Circuit Court for Prince George's County
Case No. CAL 16-42896

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1427

September Term, 2017

THE PLEASURE ZONE, INC.,

v.

BOARD OF APPEALS FOR PRINCE GEORGE'S COUNTY, MD

Graeff,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: February 6, 2019

In Xanadu did Kubla Khan
A stately pleasure-dome decree:
Where Alph, the sacred river, ran
Through caverns measureless to man
Down to a sunless sea
* * *

Samuel Taylor Coleridge, *Kubla Khan*, *in* CHRISTABEL: KUBLA KHAN, A VISION; THE PAINS OF SLEEP (London, William Bulmer & Co. 1816).

Samuel Taylor Coleridge, in his poem *Kubla Khan*, shared his conception of a mythical pleasure-dome. Unfortunately for a business entity named The Pleasure Zone, Inc., Prince George's County and the City of College Park did not find that they had decreed how the business was operating ultimately.

The Pleasure Zone, Inc., which operates a retail business under the trade name the "Comfort Zone," appeals here the propriety of a Zoning Violation Notice, issued by the Public Services Department of the City of College Park, regarding that business. The Violation Notice alleged that the use of the real property for the business was not in conformance with the Comfort Zone's Use and Occupancy Permit ("U/O"). The business was obliged to change its operation to conform to the U/O. The County Board of Appeals affirmed the decision of the City to issue the Zoning Violation Notice. Pleasure Zone, Inc. filed a Petition for Judicial Review in the Circuit Court for Prince George's County. The circuit court issued an opinion and order affirming the Violation Notice. This timely appeal followed.

QUESTIONS PRESENTED

The Pleasure Zone, Inc. presents the following questions for our consideration,

which we have rephrased modestly:[1]

1. Did the Board err in finding that the Comfort Zone operation violated its use and occupancy permit and in affirming the Violation Notice?
2. Was the Board's decision, in finding a zoning violation under the Prince George's County Code, arbitrary and capricious?
3. Is § 27-253(c) of the Prince George's County Code unconstitutionally vague as applied?

FACTUAL BACKGROUND

The Comfort Zone is a retail business, whose human co-owners (of Pleasure Zone, Inc.) are Robert Carl and Melonique Hayden. The business is located in a commercially-zoned building located at 9721 Baltimore Avenue, within the municipal limits of the incorporated City of College Park. On 3 December 2009 (before commencing operation of the business), Hayden submitted applications to the County and the City for a U/O for a "variety/department store." As required by local law,[2] the application was referred to the Maryland-National Capital Park & Planning Commission ("MNCPPC"), a bi-county agency, for review as to compliance with local land use and zoning requirements. The

[1] Appellant's questions were:

1. Is reversal warranted where the Board ignored the Use and Occupancy Permit issued, speculated on the subjective belief of a permit reviewer from another agency who did not testify, assumed that products must be "commonly" sold to be legally sold, and failed to cite any law in support of its decision?
2. Did the Violation Notice adequately set forth the basis of the alleged violation and did the Board err in its consideration of it?
3. Was the Board's decision arbitrary and capricious in finding a zoning violation under Prince George's County Code § 27-253(c) or is § 27-253(c) unconstitutionally vague as applied?

[2] According to § 27-255 of the Prince George's County Zoning Ordinance, the Planning Board for Prince George's County must review and approve a U/O. This function is performed by the Maryland-National Capital Park and Planning Commission, which acts as the zoning reviewer prior to issuance of a U/O by Prince George's County.

MNCPPC reviewer for the Comfort Zone's U/O application was Michelle Hughes ("Hughes"). As reflected in correspondence between Hughes and Hayden in the record, Hughes, perhaps provoked by the name of the business and/or its corporate owner, requested clarification regarding the proposed items the Comfort Zone intended to offer for sale. Hughes noted in her file on the U/O application that, according to verbal representations from Hayden, "the proposed use does not include an adult store. No adult products would be sold at this establishment. Products similar to a dollar store would be for sale. Variety/department store." The Code does not require a site floor plan demonstrating the retail sales of all items for a variety/department store, so Hayden was not required to submit one. Were an adult book store proposed, a site plan would have been required. Ultimately, a U/O was recommended for approval by the MNCPPC on 18 December 2009. The County issued the U/O for a "Clothing, Retail, Gifts, Novelties & Souvenirs, Shoes/Ret., Variety Store," effective 4 January 2010.

