UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1441

September Term, 2015

JACQUES GELIN, ET AL.

v.

BOARD OF APPEALS OF THE CITY OF ROCKVILLE, ET AL.

Meredith,
Graeff,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: November 2, 2016

This case involves a special exception application filed by Rubina Mohammed ("applicant"), to increase the number of children in her Rockville home child care business from eight to twelve children.[1] Jacques Gelin and other members of the West End Citizens' Association ("WECA"), appellants/cross-appellees,[2] appeal from an order of the Circuit Court for Montgomery County, which affirmed a decision of the Board of Appeals of the City of Rockville (the "Board"), appellees/cross-appellants, approving the application.

On appeal, appellants raise four questions for our review, which we have consolidated and rephrased, as follows:

1. Did the Board properly consider the applicable law in granting Ms. Mohammed's application for a special exception?

2. Was the Board's final decision approving the special exception supported by adequate evidence and findings?

3. Did the circuit court properly affirm the Board's final decision on the grounds relied on by the Board?

Appellees raise an additional issue for our review, whether appellants have standing to challenge the Board's decision.[3]

[1] Ms. Mohammed did not participate in the circuit court proceedings, and she is not a party to this appeal.

[2] Mr. Gelin is WECA's Recording Secretary. Other WECA officers -- Noreen Bryan, Dennis Cain, Patricia Woodward, and Marian Hull -- also participated in the proceedings below and are appellants/cross-appellees.

[3] Appellees raise a second question on cross-appeal: "Whether the Circuit Court erred when it concluded that the Smart and Sustainable Growth Act as codified in the Land Use Article applies to an individual special exception and not to the adoption of a local law or regulation concerning a special exception." This issue is encompassed by the first issue raised by appellants.

For the reasons set forth below, we agree with appellees that appellants do not have standing to challenge the Board's decision, and therefore, we shall dismiss the appeal.

BRIEF OVERVIEW OF ZONING REGARDING CHILD CARE FACILITIES

Pursuant to § 25.10.03(e) of the City of Rockville's Zoning Ordinance ("Zoning Ordinance"), a "child care home up to [eight] children" is permitted by right for a single unit detached dwelling in the R-60 residential zone. If nine to twelve children are enrolled in care, the Zoning Ordinance describes the institutional use as a "child care center," which requires the grant of a special exception by the Board.

Zoning Ordinances are designed to "[e]nsure that development occurs in an orderly fashion consistent with the [Master Plan] and the availability of adequate infrastructure capacity and other public facilities." Zoning Ordinance § 25.01.02. The Master Plan recognizes that "[m]ost institutional uses," including child care centers, "are beneficial to the entire community," but "some uses can be disruptive to the adjoining residential property owners." City of Rockville Comprehensive Master Plan 11-5 (2002) ("Master Plan"). The Master Plan notes that "disruption depends upon the size of the site that the institution is located, available on-site parking, and the width and location of buffers for the site." *Id.* Because hours of operation, increased traffic during the hours of operation, and parking on residential streets can also "be intrusive for the neighborhood," the Master Plan cautions that, "[w]hen allowing an institutional use in a residential neighborhood, care needs to be taken to ensure that the use is not disruptive to the adjoining property owners." *Id.* With respect to institutional uses in the area in which the property at issue here is located, the Master Plan states that "[a]dequate buffers must be maintained or installed

