Circuit Court for Anne Arundel County
Case No. C-02-CV-15-003650

**UNREPORTED**

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01211

September Term, 2016

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CITY OF ANNAPOLIS

v.

ANNAPOLIS NECK PENINSULA FEDERATION, et al.

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Meredith,
Berger,
Friedman,

JJ.

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Opinion by Meredith, J.

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Filed: September 15, 2017

On March 24, 2015, the Annapolis Department of Neighborhood and Environmental Programs (the "Department"), approved a forest conservation plan submitted by QW Properties, LLC ("QW"), appellee, for a development known as Parkside Preserve. Following the approval of the forest conservation plan, Brian Toomey and Mary Mulvihill (the "Homeowners"), appellants, along with other parties who are not participating in this appeal, challenged the Department's approval of the forest conservation plan by pursuing an administrative appeal to the Annapolis Building Board of Appeals. The Building Board of Appeals subsequently denied the Homeowners' appeal.

On November 25, 2015, the Homeowners, with others, filed a petition for judicial review in the Circuit Court for Anne Arundel County. QW moved to dismiss the petition, contending, *inter alia*, that the Homeowners had no statutory right to petition for judicial review of a decision by the Building Board of Appeals. On August 9, 2016, the circuit court ruled that there was no statute that granted the Homeowners a right to petition for judicial review of the Building Board of Appeals's decision, and the court granted QW's motion to dismiss.

This appeal followed.[1]

[1] Notwithstanding the manner in which this appeal was captioned when it was initiated, there are currently only two appellants and one appellee. The appellants are Mary Mulvihill and Brian Toomey, who own property near the property that is the subject of this controversy. The appellee is QW Properties, LLC, the entity that has been endeavoring to subdivide the property for over seven years. At one point in time, the City of Annapolis moved to dismiss the appellants' petition for judicial review for lack of

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## QUESTIONS PRESENTED

The Homeowners present one question for our review: "Should a party affected by the arbitrary and capricious decision of an administrative agency be able to seek judicial review of the decision in the circuit court even in the absence of specific statutory authority authorizing the review?"

For the following reasons, we will affirm the judgment of the circuit court.

## FACTUAL & PROCEDURAL BACKGROUND

On March 24, 2015, the Department approved QW's "forest conservation plan" for a proposed subdivision in the City of Annapolis known as Parkside Preserve. A forest conservation plan is required for certain development projects pursuant to the Maryland Forest Conservation Act. *See* Maryland Code (2012 Repl. Vol., 2016 Supp.), Natural Resources Article ("NR"), §§ 5-1603(a), 5-1604, and 5-1605. The Homeowners (and others) pursued an administrative appeal of the decision of the Department, and urged the Annapolis Building Board of Appeals to find that the Department committed numerous violations of the Forest Conservation Act when it approved QW's forest conservation plan for Parkside Preserve. The Building Board of Appeals heard the Homeowners'

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standing. After the circuit court granted QW's motion to dismiss because the court ruled that judicial review was not authorized by any statute, the City of Annapolis filed the first notice of appeal on behalf of the City's Department of Neighborhood and Environmental Programs. But, after filing a brief arguing that the circuit court had erred by ruling that judicial review was not authorized by statute, the City of Annapolis ("and its former Department of Neighborhood and Environmental Programs") voluntarily dismissed its appeal prior to oral argument.

appeal on June 23, 2015, July 20, 2015, and August 6, 2015. On October 27, 2015, the Building Board of Appeals issued an order and opinion that concluded that the requisite forest stand delineation and forest conservation plan for Parkside Preserve "were submitted to [the Department] in accordance with the applicable provisions of the [Forest Conservation Act]." The Board found that the Department's review and approval of the forest stand delineation and forest conservation plan "did not violate the [Forest Conservation Act]." It was the Board's conclusion that the Department had appropriately "applied both the letter of the law and the intent of the [Forest Conservation Act]."

