAT RES § 5-1603(c)(1). Thus, local forest conservation programs are not permitted to exempt activities not listed in COMAR 08.19.01.04 from the requirements of the Forest Conservation Act.

Prince George's County's local Forest Conservation program is codified in Division 2 of Subtitle 25 of the County's Ordinance. The 1993 version of the Prince George's County Forest Conservation program did not require an applicant to obtain a variance to remove trees having a diameter, measured at 4.5 feet above the ground, of 30 inches or 75% of the diameter of the current State Champion Tree of that species as designated by the Department (called "specimen trees"), in violation of the Maryland Forest Conservation Act. The prior version of the Prince George's County Forest Conservation program is colloquially referred to as the "1993 Woodland Conservation Ordinance." *See e.g.*, Resolution 26. However, after a revision to the County's Forest Conservation Program in 2010 via CB-27-2010, the Prince George's County Forest Conservation Act was brought into compliance with the State law. Since the 2010 amendment, Subtitle 25 has required that specimen trees "shall be preserved." ZO § 25-122(b). To remove specimen trees, the Prince George's County Forest Conservation program requires applicants to apply for a variance under ZO Section 25-119(d).

However, unlike the Maryland State Forest Conservation Act, the Prince George's County Forest Conservation program exempts "grandfathered" plans, meaning plans approved under the 1993 Woodland Conservation Ordinance, from the County's current requirements. *See* ZO § 25-119(g).

Prince George's County's grandfathering provision is far more lenient than the exemptions permitted under the Maryland Forest Conservation Act. Accordingly, Prince George's County's grandfathering provision violates the Maryland Forest Conservation Act and any decision based thereon is illegal.

Here, there are 274 specimen trees on the Subject Property and TCP2-029-12-16 proposes to remove many, if not all, of the specimen trees. The Planning Board determined that because the Preliminary Plan of Subdivision applicable to the Subject Property was approved under the 1993 Woodland Conservation Ordinance, TCP2-29-12-16, "is still subject to the requirements of [the 1993 Woodland Conservation Ordinance]; therefore, a variance is not required with this application." Resolution 26.

However, TCP2-029-12-16 does not qualify for an exemption under the Maryland Forest Conservation Act and thusTCP2-029-12-16 cannot be exempted from the State's forest conservation requirements under a Prince George's County ordinance. For the Planning Board to exempt TCP2-029-12-16 from the state requirement that specimen trees be preserved or a variance be obtained is a violation of state law (the Maryland Forest Conservation Act) and therefore illegal. Instead, TCP2-029-12-16 must comply with the

minimum requirements of the State's Forest Conservation law and thus must show that it preserves all the specimen trees or has been approved for a variance.

For all of these reasons, the District Council must reverse the Planning Board's decision to approve TCP2-019-12-16 because the Planning Board's decision violates the State's Forest Conservation Act, and the Applicant must be required to obtain a variance if it wants to remove specimen trees.

III. The District Council must vacate the Planning Board's decision to approve DET-2022-001 and TCP2-029-12-16 because the Planning Board's Resolution is legally deficient.

As a threshold issue, the Planning Board's Resolution is legally deficient because it fails to analyze whether DET-2022-001 conforms with any of the Conditions of Approval of CSP-07004-01 and because the Planning Board improperly copied, virtually, verbatim the Staff Report without providing any independent analysis of the evidence presented to it.

1. The Planning Board's Resolution is fatally flawed because it fails to adequately analyze ZO Section 27-3605(e)(2).

The Planning Board's Resolution is fatally flawed because it fails to articulate whether DET-2022-001 complies with any CSP-07004-01 Condition of Approval—as is required under ZO Section 27-3605(e)(2).

Maryland law requires administrative agencies to articulate, at minimum, the facts found, the law applied, and the relationship between the two when the agency makes a final decision. *Forman v. MVA*, 332 Md. 201, 221 (1993). Prince George's County Zoning

Ordinance (ZO) Section 27-3605(e)(2) requires the Planning Board to make a finding that "the proposed development complies with all conditions of approval in any development approvals and permits to which the detailed site plan is subject." Thus, the Planning Board is required to articulate, at minimum, whether DET-2022-001 complies with any applicable condition of approval for any prior application that DET-2022-01 is subject to.

Here, Technical Staff determined that DET-2022-001 "is subject to the conditions of approval of CSP-07004-01 and PPS 4-08002." Staff Report 12. However, in the Planning Board's Resolution, the Planning Board did not articulate any findings or conclusions as to whether DET-2022-001 complies with any of the conditions of approval of CSP-07004-01. Instead, Planning Board stated only that "the subject DET does not have to conform to the requirements of [the CSP], as it is no longer applicable." Resolution 4. The Planning Board did cite any provision in the new Zoning Ordinance to support its conclusion and for the reasons stated *supra* in Section I, DET-2022-001 is subject to the conditions of approval of CSP-07004-01.

Therefore, for this reason alone, the District Council should vacate the Planning Board's decision because the Resolution fails to satisfy the minimum requirements set forth in Maryland law and ZO Section 27-3605(e)(2).

2. The Planning Board's Resolution is legally deficient because it frustrates the ability of any appellate body to review the basis of the Planning Board's decision because the Planning Board abdicated its duty to conduct an independent analysis of the facts presented to it.

