CB 33-2019

Sayers, Margery

From: heather.urner@yahoo.com
Sent: Monday, July 1, 2019 8:39 PM
To: CouncilMail
Subject: CR 32-019, CR 33-2019

[Note: This email originated from outside of the organization. Please only click on links or attachments if you know the sender.]

Good Evening,

My name is Heather Urner, 10212 Hickory Ridge Rd Apt 203 Columbia MD 21044, Councilwoman Jung and Councilwoman Walsh, thank you for fighting for community voice, including it more will look different, it will not open flood gets, but give the words of the people to be heard to be a part of local government more as we have every right to. The point is for us to not how overwhelming our right to speak could get. I feel the discussions tonight lingered on that and on who from the community would speak and for that to be dwelt on and not see as you heard in campaign, we deserve to be heard and the process should be ours to decide, if the rug happens, we should decide and make that call. Let's look at community voice as a way to get different voices in the room because local government cares to hear in vehicles beyond emails of what we have to say, that should be a driving force to right the ship not to be timid in changing for the better.

Thank you

Heather Urner

Sayers, Margery

From: Rigby, Christiana
Sent: Monday, July 1, 2019 8:08 PM
To: Sayers, Margery
Subject: FW: If you need one reason to support CB 32, allowing citizens to question DPZ staff at Planning Board meetings.....

From: Susan Garber <buzysusan23@yahoo.com>
Sent: Monday, July 1, 2019 5:51 PM
To: Jones, Opel <ojones@howardcountymd.gov>; Yungmann, David <dyungmann@howardcountymd.gov>; Rigby, Christiana <crigby@howardcountymd.gov>; Jung, Deb <djung@howardcountymd.gov>; Walsh, Elizabeth <ewalsh@howardcountymd.gov>
Subject: If you need one reason to support CB 32, allowing citizens to question DPZ staff at Planning Board meetings.....

Please consider this:

If Savage residents (and individuals and groups concerned with protecting parks and the Little Patuxent River) had been able to question DPZ staff at the FIVE Planning Board hearing dates on the Settlement at Savage Mill from March to November of 2017, EVERYONE's time (citizens, Planning Board members, DPZ staff, etc.) would not have been wasted.

In 16.5 hours of testimony, at the direction of the petitioner's attorney, the chair would not allow any mention or clarification on the land swap which was a critical consideration in the development project. Had protestants been able to ask DPZ staff exactly what land was involved in the swap and the characteristics of the land--which in turn would clarify how much was forested, on steep slopes, etc. the intricate dance of hiding the information could have ended. How can the PB intelligently make a ruling when THEY don't even know what land the development will be on. According to HC Code, one can only apply to develop on property one actually owns.

Had DPZ staff answered critical preliminary questions, rather than replying 'that will all be resolved in the final stages' the truth could have emerged as to who owned what land, why was the developer being allowed to double count land, etc.

No citizen, no employee, no town should ever have to endure the injustice demonstrated in the Planning Board process. **When the chair looks to the petitioner's attorney for legal advice--over and over-- it is clear there is a lack of understanding of the PB's rules and procedures.** (Given that Office of Law staff typically only offer advice to the Board when directly asked, there is no correcting.)

If the Planning Board believes it is their role to approve whatever is placed before them in the Technical Staff Report, then it is obvious why they pay so little attention to testimony. They know how they will vote before the procedure begins and hence need

pay little attention or formulate questions for the staff. **If THEY are not going to ask clarifying questions then it is essential that citizens be able to.**

Please vote to provide this.

Susan Garber

Sayers, Margery

From: joel hurewitz <joelhurewitz@gmail.com>
Sent: Monday, July 1, 2019 11:06 AM
To: CouncilMail
Subject: CB33-2019 Amendment 1 - Support
Attachments: Documentation for Howard County code error June 14, 2014.pdf

Dear Council Members,

I write to give my support to Amendment 1 to CB33-2019. It allows anyone who is a party the Planning Board to appeal. This amendment is similar to the approach taken in Montgomery County: http://montgomerycountymd.granicus.com/MetaViewer.php?view_id=136&event_id=5227&meta_id=130598

Deleting the "specifically aggrieved" reference was also the proposal suggested by former Council Adminstrator Shelia Tolliver in 2014 (see attached email).

Left unresolved is how to address the broken "specifically aggrieved" references in Section 16.1109 and Section 16.1214. However, I have realized these situations are more complicated. In particular, the petitioner who is denied a request by the Director of Planning and Zoning should have an appeal. Yet, there is no hearing in which those who object to a grant or a waiver by the Director to have participated. This will require further thought and discussion of the desired procedures for all affected.

Joel Hurewitz

SUBTITLE 9. PLANNING BOARD [7]

Sec. 16.900. Planning Board.

(a) *General Provisions:* General provisions applicable to this Board are set forth in subtitle 3, "Boards and Commissions," of title 6, "County Executive and the Executive Branch," of the Howard County Code.

(b) *Number of Members.* The Planning Board shall have five members.

(c) *Qualifications.* All members of the Planning Board shall be residents of Howard County.

(d) *Executive Secretary.* The Director of Planning and Zoning or the Director's designee shall serve as Executive Secretary of the Planning Board and shall attend all meetings of the Board.

(e) *Meetings.* The Planning Board shall hold regular monthly meetings. Special meetings may be held at any time, at the call of the Chair.

(f) *Records.* The Planning Board shall keep a record of its findings, recommendations, determinations and decisions. The Planning Board shall keep minutes of its proceedings. The records shall be filed with the Department of Planning and Zoning, which shall maintain them.

(g) *Outside Assistance.* With the approval of the County Executive, the Planning Board may retain legal counsel or consultants as necessary to carry out its function and duties and responsibilities.

(h) *Studies.* The Planning Board may initiate studies related to the general duties and responsibilities and functions of the Board. For the purpose of conducting such studies, the Board shall have the assistance of the staff of the Department of Planning and Zoning, as may be provided in the budget.

(i) *Hearings.* Prior to making recommendations to the County Council on adoption of the general plan, the Planning Board shall hold at least one public hearing at which interested persons shall be afforded a reasonable opportunity to be heard regarding the general plan. In addition, prior to making recommendations to the County Council on adoption of comprehensive zoning, the Planning Board shall hold at least one public hearing at which interested persons shall be afforded a reasonable opportunity to be heard regarding the comprehensive zoning. In both cases, at least 30 days' notice of the time and place of the hearing shall be on the County's website. The Planning Board may hold hearings on any matter pending before it and shall hold hearings upon written request of the County Executive or on resolution of the County Council and as required by law and regulations.

(j) *Duties and Responsibilities.* The Planning Board shall carry out all duties and responsibilities assigned to it by law.

(1) *Recommendations on Planning and Zoning:*

(i) *Recommendations.* The Planning Board shall make recommendations to the County Council and the Zoning Board on all matters relating to:

The Planning and Zoning of the County, the adoption and amendment of regulations regarding the Planning and Zoning of the County, and amendments to the zoning map or zoning regulations.

(ii) *Time frame.* The Planning Board shall make its recommendations within a reasonable period of time, but in any event no more than 45 days after it hears the petition unless the Zoning Board or the County Council allow a longer period of time for the Planning Board to make its recommendations.

(2) *Decision making:*

(i) The Planning Board shall make decisions with respect to matters submitted to it pursuant to the laws, rules, regulations, and ordinances of the County.

(ii) The Planning Board has authority regarding street naming and house numbering pursuant to subtitle 4, "Street Names and House Numbers" of [this] title 16 of the Howard County Code.

(iii) Any person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it may, within 30 days thereof, appeal said decision to the Board of Appeals in accordance with section 501 of the Howard County Charter. For purposes of this section the term "any person specially aggrieved" includes but is not limited to a duly constituted civic, improvement, or community association provided that such association or its members meet the criteria for aggrievement set forth in subsection 16.013(b) of this title.

