UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1554

September Term, 2014

GOLOZAR KAVIANI

v.

MONTGOMERY COUNTY PLANNING BOARD

Eyler, Deborah S.,
Kehoe,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: July 29, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This judicial review action arises out of a dispute between Golozar Kaviani and the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission (the "Planning Department"). Ms. Kaviani and her spouse[1] re-graded a portion of the backyard of their residence in Potomac, Maryland. The Kavianis undertook this work without first obtaining: (1) a sediment control permit from the Montgomery County Department of Permitting Services; and (2) an approved forest conservation plan from the Planning Department. Complicating the matter is that the portion of the Kavianis' property in question is subject to an easement (the "NPS Easement") held by the National Park Service to protect the nearby Chesapeake and Ohio Canal National Historical Park. After a contested hearing before an administrative law judge ("ALJ"), the Montgomery County Planning Board (the "Board") ordered the Kavianis to pay an administrative penalty of $2,100.00 and to take the corrective actions ordered by the Planning Department.

Ms. Kaviani filed a petition for judicial review. On August 22, 2014, the Circuit Court for Montgomery County, the Honorable Gary E. Bair presiding, entered an order and memorandum opinion affirming the Board's decision. This appeal followed.

Ms. Kaviani presents three issues to this Court, which we have consolidated and re-phrased:

[1]Ms. Kaviani's spouse is identified in the record only by the initial "A." His role in events leading up to the Board's enforcement action is unclear.

1. Did the ordered corrective action by the Planning Department constitute a takings requiring just compensation?

2. Was there substantial evidence presented to the Board to support its determination that approximately 7,000 square feet of earth was disturbed by Ms. Kaviani's activities on her land?

We will affirm the judgment of the circuit court and, accordingly, the decision of the Board.

Background

Ms. Kaviani lives in a community adjacent to the C&O Canal and the Potomac River in Maryland. The rear of Ms. Kaviani's lot slopes steeply down in the direction of the canal and the river. Between her lot and the canal lies forested land owned by the National Park Service. Her lot is also encumbered by a scenic easement held by the National Park Service. This easement includes the following term:

> No change in the character of the topography or disturbance of natural physical features, except area needed for basement excavation and footings, septic facilities, wells, and required road construction, shall be permitted; also, no mining, quarrying, or other removal or depositing of earth substances or onsite drilling and removal of oil and/or gas deposits shall be conducted on the premises.

In 2010, Ms. Kaviani became concerned that the steep slope in the rear of her property was hazardous to her family's safety. In an attempt to address the hazard, she constructed two retaining walls, each approximately 150 feet long and five feet high. As part of this project, she trucked in a large amount of dirt and deposited it behind the walls, changing the slope of the land. She completed the project without obtaining either a

sediment control permit or forest conservation plan, both required by Chapter 19 of the Montgomery County Code and the Montgomery County Forest Conservation Law.

Subsequently, the County issued the Kavianis a notice of violation, ordering them to pay a fine and to comply with an issued corrective order. The corrective order detailed nine requirements to be carried out by the Kavianis. The first eight pertained to a "restoration plan" and included a requirement that the Kavianis deed a category I conservation easement to the Maryland-National Capital Park and Planning Commission (the "M-NCPPC Easement"). The specific terms of this easement had not been drafted as of the administrative proceedings in this case but the County website generally describes a category I easement as follows:

> [Category 1 easements] prohibit clearing of any tree, bush, or vegetation. They prohibit construction, paving or grading of the ground. They also prohibit the dumping of unsightly materials (trash, ash, non-biodegradable materials, etc). Diseased or hazardous trees or tree limbs may be removed to prevent possible property damage or personal injury, but only after a reasonable notice is given to the Planning Board. Category I easements do not prohibit entry into the easement; homeowners are allowed access in and out of the easement, but they are not allowed to alter the natural landscape.

