UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2176

September Term, 2014

AMHA, LLC, ET AL.

v.

HOWARD COUNTY BOARD OF APPEALS, ET AL.

Berger,
Nazarian,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 3, 2015

*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 appeal involves a dispute regarding the approval of appellee's, H & R Rock, LLC's ("H & R Rock's") redline revision to a previously approved Site Development Plan ("SDP"). Following the approval by the Howard County Planning Board (the "Planning Board"), appellants; AMHA, LLC ("AMHA"), British American Building, LLC ("British American"), and the Howard County Independent Business Association, Inc. ("HCIBA") (collectively "appellants") challenged the decision before the appellee, the Howard County Board of Appeals ("Board of Appeals"), which affirmed the Planning Board's decision, albeit on different grounds. Thereafter, AMHA filed a petition for judicial review in the Circuit Court for Howard County, which affirmed the Board of Appeals' decision, again, on different grounds. This timely appeal followed.

On appeal, AMHA presents two issues for our review.[1] Additionally, H & R Rock

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[1] The issues, as presented by AMHA, are:

> 1. Did the [Planning Board] have authority (and thus did the [Board of Appeals] have jurisdiction) to review the "redline" SDP for a site located in the [New Town] district when the SDP proposed new buildings on a previously undeveloped parcel and new uses not previously approved and not expressly allowed by the underlying [New Town] Final Development Plan?
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> 2. Did the [Board of Appeals], upon review of the [Planning Board] decision, err in applying the strict *Bryniarski* analysis to the [Board of Appeal]'s original jurisdiction, first-tier review of the [Planning Board] decision?

has filed a cross-appeal, and presents two issues for our review.[2] We condense and rephrase appellants' second question, and H & R Rock's questions as follows:

> Whether the Board of Appeals erred in dismissing appellants' challenge to a zoning decision on the grounds that appellants were not specially aggrieved.

For the reasons set forth below, we shall affirm the decision of the Board of Appeals, and the judgment of the Circuit Court for Howard County. As a result, we do not reach the first issue presented by appellants.

FACTUAL AND PROCEDURAL BACKGROUND

H & R Rock is a developer that has been improving property located at the corner of Snowden River Parkway and Minstrel Way in Columbia, Maryland ("the property"). In 2008, the Planning Board approved a SDP, under which H & R Rock sought to construct a hotel and a bank on two of five undeveloped lots. In 2012, the Planning Board reconvened to consider revisions to the 2008 SDP. Under the 2012 revisions, H & R Rock sought to construct two structures on the remaining undeveloped lots. Specifically, H & R Rock sought to construct a 9,200 square-foot one-story building to be used for commercial or retail

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[2] The issues, as presented by H & R Rock, are:

> A. Whether the Howard County Board of Appeals' decision that Appellants did not have standing to contest the approval of SDP-07-078 was clearly erroneous, arbitrary and capricious, or contrary to law.
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> B. Whether the Circuit Court committed reversible error by failing to dismiss Appellants' appeal for lack of standing[.]

purposes, and another 10,000 square-foot one-story building to be used for retail purposes as well as a vehicle repair facility.

AMHA owns property adjacent to appellants', located across both Snowden River Parkway and Minstrel Way.[3] AMHA's property is situated approximately 324.35 feet from the property. AMHA permits a gasoline service station, car wash, and convenience store that is owned by a separate entity to operate on its property. A representative of AMHA testified before the Board of Appeals that the revised SDP would diminish the value of its property by 50 percent because it would permit an increased supply of available commercial land. Additionally, AMHA argued that the proposed revisions would negatively affect his property because of increased traffic flow and decreased accessibility to its property.

Perry Burman ("Burman"), a planning consultant and commercial real estate agent, testified that the new development would negatively affect traffic by causing competition for green lights at the intersection of Snowden River Parkway and Minstrel Way. Accordingly, Burman testified that traffic generated by the development would decrease the value of AMHA's property. On cross-examination, however, Burman conceded that he had no empirical evidence to rebut H & R Rock's position regarding the negligible effect the development would likely have on traffic.

[3] While the property that is the subject of the SDP and AMHA's property sit on opposite corners of an intersection, a bank that was approved under the 2008 SDP currently occupies the corner lot on the property. The lots that are the subject of the 2012 revision to the SDP are located further west on Snowden River Parkway.

British American operates an automotive repair facility located more than 1,300 feet from the property. A representative from British American, Charles Gordon Gilbert, Jr. ("Gilbert"), testified that he believed that British American's property and the property at issue were subject to covenants which prohibited the uses proposed in the revised SDP. British American averred that approving the SDP would negatively affect the value of its property because it would impair its ability to enforce covenants to which H & R Rock may be subject.

The Board of Appeals also heard testimony from Chris Rosato ("Rosato"), a certified commercial real estate developer. Rosato testified that the 2012 revisions to the SDP would not negatively affect the value of AMHA's property. Rather, Rosato opined that any increase in traffic would be more likely to result in an increase in the value of AMHA's property.

