Baltimore County, Maryland

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February 23, 2022

SENT VIA EMAIL
Deborah C. Dopkin, Esquire, Board Chair
Joseph L. Evans, Panel Member
Adam T. Sampson, Panel Member
Board of Appeals for Baltimore County
The Jefferson Building
105 W. Chesapeake Avenue, Suite 203
Towson, Maryland 21204

RE: Lucky Star, LLC
11 Lynbrook Road
Case No.: 2021-109-A

Dear Chair Dopkin and Panel Members:

This responds the inquiry initiated by CBA Panel Member Joseph Evans and confirmed by the entire panel. Thank you for the opportunity to respond.

(1) We agree with Mr. Evans that the situation is confused. But the proximate cause is Petitioner's Engineer Patrick Richardson's testimony at the ALJ hearing to "slide" and switch from the "garden variety" Baltimore County Zoning Regulation Sec. 400, 400.3 garage height variance pled in the petition. He asserted that a garage accessory to a dwelling in a residential zone does not require the applicable accessory building residential zone variance framed in the petition. This precipitous injection of a legal claim, effectively for a special hearing determination, was outside and beyond the pale of that routine variance. Nevertheless, ALJ Maureen Murphy accepted this injection and ruled that no variance was necessary.

(2) In the absence of prior notice of this switch, our office asked for reconsideration. We disagreed with the ruling and made essentially the same arguments repeated in our motion here. ALJ Murphy reiterated her legal determination and added a grant of the variance on top of it.

(3) Upon appeal, given our priority to obtain a ruling on this legal issue of first impression, we had discussions with Petitioner's counsel. This resulted in a reciprocal approach geared to lead to a resolution of all the issues. We agreed neither to oppose nor consent to each other's requests. We would not oppose the requested variance, leaving it to Petitioner to prove its case and the CBA to rule. Petitioner likewise would neither oppose nor consent to our request for a ruling on our legal issue, leaving it up to the CBA to evaluate and decide.

(4) This brings us to the authority of the Board of Appeals to entertain the legal issue which we present and which is at the heart of our appeal. At the hearing, Chair Dopkin's questions reflected doubt or skepticism as to whether the CBA should entertain our legal request. Therefore, we must explain in more detail why we believe it is necessary and appropriate.

(5) The CBA exercises appellate jurisdiction in zoning cases, other than zoning reclassifications. County Charter Article VI, Secs. 602(a) and (e), attached.

(6) Where there is such charter county jurisdiction, the CBA has authority to consider any issue inextricably bound with the issues in the case below and affecting the public welfare, even if that aspect were not raised in detail below. Halle Companies v. Crofton Civic Ass'n 339 Md. 131, 144-46 (1995), attached and highlighted.

(7) The CBA Rules of Procedure do not specifically address the scope of review on appeal. This may contribute to the confusion. In this setting, we look to Maryland Rule 8-131(a), which covers the scope of judicial appellate review. Notably, CBA Rule 7a, attached, on "Evidence," makes admissible any evidence admissible under the Maryland Rules, along with the addition of any evidence which, *inter alia*, may be "... preserving the substantial rights of the parties."

(8) Maryland Rule 8-131(a), attached, states jurisdictional issues are always justiciable, even if not raised below. Here, we have two related jurisdictional issues raised emphatically below at the first opportunity: the ALJ's exceedance of her jurisdiction (A) in deciding a legal issue not raised in the petition and (B) not included in any public notice. This is jurisdictional, as we explained in our motion. So, the CBA has ample appellate authority to review the ALJ's jurisdictional scope.

(9) Rule 8-131(a) also provides discretion for the appellate court to address other issues not raised below. For example, the Court considered such an issue when it appeared desirable to avoid the expense and delay of another appeal. Crown Oil and Wax Co. v. Glen Const. Co. 320 Md. 546, 560-63 (1990), excerpt attached, highlighted.

Chair Deborah Dopkin asked if our office should file a petition for special hearing. Whether BCZR Sec. 500.7 authorizes an advisory opinion, absent reference to a specific property, is debatable. If we were to file such a petition relating to this property, the ALJ would surely stick to her ruling, might invoke *res judicata*, and/or also note that we could have filed an appeal. We would then be back here, but in a more precarious position.

We also noted the uncertain impact of ALJ Murphy's legal ruling if not reviewed on appeal. Other property owners may seek to take advantage of the ruling. The bureaucracy potentially, indeed probably, will believe they should follow her ruling.

(10)The Court reviewed the scope of jurisdiction under Rule 8-131(a) in Canaj, Inc. v. Baker and Division Phase II 391 Md. 374, 382-85 (2006), excerpt attached, highlighted. Judge Cathell wrote:

> "As this Court has stated before, **the primary purpose of the Rule 'is "to ensure fairness for all parties in a case and to promote the orderly administration of law."** Cases cited and quoted omitted. Emphasis supplied.

Here, we have shown fairness and restraint. We have not suggested any negative consequence from Petitioner's engineer's effort to "slide" a permit through without zoning compliance. We now neither oppose nor consent to the Petition for Variance despite the unfair and jurisdictionally defective slide to circumvent the law without proper pleading and public notice.

(11) This brings us to Panel Member Joseph Evans' request to tell the CBA exactly what we want. We request a ruling, in the form of a special hearing determination, effectively a declaratory judgment, as follows:

> "Upon review of the entire record, including People's Counsel's motion, oral argument in public hearing, and post-hearing correspondence, it is this ____ day of _____, 2022, declared, adjudged, and ordered, for reasons presented by People's Counsel:
>
> "1. That the County Board of Appeals has jurisdiction and authority to adjudicate the question of whether Baltimore County Zoning Regulation 400 --- Sections 400.1 to 400.3 --- govern, control, and apply to accessory buildings relating to dwellings in the Business-Local Zone."
>
> "2. That Baltimore County Zoning Regulation 400 --- Sections 400.1 to 400.3 --- do govern, control, and apply to accessory buildings relating to dwellings in the Business-Local Zone."

For all the above reasons, we are entitled to a ruling on the merits of the legal issue which Petitioner, via her engineer's testimony, injected into the case. We don't want to be left in a position where we have to consider it necessary to take this case to Circuit Court to get a ruling and/or secure a remand. The CBA could bring this case to a conclusion by resolving a straightforward issue of statutory construction. To paraphrase CBA Rule 7a, on Evidence, this would "... most conveniently, inexpensively, and speedily ... [preserve] the substantial rights of the parties."

(12) There was some questioning by the CBA panel concerning my reference to Zoning Supervisor's Jeffrey Perlow's indication that his office would follow ALJ Murphy's decision if left unchallenged. Whether or not the CBA finds them relevant, I am including here two e-mail chains between our office and Mr. Perlow to show his concerns. The initial August 6, 2021 e-mail chain is already in the record. It was attached to the Motion for Reconsideration filed below.

(13)As for the posture of the variance case, despite more confusion generated by Ms. Lau's description of her intended use of the property as an office for her tea import business, she later

indicated a potential dwelling use option. So it appears the BCZR Sec. 400.3 height variance for the garage accessory to a dwelling use is still in play.

Thank you again so much for the opportunity to clarify and explain our office's request and hopefully help resolve any confusion generated by this extraordinary procedural chain of events.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

cc: Dino LaFiandra, Esquire, Attorney for Petitioner, dcl@lafiandralaw.com
Patrick Richardson, Representative for Petitioner, rick@richardsonengineering.net
Jeffrey Perlow, Zoning Supervisor, Jperlow@baltimorecountymd.gov

ARTICLE VI. - COUNTY BOARD OF APPEALS*

**** Editor's notes:***

The title of this article was changed by Bill No. 85, 1978. Approved by voters Nov. 7, 1978; effective Dec. 8, 1978.

Sec. 601. - Appointment; terms; compensation.

There is hereby created and established a county board of appeals consisting of seven members who shall be appointed by the county council. Each member of the county council shall have the right to nominate one person to serve on the board of appeals. The first board of appeals appointed after this amendment shall consist of two members appointed for a term of one year, two members appointed for a term of two years and three members appointed for a term of three years. Thereafter, all appointments or reappointments shall be for three-year terms except that an appointment to fill a vacancy occurring before the expiration of a term shall be for the remainder of the unexpired term. All members of the board shall be residents of Baltimore County, and appointments shall be made so no more than five (5) of the members of the board shall be members of the same political party. The county council shall by legislative act set the compensation of the county board of appeals; provided, however, that no reduction in salary shall affect the compensation of a member of the county board of appeals during his current term. The board of appeals as constituted at the time of this amendment shall remain in effect until changed as provided in this section of the Charter.

(Bill No. 85, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 53, 1982, § 1; approved by voters Nov. 2, 1982; effective Dec. 2, 1982)

Annotation— *This section cited in Meadows of Greenspring Homeowners Association, Inc. v. Foxleigh Enterprises, Inc., 133 Md.App. 510, 758 A.2d 611 (2000).*

Sec. 601.1. - [Repealed.]

Repealed by Bill No. 85, 1978, § 2. (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

Sec. 602. - Powers and functions of county board of appeals.

The county board of appeals shall have and may exercise the following functions and powers:

(a) *Appeals from orders relating to zoning.* The county board of appeals shall have and exercise all the functions and duties relating to zoning described in Title 10 of the Local Government Article of the Annotated Code of Maryland as such functions and powers may be prescribed by legislative act of the county council. All references in law to the board of zoning appeals shall be construed to refer to the county board of appeals. In all cases, except those excluded by this Charter or by legislative act of the county council, the order of the county board of appeals shall be final unless an appeal is taken therefrom in the manner provided in Section 604 of this Article. (Bill No. 85, 1978, § 1; approved by voters Nov. 7, 1978; effective Dec. 8, 1978; Bill No. 13-18 , § 1; approved by the voters Nov. 6, 2018; effective Dec. 6, 2018)

(b) *Appeals from orders relating to licenses.* The county board of appeals shall have and exercise all the functions and powers of the board of license appeals as such functions and powers are prescribed in the public local laws of the county in effect at the time of the adoption of this Charter. All references in said laws to the board of license appeals shall be construed to refer to the county board of appeals created by this article. As soon as the county board of appeals has been duly constituted by the appointment and qualifications of its members as herein provided, the board of license appeals shall cease to exist.

(c) *Appeals from orders relating to building.* The county board of appeals shall hear and decide all appeals from orders relating to building. (Bill No. 85, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

(d) *Appeals from executive, administrative and adjudicatory orders.* The county board of appeals shall hear and decide appeals from all other administrative and adjudicatory orders as may from time to time be provided by Title 10 of the Local Government Article of the Annotated Code of Maryland, as amended, or by legislative act of the county council not inconsistent therewith. (Bill No. 13-18 , § 1; approved by the voters Nov. 6, 2018; effective Dec. 6, 2018)

(e) The county board of appeals shall have original and exclusive jurisdiction over all petitions for reclassification. (Bill No. 85, 1978, § 3) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

Annotation— *This section cited in Meadows of Greenspring Homeowners Association, Inc. v. Foxleigh Enterprises, Inc., 133 Md.App. 510, 758 A.2d 611 (2000).*

This section cited in Hammen v. Baltimore County Police Department, 373 Md. 440, 818 A.2d 1125 (2003).

Sec. 603. - Rules of practice and procedure.

Subject to the approval of the county council, the county board of appeals shall have authority to adopt and amend rules of practice and procedure to cover the conduct of its proceedings. Such rules may include matters relating to filing fees, meetings and hearings conducted by the board, the manner in which the chairman of the board shall be selected and the term for which he shall serve as chairman, and all other matters deemed appropriate or necessary for the board to conduct its proceedings. Said rules and regulations when approved by the county council shall have the force and effect of law. All decisions of the county board of appeals shall be made after notice and opportunity of hearing upon the issues before said

board. All hearings held by the board shall be heard de novo, unless otherwise provided by legislative act of the County Council, and shall be open to the public. The board shall cause to be maintained complete public records of its proceedings, with a suitable index.

