UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1273

September Term, 2014

CITIZENS OF LINGANORE OPPOSED TO GRIDLOCK, ET AL.

v.

BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY, ET AL.

Meredith,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: July 15, 2015

This case is another chapter in the long and continuing saga of Lake Linganore, an area of Frederick County that has been developed in fits and starts for more than forty years. In this appeal—there are two others pending in this Court at this writing[1]—we address a facial challenge by The Citizens of Linganore Opposed to Gridlock (the "Citizens") to the Development Rights and Responsibilities Agreement (the "Agreement") between the Board of Commissioners of Frederick County (the "Commissioners") and Oakdale Investments, LLC ("Oakdale"), the current developer. The Citizens asked the Frederick County Board of Appeals (the "Board") to reverse the Commissioners' decision to enter the Agreement on the grounds that the Agreement exceeds the scope permitted by §§ 7-303 and 7-304 of the Land Use Article of the Maryland Code, Md. Code (2012, 2014 Repl. Vol.) §§7-301 to 7-306 of the Land Use Article ("LU"), and because the Agreement violates the "uniformity requirement" of the Land Use Article. The Board rejected the Citizens' arguments, the Circuit Court for Frederick County agreed with the Board, and we affirm.

I. BACKGROUND

Oakdale is the latest in a series of developers of Lake Linganore, which it characterizes as "the first and largest" planned use development in Frederick County and

[1] *Friends of Frederick County, Inc., et al. v. Frederick County Board of Appeals, et al.*, Case No. 2497, September Term 2013; *Citizens of Linganore Opposed to Gridlock, et al. v. Board of County Commissioners of Frederick County, et al.*, Case No. 738, September Term 2014. The issues we decide in this case do not affect the outcome of these appeals.

currently home to over 8,000 residents. Development began in Lake Linganore in the late 1960s and has continued, apparently as the economy and political conditions have allowed, ever since. The remaining undeveloped portion of the Lake Linganore Planned Use Development ("PUD") zone comprises approximately 1,354 acres of real property in the "New Market Planning Region of Frederick County." We need not recount the development history of Lake Linganore in any greater detail—for present purposes, it is enough to note that Oakdale acquired the project sometime in or before 2010, and entered into the Agreement with the Commissioners in 2013.

The Agreement is a Development Rights and Responsibilities Agreement ("DRRA"), a concept defined in LU §§7-301 to 7-306. The statute defines these agreements generally as "agreement[s] between a local governing body and a person having a legal or equitable interest in real property to establish conditions under which development may proceed for a specified time." LU § 7-301(b). Stated more colloquially, a DRRA allows the County and the developer to negotiate and coordinate aspects of a development project that otherwise would have to be addressed and resolved in separate and non-coordinated permitting and approval processes. This particular agreement is detailed and consumes 21 pages, not counting exhibits and schedules. Among its terms and conditions, the Agreement describes the zoning designations, development limitations, and plan approvals for the remaining property (3,235 residential dwelling units, and no more than 400,000 square feet of commercial space); Oakdale's commitments to make road, sewer, and water improvements and to set aside land for public uses (including an elementary school, a library, a fire station, and trails); and commitments to build

moderately priced housing units. Oakdale also agreed to submit an application to the Frederick County Division of Business Development and Retention for a Tax Increment Financing District to fund construction of an additional I-70 on and off-ramp, and committed to preserving an eight-acre parcel documented to be an early Native American shelter. And finally, Oakdale committed to set a maximum height of 50 feet for single family structures and 120 feet for multi-family and non-residential structures.