The Planning Board is not permitted to copy verbatim the Staff Report in the Planning Board's final Resolution without providing some additional, independent analysis of the evidence presented to it during the public hearing.

Under ZO Section 27-3605(d)(7)(C), when the Planning Board makes a decision regarding a Detailed Site Plan, "the Planning Board's decision shall be by resolution. The resolution shall set forth the Planning Board's findings and conclusions upon which the decision is based." The Planning Board's Rules of Procedure further clarify that the Planning Board's Resolution must "contain separate statements of: (i) the findings of fact [and] (ii) conclusion of law." Rules of Procedure § 13(b).

Maryland's administrative law jurisprudence sets forth the minimum requirements of an administrative agency's (like the Planning Board's) findings of fact and conclusions of law—requiring that they be detailed enough to permit an appellate body to adequately review the administrative agency's reasoning. *See e.g.*, *Colao v. Cnty. Council of Prince George's Cnty.*, 109 Md. App. 431, 454 (1996) (finding that "in the absence of reasoned administrative analysis a reviewing court is unable to determine the basis of the agency's action"); *see also Forman v. MVA*, 332 Md. 201, 220–21 (1993) (concluding that "without findings of fact on all material issues, and without a clear statement of the rationale behind the [agency's] action, a reviewing court cannot properly perform its function"). An

administrative agency's written resolution will be deemed inadequate when it adopts verbatim a staff report without also providing the administrative agency's reasoning. *See Montgomery v. Board of Cnty. Commissioners for Prince George's Cnty.*, 256 Md. 597, 603 (1970) (finding that it is only appropriate to rely on a Technical Staff Report when the administrative agency "incorporate[es] into its order specific findings of basic facts and conclusions of either the Planning Board or of the Technical Staff **by specific reference to those findings**") (emphasis provided).

Here, the Planning Board's Resolution is virtually a verbatim copy of the Staff Report and the Planning Board failed to provide any independent analysis of the facts presented to it during the public hearing.

The Planning Board's verbatim recitation of the Staff Report frustrates the ability of appellate bodies, like the District Council, to determine the basis of the **Planning Board's** decision as opposed to the basis of the Technical Staff's decisions.

Additionally, the Planning Board "abdicated its task to exercise independent judgment." *See Maryland-Nat. Capital Park and Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83, fn. 9 (2009) (finding that the Planning Board's practice of copying larger portions of the Technical Staff Report was permissible only because the Planning Board "added additional findings of fact and conclusions") [hereinafter *Greater Baden*]. Maryland's judiciary discourages strongly the practice of adopting by reference a staff report in an administrative agency's written decision. *See Montgomery v. Board of Cnty. Commissioners for Prince George's Cnty.*, 256 Md. 597,

603 (1970). Instead, Maryland's common law makes clear that administrative agencies are required to provide an explanation for the decisions the agency reached based on the evidence considered by the agency and the conclusions made by the agency. *See e.g.*, *Gough v. Board of Zoning Appeals for Calvert Cnty.*, 21 Md. App. 697, 702 (1974) (explaining that express findings by an administrative agency are needed so that "the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board"). Underlying this requirement is the fundamental understanding that an administrative agency's role is to act as a neutral arbiter of the facts presented to it during a contested hearing. When the outcome of a contested hearing is, or appears to be, predetermined, the administrative agency has abandoned its duty to provide an independent evaluation of the issues before it and the public trust in the administrative agency is diminished.

Therefore, the District Council should remand this matter to the Planning Board so that the Planning Board can issue a written decision commensurate with an agency that actually conducted an independent analysis of the issues presented to it.

For all of these reasons the District Council must vacate the Planning Board's decision because the Planning Board's Resolution is legally deficient.

IV. The District Council must reverse the Planning Board's decision to approve the Applicant's variance request to reduce the minimum density requirements for the Subject Property because the Applicant did not demonstrate that it satisfied the required criteria under ZO Section 27-3613(d).

The Planning Board erred when it concluded that DET-2022-001 qualifies for a variance under ZO Section 27-3613(d). In the TAC-E Zone, developments are required to meet a minimum density requirement—a Floor Area Ration (FAR) of at least 0.25. ZO § 27-4204(d)(3). DET-2022-001 proposes the development of two buildings on two parcels. While one of the buildings meets the minimum FAR requirement, the Applicant proposes that the second building, on Parcel 32, have a FAR of only 0.15. Resolution 23. Accordingly, the Applicant applied for a variance from the minimum FAR requirement pursuant to ZO Section 27-3613(d).

To approve a variance under ZO Section 27-3613(d), the Planning Board must find that:

> (1) A specific parcel of land is physically unique and unusual in a manner different from the nature of surrounding properties with respect to exceptional narrowness, shallowness, shape, exceptional topographic conditions, or other extraordinary conditions peculiar to the specific parcel (such as historical significance or environmentally sensitive features);
>
> (2) The particular uniqueness and peculiarity of the specific property causes a zoning provision to impact disproportionately upon that property, such that strict application of the provision will result in peculiar and unusual practical difficulties to the owner of the property;
>
> (3) Such variance is the minimum reasonably necessary to overcome the exceptional physical conditions;

> (4) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the General Plan or any Functional Master Plan, Area Master Plan, or Sector Plan affecting the subject property;
>
> (5) Such variance will not substantially impair the use and enjoyment of adjacent properties; and
>
> (6) A variance may not be granted if the practical difficulty is self-inflicted by the owner of the property.

