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http://www.mdcourts.gov/opinions/coa/2017/13a17.pdf

DEVELOPMENT RIGHTS AND RESPONSIBILITIES AGREEMENT – REQUIRED CONTENTS – "ENHANCED PUBLIC BENEFITS" – MD. CODE ANN., LAND USE (2012) § 7-303 – CONSIDERATION

Facts:

Lillian C. Blentlinger, LLC and William L. Blentlinger, LLC, Petitioners, own two parcels of land ("the Property") in Frederick County, Maryland ("the County"), Respondent, totaling approximately 279 acres. The Blentlinger family farmed the Property for generations before deciding to explore the possibility of developing the Property for other uses. Since 1959, the Property had been zoned for agricultural use. In 2006, for the first time, the Property was designated for Low Density Residential ("LDR") land use. Being designated for LDR land use permits a property owner to apply for a Planned Unit Development ("PUD"). Frederick County Code (2014) ("FCC") § 1-19-10.500.2(A) provides, in pertinent part, that a "PUD District may only be established where the tract of land receiving the PUD District has a County Comprehensive Plan Land Use designation of [LDR], Medium Density Residential, or High Density Residential[.]" A PUD is a "floating zone[] established to provide for new development and redevelopment within identified growth areas that result in an integrated mixture of commercial, employment, residential, recreational, civic and/or cultural land uses as provided within the appropriate Frederick County Comprehensive, Community, or Corridor Plan." FCC § 1-19-10.500.1. Sometime in 2007, however, the Frederick County Board of County Commissioners ("the BOCC") removed the Property's designation for LDR land use; thereafter, the Property's designation was changed to agricultural/rural. With the 2012 Comprehensive Plan, however, the Property's designation was changed back to LDR, and the Property was included in the Linganore Community Growth Area. Since 2012, the Property has been designated for LDR land use.

On February 25, 2014, Petitioners filed an application to rezone the Property from agricultural to PUD zoning as well as a Phase I Concept Plan. Petitioners proposed developing the Property to have 720 residential dwelling units, including a mix of single-family homes and townhomes, and included an approximately twenty-five-acre site for a future middle school. On March 11, 2014, Petitioners filed a petition for a Development Rights and Responsibilities Agreement ("DRRA"), and included a draft DRRA to be entered into between Petitioners and the BOCC. The DRRA petition incorporated by reference the PUD application and the Phase I Concept Plan. On April 15, 2014, the BOCC "accepted" the DRRA petition.

On July 30, 2014, at a public hearing, the Frederick County Planning Commission ("the Planning Commission") unanimously voted (five to zero, with two members absent) to recommend the approval of the application to rezone the Property from agricultural to PUD. On October 8, 2014, at a public hearing, the Planning Commission reviewed the draft DRRA, and, in accordance with its staff's recommendation, voted to find the draft DRRA consistent with the Frederick County Comprehensive Plan. On October 22, 2014, the Planning Director for the Frederick county Planning and Development Review Department and an Assistant County Attorney issued a staff report recommending that the BOCC review the proposed DRRA "and any conditions related thereto in deciding whether to approve or deny the [] DRRA."

On November 6, 2014, the BOCC conducted a public hearing on the PUD application and the DRRA, and witnesses testified and were subject to cross-examination. During the hearing, the BOCC voted four-to-one to approve the PUD rezoning application, but limited the total unit count to 675 residential dwelling units, including 500 single-family homes and 175 townhomes, on the condition that no building permit for the construction of a residence could be obtained before January 1, 2020. And, at the conclusion of the hearing, the BOCC voted four-to-one to approve the DRRA.

On November 24, 2014, the BOCC enacted Ordinance No. 14-27-682, approving Petitioners' PUD application and the Phase I Concept Plan for the development, subject to certain conditions ("the PUD Ordinance"). As discussed at the hearing before the BOCC, one of the conditions of the PUD Ordinance limited the number of dwelling units to be constructed in the development. Yet another condition concerned the middle school site. Consistent with the BOCC's vote at the hearing, the last condition of the PUD ordinance provided that, "[w]ith the exception of structures on the Public School Site and models for the Project, neither Frederick County, nor any agency, department, division and/or branch thereof shall issue any structural building permits, prior to January 1, 2020."

On the same day, November 24, 2014, the final DRRA executed by Petitioners and the BOCC was recorded among the Land Records of Frederick County ("the Blentlinger DRRA"). Among other provisions, Section 3.4C concerned "[s]chool [s]ite [d]edication," and provided, in relevant part, as follows:

> [Petitioners] shall convey in fee simple to the Frederick County Board of Education ("BOE"), with no monetary consideration paid, the Public School Site . . . totaling a minimum of 24.5 ± buildable acres, to serve the Project and the

> surrounding region. The Public School Site will be conveyed to the BOE upon: i) the recordation of the first subdivision plat for lots in the Project; and ii) BOE's acceptance of the conveyance of land for the Public School Site. . . . In the event that the BOE does not approve the Public School Site or determines not to accept conveyance of the Public School Site, then [Petitioners] shall retain fee simple ownership of the Public School Site, and may use the Public School Site in a manner consistent with other uses with the Project.

