

IN THE CIRCUIT COURT OF MARYLAND FOR HOWARD COUNTY

MARC AND MELINDA JORDAN, et al. *

Petitioners *

v. *

Case No.: C-0768348

HOWARD COUNTY BOARD OF APPEALS *

Respondents *

FILED
07 NOV -9 PM 4:20
CIRCUIT COURT
FOR
HOWARD COUNTY

PETITIONERS' REPLY MEMORANDUM

Petitioners, numerously listed in the Petition for Judicial Review, (hereinafter "Protestants"), by and through their attorneys, G. Randall Whittenberger and Miles & Stockbridge P.C., pursuant to Maryland Rule 7-207, file this *Reply Memorandum* in support of their appeal to this Court from the February 1, 2007, decision of the Howard County Board of Appeals ("Board"), which improperly granted the Applicants' (hereinafter "Williams") request for conditional use pursuant to §131 of the Zoning Regulations of Howard County.

INTRODUCTION

This is a case where a developer desires to build large (5,600 square foot) multi-level homes in a rural district under the guise of age-restricted-adult-housing, which other than being clumped together in a massive wall formation displayed prominently in front of Protestants' community, has no resemblance to the County's Plan for aging seniors. These large homes, placed directly along the busy danger point of Route 32, have little relationship to a concept of an aging resident selling a larger family home to come to a single-story abode to avoid constant step-climbing and cleaning. Planned to be placed in the western part of the County, no public transportation exists, no supplies, shops, restaurants, or senior centers are within nearby walking distance, and the only outlet to such necessities is to navigate cross-lane drives into and along busy Route 32 to separate interchanges, hardly a comfortable task for seniors aging in place.

Remarkably, the Board of Appeals granted the conditional use plan anyway, and in the process strayed far from the objectives of the County's General Plan and Conditional Use Ordinance, becoming a rubber stamp for a developer's desire to build large homes in a lucrative area, the *age-restrictive label* serving only as a means to permit home construction.

But this aberration need not be condoned, because the developer failed to comply with §131. First off, without needing to even reach the merits, Williams' proposal must fail because §131 N does not expressly permit age-restricted adult housing in the RR-DEO Zoning District. As a plain reading of §131N.1. reveals, "RR-DEO" is not listed thereunder, and strict construction of this ordinance requires the decision to be vacated as a matter of law. The Board had no statutory power or authority to grant the use at that location. Just as the Board used the RR-DEO district (not the RR district) for its §131B.2 comparisons and analysis in reaching its decision, it must also necessarily use the same RR-DEO district under §131N. The Board cannot logically use one district for one part of the statute, and a different district for another part. One way or the other the decision must be vacated or remanded.

Contrary to Williams' conclusion, he has no legislatively pre-determined right to be granted the conditional use under §131. Quite clear from this local ordinance is the recognition that even though conditional uses might be authorized in specified zoning districts based on the presumption that they are generally appropriate and compatible in the specified districts, particular uses in particular locations may have characteristics and impacts that are not typical, and are not permitted automatically, but are subject to the very rigorous and lengthy regulations contained within §131. One of these particularly rigorous requirements is §131 G, which places the entire burden of both proof and persuasion upon the applicant to satisfy not only the specificprovisos of §131 N, but to also prove the general standards of §131B.1 and §131 B.2.

This burden is even more onerously placed upon applicant under §131 B.2, which required him (Williams) to prove a negative, that the proposed use at the proposed location will not have adverse effects on vicinal properties above those ordinarily associated with such uses, and not greater at the subject site than elsewhere in the zone. As experience shows from other such age-restricted housing projects and appeals before this Court, the provisions of this very unique County ordinance are nearly impossible to prove if properly and literally followed by the Board.

This very high burden Williams failed to meet. Even before going before the Board of Appeals Williams failed to provide with his petition information to DPZ necessary for the Staff to provide an unqualified report, and the Staff never thereafter had the benefit of a complete plan and plat to perform its necessary function of review required under §131. After the project was denied and rejected by the Hearing Examiner because of these deficiencies and proof failures, Williams on the first night of hearings before the Board of Appeals was improperly permitted to make numerous material and comprehensive amendments to his proposed plan, which violated the Board of Appeals Rules of Procedure, and precluded both the DPZ and Hearing Examiner from reviewing what was in essence and reality a new conditional use proposal. This too was a mistake of law.

Even with his new and amended proposal, Williams failed to meet his rigorous burden of proof to satisfy §131 B.1. He failed to prove, among other things, that his plan, proposing a massive block of 50 multi-story, 5600 square foot units, would be in harmony with the General Plans' policies of scaling down from large family homes to smaller, easier to maintain homes with a first-floor bedroom, more equivalent to smaller units supplementing congregate and apartment choices on a single floor, and not in the rural west where no transit service exists to

provide the older residents access to services, or where the residents could age in place. To this Williams has no meaningful response.