ZO § 27-3613(d).

Here, the Applicant has not satisfied any of the required criteria under ZO Section 27-3613(d).

1. ZO § 27-3613(d)(1): The Subject Property is not unique.

Maryland's variance jurisprudence clearly articulates the analysis necessary when an administrative agency evaluates whether a site is "unique" in the context of a request for a variance. "The uniqueness analysis examines the unusual characteristics of a specific property **in relation to the other properties in the area.**" *Dan's Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 236 Md. App. 483, 494 (2018) (emphasis supplied).

To establish uniqueness, Maryland's variance jurisprudence also requires:

> a finding that the property whereon structures are to be placed (or uses conducted) is—in and of itself—unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property.

Montgomery County v. Rotwein, 169 Md. App. 716, 727 (2006), citing *Cromwell v. Ward*, 102 Md. App. 691, 694-95 (1995).

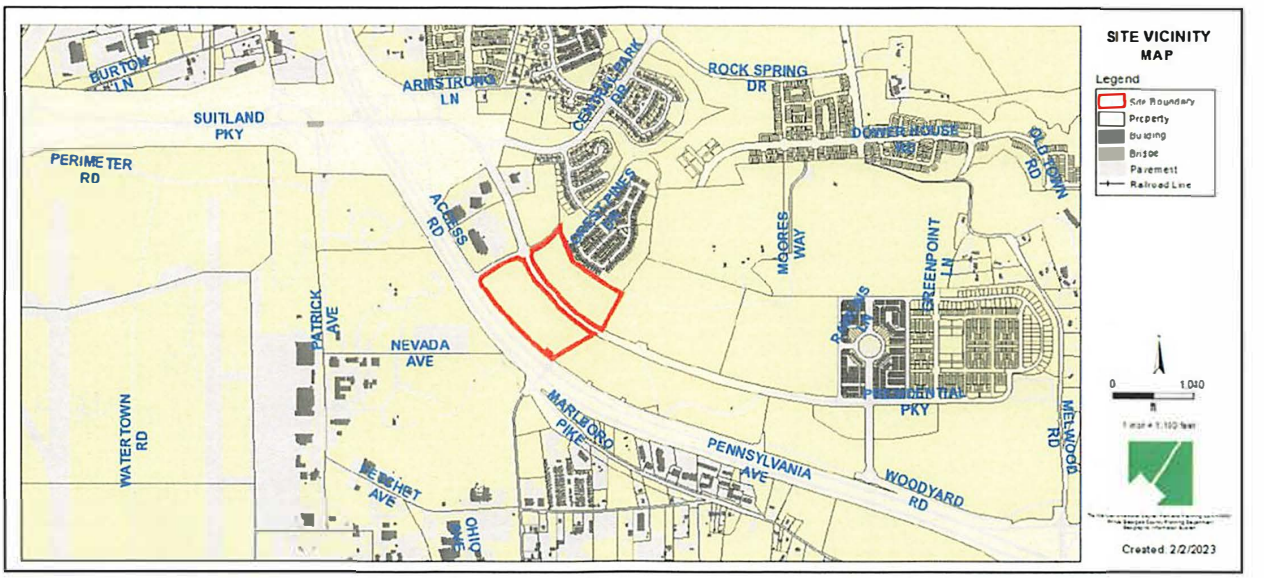
The Court of Special Appeals also provided, in *North v. St. Mary's County*, that

> in the zoning context the "unique" aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. "Uniqueness" of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

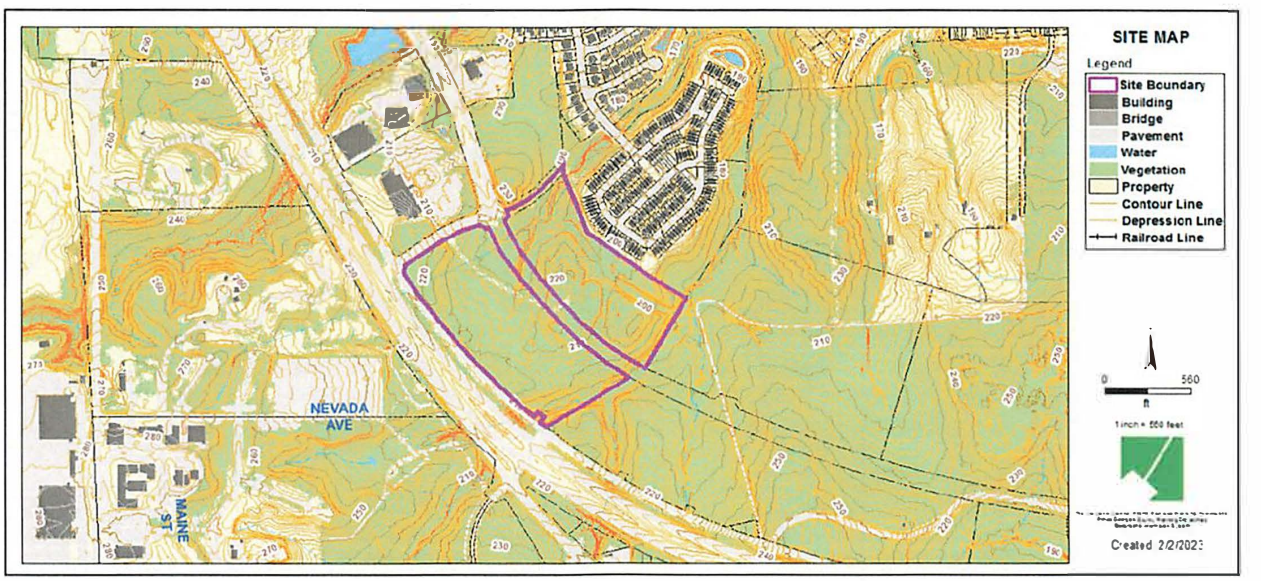
99 Md. App. 502, 514 (1994).

