

Circuit Court for Montgomery County  
Case Nos. 00000420963V  
00000428577V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2413 & 811

September Term, 2016 & September Term, 2017

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ROBERT MILLSTONE et al.

v.

MONTGOMERY COUNTY BOARD OF  
APPEALS et al.

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Eyler, Deborah S.,\*  
Friedman,  
Moylan, Charles E., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Friedman, J.

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Filed: October 4, 2018

\*Deborah S. Eyler, J., participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a specially assigned member of this Court.

\*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.

Robert Millstone and various entities associated with him assert that the purchase of scrap metals by weight is no longer permitted in Montgomery County unless the business has been “grandfathered” by the county. To enforce his view of the law—and to keep a potential competitor out—Millstone has engaged in multifaceted litigation. Two of those cases, both against the Montgomery County Board of Appeals, are currently on appeal to this Court. After oral argument in Case No. 2413 (Sept. Term 2016), the Court, on its own initiative and pursuant to Rule 8-521(b), advanced Case No. 811 (Sept. Term 2017) on to the same docket and, pursuant to Rule 8-523(b), directed that it be submitted on brief. On January 16, 2018, the Court consolidated the two cases and for the Court’s convenience, we now dispose of both cases in a single Opinion. As will be discussed below, in both cases, insurmountable procedural hurdles will prevent us from reaching formal resolution of Millstone’s central question of whether junkyards are permitted under the current Montgomery County Code.<sup>1</sup>

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<sup>1</sup> While these matters can only be disposed of on procedural grounds, we note that the Court is not persuaded by the merits of Millstone’s substantive arguments either:

*First*, Millstone contends that the deletion of the use “junkyard” from the county zoning code means that junkyards—and their characteristic function of buying scrap metal by weight—are no longer permitted in the county. We reject that simplistic reading. Rather, what happened in 1996 was the deletion of the outdated definition of junkyard and replacement with more modern and broader definitions that eventually became what appears today: “recycling collection and processing.” (The 1996 amendments replaced “junkyard” with “automobile recycling facility” and “recycling facility.” MONT. COUNTY, MD., ORDINANCE NO. 13-68 (1996). These definitions remained until they were replaced in 2014 with “recycling collection and processing,” located today at MONT. COUNTY ZONING CODE, §59-3.6.9.B.). We see nothing substantive in the old definition that isn’t included in the new. Moreover, we observe that the new definition, by providing restrictions on how long materials may be kept at the facility, adds a newer, more ecologically-conscious aspect. Finally, we reject Millstone’s suggestion that the omission

**I. CASE NO. 2413**

**BACKGROUND**

Rockville Metals, LLC applied to the Montgomery County Department of Permitting Services (“Permitting Services”) to change the use of the property located at 801 East Gude Drive in Rockville from “vehicle service – storage” to “recycling collection and processing.” Millstone, a competitor to Rockville Metals, objected to the issuance of the use and occupancy permit. Millstone then appealed to the Board of Zoning Appeals for Montgomery County, asserting that a use and occupancy permit should not have been issued because Rockville Metals intended to purchase scrap metals by weight at its facility and thus would be operating outside of the permitted scope of a recycling collection and processing occupancy.

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of the word “purchase” from the definition of “recycling collection and processing” means that the purchase of scrap metal is necessarily prohibited because the Montgomery County Code specifically rejects such a reading. MONT. COUNTY ZONING CODE, §59-3.1.2.C (providing that lists of included uses in use definitions “are to be considered typical or example uses, and not all-inclusive.”). Thus, were we to reach it, we would hold that the Montgomery County zoning ordinance does not prohibit junkyards.

*Second*, Millstone argues that the State regulations of “junk dealer” at Md. Code, Business Regulation (“BR”) Article, §17-1001(f) and “junkyard” at Md. Code, Transportation (“TR”) Article, §8-801(e) together preempt the county’s power to adopt zoning for junkyards. This argument misses the mark. Local zoning generally is not preempted by state regulation. *Cty. Council of Prince George’s Cty. v. Chaney Enterprises Ltd. P’ship*, 454 Md. 514, 540-45 (2017); *Maryland Reclamation Assocs., Inc. v. Harford Cty.*, 414 Md. 1, 38 (2010) (noting that “the Express Powers Act clearly contemplates zoning as an activity that exists in a sphere separate from the operations of State level regulation.”). And we see no intent that it should here. Thus, if we were to reach this issue, we would hold that state regulation of junkyards does not preempt county zoning authority.

The Board of Appeals granted summary disposition in Rockville Metals’s favor, finding that the company “applied for a use and occupancy permit for a recycling collection and processing occupancy and that such occupancy is allowed in the property’s zone.” The Board found that the question of “how the property may be used *following* the issuance of [the] use and occupancy permit ... [was] not ... before the Board.” (emphasis added). Millstone appealed to the Circuit Court for Montgomery County, which affirmed the grant of the permit. Millstone then timely noted this appeal, which comes before the Court as Case No. 2413.

