

PAUL KENDALL & FRANK MARTIN

Appellants

vs.

**HOWARD COUNTY PLANNING BOARD &
MANGIONE FAMILY ENTERPRISES OF
TURF VALLEY, LP**

Appellees

: BEFORE THE
:
: HOWARD COUNTY
:
: BOARD OF APPEALS
:
: HEARING EXAMINER
: BA Case No. 639-D

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DECISION AND ORDER

On October 20, 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 Paul Kendall and Frank Martin (the "Appellants"). The Appellants are appealing the letter dated April 25, 2008 (the "Planning Board letter") from Marsha McLaughlin, Executive Secretary to the Howard County Planning Board, to Louis Mangione, Mangione Enterprises¹ of Turf Valley, LP ("Mangione Enterprises" or "Appellee").² The letter informed Appellee of the Planning Board's action to approve Second Amendment to the Turf Valley Residential Subdistrict Final Development Plan ("the Second Amendment FDP") on April 24, 2008. The appeal is filed pursuant to Howard County Code ("HCC") Section 16.900(j)(2)(iii).

I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Appellants certified that notice of the hearing complied with the Howard County Code.

¹ The actual owner and developer is Mangione Family Enterprises, of Turf Valley, LP.

² The petition misstates date of the ruling or action as April 27, 2008.

The Appellants were not represented by counsel. Sang Oh, Esquire, represented Appellee Mangione Family Enterprises of Turf Valley, LP. Paul Johnson, Deputy County Solicitor, represented the Howard County Planning Board, but did not participate in the proceeding.

At the outset of the hearing, Appellee moved for dismissal of the case for Appellants' failure to timely file the appeal. Upon consideration of its 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

Mangione Family Enterprises of Turf Valley is the landowner and developer of Turf Valley, a multi-use development in western Howard County consisting of a hotel and conference center, condominiums, townhouses and single-family homes, plus commercial development. The development of Turf Valley is controlled in part by the Planning Board-approved Turf Valley Multi-Use Subdistrict Final Development Plan ("FDP"), as amended. This FDP encompasses drawings depicting development areas and includes development criteria consistent with the underlying PGCC (Planned Golf Course Community) Zoning District.

In 2008, Appellee apparently submitted proposed revisions to the approved First Amendment to the Turf Valley Residential Subdistrict Final Development Plan for the Planning Board's review.³ The Planning Board approved the Second Amendment FDP on April 24, 2008 and informed Appellee Enterprises of its decision by letter on April 25, 2008.

Paul Kendall and Frank Martin are residents of Turf Valley who are opposed to the Second Amendment FDP. Their administrative appeal petition contends the Planning Board

failed to take into account its rules and regulations and exceeded its authority in approving the amendment and that the FDP does not comport with the comprehensive sketch plan. They claim they are aggrieved because they are residents at the center of the development.

The Issue in This Case—"In Accordance With Section 501"

The issue in this case is how the 30-day period for appealing a Planning Board decision to the Board of Appeals Hearing Examiner is to be computed. HCC Section 16.900(j)(2)(iii) governs the period for appealing a Planning Board decision. This section states in pertinent part:

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*.

(Emphasis Added.)

Additionally, Section 1.106.F of the Planning Board Rules of Procedure compels the Board, when exercising its administrative decision-making authority following a public meeting, to make a decision by issuing a letter on the Executive Secretary's signature. The Executive Secretary sends this notice of decision letter to the Petitioner, and, upon request, to other interested persons.

The Executive Secretary to the Planning Board is Marsha McLaughlin, the Director of Planning and Zoning. By letter dated April 25, 2008, she notified Appellants of the Planning Board's decision to approve the Second Amendment FDP and copied Appellants as interested persons. Appellants filed their petition on Tuesday, May 27, 2008, the date stamped on the petition's top sheet.

³ The Appellants provided no information about the substance of the Second Amendment.

In its memorandum of law attached to the motion to dismiss, Appellee argues the 30-day filing period set forth in HCC Section 16.900(j)(2)(iii) must be strictly followed because the right to appeal is wholly statutory. Based on this reading, Appellee contends the appeal is untimely because Appellants filed their petition after the 30th calendar day following the Planning Board's letter of decision, on Sunday, May 25, 2008.

