Circuit Court for Prince George's County
Case No. CAE14-24783

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 37

September Term, 2016

LESLIE FLETCHER, et al.

v.

PRINCE GEORGE'S COUNTY, et al.

Meredith,
Graeff,
Leahy,

JJ.

Opinion by Graeff, J.

Filed: August 3, 2017

This appeal involves unhappy lot owners in a subdivision where a road and other infrastructure improvements to service the lots were not completed. Appellants, lot owners Leslie Fletcher and North Keys, LLC, filed a complaint in the Circuit Court for Prince George's County against appellees, Prince George's County (the "County") and three of its officials ("individual appellees").[1] The complaint included two counts: (1) declaratory judgment, asserting that, due to appellees' missteps, the County was obligated to complete the work at its own expense; and (2) negligence, requesting damages of $500,000, which reflected the cost to complete the work and the carrying cost of the lots. The circuit court ultimately granted appellees' motion to dismiss, finding that appellants lacked standing to seek declaratory relief, that the county was immune to appellant's negligence claim pursuant to the Local Government Tort Claims Act (LGTCA), and the individual appellees did not owe a duty to appellants.

On appeal, appellants present the following two questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in concluding that appellants do not have standing to seek declaratory relief to determine if appellees have a legal obligation to complete the scope of the bonded work in the Pinnacle subdivision?

2. Did the circuit court err in determining that no statutory relationship or duty of care arose between appellants and the individual appellees

[1] In addition to Prince George's County, appellants named as defendants in their complaint the following individuals: Darrell Mobley, Director of the Prince George's County Department of Public Works and Transportation, Dr. Haithum A. Hijazi, Director of the Prince George's County Department of Permitting, Inspections and Enforcement, and M. Andree Green, Esq., County Attorney for Prince George's County, beginning in July 2011 and continuing through the time the complaint was filed in 2014.

pertaining to the release and settlement of bond obligations posted in connection with a road permit issued to a previous developer?

For the reasons set forth below, we answer the first question in the affirmative and the second question in the negative, and therefore, we shall affirm, in part, and reverse, in part, the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In the circuit court's Memorandum Opinion, the court provided a summary of the background facts of this case, which we have reproduced here, as follows:

> The matter in dispute concerns a subdivided parcel of land known as Pinnacle Subdivision ("Subdivision"). The Subdivision was divided into ten lots and was previously owned by Pinnacle, LLC ("Pinnacle"). On October 6, 2005, Plaintiff Fletcher purchased Lot 5 from Pinnacle. On June 13, 2007, Pinnacle recorded the original subdivision plans, obtained a building permit, and submitted a performance bond.[2] On October 29, 2010, Pinnacle transferred the remaining lots through a deed in lieu of foreclosure to K Bank. Subsequently, on February 17, 2012, Plaintiff North Keys purchased Lots 2, 3, 4, 6, 7, 8, and 10 from K Bank.[3] Since ownership, Plaintiffs have been paying property taxes for their respective lots.
>
> Subsequently, Pinnacle's permits expired and Pinnacle did not apply for an extension of the permits. On July 9, 2012, Defendant County submitted a claim against the performance bond posted by Pinnacle. In January 2013, Defendant County and the surety company negotiated a settlement for Defendant County's claim against the bond. The settlement

[2] The parties disagree on the date the subdivision was recorded. Appellees cite the affidavit of Department of Permitting, Inspections & Enforcement ("DPIE") employee Dawit A. Abraham in support of the circuit court's finding that Pinnacle subdivided the parcel and recorded the original subdivision plans "on or about June 13, 2007." Appellants contend in their reply brief that this is incorrect, stating that the subdivision was "recorded *before* Mr. [Fletcher] purchased his lot in 2005." Resolution of this dispute is not critical to our decision in this appeal.

[3] "Lots 1 and 9 are owned by individuals who are not parties to this suit. Artery Homes, LLC built a house on Lot 9 under Pinnacle's permit. The remaining lots are undeveloped."

> amount of $170,331.00 is equal to the pro-rata share of three (3) of the ten (10) lots that were purchased by Plaintiff Fletcher and two other individuals who are not parties to this case. Prior to Plaintiff North Keys' purchase of their lots, Defendant County informed Plaintiff North Keys that it would have to obtain[] its own building permits and grading permits, build the required public roadway, and post their own performance bond. After Defendant County settled with the surety company on its claim against Pinnacle's performance bond, Defendant County informed Plaintiff North Keys that: 1) it could either complete all the public improvements under the permit requirements and receive the pro-rata share of the previous bond or 2) the County would complete the improvements on North Keys Road[] and Plaintiff North Keys would complete the remaining improvements and construction of the [proposed] public right of way called Turners Landing Court. Plaintiff North Keys refused both options.[4] In the matter *sub judice*, Plaintiffs did not submit an application for building or grading permits. On August 25, 2014, Plaintiffs brought suit for declaratory judgment and negligence against the County, public officials within the permitting agency, and the County Attorney ("Defendants").

