

Circuit Court for Baltimore City  
Case No. 24-C-20-004186

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 549

September Term, 2021

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IN THE MATTER OF THE PETITION OF  
GUILFORD AVENUE LLC

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Fader, C.J.,  
Berger,  
Raker, Irma S.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Berger, J.

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Filed: February 3, 2022

\*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 a decision of the Baltimore City Board of Municipal Zoning Appeals (“BMZA”) granting a conditional use application filed by Guilford Brewing, LLC (“Guilford Brewing”), appellee. Guilford Brewing received approval as a conditional use to offer live entertainment on the second floor of its restaurant and brewery located at 1611-1615 Guilford Ave (the “Brewery Property”). The BMZA also granted Guilford Brewing a parking variance. Guilford Avenue, LLC (“Guilford Avenue”), appellant, whose property abuts the Brewery Property, filed a petition for judicial review in the Circuit Court for Baltimore City. Guilford Avenue is the owner of 1601 Guilford Avenue, a residential cooperative of nine residents that shares a common wall with the Brewery Property. After briefing and oral argument, the circuit court affirmed the BMZA’s decision.

Guilford Avenue presents six questions for our consideration on appeal,<sup>1</sup> which we have rephrased and consolidated as three questions as follows:

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<sup>1</sup> The questions, as presented by the appellant, are:

1. Given the fact that the accessory live entertainment space is five times larger than the restaurant space, did the BMZA (and the Circuit Court) err in finding that the live entertainment use was **accessory** to the restaurant use?
2. Given the fact that the BMZA relied on a staff memorandum to interpret the Ordinance that established the Planned Unit Development and that staff memorandum was not provided to the parties or made part of the record, did the BMZA (and the Circuit Court)

- I. Whether live entertainment is permitted as a conditional use in the applicable Planned Unit Development.
- II. Whether the BMZA's decision granting Guilford Brewing's conditional use application to provide live

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err in finding that the staff memorandum was privileged?

3. Given the fact that restaurants on the first floor with live entertainment are specifically prohibited in the Planned Unit Development, did the BMZA (and the Circuit Court) err in finding that live entertainment is permitted in the Planned Unit Development when the live entertainment was throughout the Brewery Property and not limited to the second floor or even just on the second floor when it is accessory to a first floor restaurant use (despite a prohibition on restaurants with live entertainment)?
4. Given the fact that Guilford Brewing LLC did not request a parking variance and did not present evidence to the BMZA regarding the need for a parking variance, did the BMZA (and the Circuit Court) err in granting a variance for parking?
5. Given the fact that Guilford Brewing, LLC's Conditional Use Application was incomplete and failed to contain necessary information that is statutorily required for the BMZA to evaluate the impact that live entertainment would have at the Brewery Property, did the BMZA (and the Circuit Court) err in finding that the BMZA properly considered Guilford Brewing, LLC's Conditional Use Application?
6. Given the testimony and evidence presented by Appellant regarding the negative impact that live entertainment would have at the Brewery Property, did the BMZA err when it failed to properly conduct a conditional use analysis, and did the Circuit Court err in affirming the BMZA?

entertainment on the second floor of the Brewery Property was supported by substantial evidence and free of legal error.

- III. Whether the BMZA’s decision granting Guilford Brewing’s request for a parking variance was supported by substantial evidence and free of legal error.

For the reasons that follow, we shall affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On November 27, 2019, Guilford Brewing submitted a conditional use application in which it sought to provide live entertainment on the second floor of its restaurant. At the time, the restaurant was not yet operating, but Guilford Brewing had been issued building permits for the Brewery Property and sought to add live entertainment on the second floor.<sup>2</sup>

The Brewery Property is located within the Greenmount West Arts and Entertainment Planned Unit Development (the “PUD”), which was established via Baltimore City Ordinance 03-533 on May 9, 2003 and amended in 2011 by Ordinance 11-425. The PUD set forth certain categories of permitted uses that were allowed throughout the PUD, as well as other uses that were allowed on the first or ground floor of buildings within the PUD. Relevant to this appeal, Section 3(b) of the PUD Ordinance included “restaurants and lunch rooms - but not including live entertainment or dancing” on the list of “uses [that] are allowed on the first or ground floor of the buildings within the

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<sup>2</sup> The BMZA observed that the property was “improved by a two-story attached structure with [the] last authorized use as a mixed-arts building, and a pending permit for use as a restaurant/brewpub/tavern.”

PUD.” Section 3(b) of the PUD Ordinance further provided that “[i]n addition, all uses conditional in the M-1, B-1, and B-2 Districts are conditionally allowed in the PUD, subject to the requirements and provisions of Title 14 of the Zoning Code.”<sup>3</sup> The PUD Ordinance further addressed live entertainment in the context of art galleries in Section 3(f) and allowed “[l]ive entertainment as an accessory to an art gallery use, provided no admission, donation or use charge is required, and such entertainment is limited to non-amplified music.”

The BMZA held hearings on Guilford Brewing’s conditional use application on February 25 and August 11, 2020. The BMZA heard and considered legal argument and was presented with testimonial and documentary evidence submitted in support of and in opposition to the live entertainment proposal. Guilford Avenue raised several of the same issues that are before us on appeal, including that live entertainment was not a permissible use under the PUD, that the application for conditional use was incomplete, that a staff legal memorandum should have been included in the administrative record, and that a parking variance should not be issued.

Guilford Avenue further argued that the conditional use application should be denied on the merits because the proposed use of live entertainment would have a detrimental effect on the neighborhood. Guilford Avenue presented testimony and letters from neighbors in opposition to the project, including residents of the neighboring building,

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<sup>3</sup> The Baltimore City Zoning Code is codified as Article 32 of the Baltimore City Code. We shall refer to the Baltimore City Zoning Code as the “Zoning Code” or “ZC.”

while Guilford Brewery presented testimony and letters from neighbors in support of the project, including a representative of the New Greenmount West Community Association (the “Community Association”). Stephan Popescu, an owner and operator of Guilford Brewing, testified regarding a Memorandum of Understanding (“MOU”) that had been developed between Guilford Brewing and the Community Association and which included specific restrictions and conditions that were established to ameliorate concerns raised by neighbors.

