Circuit Court for Wicomico County
Case No. C-22-CV-19-000447

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 777

September Term, 2020

JEFFREY S. BAER, ET AL.

v.

WICOMICO COUNTY BOARD OF APPEALS, ET AL.

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: June 9, 2022

In the underlying administrative action, the Wicomico County Department of Planning Zoning & Community Development issued a building permit for a three-million-gallon storage tank to be constructed on a property located in the A-1 zone at the intersection of Porter Mill Road and Riggin Road near Mardela Springs. The property is owned by appellee, Edmond H. Burns, IV. Fourteen neighboring property owners (collectively, the "Appellants" or "Petitioners" below)[1] appealed the issuance of the permit to the Wicomico County Board of Appeals (the "Board"). The Board dismissed the appeal as untimely because it was not "submitted within 30 days of the Zoning Administrator's decision." Appellants filed the underlying petition for judicial review challenging the decision of the Board on the grounds that: (1) the "Board of Appeals Rules of Procedure" do not set out a deadline for filing an appeal; and (2) the Board's reliance on the 30-day "Time for Appeal" contained in the Wicomico County Code was unauthorized and in violation of State law. The circuit court affirmed the Board's decision to deny the appeal as untimely, and Appellants appealed the court's judgment.

The Appellants present two issues for our review both of which boil down to whether the Board erred in dismissing their appeal as untimely without a hearing.[2] For the

[1] Appellants are listed as follows: Jeffrey S. Baer, Susan R. Baer, Susan Demas, Caitlin J. Hetland, Lauren Hetland III, G. David Kenney, Lynette K. Kenney, Gary Mansell, Linda R. Mansell, Joshua G. Nichols, Kenneth R. Robinson, Patricia W. Robinson, Felicia Tembley, Robert J. Trembly, and John T. Williamson.

[2] In their opening brief, Appellants present these two question as follows:

(Continued)

reasons that follow, we conclude that the Board of Appeals correctly decided that the notice of appeal was untimely and, accordingly, we affirm the judgment of the circuit court.

BACKGROUND

On May 7, 2019, Mr. Burns submitted an "Application for Residential Building Plan Review" with the Building Division of the Wicomico County Department of Planning Zoning & Community Development for a building permit to construct a "3 million gallon storage tank" on his land at the northeast corner of Porter Mill Road and Riggin Road. On May 20, 2019, the Department approved the application and issued Mr. Burns Building Permit No. 28267 (the "Permit").

Approximately five months later, on September 14, 2019, counsel for Petitioners sent a letter to Mr. Burns expressing Petitioners' objections to the Permit. Specifically, counsel asserted that "there were two legal impediments to your plans: zoning and nuisance." First, the "proposed tank is a commercial or industrial use which is not a permitted use in the A-1 zoning district." Counsel threatened "to file a declaratory judgment suit in the Circuit Court for Wicomico County, asking the [c]ourt to declare [Mr. Burns'] building permit 'null and void' and [his] tank unlawful[.]" Second, the Petitioners "object[ed] to the pungent odor of the sludge (DAF) material" that would emanate from

---

"I. Whether the circuit court erred in holding that section 225-154.B of the Wicomico County Code gave Appellants 30 days in which to appeal the approval of Building Permit No. 28267?

II. Whether Appellants were timely in filing their appeal and entitled to a hearing given that neither the County Code nor the Rules of Procedure of the Board of Appeals contained any time limit for the filing of appeals?"

the tank. Counsel for Petitioners asserted, "it is apparent that your application of this material constitutes at least an actionable private nuisance." Again, counsel cautioned that unless the odor was eliminated, "my clients will be compelled to take legal action to halt its application on land in close proximity to their residences."

Counsel for Petitioners then filed a notice of appeal from the issuance of the Permit to the Wicomico County Board of Appeals on October 31, 2019—six months after the permit issued and 47 days after sending Mr. Burns a letter stating Petitioners' objections to the permit. The notice, addressed to the chair of the Board of Appeals, asserted: "I hereby enter an appeal to the Board of Appeals pursuant to § 7-3 of the County Code from the Building Inspector's issuance of a Building Permit[.]" The notice provided two grounds for the appeal:

> 1. Upon information and belief, the storage tank was erroneously determined to be an inherently permitted use in the A-1 Agriculture-Rural zoning district.
>
> 2. Upon information and belief, the building permit was approved as "Ag exempt" from pertinent State and County stormwater management, soil conservation and forest conservation laws and regulations without satisfactory evidence that the storage tank, as proposed, could be placed on the property in compliance with those laws and regulations being submitted – until at least October 17, 2019.

On November 4, 2019, the Board denied the appeal as untimely in a letter from the Chairman of the Board to Petitioners. The Chairman's letter provided, in full:

> The Board of Appeals has received your appeal of Building Permit No. 28267 that was issued on May 20, 2019. The Notice raises two issues related to decisions of the County Zoning Administrator.
>
> An appeal must be submitted within 30 days of the Zoning Administrator's decision. The Notice was not submitted to the Department

> of Planning, Zoning, and Community Development until October 29, 2019. Therefore, the Notice is not timely and it will not be considered by the Board.

