

Circuit Court for Anne Arundel County
Case No. C-02-CV-20-002291;
C-02-CV-20-002284

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0565

September Term, 2021

ANNE ARUNDEL COUNTY, MARYLAND,
et al.

v.

NATIONAL WASTE MANAGERS, INC.

Berger,
Reed,
Shaw,

JJ.

Opinion by Reed, J.

Filed: December 8, 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 comes following decades-long litigation between Anne Arundel County (the “County”) and National Waste Managers, Inc. (“Appellee”), over the development and operation of the Chesapeake Terrace Rubble Landfill (“Landfill”). In 1993, Appellee received a special exception (“Special Exception”) from the Anne Arundel County Board of Appeals (“Board”) for operation of the Landfill. However, the Special Exception was subject to conditions, one of which required Appellee to acquire a certain tract of land in fee simple for use as an access way into the Landfill (“Access Condition”). After decades of litigation over the Special Exception, the Special Exception remained in place in 2020. By 2020, Appellee was in the final stages of seeking a permit for the Landfill site from the Maryland Department of the Environment (“MDE”). That same year, the County purchased the parcel of land that Appellee was required to obtain in fee simple under the Special Exception. Previously, in 2001, the County had sent a letter – pursuant to a court order – informing MDE that Appellee met all applicable zoning requirements under the Special Exception. However, in 2020, following the County’s purchase of the access property, the County sent two letters to MDE which requested that MDE either halt or deny outright Appellee’s permit because it would be impossible for Appellee to satisfy the Special Exception’s Access Condition. The MDE proceeded to deny Appellee’s permit application. Appellee filed a claim in circuit court contending that the County did not have authority to rescind or modify the Special Exception. The circuit court ultimately granted summary judgment in favor of Appellee. The County timely noted an appeal.

In bringing its appeal, the County presents two (2) question for appellate review, which we have rephrased for clarity:¹

- I. Did the circuit court err in finding that County Executive and County Attorney had no authority to send the 2020 letters to MDE requesting that MDE halt or deny Appellee’s permit application?
- II. Did the circuit court err by finding Appellee’s application could proceed, unless otherwise ordered by the Board, despite the impossibility of satisfying the property access condition of the special exception?

For the reasons expressed herein, we affirm the decision of the circuit court.

FACTUAL & PROCEDURAL BACKGROUND

In December of 1988, Appellee initiated the approval process for development and operation of the Landfill. Two years later, Appellee sought a special exception and variance from the County because the district was zoned for rural agricultural usage. By 1993, Appellee secured the Special Exception (“Special Exception”) from the Board. The Special Exception granted Appellee permission to operate the Landfill in compliance with applicable zoning regulations, subject to certain conditions. Notably, one such condition under the Special Exception required Appellee to obtain access to the Landfill from Conway Road via “a fee-simple right-of-way, not through an easement.” The Special

¹ The County phrased the issues in its brief as follows:

- I. Did the circuit court err by finding that County Executive had no authority to act on behalf of the County?
- II. Did the circuit court err by finding NWM’s application could proceed despite the impossibility of satisfying the property access condition of the special exception?

Exception specified that the land must be purchased before beginning “operations.”

The County appealed the Board’s Special Exception ruling and excluded the Landfill in their Solid Waste Management Plan (“SWMP”). The Court of Appeals affirmed the Board’s decision in 1995. The County still refused to send a letter to MDE advising that the Landfill met zoning requirements and continued to exclude the Landfill from the SWMP. Finally, on June 20, 2001, pursuant to a court order, *see National Waste Managers, Inc. v. Anne Arundel County, et al.*, Case No. 02-C-96-032534, the County wrote to MDE and advised that the Landfill site:

meets all applicable county zoning and land use requirements subject to the performance of the conditions required by the special exception approval, including, but not limited to, fee simple ownership of access to the site from Conway Road. As of this writing, the County has not been provided with evidence that the required access has been obtained by [Appellee].

Since this letter was sent by the County, Appellee has received three (3) extensions for the Special Permit and is currently seeking two additional extensions.

