Circuit Court for Anne Arundel County
Case No. C-02-CV-17-001419

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1597

September Term, 2017

CORPORATE OFFICE PROPERTIES TRUST, *et al.*

v.

HOWARD COUNTY, MARYLAND

Kehoe,
Leahy,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: April 15, 2019

*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.

Appellants/cross-appellees, Corporate Office Properties Trust, Merritt Properties, LLC, St. John Properties, Inc., and Greenebaum Enterprises, Inc. (collectively, "Developers"), challenge the appellee/cross-appellant's, Howard County (the "County"), use of Tax Increment Financing ("TIF") for the construction of a public parking garage in downtown Columbia, Maryland. Maryland has authorized the use of TIFs by its local governments under the TIF Act, Md. Code Ann., Economic Development §§ 12-201 to 12-213.

The circuit court dismissed Developers' complaint for their lack of taxpayer standing. It denied the County's motion to dismiss the complaint based on mootness. The Developers appealed, presenting one question, which we have rephrased:

Did the circuit court err in dismissing the complaint for lack of taxpayer standing?

Howard County filed a cross-appeal, asking whether the circuit court erred as a matter of law when it denied the County's motion to dismiss based on mootness. For the reasons that follow, we shall dismiss this appeal based on mootness.

FACTUAL AND PROCEDURAL BACKGROUND

Tax Increment Financing ("TIF") is a widely-known, popular financing tool for development.[1] In November 2016, the Howard County Council passed Council Bill 56-

[1] "In a traditional TIF scheme, a locality issues tax increment bonds to finance the redevelopment of a chosen district. These bonds are secured by tax revenues generated from the expected increase in property values—i.e., the tax increment—in the district. *See generally* Frank S. London, Note, *The Use of Tax Increment Financing to Attract Private Investment and Generate Redevelopment in Virginia*, 20 Va. Tax Rev. 777, 780-81 (2001). That is, TIF pledges future increases in tax revenues generated by a project to

2016, which authorized the issuance of up to $90 million in TIF bonds to finance the construction of public improvements, including a "multi-level parking garage and related infrastructure" in a special taxing district known as the "Crescent Special Taxing District."

Bill 56-2016 gave the County Executive sole discretion to determine what development projects in the Crescent District would be funded by TIF bond proceeds: "[T]he County Executive, by executive order, is hereby authorized, empowered and directed to specify, prescribe, determine, provide for or approve . . . all matters, details, forms, documents and procedure . . . including . . . (p) the specific [i]mprovements to be financed, reimbursed or refinanced from proceeds of the [b]onds or the mechanics for determining the same[.]"

The Howard Research & Development Corporation, a wholly-owned subsidiary of the Howard Hughes Corporation ("HHC"), owned the property in the Crescent District, on which a parking garage was to be built. At the time of passage, the Council anticipated that approximately $51 million of the bonds would be used to fund HHC's construction of that garage that the County would own and operate as a public parking garage for 50 years.

In April 2017, appellants, who are commercial real estate developers owning properties in Howard County outside the Crescent District, filed suit against Howard

finance certain eligible costs for the project." *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 208 (3d Cir. 2004).

County and its County Executive in the Circuit Court for Howard County, claiming "standing as [] Howard County taxpayer[s] that will be specially aggrieved as a result of the County action" in funding the garage.[2] Their three-count complaint alleged that Bill 56-2016 was an unconstitutional special law in violation of Article III, § 33 of the Maryland Constitution[3] (count 1), and that Bill 56-2016 was an *ultra vires* act that exceeded the authority given to the County by the legislature under the TIF Act (counts 2 and 3). It sought a declaratory judgment that the "select portion of the TIF legislation that provides funding for the parking garage" violated Article III, § 33 and the TIF Act, and was *ultra vires*. The complaint was amended on June 19, 2017 removing the County Executive as a defendant, but the claims and alleged facts remained essentially the same. Howard County filed a motion to dismiss the amended complaint for lack of standing, or in the alternative, for summary judgment in favor of the County on the merits of the three counts asserted.