Additionally, the Board of Appeals heard testimony from Mickey Cornelius ("Cornelius") a certified professional traffic operations engineer who opined that, given the dedicated turn lanes on Snowden River Parkway and the split phasing at the intersection, the development under the revised SDP would not frustrate access to AMHA's property. Additionally, Cornelius testified that a member of the public would not notice any significant changes in the operation of the intersection, nor would there be any significant capacity or safety concerns caused by the approval of the revised SDP.

At the conclusion of the presentation of all of the evidence, the Board of Appeals concluded that neither AMHA, British American, nor the HCIBA had standing to pursue an appeal before the Board of Appeals. Accordingly, the Board of Appeals dismissed the

appellants' petition for appeal. Thereafter, appellants appealed the Board of Appeals' dismissal to the Circuit Court for Howard County. The circuit court considered the parties' arguments as to whether the appellants were specially aggrieved, and, therefore, had standing to challenge the Planning Board's decision. The circuit court reversed the Board of Appeals' with respect to its decision that appellants lacked standing. Nevertheless, the circuit court rejected the merits of appellants' argument against the procedure by which the revised SDP was approved. This timely appeal followed.

DISCUSSION

Byniarski v. Montgomery Cnty. Bd. of Appeals, 247 Md. 137 (1967) is the seminal case on the subject of who has standing to seek judicial review of zoning decisions. Appellants contend that the analysis in *Bryniarski* does not apply to the decisions of the Board of Appeals. H & R Rock and the Board of Appeals maintain that appellants' challenge to the applicable law is not appropriately before us on appeal. Further, H & R Rock and the Board of Appeals contend that it was not error for the Board of Appeals to rely upon the analysis set forth in *Bryniarski*, and, under that analysis, the appellants lack standing. For the reasons set forth below, we hold that appellants' arguments are properly presented before us. Additionally, we hold that the Board of Appeals was not required to strictly adhere to *Bryniarski*, but did not err in doing so. Finally, in Part III, *infra*, we analyze the Board of Appeals' decision under *Bryniarski*, and hold that there was substantial evidence to support their decision that the appellants lacked standing.

I. Appropriateness of Appellate Review

Appellants contend that they have the right to challenge a zoning decision because they need not be "specially aggrieved" to contest a zoning action enforce the Board of Appeals. *See generally Byniarski*, *supra*, 247 Md. 137; *Ray v. Mayor & City Council of Balt.*, 430 Md. 74 (2013). In support of their argument, appellants cite *Sugarloaf Citizens' Ass'n v. Dept. of Env't*, 344 Md. 271 (1996), for the proposition that aggrieved person inquiry under *Bryniarski* is not applicable to agency decisions that engage in *de novo* review. *Id.* at 286 ("Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily."). H & R Rock, for its part, argues that appellants are estopped from arguing that the "specially aggrieved" standard under *Bryniarski* is inapplicable. H & R Rock and the Board of Appeals further aver that appellants' argument is unpreserved. We address each contention in turn.

A. Appellants are Not Estopped From Arguing Against the "Specially Aggrieved" Status Established in Bryniarski:

H & R Rock argues that appellants are estopped from arguing that the "specially aggrieved" status established in *Bryniarski* is inapplicable because appellants cited the *Bryniarski* standard with approval in prior proceedings, and previous tribunals in this action have relied on the parties' representations that *Bryniarski* is the applicable law. We disagree. In our view, the doctrine of judicial estoppel or the doctrine against inconsistent positions does not bar the appellants from arguing against the applicability of the "special aggrieved" standard established in *Bryniarski* here.

The doctrine of judicial estoppel exists "to protect the integrity of the judicial system from one party who is attempting to gain an unfair advantage over another party by manipulating the court system." *Dashiell v. Meeks*, 396 Md. 149, 171 (2006). Indeed, if litigants "'were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all.'" *Kramer v. Globe Brewing Co.*, 175 Md. 461, 469 (1938) (quoting Melville M. Bigelow, *The Law of Estoppel*, 783 (Little, Brown & Co. 6th ed. 1913)).

The doctrine of judicial estoppel, however, is inapplicable here.

> First, judicial estoppel only applies to a position taken in a *subsequent* action that is inconsistent with a position taken in a *previous* action. *See Dashiell v. Meeks*, 396 Md. 149, 170, 913 A.2d 10 (2006). Second, "'the party sought to be estopped must assert a position inconsistent with that taken in prior litigation and *the position must be one of fact rather than law or legal theory.*'" *Vogel v. Touhey*, 151 Md. App. 682, 711, 828 A.2d 268 (emphasis added) (quoting *Sedlack v. Braswell Servs. Grp., Inc.*, 134 F.3d 219, 224 (4th Cir. 1998)), *cert. denied*, 378 Md. 617, 837 A.2d 927 (2003).

