CARVEL MAYS, JR.	:	BEFORE THE
Appellant	:	HOWARD COUNTY
vs.	:	BOARD OF APPEALS
HOWARD COUNTY PLANNING BOARD, WEGMANS FOOD MARKETS, INC., & SCIENCE FICTION, LLC	:	HEARING EXAMINER
	:	BA Case No. 620-D
Appellees		

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DECISION AND ORDER

On February 25, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of Carvel Mays, Jr. (the "Appellant"). The Appellant is appealing the Howard County Planning Board's approval of an amendment to FDP-117-A-II. The appeal is filed pursuant to Section 125.E.1 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Appellant certified that notice of the hearing was advertised and that adjoining property owners were notified as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Susan Gray, Esquire, represented Appellant Carvel Mays, Jr. Richard Talkin and Sang Oh, Esquires, represented Appellees Wegmans Food Markets, Inc. and Science Fiction, LLC ("Wegmans/Science Fiction"). Paul Johnson represented the Planning Board, but did not participate in the proceeding.

At the outset of the hearing, the Appellees moved for dismissal of the case. Upon consideration of Wegmans/Science Fiction's motion and the testimony and oral arguments

presented, and for the reasons stated below, I have determined to grant the motion and dismiss the appeal.

Background

In 2007 the Howard Research and Development Corporation (General Growth Properties) ("GGP") petitioned the Howard County Planning Board (the "Board") to amend FDP-117-A-II by adding the phrase "full service food and grocery stores, and related uses, of 100,000 square feet or more" as a "permitted use" under Criteria 7D, "Employment Center-Industrial Land Use Areas." This Final Development Plan encompasses a 181±-acre parcel of "New Town" zoned land known as the Sieling Industrial Center, Section 1, Area 1. The subject property lies on the west side of Snowden River Parkway between MD 175 and Oakland Mills Road. After public hearing, the Board by letter dated September 6, 2007 informed GGP of its approval of the requested FDP amendment (the "Amended FDP"), stating it clarifies that large full service food and grocery stores, and related uses are a permitted use under Criteria 7D, "Employment Center-Industrial Land Use Areas"

Appellee Science Fiction, LLC is the owner of Parcel "D-2" in the Sieling Industrial Center, Section 1, Area 1, where a large full service and grocery store is permitted under the Amended FDP. Appellee Wegmans is a large full service food and grocery store proposing to construct a store on Science Fiction's property.

Appellant Carvel Mays, Jr. is a resident of Howard County who is opposed to the Amended FDP. On October 3, 2007, he filed an administrative appeal petition in which he alleges, among other things, that the Board's September 6, 2007 letter informing GGP of its approval of the FDP amendment is "in violation of law" because (1) neither GGP nor Howard Research and Development ("HRD") has a right to petition for an amendment to the FDP for this

site; (2) the Board's approval was based on illegal delegation of zoning authority to the Board, and; (3) such delegation violates Section 202(g) of the Howard county charter providing for a right of referendum.

Appellees' Motion to Dismiss

As a starting point, it is well established that the right to appeal is statutory. *Howard County v. JJM*, 301 Md. 256, 482 A.2d 908 (1984) (citing *Maryland Bd. v. Armacost*, 286 Md. 353, 354-55 (1979); *Criminal Inj. Comp. Bd. v. Gould*, 273 Md. 486, 500 (1975); *Urbana Civic v. Urbana Mobile*, 260 Md. 458, 461 (1971)). Howard County Code Section 16.900(j)(2)(iii) sets out the standards for appealing a Planning Board decision.

> Any person *specially aggrieved* by any decision of the Planning Board *and a party to the proceedings before it* may, within thirty (30) days thereof, appeal said decision to the board of appeals in accordance with section 501 of the Howard County Charter. For purposes of this section the term "any person specially aggrieved" includes but is not limited to a duly constituted civic, improvement, or community association provided that such association or its members meet the criteria for aggrievement set forth in section 16.013(b) of this title. (Italics added.)

Under this standard, a person taking an appeal must be both specially aggrieved by a Board decision and a party to the proceedings before it.

Wegmans/Science Fiction filed a motion to dismiss the case on February 4, 2008, contending Carvel Mays, Jr. lacks standing to take an appeal under Section 16.900(j)(2)(iii) because he is not specially aggrieved, conceding the record of the proceedings before the Howard County Planning Board establishes the Appellant was a party to the relevant proceedings.

Discussion

The phrase "specially aggrieved," when used in an ordinance relating to administrative appeals, has a well-recognized meaning in Maryland law spelled out in a line of cases. *Sugarloaf*

Citizens Ass'n v. Department of Env't, 344 Md. 271, 288, 686 A.2d 605 (1996). The preeminent case in this line is *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967). Although the status of Appellants in these cases, which mainly concern appeals *from* boards of appeals or other administrative review bodies to the Maryland courts, differs from this case, which concerns appeals *to* such a body, the matter of "aggrievement" is still the same. The Court of Appeals stated in *Bryniarski:*

> Generally speaking, ... a person 'aggrieved' ... is one whose personal or property rights are adversely affected by the decision.... The decision must not only affect a matter in which the protestant has a specific interest or property right, but his interest therein must be such that the person is personally and specifically affected in a way different from that suffered by the public generally.