(Bill No. 85, 1978, § 1) (Approved by voters Nov. 7, 1978; effective Dec. 8, 1978)

Annotation— *This section cited in Pollard's Towing, Inc. v. Berman's Body, Frame & Mechanical, Inc. 137 Md.App. 277, 768 A.2d 131 (2001).*

This section cited in Hammen v. Baltimore County Police Department, 373 Md. 440, 818 A.2d 1125 (2003).

Sec. 604. - Appeals from decisions of the board.

Within thirty days after any decision by the county board of appeals is rendered, any party to the proceeding who is aggrieved thereby may appeal such decision to the circuit court of Baltimore County, which shall have power to affirm the decision of the board, or, if such decision is not in accordance with law, to modify or reverse such decision, with or without remanding the case for rehearing, as justice may require. Whenever such appeal is taken, a copy of the notice of appeal shall be served on the board by the clerk of said court, and the board shall promptly give notice of the appeal to all parties to the proceeding before it. The board shall, within fifteen days after the filing of the appeal, file with the court the originals or certified copies of all papers and evidence presented to the board in the proceeding before it, together with a copy of its opinion which shall include a statement of the facts found and the grounds for its decision. Within thirty days after the decision of the circuit court is rendered, any party to the proceeding who is aggrieved thereby may appeal such decision to the court of appeals of this state. The review proceedings provided by this section shall be exclusive.

Annotation— *Improvement association which was neither a taxpayer nor an aggrieved party had no standing to maintain appeal from order of Circuit Court affirming decision of county board of appeals granting special exception to allow property zoned for residential apartments to be sued for construction of an office building. Southland Hills Improvement Assn. v. Raine, 220 Md. 213, 151 A.2d 735 (1959).*

This section is cited in Prince George's County v. Donohue, 220 Md. 372, 152 A.2d 560 (1959).

Referred to in Renz v. Bonfield Holding Co., 223 Md. 34, 158 A.2d 615 (1960); and in Jobar Corp. v. Rodgers Forge, 236 Md. 106, 202 A.2d 612 (1964).

Certain persons owning property near property proposed for rezoning constitute "parties aggrieved" within the meaning of this section. Wier v. Witney Land Company, 257 Md. 600, 263 A.2d 833 (1970).

Sec. 605. - Employees of the board.

The board may appoint such employees, and the county executive shall make available to the board such services and facilities of the county as are necessary or appropriate for the proper performance of its duties. The county attorney or some member of the legal staff whom the county attorney designates shall serve as counsel to the board.

(Bill No. 172, 1981, § 1) (Approved by voters Nov. 2, 1982; effective Dec. 3, 1982)

Sec. 606. - Furthering legislation.

The county council shall have the power to enact furthering legislation not inconsistent with the provisions of this article to implement and define the powers and functions of the county board of appeals as herein specified. To the extent permitted by the public general laws of this state, the county council shall also have the power, by legislative act, to prescribe other appeals to be heard by the county board of appeals in addition to those specified in this article.

(Bill No. 85, 1978, § 1, approved by voters Nov. 7, 1978, effective Dec. 8, 1978)

Sec. 607. - [Repealed.]

Repealed by Bill No. 85, 1978, § 2, approved by voters Nov. 7, 1978, effective Dec. 8, 1978.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Eastern Outdoor Advertising Co. v. Mayor and City Council of Baltimore, Md.App., September 6, 2002

339 Md. 131
Court of Appeals of Maryland.

HALLE COMPANIES et al.
v.
CROFTON CIVIC ASSOCIATION et al.

No. 129, Sept. Term, 1994.
|
July 17, 1995.
|
Reconsideration Denied Aug. 17, 1995.

Synopsis
Opponents of applications for special exception and variance approval for landfill sought judicial review of decision of county **board** of **appeals** granting special exception and variance requests, subject to specific conditions. The Circuit Court, Anne Arundel County, Martin A. Wolff, J., reversed. Following grant of certiorari, 337 Md. 70, 650 A.2d 957, the Court of Appeals, Karwacki, J., addressing an issue of first impression, held that **board**, on de novo review of decision of administrative hearing officer, had authority to address issue of alternative road access and to condition grant of applications on alternative road access, even though issue of alternative access road was not raised before hearing officer.

Reversed.

West Headnotes (12)

[1] **Zoning and Planning** ⇐ Power and Authority

County **board** of **appeals** is purely statutory creation and may exercise only those powers expressly granted to it by law or those which can be fairly implied. Code 1957, Art. 25A, § 5(U).

1 Cases that cite this headnote

[2] **Zoning and Planning** ⇐ Conditions attached to grant

Power to impose conditions upon grant of variance or special exception is one which is implicit in power to grant variance or special exception.

5 Cases that cite this headnote

[3] **Zoning and Planning** ⇐ Conditions attached to grant

Both variance and special exception authorize uses which otherwise would not be permitted and, having been given power to authorize such unusual uses, county **board** of **appeals** also had to have power to limit those uses to protect health, safety and welfare of community. Code 1957, Art. 25A, § 5(U).

1 Cases that cite this headnote

[4] **Zoning and Planning** ⇐ Administrative review

Although issues to be addressed on de novo review by county **board** of **appeals** may be limited, new and additional evidence is permitted, and proceedings, therefore, are wholly original with regard to all issues properly raised. Code 1957, Art. 25A, § 5(U).

2 Cases that cite this headnote

[5] **Zoning and Planning** ⇐ Nature and form of remedy and jurisdiction

County **board** of **appeals** may not entertain truly original petition for variance or special exception, but may review actions of administrative hearing officer and take any action which officer could have taken in original proceeding. Code 1957, Art. 25A, § 5(U).

1 Cases that cite this headnote

[6] **Zoning and Planning** ⇐ Scope of review
Zoning and Planning ⇐ Determination

On applications for special exception or variance, additional evidence may be presented in de novo proceedings to county **board** of **appeals**, and **board** may impose any conditions

it feels necessary to protect public health, safety and welfare; it is appellate review mainly in sense that decision by administrative hearing officer is prerequisite to proceeding before **board**, and not in sense that **board** is restricted to record before hearing officer. Code 1957, Art. 25A, § 5(U).

1 Cases that cite this headnote

[7] **Zoning and Planning** ⇐ Scope of review

Issue of alternate road access was so inextricably intertwined with administrative hearing officer's decision denying applications for special exceptions and variance approval for landfill operations that issue was properly before county **board** of **appeals** and could be addressed on **board's** de novo review; county's two-tier process did not preclude **board** from addressing by condition any aspect of zoning proposal which might affect public welfare, main reasons for administrative hearing officer's denial of applications were traffic and environmental impacts which would be produced by originally proposed access road, and while alternative road access was not specifically discussed in prior proceedings, broad issue of access was addressed.

6 Cases that cite this headnote

[8] **Zoning and Planning** ⇐ Jurisdiction

Acting de novo, county **board** of **appeals** exercises jurisdiction akin to original jurisdiction.

2 Cases that cite this headnote

[9] **Zoning and Planning** ⇐ Administrative review

In de novo hearing before county **board** of **appeals**, new or different evidence beyond that presented during original proceeding may be used concerning any issue properly before tribunal.

1 Cases that cite this headnote

[10] **Zoning and Planning** ⇐ Landfills and waste disposal; junkyards

County **board** of **appeals**, on de novo review of administrative hearing officer's denial of applications for special exceptions and variance approval for proposed landfill, did not exceed its de novo authority in requiring alternate road access as condition to grant of special exceptions and variance, which condition **board** found would alleviate wetlands and traffic problems associated with landfill and mitigate effect upon neighboring property and community at large, even though applicant did not own property across which alternative road access would be built; requirement that applicant obtain fee simple estate in property across which road would be built was explicitly made condition of grant of exceptions and variance, and alternative access condition was justifiable in terms relating to public health, safety and welfare.

2 Cases that cite this headnote

[11] **Zoning and Planning** ⇐ Conditions attached to grant

Uncertainty of occurrence of prerequisite for granting special exception and variance approval is irrelevant if county **board** of **appeals** is satisfied that, once that prerequisite occurs, approved activities would be appropriate.

[12] **Zoning and Planning** ⇐ Landfills and waste disposal; junkyards

Decision of county **board** of **appeals** granting applications for special exceptions and variance approval for landfill, conditioned on alternative access road, did not impermissibly enlarge substance of application, despite alleged intensity of ancillary activities possibly to be performed; **board's** order did not mention off-site support facilities, which applicant had agreed to locate on property, rather than along access road.

Attorneys and Law Firms

**683 *134 Steven P. Resnick (Kevin Reynolds, on the brief), Annapolis, for petitioner.

Lynn A. Robeson, Asst. County Atty., (Phillip F. Scheibe, County Atty.; Stephen M. LeGendre, Deputy County Atty., all on brief), Annapolis, Warren K. Rich (Rich and Henderson, P.C., on the brief), Annapolis, for respondent.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, JJ.

Opinion

KARWACKI, Judge.

In this case, we shall analyze the authority of the Anne Arundel County **Board** of **Appeals** to impose a condition upon the grant of a special exception when that condition was not sought during earlier proceedings before the county administrative hearing officer.

I

This case originated from applications filed with the Anne Arundel County Department of Planning and Code Enforcement by the Halle Companies and its totally owned enterprise, Chesapeake Terrace (referred to collectively hereafter as "Halle"). Specifically, in 1990, Halle sought administrative approval for sand and gravel landfill operations. Those operations were to be conducted on approximately 108 acres of land located near the intersection of Routes 3 and 424, in Odenton, Maryland.[1] Of the 108 acres subject to the special exception *135 request, only 35 acres of previously cleared property was proposed for sand and gravel extraction. Halle also sought approval for rubble landfill operations to be conducted at that same location on approximately 482 acres (including the 108 acres for the sand and gravel landfill). Of the 482 acres, only 150 acres of previously cleared property was contemplated for landfill use, to be accomplished through the sequential filling of a number of small cells on the property. Halle's applications for special exception and variance approval were denied by Anne Arundel County's administrative hearing officer.

684 Halle appealed that decision to the Anne Arundel County **Board of **Appeals** ("the **Board**"), which heard the appeal *de novo,* pursuant to § 603 of the Anne Arundel County Charter.[2] Evidence produced at the sixteen administrative hearings held over seventeen months demonstrated that the site was within a resource extraction area on the master plan of the County, was the subject of an existing special exception granted for a sand and gravel operation, and that the subject property had been mined off and on for 40 years. The site was likened to a moonscape, and photographs of the site showed debris, deep ravines, and erosion on the property.

Photographs of the property showed trees falling into eroding ravines which were 30-45 feet deep, abandoned sediment basins, and unclaimed excavation pits. Illegal dumping, target shooting, and hunting regularly occurred on the property. After its site inspection, the **Board** observed that "because of previous mining which has occurred on this property, the land is cratered virtually up to the property line."

Halle offered expert testimony on subjects including traffic impact and road improvements, environmental protection and wetland preservation, hydrology and ground water contamination, land use planning and development, civil and environmental *136 engineering related to landfill development, and acoustical engineering. Each expert testified at length and addressed the impact of the landfill and sand and gravel operations at the site upon vicinal properties. The County and the protestants claimed that harsh environmental impact on the Patuxent River and the surrounding wetlands and floodplain would result, and further asserted that their primary concern was traffic. Patuxent Road access required truck travel along "a bad curve ... referred to as a reverse horizontal curve," and also "would require disturbing major wetlands." Questions were raised as to "the relationship of the landfill to the 100 year flood plain on Patuxent Road," and the potential threat of Patuxent Road access to residential communities north and west of the site.

Due to these concerns, Halle suggested an alternate access to the site from Conway Road at the first of the **Board's** sixteen hearings. Conway Road access would alleviate both the wetlands and traffic problems raised by the County and the protestants. It was also a shorter access route, would affect fewer people overall, and would direct the traffic further from the Patuxent River. The County Department of Public Works evaluated the proposed Conway Road access and concluded that such access was preferable because it addressed the traffic and environmental concerns.