Thomas v. Bozick, 217 Md. App. 332, 341 n.5 (2014) (emphases in original). Third, "the party who is maintaining the inconsistent positions must have intentionally misled the court in order to gain an unfair advantage." *Dashiell*, *supra*, 396 Md. at 171.

In the present action, H & R Rock alleges that appellants should be estopped from arguing against the *Bryniarski* standard because they have previously argued in favor of this standard in prior proceedings. Here, however, the doctrine of judicial estoppel is

inapplicable because none of the required elements are satisfied. First, there is no previous action from which appellants could have taken an inconsistent position. Indeed, appellants may have neglected to argue against the *Bryniarski* standard in previous proceedings. Prior proceedings before the Board of Appeals or the circuit court, however, are not prior actions. Further, the alleged inconsistency is not one of fact, but rather, it is an alternative legal theory upon which their position is based. Finally, there is no evidence that appellants have intended to deceive the court.[4]

The doctrine of judicial estoppel exists to remedy a unique problem when a litigant takes inconsistent factual positions to deceive multiple tribunals into favorable judgments. Principles of judicial estoppel are not offended where, as here, appellants have simply altered their legal position in the midst of litigation. The elements required to apply judicial estoppel are not satisfied in this proceeding. We, therefore, hold that appellants are not barred from arguing against the *Bryniarski* standard on the basis of judicial estoppel.

B. Appellants' Argument Does Not Fail for Lack of Preservation

The Board of Appeals and H & R Rock further maintain that appellants' argument concerning the inapplicability of the standard articulated in *Bryniarski* is not preserved for appellate review. The appellants' argue that because we review the Board of Appeals' decision *de novo*, we must necessarily determine the applicable law in our analysis.

[4] To be sure, we do not understand how appellants stand to benefit by waiting to argue against the *Bryniarski* standard until this appeal. Indeed, appellants could have argued the alternative theories; that *Bryniarski* is inapplicable, and if *Bryniarski* is applicable they are otherwise specially aggrieved.

Accordingly, appellants aver that argument regarding the applicable law is entirely appropriate in light of the fact that we review the legal conclusions drawn by the Board of Appeals *de novo*. We agree with appellants, and therefore, consider whether the Board of Appeal applied the correct legal standard.

Maryland Rule 8-131 governs the scope of appellate review, and provides:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Md. Rule 8-131(a). Our preservation requirement is equally applicable to administrative appeals. *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 15 (2010) ("[A] 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." (internal quotations omitted)). We begin by dissecting the language of Md. Rule 8-131, and observing that in order to eligible for appellate review, a question must generally be "raised" or "decided" by the tribunal below. Md. Rule 8-131(a). Although, appellants claim that "[t]he question of whether the BOA applied the wrong standard is not a new issue," our review of the record reveals that at no time did appellants squarely *raise* this issue in the previous proceedings.[5] The question, then, is whether this issue was "decided," Md. Rule 8-131(a), or "encompassed

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[5] To the contrary, in their supplement to their petition to appeal the hearing examiner's decision to the Board of Appeals, the appellants acknowledge that "[t]he leading case on the meaning of aggrievement and standing to appeal is *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 230 A.2d 289 (1967)."

in the final decision of the administrative agency" so that we may engage in meaningful appellate review. *Shea*, *supra*, 415 Md. at 15.

Assuming, *arguendo*, that this issue was neither raised nor decided in the prior proceedings, we are vested with discretion to consider some issues that are otherwise unpreserved. *Richardson v. Boozer*, 209 Md. App. 1, 22 (2012) ("Appellate review of issues not previously raised is discretionary."); Md. Rule 8-131(a) ("*Ordinarily*, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided . . ." (emphasis added)). Indeed, we generally require preservation "so that the trial court has an opportunity to rule upon the issues presented" in an effort to "ensure fairness for all parties in a case." *Wajer v. Balt. Gas & Elec. Co.*, 157 Md. App. 228, 236 (2004) (internal quotations omitted). Further, we are justified in considering an otherwise unpreserved argument when our holding "will promote the orderly administration of justice" and doing so will not "work unfair prejudice to either of the parties." *Jones v. State*, 379 Md. 704, 714-15 (2004). One of the paramount reasons we require preservation is to ensure that the factual record is sufficiently developed to promote an informed legal opinion.

In the action *sub judice*, the applicability of *Bryniarski* as the relevant legal standard was a necessary conclusion that must have been reached by the Board of Appeals in order to have reached their ultimate finding that appellants lacked standing. Accordingly, the applicability of *Bryniarski* was decided by the Board of Appeals and is encompassed, if only implicitly, in its final decision. Furthermore, to consider the merits of H & R Rock's cross-appeal as to whether appellants are "specially aggrieved" under *Bryniarski*, without

considering whether *Bryniarski* sets forth the applicable law would be manifestly unjust. Additionally, here there is no danger that we will render a decision in the absence of an adequately developed factual record because the question of the applicable law is a purely legal question which we review *de novo*. Accordingly, we now turn to the applicable law in this proceeding.

