Circuit Court for Calvert County
Case No. C-04-CV-17-000269

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 635

September Term, 2018

CALVERT COALITION FOR SMART GROWTH, INC., ET AL.

v.

CALVERT COUNTY, MARYLAND, ET AL.

Arthur,
Shaw Geter,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: June 17, 2019

Appellants, Calvert Coalition for Smart Growth, Inc., Susan Apple, David S. Brury, Robert Daniels, King Investments, LLC, Michael and Wanda King, and Maurice Lusby, appeal the Circuit Court for Calvert County's dismissal of their complaint for declaratory judgment. On December 1, 2017, Appellants filed a complaint against Appellees, Calvert County, Maryland and the Board of County Commissioners of Calvert County, alleging Ordinance No. 27-16 violated Maryland and Calvert County land use law. Calvert County moved to dismiss the complaint claiming Appellants had failed to present a justiciable controversy and failed to exhaust their administrative remedies. On May 21, 2018, the circuit court dismissed the complaint. Appellants timely appealed and present the following questions for our review.

1. Whether Appellants' complaint presented a justiciable controversy?
2. Whether Appellants failed to exhaust any administrative remedy before they filed their complaint in the circuit court?

STATEMENT OF FACTS

Pursuant to Section 4-101 of the Land Use Article of the Maryland Code, the State delegated to local governments the authority to adopt planning and zoning controls to "promote the health, safety and general welfare of the community" and to regulate, among other things, the "location and use of buildings, signs, structures and land." Pursuant to this authority, Calvert County adopted the Zoning Ordinance of Calvert County (the "County Zoning Ordinance"). The County Zoning Ordinance applies to all land uses and improvements within Calvert County except for lands located within a municipality and "as modified by Town Center Master Plans and Zoning Ordinance." Calvert Co. Zoning

Ord., § 1-2.01. Under the County Zoning Ordinance, Town Center Districts are intended to include all property comprehensively zoned "Town Center" and governed by the Town Center Master Plans and Town Center Zoning Ordinances. The County Zoning Ordinance designates four such Town Centers: North Beach, Chesapeake Beach, Prince Frederick, and Solomons.

The Board of County Commissioners of Calvert County (the "BOCC") adopted a zoning ordinance for the Prince Frederick Town Center (the "PFZO"). The PFZO states that it was "adopted to accomplish the aims of the Prince Frederick Master Plan [(the "PFMP")] by regulating land uses in a manner that promotes the health, safety and general welfare of Calvert County residents[.]" The PFZO also divides the Prince Frederick Town Center into eight development subareas, one of which is designated the New Town Subarea. All property within the PFZO is zoned "Town Center" and, thus, governed by the PFZO and PFMP.

One of the main priorities of the PFMP, which was adopted by the BOCC, is to "maintain high standards of road safety and minimize traffic congestion." In addition, the PFMP also states that "[n]o use or combination of new or existing uses that will generate the need for a traffic signal in locations other than those listed above will be permitted on Rte. 2/4 within the boundaries of the Town Center."

After a joint public hearing was conducted before the Calvert County Planning Commission and the BOCC, on July 26, 2016, the BOCC adopted Ordinance No. 27-16,

which approved Text Amendment 15-08(a).[1] Ordinance No. 27-16 did not change any zoning classification of any property nor did it allow any new uses. Instead, the ordinance modified previously allowed development densities and other regulations as follows:

- Increased the permitted square footage of retail commercial buildings in the New Town Subarea from 25,000 to 75,000 square feet;
- Authorized retail commercial buildings between 75,000 square feet and 150,000 square feet as a conditional use;
- Increased the permitted square footage of a home improvement center from 25,000 to 75,000 square feet;
- Authorized a home improvement center between 75,000 and 150,000 square feet as a conditional use;
- Authorized an outdoor sales and garden center in conjunction with a home improvement center not to exceed 45,000 square feet as a conditional use;
- Increased the number of permitted dwelling units in the New Town Subarea from 14 units to 24 units per acre;
- Increased the allowable height of buildings in the New Town Subarea from 45 to 60 feet;
- Changed the setbacks for buildings and other structures within the New Town Subarea.

