UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2368

September Term, 2014

AFSHIN ATTAR, ET AL.

v.

DMS TOLLGATE, LLC, ET AL.

Wright,
Arthur,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: December 28, 2015

Appellants, Afshin Attar, Ashkan Rahmanattar, Malik Imran, and Perry S. Crowl (collectively "Protestants"), bring this appeal from the grant of a Special Exception ("the Special Exception") by the Office of Administrative Hearings ("OAH") for Baltimore County on October 31, 2013, pursuant to the Baltimore County Zoning Regulations ("BCZR"), to operate a fuel service station with a convenience store containing a sales area larger than 1,500 square feet ("Wawa") in Baltimore County. The Special Exception was petitioned by William and Mary Groff, the property owners, and appellee, DMS Tollgate, LLC, the contract purchaser ("Tollgate"). The Special Exception was subsequently approved by the Board of Appeals for Baltimore County ("the Board") on June 24, 2014, upon its conduction of a *de novo* hearing. The Protestants then petitioned for judicial review where the Circuit Court for Baltimore County affirmed the decision of the Board on December 19, 2014. Protestants now appeal to this Court and submit the following questions for our consideration:

1. Whether the Board of Appeals erred legally when it assigned the burden of proof to the Protestants and concluded that the Protestants' evidence did "not rebut the presumption of validity of the Special Exception use in this case."

2. Whether the Board of Appeals' opinion satisfied Maryland's minimum requirements for articulating the facts found regarding the neighborhood's boundary.

For the reasons set forth below, we answer Protestants' first question in the negative and their second question in the affirmative, and we affirm the decision of the circuit court.

Facts

In October 2012, Tollgate applied for a Petition for Zoning Hearing for a Special Exception with the Office of Administrative Law. The Special Exception requested that Tollgate be permitted to construct the Wawa in Baltimore County on an 8.51 acre property known as 10609 Reisterstown Road ("the property"). The property is zoned as BL-AS, or Business Local with Automotive Services;[1] it is bordered by Reisterstown Road, Groff Lane, and the Gwynn Falls stream.

The Special Exception was granted by OAH after a hearing, where Tollgate and other petitioners appeared in support, and Protestants attended in opposition.[2] Witnesses for the Protestants testified at the hearing of the damaging effect that the Wawa would have to the area in terms of traffic congestion, increased crime, and environmental impact. Acknowledging these "inherent adverse effects that the legislature was presumed to have anticipated when it allowed the use by special exception," OAH approved the Special Exception.

[1] The property was rezoned as BL-AS through the 2012 Baltimore County Comprehensive Zoning Map Process ("CZMP"), which arose from extensive discussions between Tollgate, several county agencies, and community groups. In exchange for the community groups granting the rezoning request, Tollgate subjected the property to "a Declaration of Restrictive Covenants," which required that the property "be developed in a manner consistent with and complimentary to the historic character of the historic Groff Mill."

[2] Many of the Protestants are owners of gas service stations in close proximity to the proposed Wawa.

The Protestants appealed the matter to the Board, which also approved the conditions for the Special Exception after conducting a *de novo* evidentiary hearing. "Without the benefit of an approved plan," the Board granted the Special Exception "with the same conditions as those imposed by the Administrative Law Judge below."[3] The Protestants then appealed for judicial review, where the lower court affirmed the Board, stating that the Board's findings "were both reasonable and supported by substantial evidence in the record."

Standard of Review

An appellate court reviews the decision of an administrative agency "under the same statutory standards as the Circuit Court," meaning "we reevaluate the decision of the agency, not the decision of the lower court." *Gigeous v. E. Corr. Inst.*, 363 Md. 481, 495-96 (2001) (citation omitted). We review the Board's legal conclusions *de novo* but, regarding the findings of fact, we "must accept the agency's conclusions if they are based

[3] The OAH Order by the Administrative Law Judge reads as follows:

> The relief granted herein shall be subject to the following:
> 1. Petitioners may apply for appropriate permits and be granted same upon receipt of this Order; however,
> 2. Unless extended by subsequent order, the special exception granted herein must be utilized within two (2) years from the date of this Order.
> 3. The "special exception area" shall include the 1.70 acre (74,088 SF) area of the proposed Wawa service station and convenience store, but shall not include the 0.43 acre (18,628 SF) area of proposed relocated Groff Lane.
> 4. Approval by Baltimore County of landscape and lighting plan for the site.
> 5. Approval by county, state, and federal authorities of the floodplain study and/or floodplain map amendment or revision as sought by Petitioners.
> 6. Approval and issuance of all necessary permits by the State Highway Administration.

on substantial evidence and if reasoning minds could reach the same conclusion based on the record." *People's Counsel for Balt. Cty. v. Prosser Co.*, 119 Md. App. 150, 167-68 (1998) (citations omitted). "Whether we would have reached the same conclusion based on those facts is not the issue. The question is whether there is legally sufficient evidence to support the Board's conclusion." *Id.* at 179.