College Park's Public Services Department[3] sent Code Enforcer Keelah Allen-Smith ("Allen-Smith") to inspect the Comfort Zone operation in February 2010.[4] Allen-

[3] Pursuant to § 22-119 of the Land Use Article of the Maryland Code, a municipal corporation within Prince George's County has concurrent jurisdiction within its corporate limits to enforce zoning laws adopted by the County. Section 22-119 mandates that before such authority may be exercised, the municipal corporation must enter into an agreement with the County regarding enforcement of the County's zoning laws. In furtherance of this obligation, Prince George's County and the City of College Park, in 2002, entered into a written Memorandum of Understanding, whereby the City assumed principal responsibility for zoning enforcement within its corporate limits. Thus, both the City and the County had authority to inspect and enforce zoning laws within the geographic limits of the City.

[4] The Public Services Department is tasked with enforcing Prince George's County zoning ordinances, as well as the City's rental and non-residential occupancy permit process. The

Smith testified later before the Board of Appeals regarding her observations from the February 2010 inspection. She stated that, at that time, only the first floor of the structure was in use for sales to the general public, and there were no items offered for sale that were inconsistent with the uses permitted by the County's U/O. The items Allen-Smith observed for sale included "family movies, card games . . . incense, oils, lotions, body sprays, t-shirts, a few swimsuits. General merchandise items like that." Accordingly, the City also issued an occupancy permit.

Thereafter, the City received multiple complaints from nearby residents regarding the types of items then being sold and offered for sale at the Comfort Zone. Allen-Smith returned to the property on 11 October 2010 to re-inspect the store because of the complaints. She found then that items were displayed for sale on both the first and second floors of the building. She testified that the items displayed for sale were different in nature from the type of items she observed during her first inspection, being now largely sexually-explicit goods, as defined in § 27-902 of the Prince George's County Zoning Ordinance.[5] Section 27-902 reads, in relevant part:

> **Sec. 27-902. Definitions**
> (a) An adult bookstore and/or adult video store is any commercial establishment which does not have a use and occupancy permit to operate as a movie theatre or nonprofit, free-lending library and which either:
> (1) Has ten percent (10%) or more of its stock on the retail floor space of the premises to which the public is admitted, or has ten percent (10%) or more of its stock on display in the display space, in books, periodicals, photographs, drawings,

City issues an annual Occupancy Permit pursuant to its municipal Code, under which it requires registration of commercial properties.

[5] Allen-Smith testified that there were numerous items depicting sadomasochistic abuse, sexual conduct, and/or sexual excitement, as defined in the Code.

sculptures, motion pictures, films, video cassettes, compact discs, digital video discs, digital video recorders or other visual representations which depict sadomasochistic abuse, sexual conduct, or sexual excitement; or

(2) Has on the premises one (1) or more mechanical devices specifically for the purpose, in whole or in part, of viewing such materials.

(b) **Sadomasochistic abuse** means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bound, or otherwise physically restrained.

(c) **Sexual conduct** means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

(d) **Sexual excitement** means the condition of human male or female genitals, or the breasts of the female, when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Allen-Smith also found baseball cards in boxes in the basement, bearing no price tags or other suggestions that they were for sale.[6] She observed additionally in the basement non-sexual content comic books in water-stained boxes, seemingly unsuitable for sale to the public. Allen-Smith also observed a sign on the main entrance of the business, stating "any person under the age of 18 may not enter without an adult." This sign was not present when she inspected the premises in February 2010. As a result of Allen-Smith's 11 October 2010 re-inspection, the City issued a Zoning Violation Notice to the Comfort Zone for failure to comply with the terms of the County U/O.

The Comfort Zone was re-inspected again on 18 November 2010. This time, the

[6] While the record does not state how many boxes there were, the photographic exhibits admitted at the hearing (taken during the re-inspection) depict at least ten boxes.

