UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1032

September Term, 2014

CHANEY ENTERPRISES LIMITED PARTNERSHIP, ET AL.

v.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL

---

*Zarnoch,
Kehoe,
Leahy,

JJ.

PER CURIAM

Filed: September 7, 2016

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a senior judge, specially assigned member of this Court.

**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.

PER CURIAM

In this case, appellants, representatives of the sand and gravel industry, challenged an area master plan amendment of appellee, Prince George's County District Council, restricting sand and gravel mining in a portion of the County. These restrictions were upheld by the Circuit Court for Prince George's County.

For the reasons stated in Parts I and II of the concurring and dissenting opinion of Zarnoch, J., the Court rejects the District Council's procedural and jurisdictional attack on appellants' petition for judicial review and concludes that the plan amendment is invalid because it was not submitted to the Planning Board for its comments as required by county law. Thus, we reverse a contrary conclusion of the circuit court and direct the court to remand for further action by the District Council. However, for reasons set forth in the opinion of Leahy, J. and joined by Kehoe, J., a majority of the Court concludes that the plan changes are not preempted by State law. Therefore, this part of the circuit court's decision is affirmed.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER ACTION CONSISTENT WITH PARTS I AND II OF THE CONCURRING AND DISSENTING OPINION OF ZARNOCH, J. JOINED BY LEAHY, J. AND KEHOE, J. COSTS TO BE DIVIDED BETWEEN THE PARTIES: TWO-THIRDS TO BE PAID BY APPELLEE AND ONE-THIRD TO BE PAID BY APPELLANTS.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1032

September Term, 2014

CHANEY ENTERPRISES LIMITED PARTNERSHIP, ET AL.

v.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL

---

*Zarnoch,
Kehoe,
Leahy,

JJ.

Concurring and Dissenting Opinion by Zarnoch, J., which Kehoe, J. and Leahy, J. Join as to Parts I and II.

Filed: September 7, 2016

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a senior judge, specially assigned member of this Court.

**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 is an appeal by Chaney Enterprises Limited Partnership ("Chaney"), Southstar Limited Partnership ("Southstar"), and the Maryland Transportation Builders and Materials Association ("MTBMA") (collectively, the "appellants"). They seek to overturn the rejection of their challenge to the Prince George's County District Council's approval of an area master plan amendment that restricted sand and gravel mining in a portion of Prince George's County and an accompanying Sectional Map Amendment ("SMA"). Appellants sought judicial review in the Circuit Court for Prince George's County, arguing that this amendment was adopted by an unlawful procedure and was preempted by or in conflict with the State's surface mining laws. For the following reasons, we agree that the challenged master plan amendments of the District Council were procedurally defective, because the Council did not seek comment by the County Planning Board prior to approving the changes.[1] In addition, a majority of the panel concludes that the Council's actions were not preempted by state law. Thus, we reverse and remand this case to the circuit court for the entry of an order remanding the matter to the District Council.

FACTS AND LEGAL PROCEEDINGS

"Subregion 5" is composed of approximately 74 square miles of land located in the southwestern portion of Prince George's County. Within this area, there are major sand and gravel deposits, covering over 38,000 acres. Due to the vast resources located

[1] Thus, all portions of this opinion except for Part III represent the opinion of the Court.

there, Subregion 5 is a major supplier of construction materials and highway fill for the Baltimore-Washington metropolitan area. Chaney, Southstar, and other members of MTBMA own and operate sand and gravel mining businesses within the Subregion 5 area. Prior to 2013, Prince George's County permitted sand and gravel mining in Subregion 5 in developing areas under a special exception process. This policy encouraged the extraction of sand and gravel if the extraction was balanced with regulating development and protection of the environment.

The special exception process is subject in part to the Subregion 5 Master Plan, which has undergone multiple revisions since its inception in 1993.[2] The goal of the 1993 Subregion 5 Master Plan was "[t]o provide for the efficient and sequential extraction of significant mineral deposits and the reclamation and development of the extraction areas, while minimizing the impacts on the environment." The plan encouraged "extraction prior to permanent development" and required that mining operations "should occur in a manner that provides a readily available supply of these basic construction materials and prevents preemption of extraction activities by development." A business could apply for a special exception for its extraction activities and the District Council would review such applications with the goal of minimizing the effect on the environment and preventing developers from encroaching on extraction activities.

[2] *See* Md. Code (2012), Land Use Article ("LU") § 25-209, which also concerns special exceptions for mining sand and gravel, and § 27-317 of the County Zoning Ordinance, which deals with special exceptions generally.

The 2002 Prince George's County Approved General Plan "adopted a new growth tier planning concept for land use and development planning in the [C]ounty, which divided the land into Developed, Developing and Rural growth tiers."[3] Most of Subregion 5 was placed in the Developing Tier, but a portion was placed in the Rural Tier, with the stated goal of protecting "large amounts of land for woodland, wildlife habitat, recreation and agricultural pursuits," and preserving "the rural character and vistas that now exist." The 2009 revisions to the Subregion 5 Master Plan (County Resolution ("CR") 61-2009) were designed to redraw the boundaries of the Rural Tier, and shifted certain property into the Developing Tier. However, the Preliminary Subregion 5 Master Plan continued to recognize the importance of sand and gravel resources in the economic development of the area but identified them as "a diminishing resource . . . because new development on top of sand and gravel reserves eliminates potential future extraction." MNCPPC, Preliminary Subregion 5 Master Plan and Proposed Sectional Map Amendment (Feb. 2009), at 160. In this regard, the plan set a goal of "capitaliz[ing] on the extraction of sand and gravel resources prior to the land being pre-empted by other land uses." *Id.*

[3] The Subregion 5 Master Plan and Proposed Sectional Map Amendment provided a definition for the two main tiers. The "Developing Tier comprises established neighborhoods and shopping areas, schools, libraries, employment areas, and a hospital center. It is where most of the Subregion 5 population will continue to reside and work." The "Rural Tier contains farm land and extensive forest as well as other environmental, scenic and historic resources. These are the last remaining largely-undeveloped areas that are not committed to a suburban development pattern."