On December 24, 2014, Cleanwater filed in the Circuit Court for Frederick County ("the circuit court") a petition for judicial review, challenging, among other things, the validity of the PUD Ordinance and the Blentlinger DRRA. On June 8, 2015, Cleanwater filed a memorandum in support of the petition for judicial review. In relevant part, Cleanwater contended that the Blentlinger DRRA was void for lack of consideration because Petitioners had failed to provide "any 'enhanced public benefits' as consideration[.]" Cleanwater further argued that the middle school site was subject to BOE approval, which was uncertain, and that, as such, there was no guarantee that the middle school site would be dedicated. On September 28, 2015, the circuit court conducted a hearing on the petition for judicial review, and on November 4, 2015, the circuit court entered an opinion and order affirming the BOCC's adoption of the PUD Ordinance and approval of the Blentlinger DRRA. In other words, the circuit court rejected the argument that the Blentlinger DRRA was not supported by adequate consideration.

On December 1, 2015, Cleanwater filed a notice of appeal. On February 3, 2017, in a reported opinion, the Court of Special Appeals reversed the judgment of the circuit court and remanded the case to the circuit court with instructions to vacate the Blentlinger DRRA. *See Cleanwater Linganore, Inc. v. Frederick Cty.*, 231 Md. App. 620, 625, 643, 153 A.3d 874, 877, 888 (2017). In pertinent part, the Court of Special Appeals held that the Blentlinger DRRA was void for lack of consideration because it lacked any enhanced public benefits to the County. *See id*. at 625, 637, 153 A.3d at 877, 884. Thereafter, Petitioners filed a petition for a writ of *certiorari*, which the Court of Appeals granted. *See Blentlinger, LLC v. Cleanwater Linganore*, 453 Md. 7, 160 A.3d 546 (2017).

Held: Reversed and remanded.

The Court of Appeals held that, based on the plain language and legislative history of Md. Code Ann., Land Use (2012) ("LU") §§ 7-301 to 7-306 ("the DRRA statute"), as well as relevant case law, to be valid a DRRA is not required to confer an enhanced public benefit upon a local governing body, *i.e*., a county. Stated otherwise, the Court concluded that there is no evidence in the DRRA statute, its legislative history, or case law demonstrating an intent to require an enhanced public benefit as part of a DRRA. The Court also determined that nothing in FCC § 1-25-4 requires that a DRRA in Frederick County be supported by enhanced public benefits. Thus, the Court held that the Blentlinger DRRA was not required to confer any enhanced public benefit to the County, and was supported by sufficient consideration.

The Court of Appeals concluded that, by its plain language, LU § 7-303(a) requires certain detailed items to be included in a DRRA, but an enhanced public benefit, or even a public benefit, is not identified among those required contents. LU § 7-303(a) does not mention, as one of the items that must be included in a DRRA, a requirement that a DRRA be supported by enhanced public benefits. Indeed, the term "enhanced public benefit" appears nowhere in LU § 7-303(a) or elsewhere in the DRRA statute, nor does the term "public benefit." In short, the plain language of LU § 7-303(a) is unambiguous—an enhanced public benefit is not a requirement of a DRRA.

LU § 7-303(a)(9) provides: "A [DRRA] shall include: [] a description of the conditions, terms, restrictions, or other requirements determined by the local governing body of the local jurisdiction to be necessary to ensure the public health, safety, or welfare[.]" (Paragraph break omitted). LU § 7-303(a)(9)'s plain language is unambiguous, and merely requires the local governing body to determine, and include in the DRRA, a description of what it has determined to be necessary to ensure the public health, safety, or welfare. Tellingly, LU § 7-303(a)(9) does not require that a local governing body determine that any specifically identified condition, term, restriction, or other requirement is necessary to ensure the public health, safety, or welfare, or indicate in any way that a condition, term, restriction, or other requirement to ensure the public health, safety, or welfare constitutes an enhanced public benefit, or even a public benefit. The Court declined to read into the DRRA statute, and, specifically, LU § 7-303(a)(9), a requirement that was not evidenced by the clear language and plain meaning of the statute.

The Court of Appeals concluded that, similarly, nothing in FCC § 1-25-4(A) requires a DRRA to provide for an enhanced public benefit. Like LU § 7-303(a), FCC § 1-25-4(A) sets forth the various requirements of a DRRA in the County, including, for example, the requirements that the DRRA contain a legal description of the property subject to the DRRA, the duration of the DRRA, and the density or intensity of use of the property. Unlike LU § 7-303(a), FCC § 1-25-4(A)(1) also requires that a DRRA contain "[a] lawyer's certification that applicant has either a legal or equitable interest in the property[.]" In short, nothing in LU § 7-303(a)'s or FCC § 1-25-4(A)'s plain language purported to include enhanced public benefits, or public benefits, as required content of a DRRA.

