Amicus Curiarum

VOLUME 26
ISSUE 1 JANUARY 2009
A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Craig B. Chesek and Gregory J. Maddalone v. Adrienne A. Jones No. 117, September Term, 2007, filed November 6, 2008. Opinion by Raker, J.

http://mdcourts.gov/opinions/coa/2008/117a07.pdf

CONSTITUTIONAL LAW - LEGISLATIVE POLICY COMMITTEE - INVESTIGATIONS - SUBPOENA POWER

Facts: The Court of Appeals addressed the question of whether a Special Committee formed by the Legislative Policy Committee, a bi-partisan committee of the Maryland General Assembly, has the same power to issue subpoenas as that of the Legislative Policy Committee under § 2-408(a) of the State Government Article.

In 2005, the Legislative Policy Committee created a twelve-member Special Committee on State Employees' Rights and Protections to investigate the alleged wrongful political firings of employees within various state agencies during Governor Ehrlich's administration. To assist in collecting information, the Special Committee requested that the Ehrlich administration produce certain documents. When the administration failed to comply fully with the document requests, the Special Committee served subpoenas on certain witnesses, including appellants Maddalone and Chesek. As ordered, appellants appeared before the Special Committee; however, during their respective testimony, Maddalone and Chesek refused to answer certain questions, claiming their appearance was voluntary and that they were permitted to refuse to answer questions at their own discretion.

Delegate Adrienne Jones, as co-chairperson of the Special Committee, filed a Petition for Order to Compel Testimony and a Motion for Summary Judgment in the Circuit Court for Baltimore County. The Circuit Court granted Jones' motion for summary judgment against Chesek in its entirety, and granted Jones' motion for summary judgment against Maddalone in part, requiring him to answer questions regarding a state employee database, but not requiring him to answer the Special Committee's questions regarding payment of attorney fees.

Appellants noted a timely appeal to the Court of Special

Appeals. The Court of Appeals, pursuant to a petition for writ of certiorari filed by appellee Jones, issued a writ before the intermediate appellate court decided the appeal.

Held: The Court of Appeals held that appellants Chesek and Maddalone were required to fully answer the Special Committee's questions on the grounds that State Government Article § 2-408 gave the Special Committee power to enforce appellants' compliance with its subpoenas.

Section 2-408 authorizes the Legislative Policy Committee to compel testimony, depose witnesses, and issue subpoenas, and to enforce compliance with such subpoenas by petitioning the circuit court. In relevant part, the powers granted in section 2-408(a) are set forth as follows:

> "(a) Authorized. — In carrying out any of its functions or powers, the Committee may:
> (1) issue subpoenas;
> (2) compel the attendance of witnesses . . . ."

Section 2-408(b) then provides for enforcement of the subpoena power in the circuit courts of Maryland.

The Court of Appeals concluded that the Legislative Policy Committee expressly delegated all of its powers under § 2-408 to the Special Committee in the Legislative Policy Committee Resolution establishing the Special Committee, and that those powers included the Legislative Policy Committee's subpoena power as listed in 2-408(a). The Court of Appeals further reasoned that without the full force of investigative powers, the Special Committee would have been unable to fulfill its mandate to examine the involuntary separation of state employees. The Court therefore affirmed the trial court's granting of summary judgment in favor of appellee requiring appellant Chesek to fully answer questions submitted by the Special Committee, and requiring appellant Maddalone to answer questions regarding a state employee database.

At the hearing before the Special Committee, Maddalone refused to answer questions regarding payment of his attorney fees, claiming that such information fell within his attorney-client privilege. The Circuit Court ruled that Maddalone did not have to answer questions concerning payment of his attorney's fees. The Court of Appeals, however, reversed the Circuit Court. The Court of Appeals reasoned that the attorney-client privilege is generally not violated by requiring the disclosure of the payment of attorney's fees. Maddalone did not assert any exception to this

general rule and therefore the Court of Appeals did not address it.

***

Rory Howard Washington v. State of Maryland, No. 31, September Term, 2008, filed December 12, 2008. Opinion by Raker, J.

http://mdcourts.gov/opinions/coa/2008/31a08.pdf

CRIMINAL LAW - PHOTOGRAPHIC EVIDENCE - AUTHENTICATION - HARMLESS ERROR

Facts: Petitioner was convicted by a jury in the Circuit Court for Baltimore City of assault in the first degree, assault in the second degree, and three handgun violations, for his role in a shooting at a Baltimore City bar. At trial, the State introduced into evidence surveillance video and photographs. The owner of the bar testified that the surveillance system from which the video and photographs were taken consisted of eight digital video cameras recording twenty-four hours per day and positioned in various locations inside and outside the bar. The video presented at trial was compiled from the camera recordings by a technician and then given to a detective investigating the shooting. The still photographs were taken from the video.

Defense counsel objected to the admissibility of the photos and videotape on the ground that the State failed to properly authenticate the videotape pursuant to Md. Rule 5-901(a). The trial court admitted the videotape and photographs into evidence. Petitioner noted a timely appeal to the Court of Special Appeals. The intermediate appellate court held that the trial court erred in admitting the evidence, but that the error was harmless. The Court of Appeals granted certiorari.

Held: Reversed and remanded for a new trial. The Circuit Court erred in admitting the videotape and photographs into evidence without the State first properly authenticating it, and the error was not harmless beyond a reasonable doubt.

The Court of Appeals reasoned that the trial court erroneously admitted the videotape and still photographs because the State offered them as probative evidence in themselves, and not as illustrative evidence to support the testimony of an eyewitness, without first establishing that the videotape and photographs represented what they purported to portray. The State did not offer any testimony as to the process used to compile the images from the eight surveillance cameras into one video, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures.