between the institutional use and abutting residential properties" and "[m]ethods to handle any increased traffic also must be addressed." *Id.* at 11-20.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Mohammed operates a daycare, classified as a "child care home," at 731 West Montgomery Avenue in Rockville, (the "Property"). On March 21, 2013, pursuant to the Zoning Ordinance, Ms. Mohammed filed a Special Exception Application, SPX 2013-00387, with the City of Rockville's Department of Community Planning and Development Services (the "Planning Department"), seeking to increase the number of children enrolled in her existing daycare from eight to twelve, which would change the use classification from a "child care home" to a "child care center." The stated purpose for the request was to allow Ms. Mohammed to provide childcare to siblings, so that parents would not need to split their children between two daycare providers, or move both of their children to a new provider. Ms. Mohammed's daycare operates from 6:30 a.m. to 6:30 p.m., Monday through Friday, and is closed on federal holidays. Most parents typically drop their children off between 7:00 a.m. and 9:00 a.m., and drop-offs take approximately five minutes. In addition, two parents drop off more than one child at once, and one parent uses the Ride-On bus, which results in a spread of traffic flow and a total of approximately five drop-offs for eight children. The Property has ample parking in the rear, near the daycare entrance. Ms. Mohammed indicated that she intended to hire one full-time assistant.

The Property abuts 729 West Montgomery Avenue (the "Abutting Property"), which at the time of the Board proceedings, was owned by Xiaolin Wan and Shan Chen (the "Wan-Chens"). The Property and the Abutting Property share a common driveway,

which provides ingress and egress to both properties. Use of the common driveway is governed by the terms of an easement, which provides, in part:

> Owners shall have full use of the Common Driveway Area free of charge for the purposes named herein, and for any other purpose necessary in connection with the use, occupancy, maintenance, renovation or construction of any improvement now or hereafter existing on the property of any Owner. Without limiting the generality of the foregoing sentence, no Owner shall use or permit the use of the Common Driveway Area for vehicular parking and no Owner shall place, construct, maintain or permit to be placed, constructed or maintained on the Common Driveway Area any trees, shrubs, fences, barriers or structures of any kind that would interfere with the others use of the Common Driveway Area as aforesaid.

Pursuant to § 25.07.08(h) of the Zoning Ordinance, after the Planning Department accepts an application, it must refer the application to the Planning Commission "for consideration and recommendation to the Board of Appeals, based on the compliance of the proposed special exception with the [Master] Plan." The Planning Commission then reviews the "special exception application at a public meeting" and provides "an opportunity for public comment." Zoning Ordinance § 25.07.08(i). Following the public meeting, and review by the Planning Commission, the Planning Commission makes a recommendation to the Board. Zoning Ordinance § 25.08.08(j).

Here, on June 17, 2013, in advance of the Planning Commission's public meeting, the Planning Commission staff issued a written report recommending that the Planning Commission recommend to the Board a finding that Ms. Mohammed's application was in compliance with the Master Plan. The staff report indicated that there "is nothing specific in the [Neighborhood Plan] that would preclude institutional uses, i.e., day care centers. However, both the Master Plan and Neighborhood Plan share the same objective when

allowing Institutional uses and that is to make sure their presence does not disturb the neighborhood." The staff report found that Ms. Mohammed's application was in compliance with the "overall goal" of "not disturb[ing] the neighborhood, particularly adjoining property owners," based on the following: (1) the Property was an existing child care home, and increased enrollment from eight to twelve children easily could be accommodated; (2) the size of the site was adequate to accommodate the proposed child care center "without duly impacting the neighborhood and adjacent properties"; (3) the Property fronts on a major arterial roadway with direct access to the I-270 interchange; (4) the Property is on a corner lot and the driveway allows "efficient traffic circulation for the drop-off and pick-up of children"; (5) transit service is readily available and already used by a child care client; (6) the lot provides adequate surface parking for clients and "should not be disruptive to adjacent residential properties"; (7) the hours of operation "are reasonable and should not create significant disruption to surrounding neighbors"; and (8) the existence of "larger Institutional uses" and a lack of "complaints or violations for any of these," regarding traffic and noise.

At its June 26, 2013, meeting, the Planning Commission reviewed Ms. Mohammed's application. Pursuant to the Zoning Ordinance, the Planning Commission's review was limited to whether the proposed special exception complied with the Master Plan. The Planning Commission received testimony from Ms. Mohammed and three others in support of the application, and testimony and letters from six persons in opposition to the application, including the Wan-Chens and WECA.