The portion of the Agreement at the heart of this case is Paragraph 8.1. In this paragraph, the Commissioners agreed, on behalf of the County, to "freeze" certain categories of local laws, rules, regulations, and policies that would govern the approvals and permits for this development, unless the health, safety, or welfare of County residents required otherwise:

> 8.1 Effect of Agreement
>
> A. Except as otherwise provided in Section 2.3 herein, the local laws, rules, regulations and policies governing the use, density or intensity of the Subject Properties, including but not limited to those governing development, subdivision, growth management, impact fee laws, water, sewer, stormwater management, environmental protection, land planning and design, adequate public facilities laws and architecture (hereafter collectively the "Development Laws"), shall be the laws, rules, regulations and policies, if any, in force on the Effective Date of the Agreement.
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> B. If the [Commissioners] determine[] that compliance with Development Laws enacted or adopted after the Effective Date of this Agreement is essential to ensure the health, safety or welfare of residents of all or part of Frederick County, the [Commissioners] may impose the change in laws, rules, regulations and policies and the effect thereof upon the Subject Properties.

The Agreement did not, however, spare Oakdale from getting the permits or approvals it needs for each aspect of the Project from the County or any other branch of government:

> 8.2 *Approvals required*. [Oakdale] shall obtain all approvals necessary under any provision of local, State or federal law before proceeding with development of the Project. Notwithstanding anything to the contrary contained herein, this Agreement does not control or affect laws, regulations or approvals which are not within the control of the County. This Agreement does not address any approvals required by State or federal law, and [Oakdale] shall be responsible for obtaining any approvals required by State or federal law. The [Commissioners] agre[e] to provide reasonable assistance to [Oakdale], as necessary, appropriate and consistent with the spirit and intent of this DRRA, in [Oakdale's] pursuit of all required state and/or federal laws necessary to complete the Project.

The Agreement was executed July 11, 2013.

The Citizens—twelve individuals[2] who "own property that adjoins and/or confronts the real property that is the subject of" the Agreement—challenged the Commissioners' decision to sign the Agreement in a letter from counsel to the Commissioners and the Board.[3] In their letter, eight of the twelve Citizens claimed to "live within sight and/or sound of the real property," and all claimed summarily to be "directly aggrieved by the decision" to enter the Agreement. The Citizens claimed, among other things, that

[2] Two of the named plaintiffs below actually disputed their involvement in the matter.

[3] Although the letter is dated July 12, 2013, counsel makes reference to another document dated August 12, 2013 in the body of the letter, and the copy of the letter contained in Citizens' Extract bears a stamp reading "RECEIVED Aug 12 2013".

paragraph 8.1 of the Agreement exceeded the scope of the Commissioners' authority under LU §7-304, and that the building height limitations in the Agreement violated the requirement of "uniformity" within zones, since the planned use development zone in which Lake Linganore sits had no such height requirement.

Oakdale opposed the Citizens' appeal. It argued that the Commissioners had the power to enter into the Agreement, which did not exceed the scope of allowable DRRAs, and that their attack on the Agreement's height requirement was really an untimely attack on the PUD ordinance itself. The Commissioners also opposed Citizens' appeal; their arguments largely echoed Oakdale's. The Board held a hearing on September 26, 2013. After the Citizens, Oakdale, and the Commissioners each presented argument, the Board voted (three in favor and one abstaining) to confirm the Commissioners' decision to approve the Agreement.

The Citizens filed a Petition for Judicial Review of the Board's decision in the circuit court. They raised the same objections to the Agreement, and contended that the Board erred by confirming the Commissioners' decision to approve it. Oakdale and the Commissioners opposed the petition. The circuit court held a hearing on July 21, 2014, and in a memorandum opinion issued July 24, 2014, the court affirmed the decision of the Board. Citing one of its own prior opinions, the circuit court relied on the structure of Title 7 of the Land Use Article:

> The structure of Subtitle 3 in which §7-304 resides also suggests that §7-304 is not meant to provide the scope of a DRRA. . . . Had §7-304 been meant to provide the scope for a DRRA, it would certainly not be positioned within the middle of Subtitle 3. To read §7-304 in such a manner would be an

> interpretation out of harmony with Subtitle 3 of the Land Use Act, and thus inconsistent with the tenets of statutory interpretation.

The court also ruled that the "latest changes to the height requirements found in the PUD Zone became effective November 20, 2010," and therefore the Citizens' challenge to the lack of height requirement was untimely under LU §4-401 and Md. Rule 7-203. The Citizens noted a timely appeal.