Williams also failed to prove with substantial evidence that his proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses within the zone. Substantial evidence was lacking as to safety hazards, physical conditions, lighting, and sewage and water capacities under the §131 B.2 test. Indeed, proper tests had not even been completed when Williams went before the Board from which to allow the Board to even make adverse effect comparisons within the district (RR-DEO).

Williams also failed to satisfy a number of the objective criteria of §131 N by failing to provide items with his petition which were required from the beginning of the process, such as floor plans, interior feature lists, architectural elevations and other required items necessary at each and every stage of the review process. That these were not submitted, were direct violations of the statute which the Board by law should not have overlooked. The decision must be vacated and/or remanded.

1. Burden of Proof and Burden of Persuasion

Williams fails to dispute that Howard County's complex and comprehensive conditional use regulation requires the petitioning applicant to carry: (1) the burden of proof, (2) the burden of going forward with the evidence, and (3) the burden of persuasion, on all question before the Board. Specifically, §131 G provides:

The applicant for a conditional use shall have the burden of proof, which shall be by a preponderance of the evidence and which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Hearing Authority or are required to meet any provisions of these regulations.

This regulation makes clear that no burdens shift, and that Williams was required to provide all evidence and proof necessary to comply with each and every provision and requirement under §131.

2. Standard of Review

Despite the references provided by Williams, it may be recalled that a decision of an agency “is owed no deference when its conclusions are based on an error of law”. Belvoir Farms Home Owner’s Ass’n. Inc., v. AA. County, 355 Md. 259 (1999); Catonsville Nursing Home, Inc. v. Loveman, 349 Md. 560 (1998); People’s Counsel v. Md. Marine Mfg. Co., 316, 491 (1989); United Parcel Service v. Comptroller, 69 Md. App. 458 (1986). The Board of Appeals is thus not free to ignore statutory and legal requirements in reaching its decisions. See, e.g., MNCPP v. Rosenberg, 269 Md. 520 (1973). Decisions contrary to law or unsupported by substantial evidence are “not within the exercise of sound administrative discretion”, but are “arbitrary and illegal acts”. Holmes Oil Co. v. MDOE, 135 Md. App. 442, 462 (2000); Dept. of Health v. Walker, 238 Md. 512 (1965). Moreover, where the facts presented are “susceptible of but one legal conclusion, and the agency does not so conclude”, the action of the Board is arbitrary and capricious, and must be reversed. Westinghouse Electric Corp. v. Callahan, 105 Md. App. 25, 34 (1995).

3. Changes to the Proposed Conditional Use Plan Constituted Substantive Amendments to the Petition

Williams now argues that the numerous changes to his Conditional Use Plan, submitted for the first time before the Board, were not substantive. The Plan itself, along with the record, proves otherwise. Williams presented a substantially modified plan on the first night of the Board of Appeals hearing. Among other things, these changes to the proposed plan included the addition of a sketch sheet relating to the configuration and size of units, additional notes

concerning design characteristics, additional notes regarding setback, changes to lot layouts and setbacks, changes to the location and type of landscape buffering, and new descriptions of design and amenity options for possible purchasers of the units.

To try to salvage the Board's decision, Williams attempts to minimize the extent of the modifications by supplying a list of the changes within his memorandum. But even this list is substantial. More to the point, such changes were *material*. This is particularly evident by comparing the decision of the hearing examiner with the decision of the Board of Appeals. Master Carbo made determinations relating to harmony and adverse impact based upon what had been presented to him, commenting upon how the materials presented did not satisfy the requirements of §131 in many of those areas where Williams later amended his plan on the first night of the hearing.

Williams also argues the Board decides what is substantive or not. But while the Board must of course make such a decision when the issue arises, the decision is one interpreting law, and as such is evaluated by this Court as a question of law. And in this respect the law was clear as to the process for what should have happened that night. In particular, Rule 2.202(c) of the Howard County Code Rules of Procedure of the Board of Appeals plainly provides:

Substantive Amendments to the Petition. If any substantive amendments to the petition are made before or during the hearing, the Board, either before or during the hearing, shall suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning and the Planning Board for further recommendations.

Similarly, Rule 2.202(b), relating to any amendments to the petition made before or during a hearing, provides as follows:

Amendments to the Petition. If any amendments to the petition are made before or during a hearing, the Board, either before or during the hearing, may continue the hearing, or may suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning and the Planning Board for further recommendations.

The Board of Appeals' decision to proceed with the hearing, and not remand the amended petition to DPZ for further review was a *mistake* of law. A reading of both rules together suggests that even non-substantive amendments merit remand, and substantive amendments mandate it. In other words, the amendment better be very insignificant, or the Board risks having its decision vacated, as should happen here. The amendments to the petition and plan in this matter were clearly substantive. These changes did not involve corrections of spelling errors, corrections of typos, or similar corrections which would have had no impact on the presentation. Rather, the changes made to the plan by Williams were of a nature that changed the complexion of the review process.