The County argued that the **Board** could not consider the access from Conway Road because Halle could not propose an alternative entrance after having filed the initial **appeal**. The **Board** rejected the County's argument:

> "Although the County argues that the Petitioners could not suggest this alternative entrance after filing the initial appeal (an argument which this **Board** rejects), the County also indicated in its closing argument that the Conway Road entrance is a much better choice because it avoids the wetlands and the heavier traffic on Patuxent Road as well as directing the traffic further from the Patuxent River. This **Board** has often accepted modifications to an initial plan when the modifications were offered during the hearing process. There does not appear to be any reason that the *137 proposed use of the Conway Road entrance must be rejected by this **Board**."

After three months of deliberation, an on-site visit by the members of the **Board** to the property, and a review of the record taken as a whole-consisting of more than 2,000 pages of transcribed testimony and voluminous documents-the **Board** determined that the landfill would advance the public welfare of the County. It recognized the need for the landfill, concluded that its location was well suited to the use, and determined that the special exception and variance proposals **685 would benefit the vicinal community by reclaiming and restoring previously mined ravines and properties "cratered" up to the property line. Accordingly, the **Board** granted the special exception and variance requests, subject to eight specific conditions.[3]

Petitioners, several community associations led by the Crofton Civic Association and eighteen individual property owners, sought judicial review of the decision of the **Board** in the Circuit Court for Anne Arundel County. The circuit court *138 granted Anne Arundel County's motion to intervene and, after oral argument, reversed the decision of the **Board**, holding that the **Board** exceeded its *de novo* authority by imposing the Conway Road access as a condition of its special exception and variance approvals, as the Conway Road access went beyond the scope of the original application.

The circuit court concluded that the condition of access from Conway Road was a "so-called" condition and not a proper one, because it in effect substantially augmented the property "touched" by Halle's application:

> "The central question, then, which this Court must resolve is whether the **Board** had the authority under its "*de novo*" power to address the Conway Road access even though it was not part of the original application.
>
> * * * * * *
>
> "[Halle] argues that the introduction of the Conway Road access was simply a new issue which the **Board** had every right to consider. The Court agrees with [Halle] that the **Board**, pursuant to its *de novo* power, can address new issues. *Boehm [v. Anne Arundel County,* 54 Md.App. 497, 459 A.2d 590 (1982)]. It cannot, however, indiscriminately entertain matters which in effect change the nature of the original controversy or application. In this case, the **Board's** entertainment of the Conway Road access was not a mere consideration of a new issue. It was much more. Indeed, given the amount of property affected by the Conway Road access and the intensity of the ancillary activities possibly to be performed thereon, the **Board's** decision impermissibly enlarged the substance of [Halle's] application. Therefore, it is the opinion of this Court that under the circumstances, the **Board**, in entertaining the Conway Road issue, expanded the scope of its inquiry to such a degree that the nature of the original application was significantly altered. In so doing, the **Board** exceeded the bounds of its *de novo* authority.
>
> "For the reasons aforementioned, this Court finds that the **Board** erred as a matter of law when it granted the *139 special exceptions and variance beyond the scope of [Halle's] original application." (footnotes omitted).

Halle noted an appeal to the Court of Special Appeals and then filed a petition for a writ of certiorari in this Court prior to consideration of the case by the intermediate appellate court. We granted certiorari to determine whether the **Board** exceeded its *de novo* authority in requiring the Conway Road access as a condition to the grant of the special exceptions and variance.

**686 II

Petitioners first point out that the **Board** has the authority to impose conditions to the grant of special exceptions or variances to preserve the health, safety, and welfare of the community. Further, petitioners stress that the proceedings before the **Board** were conducted *de novo,* or as if the proceedings before the administrative hearing officer had never occurred. As the broad issue of access was before the administrative hearing officer, petitioners conclude that,

pursuant to its *de novo* power, the **Board** had the authority to address the alternative access to the site.

Respondents argue that Halle modified its application before the **Board** by proposing the alternative Conway Road access and thereby impermissibly expanded the scope of its original application. Further, respondents point out that the "amendment" for the new access road was not included in the notice of the public hearing and that Halle had not yet obtained ownership of the private access road intersecting with Conway Road. Consequently, respondents conclude that the circuit court was correct in reasoning that the proceedings before the **Board** of **Appeals** constituted an original rather than appellate proceeding regarding what was, in essence, a new application.

III

[1] Under the Express Powers Act, Md.Code (1957, 1994 Repl.Vol.), Art. 25A, § 5(U), each county is authorized to ***140** create a **board** of **appeals**. Anne Arundel County, by its charter, created the **Board** of **Appeals** as an independent unit of county government and vested the **Board** with the power to hear *de novo* all appeals authorized by the Express Powers Act.[4] Anne Arundel County provides for initial action upon a special exception or variance request by an administrative hearing officer. Thereafter, appeal may be taken from the decision of the hearing officer to the **Board** of **Appeals**. Anne Arundel County Charter § 603 mandates that "[a]ll decisions by the County **Board** of **Appeals** shall be made after notice and hearing *de novo* upon the issues before said **Board**." The **Board** is purely a statutory creature and may exercise only those powers expressly granted to it by law or those which can be fairly implied. *Baylis v. Mayor & City Council of Baltimore,* 219 Md. 164, 168, 148 A.2d 429, 432 (1959).

[2] **[3]** The power to impose conditions upon the grant of a variance or special exception is one which is implicit in the power to grant a variance or special exception. "This is so because the whole basis for the exception is the peculiar hardship to the applicant, and the **Board** is justified in limiting the exception in such a way as to mitigate the effect upon neighboring property and the community at large." *Id.* at 169, 148 A.2d at 432. *See also Skipjack Cove Marina, Inc. v. Board of County Comm'rs of Cecil County,* 264 Md. 381, 287 A.2d 49 (1972); 3 Yokley, *Zoning Law and Practice,* § 21-12. Both a variance and a special exception authorize uses which ***141** otherwise would not be permitted. Having been given the power to authorize such unusual uses, the **Board** must also have the power to limit those uses to protect the health, safety, and welfare of the community. *See Skipjack Cove Marina, Inc.,* 264 Md. at 386, 287 A.2d at 51 (The **board** is justified in limiting the special exception in such a way as to mitigate its effect upon neighboring property and the community at large.); 3 Rathkopf, *The Law of Zoning and Planning,* § 40.02 [3] ("Even in the absence of any specific provision therefor in the ordinance, the **board** would thus have inherent power to condition a variance. If this were not so, the ****687** **board**, for lack of such right, might be forced, at times, to deny a variance and thus perpetuate the hardship which the restrictions have imposed upon the landowner.").

IV

[4] Respondents cite the three cases in which we have previously addressed *de novo* review by a county **board** of **appeals**, *United Parcel Serv., Inc. v. People's Counsel for Baltimore County,* 336 Md. 569, 650 A.2d 226 (1994) ("*UPS* "); *County Fed. Sav. & Loan Assoc. v. Equitable Sav. & Loan Assoc., Inc.,* 261 Md. 246, 274 A.2d 363 (1971), and ***Daihl** v. County Bd. of Appeals,* 258 Md. 157, 265 A.2d 227 (1970). In the latter two of those cases, however, we addressed the **Board's** jurisdiction rather than the scope of *de novo* review. In ***Daihl,*** we held that a **board** of **appeals** cannot review actions which were not appealed specifically:

> "We think that the context in which the term *de novo* is used in Section 501.6 and 501.3 ... means that on appeal there shall be a *de novo* hearing on those issues which have been appealed and not on every matter covered in the application. In this sense *de novo* means that the **Board** of **Appeals** may hear testimony and consider additional evidence pertaining to the issue or issues presented on appeal. See Vol. 2, *The Law of Zoning and Planning,* Rathkopf, ch. 65-30, § 7. The original nature of a *de novo* hearing with its quality of newness is in contra-distinction to a review upon the record as exists where matters are heard on ***142** certiorari. 73 C.J.S. *Public Administrative Bodies and Procedure,* § 204."

Daihl, 258 Md. at 162, 265 A.2d at 229. We made a similar holding in *County Federal,* quoting the above language from ***Daihl***. *County Federal,* 261 Md. at 253-54, 274 A.2d at 367. Contrary to respondents' assertions, neither of these holdings affects the disposition in this case, as they show that we have consistently treated *de novo* appeals as wholly original

proceedings, with the word "appeal" meaning simply that the proceedings are new and independent rather than strict review of prior proceedings. *See also Lohrmann v. Arundel Corp.,* 65 Md.App. 309, 318, 500 A.2d 344, 348 (1985) ("the use of the word 'appeal,' to the extent it denotes review of the action of a lower tribunal, is a misnomer, for there is no review."); *Hardy v. State,* 279 Md. 489, 369 A.2d 1043 (1977); *Travelers Indemnity Co. v. Nationwide Construction Corp.,* 244 Md. 401, 224 A.2d 285 (1966). Although the issues to be addressed on review by the **Board** may be limited, new and additional evidence is permitted. The proceedings, therefore, are wholly original with regard to all issues properly raised.

[5] **[6]** In *UPS,* we interpreted the power granted by the Express Powers Act as providing charter counties the option to vest the **board** of **appeals** with either original jurisdiction or appellate jurisdiction over any subject matter set forth therein. *UPS,* 336 Md. at 588, 650 A.2d at 236. We concluded that it was the intent of the General Assembly that "[u]nder the Express Powers Act, a **board** of **appeals** is primarily an appellate tribunal, having only such original jurisdiction as a county's charter and ordinances expressly grant [.]" *Id.* at 591, 650 A.2d at 237.

> "The protestants also rely upon *People's Counsel v. Crown Development,* 328 Md. 303, 316, 614 A.2d 553, 559 (1992), where this Court held, *inter alia,* that on an appeal from the decision of administrative officials granting final approval of a development plan, the Baltimore County **Board** of **Appeals** was authorized under the Express Powers Act and local law to receive and consider evidence in addition to that contained in the record before the administrative ***143** officials. The *Crown Development* case, like the *Hope* [*v. Baltimore County,* 288 Md. 656, 421 A.2d 576 (1980)] case, was concerned only with the appellate jurisdiction of the **Board** of **Appeals**. Our holding with regard to additional or *de novo* evidence before the **Board** of **Appeals** does not support the view that the **Board** has original jurisdiction over all subjects delineated in § 5(U). The fact that an appellate tribunal may be authorized to receive additional evidence or hear a case *de novo* does not mean that it is exercising original jurisdiction. A *de novo* appeal is nevertheless an exercise of appellate jurisdiction rather than original jurisdiction. ****688** *See Hardy v. State,* 279 Md. 489, 492, 369 A.2d 1043, 1046 (1977). Whether a tribunal's exercise of jurisdiction is appellate or original does not depend on whether the tribunal is authorized to receive additional evidence. Instead, as Chief Justice Marshall explained, '[i]t is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause...." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 175, 2 L.Ed. 60, 73 (1803)."

Id. at 589-90, 650 A.2d at 236. That decision, however, does not conflict with our prior interpretation of *de novo* proceedings. The Anne Arundel County **Board** of **Appeals** may not entertain a truly original petition for variance or special exception, but it may review the actions of the administrative hearing officer and take any action which that officer could have taken in the original proceeding. *See Soothcage v. King,* 227 Md. 142, 152-53, 176 A.2d 221, 227 (1961). Additional evidence may be presented in the *de novo* proceedings, and the **Board** may impose any conditions it feels necessary to protect the public health, safety, and welfare. It is appellate review mainly in the sense that a decision by the administrative hearing officer is a prerequisite to proceedings before the **Board** and not in the sense that the **Board** is restricted to the record made before the administrative hearing officer. *See also* 3 Rathkopf, *The Law of Zoning and Planning,* § 37.01[7][a] ("A person aggrieved by the decision [of the ***144** administrative hearing officer] **appeals** to the **board** of **appeals**, asking it to rule upon the correctness of the administrative officer's determination; the **board** may reverse or affirm, wholly or partly, or may modify the order requirement, decision, or determination appealed from, and make such order, requirement, decision, or determination as, in its opinion, ought to be made in the case.").