On November 25, 2015, a large number of area residents (including the Homeowners) and the Annapolis Neck Peninsula Federation filed a petition for judicial review in the Circuit Court for Anne Arundel County.[2] The bare-bones petition simply requested "judicial review of the action by the City of Annapolis Building Board of Appeals ('BBOA') on October 27, 2015 to deny the appeal of the Petitioners regarding the approval of the Forest Conservation Plan for the Parkside Preserve project, formerly

[2] In addition to Mary Mulvihill and Brian Toomey, the petition listed the following persons as named petitioners: Michelle Oldfield, Megan Philbeck, Meg Parme, Rebecca Hutchinson, Brigid Morahan, Richard T. Long, Jr., Barbara and Larry Covell, Rev. Johnny Calhoun, Amber Jacobsen, Jeff Hayes, Toni Thalenberg, Peri Lyons Thalenberg, Lee N. McMichael, Catherine McMichael, Theodore J. Ayd, Lindsey E. Thomas, Virginia Ryker, Phil Reynold, Sam Nassar, William Barniea, Chip Vanreenan, Frank Stone, Philip Wasielewski, Greg Gendell, Larry M. Johnson, Mandy Owens, Bruce Katz, Carol D. Binnix, Sylvia Pailthorp, Rebecca Canning, Michel Perry-Boucher, Joseph Boucher, Cameron Boucher, Jonathan Holtzman, Courtney Holtzman, Christie Hopmann, Robert C. Pringle, Beth Bannan, Marc Whynock, Amy Banko, Laurie Ganley, Marlene Niefeld, Margaux Cerminaro, Louisa Troutner, James Ruppel, Andy Perahia, Susan and Roger Hebden, Patricia and David Miller.

titled Reserve at Quiet Waters, also known before the BBOA as ENV 1505-005." (Footnote omitted.) The petition alleged no facts other than an assertion that the listed petitioners "were parties in the above described action before the Annapolis Building Board of Appeals (BBOA)."

QW moved to dismiss the petition for judicial review, and asserted that the petition "should be dismissed with prejudice because there is no statutory right to seek judicial review of the Building Board's Opinion and Order." QW also pointed out that the Annapolis Neck Peninsula Federation was not represented by legal counsel (as required by Maryland law) and, in any event, could not qualify as an "aggrieved" party. Additionally, the only other petitioner who had signed the petition was Brian Toomey. QW further asserted that the administrative appeal of the Department's decision to the Building Board of Appeals was authorized by Annapolis City Code § 17.09.140(E), but there was no statutory provision authorizing judicial review of such a ruling by a circuit court.

On February 9, 2016, the Department filed a response to QW's motion to dismiss. The Department agreed with QW that the petition for judicial review should be dismissed for "lack of aggrievement and lack of standing" on the part of the petitioners, but the Department did not agree that there is no statutory right to petition for judicial review of the decision approving the forest conservation plan for Parkside Preserve.

On February 12, 2016, the petitioners filed an amended petition for judicial review, which did not add any additional substantive information beyond that contained

in the initial petition, but the amended petition was signed by Mary Mulvihill as well as Brian Toomey and the Vice President of Annapolis Neck Peninsula Federation. That same day (February 12, 2016), the Homeowners filed their opposition to QW's motion to dismiss, and adopted the City's assertion that, even though the Annapolis City Code did not expressly authorize judicial review of the Building Board of Appeals ruling, there was nevertheless a right of judicial review because the Annapolis City Code stated in § 17.09.025(B) that the Maryland Forest Conservation Act "shall apply to any . . . subdivision plan . . . ." QW filed its reply on February 24, 2016, pointing out, *inter alia*: "There is also no language in the Maryland [Forest Conservation Act] which authorizes judicial review of a Building Board decision on a [Forest Conservation Plan] appeal."

On May 23, 2016, the circuit court held a hearing to consider QW's motion to dismiss. An attorney who had recently entered an appearance on behalf of the Homeowners did not attend due to an apparent scheduling issue. The circuit court scheduled a second hearing to consider the QW's motion to dismiss.