On October 2, 2020, the BMZA issued a Resolution granting Guilford Brewing’s request to use the second floor of the Brewery Property for live entertainment, subject to specific conditions. The BMZA rejected Guilford Avenue’s assertion that live entertainment was not a permissible conditional use, explaining that “[b]ased on the language of the PUD, the transition rules in the current Zoning Code regarding previously formed PUD’s, and canons of statutory interpretation, the Board finds that the PUD does apply to this property, but that it does not forbid the [live entertainment] use.” The BMZA further proceeded to conduct a conditional use analysis after explaining that “since all uses conditional in the M-1, B-1, and B-2 Districts are conditionally allowed in the PUD, the Board will review this case under the conditional use standards of those prior districts.”

After summarizing the applicable standard for conditional uses and assessing “the file and evidence submitted in support of this application as well as the testimony and evidence offered in opposition,” the BMZA “evaluated the request for live entertainment at this location with the conditional use standards provided under [the Baltimore City

Zoning Code] and Maryland law.” The BMZA found that Guilford Avenue had failed to rebut by credible evidence the presumption that a conditional use is a valid use under Maryland law. The BMZA further explained that:

After a complete and comprehensive review of all of the evidence, the Board finds by competent evidence that the establishment, location, construction, maintenance, and operation of the proposed live entertainment would not be detrimental to or endanger the public health, safety, or welfare; the proposed use is not precluded by any other law, including any applicable Urban Renewal Plan; this authorization is not contrary to the public interest; and this authorization and proposed use is in harmony with the purpose and intent of th[e Zoning] Code.

The BMZA made express findings regarding the size and shape of the building, the potential impact on traffic, the character of the neighborhood, potential sound issues and safety concerns, among others.

The BMZA further addressed the parking issue and determined that a parking variance was appropriate. The BMZA reasoned that a strict application of the Zoning Code’s off-street parking requirement of thirty-six dedicated parking spaces would result in practical difficulty given the property’s unique features as “a large, middle-of-row historical structure on an irregularly-shaped lot with narrow alleys and residential buildings in the rear” for which “[n]o additions or structural alterations are proposed.” The BMZA issued the required findings set forth in § 5-308(b) of the Baltimore City Zoning Code and concluded that a parking variance was appropriate.

Finally, the BMZA considered and rejected other arguments raised by Guilford Avenue, relating to, *inter alia*, the status of an internal legal memorandum prepared by the BMZA’s Associate Counsel, as well as the completeness of the conditional use application.

The BMZA granted Guilford Brewing’s request to use the second floor of the premises for live entertainment subject to the following express conditions:

- (1) The Memorandum of Understanding (MOU) as testified to on the record is hereby incorporated into this Resolution, and where in conflict with any other provisions contained within this Resolution, the more restrictive provision applies;
- (2) Adequate lighting, and security cameras linked to the City of Baltimore’s CitiWatch Services system, must be installed; and
- (3) Appellant must submit a copy of the recorded lease, deed, or agreement for any off-site parking facilities to the Board of Municipal and Zoning Appeals and to Zoning Administration.

Guilford Avenue subsequently filed a Petition for Judicial Review of the BMZA’s decision in the Circuit Court for Baltimore City. After oral argument held on May 26, 2021, the circuit court issued a memorandum opinion and order on June 4, 2021 affirming the decision of the BMZA. This appeal followed. Additional facts shall be discussed as necessitated by our consideration of the issues on appeal.

## **DISCUSSION**

### **I. Legal Standard and Standard of Review**

“A conditional use allows a particular use on a property that is not granted to a property owner by right.” *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md.



App. 195, 210 (2018). “Certain uses, designated conditional uses, are permitted only after a property owner obtains conditional use approval after a reviewing body, such as the [BMZA], has reviewed and approved an application seeking conditional use approval.” *Id.* (citing Stanley D. Abrams, *Guide to Maryland Zoning*).

When reviewing “a local government’s decision to approve a conditional use application, we look through the circuit court’s decision, although applying the same standards of review, and evaluate the decision of the agency.” *Id.* (cleaned up). We have explained:

We review the [BMZA]’s decision, not the circuit court’s decision. We are limited to evaluating whether there is substantial evidence in the record as a whole to support the agency’s findings and conclusions and to determining whether the administrative decision is premised upon an erroneous conclusion of law.

The substantial evidence test is defined as whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. In applying the substantial evidence test we must review the agency’s decision in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity. Furthermore, not only is the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences.

We review the [BMZA’s] conclusions of law *de novo*, however, a degree of deference should often be accorded the position of the administrative agency. Although an administrative agency’s interpretation of a statute that the agency administers should ordinarily be given considerable weight by reviewing courts, we owe no deference to an agency’s erroneous conclusions of law. 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. It is the appellant’s burden, however, to establish that the agency erred as a matter of law.

*Id.* at 210-11 (cleaned up) (internal quotations and citations omitted).

**II. The BMZA Did Not Err When It Concluded that Live Entertainment was an Authorized Conditional Use in the Planned Unit Development.**

Live entertainment is an authorized conditional use because Guilford Brewing’s Property is located in a Planned Unit Development that permits live entertainment as a conditional use.<sup>4</sup> We explain our reasoning below, and also describe the interplay of the various Zoning Codes and PUD provisions.

The Brewery Property is located in an I-MU-1 Zoning District. Under the Zoning Code § 11-301 for the I-MU-1 District, live entertainment is not listed as a permissible conditional use when accessory to a restaurant, tavern, art studio, or art gallery. Therefore, applying only the Zoning Code for the I-MU-1 District, live entertainment is not a permissible conditional use because it would be an accessory to Guilford Brewing’s restaurant.

