

HOWARD COUNTY CODE

RULES OF PROCEDURE OF THE BOARD OF APPEALS

SECTION 2.200. GENERAL.

These 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 County Code; and the Howard County Zoning Regulations. For further information and assistance, applicants may consult the Department of Planning and Zoning. [See Appendices A and B for cross-referenced requirements.]

SECTION 2.201. ORGANIZATION.

(a) Chairperson; Vice Chairperson. Each January the members shall designate one member to be a chairperson and one member to be a vice chairperson. The vice chairperson shall assume the chairperson's duties if the chairperson is absent or incapacitated. The chairperson shall schedule hearings and meetings, issue summonses and subpoenas, and rule on procedural matters.

(b) Quorum. A majority of the Board of Appeals, i.e. at least three members, constitutes a quorum. A quorum shall be present before the Board can hold a meeting or hearing.

(c) Voting. The same members of the Board who were present at the hearing shall make the decision on the case, provided that any member who was absent during any portion of the hearing or who was appointed after the hearing commenced shall be considered present for voting purposes and may vote if the member certifies in writing that the member reviewed all of the evidence submitted and listened to a recording of the portion of the hearing for which the member was not present. A decision shall have the concurrence of the majority of all members of the Board. A member who was absent during any portion of the hearing or who was appointed after the hearing commenced shall vote as provided in this paragraph if necessary to achieve the number of votes needed to render a decision unless the member recuses himself for cause. Failure to achieve the necessary affirmative votes shall result in the dismissal of the case.

Need to clarify a tie is a denial. And there are no revotes nor in hearing reconsiderations.

(d) Clerk of the Board. The Director of Planning and Zoning or the Director's designee shall be the clerk of the Board of Appeals. The clerk of the Board shall be the custodian of the records of proceedings, shall accept petitions, motions and correspondence to the Board, and shall maintain the docket in each case. **Please correct the designee**

(e) Secretary. The Board of Appeals may appoint a secretary who shall record the proceedings, draft and maintain the minutes of Board meetings, and perform other secretarial duties as assigned by the Board.

(f) Administrative Assistant. The Board may appoint an administrative assistant who shall perform administrative duties as assigned by the Board.

(g) Legal Advisor. The County Solicitor shall be the legal advisor and draftsman for the Board of Appeals. The County Solicitor shall attend all meetings of the Board unless excused

by the chairperson. The County Solicitor shall provide advice and assistance to any member desiring to publish an independent or minority opinion. With the approval of the chairperson, the County Solicitor may delegate these duties to an Assistant County Solicitor.

SECTION 2.202. PETITIONS.

(a) Form and Contents of Petitions. The Board of Appeals shall prescribe the form and contents of petitions. A Petitioner shall obtain the petition from the Department of Planning and Zoning. The Petitioner shall ensure the accuracy and completeness of the information required in the petition. The petition shall be filed with the clerk of the Board, as defined under 2.201(c). The Department of Planning and Zoning may require corrections to the petition or additional information before the hearing on the petition is scheduled.

The Board has been lax and inconsistent in applying this rule

(b) Amendments to the Petition. If any amendments to the petition are made before or during a hearing, the Board, either before or during the hearing, may continue the hearing, or may suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning and the Planning Board for further recommendations.

The Board has been lax and inconsistent in applying this rule

(c) Substantive Amendments to the Petition. If any substantive amendments to the petition are made before or during the hearing, the Board, either before or during the hearing, shall suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning and the Planning Board for further recommendations.

The Board has been lax and inconsistent in applying this rule

(d) Dismissal. The Board shall dismiss a petition if it lacks jurisdiction to hear the petition. The Board may dismiss a petition if the Petitioner fails to request a hearing on the petition within six months of the date a petition is placed on the unscheduled docket or as set forth in section 2.204(h).

(e) Payment of Fees. At the time the petition is filed with the clerk of the Board, the Petitioner shall pay the filing and/or hearing fees in accordance with the current schedule of fees adopted by resolution of the County Council. Checks shall be made payable to the Director of Finance of Howard County.

(f) Refund of Fees. On its own motion and with sufficient cause, the Board may order the Director of Finance to refund the filing and/or hearing fees. If the Board of Appeals reverses the decision of an administrative agency after an appeal hearing pursuant to this subtitle, the Board shall order the Director of Finance to refund all administrative hearing and filing fees to the Appellant.

SECTION 2.203. NOTICE TO THE PUBLIC.

(a) Advertising. The Petitioner, at his or her own expense, shall advertise the date, time and place of the initial hearing in at least two newspapers of general circulation in Howard County. For variances in residential districts, the advertisement shall be published at least fifteen

days before the hearing. For all other petitions, the advertisement shall be published at least thirty days prior to the hearing. The Department of Planning and Zoning shall approve the proposed advertising before it is published. **This requirement should provide for electronic notification instead.**

(b) Posting of Property. Except in administrative appeals described in Section 2.203(d), if a petition involves land use, the property involved shall be posted with the time, date and place of the initial hearing. For variances in residential districts, the property shall be posted for at least fifteen days immediately before the hearing. For all other petitions, the property shall be posted for at least thirty days immediately before the hearing. The Department of Planning and Zoning shall determine the number of posters required and their location and the Petitioner shall bear the expense of posting. The Department of Planning and Zoning shall supply the posters. The Petitioner shall properly erect and maintain the posters.

Additional notification requirement for all property adjoining property owners.

(c) Filing Affidavit of Posting and Certificates of Advertising. The Petitioner shall file certificates of advertising and an affidavit of posting with the clerk of the Board or the secretary of the Board prior to the hearing.

(d) Hearings on Administrative Appeal From a Notice of Violation of County Laws or Regulations or on the Record. The advertising and posting requirements of this section do not apply to hearings on administrative appeals from a notice of violation of county laws or regulations or appeals heard on the record pursuant to Section 2.210(b).

(e) Hearings on Other Administrative Appeals. If the Petitioner cannot post the property because the Petitioner does not own the property, then the Petitioner shall send a copy of the petition and written notification of the place, time and date of the hearing to the property owner and the adjoining property owners, and shall file an affidavit of written notification with the clerk of the Board. The Petitioner shall comply with the advertising requirements.

See Above

(f) Hearings for Clarification or Revocation of a Special Exception when the Department of Planning and Zoning is the Petitioner. When the hearing is for clarification or revocation of a special exception and the Department of Planning and Zoning is the Petitioner, the Department of Planning and Zoning shall: **Add Conditional Use**

- (1) Advertise the date, time and place of the initial hearing at least thirty days before the hearing in at least two newspapers of general circulation in Howard County;
- (2) Send written notification of the place, time and date of the hearing to the adjoining and confronting property owners; and
- (3) Attempt to post the property.

(g) Responsibility for Assuring Compliance with Advertising and Posting Requirements. The Petitioner is responsible for assuring compliance with the advertising and posting requirements of this subtitle. If any question arises regarding compliance with the advertising and posting requirements, the burden is on the Petitioner to prove compliance. If the

Board determines that the Petitioner has made a good faith effort to comply with the advertising and posting requirements, the Board may give the Petitioner a reasonable opportunity to correct the non-compliance or, if the Board determines that the Petitioner has substantially complied with the public notice requirement, proceed with the hearing. If the Board determines that the Petitioner has not made a good faith effort to comply with the advertising and posting requirements, the Board may dismiss the petition.

SECTION 2.204. MEETINGS AND HEARINGS.

(a) Scheduled by Chairperson. The Board of Appeals shall hold meetings and hearings as scheduled by the chairperson, including preliminary hearings when the chairperson deems them necessary.

(b) Open to Public. The public is invited to attend Board of Appeals meetings and hearings. The individuals attending shall maintain order and refrain from disturbing the orderly process of the meeting or hearing. The chairperson may clear the room of disruptive individuals, or recess the meeting or hearing.

(c) Open Hearings. Evidence shall be presented to the Board of Appeals only in hearings open to the public. The Board shall not receive written or oral testimony from a party in interest outside of a hearing. Board members and the Board's staff shall not engage in communications of any kind with anyone other than Board counsel or staff, or another Board member regarding the merits of a case prior to the issuance of the decision and order.

(d) Place and Time of Hearings and Meetings. Board of Appeals hearings and meetings shall be held in the George Howard Building, Ellicott City, Maryland every Tuesday and Thursday at 7:30 p.m. unless the Chairperson schedules the hearing or meeting at a different date, time and place. Meetings of the Board of Appeals to deliberate cases and for other matters may be held from time to time, as determined by the Board. Notice of a meeting or hearing shall be posted at the Board's office in the George Howard Building one day prior to the meeting or hearing.

(e) Closed Meetings. The Board of Appeals may close a meeting, subject to the Maryland Open Meetings Act.

Should include procedures to close meeting i.e. closing statement and objections.
Need to Add clarification about the legal advice exception. A policy statement should be added affirming the Board's commitment to open meetings. Legal advice should be public.

(f) Signing Up to Testify. All individuals who are called to testify or desire to testify at a hearing shall sign their own name to the roster in favor of or opposed to the petition before the Board, as the case may be. If a hearing is continued, only the individuals who have signed a roster prior to the end of the Petitioner's case or are called by the Petitioner in rebuttal shall be permitted to testify. *This needs to re-worked. This has been abused in the past to exclude probabtive testimony.*

(g) Subsequent Hearings. Cases which have not been concluded at the initial hearing may be continued to a day and time announced by the Board immediately before the initial hearing is suspended. It shall not be necessary to readvertise a continued hearing or repost property.

(h) Postponement. All requests for postponement of the initial hearing date must be received by the Board of Appeals in writing, before the scheduled date of the initial hearing. No requests for postponement of a hearing shall be granted absent compelling circumstances. If a hearing is postponed, the Petitioner shall readvertise and repost the property with the new hearing date and time in accordance with these rules. Upon a third request for postponement of a hearing, the Board may dismiss the petition.

(i) Correspondence. A party filing written correspondence with the Board shall certify in writing that a copy of the correspondence has been served to all parties of record to the case or to their designated spokesperson. The Board may not consider the correspondence as evidence and shall return it if it is not accompanied by that written certification.

Need to add requirement for Board to substantively take up and respond.

(j) Cases Pending in Court. The Board shall not hold a hearing on a petition involving substantially the same issues of a case that has been filed and is pending before a court of law. A hearing may be scheduled when the Board is advised by the Petitioner that the court has reached a final decision. The hearing shall be scheduled at the earliest possible date.

SECTION 2.205. RECORD OF HEARINGS.

(a) Official Record. The Board of Appeals shall maintain an official record of its proceedings in each case. This record shall include all testimony and exhibits and a recording of the proceedings.

(b) Transcription of Testimony. Transcriptions of testimony shall be made if requested for court review. The transcribed testimony may be obtained from the secretary of the Board upon payment in advance of the cost of transcribing the record. The transcriber shall certify the accuracy of any transcript. The County Council shall prescribe by resolution the specifications for transcript preparation and a reasonable fee to be charged for the costs of transcription and certification.

SECTION 2.206. ADMINISTRATIVE APPEALS.

An individual wishing to appeal an administrative decision of a county agency shall file an appeal on the petition provided by the Department of Planning and Zoning within thirty days of the date of that administrative decision, unless the law provides a different time period for appeal.

Need to establish dating standards for Departments and define final decisions and require consistency with Hearing Examiner

SECTION 2.207. EVIDENCE AND MOTIONS.

(a) Pre-submission of Technical Reports. Any Petitioner or Proponent wishing to submit a technical report or other similar documentary evidence to the Board at the hearing must file six copies of the report with the clerk of the Board at least thirty days prior to the date of the initial hearing on the petition. Any Opponent or Respondent wishing to submit a report or other similar documentary evidence to the Board at the hearing shall file six copies of the report with the clerk of the Board and send one copy to the Petitioner at least ten days prior to the date of the initial hearing on the petition. If technical reports are filed late, the Board may postpone the

hearing to allow the Board members or other parties time to review the report, or take any other course of action as determined by the Board. Even if the report or other documentation is timely filed, the Board reserves the right to postpone the hearing and to require additional copies of the material for technical staff review. **Need to affirmatively prohibit "Bench Memorandums."**

(b) Rules of Evidence. Any evidence which would be admissible under the rules of evidence applicable in judicial proceedings in the State of Maryland shall be admissible in hearings before the Board of Appeals. The Board is not bound by the technical rules of evidence but will apply those rules so that probative evidence may be conveniently brought forth. The Board may exclude immaterial or unduly repetitious testimony and other evidence and may limit the number of witnesses when testimony is cumulative in nature.

The Board has a long history of prejudicial conduct in the admission of evidence. Need to add an affirmative statement emphasizing the Board's commitment to fundamental fairness.

(c) Materials Received by Reference. Public records, previous decisions and orders of the Board of Appeals, technical staff reports, Planning Board recommendations and laws and regulations of Howard County which pertain to the particular case shall be received by the Board of Appeals for its consideration. **Who puts this in the record? The Clerk, Legal advisor?**

(d) Exhibits. Exhibits and plats admitted into evidence may not be mounted and shall be folded to a maximum size of nine inches by fourteen inches. An exact duplicate of the exhibit may be mounted and used for presentation.

(e) Motions. A party may request the Board to address a preliminary matter prior to the date of the initial hearing by filing the request as a motion to the Board and certifying that a copy was provided to all persons known to have an interest in the case, including but not limited to the Petitioner, the property owner, the administrative agency, and any person entitled to written notification under rule 2.203(e) and (f), as the case may be. The certification shall state "any person interested in responding to the motion shall file a written response with the Board within fifteen days of the date that the motion was filed." The Board may rule on the motion at any time fifteen days after the filing of the motion. **Add an affirmative statement that all motions must be heard. The Board has a history of prejudice, hearing some motions and refusing to hear others.**

SECTION 2.208. APPEARANCES BEFORE THE BOARD OF APPEALS.

(a) Parties. Except for administrative appeals described in subsections (b) and (c), an individual or any other legal entity may become a party to a proceeding before the Board by:

- (1) Providing the name, address and signature of the individual or entity and the legal entity's duly authorized representative on a sign-up sheet provided by the Board;
- (2) Testifying before the Board and providing it with the name and address of the party and/or legal entity; or
- (3) Delivering a letter to the Board, received before the close of the record in the case, indicating that the individual or entity is an interested party to the matter before the Board and providing the party's name, address and signature. Such letter may not be considered for any substantive content and will be received into evidence only for identification of parties to the case. In addition, petitions for or against a

matter shall not be used for purposes of conferring party status on those individuals signing the petition under this provision.

(b) Parties to Administrative Appeals From Notice of Violation. Parties to an administrative appeal from the issuance of a notice of violation of county laws or regulations are limited to the Petitioner and the administrative agency issuing the violation notice.

(c) Parties to Administrative Appeals on the Record. Parties to an administrative appeal to be heard by the Board on the record pursuant to section 2.210(b) are limited to the administrative agency and the parties of record before the administrative agency.