The Court of Appeals held that the error in admitting the

videotape was not harmless beyond a reasonable doubt because the State relied heavily on the videotape to establish its case. The State used the videotape to counter petitioner's argument that he was not the shooter, as well as to negate any mutual affray defense.

***

James Desmond Jones v. State of Maryland, No. 37, September Term, 2008, filed December 23, 2008. Opinion by Raker, J.

http://mdcourts.gov/opinions/coa/2008/37a08.pdf

CRIMINAL LAW - REASONABLE SEARCH AND SEIZURE - VOLUNTARY CONSENT

REASONABLE SEARCH AND SEIZURE - KNOCK AND TALK

Facts: Petitioner was convicted of second degree murder and use of a handgun in the commission of a crime of violence. Prior to trial, petitioner filed a motion to suppress all physical evidence the police seized from the property on which he resided after they went there to investigate the murder. Petitioner contended that the law enforcement officers' search of the property was unlawful because the officers trespassed on to the property without a search warrant, and because petitioner's wife did not consent voluntarily to search the property after the officers' knocked on the front door to her home for approximately five minutes.

The trial court denied petitioner's motion to suppress. Petitioner noted a timely appeal to the Court of Special Appeals, which affirmed his conviction, and the Court of Appeals granted certiorari.

Held: The Court of Appeals affirmed, holding that the officers' search was reasonable under the Fourth Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights.

The Court of Appeals agreed with the Court of Special Appeals and the trial court that the officers did not trespass onto the property when they went there. The police had found a cell phone on the body of the victim. The cell phone number was listed to petitioner's wife, who was living on the property. Based on the facts presented at the motion to suppress, the Court agreed with the trial court that the posted "No Trespassing, Hunting or Fishing" sign, signed by petitioner's in-laws, was insufficient to make police, and other members of the public present on the property for legitimate purposes, trespassers.

The Court of Appeals also declined to reconsider and overrule the cases of *Scott v. State*, 366 Md. 121, 782 A.2d 862 (2001), and *Brown v. State*, 378 Md. 355, 835 A.2d 1208 (2003), which addressed the "knock and talk" procedure commonly used by police officers. In the instant case, unlike *Scott* and *Brown*, the officers never entered a dwelling or motel room but instead, the search took place

in a commercial warehouse. The Court reasoned that petitioner's case did not fall within the scope of the rule, since the officers never entered the dwelling and never conducted a search therein.

The Court of Appeals concluded that, under the totality of the circumstances, petitioner's wife consented freely and voluntarily to the search that police conducted in the warehouse located on the property. She was not seized when the officers knocked persistently on her door and when she opened the door, petitioner's wife was friendly and cooperative. Petitioner's wife refused to permit the officers to enter her home and instead suggested a commercial warehouse located on the property where they could continue to talk. Moreover, on two occasions while petitioner's wife and the officers conversed in the warehouse, petitioner's wife requested, and was granted, permission to leave the officers to retrieve items from her house, and returned both times.

***

Pines Point Marina, A Condominium Council of Unit Owners, Inc. v. Jim Rehak, et al., No. 22, September Term 2008, filed 11 December 2008, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2008/22a08.pdf

REAL PROPERTY – MARYLAND CONDOMINIUM ACT – COUNCIL OF UNIT OWNERS – STANDING TO BRING SUIT – INCORPORATED COUNCIL OF UNIT OWNERS THAT FORFEITS CORPORATE CHARTER HAS STANDING NONETHELESS, UNDER MD. CODE, REAL PROPERTY ART., § 11-109, TO BRING SUIT AS UNINCORPORATED ENTITY AS LONG AS IT DOES SO PRIOR TO EXPIRATION OF APPLICABLE STATUTE OF LIMITATIONS OR LACHES

Facts: Pines Point Marina, A Condominium Council of Unit Owners, Inc., is a condominium council of unit owners organized pursuant to the Maryland Condominium Act, Md. Code, Real Property §§ 11-101 to -143 (2003 Repl. Vol. & Supp. 2008). Under § 11-109 of the Maryland Condominium Act, the council of unit owners "may be either incorporated as a nonstock corporation or unincorporated." On 20 July 1999, Pines Point Marina incorporated under Maryland corporation law as a non-stock, non-close corporation. The condominium is located in Ocean Pines, Maryland, and consists primarily of four dwelling units, two commercial units, and approximately two hundred-eleven boat slips, most of which are owned as common elements by the participating co-owners.

Between 1999 and 2005, Pines Point Marina entered into contracts with M.V. Ocean Pines Limited Partnership, as developer, for the purchase and gradual installation of condominium unit boat slips. M.V. Ocean Pines Limited Partnership employed Jim Rehak, d/b/a Jim Rehak Floating Docks, to install boat slips purchased from the manufacturer, Topper Industries, Inc. In September, October, and November of 2003, the eastern coast of the United States experienced several strong storms. As a result of these storms, by 4 October 2003, Pines Point Marina began to notice that "many of the flotation devices for the floating docks in the Marina had come loose." On 30 August 2006 Pines Point Marina filed a complaint in the Circuit Court for Worcester County against M.V., Rehak, and Topper alleging poor workmanship and defective construction of the marina.