Messrs. Kendall and Martin did not file a response to the motion, stating at oral argument that none is required and relying on its timeliness arguments in BA Case No. 636-D.⁴ Appellants claim to the petition's timeliness goes something like this. Because HCC Section 16.900(j)(2)(iii) contains the modifier clause that an appeal of a Planning Board decision be in "accordance with section 501 of the Howard County Charter," and Section 501(d) authorizes appeals from a Board of Appeals decision to the Circuit Court and provides that such appeals be taken "in accordance with the Maryland Rules of Procedure," the 30-day filing period is to be computed in accordance with Maryland Rule 7-203(a).⁵ This rule prescribes the time for filing rules governing the judicial review of administrative agency decisions, including boards of appeal decisions.

Appellants ultimately claim the petition is timely because they did not receive notice of the Planning Board's letter of decision until sometime after April 25, 2008.⁶ They bank specifically on Rule 7-023(a)(2) or (3), which prescribes, respectively, that the 30-day filing

⁴ In Board of Appeals Case No. 636-D, I dismissed Appellants Kendall and Martin's appeal of a March 25, 2008 Planning Board decision to approve SDP-07-084 for failure to file a timely appeal.

⁵ Section 7-023(a) states in relevant part:

(a) Generally.- Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;

(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or

(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

period does not begin to run until after the date the administrative agency sent notice of the order or action to the petitioner, or until after the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

Discussion

As a starting point, the cardinal rule of statutory construction is to ascertain and carry out the real intention of the legislature. The primary source from which we glean this intention is the language itself. We first accord the words their ordinary and natural signification. We must also consider the context in which the provision appears and interpret it in the context of the entire statutory scheme. If the words of a provision are ambiguous, i.e., "reasonably capable of more than one meaning" – that is, their meaning is intrinsically unclear or their application to a particular object or circumstance is uncertain – then resort may be made to surrounding circumstances such as legislative history and prior case law. The effort is to discern the meaning and effect of the language in light of the objectives and purposes of the provision enacted. Such an interpretation must be reasonable and consonant with logic and common sense. *The Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 814 A.2d 469 (2003).

When it comes to HCC Section 16.900(j)(2)(iii), what is the ordinary and natural meaning of "in accordance with Section 501 of the Howard County Charter?" The term "accordance" is defined as "agreement; conformity: in accordance with your instructions." See Merriam-Webster On-Line Dictionary, <http://www.m-w.com/dictionary/seek>. Logically, then, a person appealing a Planning Board decision must file an appeal that conforms to the filing requirements of Section 501. The phrase "in accordance with section 501" is a procedural or

⁶ The record is devoid of evidence as to when they received the letter of decision notice.

claims-processing provision; it does not substantively qualify how the 30-day appeal period is to be calculated. To understand how an appeal is to accord with—conform to—Section 501, we must look to the applicable procedural or processing provisions.⁷

I note first that Section 501(d), the specific section upon which the Appellants' claim of timeliness relies, does not apply to their appeal. It relates only to appeals of decisions *from* the

⁷ Section 501 provides for a County Board of Appeals as follows.

(a) *Appointment; term; compensation.* The County Board of Appeals shall consist of five registered voters and residents of the County appointed by the Council. Appointees shall serve overlapping terms of five years from the first day of January of the year of their appointments, or until their successors are appointed. Vacancies, except those at the expiration of a term, shall be filled in the same manner as the original appointment and for the unexpired term. No member shall be reappointed after having served eight consecutive years immediately prior to reappointment. No more than three members shall be registered with the same political party. The members of the Board shall be paid at the rate of Twelve Hundred Dollars (\$1,200.00) per year unless such compensation be changed as provided in Section 501(f) of this article. Members of the Board shall receive reasonable and necessary expenses as may be provided in the budget.

(b) *Powers and functions.* The Board of Appeals may exercise the functions and powers relating to the hearing and deciding, either originally or on appeal or review, of such matters as are or may be set forth in Article 25a, Subparagraph (u) of the Annotated Code of Maryland, excluding those matters affecting the adopting of or change in the general plan, zoning map, rules, regulations or ordinances.