In their opposition, the Wan-Chens stated that the "existing daycare has already caused multiple traffic and noise issues," and the "expansion will be adding significant amount of traffic and noise level to both [their] family and [the] community as more cars will be coming and going during rush hour in morning and again in evening." They stated that Ms. Mohammed's parking lot "simply is not big enough to accommodate all these cars and many of them end up backing in and out of [the Wan-Chens'] parking lot to make U turns," and "some clients' cars are parked" on the Wan-Chens' property. Additionally, because of "heavy traffic from people dropping off and picking up their kids, it is very noisy, especially in the morning, and has been disruptive to [their] rest as well as peace in what it's supposed to be a primary residential neighborhood." The daily noise of traffic, as well as the children, who make "a lot of noise when they are outside playing," had "made it very difficult for" the Wan-Chens. The Wan-Chens stated that they "had to stop driving to work because [they] cannot count on being able to get out of [the common] driveway in the morning," and the existing daycare has "caused a lot of grief" on their family.

WECA submitted a letter, stating that it represented "over 1,500 families located in the West End" of the City of Rockville. Its interest, derived from its charter, was to "promote, foster and protect the interests of the community known as the West End and its environs, as well as the City of Rockville as a whole" and to "forward, promote and preserve the general welfare, character, and appearance of the community." WECA supported the Wan-Chens, stating:

> Given the fact that patrons who are delivering or picking up their children have only three parking spaces available and cannot wait in the driveway without blocking Mr. Chen and Ms. Chen from accessing their home,

> analyses needs to be done and should have been part of the staff report. The staff report ignores these issues.

WECA additionally asserted that Ms. Mohammed's application had "an adverse impact on the residential character and integrity of the West End neighborhoods caused by the expansion of the applicant's facility to an institutional use," stating that it was "detrimental to the use of the neighboring property . . . and fails to comply with the Master Plan because it is destructive to the residential integrity of the neighborhood."

The Planning Commission disagreed with staff's recommendation and voted to recommend to the Board that Ms. Mohammed's application not be approved for a special exception due to noncompliance with the Master Plan, noting in particular the "lack of the required buffer" and the "adverse effect of the continuing erosion of the residential character of the neighborhood." With regard to the buffer, the Planning Commission viewed "a property sharing a driveway easement with a residence" as "the wrong place for an institutional use due to the Master Plan's explicit requirement that institutional uses must be buffered from abutting residences."

Mr. and Ms. Mohammed appeared at the July 13, 2013, public hearing before the Board on the application. Mr. Irfan Mohammed provided an overview of the proposal to increase the capacity of the daycare from eight children to twelve children. He highlighted Ms. Mohammed's experience of being a daycare provider for more than 15 years in Montgomery County and explained the increase in demand for daycare in the County. He opined that it would "be impossible to find a lot in [Planning Area 4] that can provide

buffers and avoid any traffic[] and avoid noise." He stated that there would be no change to the appearance of the Property with the addition of four more children.

With regard to the traffic pattern, Mr. Mohammed explained that there were currently "five drop-offs, five pickups." Because parents would be bringing multiple siblings to the daycare, the traffic pattern was expected to increase to "nine drop-offs and nine pickups." Mr. Mohammed acknowledged that there had been issues with the Wan-Chens regarding "traffic and noise." He played a video of children playing on the Property, indicating that no noise could be heard from inside the house. He also showed the Board a video of traffic circulation in the area.

Ms. Mohammed emphasized that she was seeking an increase of only four children, and she believed that the term "institution" was misleading. The City's Chief of Planning clarified for the Board that a childcare center is "considered to be an institutional use" and is "in that category in the code," but noted that "there is a distinction" between a childcare center with up to 12 children, and a childcare center with more than 12 children. Furthermore, staff indicated that the Property would remain "primarily a residential use."