(d) Who May Appear. The following individuals may appear before the Board providing that the individual, partnership, corporation, trust, association, political subdivision, body or department they represent is a party to the proceedings before the Board:

- (1) An individual may appear on his or her own behalf.
- (2) A member of a partnership may represent the partnership.
- (3) A duly authorized representative of a corporation, trust, or association may represent the corporation, trust, or association.
- (4) A duly authorized representative or employee of a political subdivision, body, or department may represent the political subdivision, body, or department.

(e) Spokesperson. When a group of individuals appears in opposition to a petition, the Board may request them to elect a spokesperson who shall have the power to cross-examine witnesses, call witnesses, introduce evidence on behalf of the group, object to the introduction of evidence, make opening and closing statements, and act in a representative capacity solely on behalf of those individuals electing the spokesperson. Those individuals not electing to be represented by a spokesperson may act on their own behalf.

(f) Representation by Attorney-at-Law. Any party in a proceeding may be represented by an attorney-at-law admitted to practice law before the Court of Appeals of Maryland. Before the hearing begins the attorney shall give the Board written notification of the names and addresses of individuals he or she will be representing and his or her own name, address, and telephone number.

(g) Representatives of Associations; Number of Members; Geographical Limits. An individual testifying on behalf of any association shall substantiate that he or she is authorized to speak for and present the views of that association. The authorization may consist of a duly adopted resolution of the association signed by the president or attested by the secretary. The individual testifying shall state the number of members in the association and its geographic boundaries.

Need to add an extensive section on standing. Create a procedure to establish standing at the Hearing Examiner level. The Board has a long history of prejudice and abuse of the public trust.

(h) Subpoenas.

- (1) Request for Subpoena; Content of Request. Persons requesting the Board to issue a subpoena shall submit a written request to the Board at least twenty-one days before the initial hearing. The request shall contain the name and address of the person to be subpoenaed, a brief proffer as to the content and relevance of the person's expected testimony, and a list of all documents to be brought to the hearing by the subpoenaed person. The subpoena shall be issued by the Board at least fourteen days prior to the date of the hearing.
Need an affirmative statement committing to fairness. Board has often been bias in granting and denying subpoenas
- (2) Issuance and Service of Subpoena. The subpoena shall be signed by the chairperson of the Board at least fourteen days prior to the date of the hearing. The signed subpoena shall be promptly delivered to the person requesting the subpoena who shall be responsible for arranging service of the subpoena at least seven days prior to the date of the hearing. The person serving the subpoena shall certify in writing that the subpoena was served personally or by certified mail.

SECTION 2.209. CONDUCT OF BOARD OF APPEALS HEARINGS; ORIGINAL JURISDICTION.

(a) Oath. An individual testifying shall give his or her name and address and take the following oath given by the chairperson: "Do you solemnly promise to speak truthfully in the testimony you are about to give?"

(b) Order of Presentation.

- (1) The County Solicitor introduces reports and official documents pertaining to the case.
- (2) Opening statements.
- (3) Petitioner's presentation.
 - (i) Direct examination of witnesses.
 - (ii) Cross-examination of witnesses by the opposition, by Board members and by the County Solicitor.
 - a. *Individuals questioning the Petitioner's witness.* Normally, the opposition or a spokesperson cross-examines, but any individual wishing to question the Petitioner's witness may do so with leave from the chairperson. The chairperson may grant this leave after recognizing the individual who wishes to question the Petitioner's witness and after that individual has given his or her name, home address, and, if appropriate, its location with reference to the property which is the subject of the hearing.

- b. *Questioning.* Questioning shall be brief, pertain only to statements made by the witness, and shall not be preceded by statements or speeches. The questioning shall be interrogatory in nature and shall not be argumentative, nor make allusions about the personality or motives of the witness. At the discretion of the chairperson, questions or cross-examination shall be put in written form and asked by the County Solicitor or Assistant County Solicitor advising the Board.
 - (iii) Re-direct examination of Petitioner's witnesses.
 - (iv) Re-cross-examination of Petitioner's witnesses.
- (4) Opposition's presentation.
 - (i) Direct examination of opposition's witnesses.
 - (ii) Cross-examination of opposition's witnesses by the Petitioner, by the Board members, and by the County Solicitor.
 - (iii) Re-direct examination of opposition's witnesses.
 - (iv) Re-cross-examination of opposition's witnesses.
- (5) Petitioner's rebuttal. The Petitioner may present evidence to rebut any evidence introduced by the opposition, but no new line of testimony may be introduced at this time.
- (6) Petitioner's summation.
- (7) Opposition's summation.

(c) Burden of Proof. The burden of proof is one of a preponderance of the evidence and is on the Petitioner to show, by competent, material and substantial evidence, that he or she is entitled to the relief requested and that the request meets all prescribed standards and requirements.

(d) The Board's Action. At the end of the presentation, the Board of Appeals may grant or deny the petition, stating its findings of fact and conclusions of law, or it may take the case under advisement for further deliberation and later decision. The Board may not consider evidence from either side after the hearing is concluded; however, the Board, on its own initiative or in response to a request by a party, may receive or require legal memoranda summarizing the presentations of the Petitioner and the opposition.

SECTION 2.210. CONDUCT OF ADMINISTRATIVE APPEAL HEARINGS.

(a) De Novo Appeals.

- (1) Oath. An individual testifying shall give his or her name and address after taking the following oath given by the chairperson: "Do you solemnly promise to speak truthfully in the testimony you are about to give?"
- (2) Order of presentation.
 - (i) The County Solicitor or Assistant County Solicitor advising the Board introduces reports and official documents pertaining to the case.
 - (ii) Opening statements.
 - (iii) Presentation by party(ies) having the burden of proof ("proponent").
 - a. Direct examination of witnesses.
 - b. Cross-examination of witnesses by adverse party(ies) ("respondent"), by Board members, and Board's attorney.
 - c. Re-direct examination.
 - d. Re-cross-examination.
 - (iv) Presentation by the respondent.
 - a. Direct examination of witnesses.
 - b. Cross-examination of witnesses by proponent, by Board members, and Board's attorney.
 - c. Re-direct examination.
 - d. Re-cross-examination.
 - (v) Proponent's rebuttal.
 - (vi) Summation by proponent.
 - (vii) Summation by respondent.
- (3) Legal memoranda. The Board may receive or require legal memoranda summarizing the presentations of the parties, either on its own or upon approval of a request made at the hearing.

- (4) Burden of proof.
- (i) In an appeal of an administrative agency's issuance of a notice of violation of county laws and regulations, the burden of proof is upon the administrative agency (proponent) to show, by a preponderance of the evidence, that the respondent has violated the laws or regulations in question. However, it shall be the respondent's burden to prove all affirmative defenses, including the defense of nonconforming use.
 - (ii) In all other *de novo* appeals, the burden of proof is upon 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.

(b) Appeals on the Record.

- (1) Record Transcript. Within thirty days of filing an appeal on the record from an action of an administrative agency, the Appellant shall file one copy of the record transcript of the hearing being appealed with the clerk of the Board, and shall serve one copy of the record transcript with the administrative agency and five copies with the Board of Appeals.
- (2) Memorandum of Appellant. Within fifteen days of filing the transcript, the Appellant shall file a memorandum setting forth concisely all points on which the appeal is based and an argument in support of each point with the clerk of the Board, and serve one copy of the memorandum with the administrative agency and five copies with the Board of Appeals. The argument shall include:
 - (i) Points of law;
 - (ii) References to legal authority;
 - (iii) Page citations to particular portions of the record transcript; and
 - (iv) Exhibits by number.
- (3) Administrative Agency's Reply Memorandum. Within fifteen days after the Appellant's memorandum is filed, the administrative agency shall file a reply memorandum with the Board. The memorandum shall answer concisely all points on which the appeal is based and an argument against each point. The arguments shall include:
 - (i) Points of law;
 - (ii) References to legal authority;
 - (iii) Page citations to particular portions of the record transcript; and
 - (iv) Exhibits by number.
- (4) Sanctions for Late Filing of Memorandum. If the Appellant fails to file the memorandum within the time prescribed under this section, the Board may dismiss the appeal.

- (5) Oral arguments. The Board shall entertain oral arguments based upon the record. The Board may limit the length of oral arguments. For good cause shown, the Board may receive additional evidence. The order of presentation shall be as follows:
- (i) Presentation of the reports and decision of the county agency by the Appellant.
 - (ii) Presentation by the Appellant.
 - (iii) Presentation by the county agency or Solicitor.
 - (iv) Presentation by the Opposition.
 - (v) Decision by the Board
- (6) Burden of Proof. The burden of proof shall be 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.
- (c) **The Board's Action.** The Board may dismiss the administrative appeal or may affirm, reverse, or modify the agency's action, remand the action to the agency for further proceedings, or an appropriate combination of the above.
The Board cannot remand with an order to grant.

SECTION 2.211. DECISION AND ORDER.

(a) **Time Period of Issuance of Decision and Order.** Each case shall be decided and a decision and order issued no later than sixty days after the case is deliberated, unless the Board on its own motion and with good and sufficient reason, extends the time to no later than ninety days after the Board concludes its deliberation of a case.

(b) **Decision and Order.** The final decision and order of the Board granting or denying the petition shall be in writing, signed by the voting Board members, attested by the administrative assistant or the secretary, and shall be accompanied by findings of fact and conclusions of law. The decision and order shall be made a part of the record of the proceedings, filed with the Department of Planning and Zoning, and maintained as part of the official records of the county.

More specificity. D&Os are often lacking in establishing the facts.

(c) **Minority Opinion.** Any member who does not agree with the majority opinion may prepare a minority opinion to be attached to the Decision and Order.

(d) **Mail Copies to Parties; File Plats or Summaries.** When the clerk receives copies of the decision and order, the clerk shall mail copies to the parties or their representatives. After a land use petition is granted by the Board, the Department of Planning and Zoning shall file plats or summaries, provided by the Petitioner, with the Howard County office of the Maryland State Department of Assessments and Taxation.

(e) **Appeals from Decision 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.

SECTION 2.212. REVISORY POWER OF THE BOARD.

(a) Request of a Party. Within fifteen days of the Board issuing a decision and order, a party of record may file a motion for reconsideration. The Board may revise its decision and order if the party petitioning for reconsideration establishes mistake of fact or mistake of law. The motion for reconsideration may include a request to suspend the decision and order.

Not Permitted in hearing

(b) Process. The motion shall be in writing. The moving party shall mail or deliver a copy of the motion to each party and certify to the Board that notice to each party has been provided. Any party of record may file a written response to the motion for reconsideration within fifteen days of the filing date of a motion for reconsideration. At the discretion of the Board, oral argument may be heard on the motion. The Board shall not consider new or additional evidence unless such evidence could not reasonably have been presented at the hearing. If the Board determines to revise its decision and order, the Board shall send a copy of the revised decision and order to each party.

(c) Correcting Clerical Error. At any time and without prior notice or hearing, on its own initiative or on motion of any party, the Board may modify its decision in order to correct a clerical error.

(d) Time for Appeal to Circuit Court. The filing of a motion for reconsideration does not suspend the time for filing an appeal to Circuit Court unless the Board suspends its decision and order. Once an appeal to the Circuit Court is filed, the Board no longer retains jurisdiction to suspend its decision and order or to consider a motion for reconsideration.

SECTION 2.213. SEVERABILITY.

If any clause, sentence, part or parts of this subtitle, or of any section of this subtitle, is held to be unconstitutional or invalid, the unconstitutionality or invalidity shall not affect the validity of the remaining parts of this title or of any section.

Appendix A

HOWARD COUNTY CHARTER

ARTICLE V. BOARD OF APPEALS

SECTION 501. THE COUNTY BOARD OF APPEALS.

(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 Procedures Act, Article 41](#), 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 matters which come before the Board pursuant to its exercise of original jurisdiction shall receive a de novo hearing on all issues. Those matters coming before the Board pursuant to an appeal from an executive, administrative or adjudicatory order wherein a formal hearing was held and a verbatim record developed shall be reviewed by the Board on the basis of the record before it. However, for good cause shown, any party before the Board shall have the opportunity to present additional evidence on any issue if, in the opinion of the Board, it is required for proper disposition of the case. 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.

Appendix B

HOWARD COUNTY CODE

TITLE 16. PLANNING, ZONING AND SUBDIVISIONS AND LAND DEVELOPMENT REGULATIONS SUBTITLE 3. BOARD OF APPEALS

SECTION 16.300. COMPENSATION.

Members of the Howard County Board of Appeals shall be paid \$4,500 per year plus \$90 per official public session, up to a maximum cumulative total payment of \$12,900 per year. Members of the Board shall receive reasonable and necessary expenses, as may be provided in the budget.

SECTION 16.301. POWERS.

The Howard County Board of Appeals shall have the following zoning powers:

- (a) To authorize a variance or exception from the terms of the zoning regulations as is necessary to avoid arbitrariness and to obtain substantial justice within the spirit of the zoning regulations. However, the County Council, by passage of a resolution after public hearing, shall be the sole authority to grant these variances for governmental uses of land.
- (b) To 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.
- (c) To authorize uses provided by the zoning regulations. The Board of Appeals shall not make a final decision on uses authorized by the zoning regulations until it has considered the report of the Planning Board. However, the County Council, by passage of a resolution after public hearing, shall be the sole authority to issue special use variances for governmental uses of land.

SECTION 16.302. ENFORCEMENT.

In addition to any other remedies provided by law, the Department of Planning and Zoning may institute any appropriate action or proceedings to compel compliance with a decision of the Board of Appeals in any zoning matter. Alternatively or in addition to and concurrent with all other remedies, the Department of Planning and Zoning may enforce a decision of the Board of Appeals. With civil penalties, as provided in title 24, "Civil Penalties," of the Howard County Code. A violation shall be a class B offense.

SECTION 16.303. SEVERABILITY.

If any clause, sentence, part or parts of this subtitle, or of any section thereof, shall be held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the validity of the remaining parts of this title or of any section thereof.

January 23, 2020

VIA First Class and Electronic Mail:

The Honorable Deb Jung, Chairperson,
Howard County Council
Howard County, Maryland
3430 Courthouse Drive
Ellicott City, MD 21043

Subject: **Howard County Board of Appeals multiple violations of the Maryland Open Meetings Act 14 Official Opinions of the Compliance Board January 8, 2020**

Dear Chairperson Jung:

The undersigned Howard County Citizens individually and in their capacities as officers of several Community and Civic Associations of Howard County are writing to urge the County Council to order an investigation into violations of the Open Meetings Act by the Howard County Board of Appeals as found by the Maryland Office of the Attorney General's, Open Meeting Compliance Board (the "OMCB").