The Brewery Property, however, is also located within Planned Unit Development (“PUD”) #120, which contains the following relevant provisions:

SECTION 3. AND BE IT FURTHER ORDAINED, That in accordance with the provisions of Title 9, Subtitles 1 and 3, the following uses are allowed within the Planned Unit Development:

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<sup>4</sup> A Planned Unit Development, or “PUD”, is “a local legislative response to the relative rigidity of Euclidian zoning . . .” *County Council of Prince George’s County v. Zimmer Development Co.*, 444 Md. 490, 515 (2015). PUDs are often used “to allow the development of specialized or mixed uses.” *Id.* Once a parcel is qualified to be rezoned as a PUD, a legislative act amends the official zoning map. *Id.*

(b) In accordance with the provisions of § 9-303 of the Zoning Code, the following B-1 and B-2 uses are allowed on the first or ground floor of the Buildings within the PUD: . . . restaurants and lunch rooms - but not including live entertainment or dancing . . .

In addition, all uses conditional in the M-1, B-1, and B-2 Districts are conditionally allowed in the PUD, subject to the requirements and provisions of Title 14 of the Zoning Code.

The PUD provision adopts the conditional uses permitted in the M-1, B-1, and B-2 Districts. Under the Zoning Code ZC §6-208(15) (2015) for the M-1, B-1, and B-2 Districts, “[r]estaurants – including live entertainment and dancing, including accessory outdoor table service” are permissible conditional uses. Reading the PUD provisions and the Zoning Code together, the PUD does not include live entertainment as a permitted use by right on the first floor of the buildings within the PUD, whereas the Zoning Code for the M-1, B-1, and B-2 Districts allows live entertainment as a permissible conditional use for all buildings within the PUD.

Guilford Avenue has argued that live entertainment is a specifically prohibited use in the PUD. Guilford Avenue asserts that the PUD contains conflicting provisions that should have been construed as prohibiting live entertainment throughout the PUD. Guilford Avenue asserts that the BMZA committed legal error in its interpretation of the conflicting PUD provisions by allowing “the broader permissible uses over the specifically prohibited uses.”

In response, Guilford Brewing asserts that the plain language of the PUD permits live entertainment on the second floor of buildings within the PUD. Guilford Brewing

contends that the BMZA committed no legal error in its determination that live entertainment is a permitted conditional use on the second floors of buildings within the PUD. Furthermore, Guilford Brewing maintains that it sought a conditional use permit for live entertainment only for the second floor of the Brewery Property.

Statutory interpretation, or, as in this case, interpretation of the language of the PUD, begins with the plain and unambiguous language. *Lockshin v. Semsker*, 412 Md. 257, 274–77 (2010). We will not construe a statute’s language with “forced or subtle interpretations that limit or extend its application.” *Id.* at 275 (internal quotation marks omitted). Furthermore, statutory interpretation operates on the presumption that the drafter “intends its enactments to operate together as a consistent and harmonious body of law.” *Id.* at 276. Accordingly, when the language is plain and unambiguous, “we [will] seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute’s object and scope.” *Id.*

In our view, the BMZA did not err in determining that the PUD’s provisions permitted live entertainment on the second floor of buildings within the PUD. The BMZA properly considered -- based on testimony at the hearing -- that Guilford Brewing’s application for live entertainment was only for the second floor of the building. Furthermore, the BMZA properly harmonized the language of the PUD and the Zoning Code for the M-1, B-1, and B-2 Districts. The BMZA did not commit legal error in determining that the PUD’s specific exclusion of live entertainment as a permitted use by

right on the ground floor of the building did not prevent the permissible conditional use of live entertainment on the second floor.

For these reasons, we affirm the decision of the BMZA finding that live entertainment was a permissible conditional use.

### **III. The BMZA Resolution Granting Guilford Brewing’s Conditional Use Application was Supported by Substantial Evidence and Free of Legal Error.**

As we explained *supra* in Part II of this Opinion, live entertainment is a permissible conditional use on the second floor of buildings in the applicable PUD. We, therefore, next turn our attention to whether the BMZA’s grant of Guilford Brewing’s conditional use application was supported by substantial evidence and free of legal error. Pursuant to the Baltimore City Zoning Code, the BMZA, or in certain circumstances the City Council, must evaluate a conditional use application “based on the evidence presented at [a] public hearing.” ZC § 5-404(a). The Board may grant a conditional use permit if it finds that:

- (1) the establishment, location, construction, maintenance, or operation of the conditional use would not be detrimental to or endanger the public health, safety, or welfare;
- (2) the use would not be precluded by any other law, including an applicable Urban Renewal Plan;
- (3) the authorization would not be contrary to the public interest; and
- (4) the authorization would be in harmony with the purpose and intent of this Code.

ZC § 5-406(a).

The Zoning Code further provides that “[a]s a further guide to its decision on the facts of each case, the [BMZA] must consider the following, where appropriate:

- (1) the nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures;
- (2) the resulting traffic patterns and adequacy of proposed off-street parking and loading;
- (3) the nature of the surrounding area and the extent to which the proposed use might impair its present and future development;
- (4) the proximity of dwellings, churches, schools, public structures, and other places of public gathering;
- (5) accessibility of the premises for emergency vehicles;
- (6) accessibility of light and air to the premises and to the property in the vicinity;
- (7) the type and location of adequate utilities, access roads, drainage, and other necessary facilities that have been or will be provided;
- (8) the preservation of cultural and historic landmarks and structures;
- (9) the character of the neighborhood;
- (10) the provisions of the City's Comprehensive Master Plan;
- (11) the provisions of any applicable Urban Renewal Plan;
- (12) all applicable standards and requirements of this Code;
- (13) the intent and purpose of this Code; and
- (14) any other matters considered to be in the interest of the general welfare.

ZC § 5-406(b).

Section 14-319(a) of the Zoning Code sets forth the following additional components that must be included in an application for conditional use authorization to provide live entertainment or dancing:

- (1) a description of the type of live entertainment or dancing to be provided;
- (2) a floor plan that describes, in sufficient detail:
  - (i) the establishment generally;
  - (ii) the live entertainment or dancing venue within the establishment;
  - (iii) if dancing is to be provided, the location and dimensions of the dance floor; and
  - (iv) the maximum authorized occupant load, as approved by the Fire Department, for:
    - (A) all configurations of the establishment, generally; and
    - (B) the live entertainment or dancing venue, specifically.