Here, the Applicant failed to present any evidence comparing the alleged unique features of the Subject Property to any other property. Conversely, Citizen-Protestants provided evidence which demonstrates that, when compared to other surrounding properties, the Subject Property is definitively not physically unique or unusual.

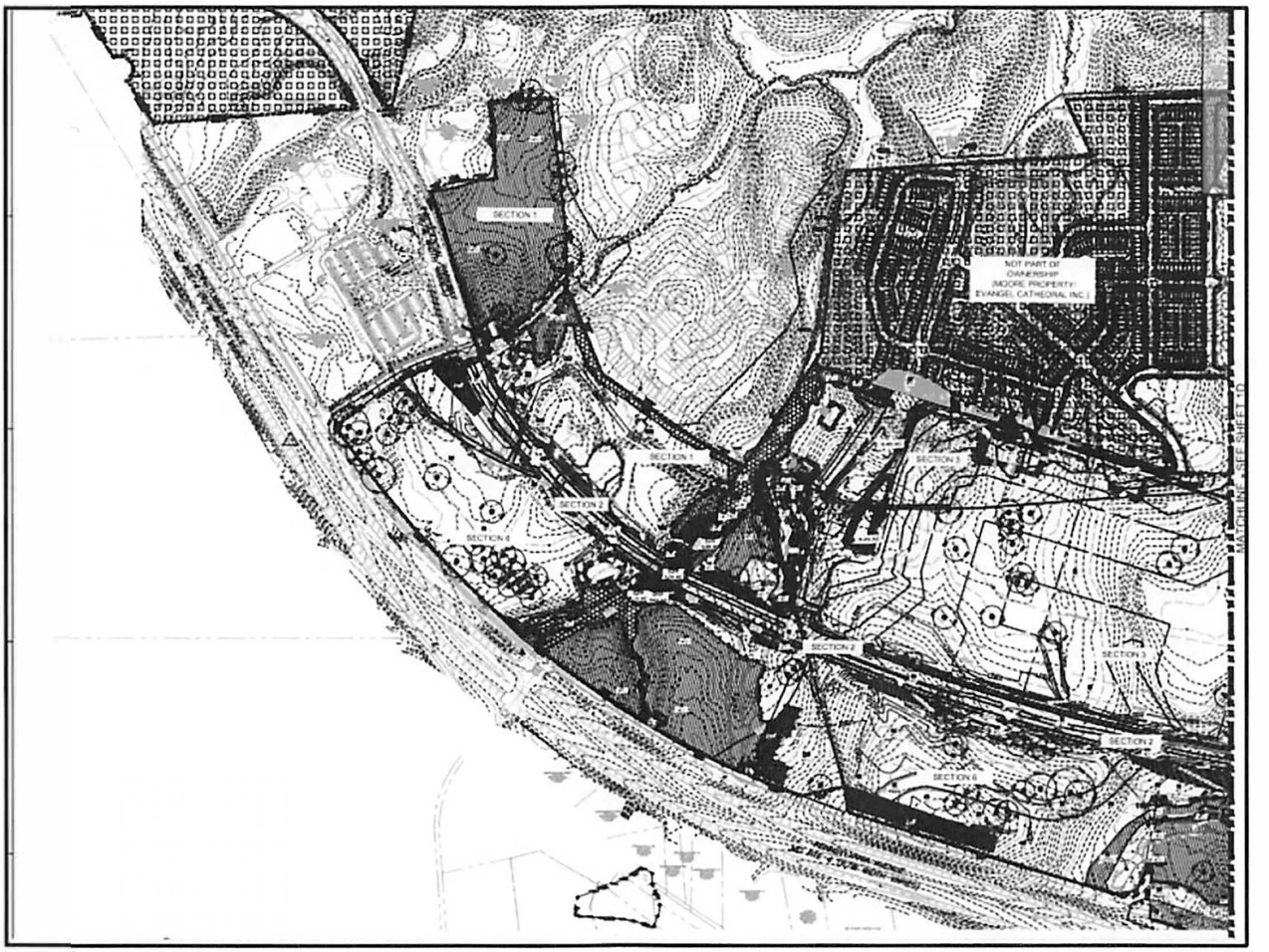
For example, Slide 3 of the Staff PowerPoint, provided below, demonstrates that the property is not unique with regard to its narrowness, shallowness, nor shape because there are many nearby properties that are similarly narrow and rectangular in shape. Indeed several nearby properties are more narrow or have irregular shapes.



