UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1186

September Term, 2014

MICHAEL A. DiNAPOLI, et al.

v.

BOARD OF APPEALS OF QUEEN ANNE'S COUNTY, MARYLAND, et al.

Zarnoch,
Hotten,
Leahy,

JJ.

Opinion by Hotten, J.

Filed: June 26, 2015

Appellants, Michael A. DiNapoli, Janet DiNapoli, Leland C. Brendsel, B. Diane Brendel, Daniel T. Hopkins, Richard M. Markman, and Queen Anne's Conservation Association, Inc. are appealing the decision of appellee, the Board of Appeals of Queen's County ("the Board"), to grant a motion to dismiss filed by appellee, Kent Island, LLC ("Kent Island"). The Circuit Court for Queen Anne's County affirmed the Board's decision, predicated on lack of standing. Appellants noted a timely appeal and present one single question for our consideration, which we have rephrased for clarity[1]:

> I. Whether the circuit court erred in affirming the Board of Appeals' decision to grant appellee's motion to dismiss.

For the foregoing reasons, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

2005 Kent Island Case

This case originated on February 23, 2005, when appellee, Kent Island brought an action against the County Commissioner, Maryland Department of Environment ("MDE"),[2] and the Sanitary Commission in the Circuit Court for Anne Arundel County. Kent Island sought a writ of mandamus and declaratory and injunctive relief, to enforce its interpretation of state laws regarding water and sewer planning. Additionally, it requested

[1] Appellant's original question presented for appeal stated:

> I. Did the Board of Appeals for Queen Anne's County rule in error when it granted, based upon lack of standing, [a]ppellee Kent Island, LLC's Motion to Dismiss [a]ppellant Michael A. DiNapoli *et al.*'s appeal challenging the Queen Anne's County Planning Commission's approval of the Cloisters site and subdivision plan?

[2] The MDE was dismissed from the case on October 27, 2005.

that the MDE require Queen Anne's County to provide a favorable water and sewer designation, allowing development of the Cloisters. The Cloisters is Kent Island's proposed construction project in Stevensville, Queen Anne's County. Following a two-day trial, on November 5, 2007, the Circuit Court for Anne Arundel County issued an order granting Kent Island's request for a writ of mandamus. The order directed Queen Anne's County to grant water and sewer service to Kent Island's property. The County Commissioners and the Sanitary Commission noted an appeal.

While the appeal was pending, Kent Island, the County Commissioners, and the Sanitary Commission negotiated a settlement which was entered as a Consent Order by the Circuit Court for Anne Arundel County on March 10, 2009. In the agreement, Queen Anne's County agreed to dismiss the appeal and Kent Island, *inter alia*, agreed to reduce the density of the approved subdivision and withdraw a claim for attorney's fees.

2009 Kent Island Case

Appellants, Michael A. DiNapoli, Janet DiNapoli, Leland C. Brendsel, B. Diane Brendel, Daniel T. Hopkins, and Richard M. Markman, brought suit as residents and taxpayers of Queen Anne's County. Appellant, Queen Anne's Conservation Association, Inc. brought suit as a "Maryland corporation concerned with issues raised in th[e] action." Appellants filed a complaint for declaratory judgment against appellees in the Circuit Court for Queen Anne's County on December 23, 2009 requesting that the Consent Order, be rendered invalid.

Appellants challenged the validity of the Consent Order, alleging that it established illegal contract zoning, unlawful attempts to create a Development Rights and

Responsibilities Agreement, denied appellants equal protection under the law, and conferred special privileges and zoning upon a single property. In response, Kent Island filed a motion to dismiss or in the alternative, motion to transfer the action to the Circuit Court for Anne Arundel County, asserting that Anne Arundel was the proper venue because that court approved and entered the consent order.

