Circuit Court for Montgomery County
Case No. 404612V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1994

September Term, 2016

ST. ANDREW'S EPISCOPAL SCHOOL, INC., ET AL.

v.

LORRAINE FITZSIMMONS, ET AL.

Berger,
Reed,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 12, 2017

*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 case is an administrative appeal from an action of the Board of Appeals of Montgomery County. The circuit court affirmed in part and reversed in part the decision by the Montgomery County Board of Appeals (the "Board") and remanded to the Board for further proceedings. Appellants/cross-appellees St. Andrew's Episcopal School, Inc. ("SAE") and Montgomery County (the "County") noted an appeal to this Court, arguing that the Board's decision should have been affirmed in its entirety. The appellees/cross-appellants are certain owners of property nearby and neighboring SAE (the "Neighbors"). On appeal, the Neighbors argue that the Board's decision should have been reversed in its entirety, and, alternatively, that the remand was appropriate.

We have consolidated the various questions raised by the parties into the following two questions:

1. Whether the Board's decision was supported by substantial evidence and was legally correct.

2. Whether the circuit court erred by remanding the case to the Board for consideration of whether the Neighbors were entitled to equitable relief.

For the reasons explained herein, we shall hold that the circuit court erred in remanding the case to the Board. We, therefore, affirm the decision of the Board in its entirety.

FACTS AND PROCEEDINGS

SAE is located on nineteen acres at 8804 Postoak Road ("the Property") in Potomac, Maryland,[1] in a residential zone. In 1963, a special exception was granted to Harker Preparatory School ("Harker"), a non-religious educational institution, which allowed

[1] SAE also has a second campus at a different site.

Harker to operate a school on the Property. A special exception allows a particular use on a property that is not granted to a property owner by right. Certain uses are permitted only after a property owner obtains a special exception after a reviewing body, such as the Board, has reviewed and approved an application seeking a special exception.[2] *See generally* Stanley D. Abrams, *Guide to Maryland Zoning*. As we shall explain further in detail, religious institutions are generally exempt from the special exception requirements. Harker operated on the Property until the early 1990s.

On September 24, 1993, SAE entered into a contingent contract with Harker for the purchase of the Property. The contract permitted SAE, upon reasonable notice and at reasonable times, to access the property for various purposes until December 31, 1994.[3] While the sale was pending, SAE sought and obtained the transfer of Harker's special exception to operate a private school on the Property.[4] The special exception transfer took effect on November 15, 1994. The sale of the property was completed on January 20, 1995. Since that date, SAE has owned and operated an Episcopal school on the Property.

[2] In Montgomery County, special exceptions were renamed "Conditional Use" in 2014.

[3] Pursuant to the contract, SAE was permitted to access the Property for the purpose of conducting architectural, engineering, environmental, and other types of tests. The contract further provided that SAE the right to use the playing fields and gymnasium, hold meetings in the buildings, and conduct tours of the Property.

[4] The record is silent as to why SAE sought the transfer of the special exception and continued to follow the special exception process when it was exempt from the special exception requirement as a religious institution (as we shall discuss *infra*). Counsel for SAE comments that SAE acted in reliance on advice of former legal counsel.

Between 1995 and 2004, SAE participated in the special exception process for various physical and operational changes to the Property and its use.

In 2010, SAE, through counsel, filed a letter with the Montgomery County Department of Permitting Services ("DPS") asking for confirmation that SAE, as a religious institution, was exempt from the special exception requirements and/or limitations. SAE further sought confirmation that it was not required to secure any special exception amendments or modifications in order to alter, expand, or modify its facility. On January 24, 2011, the zoning manager for the DPS issued a letter to SAE concluding that SAE was a religious institution "not subject to any special exception requirements or prior special exception limitations." In the years following, SAE filed building permit applications for various projects to upgrade the Property, including the renovation of an existing building and the construction of a significant addition.

