HOWARD COUNTY YOUTH PROGRAM, INC., BERNIE DENNISON, & TIMOTHY ARNETT Appellants	:	BEFORE THE
	:	HOWARD COUNTY
vs.	:	BOARD OF APPEALS
	:	HEARING EXAMINER
DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND Appellee	:	BA Case No. 618-D
vs.		
LESLIE D. FRALEY & THOMAS M. FRALEY Appellees		

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DECISION AND ORDER

On January 7, 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 departmental appeal of Howard County Youth Program, Inc., Bernie Dennison, and Timothy Arnett (the "Appellants"). The Appellants are appealing a Decision and Order of the Department of Planning and Zoning ("DPZ") in Non-Conforming Case No. 07-003 dated August 21, 2007 confirming a nonconforming use at 10459 Frederick Road (the "Property").

The Appellants 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.

Sang Oh and Richard Talkin, Esquires, represented the Appellants. E. Alexander Adams, Esquire, represented Appellees Leslie D. Fraley & Thomas M. Fraley. Bernie Dennison testified

on behalf of the Howard County Youth Program. Appellee Howard County Department of Planning and Zoning did not participate in the proceeding

Background

Appellant Howard County Youth Program, Inc. ("HCYP") operates softball and baseball programs and a snack bar in the Howard County-owned Kiwanis Wallis Park. The three-sided park fronts on Frederick Road. The designated southwest entrance to the park is Norbert's Way, a driveway that horseshoes around several small properties to exit on the northeast side of these properties. The Fraley property is situated within this horseshoe area, close to Norbert's Way. A small section of parkland physically separates the Property from Norbert's Way, with the consequence that the ball fields' equipment building is situated on the same side of Norbert's Way as the Property. Norbert's Way also functions as a parking area for the sports fields and recreation center where HCYP has a small office. HCYP also operates a snack bar and concession stand in the park and it is located to the south of and behind the Property.

The owners of the Property, Leslie D. Fraley & Thomas M. Fraley (the "Fraleys") submitted an application to DPZ to confirm certain nonconforming uses of the Property pursuant to Section 129.D.1 of the Howard County Zoning Regulations (the"Zoning Regulations"). In accordance with Sections 100.H and 129.D.1 of the Zoning Regulations, DPZ conducted a public hearing on the application July 31, 2007. By NCU Case No. 07-003 dated August 21, 2007, DPZ confirmed a retail building on the subject property as a nonconforming use for a commercial store and a retail store/building use.

The Appellants are opposed to DPZ's determination that the Property is a lawful nonconforming use and, specifically, that the Retail Building on the Property may be used as a

general retail store space. They appealed NCU Case No. 07-003 on September 19, 2007. The administrative appeal petition identifies HCYP, Bernie Dennison, and Timothy Arnett as "the lessee" of the adjoining property. The petition alleges, among other things, that DPZ's ruling in NCU Case No. 07-003 improperly authorized an alleged nonconforming use, and further, permitted an expansion/intensification of such alleged nonconforming use in violation of the Zoning Regulations and applicable law. It also contends the ruling is clearly erroneous, arbitrary, capricious, and contrary to law. The petition contends the Appellants are aggrieved by DPZ's ruling because it permits activities that will adversely affect the use and enjoyment of Appellants' land for Appellants and its invitees.

The Fraleys filed a motion to dismiss the case on December 7, 2007. They argue: (1) the appeal is defective because the Appellants did not sign the administrative appeal petition and 30 days elapsed since the NCU order, as required by Section 130 of the Zoning Regulations; (2) the Appellants lack standing to appeal because they are not "aggrieved persons" within the meaning of Section 130.A.3, as they are merely nonexclusive licensees of the adjacent property; (3) none of the Appellants were "listed" parties to the NCU confirmation hearing because they are not listed on the public hearing sign-up sheet, and; (4) the Appellants are estopped from contesting the NCU Decision and Order because Howard County, Maryland is the legal owner of the adjacent property and Howard County approved the subject Decision and Order.

The Appellants responded to the Fraleys' motion on December 21, 2007, stating: (1) the petition is legally sufficient; (2) that any person may appeal a NCU decision and order because Section 129.D.4 does not require an appellant to be either a party to the NCU confirmation proceeding or aggrieved; (3) that HCYP has party status, having been represented by counsel at

the prior proceeding, and; (4) that HCYP's property interest is more than that of a nonexclusive licensee.

Upon consideration of the Fraleys' motion to dismiss, the Appellants' response, and the testimony and oral arguments on the motion to dismiss heard on January 7, 2008, and for the reasons stated below, I have determined to grant the motion and dismiss the appeal.