(c) *Rules of practice and procedure.* The Board of Appeals shall have authority to adopt and amend rules of practice governing its proceedings which shall have the force and effect of law when approved by legislative act of the Council. Such rules of practice and procedures shall not be inconsistent with the Administrative Procedure Act of the Annotated Code of Maryland. The rules may relate to filing fees, meetings and hearings of the Board, the manner in which its Chairperson shall be selected and the terms which he shall serve as Chairperson and other pertinent matters deemed appropriate and necessary for the Board. Three members of the Board shall constitute a quorum of the Board, and its hearings shall receive public notice as required by law. All hearings held by the Board shall be open to the public, and provision shall be made for all interested citizens and citizens groups to be heard. The Board shall cause to be maintained complete public records of its proceedings, with a suitable index.

(d) *Appeals from decisions of the Board.* Within thirty days after any decision of the Board of Appeals is entered, any person, officer, department, board or bureau of the County, jointly or severally aggrieved by any such decision, may appeal to the Circuit Court for Howard County, in accordance with the Maryland Rules of Procedure. The Board of Appeals shall be a party to all appeals and shall be represented at any such hearing by the Office of Law.

(e) *Employees of the Board.* The Board may appoint, within budgetary limitations, such employees, and the 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.

(f) *Implementing legislation.* The powers and functions of the Board of Appeals as herein provided for shall be defined by implementing legislation heretofore or hereafter enacted by the Council, subject to and to the extent required by applicable State law. The Council may by legislative act increase the compensation of the members of the Board of Appeals as provided in Section 501(a) of this Article and thereafter decrease such compensation; provided, however, that no reduction shall affect the compensation of a member of the Board of Appeals during his or her current term, and in no event shall the council have the power to decrease the compensation of members of the Board below the figure provided in this Charter. To the extent permitted by State law, the Council shall also have the power, by legislative act, to prescribe other appeals to be heard by, or to limit the jurisdiction of, the Board of Appeals in addition to those specified in this Article.

Board of Appeals to the Circuit Court of Howard County, not appeals to the Hearing Examiner.

The clause "in accordance with section 501" is not further qualified by Section 501(d).

Section 501(b) establishes what matters may be appealed to the Hearing Examiner, those as are or may be set forth in Article 25A of the Annotated Code of Maryland. If the appeal does not accord or conform to this limiting language, the Hearing Examiner is deprived of jurisdiction to hear it.

If the Hearing Examiner has jurisdiction, Section 501(c) applies. Section 501(c) authorizes the Board of Appeals to adopt and amend rules of governing its proceedings, which shall have the force and effect of law when approved by legislative act of the Council (and the Hearing Examiner by dint of Section 502) to govern its proceedings. Because the Board of Appeals and the Hearing Examiner have adopted rules of procedures, an appeal taken under HCC Section 16.900(j)(2)(iii) must also accord with these rules.⁸

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

In the case, the applicable petition form is the Administrative Appeal Petition to the Howard County Hearing Authority. Section 1 requires the Appellant to provide basic information about the ruling or action from which the immediate appeal is being taken,

⁸ The Board of Appeals Rules of Procedure, Section 2.200 expressly states "[t]hese rules are in addition to the requirements of section 501 of the Howard County Charter; subtitle 3, "Board of Appeals," of title 16 of the Howard

including, in pertinent part, the date of the ruling or action. The date provided on the Appellants petition form, without explanation, is April 27, 2008. The date of the notice of decision letter, however, is April 25, 2008. In short, the appeal petition is not in accordance with Section 501.

This conclusion consonant with the Maryland Courts of Appeal decisions addressing the timely filing of administrative appeals. These decisions hold 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)). Where such statutes provide a specific remedy and procedure for administrative appeal, they must be followed scrupulously. *National Institutes of Health Federal Credit Union v. Hawk*, , 47 Md. App. 189, 422 A.2d 55 (1980) (internal citations omitted). Where a statute mandates the time to appeal runs from a fixed date, and requires a notice of appeal to be filed with certain days of the decision, the Maryland Court of Appeals has consistently concluded the appellate tribunal has no authority to decide a case on its merits when the appeal is not filed within the prescribed time frame after the final decision. *United Parcel Service v. People's Counsel for Baltimore County*, 336 Md. 569, 650 A.2d 226 (1994) (holding the Board of Appeals erred, as a matter of law, that it could exercise jurisdiction under the "discovery rule" to hear an administrative appeal of a building permit issued on October 28, 1986, considering the operative event to be a July 19, 1987 letter from the Zoning Commissioner explaining that the building permit for a warehouse use was properly issued and concluding protestants' appeal was untimely where the determinative date for taking an appeal was 30 days from the County's October 28, 1986 issuance of the permit).