Within 30 days of the Board's decision, Petitioners filed a petition for judicial review in the Circuit Court for Wicomico County. They filed their "Memorandum in Support of Their Request for Judicial Review" on March 24, 2020. In the "Statement of Facts," Petitioners asserted:

> The Application for the building permit was not advertised, nearby property owners (including Petitioners) were not notified of the application and no public hearing was held. Nor, on information and belief, was the property posted with any notice that a building permit had been applied for or had been issued. Only a very few of Petitioners were even aware of the permit and its issuance until more than 30 days after its issuance.

Turning to their argument, the Petitioners asserted that the "Board's November 4, 2019 decision denying Petitioners' appeal on the basis that the appeal 'must be submitted within 30 days of the Zoning Administrator's decision' was in error," because the Board's Rules of Procedure "do not set forth any time by which such an appeal must be filed." (Emphasis in original). Building on that contention, the Petitioners urged that section 225-154.B. of the Wicomico County Code, which requires that a written notice of appeal be submitted "within 30 days from the officer's decision," could not cure the alleged omission because the Land Use Article of the Maryland Code "states explicitly that the appeal time must be set forth 'in the rules of the board of appeals'—not in the county code." Finally, they posited that the County Code could not substitute for the Board's rules because the "Land Use Article stat[es] that '[t]he legislative body may not serve as the board of appeals.'"

On April 16, 2020, the County responded and asserted that the appeal was untimely because Petitioners "failed to appeal within the 30-day period" set forth in section 225-154 of the Wicomico County Code. In response to Petitioners' contention that the adoption of the County Code was improper, the County averred that section 4-304 of the Land Use Article allows "the board of appeals to adopt rules, which are **in accordance with any local law**." (Emphasis in original).

Eight days later, Mr. Burns filed his "Answer to Petitioners' Memorandum in Support of Their Request for Judicial Review." Echoing the County's contentions, Mr. Burns argued that the thirty-day period for filing an appeal is set forth in section 225-154 of the Wicomico County Code. According to Mr. Burns, "the Council implemented the 30-day time limit within which an appeal must be filed[,] and the Board adopted that rule precisely as the Legislature intended." Mr. Burns argued that "the Board's adoption of rules of procedure from the Council in no way equates to the 'legislative body . . . serving as the board of appeals" but "evidences the fact that the Board exercised its independent and sovereign authority and discretion conferred upon it by both state and local laws." Regarding any argument that the Petitioners lacked notice, Mr. Burns asserted that the Petitioners had notice at least five days prior to approval of the Permit and that Petitioners "failed to file their appeal within 30 days of their own correspondence to Mr. Burns putting him on notice that they would appeal."

In their reply to the County and Mr. Burns' oppositions, Petitioners asserted that the County and Mr. Burns' "contentions, although creative, reflect an unreasonable and

impermissible avoidance of the State mandated requirement of section 4-306." According to Petitioners, the "operative legislation in this instance specifies that the information is to be furnished in a board's rules. But, in this case, it is not."

After a hearing held before the circuit court on September 2, 2020,[3] the circuit court issued an "Opinion and Order." The court found that the Petitioners' "arguments lack[ed] merit." The court noted that the Board's rules state, at the outset of Section 2: "These rules are supplementary to requirements set forth in the Wicomico County Code, which should be reviewed for additional procedural requirements." Therefore, the court reasoned, "a reader of the Board's rules is directed to the County Code, which provides, at Section 225-154[B.], 'Time for Appeal – A written notice of appeal shall be submitted to the Department of Planning, Zoning and Community Development within thirty (30) days from the officer's decision.'" The court rejected Petitioners' argument that "the Board's procedures are invalid . . . because the specific time period for appeal was not set forth directly in the Board's rules":

> The phrase "provided by the rules of the board . . . ," given its plain meaning, requires simply that a reasonable time frame must be "provided." This phrase in no way precludes the Board from referring a party to another, readily available source. To hold otherwise would impute a restrictive meaning to "provided" not set forth anywhere in the statute nor in caselaw. Indeed, counsel cited no legal authority in support of its argument and the

[3] Appellants failed to include a transcript from this hearing in the record on appeal. Although the Board and Mr. Burns aver that this violates Maryland Rule 8-411, this failure is "of no consequence, however, because we look to the record developed at the agency level." *Patrick v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 156 Md. App. 423, 434 n.8 (2004). Moreover, as reflected above, in this case the circuit court issued a written opinion providing a summary of the parties arguments and the grounds for the court's decision and order.

> [c]ourt will not assume that a direct, and easy reference included in the Board's rules violates § 4-306.