On February 12, 2010, the Circuit Court for Queen Anne's County granted Kent Island's motion to transfer the case to the Circuit Court for Anne Arundel County. The case was assigned to Judge Mulford, who previously signed the consent order. Appellants filed a request for recusal on April 5, 2010, alleging that Judge Mulford was "inherently and personally biased and inclined to ratify and uphold that agreement." Following a hearing, Judge Mulford denied appellants' request. Thereafter, the parties filed cross-motions for summary judgment. On December 8, 2010, Judge Mulford issued an order and opinion granting summary judgment in favor of Kent Island.

Appellants noted an appeal with this Court, challenging the decision to transfer the case to Anne Arundel County and Judge Mulford's grant of Kent Island's motion for summary judgment. On March 1, 2012, we vacated the judgment of the Circuit Court for Anne Arundel County and remanded with instructions to transfer the case back to Queen Anne's County because Queen Anne's County had both venue and subject matter jurisdiction to decide the merits of the case. We vacated the decision of the Circuit Court for Anne Arundel County without considering appellants' contention regarding the recusal of Judge Mulford or the merits of the validity of the Consent Order.

On June 21, 2012, the Court of Appeals issued a writ of certiorari to review the decision of this Court. The Court of Appeals determined that the Consent Order was a valid, final and enrolled judgment because the Circuit Court for Anne Arundel County had jurisdiction to enter the Consent Order during pendency of the appeal in the 2005 Kent Island case. Additionally, the Court of Appeals reversed the judgment of this Court and remanded with instructions to vacate the judgment of the Circuit Court for Anne Arundel County and instruct the circuit court to dismiss the complaint. The Court of Appeals concluded that Circuit Court for Queen Anne's County did not have jurisdiction to revise or modify the Consent Order, a final judgment, entered by the Circuit Court for Anne Arundel County. Furthermore, because appellants were not parties to the proceedings leading up to the Consent Order, the Court determined that they could not seek relief under

Md. Rule 2-535[3] and Md. Code (2006, 2013 Repl. Vol.) § 6-408 of the Courts and Judicial Proceedings Article [hereinafter "Cts. & Jud. Proc."].[4]

[3] Md. Rule 2-535 indicates:

> **(a) Generally.** On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
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> **(b) Fraud, Mistake, Irregularity.** On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

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> **(c) Newly-Discovered Evidence.** On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.
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> **(d) Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

[4] Cts. & Jud. Proc. § 6-408 indicates:

> For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule.

The Present Case

On August 9, 2012, the Queen Anne Planning Commission approved the Cloisters subdivision plat and site plan. On December 5, 2012, appellants appealed this approval to the Board. Appellee Kent Island filed a motion to dismiss on January 11, 2013 alleging that the appeal was a second attempt to challenge the Consent Order between Kent Island and Queen Anne's County. Additionally, the motion indicated that based on the doctrine of res judicata, the issues raised by appellants required the Board to exceed its authority, that appellants did not have standing, and that appellants failed to present any proper grounds as a basis for appeal.

A hearing was held on August 14, 2013 and September 12, 2013 at the Board of Appeals office. Appellants presented the affidavit of Daniel T. Hopkins, which indicated that he owns property located at 833 Thompson Creek Road, Stevensville, MD, across Thompson Creek from an open agricultural field that bordered the Cloisters property. The intersection Mr. Hopkins must use to proceed westbound on U.S. Route 50/301 would be used by most of the traffic coming out of the Cloisters property, if subdivided. The actual distance of Mr. Hopkins' property from the Cloisters was approximately one half mile. An open body of water separated the Hopkins' property from a farm field that borders the Cloisters property and it was undisputed that the farm field was not property belonging to any of the appellants.

On November 8, 2013, the Board issued a memorandum discussing its formal decision. The Board concluded that appellants did not sustain any aggrievement greater than that of the general public and therefore, did not demonstrate that they had standing.

Thus, in a two to one vote of the Board,[5] appellee Kent Island's motion to dismiss was granted.