The Kavianis refused to comply with the corrective order, and the County initiated the present action. The case went before an ALJ, who held a hearing and issued a recommended decision to order the Kavianis to comply with the corrective order. Ms. Kaviani filed exceptions to this recommendation. The exceptions disputed three of the ALJ's factual conclusions, but did not dispute any of the ALJ's legal conclusions. The

recommended decision was considered by County Board (the "Board"), and the Board adopted the ALJ's recommended decision. Ms. Kaviani appealed the Board decision to the circuit court, which affirmed the Board's decision, and this appeal followed.

Analysis

I.

Ms. Kaviani's first argument is that, under the Fifth Amendment to the United States Constitution,[2] the imposition of an easement on her property "would affect her home's value and thus amount to a taking." Her argument is based on *dicta* culled from several divergent and factually inapposite lines of cases: (1) those dealing with claims that the particular use of government-owned property constituted a nuisance and thus a taking, or partial taking, of surrounding properties, *e.g., Md. Port Administration v. QC Corp.,* 310 Md. 379 (1987); (2) cases in which property owners contended that the imposition of access restrictions on highways effected a taking, *e.g., Hardesty v. State Roads Commission*, 276 Md. 25 (1975); and (3) cases involving government restrictions on rights guaranteed by the First Amendment, *e.g.*, *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2002). From these, she argues that in order for the Board's requirement for an easement to pass muster, "it must be shown that the

[2]The Fifth Amendment states that private property shall not be "taken for public use, without just compensation." U.S. CONST. Amend. V.

requirement is narrowly tailored to effectuate that compelling interest and is the least restrictive means to further the articulated interest." (Internal quotation marks omitted.)

The Board contends that Ms. Kaviani's takings argument is not preserved for judicial review because the contention was not presented at the administrative level. The issue of preservation is particularly important because, in a judicial review proceeding, a court:

> may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency. Stated differently, a . . . court will review an adjudicatory agency decision solely on the grounds relied upon by the agency.

Brodie v. Motor Vehicle Admin. of Maryland, 367 Md. 1, 4 (2001); *see also Capital Commerical Props., Inc. v. Mont. Cnty Planning Bd.*, 158 Md. App. 88, 96–97 ("[A]ppellate review of administrative decisions is limited to those issues and concerns raised before the administrative agency.").

Ms. Kaviani contends that her takings argument was raised both before the ALJ and before the Board. She avers that the following statement before the ALJ was sufficient for preservation of the issue:[3]

> I had to pay another thousand dollars for them to come and to discuss [the land disturbance] again and then they wanted to . . . change the easement . . . of the grounds around my house. That would affect the selling price, . . . and I don't think that's reasonable.

[3]We have deleted speech disfluencies from transcript quotations.

We do not believe that the ALJ, or anyone else, could reasonably conclude from this statement that Ms. Kaviani was asserting that the Board's proposed actions were unconstitutional. The ALJ did not address the matter in his extremely thorough and detailed recommended decision. Nor did Ms. Kaviani raise the issue in her exceptions to the ALJ's recommended decision.

The question was raised, however, at the hearing before the Board. Ms. Kaviani's counsel stated:

> [T]here are inherently constitutional issues involved here when you are talking about some of the extreme remedies that are being requested as an easement, planting of trees, no trees, absolutely no trees were removed, or damaged in any way. So, an easement is a complete over reaction, it is a cloud on their title. We disagree with that as a remedy.
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> * * * *
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> The easement . . . I am hearing that it will make things easier, I don't think that's the constitutional standard, just to make things easier, I think when you deal with people's rights you have to exercise the least restrictive alternative, and narrowly tailor what you need to do.

For its part, after noting—correctly—that the issue was unpreserved, the Board nonetheless addressed Ms. Kaviani's constitutional argument:

> The Respondents claimed that there was a constitutional basis for their opposition to placing a conservation easement on the area of disturbance. The Respondents argued that because the placement of the easement on the property . . . entails the Respondents' constitutional rights, the least restrictive means must be used to remedy the Respondents' violation. But the Board finds that requiring an easement does not affect a fundamental right, and therefore does not require the use of the least restrictive means. An easement may affect a liberty interest by partially restricting the use of a small portion of the Respondents' lot. But due to the property slope, the use of this area is already substantially restricted. And, under all of the

> circumstances of this case, there is at least a rational basis for concluding that placing the disturbed area in an easement is appropriate. Even if the easement affected a fundamental right, under all of the facts in this case-which included evidence that the Respondent has been reticent about complying with the forest conservation law and the corrective orders of the Planning Department-placing a forest conservation easement on the disturbed area is the least restrictive means of ensuring the Respondents' compliance with the Forest Conservation Law going forward.

