

IN THE MATTER OF	:	:	BEFORE THE
DAVID W. ELSAESSER	:		HOWARD COUNTY
Appellant	:		BOARD OF APPEALS
v.	:		HEARING EXAMINER
PLANNING & ZONING	:		BA Case No. 763-D
Appellee	:		
v.			
LIMESTONE VALLEY FARM			In re: Interested Party Limestone Valley Farm's
Interested Party			Motion to Dismiss the Administrative Appeal of
			David W. Elsaesser re: F-18-099

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ORDER

On March 5, 2019, 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 David Elsaesser (Appellant). Appellant is appealing the Howard County Department of Planning and Zoning's (DPZ) November 14, 2018 letter informing Limestone Valley Farm that Final Subdivision Plan F-18-099 is technically complete.

William Erskine Esq. represented Interested Party Limestone Valley Farm. David Moore, Senior Assistant County Attorney, represented the Department of Planning and Zoning (DPZ). Appellant was not represented by counsel.

On February 26, 2019, Interested Party Limestone Valley Farm (LVF) motioned to dismiss BA 763-D for Appellant's lack of standing. The March 5, 2019 hearing was therefore limited to argument on the motion to dismiss.¹ Upon consideration of LVF's motion to dismiss and oral

¹ Mr. Erskine identified Limestone Valley, River Hill Square, LLC & Stephen A. Klein & Associates as movants in the motion to dismiss. However, Mr. Erskine on February 12, 2019 entered his appearance only on behalf of Limestone Valley Farm. River Hill Square and Stephen A. Klein and Associates are not interested parties to this appeal.

arguments presented at the motions hearing, the Hearing Examiner has determined to grant the motion to dismiss the administrative appeal.

Background

Interested Party LVF is the owner of property located on the southwest side of Sheppard Lane at MD 108 (Clarksville Pike) known as 5450 Sheppard Lane. By letter of November 14, 2018, the Department of Planning and Zoning informed LVF the Subdivision Review Committee determined the "Final Subdivision Plans for MD Route 108 Improvements and Sheppard Lane Re-Alignment . . . to be technically complete" subject to certain plan markups and comments in ProjectDox.

Appellant David Elsaesser resides at 5737 Whistling Winds Walk. Appellant in his timely filed BA 763-D administrative appeal petition asserts he is aggrieved since DPZ erred in approving F-18-099 with the result that the "realignment of Sheppard Lane introduces a dangerous curve into the road and limits throughput on MD 108." Appellant contends this agency action results in "traffic congestion and risk of vehicular accidents for the community." He also asks the Hearing Examiner to consider that the "site plan is not beneficial to the property owner, LVF."

Included with the appeal petition is a 13-page PowerPoint presentation entitled "Traffic, Community and Policy Issues Related to Proposed Changes to MD 108 and Sheppard Lane - Discussion with DPZ on 6 Aug July (sic) 2018. These are Appellant's main reasons for noticing the appeal (by page no.)

1. Proposed Sheppard Lane Intersection – "Cover" page
2. Proposed Sheppard Lane Intersection - Security Development Corp (SDC) the broker or owner for proposed development on adjacent property realigns Sheppard Lane for its

- benefit – not community. Realignment is solely in implement a high throughput shopping cents at River Hill Garden Center – bad for traffic flow on MD 108 schools, community
3. Proposed Sheppard Lane Intersection Bad for Community – bed is dangerous, single lane to the east is choke point on MD 108
 4. PM traffic congestion
 5. AM traffic congestion
 6. Terrain at Sheppard Lane MD 108 interstation – discussing moving realignment of Sheppard Lane ROW to the east
 7. Continuous 5 lane MD 108 to Schools and Safe MD 108 Sheppard Intersection better for traffic flow and safer for school and school buses
 8. Better Sheppard Intersection and Better MD 108 Throughput – discussing Appellant's alternative Sheppard Lane realignment to the east
 9. No Clearview Residential Impact – moving the realignment east will not cause nuisance to Clearview neighbors as developer/attorney claims
 10. Better/Safer Access by Moving Sheppard to East – safer access, removes dangerous left turn from MD 108 east
 11. 11. Policy Questions – who is advocating for rad modifications that are in the best interests of the citizens and taxpayers
 12. Community Concerns/Interest
 13. Map indicating ROW reserved for realignment of Sheppard Lane

LVF's Motion to Dismiss

LVF's motion to dismiss (MTD) asserts Appellant lacks standing to note the appeal under Howard County Code (HCC) § 16.105(a), which provides that 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 (emphasis added). The MTD argues that in line with Maryland case law, Mr. Elsaesser is not aggrieved his property being too distant from the Sheppard Lane intersection realignment and MD 108 road improvements to be prima facie aggrieved or specially aggrieved because his claims of aggrievement are "bald assertions of unsubstantiated harm and admittedly community-wide impact."