(3) *Recommendations on capital programs and capital budgets:*

(i) *Recommendations.* Each year the Planning Board shall review the proposed capital program and any new or substantially changed capital project, pursuant to law. It shall prepare comments and recommendations on the impact of the proposed capital program on the County general plan and the growth of the County and submit these comments and recommendations to the County Executive, with a copy to the County Council.

(ii) *Time frame.* The proposed capital programs for the following fiscal year shall be submitted to the Planning Board at least two months before the County Executive is required to file the County's proposed capital program. The Planning Board shall submit its comments and recommendations within one month of receiving the proposed programs.

(4) *General plan guidelines:*

(i) *Preparation of guidelines.* Within five years from the adoption of this comprehensive rezoning plan, the Planning Board shall prepare general guidelines to be used by the Department of Planning and Zoning in the preparation and/or revision of the general plan.

(ii) *Adoption of guidelines.* The County Council shall adopt the guidelines by resolution prior to the formulation of the general plan utilizing these guidelines.

(5) *Other recommendations.* At the directive of the County Executive or by resolution of the County Council, the Planning Board shall review and make recommendations on any matter related to planning.

Subject: Code error

From: Christopher J. Alleva (jens151@yahoo.com)

To: earl.adams@dlapiper.com;

Date: Wednesday, June 11, 2014 5:03 PM

More info on the Code error

On Tuesday, June 10, 2014 2:40 PM, "Tolliver, Sheila" <STolliver@howardcountymd.gov> wrote:

Chris (aka Music Man),

We've traced the problem and have referred it to the Office of Law. Not sure if they can correct this through the Code company without legislation, given the history. If not, we'll put in a bill to correct. Thanks for your attentive eye.

Sheila

From: Tolliver, Sheila
Sent: Tuesday, June 10, 2014 2:35 PM
To: Vannoy, James
Cc: Nolan, Margaret Ann; Meyers, Jeff
Subject: Code error

Jim,

A constituent found an error in a reference in the Code. I'm bringing it to your attention, as the Office of Law works with the code company on such matters. If you'd rather we just correct legislatively, let me know.

The problem is the reference to "subsection 16.013(b)" in subsection 16.900 J(2)(iii). Jeff has researched the history and found the following series of actions:

- Subsection 16.900 J(2)(iii) was adopted in CB 13-1990; however, the reference at that time was to "subsection 16.103(b)".
- Apparently at some point, perhaps by a typo, 16.103 was changed to 16.013, which doesn't exist.
- CB 121-1992 repealed and reenacted subsection 16.100 as part of a larger bill. The newly adopted subsection 16.103 (b) does not deal with the subject matter referenced in the

contemporary subsection 16.900 J(2)(iii). The cross-reference in 16.900 was not changed as part of that bill.

- A word search in the current code fails to find any criteria elsewhere in the code for what constitutes an association eligible to be an aggrieved party. We think, therefore, that the entire sentence in subsection 16.900 that erroneously references the non-existent subsection 16.013 (b) should be stricken.

Please let us know how best to remedy.

Sheila Tolliver
Administrator
Howard County Council
410 313-2001

Howard County, Maryland, Code of Ordinances >> - SUPPLEMENT HISTORY TABLE >> - HOWARD COUNTY CHARTER >> ARTICLE V. BOARD OF APPEALS >>

ARTICLE V. BOARD OF APPEALS [3]

Section 501. The County Board of Appeals.

(a) *Appointment; term; compensation.* The County Board of Appeals shall consist of five registered voters and residents of the County appointed by the Council. Appointees shall serve overlapping terms of five years from the first day of January of the year of their appointments, or until their successors are appointed. Vacancies, except those at the expiration of a term, shall be filled in the same manner as the original appointment and for the unexpired term. No member shall be reappointed after having served eight consecutive years immediately prior to reappointment. No more than three members shall be registered with the same political party. The members of the Board shall be paid at the rate of Twelve Hundred Dollars ($1,200.00) per year unless such compensation be changed as provided in Section 501(f) of this article. Members of the Board shall receive reasonable and necessary expenses as may be provided in the budget.

(b) *Powers and functions.* The Board of Appeals may exercise the functions and powers relating to the hearing and deciding, either originally or on appeal or review, of such matters as are or may be set forth in Article 25A, Section 5(u) of the Annotated Code of Maryland, excluding those matters affecting the adopting of or change in the general plan, zoning map, rules, regulations or ordinances.

(c) *Rules of practice and procedure.* The Board of Appeals shall have authority to adopt and amend rules of practice governing its proceedings which shall have the force and effect of law when approved by legislative act of the Council. Such rules of practice and procedures shall not be inconsistent with the Administrative Procedure Act of the Annotated Code of Maryland. The rules may relate to filing fees, meetings and hearings of the Board, the manner in which its Chairperson shall be selected and the terms which he shall serve as Chairperson and other pertinent matters deemed appropriate and necessary for the Board. Three members of the Board shall constitute a quorum of the Board, and its hearings shall receive public notice as required by law. All hearings held by the Board shall be open to the public, and provision shall be made for all interested citizens and citizens groups to be heard. The Board shall cause to be maintained complete public records of its proceedings, with a suitable index.

(d) *Appeals from decisions of the Board.* Within thirty days after any decision of the Board of Appeals is entered, any person, officer, department, board or bureau of the County, jointly or severally aggrieved by any such decision, may appeal to the Circuit Court for Howard County, in accordance with the Maryland Rules of Procedure. The Board of Appeals shall be a party to all appeals and shall be represented at any such hearing by the Office of Law.

(e) *Employees of the Board.* The Board may appoint, within budgetary limitations, such employees, and the Executive shall make available to the Board such services and facilities of the County, as are necessary or appropriate for the proper performance of its duties.

(f) *Implementing legislation.* The powers and functions of the Board of Appeals as herein provided for shall be defined by implementing legislation heretofore or hereafter enacted by the Council, subject to and to the extent required by applicable State law. The Council may by legislative act increase the compensation of the members of the Board of Appeals as provided in Section 501(a) of this Article and thereafter decrease such compensation; provided, however, that no reduction shall affect the compensation of a member of the Board of Appeals during his or her current term, and in no event shall the council have the power to decrease the compensation of members of the Board below the figure provided in this Charter. To the extent permitted by State law, the Council shall also have the power, by legislative act, to prescribe other appeals to be heard by, or to limit the jurisdiction of, the Board of Appeals in addition to those specified in this Article.

Editor's note—

An amendment to § 501 proposed by C.B. 89, 1980 was approved at an election held Nov. 4, 1980, and became effective Dec. 4, 1980. An amendment proposed by Res. No. 124, 1982, was approved at an election held Nov. 2, 1982, and became effective Dec. 2, 1982. An amendment to subsections (c) and (f) proposed by Res. No. 126, 1996 was approved at an election held Nov. 5, 1996, and became effective Dec. 5, 1996. An amendment to subsection (c) proposed by Res. No. 103, 2000 was approved at an election held November 7, 2000, and became effective December 7, 2000. An amendment to § 501(b) proposed by Res. No. 100, 2012 was approved at an election held on Nov. 6, 2012, and became effective on Dec. 6, 2012.

Section 502. Board of Appeals hearing examiner.

The County Council may appoint hearing examiners to conduct hearings and make decisions concerning matters within the jurisdiction of the Board of Appeals. Decisions of an examiner may be appealed to the Board of Appeals as provided by law. The Council shall establish by legislative act the duties, powers, authority and jurisdiction of any examiner appointed under this section. An examiner shall be a member in good standing of the Bar of the Maryland Court of Appeals and at the time of appointment shall have knowledge of administrative and zoning law, practice, and procedure. An examiner may be removed from office by vote of two-thirds of the members of the Council.

Editor's note—

An amendment repealing § 502, proposed by C.B. 66, 1980, was approved at an election held Nov. 4, 1980, and became effective Dec. 4, 1980.

