Circuit Court for Montgomery County
Case No. C-15-CV-23-001506

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2075

September Term, 2023

IN THE MATTER OF DEBORAH JACOBS

Arthur,
Reed,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: May 7, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to MD. R. 1-104(a)(2)(B).

Deborah Jacobs appeals a decision by the Board of Appeals for Montgomery County that granted the Columbia Country Club an administrative modification of a previously approved special exception to the Montgomery County Zoning Ordinance,[1] thus permitting the Club to use recently acquired residentially-zoned property for golf and other country club purposes. On judicial review, the Circuit Court for Montgomery County affirmed the Board's decision. In her timely appeal to this Court, Jacobs argues that the Board erred in failing to abide by the prescribed application process for a special exception by granting the Club an administrative modification. For the reasons that follow, we agree and reverse the order of the Circuit Court for Montgomery County.

BACKGROUND

The Club has operated a golf and country club on Connecticut Avenue in Chevy Chase since 1911. In 1955, the Board granted the Club a special exception for improvements and the continued use of its residentially-zoned property as a golf and country club. Since the special exception was first granted, it has been modified approximately 10 times to allow construction of additional facilities, landscaping changes, and modification of existing structures.

In 2022, the Club requested an administrative modification to enlarge the special exception to add six new properties abutting or surrounding the Club, which the Club had purchased over the years. One of those properties was located on Connecticut Avenue and previously had been used as a church, while the other five properties were single family

[1] Montgomery County's Zoning Ordinance is codified in Chapter 59 of the Montgomery County Code.

homes on East-West Highway. Jacobs was the lone homeowner in the development on East-West Highway who had elected not to sell to the Club.

In its request for an administrative modification, the Club stated that it had no immediate plans to use any of the properties for anything different than their current uses. That is, the Club intended to either lease the then-vacant church to another church or use it for Club administrative purposes, and the residential properties would continue to be used as lodging for club employees or other tenants. Nonetheless, the Club sought to include all six lots "within the umbrella" of its special exception "in anticipation of eventual redevelopment" that would "directly benefit the Club and its members."

Without a public hearing, the Board issued a written resolution approving the administrative modification of the Club's special exception.

Jacobs, through counsel, opposed the administrative modification and requested a hearing. Jacobs asserted that the Club's request to enlarge the geographic boundaries of the existing special exception was not a "minor administrative modification" but would instead result in a special exception being granted to five[2] distinct residential properties without going through the necessary application and evaluation process. The Club responded that Jacobs' objections were premature because inclusion of the residential lots in the special exception would not, absent further action, result in any change to the lots or their use, and thus, their annexation into the special exception would not violate any provision of the

[2] We understand that Jacobs was discussing the five residential properties and omitted discussing the former church property. That, we think, explains the minor numerical discrepancy.

Zoning Ordinance. The Club promised that it would return with a specific proposal for redevelopment, if and when it decided to use those properties for Club activities.

In light of Jacobs' timely request for a hearing, the Board suspended its approval of the administrative modification and scheduled a hearing.

At the March 2023 hearing, the Club again asserted that because nothing was changing with respect to the use of the residential properties, the administrative modification had properly been granted. The inclusion of the properties in the special exception was, according to the Club, nothing more than "a matter of practicality" because it was, at the same time, filing its application for modification regarding the church property. That way, the Club could begin planning and budgeting for the use of all six properties in the future, and any change likely would be brought before the Board as a request for a major modification. In opposition, Jacobs presented testimony that regardless of the Club's assurances that it had no current plans to redevelop the properties, the administrative modification would result in a zoning change that would cause immediate harm to the value of her home and change the nature of the surrounding homes.

The Board voted unanimously to reinstate the administrative modification of the special exception. In its written decision, the Board cited Section 59G-1.3(c)(1) of the Zoning Ordinance for Montgomery County (2004),[3] which states:

[3] The most recent Montgomery County Zoning Ordinance went into effect on October 30, 2014. Unless otherwise requested by an applicant, Zoning Ordinance Section 59-7.7.1.B requires that a special exception approved before October 30, 2014, be "reviewed under the standards and procedures of the property's zoning on October 29, 2014." Because the applicable special exception in this matter was granted in 1955, the pre-2014 Zoning Ordinance applies.