Public Services Code Enforcement Manager for Prince George's County,[7] Jeannette Ripley ("Ripley"), performed the inspection. Ripley's findings were consistent with those of Allen-Smith's 11 October 2010 inspection, i.e., the building was filled with items depicting sexual conduct as defined in § 27-902 of the Prince George's County Zoning Ordinance and the number of items with sexual conduct depictions outnumbered greatly the boxed non-sexual content items, the latter of which were relegated to the rear of the basement.

The Board of Appeals for Prince George's County held public hearings on 2 March 2011 and 11 May 2011 regarding the Comfort Zone's administrative appeal of the issuance of the Zoning Violation Notice. Inspectors Allen-Smith and Ripley, and members of the public, testified in support of the Violation Notice. Gerald Goldberg ("Goldberg"), among others, testified on behalf of The Comfort Zone.[8] On 14 November 2016, the Board issued a Notice of Final Decision affirming the City's issuance of the Zoning Violation Notice.[9] The decision, in full, read:

> 1. The subject property is located at 9721 Baltimore Avenue, College Park, Prince George's County, Maryland, and is C-S-C (Commercial Shopping Center) zoned property located at Lots 2 thru 35, Block 1, Hollywood, on the Hill Subdivision.
> 2. Use and Occupancy Permit #34792-2009-U-00 was issued for the operation of The Comfort Zone.
> 3. Zoning Ordinance Section 27-254(a)(1) prescribes that use of a building, structure and land may not be permitted without a valid use and

[7] *See supra* footnote 4.

[8] Goldberg testified that he was "employed as – pretty much sales assistant, whatever needs to be done . . ." at the Comfort Zone. Robert Carl later testified, however, that Goldberg was not an employee, but a "volunteer," and the time Goldberg spent in the store each day was unpaid.

[9] The record does not indicate a reason for the delay of over five years between the conclusion of the hearings and the Board rendering its decision. The Comfort Zone continued its operations throughout this period.

occupancy permit.

4. On or about October 12, 2010, Violation Notice CPZ-0468 was issued to the Comfort Zone for violation of Section 27-253(c)[10] for use of the property not in conformance with the use and occupancy permit and/or accompanying plan. Exh. 3.
5. To comply with Section 27-253, the use must be consistent with the use understood at the time of issuance of the permit.
6. The County (and City) believed the store was to be used as general variety store as they commonly understood that to be in the County. Review of the history of the permit application clearly states that a variety store was intended to be for the business use of The Comfort Zone (and highlighted a contemporaneous discussion that was apparently held on the type of merchandise that would and would not be sold at the establishment). We give substantial weight to the testimony of both Inspector Keelah Allen-Smith and Code Enforcement Manager Officer Jeannette Ripley that based on their experience and common understanding of what constituted a variety store in the County, the many items found in Exhibits 24 and 26 were not the type of merchandise found in such stores. The Board does not believe that the sign displayed in Exhibit 38 is a sign commonly associated with a general variety store.
7. No one disputes that on the date the Violation Notice was issued the store displayed mixed items, including like those found in Exhibits 24 and 26. We note that no evidence was offered to show that a general variety store with a similar array of mixed items was issued a use and occupancy permit similar to the one received by The Comfort Zone.
8. The Board agrees that the City had a responsibility, and fulfilled that responsibility, to inspect commercial establishments within the City to determine annual compliance with safety requirements and consistency with the business operations described in its use and occupancy permits.

The Comfort Zone initiated an action for judicial review of the Board's decision. The Circuit Court for Prince George's County affirmed the Board's decision.

STANDARD OF REVIEW

We review the administrative body's decision, not that of the circuit court. *Long*

[10] Section 27-253(c) reads: "All use of the property shall be in conformance with the use and occupancy permit, including the accompanying plans."