On October 26, 2012, the Circuit Court for Prince George's County voided the adoption of CR-61-2009 because of a failure to satisfy the affidavit requirement of the Prince George's Ethics law, then codified at Md. Code (1984, 2009 Repl. Vol.), State Government Article ("SG") § 15-831.[4] The circuit court did not address any issue involving sand or gravel mining. This order required the District Council to "expediently review this matter and give great weight to certain properties that have received approval in other resolutions and actions of the Council based upon the 2009 resolution and Master Plan." On remand, on April 11, 2013, the District Council held joint a public hearing with the Planning Board. The testimony included statements by some community members who complained about the impact of mining in the Subregion 5 area.[5] Appellants did not appear or testify at this hearing. The Planning Board proposed some minor modifications with regard to the special exception process, but did not make any changes to the goals, policies, recommendations, or guidelines for sand and gravel from those contained in the 2009 Master Plan.[6]

[4] This mandate is now found in Md. Code (2014), General Provisions Article § 5-835(c).

[5] The citizens were "opposed to mining because of truck traffic, dust, pollution, [and] elimination of green spaces." Prince George's County Planning Department, Subregion 5 Master Plan and Sectional Map Amendment JOINT PUBLIC HEARING on April 11, 2013: Analysis of Testimony (June 28, 2013), at 29 ("Testimony Analysis").

[6] According to the "Staff Analysis" of the testimony of the surface mining opponents at the April 11th hearing, "Aggregate extraction is enforced by the state (Maryland Department of the Environment). Staff monitor conformance to the Special Exception conditions of approval, but aggregate mining and extraction is governed by the state. . . . The best recommendations mitigate the impact of mining through best

(Continued . . .)

On July 8, 2013, the Prince George's County Council sat as the District Council to consider more than a dozen individual zoning matters, as well as the Planning Board's proposals for the Subregion 5 Master Plan and Sectional Map Amendment. The proceedings regarding the individual cases were video recorded and the issues were described in detail in the Council's "Zoning Agenda" and "draft minutes." The Planning Board proposals were not.[7]

(. . . continued)
practices. Revisions of the plan text to draw attention to support and recommend best practices in regard to land reclamation during and after mining are recommended." Testimony Analysis, at 29.

[7] We take judicial notice of this information, which is found on the Council's website. *Zoning Agenda*, Prince George's County Council sitting as District Council, at 10 (July 8, 2013), *available at* https://princegeorgescountymd.legistar.com/View.ashx?M=A&ID=254764&GUID=F11DAFF4-0448-49A5-B3AC-076FB47B20AC (last accessed July 19, 2016); Zoning Minutes - Draft, Prince George's County Council sitting as District Council, at 10 (July 8, 2013), *available at* https://princegeorgescountymd.legistar.com/View.ashx?M=AO&ID=10838&GUID=e41f8b10-ebdf-4039-994a-58e58402cd24&N=RHJhZnQgTWludXRlcw%3d%3d (last accessed July 19, 2016). Judicial notice is particularly appropriate here because the record in this case contains no transcript of the July 8th work session on Subregion 5, no evidence of any notice of the Council meeting, and no indication that any witness testimony was taken or permitted. The agenda merely stated:

1:30 P.M. COMMITTEE OF THE WHOLE - (ROOM 2027)

ADOPTED SUBREGION 5 MASTER PLAN AND ENDORSED SECTION MAP AMENDMENT (SMA)

(DIGEST OF TESTIMONY)

ADOPTED SUBREGION 6 MASTER PLAN AND ENDORSED SECTION MAP AMENDMENT (SMA)

(Continued . . .)

Transmitted as the record of the District Council's July 8th proceeding is a 14-page document, labeled "District Council Work Session on the Analysis of Testimony and Adopted Subregion 5 Master Plan and Endorsed Sectional Map Amendment," which summarized (and illustrated) the Planning Board's findings and recommendations from 2009-2013. The only mention of issues related to this case was a statement that the Planning Board recommended that the Plan "[a]dd guidelines or best practices for mining operations."[8] This apparent hand-out at the work session (or possibly a power point) concluded with the "Next Step": "District Council decides to either hold a second public hearing on any new, proposed amendments, or directs staff to prepare the resolution to approve the plan and SMA." Also transmitted was a one-page sign-in sheet, listing representatives of three local law firms, one lobbying group, and an employee of the Maryland-National Capital Park and Planning Commission (accompanied by two

---

(. . . continued)

(DIGEST OF TESTIMONY)

ADJOURN

The agenda is inaccurate in one respect because, according to the video, adjournment occurred before the 1:30 P.M. work session.

According to appellants, "the District Council made [its] revisions behind closed doors, without public input or knowledge." The District Council argues: "In considering the Subregion 5 Master Plan, the District Council, gave notice of its July 8, 2013, public meeting, which included a public work session for the body's review [of] testimony collected through the April 11, 2013, joint public hearing record." As an appellate court, we are unable to resolve these disputed factual contentions.

[8] The document also described one of the "visions" of the plan: "Agriculture and mineral resources are a catalyst for economic activity."

interns). The document did not indicate whether it was a witness sign-up sheet or merely a reflection of those in attendance.

According to a later-adopted resolution, at the July 8, 2013 work session, the Council "review[ed] the adopted Subregion 5 Master Plan and, after discussion concerning the record of testimony and exhibits relevant to the . . . Plan and SMA, the Council directed Technical Staff to prepare a resolution of approval with revisions."

On July 24, 2013, the District Council approved CR-80-2013. According to the circuit court's opinion in this case, this resolution:

> [Changed] the goals and policies for sand and gravel mining from those "[capitalizing] on the extraction of sand and gravel resources" pre-development to ones critical of the need for and economic value of the industry because of the negative impact and nuisance it ha[d] on nearby properties. CR-80-2013 also prohibit[ed] mining activities in the Developing Tier, and restrict[ed] it to the Rural Tier. CR-80-2013 also altered the environmental strategies in the 2013 plan to require mining companies to achieve post-mining reclamation with a focus on reforestation and grassland consideration. The changes also removed the recommended guidelines for reviewing special exception applications contained in the 1993 plan and instead required applications to mitigate on and off-site transportation impacts from mining activities, as well as potentially limiting the hours and duration of mining activities to reduce nuisance to proximal communities.[9]

After the adoption of CR-80-2013, the Council approved another resolution (CR-81-2013), "The Subregion 5 Sectional Map Amendment." According to the title, this resolution adopted "detailed zoning proposals" in certain areas; and in its resolving clause, stated that it approved with revisions "Subregion 5 Sectional Map Amendment as

[9] The resolution also downgraded three roadways used to transport mined resources from "collector" to "local" roads.

endorsed on June 27, 2013," by the Planning Board.[10] On August 15, 2013, the Council published a notice indicating its approval of the plan and SMA. The notice stated that the SMA "is intended to implement the land use recommendations of the master plan for the foreseeable future."