Next, the court discarded Petitioners' argument that "by adopting the County's thirty-day (30) time period for appeals from administrative agencies, . . . the legislative body is serving or substituting as the Board." The court found that "an independently appointed Board chose to adopt the time period within the County Code and did so by referring parties to that Code within the rules. The Board made this decision, not the legislative body." For these reasons, the circuit court affirmed the decision of the Board.

The Petitioners noted a timely appeal to this Court on October 5, 2020.

STANDARD OF REVIEW

When reviewing the final decision of an administrative agency, "we look through the decision of the circuit court and review the agency's decision directly." *W. Montgomery Cnty. Citizens Ass'n v. Montgomery Cnty. Plan. Bd. of Md.-Nat'l Cap. Park & Plan. Comm'n*, 248 Md. App. 314, 332-33 (2020) (citing *Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Props.*, 453 Md. 516, 532 (2017)), *cert. denied*, 474 Md. 198 (2021). Our review of an agency decision is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised on an erroneous conclusion of law." *Clarksville Residents Against Mortuary Def. Fund*, 453 Md. at 532. In determining whether there is "substantial evidence," we must "decide 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *W. Montgomery Cnty. Citizens Ass'n*, 248 Md. App. at 333 (quoting *Clarksville*

Residents Against Mortuary Def. Fund, 453 Md. at 532). "We owe less deference to the Board's legal conclusions and 'give considerable weight to the agency's interpretation and application of the statute which the agency administers'" but are "under no constraint . . . to affirm an agency decision premised solely upon an erroneous conclusion of law."' *Id.* (citations omitted).

With respect to statutory interpretation, it is well-established that "[l]ocal ordinances and charters are interpreted under the same canons of construction that apply to the interpretation of statutes." *Kane v. Bd. of Appeals of Prince George's Cnty.*, 390 Md. 145, 161 (2005) (quoting *O'Connor v. Balt. Cnty.*, 382 Md. 102, 113 (2004)). It is an equally well-established "principle of law that 'the cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature,'"—here the County Council of Wicomico County. *Id.* (quoting *Rockwood Cas. Ins. Co. v. Uninsured Emps.'s Fund*, 385 Md. 99, 108 (2005)). In order to ascertain the Council's intent, "we begin with the pertinent language of the [County] Code, and ordinarily will not venture beyond its clear and explicit terms." *Harford Cnty. People's Couns. v. Bel Air Realty Assocs. Ltd. P'ship*, 148 Md. App. 244, 259 (2002). Still, we construe "the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory," *Berry v. Queen*, 469 Md. 674, 687 (2020) (quoting *Brown v. State*, 454 Md. 546, 550-51 (2017),

and view the "plain language . . . 'within the context of the statutory scheme to which it belongs, considering the purpose, aim or policy of the Legislature in enacting the statute,'" *Id.* (quoting *Johnson v. State*, 467 Md. 362, 372 (2020).

DISCUSSION

I.

Time for Appeal

A. Parties' Contentions

Appellants contend that the "Board's current Rules of Procedure do not set forth a time by which [] an appeal must be filed and are therefore not compliant with the State enabling law." Appellants refer to Maryland Code (2012, 2020 Supp.), Land Use Article ("LU") as the "Enabling Act," and aver that sections 4-304 through 4-306 direct the Board to adopt rules that, among other things, prescribe the time within which an appeal to the Board must be taken. "Despite the mandate in the Enabling Act with respect to planning and zoning matters that the Board's Rules 'shall' provide a time for the filing of any appeal, they do not" (quoting LU § 4-306 (b)). Appellants' argument and sub-contentions on appeal are erected upon this, as we will explain, erroneous postulation.

First, according to Appellants, the Board's Rules of Procedure impermissibly refer to the Wicomico County Code in Section 2, because the "enabling act specifies that the information [time for appeal] is to be furnished not by a local law but by a board's rules." And, Appellants add, that where there is a "conflict between the State and County provisions, the State provisions preempt those of the County."

Second, Appellants assert that, "more fundamental[ly], as a matter of legislative interpretation the circuit court patently erred in resorting to Chapter 225 of the Wicomico County Code, which deals only with planning and zoning matters." Because the storage tank "appeal pertains to a building permit" under Chapter 117 of the Code, Appellants insist that their appeal was taken "from the Building Division's issuance of a building permit" and not from the Zoning Administrator's decision. According to Appellants, because Chapter 117 does not provide a time for noticing an appeal, "they filed their appeal within a reasonable time after an investigation determined that the permit had been improperly issued," noting that they met the "reasonable time" requirement in LU § 4-306 (b).

Third, in their opening brief, Appellants state that because there is no time established by which an appeal of a building permit must be filed, the Board erred by ruling that their appeal was not timely and denying them a hearing or an administrative remedy.