Williams also argues the plan was submitted without objection, but this is not accurate. An objection was made to the whole amendment process, and it was clear from the record that the Board was deciding whether Williams would be permitted to proceed. The transcript at page 31 et. seq. makes this evident, and shows Protestants arguing that such changes constituted substantive amendments to the petition which required the application to be remanded to the Department of Planning and Zoning and the Planning Board for further review. The record indicates that the Protestants aggressively argued that such changes also constituted a new proposed plan *never* yet reviewed by the appropriate agencies. And the record shows they forcefully argued that under such circumstances, the applicant must *start over* and proceed through the process, including DPZ review and hearing examiner review, before any further Board of Appeals hearing. After the issue had been decided by the Board (incorrectly), it was understood when the papers were submitted, that the Board wished to proceed on, thus eliciting a "no objection" by one of the Protestants to papers being marked as an exhibit. This did not mean, as a full reading makes clear, that Protestants never objected to the Board taking the

action it did, which action was contrary to Rule 2.202. Protestants by all means raised the issue below.

But even if *arguendo* there had been no objection, the Board under its rules *was required* to remand the matter. The Howard County Code and §131 require that the Conditional Use Plan be reviewed at every stage, from beginning to end. It is not a work-in-progress concept. Maryland law also requires that substantial amendments to Planning and Zoning applications must be reviewed in each stage of the process; otherwise, the review process at each stage has not occurred, and the full requirements of the law have not been met or complied with -- a mistake of law. Williams' argument that the proceeding was heard *de novo* misses the point. The ability to elicit new evidence at a *de novo* hearing, Halle Companies v. Crofton Civic Assn., 339 Md. 131 (1995), does not alter the requirement that the same application and same plan must be reviewed at each review stage. If this were not true, there would be no purpose for having the planning department or hearing examiners involved.

4. Williams Failed to Prove that His Proposed Conditional Use Plan Will Be In Harmony with the Land Uses and Policies Indicated in the Howard County General Plan

Williams now claims his plan *was* in harmony with the General Plan, but fails to address or explain just how his plan satisfied (was in harmony with) the General Plan policies.

The General Plan is chocked full of policies to cover this situation. As so pertinently described by the Hearing Examiner in his Decision and Order, these policies are directly contradictory to the Williams' proposed plan. Because there is no rational way to argue that he proved that his plan is in harmony with these plan policies, Williams now tries to sidestep the requirement by arguing he did not have to because the General Plan language was general and left the details of such matters to future legislation. But this does not answer the

strict issue involved, where policy is plainly involved and incorporated within §131, and where it is the applicant's burden to prove that units are in harmony with such policy. Just because details of the stated goals and policy have not been enacted does not mean the policy contained within the General Plan does not exist. Indeed, it is the precedent of the Board and this Circuit Court to require the applicant to prove that its use plan is in harmony with the General Plan policies even when such policies merely contain recommendations for future legislation.¹ Thus, to ignore these policies is to ignore the clear mandate of §131B, which incorporates the General Plan in the sense that an applicant must prove that his plan is in harmony with its policies. A look at some of these General Plan policies shows Williams' failure to satisfy §131B.

One such policy of the General Plan recognizes that this market of active seniors is seeking to “sell their large family home and yard and to purchase a smaller, easier to maintain home with a first-floor bedroom”. (General Plan, p. 82). If, by statutory construction, the use plan must be in harmony with this expressed policy, then the proposed use must be a plan for units that would not be the equivalent of a large home, but rather a smaller easier to maintain unit with a first-floor bedroom.² The size of the planned homes, shown on Williams' plan, obviously shows this policy was not met. Likewise, Williams' plan fails to prove that the units

¹ The Board of Appeals has in the past utilized policies containing recommendations for future legislation as a basis to make its §131 B.1 harmony-with-General Plan determination. See In the Matter of Kimberly Homes Ellicott Properties, LLC (BA Case No. 02-039C), p. 10-14, attached to Protestants' Rule 7-207 Memorandum as **Exhibit E**, where the Board “viewed the language of the General Plan” to base its harmony decision, despite that language recommending future enactment. This was upheld by this Circuit Court. It is astonishing that the Board later granted Williams' use plan by reversing its argument regarding “future legislation”. Such a flip-flop is the essence of arbitrary, capricious and ad hoc review.

² As to first-floor bedrooms, the original plan submitted by Williams which was reviewed by DPZ did not specify first-floor bedrooms. Amendments were accepted by the Board improperly (as argued above), which now provide design detail for a first-floor master bedroom. But as these amendments should not have been allowed, Williams' original use plan should be rejected as not being in harmony with this policy from the General Plan.

