

| | | |
|--|---|-------------------|
| BERNARD RAUSCHER, et al. | : | BEFORE THE |
| Appellants | : | HOWARD COUNTY |
| v. | : | BOARD OF APPEALS |
| HOWARD COUNTY DEPARTMENT OF | : | HEARING EXAMINER |
| PLANNING AND ZONING IN F-22-020 | : | BA Case No. 788-D |
| Appellee | | |

DECISION AND ORDER

On June 28, 2022, 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 Bernard Rauscher, Francesca Galbani, Steven Patterson, Krista Patterson, Tony Spangler and Amy Spangler (Appellants). Appellants are appealing the March 10, 2022, decision letter of the Department of Planning and Zoning (DPZ) in Case No. F-22-020, in which DPZ approved the Final Subdivision Plans for the James and Susie Brickell Property consisting of one (1) lot and two (two) non-buildable bulk parcels on Mayapple Drive in the RR DEO (Rural Residential) (Density Exchange Option) Overlay Zoning District. The appeal is filed pursuant to §130.0.A.3 of the Howard County Zoning Regulations (HCZR).

The Appellants certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the

Hearing Examiner Rules of Procedure. G. Macy Nelson, Esq. represented the Appellants. Christopher DeCarlo, Esq. represented the Appellees James and Susie Brickell.

Appellants presented the following additional exhibits:

1. Settlement Agreement ratified by all parties
2. Relinquishment of Private Right of Way Agreement, not ratified

FINDINGS OF FACT

Based upon the evidence of record, the Hearing Examiner finds as follows:

1. Property Identification and Description. The approximately 36.126-acre property is located on the north side of Mayapple Drive, west of Crows Foot Drive and east of Stepping Place, Marriottsville, Maryland (the Property). The subject property lies in the 3rd Election District, and is identified as Tax Map 009, Grid 006, Parcel 254.
2. Vicinal Properties. Adjacent properties are also zoned RR DEO. Appellees own property to the south of Mayapple Drive.
3. The F-22-020 Decision and Order. Upon petition from a property owner, the Subdivision and Land Regulations of Howard County, Maryland authorizes the Department of Planning and Zoning (DPZ) to approve, deny, or approve with modifications, applications for subdivision or resubdivision. In accordance with this authority, DPZ, by decision letter dated March 10, 2022, granted approval of F-22-020 of the Final Subdivision Plans for the Brickell Property, which included extinguishing the

16.5-foot right-of-way easement for ingress and egress north and south of Mayapple Drive.

The right to appeal an administrative decision is wholly statutory. Howard County v. JJM, Inc., 301 Md. 256, 261, 482 A.2d 908, 910 (1984) (citing Maryland Bd. V. Armacost, 286 Md. 353, 354-55, 407 A.2d 1148, 1150 (1979); Criminal Injuries Comp. Bd. V. Gould, 273 Md. 486, 500, 331 A.2d 55, 64 (19751); Urbana Civic Ass'n v. Urbana Mobile Vill., Inc., 260 Md. 458, 461, 272 A.2d 628, 630 (1971).

Howard County Code Section 16.1215 provides the statutory authorization for an appeal from the administrative decision of the Director of the Department of Planning and Zoning: "Any person *specially aggrieved* by an administrative decision of the Director of Planning and Zoning in relation to this subtitle may, within 30 days of the decision, appeal the decision to the Howard County Board of Appeals according to its Rules of Procedure." (emphasis added) Section 16-105(a) states, "A person aggrieved by an order of the Department of Planning and Zoning may, within 30 days of the issuance of the order, appeal the decision to the Board of Appeals."

Pursuant to the Howard County Administrative Procedure Act, Section 2.101

(a) *Agency* means a Board, Commission, Department or other unit of County Government which is authorized by law to make rules or adjudicate contested cases.

(b) *Contested case* means a proceeding in which the legal rights, duties or privileges of a person are required by law or constitutional right to be determined only after an opportunity for a hearing.

(c) *Order* means the whole or any part of an Agency's final disposition of a contested case. An order includes licensing but does not include rule making. An order may be affirmative, negative, injunctive, or declaratory in form.

The instant request for approval of Final Subdivision Plans did not give rise to a contested hearing resulting in the Department of Planning and Zoning issuing a final disposition of a contested case, therefore Section 16.1215 provides the statutory authority for the instant appeal.

Special Aggrievement

Following the standards in *Bryniarski v. Montgomery County*, 247 Md. 137, 230 A.2d 289 (1967), two conditions precedent must be met before a person has standing: (1) he must have been a party to the proceeding before the agency, and (2) he must be aggrieved by the agency decision. A person aggrieved is one whose personal or property rights are adversely affected by the agency decision in a way different from that suffered by the public generally. *Maryland-National Capitol Park & Planning Com'n v. Smith*, 333 Md. 3, 11, 633 A.2d 855, 859 (1993) (internal citation omitted). It is noted that Howard County Code Section 16.1215 dispenses with the first prong of the *Bryniarski* test as there is no requirement that the appellant have been a party to the prior proceeding.