The Opinion, a copy of which along with the complaints, yes plural, and the County's responses are attached and enclosed, found that the Board failed to: 1.) keep minutes of their deliberations; 2.) ignored or omitted matters before them for consideration; and 3.) since there were no minutes they could not formally adopt them in subsequent sessions, as required by law or post nonexistent minutes and make them available to the public, again as required by law.

We believe this is a very serious matter and have grave concerns that Howard County Citizens may have been denied their entitled rights to due process. It appears the failure to minute Board deliberations commenced sometime in 2015. In their Opinion, the OMCB wrote:

"...Here however we are startled, especially in light of the training requirement, that such a longstanding public body simply stopped complying with two longstanding and basic requirements of the Act and also chose not to comply with a third more recent requirement."

Under the Maryland Open Meetings Act, the OMCB was established to provide guidance and support to the State's many Boards and Commissions, it does not employ investigators, nor does it have punitive powers beyond the acknowledgement requirement that compels the violating Board to own up to its violation in an open public hearing and have the Board members admit their violations by signing an acknowledgement form.

In view of the limited powers and capabilities of the OMCB, we believe it is in the Public Interest for the Council to conduct a full investigation of this serious breach of the public trust by what is perhaps the most powerful County Board. The Office of Law obviously cannot

January 23, 2020

The Honorable Deb Jung, Chairperson

The Howard County Council

Subject: Board of Appeals Open Meetings Act Violations Investigation Request

investigate itself. Accordingly, to avoid the appearance of or an actual conflict, the Council should retain an outside independent counsel to conduct this investigation.

The scope of this investigation should include a thorough review of all cases heard from 2015 to present to determine if the rights of any parties were violated, and if so, what remedies are available in the law regarding procedural requirements, such as remand or rehearing. Second, the Office of Law's responses should be reviewed to determine if misrepresentations were made to the OMCB and third, Board members and their counsel should be requested to explain why the Board as the OMCB said: "*simply stopped complying with two longstanding and basic requirements of the Act.*"

It is imperative that procedures be implemented to ensure that this never happens again and that citizen's rights to due process are guaranteed by Howard County. We also hope that an investigation may provide more details that would aid an effort to provide better enforcement of the Open Meetings Act, and perhaps legislation with repercussions for non-compliance. Given the gravity of this matter we would hope and expect that the Council formally respond to this request in a timely manner.

Respectfully Submitted,



Howard County Citizens Association

By: *Stuart N. Kohn, President*

[ADDITIONAL SIGNATORIES CONTINUE ON PAGE 3, 4 AND 5]

Enclosure

[ADDITIONAL RECIPIENTS CONTINUE ON PAGE 6]

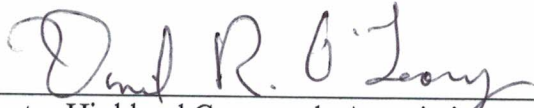
January 23, 2020

The Honorable Deb Jung, Chairperson

The Howard County Council

Subject: Board of Appeals Open Meetings Act Violations Investigation Request

[ADDITIONAL SIGNATORY]

A handwritten signature in cursive script that reads "Dan R. O'Leary". The signature is written in dark ink and is positioned above a horizontal line.

Greater Highland Crossroads Association

By: DAN O'LEARY, CHAIR

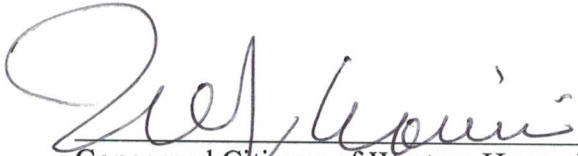
January 23, 2020

The Honorable Deb Jung, Chairperson

The Howard County Council

Subject: Board of Appeals Open Meetings Act Violations Investigation Request

[ADDITIONAL SIGNATORY]



Concerned Citizens of Western Howard County

By: THEODORE F. MARIANI, Pres.

January 23, 2020

The Honorable Deb Jung, Chairperson

The Howard County Council

Subject: Board of Appeals Open Meetings Act Violations Investigation Request

[ADDITIONAL SIGNATORY]



The People's Voice

By: Lisa MARKOVITZ, President

LAWRENCE J. HOGAN, JR.
Governor

BOYD K. RUTHERFORD
Lt. Governor



APRIL C. ISHAK, ESQ.
CHAIR

NANCY McCUTCHAN DUDEN, ESQ.
PATRICK S. MEIGHAN, ESQ.

STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

14 Official Opinions of the Compliance Board 3 (2020)

Howard County Board of Appeals

January 8, 2020

This opinion follows close on the heels of 13 *OMCB Opinions* 65 (2019), which involved allegations by the same complainant that the Howard County Board of Appeals had violated the Act by failing to audio-record the portion of a hearing in which the County Board deliberated on its decision and by failing to provide adequate minutes. Responding to that complaint on the County Board's behalf, the County Attorney asserted as to the first allegation that the Act does not require public bodies to audio-record their meetings. Indeed, the Act indeed does not so require, so we found that the County Board did not violate the Act in that regard. *Id.* Regarding the second allegation, the County Board provided us with an untitled document that the response described as "written minutes" and that contained the information required by the Act. On that issue, we stated: "Assuming that the County Board adopted that document as minutes, we conclude that the County Board did not violate § 3-306(c)(1)."¹

Complainant's request that we now reconsider 13 *OMCB Opinions* 65 alleges that the County Board had *not* adopted that document as minutes, that the County Board had not provided him with minutes upon his request for them, and that staff had told him that the County Board had not taken written minutes for several years. Responding to those allegations, the County Attorney detailed the procedures followed by the County Board's staff. In a nutshell, staff uses software that "include[s] audio-recording and written recording with automatic date and time entry generation." Staff audio-records the meeting and "use[s] the written recording function to contemporaneously type entries into the written record during the hearing." It is not apparent from the response that any member of the County Board reviews the result, which are referred to as "typewritten notes" and which, the response asserts, "may serve as minutes." Another gap left by the submissions is how staff addresses requests from the public for the County Board's minutes. Regarding this matter, the submissions yield a tangled tale on what happened when either the complainant or someone on his behalf appeared at the County Board's office and asked to

¹ Statutory references are to the General Provisions Article of the Maryland Annotated Code.

see its minutes. However, the upshot is that staff did not provide either “minutes” or the notes to that requester. And, because the audio was turned off before the County Board deliberated, no notes were made for that portion of the meeting, and no audiotape was available. Finally, the response states that the complainant’s earlier complaint had prompted a review of the County Board’s procedures and that the County Board has now “implemented new procedures to timely adopt its minutes.” From the County Board’s website, we see that the County Board formerly adopted minutes and, until some point in 2015, posted them online.

Several provisions of the Act are relevant here. First, “as soon as practicable after a public body meets, it shall have minutes prepared.” § 3-306(b)(1). “Minutes,” we have long explained, do not exist as “minutes” until the public body has adopted them. *See, e.g., 2 OMCB Opinions* 11, 13 (1998) (“As a legal matter, the ‘minutes of a public body’ become such only after the public body itself has had an opportunity to review and correct the work of whoever prepared the draft minutes.”); *7 OMCB Opinions* 83, 84 (2011) (“[D]raft minutes that are not reviewed and approved by the public body do not satisfy [the minutes] requirement.”). As exceptions to that rule, a public body may choose to adopt a practice of using live and archived audio or video streaming as its minutes instead of written minutes, §3-306(b)(2), or legislative bodies may report their votes on the Internet, but neither exception applies here. Because the County Board did not adopt staff’s typewritten notes (or any other document) as minutes, we find that the County Board violated § 3-306(b)(1). As noted in our earlier opinions, the violation is not merely technical. Minutes are the mechanism by which the public body itself discloses its meetings events to the public, and the decision on what to include, or omit, is for the members of the public body, not staff.²

Second, except for the sealed minutes of a properly closed meeting, “minutes of a public body are public records and shall be open to public inspection during ordinary business hours.” § 3-306(d). We understand that staff could not provide “minutes” to a member of the public who asked to see “minutes,” given that the County Board had not adopted any. We do not understand why staff did not at least provide the typewritten notes, or, apparently, even explain that such a thing existed—especially in light of the assertion in the response that the “typewritten notes may serve as minutes.” At any rate, we find that the County Board violated § 3-306(d). And, a public body’s failure to adopt minutes and produce them for inspection, especially viewed in conjunction with its decision to stop recording its meeting when it began its deliberations on the matter at hand, does not serve

² For guidance on what minutes must contain, we refer the County Board to *Floyd v. Baltimore City Council*, 241 Md. App. 199, 218-19 (2019), as well as to the Compliance Board opinion and Open Meetings Act Manual chapter cited there.

the Act's policy that access to meeting information "increases the faith of the public in government." *See* § 3-102(b)(stating the policy of the Act).

The third relevant provision is the requirement that a public body post its minutes online "[t]o the extent practicable." § 3-306(e). We have no facts on what might have been "practicable" for the County Board in 2019, but we note that the County Board found it practicable to post its minutes online in 2015, even before the requirement was enacted, and that it currently posts its decisions online. We do not reach a conclusion on this issue, which was not addressed in the submissions, and we raise it only to bring the requirement to the County's Board's attention in its review of its meeting procedures.

Usually, a public body's acknowledgment of a deficient practice and its undertaking to review its procedures have made our further guidance unnecessary. Here, however, we are startled, especially in light of the training requirement, that such a longstanding public body simply stopped complying with two longstanding—and basic—requirements of the Act and also chose not to comply with the third, more recent, requirement.³ Because it is not clear to us what went wrong here, we have gone into some detail so that the relevant principles will be conveyed to the County Board when, as required by the Act, a member summarizes this opinion in open session. *See* § 3-211.

Conclusion

In conclusion, the County Board violated the provisions of § 3-306 that require public bodies to adopt minutes and to make them available for inspection by a member of the public who asks for them. We encourage the County Board's endeavor to review and revise its meeting procedures. This opinion is subject to the acknowledgment requirement set forth in § 3-211.

Open Meetings Compliance Board

April C. Ishak, Esq.

Nancy McCutchan Duden, Esq.

Patrick S. Meighan, Esq.

³ It may be that the County Board, which describes its functions as "quasi-judicial," has deemed its proceedings to be exempt from the Act under the exclusion for meetings at which a public body solely performs quasi-judicial functions. However, that exclusion has not applied to most land use matters since 1991. *See* 1991 Laws of Md., ch. 655. Or, it may be that the County Board has looked only to its bylaws and County laws as the controlling authority for its meeting practices. That possibility is suggested by the County Board's bylaws, which do not address minutes at all. (The bylaws also contain a provision, § 2.204(d), that seemingly permits the County Board to routinely give notice "one day prior to the meeting or hearing"—a provision that, if implemented on a routine basis, would likely lead to violations of the Act). Whatever the cause of the violations found here, we encourage the County Board to address it.

From: [LISA MARKOVITZ](#)
To: CouncilBoard@howardcountymd.gov; [CouncilMail](#)
Subject: Board of Appeals Procedures considerations
Date: Wednesday, July 17, 2024 11:41:49 AM

[Note: This email originated from outside of the organization. Please only click on links or attachments if you know the sender.]

I am writing because I cannot attend the meeting. I am pleased to see that the Board of Appeals procedures are going to be updated. I am sure experienced minds will be weighing in on suggested changes, and I will leave much of the details to them; however, I would like to note some general problems I have seen for years now. There are some legally unsound procedures that take place regularly. Board of Appeals members do not appropriately define criteria, and often disallow testimony on topics that are not to be precluded in the proceeding. They too often take what the petitioners' attorneys say as truth without checking.

Specifically, I hope the new procedures are clear about when a proceeding should be a De Novo proceeding, as in the court system, these types of proceedings in appeals, are rare, yet, they are a matter of course for the Board of Appeals. That has caused Howard County to have no Board of "Appeals", and instead we have a "take 2" board. The take 2 situation should only occur with a decision of a remand, after an actual APPEAL is heard. An appeal which reviews the findings of the underlying arbiter, here, the Hearing Examiner, and found there was or was not an error, which would lead to either an upholding or overturning of that decision, or in a rare case a remand back to the Hearing Examiner with some instructions.

The Board of Appeals is the last County Administrative process before heading to the court system. Both sides should have an actual appeal process and not just a do over, which often have included decisions not based on the proper, appropriately defined criteria. Our Office of Law should take a close look at criteria that the Board of Appeals are to rely upon and provide written definitions of them specifically. They should also include what types of testimonies are allowed and not allowed, whether the Hearing Examiner's rulings are supposed to be part of the record, and what the burden of proof is. The Office of Law should have knowledge of these things, and make sure BOA members do as well. The Office of Law should also intervene with advice to contradict stated inaccuracies regarding procedural issues, or rights of BOA members and witnesses, when needed during proceedings.

Training should be had in the beginning and in an on-going manner as well. Errors I have seen made, are certainly not intentional from hard-working volunteers, but are important to rectify nonetheless.

Thank you.

Lisa Markovitz, MSF

July 25, 2024

Christopher Alleva

The Howard County Board of Appeals

Testimony on Rules of Procedure Opening Statement

The Howard County Board of Appeals has a long and distinguished history. It is an institution we need that the public relies on. We need this institution to be above reproach. We need them to be respected and trusted. We need them to be above bias, taint and prejudice. We need this institution to be fair, just, even-handed and insulated from the vagaries of politics because the powers we give this Board are awesome. They have the power to confer and deprive people of valuable property rights and affect the public's physical welfare.

Regrettably, this Board also has a history of not meeting these critical standards. This Board has too often in the past shown bias and pre-judgement. And even more disturbing, some have attempted to shift the burden of bias on to those impacted by that bias. This is a dangerous shifting of the burden. It is not the public's job to prove the bias shown by the Board did not influence decision making. It is the Board's job to prove to the public that this manifest bias was not outcome determinative. Bias and fairness cannot co-exist. There is a presumption that bias is unfair and the burden is on the Board to ensure the hearings they conduct are fundamentally fair. Allowing the petitioner liberality in presenting their case in chief, while restricting the opposition case is not fundamentally fair.

The Board has not always lived up the ideals of fundamental fairness and due process of law. Here are some examples:

1. In 2020, the Board was found guilty of violating the Open Meetings Act. The complainant alleged the Board cut off the recording during deliberations to cover up bias and discrimination against them.
2. The Board of Appeals Rules of Procedure have not been updated for decades. Among other things, there are mis-references to State law sections that have been repealed and replaced; there are no rules covering virtual hearings; the burden of proof for administrative appeals has no evidentiary standard and is conflicted with a vague reference to "other de novo appeals." This results in a bastardized hearing that is neither fish nor fowl hopelessly tainting the decisions. Will this nominee commit to updating the Rules and submit them to the Council within 60 days for approval by a legislative act?
3. Citizens often contact Council members with violation of due process allegations. How are these complaints handled? Who has jurisdiction? Can you please provide Council with this information?