The conditional use applicant “has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements” but “does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community.” *Schultz v. Pritts*, 291 Md. 1, 11 (1981). “The [conditional] use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid.” *Id.* The Court of Appeals has explained:

If [the conditional use applicant] shows to the satisfaction of the [BMZA] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the [BMZA] to decide. But if there is no probative evidence of harm or disturbance in light of the nature

of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a [conditional] use is arbitrary, capricious, and illegal. These standards dictate that if a requested [conditional] use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.

*Id.* (citations omitted).

In addition to arguing that live entertainment was not an authorized conditional use in the PUD, Guilford Avenue raises several additional challenges to the BMZA's grant of Guilford Brewing's application to offer live entertainment on the second floor of the Brewery Property. Specifically, Guilford Avenue asserts that the BMZA erred as a matter of law when the BMZA: (1) found that live entertainment was an accessory use; (2) considered and granted what Guilford Avenue alleges was an incomplete conditional use application; and (3) declined to include an internal staff memorandum in the record. Guilford Avenue further contends that the BMZA failed to properly consider the negative impact of live entertainment on nearby residences. We shall address each of Guilford Avenue's challenges in turn.

A. *Accessory Use Determination*

Guilford Avenue asserts that the BMZA's determination that the live entertainment use was "incidental and subordinate to the principal use as restaurant and brewpub" was not supported by substantial evidence. The record reflects that the BMZA made a finding that live entertainment was an accessory use. We observe, however, that Guilford Avenue points to no authority in support of its assertion that live entertainment was only permissible as a conditional use if it was accessory to a principal restaurant use.



In the zoning code in effect at the time the applicable PUD was established, “Restaurants – including live entertainment and dancing, and including accessory outdoor table service” were listed as permissible conditional uses in the B-1 Zoning District. *See* ZC § 6-208(15) (2015). As we explained *supra* in Part II of this opinion, the PUD expressly adopts the conditional uses permitted in the M-1, B-1, and B-2 Districts in effect at the time of the PUD’s establishment. The zoning code does not limit the permissible conditional use of restaurants including live entertainment and dancing to those in which the live entertainment is an accessory use. Rather, the use of “[r]estaurants – including live entertainment and dancing, and including accessory outdoor table service” is listed a permissible conditional use. Notably, “outdoor table service” is specifically referred to as “accessory,” while the zoning code includes no similar modifying language for the “live entertainment and dancing” component.

Nonetheless, because the BMZA expressly found that the live entertainment use would be “‘incidental and subordinate’ to the principal use as restaurant and brewpub,” we shall address Guilford Avenue’s assertion that the BMZA erred by determining that live entertainment as an accessory use even though no such requirement appears to exist in the applicable zoning code. Guilford Avenue emphasizes that a floor plan shows that the square footage of the second-floor live entertainment space is 3,140 square feet, while the first-floor restaurant space is 600 square feet. Guilford Avenue asserts that the fact that the second-floor entertainment space is physically larger than the first-floor restaurant space suggests that the live entertainment use is not “incidental and subordinate” and is not an

accessory use. Guilford Avenue further points to a statement in the initial application for conditional use in which Guilford Brewing stated that “[l]ive entertainment is not an accessory use, it will be a significant use, rivaling that of the brewpub and restaurant,” as well as a statement by a Guilford Brewing representative at the BMZA hearing stating that Guilford Brewing was “requesting live entertainment on both the first and second floors.” Notably, however, after the Acting Executive Director of the BMZA interjected that “[t]he application is just for live entertainment on the second floor,” Guilford Brewing quickly accepted this limitation, commenting, “we’ll take what we’ve put in of course.”

In our view, there was ample evidence in the record to support the BMZA’s conclusion that the restaurant use was the principal use for the property while the live entertainment was an accessory use. Pursuant to ZC § 1-314(m), a principal use is “the main use of land or a structure, as distinguished from an accessory use,” while an accessory use is a use that is “customarily incidental and subordinate to the principal use of the lot or principal structure served; and . . . located on the same lot as the principal use or principal structure served.” ZC § 1-302(c). Mr. Popescu, an owner of Guilford Brewing, testified that “[t]he restaurant use is encompassing the entire building,” and although live entertainment would take place on the second floor only, “[f]ood w[ould] be served on the entire property,” including the second floor. Mr. Popescu further testified that live entertainment would only occur two to three days per week. The conditional use application submitted by Guilford Brewing similarly provided that live entertainment would be offered “[s]everal times per month” or “2-3 times per week.” Guilford Brewing

representative Nate Pretl similarly expressed that the “conditional use request for live entertainment [w]as accessory to th[e restaurant and brewpub] uses.”

This testimony was sufficient for the BMZA to conclude that the live entertainment use was accessory to Guilford Brewing’s principal use as a restaurant and brewery. We are not persuaded by Guilford Avenue’s focus upon the square footage of the first-floor and second-floor spaces rather than on the frequency of live entertainment as compared to the restaurant use. Furthermore, the BMZA was entitled to credit Mr. Popescu’s statement that food would be served on both the first and second floor. We shall not substitute our judgment for that of the BMZA, and we reject Guilford Avenue’s assertion that the BMZA erred as a matter of law by finding that live entertainment was an accessory use.

B. *Completeness of Guilford Brewing’s Conditional Use Application*

Guilford Avenue further asserts that the BMZA “did not follow the law” because it considered an application for conditional use that was, in Guilford Avenue’s view, incomplete. Guilford Avenue contends that the BMZA could not properly assess or determine the impact of the conditional use given the incomplete application submitted by Guilford Brewing.