(footnotes omitted).

In their complaint, appellants alleged that, "[g]enerally, whenever a developer desires to record a subdivision and sell lots before the completion of the roads . . . and other infrastructure improvements, the developer must post a [completion] bond" with the Department of Public Works and Transportation ("DPW&T") "to provide a financial guarantee that the work will be completed so that homeowners do not end up paying for lots that can never be used." "As part of this process," appellants alleged, "the developer typically submits the bond(s) to DPW&T who in turn has the bond(s) reviewed by the County Attorney as part of the approval process." Appellants alleged that the County

[4] Although the County gave appellants the option of completing the subdivision improvements, appellants contend on appeal that they "do not own the common areas in the subdivision, including the proposed road bed and amenity strips, and have no right to complete the work."

should not have allowed the subdivision plat to be recorded because appellees "were not authorized to allow the Pinnacle subdivision to be recorded without a completion bond." They did so, however, and "it was reported that [appellees] typically never required completion bonds for similar residential subdivisions."

The complaint alleged that, instead of requiring "the Developer to post a completion bond for the construction of roads necessary to serve all lots," the developer posted a "performance bond" in the amount of $567,700. The developer, however, did not complete any "material portion" of the work covered by the performance bond. The complaint alleged that, although DPW&T had the authority to call the bond and have the work completed with the bond proceeds, appellees initially "did nothing," and it was only after appellants urged appellees to call the bond after Pinnacle's default that appellees took any action. Appellants alleged that appellees' decision to settle with the bond company "for a little over $100,000" was improper and "did not result in a release of [appellees'] obligation to cause the bonded work to be completed."

In Count 1 of the complaint, appellants requested the circuit court to declare the following:

> (i) the County should never have allowed the subdivision to be recorded without a completion bond, (ii) DPW&T and the County Attorney should never have approved the bond, (iii) DPW&T and the County Attorney were required to call the bond and cause the bonded work to be completed when the Developer failed to do so prior to the expiration of the road permit, (iv) DPW&T and the County Attorney should never have released the bonding company of its obligations under the bond, (v) DPIE [(Department of Permitting, Inspections & Enforcement)] is required to issue building permits for Lots which have frontage on North Keys Road without requiring completion of the bonded work or the posting of a new bond to ensure

> completion of the work, and (vi) the County is now obligated to complete the bonded work at its own expense.[5]
>
> In Count 2, alleging negligence, appellants claimed that appellees
>
> owe[d] a duty to [appellants] to exercise reasonable care in connection with the recordation of the Pinnacle subdivision, to require compliance with applicable Subdivision ordinances, to require a completion bond as prescribed, and to enforce rights against the bond to cause the bonded work to be completed when the developer failed to complete the work before the road permit expired, and to complete the bonded scope of work at this time.

Appellants sought "damages equivalent to the cost to complete the bonded work together with the carrying costs of the Lots, which amount is estimated to be $500,000.00, plus the bond proceeds held by the County."

On November 12, 2014, appellees filed a motion to dismiss, or in the alternative, a motion for summary judgment. They first argued that appellants lacked standing to maintain their lawsuit, asserting that, to have standing, appellants must "establish the 'existence of a [justiciable] controversy,'" and to do that, appellants were required to submit applications for building permits, which they failed to do.

Second, appellees argued that the individual appellees could not be sued for negligence because they were public officials acting in a discretionary capacity. Moreover, they argued that there was no privity between appellants and appellees—no contractual or special relationship—that would permit appellants to maintain a negligence claim against

[5] The parties agree that, in 2013, Prince George's County transferred construction permitting and inspection authority from the Department of Public Works and Transportation ("DPW&T") to the newly created DPIE. *See* Prince George's Cnty. Council, CB-018-2013 & CB-028-2014 (amending PGCC Subtitles 23 and 24 to reflect transfer of responsibilities and authority to from DPW&T to DPIE).

them. Appellees also argued, and appellants conceded, that the Local Government Tort Claims Act (LGTCA) "bars Prince George's County, Maryland from being . . . named as a party in a common law tort action."

On December 17, 2014, appellants filed an opposition to appellees' motion. They asserted that, pursuant to Section 24-127 of the Prince George's County Code ("PGCC"),[6] the Pinnacle "subdivision should never have been approved or recorded without the posting of a completion bond for Turner's Landing Court which is a secondary rural [road] that was to connect to North Keys Road, a public road." DPW&T, however, "allowed the subdivision to be approved and recorded and allowed the developer to sell lots to the public without requiring the completion bond to ensure that Turners [sic] Landing Court would be constructed." Appellants asserted that the "performance bond" that appellees referenced in their motion was posted by Pinnacle to satisfy the bond requirement of PGCC § 23-116,

[6] Prince George's County Code § 24-127 provides:

> In the O-S, R-A, R-E, and R-R Zones, in the event lots created by a final plat have a net lot area of two (2) acres or more and are subjected to covenants that run with the land to restrict further subdivision of the lots, and said lots are to be restricted to agricultural uses and/or one-family dwellings only, a secondary rural road, having a minimum right-of-way width of fifty (50) feet constructed in accordance with Section 23-120 of this Code shall be required. A maximum of forty-five (45) lots shall have access to the secondary rural road, every secondary rural road shall connect to another public road, but no secondary rural road shall connect two (2) other public roads. **No final plat of subdivision shall be approved without the posting of a completion bond with the Department of Permitting, Inspections, and Enforcement for construction of all secondary rural roads necessary to serve all lots fronting on said secondary rural road.**

(emphasis added).

which was a prerequisite to the issuance of a road construction permit,[7] not the "completion bond" required by PGCC § 24-127, which is a prerequisite to the approval of a final plat requiring a secondary rural road.

Appellants disputed the assertion that they lacked standing, arguing that there was a justiciable controversy. They argued that, because appellees allowed the subdivision to be approved and recorded without requiring a completion bond to ensure that a road was constructed, and then released the $567,700 performance bond for $170,331, which resulted in insufficient funds to complete the "secondary rural road needed to use [their] Lots for the purpose for which they were created," they owned residential lots that could not be improved with homes. Appellants asserted that they had a "cognizable stake in the outcome and [were] 'aggrieved' in that they ha[d] an interest which is different from that of the general public." Under these circumstances, they argued that any "suggestion that [they had] no standing or cognizable stake in the outcome of his case lacks merit."

[7] PGCC § 23-116(a) provides, in pertinent part, as follows:

> Permits required by this Subtitle shall not be issued until the applicant, as principal, has posted a performance bond in favor of Prince George's County to ensure the satisfactory performance and completion of all work covered by the permit; and/or, where applicable, a payment bond to ensure timely payment to the County, subcontractors, and/or suppliers for work performed under the permit. Said payment bond shall be held by the Department until one (1) year after the date of final acceptance of the permit in order to adequately protect subcontractors and suppliers for work performed under the permit.

Appellants further argued that the question whether the individual appellees were protected by public official immunity was a question of fact, and in any event, such immunity extends only to discretionary acts, and the obligations involved here were mandatory, not discretionary.[8] Finally, appellants contended that they had a "special relationship" with appellees by virtue of the fact that appellees "violated statutory mandates that resulted in [appellants] owning lots in a subdivision that never should have been approved, with no ability for vehicular access."

On January 20, 2015, appellees filed a reply to appellant's opposition. With respect to appellant's argument that appellees violated the PGCC because they should not have approved the Pinnacle subdivision without first requiring a completion bond, appellees asserted that approval of subdivision plats falls within the exclusive jurisdiction of the Maryland National Capital Park and Planning Commission's Prince George's County Planning Board ("M-NCPPC Planning Board"), and therefore, appellants sued the wrong entity. They further argued that, even if appellants had standing to pursue their claims, "they failed to exhaust mandatory administrative remedies as required under § 23-108 of

[8] Appellants argued that PGCC § 24-127 "mandated that a completion bond be posted prior to the approval of the subdivision," and PGCC § 23-116 mandated that, upon a determination that a performance bond was in default, DPW&T was required to "immediately notify the bonding institution or agent to undertake and complete the work in accordance with the permit." Moreover, if the decision was made to collect the bonds, appellants argued that appellees were required to "immediately move to collect the bonds and carry out the work" if the bond amount was sufficient to complete the work.

the County Code" because they failed to apply for a building permit or take advantage of procedures to object to conditions attached to a building permit.

Finally, on the merits, appellees stated that the decision to reach a settlement for a portion of the face value of the performance bond was a discretionary decision "relegated to the Director of DPIE pursuant to Subtitle 23 of the County Code."[9] And it subsequently was within the discretion of DPIE and DPW&T to require North Keys to substitute a new performance bond as a condition to issuing new building permits. It asserted that appellees could "not rely on a bond from an expired permit to which it was not a party to escape their public improvement requirements," and the court should dismiss the complaint because it "lacks the authority to direct the Executive Branch's discretionary decision-making function to proceed along [appellants'] preferred course." They further contended that "DPIE and DPW&T properly exercised their discretion in informing North Keys that building permits would not be issued absent a new bond and commitment . . . to construct certain public improvements."

On February 10, 2016, after a hearing, the circuit court granted appellees' motion. In its memorandum opinion, the court addressed the declaratory judgment request and

[9] *See* PGCC § 23-105(g), which states, in pertinent part, as follows:

> The Director is authorized to waive, defer, or accept payment in lieu of compliance with the requirements of this Subtitle . . . , in whole or in part, where construction of road improvements is not practicable or desirable due to scattered ownership of lots in the area, insufficient right-of-way, or other factors determined by the Director to constitute an unreasonable hardship to the applicant or permittee, or hazard or nuisance to the public.

found that appellants' first three assertions, i.e., that appellants (1) should not have recorded the subdivision without a completion bond, (2) should not have approved the performance bond, and (3) were required to call the performance bond and cause the work to be completed, were moot because they already had occurred and there was no relief that the court could grant.