The Court of Appeals pointed out that, although the plain language of LU § 7-303(a) and FCC § 1-25-4(A) is unambiguous—and clearly does not require enhanced public benefits as part of a DRRA generally or in the County specifically—and its analysis could end at that point, its holding was fully supported by the legislative history and purpose of the DRRA statute. The Court concluded that the legislative history of the DRRA statute demonstrated that the DRRA statute had never required, and was not intended to require, a DRRA to confer enhanced public benefits to the county to be valid. There was simply nothing in House Bill 700's bill file to suggest that a purpose of House Bill 700, and ultimately the DRRA statute, was to ensure that local governing bodies received enhanced public benefits from developers. Importantly, the term "enhanced public benefits" does not appear anywhere in the DRRA statute's bill file or in the DRRA statute as enacted. And, as demonstrated by the various bill analyses, the main purposes of House Bill 700 were to fix the problem of vesting caused by the Court's prior case law, and to allow developers and local governments to enter into DRRAs, which not only solved the vesting

problem, but also resulted in mutually beneficial agreements through which both the developers and local governments achieved important goals.

The Court of Appeals concluded that nothing in case law that had been issued after the enactment of the DRRA statute led to the conclusion that a DRRA must be supported by enhanced public benefits. Significantly, the term "enhanced public benefits" appeared in only one opinion by the Court, *Queen Anne's Conservation, Inc. v. Cty. Comm'rs of Queen Anne's Cty.*, 382 Md. 306, 322, 855 A.2d 325, 334 (2004), and was repeated later by the Court of Special Appeals in *Cleanwater Linganore, Inc. v. Frederick Cty*. ("*Casey*"), 231 Md. App. 373, 392, 151 A.3d 44, 55 (2016), and in its opinion in this case. The Court determined that neither *Queen Anne's Conservation* nor *Casey* changed the holding that a DRRA is not required to be supported by enhanced public benefits.

The Court of Appeals also held that the Blentlinger DRRA was supported by sufficient consideration. The Court stated that it knew of no statute or case law requiring a DRRA's requirements to exceed requirements of a related PUD ordinance. In the Court's view, a PUD ordinance and a DRRA are often a "package deal," so it would seem commonsensical that the requirements of the two would largely mirror one another. Simply put, the Court was unpersuaded by the argument that the Blentlinger DRRA was somehow void for lack of consideration on the basis that the Blentlinger DRRA's requirements are also required by the PUD Ordinance and other regulations and local laws. The Court concluded that there were both benefits to the County and detriments to Petitioners, as well as binding promises on Petitioners' part, that constituted sufficient consideration for the County's entering into the DRRA, which guarantees vesting of rights. And, the Court determined that, significantly, the proffer of the middle school site was a conditional promise that constituted valuable consideration.

Waterman Family Limited Partnership, et al. v. Kathleen B. Boomer, et al., No. 18, September Term 2017, filed November 20, 2017. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2017/18a17.pdf

LOCAL GOVERNMENT LAW – CODE HOME RULE COUNTIES – REPEAL OR RESCISSION OF PREVIOUSLY ENACTED MEASURE

Facts:

Waterman Family LP owns farm land in Queen Anne's County contiguous to Queenstown that it wishes to develop. The property was zoned CS ("Countryside") in the County – a designation that permits agricultural and low density residential uses. During June 2014, Waterman asked the Town to annex the property and rezone it PRC ("Planned Regional Commercial"), which would be consistent with the proposed development. The Town acceded to Waterman's request, annexing and rezoning the property by mid-November 2014.

Under Maryland Code, Local Government Article ("LG"), §4-416, municipal rezoning of annexed land is delayed for five years when the rezoning would permit a "substantially different" use or a "substantially higher" density than the prior county zoning. However, that delay is waived if the county expressly approves the rezoning. Thus, Queenstown's rezoning of the Waterman property would be delayed for five years unless Queen Anne's County expressly approved the new zoning classification. The Town asked the County to provide that approval.

At the time the County Commissioners took up the Town's request, the County was in the midst of a turnover in its governing body as a result of the November 2014 election. On November 25, 2014, the outgoing County Commissioners approved by resolution the Town's request by a 3-2 vote. The newly-elected Commissioners took office the following week and, on December 9, 2014, adopted a resolution rescinding the prior resolution by a 4-1 vote. The rescinding resolution stated that no site plan had been provided to the County and that the Commissioners wished to review the planned development "in terms of traffic, population growth, infrastructure, schools, and the environment…."

Waterman brought a judicial review and declaratory judgment action against the County in the Circuit Court for Queen Anne's County. The Town joined that action as a plaintiff while the Queen Anne's Conservation Association and various citizens ("QACA") joined the action in defense of the County.

The Circuit Court for Queen Anne's County declared that the rescinding resolution was void. The Court of Special Appeals reversed, holding that the County had authority to rescind the approving resolution. The Court of Appeals granted a petition for writ of certiorari filed by Waterman and the Town.

Held: Affirmed.

The Court of Appeals first noted that the plain language of LG §4-416 does not indicate whether a county's approval of municipal rezoning of annexed land may be rescinded. The Court reviewed the relevant legislative history of that statute and concluded that there was no indication that the General Assembly intended to override whatever authority a county would otherwise have to retract a measure that approved municipal rezoning of annexed land.