Guilford Avenue’s completeness argument focuses upon ZC § 14-319(a)(2), which sets forth additional specific requirements for live entertainment conditional use applications. As we explained *supra*, ZC § 14-319(a) requires that an application for conditional use authorization to provide live entertainment or dancing include:

- (1) a description of the type of live entertainment or dancing to be provided;

(2) a floor plan that describes, *in sufficient detail*:

- (i) the establishment generally;
- (ii) the live entertainment or dancing venue within the establishment;
- (iii) if dancing is to be provided, the location and dimensions of the dance floor; and
- (iv) the maximum authorized occupant load, as approved by the Fire Department, for:
  - (A) all configurations of the establishment, generally; and
  - (B) the live entertainment or dancing venue, specifically.

(Emphasis added.)

Guilford Avenue asserts that Guilford Brewing’s application was incomplete because “there was no indication where the live entertainment will take place beyond the general second floor.” Guilford Avenue further contends that Guilford Brewing “failed to answer any questions regarding the fire-rated capacity of” the Brewery Property. Guilford Avenue further argues that the BMZA “could not properly assess or determine the impact of this conditional use or its impact on the neighbors without knowing the size of the venue, the capacity of the venue, the location of the dance floor, and the other information” required by ZC § 14-219(a). We are not persuaded.

In our view, the BMZA acted within its discretion when it determined that the application included sufficiently detailed information. The record reflects that Guilford Brewing submitted floor plans demonstrating an occupancy of up to 355 persons. Indeed, the BMZA staff report explained that Guilford Brewing’s “documents indicate a total fire-

rated capacity of 355 persons.” Regarding the location of the dance floor, Mr. Popescu testified at the hearing that the dance floor “would be [in] the upstairs area depending on how we would set up the room. So it wouldn’t be a specific area only pertinent to dancing.” Based upon this evidence, the BMZA was entitled to find that the application included the required components in sufficient detail.<sup>5</sup> Accordingly, we reject Guilford Avenue’s assertion that the BMZA erred as a matter of law by considering an incomplete application for conditional use.

C. *Internal Staff Memorandum*

Guilford Avenue’s next allegation of error by the BMZA focuses upon an internal legal memorandum prepared by the then-Associate Counsel to the BMZA. At the August 11, 2020 hearing before the BMZA, Guilford Avenue raised a preliminary objection arguing that an internal legal memorandum prepared by Livnu Ndou when she was serving as Associate Counsel to the BMZA was required to be made part of the public record in accordance with Md. Code (1984, 2021 Repl. Vol.), § 10-218 of the State Government Article (“SG”).<sup>6</sup> The BMZA addressed the legal memorandum in its Resolution, explaining that the

legal memorandum was provided to the Board, at the Board’s request, after the initial hearing on the PUD’s applicability. The Board finds that this legal memorandum is privileged, as

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<sup>5</sup> To the extent that any information was not included in Guilford Brewing’s initial application but was offered at the hearing, we observe the ZC § 5-202(b)(2) expressly permits any “changes to [an] application [to] be made on the record at the hearing.”

<sup>6</sup> By the time of the August 11, 2021 hearing, Ms. Ndou was serving as Acting Director of the BZMA.

it is a confidential intra-agency advisory opinion protected by attorney-client privilege, attorney work-product privilege, and deliberative process privilege.

Guilford Avenue maintains that the internal memorandum was required to be included in the record pursuant to SG § 10-218, which provides, in relevant part, that “[t]he presiding officer hearing a contested case shall make a record that includes . . . any staff memorandum submitted to an individual who is involved in the decision making process of the contested case by an official or employee of the agency who is not authorized to participate in the decision making process.” Critically, however, SG § 10-218, which is a section of the Maryland Administrative Procedure Act (“APA”), is inapplicable because the BMZA is not an agency that is subject to the APA. SG § 10-203(a)(4) provides that the APA does not apply to

an officer or unit not part of a principal department of State government that:

- (i) is created by or pursuant to the Maryland Constitution or general or local law;
- (ii) operates in only 1 county; and
- (iii) is subject to the control of a local government or is funded wholly or partly from local funds[.]

*See also McDonell v. Harford County Housing Agency*, 462 Md. 582, 606 (2019) (holding that the Harford County Housing Agency did not fall under the purview of the APA because, as a government unit, it was not “part of a principal department of State government,” was created pursuant to local law, operated only in Harford County, and was subject to the control of the County Executive). The BMZA was established by Article

VII, § 82 of the Baltimore City Charter, operates only in Baltimore City, and its members are appointed by the Mayor of Baltimore City subject to confirmation of the City Council and subject to removal as prescribed by Article IV, § 6 of the Baltimore City Charter. Accordingly, the APA is inapplicable to the proceeding at issue and Guilford Avenue's reliance upon SG § 10-218 is misplaced.

Indeed, Guilford Avenue points to no authority that supports its assertion that an internal legal memorandum prepared by an attorney upon request of the BMZA to assess whether a particular use is permissible within a certain planned unit development must, upon request, be made available to a member of the public who opposes a particular conditional use application. The BMZA expressly declined to include the memorandum in the public record, explaining that the legal memorandum was protected by attorney-client privilege, attorney work-product privilege, and deliberative process privilege. In light of our determination that there is no authority to support the assertion that this internal document should have been made part of the public record, we need not undertake a detailed analysis of the applicability of the possible protections for the internal legal memorandum that are enshrined in the principles of attorney-client privilege, attorney work-product, and deliberative process.

We comment briefly upon Guilford Avenue's assertion that this Court's ability to meaningfully review the basis for the BMZA's decision in the absence of the staff memorandum in the record and that Guilford Avenue's fundamental due process right to be apprised of the facts and analysis relied upon by the BMZA was violated. The BMZA's

comprehensive written decision fully explained the basis for its conclusions and set forth the BMZA's reasons and findings of facts as to why the PUD provisions and applicable zoning code provisions permitted the proposed conditional use. The BMZA Resolution thoroughly explained the reasons and factual findings supporting its conclusion that Guilford Brewing's conditional use application should be granted. As such, the BMZA Resolution was sufficiently detailed to apprise Guilford Avenue of the reasons for its findings, was not a mere recitation of statutory criteria, and was sufficient to allow meaningful judicial review.

