UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1695

September Term, 2014

PRINCE GEORGE'S COUNTY COUNCIL
SITTING AS THE DISTRICT COUNCIL

v.

BARDON, INC.

Zarnoch,
Wright,
Arthur,

JJ.

Opinion by Wright, J.

Filed: September 18, 2015

This appeal arises from a judgment of the Circuit Court for Prince George's County entered on October 1, 2014, which affirmed Zoning Ordinance No. 4-2014 ("ZO 4-2014"), effectively granting an application for a special exception ("SE-4647") filed by appellee, Bardon, Inc. d/b/a Aggregate Industries ("Bardon"). Through the same order, the circuit court found that Condition 17, which had been imposed by appellant, the Prince George's County Council sitting as the District Council ("District Council"), was void, and the court thereby struck that provision. On October 6, 2014, the District Council appealed, asking us to determine whether it erred in enacting ZO 4-2014 subject to Condition 17.[1] For the reasons that follow, we affirm the circuit court's judgment.

[1] In its brief, the District Council worded its inquiry as follows:

> I. Whether the Second Final Decision of the District Council, after remand from the Circuit Court, was supported by substantial evidence, fairly debatable, and not premised upon an erroneous conclusion of law? Related thereto, whether the District Council reasonably concluded that *East Star, LLC v. County Comm'r of Queen Anne's County*, 203 Md. App. 477, 38 A.3d 524 (2012), was distinguishable from the law and facts applicable to the approval of SE. 4647?
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> II. Whether zoning approval of a specific special exception for surface mining in Prince George's County is governed by the provisions of the Regional District Act and the Prince George's Zoning Ordinance, instead of, standing alone, the permitting provisions in Chapter 8 of Title 15 of the Environment Article and Maryland Department of the Environment?

(Emphasis in original).

Facts and Procedural History

On August 26, 2008, Bardon filed SE-4647, applying for a special exception for surface mining of sand and gravel on a parcel of land located in Brandywine, Maryland ("Millville Property"). The Millville Property consists of approximately 576.29 acres, 456.75 acres of which were proposed to be utilized for an active mining operation, all within a Rural Residential Zone. The Development Review Division of the Prince George's County Planning Department accepted Bardon's application on November 13, 2009.

Next, SE-4647 was reviewed by numerous government agencies to determine compliance with the applicable provisions of the Prince George's Zoning Ordinance, codified in Prince George's County Code, Section 27-101, *et seq.* ("Zoning Ordinance"). It was referred for review and comment to the Prince George's County Department of Public Works and Transportation, Department of Environmental Resources, Health Department, the State Highway Administration, the Community Planning Division, the Environmental Planning Division, and the Transportation Planning Division of the Maryland-National Capital Park and Planning Commission ("M-NCPPC"), and the Maryland Department of the Environment ("MDE"). Each agency reviewed and made a recommendation that SE-4647 be approved subject to various conditions. In addition, pursuant to the requirement set forth in Md. Code (2012), § 25-209 of the Land Use Article, an Environmental Impact Report was prepared by the M-NCPPC's Environmental Planning Section, which recommended the approval of SE-4647 subject to conditions. The reports of the agencies were then analyzed by the Development

Review Division, which issued its Technical Staff report on March 28, 2012, recommending approval of SE-4647, subject to a number of conditions.

On May 23, 2012, the Zoning Hearing Examiner ("ZHE") held a public hearing as required under Zoning Ordinance § 27-132. On June 28, 2012, the Prince George's County Planning Board also held a public hearing. After consideration of the evidence presented, the Planning Board recommended the approval of SE-4647 subject to conditions by adopting a resolution on July 19, 2012.

On August 10, 2012, the ZHE issued a decision conditionally approving SE-4647. On November 19, 2012, however, after reviewing the administrative record, the District Council issued an order of remand to the ZHE, requiring it to "conduct a public hearing or hearings to reopen the record to receive and evaluate additional testimony and evidence." On January 8, 2013, the ZHE held its remand hearing, at which "nobody . . . who is not already a Person of Record in [the] case . . . appeared." On January 30, 2013, the ZHE issued its second decision, again conditionally approving SE-4647.