The court summarized the remaining issues for declaratory judgment as follows: (A) "Whether [appellees] should be required to issue building permits for lots without requiring completion of the bonded work or the posting of a new bond to ensure completion of the work"; and (B) "Whether the duty of completing the bonded work belongs to [the] County at its own expense." The court found that there was "no justiciable controversy present to uphold [appellants'] declaratory judgment action."

With respect to the issue regarding building permits, the court found as follows: (a) PGCC § 23-103 states that the "person seeking to undertake building . . . shall be responsible" for constructing or upgrading public roads, and North Keys knew when it purchased the property that Pinnacle's permit had expired and a completion bond was required for development of a subdivision; (b) appellants could not demand review of issues related to a permit issued to a previous developer who was not a party to the case; and (c) appellants had not applied for any permits, and therefore, had not properly exhausted the "administrative remedies available for the issuance of a building permit."

Regarding the performance bond, the court found that appellants did not have standing to bring a declaratory judgment action. The court stated that the PGCC makes

clear that a developer is responsible for constructing the road and posting a completion bond, and appellants could not "submit a claim based on contractual obligations between the county and a previous developer." It therefore determined that there was no justiciable controversy between the parties.

Turning to appellants' negligence claim, the court rejected the argument that appellees had a special relationship with appellants by statute because appellees violated statutory mandates, resulting in appellants owning lots in a subdivision that never should have been approved. It found that M-NCPPC Planning Board had "exclusive jurisdiction over the administration of subdivision regulations . . . and any related matters," that the "preliminary approval subdivision application is regulated by the . . . Planning Board and not [appellees]," and therefore, a statutory relationship did not exist between appellants and appellees. Moreover, the court found that the "previous permit and bond created a relationship between Pinnacle and [appellees] not between [appellants] and [appellees]." Accordingly, it found that there was "no contractual obligation or privity between the [parties] resulting in the duty of care required for a negligence suit."

STANDARD OF REVIEW

Our review of an order granting a motion to dismiss is *de novo*. *Advance Telecom Process, LLC v. DSFederal, Inc.*, 224 Md. App. 164, 173-74 (2015). We assume the truth of well-pleaded allegations and "determine whether the trial court's decision was legally correct." *Med. Mgmt. & Rehab. Services, Inc. v. Maryland Dept. of Health & Mental Hygiene*, 225 Md. App. 352, 360 (2015). "We will affirm the circuit court's judgment on

any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised." *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74 (2015) (citation and quotation marks omitted), *cert. denied*, 446 Md. 293 (2016). *Accord Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 142 (2012) ("The grant of a motion to dismiss may be affirmed on 'any ground adequately shown by the record, whether or not relied upon by the trial court.'") (quoting *Parks v. Alpharma, Inc.*, 421 Md. 59, 65 n.4 (2011)).

DISCUSSION

I.

Declaratory Judgment

Pursuant to Maryland Code (2013 Repl. Vol.) § 3-409(a) of the Courts and Judicial Proceedings Article, "a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if," *inter alia*, "[a]n actual controversy exists between contending parties." Thus, to be entitled to declaratory relief, there must be "'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Benning v. Allstate Ins. Co.*, 90 Md. App. 592, 602 (1992) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). A declaratory judgment is appropriate only when "there are actual, concrete, and adverse claims or interests.'" *Krause Marine Towing Corp. v. Ass'n of Md. Pilots*, 205 Md. App. 194, 226 (2012) (quoting *DeWolfe v. Richmond*, 434 Md. 403, 433 (2012)).

Appellants contend that the circuit court "erroneously determined that [they] lacked standing to seek the declaratory relief requested in the Complaint." They assert that they "have standing to seek declaratory relief to determine if appellees have a legal obligation to complete the scope of the bonded work in the Pinnacle subdivision," including "construction of proposed Turner's Landing Court."[10]

Appellees argue that the circuit court was correct in finding "no justiciable controversy because the appellants lacked standing to pursue a declaratory judgment." They contend that, to "establish the 'existence of a [justiciable] controversy' in this action, [a]ppellants would have to allege in their complaint that" they submitted applications for building permits and met the requirements to receive permits, including the bonding requirements, if applicable. Because appellants failed to file an application for a building permit, they assert, the court "properly concluded that there was no actual justiciable controversy" and properly granted the motion to dismiss.

In their Reply Brief, appellants reiterate that their claim on appeal relates, not to the ruling regarding building permits, but rather, to damages they suffered "as a result of the failure to have the road completed." In that regard, they assert that "[i]t is not necessary

[10] Appellants state that they "do not challenge on appeal the [circuit court's] determination that declaratory relief pertaining to building permits is not appropriate because [a]ppellants did not apply for building permits or exhaust administrative remedies with respect thereto." Although they did seek declaratory relief in this regard, they now assert that "it would be absurd for [Mr.] Fletcher to apply for a building permit for his lot which lies in a field with no access or infrastructure improvements," stating that "[t]he road must be built before the construction of any residence is feasible."

that [they] seek to construct homes on lots with no access only to compound their damages."