II. The Board of Appeals did not Err in Applying *Bryniarski*

The Board of Appeals did not err in applying the standard set forth in *Bryniarski* to determine appellants' right to relief under the Howard County zoning ordinances. Standing is often considered to be "one of the most amorphous (concepts) in the entire domain of public law." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).[6] Much of this confusion stems from the tendency of our jurisprudence to conflate issues of standing with a number of other justiciability concerns. *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 502 (2014). Indeed, courts in Maryland have often "group[ed] the traditionally distinct concepts of standing and cause of action into a single analytical construct, labeled as 'standing,' to determine whether the plaintiff has shown that he or she is entitled to invoke the judicial process in a particular instance." *Id.* (internal quotations omitted). The issue

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[6] More critically, the doctrine of standing has been condemned as "permeated with sophistry," 4 K. Davis, *Administrative Law Treatise* § 24:35, at 342 (2d ed. 1983), "a word game played by secret rules," *Flast*, *supra*, 392 U.S. at 129 (Harlan, J., dissenting), and a "largely meaningless 'litany' recited before 'the Court . . . chooses up sides and decides the case.'" William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988) (quoting Abram Chayes, *Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 22-23 (1982)).

presented in the instant case requires us to untangle these distinct concepts; namely, whether a litigant has presented a justiciable case or controversy so as to avail themselves of the judicial process, whether a particular statutory scheme grants a litigant a right to appear before an administrative agency, and whether the particular authority that litigant invokes affords him an avenue for relief. Here, in finding that appellants lacked standing, the Board of Appeals was merely observing that appellants had no cause of action under the Howard County zoning ordinances.

A. Appellants Must Be a "Person Specially Aggrieved"

Appellants argue that it was improper for the Board of Appeals to determine whether appellants were specially aggrieved under the standard articulated in *Bryniarski* because Howard County Code ("HCC") Title 2, Administrative Procedure, Subtitle 2 § 2.206 permits "[a]n individual" to appear and argue before the Board of Appeals without any further limiting language. HCC § 2.206. Accordingly, appellants seek to distinguish *Bryniarski* on the grounds that the underlying statutory language is less restrictive than the code section at issue in *Bryniarski*. In lieu of *Bryniarski*, appellants would have us determine standing in accordance with the policy in favor of informal proceedings and community engagement in administrative hearings. The Court of Appeals articulated this policy in *Sugerloaf Citizens' Ass'n v. Dept. of Env't*, 344 Md. 271, 286 (1996) ("The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative

proceeding rather easily.”). In light of “a reasonable regulation specifying criteria for administrative standing,” we are unpersuaded by appellants’ argument. *Id.*

The Board of Appeals is created under the authority of Md. Code (2013, 2013 Repl. Vol.), § 10-305 of the Local Government Article (“LG”) which permits a county to establish a county board of appeals. Under that authority, a county board of appeals “may have original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government.” LG § 10-305(b). While not expressly granted in the statute, the Court of Appeals has held that a county has the “ability to set reasonable conditions precedent to access to its Board of Appeals is an exercise of its Home Rule.” *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 604 (2014).

Accordingly, the Howard County Charter establishes the Board of Appeals and vests in it the authority to decide certain matters “originally or on appeal or review,” and to “adopt and amend rules of practice governing its proceedings.” Article V, Howard County Charter, § 501(b), (c). Indeed, HCC § 2.206 permits “[a]n individual wishing to appeal an administrative decision of a County Agency” to file an appeal. HCC § 2.206. Without any further “statute or . . . reasonable regulation specifying criteria for administrative standing” the HCC permits the broad administrative standing identified in *Sugerloaf Citizens’ Ass’n*, *supra*, 344 Md. at 286. Standing, then, as it relates to who may appear before the Board of Appeals, and be afforded party status, is awarded liberally.

Standing to appear before the Board of Appeals, however, is distinguishable from the substantive questions of standing as it relates to whether a litigant has a right to relief under

the applicable statutory regime. Separate from, but consistent with, the Board of Appeals' authority to decide administrative appeals, Title 16 of the HCC sets forth the applicable zoning provisions for Howard County. Under that statutory scheme, a planning board is vested with decision making authority with respect to zoning matters. HCC § 16.900(j)(2)(ii). Under the county zoning ordinances, "[a]ny person specially aggrieved by any decision of the Planning Board and a party to the proceeding before it may" appeal the decision to the Board of Appeals." HCC § 16.900(j)(2)(iii).

