UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2497

September Term, 2013

FRIENDS OF FREDERICK COUNTY, INC., *et al.*

v.

FREDERICK COUNTY BOARD OF APPEALS. *et al.*

Graeff,
Berger,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: October 23, 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.

In 1995, the Maryland General Assembly authorized a new development tool: the Developer's Rights and Responsibility Agreement ("DRRA"). Md. Code Ann., Land Use ("LU") § 7-301 *et seq.* A DRRA is a specific agreement between a local government and a developer that sets out the terms and conditions pursuant to which the developer will build a proposed development in the jurisdiction. Proceeding by this sort of agreement frees local government from constitutional limitations on the types and amount of impact fees,[1] exactions, and other conditions that it can impose.[2] In exchange, a DRRA provides the developer a degree of regulatory certainty by preventing legislative changes from being applied to the detriment of the development for a term of years.

In 2013, the Maryland General Assembly amended the procedure by which an aggrieved party may appeal the grant of a DRRA in Frederick County. This case requires us to consider the applicability of this statutory change.

[1] Impact fees are imposed on new developments to offset the costs that the development will place on public infrastructure. "Impact fees have two essential features: (1) they shift the cost of capital improvements from all users or taxpayers in the jurisdiction to the new residents who create the need for them, and (2) they are collected before the improvements are constructed rather than after they are in service." Paul A. Tiburzi, *Impact Fees in Maryland*, 17 U. Balt. L.Rev. 502, 502-03 (1988).

[2] The kind and amount of impact and similar fees that government may charge developers are limited by modern interpretations of the Takings Clause of the Fifth Amendment, which require both a nexus and rough proportionality to the governmental justification. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).The result has been to significantly curtail the fees that may be charged.

FACTUAL BACKGROUND

Monocacy Ventures, LLC ("Monocacy") owns 395.7 acres of land in the Monrovia area of Frederick County. Monocacy sought to develop its property into a residential subdivision containing 1,100 units, known as the Lansdale Subdivision.

Monocacy petitioned the Board of County Commissioners of Frederick County, Maryland (the "County Commissioners") for authorization to enter into a DRRA. The County Commissioners approved the petition in April of 2012 and Frederick County[3] negotiated the terms of the DRRA with Monocacy ("the Lansdale DRRA"). The terms of the Lansdale DRRA require Monocacy to contribute $53 million in public infrastructure improvements, fees, and land dedications. In exchange for these benefits to the county, the

[3] Our use of the phrase "Frederick County" obscures some complexity, which fortunately, is not necessary to the resolution of this appeal. The 2013 amendment of Chapter 1-25 of the Frederick County Code incorporates the General Assembly's amendment to the DRRA Act. Staff Report from Kathy L. Mitchell, Asst. County Att'y., to Bd. of Cnty. Commissioners of Frederick Cnty. (June 28, 2013) *available at* http://perma.cc/ZF8Y-47SJ (providing background on revisions to Chapter 1-25 of the Frederick County Code). This amendment to the County Code specifically granted the County Commissioners the authority to act as the "public principal" and enter into DRRAs. On December 1, 2014, Frederick County became a charter county replacing the County Commissioners with a County Executive and a County Council. In editing the Frederick County Code to comport with the adoption of the County Charter, Chapter 1-25 was again amended. After that amendment, the County Executive became the public principal for purposes of negotiating and executing a DRRA. The County Council function in the DRRA process is now to hold the requisite public hearings and adopt resolutions approving DRRAs before the County Executive is authorized to sign a DRRA. Thus, the County Executive and Council must cooperate on amendment to and termination of a DRRA. Memorandum from John S. Mathias, Cnty. Att'y., to Bd. of Cnty. Commissioners of Frederick Cnty., Md., (Oct. 20, 2014) *available at* http://perma.cc/2A9C-KPKF (providing background and recommending the adoption of Frederick County Code revisions to implement new charter).