Appellants filed a petition for judicial review of the Board's decision on December 2, 2013 and the hearing began on June 24, 2014 before the Circuit Court for Queen Anne's County. The circuit court affirmed the Board's decision in an opinion and order issued on July 21, 2014.

Appellants noted a timely appeal. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

When an appellate court reviews the final decision of an administrative agency, such as the Board of Appeals, we evaluate the decision of the agency and not the decision of the circuit court. *People's Counsel for Balt. County v. Surina*, 400 Md. 662, 681 (2007). "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. . . . " *People's Counsel for Baltimore County v. Loyola Coll. in Maryland*, 406 Md. 54, 66-67 (2008) (quoting *United Parcel Serv., Inc. v. People's Counsel for Balt. County*, 336 Md. 569, 576–77 (1994) (quotation omitted)). In *Spicer v. Baltimore Gas & Elec. Co.*, 152 Md. App. 151 (2003), this Court indicated:

> We review the decision of an administrative agency to determine if it is in accordance with the law or whether it is arbitrary, illegal, and capricious .

[5] This matter was heard by William D. Moore, Chairman, Kenneth R. Scott, Vice Chairman, and Howard A. Dean, Member, of the board of Appeals of Queen Anne's County. Mr. Scott dissented because he believed that Mr. Hopkins' property was sufficiently close to the Cloisters property to be specially aggrieved.

> . . . We are limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. . . . In applying the substantial evidence test, we must decide whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. . . . When reviewing the agency's legal conclusions, we may substitute our judgment for that of the agency if there are erroneous conclusions of law. . . .

Id. at 159 (quoting *Rideout v. Dep't of Pub. Safety and Corr. Serv.*, 149 Md. App. 649, 656, (2003) (internal quotations citations omitted)).

We review the grant of a motion for dismissal under Md. Rule 2-322(b)[6] in the light most favorable to the non-moving party and accept all well-pled facts in the complaint and reasonable inferences drawn from them. *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 414 (2003). Therefore, "consideration of the universe of 'facts' pertinent to the court's analysis of the motion are limited generally to the four corners of the complaint and its incorporated supporting exhibits. . . ." *Converge Services Group, LLC v. Curran*, 383 Md. 462, 475 (2004).

DISCUSSION

I.

[6] Md. Rule 2-322 states:

> The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and (5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed.

Appellants contend that the Board applied multiple incorrect legal standards in reaching its conclusion that appellants lacked standing. Specifically, appellants allege that the Board applied the legal standard regarding whether a party has standing to initiate and pursue litigation instead of the standard that applies to an interested party's ability to obtain standing in an administrative proceeding.[7] We disagree.

The Board applied the correct standard as required by Queen Anne County Code § 18:1-11A(1)(a) [hereinafter "QAC Code"], which states:

> A. Right of *appeal*.
>
> (1) An *appeal* may be taken by any *person*:
>
> (a) Aggrieved by any decision of the Planning Commission, *Planning Director* or any other employee of the *Department*[.]

(emphasis in original). Parties participating in an appeal must allege and set forth sufficient facts to indicate that they have proper "standing" in the matter before the court. *See* Stanley D. Abrams, *Guide to Maryland Zoning Decisions*, 4-2 § 4.01 (5th ed. 2012). "This principle is based upon the necessity of limiting the parties to the proceeding to those who are

[7] Appellants also allege that, in the alternative, they would be entitled to taxpayer standing to appeal the Commission's final approval. However, appellants have not

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(. . . continued)
alleged the necessary requirements for taxpayer standing. Appellants would have to allege both "'1) an action by a municipal corporation or public official that is illegal or ultra vires, and 2) that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes.'" *Kendall v. Howard County*, 431 Md. 590, 605 (2013) (quoting *120 West Fayette St., LLLP v. Mayor of Baltimore*, 407 Md. 253, 267 (2009)).