Green Valley Ass'n v. Prigel Family Creamery, 206 Md. App. 264, 273, 47 A.3d 1087, 1092 (2012). Such a body's decision is "reviewed in the light most favorable to the agency" as to its findings of fact and whether the record supports the conclusions because such decisions carry "a presumption of validity." Thus, we examine the Board's decision to determine "whether a reasoning mind could have reached the factual conclusions reached by the agency." *Eng'g Mgmt. Servs. v. Md. State Highway Admin.*, 375 Md. 211, 226, 825 A.2d 966, 975 (2003) (internal citations omitted).

When reviewing the Board of Appeals' decision, however, our review also may entertain purely legal questions as well. Taking that into account, we proceed through a three-step analysis: 1) did the agency recognize and apply the correct principles of law governing the case (which review receives our non-deferential scrutiny); 2) are the agency's factual findings supported by substantial evidence; and, 3) did the agency apply the law to the facts reasonably. *Sterling Homes Corp. v. Anne Arundel Cty.*, 116 Md. App. 206, 216, 695 A.2d 1238, 1243 (1997).

DISCUSSION

I. Should the Board's decision be reversed?

a. The Board's Findings

The Comfort Zone draws our attention first to that part of the Board's decision, which stated: "[t]o comply with Section 27-253, the use must be consistent with the use understood at the time of issuance of the permit." According to the Comfort Zone, the law provides that the use of the property must be in conformance with the U/O, and should not be viewed according to the standard cited by the Board. As this argument goes, the fact

that stores with the same or similar U/O use description as the Comfort Zone do not sell commonly the predominant kind of items the Comfort Zone sold or offered for sale at the time of and following the 11 October 2010 inspection conflates improperly commonality with lawfulness.

Additionally, the Comfort Zone complains that the Board failed to decide whether its challenged operation constituted an "adult bookstore." The inspectors, it notes, did not count how many items on display on the retail floor space depicted sadomasochistic abuse, sexual conduct, or sexual excitement. Pursuant to § 27-902 of the Prince George's County Zoning Ordinance, an "adult bookstore," in order to be deemed as such, must have at least ten percent or more of its stock, on the public retail floor space or on display, which depicts sadomasochistic abuse, sexual conduct, or sexual excitement. The Comfort Zone points-out that, in addition to its sexually-oriented merchandise, there were thousands of other items for sale in the store, including about 130,000 baseball cards and 1,500 comic books, though glossing over that these items were stored in water-logged boxes in the rear of the basement of the store and many of them were not priced for sale. As Appellant's numerosity argument continues, "only three percent of the Comfort Zone's products fell under the definition of 'sexual conduct' or 'sexual excitement.'" As this argument goes, because the Board did not decide whether the Comfort Zone's operation constituted an "adult bookstore," it is unclear whether it was in violation of § 27-902 of the County Code, which abdication of judgment warrants reversal of the Board's decision.

Appellees counter by claiming that the Board did not have to determine whether the store was operating as an adult bookstore. Rather, all the Board needed to determine was

whether the Comfort Zone was operating post-11 October 2010 in conformance with its issued U/O. The Board did so, aided by testimony of multiple witnesses and demonstrative exhibits, stating that thousands of items involving sexual conduct (defined as such in the County Code) appeared to be the major components of the inventory, and indeed on sale, at the store.

Additionally, Appellees argue that the Board's decision was supported by substantial evidence, and should be upheld. The Board relied on the MNCPPC records showing Hughes' notes that Hayden claimed no adult, sexually-explicit products would be sold at the Comfort Zone.[11] Even without the MNCPPC records, there was substantial evidence, provided by inspectors and employees, among others, that supported the Board's conclusion.

We find no error in the Board concluding that the Comfort Zone's post-11 October 2010 operation (as revealed by two inspections) was in violation of the issued U/O.[12] The

[11] The Comfort Zone interjects that the MNCPPC records containing Hughes's notes regarding her conversation with Hayden should not have been admitted into evidence and are unreliable because they were not authenticated properly, i.e., Hughes (the employee that created the documents) was not called to testify by the City and the records contain hearsay statements. This argument has no merit. "[T]he rules of evidence are generally relaxed in administrative proceedings. . . . that which is inadmissible in a judicial proceeding is not *per se* inadmissible in an administrative proceeding." *Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 408, 693 A.2d 378, 384 (1997). The records were certified by the Supervisor of the Permit Review Section of the MNCPPC, who testified, under the penalty of perjury, that the documents provided were a true and correct copy of the documents in the custody of the MNCPPC. Additionally, hearsay statements are not prohibited strictly as they are in judicial proceedings. *Id*. As such, the MNCPPC records were admitted properly and relied on by the Board.