After the adoption of Ordinance No. 27-16, Appellants brought a complaint for declaratory judgment in the circuit court (the "Complaint"). The Complaint made several core allegations: (1) the applicable State and County law required that local zoning rules be consistent with the PFMP; (2) the PFMP specifically addressed traffic congestion on Rte. 2/4; (3) the changes made by Ordinance No. 27-16 conflict with the requirements of the PFZO and the PFMP regarding traffic; and (4) these inconsistencies required the circuit court to declare that Ordinance No. 27-16 was illegal and, therefore, void. Appellees filed

[1] A proposed text amendment may be submitted to the Planning Commission by the BOCC, any citizen or organization, any governmental agency, or by the Planning Commission itself. Before any text amendment may be adopted, a duly advertised public hearing shall be held by the Planning Commission and the BOCC.

a motion to dismiss, claiming the Complaint failed to present a justiciable controversy and that Appellants had not exhausted available administrative remedies. After a hearing on the matter, the circuit court granted the motion to dismiss.

STANDARD OF REVIEW

"Our review of the circuit court's grant of a motion to dismiss is *de novo*." *Evans v. County Council of Prince George's Sitting as District Council*, 185 Md. App. 251, 256 (2009) ("Because exhaustion of administrative remedies is quasi-jurisdictional, we will treat the circuit court's decision as one granting a motion to dismiss[.]"). "In conducting that review, we must assume the truth of the well-pleaded factual allegations of the complaint, including the reasonable inferences that may be drawn from those allegations." *Id*. (quoting *Adamson v. Corr. Med. Servs., Inc.*, 359 Md. 238, 246 (2000) (internal quotations omitted).

DISCUSSION

I. Whether the Complaint failed to present a justiciable controversy.

Appellants argue the Complaint presented a justiciable controversy because it claimed, based upon facts that have already accrued, that Ordinance No. 27-16, which amended the zoning ordinance effective July 29, 2016, violated the County Zoning Ordinance, the PFZO, and the PFMP. Appellants contend Ordinance No. 27-16's changes made to the zoning ordinance "were not speculative" and that "a court can resolve this controversy by issuing a declaratory judgment regarding the legality of Ordinance No. 27-16." Conversely, Appellees argue that the Complaint failed to present a justiciable

controversy because facts necessary to support the claims of the Complaint have not yet accrued.

"[T]he existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action." *Hatt v. Anderson*, 297 Md. 42, 45 (1983); *see also* Md. Code, Courts & Jud. Pro., § 3-409(a)(1) (stating that "a court may grant declaratory judgment or decree in a civil case" if, among other requirements, there exists "[a]n actual controversy between contending parties[.]"). "[A] controversy is justiciable when there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded." *Hatt*, 297 Md. at 45–46. "[T]he addressing of non-justiciable issues would place courts in the position of rendering purely advisory opinions, a long forbidden practice in this State." *Id*. at 46.

One requirement for a justiciable controversy is ripeness. *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 690 (1987) (citing E. Borchard, *Declaratory Judgments* 770 (2d ed. 1941). "Generally, an action for declaratory relief lacks ripeness if it involves a request that the court 'declare the rights of parties upon a state of facts which has not yet arisen, [or] upon a matter which is future, contingent and uncertain.'" *Id*. (quoting *Brown v. Trustees of M.E. Church*, 181 Md. 80, 87 (1942)) (brackets in original). Thus, we "will not decide future rights in anticipation of an event which may never happen, but will wait until the event actually takes place, unless special circumstances appear which warrant an immediate decision." *Id*. (citing *Tanner v. McKeldin*, 202 Md. 569, 579 (1953)).