Subsequently, the District Council held a hearing to review SE-4647. In June 2013, the District Council issued its decision ("2013 Decision"), approving SE-4647 subject to 18 conditions, including the following:

> 17. This Special Exception shall be valid for a period not to exceed five (5) years from the date of final approval. The Applicant, its successors or assigns, shall not request and shall not be eligible for any extension of the mining of sand and gravel beyond a term of five (5) years from the date of commencement of mining on the site. Reclamation of the site shall be completed by the [A]pplicant in a maximum of five (5) years after the expiration of the 5-year period of this Special Exception . . . .

Condition 17 was not included in either of the ZHE's prior decisions.

According to the District Council, the evidence submitted by Bardon "concern[ed] the proposed phasing of mining operations and proposed completion over a five-year period." The District Council added:

> The District Council finds that the requested timeframe comports with the prescriptions of Section 15-814(a) of the Environment Article of the Annotated Code of Maryland that the duration of a surface mining permit "be granted for such period as requested and deemed reasonable." The District Council agrees that the stated time limitations of the surface mining use proposed by [Bardon] will further ensure that the proposed conditional use satisfies the general purposes of the Zoning Ordinance recited in Section 27-102(a)(1) to "protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County;" Section 27-102(a)(5) to provide "adequate light, air, and privacy;" Section 27-102(a)(6) to "promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;" Section 27-102(a)(11) to "lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;" and Section 27-317(a)(4) of the Zoning Ordinance, permitting approval of a Special Exception so long as the proposed use does not "adversely affect the health, safety, or welfare of residents or workers in the area." Based on the evidence in the record offered by [Bardon], the District Council finds that there is need to incorporate [Bardon]'s proposal for a five-year, phased mining proposals as a condition of approving the Special Exception application.

On July 11, 2013, Bardon filed a petition for judicial review of the District Council's 2013 Decision in the circuit court, challenging the imposition of the five-year limitation on SE-4647. In pertinent part, Bardon argued that this Court's decision in *East Star, LLC v. County Comm'rs of Queen Anne's County*, 203 Md. App. 477 (2012) ("*East Star*"), "presents circumstances nearly identical to those existing in the matter *sub judice*, and represents the seminal holding in the State of Maryland on the issue of preemption of local law with regard to restrictions placed upon surface mining operations."

Specifically, Bardon read *East Star* to preempt the Zoning Ordinance, thereby voiding the five-year limitation.

After hearing arguments on March 14, 2014, the circuit court entered an order on April 2, 2014, stating that the District Council "erred, as a matter of law, when it imposed the Condition 17 . . . relative to the prohibition against any renewals of the special exception and the requirement for the posting of bonds for reclamation." The court, therefore, ordered that the five-year limitation be stricken and:

> **ORDERED**, that this matter be **REMANDED** to the District Council. On remand, the District Council shall schedule SE-4647 on an Agenda in April, 2014, and shall render a final decision relative to the validity period contained in the first sentence of Condition 17 of Zoning Ordinance No. 6-2013 in light of Court of Special Appeals decision in [*East Star*] in May, 2014 . . . .

(Emphasis in original).

On remand, the District Council issued its second decision, ZO No. 4-2014, in May 2014 ("2014 Decision"), again approving SE-4647 subject to 18 conditions. It abbreviated Condition 17 to state, in its entirety: "This Special Exception shall be valid for a period not to exceed five (5) years from the date of final approval." The District Council supported its decision by stating that "*East Star* is distinguishable from the facts and law that govern" the present case. Specifically, the District Council found that: (1) "Bardon failed to preserve the issue of preemption by conflict and implication;" (2) "Bardon waived claims of preemption by implication and conflict;" (3) "Bardon is estopped from claiming preemption by conflict and implication;" and (4) SE-4647's

"approval subject to Condition 17 relative to the validity period of 5 years is not preempted by implication or conflict under *East Star*."