The Board, in response, stresses that the Wicomico County Code in section 225-154.B. sets a timeframe to file an appeal to the Board within thirty days. Because the Appellants failed to appeal within 30 days, their appeal was untimely. Although the Board also cites to the wrong enabling state statute in asserting that "Wicomico County has satisfied all Title 4 requirements of the Land Use Article," the Board correctly avers that its Rules "provide notice to all parties that additional requirements exist and where the requirements can be found" by noting that its Rules are "supplementary to requirements set forth in the Wicomico County [C]ode." (Quoting Board Rules of Procedure, § 2).

According to the Board, "[a]pplying the statutory interpretation to the facts of the case is straight forward." Because "over 130 days passed between the appeal period lapsing and the filing of the appeal," the appeal was untimely.

Regarding the Appellants' second contention that Chapter 117 does not provide a time for noting an appeal, the Board contends that the Appellants failed to raise this issue before the trial court, and, accordingly, did not preserve this issue for appellate review.

Likewise, in a separate green brief, Mr. Burns asserts that section 225-154 of the Code provides a "30-day time limit for appealing a decision of an enforcement officer" and that this period is a "reasonable time-period properly adopted and enforced by the Board pursuant to Section 2 of the Board's Rules of Procedure."

Regarding the Appellants' second contention, Mr. Burns echoes the Board's argument and contends that the Appellants failed to assert that the building of the tank is subject to section 117 of the County Code instead of section 225-154. According to Mr. Burns, this Court is constrained by Maryland Rule 8-131(a) from deciding this issue. While Mr. Burns notes that the Appellants did not order the transcript of the hearing from the circuit court, he avers that '"it plainly appears by the record', stemming back a year prior to the September 2, 2020 hearing, that Appellants never raised, or intended to raise this issue."

In their reply, the Appellants contend that they "were unlawfully denied a hearing before the Board and an opportunity to make their arguments in that forum," and "it is immaterial that they did not make the arguments in the circuit court." According to

Appellants, "[t]he Code's flaws and the Chairman's improper action denying Appellants a hearing before the Board – in combination – not only denied Appellants of the administrative remedy to which the drafters of the County Code undoubtedly intended, but also unquestionably have denied them of their right to procedural due process under Article 24 of the Maryland Declaration of Rights."

We note here that in their opening brief, Appellants requested that we "[r]everse the decision of the circuit court and remand the case to the court with instructions to direct the Board of Appeals to consider Appellants' requested administrative appeal[.]" In their reply brief, however, Appellants declare that "[r]emanding this case back to the Board would accomplish nothing." Appellants then request that we "reverse the decision of the circuit court and rule as a matter of law that the County has not provided Appellants a reasonable, effective, fair or lawful administrative remedy by which to challenge the issuance of Building Permit No. 28267 - as a practical matter no administrative remedy at all." Counsel for the Appellants clarified at oral argument that, because of this alleged failure to provide an administrative remedy, that the Appellants should be free to file a declaratory judgment action in the circuit court asking for a declaration that the permit for the storage tank was "improper, illegal."

With that, we start by clarifying the applicable regulatory framework.

B. Regulatory Framework

1. Applicable State Law

The General Assembly "delegates to local political subdivisions significant authority to regulate land use." *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 503 (2015). Because local governments are not sovereign entities and "possess no inherent power to regulate land use," a "local government's authority to regulate land use may emanate only from enabling legislation of the General Assembly." *Id.* at 504.

As mentioned above, Appellants ground their argument in section 4, subtitle 3 in Division I of the Land Use Article. Wicomico County, however, is a chartered county subject to the Express Powers Act. *Ritchmount P'ship v. Bd. of Sup'rs of Elections for Anne Arundel Cnty.*, 283 Md. 48, 54 (1978) (including Wicomico County as a charter county). And, because Wicomico County is a charter county, Division I of the Land Use Article, with narrow enumerated exceptions not relevant to this appeal, does not apply. LU § 1-401(a) ("Except as provided in this section, this division does not apply to charter counties.").[4]

[4] Section 1-401(b) lists the sections and subsections contained in Division I that apply to a charter county. Subsection 3, *Board of Appeals*, and subsection 4, *Judicial Review*, are not included.

Under the Express Powers Act, codified at Maryland Code (1974, 2013 Repl. Vol., 2019 Supp.) Local Government Article ("LG"), §§ 10-101-330,[5] the General Assembly confers on chartered counties a wide range of express powers over local affairs. These include the authority to enact local laws, LG § 10-202; establish certain county institutions, LG § 10-304; acquire, hold, and dispose of county property, § 10-312; and levy property taxes, LG § 10-313. As the Court of Appeals recently clarified: "The Express Powers Act, in LG §§ 10-305 and 10-324, provides the zoning authority for all charter counties except Montgomery and Prince George's Counties." *Md. Reclamation Assocs., Inc. v. Harford Cnty.*, 468 Md. 339, 395, *cert. denied*, ___ U.S. ___, 141 S. Ct. 560 (2020).