We are left, therefore, with a question of first impression in this state regarding the scope of a **board** of **appeals'** *de novo* review. We shall first determine whether the **Board** had the authority under its *de novo* power to address the Conway Road access in the first instance, as it was not part of the original application. Then we shall address whether the conditions imposed by the **Board** were proper.

V

[7] The circuit court concluded that, although the **Board** could address issues not raised before the administrative hearing officer, it could not "indiscriminately entertain matters which in effect change the nature of the original controversy or application.... [T]he **Board**, in entertaining the Conway Road issue, expanded the scope of its inquiry to such a degree that the nature of the original application was significantly altered."

[8] As acknowledged by the County in this case, and as noted by the Court of Special Appeals in *Lohrmann v. Arundel Corp.*, 65 Md.App. 309, 319, 500 A.2d 344, 349 (1985) (quoting *Boehm v. Anne Arundel County*, 54 Md.App. 497, 511, 459 A.2d 590, 599):

> "[T]he *de novo* hearing contemplated by section 603 ... 'is an entirely new hearing at which time *all aspects of the case should be heard anew, as if no decision has been previously rendered* [.]" (emphasis added).

Acting *de novo*, the **Board** exercises jurisdiction akin to original jurisdiction. *See Kaouris v. Kaouris*, 324 Md. 687, 714-15, 598 A.2d 1193, 1206 (1991); *Volz v. State Roads Comm'n*, 221 Md. 209, 214-15, 156 A.2d 671, 673 (1959).

***145** In *Kaouris*, we held that on appeal *de novo* from the orphans' court, a circuit court could consider issues not raised or decided below:

> "A party is foreclosed from challenging for the first time on appeal, the propriety of the exercise by a court of its power to act. Where, however, the appeal is from an orphans' court to a circuit court pursuant to Courts Article § 12-502, the exercise of that orphans' court's power may be challenged in the circuit court even though the issue was not raised in the orphans' court. This is so because the matter is heard *de novo*."

324 Md. at 715-16, 598 A.2d at 1207; *see also Barbee v. Barbee*, 311 Md. 620, 537 A.2d 224 (1988) (directing the circuit court hearing a ****689** case *de novo* to determine issues not raised in the district court).

[9] As discussed in Part IV, *supra*, the **Board** conducts wholly original proceedings with regard to all issues properly before it, and may consider new and additional evidence beyond that introduced before the administrative hearing officer. The issue **appealed** to the **Board** was whether the sand and gravel and rubble landfill operations would be in the best interest of the public health, safety, and welfare. The main reasons for the administrative hearing officer's denial of Halle's application were the traffic and environmental impacts the Patuxent Road access would produce. Although the Conway Road access was not specifically discussed in the prior proceedings, the broad issue of access was addressed. The same issue of how access to the site would affect the public health, safety, and welfare was raised before the **Board**, but, in essence, different evidence was used to prove Halle's position that the public safety would not be in danger. In a *de novo* hearing before a **board** of **appeals**, new or different evidence beyond that presented during the original proceeding may be used concerning any issue properly before the tribunal. *See Dahl* and *UPS, supra*.

We reject an interpretation of the County's two-tier process that would preclude the **Board** from addressing by condition ***146** any aspect of a zoning proposal which might affect the public welfare. The access issue was so inextricably intertwined with the administrative hearing officer's decision that it was an issue properly before the **Board** which could be addressed.

VI

[10] Although we have never clearly defined the scope of the *de novo* powers of a county **board** of **appeals** in zoning cases, we have made it clear that a **board** of **appeals** can, and should in many cases, impose conditions when granting a special exception or variance to protect the public welfare. *See, e.g., Rohde v. County Board of Appeals*, 234 Md. 259, 199 A.2d 216 (1964); *Montgomery County v. Mossburg*, 228 Md. 555, 180 A.2d 851 (1962); *Oursler v. Board of Zoning Appeals*, 204 Md. 397, 104 A.2d 568 (1954). "It has long been held and is firmly established that it is not only proper but desirable to attach to the grant of a special exception conditions which do not violate or go beyond the law and are appropriate and reasonable." *Mossburg*, 228 Md. at 558, 180 A.2d at 852.

The power of the **Board** to address all issues properly before it by condition goes hand-in-hand with the authority to take whatever action the administrative hearing officer could take if presented with the same evidence. After determining that permitting the proposed operations would be in the best interest of the public, therefore, the **Board** had the authority to address the access issue by imposing conditions as part of its *de novo* power.

Respondents contend that the condition imposed by the **Board** of **Appeals** was only a "so-called" condition rather than a true condition. In support of this conclusion, respondents point to the circuit court's reasoning:

> "The Court of Appeals, in *Baylis v. City of Baltimore*, 219 Md. 164 [148 A.2d 429] (1959), summarized the nature and scope of conditions imposed upon special exceptions: '[T]he **Board** is justified in *limiting the [special] exception in such a way as to mitigate the effect upon neighboring property and the community at large.*' ***147** *Baylis*, 219 Md. at 169 [148 A.2d 429] (emphasis added). A review of the circumstances in this case reveal that the **Board's** 'condition' of the Conway Road access is contrary to the characterization of the term as described by the *Baylis* court."

This analysis, however, ignores the findings by the **Board** that the Conway Road access would alleviate the wetland and traffic problems associated with the landfill and "mitigate the effect upon neighboring property and the community at large." The main difficulty with which the circuit court seems to have struggled is the fact that Halle did not own the property across which the Conway Road access would be built. The circuit court believed that a separate administrative proceeding was necessary for approval of such access:

> ****690** "[I]t seems logical to this Court that an access road of the significance as the one here must also be authorized by a special exception. To authorize such a substantial use as a 'condition' of the special exception, rather than authorizing the use of the access pursuant to a specific special exception grant, is contrary to reason and adverse to the plain reading and spirit of the zoning statute."

[11] In *Rohde, supra*, we upheld a special exception to which a **board** of **appeals** had imposed a condition similar to the one at issue in this case. There, we upheld a condition that access be acquired over property owned by third parties. The developer proposed to reclassify 37 acres of undeveloped land to a zoning classification which permitted apartment development, and sought a special exception permitting two high rise apartment buildings on the tract. The reclassification allowed 592 apartment units, and the special exception would add 240 more. The court noted:

> "A proposal ... [had] been pending for some time, to extend a substantial highway known as Goucher Boulevard so as to run southeast from Taylor Avenue and connect with Loch Raven Boulevard. As planned, it would pass close to the northeast side of the Ortel land, but would not actually touch that tract. A small strip of land, now zoned R-6 ***148** would be left between, but would be useless for development purposes."

Rohde, 234 Md. at 263, 199 A.2d at 218. The **board** of **appeals** granted both the reclassification and the special exception conditioned upon the extension of Goucher Boulevard for access. We addressed the contention that the special exception could not be granted due to the uncertainty of the completion of the Goucher Boulevard extension in our holding:

> "In reaching this conclusion, we have not overlooked *Bonhage v. Cruse, supra*, [233 Md. 10, 194 A.2d 803 (1963)], which involved the same provision of the Baltimore County Zoning Regulations. There, we found that there was no assurance that a side street which led into a development behind the subject property would be widened, and that unless this street were widened it could not be shown that congestion would not result. Consequently Section 502.1 b was not satisfied. The situation here presented is different in that the extension of Goucher Boulevard is required as a condition precedent to construction and access to that new road is implicitly required, so that we think the **Board** could find that with the new road built and with access to it provided, it appeared that traffic congestion would not result from the grant of the exception."

Id. at 265, 199 A.2d at 219-20. Similarly, Halle must obtain a fee simple estate rather than an easement in the Conway Road access land before the landfill operations may proceed. That was explicitly made a condition of the **Board's** grant of the exception and variance. The uncertainty of a prerequisite's occurrence is irrelevant if the **Board** is satisfied that, once that prerequisite occurs, the approved activities would be appropriate. *See also Gulick v. Board of Environmental Protection*, 452 A.2d 1202, 1210 (Me.1982) ("The **Board** is free to set any conditions that fall within the range of its statutory authority. If any of those conditions require action by someone other than the applicant itself, it is up to that applicant to get whatever agreements or guarantees it needs."). The **Board** here imposed a true condition, not an illusory one. Contrary to the circuit court's conclusion, the condition imposed ***149** does in fact restrict Halle's use of the property. We shall uphold that condition, as it is justifiable in terms relating to the public health, safety and welfare. *See* 3 Yokley, *Zoning Law and Practice*, § 21-12; *Exxon, Inc. v. City of Frederick*, 36 Md.App. 703, 375 A.2d 34 (1977) (special exception conditioned upon entrance to and exit from gas station being positioned at a specific location).

VII

[12] The circuit court also determined that because of the "intensity of the ancillary activities possibly to be performed, the **Board's** decision impermissibly enlarged the substance of respondents application." Petitioners contend that this conclusion was erroneous, and that "the 'fundamental flaw' in the ****691** court's reasoning was that on its face, neither the

Board's opinion nor the condition at issue authorized these facilities along the access road." Petitioners are correct, as the **Board's** order merely grants landfill and sand and gravel approval for the property; it does not mention off-site support facilities.

It is true that at the first hearing before the **Board,** Halle submitted an exhibit depicting support facilities along the alternative access and off of the 482 acres. After inquiry by the **Board**, however, Halle agreed to locate the support facilities within the 482 acres and submitted exhibits specifically locating them in that area. Halle stated that it could seek a subsequent special exception if it later desired to locate those facilities along the access road.

The **Board** recognized that the scope of Halle's application was limited to the 482 acre tract and appropriate access. Uses outside that tract were a question to be resolved in a separate application; hence, Halle agreed to keep the facilities within the acreage at issue. Nowhere in its opinion did the **Board** authorize support facilities along the access road, and the circuit court incorrectly concluded otherwise.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. COSTS TO BE PAID BY RESPONDENTS IN EQUAL SHARES.

All Citations

339 Md. 131, 661 A.2d 682

Footnotes

1 The property in question is located nearly two miles northwest of the intersection of Maryland Routes 3 and 424, along Conway Road. It is bordered on the north by the Little Patuxent River and to the west by the Conrail railroad tracks.

2 Anne Arundel County Charter, § 603 provides, *inter alia,* that "[a]ll decisions by the County **Board** of **Appeals** shall be made after notice and hearing *de novo* upon the issues before said **Board**."

3 Two of the **Board's** conditions addressed the access issue:

> "The special exceptions for a sand and gravel operation and rubble landfill operation are granted with the following conditions:
>
> "1. Patuxent Road shall not be used as an entrance to the operation.
>
> "2. Conway Road is to be used as the entrance to the operations, with the following conditions:
>
> "a. A right turn lane shall be constructed on eastbound Conway Road at Maryland Route 3 to a minimum length of 500 feet.
>
> "b. From the intersection of Patuxent Road and Conway Road to the entrance of the site, the road shall be improved with 12 foot travel lanes and 8 foot shoulders improved to county standards (pursuant to Article 26, Section 3-202(d), Anne Arundel County Code) where the county right-of-way exists. Additionally, the Petitioners shall pursue a diligent course to obtain the right-of-way from private property owners where possible.
>
> "c. The Road improvements on Conway Road from Route 3 to Patuxent Road shall be constructed before any rubble landfill or sand and gravel operation begins; road improvements from the intersection of Conway Road and Patuxent Road to the entrance of the site are to be completed within one year of the start of operations.
>
> "d. The access obtained to the site from Conway Road shall be through a fee-simple right-of-way, not through an easement."

4 The Express Powers Act, Md.Code (1957, 1994 Repl.Vol.), Art. 25A, § 5(U) provides that a county **board** of **appeals** may make a decision

> "on petition by any interested person and after notice and opportunity for hearing and on the basis of the record before the **board**, of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of, or subject to amendment or repeal by, the county council, as shall be specified from time to time by such local laws enacted under this subsection: An application for a zoning variation or exception or amendment of a zoning ordinance map; the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order; ..."