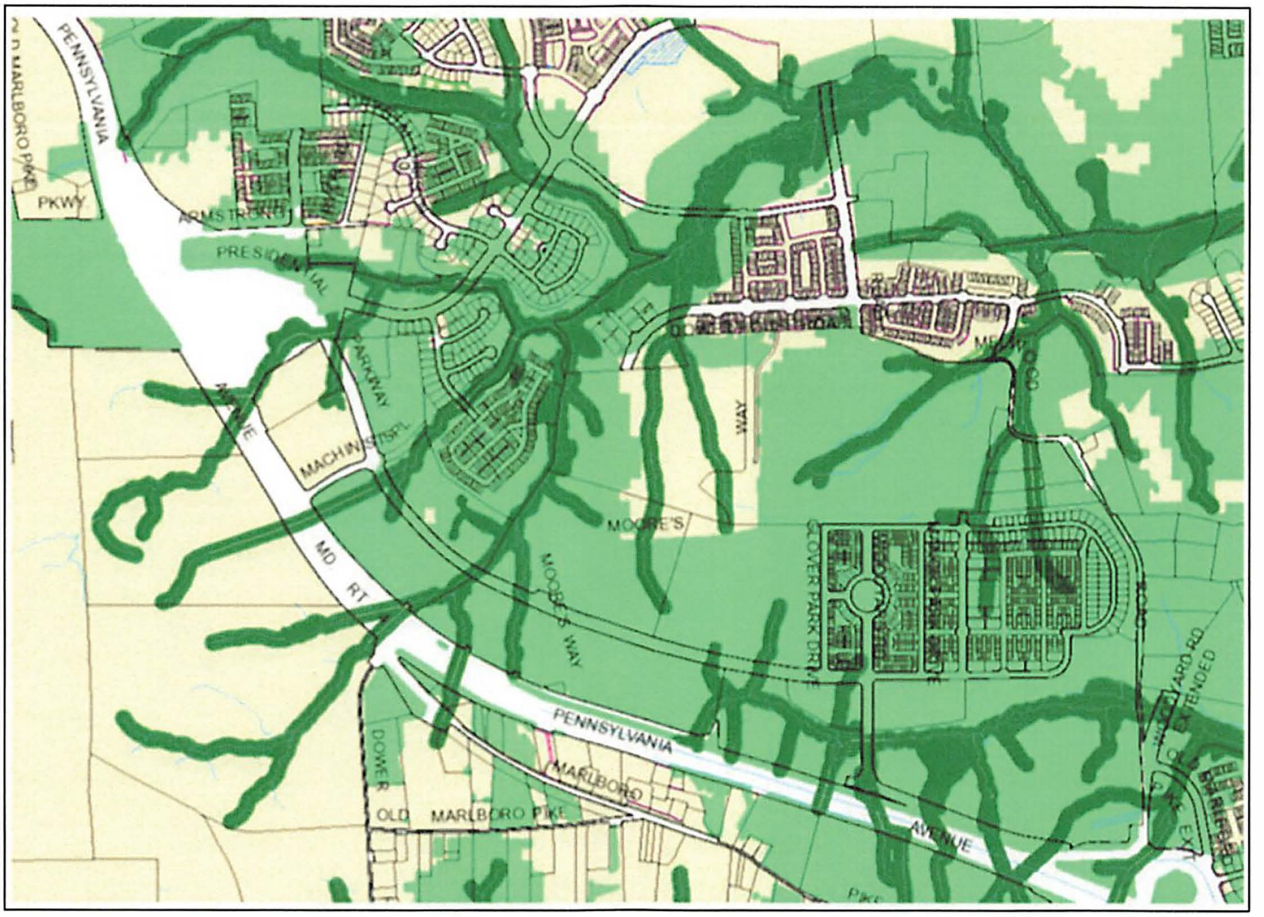
Slide 7 of the Staff PowerPoint demonstrates that the property has no exceptional geographic conditions because other nearby properties have similar elevations, slopes, and contours.