Lansdale DRRA freezes the regulatory landscape as it applies to Monocacy for the next 25 years.

On September 18, 2012, the County Commissioners conducted a public hearing on the Lansdale DRRA. Following this hearing, the County Commissioners voted to approve the Lansdale DRRA, which was then executed at another public meeting held on October 4, 2012.

On November 5, 2012, Friends of Frederick County, an environmental advocacy organization, appealed the execution of the Lansdale DRRA to the Board of Appeals of Frederick County ("Board of Appeals"). The Board of Appeals conducted a public hearing on December 20, 2012, and voted unanimously to approve the execution of the Lansdale DRRA.

Friends of Frederick petitioned for judicial review to the Circuit Court for Frederick County from the Board of Appeals' decision affirming the DRRA. The trial court upheld the Board of Appeals' decision in an opinion dated January 15, 2014. Friends of Frederick has now appealed the trial court's decision to this Court.

DISCUSSION

Friends of Frederick challenges the legality of the contents of the Landsdale DRRA, the scope of the laws frozen by the DRRA, and the duration of the freeze. For the reasons

discussed below, however, we will only address the County's[4] Motion to Dismiss and related arguments that this Court lacks jurisdiction to consider this appeal.

Motion to Dismiss

Since the adoption of the DRRA statute in 1995, and continuing today in 23 of our State's 24 jurisdictions, the process of adoption and review of a DRRA is uniform, consistent, and involves the following steps:

1. A developer, having a legal or equitable interest in real property, petitions the appropriate local government official or body, generically referred to as the "public principal," to enter into a DRRA, LU § 7-305(a);

2. The developer and the public principal negotiate the terms of the DRRA, which must include those items identified in LU § 7-303(a) and which may include those items identified in LU § 7- 303(b);

3. A public hearing is held at which public comment on the proposed DRRA is solicited, LU § 7-305(b);

4. The DRRA is reviewed by the local planning commission to determine if the DRRA is consistent with the comprehensive plan for the local jurisdiction, LU § 7-305(c);

5. The DRRA is approved by the public principal and executed by the parties;

6. The DRRA is recorded in the land records of the county, LU § 7-305(d);

7. An aggrieved party may file an administrative appeal with the local board of appeals, LU §§ 4-305, 4-306;

[4] Monocacy, the County Commissioners, and the Board of Appeals are the appellees. We refer to these parties collectively as the "the County."

8. From an adverse decision of the local board of appeals, an aggrieved party has a right to judicial review in the circuit court for the local jurisdiction, LU § 4-401;

9. From an adverse decision of the circuit court, an aggrieved party may appeal to this Court, LU § 4-405(b); and

10. From an adverse decision of this Court, an aggrieved party may petition the Court of Appeals for a writ of certiorari, Md. Code Ann. Cts. & Jud. Proc. §§ 12-201, 12-203.

Thus, a party who feels herself aggrieved by a DRRA has a statutory right to review by the local board of appeals, the circuit court, and eventually, by the appellate courts.

In 2013, however, the Maryland General Assembly changed this process—but only as it applies to DRRAs in Frederick County. House Bill 256 of 2013 proposed an amendment to the DRRA Act, which is now codified as LU § 7-307, and provides:

> (a) In Frederick County, a person aggrieved by [a DRRA] executed under this subtitle:
>
> (1) may not file an administrative appeal; and
>
> (2) may seek direct judicial review of the agreement in circuit court by filing a request with the circuit court of the county.
>
> (b) The judicial review shall be in accordance with Title 7, Chapter 200 of the Maryland Rules.

LU § 7-307. For all other jurisdictions in the State, the process remains the same.

The plain text of LU § 7-307 removes, in Frederick County only, what we have identified above as step 7, review by the local board of appeals. There is nothing in the text of LU § 7-307 that removes step 9 or 10, (appeal to this Court or the Court of Appeals), nor have we found in the legislative history of House Bill 256 of 2013 anything to suggest

that it was the intention of the legislature to withdraw appellate review from these courts. Nevertheless, that is precisely what happened. We explain.