4. Numerous appeals have been thrown out because the Board has improperly demanded citizens prove standing in original jurisdiction cases. The operative Local Government State law article 10-305.4 plainly states the only requirement is being an "interested person": *"a decision by the county board of appeals on petition of any interested person, after notice and opportunity for hearing, on the basis of a record before the board."* It is long held public policy in Maryland that zoning and land use disputes are best adjudicated in local Boards of Appeals like the one that you have been nominated. Given these non-case specific premises, how would you apply the law of standing to interested parties and appellants? Please distinguish original jurisdiction and administrative appeal matters, preferably with actual examples from past Board cases.

5. Are parties or the petitioner permitted to submit evidence into record outside the proceedings?

6. Do the Boards rules permit re-deliberation or re-voting?

7. Can the Board reopen the case after deciding and hear an oral unilateral reconsideration request without hearing from the other side?

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1666

September Term, 2007

JOEL BROIDA

v.

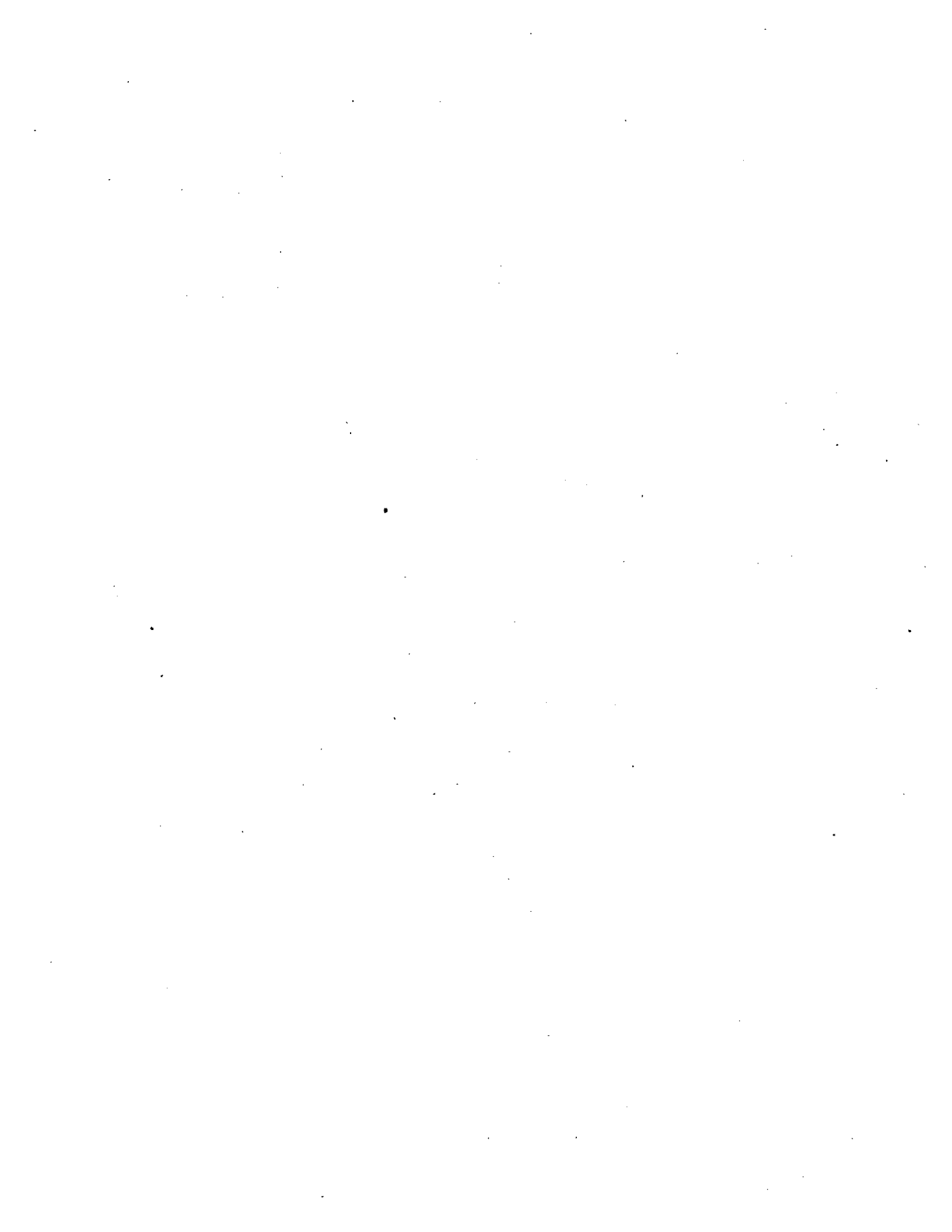
RENAISSANCE CENTRO COLUMBIA, LLC

Barbera,
Woodward,
Kenney, James A., III,
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: July 23, 2008



The genesis of this appeal is a 2-2 vote of the Howard County Board of Appeals (“Board”) on the issue of whether appellant, Joel Broida, had standing to appeal a decision of the Howard County Planning Board (“Planning Board”). Following the Board’s tie vote on February 7, 2007, appellee, Renaissance Centro Columbia, LLC (“RRC”), filed a complaint for declaratory judgment in the Circuit Court for Howard County against the Board, Broida, and Howard County, Maryland (“Howard County”), seeking a judgment declaring that the Board’s vote was a final decision in its favor, *i.e.*, that Broida lacked standing to appeal. On the same date, RCC filed a motion for summary judgment on its complaint. On July 16, 2007, the circuit court issued an order granting RCC’s motion for summary judgment. On appeal of that ruling, Broida presents four questions¹ for our review which we have consolidated and rephrased:

1. Did the circuit court err in ruling that the 2 to 2 vote of the Board had the effect of denying Broida standing to appeal?

¹ Broida presents the following four questions in his brief:

1. Did the Circuit Court err in concluding that the 2-2 vote in the Board of Appeals has the effect of determining that Broida did not have standing?
2. Did the Circuit Court err in finding that the 2-2 vote required the dismissal of the appeal before the Board of Appeals?
3. Did the Circuit Court improperly fail to require RCC to exhaust its administrative remedies before issuing a ruling?
4. Did the Circuit Court usurp the authority of the Board of Appeals by substituting its judgment for that of the Board of Appeals with regard to the effect of the 2-2 vote?

2. Did the circuit court err in failing to require RCC to exhaust its administrative remedies before issuing a ruling?

Because we answer question 1 in the affirmative, we need not address question 2. For the reasons stated below, we reverse the decision of the circuit court and remand the case to that court with instructions to remand the case to the Board for further proceedings consistent with this opinion.

BACKGROUND

On December 10, 2004, RCC purchased a 1.46 acre parcel of land situated on the northeast corner of the intersection of Little Patuxent Parkway and Wincopin Circle in the New Town District of Columbia, Maryland. Broida owns and resides in condominium No. 301 at 10205 Wincopin Circle, which is located in a five-story building across the street and about 56 yards away from the parcel of land purchased by RCC.

In 2005, RCC submitted a site redevelopment plan ("SDP") to the Planning Board for approval, proposing to develop a \$60 million, 22-story, mixed-use, retail and condominium building with 160 residential units, 10,697 square feet of retail space, a four-level parking garage, and other associated site developments. Broida and three other individuals, Lloyd Knowles, Stephen Meskin, and Jo Ann Stolley, filed a Motion to Deny Approval of Site Development Plan with the Planning Board. On January 18, 2006, after two public meetings to consider RCC's SDP, the Planning Board approved the SDP with certain modifications.

On February 14, 2006, Broida, along with Stolley, Meskin, and Knowles, appealed the Planning Board's approval of RCC's SDP to the Howard County Board of Appeals

Hearing Examiner. On April 6, 2006, RCC filed a motion to dismiss the appeal on the grounds that Broida, Stolley, Meskin, and Knowles lacked standing to appeal the decision of the Planning Board. Thereafter, the Hearing Examiner conducted a public hearing on the issue of standing and ultimately, on July 27, 2006, granted RCC's motion to dismiss, holding that Broida, Stolley, Meskin, and Knowles lacked standing to challenge the Planning Board's decision.

In August 2006, Broida, Stolley, Meskin, and Knowles appealed the Hearing Examiner's decision to the Board. On September 26, 2006, RCC filed a motion to dismiss the appeal before the Board, asserting that Broida and the others lacked standing to appeal the decision of the Planning Board. The Board held public hearings on four different days, December 5 and 18, 2006 and January 17 and 18, 2007. Because one member of the Board had resigned due to illness, the Board heard the case with four members: Robert Sharps, James Pfefferkorn, Albert Hayes, and Maurice Simpkins. None of the parties objected to proceeding before only four members.

On January 18, 2007, all parties completed the presentation of evidence, and the Board concluded the hearing and closed the record. On January 22, 2007, the Board reconvened, deliberated publicly for several hours, and voted. The Board voted unanimously that Stolley, Meskin, and Knowles did not have standing and dismissed the appeal as to them. The Board, however, deadlocked 2 to 2 on the issue of Broida's standing.

Because of the deadlock, the Board went into a closed session to discuss its rules and

to determine how to proceed. The Board ultimately decided to redeliberate and revote at a later date, February 12, 2007. The revote, the Board concluded, would include two prospective members of the Board, both of whom were to be confirmed as members on February 5, 2007. One of the new members would replace the member that resigned due to illness and the other new member would replace Pfefferkorn, who was slated to retire. The Board decided that the new members would listen to the tape of the hearings and review the record, after which the newly constituted Board would reconvene to redeliberate and revote on the issue of Broida's standing to appeal. Both Broida and RCC, on different grounds, objected to the Board's scheduled redeliberation and revote. On February 7, 2007, RCC wrote a letter to the Board, advising the Board "that reconvening, re-deliberating and re-voting is inappropriate, illegal and not authorized by law."

On February 7, 2007, RCC also filed a complaint in the Circuit Court for Howard County for declaratory judgment against the Board, Howard County, and Broida. RCC sought a declaration from the circuit court that "(a) the Board's 2 to 2 decision on January 22, 2007 is a final decision; (b) [the] decision requires the Board Appeal [sic] to be dismissed; (c) the Board Appeal [sic] is dismissed; and (d) [RCC] is entitled to such other and further relief as the [c]ourt may deem just and appropriate." On the same date, RCC filed a motion for summary judgment on its complaint. On March 21, 2007, Broida filed a motion to dismiss and a Motion to Strike And/Or Deny Motion For Summary Judgment.

On May 1, 2007, the circuit court held a hearing on the motions, during which it heard

argument from counsel for RCC, Broida, and Howard County. On July 16, 2007, the circuit court issued a Memorandum Opinion in which the court decided that the 2-2 vote of the Board constituted a “vote” and a final “decision on the case” under Section 2.201(c) of the Board’s Rules of Procedure, which provides:

Voting. The same members of the [Board] who were present at the hearing shall make the decision on the case, provided that any member who was absent during any portion of the hearing or who was appointed after the hearing commenced shall be considered present for voting purposes and may vote if the member certifies in writing that the member reviewed all of the evidence submitted and listened to a recording of the portion of the hearing for which the member was not present. A decision shall have the concurrence of the majority of all members of the [Board]. A member who was absent during any portion of the hearing or who was appointed after the hearing commenced shall vote as provided in this paragraph if necessary to achieve the number of votes needed to render a decision unless the member recuses himself for cause. Failure to achieve the necessary affirmative votes shall result in the dismissal of the case.

Howard County Code § 2.201(c). Relying on the last sentence of § 2.201(c), the court emphasized that Broida did not garner the necessary affirmative votes to maintain his appeal. Thus the court concluded that the Board’s 2-2 vote had the effect of denying Broida standing, and his appeal should have been dismissed.² Accordingly, on July 16, 2007, the court granted RCC’s motion for summary judgment and denied both Broida’s motion to dismiss and Motion to Strike And/Or Deny Motion For Summary Judgment.

Thereafter, Broida timely noted this appeal.

² The court also concluded that the Board “is precluded from re-deliberating and re-voting” under its Rules of Procedure.

DISCUSSION

I.

Parties' Contentions

Broida argues that the circuit court erred in ruling that the 2-2 vote of the Board had the effect of holding that Broida did not have standing and that dismissal of the appeal was required. According to Broida, as an adjacent property owner, he had “presumptive standing” to challenge the decision of the Planning Board, and RCC had the burden of proving that Broida was not aggrieved and thus did not have standing to appeal. Because “RCC failed to secure a majority vote of the voting members of the Board,” the Board’s tie vote, according to Broida, had the effect of denying RCC’s motion to dismiss, thereby upholding his standing to appeal. Rather than giving such effect to the tie vote, Broida argues that the circuit court “transformed the failure of RCC to gain a majority vote on its preliminary [m]otion to [d]ismiss . . . into a failure by Broida to prove his standing.” Finally, Broida asserts that the tie vote was not a “decision on the case” pursuant to Rule 2-201(c), but rather, a decision on a preliminary motion, and thus Rule 2-201(c) does not require a dismissal of Broida’s appeal.

RCC counters that, “[u]nder well-established Maryland law and the Board’s own procedural rules, the burden was on *Broida* to prove standing before the Board – and he clearly failed to do so.” (Emphasis added). That RCC raised the issue of standing before the Board as a preliminary motion, RCC argues, is “legally irrelevant.” Furthermore, RCC

contends that Broida's claim of presumptive standing as requiring RCC to prove Broida's *lack* of standing "reflects a basic misunderstanding of the law of presumptions because it confuses the burden of production with the burden of persuasion." RCC emphasizes that the presumptive standing enjoyed by an adjacent property owner under *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137 (1967) is rebuttable, which means that the burden of production, initially with RCC, shifts back to the property owner when the presumption is rebutted. In its brief, RCC explained the shifting of the burden of production:

A party contesting the standing of an adjacent landowner therefore has the burden of producing evidence that the person is not aggrieved. *Bryniarski*, 247 Md. at 144. However, once the party presents evidence sufficient to do so - thereby rebutting the landowner's presumption of aggrievement - the burden of production shifts back to the appellant who, like any other landowner, must prove that he or she is, "personally and specially affected" by the planning board's action "in a way different from that suffered by the public generally." *Bryniarski*, 247 Md. at 144.

(Internal citations omitted). Regarding the burden of persuasion, RCC asserts that "the ultimate burden of persuasion as to standing nevertheless *always* rested with [Broida]."

(Emphasis in original). Thus RCC argues that "[a] split vote is plainly insufficient to carry that burden of persuasion."

II.