By August 2017, County Executive Allan Kittleman had decided not to use TIF bonds in the financing of HHC's construction of the garage. Instead, HHC would own and operate the garage and bear the costs of its construction. The County filed, on August 24, 2017, a motion to dismiss the declaratory judgment action as moot because

[2] The venue was changed, on April 25, 2017, to the Circuit Court for Anne Arundel County, pursuant to Md. Rule 2-327, which provides in pertinent part: "On motion of any party, the court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice."

[3] "And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law."

the TIF funds would not be used to fund the garage and the Developers' claims were limited solely to that use of the TIF funds. The TIF bonds were publicly offered for sale in October 2017, reflecting a revised budget that did not include funding for a County-owned public parking garage.

After hearings on October 2 and 13, 2017, the circuit court denied the County's motion to dismiss for mootness and motion for summary judgment on the merits. But, finding "no taxpayer standing in this case," it granted the County's motion to dismiss the amended complaint.

Additional details will be included in our discussion.

DISCUSSION

Mootness

"A case is moot if, 'at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy that the court can provide.'" *State v. Neiswanger Mgmt. Servs., LLC*, 457 Md. 441, 455 (2018) (quoting *Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 162-63 (2013)). Under Maryland Rule 8-602(c)(8), we may dismiss an appeal in a case that has become moot without a decision on the merits. We will, however, address on rare occasion a moot case that "presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct, or the issue presented is capable of repetition, yet evading review." *Stevenson v. Lanham*, 127 Md. App. 597, 612 (1999) (internal quotations and citations omitted). We may also address moot cases that may "merit an

expression of our views for the guidance of courts and litigants in the future." 457 Md. at 457 (quoting *Robinson v. Lee*, 317 Md. 371, 376 (1989)).

Contentions

Howard County contends that "the crux" of appellants' case is a challenge to the use of TIF bonds to fund the private construction of a public parking garage, but that now the garage at issue will be privately owned and will not be a TIF-funded project. In its view, the "County Executive's final and categorical determination that the TIF bonds authorized by Council Bill 56-2016 would not be used to finance . . . the garage rendered this case moot while it was still pending in the trial court." Accordingly, because there is no live controversy between the parties, they argue that we should decline to review what has become a purely hypothetical question.

The Developers take issue with the County's claim that "the case is moot as a result of actions the County has taken." Pointing out that a party seeking to prove mootness carries a heavy burden, they argue that the "voluntary cessation of conduct" by the County has to meet a "stringent" standard, and that "subsequent events must make it 'absolutely clear' that the alleged misconduct 'could not reasonably be expected to recur.'" *Neiswanger*, 457 Md. at 456 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000)).

More particularly, the Developers contend that the County Executive decided not to spend TIF funds on the garage project because of this litigation, but that he could change his mind any time. Bill 56-2016 is still on the books. And, there is evidence to

suggest that the County Executive will in fact change his mind because he later opposed a bill to withdraw the authorization to fund the garage and that bill was defeated.[4] They also noted that the then-forthcoming election in November 2018 for County Executive clouded any certainty as to what the winner's position on the garage would be.[5]

Analysis

The "voluntary cessation of conduct, or a change in the factual circumstances that formed the basis for seeking judicial relief does not require 'dismissal of the judicial proceedings on the grounds of mootness where the matter is a continuing controversy or the circumstances are likely to recur.'" *Neiswanger*, 457 Md. at 456 (quoting *Chase v. Chase*, 287 Md. 472, 482 (1980)).

The *Neiswanger* Court explained:

> A "reasonable expectation of recurrence" may exist when the alleged misconduct was a "continuing practice or was otherwise deliberate." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184-85 (11th Cir. 2007). Mootness is more likely if cessation was "motivated by a

[4] On September 5, 2017, two County Council members introduced Bill 74-2017, which was specifically aimed at repealing Bill 56-2016. According to that bill's purpose clauses, the County Executive's decision to not use TIF funds for the garage "raises numerous questions about the financial data presented to the Council . . . and significantly alters the potential public benefit to be realized through the proposed investment of public funds." County Executive Kittleman opposed Bill 74-2017 and included in the legislative record a "TIF Program Comparison" showing a plan to reallocate the TIF bonds originally intended to fund the garage to road construction and other public infrastructure. Bill 74-2017 failed in the County Council on October 2, 2017.