In *Kendall v. Howard County*, 431 Md. 590, 603 (2013), the Court of Appeals explained the concept of standing in a declaratory judgment action as follows:

> We have said time and again that the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action. The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution. Under Maryland common law, standing to bring a judicial action generally depends on whether one is "aggrieved," which means whether a plaintiff has an interest such that he [or she] is personally and specifically affected in a way different from . . . the public generally.

(footnote, citations, and quotation marks omitted).

Here, we agree with appellants that they are "aggrieved." They now own lots with no access to a road, and they present a controversy regarding the County's obligation to complete, or cause to be completed, the construction of proposed Turner's Landing Court, as well as other infrastructure. Accordingly, the circuit court erred in dismissing the declaratory judgment count on the ground that appellants had no standing to bring a claim that the County was obligated to complete the work covered by the performance bond.

II.

Negligence

Appellants next contend that the circuit court erred in dismissing their negligence claim against the individual appellees on the ground that they did not owe a duty of care to

appellants.[11] They assert that the individual appellees owed a duty of care to them: (1) to comply with the mandates of PGCC § 24-127 and ensure that a completion bond was filed before approval of the subdivision; and (2) to act reasonably pursuant to PGCC § 23-116(j) in releasing the performance bond after Pinnacle defaulted on its obligation to build Turner's Landing Court and related infrastructure.[12] We will address each of these contentions, in turn.

A.

Completion Bond

As indicated, appellants contend that the individual appellees owed a duty of care to them to comply with the mandates of PGCC § 24-127 and ensure that a completion bond was filed before approval of the subdivision. Appellees contend that the circuit court properly found that there was no statutory relationship between appellants and the individual appellees because preliminary approval of a subdivision application is regulated by the M-NCPPC Planning Board, not the individual appellants.

In *Davis v. Bd. of Educ. for Prince George's County*, 222 Md. App. 246, 260-61 (2015), we explained that, to "prevail on a cause of action in negligence," a plaintiff must prove the following four elements: "'(1) that the defendant was under a duty to protect the

[11] As indicated, the parties agreed in the circuit court that the County was not a proper party with respect to the negligence claim.

[12] Appellants also rely on PGCC § 23-116(i), but that provision involves the release of bonds where construction is completed and approved. PGCC § 23-116(j), by contrast, deals with a defaulted permit, which is the situation here.

plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty.'" (quoting *Hemmings v. Pelham Wood Ltd. LLP*, 375 Md. 522, 535 (2003)). "[W]ithout a duty of care, there is no liability in negligence. *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 611 (2017).

Here, the circuit court found that the individual appellees had no tort duty to appellants. Appellants disagree, arguing that the individual appellees owed a statutory duty of care to them pursuant to PGCC § 24-127, which states: "No final plat of subdivision shall be approved without the posting of a completion bond with [DPW&T/DPIE] for construction of all secondary rural roads necessary to serve all lots fronting on said secondary rural road."

The approval of a subdivision, however, is not within the power or duties of the individual appellees. Appellants concede that the M-NCPPC Prince George's County Planning Board has exclusive power to approve subdivisions. *See* Md. Code (2012) § 20-202 of the Land Use Article ("LU") ("(a) . . . a county planning board: (i) is responsible for . . . , subdivision . . . functions that are primarily local in scope; and (ii) shall exercise, within the county planning board's jurisdiction, the following powers: . . . subdivision; . . . and . . . any related matter. . . . (b)(1) A county planning board has exclusive jurisdiction over: (i) local functions, including: . . . the administration of subdivision regulations . . . ."); PGCC § 24-107(b) ("No land shall be subdivided within the Regional District in Prince George's County until: (1) The subdivider or his agent shall

obtain approval of the preliminary plan and final plats by the Planning Board (or the Planning Director in the case of minor subdivisions as determined by the Director)").

Under these circumstances, the individual appellees had no "duty" to decline to approve the Pinnacle subdivision in the absence of a "completion bond" because they are not responsible for making that decision. Notwithstanding any alleged obligation to receive or collect a "completion bond," the individual appellees had no authority to approve or disapprove the Pinnacle subdivision plat, and they cannot be held liable for another entity's actions in that regard. The circuit court properly found that the individual appellees had no duty to appellants with respect to the decision whether to approve the subdivision without a completion bond. Accordingly, the court properly dismissed the negligence claim based on the approval of the subdivision in the absence of a completion bond.[13]

B.