On August 24, 2013, appellants filed a petition for judicial review in the circuit court. The petition stated:

---

[10] According to the Prince George's County Planning Department website, an SMA

> is a comprehensive rezoning amendment for properties within an entire geographic area, such as a subregion, planning area or part of a planning area. The purpose of an SMA is to revise zoning patterns to conform to recommendations of an area plan or sector plan. SMA's [are] adopted for most plans with the exception of the general plan and functional master plans.

What is a sectional map amendment (SMA)?, Prince George's County Planning Dep't, *available at* http://www.pgplanning.org/About-Planning/FAQs/Community_Planning/What_is_a_sectional_map_amendment__SMA__.htm (last accessed July 14, 2016).

The 2009 proposals of the Planning Board also described the purpose of an SMA:

> Comprehensive rezoning through the SMA is a necessary implementation step in the land use planning process. It attempts to ensure that future development will be in conformance with county land use plans and development policies, reflecting the county's ability to accommodate development in the immediate and foreseeable future.
>
> The approval of the zoning pattern proposed by the master plan and implemented by this SMA will bring zoning into greater conformity with county land use goals and policies as they apply to the Subregion 5 plan area, thereby enhancing the health, safety, and general welfare of the area residents.

MNCPPC, Preliminary Subregion 5 Master Plan and Proposed Sectional Map Amendment (Feb. 2009), at 169.

> [Petitioners] request judicial review of the adoption of Council Resolution No. 80-2013 ("CR-80-2013") by the Prince George's County Council, sitting as District Council for Prince George's County, Maryland (the "District Council"). Pursuant to Md. Code Ann., Land Use, §§ 21-105 and 21-216 and Prince George's County Zoning Code, §§ 27-638 through 27-648, the District Council's adoption of CR-80-2013 on July 24, 2013 constitutes a final decision to amend the 1993 Prince George's County Subregion V Master Plan and Sectional Map Amendment.

The filing also said:

> Petitioners seek judicial review of the final decision of the District Council pursuant to Md. Code Ann., Land Use, § 22-407 and Maryland Rule 7-502. Petitioners Chaney Enterprises and Southstar have standing to seek judicial review pursuant to Md. Code Ann., Land Use, § 22-407(a)(1) as "person[s] . . . in the county" with property interests affected by the District Council's final decision and/or as taxpayers of Prince George's County. Petitioner MTBMA has standing to seek judicial review pursuant to Md. Code Ann., Land Use, § 22-407(a)(1) because members of the Association are mining companies with property interests affected by the District Council's final decision and/or are taxpayers of Prince George's County.[11] Petitioners

---

[11] At the time appellants filed their action, LU § 22-407(a)(1) provided:

> Judicial review of any final decision of the district council, including an individual map amendment or a sectional map amendment, may be requested by:
>
> (i) any municipal corporation, governed special taxing district, or person in the county;
>
> (ii) a civic or homeowners association representing property owners affected by the final decision; or
>
> (iii) *if aggrieved*, the applicant.

(Emphasis added). After amendments in 2015, the provision now reads:

> Judicial review of any final decision of the district council, including an individual map amendment or a sectional map amendment, may be requested *by any person or entity that is aggrieved by the decision of the district council* and is:
>
> (i) a municipal corporation, governed special taxing district, or person in the county;

(Continued . . .)

> were not participants in the public hearing regarding CR-80-2013 which was held on April 11, 2013.

Appellants later argued that CR-80-2013 was invalid because it was adopted by unlawful procedure, was preempted by implication and by conflict with the State's surface mining law, exceeded the scope of the County's delegated authority, was arbitrary and capricious, and was unsupported by substantial evidence in the record. The Council filed a 29-page opposition to the Chaney petition, raising four procedural and jurisdictional issues. Specifically, the Council presented these questions:

> 1. Whether the Petition for Judicial Review should be dismissed for lack of standing because none of the Petitioners were parties, or attempted to be parties, to the proceedings below involving the adoption of the Master Plan?
> 2. Whether the Petition for Judicial Review should be dismissed because a Master Plan is not subject to a petition for judicial review?
> 3. Whether the Petition for Judicial Review should be dismissed for Petitioners' failure to exhaust administrative remedies available to them through the special exception process under §§ 27-296, 27-317 & 27-410 of the Prince George's County Code?
> 4. Whether the Petition for Judicial Review should be dismissed for failing to present a justiciable controversy, because Petitioners are asking the Court to speculate as to how the goals, policies, and strategies contained in the Master Plan *may* impact them *if* they apply for a special exception under §§ 27-296, 27-317 & 27-410 of the Prince George's County Code, which does not require strict conformance to the Master Plan?

(. . . continued)

> (ii) a civic or homeowners association representing property owners affected by the final decision;
> (iii) the owner of the property that is the subject of the decision; or
> (iv) the applicant.

(Emphasis added).

In a footnote in this opposition, the Council argued that the record was silent on the appellants' property ownership and the nature of their business and offered this as another reason for the court to reject the petition. This prompted the filing of an affidavit by appellees indicating property ownership in Prince George's County and the payment of taxes by Southstar and by a sand and gravel company that was a member of MTBMA.[12]

On June 26, 2014, the circuit court in an opinion and order upheld the decision of the District Council. The court questioned the appellants' ability to challenge the Council's action under LU § 22-407. It indicated that this statute authorized judicial review "only for sectional map amendments and zoning ordinances, and not for master plans." The court characterized the Council's change as "broad and policy based" and as not seeking "to alter the operations of any single parcel or several parcels of land"—in essence, planning not zoning.[13] Even if the changes constituted a zoning action, the circuit court said the appellants lacked standing because they did not participate in the proceedings of the Planning Board or Council and failed to exhaust their administrative remedies by filing applications for special exceptions. The court went on to hold that the

[12] On appeal, the Council has included some public record materials in their appendix to challenge the appellants' standing as property owners and taxpayers. In response, the appellants have moved to strike these documents. Because we have not relied on these materials, which were not considered below, we deny as moot appellants' motion to strike.

[13] The court also observed that "there are no allegations that the changes . . . were to the map or text of the Sectional Map Amendment."

Council was not legally obligated to hold another hearing on its changes because § 27-646 of the County Zoning Ordinance authorized the Council to make revisions on the basis of the record before the Planning Board. Turning to the preemption issue, the court said the surface mining changes were not preempted because state law—LU § 25-209—expressly governed special exceptions for sand and gravel mining in the County, and "the Council has 'wide latitude to regulate gravel and sand mining in the county for the general welfare, and may impose stricter regulations to limit the impact of mining on surrounding properties and roadways." Finally, the court concluded that the changes were not arbitrary or capricious, and were supported by substantial evidence, specifically the citizen testimony at the April 11, 2013 hearing "indicating concern about the traffic, noise, and environmental effects of local sand and gravel mining." This appeal followed.