At the outset of the reconvened hearing, because there appeared to be no dispute as to the right of any of the putative petitioners other than Ms. Mulvihill and Mr. Toomey to participate in the proceeding, the court granted the motion to dismiss all other named petitioners, and then heard argument regarding the rights of Homeowners Mulvihill and Toomey to proceed. Counsel for the Homeowners asserted that "there are a number of cases . . . that specifically state that you don't have to have a statutory basis for judicial review of an administrative agency's decision when there's been an arbitrary or

capricious decision made by that agency or board. That is the argument that's being made here, . . . . [W]e don't have to have specific statutory authority because their decision was flat-out wrong." In counsel's concluding comment, he reiterated that the Board's "decision was arbitrary and capricious and for that reason alone we have a basis to be here and I would ask that you deny the motion to dismiss and let's go to a merits hearing."

At the conclusion of the hearing on August 9, 2016, the circuit court ruled that "there is no legislative authorization for these appeals," and dismissed the Homeowners' petition for judicial review with prejudice.

The Department filed the first notice of appeal from the circuit court's ruling. The two Homeowners then also noted an appeal. Although the Department filed an appellant's brief, the Department thereafter filed a voluntary dismissal of its appeal prior to oral argument, and is no longer a party to this appeal.

## DISCUSSION

As the Court of Appeals noted in *Appleton v. Cecil County*, 404 Md. 92, 98-99 (2008):

> "[I]n order for an administrative agency's action properly to be before this Court (or any court) for [statutory] judicial review, there generally must be a legislative grant of the right to seek judicial review." *Harvey v. Marshall*, 389 Md. 243, 273, 884 A.2d 1171, 1189 (2005). Maryland Rule 7-201(a) regulates an action to review an order or action of an administrative agency "where judicial review is authorized by statute . . . ." *See Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 541, 723 A.2d 440, 445 (1999) (noting that Maryland Rules 7-201 and 7-202 do "not grant a right of judicial review, and . . . [are] inapplicable where judicial review is not authorized by statute").

(Footnote omitted.) *Accord Smith v. Cnty. Comm'rs of Kent Cnty.*, 418 Md. 692, 710 (2011) ("A petition for judicial review proceeding in a circuit court must be authorized specially by a legislative enactment, be it a public local law or a State statute.").

In this appeal, the Homeowners make no argument that their petition for judicial review was "authorized specially by a legislative enactment." We agree with the circuit court's conclusion that there was no jurisdiction for it to consider the (amended) petition for judicial review filed in this case.

The Homeowners offer two alternative arguments for why the circuit court should have overruled QW's motion to dismiss. As they argued at the motion hearing in the circuit court, the Homeowners contend that their assertion that the agency's action was arbitrary and capricious raises an issue that permits review in the circuit court. Although, as we shall next discuss, there is a theoretical avenue for a party to seek redress regarding the ruling of an administrative agency for which the right of judicial review is not authorized by statute, the petition filed by the Homeowners in this case made a specific request for "judicial review." We reject the Homeowners' argument that their allegations of arbitrary and capricious rulings by an administrative agency are sufficient to authorize a circuit court to conduct judicial review of those rulings.

As we explained in *Matthews* v. *Housing Authority of Baltimore City*, 216 Md. App. 572 (2014), if an administrative agency of a local government makes a ruling for which there is no legislatively authorized right of judicial review, an aggrieved party may pursue a suit for administrative mandamus. In *Matthews*, we said:

> The two types of common law mandamus actions — administrative and traditional — arise when there is no statutorily-granted right to judicial review. Arnold Rochvarg, *Principles and Practice of Maryland Administrative Law* § 13.15 (2011). Administrative mandamus, which is set forth in Md. Rule 7-401, *et seq.*, "is the proper mandamus action when the agency decision being challenged is . . . from a contested case." *Id.* (internal footnote omitted). By contrast, a traditional mandamus action "is used to review an agency action that is not the product of a contested case." *Id.* Both types, however, have specific rules of procedure which govern in circuit court, and both are subject to review by this Court. *See id.* at § 13.15-13.17.

*Id*. at 581-82.

Although the Homeowners argue, in the alternative on appeal, that the circuit court could have --- and therefore should have --- permitted them to pursue a claim for administrative mandamus, that was not the argument they made at the motion hearing. As Maryland Rule 8-131(a) provides, we ordinarily will not consider issues that were not raised or decided in the circuit court, and we decline to do so in this case.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS**.