In 2020, Appellee was seeking a permit for operation of the Landfill from the MDE. That same year, the County purchased property for a school site, including the fee-simple parcel necessary to satisfy the access condition of the Special Exception (“Access Property”). On August 31, 2020, Anne Arundel County Executive Stuart Pittman (“County Executive”) wrote the following to MDE during the comment period of the Phase III permit application process:

This letter will summarize Anne Arundel County’s comments related to the Phase III Report. However, we must repeat our primary concern that was also voiced in our most recent August 3, 2020 letter and in a July 27, 2005 letter. The proposed project has, in point of fact, *not* satisfied all applicable county zoning and land use requirements because the applicant has *not* acquired

access to the site as required by a special exception that is now more than 26 years old. (Emphasis in original)

The December 23, 1993 Board of Appeals order approved only one entrance to the landfill. This entrance was to be sited from Conway Road and to be acquired through a fee-simple right-of-way, not through an easement. . . . Please also note that as of the date of this letter, the County has not been advised by the applicant that they have acquired the fee-simple rights to this road.

On October 2, 2020, the County Attorney wrote a letter to the Assistant Attorney

General for MDE, which read, in part:

Under § 9-210 of the Environment Article of the State Code, a prerequisite to processing a permit application beyond Phase 1 is a confirmation from the local jurisdiction that the site meets all applicable zoning and land use requirements; specifically:

(3) The county has completed its review of the proposed refuse disposal system, and has provided to the Department a written statement that the refuse disposal system:

(i) Meets all applicable county zoning and land use requirements;

and

(ii) Is in conformity with the county solid waste plan.

Md. Code Ann, Environment Article, § 9-210(a)(3). While the site is in conformity with the County's Solid Waste Management Plan, the site still does not meet all applicable County zoning requirements. . . . On June 20, 2001, the County Office of Planning and Zoning wrote to MDE advised that the zoning compliance was conditioned on the applicant securing specified fee simple access to the site, and nineteen years later . . . this condition has still not been satisfied. For this reason the site does not have the necessary zoning approval. I also note that property the County purchased this year for use as a school or recreational site includes the property that would have been necessary to satisfy the access condition of the special exception approval for the Chesapeake Terrace site.

* * *

By clear mandate of State law, [Appellee's] failure to satisfy zoning requirements should have stopped the review process:

(b) Upon completion of the requirements of subsection (a)(1) and (2) of this section, the Department shall cease processing

the permit application until the requirements of subsection (a)(3) [zoning approval] of this section are met.

Md. Code Ann, Environment Article, § 9-210(b). Despite this statutory mandate, the Applicant was allowed to complete Phase II and move into Phase III of the permit process. That is contrary to State law and improper in light of the failure of the applicant to obtain full zoning approval.

* * *

This letter is to request that, at a minimum, MDE follow State law and cease processing this permit application until the statutory zoning prerequisite is satisfied. Furthermore, in light of the applicant's continued failure to satisfy the zoning condition regarding access, the application should be denied. It is simply not fair to the public to allow the application to proceed under these circumstances.

MDE halted Appellee's permit application, citing the two letters as the basis for halting the process.

On December 15, 2020, Appellee initiated a proceeding seeking an order: (1) requiring the County to confirm to MDE that the Landfill complies with applicable zoning requirements because of the Special Exception; and (2) ordering MDE proceed with its review of Appellee's permit application. Appellee moved for summary judgment on January 29, 2021. Appellee argued that County Executive and County Attorney had no authority to send the letters to MDE demanding that the application process be ceased because the County had already confirmed Appellee's compliance with zoning regulations in the 2001 letter. In response, the County opposed Appellee's motion and cross-moved for summary judgment. Appellee argued, *inter alia*, that the letters were not making demands, but rather simply informing MDE of the facts of the case.

The circuit court granting summary judgment for Appellee's finding that County Executive and County Attorney "overstepped the bounds of their authority" and "violated

Appellee’s due process rights” by “sending letters to MDE demanding they halt [Appellee]’s application process to operate the [L]andfill.” The circuit court explained that the issue in the case was not whether the County Executive has “authority to approve zoning regulations, but rather whether he has the authority to rescind or modify that approval.” The circuit court concluded that “[i]f the County now believes that the conditions of the [Special Exception] cannot be performed, that is a matter solely for the [Board] to determine.” After reaching its decision on the letters sent by the County, the circuit court noted as follows:

The Court shall not make a determination concerning any other pending issues in this matter. As repeatedly stated, the Court finds that the Board is the proper avenue to consider any and all modifications or rescissions to [Appellee]’s special exception. If the Court made a ruling on any other issues besides the authority of the letters, the Court would be allowing the County to go around a Board hearing, which we have already iterated is a crucial procedure in the due process rights of [Appellee] and other landowners.

The County timely filed notice of appeal challenging the circuit court’s decision.