QUESTIONS PRESENTED

Appellants present six questions for our review, which we have consolidated into the following four questions[14]:

[14] Appellants' original questions to this Court were:

1. Whether CR-80-2013 was adopted by unlawful procedure where the District Council made substantive changes to the Subregion 5 Master Plan, as adopted and transmitted by the Planning Board, without remanding the matter to the Planning Board and without providing the public with notice or an opportunity for meaningful public comment on the changes before adoption?

2. Whether the mining restrictions adopted by CR-80-2013 have been impliedly preempted by the state's comprehensive sand and gravel mining scheme?

(Continued . . .)

1. Was Appellants' petition for judicial review properly before the circuit court?

2. Did the District Council exceed its planning and zoning authority by adopting the master plan and sectional map amendments without additional comment by the Planning Board?

3. Were the Council's actions impliedly preempted by the State's comprehensive sand and gravel mining scheme?

4. Were the surface mining restrictions adopted by the Council supported by competent, material, and substantial evidence to constitute a lawful exercise of the District Council's power?

We answer the first two questions in the affirmative, and a majority of the panel answers no to question three. Because our remand will necessitate a new hearing by the Council, we need not reach the remaining question. Thus, we reverse the circuit court's decision.

(. . . continued)

3. Whether the mining restrictions adopted by CR-80-2013 have been preempted by conflict with the State's comprehensive sand and gravel mining scheme?

4. Whether the District Council exceeded its planning and zoning authority by adopting sand and gravel mining restrictions which effectuate a zoning change, whereby sand and gravel mining is effectively deemed a prohibited use within the Developing Tier areas of Subregion 5, through the master planning process?

5. Whether the mining restrictions adopted by CR-80-2013 constitute an unlawful, arbitrary, capricious and/or unsubstantiated exercise of power where there is no evidence in the record to support the District Council's "nuisance" classification, where the State's comprehensive regulatory scheme provides the necessary safeguards to prevent and avoid adverse impacts to the surrounding areas and environment, and where the State has expressly preempted the local police power in this regard?

6. Whether the "revisions" to the Subregion 5 Master Plan that were adopted by CR-80-2013 are arbitrary, capricious and/or unsupported by competent, material and substantial evidence in the record?

STANDARD OF REVIEW

In the typical administrative law/zoning case, our review is "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 administrative decision is premised upon an erroneous conclusion of law." *United Parcel Serv. v. People's Counsel,* 336 Md. 569, 577 (1994). However, the determinative issues in this case are all questions of law and are reviewed *de novo*. *See Perry v. Dep't of Health & Mental Hygiene*, 201 Md. App. 633, 638 (2011).

DISCUSSION

I. Jurisdictional and Procedural Issues

A. Jurisdiction under LU § 22-407(a)(1)

The Council has fired a volley of procedural and jurisdictional objections questioning appellants' right to file a petition for judicial review. Some of these hit the mark in the circuit court; others did not. The Council's most formidable contention is that appellants have only challenged a master plan amendment and such challenges, unlike zoning amendments, are not reviewable under LU § 22-407(a)(1).

At the time the petition for judicial review was filed, § 22-407(a)(1) provided:

> Judicial review of any final decision of the district council, including an individual map amendment or a sectional map amendment, may be requested by:
>
> > (i) any municipal corporation, governed special taxing district, or person in the county;
> > (ii) a civic or homeowners association representing property owners affected by the final decision; or
> > (iii) if aggrieved, the applicant.

Although located in the "Zoning" title of the Land Use Article and expressly including such zoning changes as map amendments, the text of the statute broadly authorizes judicial review of "any final decision" of the Council.[15]

However, the Council argues, and the circuit court agreed, that § 22-407(a)(1) incorporated a long line of Maryland cases that distinguish between planning and zoning, particularly with respect to judicial review. *See, e.g.*, *County Council of Prince George's County v. Zimmer Dev. Co.*, 444 Md. 490, 522 (2015) ("The advisory nature of plans makes direct judicial review of their adoption and approval infrequent, at best").[16] In response, the appellants contend that because the Council has final decision-making authority "over both master plan amendments and corresponding SMAs," the decision to adopt both is subject to judicial review under § 22-407(a)(1).[17]

An SMA is a legislative zoning action reviewable under § 22-407(a)(1). *See County Council for Prince George's County v. Carl M. Freeman Associates, Inc.*, 281 Md. 70, 75-76 (1977). Planning Board documents in the record describe an SMA as "a necessary implementation step in the land use planning process. It attempts to ensure that

---

[15] We reject the Council's contention that the appellants have not challenged a "final decision." It is hard to imagine what steps the Council could have taken to make its actions more final.

[16] Although the petition for judicial review is less than clear, a liberal reading of the filing, which mentioned the SMA and also invoked § 22-407, *see supra* pages 8-9, would seem to support the appellants' argument that they challenged both the master plan amendment and the SMA.

[17] There is no reported case where § 22-407(a)(1) has been found to apply to review of a master plan amendment.

future development will be in conformance with county land use plans and development policies. . . ." *See supra* n.10, at page 8; *see also* LU § 21-101(b) (describing the purposes of the Regional District Plan to "guide" and "coordinate"). But in classic zoning terms, this statute also sets forth as a purpose to "protect and promote the public health, safety, and welfare," and applies this section to "the protection of and the carrying out of the plan" § 21-101(a)(3); *see also* § 27-102(a)(3) of the Prince George's County Zoning Ordinance, which describes one of the purposes of the zoning ordinance: "[t]o implement the General Plan, Area Master Plans, and Functional Master Plans"; and § 27A-210(a) of the Zoning Ordinance (SMA "will shortly follow approval of a master plan or sector plan with the express purpose of implementing the land use recommendations of that plan"). As tempting as it is to adopt appellants' argument of a merger of planning and zoning via the SMA, we are constrained by the terms of the SMA and CR-81-2013, which do not appear to mention the surfacing mining changes.[18]

Another theory that might support appellants is that an *indirect* attack on the SMA and invalidation of the zoning changes will *directly* lead to the voiding of the plan. A similar contention was made in *State v. Burning Tree Club, Inc.*, 315 Md. 254 (1989). There, a tax-subsidized country club brought a taxpayer suit challenging the constitutionality of an unrelated exemption for other clubs with the goal of benefiting from the invalidation of the entire statute. The Court of Appeals held that a taxpayer has

[18] The parties have not directed us to any specific language of CR-81-2013 that deals with the surface mining restrictions of CR-80-2013. And we will not hazard a guess.

standing to attack the entire statute "when the allegedly unconstitutional portion does not, by itself, directly increase his tax burden." *Id.* at 292. Whether this taxpayer standing case has any applicability here is an issue we need not decide, because we believe appellants' zoning/planning attack is supported by other Maryland authorities that would justify review under LU § 22-407(a)(1).