The defendants responded with motions for summary judgment on the basis that, on 7 October 2005, the Maryland Department of Assessments and Taxation forfeited Pines Point Marina's corporate charter for failure to file required state tax returns. It was not until 4 December 2006 that Pines Point Marina revived its

corporate status. The defendants thus alleged that, under *Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 857 A.2d 1095 (2004), and *Stein v. Smith*, 358 Md. 670, 751 A.2d 504 (2000), Pines Point Marina lacked standing to bring and maintain its suit because its corporate charter was forfeit at the time the action commenced and was not revived, to allow Pines Point to sue as a corporation in good standing, before expiration of the applicable three year statute of limitations for the relevant claims—on or around 4 October 2006. Pines Point Marina did not amend its complaint to sue as an unincorporated association.

Pines Point Marina countered by alleging that a council of unit owners is unlike any other entity under Maryland corporation law in that a council derives its legal existence from the Maryland Condominium Act, and Md. Code, Real Property § 11-109 in particular, and not from the act of incorporating. Thus, Pines Point alleged, under Real Property § 11-109, if an incorporated council of unit owners forfeits its corporate charter, it becomes by default an unincorporated association with the right to sue and be sued, apparently without further ado. Pines Point also pointed to the fact that in both its original and amended complaint it declared that it was suing "on behalf of [the] unit owners" of the condominium.

The Circuit Court for Worcester County granted the defendants' motions for summary judgment on the ground that, under *Dual Inc.* and *Stein*, Pines Point Marina's claim was barred because the Marina failed to bring suit, before the expiration of the applicable statute of limitations, as a corporation in good standing. Although Pines Point Marina appealed to the Court of Special Appeals, the Court of Appeals, on its own motion, issued a writ of certiorari before the intermediate appellate court decided the appeal.

Held: Judgment reversed and case remanded for further proceedings. Md. Code, Real Property § 11-109(a) provides, in part, that "[t]he affairs of the condominium shall be governed by a council of unit owners which, even if unincorporated, is constituted a legal entity for all purposes." Further, § 11-109(d) provides that the "council of unit owners may be either incorporated as a nonstock corporation or unincorporated and it is subject to those provisions of Title 5, Subtitle 2 of the Corporations and Associations Article which are not inconsistent with this title" and that, among other powers, the council has the power "[t]o sue and be sued, complain and defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium."

In interpreting the legislative intent of Real Property § 11-109, the Court first looked to the applicable provisions cross-referenced by § 11-109 to the Corporations & Associations Article. The Court found that certain sections of the Corporations & Associations Article do provide for the loss of rights and powers upon the forfeiture of corporate charter by a non-stock corporation, but that such provisions apply only if they are, as stated in Real Property § 11-109(d), "not inconsistent" with the condominium laws. Highlighting the inconsistencies between Real Property § 11-109 and the applicable Corporations & Associations Article provisions, the Court found that it was unable to determine whether Real Property § 11-109 was intended to provide an incorporated council of unit owners that forfeits its corporate charter with the right to bring and maintain suit, by default, as an unincorporated association. The Court looked next to secondary sources and commentary contemporary with when the current form of § 11-109 was enacted, and again found ambiguity.

The Court then looked to the language of the parallel provision of the Uniform Condominium Act and its implementation, or lack thereof, in Maryland and other states, for guidance. The Court found that § 3-101 of the Uniform Condominium Act, the parallel to Real Property § 11-109, provides for a council of unit owners to be "organized", or established, as one of the statutorily-designated entities. Twenty states took the approach suggested by the Uniform Condominium Act in providing that the council of unit owners should be "organized" as one of the appropriate entities. Twenty other states, including Maryland, however, have chosen not to adopt the Uniform Act's language and instead provide, in general terms, that the council of unit owners may function and possess certain powers as incorporated or unincorporated entities. The Court found instructive the lack of adoption of the Uniform Act's approach by the Maryland Legislature, despite the amendment of § 11-109 nineteen times over the years, because such inaction militated against Appellees' contention that the "incorporated or unincorporated" language of Real Property § 11-109 was intended as providing for an absolute dichotomy in treatment between incorporated and unincorporated councils of unit owners.

Finally, the Court looked to the intention of the Legislature in providing for condominium regimes under the Maryland Condominium Act and found, consistent with precedent, that because the Legislature intended to provide uniquely for the authority by which a condominium development may maintain and sustain its existence, Real Property § 11-109 should be interpreted as providing that when an incorporated council of

unit owners forfeits its charter, it becomes by default an unincorporated council of unit owners with the right to sue intact, as provided in § 11-109.

Nonetheless, a council of unit owner's ability to sue remains subject to the applicable statute of limitations. Although Pines Point Marina, at all times in the litigation before the Circuit Court, maintained the suit as an incorporated council of unit owners, Pines Point alternatively asserted in its original and amended complaints that it was suing "on behalf of [the] unit owners." In light of its holding and the unique posture of a condominium council of unit owners whose corporate charter is forfeit, vis a vis general corporation law, the Court found it just to remand the case to the Circuit Court to determine whether Pines Point, as an unincorporated association, brought suit properly within the statute of limitations; i.e., whether Pines Point should be permitted to amend its complaint expressly to sue as an unincorporated association and, if so, whether that amendment, or the suit as pled alternatively, should relate back to its original complaint.

***

Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, et al., No. 27, September Term, 2008, filed December 24, 2009, Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2008/27a08.pdf

REAL PROPERTY - ZONING - VARIANCES - SUBSTANTIAL EVIDENCE SUPPORTED DECISION OF COUNTY BOARD OF APPEALS DENYING A CHURCH'S REQUEST FOR VARIANCES FROM HEIGHT AND AREA REGULATIONS FOR AN IDENTIFICATION SIGN WHERE QUALIFIED EXPERTS TESTIFIED THAT PHYSICAL ATTRIBUTES OF CHURCH'S PROPERTY WERE NOT PHYSICALLY UNIQUE AND CHURCH REASONABLY COULD IDENTIFY ITSELF AND CONDUCT OUTREACH WITHOUT A 250 SQUARE-FOOT SIGN FACING THE BALTIMORE BELTWAY.