Appellants argue that it was inappropriate to apply HCC § 16.900(j)(2)(iii) because the Board of Appeals' decision was not an appeal from the Planning Board's decision. Rather, appellants assert that because they were not afforded an adequate opportunity to argue against the Planning Board's decision, and the Board of Appeals received evidence, the Board of Appeals' function was not truly appellate. In a footnote, appellants argue that the proceeding before the planning board was a meeting rather than a contested case. As such, appellants claim there was no decision to appeal from in the first instance, and, therefore, the Board of Appeals erred in finding that the appellants lacked standing to contest the results of an informal meeting. Stated differently, appellants argue that the Board of Appeals was exercising original, rather than appellate, jurisdiction when it denied their challenge to the revised SDP. We are unpersuaded.

First, the fact that the proceedings before the Board of Appeals was styled as *AMHA LCC, et al. v. Howard County Planning Board and H & R Rock, LLC*, is telling in that Board of Appeals was reviewing, rather than considering in the first instance, the decision rendered

against AMHA before the Planning Board. More importantly, however, AMHA's proposed construction of these authorities would render HCC § 16.900(j)(2)(iii) superfluous if those dissatisfied with the Planning Board's decision could invoke the original jurisdiction of the Board of Appeals notwithstanding the clear textual limitations outlined under the Planning Board's regulations.

We are cognizant that in Howard County, the Board of Appeals is not limited, like we are, to the factual record created before some inferior tribunal. Indeed, the Board of Appeals is often free to receive evidence, and consider new legal theories that were not presented in prior proceedings. We are further aware that because of the format of the Planning Board's hearing, which was designed to facilitate community engagement (that is encouraged pursuant to the policy articulated in *Sugarloaf)*, appellants were not afforded the process that they otherwise would have if their rights were more directly affected. *See Sugerloaf Citizens' Ass'n*, *supra*, 344 Md. at 286. These distinctions, however, do not provide appellants a means to ignore the clearly articulated intent of the Howard County Council to limit the class of persons who may challenge the decision of the planning board to those who are "specially aggrieved."

Pursuant to the Howard County Code, § 2.206 is a rule articulating the Board of Appeals' jurisdiction, whereas HCC § 16.900(j)(2)(iii) identifies a class of persons who may have a remedy for decisions rendered by the Planning Board. Contrary to appellants' argument, these rules are not exclusive avenues for seeking administrative decisions. Rather, these sections are applied simultaneously. The zoning regulation in HCC § 16.900(j)(2)(iii),

then, operates as "a statute or a reasonable regulation specifying criteria for administrative standing." *Sugarloaf Citizens' Ass'n*, *supra*, 344 Md. at 286.

Accordingly, the scope of individuals who may be afforded party status before the Board of Appeals is broader than the scope of individuals who will be entitled to relief under the county's zoning ordinances. Compliance with HCC § 2.206, then, is a necessary, but not always a sufficient, condition precedent to attaining relief from the Board of Appeals. We reject the appellants' attempt to ignore the express purpose of HCC § 16.900(j)(2)(iii) by arguing that their claim is somehow collateral to the Planning Board's decision. We, therefore, hold that the Board of Appeals did not err in requiring that appellants fall within a class of persons who are "specially aggrieved" pursuant to HCC § 16.900(j)(2)(iii).

B. Construing the Term "Person Specially Aggrieved"

Appellants argue, and we agree, that the standing analysis set forth in *Bryniarski*, "refers only to judicial review, and is not *per se* applicable to [Board of Appeals] hearings and decision making." Indeed, in *Bryniarski* the Court of Appeals was construing the terms of a statute that enabled a "person aggrieved" to appeal the decision of a board of zoning appeals to the circuit court. *Bryniarski*, *supra*, 247 Md. at 144. Similarly, the Court of Appeals in *Ray* also sought to determine who may appear before the circuit court to challenge a decision made by an administrative agency tasked with making zoning decisions. *Ray*, *supra*, 430 Md. at 80-81. Accordingly, this action is distinguishable from *Bryniarski* and *Ray*, because those cases involved questions of statutory construction with respect to a state statute permitting judicial review of an agency decision. In contrast, this case presents a

question of statutory construction with respect to a party's right to relief under a county's zoning ordinances.

The question, then, is whether it was error for the Board of Appeal to use the same standard articulated in *Bryniarski* when construing the term "[a]ny person specially aggrieved" as it appears in HCC § 16.900 (j)(2)(iii). Generally, we afford "'a great deal of deference . . . to an administrative agency's interpretation of its own regulation.'" *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 297-98 (2015) (quoting *Crofton Convalescent Ctr., Inc. v. Dep't of Health & Mental Hygiene, Nursing Home Appeal Bd.*, 413 Md. 201, 215 (2010)). Despite the deference we afford to an agency's construction of its own regulation, "'it is always within our prerogative to determine whether an agency's conclusions of law are correct. . . . Accordingly, we determine whether the [agency]'s conclusions are plainly erroneous or inconsistent with the regulation.'" *Id.* at 215 (internal quotations omitted).

