

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0727

September Term, 2016

ELAINE S. GILL

v.

BOARD OF APPEALS OF HARFORD
COUNTY, MARYLAND

Graeff,
Berger,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: May 22, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from the denial by appellee, the Board of Appeals (“Board”) for Harford County, of an application filed by appellant Elaine S. Gill (“Gill”) for a special exception to permit a “personal-care boarding home” on a lot she previously purchased. The Board’s denial was based on its interpretation of the language of the Harford County Zoning Code (“ZC”), specifically § 267-88F(6)(b), and its determination that the lot did not meet the minimum lot size requirements for a conventional single-family home in an Agricultural District.

Gill has presented one issue for our review, which we have rephrased as follows:

Whether the Board of Appeals for Harford County erred in denying Gill’s application for a special exception for a personal-care boarding home based on ZC Code § 267-88(F)(6)(b), which requires that a proposed use “meet[] the minimum lot size requirements for a conventional single-family residence in the district where located.”

For the reasons discussed below, we hold that the Board erred in denying Gill’s application for a special exception without entertaining the merits of Gill’s application. We, therefore, reverse the judgment of the circuit court, and remand the case to the Zoning Hearing Examiner for a decision on the merits of Gill’s application for a special exception.

BACKGROUND AND PROCEDURAL HISTORY

Gill is the owner of Always Best Care Senior Services (“ABCSS”). In addition to in-home care, ABCSS provides referrals to assisted living facilities for adult seniors with chronic health conditions who require constant assistance. In providing these services to the community, Gill observed a gap in available “personal-care boarding homes” located in Harford County.

A “personal-care boarding home” is “[a]ny premises which provides personal care to adults, for consideration, and provides these services to a minimum of 3 adults not related to the provider or owner.” ZC § 267-4. The Harford County Council (“the Council”) determined that personal-care boarding homes provide an important service to Harford County. The Council explained the need for these homes in 1985, when it enacted legislation regulating personal-care boarding homes, in the following manner:

[T]hese types of premises provide food, shelter, and assistance to adults, for consideration, who because of age, physical or mental limitations have difficulty with these daily living activities and are in need of such services [T]hese premises are essential in that they offer an alternative living to institutional facilities and render an atmosphere of family living”

Harford County Council Bill No. 85-46 (October 10, 1985).¹

In 2014, Gill purchased a lot of land (“the Property”) in Fallston, Maryland in the Agricultural District (“AG”) of Harford County intending to turn it into a personal-care boarding home. The Property is approximately 1.83 acres (or 79,714 square feet) in size and was recorded in 1959. It is improved with a 1,488 square foot single-family home constructed in 1961 and is located across the street from Gill’s personal residence. To comply with certain personal-care boarding home requirements, Gill intended to have at least one staff member present for every five residents, and to meet all requirements regarding the dispensing of short-term narcotic prescriptions, such as taking certain security measures. Gill represented in her application that she would not provide alcohol

¹ Hereinafter, all references to a bill number (“Bill No.”) refer to a bill of the Harford County Council.

or drug rehabilitation services at the home, but instead, provide assistance to residents age 50 and older with chronic health conditions who would live in the facility until they pass away. Further, she intended to comply with all statutory requirements regarding any structural improvements to the Property.

Harford County Zoning Code Statutory Framework

Pursuant to ZC § 267-49A, the “minimum design standards and specific regulations for each district are set forth in § 267-51 (Requirements for Specific Districts) and in Tables 53-1 through 61-1.” Section 267-53 of the Code provides general provisions pertaining to the Agricultural District. Specifically, subsection C(1) provides that the

[m]inimum lot area, maximum lot area, maximum average lot area per dwelling unit or family unit, building setback from adjacent residential lot lines, lot width, front, side and rear yard and maximum building stories, as displayed in Table 53-1, shall apply, subject to other requirements of this Part 1.

ZC § 267-53C(1) (emphasis added).