In November of 2014, the Neighbors sent a letter to the Board requesting that the Board investigate and take action in response to an alleged violation of SAE's special exception. The Neighbors alleged that SAE was not a religious organization and therefore did not qualify for the exemption to the special exception requirement. Alternatively, the Neighbors maintained that SAE did not qualify under a 2002 "exception to the exemption" clause of the zoning code.[5] The Board also received a letter from counsel for SAE, in which SAE asserted that it was exempt from the special exception requirements. The Board considered the Neighbors' letter to be a zoning complaint about a special exception

[5] We shall discuss the "exception to the exemption" argument *infra*.

under Section 59-G-1.3(b) of the Montgomery County zoning ordinance and referred the complaint to the DPS for investigation on January 23, 2015.

The DPS commenced an investigation. In addition to considering information from SAE and the Neighbors, the DPS performed its own independent research. On February 13, 2015, the DPS issued a letter to the Board detailing the conclusion of its investigation. The DPS concluded that there was "no violation" of a special exception. The DPS found that (1) SAE was a religious organization, and (2) the "exception to the exemption" was inapplicable. The DPS further found that SAE's use of the Property was "permitted by operation of law." DPS "request[ed] that the Board of Appeals vacate the Special Exception . . . ." The Board agreed with the DPS findings and subsequently issued a resolution on April 2, 2015 summarizing the DPS's findings and revoking the special exception.

The Neighbors subsequently filed a petition for judicial review in the Circuit Court for Montgomery County. Following a hearing, the circuit court found "substantial evidence to support the Board's conclusion that at all relevant times, [SAE] was a church or religious organization." The circuit court further found that the "exception to the exemption" did not apply to SAE and that SAE was "excepted from abiding by a [s]pecial [e]xception." Nonetheless, the circuit court remanded the case to the Board for consideration of whether the Neighbors were entitled to equitable relief. Specifically, the court ordered "that this matter shall be remanded to [the Board] for the purposes of obtaining further evidence regarding [the Neighbors] reliance to their individual or community detriment upon the [DPS] and/or [SAE]'s course of conduct . . . ."

This appeal followed.

STANDARD OF REVIEW

When reviewing "'the decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision.'" *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012) (quoting *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008)); *Ware v. People's Counsel for Balt. Cnty.*, 223 Md. App. 669, 680 (2015) ("In an appeal from a judgment entered on judicial review of a final agency decision, we look 'through' the decision of the circuit court to review the agency decision itself."). We are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Hamza Halici, et al. v. City of Gaithersburg*, 180 Md.App. 238, 248 (2008) (internal quotation marks and citations omitted).

The "substantial evidence" test is defined as "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 48–49 (2007) (internal quotation omitted). "In applying the substantial evidence test . . . . [we] must review the agency's decision in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity." *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 476–77 (2003). "Furthermore, not only is the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can

be drawn, it is for the agency to draw the inferences." *Id.* at 477 (internal quotations omitted).

Although we generally defer to the factual findings of an administrative agency, "[w]e review an agency's decisions as to matters of law *de novo* for correctness." *Wallace H. Campbell & Co. v. Maryland Comm'n on Human Relations*, 202 Md. App. 650, 663 (2011). However, "[e]ven with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Grasslands Plantation, Inc. v. Frizz-King Enterprises, LLC*, 410 Md. 191, 204 (2009) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 69 (1999)).

DISCUSSION

I.

In this administrative appeal, we first consider whether the Board's conclusions were supported by substantial evidence. The Board concluded that SAE is a religious organization not subject to the special exception requirement. Before the circuit court, the Neighbors argued that SAE was not a religious organization. On appeal, the Neighbors have abandoned that argument[6] and instead argue that the "exception to the exemption"

[6] Indeed, the record reflects that the evidence is overwhelming that SAE is a religious organization.

applies to SAE and that, as a result, SAE is required to obtain a special exception to operate an educational institution on the Property.

