

FACTUAL AND PROCEDURAL BACKGROUND

A brief recitation of the facts surrounding this case is required before reviewing the actual modification of the special exception. Two of the Petitioners, Mr. and Mrs. McMillan own the property designated as Tax Map 18, Parcel 162, known as 2852 Dublin Road "McMillan Parcel"). The McMillan Parcel, which is the subject of the litigation, is located in an agricultural zone. Ms. Mingo, the additional Petitioner, owns the adjoining property, designated as Tax Map 18, Parcel 65, known as 2824 Dublin Road ("Mingo Parcel"). The Mingo Parcel is also zoned AG, Agricultural.

Petitioners received approval for a special exception in connection with the operation of a motor vehicle repair shop on the McMillan Parcel originally in Case No. 3693 on March 9, 1989. (Zoning Hearing Examiner's Decision, Mar. 9, 1989, p. 5-6) Subsequently, in Case No. 4974, the Petitioners sought and were granted approval by the Harford County Council, sitting as the Board of Appeals (hereinafter the "Board") to modify the site plan and construct a shop building on January 13, 2000. (Zoning Hearing Examiner's Decision, Jan. 13, 2000, p. 5-6) Both of these approvals imposed a number of conditions on the Petitioners. The Petitioners subsequently requested a modification of the special exception for the motor vehicle repair shop. The case was originally scheduled to be heard before Robert Kahoe, Jr., Zoning Hearing Examiner for Harford County, on July 27, 2005. However, the case was postponed and was heard on August 29, 2005. Mr. McMillan sought the Board's consent to modify the previously granted approvals to allow him to construct a thirty eight (38) foot by thirty six (36) foot addition to his shop, as well as a thirty two (32) foot by thirty two (32) foot addition to be used as office space. Mr. McMillan and Ms. Mingo also agreed to an exchange of land, which

would increase the McMillan Parcel to 3.9 acres. In addition, Mr. McMillan planned to relocate the entrance to his property, which would be on the newly acquired parcel from Ms. Mingo. (Zoning Hearing Examiner's Decision, Dec. 19, 2005, p. 2)

At the hearing held on August 29, 2005, Petitioners Mr. McMillan and Ms. Mingo testified as to the requested modification. (Transcript, August 29, 2005, p. 9-16, 65-66) Thereafter, thirteen (13) neighbors in Petitioners' community were called and testified in favor of granting the proposed modification. (Transcript, p. 67-109) Mr. Rowan Glidden, accepted by the Board as an expert land planner, testified that he did not believe that the requested use would generate any adverse effects that departed significantly from the effects inherent in the operation of a motor vehicle repair shop. (Transcript, p. 116, 125) In addition, Mr. Dennis Sigler, a representative of the Department of Planning and Zoning testified that the Department was in accord with the modification, and that the modification would actually improve the situation. (Transcript, p. 127-128)

However, two individuals testified in opposition to the proposed modification: Mrs. Deborah Felix and Ms. Jocelyn Allen. Mrs. Felix, whose property is located across from the McMillan Parcel, complained that previous conditions imposed on Petitioners had been violated. Mrs. Felix also requested that the Hearing Examiner place certain limitations on the growth of Mr. McMillan's business. (Transcript, p. 140) Ms. Jocelyn Allen, another neighbor, lives 500 to 600 feet away from the McMillan Parcel. She too was opposed to the proposed modification due to allegations of odors and noise arising out of the operation of Mr. McMillan's business. (Transcript, p. 144-145) On December 19, 2005, the Zoning Hearing Examiner issued his recommendation in which he denied the Petitioners' request. Petitioners filed a request to be heard before the Harford County

Council, sitting as the Board of Appeals. The Board heard the final argument, and issued its decision adopting the Hearing Examiner's recommendation on March 21, 2006.