Table 53-1, entitled “Design Requirements for Specific Uses -- AG Agricultural District,” provides the “Minimum Lot Area” required for various use classifications in the Agricultural District. Several types of uses are listed under “Use Classification,” including “Residential: Conventional.” The pertinent portion of Table 53-1 is represented by the following table:

USE CLASSIFICATION	Minimum Lot Area (sq. ft.)
RESIDENTIAL: CONVENTIONAL	
Lots recorded prior to 2-8-77	20,000
Lots recorded on or after 2-8-77	2 acres

See Zoning Code, Chapter 267, Table 53-1.

As is represented in the table above, two types of lots are listed under “Residential: Conventional.” The first type is “Lots recorded prior to 2-8-77” (i.e. lots recorded prior to February 8, 1977), which requires a “minimum lot area” of 20,000 square feet. The second type of lot listed is “Lots recorded on or after 2-8-77,” and requires a “minimum lot area” of “2.0 acres”.² Critically, Table 53-1 provides the only specific minimum lot sizes in the Zoning Code that are relevant to the minimum lot size required by ZC § 267-88F(6)(b).

Article IX governs special exceptions permitted under the Zoning Code. Pursuant to ZC § 267-88A, “[s]pecial exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1.” Section 267-88F(6) provides a special exception for personal-care boarding homes, but requires that certain requirements be met. Under the “Specific Standards” for “Residential Uses,” the statute provides the following regarding personal-care boarding homes:

² A note at the bottom of Table 53-1 provides: “General requirements shall apply to all permitted uses in the classification. Some uses may have additional requirements specifically cited in Article IX Special Exceptions.”

This use may be granted in the AG, RR, R1, R2, R3, R4, RO, VB and VR districts, provided that:

...

(b) The proposed use meets **the minimum lot size requirements** for a **conventional single-family residence in the district where located**.

...

(e) All applicable State and County laws and regulations are satisfied.

ZC § 267-88F(6)(b), (e) (emphasis added).

Application for a Special Exception and Board of Appeals Decision

On October 10, 2014, Gill filed an application for a special exception for a personal-care boarding home to be located on the Property, pursuant to ZC § 267-88(F).³ Her request was heard by a Zoning Hearing Examiner (“Hearing Examiner”) for the Harford County Board of Appeals on February 11, 2015. A series of zoning experts and other testimony was received regarding whether the Zoning Code required that Gill obtain a variance in order to be approved for a personal-care boarding home special exception.⁴

The Hearing Examiner found the following:

³ Prior to the hearing, Gill also filed for a variance pursuant to § 267-53(C)(1), Table 53-1, to permit a personal-care boarding home on a lot of 1.83 acres in size. At the commencement of the hearing, however, Gill withdrew her request for a variance and instead argued that a variance was not required by the zoning code.

⁴ Gill presented Torrence Pierce as an expert witness who testified that a variance is not required because the deed for the Property was recorded before 1977 and the Property, therefore, meets the minimum lot size required by ZC § 267-88F(6)(b). Anthony McClune testified as an expert on behalf of the Department of Planning and Zoning that a variance was required because the “current” Zoning Code is applicable to Gill’s application for a personal-care boarding home and the “current” Zoning Code requires that the lot be

The Applicant's argument that when the lot was recorded should control is not part of the Code. The Code is specific in that the minimum lot size requirement must be met for the district where located. [. . .] There can be no dispute the minimum lot size requirement for the AG District is currently two (2) acres, and this is what applies under [the] plain reading of the statute.

The Applicant is not entitled to the pre 1977 minimum lot size requirement of 20,000 square feet because the statute is not concerned with the requirements of her individual lot. The statute provides that the minimum lot size for the Agricultural District as a whole must be met -- not for Applicant's lot. The language "where located" demonstrates legislative intent to include the current District requirements and not the historical requirements for the individual lot

The Hearing Examiner's decision was based entirely on the conclusion that the plain language of ZC § 267-88F(6)(b) required that, to be entitled to a special exception for a personal-care boarding home, any lot within the Agricultural District must meet the post-1977 minimum lot size requirement.