[12] It appears that the Comfort Zone jousts with the requirements for an "adult bookstore" because it knew that it could not obtain a U/O for such a use. An "adult bookstore" would require the grant of a special exception by the County, which could not happen here, given

Board was not obligated to determine whether the Comfort Zone was operating as an adult bookstore; it had to determine merely whether the store's operation was in compliance with the U/O, i.e. being used in a manner consistent with the understood use, selling items consistent with a "Clothing, Retail, Gifts, Novelties & Souvenirs, Shoes/Ret., Variety Store." The Comfort Zone claims that many of the items offered for sale, which fall into the category of sexually-explicit goods, were "novelties." It was reasonable for the Board to conclude that they were not. There existed substantial evidence, including reports from the inspections, inventory photographs from the inspections, and testimony from the inspectors (and even witnesses called by the Comfort Zone) upon which the Board rested its determination. Thus, the Board's exercise of a degree of common sense in this regard will not be overturned by this Court.

b. The Violation Notice

The Comfort Zone claims that the Violation Notice failed to set forth adequately the basis of the alleged violation. In aid of this argument, Appellant characterizes the Violation Notice as a charging document in the subject administrative proceedings. *See In re Roneika S.*, 173 Md. App. 577, 920 A.2d 496 (2007). As this goes, a charging document must "provide such description of the *criminal* act alleged . . . as will inform the accused of the specific conduct with which he is charged, thereby enabling him to defend against the

where the Comfort Zone is located within the City. By maintaining that the baseball cards and comic books were part of its inventory for sale, the Comfort Zone was arguing implicitly to count each card and comic book individually, as well as other items that were "for sale," but not available readily to an ordinary customer, in order to overcome the 10 percent requirement in § 27-902.

accusation . . .” *Williams v. State,* 302 Md. 787, 790-91, 490 A.2d 1277, 1279 (1985) (emphasis added). “A charging document that fails to give sufficient notice is deficient and subject to dismissal.” *Denicolis v. State*, 378 Md. 646, 661, 837 A.2d 944, 953. The Zoning Violation cited the language from § 27-253(c) of the Prince George’s County Code, and demanded the Comfort Zone to “[c]ease use of all premises until a [new and] valid Use and Occupancy Permit, including final approval of the permit, is granted by the Department of Environmental Resources.” This language, in the Comfort Zone’s view, does not provide any direction or guidance of what the Comfort Zone must do to conform to the Code or the issued U/O; therefore, the Violation Notice did not fulfill the legal standard of specificity and must be overturned.

Lastly, the Comfort Zone takes issue with the Violation Notice because it does not itemize the particular products offered for sale that violate the current U/O. Indeed, the Notice does not indicate what particular product or percentage of products that it offers for sale would come within, or without, the terms of the U/O.

Appellees retort that the Violation Notice was not a charging document in a criminal case and thus this argument is inapplicable in a civil code enforcement proceeding. Beyond this, the City argues that the Notice cites specifically and properly the section of the County Code that the Comfort Zone was alleged to have violated, and thus was sufficient to communicate to the Comfort Zone the nature of the violation. The Notice also included photographs of the assertedly objectionable inventory alleged to be not in compliance with the U/O, further giving the Comfort Zone notice of its violations.

In our review of the record, we find no reversible error infecting the Violation

Notice. It is apparent to a reasonable person, based on the record, that most of the products on sale at the Comfort Zone violated the U/O. The sign on the main entrance of the business, proclaiming the items offered for sale within were not suitable for minors unaccompanied by an adult, suggests that the proprietor had more than a clue what was unsuitable inventory for a "variety store." Even if the Comfort Zone's expressions of trepidation are genuine as to what it must do to conform its operations to the issued U/O, it can consult further with the City and/or County and, if specific or categorical disagreements persist, appeal anew.