Subsequently, an amendment proposed by Res. No. 103, 2000, approved at election November 7, 2000 and effective December 7, 2000, added a new § 502 as set out herein.

FOOTNOTE(S):

— (3) ---

Editor's note— *An amendment to art. V proposed by Res. No. 116, 1996 was approved at an election held Nov. 5, 1996, and became effective Dec. 5, 1996.* *(Back)*

Sayers, Margery

From:	Christopher J. Alleva <jens151@yahoo.com>
Sent:	Monday, July 1, 2019 7:53 AM
To:	CouncilMail
Cc:	Stuart Kohn; Dan O'Leary; Joel Hurewitz; Broida Joel
Subject:	CB33-2019 Response to Mr. Sang Oh, Angelica Baily testimony and Howard County's Star Chamber
Attachments:	Broida V WCI and Howard County.asf; Zoning Law and Nuissance Law.pdf; Little Patuxent Bus Stop and Pathway.pdf

Dear Council Members:

Please accept this for the record of CB33-2019.

As Mr. Oh opened his remark he said: "we need clear up some things." Unfortunately, Mr. Oh did the opposite with his testimony so I need to respond to some of the points he made in his testimony. This response does constitute a legal analysis it is simply a reply to his testimony in a legislative hearing.

I am going to skip any critique of Ms. Baily's testimony. Her testimony was so riddled with so many straw men, I tripped over them coming to the witness chair. The Chamber and Howard Hughes testimony oddly delivered through a County Agency, the Downtown Partnership was equally unpersuasive and self serving at the expense of the Citizen's of Howard County basic rights.

Oh's First Assertion: Standing is a requirement in order to appeal. You don't need standing to participate at Planning Board, you only need standing if you want to appeal.

That statement is perfectly accurate. Where it falls down is the failure to recognize that Planning and Zoning Appeals are under the legislative branch for a reason. It is designed as a check on the Administration. Appeals of Planning Board decisions are predicated on the complaint that the Administrative Agency, Planning Board or DPZ, did comply with the Howard County Code, the codification of legislative intent.

Furthermore, there are profound and flagrant errors in the Planning Board Rules of Procedure that violate the Howard County Administrative Procedures Act. For example, in section 1.106, there is no standard of proof, i.e. preponderance of the evidence and plans are heard that violate the County Charter, the Zoning Enabling Act, the Zoning Regulations and the Subdivision Regulations.

It is important to view this legislation in tandem with CB32- 2019, placing DPZ under oath and cross examining them at Planning Board sessions. Both of these bills address a fundamental problem in Howard County, that is the breach of faith and trust in DPZ and the Planning Board.

Oh's Second Assertion: Zoning Law is Derived from Nuisance Law

It accurate to say nuisance law applies only to what is in some way actually, or at least potentially noxious or harmful. Zoning is more broadly concerned with the regulation of uses whether or not they fall within this category. The basic philosophy behind both nuisance and zoning is the same, i.e., the proper regulation and use of property. But zoning is more comprehensive because it proceeds on the basis of benefitting the entire

community through a more or less extensive planned scheme of restrictions. (foot note 1. Zoning and the Law of Nuisance Fordham Law Review 1961).

Accordingly, this analogy is inapplicable to bill before the Council on standing.

Oh's Third Assertion: In order to complain you have to show actual injury to have standing.

How is this even possible? Planning and Zoning decisions precede the physical construction of the use approved. How can one show an injury for something that hasn't occurred. When Yellowstone Park was first proposed the Governor of Wyoming was opposed, years later seeing the benefits, he changed his position. Perhaps an appellants may change their mind years later. In the present it is impossible to show injury. Moreover, Appellants do not appeal for monetary damages. Successful appeals have to prove that the agency did not comply with their own rules.

Mr. Oh has created this false standard of distance and proof of an injury when in fact the standard is merely to you are specially aggrieved, that is differently than the general public.

Oh's Forth Assertion: Proposed text defining who has standing is more restrictive than the existing text.

That statement is perfectly accurate, yet entirely false. There is no standard currently, so any standard is more restrictive than no standard. The reality is that Oh and company have succeeded in imposing a highly dubious series of precedent setting Board of Appeals and Hearing Examiner mis-decisions that for all intents and purposes bar any one on the entire planet from appealing. It bars adjoining property owners, parties to the Planning Board case, and even properties on the same plat.

Oh's Fifth Assertion: Howard County Follows Bryniarski Case Precedent. Answer, this Erroneous.

This case deals with standing before Circuit Court in Maryland. Bryniarski has nothing to do with standing before a local appeals board. Attached hereto is a clip of the first minute and 30 seconds from the Appeals Court of the Joel Broida case, another public testifier on this Bill. Counsel for the developer pompously declares that Bryniarski is the law and the land and one of the Judges jumps out of his chair and declares, "no it's not, Bryniarski deals with standing before the Circuit Court" and then he notes there are several cases dealing with standing before Board's of Appeal. The Judge then says, even if you're right, and with body language says, and you're not, how can they overcome the exhaustion of Administrative Remedies hurdle for the Court to even hear the case?

Howard County Board of Appeals is a modern day Star Chamber

It is evident that Howard County in cahoots with the land use bar has created a "Star Chamber" of justice depriving it's citizen's of their basic right to due process. The Star Chamber was an English court that developed in the late 15th century, mainly trying cases affecting the interests of the Crown. It was notorious for its arbitrary and oppressive judgments and was abolished in 1641.

The present situation results in the Planning Board hearing cases they do not have authority hear, under the absence of even basic rules like a standard of proof. Parties are then barred from standing to appeal these gross injustices and then adding insult to injury they can never appeal to the Courts because they are prevented from exhausting their administrative remedies.

Finally, I want to share an appeal from 2015. CEPPA No, 12 required Howard Hughes to construct a pathway from the Hospital to Blandair Park. The segment that ran in front of the Columbia Exxon was proposed to

eliminate a decel. lane owned by the property and vital for traffic safety (see picture attached). We objected, and then we were treated to a parade of County staff from DPZ and DPW absurdly telling us how it would be safer.

It was only our right to appeal that forced the County and Howard Hughes to do the right thing and preserve this turning lane. And we were on our own, not backed by the hundreds of millions of dollars awarded to Howard Hughes by the County.

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1961

Zoning and the Law of Nuisance

ZONING AND THE LAW OF NUISANCE

INTRODUCTION

The law of zoning, in a relatively short period of time, has achieved a prominent position. The process by which this facet of land use control originated, expanded and is maturing, can be traced, to a large extent, by an examination of its relationship with the much older common law concept of nuisance. Though the influence of nuisance law on zoning today is limited, zoning has had a continuing effect on the application of the former. This comment will explore the various interrelationships of both concepts.

COMPARISON OF NUISANCE AND ZONING

Nuisance Defined

Nuisance is of common-law origin[1] and is grounded in the maxim that "a man shall not use his property so as to harm another."[2] The concept of nuisance is a broad one, difficult to define precisely.[3] Its meaning has been the subject of numerous and varied definitions,[4] some of which extend its scope beyond the invasion of property interests. In its narrower, more accurate sense, nuisance denotes a condition, which because of some noxious or harmful characteristic, causes an unwarranted interference with the ownership and enjoyment of another's property.

Nuisances have been classified according to the scope of their effects as public or common, private, and mixed or united. A public nuisance is one which infringes upon those rights shared as a whole by the citizens of the community, regardless of the number directly injured.[5] Private nuisances, on the other hand, affect one or more persons in the enjoyment of an individual right not similarly shared by the general public.[6] Those which are mixed or united constitute both a public and a private nuisance.[7] A facility, for example, polluting the atmosphere with smoke or dust may constitute both a public nuisance, enjoinable at the behest of the municipality, and a private nuisance, actionable

1. See Aldred's Case, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (1610).

2. "Sic utere tuo ut alienum non laedas." Joyce, The Law of Nuisances 45 (1906).

