Circuit Court for Montgomery County
Case No. 431877V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1330

September Term, 2017

DEBORAH A. VOLLMER, ET AL.

v.

BOARD OF APPEALS OF
MONTGOMERY COUNTY, MARYLAND,
ET AL.

Nazarian,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: April 8, 2019

Deborah Vollmer, John Fitzgerald, and Gautam Prakash (collectively, "Appellants") opposed a permit issued by the Montgomery County Historic Preservation Commission that allowed the relocation of a building in downtown Bethesda, as part of a redevelopment project that will include parts of the planned Purple Line light rail. The County's Board of Appeals subsequently dismissed Appellants' administrative appeal for lack of standing, a conclusion affirmed by the Circuit Court for Montgomery County. We conclude that although Appellants' appeal is likely moot, the Board did not err in determining that Appellants lacked standing. Accordingly, we affirm.

BACKGROUND & PROCEDURAL HISTORY

In December 2016, the Montgomery County Historic Preservation Commission ("Commission") granted 7272 Wisconsin Avenue, LLC ("7272 Wisconsin" or "Intervenor") conditional approval of a historic area work permit to relocate a historic building in Bethesda.[1] Appellants, having opposed the approval of the permit before the Commission, filed an appeal with the Montgomery County Board of Appeals ("Board") pursuant to Chapter 24A of the Montgomery County Code.[2]

[1] The building, then located at 7250 Wisconsin Avenue and known as Community Paint and Hardware, had been the earliest commercial building still standing in the Bethesda Commercial District. Intervenor sought to relocate the building as part of a mixed-use redevelopment project involving Metro's Red Line, the Purple Line light rail, and the Capital Crescent Trail.

[2] Section 24A-6 of the Montgomery County Code requires obtaining a historic area work permit before reconstructing, demolishing, or relocating a historic site. Section 24A-7 then sets forth the procedures involved in applying for and obtaining such a permit, including a public meeting of the Historic Preservation Commission. Section 24A-7(h) provides that within 30 days after the Commission decides on an application,

Montgomery County and Intervenor (collectively, "Appellees") filed a motion to dismiss, arguing that Appellants lacked standing to appeal the Commission's decision to the Board because Appellants were not "aggrieved parties" as required by § 24A-7(h) of the County Code. Specifically, Appellees argued: 1) None of the Appellants own property that adjoins, confronts, or is otherwise located in the immediate vicinity of the subject building; and 2) None of the Appellants have a personal or property interest, specific and different from that of the general public, that was injured by the Commission's decision to grant the permit.

After briefing and oral argument on the standing matter, the Board granted the motion to dismiss. Appellants petitioned for judicial review in the Circuit Court for Montgomery County, which affirmed the Board's dismissal—first in a bench ruling, and then, about two weeks later, in a written order and decision that incorporated the ruling from the bench. Appellants timely appealed.

DISCUSSION

"In an appeal from judicial review of an agency action, we review the agency's decision directly and not the decision of the Circuit Court . . . ." *Hollingsworth v. Severstal Sparrows Point, LLC*, 448 Md. 648, 654 (2016). In doing so, our review is narrow: we are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the

"an aggrieved party may appeal the Commission's decision to the Board of Appeals, which must review the decision *de novo.*"

administrative decision is premised upon an erroneous conclusion of law." *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012) (Citation omitted). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *McClure v. Montgomery County Planning Bd.*, 220 Md. App. 369, 380 (2014) (Citation omitted). Under this standard, we must "defer to the agency's fact-finding and drawing of inferences if they are supported by the record" and "review the agency's decision in the light most favorable to it." *Motor Vehicle Admin. v. Carpenter*, 424 Md. 401, 413 (2012). Nevertheless, we afford no deference to agency conclusions "based upon errors of law." *State Ethics Comm'n v. Antonetti*, 365 Md. 428, 447 (2001).

