Circuit Court for Washington County
Case No. 21-C-16-57802 AA

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1882

September Term, 2017

ARTHUR B. BUNDICK

v.

WASHINGTON COUNTY BOARD OF APPEALS

Wright,
Kehoe,
Leahy,

JJ.

Opinion by Kehoe, J.

Filed: February 15, 2019

* 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. *See* Md. Rule 1-104.

This is an appeal from a judgment of the Circuit Court for Washington County, the Honorable Dana Moylan Wright presiding, which affirmed a decision rendered by the Washington County Board of Appeals in a dispute over a subdivision application. The appellant is Arthur B. Bundick, a neighboring property owner. The appellees are Juanita M. Dornberg, the Personal Representative of the Estate of Virginia Alice Morris, and the Board of County Commissioners for Washington County.[1] Mr. Bundick presents one issue to us, which we have reworded:

> Did the Board err when it approved a subdivision application which established a lot that did not comply with the current dimensional requirements of the Washington County Subdivision Regulations?

We will affirm the judgment of the circuit court.

Background

The record extract is sparse.[2] We glean from it that our story began in 1985, when the Planning Commission approved the subdivision application of Merle and Virginia Morris to establish two residential lots, identified as lots "V-1" and "V-2" on the subdivision plat. These are "panhandle" or "flagstaff" lots, that is, they have very limited road frontage, in this case about 25 feet, on the public road, and extend away from the road for a considerable

[1] The County Commissioners have adopted Ms. Dornberg's brief as "correctly [setting] forth the longstanding interpretive position of the County's permitting staff." *See* Md. Rule 8-503(f).

[2] Some of the problems were remedied in an appendix attached to the appellee's brief.

distance to the parts of the lots that are buildable.[3] The subdivision plat indicated that Mr. and Ms. Morris retained other acreage (the "Retained Acreage"), which was connected to the public road by two separate panhandles. The Retained Acreage is now owned by Ms. Dornberg, in her capacity as the personal representative of the Estate of Virginia Morris.

In 2016, Ms. Dornberg filed two applications to subdivide the Retained Acreage. In the first, she sought to divide the Retained Acreage into four lots. This application was ultimately denied by the Board of Appeals. In the second, Ms. Dornberg sought to subdivide the Retained Acreage into two lots. The new lot, titled "V-4," included one of the two panhandles established by the 1985 subdivision plat. The remaining acreage included the other panhandle. Each lot used its own panhandle for access to the public road. This second application is the subject of the current appeal.

The Planning Commission approved the application. Morton Batchelder, who owned a nearby property, objected to the proposal and appealed the Commission's decision to the Board of Appeals. At the hearing before the Board, Mr. Batchelder testified in opposition to the application. Mr. Bundick did not testify but submitted a letter in support of Mr.

[3] *See* Washington County Subdivision Ordinance § 202.43:

> Panhandle Lot
> A polygonal shaped lot with the appearance of a "pan" or "flag and staff" in which the handle is most often used as the point of access to a street or road. The "handle", when less than the minimum width for a building lot in the Zoning District where it is to be located, is not to be used in computing the minimum area required.

Batchelder's position. The Board affirmed the Commission's decision. The issues before the Board were (1) whether the Board's denial of the first 2016 subdivision application precluded the Board from considering Ms. Dornberg's second application; and (2) whether the proposed subdivision was required to comply with the provisions of Washington County's Adequate Public Facilities Ordinance pertaining to traffic safety, particularly sight distances for drivers. The Board answered both of these questions in the negative.[4] In its written opinion, the Board noted that the 2016 subdivision application "does not rely on the creation of a new access point. As such, it does not trigger . . . review under [current] ordinances or regulations[.]" The Board concluded that the Planning Commission's "routine approval of the unremarkable subdivision plat" was not in error.

Mr. Bundick filed a petition for the judicial review of the Board's decision. The court affirmed the Board's decision.

1. The Standard of Review

In a judicial review proceeding, the issue before an appellate court "is not whether the circuit . . . court erred, but rather whether the administrative agency erred." *Bayly Crossing, LLC v. Consumer Protection Division*, 417 Md. 128, 136 (2010) (citations, internal quotation marks, and brackets omitted). For that reason, we "look through" the circuit court's decision, to "evaluate the decision of the agency" itself. *People's Counsel for*

[4] Mr. Bundick does not challenge these aspects of the Board's decision.