The Court then noted that, under the common law, the governing body of a local government generally has the right to reconsider its actions, by adopting a measure that had previously been rejected or by rescinding a measure that had previously been adopted. Under that principle, the County had authority to rescind its approval in this case. The Court noted that Article XI-F of the Maryland Constitution also incorporates such a principle in providing for the home rule powers of a code home rule county, such as Queen Anne's County.

In its opinion, the Court noted that it was undisputed that Waterman had taken no action toward development of the property in the two-week interval between the approving and rescinding resolutions and that the outcome might be different if Waterman had acquired vested rights in the rezoning before the County rescinded its approval.

COURT OF SPECIAL APPEALS

Comptroller of the Treasury v. Two Farms, Inc., No. 944, September Term 2016, filed November 29, 2017. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2017/0944s16.pdf

STATUTES – ADMINISTRATIVE LAW & PROCEDURE – LICENSES – AGENCY POWERS
A State licensing agency has an implied power to suspend or revoke a license for a "fundamental" reason, such as when a licensee acts outside the scope of its license.

STATUTES -- TOBACCO REGULATION
The Comptroller has the implied power -- legislatively recognized -- to suspend a cigarette retail licensee for unlawful sales of tobacco products to a minor, because the retailer is acting outside the scope of its license, and thus, in violation of Title 16 of the BR Article. The Comptroller's authority to suspend a cigarette retail license is not derived from BR Article § 16-210(a)(2), which authorizes discipline of a licensee that "fraudulently or deceptively uses a license."

STATUTES -- STATUTORY CONSTRUCTION -- STATE LICENSES
Fraudulent or deceptive use of a State license is not confined to common law fraud and does not require that someone be actually misled, but does require some intent to defraud or deceive.

ADMINISTRATIVE LAW AND PROCEDURE -- JUDICIAL REVIEW
A court may not uphold an agency decision on any basis other than the findings or reasoning stated by the agency.

Facts:

In August of 2015, the Baltimore County Health Department cited Two Farms, Inc., a state licensed cigarette retailer, for selling tobacco products to minors on three occasions. After a hearing officer determined that Two Farms had violated local tobacco ordinances, the County notified the Comptroller, who initiated proceedings to suspend the retailer's license for "fraudulently or deceptively us[ing] a license" as proscribed by BR § 16-210(A)(2). After a hearing before a representative of the Comptroller, the hearing officer found Two Farms liable and ordered suspension of its license for 10 days. The retailer petitioned for judicial review and the Circuit Court for Baltimore County overturned the suspension, concluding that Two Farms

had not fraudulently or deceptively used its license when it made unlawful tobacco sales to minors. The Comptroller appealed.

Held: Affirmed

The "fraudulent or deceptive use" language was added to the tobacco licensing statute in 1988 as part of a code revision initiative to incorporate into law certain "fundamental," "inherent" or "implied" grounds for state licensee discipline. The provision appears in 57 licensing statutes. The Court of Special Appeals said that such language does not incorporate common law concepts or require that someone be actually misled, but demands more than the violation of a law prohibiting tobacco sales to minors.

The Comptroller also argued that the General Assembly in 1994 recognized his authority to suspend a license for unlawful sales to minors by excepting from legislation authorizing the Comptroller to compromise a proposed suspension or revocation and to impose a financial penalty, licensee discipline for violations of CL § 10-107. That statute prohibits illegal sales of tobacco products to minors. The Court of Special Appeals concluded that the 1994 amendment did not expand the terms of BR § 16-210(a)(2). Rather, it recognized the Comptroller's implied authority to suspend a license because a retailer was acting outside the scope of its license by unlawfully selling tobacco products to minors.

Although recognizing this authority in Title 16 of the BR Article, the Court said that because Two Farms was accused of violating BR § 16-210(a)(2) for fraudulently or deceptively using its license and adjudicated liable for the same reason, it could not uphold the Comptroller's decision on that basis. An agency decision cannot be upheld on any other basis than that stated by the agency. Because the agency decision could not be supported by its "fraudulent or deceptive use" finding, the circuit court was correct in overturning the suspension.

Gary W. Stisser, et al. v. SP Bancorp, Inc., et al., No. 1790, September Term 2015, filed November 29, 2017. Opinion by Leahy, J.

http://mdcourts.gov/opinions/cosa/2017/1790s15.pdf

COURTS & JUDICIAL PROCEEDINGS – PERSONAL JURISDICTION

Facts:

SP Bancorp, Inc. ("SP"), a Maryland corporation that did no business in the state, merged into a newly formed subsidiary of Green Bancorp, Inc. ("Green")—a bank holding company incorporated and principally located in Texas. Two nonresidents (Gary W. Stisser and Fundamental Partners, "Appellants") who owned shares of common stock in SP filed a direct shareholder class action in the Circuit Court for Baltimore City against SP and its individual directors ("SP Directors"), as well as claims against Green and its merger subsidiary ("Searchlight"). All of the SP Directors were non-Maryland residents and all of the activity giving rise to the lawsuit occurred in Texas, save one: Green's incorporation of Searchlight in Maryland. Appellants' primary contention was that the SP Directors breached their fiduciary duty, aided and abetted by Green, in contriving the merger to advance their interests at the shareholders' expense.