Citing evidence in the record before it, the District Council noted that Bardon's Statement of Justification, which accompanied its application for Special Exception, provided that the estimated "time required for the extraction and removal of material from the site will be five (5) years." The District Council also cited Bardon's comments that "[t]he use is only temporary, estimated to conclude in (5) years time," and that "[t]he approval of this special exception will help to ensure that there will be an adequate supply of land and gravel for the metropolitan area for the next five (5) years." In addition, the District Council relied on Bardon's assurances that the special exception application "is in conformance with applicable Federal, State, and County laws and regulations." Although the District Council acknowledged Bardon's request during the May 23, 2012 public hearing that the ZHE "not place a condition of approval relative to a time limit . . . [b]ecause of the Queen Anne case," the District Council explained that Bardon's statement did not qualify "as a challenge to [ZO] § 27-410 based on preemption by implication or preemption by conflict."

On June 4, 2014, Bardon again filed a petition for judicial review in circuit court. After hearing the matter on September 15, 2014, the court ruled as follows:

> I have had the opportunity to review the memoranda submitted by counsel, to review the relevant case law, and it is this Court's view that *East Star* is controlling, and that the County's decision with respect to limiting the Petitioner to the five years is outside of the realm of what was anticipated by East Star or what is anticipated in terms of the whole general nature of this case.

> So, ordinarily, I would remand it for the District Council to issue a decision and comport with this Court's decision, but I don't believe that the County believes that this Court is an appropriate controlling body. I am not sure. But I do not believe that since the County's position is that they do not believe that *East Star* is controlling that they will make a decision that will be consistent with any remand of this Court.
>
> So, I am going to issue an order . . . .

On October 1, 2014, the circuit court entered an order affirming ZO 4-2014, thus effectively granting SE-4647. In so doing, the court found Condition 17 to be void and ordered that it be stricken.

Standard of Review

When reviewing administrative decisions, we look through the circuit court, although applying the same standard of review, and evaluate the decision of the agency. *County Council of Prince George's County, Sitting As The District Council v. Zimmer Dev. Co.*, ___ Md. ___ , No. 64, Sept. Term 2014, slip op. at 63 (Aug. 20, 2015) (citation omitted).

> In so doing, we are limited to determining if there is substantial evidence in the record as a whole to support the agency's finding and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. Stated differently, [o]ur primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious. In applying the substantial evidence test, we must decide whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. When deciding issues of law, however, our review is expansive, and we may substitute our judgment for that of the agency if there are erroneous conclusions of law. As to error of law, this Court's review is *de novo*.

Matthews v. Hous. Auth. of Baltimore City, 216 Md. App. 572, 582, *cert. denied*, 439 Md. 330 (2014) (internal citations omitted).

Generally, "[w]hen an administrative function remains to be exercised . . . a court must remand the case to the administrative agency." *Zimmer Dev. Co.*, slip op. at 97 (citations omitted). "The court need not remand, however, if the remand would be futile." *Id.* (citations omitted).

Discussion

The District Council argues that its decision to issue ZO 4-2014 subject to Condition 17 was "supported by substantial evidence . . . and not premised upon an erroneous conclusion of law," and thus should have been affirmed by the circuit court in its entirety. According to the District Council, *East Star* is "distinguishable from the law and facts that govern zoning approval for special exceptions in Prince George's County." Instead, it contends that "zoning approval of a specific special exception for surface mining in Prince George's County is governed by the provisions of the Regional District Act [("RDA")] and the [] Zoning Ordinance." Alternatively, the District Council argues that Bardon "failed to preserve the issue . . . of whether the validity period of five (5) years in [Zoning Ordinance] § 27-410(a)(4) . . . , or whether a condition of approval relative to a 5 year limitation on surface mining would be preempted by State law in light of the *East Star* decision." As such, the District Council asks us to reverse the circuit court's judgment.