Performance Bond

Appellants' next contention relies on PGCC § 23-116(j), which addresses action on a defaulted permit. It requires that the Director of DPW&T/DPIE attempt to get the bonding institution to complete the work, and if that fails, to collect all performance bonds. PGCC § 23-116(j)(1) & (2). The Director then

> shall evaluate the work remaining to be done, determine whether the work covered by the permit should be completed, the work site should be restored to its original condition, or other modifications to the permitted work site should be made. The Director shall then determine whether the bonds posted

[13] We also note that Ms. Green did not become County Attorney until 2011, well after the subdivision was approved. Accordingly, the dismissal of the claims against her was proper on this ground as well.

> are sufficient to carry out the required completion, restoration, or modified work.

PGCC § 23-116(j)(3). After estimating the costs for the work, there are two options: (a) "[i]f the amount of bond posted is in excess of the estimate, the Department shall immediately move to collect the bonds and carry out the necessary work"; or (b) "[i]f the bonds posted are not sufficient, the Department shall develop and implement a course of action as determined by the Director." PGCC § 23-116(4) & (5).

Appellants argue that the individual appellees owed a statutory duty to them pursuant to PGCC § 23-116(j) to act reasonably in releasing the performance bond after Pinnacle defaulted on its obligation to build Turner's Landing Court and related infrastructure. They assert that the court erred in finding to the contrary and in granting the motion to dismiss the negligence claim relating to the release of the performance bond.

Appellees assert, without much analysis, that the circuit court correctly concluded that they had no duty to appellants under PGCC § 23-116(j) because there was no privity between appellant and the individual appellees. They also argue that the individual appellees are immune from suit because they are public officials who were acting in a discretionary capacity.[14] For the reasons set forth below, we agree that the individual

[14] Appellees invoke Maryland Code (2013 Repl. Vol.) § 5-507 of the Courts and Judicial Proceedings Article ("CJP"), which sets forth immunity for officials "of a municipal corporation." Although there is a difference of opinion whether Prince George's County is encompassed in § 5-507 as a "municipal corporation," *see Prince George's County v. Brent*, 414 Md. 334, 354 (2010), CJP § 5-507 is merely a codification of existing common law public official immunity, *id.* at 355. Accordingly, we need (continued . . .)

appellees are immune from liability on the negligence claim because they are public officials who were engaging in discretionary acts.[15]

In *D'Aoust v. Diamond*, 424 Md. 549, 586 (2012), the Court of Appeals delineated the principles of public official immunity, as follows:

> "[A] governmental representative is entitled to public official immunity under the common law when he or she is acting as a public official, when the tortious conduct occurred while that person was performing discretionary rather than ministerial acts, and when the representative acted without malice." *Livesay v. Balt. Cnty.*, 384 Md. 1, 12 (2004) (citing *Lovelace v. Anderson*, 366 Md. 690, 714 (2001)). Broken down into its component parts, in order to receive qualified public official immunity, an individual must, at the time of the alleged acts, be: (1) a public official; and (2) engaged in the performance of discretionary, rather than ministerial, acts conducted without malice. *See James v. Prince George's Cnty.*, 288 Md. 315, 323 (1980). Thus, in Maryland, "officials . . . enjoy no immunity at all for ministerial acts and only a qualified immunity on matters calling for the officer's discretion." W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 132, at 1059 (5th ed. 1984).

(parallel citations omitted). The purpose of this doctrine is "to allow public officials the freedom to make discretionary decisions according to their best judgment, without undue influence from a fear of personal liability." *Id.* at 596. *Accord Frat. Order of Police Montgomery Cnty. Lodge 35 v. Montgomery Cnty. Exec.*, 210 Md. App. 117, 162 (2013) (policy behind immunity "is to refrain from chilling the ability of officials to exercise their discretion in carrying out their official duties").

(. . . continued) not determine whether § 5-507 applies to this case, and instead, we will address the issue based on common law principles of public official immunity.

[15] Given our decision in this regard, we do not need to determine whether there was privity, or an intimate nexus, between the individual appellees and the appellants with regard to the release of the performance bond.

1.

Public Official

We begin with the first factor for public official immunity, that an individual be a public official, as opposed to a "'mere government employee or agent.'" *D'Aoust*, 424 Md. at 587 (quoting *Muthukumarana v. Montgomery Cnty.*, 370 Md. 447, 479 (2002)). In *D'Aoust*, the Court provided four factors that it deemed "useful in determining whether an individual is a public official," as follows:

> (i) The position was created by law[16] and involves continuing and not occasional duties.
>
> (ii) The holder performs an important public duty.
>
> (iii) The position calls for the exercise of some portion of the sovereign power of the State.
>
> (iv) The position has a definite term for which a commission is issued and a bond and an oath are required.