230 A.2d at 294.

Generally, appellants must prove special aggrievement by showing the impact of the land use decision on their property is different from its impact upon the public generally. An exception to this rule applies if the appellant is an adjoining, confronting, or nearby property owner, who is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved. *Bryniarski v. Montgomery County,* 230 A.2d at 294. Determining whether protestants are "aggrieved" by a final administrative decision and thus have standing to take an appeal may be adduced in the petition for appeal either by express allegation or by necessary implication.

Wegmans/Science Fiction argues Carvel Mays, Jr. lacks standing because the appeal petition makes evident he is not specially aggrieved by the effect of the Board's action. They point us to the Appellant's statement in the petition that he is aggrieved "because of the increased cost of county service for this type of use, and because of the increase in traffic such use will generate." As Wegmans/Science Fiction argue, even assuming arguendo an increase in the cost of county service for the type of use, Mr. Mays does not allege how such increases or any

increase in traffic harms him in a manner different from the public generally. At oral argument, Mr. Mays did not offer any evidence to refute this argument.

Wegmans/Science Fiction further argue Carvel Mays lacks standing because he does not live within "sight or sound" of the subject property, a standard the Maryland courts have applied to determine if a person is a "nearby property owner" and presumptively aggrieved within the meaning of the *Bryniarski* exception to the special aggrievement rule. *Sugarloaf Citizens Ass'n v. Department of Env't*, 344 Md. 271, 298, 686 A.2d. 605, 629 (internal citations omitted). A protestant who resides considerable distance from and out of sight of a property subject to a zoning action must make a showing that the action must causes her unique or special kind of damage other than that suffered by the whole community. *See e.g., DuBay et al. v. Crane*, 240 Md. 180, 185, 213 A.2d 487, 489-90 (1965) (holding that appellants residing some 1500 feet from a rezoned property on the other side of the Beltway or more than four-tenths of a mile away and possibly out of sight of the proposed apartments lacked standing, being unable to show unique or special damage).

Mr. Mays resides at 2625 Sand Hill Road, Ellicott City, which, according to Wegmans/Science Fiction, is some 9.75 miles from the subject property and separated from it by many intervening features. Mr. Mays has failed to come forward with any evidence to establish how the impact of the Board's action will uniquely aggrieve him at his almost ten-mile distant residence. I must conclude Mr. Mays is not "specially aggrieved" as defined in the *Bryniarski* line of cases nor presumptively aggrieved as a nearby property owner.

Wegmans/Science Fiction lastly refute Mr. Mays' claim to have standing to appeal based on his interest in the subject property as "a resident of Howard County," as is stated in the petition. The Maryland courts have long held that absent a statute creating a private right as a

taxpayer or otherwise, mere residency does not confer upon the owner of zoned property the right to enforce zoning regulations. *E.g.*, *Pattison v. Corby*, 226 Md. 97, 101, 172 A.2d 490, 492(1961) (internal citations omitted). Nonetheless, Mr. Mays argues his very status as a Howard County resident makes him specially aggrieved because the Board's action in amending the FDP at issue violates his personal right to vote by circumventing his charter-established right to take zoning decisions (except change-mistake zoning actions) to referendum.

As discussed above, the right to appeal is wholly statutory. The controlling statute in this case is Section 16.900(j)(2)(iii), which limits appeals of Planning Board decisions to persons who are specially aggrieved as defined in the *Bryniarski* line of cases. Mr. Mays would have me instead apply the referendum provision in Section 202(g) of the Howard County Charter to satisfy this aggrievement requirement. The Appellant concedes this interpretation of "specially aggrieved" is, apparently, a case of first impression. He also concedes his challenge to the Board's action in amending FDP 117-A-II is being appealed to the Hearing Authority in order to exhaust all administrative remedies before filing a declaratory judgment action.

Based on the evidence before me, I conclude the interest which Carvel Mays, Jr. seeks to protect in this case as a resident of Howard County is clearly beyond the zone of interests protected by Howard County Code Section 16.900(j)(2)(iii). The purpose of this provision is to secure the administrative due process rights of persons aggrieved by a Planning Board land use decision, not their right to vote on matters subject to referenda.

Consequently, the preponderance of evidence indicates that Mr. Mays does not have standing to take this appeal because he does not suffer unique harm from the impact of the Board's action to amend FDP 117-A-II. Accordingly, I will grant Wegmans/Science Fiction's motion and dismiss the appeal.

II. Appellant's Motion to Dismiss GGP as an Intervening Party

At oral argument the Appellant motioned to dismiss GGP as an intervening party because "it does not have a dog in this fight." Because the Appellant's petition is dismissed, the motion is moot.

ORDER

Based upon the foregoing, it is this **20th day of March 2008**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Carvel Mays, Jr. in BOA Case No. 620-D is hereby **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

Date Mailed: 3/28/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.