Section 10-324 of the Local Government Article states: "[A charter] county may enact local laws relating to zoning and planning to protect and promote public safety, health, morals, and welfare[.]" The statute further clarifies that "[i]t is the policy of the State that the orderly development and use of land and structures requires comprehensive regulation through implementation of planning and zoning controls" and that such "planning and zoning controls shall be implemented by local government." LG § 10-324(b). Section 10-324(c) makes clear, however, that the section does not "grant to [a

[5] The Express Powers Act was previously codified at Article 25A. The Act was recodified generally without substantive change, at Title 10 of the Local Government Article. 2013 Md. Laws ch. 119 (H.B. 472) (noting the purpose of the Act, among other things, was to "revise, restate, and recodify the laws of the State relating to . . . the Express Powers Act for charter and code counties").

Chapter 7 of the Wicomico County Code governing the Board of Appeals provides, in § 7-1, that "[t]he Wicomico County Board of Appeals is hereby created and established pursuant to the authority of Article 25A, § 5(U) of the Annotated Code of Maryland." In 2013, Article 25A, § 5(U) was recodified at LG § 10-305.

charter] county powers in any substantive area not otherwise granted to the county by other public general law or public local law."

Section 10-305 "authorizes a charter county to establish a board of appeals and provides that a board of appeals shall have exclusive appellate jurisdiction over, *inter alia*, a variety of adjudicatory zoning matters." *Md. Reclamation Assocs.*, 468 Md. at 395. Specifically, LG § 10-305(a) states:

> A county may enact local laws to provide for:
>
> (1) the establishment of a county board of appeals, whose members shall be appointed by the county legislative body;
> (2) the number, qualifications, terms, and compensation of the members of the county board of appeals;
> (3) the adoption by the county board of appeals of rules of practice that govern its proceedings; and
> (4) a decision by the county board of appeals on petition of any interested person, after notice and opportunity for hearing, on the basis of a record before the board.

Boards of appeal are granted "original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government over matters arising under any law, ordinance, or regulation of the county council that concerns":

> (1) an application for a zoning variation or exception or amendment of a zoning map;
> (2) the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order; or
> (3) the assessment of any special benefit tax.

LG § 10-305(b). The statute provides an avenue for an aggrieved person to seek judicial review in the circuit court of the county and a right for further review in this Court. LG § 10-305(d). The Court of Appeals clarified in *Chesapeake Bay Foundation, Inc. v. DCW*

Dutchship Island, LLC, that a "County's ability to set reasonable conditions precedent to access to its Board of Appeals is an exercise of its Home Rule" and "thus lies beyond the competence of the General Assembly or any other branch of state government to alter or erase." 439 Md. 588, 604 (2014) (citation omitted).

2. Relevant Provisions in the Wicomico County Code

Pursuant to the authority granted by the General Assembly in the Express Powers Act, Wicomico County established the Wicomico County Board of Appeals. Wicomico County Code § 7-1.A. The County vests the Board of Appeals with "all the functions and duties relating to zoning described in [the Express Powers Act] as such functions and powers may be prescribed by legislative act of the County Council." *Id.* § 7-3.A. "These duties, functions and powers shall include, but not be limited to":

> (1) To authorize such variances from the terms of Chapter 225 as will not be contrary to the public interest, and where owing to the uniqueness of the property, topographical or special conditions, the strict enforcement of the provisions of said chapter will result in practical difficulty or unreasonable hardship.
> (2) To hear and decide applications for special exceptions under Chapter 225 of this Code.
> (3) To hear and decide matters pertaining to a nonconforming use under Chapter 225 of this Code.
> (4) To determine unclassified uses as the same shall be required by Chapter 225 of this Code.
> (5) **To hear and decide appeals from any final order, decision, requirement or interpretation made by an administrative official in the enforcement of any matter under Chapter 225**.

Id. § 7.3.A. (emphasis added). The County further authorizes the Board to "**hear and decide appeals from all other administrative and adjudicatory orders as it may be**

required to act upon, by [the Express Powers Act], as amended, or by legislative act of the County Council not inconsistent therewith." *Id.* § 7.3.B. (emphasis added).

Consistent with this authority, the County grants the Board "the authority to adopt and amend rules of practice to cover the conduct of its proceedings." *Id.* § 7.4.A. Accordingly, the Board has adopted Rules of Procedure ("Board Rules"). Section 2 of the Board Rules instructs: "**These rules are supplementary to the requirements set forth in the Wicomico County [C]ode, which should be reviewed for additional procedural requirements.**"[6] (emphasis added). Section 3 prescribes the duties and responsibilities of the Board to "hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made **by any administrative official, officer or body in the administration of the Wicomico County Code**" as well as "appeals from any chapter of the Wicomico County Code which authorizes an appeal to the Board." Board Rules § 3.A, F. (emphasis added). The Board Rules provide detailed requirements and procedures for hearing and deciding appeals, but they do not provide the time within which an appeal from a decision by an administrative official, officer or body must be filed.