Appellants argue forcefully, and we agree, that the Board of Appeals was not bound to construe the term "person specially aggrieved" in accordance with the Court of Appeals' holdings in *Bryniarski*, and *Ray*. Indeed, the Board of Appeals could have promulgated a different standard for defining special aggrievement, or the Board of Appeals could have construed its standard differently so long the construction was reasonable enough to survive our *de novo* review of its legal conclusions. Appellants, however, have not convinced us that the Board of Appeals erred in relying on the rationale of the Court of Appeals' holdings construing similar standards of aggrievement when construing its own special aggrievement standard.

Indeed, the HCC seemingly attempts to articulate a standard for special aggrievement by providing, "[f]or purposes of this section the term 'any person specially aggrieved' includes but is not limited to [a class of individuals that] meet the criteria for aggrievement set forth in subsection 16.103(b) of this title." Unfortunately, subsection 16.103(b) offers us no guidance because its provisions are wholly unrelated to whether an individual is specially aggrieved.[7] Without further textual guidance from the HCC, the Board of Appeals looked to *Bryniarski* and *Ray* to define special aggrievement. Notably, *Bryniarski* and *Ray* only involved a standard that required "a person aggrieved." *Bryniarski*, *supra*, 230 Md. at 143; *Ray*, *supra*, 430 Md. at 80. Here, however, the HCC includes the additional limiting language that participants must be "*specially* aggrieved." HCC § 16.900(j)(2)(iii) (emphasis added). Further, HCC § 16.900(j)(2)(iii) was originally enacted, and later revised, subsequent to the Court of Appeals' holding in *Bryniarski*. Accordingly, it may have been within the purpose of HCC § 16.900(j)(2)(iii) to adopt the standard set forth in *Bryniarski*. We, therefore, hold that the Board of Appeals reliance on *Bryniarski* and *Ray*, when construing the term "specially aggrieved" as it appears in HCC § 16.900(j)(2)(iii), although not necessarily required, was not error.

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[7] The Board of Appeals avers that this broken statutory link is a "legislative mystery" perhaps attributable a typographical error. In any event, we observe that the HCC offers us no further guidance on how to construe the term specially aggrieved.

III. Appellants Do Not Have Standing Under *Bryniarski*

A. Standard of Review

> In judicial review of zoning matters . . . the correct test to be applied is whether the issue before the administrative body is fairly debatable, that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions. . . . For its conclusion to be fairly debatable, the administrative agency overseeing the variance decision must have substantial evidence on the record supporting its decision.

White v. North, 356 Md. 31, 44 (1999) (quotations and citations omitted).

Indeed, we will not hesitate to "correct illegal actions and those which are arbitrary and unreasonable . . . , but [we] will not substitute [our] own independent examination of or [our] own judgment on the facts for those of the agency to which the carrying of out of state policy has been delegated." *Snowden v. City of Balt.*, 224 Md. 443, 445 (1961). For this reason, we give no deference to the judgment of the circuit court, though we apply the same standard of review. *Cnty. Council of Prince George's Cnty v. Zimmer Dev. Co.*, 444 Md. 490, 553 (2015). Rather, we look directly to the Howard County Board of Appeals, "and evaluate the decision of the agency." *Id.* In so doing, we will "consider often the expertise of an administrative agency tasked with implementing statutes when determining whether its decision was premised on an erroneous conclusion of law. *Id.* (citing *People's Counsel for Balt. Cnty. v. Surina* 400 Md. 662, 683 (2007)). Although we generally defer to an agency's factual findings, "we do not afford deference to the legal conclusions of the agency." *Id.* The question whether AMHA has standing to challenge the Board of Appeal's

decision is a mixed question of law and fact. Accordingly, we review *de novo* the Board of Appeals' legal conclusions regarding the meaning of "specially aggrieved," but we defer to the factual findings made by the agency that inform the analysis in this case.

B. Appellees Are Not Specially Aggrieved

In H & R Rock's cross-appeal, they seek to affirm the Board of Appeals' decision that AMHA, British American, and the HCIBA lack standing to argue against their revised SDP. In order to have standing--that is in this context, a private right to relief to challenge a decision of the planning board before the Board of Appeals--a litigant must be a "person specially aggrieved." HCC § 16.911(j)(2)(iii). Generally, "a person aggrieved by the decision of a board of zoning appeals is one whose personal or property rights are adversely affected by the decision of the board." *Bryniarski*, *supra*, 247 Md. at 144. Furthermore, not only has the term "person aggrieved" been construed to require that the challenged decision affect one's personal or property rights, the individual must also be aggrieved "personally and specially affected in a way different from that suffered by the public generally." *Bryniarski*, *supra*, 247 Md. at 144.