II. DISCUSSION

On appeal, the Citizens argue that the Agreement violates LU §7-304, and thus is invalid, because it purports to "freeze" local laws, rules, regulations, and policies beyond those governing "use, density, and intensity." They argue that these three words, as used in LU §7-304, are terms of art in the zoning world and do not include development and subdivision rules, environmental laws, or the other non-zoning laws and regulations that Paragraph 8.1 seeks to freeze. The Citizens argue as well that the absence of a height limit in the Lake Linganore PUD ordinance renders the Agreement's agreed height limit inconsistent with LU §4-201's "uniformity" requirement, and therefore (and independent of 8.1) renders the Agreement invalid.[4]

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[4] Their brief phrased the Citizens' Questions Presented as follows:

> 1. Did the Frederick County Board of Appeals err as a matter of law by failing to find that the parties to the [Agreement] impermissibly negotiated a "freeze" of local development laws in derogation of section 7-304(a) of the Maryland Land Use [Article]?

(continued…)

Oakdale and the Commissioners counter that this is precisely the sort of agreement the DRRA subtitle of Land Use Article was meant to allow, and the language, structure, and legislative history of the statute confirm this. They dispute that LU §7-304 allows counties only to "freeze" zoning laws, and argue instead that its language "does not limit in any way what specific laws, rules, regulations, and policies that govern use, density, or intensity . . . would be frozen by operation of § 7-304." Both argue as well that the Citizens' uniformity argument is really an untimely attempt to attack the planned use development legislation itself, which was enacted years ago. Oakdale adds that the uniformity requirement does not apply to planned use development zones, but in any event is meant to bar "discrimination" against particular properties rather than disparate results within a zone.

When we review an appeal from an agency determination, we look through the decision of the circuit court and "review the administrative decision itself." *Wisniewski v. Dep't of Labor, Licensing and Regulation*, 117 Md. App. 506, 515 (1997) (citation omitted). We review factual findings under the substantial evidence standard, and look for errors of law:

> [A] reviewing court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency, but it must not itself make

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2. Did the Frederick County Board of Appeals err as a matter of law by failing to find that the lack of a maximum height limit in Frederick County's PUD Zone violates Maryland's uniformity requirement contained in Maryland Land Use [Article] §4-201(b) rendering the required "maximum height" term of the [Agreement], and the [Agreement] itself, void?

> independent findings of fact or substitute its judgment for that of the agency. Of course, a reviewing court may always determine whether the administrative agency made an error of law. Therefore, ordinarily, the court reviewing a final decision of an administrative agency shall determine (1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision.

Baltimore Lutheran High School Ass'n, Inc. v. Employment Sec. Admin., 302 Md. 649, 662 (1985). When we review an agency's interpretation of a statute, we employ principles of statutory construction, looking first to the plain meaning of the statute:

> Where the language [of the statute] is clear and free from doubt the court has no power to evade it by forced and unreasonable construction. Thus, where there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly.

Gray v. Anne Arundel Cnty., 73 Md. App. 301, 310 (1987) (internal citations omitted). We construe statutes, however, "considering the context in which the words are used and viewing all pertinent parts, provision and sections so as to assure a construction consistent with the entire statute." *Id.* (Citation omitted).

Before diving into the analysis, though, we need to unpack the main question. The Citizens take the position that the Agreement is invalid, and thus that we should reverse the Board's decision to affirm the Commissioners' decision to enter it, because it purports to freeze a broader range of local laws than LU §7-304 allows. But this strikes us really as two separate issues: *first*, whether the Commissioners were authorized to enter into this DRRA, and *second*, if they were, whether the freeze provision is unlawfully broad. This separation matters because the relief the Citizens seek—total invalidation of the Agreement—doesn't necessarily follow from a ruling that the specific "freeze" provision

is overbroad. Moreover, we don't, and can't, know the actual breadth of Paragraph 8.1 at this point because there is neither any evidence nor any suggestion that any laws, rules, regulations, or policies governing any aspect of the Development has changed since the Agreement was executed. So in addition to the pure legal questions this appeal poses, we face the important juridical question of how broadly we can and should decide them.