In response, Bardon contends that "the holding in *East Star* [] conclusively requires the preemption of the five year time limitation set forth in § 27-410(a)(4) of the Zoning Ordinance, and the five year limitation included in Condition 17 of the [2014] Decision." Specifically, Bardon avers that Md. Code (1982, 2014 Repl. Vol.), § 15-

814(a) of the Environment Article ("Envir.") "clearly allows for the issuance of a surface mining permit for a period of up to 25 years, preempting by implication [and conflict] any effort by a local jurisdiction to limit this timeframe." Moreover, according to Bardon, the RDA "does not provide a basis for distinguishing [our] holding in *East Star* []." Finally, Bardon avers that it did not waive its right to claim preemption as the District Council suggests. We agree with Bardon.

"Preemption of local law by [S]tate law can be express or implied or can occur when local law conflicts with State law." *East Star*, 203 Md. App. at 484-85 (citing *Talbot County v. Skipper*, 329 Md. 481, 487-88 (1993)) (footnote omitted). "Preemption by implication occurs when a local law 'deals with an area in which the [General Assembly] has acted with such force that an intent by the State to occupy the entire field must be implied.'" *Id.* at 485 (quoting *Skipper*, 329 Md. at 488). Meanwhile, "[c]onflict preemption occurs 'when [a local law] prohibits activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law.'" *Id.* (quoting *Skipper*, 329 Md. at 487 n.4) (footnote omitted).

In *East Star*, the Queen Anne's County Commissioners introduced County Ordinance 08-20 ("CO 08-20") to amend the Queen Anne's County Zoning Ordinance, in part by limiting major extraction operations to a period of five years. *Id.* at 481. After reviewing Envir. § 15-801 *et seq.*, COMAR, and relevant state cases, this Court held that "State law has provided a detailed and elaborate regulatory program for surface mining and manifests the general legislative purpose to create an all-encompassing scheme governing the areas Queen Anne's County seeks to control through CO 08-20." *Id.* at

493. Accordingly, we ruled that "[b]y addressing . . . the time periods for mining activities, . . . the County [] acted beyond its zoning powers and impermissibly entered the realm of a State law that impliedly preempts its authority." *Id.*

We explained in *East Star*:

> State law in this area existed before the Ordinance was enacted; the general law addressed the particular aspect the local law seeks to control; and the Ordinance seeks to regulate the time of major extraction operations, an area of local control which has not traditionally been allowed . . . .
>
> We find no merit in the County's argument that, by virtue of requiring MDE to process surface mining applications "concurrently with any local or county, land use and zoning reviews," (specifically [Envir.] § 15-810(a) and COMAR § 26.21.01.04(M)), the Legislature recognized the authority of local governments to adopt surface mining regulations of the type at issue here. In *Days Cove* [*Reclamation Co. v. Queen Anne's Cnty.*, 146 Md. App. 469, 501 (2002)] and *Skipper*, [329 Md. at 489,] the Court discussed statutes that similarly addressed local authority to legislate in areas of zoning and land use, but nonetheless found preemption because the State law was, as it is here, extensive, specific, and all-encompassing.
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> * * *
>
> Even if CO 08-20 were not impliedly preempted, . . . the Ordinance conflicts with State law regarding mining operations and the process of reclamation . . . .
>
> * * *
>
> CO 08-20 contradicts the authority of MDE by limiting the term of the permit to five years, with renewals allowed only in increments of five years if conditional use approval is granted. In comparison, [Envir.] § 15-814 provides that "a surface mining permit shall be granted for such period as requested and deemed reasonable, but not exceeding twenty-five years."
>
> Thus, CO 08-20 is in direct conflict with the key provisions in the Env[ir]. Article, as it places additional and incompatible restrictions on the surface mining operations than those imposed by State law. Here, the Ordinance limits and restricts an activity which the General Assembly expressly intended to permit . . . .

Id. at 492-94 (internal citations and footnotes omitted).

As Bardon aptly states, "[t]he District Council cannot reasonably maintain that the holding in *East Star* [] does not apply to this matter." Envir. § 15-814 clearly allows for the issuance of a surface mining permit for a period of up to 25 years, preempting by implication and conflict any effort by a local jurisdiction to limit this time frame, including the District Council's efforts to do so. Like the Queen Anne's County Commissioners, the District Council sought to limit surface mining operations to five years.[2] In so doing, it acted beyond its zoning powers and impermissibly entered the realm of State law that impliedly preempts its authority.