The Court of Appeals has drawn parallels between zoning ordinances that require special aggrievement as a condition precedent to private enforcement and the substantive law of public nuisance. *Ray*, *supra*, 430 Md. at 82. Indeed, the violation of zoning ordinances, similar to the law of public nuisance, was traditionally "an offense against the state and, accordingly, was subject to abatement on motion of the proper governmental agency, an individual could not maintain an action for a public nuisance unless he suffered

some special damage from the public nuisance." *Id.* (emphasis omitted) (quoting Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 63:14 (2012) ("The strict standard of [special] aggrievement for standing to enforce a zoning ordinance is based in early nuisance law which antedated zoning.")).

Although we employ a flexible factorial standard for determining whether a protestant is specially or generally aggrieved, the Court of Appeals has articulated a number of analytical tools to aid us in our analysis. First, we recognize that a protestant's proximity to the subject of the zoning dispute "is the most important factor to be considered." *Ray*, *supra*, 430 Md. at 82-83. A protestant is said to be *prima facie* aggrieved "when his proximity makes him an adjoining, confronting, or nearby property owner." *Ray*, *supra*, 430 Md. at 85. Generally, a property owner who is sufficiently "adjoining, confronting, or nearby" is within 200 feet of the offending property.[8] *Id.* at 91. Once a protestant is considered to be *prima facie* aggrieved, "some typical allegations of harm acquire legal

[8] In a comprehensive assessment, the Court of Appeals in *Ray* observed that the universe of individuals who are not *prima facie* aggrieved, but yet may still be specially aggrieved (*i.e.*, "'almost' *prima facie* aggrieved") is typically "found applicable only with respect to protestants who lived 200 to 1000 feet away from the subject property." *Ray*, *supra*, 430 Md. at 91. From *Ray*, we infer generally that only property owners within a 200 foot radius of the subject property can qualify as *prima facie* aggrieved. This is so because the adverb "almost" necessarily requires exclusivity from the subject it relates to. Stated differently, one cannot be both "'almost' *prima facie* aggrieved" and "*prima facie* aggrieved." *Id.* The Court of Appeals emphasized, however, as do we, that "there is no bright-line rule for who qualifies as 'almost' *prima facie* aggrieved." *Id.* Rather, these measurements, as well as our entire *prima facie* aggrievement analysis are merely analytical tools that guide our inquiry as to whether a particular protestant is aggrieved in a manner distinguishable from the community at-large.

significance that would otherwise be discounted." *Id.* at 83. Beyond 200 feet, a litigant must offer additional "plus factors" in order to show that they are aggrieved. *Id.* at 85. Accordingly, there is a positive correlation between the distance in proximity to the alleged source of aggrievement and the quality and quantities of proof required to show special aggrievement.

Prima facie, Latin for 'on its face,' "refers to 'the establishment of a legally mandatory, rebuttable presumption.'" *Mejia v. State*, 328 Md. 522, 533 (1992) (quoting *Stanley v. State*, 313 Md. 50, 60 (1988)). Critically, it means that the proponent has satisfied their burden of production permitting, but not requiring, a decision in their favor. *Id.* Accordingly, property owners within 200 feet of the subject property are generally cloaked with a rebuttable presumption that they are specially aggrieved by a zoning violation. Of course, however, this presumption can be overcome if an opposing party presents sufficient evidence to rebut that presumption.

Here, we observe that AMHA is located approximately 324.35 feet away from the subject property. Notwithstanding that the Court of Appeals' decision in *Ray* may suggest that AMHA is not *prima facie* aggrieved, the Board of Appeals determined that "AMHA is a nearby property owner and is *prima facie* aggrieved." We need not disturb this finding on appeal, however, because this finding subjected H & R Rock to the more rigorous evidentiary hurdle of rebutting the presumption in favor of AMHA, rather than merely challenging the legal sufficiently of the evidence AMHA presented to show special aggrievement. Accordingly, we now determine whether there is substantial evidence to

support the Board of Appeals' conclusion that AMHA did not satisfy its burden of persuasion and that H & R Rock successfully rebutted the presumption that AMHA was specially aggrieved.

In rendering its decision, the Board of Appeals considered the testimony of Amran Pasha, who testified in support of AMHA. Pasha claimed that the development would diminish his property by increasing the supply of commercial land, and would result in increased traffic. In further support of AMHA's position, Burman, a planning consultant and commercial real estate agent, testified that the proposed development would specially burden AMHA by increasing traffic near AMHA's property, and it would leave AMHA's customers competing for green lights on Minstrel Way.

In support of H & R Rock's position, Rosato, a certified commercial real estate appraiser, testified that the development would not likely affect the value of AMHA's property. To the contrary, Rosato opined that if anything, the increased traffic generated by the development on the property would have no effect or possibly increase the value of AMHA's property. Additionally, Cornelius, a certified professional traffic operations engineer, testified that the new development would not likely result in a noticeable increase in traffic. Further, Cornelius claimed that if the development did result in increased traffic, the traffic would not frustrate access to AMHA's property, and the intersection at Minstrel Way and Snowden River Parkway would still operate at an acceptable level.