At the time the Board issued its decision, the relevant portion of the Montgomery County Zoning Code ("MCZC") was § 69-G.2.19(e) of the 2004 Zoning Ordinance, titled "Exceptions."[7] It provided:

> The requirements of Section 59-G-2.19 [governing special exceptions] do not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County. This exemption does not apply to any private educational institution which received approval by the Board of Appeals to operate a private educational institution special exception in any building or on a lot, lots or tract of land that was not owned or leased by any church or religious organization at the time the Board of Appeal's decision was issued.

The first sentence of this subsection is referred to as the "exemption" from the special exception requirement. The exemption has been in effect for at least the last fifty years and was the law when the special exception was transferred to SAE in 1994. *See*, *e.g.*, MCZC (1965) § Section 111-37 and MCZC (1972) § 59-G-2.19(c). The first sentence of § 59-G-19(e) plainly encompasses SAE because it is a school "located in a building or on premises owned or leased by [a] church or religious organization." The second sentence

[7] Montgomery County amended its zoning code in 2014. The special exception provisions at issue in this appeal were considered by the Board applying the 2004 zoning code. All zoning code references in this opinion are to the 2004 code unless otherwise specified.

is referred to as the "exception to the exemption" and was adopted in 2002. *See* Montgomery County Ordinance 14-62, Zoning Text Amendment No. 02-21 (effective November 11, 2002). The Neighbors assert that the exception to the exemption applies to SAE, and, therefore, SAE is required to abide by the special exception requirements.

The Neighbors contend that the exception to the exemption provision should be read to encompass the facts of this case because the special exception was transferred to SAE on November 15, 1994, approximately two months before SAE's purchase of the Property was finalized. The Neighbors argue that because SAE received a special exception when the Property was still owned by Harker, the special exception was issued for a school "in a building or on a lot, lots or tract of land that was not owned or leased by any church or religious organization at the time" the special exception was issued. *See* MCZC § 59-G-2-19(e).

The Board rejected this interpretation of the exception to the exemption provision. The Board emphasized that the exception to the exemption provision was enacted in 2002 and "contains no language indicating that it was intended to operate retroactively." The Board further discussed the history of the exception to the exemption provision, explaining that its purpose was "not to invalidate or affect any exemption claimed from the special exception process for any private school that exists on property owned or leased by any church or religious organization as of the effective date" of the provision. The Board further explained that "the exception [to the exemption] was enacted to close a loophole that would have allowed private educational institutions to sell their property to a religious institution and then lease it back, specifically to circumvent the special exception process."

For these reasons, the Board concluded that SAE was "a religious organization not subject to the requirement for a special exception."

We agree with the Board's interpretation of the exception to the exemption provision. First, we observe that the exception to the exemption was not enacted until 2002, seven years after SAE began using the Property. The application of the exception to the exemption to the facts of this case would yield a result inconsistent with the stated purpose of the 2002 amendment. As the Board explained, the intent of the amendment was to close a loophole and prevent non-religious organizations from structuring property transactions in such a manner as to avoid the special exception requirement. Here, SAE operates a religious school on property that it, a religious organization, owns. This is not the scenario contemplated by the exception to the exemption provision.

Furthermore, the plain language of the exception to the exemption provision does not encompass the facts of the present case. The first sentence of MCZC § 59-G-2-19(e) applies to "any private educational institution, or parochial school . . . on premises owned by any church or religious organization." The exception to the exemption provision applies only to "private educational institutions" and does not include "parochial schools," a term which is expressly included in the preceding sentence. A "parochial school" is "a private school maintained by a religious body usually for elementary and secondary instruction." Parochial School, Merriam-Webster, http://www.merriam-webster.com/dictionary/parochial%20school. The record reflects -- and the Neighbors do not dispute in this appeal -- that SAE is a school affiliated with and operated under the auspices of the Episcopal Church. Accordingly, it is a parochial school. Because the first

sentence of MCZC § 59-G-2-19(e) refers to both "private educational institutions" and "parochial schools," but the second sentence refers only to "private educational institutions," we interpret the exception to the exemption provision as excluding parochial schools such as SAE.