I. MOOTNESS

We may dismiss an appeal if "the case has become moot." Md. Rule 8-602(c)(8). "A case is moot when it does not present 'a controversy between the parties for which, by way of resolution, the court can fashion an effective remedy.'" *Potomac Abatement, Inc. v. Sanchez*, 424 Md. 701, 710 (2012) (quoting *Adkins v. State*, 324 Md. 641, 646 (1991)). "Although there is no constitutional bar to this Court expressing its views on a moot issue, we rarely do so and usually dismiss the appeal without addressing the merits of the issue." *Powell v. Md. Dep't of Health*, 455 Md. 520, 539-40 (2017) (quoting *Mercy Hosp., Inc. v. Jackson*, 306 Md. 556, 562 (1986)).

Here, it is exceedingly difficult to see how any effective remedy could be available to Appellants, even if—for argument's sake—we were to disagree with the Board and the

Circuit Court, find that Appellants are appropriately aggrieved for the purposes of standing, and send the case back to the Board for a resolution on the merits. Appellants did not seek a stay or injunctive relief following the Circuit Court's bench ruling, and later in August 2017, the building in question was physically relocated to another location in Bethesda. Currently, as Appellees point out, the building's former location "has been excavated and is the site of a major construction project." Given these circumstances, and now that the extensive redevelopment project has gotten underway, it is hard to envision how the building could potentially be returned to the site in question.

Notwithstanding these practical realities, Appellants have maintained before this Court that the Board could still, even at this point, order the building returned to the site.[3] Despite our skepticism, we will address whether the Board erred in determining that Appellants lacked standing due to not being "aggrieved."

II. APPELLANTS WERE NOT "AGGRIEVED" AND THEREFORE LACKED STANDING.

A. The County Could Require That Appellants Be "Aggrieved."

As an initial matter, Appellants contend that the Board applied an incorrect legal standard for determining standing. Appellants argue that the Board should not have focused on whether Appellants were "aggrieved" (as called for by § 24A-7(h) of the

[3] In June 2018, Appellees filed a motion in this Court to dismiss the appeal as moot. Appellants filed an opposition to the motion to dismiss, in which they argued that "the way remains open for a design that would facilitate the goal of restoring the Building to a site at or near its original or the nearly adjacent second location on the site[.]" Prior to oral argument, in an order dated August 7, 2018, this Court summarily denied the motion to dismiss.

County Code), but "interested person[s]," a standard taken from the Express Powers Act—and which, on its face, appears to contemplate a more lenient threshold for conferring administrative standing than a more stringent "aggrievement" standard.[4]

The "interested person" language Appellants point to comes from the section of the Express Powers Act that generally authorizes charter counties to establish Boards of Appeals: "A county may enact local laws to provide for . . . a decision by the county board of appeals on petition of any interested person . . . ." Md. Code (2013, 2018 Cum. Supp.), Local Government Article, § 10-305(a). However, a separate provision in the Express Powers Act provides additional authority for charter counties (including Montgomery County) to "enact laws for historic and landmark zoning and preservation . . . in accordance with Title 8 of the Land Use Article[.]" Local Government Article, § 10-325(a). Laws enacted under this section may "provide for appeals or judicial review." *Id*. In turn, Title 8 of the Land Use Article, which concerns historic preservation,

[4] We do agree that notwithstanding the general ability of charter home rule counties "to set reasonable conditions precedent to access to [a] Board of Appeals," *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 604 (2014), it remains an open question whether requiring parties to be "aggrieved" for the purposes of administrative standing (that is, to even get a foot in the door to be able to take an appeal to the Board) conflicts with the section of the Express Powers Act cited by Appellants. After all, that provision authorizes Boards of Appeals to decide appeals "on [the] petition of any *interested* person . . . ." Md. Code (2013, 2018 Cum. Supp.), Local Government Article, § 10-305(a)(4) (Emphasis added); *see Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. 172, 186 n. 4 (2010) (Noting this potential conflict, but declining to decide the issue).