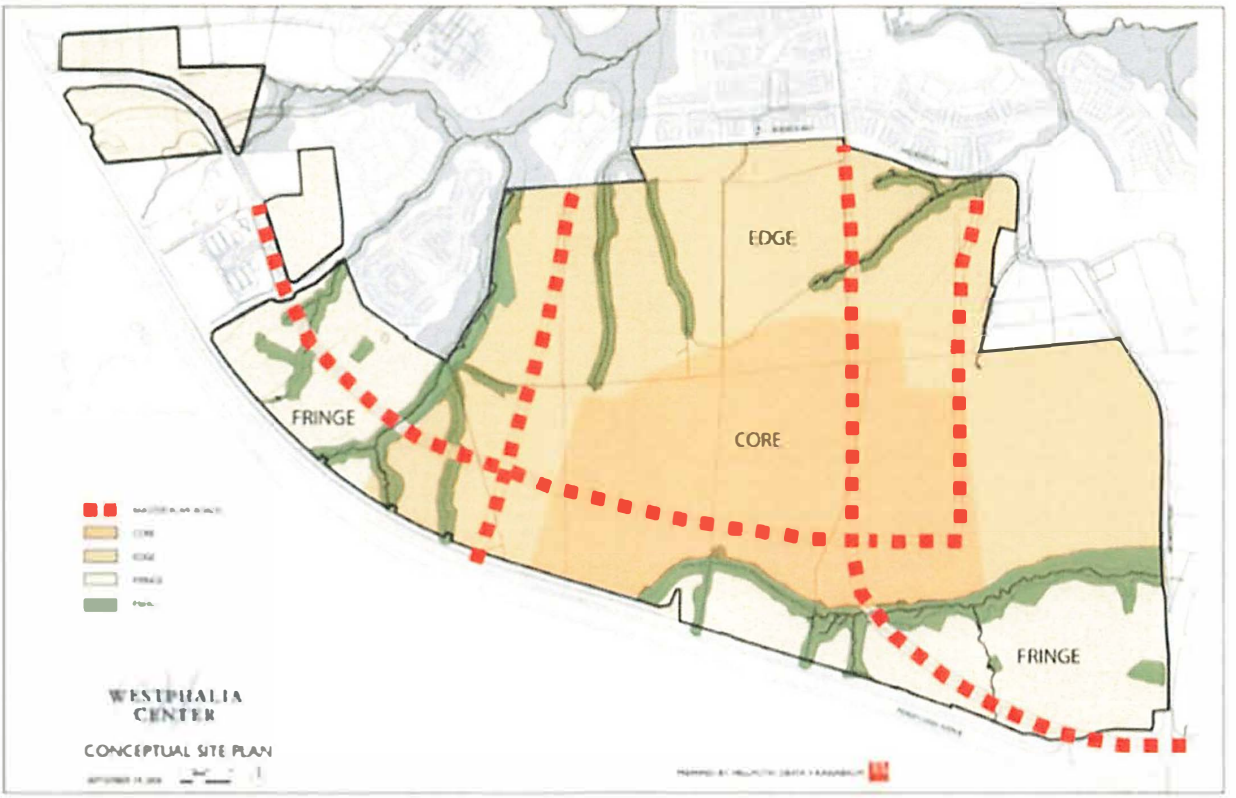
Slide 15 of the Staff PowerPoint demonstrates that other nearby properties have specimen trees with similar distribution patterns.



A screenshot from PGAtlas with the Green Infrastructure Plan and Stream Center layers on, provided to the Planning Board in Additional Backup page 23, reproduced below, demonstrates that other nearby properties are similarly impacted by Primary Management Areas and other environmental features.



Finally, a screenshot from the Westphalia Sector Plan, provided to the Planning Board in Additional Backup page 24, reproduced below, further demonstrates that other properties within the Westphalia Town Center are similarly impacted by Primary Management Areas and other environmental features.



On this basis alone the District Council must reverse the Planning Board's decision to approve the Applicant's variance request because the Subject Property is not unique.

2. ZO § 27-3613(d)(2): The strict application of the minimum FAR requirements would not result in a peculiar or unusual practical difficulty to the Applicant.

To establish a practical difficulty, Maryland's jurisprudence requires the Applicant to make a showing that:

> compliance with the strict letter of the restrictions . . . would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. . . . That means that an applicant must show more than simply that the building "would be suitable or desirable or could do no harm or would be convenient for or profitable to its owner."

Rotwein, 169 Md. App. at 729–30 (internal citations omitted). *Rotwein* makes clear that an applicant cannot establish practical difficulty merely by stating that without the variance, the Applicant cannot develop the property exactly how it wishes.

Here, the Applicant could easily meet the minimum FAR requirement if the Applicant increased the number of stories in the proposed building. The fact that warehouses do not normally have more than one story is not sufficient to create a practical difficulty when the Applicant could instead construct a commercial or office space with the same building footprint with multiple floors. Furthermore, for the reasons stated *supra* in Section I, a warehouse is not even a permitted use on the Subject Property. Thus, any alleged difficulty in developing a warehouse on the Subject Property, caused by the strict enforcement of the minimum FAR requirement, cannot create a practical difficulty as that term has been defined by Maryland's case law.

Therefore, the District Council must reverse the Planning Board's decision to approve the Applicant's variance request because the Applicant would not face a practical difficulty if it was required to satisfy the minimum FAR requirement.

3. ZO § 27-3613(d)(3): The record lacks any evidence to demonstrate why the requested variance is the minimum necessary variance.

The Applicant failed to provide any evidence to demonstrate why the requested variance is the minimum necessary variance. Instead, the Applicant only provided a conclusory statement that "Applicant is proposing the minimum variance needed for the proposed development of this parcel." Backup 44. Similarly, the Planning Board failed to

point to any evidence to support its conclusory statement that "the variance is the minimum necessary, given the specific conditions of the property." Resolution 24. Thus, the record lacks any evidence to demonstrate why the requested variance is the minimum necessary variance. Therefore, the District Council must reverse the Planning Board's decision to approve the Applicant's variance request because the Applicant has not demonstrated that it satisfies this requirement.

4. ZO § 27-3613(d)(4): The requested variance would substantially impair the General and Sector Plan.

The Subject Property is located in the fringe area of the Westphalia Town Center. Staff Report 29. The Westphalia Sector Plan puts forth the following goals for the fringe area:

> Develop town center fringe areas as distinct and cohesive districts of commercial, office, employment, and institutional uses in campus like settings that are separate from the core and have "greener" character and setting by abutting parkways, parks, and green space fronting MD 4. Create building styles that favor large office or institutional developments, with medium- to large-scale commercial developments, and limited landmark, high-density structures such as mid-rise hotel and office buildings.
> ...
> **Development Density and Intensity Targets:**
> - 0.3 FAR or greater for commercial and employment uses
>
> **Recommended Range of Land Use Mix:**
> - Retail and Services: Less than 40%
> - Office: More than 50%
> - Public and Quasi-Public Uses: More than 10%
>
> **Design Principles:**
> ...