Several witnesses testified in favor of the application. The Wan-Chens testified against the application, stating that they had a "strong object[ion]" to daycare expansion because of "the traffic and the noise." Other residents, and members of WECA, testified against the grant of the special exception. In particular, WECA members, including Mr. Gelin, asserted generally that the child care center violated the Master Plan, would "further deteriorat[e] the residential character of the West End and adversely impact[] the

quality of life" of the residents in the Abutting Property, and "would add to the creeping erosion of the residential character of the neighborhood."

On September 14, 2013, the Board issued a written decision denying the special exception, finding that the special exception would adversely affect the Master Plan "in that it does not provide the required buffer between the proposed institutional use and the adjacent residential property at 729 West Montgomery Avenue"; would result in an increase in traffic, thereby adversely affecting the health and safety of residents in the area; would be detrimental to the use of the Abutting Property, due to parking issues at drop-off and pick-up; would change the character of the neighborhood by allowing an institutional use in a residential neighborhood; and would constitute a nuisance, "given the physical location of the site, the considerable amount of vehicular traffic, and ambient noise generated by this traffic, already impacting the surrounding neighbors."

By letter dated September 26, 2013, the Mohammeds requested that the Board reconsider its decision denying the application. They indicated that they had secured an agreement with the Rockville Church of God, which abuts the Property, to allow parents, other than those with infants, to use the church's parking lot on weekdays during drop-offs and pick-ups, and then walk to the Property using an existing walkway that connects the church parking lot to the Property.

The Board granted the Mohammeds' request for reconsideration, noting that the Mohammeds had provided adequate information to warrant a rehearing. On January 11, 2014, it held a reconsideration hearing. Prior to the hearing, Planning Commission staff submitted another report recommending that the Board approve the special exception.

Although the Board previously had found that the proposed use did not provide an "adequate buffer between the proposed institutional use and the" Abutting Property, staff reiterated its position that "the scale of this particular use does not warrant buffering in that the primary use of the [P]roperty will remain residential." Furthermore, because of the shared driveway easement, any "erection of landscaping/screening" between the Property and Abutting Property would be prohibited, and in any event, it "would greatly detract from the residential character of the [P]roperty." The staff's position was that the current landscaping along the perimeter of the Property was adequate to satisfy the Master Plan. Although day care use was classified as "institutional," the primary use of the Property would remain "residential." The staff report observed that the Mohammeds' agreement with the Rockville Church of God would mitigate any adverse effects on the Abutting Property owners.

At the hearing, Ms. Mohammed's attorney, retained after the first hearing, explained that, at the time of the first hearing, the Mohammeds had not yet reached a formal arrangement with the Rockville Church of God, which arrangement was the basis for the request for reconsideration. Counsel stated that the Zoning Ordinance provides "specific . . . minimal" standards for childcare centers, and "fencing/screening" is "not a requirement but it's an option to protect adjacent property owners." She stated that there are also "general standards," and the Mohammeds had "met every standard," both in the Zoning Ordinance and in the Master Plan. Counsel stated that, under *Trail v. Terrapin Run*, 403 Md. 523 (2008), the Master Plan is "a guide," and its provisions are not mandatory. Although childcare centers technically were an institutional use, counsel argued that the

"standard that needs to be applied . . . is in the level of adverse impacts" at the Property, compared with the "adverse impacts that you would normally assume would occur with any type of childcare center," including traffic and noise. When questioned about the Master Plan requirement of a buffer between residential and institutional uses, counsel responded that the buffer requirement is not mandatory, and a buffer installed in the middle of a shared driveway did not make sense. She also argued that the Mohammeds had exceeded the requirements of the Master Plan by securing the parking agreements, and that the parking agreement mitigated any traffic and noise issues that an additional four children would present.