On October 20, 2015, the Board voted to adopt the Hearing Examiner's recommendation to deny Gill's application for a special exception. Gill timely filed a petition for judicial review. The Circuit Court for Harford County held a hearing on the petition on May 20, 2016 and issued a ruling from the bench affirming the Board's decision. The circuit court's ruling was based on conclusions similar to the Hearing Examiner's decision. The court issued the following opinion from the bench:

a minimum of two acres. The Hearing Examiner, in his written opinion, found McClune's testimony to be more convincing. Because this case involves a question of law, however, we need not address the evidence presented before the Hearing Examiner nor the experts' opinions regarding whether the Property meets the minimum lot size required by ZC § 267-88F(6)(b).

There is no dispute that the lot in question is located in an agricultural district. The specific unambiguous language of [ZC § 267-88F(6)(b)] requires that “[t]he proposed use meets the minimum lot size requirements for a conventional single-family residence in the district where located.” The minimum lot size requirements for [the] agricultural district is two acres. That is the plain meaning of the statute and the Court does not see where the chart at Table 53-1 would apply.

[. . .]

[The Hearing Examiner] actually analyzed each of the arguments made and explained why the two-acre minimum applied, based on the unambiguous reading of the Code.

Therefore, finding no legal error, the Court will affirm the decision of the Harford County Council

DISCUSSION

I. Standard of Review

We have explained that we that we “look[] through the circuit court's ... decision[], although applying the same standards of review, and evaluate[] the decision of the agency.” *People's Counsel v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007). In other words, we “review[] the agency's decision, not the circuit court's decision.” *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012) (citation omitted).

We review an administrative agency’s conclusions of law *de novo*, “however, ‘a degree of deference should often be accorded the position of the administrative agency.’” *Assateague Coastkeeper v. MDE*, 200 Md. App. 665, 690 (2011) (quoting *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173–74 (2011)). Although “[a]n administrative agency's interpretation of a statute that the agency administers should ordinarily be given

considerable weight by reviewing courts,” *Piney Orchard Cmty. Ass'n*, 231 Md. App. at 92 (citation omitted), we owe no deference to an agency’s erroneous conclusions of law. *See Bd. of County Com'rs for St. Mary's County v. S. Res. Mgmt., Inc.*, 154 Md. App. 10, 34 (2003) (“[W]here an administrative agency renders a decision based on an error of law, we owe the agency's decision no deference.”) (citations omitted). “In contrast to administrative findings of fact, questions of law, including the proper construction of a statute, are subject to more plenary review by the courts.” *Maryland Office of People's Counsel v. Maryland Pub. Serv. Comm'n*, 226 Md. App. 483, 501 (2016) (quoting *Office of People's Counsel v. Maryland Pub. Serv. Comm'n*, 355 Md. 1, 14 (1999)). It is the appellant’s burden, however, to establish that the agency erred as a matter of law. *Assateague Coastkeeper*, 200 Md. App. at 690).

II. The Board Erred in Concluding that the Zoning Code Requires a Minimum Lot Size of Two Acres for Gill’s Application for a Special Exception.

The critical issue in this case is whether the plain language of ZC § 267-88(F)(6)(b) requires that, to obtain a special exception for a personal-care boarding home in the Agricultural District, a lot that was recorded prior to 1977 must comply with the post-1977 minimum lot size requirement for “a conventional family home.” Our task, therefore, is one of statutory construction and we review the Board’s decision for legal error. *S. Res. Mgmt., supra*, 154 Md. App. at 34. We hold that the Board, in adopting the Hearing Examiner’s decision, based its decision on an erroneous conclusion of law.

A. The Plain Language of the Zoning Code Provides that the Minimum Lot Size for a Personal-Care Boarding Home Special Exception is Based on the Date of Recordation.

The foremost goal of statutory interpretation is to carry out the intention of the legislature. *Solomon v. State*, 442 Md. 254, 265 (2015); *see also Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 444-45 (1997) (citing *State v. Pagano*, 341 Md. 129, 133 (1996)). However, “[t]he very language of the statute serves as the primary source of the legislature's intent.” *Kona Properties, LLC v. W.D.B. Corp.*, 224 Md. App. 517, 561 (2015). We, therefore, rely on the plain meaning of the language used in the statute, and, if the language is clear and unambiguous, we need not look into the legislative history to “ascertain and effectuate” its meaning. *Baltimore Cnty. v. Balt. Cnty. Frat. Order of Police*, 439 Md. 547, 572 (2014)).