- Design large commercial buildings to have architectural variation that supports a human scale and provides the appearance and functionality of smaller scale development:

Westphalia Sector Plan Part 2, page 27.

Table 5: Approved Zoning Changes (Continued)
Fringe areas along Pennsylvania Avenue (MD 4) should be designed as a destination for employment with a corporate character with service and retail uses located within office and residential structures, and the potential for hotels in this area.

Westphalia Sector Plan Part 5, page 85.

Allowing the proposed use and FAR of 0.15 on the Subject Property would Substantially impair all of the above listed goals and thus would substantially impair the integrity of the Westphalia Sector Plan. Thus, the District Council must reverse the Planning Board's decision to approve the Applicant's variance request because the request would substantially impair the integrity of the Sector Plan.

5. ZO § 27-3613(d)(5): The requested variance would substantially impair the use and enjoyment of adjacent properties.

If the Applicant's requested variance is approved, and the Applicant was permitted to reduce the minimum FAR requirement to develop a distribution warehouse, the variance would substantially impair the use and enjoyment of adjacent residential properties. The proposed development is not a less intense use as asserted by the Applicant—it is only less dense. Distribution warehouses are a high-intensity, heavy industrial use that operate on a 24/7 basis and produce extensive amounts of light, air, noise, and water pollution. They can also create hazardous traffic conditions due to the high number of vehicular trips

generated by the use. These uses are not appropriate near residential uses and will impair the use and enjoyment of surrounding properties. Thus, the District Council must reverse the Planning Board's decision to approve the Applicant's variance request because the request would substantially impair the use and enjoyment of adjacent properties.

6. ZO § 27-3613(d)(6): The alleged practical difficulty is self-inflicted.

Under ZO Section 27-3613(d)(6), the Planning Board is not permitted to approve a variance request when the alleged practical difficulty is self-inflicted, even if the variance request satisfies criteria (d)(1)-(d)(5). Here, Applicant's variance request does not satisfy any other criteria under ZO Section 27-3613(d). However, even if the Applicant were able to establish that it would face a practical difficulty, the alleged practical difficulty would be entirely self-inflicted. The Applicant is choosing to develop the Subject Property with a one-story building for a use that is not even permitted on the Subject Property. The Applicant asserts it cannot meet the FAR requirement by adding additional stories to the proposed building because the warehouses are typically operated in one-story buildings. *See* Resolution 24. However, retail, hotel, or office uses often operate in multi-story buildings. If the Applicant chose to develop the property with any of these other categories of uses, even within the same building footprint, it would easily be able to meet the minimum FAR requirement. Thus, the District Council must reverse the Planning Board's decision to approve the Applicant's variance request because any alleged practical difficulty is self-inflicted.

For all of these reasons, the District Council must reverse the Planning Board's decision to approve the Applicant's variance request.

V. The District Council must reverse the Planning Board's decision to approve DET-2022-001 because the decision is not supported by substantial evidence.

The Planning Board's decision to approve DET-2022-001 is not supported by substantial evidence.

The Planning Board may only approve a detailed site plan upon a finding that all of the following standards are met:

> (1) The proposed development represents a reasonable alternative for satisfying the applicable standards of this Subtitle, without requiring unreasonable costs and without detracting substantially from the utility of the proposed development for its intended use;
>
> (2) The proposed development complies with all conditions of approval in any development approvals and permits to which the detailed site plan is subject;
>
> (3) The proposed development demonstrates the preservation and/or restoration of the regulated environmental features in a natural state, to the fullest extent possible, in accordance with the requirements of Section 24-4303(D)(5) of Subtitle 24: Subdivision Regulations;
>
> (4) Proposed development located within a Planned Development (PD) zone shall be in conformance with the PD Basic Plan and PD Conditions of Approval that apply to that development;
>
> (5) The proposed development conforms to an approved Tree Conservation Plan, if applicable;
>
> (6) The development proposed in a detailed site plan for infrastructure complies with applicable regulations of PART 27-6: Development Standards, prevents offsite property damage, and prevents environmental degradation to safeguard the public's health, safety, welfare, and

economic well-being for grading, reforestation, woodland conservation, drainage, erosion, and pollution discharge; and

(7) Places of worship located on a lot between one (1) and two (2) acres in size shall also meet the following standards:

(A) The minimum setback for all buildings shall be twenty-five (25) feet from each lot line;

(B) When possible, there should be no parking or loading spaces located in the front yard; and

(C) The maximum allowable lot coverage for the zone in which the use is proposed shall not be increased.

ZO § 27-3605(e).

Here, the record lacks substantial evidence to support a finding that the DET-2022-001 satisfies criteria 27-3605(e)(2). DET-2022-001 is subject to the conditions of approval in CSP-07004-01 and PPS 4-08002 and thus, DET-2022-001 must conform to those conditions. *See* ZO § 27-3605(e)(2). However, the record demonstrates that DET-2022-001 does not conform to several conditions of approval for both CSP-07004-01 and PPS 4-08002.