[5] In November 2018, Calvin Ball defeated Allan Kittleman for County Executive. Erin B. Logan, *Democrat Ball defeats incumbent Howard County executive Kittleman*, BALT. SUN (Nov. 7, 2018), https://www.baltimoresun.com/news/maryland/howard/ph-ho-cf-executive-race-1108-story.html.

> defendant's genuine change of heart rather than his desire to avoid liability." *Id.* at 1186. This may be shown by the factual circumstances, particularly the relationship between the cessation and pending litigation. *Id.* (collecting cases). Refusal to acknowledge misconduct tends to support a conclusion that the cessation was motivated by a desire to evade liability, leaving a "live dispute" between the parties. *Id.* at 1187.

457 Md. at 456-57.

In *Neiswanger*, the State sued an operator of four Maryland nursing facilities, alleging "a widespread pattern of unlawful involuntary discharges of residents" in violation of the Health General Article and requesting injunctive relief. *Id.* at 449. The trial court dismissed the case on the grounds that the Injunction Clause in the Patient's Bill of Rights was applicable only to the individual resident and that the enforcement provision of the statute did not "specify injunctive relief as a means of enforcement" by the State. *Id.* at 454. The operator argued that the case was moot because it no longer operated those facilities, and under a consent agreement entered into after the State's complaint was filed, it was required to "implement changes to its involuntary discharge practices." *Id.* at 453, 455-56. The *Neiswanger* Court concluded that it could address the case under either the voluntary cessation or public policy exceptions to the general mootness doctrine. *Id.* at 457-58. Because the State alleged "deliberated, unlawful conduct over a prolonged period of time in multiple [] facilities" and "Neiswanger entered into the [c]onsent [a]greement only after the State sued," *id.* at 457, "Neiswanger ha[d] not demonstrated that its allegedly wrongful behavior 'could not reasonably be expected to recur.'" *Id.* at 458. In addition, the central issue in the case—"[d]etermining the nature of the relief available and the extent of the Attorney General's enforcement

powers"—was a "matter of significant public policy" and involved "time-sensitive issues," as residents could be involuntarily discharged without adequate notice or opportunity for a hearing. *Id.* at 458. Therefore, the Court, by addressing the issue, "will avoid duplicative and inconsistent litigation results." *Id.*

In *Carroll County Ethics Comm'n v. Lennon*, 119 Md. App. 49, 52-53 (1998), the Carroll County Ethics Commission found that an attorney had violated the Ethics Ordinance by representing clients who had business before the County Planning Commission, of which he was a member. After he requested declaratory relief from the circuit court and it granted summary judgment in his favor, the attorney resigned from the Planning Commission. The Ethics Commission appealed to this Court, and we decided that the case was not moot because the controversy "as to whether Lennon's activities fall within the ambit of the [] Ethics Ordinance is very much alive" as the circuit court had made a finding that he did not violate the Ethics Ordinance. *Id.* at 59. We felt compelled to "decide the issue on the merits because it involves matters of public importance that are likely to recur if not decided now." *Id.* at 60 (quoting *Anne Arundel County Professional Firefighters Association v. Anne Arundel County*, 114 Md. App. 446, 455 (1997)). That public importance concerned "the public's confidence in government officials" and the Ethics Commission's "essential public function" of "ferreting out alleged ethical violations." *Id.* at 61. Moreover, an attorney's "voluntary cessation" could foreclose appellate review "in cases like this as long as the putative violator resigns

from his position or even simply promises to refrain from the challenged conduct." *Id.* at 61.

In *Stevenson v. Lanham*, 127 Md. App. 597, 601 (1999), a prisoner on a life-threatening "hunger strike" challenged, on constitutional grounds, the circuit court's declaratory judgment that the State "may in the future use medically reasonable force to administer sustenance and medical care to him over his objection if necessary to prevent physical harm or death." By the time the declaratory judgment was issued, the prisoner "changed the nature of his hunger strike . . . carrying on the limited kind of 'hunger strike' in which he had engaged for three years . . . without any adverse effect on his health." *Id.* at 621. We held that the action "became moot when [the prisoner] resumed a 'hunger strike' that does not threaten his health." *Id.* at 626. We explained that "[t]he case turns on highly particularized facts that [were] unlikely to recur, and [did] not implicate a matter of great public concern," and "there is no evidence that appellant [would] resume the type of life threatening hunger strike that he had undertaken for many months before his health crisis." *Id.* at 626.