A. The Terms Of The Agreement Do Not Exceed The Commissioners' Authority Under The Land Use Article.

Development Rights and Responsibilities Agreements are creatures of State statute. By design, DRRAs streamline the otherwise piecemeal and parallel approval processes for different aspects of complicated developments. Title 7, Subtitle 3 of the Land Use Article statute defines a DRRA as "an agreement between a local governing body and a person having a legal or equitable interest in real property to establish conditions under which development may proceed for a specified time." LU §7-301. The purpose of these agreements, then, is to allow developers and "local governing bodies" such as the County to negotiate terms, if they so choose, as a coherent whole. Rather than, for example, leaving to separate proceedings to determine whether a project complies with applicable zoning law and regulations and what public infrastructure investments the project will require, the statute allows the developer and the County to negotiate and agree on solutions. This broader right to form agreements, the scope of which we discuss next, includes a right to agree to "freeze" certain laws, rules, regulations, and policies as of the time of signings, the scope of which we discuss thereafter. A DRRA is not a substitute for the required approvals—indeed, this DRRA specifically requires Oakdale to "obtain all approvals

necessary under any provision of local, State or federal law before proceeding with development of the Project"—but allows Oakdale and the County to establish by agreement many of the rules of engagement.

Sections 7-303(a) and (b) of the Land Use Article list the required and optional components of each DRRA:

> (a) A [DRRA] *shall include*:
>
> (1) a legal description of the real property subject to the agreement;
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> (2) the names of the persons having a legal or equitable interest in the real property subject to the agreement;
>
> (3) the duration of the agreement;
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> (4) the permissible *uses* of the real property;
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> (5) the *density or intensity* of use of the real property;
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> (6) the *maximum height and size of structures* to be located on the real property;
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> (7) a description of the permits required or already approved for the development of the real property;
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> (8) a statement that the proposed development is consistent with the comprehensive plan and development regulations of the local jurisdiction;
>
> (9) a description of the conditions, terms, restrictions, or other requirements determined by the local governing body of the local jurisdiction to be necessary to ensure the public health, safety, or welfare; and
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> (10) to the extent applicable, provisions for the:
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> (i) dedication of a portion of the real property for public use;

> (ii) protection of sensitive areas;
> (iii) preservation and restoration of historic structures; and
> (iv) construction or financing of public facilities.
>
> (b) An agreement *may*:
>
> (1) set the time frame and terms for development and construction on the real property; and
>
> (2) provide for other matters consistent with this division.

LU §7-303 (emphasis added). From there, LU §7-304 "freezes" the local laws, rules, regulations, and policies governing the use, density, or intensity of the property as of the time of signing, unless the public health, safety, and welfare require otherwise:

> (a) Except as provided in subsection (b) of this section, the local laws, rules, regulations, and policies governing the use, density, or intensity of the real property subject to an agreement shall be the local laws, rules, regulations, and policies in force at the time the parties execute the agreement.
>
> (b) If the local jurisdiction determines that compliance with local laws, rules, regulations, and policies enacted or adopted after the effective date of an agreement is essential to ensure the public health, safety, or welfare, an agreement may not prevent a local government from requiring a person to comply with those local laws, rules, regulations, and policies.

LU §7-304.

The Citizens argue that the words "use," "density," and "intensity"—words they characterize as zoning law terms of art—limit strictly the categories of laws, rules, regulations, and policies a DRRA can "freeze." Because Paragraph 8.1 includes additional categories of laws, rules, regulations, and policies, most notably in its "including but not

limited to" clause, the Citizens contend that the Agreement purports to freeze local laws beyond those permissibly frozen under LU §7-304, and thus that the entire Agreement is invalid. They go on to urge as well to interpret LU §7-304 to allow DRRAs only to freeze zoning laws explicitly delineating permissible uses, densities, or intensities. We disagree for two reasons.