Although the review in circuit court pursuant to LU § 4-401, described above in step 8, and the review in Frederick County, pursuant to LU § 7-307(a)(2), appear the same and serve the same function, they are different and exclusive. Critically for these purposes, a person aggrieved by a DRRA in Frederick County no longer has the capability of accessing the judicial review procedures of Title 4, subtitle 4 of the Land Use Article (LU § 4- 401 *et seq.*) because they are not seeking "judicial review of a decision of a board of appeals." LU § 4-401(a). The right to use the appellate procedure in LU § 4-405(b) is only granted for persons using the judicial review procedure of LU § 4-401(a). And since those obtaining judicial review through the grant in LU § 7-307(a)(2) are not using LU § 4-401(a), they are not entitled to appellate review under LU § 4-405(b).

Moreover, there is no alternative statutory route to this Court. Maryland law is clear that, in the absence of such a statutory route, we have no jurisdiction to entertain an appeal. CJP § 12-302 ("Unless a right to appeal is expressly granted by law, [CJP] § 12-301…does not permit an appeal from a final judgment of a court made in exercise of appellate jurisdiction in reviewing the decision of the District Court, an administrative agency, or a local legislative body.");[5] *e.g. Prince George's Cnty. v. Beretta U.S.A. Corp.*, 358 Md. 166,

[5] Circuit court review of agency decisions is considered an exercise of appellate jurisdiction for purposes of CJP § 12-302, *Gisriel v. Ocean City Bd. of Sup'rs of Elections*, 345 Md. 477, 496 (1997), despite the fact that such review is not technically an exercise of

(continued…)

174 (2000) ("[U]nless the right to appeal from the Circuit Court to the Court of Special Appeals … [is] authorized by state statute or local law, the Court of Special Appeals [has] no jurisdiction to entertain [the case]"). Thus, in Frederick County only, there is no right to appeal from an adverse decision of the circuit court as to a DRRA. As a result, the decision of the Circuit Court for Fredrick County is final and unappealable.

Friends of Frederick does not contest the logic of this analysis but offers three alternative ways by which it suggests that we should avoid this result: (1) a "statutory route," by which it hopes to reenter LU § 4-401(a); (2) a "timing route," by which it argues that LU § 7-307 does not apply to this litigation because of the effective date of House Bill 256; and (3) a "constitutional route," by which it argues, that it would be unconstitutional not to permit its appeal. None of these routes is availing.

1. The Statutory Route

Friends of Frederick's first attempt to avoid dismissal is to use the alternative route provided in the statute, LU §4-401(a). As we have recounted above, Friends of Frederick is now excluded from the first grant of jurisdiction under LU §4-401(a), the "judicial review of a decision of a board of appeals" because the board of appeals has been cut out of the process. As a result, Friends of Frederick makes a bid for the second grant of jurisdiction: claiming that it is seeking "judicial review of … a zoning action of a legislative body." LU §4-401(a). Unfortunately, figuring out what constitutes a "zoning action" is

appellate jurisdiction. *Shell Oil Co. v. Supervisor of Assessments of Prince George's Cnty.*, 276 Md. 36, 43 (1975) (holding that "review of a decision of an administrative agency is an exercise of original jurisdiction and not of appellate jurisdiction.").

remarkably complicated, at least since the Court of Appeals' decision in *Maryland Overpak*. *Maryland Overpak Corp. v. City of Baltimore*, 395 Md. 16 (2005).