Appellant, who did not respond in writing to the MTD (and was not required to do so),

argued during the proceeding in main point that allowing the Sheppard Lane intersection realignment and MD 108 road improvements would forever fix the single-through lane in front of River Hill High School. He also argued the agency action would cause additional unsafe traffic along his road because more people would speed along Whistling Wind Lane to drop off children attending River Hill High School by the pathway leading to the school to avoid MD 108 traffic. He is concerned for the safety of his children as well the children of his neighbors.

Discussion

The right to appeal is wholly statutory in nature. *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 (1975); *Urbana Civic Ass'n v. Urbana Mobile Vill., Inc.*, 260 Md. 458, 461, 272 A.2d 628, 630 (1971)). In Howard County, the condition precedent to assert standing before the Hearing Authority from a DPZ agency action is that the person must be aggrieved. HCC § 16.105(a). Consistent with many charter counties, the Hearing Authority applies the common law definitions and tests when measuring aggrievement in zoning/land use cases.

Maryland judicial opinions have often characterized the statutory aggrieved person administrative hearing standard as “mirroring” common law principles. See *Sugarloaf Citizens' Ass'n v. Department of Env't*, 344 Md. 271, 288, 686 A.2d 605, 614 (1996) (holding “the statutory requirement that a party be ‘aggrieved’ mirrors general common law standing principles applicable to judicial review of administrative decisions”), citing *Medical Waste Assocs. v. Maryland Waste Coalition*, 327 Md. 596, 611 n. 9, 612 A.2d 241, 624 n. 9, quoting *Bryniarski v.*

Montgomery County Board of Appeals, 247 Md. 137, 143-146, 230 A.2d 289, 294 (1967); *Holland v. Woodhaven Bldg. & Development, Inc.*, 113 Md. App. 274, 687 A.2d 699, (1996).

This Hearing Examiner thus ruled in Board of Appeals Case No. 661-D (decided February 11, 2008):

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.

➤ **A Person Aggrieved**

Bryniarski, the milestone case on aggrieved person standing doctrine in appeals authorized by Maryland zoning statutes, defines the principles governing the determination of whether or not a party is sufficiently aggrieved to possess standing to appeal to a board of appeals.² 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

² *Bryniarski* offers a brief history of the legal historical origins of the “aggrieved person” standing doctrine. “The requirement that a person must be ‘aggrieved’ in order to appeal to the Board and from the Board to a court of record was originally included in the Standard State Zoning Enabling Statute and generally appears in State Zoning Enabling Acts and in municipal zoning ordinances throughout the United States. See 2 Rathkopf, *The Law of Zoning and Planning*, sections 63-14 to 63-15 (3d ed.) and particularly note 3. This requirement is contained in the Maryland Zoning Enabling Act, Code (1957), Article 66B, sections 7(d) and 7(j). The term ‘person aggrieved’ generally appears in the municipal zoning ordinances ... There have been many cases in Maryland and in other states considering the meaning of ‘a person aggrieved,’ but, apparently, the word ‘aggrieved’ has never been legislatively defined.” *Bryniarski*, 247 Md. at 143, 230 A.2d at 294.

interest therein must be such that the person is personally and specifically affected in a way different from that suffered by the public generally.” *Bryniarski*, 247 Md. at 144, 230 A.2d at 296.

Bryniarski distinguished the status of persons seeking standing as an “aggrieved person” based on the location of their property relative to the subject property (the site of the contested zoning decision). On one side of the aggrievement divide—the “standing” fence—are adjoining, confronting or nearby property owners deemed, *prima facie*, to be specially damaged and, therefore, persons aggrieved. On the other side are property owners who will not ordinarily be considered aggrieved because their property is far removed from the subject property. The proximity of the “aggrieved” property owner to the subject property determines the legal burden of proof required to acquire aggrieved person status.

The prima facie aggrievement burden of proof. The fact of a person seeking standing as an aggrieved person based on property adjoining, confronting or being nearby the subject property is presumptive evidence of special damage. “The person challenging the fact of aggrievement has the burden [of production] of denying such damage in his answer to the petition for appeal and of coming forward with evidence to establish that the petitioner is not, in fact, aggrieved.” *Id.* at 145, 230 A.2d at 294.

The burden of proof for other property owners. A person whose property is far removed from the subject must meet the burden of [production and persuasion] alleging and proving by competent evidence—either before the board or in the court on appeal if his standing is challenged—the fact that his personal or property rights are specially and adversely affected by the board's action. A person whose sole reason for objecting to the board's action is to prevent competition with his established business is not a person aggrieved (citing *Kreatchman v. Ramsburg*, 224 Md. 209, 167 A.2d 345 (1961)). *Id.*

Almost five decades later, *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 59 A.3d 545 (2013) reviewed and refined *Bryniarski*'s aggrieved person evidentiary burden as a three-tiered obligation rooted in proximity to the site of the land use decision at issue.