### **DISCUSSION**

In reviewing a decision of an administrative agency:

We look through the circuit court’s decision, although applying the same standards of review, and evaluate the decision of the agency. In other words, we review the agency’s decision, not the circuit court’s decision. We are limited to evaluating whether there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determining whether the administrative decision is premised upon an erroneous conclusion of law.

*Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 210 (2018) (cleaned up), *cert. denied sub nom. Paul v. Brandywine Senior Living*, No. 139, 2018 WL 3730251 (Md. July 31, 2018). Our standard of review also acknowledges the Board’s expertise on zoning issues and its greater familiarity with the law it was created to administer, the Montgomery County Zoning Code. *See Carven v. State Ret. & Pension Sys. of Md.*, 416 Md. 389, 406 (2010). Here, however, because the Board of Appeals granted summary disposition, a process much akin to summary judgment, we will review its determination

as we would a grant of summary judgment, without significant deference to the agency decision.

Millstone challenges the Board's grant of summary disposition arguing that Rockville Metals intends to use the property to purchase scrap metal by weight, an activity that Millstone contends is prohibited.<sup>2</sup> We don't reach the merits of that argument, however, because it misunderstands the nature of the administrative decision and our review of that decision. In granting Rockville Metals's use and occupancy permit, Permitting Services relied on just three predicate facts: (1) that Rockville Metals's property is zoned for heavy industrial uses; (2) that Rockville Metals sought to use the property for recycling collection and processing; and (3) that recycling collection and processing is a permitted use within the heavy industrial zone. On the basis of these three predicate facts, Permitting Services issued the permit. At the Board, Millstone did not challenge any of these three predicate facts. Rather, Millstone argued that despite Rockville Metals saying that it wanted to use the property for recycling collection and processing, it really planned to use the property for the purchase of scrap metal by weight. The Board rejected Millstone's argument for two interrelated reasons: *first*, that it did not create a material

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<sup>2</sup> While this is the focal point of Millstone's argument, we recognize that Millstone also made a late challenge that Permitting Services failed to comply with § 59-7.4.2.D (currently codified at MONT. COUNTY CODE § 8-28(h)), which requires certain "necessary findings" by Permitting Services before it may issue a use and occupancy permit. This contention was, however, not made to the Board and is thus not preserved for our review. Regardless, a cursory review of the file makes clear that even if Permitting Services didn't explicitly label anything as "necessary findings," there was more than sufficient evidence in the record on which to have made those necessary findings.

dispute about the three predicate facts (and thus wasn't relevant to the issuance of the permit); and *second*, that it concerned allegations about post-issuance conduct, which could only be raised later, in an enforcement proceeding. We agree. Millstone's argument, even if correct, doesn't preclude the issuance of the use and occupancy permit. We, therefore, affirm.

## **II. CASE NO. 811**

### **BACKGROUND**

Later, Millstone sought to compel the Department of Permitting Services to institute a zoning enforcement action against Rockville Metals. Millstone's theory in this action was the same as before: that Rockville Metals was purchasing scrap metal by weight, which, according to Millstone, was not permitted. Permitting Services disagreed with Millstone's theory and refused to prosecute. The Board of Appeals affirmed Permitting Services' refusal, finding that it lacked subject matter jurisdiction to consider the appeal. The Circuit Court for Montgomery County affirmed and Millstone brought a timely appeal to this Court, which has been designated as Case No. 811.

### **DISCUSSION**

As described above, we "look through" the circuit court decision to evaluate the Board's decision. *Brandywine Senior Living at Potomac LLC*, 237 Md. App. at 210. Here, the decision we are reviewing is the Board's legal conclusion that it lacked subject matter jurisdiction to consider Millstone's appeal. We review this decision without significant deference. *People's Ins. Counsel Div. v. Allstate Ins. Co.*, 424 Md. 443, 457 (2012)

(“... although an agency’s interpretation and application of a statute that it administers ordinarily is given considerable weight by reviewing courts, the court must make the ultimate legal determination”).

As in Case No. 2413, the Board’s affirmance of Permitting Services’ decision was solely on a procedural ground. The choice by Permitting Services to institute a prosecution or not, is not an appealable decision. The Montgomery County Code is crystal clear on the topic: “[A] person may not appeal to the Board of Appeals a decision by an enforcement officer to issue or decline to issue a notice of violation.” MONT. COUNTY CODE, §1-18(f)(4); *see also* §2-112 (listing topics over which Board of Appeals has jurisdiction). Therefore, the Board of Appeals did not err in dismissing Millstone’s appeal. We affirm.

**JUDGMENT OF THE CIRCUIT  
COURT FOR MONTGOMERY  
COUNTY IN CASE NO. 2413  
AFFIRMED. COSTS ASSESSED TO  
APPELLANTS.**

**JUDGMENT OF THE CIRCUIT  
COURT FOR MONTGOMERY  
COUNTY IN CASE NO. 811  
AFFIRMED. COSTS ASSESSED TO  
APPELLANTS.**