The Wicomico County Zoning Regulations, located in Chapter 225 of the County Code and referred to throughout Chapter 7, empowers the "Planning Director, or his designated representative, to supervise the Zoning Administrator and to administer and

[6] Section 1.P. of the Board Rules does note: "These Rules do not constitute jurisdictional requirements. Failure of the Board, its staff, or any party to comply with any provisions of these rules of procedure shall not invalidate any otherwise valid decision or action of the Board."

enforce the provisions of this chapter." Wicomico County Code § 225-11.A. Upon a violation, the Zoning Administrator must notify the property owner and/or the responsible person and take any action, including removal of an illegal structure, to "ensure compliance with or to prevent violations of" the zoning regulations, in addition to other remedies provided in the Code. *Id.* § 225-11.B. The regulations specify, among other things, that permits for a building and other structures may not be inconsistent with the provisions of the zoning regulations:

> C. All departments, officials and public employees of Wicomico County who are vested with the **authority to issue permits shall conform to the provisions of this chapter and shall not issue <u>any permit for any use of land, building, structure or purpose</u> which would be inconsistent with the provisions herein set forth.**
> D. Any permit issued in conflict with the provisions of this chapter shall be null and void.

Id. § 225-11. (emphasis added). Subsection 154.A. of Chapter 225 specifies that "[a]ny person or persons aggrieved by any **decision of the enforcing officers as identified in § 225-11**, or by a decision by the Wicomico County Planning and Zoning Commission authorized by the provisions of this chapter," has the right to "**appeal said decision to the Wicomico County Board of Appeals**." *Id.* § 225-154.A. (emphasis added). "A written notice of appeal shall be submitted to the Department of Planning, Zoning and Community Development **within <u>30 days</u> from the officer's decision**."[7] *Id.* § 225-154.B. (emphasis added).

[7] Although the appeal is submitted to the Department, the appeal is before the Board of Appeals, as clarified by section 7.3.A. of the Wicomico County Code.

Supplementing the "County's land development codes, including existing zoning and subdivision provisions," the Critical Area Resource Protection Chapter "imposes specific regulations for the development and other land use within the Wicomico County Critical Area." *Id.* § 125-1.B. This Chapter "expressly" provides "that if any property owner, developer or any other person interested therein is dissatisfied with any final ruling as to the interpretation or application of the terms and conditions herein provided, they may appeal to the Board of Appeals, provided that said **appeal is taken within 30 days after the final decision has been rendered**." *Id.* § 125-47. (emphasis added).

Likewise, the Forest Conservation Chapter "supplement[s] the county's land development codes, including existing zoning and subdivision provisions" and "imposes specific regulations for retention of forests, reforestation and afforestation for land uses within Wicomico County." *Id.* § 126-2.B. The Chapter "provide[s] special regulatory protection for the forest lands and timber resources located within Wicomico County. Development standards and requirements established herein are intended to foster more sensitive development activity for forested areas and to minimize the adverse impacts of development activities on water quality." *Id.* § 126-1.A. This Chapter grants: "Any person specially aggrieved by any final ruling as to the interpretation or application of the terms and conditions herein provided may appeal to the Board of Appeals, provided that said appeal is taken **within thirty (30) days after the final decision has been rendered**." *Id.* § 126-22.A. (emphasis added). The statute further provides that appeals from the

requirements of the Forest Conservation Chapter "shall be processed in accordance with the provisions" of the Wicomico County Zoning Regulations. *Id.* § 126-22.C.

The County Council also adopted the "provisions set forth in the International Building Code . . . , 2015 Edition, including the appendices, as the building code for Wicomico County, Maryland and incorporated [them] by reference." *Id.* § 117-2. The Code requires: "Any owner . . . who desires to construct, enlarge, alter, repair, move, improve, remove, convert, demolish, or change the occupancy of a building or structure . . . shall first make application to the Chief Building Official and obtain any required permit." *Id.* § 117-3.D. The Code provides the following provision regarding applications for appeal under the building code:

> An application for appeal shall be submitted to the Board of Appeals and shall be **based on a claim that the true intent of this code or the rules legally adopted hereunder have been incorrectly interpreted, the provisions of this code do not fully apply or an equally good or better form of construction is proposed.** The Board of Appeals shall not have authority to waive requirements of this code. The Board of Appeals shall mean the Board of Appeals as established by Chapter 7 of the Wicomico County Code.

Id. at 117-3.V. (emphasis added); *see also id.* at 117-5.AA. (similarly modifying appeal provision to International Residential Code) .

Having set out the broad regulatory scheme, we now turn to consider Appellants' contentions on appeal.

C. Analysis

1. Application of State Law

Appellants' contention that the Board Rules must expressly state the time for an appeal rests on an erroneous application of statutes contained in the Land Use Article that are expressly inapplicable to charter counties such as Wicomico County. Appellants do not direct us to anything in the Express Powers Act—the applicable enabling legislation—specifying that a time for appeal must be expressly stated in the Board Rules.