Members of WECA testified that permitting an institutional use at the Property would erode the residential character of the neighborhood, and traffic and noise had been detrimental to the Abutting Property owners. Mr. Mohammed testified to the parking arrangement with the Rockville Church of God, stating that traffic would enter the church parking lot off of Nelson Street and exit off of West Montgomery. He stated the increased traffic would be "very minimal" and would not adversely affect the public. The planned parking arrangement was that one-third of the parents would park at the church and walk to the Property, and those parents with infants would continue to park in the driveway. This arrangement would effectively keep the number of drop-offs and pick-ups at the Property the same as it had been. Chairman Curtis stated that a better solution to the traffic issue would be for the church parking lot to be used for every parent, but stated: "I don't think we have a legal right to refuse this." Another board member stated: "I agree with

you. I don't think there's any way to legally reject this application," and "I don't think we have the legal right to deny it. Four more students . . . are not making a big difference."

On February 8, 2014, the Board issued its final decision granting the application for special exception. The Board found that the proposed use "would not adversely affect the City's Master Plan" because, although "the proposed use is classified as 'institutional,' the home will remain primarily residential," the "additional 4 children proposed, would cause minimal impacts to the traffic" and would not "[a]dversely affect the health and safety of residents in the area," the parking plan would mitigate any effects on the adjacent property owners, and the addition of four children would not cause any additional impacts constituting a nuisance. The Board made additional findings regarding outdoor play space, satisfaction of applicable state and county requirements, the cumulative effect of other childcare centers in the area, and lot size. With respect to "fencing and screen planting," the Board stated:

> The Board has not deemed it necessary to require fencing and screening, because it would detract from its primary use as a residence. In addition, the driveway easement prohibits the erection of fences, shrubs, barriers or structures of any kind that would interfere with the other's use of the common driveway area.

The Board ultimately granted the special exception, with certain conditions, including that the Mohammeds "enforce a parking plan that assigns at most 50% of vehicles picking up and dropping off to the child care center and at least 50% at the Rockville Church of God. Such vehicles must park in designated parking spaces as represented by the parking plan."

On February 21, 2014, Mr. Gelin, on behalf of WECA, requested reconsideration of the Board's grant of the application for special exception. WECA based its request for reconsideration on the grounds that: (1) the Board's final decision was based on an erroneous interpretation of Maryland law; (2) the final decision was "flawed because it [was] not based on new evidence that invalidates the Board's original findings and the decision fails to provide any explanation for the reversal of its original findings"; and (3) the condition requiring the Mohammeds to enforce a parking plan is "impracticable and unenforceable." The Board voted not to reconsider the grant of the application for special exception.

On March 10, 2014, Mr. Gelin filed a Petition for Judicial Review in the circuit court, which held a hearing on July 14, 2015. The issues presented to the circuit court were: (1) whether the Board's approval of Ms. Mohammed's application for a special exception was based on an erroneous conclusion of law; and (2) whether the Board's reversal of its previous decision was erroneous because it directly contradicted its earlier ruling without any additional evidence or findings.

At the hearing, counsel for WECA asserted that the Board's "decision was arbitrary and capricious because it did not comply with the Rockville City Master Plan or the applicable law regarding when a special exception may be granted." Counsel argued that the Board failed to make "a critical finding on the failure of the applicant to provide a buffer" between the Property and the Abutting Property, which buffer is required by the Master Plan. Counsel argued that the "crux of this matter is [the Board] flip-flopped. They changed their position in the second decision with no rational basis because the essential

finding, which is that there is no buffer, was never modified." And because there was "no way on this property that it can ever be buffered from the adjoining property," as buffering would require "a fence down the middle of the driveway," counsel argued that a special exception could not be granted.

Counsel also argued that *Terrapin Run*, which "declared that master plans are advisory only and not binding," was overruled by the legislature when it adopted the Smart and Sustainable Growth Act (the "Growth Act"), which "requires the applicants show by a preponderance of the evidence that the application furthers and is not contrary to the Master Plan."[4] Instead of applying the Growth Act, however, the Board reversed its first decision "based on no new evidence other than the parking agreement[,] which did not address the critical buffering requirement of the [Master Plan]" between institutional and adjoining residential uses.