The circuit court granted motions to dismiss filed by the SP Defendants and the Green Defendants (together as "Appellees"), finding that the court lacked personal jurisdiction over the SP Directors and Green, and that, although the court had jurisdiction over SP and Searchlight, Appellants failed to state a claim against them. Appellants noted their appeal to this Court, challenging the dismissal of all four defendants.

Held: Affirmed.

First, the Court of Special Appeals held that, in accordance with the Supreme Court's recent decisions delimiting the authority of state courts to exercise general jurisdiction over nonresident corporations, Green cannot be said to be "at home" in Maryland with no contact in the state save for the fleeting existence of its merger subsidiary, Searchlight. *See Bristol Myers Squibb Co. v. Superior Ct. of Cal, S.F. Cty.*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014*); Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

Next, the Court of Special Appeals instructed that, consistent with *Burger King Corp. v. Rudzewicz*, a defendant corporation is subject to specific personal jurisdiction in a forum state only if it can be demonstrated that (1) the defendant has "purposefully directed its activities at residents of the forum"; (2) the plaintiff's claims "arise out of or relate to" those activities

directed at the state; and (3) the exercise of personal jurisdiction would "comport with fair play and substantial justice" so as to be constitutionally reasonable. 471 U.S. 462, 472, 476 (1985). The Court then held that Green was not subject to specific jurisdiction in Maryland because (1) Green did not, through its mere formation of Searchlight in Maryland, create a continuing obligation with Maryland such that it could be deemed to have exhibited an intent to avail itself of the continuing privileges and protections of Maryland law; and (2) the remainder of Green's conduct that *did* give rise to the lawsuit all occurred outside of Maryland. Because Green's contacts did not did not rise to the level of "transacting any business" in Maryland within the meaning of Maryland's long-arm statute, the Court of Special did not need to determine whether Maryland's exercise of jurisdiction would comport with traditional notions of due process under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Court noted, however, that (3) given Green's limited and attenuated contacts in the state, Maryland's exercise of jurisdiction would offend Green's right to due process.

The Court of Special Appeals rejected Appellants' contention that the SP Directors were subject to personal jurisdiction in Maryland by virtue of their seat on the SP's Board of Directors and because they "caused" SP to file articles of merger in Maryland. First, the Court declined to impute SP's contacts, including the filing of the articles of merger, to its directors. Next, the Court observed that Maryland has not enacted a director-consent statute, and concluded that under the facts presented, the SP Directors— all nonresidents who never entered Maryland in connection with SP business—did not purposefully avail themselves of the privileges and protections of Maryland law. Accordingly, the Court held that it would violate the due process rights of nonresident defendants to subject them to personal jurisdiction in Maryland based solely on their directorship of a company incorporated in Maryland. *See CSR, Ltd. v. Taylor*, 411 Md. 457, 479-80 (2009);

Finally, Appellants' sole contention against SP and Searchlight—the two Maryland companies—was that they were necessary parties in the litigation against Green and the SP Directors. Having held that Appellants may not maintain their action in Maryland against Green and the SP Directors, the Court affirmed the grant of Appellees' motion to dismiss the complaint against Searchlight and SP for failure to state a claim.

Anthony Grandison v. State of Maryland, No. 2039, September Term 2017 and *Anthony Grandison v. State of Maryland*, No. 2822, September Term 2015, filed November 29, 2017. Opinion by Woodward, C.J.

http://mdcourts.gov/opinions/cosa/2017/2039s14.pdf

CRIMINAL LAW – ILLEGAL SENTENCE – MARYLAND CONSTITUTION – POWERS OF GOVERNOR TO COMMUTE SENTENCE

CRIMINAL LAW – ILLEGAL SENTENCE – MARYLAND CONSTITUTION – EX POST FACTO CLAUSE – POWERS OF GOVERNOR TO COMMUTE SENTENCE

CRIMINAL LAW – ILLEGAL SENTENCE – STATUTORY INTERPRETATION – EX POST FACTO CLAUSE – POWERS OF GOVERNOR TO COMMUTE SENTENCE

Facts:

In 1983, Anthony Grandison, appellant, hired Vernon Lee Evans, to murder Scott Piechowicz and his wife, Cheryl Piechowicz, to prevent them from testifying against him in a then-pending criminal trial in the United States District Court for the District of Maryland. Evans succeeded in murdering Mr. Piechowicz, but in a case of mistaken identity, Evans murdered Susan Kennedy instead of Ms. Piechowicz.

After being convicted in federal court for conspiracy to violate civil rights resulting in death and witness tampering, Grandison was sentenced to life imprisonment plus a consecutive ten-year sentence. In 1984, Grandison was also convicted by a jury sitting in the Circuit Court for Somerset County of two counts of first degree murder, conspiracy to commit murder, and use of a handgun in the commission of a crime of violence. These convictions resulted in two death sentences along with a sentence of life for the conspiracy conviction plus twenty years for the handgun conviction to run consecutive to the life sentence.