Standard of Review

Review of a grant of summary judgment under Rule 2-501 requires an examination of the same information from the record and a determination of the same issue of law as the

trial court. *Miller v. Bay City Prop. Owners Ass'n, Inc.*, 393 Md. 620, 632 (2006). On appeal, “[t]he question of whether a trial court’s grant of summary judgment was proper is a question of law subject to *de novo* review.” *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). Accordingly, “we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” *Id.*

Furthermore, “[i]t is well settled . . . that ordinarily a motion for summary judgment may be upheld only on the grounds relied upon by the hearing court.” *Mt. Olive African Methodist Episcopal Church of Fruitland, Inc. v. Bd. of Incorporators of African Methodist Episcopal Church Inc.*, 348 Md. 299, 322 (1997) (quoting *Gross v. Sussex, Inc.*, 322 Md. 247, 276 (1993) (internal quotation and alteration omitted)). In other words, we “will not ordinarily undertake to sustain the judgment by ruling on another ground, not ruled upon by the trial court, if the alternative ground is one as to which the trial court had a discretion to deny summary judgment.” *Id.* (quoting *Three Garden Village Ltd. Partnership v. U.S. Fid. & Guaranty Co.*, 318 Md. 98, 108 (1989) (internal quotation omitted)). “Consequently, unless we conclude that the trial court was legally correct in granting summary judgment in favor of the petitioner, this case will have to be remanded for further proceedings.” *Id.* at 323 (citations omitted).

III.

Analysis

“One requirement of justiciability is that the plaintiff have standing in the sense that the person is entitled to invoke the judicial process in a particular instance.” *Adams v. Manown*, 328 Md. 463, 480 (1992). Generally, the burden of proof is on the plaintiff to prove standing by a preponderance of the evidence. *Gosain v. County Council for Prince George’s County*, 178 Md. App. 90, 98 (2008).

With regard to standing, Howard County Code § 16.900(j)(2)(iii) provides “[a]ny person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it” with the right of appellate review of such decision within thirty days.³ Thus a condition precedent to standing to appeal the Planning Board’s decision is that the appellant must be aggrieved by the decision.

The Court of Appeals in *Bryniarski* articulated the principles governing the determination of whether a party is sufficiently aggrieved to possess standing to appeal to a board of zoning appeals.⁴ 247 Md. at 144. Although *Bryniarski* involved an appeal from a

³ In its entirety Section 16.900(j)(2)(iii) provides:

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 grievement set forth in section 16.013(b) of this title.

⁴ Neither party contests that Broida was a party to the proceedings before the Planning Board. As the Court of Appeals has explained: “[O]ne may become a party to
(continued..)

board of zoning appeals rather than, as in the instant case, to a board of zoning appeals, the Court indicated that the aggrievement requirement applies regardless of whether the appeal is to a board of zoning appeals or from such board to a court of record. *See Id.* at 140, 143.

Specifically, with regard to aggrieved person status, the Court opined:

[A] person aggrieved by the decision of a board of zoning appeals is one whose personal or property rights are adversely affected by the decision of the board. 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 he is personally and specially affected in a way different from that suffered by the public generally. The circumstances under which this occurs have been determined by the courts on a case by case basis, and the decision in each case rests upon the facts and circumstances of the particular case under review.

Id. at 144.

More pertinent to the case *sub judice*, however, was the Court's exposition in *Bryniarski* on the different burdens of proof assigned to "[a] person whose property is far removed from the subject property" as opposed to "[a]n adjoining, confronting or nearby property owner." *Id.* at 145. The Court explained the burdens placed upon these two types of property owners:

(b) An adjoining, confronting or nearby property owner is deemed, *prima facie*, to be specially damaged and, therefore, a person aggrieved. The person challenging the fact of aggrievement has the burden of denying such damage in his answer to the petition for appeal and of coming forward with evidence to establish that the

⁴(...continued)

an administrative proceeding rather easily." *Sugarloaf Citizens Assn. v. Dept. of Environment*, 344 Md. 271, 286 (1996).

petitioner is not, in fact, aggrieved.

* * *

(c) A person whose property is far removed from the subject property ordinarily will not be considered a person aggrieved. But he will be considered a person aggrieved if he meets the burden of 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.

Id. at 145 (citations omitted):

The parties agree that the first sentence of the above quotation creates a rebuttable presumption that an “adjoining, confronting or nearby property owner” is a person aggrieved.

Id. RCC also agrees that Broida is such property owner and thus is presumptively aggrieved.

Each party, however, has a very different view regarding the meaning of the second sentence of the quotation: “The person challenging the fact of aggrievement has the burden of . . . coming forward with evidence to establish that the petitioner is not, in fact, aggrieved.” *Id.*

Broida argues that the presumption of aggrievement (and thus standing to appeal) shifts both the burden of production *and persuasion*. Consequently, the Board's 2-2 vote means that RCC failed to meet its burden of persuasion to overcome the presumption, thereby giving Broida standing to appeal. RCC, on the other hand, asserts that the presumption of aggrievement shifts only the burden of production, with the burden of persuasion remaining with Broida. Because RCC met its burden of production, RCC contends that the Board's tie vote means that Broida failed to meet his burden of persuasion.

Under Maryland law, there are two kinds of presumptions: “the presumption that shifts only the burden of production and the presumption that shifts both the burden of production and the burden of persuasion.” Joseph F. Murphy, Jr., *Maryland Evidence Handbook* 418 (3d ed. 1999). Examples of the former include the presumption of receipt when a letter is mailed, *Bock v. Ins. Comm’r*, 84 Md. App. 724, 733-34 (1990), and the presumption of negligence when a motor vehicle is lawfully stopped on a highway awaiting to enter an intersecting highway when suddenly struck from behind by another vehicle, *Andrade v. Housein*, 147 Md. App. 617, 623 (2002). Examples of the latter include the presumption that the driver of a motor vehicle is the agent, servant and/or employee of the owner of the vehicle, *Phillips v. Cook*, 239 Md. 215, 221-22 (1965), and the presumption of invalidity of an *inter vivos* gift when there exists a confidential relationship between the donor and the donee, *Upman v. Clarke*, 359 Md. 32, 35 (2000). The determination of which type of presumption applies depends, not on the law of evidence, but “on the substantive and procedural law applicable to the particular case.” Murphy, *Maryland Evidence Handbook*, 110. Accordingly, we must examine the language used by the Court of Appeals in *Bryniarski* to find the answer.

The Court of Appeals stated that the party challenging the presumption has the burden of “coming forward with evidence *to establish that the petitioner is not, in fact, aggrieved.*” *Bryniarski*, 247 Md. at 145 (emphasis added). According to Black’s Law Dictionary, “establish” means “to prove; to convince.” BLACK’S LAW DICTIONARY 586 (8th ed. 2004).

The American Heritage Dictionary defines “establish” as “to prove the validity or truth of.” THE AMERICAN HERITAGE DICTIONARY 609 (4th ed. 2000). In the Maryland Uniform Commercial Code, the General Assembly included the following definition: “(8) ‘Burden of establishing a fact means the burden of *persuading* the triers of fact that the existence of the fact is more probable than its nonexistence.” Md. Code (1975, 2002 Repl. Vol.), § 1-201(8) of the Commercial Law Article (“C.L.”) (emphasis added). Thus the Court’s use of the word “establish” connotes a requirement of “proving” or “persuading a trier of fact” that “the petitioner is not, in fact, aggrieved.”

It is also important to note that the Court of Appeals in *Bryniarski* did not describe the evidence that a challenger must bring forward in terms of “refuting” the presumption of aggravement or “supporting” a finding of its nonexistence. Indeed, the General Assembly used the following language to define a shifting of the burden of production presumption: “‘presumption’ or ‘presumed’ means that the trier of fact must find the existence of the fact presumed unless and until *evidence* is introduced *which would support* a finding of its nonexistence.” C.L. § 1-201(31) (emphasis added). Therefore, we conclude that in *Bryniarski* the Court of Appeals intended to shift the burden of production *and the burden of persuasion* to the party challenging the presumption that “[a]n adjoining, confronting or nearby property owner” is a person aggrieved. Accordingly, in the case *sub judice*, RCC, as the challenger of the presumption, had the burden of production and persuasion that Broida was not, in fact aggrieved.

An “adjoining, confronting or nearby property owner is deemed” to have a presumption of standing that rests on the policy consideration that such a property owner is likely to be affected by the administrative decision “in a way different from that suffered by the public generally.” *Bryniarski*, 247 Md. at 144-45; *see also* Murphy, *Maryland Evidence Handbook*, 424 (stating that “[c]onsiderations of public policy” are usually behind presumptions that shift the burden of production and the burden of persuasion). Principles of standing do not address the merits of a zoning decision but provide only the opportunity to address the merits of that decision. To impose the burden of production and persuasion on the challenger of the presumption of aggrievement will not accord the holder of the presumption with any advantage regarding the merits of the zoning decision.

In this regard, we find the language of the Court of Appeals of New York instructive:

Standing principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules. Because the welfare of the entire community is involved when enforcement of a zoning law is at stake, there is much to be said for permitting judicial review at the request of any citizen, resident or taxpayer; this idea finds support in the provision for public notice of a hearing. But we also recognize that permitting everyone to seek review could work against the welfare of the community by proliferating litigation, especially at the instance of special interest groups, and by unduly delaying final dispositions.

* * *

[I]t is reasonable to assume that, when the use is changed, a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from

depreciation of the character of the immediate neighborhood. Thus, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury.

Matter of Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 133-34 (N.Y. 1987) (citations omitted).

Both parties concede that, because Board's vote was evenly divided, "the party with the burden of proof fails to meet its burden."⁵ The burden of proof is comprised of the burden of production and the burden of persuasion. Therefore, having concluded that RCC

⁵ In the alternative, RCC argues that Broida failed to sustain his burden under Howard County Code Section 2.210(a)(4)(ii), which provides:

(ii) In all other *de novo* appeals, the burden of proof is upon 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.

Under that Section, RCC contends that, on appeal to the Board, Broida had the burden to show that the action taken by the Hearing Examiner was "clearly erroneous, and/or arbitrary and capricious, and/or contrary to law" and that the Board's 2-2 vote was insufficient to demonstrate that Broida had met that burden. In so arguing, however, RCC points to no authority to support its assertion that the Hearing Examiner is "the administrative agency" referred to in § 2.210(a)(4)(ii). As an arm of the Board, the position of Hearing Examiner was created "to alleviate the backlog of cases heard by the Board . . . and to expedite and improve the process by which citizens may have land use and other administrative issues heard and decided." Howard County Council, Memorandum: Proposed Hearing Examiner Legislation, September 20, 2001. On appeal to the Board from the decision of the Hearing Examiner, the Board "hear[s] the case *de novo* – that is, the Board [] hear[s] testimony, take[s] evidence, and decide[s] the case *as if the [H]earing [E]xaminer's hearing had not occurred.*" *Id.* (emphasis added). Thus, consistent with the purpose of the Hearing Examiner, the standard articulated in § 2.210(a)(4)(ii) does not apply to action taken by the Hearing Examiner.

had the burden of production and persuasion that Broida was not aggrieved, we hold that the 2-2 vote of the Board had the effect of upholding Broida's status as presumptively aggrieved, and thus accorded him standing to appeal. The circuit court erred in ruling otherwise.⁶

**JUDGMENT OF THE CIRCUIT COURT
FOR HOWARD COUNTY REVERSED AND
REMANDED TO THAT COURT FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION; APPELLEE TO PAY
COSTS.**

⁶ We also disagree with the circuit court's conclusion that Board Rule 2-201(c) required the dismissal of Broida's case because of the tie vote. The first sentence of Rule 2-201(c) clearly states that the rule applies to a "decision on the case," which we read as the merits of the decision, not a preliminary motion regarding standing. In fact, the Court in *Bryniarski* emphasized that "[t]he status of a person to appeal as a 'person aggrieved' is to be distinguished from the result on the merits of the case itself." 247 Md. at 145.

HEADNOTE: *Jacob Hikmat v. Howard County, Maryland, et al.,*
 No. 2515, September Term, 2001

ADMINISTRATIVE LAW - JUDICIAL REVIEW -

A property owner in Howard County petitioned for a waiver of the application of the County's subdivision regulations. The Department of Planning & Zoning denied the request. The property owner appealed to the Board of Appeals, and the Board reversed. Howard County, on behalf of the Department of Planning & Zoning, petitioned for judicial review in the Circuit Court for Howard County. Based on Md. Code, art. 25A, the County Charter, and the County Code, Howard County had the right to seek judicial review.

ADMINISTRATIVE STANDARD OF REVIEW -

The Board's standard of review is not a true de novo review but is not as deferential as the judicial standard of review.

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 2515
September Term, 2001

JACOB HIKMAT

v.

HOWARD COUNTY, MARYLAND, et al.

Davis,
Eyler, James R.,
Alpert, Paul E.
(Ret., specially assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: December 4, 2002

RAFAT, Inc., appellant,¹ filed a petition with the Howard County Department of Planning and Zoning ("DPZ") to waive a requirement contained in the Howard County Subdivision and Land Development Regulations ("HCSLDR") in order to permit disturbance of a stream and buffer area located within its property. The request was denied by DPZ, and appellant appealed to the Board of Appeals ("Board"). The Board reversed, granting appellant's waiver petition, and Howard County, ("the County"), appellee, on behalf of DPZ, filed a petition for judicial review in the Circuit Court for Howard County. The circuit court reversed, and appellant noted an appeal to this Court. The primary task facing this Court is to determine whether the Board committed any errors of law or acted arbitrarily¹ or capriciously. We hold that it did not commit any errors of law, but that its decision granting the waiver cannot be sustained because the findings and conclusions contained in its opinion are inadequate.

In addition, we are presented with the question of whether the circuit court erred in granting a motion to intervene filed by several community members, additional appellees. We shall hold that the circuit court did not err.

¹There are various references in the record to Jacob Hikmat; Jacob Hikmat, Inc.; Jacob Hikmat, President, RAFAT, Inc.; and RAFAT, Inc. We have determined that the proper party is RAFAT, Inc.

Factual Background

Appellant owns a 6.9 acre parcel of land, zoned R-20, in Howard County. A small stream crosses the property in a north-south direction with approximately two-thirds of the property lying on one side of the stream. In February 1997, appellant sought approval from DPZ to subdivide the property into 12 lots and open space. The proposed subdivision reflected 4 lots on the one-third portion of the property, accessed by a use-in-common driveway crossing the stream.

DPZ initially approved appellant's sketch plan, and later its preliminary plan, but by letter dated February 11, 1999, DPZ rescinded the approval. The letter explained that at the time the sketch plan was approved, DPZ regarded the disturbance needed to construct the proposed driveway as necessary because it was to be placed over an existing steel pipe, and the embankment would be part of an in-stream storm water management pond. By the time of the preliminary plan, however, the driveway was no longer located at the site of the existing pipe, and the embankment no longer played a role in storm water management. Due to the changed circumstances, DPZ requested a revised preliminary plan and further stated, "[i]f you intend to pursue the current design which includes residential Lots 10-13, you must submit a formal waiver petition for relief from Subdivision Regulations, Section 16.116(a), to allow the disturbance within the environmental

buffers needed to construct the proposed use-in-common driveway designed to serve as access for those lots.”²

On June 1, 1999, appellant filed a waiver petition, pursuant to HCSLDR section 16.104, seeking permission to grade and remove vegetative cover for the purpose of constructing the use-in-common driveway. Section 16.104(a), in pertinent part, provides:

So that substantial justice may be done and the public interest secured, the Department of Planning and Zoning may grant waivers of the requirements of [the HCSLDR] in situations where the Department finds that extraordinary hardships or practical difficulties may result from strict compliance with [the HCSLDR] or determines that the purposes of this Subtitle may be served to a greater extent by an alternative proposal.