Counsel for the Board argued that, in its final decision, the Board concluded "that the adverse impacts were generally no different at this day care than they would be anywhere else in the zone," and the "adverse impacts of the shared driveway were mitigated by the parking plan." With respect to the buffer requirement, the Board concluded that the buffer is a recommendation, not a requirement, and the Board concluded that a buffer was not necessary. In that regard, counsel stated that the Master Plan requires an "adequate buffer," and "adequate" in this case was to mitigate adverse impact by having parents park in the church parking lot. In granting the special exception, the Board

[4] Maryland Code (2012 Repl. Vol.) §§ 1-101 to 11-209 of the Land Use Article ("LU").

"effectively conceded that their original interpretation that the master plan required a buffer was wrong," and the "buffer would have been to address the adverse impacts of parking and traffic, which were being mitigated by the parking arrangement." Counsel stated that the Master Plan is "a recommendation. It's a guide. It's a policy."

With respect to the Growth Act, which "was promulgated in response to the ruling" in *Terrapin Run*, the Board argued that it requires only that an "action," defined as "the adoption of an ordinance or a regulation," be consistent with the Master Plan. Because the Board did not adopt a new ordinance or regulation, and instead "merely granted a special exception to increase the capacity of a child day care home," the Growth Act was not applicable.

With respect to the Board's findings, counsel argued that appellants' contention that the Board considered no new evidence "is simply untrue," as the Board heard new evidence regarding the parking plan designed to divert one-third of the traffic to the church parking lot. The Board questioned the Mohammeds about the parking plan and the impacts of the plan, and it was "persuaded to change its position and findings based on the new evidence and arguments presented and concluded that the special exception should be granted."[5]

[5] Counsel stated that the Board "had a basis for changing each one of its findings." First, with respect to the Master Plan, the Board "effectively conceded that their original interpretation that the master plan required a buffer was wrong," as the buffer "would have been to address the adverse impacts of parking and traffic, which were being mitigated by the parking arrangement." Second, the Board found that the adverse health and safety effects of traffic and congestion had been mitigated by diverting traffic to the church. Third, the Board acknowledged that the shared driveway was a challenge, but concluded that any detriment to the use of the Abutting Property had been addressed by the parking plan. Fourth, the Board was persuaded that the residential character of the neighborhood would not change, as the day care would be "virtually unnoticeable with (continued . . .)

On August 6, 2015, the circuit court issued a written opinion and order affirming the Board's final decision. Although the court agreed with WECA that the Growth Act applied to individual special exception applications, noting that Maryland Code (2012 Repl. Vol.) § 1-302 of the Land Use Article ("LU") "expressly applies the consistency requirement to individual special exceptions," it concluded that the Growth Act requires only that a special exception "is consistent with" a Master Plan, not that the special exception "conforms to" the Master Plan. Because "consistency is less rigid than strict conformity," the legislature "envisioned a concept granting those governmental bodies interpreting comprehensive plans leeway to determine consistency rather than follow a strict conformity rule." Thus, the circuit court concluded that the Growth Act requires only that a special exception be found to be consistent with a jurisdiction's master plan.

The court then considered whether appellants showed that the Board's determination, that the special exception was consistent with the Master Plan, was not based on substantial evidence in the record. With respect to the "adequate buffer" issue, the court found that the Board properly exercised its discretion in determining that the special exception was compatible with the Master Plan. The court stated:

> [T]he Board made the required findings at the reconsideration hearing. The findings were based on the evidence presented. The Applicants not only provided a physical buffer in the rear of the property, as the backyard play area is surrounded by a fence and sufficiently distanced from the adjacent property to prevent noise disturbance to the neighbors, they also provided mitigation of the traffic and noise issues through the parking agreement with Rockville Church of God. With half the total traffic diverted from the shared

(. . . continued) the drop off and pickup primarily occurring at the church." Finally, the Board was persuaded that the minimal impacts of four additional children would not constitute a nuisance, and the parking arrangement would mitigate any traffic issues.

