

Circuit Court for Baltimore County
Case No. 03-C-15-10527

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2499

September Term, 2016

KAREN CRUZ, *et al.*

v.

BALTIMORE COUNTY, *et al.*

Leahy,
Friedman,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: May 3, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants, Baltimore County residents who object to a local development project, appeal the approval by a Baltimore County Administrative Law Judge (“ALJ”) of a Planned Unit Development (“PUD”) designed to permit mixed-use development on the site of the North Point Government Center in Dundalk. We conclude that the ALJ and the Baltimore County Board of Appeals properly found that the ALJ lacked jurisdiction over an underlying land sale contract, and affirm the granting of the PUD.

BACKGROUND

The southeast corner of Merritt Boulevard and Wise Avenue used to be the home of North Point Junior High School. In 1981, the Baltimore County Board of Education sold the property to Baltimore County, which converted it into a multi-use government center, including a police precinct and recreation facility. In 2013, Baltimore County determined that the land was “no longer needed for public use” and sold the property through a public bidding process. A developer, Merritt Pavilion, Inc., won the bid and entered into a contract with the County to purchase a portion of the site. Merritt Pavilion intends to demolish the old school building and construct a mixed-use development with commercial and office uses. A community recreation and arts building will also be constructed, while the remainder of the land will be retained by the County for athletic and recreational uses.

When the Board of Education sold the property to the County in 1981, it included a covenant prohibiting the County from selling any portion of the property without the approval of the State Board of Public Works (“BPW”). *State v. Merritt Pavilion*, 230 Md. App. 597, 639 (2016). BPW has, thus far, declined to approve the sale. Pamela Wood,

Dundalk Government Center Stalled Amid Legal, Political Wrangling, BALT. SUN (May 8, 2016), <https://perma.cc/CN7M-ZPZG>.

Although it has not been used as a residential property at least since the 1950s, the entire property is currently within a residential zoning district. Rather than seek a mere change of the zoning, Merritt Pavilion asked the County Council to authorize a PUD, a sort of “floating zone” that can better accommodate mixed-use development. The County Council granted permission, and Merritt Pavilion applied for a PUD. Balt. Cnty. Council Res. 52-14. The matter was assigned to a Baltimore County ALJ, who held hearings, including testimony from Merritt Pavilion’s experts, County officials, and local residents. A central focus of the opponents’ argument was that the ALJ should not approve the PUD because BPW had not approved the sale of the property.

After three days of hearings, the ALJ approved the PUD. As part of his ruling, ALJ found that he lacked jurisdiction to deny the PUD based on BPW’s failure to approve the sale. The ALJ’s decision was appealed to the Baltimore County Board of Appeals, which affirmed. An administrative appeal was taken to the Circuit Court for Baltimore County, which again affirmed. Cruz noted this timely appeal.

STANDARD OF REVIEW

In administrative agency reviews, we look through the circuit court to the decision of the agency to determine if it was correct. *Swoboda v. Wilder*, 173 Md. App. 615, 634-35 (2007). Here, the agency consisted of two parts, the ALJ, who made the findings of fact, and the Board of Appeals, which reviewed those facts. We will give deference to the facts found by the ALJ. *Id.* at 634 (factfinding of an administrative agency is reviewed to

determine whether there is substantial evidence in the record to support it, giving deference to the factfinder). We will review the legal conclusions made by both the ALJ and the Board of Appeals without deference, except to the extent that those bodies were applying the specific law that they are charged with enforcing, the Baltimore County Zoning Code. *Marzullo v. Kahl*, 366 Md. 158, 172 (2001).

DISCUSSION

Cruz raises several issues on appeal, which we will address in turn. *First*, Cruz argues that the ALJ erred by approving the PUD in the absence of approval of the sale of the property by BPW. *Second*, Cruz argues that the ALJ erred in granting the PUD because the development plan conflicted with the County Master Plan. *Third*, Cruz argues that the ALJ erred in finding that the development provided a community benefit. *Fourth*, Cruz argues that the PUD was inappropriate in this residential district.