3. It has been said that "the only approximately accurate method of determining the meaning of the term nuisance is to examine the cases adjudicating what are and what are not nuisances." Id. at 1. For a discussion of the relationship between nuisance and negligence, see Comment, 24 Ind. L.J. 402 (1949).

4. See, e.g., Hart v. Wagner, 184 Md. 40, 43, 40 A.2d 47, 50 (1944); Randall v. Village of Excelsior, — Minn. —, —, 103 N.W.2d 131, 134 (1960); Lore v. Town of Douglas, — Wyo. —, —, 355 P.2d 367, 370 (1960). See also the definitions listed in Joyce, The Law of Nuisances 2-5 n.6 (1906). Blackstone gives a broad definition, describing it as "[A]nything that worketh hurt, inconvenience or damage." 3 Blackstone, Commentaries *216.

5. See, e.g., Echave v. City of Grand Junction, 118 Colo. 165, 168, 193 P.2d 277, 280 (1948); Mandell v. Pivnick, 20 Conn. Supp. 99, 125 A.2d 175 (Super. Ct. 1956).

6. E.g., W. G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953); Adams v. Commissioners, 204 Md. 165, 102 A.2d 830 (1954).

7. Garfield Box Co. v. Clifton Paper Bd. Co., 125 N.J.L. 603, 17 A.2d 588 (Sup. Ct. 1941).

by an individual property owner injured thereby.[8] Generally, a public nuisance cannot be the subject of an action by an individual citizen unless he can show special injury apart from that suffered by the public.[9]

Nuisances have been further categorized according to type. A nuisance per se or at law is an act, occupation, or structure which is a nuisance regardless of location or surroundings.[10] Examples fitting within this definition are necessarily limited, gambling establishments[11] and disorderly houses[12] being the two most often cited. Much more common are nuisances *per accidens*, or in fact, those which become such by reason of circumstances or location.[13] A gasoline station[14] or funeral parlor[15] may in one location be an authorized activity, and in another may constitute a nuisance in fact. It has also been held, inaccurately, that these may be nuisances per se.[16] In addition, those activities which have been declared nuisances by the legislature, or are carried on in violation of an ordinance, are said to be statutory nuisances.[17]

Zoning Distinguished

In its accurate sense, common-law nuisance applies only to what is in some way actually or at least potentially noxious or harmful. Zoning is concerned with the regulation of uses whether or not they fall within this category. The basic philosophy behind both nuisance and zoning is the same, *i.e.*, the proper regulation and use of property. But zoning is more comprehensive because it proceeds on the basis of benefitting the entire community through a more or less extensive planned scheme of restrictions. Various factors are taken into consideration such as the character of the district and its suitability for par-

8. See McGee v. Yazoo & M.V.R.R., 206 La. 121, 122, 19 So. 2d 21, 22 (1944). See also City of Phoenix v. Johnson, 51 Ariz. 115, 119, 75 P.2d 30, 34 (1938).

9. Schroder v. City of Lincoln, 155 Neb. 599, 52 N.W.2d 808 (1952); Morris v. Borough of Haledon, 24 N.J. Super. 171, 174, 93 A.2d 781, 784 (Super. Ct. 1952). See Note, 23 Albany L. Rev. 447 (1959).

10. See Dill v. Exel Packing Co., 183 Kan. 513, 331 P.2d 539 (1958); Bluemer v. Saginaw Cent. Oil & Gas Serv., 356 Mich. 399, 97 N.W.2d 90, (1959).

11. Heyne v. Loges, 68 Ariz. 310, 312, 205 P.2d 586, 588 (1949).

12. Kelley v. Clark County, 61 Nev. 293, 296, 127 P.2d 221, 224 (1942); Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 416, 47 N.E. 2, 4 (1897).

13. E.g., Lauderdale County Bd. of Educ. v. Alexander, 269 Ala. 79, 83, 110 So. 2d 911, 915-16 (1959).

A nuisance per se is sometimes referred to as an absolute nuisance, and a nuisance in fact as a qualified nuisance. Interstate Sash & Door Co. v. City of Cleveland, 148 Ohio St. 325, 326, 74 N.E.2d 239, 240-41 (1947). "[T]he former . . . is established by proof of the mere act . . . the latter by proof of the act and its consequences." State v. WOR-TV Tower, 39 N.J. Super. 583, 587, 121 A.2d 764, 768 (Super. Ct. 1956).

14. Bell v. Brockman, 190 Okla. 583, 584, 126 P.2d 78, 79 (1942); Thomas v. Dougherty, 325 Pa. 525, 526, 190 Atl. 886, 887 (1937).

15. City of St. Paul v. Kessler, 146 Minn. 124, 125, 178 N.W. 171, 172 (1920).

16. Pennell v. Kennedy, 338 Pa. 285, 12 A.2d 54 (1940); Appeal of Perrin, 305 Pa. 42, 156 Atl. 305 (1931). See Note, 24 Mo. L. Rev. 269 (1959).

17. O'Keefe v. Sheehan, 235 Mass. 390, 126 N.E. 822 (1920).

ticular uses,[18] the conservation of property values,[19] the lessening of traffic congestion,[20] public safety,[21] and aesthetic considerations.[22] These and similar factors may also be given weight in nuisance actions.[23] In the latter case, they are not prior, planned considerations, as they are in zoning, but rather constitute evidentiary aids in determining the character of the use in question.

Influence of Nuisance on the Development of Zoning

Nuisance law exerted a greater influence on zoning when it was in its formative stages than it does today. It was early recognized that the validity of zoning laws was based not upon their relation to the law of nuisance, but upon the police power of the state.[24] Yet courts relied on the concept of nuisance in passing upon the new zoning ordinances.[25] Since the first zoning enactments were little more than nuisance regulations,[26] it was natural for courts to tend to relate them by analogy. Particularly before the decision in *Village of Euclid v. Ambler Realty Co.*,[27] which upheld zoning regulations as a proper exercise of the police power, restrictions of uses which were also common-law nuisances, or which at least contained elements of the same, were more likely to be upheld.[28] Failure to give compensation for the restriction of uses which were not nuisances was considered to border on deprivation of property without due process of law.

As zoning ordinances expanded to include the regulation of nonoffensive sub-

18. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); City of Keene v. Blood, 101 N.H. 466, 146 A.2d 262 (1958); Eves v. Zoning Bd., 401 Pa. 211, 164 A.2d 7 (1960). Additional zoning purpose are listed in State v. Hillman, 110 Conn. 92, 94-97 n.1, 147 Atl. 294, 295-96 n.1 (1929). See also Pa. Stat. Ann. tit. 16, § 5226 (1953).

19. Strain v. Mims, 123 Conn. 275, 193 Atl. 754 (1937); Cobble Close Farm v. Board of Adjustment, 10 N.J. 442, 452-53, 92 A.2d 4, 9 (1952).

20. Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 171, 60 A.2d 743, 753 (1948).

21. State v. Iten, — Minn. —, —, 106 N.W.2d 366, 368-69 (1960).

22. See Comment, 29 Fordham L. Rev. 729 (1961).

23. Obrecht v. National Gypsum Co., 361 Mich. 399, 105 N.W.2d 143 (1960); Sohns v. Jensen, 11 Wis. 2d 449, 105 N.W.2d 818 (1960); Pennoyer v. Allen, 56 Wis. 502, 14 N.W. 609 (1883). See also Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases, 1955 Wis. L. Rev. 440, 443.

24. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926); Miller v. Board of Pub. Works, 195 Cal. 584, 234 Pac. 381, 384 (1925); Boyd v. City of Sierra Madre, 41 Cal. App. 520, 183 Pac. 230 (Dist. Ct. App. 1919); Comment, 32 Yale L.J. 833, 834 (1923); Comment, 29 Yale L.J. 109 (1919).