The District Council relies on *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1 (2010), to argue that the doctrine of preemption should not be applied when zoning requirements "coexist" with planning (*i.e.*, permit) requirements. At oral argument, counsel for the District Council noted that the special exception for surface mining operations should be limited to five years, as permits for that purpose are issued for the same duration. The District Council's reliance on *Md. Reclamation Assocs.*, however, is also undercut by *East Star*:

> Although the County relies on *Md. Reclamation*, we find it inapposite. There, the Court of Appeals concluded that the General Assembly in State environmental legislation preserved the right of local governments to legislate and enforce zoning regulations. 414 Md. at 40-43, 994 A.2d 842. Contrary to that case, the restrictions here . . . are, for the most part, not traditional areas of regulation controlled by local government. Thus, unlike the local law in *Md. Reclamation*, CO 08-20

[2] Although the appeal in *East Star* arose from the circuit court's grant of summary judgment in the Queen Anne's County Commissioners' favor, after they introduced CO 08-20 – and not from an application for special exception as is the case here – the intended result was the same: to limit major extraction operations to a duration of five years. *See East Star*, 203 Md. App. at 480-81.

> impermissibly seeks to impose the types of requirements on surface mining that go beyond classic zoning considerations and are entrusted by State law to the MDE. *See Md. Reclamation*, 414 Md. at 40, 994 A.2d 842.

East Star, 203 Md. App. at 493. Here, the non-traditional considerations such as timing and the effect of extended surface mining on the environment are entrusted by State law to the MDE, and not to local government. Therefore, the doctrine of preemption applies.

Likewise, the RDA does not provide a basis for distinguishing *East Star*, as the District Council alleges. RDA § 22-202,[3] which the District Council cites to argue that "the enactment of zoning laws . . . falls within [its] exclusive province," is inapplicable because it regulates building and lot size requirements, and not surface mining. As Bardon points out, "[n]owhere is the District Council . . . authorized under Maryland law to pass legislation or impose restrictions limiting the time frame in which an applicant for special exception may engage in *sand and gravel mining*." (Emphasis added). In *Zimmer Dev. Co.*, *supra*, the Court of Appeals explained the distinction between "[c]onditional zoning, when used to impose requirements related to design, layout, siting, appearance, and landscaping" and when it involves "*uses* of the land." Slip op. at 76

[3] This section is codified in Md. Code (2012), Land Use Article, and states:

> **§ 22-202. Effect of zoning laws**
>
> (a) This section applies to any zoning law that imposes a more restrictive height limitation, lesser percentage of lot occupancy, wider or larger courts, deeper yards, or other more restrictive limitations than those provided by State, county, municipal, or other local regulations.
>
> (b) A zoning law described in subsection (a) of this section shall prevail in the area where it is imposed over the limitations provided by State, county, municipal, or other local regulations.

(emphasis in original). "[T]he RDA provides expressly for the District Council to adopt the local laws to implement [the former,]" which is "related closely to planning," *id.*, but is silent as to the latter.

Finally, we agree with Bardon that the District Council's conclusions finding that Bardon failed to preserve the issue of preemption and/or waived its claims of preemption, thereby now estopping it from raising such claims, are without merit. It is undisputed that Bardon submitted SE-4647 and its Statement of Justification years prior to the issuance of our decision in *East Star*. Moreover, counsel for Bardon clearly requested, during the May 23, 2012 public hearing, that the ZHE "not place a condition of approval relative to a time limit . . . [b]ecause of the *Queen Anne* case." We understand this to be a reference to "*East Star, LLC v. County Comm'rs of Queen Anne's County*." And, because this evidence properly came before the District Council when it reviewed the ZHE's decision, we are satisfied that Bardon preserved its argument as to preemption.

For all of the foregoing reasons, we affirm the circuit court's judgment.

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