In this judicial review proceeding, we review the Board's decision. *See* Montgomery County Planning Board Enforcement Rule 4.8 ("The Board is the final decision maker for purposes of Judicial Review."); *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 60 (2002) (When reviewing an agency decision, a court reviews "the final decision of the agency, not the ALJ's recommended decision.").

Assuming that Ms. Kaviani's appellate contentions are preserved, the record before us is insufficient to properly address Ms. Kaviani's takings claim. Regulatory takings claims generally involve one, or sometimes both, of two possible legal theories.

The first theory concerns so-called "categorical" takings, where the regulation causes either some kind of permanent physical invasion on a person's property, *see e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or completely deprives an owner of "all economically beneficial use or productive use of land[.]" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). The second theory rests on assertions that the regulation in question has gone "too far" for the purposes of the Fifth Amendment, which is determined by the court weighing several factors, primarily:

"(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action." *Neifert v. Dep't of Env't*, 395 Md. 486, 517 (2006) (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

The record in this case does not equip us to decide whether imposition of the Easement will constitute a categorical taking because the record does not contain a copy of the terms of the proposed easement. The only document in the record that provides information on the proposed easement is an aerial image of Ms. Kaviani's property overlain with an image of approximately where the County proposes to place the easement. This is insufficient for us properly examine the issue. Even if Ms. Kaviani were arguing that the easement constitutes a categorical taking—and she presented no authority or analysis on the issue in her brief—we have no way to determine whether the easement will in ***any*** way impact Ms. Kaviani's existing property rights because Ms. Kaviani's entire property is already subject to the NPS Easement. If the restrictions in the NPS Easement and the Easement are substantively the same, we do not see how Ms. Kaviani's property rights will be impacted by the placement of the Easement. Moreover, because we do not know what the terms of the Easement are in the first place we cannot decided whether that imposition of that easement, considered in isolation, would constitute a taking.

In much the same way, there is little, if any, evidence in the record by which we could decide whether imposition of the M-NCPPC Easement would "go too far" in the sense that concept has been developed by *Penn Central* and other takings cases. For example, we have no information as to the value of the Kaviani's property and how that value would be effected by imposition of an additional easement. In light of the limitations of the record, addressing Ms. Kaviani's constitutional claim would be a theoretical exercise which we decline to undertake.

II.

Ms. Kaviani's second contention is that there was no substantial evidence in the record to support the ALJ's factual conclusion that she disturbed over 5,000 square feet of land. During the hearing before the ALJ, the County's forest conservation inspector, Stephen Peck, testified that her activities disturbed approximately 7,000 square feet. Ms. Kaviani argues that this testimony was impermissible because: a) it was completely based on hearsay and b) "[t]he important threshold issue requires more than just statements that the area disturbed was more than 5,000 square feet." We disagree.

Judge Bair, writing for the circuit court, cited to the following facts in determining whether there was substantial evidence in the record to support the Board's factual finding:

> i. [Ms. Kaviani] offered no evidence in the proceedings below that she disturbed less than 5,000 square feet;

> ii. The Board relied on ALJ O'Connor's recommendation, Inspector Peck's testimony, and the Planning Department exhibits to find that [Ms. Kaviani] disturbed roughly 7,000 square feet of land;
>
> iii. Inspector Peck was qualified to assess both the nature of the land and the area of the disturbance caused by [Ms. Kaviani]; and
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> iv. Both ALJ O'Connor and the Planning Board considered Inspector Peck's testimony and other evidence including photo exhibits in a manner consistent with the Planning Board's Enforcement Rules.

Based on this evidence the circuit court concluded that the Board's findings were based on substantial evidence. We agree.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.