> driveway to the church parking lot, the resulting impact could be less than the impact prior to the four-child increase.
>
> In the present case a traditional buffer proved impossible, as the adjoining property is linked with Applicant's by a shared driveway. In its reconsideration hearing, the Board exercised its discretion and determined that the mitigation provided by the parking agreement was sufficient. In essence, the Board found the parking agreement to be the functional equivalent of a buffer.
>
> Again [WECA is] correct that a special exception should be consistent with the Plan. However, [WECA's] notion of consistency, more akin to conformity, is more rigid than that which is contemplated by the Plan, the Zoning Ordinance, and the Growth Act. Thus, the Board's finding that the parking agreement brought the special exception application into compliance with the Plan's requirements was squarely within its discretion.

(footnotes and references omitted).

The court then considered whether the Board's reversal of its previous decision was supported by substantial evidence in the record. The court reiterated that the Master Plan is advisory, and it is within the Board's discretion to determine whether a special exception is consistent with the Master Plan. Therefore, the court stated, the Board's reversal "need not be premised on how and where a buffer could be installed." Instead, the Board could, and did, receive additional evidence at the reconsideration hearing, i.e., the parking agreement, which persuaded the Board that "the mitigation it provided essentially constituted a buffer." Furthermore, the mitigation provided by the parking agreement "also persuaded the Board that the primary use of the home would remain residential, and therefore the [Mohammeds'] proposed addition of four children would result in only minimal impact and would not alter the character of the neighborhood."

The court also observed that the evidence adduced at the reconsideration hearing "was significant and persuasive when compared with the evidence presented at the initial hearing," when the Mohammeds did not have counsel. Thus, in light of the additional evidence of the parking agreement at the second hearing, the Board's finding that four additional children was consistent with the Master Plan was not erroneous and was supported by substantial evidence.

This appeal followed.[6]

DISCUSSION

Before addressing the merits of appellant's contentions, we must address the Board's contention that this appeal should be dismissed because appellants do not have standing to challenge the Board's final decision. The Board asserts that appellants "are not aggrieved, cannot establish property owner standing, and have suffered no harm to be addressed by this Court." The Board acknowledges that it did not raise the issue of standing in the circuit court, but it asserts that, "in this instance, it is necessary to address the issues, as not one of the [a]ppellants can establish standing."

Appellants respond in two ways. Initially, they argue that the Board has waived the issue of standing because it failed to raise the issue in the circuit court. In any event,

[6] Bernard Renard filed a Motion to Intervene as an appellant, stating that he has purchased the property at 729 West Montgomery Avenue, which abuts the Property, and therefore, he is an aggrieved property owner. He cites no rule permitting a party to intervene in a case pending in this Court. On February 3, 2016, this Court denied the Motion. On August 11, 2016, Mr. Renard filed a Renewed Motion to Intervene, which provided no additional grounds or authority for granting the motion. Under these circumstances, we shall again deny the motion.

appellants argue that Mr. Gelin and Noreen Bryan, as WECA representatives, have standing to pursue this appeal because they "meet the requisite 'special aggrievement' standard for associations." In support, they assert that WECA "has and continues to expend extensive volunteer time on protecting the property interests of the residents of the West End."

We address first whether the issue of standing is properly before us. Appellate courts "ordinarily do not decide issues of standing not raised in the trial court. *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008). *Accord County Council of Prince George's County v. Zimmer Dev. Corp.*, 217 Md. App. 310, 320 (2014), *aff'd on other grounds*, 444 Md. 490 (2015). There are, however, some circumstances in which "an appellate court may consider a standing issue even though it was not raised in the trial court." *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59, 70 (2003). For example, a "'standing' issue may relate to the jurisdiction of the appellate court, such as whether the 'case-or-controversy requirement' is met, and such an issue may always be noticed by the appellate court." *Id.* (quoting *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 970-71 (1984) (Justice Stevens concurring)). *Accord State Comm'n on Human Rel. v. Anne Arundel County*, 106 Md. App. 221, 236 (1995) ("'[A]lthough the issue of standing may not be jurisdictional in nature, it does go to the very heart of whether the controversy before the court is justiciable. If the controversy is nonjusticiable, it should not be before the court, and therefore must be dismissed.'") (quoting *Sipes v. Bd. of Mun. and Zoning Appeals*, 99 Md. App. 78, 87-88 (1991)). Indeed, relevant to this case, the Court of Appeals held in *Southland Hills Imp. Ass'n of Baltimore County, Inc. v. Raine*, 220 Md. 213, 216