There is a major exception to the restrictive judicial review of a master plan change that is alleged by a county to be a mere guide and recommendation. Such an exception exists where a statute provides otherwise, either by requiring conformance or compliance with the plan or by linking planning and zoning. In *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, the Court of Appeals said:

> We repeatedly have noted that plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statues or local ordinances linking planning and zoning. Where the latter exist, however, they serve to elevate the status of comprehensive plans to the level of true regulatory device. In those instances where such a statute or ordinance exists, its effect is usually that of requiring that zoning or other land use decisions be consistent with a plan's recommendations regarding land use and density or intensity.

372 Md. 514, 530-31 (2002) (Internal Citations and footnotes omitted); *see also HNS Dev., LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 457 (2012) ("[W]hen the development regulations incorporate Master Plan compliance[,] the Master Plan itself becomes a regulatory device, rather than a mere guide and recommendation"); *Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 100 (2009) ("In the context of subdivision matters, it is equally well established that the recommendations of a master plan may be binding to the extent there is a statute,

regulation, or ordinance requiring that a proposed subdivision conform to the master plan”).

In our view, this exception applies here, because a Prince George’s County ordinance ties the master plan changes to the statute for obtaining a special exception—a vital key to the exercise of surface mining rights.[19] Specifically, § 27-317(a)(3) of the Zoning Ordinance provides that a special exception may be approved if (among other findings) “[t]he proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan.”[20] Because CR-80-2013 prohibits mining activities in the Developing Tier, along with other major restrictions, it would be hard to imagine that a special exception for mining in this area could be granted without “substantially impair[ing] the integrity” of the plan. Thus, the planning changes have binding effect as regulation, not planning. Such actions are reviewable under LU § 22-407(a)(1).

B. Exhaustion of Administrative Remedies

The District Council argues, and the circuit court agreed, that appellants should have raised their legal objections to CR-80-2013 in a special exception proceeding. This

[19] Thus, we need not decide whether the statutory provisions, cited on pages 15-16, *supra*, would provide the necessary linkage between planning and zoning so as to permit judicial review.

[20] In the case of surface mining special exceptions, § 27-317 would appear to supplement the provisions of LU § 25-209. *See* n.2, *supra*.

contention would not defeat the petition of MTBMA, because the association is expressly authorized to seek judicial review under LU § 22-407 and obviously has no need to apply for a special exception to engage in mining activities. But as to the other parties, we believe that immediate review is authorized under § 22-407(a)(1) regardless of whether appellants sought a special exception for mining activities. This question was touched upon in *Evans v. County Council of Prince George's Sitting as Dist. Council*, 185 Md. App. 251 (2009). There, this Court upheld the dismissal of an action for declaratory and injunctive relief challenging a zoning text amendment, because the appellants could have raised their objections in a special exception proceeding.

However, we pointedly noted that the challengers had not filed an action under the predecessor statute to § 22-407, which we repeatedly characterized in *dicta*, as authorizing "immediate judicial review," *Evans*, 185 Md. App. at 261, 263-65. In light of *Evans*, it is no great leap for this Court to conclude that § 22-407 authorizes immediate judicial review for the appellants here without first requiring them to resort to a special exception proceeding. Another factor cutting against superimposition of an exhaustion requirement on this remedy is the 30-day deadline within which a challenger must file a petition. § 22-407(a)(2). Clearly, no one could begin to seek a special exception and still meet this filing deadline.[21]

[21] Our conclusion that appellants did not have to seek a special exception before seeking judicial review under § 22-407(a) necessarily disposes of the Council's argument that this case is non-justiciable because it asks us to speculate about what would have happened if appellants had sought a special exception.

C. Standing

The District Council also questions appellants' standing to bring this action, focusing primarily on their failure to participate in the proceedings before the Planning Board and the Council. *See County Council of Prince George's County v. Billings*, 420 Md. 84, 97 (2011). Appellants respond that such a standing requirement applies only when a litigant seeks review of an agency adjudicative decision, not a legislative determination, which is how they have characterized the Council's planning/zoning action. A quasi-judicial action is certainly the typical setting where such a standing argument is applicable.[22] However, we need not resolve this standing question on this ground.

Appellants also argue that they "never had an opportunity to raise the issues presented in this appeal at the agency level." For the most part, this is true. They could have testified before the Planning Board, but they were not aggrieved by any action taken by the that Board. If anything, the Board seemed to defer to state regulation of surface mining in rejecting calls for tougher local control. *See* n.6, *supra*, and accompanying text. The Board's minor changes to the plan governing sand and gravel appear to be consistent with the October 2012 remand order to "give great weight to certain properties that have received approval in other resolutions."

[22] The Council made no findings, which are the hallmark of a quasi-judicial proceeding.

Appellants also could have attended the July 8, 2013 work session of the District Council, although nothing in the record gave any notice of the far-reaching changes the Council would approve. And the record is silent on whether they would have been allowed to testify at the work session.[23] Significantly, the handout at the session indicated that if there were proposed amendments, the District Council would hold a *second* public hearing. *See* page 6, *supra*. For these reasons, we conclude that under these circumstances, standing rules did not require appellants to attend or participate in the proceedings before the Planning Board or District Council.

The Council seeks to raise an additional standing argument, contending that certain appellants did not meet the taxpayer and property ownership requirements. These requirements apply only to a "person" suing under LU § 22-407(a). *Gosain v. County Council of Prince George's County*, 420 Md. 197, 205, 210 (2011). Unlike the other appellants, MTBMA is seeking judicial review under § 22-407(a)(1)(ii) as "a civic or homeowner association representing property owners affected by the final decisions."[24] In the circuit court, the Council only suggested that the appellants had not demonstrated the standing prerequisites. Appellants responded to this argument via an affidavit that was unchallenged by the Council. Here the Council seeks to generate a factual dispute

[23] As we noted earlier, no transcript of the work session exists.