D. *Effect on the Neighborhood*

In addition to the narrower challenges we have already discussed in this section, Guilford Avenue generally challenges the BMZA's conditional use determination, arguing that the BMZA failed to properly credit the evidence presented by Guilford Avenue that the proposed live entertainment would have a negative effect on the neighborhood and particularly on the residents of the adjacent property. Guilford Avenue contends that it presented credible evidence demonstrating that the live entertainment at the Brewery Property has adverse effects above and beyond those inherently associated with restaurants with live entertainment at other locations. Guilford Avenue asserts that its credible evidence was not rebutted by Guilford Brewing, and, accordingly, the conditional use application should have been denied.

Guilford Avenue specifically points to testimony it presented that transmission of sound would be particularly impactful to adjacent residential units, that the location of the



venue on the only two-way North-South street in the immediate neighborhood makes the location a particularly bad location for an entertainment venue, and the Brewery Property does not have a loading and unloading area in front of the building. Guilford Avenue further points to testimony about parking concerns and the residential character of the immediately surrounding area.

Our review of the record, however, reflects that the BMZA heard and considered considerable evidence submitted in support of and in opposition to the proposed conditional use, including on the specific topics identified by Guilford Avenue. The BMZA summarized the evidence offered in support of the proposed conditional use as follows:

[Guilford Brewing] testified that the property has been authorized for use as a restaurant and brewhall, and that the proposal is to add live entertainment on the second floor. [Guilford Brewing] testified that this is a large building, and that this would be a beneficial use. [Guilford Brewing] testified that there is a Memorandum of Understanding (MOU) with the [New Greenmount West Community Association], which was submitted into the record. [Guilford Brewing] testified that there would be a full-time security company to patrol inside, outside, and at the door. [Guilford Brewing] testified that there would be security cameras along the outside of the building, which would be connected to the CitiWatch system. [Guilford Brewing] testified that the windows and walls would be soundproofed, and the decibel threshold would likely be lower than what was agreed to in the MOU. [Guilford Brewing] testified that the hours of operation would be 11:00AM to 12:00AM during the week, and until 2:00 AM over the weekend. [Guilford Brewing] testified that despite opposition’s testimony, the PUD names this an “Arts and Entertainment District,” and therefore it is not just a residential area . . . [Guilford Brewing] testified that while opposition testified to traffic concerns, they did not present traffic experts.

Several community members testified in support of the appeal. A representative from the community association testified that [Guilford Brewing] had worked closely with the association, and after discussion with the community and [Guilford Brewing], the association voted in January to support the use. A community member in support testified that this use would make the neighborhood safer, because rather than a vacant building, there would be one with security. A community member in support testified that contrary to opposition's testimony, this is not a quiet neighborhood; and that the soundproofing proposed would help with any additional noise. A community member in support testified that they were excited for this to open, and another community member in support testified that they specifically sought out this area because of this proposal. A community member in support testified that this use would bring jobs to the City and to the area.

An MOU was submitted into evidence, between the New Greenmount West Community Association and [Guilford Brewing]. It was signed on February 23, 2020. The MOU limits the hours of the live entertainment; prohibits off-premise alcohol sales; prohibits the formation of a "rope line" or other formed line outside the premises; prohibits third-party promoter events, prohibits cover fees or other admission fees; and requires [Guilford Brewing] to submit proof of contract with a nearby property owner for overflow parking. The MOU also requires all music to [be] under 55 decibels and not audible beyond adjacent sidewalks and properties; requires management and staff to discourage any illegal activity or unruly behavior from patrons within and around the premises; and requires video surveillance of the property registered with the Baltimore Police Department.

The Board also received several letters in support of the appeal. Letters in support were received from the local neighborhood association, Councilman Robert Stokes, local businesses, a local school, and members of the community. The letter in support from the New Greenmount West Community Association expressed satisfaction with [Guilford Brewing]'s transparency during the process. Letters in support stated that this proposal would bring jobs and customers to the area, attracting people to the neighborhood. Letters in support

stated that this proposal would revitalize a “down and out” area, and give the area an economic boost.

The BMZA also summarized the testimony and documentary evidence submitted in opposition to the proposed live entertainment conditional use:

Opposition testified that while a permit for the restaurant and brewpub had been filed, it had not yet been finalized because they were still working on the buildout, and therefore this appeal was premature. Opposition testified that [Guilford Brewing]’s application should be rejected because the Conditional Use Authorization Application for Live Entertainment is incomplete. Specifically, that it does not list the fire-rated capacity or include a floor plan that details where the dance floor will be located . . . Opposition testified that the live entertainment is not an accessory use to the restaurant, because it takes up such a large portion of the property.

Several members of the community testified in opposition. A community member in opposition testified that when this property was used for manufacturing, sound would travel through to his home. A community member in opposition testified that this is bad location for live entertainment because it is at the intersection of the only two-way streets entering Greenmount West. A community member in opposition testified that Guilford Avenue itself is narrow, and has many blind spots as well as a bus stop, with an average of one car accident a month. A community member in opposition testified that loading zones would take up additional lanes. A community member in opposition testified that the PUD was set aside for artists to live and work, not for a live entertainment space. A community member in opposition testified that this use would cause parking issues, bring noise, and damage existing property values. A community member in opposition testified that there would be unforeseen problems with more people around, such as an increase in robberies and car-jackings. A community member in opposition testified that there should be separate security for the neighbors. A community member in opposition testified that while they were in support of the restaurant, the live entertainment will change the temperament of the neighborhood.

The Board also received several letters in opposition to the appeal. Letters in opposition were received from local business and community members. The letters expressed concerns regarding an increase in crime. The letters expressed concerns regarding the safety of pedestrians from increased traffic, particularly schoolchildren. Letters in opposition stated that there are already entertainment venues in the area with music. Letters in opposition expressed a desire for [Guilford Brewing] to hire local artists and entertainment from within the neighborhood. Letters in opposition stated that this proposal would suppress further development in the area. Letters in opposition expressed concerns about the increase in noise.