Nevertheless, given the separate, additional authorization regarding historic preservation contained in § 10-325 of the Local Government Article, that open question is inapplicable in the specific situation before us.

specifies that "[a]ny person *aggrieved* by a decision of a [historic preservation] commission may appeal the decision in the manner provided for an appeal from the decision of the planning commission of the local jurisdiction." Md. Code (2012, 2018 Cum. Supp.), Land Use Article, § 8-308. (Emphasis added). Although Appellants are correct that the relevant provisions of Title 8 normally do not apply to charter counties, *see* Land Use Article, § 1-401, in this particular context, § 10-325 of the Local Government Article—which *does* apply to Montgomery County—specifically authorizes charter counties to enact historic preservation laws "in accordance with Title 8 of the Land Use Article." In other words, § 10-325 of the Local Government Article specifically reaches across the divide and authorizes Montgomery County as a charter county to set an aggrievement standard as prescribed by § 8-308 of the Land Use Article. As a result, Montgomery County may impose an aggrievement standard for appeals to the Board from a decision by the Historic Preservation Commission.

B. The Board Did Not Err in Determining That Appellants Were Not Aggrieved.

Having determined that the Board's legal inquiry could hinge on whether Appellants were aggrieved, we turn to whether the Board properly determined if Appellants were actually aggrieved.[5]

[5] Because Montgomery County is authorized to require that parties be aggrieved to appeal a Commission decision to the Board, Appellants' argument that they have standing because they fall within the zone of interests of the County's historic preservation statute is inapposite.

"The property owner standing doctrine recognizes that owners of real property may be 'specially harmed' by a decision or action (usually related to land use) in a manner different from the general public." *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 519 (2014). In turn, "[t]he basis of this type of 'standing' is found in the zoning law concept of 'special aggrievement[.]" *Id*. Recently, in *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 81 (2013), the Court of Appeals reiterated that a person who is sufficiently "aggrieved" in this context is "one whose personal or property rights are adversely affected by the decision of the board. The decision must not only affect a matter in which the protestant has a specific interest or property right but his [or her] interest therein must be such that he [or she] is personally and specially affected in a way different from that suffered by the public generally." (Emphasis removed) (quoting *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 144 (1967)). Additionally, "unless the complainant alleges sufficient 'special aggrievement,' the complainant has no standing to challenge the act, but rather is merely 'generally aggrieved,' in a similar manner as the rest of the public." *State Center*, 438 Md. at 521.

In *Ray*, the Court of Appeals elucidated the gradations of aggrievement conferred on parties because of proximity. At the first level, "[a]n adjoining, confronting or nearby property owner is deemed, *prima facie*, to be specially damaged and, therefore, a person aggrieved." 430 Md. at 81. Second, "[a] protestant is specially aggrieved when she is farther away than an adjoining, confronting, or nearby property owner, but is still close enough to the site of the rezoning action to be considered almost *prima facie* aggrieved,

and offers 'plus factors' supporting injury."[6] *Id*. at 85. Finally, a residual third category is comprised of everybody else, deemed (merely) to be "generally aggrieved." *Id*. Notwithstanding dicta in *Bryniarski* that "theoretically recognized" that individuals in this residual third category may still be able to establish standing, the Court of Appeals has "never before found in fact" an instance in which "a person who was far removed from the site of rezoning actually qualified as 'specially aggrieved.'" *Ray*, 430 Md. at 85-86, 92.

Here, two of the three Appellants (Fitzgerald and Prakash) do not own the properties at which they reside. As such, regardless of their actual proximity, they are unable to be deemed *prima facie* aggrieved. *Ray v. Mayor & City Council of Balt.*, 203 Md. App. 15, 26 (2012), *aff'd*, 430 Md. 74 (2013) ("[A] non-property owner[] is denied [*prima facie* aggrievement]. He [or she] is, of course, free to try to establish special aggrievement with its attendant allocation of a stern burden of proof. What he [or she] lacks as a non-property owner is the easy *prima facie* comfort of presumptive aggrievement and standing."). Vollmer, who does own her residence, lives a linear distance of approximately 1,184 feet from the site in question, which the Court of Appeals has suggested is not close enough to be *prima facie* aggrieved (or even almost *prima facie* aggrieved). *Ray*, 430 Md. at 92 ("[P]rotestants who lived more than 1000 feet