ZONING - RLUIPA - COUNTY BOARD OF APPEALS'S DENIAL OF VARIANCES NEEDED FOR ERECTION OF A 250 SQUARE-FOOT IDENTIFICATION SIGN PROPOSED BY A CHURCH DID NOT IMPOSE A SUBSTANTIAL BURDEN ON THE CHURCH'S RELIGIOUS EXERCISE.

Facts: Trinity Assembly of God of Baltimore City, Inc. ("Trinity") operates a church from facilities located in a low-density residential zone in the greater Towson area of Baltimore County. Trinity has between 1700 and 2000 members, with approximately 1300 of them attending church services in any given week. Trinity's property ("the Property") consists of approximately 15 acres of land located at the intersection of West Joppa Road and the Baltimore Beltway ("the Beltway" or "I-695"). The north side of the Property abuts the Beltway's eastbound lanes. Sole vehicular and pedestrian access to the Property is provided by an entrance on the West Joppa Road frontage of the Property.

Trinity has two existing identification signs on the Property. One is 36 square feet in face area and is located at the Property's West Joppa Road entrance. Trinity's other sign, which is 24 square feet in face area, is situated where the Property abuts the Beltway and is parallel to the Beltway, such that, theoretically, it is viewable by both eastbound and westbound motorists. This case arose out of Trinity's desire to replace its Beltway-facing sign with a new, single-faced sign that would be 250 square feet in area, 25 feet tall, and face eastbound traffic only. A portion of the face area of the proposed sign, approximately five feet long and 18 ½ feet wide, would be changeable copy operated electronically by Trinity. To erect the desired sign, Trinity sought variances from the square-footage and height limitations of the County's sign law, codified in Section 450 of the Baltimore County Zoning Code, which are 25

square feet and six feet, respectively.

The Deputy Zoning Commissioner for Baltimore County rejected Trinity's application for the variances, and Trinity appealed to the County Board of Appeals (the "Board"), which held a *de novo* evidentiary hearing. Among the evidence adduced, Trinity's pastor testified that the proposed sign was necessary because people have a hard time finding the church. He also testified that the sign would allow Trinity to evangelize and reach potential congregants. He acknowledged that Trinity already uses web-sites and business cards to provide directions. Trinity also presented evidence, by way of expert testimony, that highway safety standards dictated that the sign be as large as Trinity proposed in order to be viewed safely from the Beltway and that unique physical characteristics of the Property required variances from the Zoning Code's height and area limitations.

People's Counsel for Baltimore County rejoined with expert testimony that the Property's physical attributes are common in Baltimore County and that Trinity is identifiable from the Beltway without so large a sign. A representative from the State Highway Administration (the "SHA") also testified that Trinity's proposed sign is not consistent with highway safety standards. He also pointed out that the stretch of the Beltway at issue already has a higher than average accident rate.

The Board denied Trinity's requested variances, noting that Trinity's experts were not convincing on the question of the Property's uniqueness. The Board also noted that Trinity would not suffer practical difficulty without the proposed sign. Trinity sought judicial review in the Circuit Court for Baltimore County, which affirmed the Board. Nonetheless, the Circuit Court remanded the matter to the Board to consider whether, under the Religious Land Use and Institutionalized Persons Act (the "RLUIPA"), denial of the variances imposed a substantial burden on Trinity and, if so, whether that denial was the least restrictive means of advancing a compelling government interest. On remand, the Board again denied the variances, noting that its denial would not substantially burden Trinity's religious exercise because Trinity has other avenues available to it to evangelize and reach new members. Trinity again sought review in the Circuit Court, which affirmed the Board. Trinity appealed to the Court of Special Appeals, which, in a reported opinion, also affirmed. *Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. County*, 178 Md. App. 232, 941 A.2d 560 (2008). The Court of Appeals granted Trinity's Petition for a Writ of Certiorari. *Trinity Assembly v. People's Counsel*, 405 Md. 63, 949 A.2d 652 (2008).

Held: Affirmed. Initially, the Court reviewed the variance criteria delineated in the Baltimore County Zoning Code, that an applicant must prove (1) uniqueness and (2) practical difficulty, if the applicant is to obtain variance relief from the height and area limitations of the County's sign law. Under the generally deferential standard of review for administrative agencies, the Court determined that substantial evidence of record supported the Board's decision that the Property is not unique and Trinity would not suffer practical difficulty without its desired sign. The Court recognized that the testimony of People's Counsel's witnesses, if believed, was sufficient in that regard, it being the Board's province to resolve conflicting and competing evidence.

The Court next analyzed Trinity's argument that the Board's denial of the variances imposed a substantial burden on Trinity's religious exercise. The Court observed that the RLUIPA prohibits a zoning body from imposing a substantial burden on an institution's religious exercise, unless it is the least restrictive means of advancing a compelling government interest. The Court reviewed the relevant history leading up to Congress's enactment of the RLUIPA. The Court noted that the RLUIPA applies where a zoning body uses "individualized assessments" to determine whether to permit a religious institution to use real property for religious purposes. Thus, the Court determined, the RLUIPA applied to this case because the Board was tasked with the fact-specific inquiries of determining whether the Property is unique and whether Trinity would suffer practical difficulty without its desired sign. The Court observed that, under the RLUIPA, "substantial burden," has the meaning that it traditionally had in Free Exercise jurisprudence. This required Trinity to show that denial of the variances prevented the church from observing a particular religious tenet and left the church without a reasonable alternative to engage in its asserted religious exercise. The Court surveyed the cases of federal courts and other state courts and held that, under the circumstances, the Board's denial of variances for Trinity to erect a 250 square-foot sign facing the Beltway did not impose a substantial burden on Trinity's religious exercise.