First, and before we even reach the scope of the freeze provisions, we see in LU §7-303 an unambiguous legislative intent not only to authorize DRRAs between local governing bodies and developers, but to require that any DRRAs that they do enter contain a broad array of relevant provisions. It may seem like a needless analytical step to say this, since the Citizens don't contend that the Agreement itself runs afoul of LU §7-303. But the freeze provisions on which the Citizens focus arise in the context of a statute that *requires* DRRAs to encompass not only use, density, and intensity, LU §7-303(a)(4)-(5), but also, to name a few, "a description of the permits required or already approved for the development of the real property," *id*., (a)(7), "a statement that the proposed development is consistent with the comprehensive plan and development regulations of the local jurisdiction," *id*., (a)(9), and, to the extent applicable, "provisions for the dedication of the real property for public use," "protection of sensitive areas," "preservation and restoration of historic structures," and "construction or financing of public facilities." *Id*., (a)(10)(i)-(iv). The Citizens take issue with the inclusion of height restrictions in the Agreement, but LU §7-303(a)(6) *requires* the Agreement to include "the maximum height and size of structures to be located on the real property," just as (a)(3) required it to include "the duration of the agreement." And beyond the required provisions, LU §7-303(b) permits

the parties to agree on "the time frame and terms for development and construction on the real property," *id*., (b)(1), as well as "provide for other matters consistent with this division." *Id*., (b)(2).

The fact that these agreements are meant to be broad doesn't mean, of course, that every provision a jurisdiction and developer might negotiate within those broader categories necessarily will be effective or legal. Put another way, the DRRA laws do not give the County and Oakdale the authority to negotiate terms that would be illegal under the governing law. So it's fair for the Citizens to challenge the ultimate legal effect of the freeze provision and the height restrictions, and we can, and must, analyze those questions separately.

Second, with regard to the Agreement's freeze provision (Paragraph 8.1), we conclude that the Citizens' construction of LU §7-304 would effectively read the word "governing" out of the statute. We analyze the Citizens' argument against the language and structure of a statute, and if they are unambiguous, we look no further:

> If statutory language is unambiguous when construed according to its ordinary and everyday meaning, then we give effect to the statute as it is written. "If there is no ambiguity in that language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends; we do not need to resort to the various, and sometimes inconsistent, external rules of construction, for the Legislature is presumed to have meant what it said and said what it meant."

Md. Overpak Corp. v. Mayor and City Council of Baltimore, 395 Md. 16, 48 (2006) (quoting *Kushell v. Dep't Of Natural Resources*, 385 Md. 563, 577 (2005)).

We see no ambiguity here. By its terms, LU §7-304 automatically freezes "the local laws, **rules**, **regulations**, and **policies** *governing* the use, density, or intensity" of a subject property as soon as an agreement is executed. And the universe of laws, rules, regulations, and policies "governing" something necessarily is broader than the thing being governed. Black's Law Dictionary defines the word "govern" as a verb meaning "to control a point in issue." Black's Law Dictionary 810 (10th ed. 2014). Merriam Webster's eleventh edition similarly defines "govern" as a verb connoting control, and not necessarily from within:

> 1) to exercise continuous sovereign authority over; esp: to control and direct the making and administration of policy in [or] to rule without sovereign power and usually without having the authority to determine basic policy.
> 2) [to] manipulate [or] to control the speed of (as a machine) esp. by automatic means.
> 3) to control, direct, or strongly influence the actions and conduct of[,] to exert a determining or guiding influence in or over[, or] to hold in check; restrain
> 4) to require (a word) to be in a certain case
> 5) to serve as a precedent or deciding principle for
> 6) to prevail or have decisive influence; control
> 7) to exercise authority

Merriam Webster Dictionary 541 (11th ed. 2011). These common-sense definitions indicate that laws, rules, regulations, and policies other than those specifically addressing use, density, or intensity still could "govern" use, density or intensity. We disagree, then, that LU §7-304 can freeze *only* zoning laws, rules, regulations, and policies.