Based on this testimony, the Board of Appeals concluded that H & R Rock had rebutted the presumption in favor of special aggrievement. In so doing, the Board of

Appeals rejected the testimony of Pasha and Burman, and accepted the testimony of Rosato and Cornelius. Indeed, the Board of Appeals, acting as fact-finder, was "free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony." *Prior v. State*, 195 Md. App. 311, 329 (2010). We do not sit on appeal to determine whether we concur with the weight and credibility afforded to this evidence by the Board of Appeals. Rather, our role is to determine whether the Board of Appeals' findings were reasonable and supported by substantial evidence. *Parham v. Dept. of Labor, Licensing & Regulation*, 189 Md. App. 604, 613 (2009) ("'In the absence of fraud, our inquiry is whether the findings are supported by substantial evidence and are reasonable, not whether they are right.'" (quoting *Dept. of Econ. & Emp't Dev. v. Taylor*, 108 Md. App. 250, 261-62 (1996)).

AMHA's claim that it is specially aggrieved is further diminished by the fact that one of its two arguments for aggrievement is that its property value would be reduced "based on increasing the supply of available commercial land facing Snowden River Parkway." Currently, an Exxon service station operates on AMHA's land. Indeed, the Board of Appeals was justifiably unpersuaded by AMHA's attempt to limit available commercial space. Further, the Court of Appeals has specifically disavowed attempts to use zoning ordinances as a means to limit competition.[9] *Bryniarski*, *supra*, 247 Md. at 145 ("A person whose sole

[9] Testimony considered by the Planning Board and the Board of Appeals further reflects that it is the intention that at least some of the retail space under the revised SDP will be occupied by a 7-11 convenience store. It would not have been unreasonable for the (continued...)

reason for objecting to the board's action is prevent competition with his established business is not a person aggrieved."); *Kreatchman v. Ramsberg*, 224 Md. 209, 220 (1961) ("It was no part of the purpose of the zoning regulations to protect business from competition.").

With AMHA's only other legitimate claim to aggrievement being the potential for increased traffic, the Board of Appeals was free to credit the testimony of Cornelius as more credible than the testimony of Burman. Indeed, Cornelius described the state of the traffic patterns before and after the proposed development. Cornelius further hypothesized that the development would generate approximately 100 additional trips through the intersection during peak hours, which was found to be a *de minimis* increase over the 4,000 peak hour trips previously generated. On the other hand, Burman speculated that the development would result in an unduly burdensome increase in traffic, and he was unable to offer empirical evidence to rebut Cornelius' testimony.

Likewise, the Board of Appeals did not err in finding that British American was not specially aggrieved. British American is located more than 1,300 feet away from the SDP. A representative from British American claimed that when he stands on the corner of his property he can see the hotel located on the SDP. Further, there was testimony that the SDP may violate a covenant that binds both the proposed development and British American. The Board of Appeals found that due to their proximity, British American was not *prima*

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[9] (...continued)
Board of Appeals to have construed AMHA's claim that its property value would be diminished as an argument against competition with the anticipated 7-11.

facie aggrieved. Further, the Board of Appeals observed that the "sliver" of the hotel that could be seen from British American's property was not a part of the revisions to the SDP. Finally, the Board of Appeals observed that if British American was entitled to remedy for the breach of a covenant, that would, more appropriately, be instituted in a separate proceeding to enforce the covenant rather than an attempt to enforce zoning ordinances. Accordingly, the Board of Appeals was unpersuaded by British American's argument that a potential covenant made them specially aggrieved. Similarly, the Board of Appeals found that HCIBA produced no evidence showing that they were specially aggrieved by the development. We agree.

Based on the evidence and the testimony presented before the Board of Appeals, we hold that the Board of Appeals' finding that neither AMHA, British American, nor the HCIBA were specially aggrieved was supported by substantial evidence. Accordingly, we hold that the Board of Appeals did not err in dismissing appellants' petition for appeal.

IV. Conclusion

For the reasons set forth herein, we affirm the decision of the Board of Appeals, and we affirm the judgment of the circuit court entered November 17, 2014. We hold that the question as to whether it was proper for the Board of Appeals to draw from the Court of Appeals' holding in *Bryniarski*, when construing the term "any person specially aggrieved" as it appears in the HCC, is properly before us on appellate review. Additionally, we hold that it was appropriate for the Board of Appeals to rely on the Court of Appeals' holding in *Bryniarski*, and *Ray*. Lastly, we hold that there was substantial evidence to support the

Board of Appeals' decision that appellants were not specially aggrieved, and therefore, had no standing to challenge the Planning Board's decision to approve the SDP. In light of our affirming the analysis of the Board of Appeals, we do not reach the remaining question presented by appellants. We, therefore, affirm the judgment of the circuit court entered November 17, 2014.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY, ENTERED NOVEMBER 17, 2014, AFFIRMED. APPELLANTS TO PAY COSTS.