Baltimore County v. Loyola College, 406 Md. 54, 66 (2008). A court accepts an agency's factual findings if they are supported by substantial evidence, that is, if there is relevant evidence in the record that logically supports the agency's factual conclusions. *Bayly Crossing*, 417 Md. at 138-39. In contrast, a court reviews the agency's legal conclusions *de novo*. *Id.* at 137.

2. Analysis

"[D]ecisions of administrative agencies are prima facie correct and carry with them the presumption of validity[.]" *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 513 (1978) (citation omitted); *see also Assateague Coastal Trust v. Schwalbach*, 448 Md. 112, 124 (2016); *Marsheck v. Bd. of Trustees of Fire & Police Employees' Ret. Sys. of City of Baltimore*, 358 Md. 393, 402 (2000).

Mr. Bundick presents one contention to us. He argues that the decision of the Board was legally incorrect because it ignored a provision of the current version of the Subdivision Ordinance that limits panhandles to a maximum length of 400 feet. He asserts that, because the panhandle connecting the newly-established lot to the public road is more than 1,000 feet long, the Board erred in approving the subdivision application. The provision in question is § 405.11.G, which states in pertinent part (emphasis added):

> § 405.11.G. Panhandle Lots
>
> 1. Panhandle lots shall be a minimum of twenty-five (25) feet in width from the public road to the main body of the lot.
>
> 2. A maximum of four (4) panhandle lots are allowed in the subdivision of an original tract of land. . . . For the purposes of this section only, the original

> tract of land is defined as the boundaries of the tract as they existed in the Land Records of Washington County on the date of the adoption of Section 405.11.G, which is October 31, 1989.
>
> 3. Not more than two (2) panhandle lots may have adjoining driveway entrances to a public right-of-way.
>
> • • •
>
> 5. *The length of each panhandle shall not exceed four hundred (400) feet.*

Mr. Bundick asserts that neither the Board nor the Planning Commission had "the power to approve the creation of proposed lot V-4, since the panhandle portion of the proposed lot exceeded the 400-foot dimensional limitation on panhandle lots established in the Ordinance."

The fatal flaw in this argument is that no one argued to the Board that the subdivision application should be denied because the panhandle for Lot V-4 was more than 400 feet long. In fact, the dimensional limitation contained in § 405.11.G.5 was not raised to the Board in any fashion. Because the issue was not presented, the Board did not address whether or how § 405.11.G.5 applied to Ms. Dornberg's application. It is not appropriate for a court in a judicial review action to consider Mr. Bundick's argument for the first time. *See, e.g., Public Service Comm'n v. Panda–Brandywine, L.P.*, 375 Md. 185, 204 (2003) ("An issue that was not raised before the Commission or encompassed in the final decision of the agency should not be addressed by the appellate court on judicial review of that decision."); *Brodie v. Motor Vehicle Administration*, 367 Md. 1, 4 (2001) ("Since Brodie's entire challenge to the administrative decision was based on an issue not raised before the agency, the Circuit Court should have affirmed the administrative decision without

reaching the issue."); *Office of People's Counsel v. Public Service Comm'n*, 226 Md. App. 176, 204-05 (2015) ("[I]n an action for judicial review proceeding of an adjudicatory decision by an administrative agency, a reviewing court ordinarily 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." (citation omitted)).

For these reasons, we will not address the merits of Mr. Bundick's dimensional argument and will affirm the Board's decision.[5]

THE JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.

[5] There was certainly substantial evidence to support the agency decision. The Board's analysis relied in large part on the testimony of Timothy Lund, the deputy director of the Washington County Planning Office. He stated that Ms. Dornberg had the right to subdivide the Retained Acreage into two lots because the Retained Acreage included two panhandles and was established prior to October 31, 1989 (which was the date on which the 400-foot panhandle became effective). He summarized his conclusions thus:

> By virtue of the fact that the [Retained Acreage] as created in 1985 had two access points, fee simple road frontage which is the requirement of the subdivision regulations, [the Retained Acreage] had the ability to be subdivided at that time and continued to have the ability to be subdivided[.]

In reaching this conclusion, Mr. Lund also pointed to a "grandfathering" provision of the Washington County Zoning Ordinance, which provided that lots greater than six acres in area that are located in the County's Environmental Conservation District and were in existence on October 29, 2002, i.e. "shall be permitted to subdivide up to three (3) lots[.]" *See* Zoning Ordinance § 5B.4(a). The Retained Acreage meets these criteria.

Mr. Lund's conclusions were not challenged at the Board's hearing and Mr. Bundick does not address any of these matters in his brief.