Additional factors support our interpretation of the exception to the exemption provision. We observe that if any other religious organization were to purchase the Property from SAE, they would plainly be permitted to open a school without a special exception. Furthermore, our interpretation of the ordinance is consistent with that of the Board. As set forth *supra*, the Board's interpretation and application of MCZC § 59-G-2-19(e) is entitled to "considerable weight" because the Board is the agency that administers the ordinance. *Grasslands Plantation*, *supra*, 410 Md. at 204. In our view, applying the exception to the exemption to SAE would yield an illogical result. We will not adopt a strained reading of the text that would require SAE, alone among religious schools in Montgomery County, to abide by the special exception requirements simply because they sought the transfer of the special exception shortly before the purchase of the Property was finalized. For these reasons, we hold that the Board's conclusion that SAE is exempted from abiding by the special exception requirements is supported by substantial evidence and is not premised upon erroneous conclusions of law.

II.

Having addressed the issues determined by the administrative agency, and having concluded that the agency's determination was supported by substantial evidence and based upon correct conclusions of law, our task would usually be complete. Because this

is an administrative appeal, we look through the circuit court's decision to the decision of the administrative agency and address only the decision of the administrative agency. The circuit court, however, addressed issues not raised before the Board and issued an order remanding the case for further proceedings before the Board for consideration of equitable/zoning estoppel and laches. On appeal, therefore, we must consider the appropriateness of the circuit court's order. SAE and the County assert that the circuit court's order remanding the matter to the Board for consideration of equitable arguments is improper for a multitude of reasons, and we agree.

First, we emphasize the nature of the proceeding before the Board, as well as the scope of the appeal to the circuit court and to this Court. The Board only has the authority conferred upon it by state and county law. "It is elementary that since an administrative agency . . . is a creature of statute, it has no inherent powers and its authority thus does not reach beyond the warrant provided by statute." *Holy Cross Hospital, Inc. v. Health Svcs. Cost Review Comm'n*, 283 Md. 677, 683 (1978). "A district council may adopt zoning law that authorize the board of appeals, the district council, or an administrative office or agency designated by the district council to grant special exceptions and variances to the zoning laws on conditions that are necessary to carry out the purposes of this division." *See* Md. Code (2012), § 22-301(a) of the Land Use Article. Section 22-301(b) of the Land Use Article further provides that "an appeal from a decision of an administrative office or agency designated under this subtitle shall follow the procedure determined by the district council."

Pursuant to the relevant provisions of the Land Use Article, the Montgomery County District Council established the Board and authorized it to "grant petitions for special exceptions as authorized in Zoning Code § 59-A-4.11." MCZC § 59-G-1.11. The proceedings giving rise to this appeal were not conducted as part of the special exceptions proceeding. Rather, they were the end product of the "complaint" process established by MCZC § 59-G-1.3(c). The complaint process was set forth in MCZC § 59-G-1.3(b) and proscribed specific steps to be taken in response to a complaint. The Board is required to refer to the DPS for inspection of the premises of the "subject special exception" to determine the validity of the complaint, after which the DPS must forward written findings of the nature of the complaint and results of the inspection to the Board. The DPS may recommend modification of the terms or conditions of the special exception or propose remedial action as indicated by the circumstances. After receiving findings and recommendations from the DPS, the Board is permitted to dismiss the complaint if the DPS "[l]etter indicates that the complaint is without merit." MCZC § 59-G-1.3(b)(4). The Board must notify the complainant "of the action taken." *Id.* There is no provision of the Montgomery County Code that affords the complainants a hearing, evidentiary or otherwise.