[6] As the Court of Appeals describes this category of "almost *prima facie"* aggrievement: "[O]nce sufficient proximity is shown, some typical allegations of harm acquire legal significance that would otherwise be discounted. But in the absence of proximity, much more is needed." *Ray*, 430 Md. at 83.

from the rezoning site have repeatedly been denied standing"); *id*. at 91 ("Although there is no bright-line rule for who qualifies as 'almost' *prima facie* aggrieved . . . this category has been found applicable only with respect to protestants who lived 200 to 1000 feet away from the subject property."); *see Anne Arundel County v. Bell*, 442 Md. 539, 559 (2015) (quoting *Ray*). Moreover, "[g]enerally, to be considered an aggrieved party, the complaining property owner must be in 'sight or sound' range of the property that is the subject of [the] complaint." *Comm. For Responsible Dev. on 25th St. v. Mayor & City Council of Balt.*, 137 Md. App. 60, 86 (2001).

Thus, because Appellants are not *prima facie* aggrieved, they would need to show that they were uniquely and adversely affected by the Commission's decision as to confer special aggrievement. Appellants' claims—that the building (at its now previous site) evoked fond memories, aesthetic pleasure, and a unique appreciation for historic preservation—do not rise to the level required for special aggrievement, and therefore do not confer standing. This Court's analysis in *25th Street* is especially instructive in this regard. In *25th Street*, a Baltimore City resident appealed the issuance of a permit that would have allowed demolishing ten vacant buildings to erect a pharmacy and parking lot. 137 Md. App. at 66. Part of the basis for challenging the permit in *25th Street* was that the project "did not blend in with the historical character of the neighborhood." *Id*. at 66-67. After analyzing whether the resident was sufficiently aggrieved for the purposes of standing, we concluded: "While we sympathize with appellant's wish to preserve the historic character and aesthetics of his neighborhood, we do not find that his interests in

the matter are any different than the interests of a member of the general public . . . his interests are [] too attenuated to make him personally aggrieved by the Board's decision in this case."[7] *Id*. at 89.

We see no reason to conclude any differently here. Appellants' professed interests in historic preservation, or the aesthetic pleasures and memories sparked by passing by the historic building on a frequent basis, are too attenuated to be distinct from any adverse effects that might be experienced by the public at large. Though we sympathize with the desire to preserve historic neighborhoods, Appellants cannot credibly claim that they are "personally and specially affected in a way different from that suffered by the public generally." *Ray*, 430 Md. at 81 (Emphasis removed).

CONCLUSION

The author Amos Oz once warned about the practical challenges in seeking to recreate in space what has been lost to time.[8] This case illustrates that principle. The building whose historic work permit Appellants challenged has already been relocated to a nearby site in Bethesda, and the subject property is currently the site of a significant redevelopment project that will ultimately result, among other components, in a Purple Line station. More to the point, the Appellants do not own property close enough to the

[7] *See also Ray*, 430 Md. at 94: "[T]he weight of authority indicates that claims of change in the character of the neighborhood by protestants who lack proximity are insufficient to prove special aggrievement."

[8] *See* Bernard Avishai, *The Israel of Amos Oz*, NEW YORKER, Jan. 5, 2019, available at https://www.newyorker.com/culture/postscript/what-israel-meant-to-amos-oz.

site to have been specially aggrieved, *prima facie*, by the Commission's decision to grant the permit. Nor do Appellants' professed interests in historic preservation rise to a level that confer special aggrievement on the basis of unique, adverse harm distinct from that experienced by the general public. As such, the Board of Appeals did not err in determining that Appellants were not aggrieved, and therefore lacked standing for the purposes of an administrative appeal, as required in this context by the Montgomery County Code.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.