Prior to *Maryland Overpak*, Maryland courts applied a straightforward definition of "zoning action" under LU §4-401(a) and its precursors, limiting judicial review to classic Euclidian zoning reclassifications.[6] If a parcel of land was reclassified from the R-4 to the B-3 zoning district, for example, that action was considered a zoning action and judicial review would be available in the circuit court. *Carroll County v. Stephans*, 286 Md. 384, 388-89 (1979); *Armstrong v. City of Baltimore*, 169 Md. App. 655 (2006). In *Maryland Overpak*, the Court of Appeals recognized a trend away from classic Euclidean zoning to include more modern, flexible zoning concepts. The Court of Appeals in *Maryland Overpak* sought to expand the definition of "zoning action" in LU § 4-401(a) to match. *Maryland Overpak*, 395 Md. 48-49. The *Maryland Overpak* Court developed a two-part test:

> [F]irst, there must be a determination that the process observed by the governmental body in affecting an alleged zoning action was quasi-judicial in nature, rather than legislative. A quasi-judicial proceeding in the zoning context is found where, at a minimum, there is a fact-finding process that entails the holding of a hearing, the receipt of factual and opinion testimony and/or forms of documentary evidence, and a particularized conclusion, based upon delineated statutory standards, for the unique development proposal for the specific

[6] Euclidean zoning refers not to the father of geometry but to the decision of the United States Supreme Court approving zoning as an exercise of the state's police power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Today, "[t]he term 'Euclidean' zoning describes the early zoning concept of separating incompatible land uses through the establishment of fixed legislative rules." *Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's Cty.*, 138 Md. App. 589, 623 (2001) (internal quotations and citations omitted).

> parcel or assemblage of land in question. Second, if the governmental act in question involves a quasi-judicial process, the inquiry moves to the question of whether it qualifies as a "zoning action." Where the City Council exercises its discretion in deciding the permissible uses and other characteristics of a specific parcel or assemblage of land upon a deliberation of the unique circumstances of the affected land and its surrounding environs, a "zoning action" is the result.

Maryland Overpak, 395 Md. at 53. Applying this test, the Court of Appeals has found an amendment to a PUD in Baltimore City to be a "zoning action." *Maryland Overpak*, 395 Md. at 54 (finding that (1) the mode of approving a PUD amendment to be quasi-judicial; and (2) that an amendment to a PUD qualifies as a "zoning action," therefore, judicial review under LU § 4-401was appropriate). By contrast, a text amendment to the city zoning ordinance in the City of Rockville was found not to be a "zoning action." *Mayor and Council of Rockville v. Pumphrey*, 218 Md. App. 160, 188-192 (2014) (finding (1) the process to be more "legislative"; and (2) that the text amendment did not specify an appropriate use, and was dissimilar to a "zoning action," therefore judicial review under LU § 4-401 not available). Thus, Friends of Frederick invites us to find that the adoption of a DRRA has a "legislative" quality and is more similar to the adoption of a PUD than to a text amendment.

Fortunately, however, we need not decide whether a DRRA is a "zoning action," because we hold that the execution of a DRRA is an executive not legislative function. When the Lansdale DRRA was executed, it was by the Board of County Commissioners

of Fredrick County acting in its executive capacity.[7] Moreover, when Frederick County adopted a charter form of government, separating the executive from the legislative power, it identified its county executive as its public principal for the purpose of negotiating future DRRAs. *See supra* n.3. As a result, the second grant of jurisdiction, for "judicial review of a decision of … a zoning action of a *legislative body*," under LU § 4-401(a) is also not available to Friends of Frederick. See LU § 4-401(a) (emphasis added).

2. The Timing Route

Friends of Frederick's second theory is that LU § 7-307 does not apply to this litigation because, given the effective date of HB 256 of 2013, it was, in essence, too far along in the litigation process. House Bill 256 of 2013 became effective on October 1, 2013. By that date, the parties were finished with step 7 (board of appeals review) and in step 8 (judicial review in the circuit court) on our schematic, above. Friends of Frederick argues, in effect, that because it had begun step 8 (judicial review in the circuit court) under the old procedure, that it should be entitled to finish under that same procedure.