We have reviewed the entire record and conclude that the BMZA’s summary of the evidence offered in support of and in opposition to the proposed live entertainment use reasonably reflects the evidence presented.

After summarizing the applicable standard for conditional uses and assessing “the file and evidence submitted in support of this application as well as the testimony and evidence offered in opposition,” the BMZA “evaluated the request for live entertainment at this location with the conditional use standards provided under [the Baltimore City Zoning Code] and Maryland law.” As we explained *supra*, the Board expressly found

by competent evidence that the establishment, location, construction, maintenance, and operation of the proposed live entertainment would not be detrimental to or endanger the public health, safety, or welfare; the proposed use is not precluded by any other law, including any applicable Urban Renewal Plan; this authorization is not contrary to the public interest; and this authorization and proposed use is in harmony with the purpose and intent of th[e Zoning] Code.

Notably, the BMZA made the following express findings:

- The “large former warehouse is an appropriate space for the proposed use, given its size, shape, and arrangement of other structures.”

- “While opposition testified as to one-way streets and nearby bus stops, Guilford Avenue itself is a two-way street with parking lanes” and “Appellant has proposed additional off-site parking facilities in agreement with the [Community Association].”
- Live entertainment was not “an incongruous use in this area,” which was “specifically designate[d]” in the PUD “as an arts and entertainment district.”
- The location “is not a quiet residential area, as described by opposition, but one with several commercial establishments” and although “this property is located near dwellings, churches, and schools, many residents testified in support of the [live entertainment use], and a nearby school submitted a letter in support of the [live entertainment use].”
- “No credible evidence was submitted regarding inaccessibility for emergency vehicles.”
- “As no additions or structural alterations are proposed, there will be no change to light and air accessibility to the premises or nearby properties.”
- “What additional noise there might have been is mitigated by [Guilford Brewery’s] soundproofing of both the walls and windows.”
- “The structure will maintain its historical nature and thus preserve the cultural and historic landmarks and structures of the area.”
- “While opposition testified to safety concerns, the Board found the testimony in support more credible. Specifically, that an occupied building would be safer than a vacant one, particularly given the installation of security cameras, adequate lighting, and full-time security staff.”

Based upon our review of the record, we are not persuaded by Guilford Avenue’s assertion that the BMZA Resolution is a “boilerplate recitation of the law without proper findings or meaningful analysis,” and we reject Guilford Avenue’s contention that the BMZA “failed to deliberate and consider the evidence before it.” The record reflects that the BMZA assessed the evidence, drew reasonable inferences from the evidence presented, and made factual findings that were supported by the evidence.

As the Court of Appeals has explained, “[e]valuation of a [conditional use] application is not an equation to be balanced with formulaic precision.” *People’s Couns. for Balt. Cnty. v. Loyola Coll.*, 406 Md. 54, 101 (2008). Accordingly, reviewing “[c]ourts are to defer to the conclusions of the zoning body where the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning *fairly debatable*.” *Id.* (internal quotation omitted) (emphasis in original). A zoning body’s finding is fairly debatable when “reasonable minds could have reached a different conclusion on the evidence, and if the conclusion is supported by substantial evidence in the record.” *Becker v. Anne Arundel Cnty.*, 147 Md. App. 114, 137 (2007).

In our view, this is precisely the type of case in which deference to the zoning body is appropriate. Those in support of the proposed conditional use and those in opposition each presented evidence supporting their divergent views, and the BMZA was entitled to credit the evidence it found more persuasive. Based upon the evidence, the BMZA reasonably concluded that Guilford Brewing’s application for conditional use should be granted and explained its reasoning in detail. The BMZA’s finding that the proposed live entertainment use would not adversely affect the community was supported by substantial evidence, and we shall not disturb it on appeal.

**IV. The BMZA’s Decision Granting Guilford Brewing’s Request for a Parking Variance was Supported by Substantial Evidence and Free of Legal Error.**

Although Guilford Brewing did not formally request a parking variance, the BMZA determined over the course of the proceedings that Guilford Brewing had met the

requirements for obtaining a variance. The BMZA, in its resolution, described the reasons why Guilford Brewing had successfully established that it would suffer practical difficulties if the bulk regulations for off-street parking were carried out. Furthermore, the BMZA also determined that Guilford Brewing and the Brewery Property met the seven additional requirements for obtaining a variance.

Under the applicable Zoning Code, ZC § 5-308, to grant a variance, the BMZA:

must find that, because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, an unnecessary hardship or practical difficulty, as distinguished from a mere inconvenience, would result if the strict letter of the applicable requirement were carried out.

This requirement for granting a variance is referred to as the required finding of uniqueness and unnecessary hardship and/or practical difficulty and has been embodied in Maryland's common law. *See Dan's Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 236 Md. App. 483, 491 (2018). A variance will be permitted if the uniqueness of the property would cause unnecessary hardship or practical difficulty if held to a strict application of the Zoning Code as written. *Id.*

The first requirement of uniqueness considers whether:

the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property.

*Dan's Mountain Wind Force, LLC, supra*, 236 Md. App. at 492 (quoting *Cromwell v. Ward*, 102 Md. App. 691, 694 (1995)). An analysis of uniqueness “examines the unusual

characteristics of a specific property in relation to the other properties in the area.” *Id.* at 494. Put differently, “[a] variance[] should only be granted when the uniqueness or peculiarity of a subject property is not shared by the neighboring propert[ies].” *Cromwell, supra*, 102 Md. App. at 719.