***

Supervisor of Assessments v. Stellar GT, No. 36, September Term 2008, filed December 12, 2008. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2008/36a08.pdf

TAXATION - PROPERTY TAX – MID-CYCLE REVALUATION

Facts: The purchasers of Georgian Towers, Stellar GT ("Stellar"), appealed a mid-cycle reassessment of the apartment building from $52,561,600 to $88,865,500, which would have resulted in a substantial tax increase. Stellar first appealed to the Property Tax Assessment Appeals Board, which ultimately affirmed, and then to the Maryland Tax Court. After testimony from the Supervisor that "[t]he sale triggered it to come to my attention," the Tax Court concluded that revaluation was permissible, regardless of whether it was precipitated by a sale, as long as one of the statutory bases for revaluation existed. Stellar sought judicial review in the Circuit Court for Montgomery County, where the decision of the Tax Court was affirmed and appealed to the Court of Special Appeals, which reversed. In a reported opinion, the intermediate appellate court, held that the facts presented to the Tax Court "do not support the legal conclusions reached by the court," because "the Supervisor used the sale price of the property as a retroactive justification for a reassessment," and the sales price did "not fall within any of the enumerated exceptions to the statutory scheme," in Section 8-104 of the Tax-Property Article, Maryland Code (1985, 2001 Repl. Vol.) providing for reassessments every three years. *Stellar GT v. Supervisor of Assessments*, 178 Md. App. 624, 636, 943 A.2d 100, 107 (2008).

Held: The Court of Appeals affirmed. The Court first noted that property may be revalued as of the date of finality if one of six factors, including "substantially completed improvements," "*causes* a change in the value of the property" under Section 8-104 of the Tax-Property Article, Maryland Code (1985, 2001 Repl. Vol.) and that the word "cause" is defined by Merriam-Webster's Collegiate Dictionary as "a reason for an action or condition" and "something that brings about an effect or result." 196 (11th ed. 2005). The Court then concluded that the revaluation was not permissible because the basis for the revaluation clearly was the sales price, which is prohibited under *Montgomery County Board of Realtors, Inc. v. Montgomery County*, 287 Md. 101, 103, 411 A.2d 97, 98 (1980), rather than from a review of either the premises, documents available from the permit office or documents submitted by the owner and that one of the factors specifically enumerated in Section 8-104 (c) must bring about the revaluation and the change in value. The Court held that linking reassessment to the occurrence of certain specified events, as defining causation,

differs from the Supervisor's and the Tax Court's concept of causation, both of which would obviate any direct linkage between the change in value and its cause and rely only on the proffered existence of one of the statutory factors, even if the revaluation was not based upon that statutory factor.

***

COURT OF SPECIAL APPEALS

Alice Lee-Bloem v. State of Maryland, No. 2227, September Term, 2007, filed December 4, 2008. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2008/2227s07.pdf

ADMINISTRATIVE LAW – MEDICAL PRACTICE ACT – PRE-CHARGE CHALLENGES TO MARYLAND BOARD OF PHYSICIAN'S INVESTIGATORY PROCESS GENERALLY PROHIBITED

Facts: The Maryland Board of Physicians (the "Board") received a complaint alleging that psychiatrist had provided substandard care to a patient. The Board commenced an investigation pursuant to the Medical Practice Act ("the Act"), Md. Code (1981, 2005 Repl. Vol., 2008 Supp.), § 14-401 *et seq.* of the Health Occupations Article ("HO"), by engaging three peer reviewers to recommend whether psychiatrist had violated the relevant standard of care. After the conclusion of those peer reviews but before the Board had taken any disciplinary action or issued any charges against her, psychiatrist filed a Verified Complaint under both Maryland law and 42 U.S.C. §1983 against the Board and several other parties in the Circuit Court for Baltimore City. Psychiatrist alleged that (1) the Board's review process was not governed by sufficient rules and was therefore violative of psychiatrist's due process rights; (2) the peer reviewers were not qualified to assess whether she had complied with the relevant standard of care because they were unfamiliar with the orthomolecular approach she employed; and (3) one of the peer reviewers was improper because of a conflict of interest. The defendants below filed motions to dismiss on the grounds that psychiatrist failed to exhaust her administrative remedies; HO § 12-405(g) prohibits pre-charge challenges to the Board's investigatory process; and psychiatrist's due process claim under 42 U.S.C. § 1983 was not ripe. The court granted the defendants' motions.

Held: Affirmed. Psychiatrist did not exhaust her administrative remedies under the Act, and none of the exceptions to that doctrine applied. HO § 14-405(g) prohibits pre-charge challenges to the Board's investigatory process, including constitutional challenges, unless the alleged deficiencies are so fundamental and egregious that they compromise the accused's opportunity for a fair hearing, which was not the case. Psychiatrist's 42 U.S.C. § 1983 claim was not ripe both because the

Board's decision to commence the investigation by engaging peer reviewers was not a final decision, and psychiatrist lacked an injury to a requisite property interest insofar as the Board had not taken any disciplinary action or filed any charges against psychiatrist at the time of her complaint.

***

Henderson v. State, No. 2344, 2006 Term, filed November 26, 2008. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2008/2344s06.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT SEARCH AND SEIZURE – TRAFFIC STOP RIPENING INTO *TERRY V. OHIO* INVESTIGATIVE DETENTION.