[24] At the time the petition for judicial review was filed, such associations did not have to be aggrieved. A 2015 amendment to LU § 22-407(a) added this requirement. *See* n.11, *supra*. A predecessor association, Maryland Aggregates Association, Inc., has been described by the Court of Appeals as "an organization that represents the interests of the surface mining industry." *Maryland Aggregates Ass'n, Inc. v. State*, 337 Md. 658, 665 (1995).

regarding the appellants' tax and property qualifications. In our view, this issue is simply not preserved.

For all of these reasons, we reject the Council's standing contentions. We now turn to the merits of the case.

II. Remand to the Planning Board

Appellants argue that after the District Council amended the master plan to restrict sand and gravel activities, it should have remanded the issue to the Planning Board. We agree.

Appellants argue that the Council made substantive revisions to the plan without additional notice and public hearing and without a remand to the Planning Board. The Council rejects this contention, relying on a provision in the County Zoning Ordinance, specifically § 27-646(a)(2), which provides:

> If the District Council considers amendments to the adopted plan that *are not based* on the record or that constitute amendments as stated in Section 27-226(c), then at least one (1) additional joint public hearing shall be held with the Planning Board on the amendments. Amendments proposed only to retain the existing zoning of property may be approved by the Council without holding an additional public hearing.[25]

(Emphasis added). It asserts that critical comments about the sand and gravel industry in the record before the Planning Board justified the Council's unilateral changes. Appellants dispute this characterization of the record and argue that § 27-646(a)(2) is

[25] The handout at the July 8, 2013 Council meeting—which was obviously prepared by the Planning Board—did not reflect the subtleties of § 27-646(a)(2). It simply stated that the Council would hold "a second public hearing on any new, proposed amendments."

inconsistent with various provisions of state law.[26] Although the circuit court reached this contention, we need not decide all of these issues, because § 27-646(a)(3) of the Zoning Ordinance provides that "[a]ll proposed amendments shall be referred to the Planning Board for its written comments, which shall be submitted to the Council prior to its action on the amendments."

In our view, there is simply no indication in the record that the Planning Board was given the opportunity to consider the July 8, 2013 amendments. For this reason, under § 27-646(a)(3) of the Zoning Ordinance, the Council's sand and gravel changes to the plan could not be given effect without a remand to the Planning Board for its comments. We are mindful of LU § 21-104(b)(4), which provides that a plan amendment "may not be deemed void, inapplicable, or inoperative on the ground that the basis, content, or consideration of the plan or amendment is inconsistent with this division." This provision is not in play here because we hold the Council's actions invalid for its failure to follow its own ordinance. Thus, the circuit court decision on this point is reversed, and the case is remanded to the circuit court for further remand to the District Council and to the Planning Board for its comments on the changes to the plan. This will necessarily require a new hearing before the Council, where appellants can register their objections to any plan changes, should the Council insist on their retention.

---

[26] Appellants have not argued that the adoption of changes to the SMA were inconsistent with state law. *See* LU § 20-202(b) (A county planning board has exclusive jurisdiction over the preparation and adoption of recommendations to the district council with respect to zoning map amendments); *see also* LU § 22-208(b) (Local provisions governing zoning map amendments may not conflict with state law).

III. State Law Preemption

The circuit court rejected appellants' preemption challenge because of the Council's traditional land use authority to regulate "for the general welfare" and its specific power under LU § 25-209. That statute provides:

> (a) The [Maryland-National Capital Park and Planning Commission] shall prepare a report in accordance with this section before a zoning hearing examiner or the district council may conduct a hearing on a request for a special exception to mine sand or gravel.
> (b) The report shall comprehensively evaluate the request by analyzing the impact of the proposed mining activities on the surrounding area, considering only:
>> (1) noise;
>> (2) watershed and water quality;
>> (3) airshed and air quality;
>> (4) traffic and traffic safety; and
>> (5) other environmental factors relating to the health, safety, and welfare of the residents in the affected area.
>
> (c) In addition to the initial filing fee, the applicant shall pay a fee not to exceed $8,000 for the services of the Commission to prepare the report.

The court did not cite or distinguish *East Star, LLC v. County Com'rs of Queen Anne's County*, 203 Md. App. 477 (2012). In *East Star*, this Court held that a local zoning ordinance that prohibited major extraction operations from exceeding 20 acres, other than by expansion in 20-acre increments, was preempted by the State's surface mining laws, Md. Code (1982, 2014 Repl. Vol.), Environment Art. ("Env.") § 15-801, *et seq*. The Court characterized this statute as "a very elaborate scheme regulating virtually all aspects of surface mining in Maryland." 203 Md. App. at 489.[27]

[27] The opinion set forth in detail the licensing, permit, and reclamation requirements of the statute and Department of Environment regulations. *Id.* at 490-91.

The *East Star* opinion went on to note:

> The articulated purpose of the statute is to balance the "important contribution" of the "extraction of minerals . . . to the economic well-being of the state and the nation" against "potential health, safety, and environmental effects." § 15-802(a)(1). Pursuant to § 15-803(a)-(b), MDE "may adopt regulations as are reasonably necessary" to effectuate the legislative intent, and, "in adopting [those] regulations . . . [,] shall recognize the basic and essential resource utilization aspect of the surface mining industry and the importance of the industry to the economic well-being of the State."

Id. at 489-90.[28] This Court concluded that the Queen Anne's zoning ordinance was not salvaged by 1) a specific provision in the surface mining law that required the Department of Environment to process state applications concurrently with any local or county land use and zoning reviews, or 2) traditional local authority over zoning and land use matters. *Id.* at 492. Preemption was still warranted because the state law was "extensive, specific, and all-encompassing." *Id.*; *see also Talbot County v. Skipper*, 329 Md. 481, 489 (1993); *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469, 503 (2002).Based on *East Star*, I believe that the planning/regulatory changes with respect to sand and gravel extraction are inconsistent with the express terms of the Surface Mining Act. The July 2013 amendments tilted the "balance" contemplated by state law and the views of the Planning Board. Although state law directed the protection

---

[28] A similar note is found in Env. § 15-802(a)(2), which states:

> All reasonable steps should be taken:
>
> > (i) To protect these resources from encroachment by other land uses that would make these resources unavailable for future use; and
> > (ii) To balance this activity against other possible land uses, including consideration of uses for surrounding properties[.]

of sand and gravel resources from "encroachment by other land uses that would make these resources unavailable for future use," banning mining activities in the Developing Tier clearly has that effect.[29] In short, once property is developed, mining resources are "unavailable for future use." *See* n.28, *supra*. Deleted from the plan is language similar to that found in state law that mineral resources should not be preempted by other uses. Disregarding the State's declaration that such mining was important to the "economic wellbeing of the state," the resolution now requires the industry to prove it to the County. Now instead of being economically beneficial, mining is viewed as a "nuisance."