Adjoining, confronting or nearby property owners within “sight and sound” are deemed to be specifically damaged and therefore aggrieved. Committee for Responsible Development on 25th Street, et al. v. Mayor and City Council of Baltimore, et al., 137 Md. App. 60, 767 A.2d 906 (2001). Both “prima facie” aggrievement and special aggrievement simply give rise to rebuttable presumptions.

In qualifying under the Bryniarski test of prima facie aggrievement, if the contesting property owner is not adjoining or confronting, the qualification of “nearby” depends upon a number of factors including: (1) geographic proximity to the subject property; (2) visibility by clear sight to the subject property; and (3) intervening presence of an obstacle notwithstanding visibility to the subject property. The ability to view the subject property must be measured from the objector’s property and not from the objector’s place of employment or the fact that the objector regularly passes by the subject property. In addition, claims that there will be an increase in traffic flow, impact/change in neighborhood character, or depreciation in property value must be demonstrated to be special rather than merely general detrimental effects. Benn Ray v. Mayor & City Council of Baltimore, 203 Md. App. 15, 36 A.2d 521 (2012). Distances of 200-1,000 feet between properties have been deemed to be too far away to support “prima facie” aggrievement but may be close enough to be “almost prima facie aggrieved”. Distances greater than 1,000 feet have been found to be too far away to support a claim of special aggrievement. Ray v. Mayor & City Council of Baltimore, 430 Md. 74, 59 A.3d 545 (2013).

Howard County Code Section 16.200(b)(1) defines “*Adjoining* means land which is touching or would be touching in the absence of an intervening utility or road right-of-way, other than a principal arterial highway.” Appellants are owners of land adjoining, confronting, or within sight and sound of the Brickell property and the easement south of Mayapple Drive and are thereby aggrieved.

STANDARD OF REVIEW

Pursuant to Howard County Code Section 16.1215, appeals to the Board of Appeals of decisions made pursuant to the Director of Planning and Zoning’s administrative decision-making authority shall be heard in accordance with the Board of Appeal’s Rules of Procedures. Subtitle 2.-Rules of Procedure of the Board of Appeals, Section 2.210 provides that administrative appeals such as the instant appeal are *de novo* and the burden of proof is on the appellant to show that the action taken by the Administrative Agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. Per Howard County Code § 16.302(a) (jurisdiction of Hearing Examiner), when a matter is authorized to be heard and decided by the Board of Appeals, the matter will first be heard and decided by a Hearing Examiner. Hearing Examiner Rule of Procedure 10.2(c) assigns the burden of proof in an appeal from an administrative agency decision of showing by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

In a *de novo* (meaning as new) appeal, the role of the Hearing Examiner is akin to a trial court, and the appeal may be a contested case, in which the evidence is adduced

and the Hearing Examiner is the trier of fact awarded deference on appellate review as the Examiner saw the witnesses and the evidence firsthand. Appellants burden of proof is to provide substantial evidence that the approval of the Final Subdivision Plan was clearly erroneous, arbitrary and capricious, or contrary to law.

MOTION TO DISMISS WITH PREJUDICE

During the June 28, 2022, evidentiary hearing on Appellants appeal of F-22-020, Appellants orally moved to dismiss their appeal with prejudice. Appellants provided Exhibits 1 and 2 as the basis for their Motion to Dismiss with Prejudice. Appellees agreed with the Motion to Dismiss with Prejudice in consideration of Appellants Exhibits 1 and 2. Upon consideration of Appellants oral Motion to Dismiss with Prejudice, Appellants Exhibits 1 (ratified Settlement Agreement) and Exhibit 2 (unratified Relinquishment of Private Right of Way Agreement), and Appellees concurrence with the Motion, the Motion to Dismiss will be granted.

ORDER

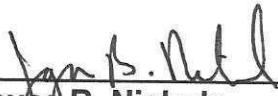
Based upon the foregoing, it is this 28th day of June, 2022, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That Appellants Motion to Dismiss with Prejudice the administrative appeal of Bernard Rauscher, Francesca Galbani, Steven Patterson, Krista Patterson, Tony Spangler and Amy Spangler appealing the March 10, 2022 decision letter of the Department of Planning and Zoning (DPZ) in Case No. F-22-020, in which DPZ approved the Final Subdivision Plans for the James and Susie Brickell Property consisting of one (1) lot and two (two) non-buildable bulk parcels on Mayapple Drive, Marriottsville, in the RR DEO (Rural Residential) (Density Exchange Option) Overlay Zoning District, be and is hereby **GRANTED**, and it is further **ORDERED**, that,

The March 10, 2022, decision letter by the Department of Planning and Zoning approving Final Subdivision Plan F-22-020, the Brickell Property, remains in full force and effect.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER



Joyce B. Nichols

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.