I. THE COVENANT AND THE BOARD OF PUBLIC WORKS

Cruz makes two arguments based on the fact that BPW has not yet approved the sale of the property. First, Cruz contends that the ALJ should have interpreted the covenant and land sale contract to disallow the sale to Merritt Pavilion, and declared the contract to sell the land void. Second, Cruz argues that the lack of approval from BPW so far means that there is no “reasonable expectation that the proposed development ... will be developed to the full extent of the plan,” Baltimore County Code (“BCC”) § 32-4-245(c)(3), and that, therefore, the ALJ erred in finding that there was such a reasonable expectation of development, and approving the PUD.

The ALJ found that he had no authority to void the contract, and the Board of Appeals agreed with the ALJ’s legal analysis:

[T]he Office of Administrative Hearings and Board of Appeals are administrative agencies that are created by statute. They have no authority beyond what is granted unto them under law and the language of the enabling statute. ... Absent specific authority the ALJ and Board cannot void ... or interpret private contracts.

The Board’s reasoning is correct as a matter of law. The ALJ is empowered to review the plan and approve or disapprove of the PUD, but has no power beyond that granted by the Baltimore County Code. *Blakehurst Lifecare Cmty. v. Balt. Cnty.*, 146 Md. App. 509, 519 (2002) (“An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”) (cleaned up).¹ The contract is external to the PUD approval. Thus, the ALJ and Board were correct in finding that the ALJ had no jurisdiction over the contract.

Despite this, Cruz argues that the ALJ had jurisdiction under the doctrine of primary jurisdiction, which allows administrative agencies that have concurrent jurisdiction with the courts over some matter to exercise subject matter jurisdiction over that and related matters. *Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 478-79 (2004) (quoting *Md.-Nat’l Capital Park and Planning Comm. v. Wash. Nat’l Arena*, 282 Md. 588, 601-02

¹ “Cleaned up” is a new parenthetical intended to simplify quotations from legal sources. See Jack Metzler, *Cleaning Up Quotations*, J. APP. PRAC. & PROCESS (forthcoming 2018), <https://perma.cc/JZR7-P85A>. Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

(1978)). The Court of Appeals only allows the doctrine of primary jurisdiction to apply to areas in which “the claim is initially cognizable in the courts but raises issues or relates to subject matter falling within the *special expertise* of an administrative agency.” *Id.* at 479 (emphasis added). The ALJ is not an expert in contracts of sale or covenants, or if he is, he is certainly no more of an expert in those topics than is the circuit court. Moreover, there is nothing about the interpretation of this contract of sale or covenant that requires the special zoning expertise of the ALJ. Further, a central consideration that courts use in determining whether primary jurisdiction is appropriate in a given situation is whether the available administrative remedy is the right way to resolve an issue. *Id.* at 479-80. The only power given to the ALJ was to approve or deny the PUD. Denying a PUD would not remedy what Cruz contends is an illegal land sale. Thus, the doctrine of primary jurisdiction is not applicable does not extend jurisdiction to the ALJ here.²

Finally, Cruz argues that the failure of BPW to approve the sale meant that there was no reasonable expectation that the development would be completed. “The [ALJ] may

² At oral argument, Cruz argued that the Board of Appeals has jurisdiction over the contract to sell the land because it has jurisdiction, generally, over all decisions made by the County government. We need not address the merits of this claim, because the County’s decision to contract to sell the land to Merritt Pavilion is not under review here and was not under review before the Board of Appeals. As far as we can tell, the decision to sell the land was never itself brought before the Board of Appeals, and this theory was not raised before the Board of Appeals in this instance. We thus decline to reach this issue; as the Board of Appeals neither addressed its own jurisdiction nor the merits of this argument, it is outside the ambit of our review. *See Schwartz v. Md. Dep’t of Nat. Res.*, 385 Md. 534, 555 (2005) (“A reviewing court ordinarily may not pass upon issues presented to it for the first time on judicial review.”) (cleaned up). Although we need not decide this question here, we do note that the Board of Appeals has no powers beyond those assigned to it by the Baltimore County Charter § 602, as authorized by Md. Code Land Use § 4-305.