Id. at 587 (citation and quotation marks omitted). These factors, however, are not conclusive, and "even if an individual does not meet these criteria, he may nonetheless be considered a public official if he exercises a large portion of the sovereign power of government or can be called on to exercise police powers as a conservator of the peace." *Id.* at 587-88 (citations and quotation marks omitted). The Court concluded that the "exercise of sovereign power, . . . generally contemplates someone serving in a legislative

[16] In a footnote, the Court of Appeals explained that a "position created by law means that: (a) the office was created by Constitutional or legislative enactment, such as a statute or local ordinance; (b) an oath is generally prescribed; and (c) a commission is issued." *D'Aoust v. Diamond*, 424 Md. 549, 587 n.13 (2012) (citations and quotation marks omitted).

or policymaking capacity." *Id.* at 588 (citations and quotation marks omitted). *Accord de la Puente v. County Comm'rs of Frederick County*, 386 Md. 505, 513 (2005) (Sovereign power means "the power to make and enforce laws.") (quoting BLACK'S LAW DICTIONARY 1430 (8th ed.2004)).

Thus, our first task is to address whether the individual appellees, Darrell Mobley, Director of DPW&T, Dr. Haithum A. Hijazi, Director of DPIE, and M. Andree Green, Esq., former County Attorney for Prince George's County, are public officials for immunity purposes. We will address each appellee individually.

a.

Dr. Hijazi, Director of DPIE.

The first factor indicating that a person is a public official for the purpose of public official immunity is that the position was created by law and involves continuing duties. The position of Director of DPIE was created pursuant to the Charter for Prince George's County, which states: "There shall be a Department of Permitting, Inspections, and Enforcement headed by a Director of Permitting, Inspections, and Enforcement." Prince George's County Charter, Schedule of Legislation § 17. Accordingly, the position was created by law. *See Biser*, 128 Md. App. at 679 (Director of Planning was "created by law" where the position was established in the Bel Air Code). And, it is clear from the nature of the position that the Director of DPIE performs continuing duties. Accordingly, the Director of DPIE satisfies the first factor.

The second factor is whether the holder performs an important public duty. According to Mr. Hijazi's affidavit:

> As Director of DPIE, [his] responsibilities include but are not limited to: the administration and enforcement of the County's permitting functions as assigned by law. These functions include, but are not limited to: (1) Housing regulations and inspections; (2) Construction standards, including plans review and inspections, and enforcement of building and fire codes related to building permits; (3) Zoning enforcement; and (4) Property standards. In addition, [he is] responsible for the administration of County laws relating to business licensing and the processing of complaints against such businesses.

We conclude that the administration and enforcement of the County's permitting functions is an important public duty.

The third factor is whether the position calls for the exercise of some portion of the sovereign power of the State. Pursuant to PGCC § 23-105(a), the Director of DPIE is granted the authority

> to make, adopt, and amend such rules and regulations as are reasonably necessary to implement the requirements and purpose of this Subtitle, and to fully exercise the authority of Article 25A of the Annotated Code of Maryland and the County Charter, to protect the public safety and health with respect to public roads under the jurisdiction of the County. [17]

[17] In 2013, Article 25A became the Local Government Article. Maryland Code (2013 Repl. Vol.) § 10-317 of the Local Government Article, formerly Article 25A, § 5(T), states, in pertinent part, as follows:

> (a) [A] county may enact local laws to protect and promote public safety, health, morals, comfort, and welfare, relating to: (1) the location, construction, repair, and use of streets . . . .
>
> (b) A county may enact local laws to provide for appropriate administrative and judicial proceedings, remedies, and sanctions to administer and enforce local laws enacted under subsection (a) of this section.

Moreover, pursuant to PGCC § 28-230, DPIE, and by implication, its Director, is authorized to issue citations for violations of the county Housing Code or its Zoning Ordinance.

In *Biser*, 128 Md. App. at 679, this Court noted that Bel Air town regulations granted the "Zoning Administrator" the "power and duty to conduct inspections and surveys to determine whether violations of the zoning ordinance exist," in addition to the "authority to seek criminal or civil enforcement of the ordinance and take any action on behalf of the county to abate any violation or potential violation." We concluded that this "evidence plainly establishes that [the Zoning Administrator] was acting subject to the direction and control of the sovereign," and therefore, in light of the other factors, was a public official. *Id.*

Here, like the official in *Biser*, the Director of DPIE may issue rules and regulations and has the power to issue citations for violations. Accordingly, the Director of DPIE exercises some portion of the sovereign power of the State and satisfies the third factor.

Although it is not clear from the record, and the parties have not addressed, whether the Director of DPIE satisfies the fourth factor, i.e., "has definite term for which a commission is issued and a bond and an oath are required," we have stated that the "four guidelines are not conclusive and each may be given greater or lesser emphasis depending on the factual circumstances." *Id.* at 678 (concluding that the "positions of Director of Planning and of Zoning Administrator" were "public officials" notwithstanding that the

positions did not involve a defined term, commission, bond, or oath). Based on all of the factors, we conclude that Dr. Hijazi was a public official for the purposes of tort immunity.

b.