In 2013, the General Assembly repealed the death penalty in Maryland, and that same year, Grandison filed a motion to correct an illegal sentence. The circuit court denied all relief, except pursuant to the State's concession, vacated Grandison's twenty-year sentence for the handgun violation. The Court then resentenced Grandison to fifteen years for the handgun violation to run consecutive to the life sentence for conspiracy. Grandison filed an appeal from this order.

In 2015, Governor Martin O'Malley signed Executive Order 01.01.2015.05 commuting Grandison's death sentences to life without the possibility of parole sentences. Thereafter, Grandison filed another motion to correct an illegal sentence attacking his new sentence of life without the possibility of parole. The circuit court denied all requested relief under this second motion to correct an illegal sentence. Grandison filed an appeal from this order and the appeals were consolidated.

Held: Affirmed.

After the Court found many of Grandison's claims not cognizable under Maryland Rule 4-345(a) and *Colvin v. State*, 450 Md. 718 (2016), the Court considered appellant's challenges to Governor O'Malley commuting his death sentences to life without the possibility of parole. The Court first determined that the Governor of Maryland has the power to grant reprieves or pardons under Article II, Section 20 of the Maryland Constitution. The Court held that except for a limitation of this power in cases of impeachment under Article II, Section 20, and perhaps, bribery of public officials under Article III, Section 50, the Governor of Maryland's pardon power is plenary.

The Court next turned to Grandison's contention that Governor O'Malley did not have the authority under Article II, Section 20, to *sua sponte* commute his death sentences to life in prison without parole sentences, because he did not apply for a commutation. The Court held that the provision on which Grandison relied, namely that "before granting a *nolle prosequi*, or pardon, [the Governor] shall give notice, in one or more newspapers, of the application made for it, and of the day on, or after which, his decision will be given[,]" was merely a notice requirement and not a condition precedent. Because Governor O'Malley gave notice of his commuting Grandison's sentence on the day of his decision, such action by the Governor was lawful.

In considering Grandison's contention that Governor O'Malley's commutation of his death sentences also violated the Ex Post Facto Clause of Article 17 of the Maryland Declaration of Rights, the Court held that, even if the *Ex Post Facto* Clause was applicable to the Maryland Constitution, the Governor's actions did not violate the *Ex Post Facto* Clause because such action did not *increase* Grandison's sentences. *See Woods v. State*, 315 Md. 591, 606 07 (1989) (rejecting "the notion that a life sentence without the possibility of parole is, even relatively, the equivalent of death itself"). Moreover, the Court rejected Grandison's alternative argument that, if the Governor derived his authority under Md. Code (1957, 1982 Repl. Vol.), Article 41, §§ 118 and 119, and their modern day counterparts, Md. Code (1999, 2008 Repl. Vol., 2017 Supp.), Correctional Services Article ("CS") §§ 7 601 and 7 602, this exercise violated the *Ex Post Facto* Clause. The Court held that, because the Governor was authorized to commute a sentence of death to a sentence of life without the possibility of parole under the language of Article 41, §§ 118 and 119, which were in effect at the time of Grandison's sentencing, and there was no retroactive change in CS §§ 7 601 and 7 602, no violation of the *Ex Post Facto* Clause occurred.

Anthony Barrett v. State of Maryland, No. 530, September Term 2016, filed November 29, 2017. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2017/0530s16.pdf

MARIJUANA – PROBABLE CAUSE – SEARCH INCIDENT TO ARREST

Facts:

On November 24, 2014, Baltimore City Police Department detectives stopped a vehicle with a crack in the windshield. They noticed a strong odor of marijuana and asked appellant, Anthony Barrett, who was seated in the front passenger seat, if there was any marijuana present in the vehicle. Appellant responded that they were smoking marijuana, and he handed the officer a brown hand-rolled cigar containing green plant material.

The appellant was asked to exit the vehicle, and officers searched his person, revealing a 9-millimeter handgun in his pants. Appellant was then placed under arrest.

Appellant was convicted of possession of a firearm by a prohibited person; wearing, carrying, or transporting a handgun on the person; and wearing, carrying, or transporting a handgun in a vehicle.

On appeal, appellant argued that the search was unconstitutional, and that his convictions for wearing, carrying, or transporting a handgun on his person and in a vehicle should be merged.

Held: Sentence imposed on Count 6 (wearing, carrying or transporting a handgun in a vehicle) vacated. Remaining judgments affirmed.

A warrantless search of a person is reasonable under the Fourth Amendment only if it falls within an exception to the warrant requirement. Probable cause to believe criminal activity is occurring does not justify a search of a person, but it does authorize police to arrest the person and then search him or her incident to that arrest, even if the search occurs prior to the arrest.

Despite the decriminalization of possession of less than ten grams of marijuana, a law enforcement officer who has reason to believe that an individual is in possession of marijuana has probable cause to effectuate an arrest, even if the officer is unable to identify whether the amount possessed is more than 9.99 grams. A requirement that law enforcement has to be absolutely sure that the amount of marijuana involved is more than 9.99 grams before they have probable cause to arrest is inconsistent with the concept of probable cause, which requires only facts sufficient to warrant a prudent person in believing that an individual is committing a crime.