uniquely affected by the decision which is being appealed and precluding frivolous appeals, harassment, or merely crowding the courts with litigation instituted by or involving those persons who are not specially affected by the decision and have no statutory right of appeal." *Id.*

Appellants cite to *Sugarloaf Citizens' Assn. v. Dept. of Environment*, 344 Md. 271 (1996), *partially abrogated by statute*, Md. Code (1987, 2013 Repl. Vol.) § 5-204(f) of the Environment Article, for the proposition that the Board should have applied a lenient standard and that "it is not the proper function of an administrative official or agency in the executive branch of government to decide whether a plaintiff or potential plaintiff has standing to maintain an action in court." *Id.* at 289-90. However, *Sugarloaf* also recognizes that local governments have the authority to establish reasonable administrative standing requirements in their local codes:

> The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily.
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> * * *
>
> Bearing in mind that the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation, we think that absent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings.

Id. at 286-87 (quoting *Morris v. Howard Res. & Dev. Corp.*, 278 Md. 417, 423 (1976)). Thus, while it is true that *Sugarloaf* indicates that administrative standard requirements are

generally more lenient than the requirements for judicial standing, it also reflects that this proposition only stands if no reasonable regulation has been adopted with a more stringent criteria to obtain standing.

Appellants aver that QAC Code §18:1-119A(1)(a) does not offer "specific criteria upon which to base a determination of aggrievement." However, QAC Code §18:1-119A(1)(a) does require that any person filing an appeal of a Board decision be aggrieved by the decision.

In *Chesapeake Bay Foundation v. DCW Dutchship Island*, 439 Md. 588 (2014), the Court of Appeals quoted *Sugarloaf* for the proposition that administration requirements for standing are not very strict. *Id.* at 599. However, it also noted that "this leniency only exists '[a]bsent a statute or a reasonable regulation specifying criteria for administrative standing[.]'" *Id.* (quoting *Sugarloaf*, 344 Md. at 286).

Although the term "aggrieved" is not defined by the Queen Anne County Code, it has been defined by case law. In *Chesapeake Bay Foundation, Inc. v. Clickner*, 192 Md. App. 172 (2010), this Court evaluated a decision by Anne Arundel County Board of Appeals to dismiss an appeal on the ground that appellants lacked standing. *Id.* at 179. The Anne Arundel County Code § 18-16-402 provided:

> A person aggrieved by a decision of the Administrative Hearing Officer who was a party to the proceedings may appeal to the Board of Appeals within 30 days after the date upon which the memorandum [of the AHO's decision] was filed. . . .

Id. at 186. We cited to *Bryniarski v. Montgomery Co.*, 247 Md. 137 (1967) to assist us regarding the term "aggrieved." The *Bryniarski* court indicated:

> 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. Certain principles, however, have evolved. They are as follows:
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> 2. In cases involving appeals under the provisions of a zoning ordinance:
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> (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 petitioner is not, in fact, aggrieved. . . .
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> (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.
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> * * * *
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> 4. If any appellant is a person aggrieved, the court will entertain the appeal even if other appellants are not persons aggrieved.

Clickner, 192 Md. App. at 185-86 (quoting *Bryniarski*, 247 Md. at 144–45 (citations omitted)). Furthermore, the *Bryniarski* court explained:

> [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.

Clickner, 192 Md. App. at 185 (quoting *Bryniarski*, 247 Md. at 144 (citing *DuBay v. Crane*, 240 Md. 180, 185 (1965)).

We determined that the Board in *Clickner* erred because it focused exclusively upon property rights and "did not make findings sufficient for us to determine whether or not appellants ha[d] a personal interest that [would] be affected personally and specially in a way distinct from the general public." *Clickner*, 192 Md. App. at 190. We concluded that the proper question for the Board was "whether the appellants would be affected differently than the general public by the grant of the variances." *Id.* at 191.