Mr. Mobley, Director of DPIE

Because the Prince George's County Charter and Code (before the 2013 transfer of authority from DPW&T to DPIE) provided identical authority to the Director of DPW&T, a position that is equally as continuous and important as Director of DPIE, we likewise conclude that Mr. Mobley was a public official for the purposes of immunity. *See* Prince George's County Charter, Schedule of Legislation § 6; PGCC §§ 23-102(b)(8), -105(a) (2013 republication).

c.

Ms. Green, County Attorney

With respect to Ms. Green, the former County Attorney, appellants do not dispute that she is a public official for the purposes of immunity, addressing in their reply brief only whether the duties of the individual appellees were discretionary. *See Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 618 (2011) ("[A]ppellate courts cannot be expected to either (1) search the record on appeal for facts that appear to support a party's position, or (2) search for the law that is applicable to the issue presented."). As appellees note, however, the position of County Attorney was created by the County Charter. *See* Prince George's County Charter, Schedule of Legislation § 5. And the duties of the County Attorney, as legal advisor to the County Executive and agencies that receive or disburse

County funds, *id.*, are continuing and not occasional. We conclude that the County Attorney is a public official for purposes of immunity from liability. *See Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 202 (Ky. 1997) ("As with any public official, the county attorney is immune from liability when exercising a discretionary function as long as the official acts within the general scope of the authority of office.").

2.

Discretionary Acts

Having determined that the individual appellees are public officials, we turn next to the second requirement for public official immunity, i.e., that the officials were engaged in the performance of discretionary, as opposed to ministerial, acts.[18] In *D'Aoust*, the Court of Appeals explained the critical distinction between a discretionary act, for which there is immunity in the absence of malice, and a ministerial act, for which there is no immunity:

> In a general sense, "ministerial . . . refers to duties in respect to which nothing is left to discretion . . . ." *State, Use of Clark v. Ferling*, 220 Md. 109, 113 (1959). An action has been defined as ministerial if "it is a duty that has been positively imposed by law, and its performance [is] required at a time and in a manner, or upon conditions which are specifically designated[.]" *First Nat'l Bank of Key West v. Filer*, 107 Fla. 526, 145 So. 204, 207 (1933). A function has also been described as ministerial if it is "absolute, certain, and imperative, involving merely the execution of a set task[.]" *James*, 288 Md. at 326 (quoting *Doeg v. Cook*, 126 Cal. 213, 58 P. 707, 708 (1899)). Similarly, a task is considered ministerial if it is "inflexibly mandatory." *McCray v. Maryland*, 456 F.2d 1, 4 (4th Cir. 1972), *overruled in part by Pink v. Lester*, 52 F.3d 73, 77 (4th Cir. 1995) (holding that the

[18] This immunity for discretionary acts is qualified immunity because it applies only where the officer acts in good faith, and it does not apply if the officer acts "maliciously, or for an improper purpose.'" *D'Aoust v. Diamond*, 424 Md. 549, 586 (2012) (quoting *Prosser and Keeton on The Law of Torts* § 132, at 989 (5th ed. 1984)). There is no claim here that the individual appellees acted maliciously.

> analysis by the court in *McCray* regarding liability for negligent conduct in an action brought pursuant to 42 U.S.C. § 1983 was inconsistent with United States Supreme Court case law). The Restatement (Second) of Torts provides useful commentary indicating that "[m]inisterial acts are those done by officers and employees who are required to carry out the orders of others or to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done." Restatement (Second) of Torts § 895D cmt. h.

D'Aoust, 424 Md. at 587-89 (parallel citations omitted). The Court explained that "discretionary acts are those 'requiring personal deliberation, decision and judgment,' while ministerial acts are those 'amounting only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own.'" *Id.* at 589 (quoting Prosser § 132, at 988-89).

Appellees contend that the decision whether "to enforce the previous developer's bond to complete public improvements was discretionary." Although appellants urge that we reverse the circuit court's dismissal of the negligence claims, they do not respond directly to this argument.

In addressing this issue, we note that, although PGCC § 23-116(j) sets forth procedures for the Director to follow where, as here, a permit is in default, another provision in the subtitle gives the Director discretion to determine the proper way to enforce a bond dealing with public improvements. PGCC § 23-105(g) states, in pertinent part:

> The Director is authorized to waive, defer, or accept payment in lieu of compliance with the requirements of this Subtitle . . . , in whole or in part, where construction of road improvements is not practicable or desirable due to scattered ownership of lots in the area, insufficient right-of-way, or other

> factors determined by the Director to constitute an unreasonable hardship to the applicant or permittee, or hazard or nuisance to the public.

This provision indicates that it is within the discretion of the Director of DPW&T (or the Director of DPIE under the current version of the ordinance) to decide how to address the failure to complete the road and to accept a partial settlement in lieu of compliance where the Director determines that is the most practicable approach to the problem. We conclude that the decision here was discretionary for purposes of public official immunity. Accordingly, the individual appellees have immunity under the doctrine of public official immunity, and the circuit court properly granted the motion to dismiss the negligence claim.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY APPELLANTS AND 50% BY APPELLEES.