In re B.C. & In re Adoption/Guardianship of B.C., Nos. 1744 & 2342, September Term 2016, filed November 30, 2017. Opinion by Reed, J.

http://mdcourts.gov/opinions/cosa/2017/1744s16.pdf

PARENT AND CHILD – EVIDENCE OF PARENTAGE – IN GENERAL – PRESUMPTIONS AND BURDEN OF PROOF – AS TO PATERNITY; PRESUMED FATHERHOOD; IN GENERAL

Facts:

B.C. was born in June of 2014 at Johns Hopkins Hospital to C.R. and G.C., the appellant and presumptive father. Shortly after B.C.'s birth, it was clear that he had been exposed to cocaine *in utero*. As a result, he remained in the hospital's care for two weeks following his birth. Subsequently, he was sheltered by the Department of Social Services ("the Department"). Although G.C. maintained from the beginning that he was not the biological father of B.C., he is named as the child's father on his birth certificate by virtue of being married to C.R. at the time of B.C.'s birth.

While in the Department's care, B.C. was found to be a Child in Need of Assistance ("CINA") because he was born exposed to cocaine and neither his mother, nor presumptive father, was able to provide him with appropriate care and supervision. Although reunification was the ultimate goal, the Department had concerns that neither G.C. nor C.R. was fit to parent the child. Accordingly, at the request of G.C., B.C.'s permanency plan was changed to relative placement for adoption with G.C.'s niece in North Carolina. While B.C. was living with G.C.'s niece, G.C. became threatening, and on one occasion, visited the child without the Department's knowledge or permission. As a result, the niece refused G.C. any further contact with B.C. and precluded him from visiting the child.

After being barred contact with B.C., G.C., requested a paternity test believing that if it was proven that he was not the child's biological father, the child would be removed from his niece's home and returned to Maryland. The genetic test results confirmed that G.C. was not B.C.'s biological father. Accordingly, the Department filed a motion to determine exclusion of paternity which was granted by the Circuit Court for Baltimore County sitting as the juvenile court. Several months after, the Department filed a judicial notice of paternity exclusion requesting that G.C. be stricken as a party in the CINA and Termination of Parental Rights ("TPR") proceedings. That motion was also granted by the juvenile court.

Held: Affirmed.

The Juvenile court did not err in granting the motion to determine exclusion of paternity or in granting the motion for G.C. to be stricken as a party in the CINA and TPR proceedings. Pursuant to *Sieglien v. Schmidt*, 224 Md. App. 223 (2015), the presumption of paternity can be rebutted after a proceeding showing that to disestablish parentage is in the best interest of the child. A juvenile court has *parens patriae* authority and frequently exercises it in guardianship proceedings, especially when a child has been adjudicated as a CINA. To that end, the court has the authority to determine an outcome as long as it is in the best interest of the child.

MD. CODE ANN., CTS & JUD. PROC., §3-802(a) imparts upon the Department the responsibility to "ensure that reasonable efforts were made to prevent placement and achieve a permanency plan for the child." All of this is done consistent with the child's best interest in mind. Here, there are a number of factors that indicate that the Department acted within the child's best interest. Chief among them is that G.C. requested the paternity test to rebut the presumption of paternity. Even had he not, the fact remains that he is unable to provide B.C. with the appropriate care that he requires, thus his rights would likely have been terminated in a subsequent TPR proceeding.

In the instant case, because B.C. was adjudicated as a CINA, does not have a stable home environment with G.C., and has no established relationship with G.C. – therefore, G.C. is not a de facto parent, the juvenile court exercised its discretion in disestablish paternity because it was not in the child's best interest. Thus, there was no abuse of discretion.

Our holding does not suggest that the Department has the authority to initiate a process to rebut the presumption of paternity vested in a presumptive father as a result of Estate and Trusts Article §1-2016. However, when a presumptive father proves that he is not the biological father of the child and where it is in the best interest of the child to be adopted by a non-relative, the Department is allowed to file such a motion.

Kevin Mihailovich v. Department of Health & Mental Hygiene, No. 573, September Term 2016, filed September 28, 2017. Opinion by Sharer, J.

http://www.courts.state.md.us/opinions/cosa/2017/0573s16.pdf

STATE PERSONNEL – DISCIPLINARY ACTIONS – SUSPENSION WITHOUT PAY – FIVE WORKDAYS

Facts:

On March 17, 2015, Kevin Mihailovich, an employee of the Thomas B. Finan Center, an in-patient psychiatric facility that is managed by the Department of Mental Health and Hygiene (DOH), was given a 15-day suspension as a result of a March 3rd incident, when he failed to use the required de-escalation techniques with a patient, resulting in the patient sustaining injuries that required medical treatment. Mihailovich appealed the suspension in accordance with the procedures set forth in the State Personnel and Pensions Code (SPP). A hearing on the merits was conducted by the Office of Administrative Hearings resulting in a subsequent written decision issued by the Administrative law Judge (ALJ), reversing the suspension and ordering back pay, finding that the suspension had not been timely imposed as required by the statute. The ALJ's decision was based on its interpretation of the term "workdays" in SPP § 11-106(c), which requires that disciplinary suspensions be imposed "no later than 5 workdays" of the known misconduct, as pertaining to the employee's work schedule and not that of the appointing authority.