In *Anne Arundel County v. Ebersberger*, we considered whether a declaratory judgment action challenging the validity of a county ordinance that authorized the

renovation of a community pool and allowed the imposition of a special benefit tax to finance said renovation presented a justiciable controversy. 62 Md. App. 360 (1985). We held the action did not present a justiciable controversy and should have been dismissed because the "ordinance d[id] not *require* the district to renovate the pool; it merely *authorize[d]* such work." *Id*. at 371 (emphasis in original). We reasoned that the ordinance did not specify any particular means of financing the renovation and that "[t]here [was] certainly no assurance, from the record [then] before us, that a budget containing an appropriation for the pool w[ould] ever be approved or that a special benefit tax to support such an appropriation w[ould] ever be levied." *Id*. Thus, "[a]t least until the prospect of such an appropriation or such a tax bec[ame] substantially more certain, the plaintiffs [had] suffered no injury from the challenged ordinance, and its validity or invalidity [was] therefore of no practical consequence." *Id*.

That is, in essence, what we have here. The Complaint alleges that Ordinance 27-16 is illegal, and therefore void, because it is inconsistent with the County Zoning Ordinance, the PFMP, and the PFZO, and that this inconsistency violates applicable State and County law. Specifically, the Complaint contends Ordinance No. 27-16 is inconsistent with the PFMP's prohibition on any "use or combination of new or existing uses that will generate the need for a traffic signal in locations . . . on Rte. 2/4 within the boundaries of the Town Center." However, like *Ebersberger*, Ordinance No. 27-16 does not *require* any sort of development inconsistent with the County Zoning Ordinance, the PFMP, or the PFZO. Instead, it merely modified allowable densities, heights, and other bulk regulations applicable in the New Town Subarea. There is no indication that any development or

proposed budget has been approved consistent with the changes made by Ordinance No. 27-16, and there may never be such approval or development.

Appellants cite many cases in support of their proposition that a zoning ordinance that changes the zoning rules to permit different types of development presents a justiciable issue ripe for a decision by a court. *See Chatham Corp. v. Beltram*, 252 Md. 578 (1969) (holding zoning reclassification of land from single-family residence districts to garden apartment districts invalid in action brought by home owners in close proximity to reclassified land); *Habliston v. City of Salisbury*, 258 Md. 350 (1970) (declaring invalid a city ordinance that reclassified area from "Industrial" to "Residential B" in action brought by property owner whose property boundary ranged from 200 to 500 feet from boundary of reclassified area); *Grooms v. LaVale Zoning Bd.*, 27 Md. App. 266 (1975) (holding valid a comprehensive rezoning ordinance that reclassified portions of land from Rural-Residential to Residential A and Commercial A, respectively, in action brought by property owners residing in the effected land). Appellants suggest that, in light of these cases, "[j]usticiability does not require the existence of an application to develop the land in accordance with the new zoning ordinance." However, Appellants' reliance is misplaced as each of these cases involved a challenge to a zoning reclassification of property. Here, Ordinance No. 27-16 did not reclassify the zoning of any property or introduce new uses. Instead, it merely modified previously allowed densities, height, and other bulk regulations.

Similarly, *Bell v. Anne Arundel County, Md.*, on which Appellants rely, was reversed in total, not partially, by the Court of Appeals. 215 Md. App. 161 (2013), *rev'd*, 442 Md. 539, (2015) (holding owners of property within close proximity to rezoned land

were specially aggrieved parties that had standing to challenge rezoning ordinance). As such, it offers no support for Appellants' contentions. Moreover, the case of *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 700 (1987), is not applicable to the facts before us. That case dealt with a challenge to a city's amendment of its master plan, which was a prerequisite to the adoption of a zoning reclassification, on the basis that the procedures leading to the amendment failed to comply with applicable law. Appellants make no such argument here. Thus, we conclude the Complaint failed to present a justiciable issue and, therefore, we need not reach the issue of exhaustion of administrative remedies.