Discussion

I. The Petition's Legal Sufficiency

With respect to the first motion, the Fraleys argue the administrative appeal petition form on which the Appellants presented their appeal is legally defective. According to the Fraleys, while the petition is ostensibly signed by HCYP, Bernie Dennison, and Timothy Arnett, it is in fact signed by some unknown individual in violation of Section 3.1 of the Hearing Examiners Rules of Procedure and Section 2.202(a) of the Board of Appeals Rules of Procedure, and that these violations are cause for dismissal.

Section 3.1 of the Hearing Examiner Rules of Procedure requires petitions to be filed in the manner prescribed by Section 2.202(a) of the Board's Rules. Among other things, Section 2.202(a) provides that the Board of Appeals shall prescribe the form and content of the petition, that the petitioner shall ensure the accuracy and completeness of the information required on the petition, and that DPZ may require corrections to the petition or additional information.

Administrative proceedings are intended to be less formal mechanisms for resolving grievances. The petition form is therefore merely a device to provide fair notice of the claim and grounds on which it rests, to give the opposing party adequate opportunity to prepare a defense.

Davis, *Administrative Law Treatise*, 2d Ed., Section 14:11 (1980); Stein, Mitchell, Mezines, *Administrative Law*, Section 33.03[3] (1991). "Mere irregularities in an application to a board for a permit not amounting to a jurisdictional defect do not affect the validity of the permit. A substantial compliance with the requirements of an administrative regulation in making an application for a permit is sufficient." *Beall v. Montgomery County Council*, 240 Md. 77, 89 (Md. 1965), quoting *Heath v. Mayor and City Council of Baltimore*, 187 Md. 296, 299, 49 A.2d 799 (1946).

In this case, the Fraleys were on fair notice as to the Appellants' identity. The Appellant's counsel, Sang Oh, who is co-counsel with Richard Talkin, signed the petition. Mr. Talkin spoke at the public hearing on the NCU petition. Moreover, at oral argument on the motion to dismiss, Mr. Dennison identified himself as the President of HCYP's Board of Directors and stated that it is his signature on the petition. Timothy Arnett spoke at the NCU application public hearing and he is listed as a HCYP representative on the NCU hearing sign-up sheet, which the Fraleys attached to their motion to dismiss. Consequently, based upon these facts, I conclude that the Appellants have substantially complied with Section 2.202(a). The Fraleys' motion is denied.

The Fraleys' argument that the petition is defective because it was untimely filed is denied. The date of the NCU order is August 21, 2007, and the Appellants filed the administrative petition on September 19, 2007, 29 days later.

II. Standing

1. Administrative Standing –Controlling Law

The Fraleys' second motion to dismiss alleges each of the Appellants lack standing to

pursue the appeal as required by Section 130.A.3 of the Zoning Regulations.

> Appeals to the Hearing Authority may be taken by *any person aggrieved*, or by any officer, department, board or bureau of the County affected by any decisions of the Department of Planning and Zoning [emphasis added].

Section 130.A.3.

According to the Fraleys, only those persons who were "listed parties" (as discussed below), to the public hearing on their NCU confirmation application and who are aggrieved by the decision in this case may take an appeal to the Hearing Examiner.

The Appellants argue in response that Section 129.D.4, not Section 130.A.3, controls who may appeal a DPZ nonconforming use confirmation decision to the Hearing Authority.

> The [confirmation of nonconforming use] Decision of the Director of Planning and Zoning or the Director's Designee is appealable to the Hearing Authority on a de novo basis.

Section 129.D.4.

According to the Appellants, absent express language in Section 129.D.4 that an appellant be a party to a NCU confirmation proceeding and aggrieved in any manner by a DPZ NCU confirmation decision, there is no predicate standing requirement for appeals of a DPZ nonconforming use confirmation to the Hearing Examiner. At oral argument the Appellants asserted this reading is supported by other provisions in the Zoning Regulations concerning appeals to the Hearing Authority from three additional types of de minimus land use decisions made by DPZ through the Section 100.H public hearing process: (1) administrative adjustments to bulk regulations (Section 100.F.1); (2) administrative adjustments to district map lines (Section 100.F.2), and; (3) temporary uses (Section 132.A). They call our attention to Section 100.F, which provides that appeals of DPZ decisions on administrative adjustment applications

are appealable on a de novo basis and to Section 132.C, which provides that appeals of DPZ decisions on temporary use applications be heard on the record.