We cannot, “under the guise of construction, . . . supply omissions or remedy possible defects in the statute, or . . . insert exceptions” that are not in its plain language. *McNeil v. State*, 112 Md. App. 434, 451 (1996) (quoting *Amalgamated Cas. Ins. Co. v. Helms*, 239 Md. 529, 535–36 (1965)). Moreover, we have explained that, in our endeavor to ascertain the legislative intent, we interpret the statute “as a whole to ensure that no word, clause, sentence, or phrase is rendered meaningless.” *Bourgeois v. Live Nation Entm't, Inc.*, 430 Md. 14, 27 (2013); *see also Montgomery Cnty. v. Buckman*, 333 Md. 516, 523-24 (1994) (“[A]bsent a clear intent to the contrary, a statute is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory.”).

The critical language of ZC § 267-88F(6)(b) at issue requires that the lot meet the “minimum lot size requirements for a conventional single-family residence in the district where located.” On appeal, Gill argues that this language instructs us to determine the minimum lot size requirement from Table 53-1, under “Residential: Conventional” uses in the Agricultural District. The Board maintains that the language of ZC § 267-88F(6)(b) indicates that the minimum lot size required is the minimum lot size required for “[l]ots recorded on or after 2-8-77” i.e. what the Board refers to as the “current” minimum lot size requirement for single-family homes in the Agricultural District. No provision in the code, however, designates the minimum lot size requirements for lots recorded **after** 1977 as the prevailing standard for the personal-care boarding home special exception, without regard to when the lot was recorded.

The Board argues that because the language of ZC § 267-88F(6)(b) is clear, we have no reason to look to Table 53-1. The Board further maintains that statutory construction clearly calls for the minimum lot size for a conventional single-family residence in the AG District. The problem with this assertion, however, is that the subsection itself does not specify the minimum lot size requirements for the personal-care boarding home special exception. The Board never explains the source of the two acre minimum that it asserts is the “current” prevailing minimum lot size in the Agricultural District. Table 53-1, however, provides for two minimum lot size requirements under “Residential: Conventional” uses -- one for lots recorded prior to 1977 and one for lots recorded after 1977. Moreover, ZC § 267-53C(1) provides, specifically, that the “[m]inimum lot area, . . . as displayed in Table 53-1, **shall apply**, subject to other requirements of this Part 1.”

Indeed, the note accompanying Table 53-1 refers specifically to the article governing special exceptions, providing that other requirements in Article IX may apply in addition to the requirements in Table 53-1.

We, therefore, hold that the plain language of the statute provides the minimum lot size required to meet the requirements of ZC § 267-88F(6)(b). Pursuant to ZC § 267-88F(6)(b), we first look to the requirements for the Agricultural District, as this is the “the district where [the Property is] located.” As we have explained, the minimum and maximum measurements are determined by reference to Table 53-1, pursuant to ZC § 267-53C(1). Table 53-1 lists two classifications of lots under “Residential: Conventional,” which are defined by when the lot was recorded. The statute makes no distinction preferring the application of the requirements associated with lots recorded on or after February 8, 1977 over the requirements for lots recorded before February 8, 1977 for all lots. The 20,000 square feet minimum, therefore, is the “current” zoning law that applies to lots recorded prior to 1977, and the two acre minimum applies specifically to lots recorded after 1977.

As neither the size of the property nor the date it was recorded is in dispute, the Property complies with the plain language of ZC § 267-88F(6)(b) that the lot “meet[] the minimum lot size requirements for a conventional single-family residence in the district where located.” The Property is clearly located in the Agricultural District, it was recorded in 1959, and its size is approximately 1.83 acres – more than the 20,000 square feet minimum lot size required for lots recorded prior to 1977. The statutory framework of the personal-care boarding home follows a logical progression from ZC § 267-88F(6) to the

two categories of “conventional” and “residential” uses listed for the Agricultural District under Table 53-1. The only reasonable conclusion, therefore, is that Gill’s property falls under the “Lots recorded prior to 2-8-77” category of “Residential: Conventional” use classifications and must meet the 20,000 square feet minimum to comply with the minimum lot size required for “a conventional single-family residence in the district where located.”⁵ *See* ZC § 267-88F(6)(b).