II. Whether Appellants failed to exhaust any administrative remedy before they filed the Complaint in the circuit court.

Assuming *arguendo* that the Complaint did present a justiciable issue, we will consider whether Appellants exhausted any available administrative remedy. "Whenever the Legislature provides an administrative and judicial review remedy for a particular matter or matters, the relationship between that administrative remedy and a possible alternative judicial remedy will ordinarily fall into one of three categories."[2] *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 60 (1998). The first, "exclusive," means "that only an administrative, and not a judicial remedy, is available." *Evans v. County Council of Prince George's Sitting as District Council*, 185 Md. App. 251, 259 (2009). The second, "primary but not exclusive," means that a claimant must invoke and exhaust the administrative

[2] Although exceptions to the rule requiring exhaustion of administrative remedies exist, none is applicable in this case. *See Prince George's County v. Blumberg*, 288 Md. 275, 284–85 (1980) (recognizing five exceptions to the exhaustion rule).

remedy before seeking judicial review. *Id*. The third, "fully concurrent," means that "the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy." *Id.*

"Which one of these three scenarios is applicable to a particular administrative remedy is ordinarily a question of legislative intent." *Id*. (quoting *Zappone*, 349 Md. at 61). The Court of Appeals "has consistently held that because, under the Declaratory Judgment Act, statutory administrative remedies are exclusive, the administrative procedures established must be exhausted before a litigant may seek declaratory relief from a trial court." *Id*. (quoting *Moose v. Fraternal Order of Police*, 369 Md. 476, 487 (2002)).

In *Evans*, *supra*, a group of citizens filed a complaint for declaratory judgment challenging a text amendment, adopted by the Prince George's County Council sitting as the District Council, that would permit one-family detached housing for the elderly to be built in the Rural-Estate Zone pursuant to a special exception. There, the Regional District Act provided that the District Council shall hear appeals relating to "decisions of the zoning hearing examiner in special exception cases," and that the District Council may authorize the Board of Zoning Appeals "to interpret zoning maps or pass upon disputed questions of lot lines and district boundary lines or similar questions that may arise in the administration of the regulations." *Id*. at 260. Once the administrative appeal of the zoning hearing examiner's decision was heard by the District Council or Board of Zoning Appeals, judicial review was expressly authorized by statute. *Id.* We held that the circuit court properly dismissed the citizens' complaint for declaratory relief because they had not exhausted the administrative remedies available under the Regional District Act before seeking judicial

intervention, and that "if and when any property owner s[ought] to take advantage of the special exception created by [the text amendment], the citizens w[ould] have available to them 'fully adequate administrative adjudicatory remedies.'" *Id*. at 262.

Similarly, here, when an owner of property in the New Town Subarea seeks to take advantage of Ordinance No. 27-16, it would be required to obtain zoning approval. Calvert Co. Zoning Ord., § 4-1.01(D)–(E). Any person or organization aggrieved by the approval may appeal to the Board of Appeals, *Id*. at § 11-1.07(A)–(C), and thereafter to the Calvert County Circuit Court for judicial review. *Id*. at § 11-1.07.

Property owners seeking to develop property consistent with the modifications made by Ordinance No. 27-16 would also be required to obtain other approvals for which the Calvert County Zoning Ordinance provides administrative remedies. Site development plans are reviewed for approval by the Calvert County Planning Commission. *Id*. at § 4-2.01(D). Any person or organization aggrieved by the Planning Commission's decision may appeal by petition to the circuit court for judicial review. *Id*. at § 4–5. Lastly, any issuance of a required grading or building permit is appealable to the Calvert County Board of Appeals and, thereafter, to the circuit court for judicial review. *Id*. at § 11-1.07(A)–(C). Thus, even if the Complaint presented a justiciable controversy, there exists adequate administrative remedies that Appellants have not exhausted. Accordingly, the circuit court did not err in dismissing the Complaint.

JUDGMENTS OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.