This argument ignores the rules governing the effective dates of statutes. The legislature is free to determine how its statutes will apply on their effective dates, subject

[7] In a county with a commissioner form of government, the board of county commissioners serves as both the executive and legislative branch of local government. *Bd. of Cnty. Comm'rs of Washington Cnty. v. H. Manny Holtz, Inc.*, 60 Md. App. 133, 143-44 (1984) ("[T]he board of county commissioners, in those counties which have one, functions as the county government. It is the county body politic. In performing its various functions, it exercises legislative, quasi-legislative, executive, and quasi-judicial authority, sometimes in combination."). Here, we hold that negotiating a DRRA was done in its executive capacity.

only to the constitutional prohibition on the retroactive impairment of vested rights. *Dua v. Comcast Cable of Maryland*, 370 Md. 604, 623-30 (2002) (reaffirming constitutional prohibition on legislative abrogation of vested rights). If the legislature is silent (as it most often is), courts are instructed to apply changes in substantive law prospectively. *Mason v. State*, 309 Md. 215, 219-20 (1987). But "a statute effecting a change in procedure only … applies to all actions whether accrued, pending[,] or future." *Id*.

We hold, therefore, that the old procedural route for judicial review of DRRAs in Frederick County ended on the effective date of the bill, no matter where in the process a case was pending. It doesn't matter for our analysis that this litigation was in process in the circuit court when the new law went into effect. The right to appeal to this court ended immediately on October 1, 2013.

3. The Constitutional Route

Friends of Frederick's third attempt to save appellate review for this case is to suggest that the change in the process of judicial review is unconstitutional on either of two grounds.

First, it argues that the legislature's treatment of Frederick County differently from the rest of the State must be irrational and, therefore, unconstitutional. We reject this reasoning. There is a strong presumption of constitutionality that attaches to the properly enacted laws of the State of Maryland. *Murphy v. Edmonds*, 325 Md. 342, 356 (1992) ("A statutory classification reviewed under the rational basis standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary."); *Briscoe v. Prince George's Health Dep't*, 323 Md. 439, 448-49 (1991)

(affirming that a statute may be upheld when any state of facts reasonably, may be conceived to justify it). Moreover, there is no constitutional prohibition on legislating different rules for different counties. *Lonaconing Trap Club, Inc. v. Md. Dep't of Env't*, 410 Md. 326, 344-45 (2009) (finding "[t]erritorial classifications generally [ ] permissible under equal protection analysis). Given the rapid pace of development in Frederick County and the contentious and litigious nature of the conflicts that arise as a result, we do not think a decision to expedite judicial review of DRRAs in Frederick County is inherently irrational. Moreover, this alternative process is not exclusive. Should the legislature wish to create an expedited review process in another county or counties, they could be added to LU § 7-307 without difficulty.

Second, and alternatively, Friends of Frederick argues that deleting its right to appeal from the decision of the Circuit Court for Frederick County violates its due process rights under Article 24 of Maryland's Declaration of Rights and the Fourteenth Amendment to the United States Constitution. But there is no due process right to an appeal. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding a state is not required by the federal constitution to provide a right to appellate review) (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1894)); *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 500 (1975) ("The right to an appeal is not a right required by due process of law [under the Maryland Constitution], nor is it an inherent or inalienable right."). Moreover, it is clear that there is no right to an appeal to this Court from an adverse decision in a circuit court. *Dvorak v. Anne Arundel Cnty. Ethics Comm'n*, 400 Md. 446 (2007). Thus, neither of Friends of Frederick's constitutional challenges are availing.

In the end, Friends of Frederick is unable to escape the effect of House Bill 265 of 2013 and LU § 7-307, which besides skipping review at the local board of appeals, also had the effect of eliminating the right of review to this Court and making the decision of the Circuit Court for Frederick County the final word on a Frederick County DRRA. We, therefore, must dismiss this appeal.

MOTION TO DISMISS GRANTED. COSTS TO BE PAID BY APPELLANT.