25. See Noel, Unaesthetic Sights As Nuisances, 25 Cornell L.Q. 1, 14 (1939).

26. See Bettman, The Constitutionality of Zoning, 37 Harv. L. Rev. 834, 839 (1924): "[Z]oning represents no radically new type of property regulation, but merely an extension or new application of sanctioned traditional methods for sanctioned traditional purposes." See also Comment, 39 Yale L.J. 735, 737-38 (1930).

27. 272 U.S. 365 (1926).

28. "When zoning was new and had to win its way through legislatures and the courts, theories not linking up with familiar categories of power and policy would have been no help to the cause, the legal pioneers in the movement were wise to proceed as they did." Freund, Some Problems in the Law of Zoning, 24 Ill. L. Rev. 135, 149 (1929).

jects, it became clear that the police power of the state was the sole basis for their constitutionality. This was conclusively determined by the *Euclid* decision, although it was noted by Mr. Justice Sutherland that the analogies of nuisance law, where applicable, could serve as useful guides.[29] It could no longer be doubted that zoning was not limited to or coextensive with nuisance. However, because of the early reliance on nuisance, and because of the analogy between nuisances and restricted uses, courts remained prone to regard all restricted uses as nuisances, if not in theory, at least in terminology. Use of nuisance terms in zoning cases has persisted long after the cleavage between them should have become complete.[30] This has helped to sustain the notion, less and less prevalent, that somehow nuisance and zoning are dependent upon each other.

Nuisance influence has remained strongest in the field of retroactive zoning.[31] Logically, it was felt that a more persuasive reason was necessary to justify the removal without compensation of already existing uses than the prohibition of future ones. The abatement power over nuisance could be borrowed if there were in fact an element of common-law nuisance present in the subject sought to be removed.[32] Reliance upon the latter was felt to be necessary because of the difference in the application of the respective powers of zoning and nuisance. This was explained by the court in *Jones v. City of Los Angeles*:[33]

> And here the distinction between the power to prohibit nuisances and the power to zone is exceedingly important. The power over nuisances is more circumscribed in its objects; but once an undoubted menace to public health, safety, or morals is shown, the method of protection may be drastic. . . . Zoning is not so limited in its purposes. . . . It deals with many uses of property which are in no way harmful. If its objects are so much broader than those of nuisance regulation, if its invasion of private property interests is more extensive, and if the public necessity to justify its exercise need not be so pressing, then does it not follow that its means of regulation must be more reasonable and less destructive of established interests?[34]

Generally, nonconforming uses which were not actual nuisances would be protected even today from removal without compensation.[35] Yet if they become

29. 272 U.S. at 387-88.

30. See Clutter v. Blankenship, 346 Mo. 961, 144 S.W.2d 119 (1940); King v. Blue Mountain Forest Ass'n, 100 N.H. 212, 123 A.2d 151 (1956); Mayor of Alpine v. Brewster, 7 N.J. 42, 80 A.2d 297 (1951); Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182, 189 (Super. Ct.), aff'd, 15 N.J. 238, 104 A.2d 441 (1954).

31. See Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14, 22 (1930); Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 457, 473 (1941); O'Reilly, The Non-Conforming Use and Due Process of Law, 23 Geo. L.J. 218, 225 (1934).

32. Jones v. City of Los Angeles, supra note 31; Noel, supra note 31, at 473: "Although according to the better view it is not essential that a particular enterprise actually constitute a common-law nuisance to be subject to legislative removal, the matter of whether injunctions have been frequent or rare will influence strongly the decision as to whether the use is sufficiently detrimental to the public welfare to be subject to removal without compensation."

33. 211 Cal. 304, 295 Pac. 14 (1930).

34. Id. at 310, 295 Pac. at 20. See also Comment, 1951 Wis. L. Rev. 685, 692.

35. Kryscnski v. Shenkin, 53 N.J. Super. 590, 148 A.2d 58 (Super. Ct. 1959); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952); Incorporated Village of Brookville v. Paulgene

inimical to the public health or safety, they may be removed under the police power.[36] Even though such uses are usually found to be nuisances, this finding is unnecessary. Zoning has thus achieved an independent, self-sufficient status. This contrasts sharply with the earlier consideration of zoning as a mere extension of nuisance law.

Influence of Zoning on the Law of Nuisance

The growth of zoning may be tending to liberalize nuisance law. This is indicated by an analysis of court decisions in nuisance cases outside of zoned areas.[37] Since the trend today is toward a liberal application of zoning laws, the effect upon nuisance law in zoned areas has been similar. In the latter instance, however, the influence has been more direct, leading some courts to hold that where they coincide with common-law nuisance, zoning regulations have pre-empted the field.[38] At the least, while the law of nuisance remains essentially distinct, zoning statutes have to varying degrees circumscribed the extent of nuisance actions. There are dual aspects of this effect—the authorization of common-law nuisances and the restriction of uses which are not such.

Effect of Authorizing Ordinances

A use which is being properly operated in an authorized zone cannot be a nuisance per se. Generally it cannot be a public nuisance either.[39] In reaching this conclusion, the court, in *Robinson Brick Co. v. Luthi*,[40] stated:

> Where the legislative arm of the government has declared by statute and zoning resolution what activities may or may not be conducted in a prescribed zone, it has in effect declared what is or is not a public nuisance.[41]

An authorized use, however, may constitute what is in fact a public nuisance.[42]

Realty Corp., 24 Misc. 2d 790, 200 N.Y.S.2d 126 (Sup. Ct. 1960); Incorporated Village of No. Hornell v. Rauber, 181 Misc. 546, 40 N.Y.S.2d 938 (Sup. Ct. 1943). See generally Noel, Retroactive Zoning and Nuisances, 41 Colum. L. Rev. 457 (1941); O'Reilly, The Non-Conforming Use and Due Process of Law, 23 Geo. L.J. 213 (1934).

36. Incorporated Village of Brookville v. Paulgene Realty Corp., supra note 35. "How far the police power will go in sustaining a governmental agency in interfering with established property rights without paying compensation therefore is not capable of exact statement. Apparently it is a matter of weighing the urgency of the evil to be corrected against the cost to the property owner of complying with the new law, or the dimunition in value which results from it. . . ." Id. at 798, 200 N.Y.S.2d at 137.

37. Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases, 1955 Wis. L. Rev. 440.

38. Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946); Godard v. Babcon-Dow Mfg. Co., 313 Mass. 280, 47 N.E.2d 303 (1943). See generally Kurtz, The Effect of Land Use Legislation on the Common Law of Nuisance in Urban Areas, 36 Dicta 414 (1959); Comment, 54 Mich. L. Rev. 266 (1955).

39. E.g., Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 269, 288 P.2d 507, 511 (1955); Nugent v. Vallone, — R.I. —, 161 A.2d 802 (1960); Lindermeyer v. City of Milwaukee, 241 Wis. 637, 639, 6 N.W.2d 653, 655 (1942).

40. 115 Colo. 106, 169 P.2d 171 (1946).

41. Id. at 108, 169 P.2d at 173.

42. See the definition of public nuisance at text accompanying note 5 supra.

But since the governing authority which has authorized the use is also the only proper party to bring an action for abatement of a public nuisance,[43] the remedy has, in effect, been suspended.