Rather, as set out above, the Express Powers Act authorizes the establishment of a county board of appeals, and broadly empowers a charter county to "enact local laws to provide for: . . . (3) the adoption by the county board of appeals of rules of practice that govern its proceedings[.]" LG § 10-305(a). The Express Powers Act provides that a board of appeals may have "original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government" over a broad range of matters including "an application for a zoning variation or exception or amendment of a zoning map" and the "issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order." LG § 10-305(b)(1-2).

Consistent with this authority, the County Code grants the Board "the authority to adopt and amend rules of practice to cover the conduct of its proceedings." Wicomico County Code § 7.4.A. The Board, in turn, adopted the Board Rules and instructs in section 2 that its "rules are supplementary to the requirements" set forth in the County Code.

We discern no provision within the Express Powers Act that imposes a requirement similar to LU § 4-306 (b)'s requirement that a board's rules "shall" provide a time for the filing of any appeal. To the contrary, the Act bestows plenary authority on the county council "to set reasonable conditions precedent to access to its Board of Appeals [as] an exercise of its Home Rule." *Chesapeake Bay Found.*, 439 Md. at 604.

To ascertain the intent of the County Council of Wicomico County, we need not venture here beyond county code's "clear and explicit terms." *Harford Cnty. People's Couns. v. Bel Air Realty Assocs. Ltd. P'ship*, 148 Md. App. 244, 259 (2002). The Council granted the Board the express authority to "adopt and amend" its own Board Rules. While the Council did require the Board to comply with certain requirements, the Board was not restricted from referencing other sources or supplementing its own rules with other procedural requirements. To conclude otherwise would unduly restrict the Board from appropriately referencing other provisions located in the Wicomico County Code and elsewhere.

Accordingly, we reject Appellants' contention that the Board's Rules of Procedure impermissibly refer to the Wicomico County Code in Section 2, because the "enabling act specifies that the information [time for appeal] is to be furnished not by a local law but by a board's rules."

2. Timeliness under Section 225-154 of the Wicomico County Code

Appellants first contention is that the Board Rules are defective because they "do **not** set forth a 'time' for appeal."

Appellants' second contention, raised for the first time in this Court, is that their appeal before the Board did not concern a zoning or planning matter but "pertain[ed] to a building permit which is required by 'Chapter 117. Building Construction' for building and structures like the subject storage tank." We agree with Appellants that we review whether the issue was preserved before the Board rather than before the circuit court. *See McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 251 (2012) ("Generally, in an appeal from judicial review of an agency action, we review the agency action directly, not the decision of the trial court.").

In their letter noting an appeal to the Board, the Appellants only raised issues relating to decisions of the Zoning County Administrator:

> **1.** Upon information and belief, the storage tank was erroneously determined to be an inherently permitted use in the A-1 Agriculture-Rural zoning district.
>
> **2.** Upon information and belief, the building permit was approved as "Ag exempt" from pertinent State and County stormwater management, soil conservation and forest conservation laws and regulations without satisfactory evidence that the storage tank, as proposed, could be placed on the property in compliance with those laws and regulations being submitted – until at least October 17, 2019.

Our Courts have "repeatedly pointed out that judicial review of administrative decisions is limited to the issues or grounds dealt with by the administrative agency." *Ins. Com'r v. Equitable Life Assur. Soc. of U.S.*, 339 Md. 596, 634 (1995) (collecting cases). Alternatively stated, "[a] party who [alleges] . . . that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceeding, may not raise an objection

for the first time in a judicial review proceeding." *Cicala v. Disability Review Bd.* , 288 Md. 254, 261-62 (1980).

Out of respect for a co-ordinate branch of government, reviewing courts are "restricted to the record made before the administrative agency," and are "confined to [deciding] whether, based upon the record, a reasoning mind reasonably could have reached the factual conclusion reached by the agency." *Md. State Ret. & Pens. Sys. v. Martin*, 75 Md. App. 240, 246 (1988). Appellants conceded at oral argument that they did not raise this issue in the circuit court, and claim they had no opportunity to present their argument before the Board. We agree.

Although Appellants challenged the permit as not conforming with applicable zoning, stormwater management, soil conservation and forest conservation laws, their appeal was nevertheless from the issuance of the building permit. The fact that the appeal was from a building permit issued under Chapter 117 of the County Code was obviously presented to the Board. Given that the Board did not hold a hearing before it dismissed the appeal as untimely, Appellants had no further opportunity to raise, or fail to raise, their contention that the Board should be constrained to the provisions of the building code in determining whether their appeal was timely. Consequently, we will address Appellants' contention.