B. The Language “in the district where located” Does Not Requires that All Lots Meet the Minimum Lot Size of Two Acres for Lots Recorded After 1977 to Comply with the Requirements for a Special Exception.

The Board argues that the phrase “in the district where located,” with “no reference in the statute to a particular time, lot, or table,” means that the minimum lot size required is the “current” minimum lot size for the Agricultural District. To the extent the Board contends that we must base our decision on “the current requirements for the district that are applicable for the special exception,” rather than a “historical” minimum lot size, we agree. The minimum lot size requirement, however, for lots recorded after 1977 did not replace the required minimum size for lots recorded prior to 1977. On the contrary, the Code provides specifically for two separate requirements as determined by the date the lot

⁵ Both parties presented arguments on appeal asserting that the legislative history supports their opposing proposed interpretations of the plain language of ZC § 267-88F(6)(b). Because we find that the plain language of the Code is unambiguous as to the minimum lot size requirement for a personal-care boarding home special exception in the Agricultural District, we need not delve into the legislative history to support our interpretation. *See W.R. Grace & Co. v. Swedo*, 439 Md. 441, 453–54 (2014).

was originally recorded. Both minimum lot sizes are the “current” law but apply to two different types of lots.

Although the Board concedes that Gill would be entitled to use the Property as single-family home, the Board differentiates the use of the Property as a personal-care boarding home as a “new use.” Whether Gill’s request for a personal-care boarding home special exception is a “new use,” however, has no bearing on whether the minimum lot size requirement is based on the requirements for a lot recorded before or after February 8, 1977. Indeed, in a separate subsection regulating the Agricultural District, the Code contemplates new “residential development”⁶ for lots that meet a minimum lot size that is determined based on whether the lot was recorded before or after 1977. *See* ZC § 267-53D(3)(d). Subsection 267-53D provides that the following is permitted in the Agricultural District:

(3) Residential development, **on parcels as described in the Land Records as of February 8, 1977**, as provided below:

(a) Residential development rights shall be calculated pursuant to the following guidelines:

[1] One lot shall be permitted on **any parcel of land that is more than 20,000 square feet** and less than 11 acres.

. . .

(b) **Any new lot created** pursuant to Subsection D(3)(a)[1-4] shall be **a minimum of 2 acres**

Emphasis added.

⁶ “Development” refers to “[t]he construction, reconstruction, conversion, erection, alteration, relocation, or enlargement of any building or structure; any mining, excavation or landfill; and any land disturbance in preparation, for any of the above.” ZC § 267-4.

Similar to the provisions in Table 53-1, ZC § 267-53D(3)(d) contemplates two different minimum lot size requirements, depending on when the lot was recorded. Because ZC § 267-53D(3)(d) pertains only to development within the Agricultural District, the subsection includes the two separate minimum lot size requirements within the language of the provision. The personal-care boarding home special exception under ZC § 267-88F(6), however, is permitted in nine zoning districts and, therefore, relies on each district's design requirements for a conventional family home to supplement the minimum lot size requirement for each district. Similar to ZC § 267-53D(3)(d), however, the minimum lot size required by ZC § 267-88F(6)(b), in conjunction with Table 53-1, is determined by the date the lot was recorded. Indeed, the same minimum lot size requirements are used depending on the date of recordation.

The "current" design requirements for use classifications within the Agricultural District, provide two mutually exclusive types of lots under "Residential: Conventional" uses and a series of particular design requirements for each of the two types. Both of the minimum lot size requirements for the two types of lots that are listed in Table 53-1 are therefore part of the "current" law. Notably, the Board has not cited to any provision indicating that § 267-88F(6)(b) refers *only* to the two acre minimum for lots recorded after 1977. Indeed, the Zoning Code includes a table for each district indicating the minimum and maximum design requirements, and ZC §267-49A and § 267-53D indicate that Table 53-1 applies. The tables included in the Zoning Code for each district apply to references in the Code to minimum and maximum size requirements, consistent with ZC § 267-53C(1).