approve a proposed PUD ... only upon finding that ... [t]here is a reasonable expectation that the proposed development ... will be developed to the full extent of the plan.” BCC § 32-4-245(c)(3). We are not convinced, however, that the lack of approval thus far means that the PUD process must halt. As the ALJ noted, a contract purchaser—someone who doesn’t yet own the land—may apply for a PUD, which suggests that the County Code envisions that the application process may begin *before* a land sale is complete. BCC § 32-4-101(e). Cruz is arguing, in effect, that there is no certainty that BPW will approve the sale. While we appreciate that this approval has been and continues to be a major point of contention, we do not consider it erroneous to approve a PUD simply because another aspect of the project is awaiting approval from another administrative agency.³ We find no error in the ALJ’s and Board’s legal analysis that delay at BPW does not affect the ALJ’s approval of the PUD, or in the ALJ’s factual finding that there was a reasonable expectation that the development would be fully developed.

II. THE MASTER PLAN

Cruz next argues that the Development Plan in the PUD conflicts with the County Master Plan. The ALJ found that the PUD was not required to comply with the Master Plan, but that, in any event, it *did* comply with the Master Plan. The Board of Appeals affirmed the ALJ’s legal analysis:

³ For these purposes, the BPW, despite its high-ranking membership, is an administrative agency charged with certain tasks by statute (or in this case, by covenant), and its approval or disapproval is not a foregone conclusion. *See Bd. of Pub. Works v. K. Hovnanian’s Four Seasons at Kent Island, LLC*, 443 Md. 199, 215-20 (2015) (discussing BPW’s status as an administrative agency).

The ALJ may approve a proposed PUD development plan only upon finding ... [t]he PUD development plan is in conformance with the goals, objectives, and recommendations of [1] the Master Plan, [2] area plans, or [3] the Department of Planning.

BCC § 32-4-245(c)(5). Compliance with the Master Plan is, therefore, one of three potential ways in which to satisfy BCC § 32-4-245(c)(5), but the Code can also be satisfied by demonstrating the PUD’s compliance with the relevant area plan or the approval of the Baltimore County Department of Planning. Because the PUD had the approval of the Department of Planning, compliance with the Master Plan was not required, and any conflict with the Master Plan was legally irrelevant.

Even if it was required, however, the ALJ found that the PUD complied with the Master Plan. And, because there was substantial evidence in the record to support this finding, particularly because the Department of Planning determined that, under the Master Plan, the location of the property was appropriate for mixed-use development and the PUD satisfied all of the relevant County rules and regulations, we hold that there was substantial evidence to support the ALJ’s finding.

III. COMMUNITY BENEFIT

Cruz’s third challenge disputes the ALJ finding of fact that the PUD provides a “community benefit” as required. BCC § 32-4-242(b)(6). Cruz argues that the plan calls for an overall reduction of athletic fields on the property, and questions whether the community recreation facility that Merritt Pavilion has promised to build will be an

adequate replacement for the existing building. From this, Cruz argues that the community benefit of the development will be less than what already exists on the site.

As the Board noted, the property is located in a district that the County has determined to be in need of revitalization, which by law suffices to provide the “community benefit”:

[T]he ALJ expressly found that “the project is located within the North Point Commercial Revitalization District which is a ‘public policy [community] benefit’ as a matter of law pursuant to B.C.C. § 32-4-242(b)(6)(iv).”