Subsection (b) further requires that the developer demonstrate “the desirability” of a waiver and that the waiver must not have the effect of “nullifying the intent and purpose” of the HCSLDR.

Appellant, in its waiver petition, asserted the following as justification for its request: (1) strict compliance with the regulations would result in extraordinary hardship and practical difficulties because one-third of the buildable property would be unusable, thereby prohibitively increasing the development cost per lot and preventing a “credible” builder from pursuing the project, (2) all alternatives were considered and appellant chose the most feasible alternative, (3) the waiver would not be

²HCSLDR section 16.116(a) provides for protection of streams and wetlands by prohibiting grading, removal of vegetative cover and trees, paving, and locating new structures within a wetland or streambank and a specified buffer zone.

detrimental to the public interest because (a) the crossing would not be noticeable from Gwynn Park Drive, (b) the crossing would have no flooding impact on upstream properties, (c) the crossing was more than 600 feet from the downstream property, (d) erosion and sediment control measures would be provided, and (e) granting the waiver would control 100 year storms, a benefit greater than that required by the regulations, and (4) approval of the waiver would not nullify the intent of the regulations because it would minimize the impact on the stream while allowing development in accordance with zoning regulations.

By letter dated July 27, 1999, DPZ denied the waiver request, providing the following reasons for the denial:

1. Nullifies the Intent of the Regulations
Effective August 19, 1999, no forest conservation easements will be allowed on residential lots less than 10 acres in size, unless the preliminary plan has signature approval by that date. Per Section 16.1205(a), (d), & (e), subdivision, site development, and grading shall leave forested stream buffers, steep slopes, and areas contiguous with those sensitive areas in an undisturbed condition and protected by inclusion as part of the forest conservation easement area. Steeply wooded slopes and stream buffers are proposed to be disturbed on this site for the purpose of providing the access which would allow creation of 4 lots. In addition, priority tree save areas adjacent to the stream and its buffers would have to be disturbed to accommodate the development of the 4 lots. This Division will not accept fee-in-lieu or off-site easements as an alternative to protection of the priority wooded areas unless the applicant has demonstrated that reasonable efforts to protect that priority forest have been taken; that the plan cannot be reasonably altered to include protection of the priority forest; or that

a specific alternative offsite location has been identified where forest planting would have a greater environmental benefit than on this site. The applicant has failed to provide such justification.

2. Self-Created Hardship

Per Section 16.116(c), the applicant has attempted to establish that the driveway crossing is essential for the creation of 4 of the 12 lots and has shown the disturbance (conceptual grading) necessary for placing a driveway across the environmental area, which would allow development of those 4 lots across the stream. The applicant has stated that no other reasonable alternative access points are available through the adjacent lots or elsewhere on the site to the 1.3 acre piece of land on the other side of the stream and that development of the 4 lots is not possible except by crossing the stream and grading for the crossing by a use-in-common driveway.

However, there is no guarantee of lot yield in the R-20 zoned district. The applicant has failed to demonstrate that the proposal would not nullify the purpose of the Regulations, which is to protect environmental buffers and steep slopes on the site for the purpose of preserving water quality and vegetative cover on erodible soils. The applicant has not shown that reasonable use of the 6.7 acre site is dependent on realizing the density proposed (i.e., 12 lots on 6.9 acres). Without the stream crossing, the developer can create 8 residential lots.

3. Detrimental to the Public Interest

The lot and use-in-common driveway layout proposed as justification for the stream crossing is a forced design, shoe-horning minimum-sized (14,000 sf.) lots into the narrow wooded stream valley adjacent to existing residential backyards. One lot is encumbered by a drainage structure; another lot is encumbered with the paving for the use-in-common driveway to be 7 feet from the house; a third lot has questionable driveway access into the garage. The use-in-common driveway itself has no flexibility in design. It requires wholesale removal of priority forest adjacent to the 50-foot stream buffer and construction of retaining walls

to create a bench for construction. In order to accommodate lots in compliance with the minimum building envelopes required by Zoning, the driveway must be located as far as possible uphill and adjacent to the neighboring properties, leaving limited room for the required landscape buffer.

On August 5, 1999, DPZ sent a letter to appellant requesting a revised subdivision plan. On September 14, 1999, appellant submitted a revised plan which reflected a 1.9 acre lot, in lieu of four lots, and without a stream crossing. On October 14, 1999, DPZ approved the plan.

Appellant noted an appeal to the Board, challenging DPZ's denial of its waiver request and DPZ's requirement for a new plan. In pertinent part, appellant asserted that DPZ erred by (1) referencing law not yet in effect, (2) referencing disturbance of steep slopes that do not exist, (3) referencing a distance of 8' from the use-in-common driveway to adjacent properties while the proposal was 10', and (4) other factual errors.

The Board heard testimony on October 19, 1999, December 2, 1999, February 22, 2000, and June 8, 2000. Cindy Hamilton, a DPZ employee, testified that there were no steep slopes, wetlands, or flood plains within the stream or stream buffer. She also testified that DPZ was justified in considering the entire area, not just the stream and buffer area, when making its decision. She stated that DPZ was concerned with the tightness of the

"building envelope," but acknowledged that in the absence of the stream crossing issue, the proposed lots would be allowed. Jacob Hikmat testified that the project met the requirements of Howard County's Forest Conservation Act, see Howard County Code § 16.1205 (laying out the requirements of a forest conservation plan), and the requirements of the applicable Howard County Zoning Regulations. He also testified that the hardship was not self created, but was created by the stream and that the configuration and size of the lots bore no relevance to the impact of the stream crossing. Joseph Rutter, Director of DPZ, testified that a reasonable use of the property existed, without crossing the stream, because an 8 lot subdivision was viable. Testimony revealed that the forest conservation changes, referred to in DPZ's July 27, 1999 letter, were contained in Council Bill 13-1999, effective August 19, 1999, and prohibited forest conservation easements on residential lots less than ten acres in area. Mr. Rutter explained that the reference was placed in the denial letter as a "heads-up" warning which could affect the preliminary plan approval.

On July 21, 2000, the Board issued its Decision and Order. The Board described the case as a *de novo* appeal conducted in accordance with Section 2.210(a) of the Board's Rules of Procedure, contained within Title 2 of the County Code. Citing section 2.210(a)(4)(ii), the Board acknowledged that "[t]he

burden of proof in this appeal is on the Appellants to show that the action taken by DPZ in denying . . . [the waiver petition] was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law." After acknowledging that the initial burden was on appellant, the Board observed that DPZ was obligated to apply the criteria contained in HCSLDR section 16.104(a), and the burden of demonstrating the desirability of a waiver was on appellant. Ultimately, the Board concluded that DPZ's denial was arbitrary and capricious, pointing to the following reasons by DPZ:

(1) citing a law that is not yet in effect as a basis for denying the waiver request; (2) inappropriately captioning the second basis for denying the waiver request as a "self-created hardship" is not accurate when evidence was presented by the Appellant that the hardship was created by the stream and not by the creation of lots; (3) the letter denying the waiver request states that the waiver is detrimental to public interest, however, the basis given for the waiver being detrimental to the public interest is the proposed lot sizes and configurations. The lot configurations do not have anything to do with the environmental impact regarding the stream crossing and the evidence showed that the proposed lots will meet the required subdivision regulations. DPZ's denial letter fails to address the public interest which is the protection of the stream and stream buffer and does not address the environmental impact of the area to be crossed as a basis for its denial of the waiver request.

Based on its conclusion that DPZ's denial of appellant's waiver petition was arbitrary and capricious, the Board granted appellant's waiver petition.

On August 18, 2000, appellee, on behalf of DPZ, filed a

petition for judicial review in the Circuit Court for Howard County. On September 28, 2000, Ronald Dempsey, Jennifer Bean-Dempsey, Jeffrey Quillen, Richard Been, and Ann von Lossberg, members of the Gwynn Acres community, filed a motion to intervene in the circuit court proceedings.³ On April 13, 2001, the court granted their motion.

On November 1, 2001, the court held a hearing to review the Board's decision, and on January 22, 2002, issued its own decision. The court reversed the Board's decision and remanded the case to the Board to either affirm DPZ's decision or remand the matter to DPZ for DPZ to correct its decision. The court stated that, according to the applicable judicial standard of review, it was required to determine whether the Board's decision was arbitrary, capricious, or illegal. The court held that (1) the Board exceeded its authority under section 2.210(c) by granting the waiver petition based on errors in wording or captioning in the denial letter, explaining that because "the question before the agency was fairly debatable, the matter should have been remanded to DPZ to correct its denial letter" (footnote omitted), (2) the Board impermissibly substituted its judgment of the appropriate "public interest" criteria under HCSLDR section 16.104 for the judgment exercised by DPZ, (3)

³Additional facts pertaining to the motion to intervene will be set forth when we address that issue.

while the Board correctly stated that the burden of proof was on appellant, it ignored that burden and did not address the waiver criteria contained in section 16.116, and (4) the decision of DPZ was supported by substantial evidence, and thus, the Board's decision was arbitrary and capricious. With respect to the last point, the court also stated that the court could not substitute its judgment "for that of the administrative agency, i.e., DPZ."⁴

Contentions of the Parties

Appellant contends that the circuit court and this Court are required to review the decision of the Board and not the decision of DPZ. Appellant further contends that the Board's standard in reviewing DPZ's decision was, if not a pure *de novo* standard, something less deferential than the judicial standard of review that we are bound to apply. According to appellant, the Board applied the correct standard, and was free to consider the evidence before it and apply the facts to the law as it deemed appropriate in fashioning an appropriate remedy. In addition, appellant contends that there is substantial evidence to support the Board's decision. Finally, appellant argues that the circuit court erred in granting the motion to intervene.

⁴It is not clear to us whether the court applied what was in essence the judicial standard of review to the Board's review of DPZ's decision and/or reviewed DPZ's decision, as distinguished from reviewing the Board's decision. It is not necessary that we determine that issue with certainty because our function is to review the Board's decision, not that of the circuit court.

Appellee contends that DPZ is the agency responsible for enforcing the laws governing the subdivision of land and that the Board must apply a deferential standard of review when reviewing DPZ's decisions. According to appellee, the Board erred as a matter of law in basing its decision on nonsubstantive errors in DPZ's denial letter, in establishing its own standard of "public interest," and in ignoring that the burden of proof was on appellant. Alternatively, appellee contends that the Board's reasons for reversal were not supported by evidence in the record. Finally, appellee contends that the issues relating to self-created hardship and the public interest standard were not preserved because they were not raised by appellant in its petition to appeal DPZ's denial to the Board.

Issues Presented

As rephrased by us, the issues that we must decide are:

- 1) whether the Board applied the correct standard of review;
- 2) whether the Board's decision was supported by legally sufficient evidence and/or set forth sufficient findings to support its conclusions; and
- 3) whether the circuit court erred in granting the motion to intervene.

Right to Judicial Review

On appeal to this Court, appellant raises no issue with respect to appellee's right to seek judicial review of DPZ's

decision.⁵ Nevertheless, because it is a jurisdictional question, we shall comment on it briefly.⁶

Appellee's petition for judicial review stated that Howard County, through its Department of Planning and Zoning, was seeking review of the Board's decision. This statement is ambiguous with respect to whether the petitioner was DPZ or the County. Moreover, a review of the motion papers filed in circuit court and the circuit court's order denying the motion adds to the uncertainty because the conclusion that the County had standing relied on a hybrid analysis of the County's and DPZ's functions and rights. Nevertheless, we read the pleadings as indicating that Howard County, representing the interests of DPZ, was the petitioning party. We will review relevant statutes and case law to determine whether the circuit court properly exercised jurisdiction when the County sought judicial review of its Board's decision.

As a starting point, we recognize that it is well

⁵When the County filed its petition for judicial review in the circuit court, appellant sought to dismiss it on the basis that the County did not have standing to seek judicial review of the Board's decision. The lower court denied appellant's motion to dismiss, finding that the County did have standing based on statutory authority and case law.

⁶We recognize that seeking judicial review of an agency decision requires invoking the original jurisdiction of the circuit court, but in this context, our analysis discusses the right as if it were an appeal because that is the way it is referred to in the relevant statutes and county code provisions.

established in this State that the right of appeal is wholly statutory. Howard County v. JJM, 301 Md. 256, 261 (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)). Section 5(X) of Article 25A of Maryland's Code authorizes Howard County, as a charter county, to enact local laws "relating to zoning and planning including the power to provide for the right of appeal of any matter arising under such planning and zoning laws to the circuit court" Md. Code (2001 Repl. Vol.), art. 25A, § 5(X). Article 25A, section 5(U) provides for an appeal to a board of appeals by any "interested person" and for an appeal from the board to circuit court by a party before the board and "aggrieved" by it. The section also provides that a party in the circuit court proceedings may appeal to this Court. Pursuant to this express grant of power by the General Assembly, Howard County has adopted various charter and code provisions that define the right of appeal from a decision by the Board to the circuit court.

Howard County Charter section 501(d) provides for a right of appeal from the Board to the circuit court by any "person, officer, department, board or bureau of the County . . . aggrieved" by the decision. Howard County Code section 2.211(e), governing the Board's rules of procedure, also provides for a

right of appeal from decisions of the Board using the same language as the charter.

Howard County Zoning Regulations section 130(D), discussing court review, provides for an appeal from the Board to circuit court, and from circuit court to this Court. The appeal from the Board may be by "[a]ny person, persons, taxpayer, officer, department, board or office of the County . . . aggrieved" by the decision of the Board. Section 130(A)(2), discussing the Board's powers generally, provides for an appeal to the Board 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." We note that the latter provision does not seem to apply to an appeal by or on behalf of DPZ itself, but in addition, it is far from certain that the zoning provisions apply to the case before us because it involves a planning/subdivision issue.

Howard County Code section 16.105, which discusses the right of appeal in matters involving the subdivision and land development regulations, permits appeals to the Board by "[a] person specially aggrieved by an order of the Department of Planning and Zoning," and then permits appeals to the circuit court "[i]f the appellant continues to be aggrieved by the decision of the Board"

In summary, while all of the above provisions may not be

totally consistent, there appears to be a broad list of entities that can seek judicial review, subject of course to the requirement that the entity be "aggrieved" in order to obtain judicial review. In T & R Joint Venture v. OPZ, 47 Md. App. 395 (1980), we recognized that "[t]he condition of 'aggrievement,' of being 'aggrieved,' is a common prerequisite in the laws relating to administrative appeals, and particularly in zoning cases." Id. at 401. Citing the test first set forth in Bryniarski v. Montgomery County, 247 Md. 137, 144 (1967) (providing guidelines as to who is or is not "aggrieved"), we noted that:

Generally speaking, the decisions indicate that a person aggrieved by the decision of a board of zoning appeals is one whose personal or property rights are adversely affected by the decision of the board. 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 he is personally and specially affected in a way different from that suffered by the public generally. The circumstances under which this occurs have been determined by the courts on a case by case basis, and the decision in each case rests upon the facts and circumstances of the particular case under review.