> If the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood, the board, without convening a public hearing to consider the proposed change, may modify the term or condition.

The Board found that the administrative modification satisfied that standard and reinstated it, subject to the condition that any further modification of the special exception to change the use of the residential properties would require approval of the Board "in accordance with the procedures and substantive standards applicable to a major modification," including, among other things, a fully noticed public hearing before the hearing examiner.

According to the Board, no potential economic impact to Jacobs could be addressed unless and until the Club brought a further request for modification of the special exception before the Board for approval. While sympathizing with Jacobs' concerns, the Board nonetheless found that bringing the properties already owned by the Club under the umbrella of the Club's existing special exception, with no change to their outward appearance or current usage, would not constitute a substantial change to the nature, character, or intensity of the special exception use or to its effect on traffic or the immediate neighborhood.

Jacobs filed a petition for judicial review.[4] Following a hearing, the circuit court issued a written order affirming the Board's decision. Jacobs timely noted this appeal of the circuit court's order.

[4] Pursuant to Article V, § 2-114 of the Montgomery County Code, which governs the Montgomery County Board of Appeals, a party aggrieved by a decision of the Board may seek judicial review in the circuit court. The same provision grants a right of appeal to this Court to a party aggrieved by a decision of the circuit court.

DISCUSSION

When we review the decision of an administrative agency, we evaluate the decision of the agency itself, not the actions of the circuit court. *Matter of Gendell*, 262 Md. App. 557, 567 (2024). Our role in reviewing an agency decision is to evaluate "whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to [determine] whether the administrative decision is premised upon an erroneous conclusion of law." *Id.* We review factual findings in the light most favorable to the agency and defer to the agency's resolution of conflicting evidence. *Comptroller of Maryland v. FC-GEN Operations Inv. LLC*, 482 Md. 343, 359-60 (2022). With regard to an agency's legal conclusions, however, it is our role "to determine whether the agency's decision was made in accordance with the law or whether it is arbitrary, illegal, or capricious." *Gendell*, 262 Md. App. at 568 (cleaned up). Thus, while we may apply "a degree of deference" to an agency's interpretation of the statute and regulations it administers, we must also "assess how much weight to accord that interpretation, keeping in mind that it is always within the court's prerogative to determine whether an agency's conclusions of law are correct." *FC-GEN*, 482 Md. at 362 (cleaned up).

The Club contends that the modification was "nothing more than a redrawing of the special exception boundary line," and the issue on appeal is a mixed question of law and fact as to whether that minor change substantially altered the nature, character, or intensity of the current use of the properties. We disagree. The real question before us is purely a legal one: whether an existing special exception can be modified to encompass a separate abutting or confronting property. We conclude that it can't, and that the Board exceeded

its authority by granting special exceptions without following the requisite application and evaluation process, including a public hearing as to whether the requirements for granting a special exception to those properties had been met.

Maryland law generally defines a "special exception" as the grant of a specific use not permitted by right but provided for within a jurisdiction's comprehensive zoning plan upon a finding that: (1) the requirements for such an exception on the subject property can be satisfied; and (2) the use is generally consistent with the plan and compatible with the existing neighborhood. *See* MD. CODE, LAND USE § 1-101(p). The Montgomery County Zoning Ordinance contains a similar definition of a "special exception" as the "grant of a specific use that would not be appropriate generally or without restriction," and that use must be "consistent with the applicable master plan and … compatible with the existing neighborhood." Zoning Ordinance § 59-A-2.1.

The Montgomery County Zoning Ordinance requires that a special exception "must not be granted" without specific enumerated findings, and "the Board of Appeals ... must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location." Zoning Ordinance § 59-G-1.2.1. Once granted, a minor modification to a special exception can be approved without a public hearing, "[i]f the proposed modification is such that the terms or conditions could be modified without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood." Zoning Ordinance § 59-G-1.3(c)(1). If, on the other hand, "the proposed modification substantially alters the nature, character, intensity of use or the conditions of the original

grant, the Board must convene a public hearing to consider the proposed modification," and the special exception holder must comply with the designated procedures for filing a petition for a special exception. Zoning Ordinance § 59-G-1.3(c)(2).