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APPENDIX H - RULES OF PRACTICE AND PROCEDURE OF THE BALTIMORE COUNTY BOARD OF APPEALS

Rule 1. General

a. The county board of appeals shall select one of its members to be the chairman of the board, and he shall serve as chairman at the pleasure of the board. The chairman shall preside at all meetings of the county board of appeals, and in his absence he shall designate another member of the board to sit in his place as acting chairman.

b. Meetings of the county board of appeals shall be held as determined by the chairman, but never less than weekly; and the board shall meet at such other times as the board may determine.

c. Three (3) members of the board of appeals, as designated by the chairman, shall sit for the purpose of conducting the business of the board; and a majority vote of two (2) members shall be necessary to render a decision, except as follows: [Bill No. 50-2005]

   1. During the course of a hearing, if any member of the original panel is unable to continue to serve, the chairman shall appoint a member to fill the vacancy; or
   2. In the case of a remand, if any member of the original panel is unable to serve, the chairman shall appoint a member to fill the vacancy.

d. All appeals to the board from decisions of the zoning commissioner or deputy zoning commissioner shall be in conformance with the rules of the zoning commissioner of Baltimore County with respect to the form of appeal, and the filing fees shall be as established either by said rules of the zoning commissioner or by the Baltimore County Zoning Regulations. **[Bill No. 50-2005]**

e. Unless authorized by the board, a person may not take photographs, motion pictures or audio or video recordings of any kind during the conduct of a hearing before the board or during any public deliberation of the board. **[Bill No. 50-2005]**

Rule 2. Notice.

a. No hearing shall be conducted without at least ten (10) days' notice to all parties of record or their counsel of record, unless otherwise agreed to by all such parties or their counsel of record.

b. Postponements and continuances will be granted at the discretion of the board only upon request in writing by an attorney of record or a party of record (if not represented by counsel), addressed to the board and with a copy to every other attorney of record or party of record (if not represented by counsel) entitled to receive notice, in accordance with section 500.11 of the Baltimore County Zoning Regulations, setting forth good and sufficient reasons for the requested postponement. **[Bill No. 50-2005]**

c. No postponement shall be granted within fifteen (15) days prior to the hearing date except in extraordinary circumstances and for a reason satisfactory to the board, given by the party requesting such postponement indicating that the circumstances requiring the postponement are of an unusual and ordinary nature.

d. All records and dockets of the board shall be open to the public during normal business hours.

e. In appeals from decisions of the zoning commissioner, formal notice of hearings, continuances and decisions of the board will be provided only to those persons entitled to receive same in accordance with section 500.11 of the Baltimore County Zoning Regulations.

Rule 3. Appeals.

a. No appeal shall be entertained by the board of appeals unless the notice of appeal shall state the names and addresses of the persons taking such appeal.

b. **[Bill No. 50-2005]**

Rule 7. Evidence.

a. Any evidence which would be admissible under the general rules of evidence applicable in judicial proceedings in the State of Maryland shall be admissible in hearings before the county board of appeals. Proceedings before the board being administrative in nature, the board will not be bound by the technical rules of evidence but will apply such rules to the end that needful and proper evidence shall be most conveniently, inexpensively and speedily produced while preserving the substantial rights of the parties. Any oral or documentary evidence may be received; but the board reserves the right as a matter of policy to provide for the exclusion of immaterial or unduly repetitious evidence, and the number of witnesses may be limited if it appears that their testimony may be merely cumulative.

b. All evidence, including records and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

c. Prepared statements may be read by participants in the hearing if they include factual material and do not include argument, provided copies of said statements have been delivered to the board and opposing counsel at least five (5) days prior to hearing, and their admissibility ruled upon, the same as if the factual content were presented in the usual manner. "Prepared statements" within the meaning of this section shall not include factual reports, written summations, letters, expert opinions of professional expert witnesses and other such similar documents.

d. Except as may otherwise be provided by statute or regulation, the proponent of action to be taken by the board shall have the burden of proof.

e. Any official record or entries therein when admissible for any purpose may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, and the appearance of the officer will not be required unless demanded by a party to the case for good cause shown to the board. This rule does not prevent any party from summoning any proper witness to attend any hearing before the board.

f. Records of other proceedings before the board may be offered in evidence by the production of the files containing said records of such other proceedings.

g. In such cases as the board may determine, it may by order require that the direct testimony of all "expert" witnesses be submitted in writing, accompanied by copies of all exhibits to which reference is therein made, unless such are of a voluminous nature or within the files of, or readily available to, the board of appeals, in which case adequate reference shall be made thereto, which testimony shall be submitted by the parties required so to do and under the time and service provisions as contained in said order. Thereafter, said "expert" witnesses shall be personally present at the hearing for affirmation of their written statement and exhibits previously submitted and for cross-examination.

Rule 8. Special rule pertaining to persons appearing before the board as representatives of civic or improvement associations.

a. Before any person shall testify on behalf of any civic or improvement association, it shall be shown that he has accurate knowledge of the number of members in the association and the geographical limits of the association.

b. Before any such person shall testify it shall also be shown that he is authorized to speak for and present the views of the civic or improvement association.

c. Such authorization shall consist of presenting at the hearing or prior thereto a resolution in duplicate duly adopted by the association at its annual meeting, first meeting of each year, or a special meeting of the association, signed by the president and attested by the secretary, providing that the responsibility for review and action on all zoning matters be placed in its board of directors or a duly elected zoning committee. **[Bill No. 50-2005]**

d. Before any such authorized person shall testify, it shall be shown by written affidavit in duplicate, signed by the president of the association and attested by the secretary, that he is currently a duly elected member of the board of directors or zoning committee of that association, or is an attorney appointed to represent the board of directors or

West's Annotated Code of Maryland
Maryland Rules
Title 8. Appellate Review in the Court of Appeals and Court of Special Appeals
Chapter 100. General Provisions

MD Rules, Rule 8-131

RULE 8-131. SCOPE OF REVIEW

Currentness

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals--Additional Limitations.

(1) *Prior Appellate Decision.* Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

Committee note: The last sentence of subsection (b)(1) amends the holding of *Coleman v. State,* 281 Md. 538 (1977), and its progeny.

(2) *No Prior Appellate Decision.* Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Cross reference: Rule 2-519.

(d) Interlocutory Order. On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

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(e) Order Denying Motion to Dismiss. An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

Source: This Rule is derived as follows:

Section (a) is derived from former Rules 1085 and 885.

Section (b) is derived from former Rule 813.

Section (c) is derived from former Rules 1086 and 886.

Section (d) is derived from former Rules 1087 and 887.

Section (e) is derived from former Rule 1009.

Credits
[Adopted Nov. 19, 1987, eff. July 1, 1988. Amended April 5, 2005, eff. July 1, 2005.]

Notes of Decisions (470)

MD Rules, Rule 8-131, MD R A CT AND SPEC A Rule 8-131
Current with amendments received through January 1, 2022. Some sections may be more current, see credits for details.

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320 Md. 546
Court of Appeals of Maryland.

CROWN OIL AND WAX COMPANY OF DELAWARE, INC., et al.
v.
GLEN CONSTRUCTION COMPANY OF VIRGINIA, INC.

No. 104 Sept. Term 1989.
|
Sept. 11, 1990.

Synopsis
Assignee of owner brought action seeking to require contractor to arbitrate claims. The Circuit Court, Frederick County, Clater W. Smith, Jr., J., denied relief and assignee appealed. The Court of Special Appeals affirmed. The Court of Appeals, Rodowsky, J., held that assignee was a successor to the owner and thus entitled to require arbitration by the contractor.

Reversed and remanded.

West Headnotes (12)

[1] **Alternative Dispute Resolution** ⚷ Existence and validity of agreement

Alternative Dispute Resolution ⚷ Merits of controversy

Sole question before the court in action to compel arbitration is whether there exists an agreement to arbitrate, and court is prohibited from inquiring into the merits of the claim. Code, Courts and Judicial Proceedings, §§ 3–207, 3–208, 3–210.

11 Cases that cite this headnote

[2] **Alternative Dispute Resolution** ⚷ Agreements to Arbitrate

Alternative Dispute Resolution ⚷ Evidence

Intention of the parties controls on whether there is an agreement to arbitrate but, where the parties use a broad, all encompassing clause, it is presumed that they intended all matters to be arbitrated. Code, Courts and Judicial Proceedings, §§ 3–207, 3–208, 3–210.

12 Cases that cite this headnote

[3] **Alternative Dispute Resolution** ⚷ Presentation and reservation of grounds of review

Appellant's successor theory to support claim that it was entitled to enforce arbitration agreement in contract entered into between two others was not an "issue" and could be presented for the first time on appeal; theory was merely an additional argument for its claim of entitlement to arbitration.

7 Cases that cite this headnote

[4] **Appeal and Error** ⚷ Permissive or Discretionary Review

Court of Appeals may exercise discretion to consider an issue raised for the first time on appeal even though the Court of Special Appeals has declined to do so.

14 Cases that cite this headnote

[5] **Appeal and Error** ⚷ Nature or Subject-Matter of Issues or Questions

Even if appellant's successor theory in support of its claim of entitlement to arbitration under contract entered into between others was an "issue," it would be considered, even though raised for the first time on appeal.

16 Cases that cite this headnote

[6] **Alternative Dispute Resolution** ⚷ Persons entitled to enforce

Owner at least equitably assigned its benefits under construction contract to a partnership, and partnership assumed the obligations of the owner and thus had the right to compel arbitration of dispute with the contractor.

7 Cases that cite this headnote

[7] **Assignments** ⚷ Personal nature

Nothing in the nature of the performance to be rendered by owner prevented it from transferring to another its benefits or delegating the duties as owner under contract calling for construction of hotel.

1 Cases that cite this headnote

[8] **Stipulations** ⚷ Matters Concluded

Court is not bound by stipulations on matters of law.

2 Cases that cite this headnote

[9] **Fraud** ⚷ Fraud in particular transactions or for particular purposes

Any attempt by principals to retain in corporation the damages for any breach of contract by contractor, while requiring outside investors to pay for the construction through their investments in limited partnership, would work a fraud on the outside investors.

1 Cases that cite this headnote

[10] **Evidence** ⚷ Degree of Proof in General

Where factual conclusion requires clear and convincing evidence and there were other plausible and innocent inferences, court was required to draw those other inferences.

[11] **Assignments** ⚷ Nature and extent of rights of assignee in general

Unlike the third-party beneficiary theory, successor theory of rights under contract does not focus on the time of formation of the contract.

3 Cases that cite this headnote

[12] **Contracts** ⚷ Construction or repair of buildings

Term "successor" as used in construction contract embraced a syndicated limited partnership for development of project where the contract was entered into at a time when that was a common vehicle for investments.

2 Cases that cite this headnote

Attorneys and Law Firms

**1185 *549 C. Allen Foster (Steven D. Hedges, Patton, Boggs & Blow, Greensboro, N.C., and John A. Moag, Jr., Patton, Boggs & Blow, Baltimore), all on brief, for petitioners.

John Anthony Wolf (John F. Morkan, III, Ober, Kaler, Grimes & Shriver, Baltimore), all on brief, for respondent.

Argued before MURPHY, C.J., and ELDRIDGE, COLE, RODOWSKY, McAULIFFE, ADKINS* and CHASANOW, JJ.

Opinion

RODOWSKY, Judge.

"It is an ancient rule of the common law that a person who did not enter into a contract, or succeed to the interest of those who did, has no right of action for its breach, although he sustained damage thereby." *Levy v. Glens Falls Indem. Co.*, 210 Md. 265, 270, 123 A.2d 348, 351 (1956). In this case we examine the concept of a "successor" in the context of steps in the development of a parcel of unimproved, commercially zoned realty. The issue is whether, under a construction contract signed, as owner, by a corporation controlled by two individuals developing the property, the contractor is obliged to arbitrate claims on behalf of a limited partnership used by the same two individuals to syndicate the project.

On the south side of the intersection of Interstate Route 270 and Maryland Route 85 in Frederick County lies a 7.009 acre portion of a former farm. In February 1982 this portion was one of the assets owned by Crown Oil & Wax Company of Delaware, a Delaware corporation (Crown Inc.). An experienced real estate developer, Edward J. Joyeusaz, a/k/a Ed Joy (Joy), for some time had been interested in

prohibits Crown Inc. from asserting any claim on behalf of FHLP. We need not decide those contentions if Glen has agreed to arbitrate with FHLP. We, therefore, turn to whether we may consider FHLP's successor in interest argument and, if so, its application here.