STANDARD OF REVIEW

We review a trial court’s decision to grant summary judgment *de novo*, asking “whether the trial court’s legal conclusions were legally correct.” *D’Aoust v. Diamond*, 424 Md. 549, 574 (2012). If there is no genuine dispute of material fact “we review the trial court’s ruling on the law, considering the same material from the record and deciding the same legal issues as the circuit court.” *Id.* at 575 (citation omitted). “In conducting our review of a grant of a motion for summary judgment, we consider ‘only the grounds upon which the trial court relied in granting summary judgment.’” *Id.* (citing *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 541–42 (2007)).

DISCUSSION

I. Authority of County to Send 2020 letters to MDE

A. Parties' Contentions

The County contends that the circuit court erred in finding that County Executive and County Attorney acted outside of their authority in sending the 2020 “demand” letters to MDE. The County argues that “County Executive clearly has the authority under the County Charter to speak on behalf of the County.” Moreover, the County asserts that the 2020 letter to MDE “did not rescind or modify the [2001] zoning approval letter.” Instead, the County states that the 2020 letter merely “notified MDE that [Appellee] had still not satisfied the zoning condition, and, since the condition had still not been met, MDE should stop processing or should deny the permit until [Appellee] established the condition was met.” As for the County Attorney, the County argues that County Attorney “has the authority to speak for his client on legal issues, and the request to MDE’s counsel on this important zoning issue was exactly that and well within the Charter authority of the office.”

In response, Appellee contends that the issue decided by the circuit court was not whether County Executive and County Attorney have general authority to act on behalf of the County, but rather, whether “County Executive (or County Attorney) specifically has authority to unilaterally revoke [Appellee]’s special exception and cause MDE to halt its review without so much as affording a hearing.” Appellee asserts that “there is a statutorily prescribed process, under Section 18-16-404 of the Anne Arundel County Code, that the County must follow before an exception may be revoked or amended, and it is undisputed that the County did not follow that process.”

B. Analysis

At the outset, it is crucial to determine whether the letters sent by County Executive and County Attorney were either: (1) attempts to “rescind or modify the [2001] approval zoning letter,” as found by the circuit court; or (2) merely attempts to notify MDE that the zoning conditions for the Landfill were not satisfied, as asserted by the County. We agree with the circuit court that the 2020 letters were more properly considered attempts to rescind or modify the 2001 zoning approval letter. We explain.

In *Purich v. Draper Properties, Inc.*, 395 Md. 694, 714 (2006) the Court of Appeals explained that “special exceptions are the ‘grant of a specific *use* that would not be appropriate generally or without restriction....’” (quoting § 59–A–2.1 of Montgomery County the Zoning Ordinance) (Emphasis in opinion). The Court explained that a “special exception brings a property into conformance with applicable zoning laws.”

The County argues that “the letter from the County Executive did not rescind or modify the zoning approval letter, but rather notified MDE that [Appellee] had still not satisfied the zoning condition, and, since the condition had still not been met, MDE should stop processing or should deny the permit until [Appellee] established the condition was met.” The County’s reference to the 2020 letters as “notifications” is contrary to the unmistakable tenor of the letters, which clearly requested that MDE stop processing the permit or deny the permit outright. As the circuit court noted in this case, the issue was “not whether [County Executive] has the authority to approve zoning regulations, but rather whether he has the authority to rescind or modify that approval.” The 2001 zoning approval letter operated to confirm that the Landfill complied with applicable zoning requirements,

allowing MDE to process Appellee’s permit application. MDE stated that “the sole reason they halted [Appellees] application was due to the two [2020] letters” sent by the County. Where, as here, the County sends a letter to MDE confirming zoning approval for permit purposes, and thereafter, sends a letter requesting that the permitting process be stopped or denied outright for lack of zoning compliance, the second letter operates not as a notification, but as an attempt to rescind or modify the prior zoning approval. Accordingly, the circuit court correctly found that the letters from the County were attempts to rescind or modify the prior zoning approval.

We now must decide whether the County and/or County Attorney had the authority to rescind or modify the Special Exception’s prior zoning approval. Notably, the Anne Arundel County Code § 18-16-404 provides the method for rescission, suspension, or modification of a special exception:

§ 18-16-404. *Rescission, suspension, or modification of a variance or special exception.*

(a) **Grounds. On motion of the County or an aggrieved party**, or on the Administrative Hearing Officer’s own initiative, approval of an application for a rezoning, variance or **special exception shall be rescinded**, suspended, or modified **if the Administrative Hearing Officer determines, *after a hearing***, that:

- (1) the approval or grant was based on a fraudulent misrepresentation of material information in the application, testimony, administrative site plan, or other supporting documents; or
- (2) the use of the property deviates from the approved administrative site plan, an allowed use under the rezoning, or any conditions imposed.