In *Ray v. Mayor and City Council of Baltimore*, 430 Md. 74 (2013), the Circuit Court for Baltimore City ruled that residents lacked standing to bring a challenge to a city's decision approving a planned unit development ("PUD"). *Id.* at 79. We affirmed the circuit court's decision and the Court of Appeals granted a writ of certiorari. *Id.* at 79-80. The residents filed for judicial review of the PUD ordinance under Md. Code (1957, 2010 Repl. Vol.), Article 66B, § 2.09(a)(1)(ii), which provides:

> (a) *Who may appeal; procedure.*—(1) An appeal to the Circuit Court of Baltimore City may be filed jointly or severally by any **person,** taxpayer, or officer, department, board, or bureau of the City **aggrieved** by:
>
> > (i) A decision of the Board of Municipal and Zoning Appeals; or
> >
> > (ii) A zoning action by the City Council.

Id. at 80 (emphasis in original). The Court of Appeals cited to the definition of a "person aggrieved" as defined by the *Bryniarski* court and noted that, "the standard is flexible in the sense that it is based on a fact-intensive, case-by-case analysis." *Id.* at 81. Thereafter, the Court determined that the concept of special aggrievement that is currently used in zoning laws is derived from the laws pertaining to the tort action of public nuisance. *Id.* at 82. The Court quoted Edward H. Ziegler, Jr. *Rathkopf's the Law of Zoning and Planning* § 63:14 (2012), which stated:

> [T]he "special damage" rule was an outgrowth of the law of public nuisance. **Inasmuch as a public nuisance was an offense against the state and, accordingly, was subject to abatement on motion of the proper governmental agency, an individual could not maintain an action for a public nuisance unless he suffered some special damage from the public nuisance.**

Ray, 430 Md. at 82 (emphasis in original).

The Court of Appels determined that:

> In sum, Maryland courts have accorded standing to challenge a rezoning action to two types of protestants: those who are *prima facie* aggrieved and those who are almost *prima facie* aggrieved. A protestant is *prima facie* aggrieved when his proximity makes him an adjoining, confronting, or nearby property owner. A protestant is specially aggrieved when she is farther away than an adjoining, confronting, or nearby property owner, but is still close enough to the site of the rezoning action to be considered almost *prima facie* aggrieved, *and* offers "plus factors" supporting injury. Other individuals are generally aggrieved.

Id. at 85 (emphasis in original). The Court concluded that the circuit court did not err in dismissing the residents' petition for judicial review because they failed to allege specific facts that they had been specially aggrieved in a manner different from the general public.

In the case at bar, the record demonstrates that the Board considered all relevant evidence provided by appellants before rendering its conclusion. The only testimony submitted by appellants took the form of a sworn affidavit by appellant Mr. Hopkins, which pointed to increased traffic and decreasing property values. Appellants did not present more evidence that the development would have a greater, specific impact on them as opposed to the general public. The Board, as the fact finder, determined that appellants did not fall into the category of "aggrieved" as reflected in the QAC Code or case law. The Board indicated in its written memorandum:

> Given the Board's limitations on the scope of appeal, the Board believes that the proper analysis as to whether the parties have standing is whether they are specially aggrieved by the proposed use of the subject property. The term "specially aggrieved" means that the parties are aggrieved in a manner different from that of the public in general. *Ray*, 430 Md. 77, *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 144 (1967). In this case, the nearest property is a one half-mile away. An open body of water separates their property from a farm field that borders subject property. The farm field is not the property of any of the parties to these proceedings and, therefore, not subject to the control of any of the parties. Therefore, the Board believes that any aggrievement by the [a]ppellants is no different from that which is suffered by the public in general.

We perceive no error in the Board's determination and conclude that it used the appropriate standard to assess standing under the circumstances presented. Both parties were afforded the opportunity to present evidence and the Board was able to perceive this and render its determination. We will not substitute our judgment for that of the Board. Accordingly, we shall affirm.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S

COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.