As a starting point, it is well established that the right to appeal is wholly 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)). Article 25A, Subparagraph 5(U) of the Annotated Code of Maryland authorizes a board of appeals in a charter county to review certain actions of an administrative officer or agency, on the appeal of any interested person, including applications for zoning variations or exceptions, 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; and the assessment of any special benefit tax.

Pursuant to this power, Section 501.B of the Howard County Charter authorizes the Board of Appeals to hear appeals of such matters as are or may be set forth originally in Article 25A, Subparagraph 5(U) of the Annotated Code of Maryland. Section 502 authorizes the Hearing Examiner to conduct hearings and make decisions concerning matters within the jurisdiction of the Board of Appeals.

With respect to appeals of administrative decisions taken by DPZ, Title 16, Subtitle 3 of Howard County Code, Section 16.301(b) authorizes the Board of Appeals to "[t]o hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by any administrative official in the application, interpretation, or

enforcement of this title or of any regulations adopted pursuant to it." Additionally, Section 130(B)(4) of Howard County's Zoning Regulations provides that the Board of Appeals may "hear and decide appeals where it is alleged the Department of Planning and Zoning has erred in the interpretation or application of any provisions of the Zoning Regulations."

Section 130.A.3 of the Zoning Regulations further implements the Board of Appeals' authority by giving it jurisdiction to hear appeals from any "person aggrieved" by any decisions of the Department of Planning and Zoning. This aggrieved person standing criterion is repeated in Title 16, Section 16.105(a) of the Subdivision and Land Development Regulations, which authorizes appeals of DPZ decisions arising out of the subdivision and land development process to the Board of Appeals from a "person aggrieved" by an order of the Department of Planning and Zoning. I therefore have jurisdiction to hear the Appellants' administrative appeal only if they are persons aggrieved by the decision below.[1]

Under the interpretation urged by the Appellants, the "aggrieved person" standing requirement is inapplicable to this administrative appeal because Section 129.D.4 is silent as to who may take an appeal. But giving weight to this interpretation would produce absurd results by opening the door to a barrage of appeals by entities wholly unaffected by any given DPZ administrative decision, simply because specific regulation/s fail to expressly state who has standing to appeal. It would also create the need, I might add, for dozens of new administrative appeal petitions, which now reflect Section 130.A.3's aggrievement standard by requiring

[1] The Fraleys did not challenge whether HCYP is a "person" for the purposes of this appeal, only its claim to be aggrieved. Under the rules of construction in Section 101.G of the Zoning Regulations, a "person" includes an individual, a corporation, a partnership, an incorporated association, or any other similar entity.

appellants to state the manner in which they are aggrieved by the ruling or action.[2]

The Appellants in error urge us to read Section 129.D.4 as permitting any person to appeal a DPZ Section 100.H public hearing decision to the Hearing Examiner. This section deals only with the type of evidentiary hearing on appeal, which is de novo, meaning the Hearing Examiner does not examine evidence presented to the decision maker below, in this case DPZ. Nor does the Hearing Examiner review the procedure below except to assure the matter is properly before her, which is this case is the matter of whether the Appellants have standing to make the instant appeal.

2. The Appellants Are Not "Persons Aggrieved"

The Fraleys seek dismissal of the Appellants' appeal on the ground that none is persons aggrieved by DPZ's decision. The phrase "person aggrieved," when used in an ordinance relating to administrative appeals, has a well-recognized meaning in Maryland spelled out in a line of cases. *Sugarloaf Citizens' Ass'n v. Department of Env't*, 344 Md. 271, 288 (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. As the Court of Appeals stated in *Bryniarski:*

Generally speaking, ... a person 'aggrieved' ... is one whose personal or property rights are

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[2] The universe of Section 100.H public hearing decisions appealed to the Hearing Examiner is small. In my tenure as Hearing Examiner, the number is three, including this case. The two additional cases concern DPZ bulk regulation administrative adjustment decisions, which both state, "a person aggrieved by it may appeal it to the Board of Appeals within 30 days."

> 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.

To have standing to appeal an administrative decision as an aggrieved person under *Bryniarski,* the appellant must satisfy two prongs. The first prong is that the appellant must have a protectible property or personal interest. The second prong is that the impact of the land use decision on such interest must be 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.

A. Howard County Youth Program

The Appellants' administrative appeal petition identifies them as the "lessee" of the adjoining property and alleges they are aggrieved because the DPZ NCU confirmation decision permits activities that will adversely affect the use and enjoyment of its land for Appellants and its invitees.