This leads us to the question of how far beyond the zoning laws a freeze provision might reach under LU §7-304. But because *none* of the County's laws, rules, regulations,

or policies *relating to this project*[5] has changed in the time since the Agreement was executed, the question is a hypothetical one that we decline to answer sweepingly in a factual vacuum:

> A controversy is ripe when there are interested parties asserting adverse claims *upon a state of facts which must have accrued* wherein a legal decision is sought or demanded. The declaratory judgment process is not available to decide purely theoretical questions or questions that may never arise, . . . or questions which have become moot, . . . or merely abstract questions. Nor should it be employed where a declaration would not serve a useful purpose or terminate a controversy. To address issues which are non-justiciable because they are not ripe would place courts in the position of rendering purely advisory opinions, a long forbidden practice in this State.

Hickory Point P'ship v. Anne Arundel Cnty., 316 Md. 118, 129-30 (1989) (internal quotation marks and citations omitted) (emphasis in original). Although we are comfortable deciding, as a matter of pure statutory interpretation, that LU §7-304 is not limited strictly to freezing zoning laws, this record does not afford us a basis to opine generally that any other set of laws, rules, regulations, or policies do or do not govern use, density, or intensity, nor to distinguish among specific laws, rules, regulations, or policies for that purpose. We recognize that our (non-)decision here leaves some uncertainty for Oakdale and the County about the scope of the freeze in this Agreement, and specifically whether a future amendment to a County law, rule, regulation, or policy could give rise to future litigation. But we cannot pretend to know, for example, that all (or no) County laws

[5] We use the italicized phrase purposely to note that a broader range of laws, rules, regulations, and policies than those that might be said to *govern* use, density, or intensity remains unchanged.

regarding "protection of sensitive areas" govern use, density, or intensity—some might, others might not. Neither the Board nor the circuit court was asked to make these distinctions either—they were asked only to decide whether the Commissioners overstepped their authority in approving the Agreement, and we hold that they did not.

B. The Citizens' Challenge To The Height Restrictions Lacks Merit.

The Citizens attack both the Agreement and the planned unit development zone legislation on the grounds that and the height requirements in the Agreement conflict with the lack of height requirement within the zone, and thus violate the Land Use Article's "uniformity requirement." We disagree.

The "uniformity requirement" is set forth in LU §4-201(b)(2), and generally requires zoning regulations to be uniform within each zone:

> (1) Within the districts and zones, the legislative body may regulate the construction, alteration, repair, or use of buildings, structures, or land.
>
> (2) Except as otherwise provided in this division or authorized by law:
>
> (i) zoning regulations shall be uniform for each class or kind of development throughout each district or zone; but
> (ii) zoning regulations in one district or zone may differ from those in other districts or zones.

But although the Citizens are correct that this language indicates that zoning must be uniform, the Agreement does not represent an act of zoning. The Agreement is a contract between the Commissioners and Oakdale. "A DRRA is not an ordinance or legislation as those terms are commonly understood; rather, it is a contract whose purpose

is to vest rights under zoning laws and regulations, in consideration of enhanced public benefits." *Queen Anne's Conservation, Inc. v. Cnty. Comm'rs of Queen Anne's Cnty.*, 382 Md. 306, 322 (2004). The height requirement, therefore, is binding on Oakdale *only*, and only in exchange for good and valuable consideration.

The height requirements portion of the Agreement is located within Article II, labeled "Zoning, Development Limitations, Plan Approvals and Plan Consistency," and the height requirements fall under Paragraph 2.3, labeled "Development Limitations." Paragraph 2.1 is labeled "Zoning and Plan Designations," and it is the only paragraph in that part of the Agreement that makes reference to zoning.[6] This context, and the fact that the Agreement is a contract in the first place, demonstrate that the height requirement represents an act of forbearance, as part of the Agreement, rather than any kind of legislation. "The very essence of zoning is territorial division according to the character of the land." *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 531 (2002) (quoting *Harbor Island Marina, Inc. v. Board of Cnty. Comm'rs of Calvert Cnty.*, 286 Md. 303, 312 (1979)). The Commissioners have not bound the land—they have bound a party, and the Citizens' argument fails.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[6] Further, Paragraph 2.1 seems to exist only to demonstrate the parties' joint understanding of how Lake Linganore is presently zoned rather to affect any zoning.