Facts: Hayward T. Henderson ("Henderson") was the rear-seat passenger in an automobile stopped by a police officer for traffic violations. The officer recognized Henderson and the driver from a prior, recent encounter involving illegal drugs. A second officer arrived for backup. While running checks for outstanding warrants, police discovered an outstanding warrant, for failure to appear on an illegal drug charge, for the front-seat passenger. The police officers confirmed the continuing validity of the open warrant, and requested additional backup, which arrived within several minutes. The officers then extracted the front-seat passenger from the car and arrested him. A search incident to the arrest uncovered $741 on his person. Nine minutes later, the K-9 unit the police officers had requested at the outset of the traffic stop arrived on the scene. When Henderson and the driver were ordered out of the car, police saw a knife in plain view on the rear floor of the car, near where Henderson had been sitting. The K-9 scan alerted to the presence of drugs, and the police then searched the car, finding the knife and a handgun. The handgun was found underneath the front passenger seat, within reach of the rear passenger compartment. Henderson was arrested, and a search incident to the arrest revealed crack cocaine on his person. After the circuit court denied his motion to suppress evidence, he was convicted of drug possession and handgun charges.

Held: The court correctly denied Henderson's motion to suppress. The initial traffic stop ripened into a *Terry* investigative stop before the K-9 alerted. Because there was reasonable, articulable suspicion that all three vehicle occupants were involved in illegal drug activity, the officers did not illegally effect a second detention during the nine minutes spent waiting for the K-9, after the first warrant-based arrest. The court also correctly denied Henderson's motion to acquit on the handgun charges, because there was sufficient evidence that the handgun was within Henderson's dominion and control to infer possession. Therefore, the Court affirmed the judgments entered by the circuit court.

***

Robert L. Thomas v. State of Maryland, No. 921, September Term, 2007, decided December 1, 2008. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2008/921s07.pdf

CRIMINAL LAW - BRIBERY -Maryland Code Ann., Criminal Law Article, § 9-201(c); *Kable v. State*, 17 Md. App. 16 (1973), Bribery, Conspiracy to Commit Bribery; providing that a "[a] public employee may not demand or receive a bribe, fee, reward, or testimonial to . . . influence the performance of the official duties of the public employee. . . ."

Facts: The duties of appellant, Deputy Director of the Prince George's County Office of Central Services, were to manage the County's fleet and facilities; another deputy director, was responsible for procurement. The Director of the Office of Central Services and Deputy Chief Administrative Officer for Government Internal Support, supervised both deputies and was the purchasing agent for the County *with sole legal authority* to enter into contracts on behalf of the County. Request for proposals based on a number of factors not necessarily limited to price were published and the proposals received were reviewed by a proposal analysis group (PAG) consisting of, *inter alia*, a "procurement official" and five voting members, including appellant and the other deputy director. Upon its review, the PAG would then make a recommendation to the Director of the Office of Central Services, who has the sole legal authority to enter into contracts on behalf of the County. Appellant received payment for his efforts in influencing the awarding of a County security management system contract to a company other than Interior Systems, Inc. (ISI), *e.g.*, ADT/Tyco, which would subsequently employ ISI. Appellant challenged the jury instruction, "[i]t is not a defense to the crime of bribery that the public employee did not have the actual authority, power, or ability to perform the act for which the money was demanded or received," contending that it allowed the jury to convict him of bribery, notwithstanding any reasonable doubt that the jury might have had as to whether the awarding of contracts was part of appellant's "official duties." Denominating the testimony of a State's witness as "inadmissible lay opinion" evidence, appellant also assigned error to the court's decision to allow the witness to testify that it was his "belief" that appellant had influence over the awarding of contracts with

the County. Appellant finally contended that the trial court erred by denying appellant's motion to dismiss the second count in the indictment because it failed to state an essential element of the crime of bribery – namely, that the bribe must have been demanded or received *from another*.

Held: Although the lack of actual authority, power or ability to perform the act for which the money is demanded or received ***is***, in fact, a defense to bribery, *if* the act for which the public employee accepted the bribe involves a matter to which the public employee *bore no official relation*, the circuit court's instruction was proper because, reviewing the jury instructions as a whole, the circuit court properly instructed the jury that, to convict appellant of bribery, it must find beyond a reasonable doubt that the bribe was demanded or received for the purpose of influencing appellant *in the performance of his official duties.* The testimony of the State's witness as to his "belief" that appellant had the authority to influence the awarding of the contract was not an "opinion" requiring perceptions of – and drawing inferences from – facts, but merely an attestation of what he had learned during the course of the investigation. Moreover, the testimony did not comport with the requirements of Maryland Rule 5-701 and, in any event, assuming error in its admission, was harmless beyond a reasonable doubt in light of the weight of the evidence supporting the jury's conclusion that the illegal act for which appellant received payment was within the performance of his official duties. Appellant's indictment, which tracked the language of C.L. § 9-201 alleging that appellant was a "public employee working for Prince George's County, Maryland in the capacity of Deputy Director of the Department of Central Services" and "did demand and receive a bribe for the purpose of influencing the said [appellant] in the performance of his official duties in violation of § 9-201, Criminal Law Article . . ." sufficiently stated all of the elements of the crime of bribery. The fact that the bribe must be demanded or received *from another* is implicit in the language of C.L. § 9-201.

***

Adams v. State, No. 2292, September Term 2006, filed December 2, 2008. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2008/2292s06.pdf

JURY SELECTION

Facts: At the beginning of jury selection, the trial court announced that prospective jurors would be called from the venire, starting with juror number seven. Ultimately, defense counsel excepted, stating that defendant had hoped to have juror number six on the panel.