The motion to dismiss contends HCYP is not aggrieved because the organization is a non-exclusive licensee, not a lessee. Exhibit A of the Fraleys' Memorandum in Support of their Motion to Dismiss is a 12-page document entitled "Amended and Restated License and Agreement" dated April 11, 2005, between HCYP and Howard County, as approved by the Director of Howard County's Department Recreation and Parks. It recites the history of the original license and agreement, which dates to 1992, when the County and HCYP entered into a

license and agreement for HCYP to use a portion of the park for softball and baseball programs for Howard County youth and to maintain the equipment storage building, snack bar, practice areas, public restrooms, and ball fields. Following this history are fifteen terms of agreement amending and restating the agreement. By Term No. 2, the County grants HCYP "the *non-exclusive* right to use certain portions of the Property ... for its *nonexclusive* use" including the ball fields, practice areas, practice fields, equipment storage building, public restrooms, snack bar, parking spaces (collectively the Ball Fields) and a 170-square foot portion of the Kiwanis-Wallis Recreation Center for use an office (the "Office Area") [emphasis added].

By these contractual terms, HCYP is alleged not to have shown any cognizable property or personal interest, contrary to the mandate of the first prong of the *Bryniarski* aggrieved person test. HCYP responds by maintaining the Fraleys over rely on the word "License" in the agreement, which belies the notion that the agreement is a mere license. We are directed to several cases where Maryland courts purportedly allowed appellants with less than a fee simple property interest to bring appeals to protect their interests.

In support of HCYP's petition claim to a leasehold property interest we are directed to *University Plaza Shopping Center, Inc., v. Garcia,* 279 Md. 61, 66, 367 A.2d 957, 960 (1977) for the proposition that the license fee HCYP's pays for the use of the ball fields is rent, even if the license agreement does not employ the term "rent." But this case in inapposite, as it concerns the interpretation of whether certain work done by a tenant under an indenture of a commercial lease between the shopping center landlord and a commercial store lessee was additional rent, which if not paid was cause for ejectment, not, as here, whether fees paid pursuant to a license agreement

could be even be construed to create a leasehold interest in property.

In this case, the Appellants do not pay rent for the ball fields. Nor can HCYP claim a property interest based on improvements made, as Term No. 6 expressly provides that any HCYP improvements, alterations, or changes to the License Area become Howard County's property. I am not persuaded that HCYP holds a leasehold interest in the adjoining property.

Parsing another case cited in the response, it appears HCYP claims, alternatively, a defensible personal property right within the meaning of the first prong of the Bryniarski test under *Cylburn Arboretum Assoc. Inc., v. Mayor and City Council,* 106 Md. App. 183, 189, 664 A.2d 382, 385 (1995), where the court held that an association with a revocable license lacked standing to appeal a city ordinance. HCYP invokes *Cylburn* to distinguish its rights as a licensee from that of a mere revocable licensee.

In *Cylburn*, an organization approved by Baltimore City's Board of Recreation and Parks to use certain areas of the park as a garden center and wild flower preserve later incorporated itself as the Cylburn Association. A subsequent letter from the Director of the Department of Recreation and Parks to the association's president advised him that the city considered the relationship to be a revocable license, which the association acknowledged.

The association subsequently appealed a city ordinance approving a planned unit development for an adjoining, formerly city-owned property to circuit court, claiming it was a person aggrieved under *Bryniarski*, having spent over $400,000 on improvements and losing the adjoining property as a buffer area, which by an earlier city ordinance protected the park from area development. The court held the association lacked a protectible personal interest and thus

was not entitled to sue because as a revocable licensee, the association had insufficient personal property rights to use and maintain the park. Piggybacking on this initial ruling, HCYP contends it has greater personal property rights than a revocable licensee because its agreement with the County lapses on June 15, 2020, with certain automatic renewal. In short, the term of the license gives rise to a protectible personal property interest.

In my view, HCYP's reliance on these cases goes only—and unsuccessfully—to satisfying the first prong of the *Bryniarski* test, the demonstration of a protectible property or personal interest. As *Cylburn* clarifies, however, possessing standing to appeal is a two-part test under *Bryniarski.* Accordingly, an appellant who establishes a personal or property interest under the first prong of the *Bryniarski* test also has the burden of proving the second prong, i.e., that the property or personal interest will be harmed by the administrative decision in a manner distinct from the harm suffered by the public generally.

In *Cylburn*, the court concluded that even if the association were presumed to have established a personal interest under the first prong of the *Bryniarski* test, it nonetheless failed the second prong. Although the association claimed the zoning changes would defeat the substantial monies spent on the park, the court concluded that these changes affected the entire park, not just the association's classes, gift shop operations, good will, and any other continuing projects. The court went on to observe the association had no greater financial interest in the park than other users.