The requirements set out in ZC § 267-88F(6) for a personal-care boarding home special exception do not specify that all lots are subject to the minimum lot size requirements of either of the two classifications of lots listed in Table 53-1. Moreover, no part of the statute indicates that the minimum lot size requirements for a conventional family home under Table 53-1 do not apply to special exceptions. On the contrary, the note beneath Table 53-1 refers specifically to special exceptions, providing that additional requirements contained in Article IX may apply. Reaching the Board’s conclusions, therefore, would require us to read into the statute a prevailing minimum lot size for all lots regardless of when the lot was recorded. In interpreting the statute, we will not “supply omissions or remedy possible defects,” particularly where the plain language of the statute provides for a logical conclusion. *See McNeil, supra*, 112 Md. App. at 451 (citation omitted).

C. Determining the Minimum Lot Size Based on the Design Requirements of Table 53-1 is Consistent with the Purpose of the Personal-Care Boarding Home Special Exception.

An underlying purpose of regulating the personal-care boarding home under the Zoning Code was the Council’s belief that “these premises are essential in that they offer an alternative living to institutional facilities and render an atmosphere of family living” *See* Bill No. 85-46. Permitting such a use, therefore, in a single-family home within certain zoning districts subject to the same design requirements as would be required for a “conventional” family home is consistent with the Council’s purpose of enacting the special exception for a personal-care family home.

Unlike other residential uses, such as “Nursing Homes,” ZC § 267-88F(6) permits a personal-care boarding home special exception on lots that meet the same minimum lot size required for a “conventional” single-family use of the lot within the district “where located.” *See* ZC § 267-88F(5).⁷ As a special exception for a nursing home contemplates a facility with purposes different from the personal-care boarding home, the language of the subsection regulating nursing homes provides specifically for a “minimum parcel area of 5 acres.” The purpose of enacting a personal-care boarding home special exception -- to provide “an atmosphere of family living -- is therefore fulfilled by requiring the boarding home to meet the same lot size requirements of a family home, as is appropriate for each district. *See* Bill No. 85-46. Regarding the Agricultural District, a “conventional” family home on a lot recorded prior to February 8, 1977 must be a minimum of 20,000 square feet. *See* Zoning Code, Chapter 267, Table 53-1. The same minimum lot size is required for a personal-care boarding home on a lot recorded prior to February 8, 1977.

The plain language of the ZC § 267-88F(6)(b) does not require that the Property meet the requirements for lots recorded on or after 1977. Indeed, the Code provides two separate minimum lot size requirements for “Residential: Conventional” uses within the Agricultural District. Whether a lot must meet the 20,000 square feet or the two acre minimum lot size is determined based on whether the lot was recorded before February 8,

⁷ Subsection 267-88F(5), “Nursing homes and assisted living facilities” are permitted as a special exception subject to the following provision: “These uses may be granted in the AG, RR, R1, R2, VR, VB and B1 districts, provided that: (a) A minimum parcel area of 5 acres is established and a maximum building coverage of 40% of the parcel is provided.”

1977 or on or after that date. The Board, by adopting the recommendations of the Hearing Examiner, based its decision to deny Gill's request for a special exception for a personal-care boarding home solely on the incorrect premise that "[t]here can be no dispute the minimum lot size requirement for the AG District is currently two (2) acres, and this is what applies under [the] plain reading of the statute."

The Board, therefore, erred in concluding that the Zoning Code requires a minimum lot size of two acres for Gill's application for a special exception. As a result, the Board erred as a matter of law in determining that Gill must seek a variance to locate a personal-care boarding home on the Property. Additionally, because the Hearing Examiner found that the Property failed to meet the minimum lot size requirements contained in ZC § 267-88F(6)(b), he concluded that the "remaining provisions of Section 267-88F(6) and the provisions of § 267-9I do not need to be addressed." Accordingly, we reverse the Circuit Court for Harford County and remand the instant case to the Zoning Hearing Examiner for a decision on the merits of Gill's application for a special exception.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED. CASE IS REMANDED TO THE HEARING EXAMINER FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.