I

[3] Glen submits that FHLP's contention that it is a successor to Crown Inc. is an "issue" which was not raised in or decided by the trial court and cannot be considered by us because of Rule 8–131(a). *See* n. 7, *supra*. Whether FHLP could directly claim in arbitration against Glen has ***561** been an issue in this action from its inception. Glen joined FHLP as a party to this action, even though FHLP was not a named party in the arbitration and had not sought to be added directly as a party. Glen sought, and obtained, an injunction restraining FHLP from pursuing in arbitration ****1191** any claim in its own name. The third party beneficiary theory advanced by FHLP in the circuit court is basically an argument supporting arbitration by FHLP with Glen.

Although FHLP did not argue the successor theory until the case was briefed for the Court of Special Appeals, the theory does not present a new issue, but it is an additional argument for direct arbitration between FHLP and Glen. *See Mandel v. O'Hara,* 320 Md. 103, 576 A.2d 766 (1990) (issue of gubernatorial immunity for common law tort decided on argument, first advanced on appeal, that exercise of veto is a legislative function, although trial court argument rested on analogy to immunity of President of the United States); *Bachmann v. Glazer & Glazer, Inc.,* 316 Md. 405, 559 A.2d 365 (1989) (issue of discharge of guarantor decided on doctrine of subrogation, although not argued).

Even if the successor argument were a new issue, raised for the first time on appeal, this Court has discretion under Rule 8–131(a) to consider it, and we exercise that discretion to consider the "issue" in this case. Inasmuch as Rule 8–131 "employs the term 'ordinarily,' it permits exceptions and we have occasionally decided cases on issues not previously raised." *Taub v. State,* 296 Md. 439, 441, 463 A.2d 819, 820 (1983). *Taub* was a prosecution under the animal cruelty statute that resulted in convictions in the District Court and on de novo appeal in circuit court. The issues raised in those courts concerned the constitutionality of the statute and whether it had been preempted by federal law. In addition, claimed errors in evidentiary rulings had been preserved for appellate review. In our certiorari review we decided the case on a new issue, raised for the first time at oral argument to this Court, namely, whether the Maryland criminal statute applied to scientific research pursuant to a ***562** federal program. Decision of that issue was "completely dispositive of the case." *Id.* at 442, 463 A.2d at 820.

[4] Nor is any exercise of discretion on this Court's part negated by the determination of the Court of Special Appeals that it would not consider the "issue," even though expressly urged to do so. This Court may exercise discretion independently under those circumstances. We need not first conclude that there was an abuse of discretion by the Court of Special Appeals. *See Squire v. State,* 280 Md. 132, 368 A.2d 1019 (1977).

In *Squire* this Court had granted certiorari on the question of whether the Court of Special Appeals had abused its discretion in failing to take cognizance of plain error in a jury instruction to which no exception had been taken. We concluded that it was "unnecessary for us to consider that precise issue since we have concluded (in the exercise of our independent discretion derived from [former] Rule 756g) that this Court should recognize the existence of the error ... and reverse the judgment." *Id.* at 134, 368 A.2d at 1020. Former Rule 756(g) was a specific application to jury instructions in criminal cases of the general rule that "this Court will not consider claims of error which have not been presented and decided by the trial court." 280 Md. at 134, 368 A.2d at 1020.

[5] We exercise our discretion to decide the "issue" because it is desirable "to avoid the expense and delay of another appeal." *See* Md. Rule 8–131(a). As the instant case has come to us there is, very properly, no evidentiary flesh on the skeleton of the claims, and the claims themselves are unspecified and wholly abstract. Were the case sent to arbitration in the format sought by Glen, Glen theoretically could urge as to each specific item of claimed damages that there was no liability on its part at all and, if any there be, that liability is only to FHLP and beyond the award powers of the arbitrators. Thus, any award in favor of Crown Inc. would invite an action by Glen in court to set aside the award on the ground that the underlying claim ***563** was one by or on behalf of FHLP. If, because FHLP is the successor to Crown Inc., Glen has agreed to arbitrate with both, then the grossly inefficient, multiple procedures hereinabove outlined can be avoided. Further, Glen has had the opportunity, of which it availed itself, to ****1192** brief and argue against the successor theory at the appellate level.

II

By ¶ 7.2.1 of the general conditions of the construction contract, Glen bound itself to the owner, and to the successors of the owner, "in respect to" all covenants in the contract. The covenants include the agreement to arbitrate. FHLP is a successor of Crown Inc. within the meaning of the construction contract, so that Glen has agreed to arbitrate with FHLP.

"Successor" is not defined in the contract. The word has:

> "many legal applications and [ ] it is therefore difficult to define precisely. Recognizing this difficulty, Mr. Justice Marshall once remarked, 'There is, and can be, no single definition of "successor" which is applicable in every legal context.' *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249, 263 n. 9, 94 S.Ct. 2236, 2243 [n. 9], 41 L.Ed.2d 46 (1974).... To determine the meaning of 'successor' in the area of labor law, Mr. Justice Marshall appears to endorse a case-by-case approach with emphasis on the facts of each case. 417 U.S. at 256, 262–63 n. 9, 94 S.Ct. [at 2240, 2243–44 n. 9]. The same fact-oriented approach has also been employed by courts in defining the limits of purely contractual successorship....
>
> "In the non-labor contractual cases, 'successor' has often been defined as 'one who takes the place that another has left, and sustains the like part or character.' *Wawak Co. v. Kaiser,* 90 F.2d 694, 697 (7th Cir.1937); *Citizens Suburban Co. v. Rosemont Development Co.,* 244 Cal.App.2d 666, 676, 53 Cal.Rptr. 551, 557 (1966); *Van Deusen v. Ruth,* 343 Mo. [1096,] 1103, 125 S.W.2d [1,] 4 [(1938)]; *Thompson v. North Texas National Bank,* 37 S.W.2d [735,] 739 [(Tex.Com.App.1931)]; ***564** Black's Law Dictionary 1600 (rev. 4th ed. 1968). The definition goes beyond the borders of contract assignment and is used so as to obviate the need for express assumption of burdens. *Citizens Suburban Co. v. Rosemont Development Co.,* 244 Cal.App.2d at 676, 53 Cal.Rptr. at 557."

Safer v. Perper, 569 F.2d 87, 95 (D.C.Cir.1977) (footnote and citations omitted).

[6] In the case before us Crown Inc. at least equitably assigned its benefits under the construction contract to FHLP and FHLP assumed the obligations of Crown Inc. under the contract. " ' "Any words or *transaction(s)* which show an intention on one side to assign, and on the other to receive, * * *, will operate as an effective equitable assignment," * * *.' (Emphasis supplied)." *Ruberoid Co. v. Glassman Constr. Co.,* 248 Md. 97, 103, 234 A.2d 875, 878 (1967). Purportedly, as of July 1, 1984, and certainly by December 9, 1986, when the ground lease was acknowledged, Crown Inc. leased the hotel site to FHLP. By the latter date, FHLP had been syndicated. That lease in part provides:

> "FIFTH: Lessee is leasing the Land pursuant to this Lease for the purpose of constructing the hotel complex and retail/office complex, that is, for the purpose of building, owning and operating (i) a 170–room Quality Inn Hotel complex ... and (ii) a 47,000 square foot, more or less, retail/office rental facility.... The development of the Project, and its construction, ownership and operation shall be at the sole cost and expense of Lessee; and in connection therewith, Lessee does hereby indemnify and hold the Lessor harmless from any and all claims, causes of action, bills, reckonings, accounts and/or liabilities of any nature ... arising out of the construction, ownership or operation of the Project."

The construction loan agreement under which FHLP is primarily liable to Citizens, as between FHLP, Crown Inc., Joy and Understein, is consistent with the structuring of the transaction as described in the ground lease. Based on ***565** the entire transaction there is also an equitable assignment of the franchise agreement with Quality Inns from Crown Inc. to FHLP. If the language of the ground lease is not an express assumption by FHLP of Crown Inc.'s obligations as owner under the construction contract, the entire transaction ****1193** compels the finding that there was an implied assumption. *See Automatic Retailers of America, Inc. v. Evans Cigarette Service Co.,* 269 Md. 101, 304 A.2d 581 (1973); *R.E.C. Management Corp. v. Bakst Service, Inc.,* 265 Md. 238, 289 A.2d 285 (1972).

[7] The obligations on Crown Inc., as owner, under the construction contract primarily involve the payment of money to Glen. "[T]here is nothing personal about the act of payment." 4 Corbin on Contracts § 864, at 429 (1951). Thus, nothing in the nature of the performance to be rendered by Crown Inc., as owner, prevents it from transferring the benefits, or delegating the duties, of owner.

The Glen–Crown Inc. construction contract in ¶ 7.2.1 provides that "[n]either party to the Contract shall assign the Contract ... without the written consent of the other[.]" *Ruberoid Co. v. Glassman Constr. Co.,* 248 Md. 97, 234 A.2d 875, addressed the effect of a similar provision binding a subcontractor. At the time the subcontract was formed the

391 Md. 374
Court of Appeals of Maryland.

CANAJ, INC.
v.
BAKER AND DIVISION PHASE III, et al.

No. 72, Sept. Term, 2005.
|
March 6, 2006.

Synopsis
Background: Delinquent taxpayer moved to vacate foreclosure judgment and tax sales on properties based on fraud, mistake, or irregularity. The Circuit Court, Baltimore City, John C. Themelis, J., denied motion. Taxpayer appealed.

Holdings: Upon granting certiorari on its own motion, the Court of Appeals, Cathell, J., held that:

[1] payment of delinquent taxes was a condition precedent to delinquent taxpayer's right to seek a vacation of foreclosure judgment;

[2] city's failure to cite properties as abandoned did not create jurisdictional defect that prevented foreclosure on taxpayer's right of redemption;

[3] city's failure to cite properties as abandoned did not constitute constructive fraud; and

[4] taxpayer's due process rights were not violated.

Affirmed.

West Headnotes (15)

[1] **Taxation** ⚷ Judgment or decree, and review
In order to challenge the foreclosure of the equity of redemption in a tax sale, the taxes and other relevant charges acknowledged to be due, either prior to the challenge or simultaneously with it, must, as a condition precedent, be paid.

12 Cases that cite this headnote

[2] **Taxation** ⚷ Judgment or decree, and review
Payment of delinquent taxes was a condition precedent to delinquent taxpayer's right to seek a vacation of foreclosure judgment, and thus, taxpayer was not entitled to challenge foreclosure and tax sale of property, even if it had secured a purchaser for the property who might pay the taxes, where the delinquent taxes were not actually paid.

14 Cases that cite this headnote

[3] **Taxation** ⚷ Proceedings, relief granted, and review
Delinquent taxpayer waived on appeal its claims that tax sale of property was required to be vacated based on fraud, mistake, or irregularity, where it failed to sufficiently raise the issues as to the specific properties in the trial court prior to judgment.

1 Cases that cite this headnote

[4] **Taxation** ⚷ Proceedings, relief granted, and review
In reviewing a decision denying a motion to set aside a foreclosure judgment on grounds of fraud, mistake, or irregularity, the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion. West's Ann.Md.Code, Courts and Judicial Proceedings, § 6–408; Md.Rule 2–535.

11 Cases that cite this headnote

[5] **Taxation** ⚷ Sale of Land for Nonpayment of Tax
In order to sell property at a tax sale, the City must comply with a number of requirements, the first of which is that the owner must owe taxes on the property.

[6] **Statutes** ⚷ Language
Statutes ⚷ Plain language; plain, ordinary, common, or literal meaning
The process of statutory interpretation always begins with an analysis of the language of the statute; the court must determine whether the plain language of the statute is clear and unambiguous.

1 Cases that cite this headnote

[7] **Statutes** ⚷ What constitutes ambiguity; how determined
A statute is ambiguous when there appear to be two or more reasonable alternative interpretations of its language.