A case addressing the inapplicability of the Maryland Rules' time prescriptions for filing a board of appeals administrative appeal and analogous to the instant appeal is *Fallston Meadows Community Ass'n v. Board of Child Care of Baltimore Annual Conference of United Methodist Church*, 122 Md. App. 683, 716 A.2d 344 (1998). The Fallston Meadows protestants appealed a March 1, 1996 Harford County Department of Planning and Zoning decision to approve a preliminary subdivision/site plan to the Board of Appeals on March 25, 1996. The Board of Appeals Hearing Examiner dismissed the appeal for lack of subject-matter jurisdiction, concluding the protestants should have taken the appeal to circuit court. In two separate appeals, the protestants appealed the department's site plan approval and the Board's subsequent ratification of the hearing examiner decision to circuit court. In a consolidated hearing, the circuit court affirmed the Board decision.

On appeal, the Maryland Court of Special Appeals opined it would have dismissed the appeal even if the Board had jurisdiction because the initial appeal to the Board of Appeals hearing examiner was not timely filed. The relevant statute required appeals of a decision of the Zoning Administrator to the Harford County Board of Appeals to be taken within 20 days from March 4, 1996, when the County mailed a copy of the plan to the protestants. The 20th day following the March 4 action was Sunday, March 24. Protestants, however, waited until Monday, March 25 to file, one day beyond the allotted 20-day filing period for appealing the decision mailed on March 4.

The *Fallston Meadows* Court rejected the Protestants' argument that the time computation prescriptions in Maryland Rule 1-203(c) guided the calculation of the statutory 20-

day appeal period, entitling them to file their appeal on Monday, March 25.⁹ As the Court explained, Maryland Rule 1-101 expressly states its time rules apply only to *matters of court in the state*, excepting certain courts (emphasis added). Consequently, the Harford County Board of Appeals is not subject to the dictates of the Maryland Rules, because the board is neither a court of competent jurisdiction nor judicial tribunal within the meaning of the Rules themselves. *Fallston Meadows*, 122 Md. App. at 697-698, 716 A.2d at 351-352.

In the instant case, Rule 1-101's express qualifying language that the Maryland Rules are inapplicable to local administrative appeals defeats Appellants' reliance on Rule 7-203 to save their petition.¹⁰ Being a rule of state court, Rule 7-203 is not applicable to an administrative appeal to the Board of Appeals Hearing Examiner. Neither the Board of Appeals nor the Hearing Examiner is a court of competent jurisdiction or judicial tribunal. The time prescribed for filing appeals for their review is governed by local regulations.

Conclusion

In this case, the governing local regulation is HCC Section 16.900(j)(2)(iii). The determinative date for purposes of this appeal is April 25, 2008, the date of the letter informing

⁹ Rule 1-203 sets forth the rules for computing the time to file all matters in all courts of this State, except the Orphans' Courts and except as otherwise specifically provided. It states:

(a) In computing any period of time prescribed by these rules, by rule or order of court, or by an applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. If the period of time allowed is more than seven days, intermediate Saturdays, Sundays and holidays are counted; but if the period of time allowed is seven days or less, intermediate Saturdays, Sundays, and holidays are not counted. The last day of the period so computed is included unless:

(1) it is a Saturday, Sunday, or holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or holiday; or

(2) the act to be done is the filing of a paper in court and the office of the clerk of that court on the last day of the period is not open, or is closed for a part of a day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, holiday, or a day on which the office is not open during its regular hours.

Appellee of the Planning Board decision to approve the FDP Second Amendment. The 30-day period to appeal ended on May 25, 2008. Because Appellants did not file their appeal until April 27, 2008, the appeal petition was filed beyond the allotted time and must be dismissed as untimely.

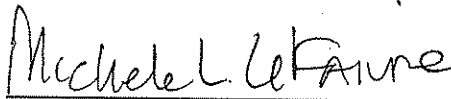
¹⁰ Appellants did not address Maryland Rule 1-101 at oral argument.

ORDER

Based upon the foregoing, it is this 27th day of October 2008, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Paul Kendall and Frank Martin in BA Case No. 639-D is hereby **DISMISSED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: 11/6/08

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.