II. Was the Board's decision arbitrary and capricious?

The Comfort Zone next mounts arguments of purported constitutional dimension that the Board's decision in affirming the Violation Notice was arbitrary and capricious. To evaluate this sort of an unconstitutionality assertion, we look to: "whether . . . an exercise of the state's police power, bears a real and substantial relation to the public health, morals, safety and welfare of the citizens of the State." *Bowie Inn, Inc. v. Bowie*, 274 Md. 230, 236, 335 A.2d 679, 683 (1975). We will not disturb a local agency's exercise of its police power unless it is done arbitrarily and capriciously. *Id.*

The arbitrary or capricious standard "sets a high bar for judicial intervention, meaning the agency action must be 'extreme and egregious' to warrant judicial reversal under that standard." *Md. Aviation Admin. v. Noland*, 386 Md. 556, 576, 873 A.2d 1145, 1157 (2005). In order to overturn the Board's decision as arbitrary and capricious, the Comfort Zone must "overcome a very deferential standard to rebut the presumption that the [Board] exercised its discretion properly." *Md. Office of People's Counsel v. Md. Pub.*

Serv. Comm'n, 461 Md. 380, 400, 192 A.3d 744, 756 (2018).

The City responds, and we agree, that the Board's decision to uphold the Violation Notice was not arbitrary and capricious. The photographs of inventory attached to the Notice were of adult products, such as dildos, vibrators, and adult videos/CDs, displayed prominently for sale in the store. The Comfort Zone obtained a U/O for a "retail variety store," after Hayden made representations that the store would not sell adult products. The Violation Notice issued to the Comfort Zone cited the Code provision that the store violated and provided photographic evidence to demonstrate the kind and type of items deemed inconsistent to the U/O and which violated the Code. As such, the Board's decision was supported by substantial evidence and its action was not arbitrary and capricious.

III. Is § 27-253(c) of the Prince George's County Code unconstitutionally vague as applied?

The Comfort Zone, in its final effort to persuade us that the Board's decision should be overturned, claims that § 27-253(c) of the Prince George's County Code is unconstitutionally vague as applied. In essence, it claims that § 27-253(c) provides no guidance as to what inventory is permissible or impermissible in a particular business, so the Comfort Zone did not have any objective standards to inform it of how to conform its operation with the U/O.

The void-for-vagueness doctrine, which appears for analysis most often in criminal cases, requires that a statute "be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Galloway v. State*, 365 Md. 599, 614, 781 A.2d 851, 860 (2001), *cert. denied*, 535 U.S. 990 (2002) (internal

quotations omitted). Although this doctrine is most often addressed in the context of criminal cases, the Court of Appeals has stated: "if a legislative body is precluded from acting arbitrarily, so is an administrative body created by it." *Miller v. Maloney Concrete Co.*, 63 Md. App. 38, 50, 491 A.2d 1218, 1224 (1985). In our consideration of the vagueness doctrine, we "determine whether the complaining party could have reasonably foreseen that *their* conduct was subject to the statute, and/or whether the statute led to arbitrary enforcement *based on the facts before the court*." *Hall v. State*, 448 Md. 318, 342, 139 A.3d 936, 950 (2016) (italics in original).

We hold that § 27-253(c) of the Prince George's County Code is not unconstitutionally vague as applied in this case. The Comfort Zone's perhaps disingenuous confusion serves no benefit in attempting to convince us that it did not understand why or how it was in violation of the U/O. The facts of this case – the representations by Hayden that there will be no sexually-explicit adult items sold; the rearranging, augmentation, and display of items between the February 2010 inspection and later inspections; and, the new sign prohibiting those under 18 years of age from entering unless accompanied by an adult – indicate that the Comfort Zone intended and understood well enough that it intended to operate in violation of its U/O. The switch-a-roo in operations effected by the Comfort Zone between February 2010 and October 2010 would attract inevitably the local governments' attention. Section 27-253(c) of the Prince George's County Code passes constitutional muster.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.