The Board summarized the facts supporting the ALJ’s finding that there were additional community benefits in the PUD:

[A] new community building is proposed which will accommodate some of the existing programs. Improvements will be made to existing ballfields. [The] Director of the Department of Recreation and Parks opined that the renovation of the outdoor areas and the new community building will better accommodate existing programs. Although the Appellants’ argument noting that the property at issue already provides significant community benefit unique from the proposed development is not without merit, such an argument is not contemplated by the applicable statutes. Consequently, this Board cannot find that the ALJ was charged with considering it, or erred in not doing so.

These benefits are supported by evidence in the record and, as the Board pointed out, are not contradicted by Cruz.

There is adequate evidence to demonstrate this community benefit. At the hearing, the Director of the Recreation and Parks Department discussed the plans for the site, including the ballfields about which Cruz is concerned. The Director testified that the new

recreation facility will be an improvement over the existing center, and that the fields, theater, and recreation center will be upgraded with modern amenities. Given this favorable testimony, and that a public benefit is not simply a matter of counting the number of ballfields before and after a project is complete, we hold the ALJ did not err in finding that the PUD will create a community benefit, nor did either the Board or the ALJ err in determining that the location of the property in a revitalization district made the development a community benefit as a matter of law.

IV. THE PUD

Finally, we consolidate Cruz's final two arguments and address Cruz's contention that the PUD itself is illegal and not in compliance with the Baltimore County Zoning Regulations. A PUD is a creature of zoning law designed to provide flexibility in zoning. *Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's Cnty.*, 138 Md. App. 589, 624 (2001). Cruz argues that the use of a PUD here, to transform a property zoned entirely for residential use into a mixed-use development, is an inappropriate use of a PUD.⁴ The Board of Appeals rejected the argument that the PUD was inappropriate for the area, noting the property's history of hosting non-residential uses.

The ALJ summarized the legal status of PUDs generally and this PUD in particular:

The proposal in this case involves a PUD, which is a zoning/development process created by the County Council.

⁴ Cruz also argues that PUDs are arbitrary and capricious, and "completely undermine[] the concept of zoning." The legality of PUDs is settled law in Maryland. *City of Rockville v. Rylyns Enter. Inc.*, 372 Md. 514, 540 n.15 (2002). The Baltimore County PUD process was recently approved by the Court of Appeals. *Kenwood Gardens Condo., Inc. v. Whalen Props. LLC*, 449 Md. 313 (2016). We have neither the authority nor the inclination to change that well-settled law.

PUDs were designed to provide flexibility to address “changing patterns of land development and the demonstrated shortcomings of orthodox zoning regulations.” Maryland’s highest court has described the PUD as a “floating zone,” in that it allows a specific parcel or property to be developed in a manner that may not be permitted by the existing zoning classification. [T]he subject property is zoned D.R. 10.5, which would not permit commercial uses. But with the PUD, the property is in a sense rezoned (i.e., the “floating zone”) to permit commercial and retail uses as proposed in this project.

(citations omitted). The use of the PUD here is appropriate for several reasons. First, the record shows that this property has hosted mixed-use, non-residential facilities at least since the 1950s. The property has hosted first a school, then County offices, then community-use facilities over the past 60 years. To suggest that it was ever residential or that the conversion to private mixed-use facilities is a drastic departure from existing uses is simply incorrect. Further, the entire purpose of a PUD is to allow the County flexibility and to “rezone” an area in which development is desirable. The County has determined that mixed-use and commercial development in this location is desirable despite the fact that it is zoned residential. Thus, the County has employed a zoning tool that it put into the zoning code, the PUD, to allow the development to proceed without a comprehensive rezoning. Balt. Cnty. Zoning Regs. § 430. The bill passed by the County Council granting permission for Merritt Pavilion to apply for the PUD, and the PUD approved by the ALJ, are in compliance with the procedural and substantive requirements of §§ 430 and 430.3 of the Baltimore County Zoning regulations. Far from being an inappropriate use of a PUD, this is its precise intended use.

We see no error in the decisions of the ALJ and the Board of Appeals. We affirm.

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