Held: Affirmed. The availability of peremptory challenges is not the right to select jurors that a defendant might want on the jury panel, rather it is the right to reject those whom he does not want. Maryland Rule 4-312 imposes no requirement that the trial court begin the selection of jurors is any particular order. More to the point, when the court announced the order of selection in advance of voir dire, there was no abuse of discretion.

***

State v. Karmand, No. 3050, September Term, 2007, filed December 8, 2008. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2008/3050s07.pdf

CRIMINAL LAW - STATE'S APPEAL FROM FINAL JUDGMENT IMPOSING OR MODIFYING SENTENCE IN VIOLATION OF MARYLAND RULES, UNDER SECTION 12-302(C) OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE - MODIFICATION OF SENTENCE IN THAT STATUTORY SUBSECTION INCLUDES REDUCTION OF SENTENCE - COURT'S AUTHORITY TO REVISE SENTENCE UNDER RULE 4-345.

Facts: Omied Karmand pleaded guilty to drug distribution and was sentenced to three years' imprisonment, all but nine months suspended, followed by eighteen months' probation. The same day the offense occurred, Karmand was arrested in the District of Columbia for a similar, but separate, offense, and served a 30-day sentence for that crime. Within 90 days of the sentencing hearing in Maryland, Karmand filed a motion for reconsideration under Rule 4-345(e), which the circuit court held *sub curia*. About a year later, on Karmand's motion, the court set the motion for reconsideration for hearing. Because Karmand wanted to pursue a career as a healthcare professional, and his conviction presented a possible bar to entry into that profession, he moved for the court to strike his original conviction and to enter probation before judgment.

The court orally denied Karmand's motion, and the ruling was docketed. Within 30 days of the hearing on the motion for reconsideration, Karmand filed a new motion for reconsideration. The circuit court then set the motion for hearing. At the second hearing, the court granted Karmand's motion to strike his conviction and enter probation before judgment. The State appealed under Md. Code, Courts & Judicial Proceedings section 12-302(c)(2)(ii), on the grounds that the court had violated Rule 4-345(e) by granting Karmand's second motion for reconsideration. The State also argued that the court lacked authority under Rule 4-243 to revise Karmand's original sentence without the State's consent, because that sentence had been imposed under a three-way plea agreement. Karmand argued in opposition that the State lacked statutory authority to pursue the appeal, because the State was challenging a final judgment reducing a sentence, whereas the statute permits State appeals only if the trial judge "imposed or modified" a sentence in violation of the Maryland Rules.

Held: The State's appeal was not dismissed under CJ 12-302(c)(2)(ii) because modification of a sentence includes

sentence reductions. On the merits of the State's appeal, the Court of Special Appeals held that the circuit court lacked authority to grant Karmand's second motion, because it had been filed more than 30 days after imposition of sentence. The effect of the court's denial of Karmand's first motion was to leave the original sentence in force. Therefore, the court's granting of Karmand's second motion for reconsideration was not permitted under Rule 4-345(e). Because resolution of the untimeliness issue was dispositive, the Court of Special Appeals declined to address the other issues raised in the State's appeal. The circuit court's order striking Karmand's conviction and entering probation before judgment was vacated.

***

Gasper v. Ruffin Hotel Corp. of Maryland, No. 0968, September Term 2007, filed December 2, 2008. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2008/968s07.pdf

LABOR AND EMPLOYMENT - RETALIATORY DISCHARGE - PROOF - JURY INSTRUCTIONS - PREEMPTION

Facts: Gasper was discharged by Ruffin after she complained of sexual harassment by a fellow employee. Her complaint alleged retaliatory discharge, negligent hiring, and related counts. The negligent hiring count related to Gasper's assertion that Ruffin, her employer, re-hired one Ahmed, who had previously been discharged by Ruffin for sexual harassment. Ruffin rehired Ahmed, she alleged, to rid the company of those who complained of harassment or other improprieties.

Held: Reversed and new trial granted. On the retaliatory discharge count, the court instructed the jury that Gasper must prove that the exercise of her protected right (to complain) was the "determining factor" in her discharge. The trial court erred in that instruction, and ought to have advised the jury that Gasper's burden was to prove that the exercise of her protected right was a "contributing factor."

The court erred as well in ruling that Gasper's wrongful discharge claims were preempted by the federal Human Rights Act and the Montgomery County Human Relations ordinance.

The trial court also ruled, erroneously, that Gasper's negligent hiring and retention claims were preempted by the Maryland Workers' Compensation Act.

***

P Overlook v. Board of County Commissioners of Washington County, No. 1142, September Term, 2007, filed December 2, 2008. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2008/1142s07.pdf

REAL PROPERTY - ZONING - APPEAL FROM AGENCY LETTER CONFIRMING PRIOR DECISION - EQUITABLE ESTOPPEL OF PROPERTY OWNER TO DENY DENSITY LIMITATION ON PROPERTY REZONED AT OWNERS' REQUEST SUBJECT TO THAT LIMITATION.

Facts: P Overlook, LLLP, purchased property in Washington County in 2004 that had a nine-lot residential density restriction on it. This restriction was imposed on October 28, 2003, by the Board of Commissioners of Washington County as a condition to a piecemeal map amendment of the property to the Rural Village district ("RV"), as requested by Overlook's predecessors-in-title. Overlook participated in the map amendment process, and neither it nor its predecessors challenged the density restriction. Both parties also had the opportunity to withdraw their rezoning request within five days if they did not agree to the condition, but neither did. Soon after this map amendment was granted, Overlook purchased the property from the predecessors. In 2005, when comprehensive rezoning in Washington County was completed, Overlook's property was classified in the Rural Village district, but the ordinance was silent as to any density restriction for the property.