Id. (quoting Bryniarski, 247 Md. at 144) (citation omitted).

Using the Bryniarski test, we determined that "a public official, agency, or entity is not legally 'aggrieved' by virtue of alternative personal or property rights merely because it has public duties and responsibilities of one sort or another, or because it represents the citizens of the subdivision." Id. at 402. In T & R, Anne Arundel County, in conjunction with its

Office of Planning and Zoning ("OPZ"), argued that it was aggrieved because if the land were rezoned, OPZ would be required to make major revisions to its master plans. Id. at 403. This Court rejected that argument, holding that "[t]hat is clearly not the type of special interest, or personal property right, required under the cases." Id. ("Many people - public officials and private individuals - are put to extra work, or inconvenience, or even expense by zoning decisions; but that does not necessarily make them 'aggrieved' in the legal and statutory sense.").

More recently, in M-NCPPC v. Smith, 333 Md. 3 (1993), the Court of Appeals recognized that "[a]n agency may maintain an appeal in those cases involving the agency's role in protecting the public interest," but held that the agency in question was not aggrieved by the Board's decision rejecting its recommendations and could, therefore, not maintain an appeal. Id. at 13-14. In Smith, property owners applied for a building permit, and pursuant to Prince George's County zoning ordinances, commissioners from the Maryland-National Capital Park & Planning Commission ("Commission") reviewed the application and recommended denial of the permit. Id. at 5. The owners appealed to the Board of Appeals, which reversed the denial of the permit. Id. at 6. When both the Commission and the County appealed the Board's decision, the owners moved to dismiss for lack of

standing, and the motion was granted as to the Commission. Id. On appeal from that decision by the trial court, the Court of Appeals affirmed the lower court's granting of the motion to dismiss, reasoning that the Commission could not establish that it was aggrieved by the Board's reversal of its recommendation. Id. at 11-19. The Court explained that "[t]he Commission will not suffer any property loss, or be compelled to act based on the board's decision. The only possible injury is the arguable indignity of having a recommendation rejected." Id. at 12.

In the case before us, it is very arguable that the County, acting on behalf of DPZ, does not fit the definition of "aggrieved" as discussed in T & R and Smith.

As previously indicated, Article 25A, section 5(U) requires that an entity be a party to the proceeding before the board and be aggrieved by the board's decision in order to be able to appeal the board's decision to circuit court. In addition to the question of aggrievement, which we will revisit before concluding our discussion, there is the question of party status. Under the applicable provisions, there is no right of appeal unless one is a party. See Md. Code art. 25A, § 5(u); Montgomery County v. One Park North Associates, 275 Md. 193, 201-02 (1975). The County is asserting DPZ's position, however, and DPZ was a party before the Board. Because Howard County is a body corporate pursuant to its charter, and for that reason may have had to file the petition

for judicial review in its name, we hold that the "party" requirement is satisfied.

Aside from the provisions addressing the right to appeal to and from a Board's decision, there is another possible basis for finding that the County had the right to seek judicial review. This stems from a statutory provision that grants the County general power to enact and enforce local legislation. Md. Code (2001 Repl. Vol.), art. 25A, § 5(A). In addition to section 5(A)'s broad grant of powers, Howard County's charter section 904 provides that "the County shall have all powers necessary and convenient for the conduct of its affairs" Section 904 has previously been relied on by the Court of Appeals as a catchall provision granting the County the authority to appeal a decision by the Board on behalf of its Office of Planning and Zoning in order to defend its subdivision regulations against charges of unconstitutionality. See Howard County v. JJM, 301 Md. 256, 261-63.

JJM is distinguishable from the case at hand, however, because there the County did not seek judicial review of the Board's decision in circuit court but only sought to appeal the circuit court's decision that one of the county's code provisions was unconstitutional. Id. at 259-61. In the present case, we are asked to determine whether the County had the right, on behalf of DPZ, to seek judicial review of the Board's decision in

circuit court, not on the issue of the constitutionality of the code provisions, but on the basis of whether the Board erred in reversing DPZ's denial of the waiver.

Before concluding this discussion, we recognize another line of cases exemplified by Heaps v. Cobb, 185 Md. 372, 379 (1945), and Criminal Injuries Compensation Board v. Gould, 273 Md. 486 (1975). Those cases stand for the proposition that, in the absence of a statutory right of appeal, judicial review of an administrative agency's decision may be appropriate. Such review may be by application for mandamus, certiorari, or otherwise, but a petition for judicial review may be treated as such if it alleges arbitrary, capricious, illegal, or unreasonable action by the agency. Gould, 273 Md. at 513; see also City of Seat Pleasant v. Jones, 364 Md. 663 (2001). This doctrine is based on the fact that courts have inherent power to review and correct actions by an administrative agency that are arbitrary, capricious, illegal, or unreasonable. Gould, 273 Md. at 501.

In the case before us, there is a statutory right to appeal. The question is one of standing. Under the Gould line of cases, a party seeking judicial review presumably still needs standing to do so successfully. Standing is not limited, however, to situations where there is an impairment of personal or property rights, at least not in the traditional sense. Id. at 508.

The State Administrative Procedure Act, while not applicable

here, requires that an entity seeking judicial review be both a party and "aggrieved." See Md. Code (2001 Repl. Vol.), State Gov't § 10-222(a)(1). The facts necessary to satisfy the aggrieved requirement, when the petitioner is a governmental entity, appear to be that it have an interest in interpreting, administering, and enforcing the laws in question in a given case. See Maryland Real Estate Commission v. Johnson, 320 Md. 91 (1990) (the State Real Estate Commission had standing to appeal from a circuit court decision and was aggrieved because a fund it managed would be required to disburse funds to claimants, it had the power to investigate claims, and to punish violators.) This approach has been followed with respect to local and not State agencies. See Calvert County Planning Commission v. Howlin Realty Management, Inc., 364 Md. 301 (2001); Board of Liquor v. Hollywood, 344 Md. 2 (1996); and Carroll County v. Lennon, 119 Md. App. 49 (1998).

We conclude that when an agency's action is alleged to be arbitrary, capricious or illegal, the requirement of standing or "aggrieved" is a low threshold. See Board of License Commissioners v. Corridor Wines, Inc., 361 Md. 403, 411 (2000) (In the absence of a statutory provision for judicial review of a final decision by an administrative agency, certiorari or mandamus "is normally available for ordinary 'substantial evidence' judicial review of the adjudicatory administrative

decisions"). But see State v. Board of Education, 346 Md. 633, 644 (1997) (noting that the legislature could preclude judicial review of a dispute between the State and a State agency). We also conclude that the current view is that a governmental entity, including a local entity, with an interest in administering the laws in question is aggrieved.

Howlin Realty, supra, is not exactly on point because the question was whether the county planning commission could be a party in circuit court after the property owner petitioned for judicial review. Nevertheless, the Court held that the planning commission had standing to be a party because it had substantial control over the subdivision of land within the county, and as such, was charged with implementing important public policy. Id. at 320.

We have not been able to find any authorities on point in that most of the cases involving a government agency deal with the absence of a statutory right to seek judicial review, the right to appeal from circuit court to this Court, or whether the agency is barred from judicial review because it exercises quasi-judicial functions. Based on the general powers and obligations of the County to enforce and maintain its laws, and relying primarily on the reasoning in Howlin Realty, we conclude that the County did have the power and standing to seek judicial review on behalf of DPZ.

Standard of Review

The parties do not dispute the applicable judicial standard of review. Accordingly, we will quote from this Court's recent decision in Stover v. Prince George's County, 132 Md. App. 373 (2000), to articulate the applicable standard of review of an administrative agency's decision:

When reviewing a decision of an administrative agency, this Court's role is "precisely the same as that of the circuit court." Department of Health and Mental Hygiene v. Shrieves, 100 Md. App. 283, 303-304, 641 A.2d 899 (1994) (citation omitted). "Judicial review of administrative agency action is narrow. The court's task on review is not to 'substitute its judgment for the expertise of those persons who constitute the administrative agency.'" United Parcel Service, Inc. v. People's Counsel for Baltimore County, 336 Md. 569, 576-577, 650 A.2d 226 (1994) (quoting Bulluck v. Pelham Wood Apts., 283 Md. 505, 513, 390 A.2d 1119 (1978)).

Rather, "to the extent the issues on appeal turn on the correctness of an agency's findings of fact, such findings must be reviewed under the substantial evidence test." Department of Health and Mental Hygiene v. Riverview Nursing Centre, Inc., 104 Md. App. 593, 602, 657 A.2d 372, cert. denied, 340 Md. 215, 665 A.2d 1058 (1995) (citation omitted). The reviewing court's task is to determine "whether there was substantial evidence before the administrative agency on the record as a whole to support its conclusions." Maryland Commission on Human Relations v. Mayor and City Council of Baltimore, 86 Md. App. 167, 173, 586 A.2d 37, cert. denied, 323 Md. 309, 593 A.2d 668 (1991). The court cannot substitute its judgment for that of the agency, but instead must exercise a "restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions." State Administration Board of Election Laws v. Billhimer, 314 Md. 46, 58- 59, 548 A.2d 819 (1988), cert. denied, 490 U.S. 1007, 109 S. Ct. 1644, 104 L. Ed. 2d 159 (1989) (quoting Supervisor of Assessments of Montgomery County v. Asbury Methodist Home, Inc., 313 Md. 614, 625, 547 A.2d 190 (1988)).

The reviewing court's analysis has three parts:

1. First, the reviewing court must determine whether the agency recognized and applied the correct principles of law governing the case. The reviewing court is not constrained to affirm the agency where its order "is premised solely upon an erroneous conclusion of law."

2. Once it is determined that the agency did not err in its determination or interpretation of the applicable law, the reviewing court next examines the agency's factual findings to determine if they are supported by substantial evidence, i.e., by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. At this juncture, . . . "it is the agency's province to resolve conflicting evidence, and, where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference."

3. Finally, the reviewing court must examine how the agency applied the law to the facts. This, of course, is a judgmental process involving a mixed question of law and fact, and great deference must be accorded to the agency. The test of appellate review of this function is "whether, . . . a reasoning mind could reasonably have reached the conclusion reached by the [agency], consistent with a proper application of the [controlling legal principles]."

Comptroller of the Treasury v. World Book Childcraft Int'l, Inc., 67 Md. App. 424, 438-439, 508 A.2d 148, cert. denied, 307 Md. 260, 513 A.2d 314 (1986) (quoting Ramsay, Scarlett & Co., Inc. v. Comptroller of the Treasury, 302 Md. 825, 834-838, 490 A.2d 1296 (1985)).

Id. at 380-81.

Discussion

1.

As a preliminary point, we agree with appellant that it is the Board's decision, the final administrative decision, that we are required to review. See Dep't of Health & Mental Hygiene v.

Shrieves, 100 Md. App. 283, 301-02 (1994) ("When reviewing an agency's decision overruling an ALJ's recommendation, the question is not 'whether the agency erred' in overruling the ALJ but whether there is substantial evidence for the agency's decision.").

The next issue that we must determine is whether the Board applied the appropriate standard of review when it reviewed DPZ's decision. Appellee urges us to hold that the Board was bound to a deferential standard of review similar to our judicial standard of review. Appellant, on the other hand, acknowledges that the Board's standard of review is not purely *de novo* in that it requires the Board to determine whether DPZ's decision was arbitrary, capricious or contrary to law before arriving at its own conclusions, but it does not agree with appellee's limited view of the Board's powers. Our determination of this issue centers on our understanding of the relevant statutory framework, including a Maryland statute, the Howard County Charter, the Howard County Code, and Howard County Zoning Regulations, which we will review below.

Relevant Statutes and Regulations⁷

Our examination of the statutory scheme begins with article 25A, section 5(U) of Maryland's Annotated Code, entitled "County Board of Appeals," which empowers Charter counties:

[t]o enact local laws providing (1) for the establishment of a county board of appeals . . . and (4) [allows] for the decision by the board on petition by any interested person and after notice and opportunity for hearing and on the basis of the record before the board, of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance or regulation of, or subject to amendment or repeal by, the county council, [including] . . . 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 adjudicative order

Md. Code (2001 Repl. Vol.), art. 25A, § 5(U) (emphasis added).

In addition to granting broad powers to a board of appeals regarding original and appellate jurisdiction, subsection 5(U) also requires that any opinion by a board include a statement of the facts found and the basis for its decision. Finally, the statute recognizes the right of an aggrieved party to appeal the decision of a board to the circuit court, and then to this Court. Id.

Pursuant to the broad grant of powers by the state statute,

⁷The statutes, code provisions, and regulations discussed are considered in the form in which they appeared at the time of the appeal to the Board. Subsequent changes to the Charter and Code may be discussed if relevant.

section 501 of Howard County's Charter states in pertinent part:

(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,

(c) Rule of practice and procedure. The Board of Appeals shall have the 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 Procedures Act, Article 41, of the Annotated Code of Maryland. . . . All matters which come before the Board pursuant to its exercise of original jurisdiction shall receive a de novo hearing on all issues. Those matters coming before the Board pursuant to an appeal from an executive, administrative or adjudicatory order wherein a formal hearing was held verbatim on the record developed shall be reviewed by the Board on the basis of the record before it.

These provisions are relevant in understanding the present dispute because they recognize the distinction between a *de novo* appeal and an appeal on the record and require that the Board's rules of practice and procedure not be inconsistent with the requirements set forth in Maryland's Administrative Procedure Act.

Next, we turn to Title 2 of Howard County's Code, which contains administrative procedures generally and the Board's rules of procedure specifically. Subtitle 2, entitled "Rules of Procedure of the Board of Appeals," addresses various topics, including organization of the Board, requirements for petitions to the Board, how notice to the public must be provided, and how

meetings and hearings are conducted through the introduction of evidence and motions, as well as testimony by the parties. The subtitle begins by explaining that "these 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 County Code; and the Howard County Zoning Regulations. See § 2.200. Section 2.210 is important in the present case because it governs the conduct of administrative appeal hearings, distinguishing between *de novo* appeals and appeals on the record. Section 2.210(a)(4) sets forth the burden of proof applicable to different types of *de novo* appeals, stating:

- (i) In an appeal of an administrative agency's issuance of a notice of violation of county laws and regulations, the burden of proof is upon the administrative agency (proponent) to show, by a preponderance of the evidence, that the respondent has violated the laws or regulations in question. However, it shall be the respondent's burden to prove all affirmative defenses, including the defense of nonconforming use.
- (ii) In all other *de novo* appeals, the burden of proof is upon 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.