Once a special exception has been granted, a previously prohibited use becomes permitted, although conditions may be imposed. *Purich v. Draper Properties, Inc.*, 395 Md. 694, 714 (2006). Thus, a use that would otherwise conflict with local zoning goals is thereafter considered in "conformance with applicable zoning laws." *Id*. As such, the granting of a special exception "requires a case-by-case evaluation by an administrative zoning body or officer according to legislatively-defined standards." *People's Counsel for Baltimore Cnty. v. Loyola Coll. in Maryland*, 406 Md. 54, 71 (2008). It then follows that the terms of the special exception can only be modified for the use of the lot for which the special exception has already been approved. We reject the notion that once granted, the boundary line of a special exception is simply a term to be modified. If a special exception was modified to apply to properties other than the one for which it was specifically granted, a use prohibited on the other properties would be deemed to conform with zoning laws without having to go through the public hearing process prescribed for special exceptions.[5]

[5] The Club points out that the Board has, on at least one prior occasion, approved a modification of a special exception to include a property separate from that covered by the special exception, implying that we should defer to the Board's interpretation of the enabling legislation relating to special exceptions in this matter. *See Petition of the Bullis School*, Case Number S-687-G (Effective date of Resolution, October 24, 2011) (in which the Board approved the school's request to use its newly acquired land contiguous to the existing campus for an expanded cross-country course and field-based class activities until the school redesigned and formally amended its master campus plan). The *Bullis* decision does not, however, inform our holding. While we "'occasionally apply agency deference'"

If we were to affirm the Board's ruling and permit the requested modification, we would, just as Jacobs argues, be facilitating an end run around the entire process. Our concerns are not assuaged by the Club's assertion that it has no current plans to redevelop the properties, nor by its agreement that it would undergo the major modification process if and when it decided to use the five residential properties for anything other than residences. The Club's concession that it would go through the proper process for making a major modification to the special exception at some point in the future does not ameliorate the Board's lack of proper public process in granting the special exceptions in the first place.

Finally, we are not persuaded by the Club's argument that "[n]othing in the Zoning Ordinance precludes the Board from utilizing the Minor Modification process to expand the geographic footprint of the Special Exception[.]" This argument is based on a false premise. Although it is true that no subsection of the Zoning Ordinance specifically precludes the Board from doing so, neither does any subsection authorize such an action. An administrative agency has only the powers delegated to it by the enabling legislation. In other words, the agency—here the Board—is authorized to take only the actions granted to it by the Montgomery County Council in the Zoning Ordinance. *See Cosgrove v.*

to an agency's interpretation of a statute that it administers, "[w]hether the agency correctly interpreted and applied applicable case law presents a legal question on which the courts 'do not apply any agency deference.'" *King v. Helfrich*, 263 Md. App. 174, 206, *cert. denied*, 489 Md. 286 (2024) (quoting *FC-GEN*, 482 Md. at 360). Moreover, we do not give any weight to agency interpretations of their own regulations if an "interpretation is plainly erroneous." *FC-GEN*, 482 Md. at 361. Thus, we will not defer to the agency's prior, incorrect legal determination.

Comptroller of Maryland, 263 Md. App. 147, 166 (2024) (quoting *Northwest Land Corp. v. Md. Dep't of Environment*, 104 Md. App. 471, 502 (1995)) ("Administrative agencies derive their authority from the legislative branch, and only have those powers which the legislature has either 'expressly or impliedly conferred.'"); *see also Dep't of Hum. Res., Baltimore City Dep't of Soc. Servs. v. Hayward*, 426 Md. 638, 658 (2012) ("Administrative agencies have broad authority to promulgate regulations, to be sure, but the exercise of that authority, granted by the Legislature, must be consistent, and not in conflict, with the statute the regulations are intended to implement. We have consistently held that the statute must control."). Thus, the question isn't whether the statute prevents the Board from doing something; rather the question is whether the statute allows it. And, here, it does not.

A commonsense reading of the Zoning Ordinance as a whole makes clear the importance placed on the right of the community to participate and be heard in zoning decisions. The Board exceeded its authority in granting the Club's request for an administrative modification.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR ENTRY OF ORDER VACATING THE DECISION OF THE BOARD OF APPEALS FOR MONTGOMERY COUNTY. COSTS TO BE PAID BY APPELLEE.