The court, in *Robinson*, went further, and held that even if the mining operations in question were a private nuisance, the lower court had no jurisdiction to enjoin the operation, because of the authorizing statute.[44] A majority of courts, however, have held that a use, which, though authorized by statute, becomes a nuisance in fact, may be the basis of an action to enjoin a private nuisance on the part of the one injured.[45] This view recognizes that what constitutes a nuisance should not be conclusively determined by zoning ordinances. The minority cases hold that the zoning ordinance, since it decides which uses are permitted in various zones, is decisive as to whether nuisance remedies should be granted. The implication, therefore, is that a remedy for a private nuisance will not be permitted against an authorized use, not because it is not in fact a common-law nuisance, but because it is located in an authorized zone.[46] At least one state has expressly so provided by statute.[47]

The theory behind this enactment and decisions of similar effect is that persons living in developed areas must to a certain degree submit to the unavoidable annoyances and discomfort attendant upon the operation of necessary industries or facilities. It is the purpose of zoning to attempt to strike a balance between these conflicting interests as painlessly as possible. Necessarily the line must be drawn somewhere, resulting in different classifications of zones. For this reason, "what would be an unreasonable interference with the comfortable enjoyment of one's home in a residential area might be regarded as the normal, expected and inescapable concomitant of modern social conditions in an industrial section."[48]

Thus the conflict in this line of cases is not whether a nuisance is in fact present, but over the policy question of whether authorized operations will be actionable despite their careful conduct. To say that an authorized use is not or cannot be a nuisance really means that the complainant is without a remedy.

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43. See Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 Atl. 379 (1917); Morris v. Borough of Haledon, 24 N.J. Super. 171, 93 A.2d 781 (Super. Ct. 1952).

44. 115 Colo. at 108, 169 P.2d at 173.

45. E.g., Commerce Oil Ref. Corp. v. Miner, 170 F. Supp. 396 (D.R.I. 1959); Vulcan Materials Co. v. Griffith, 215 Ga. 811, 815, 114 S.E.2d 29, 33-34 (1960); Rockenbach v. Apostle, 330 Mich. 338, 341, 47 N.W.2d 636, 639 (1951); Sweet v. Campbell, 282 N.Y. 146, 25 N.E.2d 963 (1940) (four-to-three decision); Reid v. Brodsky, 397 Pa. 463, 465 n.1, 156 A.2d 334, 336 n.1 (1959). See 9 Fordham L. Rev. 437 (1940); 11 Syracuse L. Rev. 323 (1960).

46. See Bove v. Donner-Hanna Coke Corp., 142 Misc. 329, 254 N.Y. Supp. 403 (Sup. Ct. 1931). See also Beuscher & Morrison, Judicial Zoning Through Recent Nuisance Cases, 1955 Wis. L. Rev. 440, 443-44; Comment, 54 Mich. L. Rev. 266, 267 (1955).

47. Cal. Code Civ. Proc. § 731a. Compare Fendley v. City of Anaheim, 110 Cal. 731, 294 Pac. 769 (1930), with Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955).

48. Fuchs v. Curran Carbonizing & Eng'r Co., 279 S.W.2d 211, 218 (Mo. Ct. App. 1955). See also Kankakee v. New York C.R.R., 387 Ill. 109, 55 N.E.2d 87, 90 (1944).

The expression that the legislature may legalize that which otherwise would be a public or private nuisance[49] leads to the same result. Conversely, the legislature has the power to prescribe, under reasonable limitations, that certain operations constitute nuisances, thereby changing the common-law classifications.[50]

The Effect of Zoning Ordinances Upon Unauthorized Uses

The authority of the legislature to modify the extent of nuisance law has been carried to an extreme by several cases[51] which have declared that any operation carried out in violation of a zoning ordinance is a nuisance, even, in some instances, a nuisance per se. Thus a retail store in a residential area has been expressly declared a nuisance because it violated a zoning ordinance,[52] although the restriction has no real relation to the common-law concept of nuisance.[53] The effect of these decisions is to extend the definition of nuisance beyond its traditional meaning, thereby introducing another element of uncertainty into this already ill-defined and confused area.

The majority of courts recognize that the legislature does not have the power to declare that a violation of a zoning ordinance will itself constitute a nuisance.[54] Structures erected subsequent to and in violation of a zoning ordinance may of course be enjoined,[55] whether they are or are not common-law nuisances. On the other hand, prior nonconforming uses which cannot be reasonably included either under the police power, or under nuisance law, should not be subject to removal without compensation.[56]

Ultimately, the test, in the case of either future or existing nonconforming uses, reduces itself basically to the question of whether the restrictive ordinance, considering all the circumstances, is or is not arbitrary in its application.[57] The fact that a restricted operation is denominated a nuisance, a statutory nuisance, or is excludable under the police power is not determinative. This goes back to

49. Godard v. Babson-Dow Mfg. Co., 313 Mass. 280, 47 N.E.2d 303 (1943); Clutter v. Blankenship, 346 Mo. 961, 144 S.W.2d 119 (1940).

50. Mayor of Alpine v. Brewster, 7 N.J. 42, 80 A.2d 297 (1951); Borough of Creskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (Super. Ct. 1953), aff'd, 15 N.J. 238, 104 A.2d 441 (1954). See also Pa. Stat. Ann. tit. 16, § 5190 (1953).

51. See McIvor v. Mercer-Fraser Co., 76 Cal. App. 2d 247, 172 P.2d 758 (Dist. Ct. App. 1946); City of New Orleans v. Lafon, 61 So. 2d 270, 273 (La. Ct. App. 1952); Heinl v. Pecher, 330 Pa. 232, 234, 198 Atl. 797, 799 (1938). See also People v. Kelly, 295 Mich. 632, 634, 295 N.W. 341, 343 (1940).

52. City of New Orleans v. Liberty Shop, Ltd., 157 La. 26, 101 So. 798 (1924).

53. Ibid.

54. Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); Monzolino v. Grossman, 11 N.J.L. 325, 168 Atl. 673 (1933); Parker v. Zoning Bd., — R.I. —, —, 156 A.2d 210, 213 (1959); Greenwood v. The Olympic, Inc., 51 Wash. 2d 18, 315 P.2d 295 (1957).

55. See Pa. Stat. Ann. tit. 16, § 5232 (1953).

56. See note 35 supra and accompanying text.

57. Reese v. Mandel, 224 Md. 121, 125, 167 A.2d 111, 115-16 (1961); Kozesnick v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957); Delawanna Iron & Metal Co. v. Albrecht, 9 N.J. 424, 426, 88 A.2d 616, 618 (1952); Walker v. Town of Elkin, 254 N.C. 85, 88, 118 S.E.2d 1, 4 (1961); Gayland v. Salt Lake County, — Utah —, —, 358 P.2d 633, 636 (1961).

the distinction between nuisance and zoning noted in the early case of *City of Aurora v. Burns*,[58] a view subsequently adopted by the *Euclid* decision:

> The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development.[59]

If the operation in question is not offensive or dangerous, it should not properly be the subject of a nuisance action. If it is a proposed use, it may be restricted by a zoning ordinance. But if it preceded the zoning regulation it will generally be protected as a nonconforming use.[60] The courts, in applying a rule of reason, to both zoning and nuisance restrictions, will determine whether they are so confiscatory as to come within the purview of the just compensation clause of the fifth amendment or the due process clause of the fourteenth amendment. This is actually the underlying basis for the validity of all regulatory enactments dealing with property.

Zoning Laws as Evidence of Nuisance

In nuisance actions, courts may take into consideration zoning regulations proscribing or authorizing similar uses. While the presence or absence of such statutes may be persuasive evidence, it is not determinative of the question in the particular case.[61] The majority of courts do not feel conclusively bound in nuisance cases by zoning ordinances either authorizing or prohibiting the type of operation in question.[62]

Conclusion

Both nuisance and zoning derive from the same basis—the police power; and both have the same ultimate purpose—land use regulation. Both are ultimately governed in their application by the appropriate clauses of the fifth and fourteenth amendments. Within these bounds, the unmistakable tendency has been to allow a widening of the scope of zoning and an extension of its powers to the outside limits of what is a reasonable and non arbitrary plan for a better community. Similarly, except where the policy of protection of industrial uses has intervened, there has been a liberalization of the application of nuisance law. It can be expected that in the future there will be a decrease in the uncertainty caused by relating zoning with the confusing concept of nuisance, proportionate to the increase in the scope and self-sufficiency of zoning.