Therefore, when reviewing the decision of an agency, our role "is 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." *People's Counsel for Balt. Cnty. v. Elm Street Dev., Inc.*, 172 Md. App. 690, 700 (2007) (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). We "may not substitute our judgment for that of the Board" in making such a determination "unless the agency's conclusions were not supported by substantial evidence or were premised on an error of law." *Id*. 700-01 (citation omitted).

Discussion

I. The Burden of Proof was not inappropriately assigned to the Protestants.

A special exception in Baltimore County is granted pursuant BCZR § 502.1, which provides, in pertinent part:

> Before any special exception may be granted, it must appear that the use for which the special exception is requested will not:

A. Be detrimental to the health, safety or general welfare of the locality involved;
B. Tend to create congestion in roads, streets or alleys therein[.]

The Court of Appeals has dictated that we determine whether a requested special exception should be denied based on the "facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone." *Schultz v. Pritts*, 291 Md. 1, 22-23 (1981) (citations omitted).

It is undisputed that "both the burden of production and the burden of persuasion on the issue of whether the special exception should be granted" fall on the applicant, whereby he must persuade the Board "by a preponderance of the evidence that the special exception will conform to all applicable requirements." *People's Counsel for Balt. Cty. v. Loyola Coll. in Md.*, 406 Md. 54, 109 (2008).

The Protestants, however, assert that the Board "assigned the burden of proof to the Protestants" when it stated: "The Protestants' concerns taken from the available evidence do not rebut the presumption of validity of the Special Exception in this case." Read in the context of the Board's opinion, the statement does not change the burden of proof from the applicant to the Protestants. First, in the "DECISION" section of its opinion, the Board states: "The instant case then presents the narrow issue of [Tollgate's] compliance with the requirements for a Special Exception. In the Board's view the evidence presented is sufficient to satisfy the requirements of Section 502.1 of the BCZR

. . . ." The Board here acknowledges that Tollgate has met its burden of proof by presenting "sufficient" evidence that the Special Exception will comply with the requirements of BCZR § 502.1. Second, the Board follows this finding by noting that:

> there is a presumption under Maryland Law that a Special Exception is in [] the general interest of the jurisdiction and therefore valid and that a Special Exception is properly denied only when there are facts and circumstances showing the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the Special Exception use.[4]

By stating that the Protestants' evidence "d[id] not rebut the presumption of validity of the Special Exception use in this case," the Board is referring not to the burden of proof borne by Tollgate, as the applicant, but rather to the presumption of validity once the applicant has already presented sufficient evidence. The Board is merely emphasizing that the Protestants have failed to rebut the evidence put on by the applicant.

II. The evidence presented by the Protestants was not enough to rebut that put on by Tollgate, providing the Board with sufficient evidence to make its factual findings.

The Protestants next argue that they "presented evidence generating a genuine question of fact as to whether" the Special Exception will create congested roads per BCZR § 502.1(B), and that it will have detrimental environmental and economic impacts per BCZR § 502.1(A).

[4] The Board refers to law cited earlier in its opinion. *Schultz v. Pritts* dictates that a special exception is presumed to be in the interest of the general welfare and is therefore valid. *Schultz*, 291 Md. at 11.

i. Road congestion

BCZR § 502.1(B) requires that a special exception not "[t]end to create congestion in roads, streets or alleys therein." The Protestants maintain that the proposed Wawa would result in "potential congestion and traffic difficulty off Groff Mill Road" from turning fuel delivery trucks. They provided testimony from John Seitz of Transportation Resource Group supporting that theory. Tollgate, on the other hand, provided its evidence that the Wawa would not create congestion on the roads in testimonial form from its own expert witness, Ken Schmit, an expert in the field of Traffic Engineering and Transportation Planning. Tollgate also presented Traffic Impact Studies in accordance with the State Highway Access Manual. There was, therefore, sufficient evidence for the Board to find that the road congestion on Reisterstown Road would not be negatively impacted by the granting of the Special Exception. We thus will not disturb the Board's decision.

ii. Floodplain relocation

Protestants provide evidence that the Gwynn Falls floodplain may be impacted by the construction of the Wawa. The Board, however, made no finding as to the impact that the granting of the Special Exception will have on the flood plain:

> The possibility of a negative impact upon the flood plain by [the applicant's] plans will be determined separately by way of the investigation by State and Federal authorities and pursuant to Baltimore County Code (Section 32-8-101 et seq.) will only be granted when there is no adverse effect upon the safety and welfare of the citizenry.