In this case, the Developers' amended complaint refers only to "the use of TIF funding for the construction of the garage," and not to other developments in the Crescent District. It sought a declaration that the garage at issue violates the Maryland Constitution and the TIF Act. The Developers' claims rest primarily on an "improper competitive advantage the County has given only to HHC" and the burden that the operation and maintenance of such a facility for 50 years would place on taxpayers.

Unlike in *Neiswanger*, there is no "deliberated, unlawful conduct over a prolonged period of time." *See* 457 Md. at 457. And, unlike in *Lennon*, the circuit court dismissed the amended complaint, and neither it nor an administrative body made a finding on the merits of the alleged violations. *See* 119 Md. App. at 59. Here, we are persuaded that the alleged unlawful behavior cannot "reasonably be expected to recur." *See Neiswanger*, 457 Md. at 456.

As in *Stevenson*, this case "turns on highly particularized facts that are unlikely to recur." *See* 127 Md. App. at 626. It is undisputed that by August 2017, the then-County Executive had changed his mind. We do not know whether it was a genuine change of heart or a practical decision made in light of this pending litigation. But, according to his affidavit dated May 29, 2018, the County Executive had "made the final decision that none of the TIF bonds would be used to finance HHC's construction" of the garage because "[a]s of August 2017, the County and HHC had not been able to agree on certain aspects of the continuing operation and maintenance of the [garage]."[6]

[6] Howard County submitted documents, including affidavits, in appendixes to its Brief, Motion to Dismiss, and "Reply Brief of Cross-Appellant and Reply to Opposition to Motion to Dismiss." It requests that we take judicial notice of documents not in the record extract as official public documents, citing *Chesek v. Jones*, 406 Md. 446, 456 n.8 (2008).

Maryland Rule 8-501(e) provides, "If the record extract does not contain a part of the record that the appellee believes is material, the appellee may reproduce that part of the record as an appendix to the appellee's brief together with a statement of the reasons for the additional part." And, Maryland Rule 8-603(d) provides, "A motion to dismiss or response that is based on facts not contained in the record or papers on file in the appellate court shall be supported by affidavit and accompanied by any part of the record or papers on which it is based."

When the TIF bonds were publicly offered for sale in October 2017, they included a revised budget that included appropriations for road and other improvements in the Crescent District, but not for the building of the garage. And, on October 19, 2017, the County entered into an agreement with HHC to construct a "quick-strike" emergency response station in or adjacent to the garage, which HHC would build. This agreement stated that the garage "shall be developed and financed by [HHC]" and "[HHC] shall own and maintain the [g]arage." According to the then-County Executive's May 29, 2018 affidavit, approximately $48 million of the TIF bonds have been sold, and of those approximately $38 million have been allocated to public infrastructure projects.

To be sure, Bill 56-2016 is still on the books. But, the bill provided the County Executive with discretion to determine what "specific improvements [are] to be financed, reimbursed or refinanced from proceeds of the [TIF] bonds" in the Crescent District, and that determination appears to have already been made and to be final: TIF funds will not be used to build the garage; the garage will be built, owned, and operated by a private entity; and the construction of the garage may have already begun.[7] In short, there is no live controversy. Because the garage is already being built without TIF funds and will be owned and operated by HHC, this controversy "could not reasonably be expected to

[7] Howard County included as an appendix to its "Reply Brief of Cross-Appellant and Reply to Opposition to Motion to Dismiss," received by this Court on September 28, 2018, an undated affidavit of Greg Fitchitt, HHC President of the Columbia, Maryland Region. Mr. Fitchitt stated that HHC "has received all necessary approvals to proceed with phase one" of the construction of the garage.

recur." *Neiswanger*, 457 Md. at 458. For these reasons, we hold that this case is moot and dismiss the appeal.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED; CASE REMANDED WITH DIRECTIONS TO ENTER ORDER DISMISSING ACTION AS MOOT; COSTS TO BE PAID BY APPELLANT.