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58. 319 Ill. 93, 149 N.E. 784 (1925).

59. 272 U.S. at 392-93 (1926), citing City of Aurora v. Burns, 319 Ill. 93, 94-95, 149 N.E. 784, 788 (1925).

60. See note 35 supra and accompanying text. See also Pa. Stat. Ann. tit. 16, § 5233 (1953).

61. See Commerce Oil Ref. Corp. v. Miner, 170 F. Supp. 396, 409 (D.R.I. 1959); Lauderdale County Bd. of Educ. v. Alexander, 269 Ala. 79, 110 So. 2d 911 (1959); Rockenbach v. Apostle, 330 Mich. 338, 341, 47 N.W.2d 636, 639 (1951); White v. Old York Rd. Country Club, 222 Pa. 147, 185 Atl. 316 (1936); Appeal of Perin, 305 Pa. 42, 156 Atl. 305 (1931). See also Kellerhals v. Kallenberger, — Iowa —, 103 N.W.2d 691 (1960); Sohns v. Jensen, 11 Wis. 2d 449, 105 N.W.2d 818 (1960).

62. See notes 45 and 54 supra and accompanying text.


Little Patuxent Pkwy
Columbia, Maryland
Google
Street View - Aug 2018
EXXON
Google
Image capture: Aug 2018
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Report a problem

Sayers, Margery

From: Christopher J. Alleva <jens151@yahoo.com>
Sent: Monday, July 1, 2019 7:12 AM
To: CouncilMail; Brian England
Cc: Joel Hurewitz; Broida Joel; Dan O'Leary; Williams, China; Facchine, Felix; Walsh, Elizabeth; Jung, Deb
Subject: CB33- 2019/ 2013 HC B. of Appeals Erroneously Attempts to Dismiss Case for Lack of Standing where they were original jurisdiction
Attachments: BA 11-34 C Giant Standing Notice.pdf; OOL-conflict.doc

To: County Council of Howard County.

Below I pasted in an article from the Baltimore Sun that details an incident when the Board of Appeals acted arbitrarily, capriciously, and erroneously on the standing matter. I wanted to get this in record for CB33-2019.

After 13 sessions from October 2012 the Board of Appeals voted 3-2 July 15, 2013 to deny Giant Foods gas station conditional use request for a gas station. From the beginning it was obvious to everyone that putting a gas station at the Centre Park Drive shopping center was unwise. The parking lot already failed.

Outrageously, the Board voted to recall the parties two months later on 9/11/2013 to hear the Board's motion to dismiss the case for lack of standing after they had voted. The scandal here is that no one has to have standing to oppose a conditional use before the BoA because they are siting in original jurisdiction not in an appellate capacity. **By the way, Giant is now glad this was denied.**

Also, attached is a memorandum to the file written to memorialize the BoA errors in the Broida case. Mr. Broida testified to his experiences in 2007. Again, the BoA misapplied the law

Amanda Yeager

Baltimore Sun October 2, 2013
People seeking standing in a recent Howard County Board of Appeals case about a proposed gas station on Centre Park Drive in Columbia are accusing the board of violating the Maryland Open Meetings Act for holding an unannounced work session after a hearing on Sept. 11.

Bill Erskine, the attorney for those seeking standing in the gas station case, wrote a letter to the board stating that the work session "was in fact intended to deprive the public as well as the parties to this instant case of the notice required under the Maryland Open Meetings Act."

In January 2012, operators of the Giant Food store on Centre Park Drive requested a conditional use to open a gas station in the Columbia Palace Plaza parking lot. Objections were raised by Sean Maumood, who owns a gas station across the street, as well as three neighborhood residents concerned about a rise in traffic. The county hearing examiner approved the request, and the case moved to the Board of Appeals.

According to documents provided by Howard County Independent Business Association Executive Director Chris Alleva, who aided the gas station owner and residents in their objection, the unscheduled Sept. 11 work session was held after the close of an unrelated hearing.

Alleva, who had just attended another the hearing, said he and his lawyer packed up and left at the end, only to find out later a work session followed the same night.

The Maryland Open Meetings Act requires "reasonable or advance notice" in writing for government meetings held in closed or open session.

A Board of Appeals hearing on plans for a funeral home in Clarksville that was scheduled for Thursday, Jan. 5 had to be postponed because the hearing was not properly advertised by the county.The law says the county has to advertise zoning hearings 30 days in advance, through a notice in the local...

The work session lasted 12 minutes, according to minutes from the prior meeting.

Alleva and Erskine were subsequently notified by the board's administrative assistant that a work session to discuss standing in the gas station case had been scheduled for Oct. 3.

The board already voted July 15 to approve standing for Maumood and deny the request by Giant for a conditional use to build the gas station.

"They voted already," Alleva said. "For them to do this" – revisit who has standing in the case – "is highly irregular."

At the hearing on July 15, opponents argued, and some board members agreed, that the gas station Giant wanted would create safety hazards for customers driving through the parking

The votes on who had standing and the Giant request to build were both split, 3 to 2.

In notifying Erskine, the appeal board's administrative assistant said board member James Howard moved to reconsider standing in the case during the Sept. 11 work session, citing a decision in a prior Baltimore land-use case.

In that decision, a judge ruled that Remington resident Benn Ray had no standing to object to a proposed development of apartments and a big-box store on the site of a closed car dealership because he didn't live close enough to be negatively affected.

Alleva and Erskine said the Benn Ray case already had been discussed in a prior Board of Appeals hearing.

Erskine wrote to the board and requested the Oct. 3 work session not be held. He wrote that Maryland law requires motions to reconsider standing be brought by a party to the case, and only then in the event of a mistake of fact or law.

"Quite simply, Mr. Howard is asking the Board to reconsider the exact same facts and the exact same law and is hoping that the Board will have an impermissible *change of mind* [Erskine's emphasis]," he wrote.

Barry Sanders, counsel for Howard and the Board of Appeals, declined to be interviewed. Howard also would not answer questions about the case.

County Deputy Solicitor Paul Johnson, who does not represent the board, said no state open meetings rules were broken.

"I think it would be a little bit excessive to say we have to give everybody notice to say we're having a work session to decide when we're going to have another work session," Johnson said.

Howard County Board of Appeals

George Howard Building
3430 Courthouse Drive
Ellicott City, Maryland 21043
313-2377

September 12, 2013

Stacy P. Silber, Esq.
Lerch, Early & Brewer
3 Bethesda Metro Center - Suite 460
Bethesda, MD 20814

William Erskine, Esq.
Offit Kurman
8171 Maple Lawn Blvd., Suite 200
Maple Lawn, MD 20759

Dear Ms. Silber & Mr. Erskine:

RE: BA 11-034C, Giant of Maryland, LLC

On September 11, 2013, Board member James Howard moved to reconsider the Motion to Dismiss for Lack of Standing in BA 11-034C, Giant of Maryland, LLC, based on the record as presented before the Board previously, in light of the decision in the *Benn Ray* case (Benn Ray, et al. v. Mayor and City council of Baltimore, et al. 430 Md. 74 (2013))

The Board has scheduled a work session to consider this Motion for Thursday, October 3 @ 6:30 p.m. in the C. Vernon Gray Room.

Sincerely,

Robin Regner

Robin Regner
Administrative Assistant

cc: Board members
Barry Sanders, Esq.

1It Whom it may concern:

Inherent Conflict of Office of Law

There are a ton of cases that "permit" a public attorneys office to represent multiple and conflicting segments of Government.

That said I think there is a fairly compelling case in Howard County to review that practice. First, in my opinion, contrary to some in the HC OOL, there is only one client, not multiple clients. (Charter Section 101. - Body corporate and politic. "Howard County as it now exists constitutes a body corporate and politic")

The disparity is particularly seen in Board Of Appeal cases, whose rules are archaic and deny due process. The subpoena rule (must ask before any testimony is taken) and sign in rule in particular[1]. They have been used for years as "gotcha" rules".