In this case, HCYP initially proffered, as adverse harm, a loss of income if the adjoining Property had a retail use. Certainly, by the face of the agreement, which contains several terms

pertaining to the snack bar and any other concession in the licensed area, the loss of any income to an adjoining retail use, is, apparently, a matter of concern to HCYP. Nevertheless, a person whose sole reason for objecting to an administrative action is to prevent competition is not a person aggrieved. *Kreatchman v. Ramsburg*, 224 Md. 209, 167 A.2d 345 (1961).

Mr. Dennison further proffered that HCYP would be detrimentally impacted by adverse impacts because persons attending the park would leave it from the Norbert's Way entrance and turn right to access the adjoining retail use. He proffered that the increase in traffic to the Fraley's site would result in a dangerous situation that would detrimentally affect HCYP because of a dangerous situation. It was his belief that this unsafe condition would increase the cost of liability insurance. He also proffered that the park, which now generates about $150,000 a year, would suffer financial loss from the increase in traffic to the Fraley's site, which in his opinion would cause people to stop participating in HCYP-run activities.

HCYP's ultimate alleged factual predicate of adverse harm different from the public generally is fear that a change in use to the Property would increase traffic and cause safety problems or reduce the park's appeal if users of the parks sought pedestrian access to a retail use, if established. In my view, this possible adverse impact is too speculative to prove special damage or direct harm. A person seeking to redress a public wrong, such as is alleged by the appellant, must prove special damage from such wrong, differing in character in kind from that suffered by the general public. See *Loughborough Development Corporation v. Rivermass Corporation*, 213 Md. 239, 131 A. 681 (1974) (citations omitted). I also fail to understand how a non-exclusive licensee, who shares use of the park with other organizations and the County,

suffers direct harm different from these entities. Certainly it is the park users—the public—who might be harmed by any safety problems potentially caused by retail use at the Property, not HCYP.

I therefore conclude HCYP has failed to proffer a property or personal interest that would be adversely affected by DPZ's NCU confirmation decision in a manner different from any harm the public might generally suffer. Consequently, HCYP is not an aggrieved person and does not have standing to appeal.

B. Bernie Dennison

Bernie Dennison testified as the President of HCYP's board of directors, but presented no testimony or evidence that he was individually aggrieved by the decisions below. Having failed to establish how his individual property or personal rights are adversely affected differently than the public by the decision at issue, Mr. Dennison lacks standing to appeal.

C. Timothy Arnett

No evidence or testimony was presented to demonstrate how Mr. Arnett is individually aggrieved by the decision below. Having failed to establish how his individual property or personal rights are adversely affected differently from the public's by the decision at issue, Mr. Arnett lacks standing to appeal.

III. The Appellants' Party Status

The Fraleys' third motion to dismiss alleges the Appellants lack standing in part to appeal because they are not listed or approved parties to the DPZ NCU confirmation public hearing. However, Section 130.A.3 does not require a person to have been a party to the proceeding at

issue to have standing, only that they be aggrieved.

Where the County Council has decided to narrow the list of persons who can appeal certain types of land use administrative appeals to the Hearing Authority to aggrieved parties it has expressly done so. Thus, an appeal of a Planning Board decision is limited to "*[a]ny person specially aggrieved* by any decision of the Planning Board *and* a *party to the proceedings before it*" [emphasis added]. Howard County Charter, Subtitle 9, § 16.900.

In any case, it is clear HCYP was a party to the proceeding below through its counsel, Richard Talkin, who spoke at the hearing. Timothy Arnett was also a party. His name appears on the sign-in sheet as an HCYP representative and he spoke at the hearing. However, Bernie Dennison was not a party, as he neither participated in nor appeared at the public hearing and did not enter his name on the sign-up sheet. The Fraleys' motion to dismiss on this ground is denied.

IV. Estoppel

The Fraleys' final motion is that the Appellants are estopped from contesting the NCU Decision and Order because Howard County, Maryland is the legal owner of the adjacent property and Howard County approved the subject Decision and Order. It is worth observing that this argument is belied by the fact that Section 130.A.3 provides that Appeals to the Hearing Authority may be taken by an *officer, department, board or bureau of the County* affected by any decisions of the Department of Planning and Zoning [emphasis added]. As I read this language, the Department of Recreation and Parks, which approved HCYP's license and agreement has standing to appeal the decision below, and need not prove aggrievement to take the appeal, only that they be affected by that decision. The motion to dismiss is denied.

ORDER

Based upon the foregoing, it is this **11th day of February 2008**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Howard County Youth Program, Inc., Bernie Dennison, and Timothy Arnett in BOA Case No. 618-D is hereby **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

Date Mailed: 2/12/08

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.