(Emphasis added). Here, the County did not move to rescind, suspend, or modify the Special Exception through the proper procedure, which would have required a hearing to

decide the issues now raised. The lack of a hearing prior to rescission of Appellee’s Special Exception deprived Appellee of the opportunity to dispute the claims within the County letters at an open hearing. This is precisely why the circuit court found that the County letters “violated the due process rights” of Appellee. We agree.

While the County certainly has the right to challenge the validity of the Special Exception through a proper motion with the Board, County Executive and County Attorney did not have the authority to request that MDE halt or deny Appellee’s permit process without a hearing. In doing so, the County infringed upon the due process rights owed to Appellee under the Anne Arundel County Code. Thus, the circuit court did not err in finding that the County acted outside its authority, and violated Appellee’s due process rights, by sending the 2020 letters to MDE requesting that Appellee’s permit process be halted or denied. As stated by the circuit court, the validity of Appellee’s Special Exception is a matter for the Board.

II. Matter for the Board: Impossibility of Special Exception’s Access Condition

A. Parties’ Contentions

The County contends that the circuit court erred in finding that the issue of whether implementation of the Special Exception was impossible was solely a matter for the Board to determine. The County urges that “[t]he decision of the Circuit Court should be reversed because the impossibility of the condition’s occurrence renders the permit approval process meaningless.” Moreover, the County argues that the access condition is “not an operational condition that may only be met when the use is implemented,” but rather, “it is a condition precedent to implementing the use[.]” Thus, the County contends that the circuit court erred

in finding that this was solely a matter for the Board to decide where the access condition of the Special Exception was impossible to secure.

In response, Appellee contends that the County expressly waived their argument that implementation of the Special Exception was impossible during circuit court argument. Further, Appellee argues that, even if the argument was not waived, the Special Exception is presently valid, and the impossibility issue will only arise when operations on the Landfill commence.

B. Analysis

A review of the record indicates that the County expressly waived the argument that implementation of the Special Exception was impossible. At hearing, the circuit court responded to the County's assertion there was no genuine dispute of material fact as follows:

THE COURT: There's a huge dispute of fact of whether or not [the access condition is] impossible or not.

. . . .

Should that go back to the Board –

[The County]: Your Honor, we allege in our motion, and have a fact in evidence that we will not sell it to [Appellee], and [Appellee] has an affidavit from their vice president saying the County won't sell it to me, I've tried. So, that is undisputed.

THE COURT: No, it's not undisputed. It's undisputed that, as of today, the price is not right. As of today, you haven't been sued for bad faith by -- by National Waste Management, and you want to get out of this by allowing them to have that[?] . . .

[The County]: **Well, you know, respectfully, Your Honor, the Court shouldn't consider those issues because the Board of Appeals is going to consider those issues.**

The circuit court also noted in its memorandum opinion that subsidiary issues would be left to the Board to decide:

The Court shall not make a determination concerning any other pending issues in this matter. As repeatedly stated, the Court finds that the Board is the proper avenue to consider any and all modifications or rescissions to [Appellee]’s special exception. If the Court made a ruling on any other issues besides the authority of the letters, the Court would be allowing the County to go around a Board hearing, which we have already iterated is a crucial procedure in the due process rights of [Appellee] and other landowners.

Waiver is the “intentional relinquishment or abandonment of a known right.” *State v. Rich*, 415 Md. 567, 580 (2010) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). In *Rich*, the Court of Appeals explained the preclusive impact of a waiver as opposed to a forfeiture: “Forfeited rights are reviewable for plain error, while waived rights are not.” Here, the County expressly raised the issue, but then requested that the circuit court allow the Board to decide the issue. The County thereby intentionally relinquished their right to have the issue of impossibility considered and decided by the circuit court. This also constituted a waiver of the County’s present right to have the issue decided on appeal. Accordingly, we hold that the circuit court properly declined to address the issue of whether the access condition in the Special Exception was impossible to satisfy based on the County’s express waiver of the issue.

CONCLUSION

We hold that the circuit court did not err in finding that the County exceeded its authority and violated Appellee’s due process rights by sending the 2020 letters to MDE requesting that MDE halt or deny outright Appellee’s permit application. Moreover, we

hold that the County affirmatively waived the argument that the Special Exception is invalid due to the impossibility of the condition precedent being met by stating on the record that the issue should be decided by the Board. Accordingly, we affirm the decision of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED; COSTS TO BE PAID BY THE
COUNTY.**