Over the years the BOA has on occasion hid behind it's archaic/out dated rules of procedures and the **Office of Law's preference for "rote" hearings and '*de facto*' asserted support of the County, partiuclarly DPZ's positions**, another one of its stated public clients[2].

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1 . What 'due process' principle do these rules support?

2 . By way of example of the Office of Law's inherent conflict, in a recent case DPZ refused to correct its erroneous pending Technical Staff Report (TSR) to the BOA, until a subpoena was issued (in a number of cases when there are errors in the TSR, DPZ has automatically refused to correct clear errors ,or erroneous statement based on lack of information) for Ms. McLaughlin; Paul Johnson, Esq, Deputy County Solicitor, then intervened on behalf of Ms. McLaughlin. The result was a corrected TSR on a significant issue in the case. Ms. McLaughlin's subpoenaed appearance was then excused. **But the conflict issue remains, and in my opinion adversely affects the rendering of independent legal advice to the BOA**!

Another example was the Tower case, where OOL counsel gave a board member what in my opinion, was absolutely wrong legal advice resulting in a significant vote change, from 3-1 granting standing to Mr. Broida, to 2-2 tie vote. (See the unreported opinion of *Broida v. Renaissance Centro Columbia, LLC*, unreported – issued 7-23-2008)

The 2-2 vote resulted from Mr. Sanders erroneous answer to Mr. Pfefferkorn's question to Mr. Sanders of "whether Mr. Broida's special aggrievement had to be different than Ms. Stolley's aggrievement (who also lived in the same adjacent building as Mr. Broida). When Mr. Sanders answered yes, Mr. Pfefferkorn changed his vote, resulting in the 2-2 tie, instead of a 3-1 vote in favor of Broida's standing. The *right answer* is that Mr. Broida had to show a special aggrievement from the general public, NOT from Ms. Stolley, a fellow resident in the same adjacent building as Mr. Broida's residence.

That error was compounded by the Office of Law's refusal (to the undersigned's knowledge- first time ever) not to join Broida's appeal from the Circuit Court's grant of a Motion for Summary Judgment in violation of the long standing legal requirement of "*exhaustion of administrative remedies*". As the Court of Special Appeals found, when measured again the correct legal standard the 2-2 vote was denial of RCC's Motion to Dismiss. RCC failed to carry their burden of production and persuasion on the rebuttable presumption of Mr. Broida's standing. (See page 10-12 of the opinion). Interestingly after conferring with OOL Counsel, the BOA came back and voted to continue the hearing until new members could vote, instead of correctly concluding that RCC had failed in its challenge of Mr. Broida's standing and proceeding with the De Novo hearing as provided by 2.210 (a)(2) (iii). In my opinion, Mr. Sanders was influenced by DPZ's extreemly strong position that their New Town procedures not be legally challenged, **which was the focus of Mr. Broida's appeal**. DPZ and the Administration *(despite political promises to the contrary)* wanted RCC to win in the worst way to avoid possible exposure of illegal practices over the years. That explains the OOL's exceedingly weak response at the Circuit Court level and their failure (to my

Frankly, the BOA needs to review the record of the Office of Law's record on appeal to Annapolis[3]. In that Tower case, in my opinion had Mr. Sanders given the correct advice, the vote would have been 3-1 for Mr. Broida's standing. Alternatively had he correctly analyzed the effect of the 2-2 vote , Mr. Broida still would had standing.

In my opinion from seeing a number of cases over the years, there has been a clear preference in the OOL's advice to the BOA to support the applicable 'administrative decision', typically being appealed. In my opinion that constitutes a conflict of interest and denies the BOA 'independent' legal advice. In my opinion it also increases the number of appeals, which even with mostly "pro se"/volunteer counsel (huge advantage to Appellee in terms of resources/legal support), has resulted in an unusually unsuccessful appeal record for OOL

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knowledge first time) to join Mr. Broida's appeal challenging the Circuit Court's opinion ending the case by Summary Judgment BEFORE "*exhaustion of administrative remedies*"

3 . A significant number of the appeals are 'pro se' and/or without the benefit/resources of paid counsel, **a distinct advantage to the Appellee side**.

Sayers, Margery

From: Susan Gray <susan@campsusan.com>
Sent: Friday, June 21, 2019 8:59 AM
To: CouncilMail; STUART KOHN; Alan Schneider; Charles Lapinski; Chris Alleva; Susan Garber; Dan O'Leary; Marlena Jareaux
Cc: Susan Gray
Subject: CB 33 Standing Bill

Dear Council Members:

Some comments on Bill 33-2019:

1. The Bill, as proposed, doesn't really improve citizen standing in HC. It defines the legal term "specifically aggrieved" by the more common phrases typically used in standing cases in defining what that term means. Unfortunately, though, this use of more common language seems problematic because it hides the fact that what those common phrases actually mean in terms of whether one has standing to mount an appeal all the way up through the courts is very nuanced and condition specific. I fear that folks will take the common descriptions at face value and just assume they have standing without carefully considering the nuances of their case and whether in their particular circumstance they truly have standing.

If there is any possibility of litigation through the courts, now if you go through the Board of Appeals process as is set out in CB 33, you have to make sure from the get go before the Planning Board that there is a potential petitioner who meets all the Md. case law standing requirements, not just what is specified in the Howard County Code. I can see how the use of this more common language establishing an appeal from the Planning Board to the BOA (as well as the new language which allows anyone who participated in the Planning Board proceeding to appeal to the BOA) could actually set folks up for failure when they file for judicial review of a BOA decision.

2. If the Council truly wishes to open up standing in the County, there is a relatively easy way to do this—that is: have nothing, or almost nothing go through the Board of Appeals. (BOA) The reason for this is that under Article XIA of the Md. Constitution, the Express Powers Act (now Land Use Article of Annotated Code, Subtitle 10) and the HC Charter, one has to be specifically aggrieved to file an appeal of a BOA decision to Circuit Court. The HC Charter mimics this state law standard. Since state law and the Charter govern here, both would have to be changed to have a different test for standing for appealing a BOA decision to Circuit Court. Folks very well could think that the same appeal standard applies from the BOA to the Circuit Court when it does not.

From a citizens perspective, the good thing is there is no such state or charter requirements for filing judicial appeals of other agency decisions (decisions from quasi-judicial proceedings before the Planning Board, Hearing Examiner or Zoning Board). For appealing decisions to the Circuit Court from these entities, the Council can simply establish by ordinance (or the people could ratify a Charter change) setting forth who has standing. Through either of these methods standing can be given to whomever and whatever the Council or the people choose. In PG, at one point standing was expanded and given to any taxpayer in the County.

Besides the ability to establish less onerous standing requirements, there are other good reasons to have land use decision processes which do not go before the BOA. For example, there is no reason to have to present a case twice (first before the Planning Board and then before the BOA) as is currently done in many instances. Furthermore, the BOA

has a screwy interpretation (inconsistent with Maryland Rules and inconsistently applied) of how to count the 30 days for appeal from the Planning Board to the BOA—often resulting in cases being kicked out for the appeal to the BOE being filed too late.

Thus, if the Council wants to broaden standing in a meaningful way, by Bill, change the decision-making processes for land-use decisions so that there is only one quasi judicial hearing (and it is not before the BOA) and establish a direct appeal of the resulting decision to the Circuit Court.

This is generally how it was done in PG from the early 1990's to about five years ago. This much more lax standing requirement really opened up the courts to citizens From the developers perspective, though, this gave citizens way too much access to the courts. About ten years ago they started lobbying to "do things more like Howard" (get rid of taxpayer status as sufficient to establish standing in judicial review cases). The citizens were not watching and a several years ago the requirement that all you had to do to have standing was to be a "taxpayer" in PG was eliminated.