Subsection (b) contains the burden of proof applicable to appeals on the record, the same standard applicable to *de novo* appeals from administrative agencies.

Pertinent to the issues in this case, Title 16 of Howard County's Code contains the County's "Planning, Zoning and

Subdivisions and Land Development Regulations.” Although Title 16 contains the requirements for a waiver and other substantive issues in this case, it also provides rules and procedures governing the Board’s role in this context. Compare § 16.104 (Waivers); § 16.116 (Protection of wetlands, streams, and steep slopes); § 16.1200 (Forest conservation), with § 16.105 (Appeals); § 16.300 (Board of Appeals). First, section 16.105 explains that “a person specially aggrieved” by an order of DPZ may appeal to the Board in accordance with section 501 of the Charter. Next, subtitle 3 of title 16 lays out the Board’s powers in the context of planning, zoning, subdivisions, and land development.⁸ Section 16.301 provides that the Board has the power “[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.”

⁸Subtitle 3 was amended in 2000, creating the position of hearing examiner to hear and decide some matters that were previously heard by the Board exclusively. The changes provide for the hearing examiner to initially hear matters where the Board has original jurisdiction or where there was no hearing below. On the other hand, the Board continues to hear and decide appeals where there has already been an opportunity for a contested case hearing. The amendments further clarify the applicable burden of proof to be used by both the hearing examiner and the Board. These revisions suggest that the County recognized that there was some confusion regarding the existing appeal procedures and attempted to clarify the Board’s role.

Finally, section 130(B)(4) of Howard County's Zoning Regulations also contains a section pertaining to the Board of Appeals, which provides that the Board 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."

We conclude that, read as a whole, these provisions mean that the Board's standard is not as deferential as the judicial standard but is not a purely *de novo* proceeding. The Board expressly applied section 2.210(a)(4)(ii) and recognized that it was required to consider DPZ's decision and treat it as correct unless, based on the facts found from the evidence, the Board determined that DPZ's decision was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. The provision in question is one of the Board's own rules of procedure. We reach our conclusion, having given due deference to the Board's interpretation and application of its rule of procedure. The question is not one of substantive law to which no deference is owed.

Besides the reference in section 2.210(a)(4)(ii) to the burden of proof of the appellant to show that DPZ's action was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law, none of the code provisions and regulations addressing the Board's role in administrative appeals limit its

powers. Notably, the County Charter distinguishes between *de novo* appeals and appeals on the record⁹ and requires that the Board's procedures comply with the requirements of Maryland's Administrative Procedure Act. These are important features because, when a county law provides for a hearing, due process requires that it be a meaningful hearing. In this case, the hearing before the Board is the first hearing. Under these circumstances, the Board's role is more akin to a second tier administrative agency, rather than a first tier judicial reviewer, as appellee suggests. This approach is also consistent with other provisions contained in section 2.210, which explain how to conduct a *de novo* appeal, and with section 16.301, which permits the Board to hear and decide appeals when it is alleged that DPZ committed error, without providing further limitation on the Board's powers.

Our analysis of whether the Board applied the correct standard of review requires that we determine the nature and scope of the remedy that the Board was permitted to afford when it found that DPZ's decision was arbitrary and capricious. Appellant argues that, under the statutory scheme, the Board provides checks and balances on DPZ's regulatory power and that

⁹According to the Charter, where there is a formal hearing below and a verbatim record developed, except in certain circumstances, the Board does not hold *de novo* evidentiary hearings but reviews the record for error. This type of appeal on the record is clearly distinguishable from a *de novo* appeal.

the nature and scope of the *de novo* appellate proceeding is designed to and permits the Board to correct any error.

Appellee, on the other hand, argues that the Board was required to remand the matter to DPZ even after it found its decision was arbitrary and capricious.

We believe that the Board had the authority to grant the waiver if its own findings were sufficient to support such a conclusion. First, under the applicable standard of review, the Board was entitled to make its own findings and apply the facts to the law. In addition, in the absence of any express language in any of the Code provisions suggesting that the Board's power was limited to the determination of whether DPZ's decision was arbitrary or unlawful, there is no reason to believe that the Board did not have the substantive power to fashion an appropriate remedy. Further, subsequent revisions to section 2.210 have included the addition of a subsection (c), which provides that "[t]he Board may dismiss the administrative appeal or may affirm, reverse, or modify the agency's action, remand the action to the agency for further proceedings, or an appropriate combination of the above." If there was no procedural tool available before, on remand, this new rule of procedure appears to provide the Board with the authority to grant the waiver.

2.

Given our conclusion that the Board, in its opinion, applied

the correct standard, we must now apply our standard of review to determine whether the Board's decision was sufficient in terms of its findings and conclusions. The Court of Appeals' decision in United Steelworkers of America v. Bethlehem Steel Corp., 298 Md. 665 (1984), provides a brief explanation about our role in determining whether a decision by an administrative agency can be upheld based on the agency's findings and conclusions:

Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

Id. at 679 (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-68 (1962); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943); Harborlite Corp. v. I.C.C., 613 F.2d 1088, 1092-93 (D.C. Cir.1979); Int'l Paper Co. v. Fed. Power Comm'n, 476 F.2d 121, 128 (5th Cir. 1973); USV Pharmaceutical Corp. v. Secretary of Health, Educ. & Welfare, 466 F.2d 455, 461-62 (D.C. Cir. 1972); Marco Sales Co. v. FTC, 453 F.2d 1, 7 (2d Cir. 1971); Davis v. Weinberger, 390 F. Supp. 813, 816 (M.D. Pa. 1975); Blodgett Uncrated Furniture Serv., Inc. v. United States, 288 F. Supp. 591, 598-99 (W.D. Mich. 1968); Bell Lines, Inc. v. United States, 263 F. Supp. 40, 44-46 (S.D. W.Va. 1967); 3 Davis, Administrative Law Treatise § 14:29 (2d ed. 1980)).

The two conclusions that we must test for sufficiency are 1) whether DPZ's decision was arbitrary and capricious, and 2) whether appellant's waiver request should be granted. We hold that the Board's first conclusion is sustainable, but its second conclusion is not.

The Board's reasons for concluding that DPZ's decision denying appellant's waiver petition was arbitrary and capricious were that the denial letter 1) cited law that was not yet in effect as a basis for denying the waiver request, 2) inappropriately captioned the second basis for denying the waiver as "self-created hardship," where evidence presented by appellant demonstrated that the hardship was created by the existence of the stream and not by appellant's subdivision of the property into lots, and 3) stated that the waiver would be detrimental to the public interest because of the proposed lot sizes and configurations, when the public interest issues should have been decided based on environmental impact.

With respect to the reference in DPZ's denial letter to legislation not yet in effect, the Board had before it testimony - not just the letter - and characterized the reference as a "basis" for denying the waiver request. The Board did not characterize it as an error in transcription, as appellee suggests. Similarly, the Board did not find that the reference to "self-created hardship" was an error in transcription and

referred to evidence that the hardship was created by the stream and not by the creation of lots. Finally, with respect to the factors relevant to "public interest," the Board concluded that lot sizes and configurations permitted by the zoning regulations had nothing to do with the environmental impact of the proposed stream crossing. This interpretation of the applicable regulations is also owed deference. See, e.g., Board of Physician Quality Assur. v. Banks, 354 Md. 59, 69 (1999) (recognizing that "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts") (citing Lussier v. Md. Racing Comm'n, 343 Md. 681, 696-697 (1996), and cases therein). Applying the judicial standard of review to the Board's decision, we cannot hold that the Board applied an incorrect principle of law or itself acted arbitrarily in concluding that these reasons were arbitrary.¹⁰

¹⁰We also find no merit in appellee's contention that the Board erred in reversing DPZ's decision because the self-created hardship and public interest issues were not specifically mentioned by appellant in its petition to appeal DPZ's denial. Although the two cases cited by appellee in support of its contention do state that a board's review is limited to those issues presented on appeal, their discussion of what is considered an "issue" reflects a broad interpretation that is intended to limit the board from reversing decisions by the lower body that were not challenged by appellant. See Halle v. Crofton Civic Ass'n, 339 Md. 131, 145-46 (1995) ("The access issue was so inextricably intertwined with the administrative hearing officer's decision that it was an issue properly before the Board which could be addressed."); Daihl v. County Board of Appeals,
(continued...)

Consequently, had the Board simply remanded the matter to DPZ for further consideration, we could affirm the Board. The Board granted the waiver request, however, and in doing so, it was required to set forth findings of fact and conclusions of law sufficient to affirm its decision. See United Steelworkers of America v. Bethlehem Steel Corp., 298 Md. 665, 679 (1984); see also Md. Code, art. 25A § 5(U) (explaining that when a board files an opinion, it must include a statement of the facts founds and the grounds for its decision) and Howard County Code § 2.211(b) (requiring that the board's decision be accompanied by findings of fact and conclusions of law). The Board's opinion does not contain the necessary findings to sustain the Board's conclusion that the waiver criteria had been met. See Howard County Code § 16.104 (setting forth the necessary requirements for granting a waiver). Accordingly, we must remand to the Board to either remand to DPZ or to set forth findings and conclusions sufficient to justify why the waiver should be granted.

¹⁰ (...continued)
258 Md. 157, 161-64 (1970). In the present case, appellant alleged both specific and general factual errors in its petition, all in support of the contention that DPZ's denial letter was arbitrary and capricious. See Halle, 339 Md. at 138 (recognizing that the Board can address new issues, but "cannot, however, indiscriminately entertain matters which in effect change the nature of the original controversy or application"). The fact that the Board's reversal was not based solely on the errors alleged by appellant does not mean that it erred as a matter of law.

Appellant's final claim is that the circuit court erred in granting the motion to intervene. We will briefly set forth the facts relevant to the motion and the Rule 2-214 requirements governing intervention rights and will then explain why we hold that the circuit court did not err in granting the motion.

On September 28, 2000, more than two months after the Board issued its decision reversing DPZ's denial letter, Ann von Lossberg, Richard Breen, Jennifer Bean-Dempsey, Ronald Dempsey, and Jeffrey Quillen ("Intervenors"), pursuant to Rule 2-214, moved for leave to intervene as of right in circuit court. In their petition, intervenors alleged that as adjacent or nearby property owners of the proposed subdivision, they were necessarily affected and therefore "aggrieved" parties. They also alleged that they had been denied the right to participate in the hearings before the Board¹¹ and that they should be

¹¹Intervenors' attempt to participate in the hearings came in the form of a letter to the Board after its first hearing but before the other three. Ann von Lossberg, President of the Gwynn Acres community association, wrote to the chairperson of the Board, asking if it would be possible for the community to be heard at the next hearing on the issue of the impact that the stream crossing would have on them. The letter also mentioned the Hikmat appeal's potential effect on an appeal that the community association was also pursuing before the Board and suggested that a decision in the RAFAT appeal could preclude their appeal. The Board denied the community association's request to testify, stating that only parties to the appeal were permitted to testify, and that their only opportunity to testify would be if either DPZ or Hikmat called one of the community
(continued...)

afforded a right to be a party in the matter because their interests could not be adequately represented by the County, and further that they would be able to provide valuable testimony about the "detriment to the public interest," one of the criteria for waiver.

After a hearing on the matter, the circuit court, on April 13, 2001, granted the motion to intervene, finding that the intervenors were entitled to intervene as of right, based on their satisfaction of the requirements of Rule 2-214(a)(ii). Although the court first recognized that the intervenors did not have an unconditional right to intervene as a matter of law because they were not parties to the underlying proceeding, it went on to conclude that the intervenors' motion was timely and that they satisfied the "protectible interest" and "Interest-Analysis" tests used in determining compliance with Rule 2-214(a)(ii).

Rule 2-214(a)(ii) provides that, "[u]pon timely motion, a person shall be permitted to intervene in an action . . . when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest

¹¹(...continued)
members as a witness.

unless it is adequately represented by existing parties.” In this Court’s decision in Chapman v. Kamara, 118 Md. App. 418 (1997), we stated that the appropriate standard of review for an intervention as of right is whether the lower court committed error. Id. at 427. We also discussed the four requirements that a party moving for intervention as of right must demonstrate: 1) the application for intervention must be timely, 2) the applicant must have an interest in the subject matter of the action, 3) the disposition of the action must at least potentially impair the applicant’s ability to protect its interest, and 4) the applicant’s interest must be inadequately represented by the existing parties. Id.

Recognizing that a timely application is a prerequisite for intervention, the circuit court determined that intervenors’ motion was timely, using the factors set forth in Maryland Radiological Society v. Health Services, 285 Md. 383, 388-89 (1979) (noting that all relevant circumstances should be taken into account). Next, the circuit court concluded that the second and third requirements (relating to whether intervenors had a “protectible interest”) were met based on intervenors’ status as adjoining property owners and because of the threat of increased erosion and greater flooding if appellant’s waiver request was granted. Finally, applying the “Interest-Analysis” test set forth in Maryland Radiological Society, 285 Md. at 390-91, the

circuit court found that intervenors' interest in the case was similar to that of the County, but not identical, and that it was not clear that the County would provide adequate representation for intervenors. We are satisfied that the circuit court did not err in concluding that all four requirements were met by intervenors.

On remand to the Board, the Board shall determine whether and to what extent the intervenors may participate in proceedings before it.

**JUDGMENT REVERSED IN PART AND
AFFIRMED IN PART. CASE REMANDED
TO THE CIRCUIT COURT FOR HOWARD
COUNTY WITH INSTRUCTIONS THAT IT
BE REMANDED TO THE BOARD OF
APPEALS FOR FURTHER PROCEEDINGS
NOT INCONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.**

Montero Carranza, Amankaya

From: STUART KOHN <stukohn@verizon.net>
Sent: Friday, July 26, 2024 7:22 AM
To: CouncilMail; Eisenberg, Lynda; PlanningBoard; CouncilBoard@howardcountymd.gov
Subject: Subpoenas Not Discussed in Zoning or Planning Board Rules of Procedure

Follow Up Flag: Follow up
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[Note: This email originated from outside of the organization. Please only click on links or attachments if you know the sender.]

FYI,

At yesterday's Board of Appeals (BoA) meeting regarding revising their Rules of Procedure the subject of subpoenas was briefly discussed as it is included in the last revision of 35 years ago in the BoA Rules. It was stated the subpoenas rules are defined in the Zoning Board Rules of Procedure. I don't see it in the established Rules. This was a major item of discussion when HCCA testified on revising the Zoning Board Rules of Procedure. If this is true, we would appreciate this most important mechanism for a given case to be updated in both the Zoning Board and Planning Board Rules of Procedure. This should be corrected to ensure due process is in order for all parties.

Thank You,

Stu Kohn
HCCA President