[8] **Statutes** ⚷ Plain, literal, or clear meaning; ambiguity
In interpreting a statute, if statutory language is ambiguous, a court must look beyond the statute itself and into the legislative history for guidance as to the intent of the Legislature in passing the statute.

7 Cases that cite this headnote

[9] **Taxation** ⚷ Actions to Foreclose Right of Redemption
City's failure to cite properties as abandoned or vacant did not create a jurisdictional defect that prevented the court from foreclosing on delinquent taxpayer's right of redemption on the property; the delinquency of the taxes authorized the tax sale and the failure to cite the properties only affected the city's ability to collect the difference between the sale prices and the liens on the properties from the delinquent taxpayer. West's Ann.Md.Code, Tax–Property, § 14–817.

7 Cases that cite this headnote

[10] **Taxation** ⚷ Judgment or decree, and review
City's failure to cite properties as vacant or abandoned did not constitute constructive fraud, and thus, did not warrant reopening judgment that foreclosed taxpayer's right of redemption; the city's actions complied with the essential requirements of the general tax sale statute and the delinquent taxpayer received notice and was present throughout the foreclosure of the rights of redemption proceedings, and thus, neither the taxpayer nor the court were deceived by the city's actions. West's Ann.Md.Code, Tax–Property, § 14–845.

5 Cases that cite this headnote

[11] **Fraud** ⚷ Elements of Constructive Fraud
"Constructive fraud" is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.

22 Cases that cite this headnote

[12] **Constitutional Law** ⚷ Tax sales and proceedings thereon
Taxation ⚷ Constitutional and statutory provisions
Taxation ⚷ Constitutional and statutory provisions
Delinquent taxpayer's due process rights were not violated by foreclosure of taxpayer's right to redeem property and sale of property at tax sale; taxpayer had notice that taxes were overdue and that the property was to be disposed of at a tax sale, taxpayer had ample opportunity to contest the sales or pay the taxes due, and taxpayer was represented by counsel throughout the entire proceedings. U.S.C.A. Const.Amend. 14; West's Ann.Md. Const.Declaration of Rights, Art. 24; West's Ann.Md.Code, Tax–Property, § 14–817(c).

3 Cases that cite this headnote

[13] **Constitutional Law** ⚷ Notice and Hearing
The fundamental requisite of due process of law is the opportunity to be heard. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[14] **Constitutional Law** Factors considered; flexibility and balancing

In evaluating the sufficiency of process, courts are required to determine the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[15] **Constitutional Law** Right to Property
Constitutional Law Real property in general

A land owner's interest in their property is one of the fundamental principles upon which both the United States' and Maryland's Constitutions were created; great care must be taken in avoiding the erroneous deprivation of such property interests. U.S.C.A. Const.Amend. 14; West's Ann.Md. Const.Declaration of Rights, Art. 24.

7 Cases that cite this headnote

Attorneys and Law Firms

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Kyriakos P. Marudas, Asst. City Solicitor (Ralph S. Tyler, City Solicitor and William R. Phelan, Jr., Principal Counsel of Baltimore City Department of Law, Baltimore), on brief, for appellees.

Argued before BELL, C.J., RAKER, WILNER, CATHELL, HARRELL, BATTAGLIA and GREENE, JJ.

Opinion

**1070 CATHELL, J.

*378 Between March 14, 2003, and June 29, 2004, the Circuit Court for Baltimore City foreclosed **Canaj**, Inc.'s (appellant) right of redemption to a number of properties sold at a tax sale on August 8, 2001. Appellant had moved to dismiss the foreclosure proceedings as to only two of the properties, 523 Senker Place and 2300 Brunt Street. It filed no prejudgment motions to dismiss as to any of the other of its properties. As to those two properties only, the foreclosure actions were dismissed by express agreement of the parties.

After having failed to file any prejudgment motions to dismiss in respect to any of the other properties on the grounds here raised, appellant, following the foreclosure, on August 19, 2004, moved to vacate all of the judgments and void the tax sales as to the other properties based on fraud, mistake or irregularity. The trial judge denied the motions *379 and appellant filed an appeal in the Court of Special Appeals. This Court, on its own motion, granted certiorari before the case was heard by the intermediate appellate court. *Canaj, Inc. v. Baker and Division III,* 389 **Md**. 398, 885 A.2d 823 (2005).

I. Facts

Appellant was the owner of fourteen properties located in Baltimore City ("City"). For over seven years appellant failed to pay property taxes, leading the City to attempt to dispose of the properties at a tax sale. Baker and Division III[1] ("Baker") purchased the properties at the tax sale on August 8, 2001. Baker filed timely complaints seeking to foreclose appellant's rights of redemption on November 5, 2001. The proceedings were consolidated into two separate cases in the Circuit Court for Baltimore City: 24–C–01–005462 ("5462") and 24–C–01–005463 ("5463").[2] The court issued judgments foreclosing appellant's right of redemption on March 14, 2003 *380 (571 Baker Street);[3] April 27, 2004 (592 Baker Street); May 11, 2004 (575 Baker Street); and June 29, 2004 (588 Baker Street); and on June 11, 2004, for all the properties in case 5462.

On August 19, 2004, forty-one days after the last foreclosure judgment was entered, appellant, represented by new counsel, **1071 filed a motion seeking in essence, vacation of the judgments based upon allegations of fraud, mistake or irregularity. The Circuit Court held a hearing on the motion on April 4, 2005, and on April 5, 2005, it filed an order making the following findings:

"1. That there was no fraud, mistake or irregularity within the meaning of Maryland Rule 2–535.[4]

"2. That there is no lack of jurisdiction or constructive fraud as defined in Section 14–845 of the Tax–Property Article of the Maryland Code.

"3. That the City of Baltimore is precluded from collecting any taxes [against the original owner] on the properties *381 included in the above-referenced case."[5]

Appellant subsequently filed this appeal.

The following questions are presented for our review:

"1. Did the circuit court have jurisdiction to enter judgments foreclosing the right of redemption on the Appellant's properties in view of the fact that a requirement of the applicable statute was ignored causing the properties to be illegally included in the special tax sale held by the Mayor and City Council of Baltimore City?

"2. Did the lower court lack jurisdiction to enter judgements foreclosing the right of redemption on Appellant's properties because of constructive fraud?

"3. Did the lower court deprive the Appellant of its properties without due process of law in violation of the Declaration of Rights of Maryland and the Fourteenth Amendment of the United States Constitution?"

We shall hold for the reasons that follow that the Circuit Court properly entered the judgments of foreclosure against the **1072 appellant, that Baltimore City's actions did not constitute constructive fraud, and that appellant's due process rights were not violated.

*382 We shall first address some threshold issues presented at the trial court level in respect to the motions to vacate, which were not resolved due to the trial court's reliance on other reasons in support of its judgment. We shall address the unresolved issues because we necessarily must confront them as they concern a condition precedent to challenging a tax sale where it is conceded that taxes are sufficiently delinquent to authorize a tax sale. *See Brewer v. Brewer,* 386 **Md**. 183, 872 A.2d 48 (2005). Even though we shall be holding that the condition precedent has not been met, and we shall also hold that appellant waived the issues it now raises in respect to the relevant tax sales, we shall, nonetheless, address the issues actually decided by the trial court because they raise very important issues; issues that will continue to arise in tax sale proceedings, especially in Baltimore City where tax sales are used to address the City's very real problem with abandoned and vacant properties.

Although not presented in the appellant's or the City's briefs, we address the condition precedent issue and we shall also discuss the unresolved waiver issue, both pursuant to Maryland Rule 8–131, which provides in relevant part:

"(a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2–322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

...

"(2) No prior appellate decision. Except as otherwise provided in Rule 8–304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that *383 would have been cognizable by the Court of Special Appeals."

Judge Raker, writing for the Court in *Jones v. State,* 379 **Md**. 704, 712–13, 843 A.2d 778, 783 (2004), discussed the second sentence of Rule 8–131(a), opining that:

"The second sentence of Rule 8–131(a) sets forth the general proposition that an appellate court *ordinarily* will not consider an issue that was not raised or decided by the trial court. The plain language of the rule, however, makes clear that the prohibition is not absolute. *See Crown Oil v. Glen,* 320 **Md**. 546, 561, 578 A.2d 1184, 1191 (1990) (noting that, inasmuch as Rule 8–131(a) employs the term 'ordinarily,' it permits exceptions, and appellate courts have occasionally decided cases on issues not previously raised). The word 'ordinarily' in Rule 8–131(a) anticipates that an appellate court will, on appropriate occasion, review unpreserved issues. This has been the practice of the Maryland appellate courts, as well as of the federal

courts and our sister states, dating well before Rule 8–131(a). *See Atlantic Mutual v. Kenney,* 323 **Md.** 116, 122, 591 A.2d 507, 510 (1991) (noting that Rule 8–131(a) is simply enunciatory of the practice which has existed since 1825); *see also* Annot., *Issue First Raised on Appeal,* 76 A.L.R. Fed. 522 (1986). In ****1073** *State v. Bell,* 334 **Md.** 178, 638 A.2d 107 (1994), we concluded:

> 'It is clear from the plain language of Rule 8–131(a) that an appellate court's review of arguments not raised at the trial level is discretionary, not mandatory. The use of the word "ordinarily" clearly contemplates both those circumstances in which an appellate court will not review issues if they were not previously raised and those circumstances in which it will.'

Id. at 188, 638 A.2d at 113. Thus, under the Rule, an appellate court has discretion to excuse a waiver or procedural default and to consider an issue even though it was not properly raised or preserved by a party."

***384** The first sentence of subsection (a) of the rule is as relevant as is the second sentence, especially considering the circumstances at issue in this case.

As this Court has stated before, the primary purpose of the Rule "is 'to ensure fairness for all parties in a case and to promote the orderly administration of law.' " *State v. Bell,* 334 **Md.** 178, 189, 638 A.2d 107, 113 (1994), (quoting *Brice v. State,* 254 **Md.** 655, 661, 255 A.2d 28, 31 (1969), quoting *Banks v. State,* 203 **Md.** 488, 495, 102 A.2d 267, 271 (1954)); *Basoff v. State,* 208 **Md.** 643, 650, 119 A.2d 917, 921 (1956).

In order to ensure that fairness, Judge Raker for the *Jones* Court stated that "appellate courts should make two determinations concerning the promotion or subversion of 8–131(a)'s twin goals." 379 **Md.** at 714, 843 A.2d at 784. "First, the appellate court should consider whether the exercise of its discretion will work unfair prejudice to either of the parties" and "[s]econd, the appellate court should consider whether the exercise of its discretion will promote the orderly administration of justice." *Id.* at 714–15, 843 A.2d at 784. In the case *sub judice,* the condition precedent issue appears to have been presented below, but not decided. Because, as explained below, the Circuit Court correctly denied appellant's motions to vacate the judgments based upon statutory provisions, addressing the condition precedent and waiver issues under the Rule does not unfairly prejudice either party. There are no contested facts relating to whether the taxes have, in fact, been paid. All parties to the present appeal agree that taxes have not been paid. By addressing the issue we merely state what the law is, and what the trial court should have found the law to be had it resolved the issue of the "condition precedent." Moreover, it appears that there are literally thousands (5,000 or more) of abandoned or vacant properties creating such severe problems for the City of Baltimore that it is attempting to resolve some of them by the tax sale process. Finally, by resolving the unresolved (but presented below) issue, we thereby promote the orderly administration of justice.

***385** What occurred here may be an unusual attempt to avoid altogether the responsibility of owners to pay property taxes and an attempt to avoid compliance with the requirements imposed upon taxpayers relating to the right to redeem in tax sale cases. In order to redeem, the delinquent taxpayer has to tender all of the taxes, interest and costs of sale to the Collector or to the holder of the certificate.[6] Md.Code ****1074** (1985, 2001 Repl.Vol.), § 14–828 of the Tax–Property Article.

During the hearing on the motion to vacate the judgments foreclosing appellant's rights of redemption, there was an extensive discussion regarding the amount of taxes owed and the delinquent owner's failure to timely redeem the properties. The following is an excerpt of the pertinent parts of that discussion.