(1959), that the standing of an association to assert the claims of members with regard to the granting of a special exception "goes to the jurisdiction" of the Court and would be decided even though not raised below. Pursuant to this case law, and because the issue of standing here relates to whether there is a "justiciable controversy" before this Court, we will address the issue, even though it was not raised below.

LU § 4-401(a) provides that a request for judicial review of a decision of a board of appeals may be filed by: "(1) a person aggrieved by the decision or action; (2) a taxpayer; or (3) an officer or unit of the local jurisdiction." Here, appellees assert that appellants have no standing to appeal because they are not "aggrieved" by the decision of the Board, and they cannot establish taxpayer standing.

The Court of Appeals discussed the requirement that a person be "aggrieved" to have standing to challenge a land use decision in *Ray v. Mayor and City Council of Baltimore*, 430 Md. 74 (2013). It explained that "a person aggrieved" was

> "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**." (Emphasis added).

Id. at 81 (quoting *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 144 (1967)). The Court subsequently explained the concept of property owner standing, as follows:

> To establish property owner standing, a complainant must be "specially aggrieved." The most important consideration in whether a property owner is specially aggrieved is the presumption derived from the proximity of his/her/its property to the rezoned property. Our cases demonstrate that a party will only be specially aggrieved for purposes of property owner

> standing if the party is "an adjoining, confronting, or nearby property owner" (*prima facie* aggrieved) or is "farther away than an adjoining, confronting, or nearby property owner, but is still close enough to the site of the rezoning action and offers 'plus factors' supporting injury" (almost *prima facie* aggrieved). We have found almost *prima facie* aggrieved complainants whose property is between 200 and 1000 feet away from the subject property.

Zimmer, 444 Md. at 510 n.12 (citations omitted).

The Court of Appeals has stated that proximity is a critical factor in showing aggrievement in this regard. *Ray*, 431 Md. at 82-83. Appellees assert that, because "each of the appellants live a substantial distance from the day care home," they have failed to show that they are aggrieved.

Appellants do not dispute appellee's factual assertion regarding property owner standing and the distance of the homes of the individual appellants. Nor do they argue that they have taxpayer standing. Rather, they assert that Mr. Gelin and Ms. Bryan participated in these proceedings as representatives of WECA, and WECA, a neighborhood civic association representing 1600 families "in preserving the West End's residential characteristics of from intrusions of institutionalization," meets the "special aggrievement" standard.[7]

The Court of Appeals, however, has held "that an association lacks standing to sue where it has no property interest of its own – separate and distinct from that of its individual members – which may be affected by any of the alleged acts under attack." *Citizens*

[7] Appellants note that LU § 1-101(k) defines a "person" aggrieved as "an individual, receiver, trustee, guardian, personal representative, fiduciary, representative of any kind, partnership, firm, association, corporation, limited liability company, or other entity." They assert that, as an unincorporated civic association, they fall within the designation of "other entity."

Planning and Housing Ass'n v. County Exec. Of Baltimore County, 273 Md. 333, 345 (1974). Indeed, it has held that an "improvement association" is not authorized to appeal "as a party aggrieved by reason of the members being aggrieved." *Southland Hills*, 220 Md. at 217. Pursuant to this case law, appellants do not have standing to appeal, and there is no "justiciable controversy" before us. Accordingly, we shall dismiss the appeal.

APPEAL DISMISSED. REVISED MOTION TO INTERVENE DENIED. COSTS TO BE PAID BY APPELLANTS.