According to Appellants, Wicomico County Code § 225-154 cannot direct the timeline for an appeal in this case because it is "difficult to believe the legislature ever contemplated that this round-about and burdensome way for a person – frequently in these

cases not a lawyer – to find out when an appeal must be filed[.]" We start by pointing out that, not only is Appellants' letter noting their appeal to the Board based entirely on alleged violation of the zoning, stormwater management, soil conservation and forest conservation laws, Appellants acknowledge, perhaps inadvertently, that the relevant time frame for the appeal to the Board pertains to "planning and zoning matters." *See* page 8 of Appellants' brief ("Despite the mandate in the Enabling Act with respect to planning and zoning matters that the Board's Rules 'shall' provide a time for the filing of any appeal, they do not.").

Contrary to Appellants' assertion, we do not find it cumbersome to locate the timeframe for an appeal based on an alleged zoning violation. Section 2 of the Board Rules directs that its Rules "are supplementary to requirements set forth in the Wicomico County Code, which should be reviewed for additional procedural requirements." An interested person would appropriately turn first to the section of the Code constituting the "Wicomico County Zoning Regulations." Then, to find the appeal timeframe, that individual would scan to Part 13, titled "Appeals, Interpretations, Variances and Special Exceptions," and find "Processes and Procedures." There, in Section 225-154.B., one finds the requirement that "[a] written notice of appeal shall be submitted to the Department of Planning, Zoning and Community Development within 30 days from the officer's decision."

As we highlighted above, the zoning regulations specify, among other things, that permits for a building and other structures "shall not issue . . . for any use . . . which would be inconsistent with the provisions herein set forth." *Id.* § 225-11.C. And, lest there be

any confusion as to whether this language applies to a building permit issued by the "Department of Planning, Zoning & Community Development, Building Division," as the permit under consideration in this appeal, the provision specifies at the outset that it applies to:

> **All departments, officials and public employees of Wicomico County who are vested with the authority to issue permits** shall conform to the provisions of this chapter and shall not issue any permit for any use of land, building, structure or purpose which would be inconsistent with the provisions herein set forth.

Wicomico County Code § 225-11.C.

As apparent from Appellants' letter noticing their appeal, the issues raised do not concern the issuance of a building permit itself but considerations relating to zoning, stormwater management and conservation laws which also require an appeal be filed within thirty days to the Board. *See, e.g., id.* §§ 126-22.A. (forest conservation); 196-26 (stormwater management). Appellants do not contend, nor does their letter of appeal to the Board demonstrate, that their appeal is "based on a claim that the true intent of [the building] code or the rules legally adopted [t]hereunder have been incorrectly interpreted, the provisions of th[e] code do not fully apply or an equally good or better form of construction is proposed." *Id.* § 117-3.V. Appellants have not, therefore, established that their appeal is authorized under the very provision that they contend applies.

There is no dispute that the Appellants filed their appeal to the Board on October 31, 2019—164 days after the permit was issued and 47 days after the Appellants' counsel

sent a letter to Mr. Burns asserting that tank was in violation of the zoning code. Accordingly, we discern no error in the Board's decision to dismiss Appellants' appeal.

3. Failure to Provide a Hearing

Appellants appear to contend that the Board erred in denying them a hearing and that various procedural and associated defects deprived them of an effective administrative remedy.

First, Appellants assert that they were denied a hearing before the Board, which deprived them of their administrative remedy and their right to procedural due process. Our Courts have "consistently held that, where the notice of appeal was not filed within the prescribed period after the final decision from which the appeal was taken, the appellate tribunal had no authority to decide the case on its merits." *United Parcel Serv., Inc. v. People's Couns. for Balt. Cnty.*, 336 Md. 569, 580 (1994). Alternatively stated, when a petitioner appeals an agency determination to a board of appeals after the appeal period had expired, the board "ha[s] no appellate jurisdiction over the case." *Id.* (citing *Miller v. Pinto*, 305 Md. 396, 405 (1986)). According, the Appellants were not entitled to a hearing before the Board because their appeal was untimely and not properly before it.

Second, as first stated in their reply brief and clarified at oral argument, the Appellants assert that the County Code fails to provide a legitimate administrative remedy, freeing the Appellants to file a declaratory judgment action in circuit court. Appellants appear to be asserting both that the agency lacks a proper procedure, by failing to note a time for appeal, and a proper remedy.

As an initial matter, Appellants do not raise this issue in their "Questions Presented" and have waived this issue for appellate review. *Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 426 (2001) (citing Md. Rule 8-504(a)(3)). As we stated in *Green*, "[a]ppellants can waive issues for appellate review by failing to mention them in their 'Questions Presented' section of their brief." *Id.* We reasoned that "[c]onfining litigants to the issues set forth in the 'Questions Presented' segment of their brief ensures that the issues are presented and obvious to all parties and the Court." *Id.* (citing *DiPino v. Davis*, 354 Md. 18, 56 (1999)). Even if we were to address the merits, Appellants' arguments would fail. As we hold above, the Wicomico County Code provides a time for filing an appeal from the permit that was issued in this case.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.