> THE COURT: Well how much difference between the taxes owed and the amount paid, was there? Was it an unconscionable difference ...
>
> [Appellant]: Oh, yes. The taxes owed ... on the case ending in 62 ... were $128,000.00, and the non-profit paid $6,400.00 for the property, and the value of the properties were $122,000.00.
>
> THE COURT: And the taxes owed were how much?
>
> [Appellant]: $128,534.70. That's in case ending in 62 [case number 24–C–01–005462].

...

***386** THE COURT: And the amount paid [for the property at the tax sale] was?

> [Appellant]: On that one was $6,408.70. And on the other case, Case Number ending in [54]63, I believe if

> I'm not mistaken that the taxes were $55,020.00 and the Plaintiff paid $2,629.00

...

> THE COURT: Well is the only reason—what I was trying to get at is the only reason we're here is because your client believes he is liable for the deficiency.
>
> [Appellant]: No, your Honor, we're here because my Client wants the properties and may in fact have something planned to do with the properties and would have done so, but for the fact that the City illegally put these into this tax sale.
>
> THE COURT: What amount would he have had to tender to redeem?
>
> [City]: Your Honor, he would have had to tender the full amount [of] taxes due on the properties. Of course, interestingly, if for some reason we were to vitiate these ... Judgments, then paradoxically then those obligations ... plus additional interest ... *because they have not been redeemed,* and interest continues to accumulate daily....
>
> [Appellant]: And my Client [is] fully aware of that, your Honor, that he's responsible for the taxes, but the point we're here today on is the fact that this sale was illegal....

...

> THE COURT: So if this were a regular tax sale, the amount involved would have been at that time $128,534.00? [Emphasis added.]

Although appellant acknowledged that it was responsible for the taxes owed, it never, at the hearing or at any other time, directly proffered that it was ready, willing and able to pay the amounts, or to pay undisputed amounts, and, more importantly, ***387** it has not paid any of the delinquent taxes and charges due.

Tax–Property Article, Section 14–828, in relevant part, requires:

> ****1075 " § 14–828 Required payments; ...**
>
> (a) *Payments to collector.*—If the property is redeemed, the person redeeming shall pay the collector:
>
> (1) the total price paid ... together with interest;
>
> (2) any taxes, interest, and penalties paid by any holder of the certificate of sale;
>
> (3) any taxes, interest, and penalties accruing after the date of the tax sale;
>
> (4) unless the party redeeming furnishes the collector a release or acknowledgment executed by the plaintiff or holder of the certificate of sale that all actual expenses or fees ... have been paid to the plaintiff or holder of the certificate of sale, any expenses or fees for which the plaintiff or the holder of a certificate of sale is entitled to reimbursement under § 14–843 of this subtitle; and
>
> (5) for vacant and abandoned property sold under § 14–817 of this subtitle for a sum less than the amount due, the difference between the price paid and the unpaid taxes, interest, penalties, and expenses.

...

> (c) *Notice to holder of certificate; certificate of redemption.*—**On receipt of the proper amount,** the collector shall notify the holder of the certificate of sale that the property has been redeemed and that on surrender of the certificate of sale all redemption money excluding taxes received by the collector will be paid to the holder." (Emphasis added.)

By attacking the sale procedure in a post-judgment motion to vacate, instead of paying the taxes and charges which it would have been required to do in order to redeem prior to judgment, the taxpayer appears to be seeking to have the title of the property revert back to the delinquent taxpayer without ***388** having to ever redeem by paying the overdue and due taxes. This Court long ago rejected such practices, albeit in an equity case (but an equity case in which the court recognized the requirement of payment as part of the tax sale procedure.). *Steuart v. Meyer,* 54 **Md.** 454 (1880). In *Steuart,* as similar to the case at bar, the assigns of a delinquent taxpayer filed an injunction after the sale had been ratified, requesting that title to the subject property not be conveyed to the tax sale purchaser because of what they termed procedural irregularities, alleging that the sale had been prematurely held in respect to the published date of the sale. *Id.* at 461–62. The Court determined that the Collector was not allowed to conduct the sale on that particular date and that a delinquent owner normally would have had a right to seek to set aside the sale under some circumstances. *Id.* at 465. Such a right,

Rebecca Wheatley

From: Jeffrey N Perlow
Sent: Friday, August 6, 2021 3:27 PM
To: Peter Max Zimmerman
Subject: RE: ALJ Zoning decision in Case No. 2021-109-A, Luke Star, LLC, 11 Lynbrook Road

Pete,
Unfortunately, we ultimately had to approve their building permit because they stated the accessory building was for their personal/private use only. Code Enforcement or Building Inspections may prove that to be a misrepresentation of the use stated on the building permit, but that doesn't change our agreement with your interpretation of the facts. If you would like to arrange a meeting with the ALJ to explain the law to her, I would be glad to attend that meeting. Please let me know. Thanks so much!
Jeff

From: Peter Max Zimmerman
Sent: Friday, August 06, 2021 11:29 AM
To: Jeffrey N Perlow <JPerlow@baltimorecountymd.gov>
Subject: RE: ALJ Zoning decision in Case No. 2021-109-A, Luke Star, LLC, 11 Lynbrook Road

Thank you very much, Jeff.

I will file a motion for reconsideration. I trust you will be ok with my including our e-mail exchange so as to emphasize the importance of the issue.

I am going to try to correct what we see as a mistaken analysis.

Peter

From: Jeffrey N Perlow <JPerlow@baltimorecountymd.gov>
Sent: Tuesday, August 3, 2021 4:49 PM
To: Peter Max Zimmerman <pzimmerman@baltimorecountymd.gov>
Subject: RE: ALJ Zoning decision in Case No. 2021-109-A, Luke Star, LLC, 11 Lynbrook Road

Pete,
The Zoning Review Office agrees with your interpretation completely. We put the building permit on hold because we believe that they would need a Change of Occupancy permit if they are going to use the accessory structure for commercial purposes. However, if she (or the Board of Appeals) does not reverse the decision, the Zoning Office may ultimately be bound by her decision and we may have to approve their building permit application in the future.
Jeff

From: Peter Max Zimmerman
Sent: Tuesday, August 03, 2021 10:21 AM
To: Jeffrey N Perlow <JPerlow@baltimorecountymd.gov>
Subject: ALJ Zoning decision in Case No. 2021-109-A, Luke Star, LLC, 11 Lynbrook Road

Hi Jeff,

This case began with a typical petition for height variance for a garage accessory to a dwelling. It went to hearing. ALJ Murphy's July 20, 2021 decision is attached.

The property happens to be in a BL Zone.

At the hearing, Petitioner's consultant Rich Richardson claimed that because the property is in the BL Zone and not the Residence Zones referred to in BCZR Sec. 400.1, then it is exempt from this section.
The ALJ agreed with Mr. Richardson and dismissed the petition as moot, allowing the garage to remain as constructed.

I disagree with this interpretation.

Because a dwelling is permitted in the B.L. Zone by virtue of the BCZR Sec. 230.1.A.1 incorporation of the uses permitted in the immediately adjacent residential zone, here D.RR. 16, then the dwelling use effectively is grafted or transmuted into a residential zone for the purpose of residential use.

I note that there are many zones which incorporate D.R. Zone uses. These include the O.R-1, O.R.-2 --- 205.3, 206.3 ---- and all the Business Maritime Zones ---- 216.1, 221.1, 225.1.
So this ruling has larger implications.

I assume that the office has viewed accessory residential buildings and structures as subject to BCZR Sec. 400.1, whether in residential or business zones, or other zones incorporating D.R. Zone uses.

I would appreciate your thoughts, including any past office policy, written or informal.

I anticipate requesting reconsideration of this ruling.

Thank you as usual.

Peter Max Zimmerman, People's Counsel

Peter Max Zimmerman

From: Peter Max Zimmerman
Sent: Monday, September 13, 2021 11:54 AM
To: Jeffrey N Perlow
Subject: RE: Case No. 2021-109-A, 11 Lynbrook Road; Statutory Construction; Residential accessory buildings in the B.L. Zone (and, by implication, other zones incorporating residential uses); BCZR Sec. 400.1, 400.2, 400.3

I agree. Thanks, Jeff.

Peter

From: Jeffrey N Perlow <JPerlow@baltimorecountymd.gov>
Sent: Monday, September 13, 2021 11:43 AM
To: Peter Max Zimmerman <pzimmerman@baltimorecountymd.gov>
Subject: RE: Case No. 2021-109-A, 11 Lynbrook Road; Statutory Construction; Residential accessory buildings in the B.L. Zone (and, by implication, other zones incorporating residential uses); BCZR Sec. 400.1, 400.2, 400.3

She totally ignored Sections 1B01.1.A.18.g ; 230.1.A.1 ; 232.1 ; 232.2 ; 232.3 and 302.1, BCZR. There are probably other sections that I am overlooking, but you get the idea.

From: Peter Max Zimmerman
Sent: Monday, September 13, 2021 10:05 AM
To: Jeffrey N Perlow <JPerlow@baltimorecountymd.gov>
Subject: Case No. 2021-109-A, 11 Lynbrook Road; Statutory Construction; Residential accessory buildings in the B.L. Zone (and, by implication, other zones incorporating residential uses); BCZR Sec. 400.1, 400.2, 400.3

Hi again Jeff,

You may have received Administrative Law Judge Maureen Murphy's September 9, 2021 decision purportedly "granting" my motion for reconsideration by adding the grant of a variance but at the same time rejecting my main point. ALJ Murphy opines and rules explicitly that her original July 20, 2021 statutory construction was correct. Her ruling is that BCZR Sec. 400 (400.1, 400.2, and 400.3) apply only to residence zones literally and therefore exempt from review accessory building residential uses in the B.L. Zone and the many other business and office zones which permit residential uses only by incorporation of adjoining residential zone permitted uses. Her reconsideration decision thus does not alter her initial ruling but just adds an alternative approval.

As you know, I addressed both procedural and substantive issues regarding the original ruling in my motion for reconsideration dated August 9, 2021.

It seems to me that this reconsideration decision, maintaining ALJ Murphy's earlier statutory ruling, if unchallenged, remains the precedent which we were concerned about, which the zoning office would unfortunately have to follow, and with which we definitely disagree.

The ALJ's purportedly literal statutory construction lacks context, and defeats the essential statutory purpose. It is the sensible statutory purpose to regulate the location and height of accessory residential building uses, extending effectively to hybrid or complementary business or office/residential zone uses by virtue of incorporation of permitted residential zone uses, and other issues we identified. We are discussing here the application of BCZR Sec. 400 for any residential accessory building uses in all the Business Zones, all the Business Maritime Zones, and the OR-1 And OR-2

Zones. The incorporation provisions include, respectively, BCZR Secs. 230.1.A.1, 233.1.A, 236.1.A, 216.1.B.1, 221.1.B.1225.1.B.1, 205.3.A.1, and 206.3.A.2.

In my view, therefore, the ALJ ruling is in the genre which the courts often describe as not seeing the forest for the trees.

In addition, the reconsideration decision rejected my procedural point that the petition came in looking like a garden variety variance petition; the petition made no mention of the BCZR Sec. 400 accessory building/B.L. Zone statutory construction issue; petitioner's engineer injected it at the ALJ hearing, involving a different form of relief from that in the petition: namely a special hearing/declaratory judgment determination of the law; there was no opportunity to comment on it by us or any of the agencies, and there was moreover no public notice of the issue.
So, in addition to our disagreement with the substantive statutory construction issue, there was procedural irregularity and surprise.

I see no alternative but to take an appeal to resolve this issue at a hearing at the County Board of Appeals, factoring in, among other things, the zoning office's understanding and policy.

As usual, your thoughts are welcome. Our appeal will have to be filed within 30 days of the final decision.

Peter Max Z

P.S. For convenience, I attach ALJ Murphy's original July 20, 2021 opinion, our office's August 9 Motion for Reconsideration, and ALJ Murphy's opinion and order September 9 on reconsideration.