Finally, in the face of this all-encompassing state regulatory scheme, traditional zoning authority creates no safe harbor. Neither would LU § 25-209. Viewed realistically, this statute merely establishes a Planning Board reporting requirement. Its articulation of the special exception factors seems only a greater specification of those considerations already examined under § 27-317(a) of the Zoning Ordinance. This statute cannot support the weight of the substantial changes made by the Council to the sand and gravel provisions and is not a reason to reject appellants' preemption challenge.

In my opinion, the sand and gravel provisions of CR-80-2013 are preempted by and in conflict with state law and are, for that reason, invalid. I would reverse the decision of the circuit court on this ground. Thus, I respectfully dissent.

[29] *Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1 (2010), found no state preemption in a local acreage limit on rubble landfill. There, the limitation was not "a categorical ban." *Id.* at 44.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1032

September Term, 2014

CHANEY ENTERPRISES LIMITED PARTNERSHIP, ET AL.

v.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL

---

*Zarnoch
Kehoe,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: September 7, 2016

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a senior judge, specially assigned member of this Court.

**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.

Leahy, J., joined by Kehoe, J.

We are in accord with the well-reasoned concurring and dissenting opinion's pronouncement that the master plan amendments transgress the express intent of the Surface Mining Act to protect surface mining activities.[1] We understand that the loss of mineral resource-bearing land to development is a serious concern that transcends local boundaries. We cannot, however, go so far as to hold that the Prince George's County Council's exercise of power to amend the master plan to prohibit or restrict surface mining operations in a certain area was preempted by the Act.

The authority of Prince George's and Montgomery Counties over zoning and planning is found in the Regional District Act, which is currently codified in Division II of Land Use Article of the Maryland Code. The Regional District Act "is the essential source of the delegation by the State of zoning authority to Prince George's County[.]" *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Corp.*, 444 Md. 490, 524 (2015); *see also Northampton v. Prince George's County*, 273 Md. 93, 97-98 (1974) (stating that the proper procedure for zoning in Prince George's County was contained in the Regional District Act).

As the Court of Appeals outlined in great detail in *Zimmer*, the history of the Regional District Act stretches back to 1927, when it was enacted by Chapter 448 of the

[1] Maryland Code (1982, 2014 Repl. Vol.), Environment Article ("Env't"), § 15-802(2)(a) ("[t]o protect these resources from encroachment by other land uses that would make these resources unavailable for future use[.]") and (b) ("[t]o balance [surface mining activity] against other possible land uses, including consideration of uses for surrounding properties[.]").

Laws of Maryland of 1927. *Id.* at 523 n.29. In 1959, the same year that the General Assembly amended the Express Powers Act to include zoning and planning,[2] the General Assembly created the county planning boards of Prince George's and Montgomery Counties and delegated primary zoning authority to the local legislative bodies of Prince George's and Montgomery Counties. *See* 1959 Md. Laws, ch. 780 (H.B. 332); *see also Zimmer*, 444 Md. at 524 n.29. The 1959 enactment gave the local legislative bodies of the two counties (within the Regional District within their respective counties) the power to regulate, *inter alia*, "the uses of land for trade, industry, residence, recreation, agriculture, forestry, or other purposes[,]" and the power to make zoning plans, as well as to "from time to time amend its regulations . . ., including the maps . . ." 1959 Md. Laws, ch. 780 (H.B. 332).

Specifically, the current iteration of the Regional District Act, Section 22-104 of the Land Use Article, gives the Prince George's County Council sitting as the District

[2] The Home Rule Amendment of the Maryland Constitution, ratified in 1914, mandates that "[t]he General Assembly shall by public general law provide a grant of ***express powers*** for such County or Counties as may thereafter form a charter under the provisions of this Article. . . ." Md. Const. Art. XI-A § 2 (emphasis added). Section 4 of Article 11-A prohibits the General Assembly from enacting public local laws on any subject covered by that public general law, which became the Express Powers Act.. *See* Md. Const. Art. XI-A § 4 ("[N]o public local law shall be enacted by the General Assembly for said . . . County on any subject covered by the express powers granted as above provided."). In 1959, the General Assembly added planning and zoning as one of the powers expressly delegated to charter counties under the Express Powers Act. *See* 1959 Md. Laws, ch. 614 (H.B. 35). The Express Powers Act is currently codified as Section 10-101 *et seq.* of the Local Government Article.

Council[3] ("Council") the authority "to adopt and amend the text of the zoning law" and "adopt and amend any map accompanying the text of the zoning law" for the county. Section 22-104(b)(6) of the Land Use Article authorizes the Prince George's County Council to adopt and amend zoning laws that "regulate . . . the uses of land, including surface, subsurface, and air rights for the land, . . ." Notably, Section 22-104(c) names only two sections of the Land Use Article that limit this exercise of authority by the Council—§ 17-402 (governing the Glenn Dale Hospital Property) and § 25-211 (zoning classification of Beltsville Agricultural Research Center). There is no express limitation relating to sand and gravel mining, nor is there any qualification regarding Section 25-209 of the Land Use Article—the provision upon which the circuit court in this case relied in for its determination that CR-80-2013 was not preempted by state law.4

Turning to the State Surface Mining Act, we read it to preempt the local permitting and regulatory authority over surface mining operations, but not to preempt the local planning and zoning authority. In an analogous case, *Md. Reclamation Assocs. v. Harford County*, the Court of Appeals rejected MRA's argument that because Section 9-210 of the Environment Article gave the State government authority to issue permits

[3] The Prince George's County Council sits as the district council when it adopts and amends the text of the zoning law or the map. *Zimmer*, 444 Md. at 526; Maryland Code (2012), Land Use Article ("LU"), §§ 14-101(f), 22-101, 22-104.

[4] LU § 25-209 sets out the requirement of and content for the special report that the Planning Board must prepare and present to the Council upon a request for a special exception to mine sand and gravel.

for rubble landfills, Harford County was preempted from applying an amendment to its zoning ordinance that rendered MRA's property ineligible for use as a rubble landfill. 414 Md. 1, 38-40 (2010). In *Md. Reclamation*, the Court pointed to another section of the same statute that provided "'the [MDE] Secretary may not issue a permit to install' a waste disposal system unless that system '[m]eets all applicable county zoning and land use requirements . . . .'" *Id.* at 40 (alterations in *Md. Reclamation)* (citing Env't § 9-210(a)(3)(i)). Construing this provision together with Section 9-204(d), the Court concluded that

> these provisions indicate a clear intent on the part of the General Assembly to locate environmental permitting with MDE, and zoning with local government. There is no reasonable way to construe these provisions of the Maryland Code as doing anything other than complementing local government's role in planning and zoning. If we held otherwise, we would be reading an overbroad preemptive intent into an otherwise clear statutory scheme.