The second requirement of practical difficulty or unnecessary hardship considers “whether practical difficulty and/or unnecessary hardship, resulting from the disproportionate impact of the ordinance caused by the property’s uniqueness, exists.” *Dan’s Mountain Wind Force, LLC, supra*, 236 Md. App. at 492 (quoting *Cromwell v. Ward*, 102 Md. App. 691, 695 (1995)). A finding of practical difficulty is more lenient than the stricter finding of unnecessary hardship. *Id.* at 501. Determining which standard to apply depends on whether the sought-after variance is for an area variance or a use variance. *Id.* The more lenient practical difficulties test applies to area variances, whereas the stricter unnecessary hardship test applies to use variances. *Id.* (quoting *Montgomery Cnty. v. Rotwein*, 169 Md. App. 716, 728 (2006) (internal quotation marks omitted)).<sup>7</sup>

- A. *The BMZA’s determination that the Brewery Property was unique and that Guilford Brewing would suffer practical difficulties if bulk parking regulations were carried out was free from legal error and supported by substantial evidence.*

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<sup>7</sup> An area variance is “[a] variance[] from area, height, density, setback, or sideline restrictions, such as a variance from the distance required between buildings.” *Rotwein, supra*, 169 Md. App. at 728. A use variance, “permit[s] a use other than that permitted in the particular district by the ordinance, such as a variance for an office or commercial use in a zone restricted to residential uses.” *Id.*



In accordance with ZC § 5-308, the BMZA made the initial determination that the Brewery Property was unique. In its written resolution, the BMZA determined that the Brewery Property was unique “because it is a large, middle-of-row historic structure on an irregularly shaped lot with narrow alleys and residential buildings in the rear.” The BMZA then determined that because of the “particular physical surroundings, shape, and topographical conditions of the existing land and structure involved,” a strict application of the Zoning Code and the regulations for off-street parking would result in practical difficulties.

The BMZA’s determination that the Brewery Property was unique is free from legal error. The BMZA properly applied the Zoning Code and common law standard for an analysis of uniqueness by examining the Brewery Property’s shape, surroundings, and relation to neighboring properties. The BMZA found that the Brewery Property was unique in comparison to the neighboring properties because of the property’s position in the middle of the row of neighboring properties, the irregular shape of the entire lot, and the abutting residential buildings in the rear of the property.

The BMZA properly applied the uniqueness of the Brewery Property to an analysis of whether the uniqueness would create practical difficulties. As an initial matter, the BMZA properly applied the more lenient practical difficulties test because the sought-after variance was for an area variance. As we explained, a finding of practical difficulties is less stringent than a finding of unnecessary hardship for a use variance. The BMZA determined that because of the irregular shape of the lot, the position of the Brewery

Property in the middle of the row, and the abutting residential buildings in the rear, that bulk regulations for off-street parking would create practical difficulties. The BMZA, therefore, determined that Guilford Brewing had met the threshold requirements of uniqueness and practical difficulties for obtaining an area variance, and further concluded that Guilford Avenue had presented sufficient evidence to support these findings.

B. *The BMZA's additional findings and determinations under the Zoning Code in granting the parking variance were free from legal error and supported by substantial evidence.*

In addition to finding that the subject property is unique and that strict compliance with the Zoning Code would cause practical difficulties if the applicable bulk regulation were imposed, the BMZA must also make seven independent and interrelated findings of fact pursuant to ZC § 5-308(b).<sup>8</sup> These findings are based on a comprehensive review of the subject property, the conditions on which the application is based, the purpose of variance, the effect of the variance on the surrounding neighborhood, the harmonization of

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<sup>8</sup> Pursuant to ZC § 5-308(b) the Board must find that: (1) the conditions on which the application is based are unique to the property for which the variance is sought and are not generally applicable to other property within the same zoning classification; (2) the unnecessary hardship or practical difficulty is caused by this article and has not been created by the intentional action or inaction of any person who has a present interest in the property; (3) the purpose of the variance is not based exclusively on a desire to increase the value or income potential of the property; (4) the variance will not: (i) be injurious to the use and enjoyment of other property in the immediate vicinity; or (ii) substantially diminish and impair property values in the neighborhood; (5) the variance is in harmony with the purpose and intent of this Code; (6) the variance is not precluded by and will not adversely affect: (i) any Urban Renewal Plan; or (ii) the City's Comprehensive Master Plan; (iii) and Historical and Architectural Preservation District; and (7) the variance will not otherwise: (i) be detrimental to or endanger the public health, safety, or welfare; or (ii) be in any way contrary to the public interest.

the variance with existing plans and districts, and, lastly, a determination that the variance will not “be detrimental to or endanger the public health, safety, or welfare; or be in any way contrary to the public interest.” ZC § 5-308(b).

The BMZA determined, in connection with its initial findings, that the conditions concerning the Brewery Property were unique and that the resulting practical difficulties were not created by Guilford Brewing or any person who has an interest in the Brewery Property. The BMZA further found that the requested variance was not solely based on a desire to increase the value or income of the Brewery Property. This determination was based on the lack of any evidence “adduced at the hearing or can be inferred from the plans” that the requested variance was exclusively due to a desire to increase the value or income of the property. The BMZA further found that “evidence submitted by [Guilford Brewing] and those in support” was credible to the proposition that the proposed variance: (1) would not injure the use and enjoyment of other property in the immediate vicinity, and (2) would not substantially diminish or impair property values in the neighborhood. The BMZA further noted that the proposed parking variance would be in harmony with Zoning Code and would not adversely affect any existing plans or historical districts or the historical nature of the Property. Finally, the BMZA determined that the parking variance would not “be detrimental to or endanger the public health, safety, or welfare, or be in any way contrary to the public interest.”

The BMZA, therefore, determined that Guilford Brewing had met the additional requirements for a variance pursuant to ZC § 5-308. Our review of the record reflects that

the BMZA properly applied the seven interrelated factors and supported these findings with testimony and evidence presented at the hearings. The BMZA acted properly within its authority in making these determinations and concluded that there was sufficient evidence to support its findings. Accordingly, we hold that there is substantial evidence to support the BMZA's findings as to the parking variance, and we shall not disturb the judgment of the circuit court on appeal.

**JUDGMENT OF THE CIRCUIT COURT  
FOR BALTIMORE CITY AFFIRMED.  
COSTS TO BE PAID BY APPELLANT.**