Tollgate is not prevented by the BCZR from proceeding with the request for the Special Exception before receiving approval for the proposed floodplain relocation. Because the Board did not make, nor was it required to make, a factual conclusion on this issue, and we cannot make such a conclusion, there was no error from the Board for us to review. *See Prosser Co.*, 119 Md. App. at 179 (explaining that "[t]he question is whether there is legally sufficient evidence to support the Board's conclusion").

iii. Economic impact

Protestants argue that the Wawa will negatively impact the economic stability of the neighborhood. BCZR § 502.1(A) provides that for a proposed special exception use to be approved, the petitioner must demonstrate that the use will not be "detrimental to the health, safety, and general welfare of the locality involved." Protestants aver that since five gas stations already operate in close proximity to the proposed Wawa, several owned by some of the Protestants, "[t]he addition of a sixth gas station on this portion of Reisterstown Road will increase the amount by which the supply of gas exceeds the market demand" arguably causing "one of the existing five gas stations [to] go out of business if the proposed Wawa is built."

While the new Wawa may result in the closure of an existing gas station, BCZR § 502.1(A) does not protect against economic competition. The Court of Appeals has previously noted that the "prevention of competition is not a proper element to be considered in zoning." *Kreatchman v. Ramsburg*, 224 Md. 209, 219 (1961) (citations omitted). County zoning ordinances do not operate to provide economic protection to

existing businesses. *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 150 Md. App. 479, 501 (2003). The economic effects of zoning should be considered only as they affect the general welfare. *Kreatchman*, 334 Md. at 222.

The Protestants provide only speculative evidence on the impact the Wawa would have if it opens. Even then, they discuss only the harm that the Protestants themselves may suffer. However, merely showing the economic impact on three or four of the Protestants if the Wawa is built is not enough to amount to the "general welfare" of the locality. Taking this into consideration, there is substantial evidence to support the Board's findings of fact with respect to the Special Exception use's impact on the health, safety, or general welfare of the locality involved.

III. The Board's opinion satisfied any need for articulating the boundaries of the "neighborhood" under the BCZR.

Protestants allege that "a definition of the neighborhood is an element of the required proof for a special exception," and that the neighborhood's boundary is required to be specifically defined. In its language, BCZR § 502.1 does not explicitly required that a petition for special exception set forth a defined boundary of the neighborhood impacted by the prosed use. BCZR § 502.1 merely requires that a special exception consider the health and safety of "the locality involved." Protestants, however, cite *Lucas v. People's Counsel for Balt. Cnty.*, 147 Md. App. 209 (2002),[5] for the proposition that

[5] *Lucas* was disapproved of by *People's Counsel for Balt. Cty. v. Loyola College in Md., supra,* on different grounds.

the Board must specifically define the neighborhood pertinent to the special exception. *Lucas* involved a petition for a special exception for an "airport" zoning special exception on a farm zoned for agriculture, located within a National Register Historic District in Baltimore County. *Lucas*, 147 Md. App. at 216-17. While in *Lucas* we did explain that the definition of the relevant special exception area provided by the Board was insufficiently precise, it was insufficient because the Board relied on descriptions of the locality such as "'land around Helmore Farm,' on 'the horse industry in the area,' on the 'historical district,' and on 'Greenspring Valley.'" *Id.* at 241. Contrary to what Protestants urge, we did not hold in *Lucas* that the Board must always provide a definitive boundary of the neighborhood when issuing a special exception, but rather that the areas impacted by the grant of a special exception need to be more concretely defined than what was relied on in that case. *Lucas* noted that "a neighborhood could be defined by a more flexible area, so long as the description is precise enough to enable a party or an appellate court to comprehend the area that the Board considered." *Id.* (Citation omitted).

In the instant case, the pertinent area affected by the special exception has been sufficiently defined. There was testimony before the Board of the location of the proposed Wawa, the general vicinity surrounding the Wawa, as well as the location of the Protestants' competing gas stations. Unlike in *Lucas*, where the special exception proposed a helicopter landing strip on a farm reserved for agriculture in a historical area, Tollgate here is proposing a gas station in an area where at least five other gas stations

already exist. That difference is important in determining "the area that the Board considered" for the purposes of our review. *Lucas*, 147 Md. App. at 241. Thus, without the definition of neighborhood being explicitly required by BCZR § 502.1 and the ample evidence before the Board as to "the locality involved" in the proposed Wawa, we will not disturb the Board's decision because of a lack of an explicit, concrete outline of the neighborhood for the Special Exception.

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