Id.

Similarly, Title 15 of the Environment Article governing surface mining operations contains two express references to the local zoning requirements that unequivocally demonstrate the General Assembly's intent that local governments maintain their zoning authority separate from the state's permitting process. Section 15-810(a) states that "[t]he Department shall process the permit application concurrently with any local or county land use and zoning reviews[,]" and Section 15-810(c)(2) states that "[t]he Department may not issue the permit until the appropriate county has: . . . (2) Provided the Department with a written statement that states that the proposed land use

conforms with all applicable county zoning and land use requirements." Although, as noted above, the statute contains the express intention that surface mining activities are to be protected against encroachment by other land uses, Env't § 15-802(2)(a), this intention must be balanced against "consideration of uses for surrounding properties," Env't § 15-802(2)(b), and this, in my view, is a consideration left for the local zoning authority rather than a department within the state government. Here, as in *Md. Reclamation*, "there is no reasonable way to construe these provisions of the Maryland Code as doing anything other than complementing local government's role in planning and zoning." *Md. Reclamation*, 414 Md. at 40.[5]

CR-80-2013 would have amended the Master Plan for a particular area—Subregion 5—to prohibit surface mining within the Developing Tier, which, as the per

[5] The dissent relies on *East Star, LLC v. County Commissioners of Queen Anne's County*, 203 Md. App. 477 (2012), in which this Court held that a local zoning ordinance was preempted by the Surface Mining Act. The ordinance in that case, however, "restrict[ed] the maximum disturbance area, limit[ed] the length of time of a surface mining operation, and require[d] that the previously disturbed area be reclaimed before any expansion of mining acreage." *Id*. at 492. This Court determined the county "acted beyond its zoning powers" because "the restrictions . . . are, for the most part, not traditional areas of regulation controlled by local government" and the Surface Mining Act "manifest[ed] the general legislative purpose to create an all-encompassing scheme governing areas Queen Anne's County [sought] to control," *id*. at 493, "particularly the severe reclamation requirements" *id.* In the present case, the Council amended the Master Plan to address concerns of truck traffic, environmental pollution, diminishing green space, and other concerns raised by members of the community. As the Court observed in *Md. Reclamation*, these are "classic zoning considerations: the impact of the use on neighboring properties due to emissions from the site, increase in noise, increase in traffic, danger to children, impairment of landscape and visual concerns, etc." 414 Md. at 40.

curiam points out, "comprises established neighborhoods and shopping areas, schools, libraries, employment areas, and a hospital center. It is where most of the Subregion 5 population will continue to reside and work." Per Curiam. Op. at 3 n.3. The Resolution did not prohibit surface mining in the Rural Tier in Subregion 5, nor could it expel the surface mining operations that already exist in the Subregion 5 Developing Tier.[6] It may be that CR-80-2013 had other legal defects,[7] and if so, perhaps those defects would have been addressed had the proper procedures been followed. As the per curiam opinion explains, prior to adopting any amendments to the master plan, the matter should have been referred to the Planning Board for review and comment pursuant to the Prince George's County Zoning Code, § 27-646(a)(3), and, there would have been additional public hearings at which, for example, the appellants could have appeared and testified.

---

[6] Once a property owner has obtained a lawful building permit and completed substantial construction, the owner has established vested rights which cannot be taken away by amendment of the zoning regulations. *Prince George's Cnty. v. Equitable Trust Co.*, 44 Md. App. 272, 279, (1979). Any consequent nonconforming use is protected. *See Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 653 (2015) (citing *Trip Associates, Inc. v. Mayor & City Council of Baltimore,* 392 Md. 563, 573 (2006) ("[a] valid and lawful nonconforming use is established if a property owner can demonstrate that, before and at the time of the adoption of a new zoning ordinance, the property was being used in a then-lawful manner for a use that, by later legislation, became non-permitted.")).

[7] We do not reach—and neither does the dissent— whether any distinct parts of the Resolution may conflict with the Surface Mining Act. For example, we do not address whether the provision that would have required surface mining operators to mitigate certain on-site transportation impacts as part of the special exception application process would have conflicted with the Surface Mining Act.

The dissent would hold that the County is preempted, and thus prohibited, from amending the Master Plan to "ban[] mining activities in the Developing Tier" in Subregion 5, and amending the stated "view" of surface mining activity from being important to the economic wellbeing of the state, to a view that surface mining is essentially a nuisance. But in our view, it cannot be that the Council—and by extension, the citizens of Prince George's County—are powerless to restrict surface mining in those areas of the County where surface mining is no longer a safe and viable activity. Therefore, we do not declare CR-80-2013 *ultra vires* because it was preempted by State law, but rather, we attribute its demise to the fact that it was adopted by an unlawful procedure.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1032

September Term, 2014

CHANEY ENTERPRISES LIMITED PARTNERSHIP, ET AL.

v.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL

---

*Zarnoch
Kehoe,
Leahy,

JJ.

Concurring Opinion by Kehoe, J.

Filed:

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a senior judge, specially assigned member of this Court.

**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.

The issue that divides this panel is whether the 2013 amendments to the Prince George's County Subregion 5 Master Plan impermissibly conflict with the provisions of the Surface Mining Act.

I agree with Judge Leahy that the provisions of the Surface Mining Acting Act does not render "the [District] Council—and by extension, the citizens of Prince George's County— . . . powerless to restrict surface mining in those areas of the County where surface mining is no longer a safe and viable activity." I am writing separately because I believe that this conclusion may not be the end of the analysis.

In the context of conflict preemption, prohibiting a sand and gravel mining operation in the midst of a settled residential area or next to a school or a hospital is one thing. Prohibiting sand and gravel operations in broad swathes of a county because those areas will likely be developed in the future, may be quite another, especially in light of the General Assembly's express declarations of public policy contained in § 15-802 of the Environment Article.

The District Council's amendments to the Subregion 5 Master Plan prohibit new sand and gravel operations in the Developing Tier and add additional restrictions to such operations in the Rural Tier. This is problematic, especially when viewed in the context of the extremely sparse record supporting the relevant amendments. However, it is conceivable that there might be facts to support such a policy and it is preferable, in my view, for us to give the District Council an opportunity to address the issue after providing the public notice and the opportunity to be heard that the Prince George's County Code requires.