Pursuant to the Montgomery County Code, the DPS has the exclusive authority charged with "administering, interpreting, and enforcing the zoning law and other land use laws and regulations." Montgomery County Code ("MCC") § 2-42B(a)(2)(A). After the DPS determined that a particular use is permitted "by right" and does not require a special exception, the Board has no jurisdiction over the property and cannot hold hearings or

exercise authority over the permitted use. *See Manian v. Cnty. Council for Montgomery Cnty.*, 171 Md. App. 38, 40 n.1 (2006) (commenting that a dental office that had previously been permitted by special exception on a particular property was, after rezoning, a permitted use, and, therefore, the special exception had been revoked). *See generally* MCC § 2-112 (providing an overview of the Board's review and approval authority).

Neither the Neighbors nor the circuit court explained the source of the Board's purported jurisdiction to hold an evidentiary hearing on the various equitable issues specified in the circuit court's remand order. After the DPS determined that SAE was a religious organization exempt from the special exception requirement, the Board had no further jurisdiction over SAE's permitted use. Accordingly, the circuit court had no authority to remand this case to the Board for further proceedings.

Furthermore, the circuit court considered the various equitable arguments for the first time on appeal. These issues were not raised before the administrative agency. Indeed, as we explained, the Board lacks the authority to consider them. A circuit court considering an appeal of an administrative agency's decision is "restricted to the record made before the administrative agency" and "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." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001). Therefore, the circuit court's remand order exceeded the Board's statutory authority. In addition, the circuit court's consideration of estoppel and laches exceeded the proper scope of the administrative appeal. Accordingly, for these reasons, we shall vacate the portion of the circuit court's order remanding this case to the Board for further proceedings.

We further note that zoning estoppel has been discussed by Maryland appellate courts on a theoretical level but has never been actually adopted as the law in the State of Maryland, nor applied to the facts of a particular case. In *Maryland Reclamation Assocs., Inc. v. Harford Cty.*, 414 Md. 1, 57 (2010), the Court of Appeals discussed zoning estoppel but "stop[ped] short of adopting zoning estoppel" because the facts of the case did not warrant it. The actual application of zoning estoppel is an issue "of first impression in this state." *Cty. Council of Prince George's Cty. v. Offen*, 334 Md. 499, 510 (1994).

In this appeal, not only do the Neighbors assert that zoning estoppel should be adopted by the State of Maryland, but they further assert that zoning estoppel should be applied in an entirely different manner than that in which it is applied in states which have adopted zoning estoppel. Traditionally, zoning estoppel is a defense raised by a landowner against the government's enforcement of its zoning ordinance. *Maryland Reclamation*, *supra*, 414 Md. at 54. The Court explained:

> The traditional, 'black-letter' definition of zoning estoppel is: "A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith, (2) upon some act or omission of the government, (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired."

Id. (quoting David G. Heeter, Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes, URB. L. ANN. 63, 66 (1971)). The Neighbors propose to use zoning estoppel not as a defense to government action, but affirmatively against another landowner. By seeking to use zoning estoppel as a sword

rather then a shield, the Neighbors seek to force the government to prevent SAE from using its property to the full extent permitted by law. In light of our determination that this issue is not properly before us in this appeal, we need not undertake an analysis of whether zoning estoppel has ever been employed in the manner suggested by the Neighbors. We simply observe that this is a significant extension of the doctrine of zoning estoppel as discussed by the Maryland appellate courts, and that zoning estoppel itself has not been adopted by the Court of Appeals.

The Board's March 4, 2015 Resolution revoking SAE's special exception is supported by substantial evidence and is not premised upon an erroneous conclusion of law. The circuit court's remand order is, for the reasons explained above, improper as a matter of law. We, therefore, affirm in part and reverse in part the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND REVERSED IN PART. THE CIRCUIT COURT'S ORDER REMANDING CASE TO THE BOARD OF APPEALS IS VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR ISSUANCE OF AN ORDER AFFIRMING THE MONTGOMERY COUNTY BOARD OF APPEALS IN ITS ENTIRETY. COSTS TO BE PAID BY THE APPELLEES/CROSS-APPELLANTS.