Prima facie aggrievement. A protestant is *prima facie* aggrieved when his proximity makes him an adjoining, confronting, or nearby property owner. When deciding whether a protestant is *prima facie* aggrieved ... proximity is the only relevant factor. The inquiry is *focused solely* on whether the protestant

is an adjoining, confronting or nearby property owner. *Id.* at 74, 83 n.6, 59 A.3d at 550 n.6 (emphasis added) (internal quotation and citations omitted).

Almost prima facie aggrieved. A person who is not an adjoining, confronting, or nearby property owner is almost prima facie aggrieved and offers “plus factors” supporting injury. Proximity is still the sole determinative factor, but courts have referenced additional claims of aggrievement in specific cases to support their holding. *Id.*

A “nebulous” third category of aggrievement. Recognized only in dicta, this “poorly-defined category” may include protestants with standing who, despite being “far removed from the subject property,” may nevertheless be able to establish “the fact that his personal or property rights are specially and adversely affected by the board's action.” Although this point has been repeated in other cases ... we have found no instance in which the Court held that a person who was far removed from the site of rezoning actually qualified as “specially aggrieved.” *Id.* at 85-86, 59 A.3d at 552 (internal citations and emphasis removed).

Critically, the *Ray* decision, while not a “regime change” contravening stare decisis (the doctrine of precedent by which courts adhere to judicial principles laid down in prior decisions), firmly and narrowly reframed the burden of proof evidentiary obligations of persons seeking aggrieved status. Proof of sufficient proximity is the most important obligation. *Id.* at 84, 59. A.3d. at 500. The new “almost prima facie” aggrieved category applies to protestants nudging up against the “adjoining, confronting or nearby” standard of *prima facie* aggrievement, and generally applies to persons living 200 to 1000 feet away from the subject property if they allege specific facts of their injury (“plus factors”). In other words, once sufficient proximity is shown, some typical allegations of harm acquire legal significance that would otherwise be discounted. But in the absence of proximity, much more is needed. *Id.* at 91-92, 59 A.3d at 555-56 (internal citations omitted).

The *Ray* Court’s insistence on evidentiary rigor in cases where a protestant’s standing is contested has roots in the “law of standing” principle that persons alleging aggrievement must

offer facts establishing a direct nexus between their claim of special harm that directly affects their properties and the government action under challenge.

➤ **The Aggrievement Tests as Applied to Appellant David Elsaesser**

According to the map included with the MTD, Appellant's property lies some 695 feet from the closest point of the F-18-099 MD 108 road improvements and some 890 feet from the Sheppard Lane realignment at MD 108. LVF contends that this distance and the presence of year-round vegetation and foliage, existing improvements, and the topography, the development areas under F-18-099 means that the Sheppard Lane realignment and MD 108 improvements are not within the "sight or sound" of the Elsaesser Property. Appellant argued during the proceeding that he might be able to see cars at certain times of the year when there is less tree foliage.

As a simple matter of proximity, Appellant is not prima facie aggrieved. Although Appellant lives within 200 to 1000 feet away from the subject property Mr. Elsaesser failed to allege specific facts – plus factors – of an injury to accord him "specially aggrieved" status. In other words, once sufficient proximity is shown, some typical allegations of harm acquire legal significance that would otherwise be discounted. As *Ray* instructs, absent proximity much more is needed. *Id.* at 91-92, 59 A.3d at 555-56 (internal citations omitted). None of the arguments in the 13-point PowerPoint supplement included with the petition allege specific facts supporting special aggrievement status. Appellant having failed to allege specific facts to support "specially aggrieved" standing status, Appellant lacks standing to notice this appeal. While the Hearing Examiner empathizes with him about his children's safety, his claim that the improvements will increase unsafe traffic on his street because more people will drop off students along his street

is too attenuated to accord him standing as a person specially aggrieved. Without a showing of any aggrievement, Appellant has not met even the thinnest aggrievement threshold, *Ray's* nebulous third category of aggrievement.

Even more, Appellant's main concern with the agency action is its effect on the community. But as the *Ray* court instructs us, general allegations of harm having a common effect upon the public are insufficient to show aggrievement.

A Final Note

Had Mr. Elsaesser had standing to appeal, the hearing on the merits of the appeal would have been limited to the legal sufficiency of the agency action going to DPZ's technical completeness determination under the substantial evidence test. As a matter of law, Mr. Elsaesser could not use the merits hearing to press his interest in an alternative alignment of Sheppard Lane or a reconfigured MD 108.

ORDER

Based upon the foregoing, it is this **15th Day of April 2019**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the BA 763-D administrative appeal of David Elsaesser is hereby **DISMISSED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

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.

In accordance with C.B. 51-2016, § 1 (HCC Sec. 22.902 - Computation of time), if the deadline to appeal is a Saturday, Sunday, or holiday, or if the County offices are not open, the deadline shall be extended to the end of the next open County office business day.