In 2006, Overlook wrote to the Zoning Administrator for Washington County, asking him to "confirm" that the property is located in the RV zone, but not subject to a nine-lot density restriction. The Zoning Administrator responded in a letter in which he stated that, because of the map amendment decision in 2003, the property is in the RV zone, and subject to a nine-lot density restriction. Overlook challenged this "determination" before the Washington County Board of Appeals. The Board ruled that it was questionable whether the letter was an appealable determination, and that, even if it were, and the Zoning Administrator erred, Overlook was estopped to challenge the density restriction. Overlook filed an action for judicial review in the Circuit Court for Washington County, which upheld the Board's decision. Overlook appealed that decision, arguing that the Board erred in (1) determining that the Commissioners had lawfully placed a nine-lot density restriction on Overlook's property and (2) failing to find the Commissioners exceeded their authority by imposing a lot density restriction after the zone was created.

Held: Judgment affirmed. The Court of Special Appeals held that the Zoning Administrator's letter was not appealable under *United Parcel Service, Inc. v. People's Counsel*, 336 Md. 569 (1994), and, to the extent it was, the County Commissioners properly determined that the property owners were equitably estopped to deny the existence of the nine-lot density restriction.

The Court explained that the issues presented by Overlook were not properly before the Court, because the Board did not decide these issues–the Board only decided that it was questionable whether Overlook had the right to appeal the Zoning Administrator's 2006 letter, and whether it was estopped to attack his statement that a nine-lot density restriction applies to the Property. Thus, the only question properly before the Court was whether the Board's decision was supported by substantial evidence in the agency record and was not founded upon legal error.

The Court held that, based on *UPS*, the Zoning Administrator's letter was not a determination. In *UPS*, the Court of Appeals made clear that a zoning official's mere confirmation of a prior decision is not itself a zoning decision. As in *UPS*, the Zoning Administrator in the case at bar simply was reporting past events and confirming the Commissioners' decision in 2003; the letter was not a determination or decision, subject to appeal to the Board. Furthermore, Overlook's legal challenges to the nine-lot density restriction should have been pursued in an action for judicial review of the Commissioners' October 28, 2003 decision. The application also could have been withdrawn within five days of the decision, or the predecessors-in-title could have challenged the density restriction in circuit court. Overlook did not pursue an action for judicial review, and the time for doing so expired 30 days after the October 28, 2003 decision.

Even if the Zoning Administrator's letter was a determination, and thus appealable, Overlook is equitably estopped to challenge the density restriction. Maryland cases have applied principles of equitable estoppel in a zoning context when a zoning applicant has pursued and obtained a zoning change only later to attack the change as invalid. Overlook participated in both the zoning map amendment application process and the comprehensive rezoning process, and had notice of the restriction as a condition. Overlook also benefited from the map amendment decision, because the land would have been rezoned otherwise to allow less residential development than Overlook wanted. Overlook's later position, that the property was in the

RV district, but without a density restriction, was an obvious attempt to benefit from the rezoning to the RV district, while attacking the density condition that enabled them to obtain the rezoning in the first place. Thus, the Board did not erroneously apply the doctrine of equitable estoppel to bar Overlook from challenging the nine-lot density restriction on the Property.

***

Wash. Metro. Area Transp. Auth. v. *Deschamps*, No. 1707, September Term, 2007, filed December 3, 2008. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2008/1707s07.pdf

TORTS – MARYLAND TORT CLAIMS ACT – ECONOMIC CAP APPLIES TO WMATA FOR PROPRIETARY FUNCTIONS

Facts: Passenger was injured on an escalator owned and operated by Washington Metropolitan Area Transit Authority ("WMATA"). Passenger sued WMATA in the Circuit Court for Prince George's County for negligence. A jury awarded the passenger $51,781.95 for past medical expenses and $300,000 for non-economic damages. WMATA filed a motion for judgment notwithstanding the verdict, or alternatively, for a new trial, remittitur, or a conformation of the judgment to the statutory cap pursuant to the Maryland Tort Claims Act, Md. Code (1984, 2004 Repl. Vol., 2008 Supp.), § 12-101 *et seq.* of the State Government Article ("SG"). Following a hearing on the motion, the circuit court granted WMATA's motion to reduce the verdict but denied its motion otherwise. WMATA appealed the portions of its motion that the court denied, and the passenger cross-appealed the court's reduction of her jury award.

Held: Affirmed. As "an instrumentality and agency" of the State under Md. Code (1977, 2008 Repl. Vol.), § 10-204(4) of the Transportation Article, WMATA enjoys limited immunity from suit for proprietary functions it performs under the Maryland Tort Claims Act. SG 12-104(a)(2) of that Act provides that "[t]he liability of the State and its units shall not exceed $200,000 to a single claimant for injuries arising from a single incident or occurrence." Although the Act does not define the term "unit," the Court of Appeals has used language suggesting that units are indeed agencies. The circuit court, therefore, did not err in reducing the passenger's award.

***

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated November 25, 2008, the following attorney has been disbarred by consent from the further practice of law in this State:

CATHERINE ROBINSON COPPER
*

By an Order of the Court of Appeals of Maryland dated November 26, 2008, the following attorney has been suspended for thirty (30) days by consent, effective December 1, 2008, from the further practice of law in this State:

ANTHONY IGNATIUS BUTLER, JR.
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective December 8, 2008:

ROBIN KEITH ANNESLEY FICKER
*