First, DET-2022-001 does not conform with CSP-07004-01 Condition of Approval 1 which limits the types of land uses on the Subject Property to only residential, hotel, retail or office. The **only** evidence in the record is Staff's finding that the use proposed in DET-2022-001 "is neither retail nor office use." Technical Staff Report 13. On this basis alone the Planning Board's decision to approve DET-2022-001 must be reversed.

Second, DET-2022-001 does not conform with CSP-07004-01 Condition of Approval 17 which requires Detailed Site Plan applications include "a description of the use of green building techniques and alternative energy sources for the development

throughout the site." Planning Staff in their SDRC comments clarified that the description of the green building techniques must be more than a statement that the development conforms with ZO Section 27-61600. However, the record lacks any evidence that the Applicant provided to the Planning Board a description of the use of green building techniques and alternative energy sources aside from a statement that the development complies with ZO Section 27-61600.

Third, DET-2022-001 does not conform with PPS 4-08002 Condition 7 which requires that "prior to approval of each detailed site plan, the public utility companies shall provide comments to ensure adequate area exists to provide proper siting and screening of the required utilities." Here, however, the only evidence on the record is that "comments from the utility companies were not included in the documents submitted with this application." Staff Report 18; Resolution 12.

Fourth, DET-2022-001 does not conform with PPS 4-08002 Condition of Approval 19 which requires that at the time of the Detailed Site Plan, the Applicant dedicate a transit station to public use. However, the Applicant did not propose any dedication for a transit station within the Subject Property and the Applicant failed to provide "correspondence from the affected transit agencies showing" that the Washington Metropolitan Area Transit Authority and the County no longer intended to build the transit center. Staff Report 18; Resolution 13. The record also includes a statement from Staff that Condition 19 does not "allow for the flexibility to remove the requirement for dedication to public use for a transit center." Staff Report 18.

Therefore, the District Council must reverse the Planning Board's decision to approve DET-2022-001 because the record lacks substantial evidence to support the Planning Board's conclusion that DET-2022-001 satisfies ZO Section 27-3605(e)(2).

VI. The District Council must reverse the Planning Board's decision to approve TCP2-029-12-16 because the decision is not supported by substantial evidence.

The Planning Board's decision to approve TCP2-029-12-16 is not supported by substantial evidence.

To approve a Type II Tree Conservation Plan, the Planning Board is required to determine that, among other things:

> 1. All specimen trees have been preserved or the Applicant has qualified for a variance under ZO Section 25-119(d). *See* ZO § 25-122(b).
>
> 2. The limits of disturbance provided on the Type II Tree Conservation Plan are identical to the limits of disturbance provided on an approved Erosion and Sediment Control Technical Plan. *See* ZO § 25-119(a)(3); Environmental Technical Manual A-16.
>
> 3. The Applicant has exhausted all onsite preservation and restoration techniques before it is approved for offsite preservation or restoration techniques. *See* ZO § Section 25-122(c); Environmental Technical Manual A-16.

Here, the record lacks substantial evidence to support a finding that TCP2-029-12-16 satisfies any of these three requirements.

First, TCP2-029-12-16 proposes the removal of specimen trees, but the Planning Board did not require or approve a variance. For the reasons stated *supra* in Section II, the Planning Board erred legally when it determined that the TCP2-029-12-16 does not require a variance application to remove the specimen trees on the Subject Property. Thus, the

record lacks substantial evidence to support the Planning Board's approval of TCP2-029-12-16 because the record lacks substantial evidence that the application preserves the specimen trees or qualifies for a variance as is required by ZO Section 25-122(b) and the Maryland Forest Conservation Act.

Second, there is no evidence whatsoever to demonstrate whether the limits of disturbance in TCP2-029-12-16 are identical to the limits of disturbance in an approved Erosion and Sediment Control Technical Plan because the Resolution makes clear that the Applicant failed to provide the Planning Board with a copy of an approved Erosion and Sediment Control Technical Plan. Resolution 8–9. Thus, the record lacks any evidence to support the Planning Board's approval of TCP2-029-12-16 because the record is devoid of any evidence that the Planning Board could use to determine whether the limits of disturbance provided in TCP2-029-12-16 satisfy the requirements of the ZO Section 25-119(a)(3) and the Environmental Technical Manual.

Third, the conservation threshold for the Subject Property is 15.98 acres, but TCP2-029-12-16 proposes only 2.07 acres of onsite woodland preservation or restoration. Staff Report 30. Instead, TCP2-029-12-16 proposes to meet the vast majority of its preservation requirements through off-site mitigation. However, the record lacks any evidence to demonstrate how or whether the Applicant exhausted each onsite preservation technique provided in ZO Section 25-122(c) before it was approved to utilize offsite preservation techniques. Thus, the record lacks substantial evidence to support the Planning Board's approval of TCP2-029-12-16 because the record is devoid of any document or evidence

that the Planning Board could use to determine whether the Applicant exhausted onsite preservation techniques as is required by ZO Section 25-122(c).

For all of these reasons, the District Council must reverse the Planning Board's decision to approve TCP2-029-12-16 because the record lacks substantial evidence to support the Planning Board's decision.

CONCLUSION

For all of these reasons Citizen-Protestants request the District Council disapprove DET-2022-001 and TCP2-029-12-16.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April 2023, a copy of the foregoing Exceptions and Request for Oral Argument was mailed electronically and by first-class, postage pre-paid, to:

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