The DOH moved to have the ALJ reconsider its decision contending that the ALJ had erred in its calculation of the five workdays when it counted Mihailovich's scheduled workdays and included Saturdays, Sundays and holidays, which are expressly required by the statute to be excluded from the calculation. Notwithstanding the error, the ALJ summarily dismissed the motion for reconsideration. The DOH then sought judicial review in the Circuit Court of Baltimore City. After a hearing on the merits, the circuit court agreed with the DOH and reversed the ALJ's decision, thereby reinstating the suspension. Mihailovich then appealed that order to the Court of Special Appeals.

Held: Reversed and remanded.

The Court of Special Appeals, reversing the order of the Circuit Court for Baltimore City, held as a matter of first impression that the term "workdays," as specified in SPP § 11-106(c), pertains to the schedule of the appointing authority, not the employee, for the purpose of establishing the temporal parameters within which disciplinary suspension must be taken.

The statute provides that "[a]n appointing authority may suspend an employee without pay no later than 5 workdays following the close of the employee's next shift after the appointing authority acquires knowledge of the misconduct for which the suspension is imposed." SPP § 11-106(c)(1). The Court found that the language of the statute is unclear and allows for ambiguity in its interpretation and application. The purpose and legislative history of the statute, however, accorded the meaning of the term "workday" to pertain to the work schedule of the appointing authority.

The Court discussed the legislative history of the statute that has evolved into what is now State Personnel and Pensions Code, as a direct result of the State Personnel Management System Reform Act of 1996. The purpose of the Act was to develop a more efficient and transparent personnel management system to benefit both employees and the appointing authorities. The Act effectively rewrote and reorganized what are now the existing personnel management statutes, including § 11-106. The provisions of the Act that pertained specifically to § 11-106, clarified the timeframe for which an appointing authority has to act when imposing a disciplinary action on an employee and provided additional time to the strict time constraint for when a suspension can be imposed, by extending the number of days from two to five. The Act also restricted which days could be counted towards the five-workday calculation, to exclude Saturdays and Sundays, legal holidays, and employee leave days. SPP § 11-106(c)(2).

The Court reasoned that when read in conjunction with all of the provisions of § 11-106, subsection (c) requires the appointing authority to complete the pre-requisite steps, as provided under subsection (a), within five workdays. It elaborated, finding that within the five workdays time period under § 11-106(c), once the appointing authority acquires knowledge of employee misconduct, it then has five of the agency workdays to investigate, meet with the employee in question, consider any mitigating factors, determine the appropriate disciplinary action, and give written notice of the suspension and appeal rights, to the employee. The 5-workday period commences on the day following the end of the employee's next shift after the appointing authority acquires knowledge of the misconduct. The days to be excluded from the calculation are Saturdays, Sundays, employee leave days, and legal holidays as recognized by Maryland law. In the case of "24/7" agencies, the 5-day count would be five consecutive calendar days, subject to any such statutory exclusions of § 11-106(c)(2).

Having established the legislature's intended meaning of the term "workdays," the Court then applied that finding to the case of Mihailovich and concluded that even though the ALJ erroneously counted Mihailovich's workdays and included days it was prohibited from counting in its calculation, the Court's own re-calculation of the proper workdays confirmed that the suspension had been imposed more than five of the agency's workdays after it had acquired knowledge of Mihailovich's misconduct.

The Court of Special Appeals reversed the order of the Circuit Court for Baltimore City, reasoning that despite the ALJ's error in its interpretation and application of the statute, it had nonetheless correctly determined that the disciplinary suspension imposed on Mihailovich was untimely and was, therefore, not permitted under the statute.

ATTORNEY DISCIPLINE

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By a Per Curiam Order of the Court of Appeals dated November 7, 2017, the following attorney has been placed on inactive status:

MARIATU KARGBO

*

This is to certify that the name of

L. MICHAEL SCHAECH

has been replaced upon the register of attorneys in this Court as of November 16, 2017.

*

This is to certify that the name of

RAMOND JEROME VANZEGO, JR.

has been replaced upon the register of attorneys in this Court as of November 16, 2017.

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JUDICIAL APPOINTMENTS

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On October 6, 2017, the Governor announced the appointment of **MATTHEW JOHN FADER** to the Court of Special Appeals. Judge Fader was sworn in on November 1, 2017 and fills the vacancy created by the retirement of the Hon. Peter B. Krauser

*

On October 24, 2017, the Governor announced the appointment of Delegate **BRETT ROBERT WILSON** to the Circuit Court for Washington County. Judge Wilson was sworn in on November 17, 2017 and fills the vacancy created by the retirement of the Hon. M. Kenneth Long, Jr.

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UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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