STANDARD OF REVIEW

In judicial review of zoning matters, the Court must first evaluate the board's legal conclusions. When reviewing the board's legal conclusions, the court "must determine whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law." Eastern Outdoor Advertising Co. v. Mayor and City Council, 128 Md.App. 494, 514-15, 739 A.2d 854 (1999).

When reviewing findings of fact, "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." Lewis v. Dept. of Natural Resources, 377 Md. 382, 406, 833 A.2d 563, 578 (2003) (quoting Sembly v. County Bd. of Appeals, 269 Md. 177, 182, 304 A.2d 814, 818 (1973); *see also*, Eller Media Co. v. Mayor and City Council of Baltimore, 141 Md. App. 76, 83, 784 A.2d 614, 618 (2001). In order to be fairly debatable, the administrative agency overseeing the decision must have "substantial evidence" on the record supporting its decision. Lewis, 377 Md. at 406, 833 A.2d at 578; *see*, Mayor of Annapolis v. Annapolis Waterfront Co., 284 Md. 383, 395, 396 A.2d 1080, 1087 (1979).

The Court may not substitute its own judgment for that of the board, and must accept the board's conclusion if based on substantial evidence in the record. "If a court finds no substantial or sufficient evidence to support the factual findings of the Board, the

Board's decision will be reversed because it was arbitrary and illegal." Eller Media Co.,
141 Md. App. at 83, 784 A.2d at 618.

DISCUSSION

A. Because the Board did not apply the correct legal principles, the Court need not give any deference to its decision.

The Harford County Zoning Code ("Code") Sections 267-52 (B) and (C) govern special exceptions generally. Section 267-52 provides in pertinent part that:

(B) A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.

(C) Extension of any use of activity permitted as a special exception shall require further Board approval.

Furthermore, Section 267-9(I) of the Code sets forth the standard to be used in granting a special exception. It provides that:

... (t)he Board shall not approve an application if it finds that the proposed building, addition, extension of building or use, use or change of use would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood.

Appellate courts in Maryland have consistently held that while the applicant seeking a special exception has the burden of proving that his or her use meets the prescribed standards and conditions of the above sections, the applicant does not have the burden of establishing affirmatively that the proposed use is in the general welfare.

Schultz v. Pritts, 291 Md. 1, 11, 432 A.2d 1319, 1326-1327 (1981) (hereinafter "Schultz").

A key issue in this case is the test to be applied in granting a modification of a special exception. Both Petitioners and the Harford County Council are in accord that the appropriate test to be used is the standard articulated in Schultz. The Court in Schultz held that,

“... the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” Schultz, 291 Md. at 15, 432 A.2d at 1327.

The Board's decision not to grant Petitioners' request for modification was grounded in the observation that some hostility and negativity existed by way of Mrs. Felix and Ms. Allen, with respect to Mr. McMillan's use of the motor vehicle repair shop. (Zoning Hearing Examiner's Decision, p. 11, December 19, 2006) However, this rationale is not legally sufficient to deny Petitioners the modification, as it does not meet the test set forth by the Court of Appeals in Schultz and its progeny. The Protestants failed to establish with specificity that they would be adversely impacted more in their location than any other location in the zone. Their allegations of adverse impacts were not only vague, but also characterize the effects associated with the operation of motor vehicle repair shops generally. Therefore, the Petitioners' request for modification should be granted.

In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995), the Court of Special Appeals further expanded on the Schultz principle, stating that the decision to grant a special exception must be based on “substantial evidence of adverse impact... greater than or above and beyond impact elsewhere in the zone.” Mossburg, 107 Md. App. at 9, 666 A.2d at 1257. However, in the instant case, the Hearing

Examiner's decision was based on the opinion of two individuals' negative testimony concerning the proposed modification. Ms. Allen and Mrs. Felix, the two Protestants and neighbors of the McMillan Parcel opposed the proposed modification. They voiced their concerns about the potential impact on ground water generated by hazardous waste from Mr. McMillan's use and the continuing expansion beyond the original approval. (Zoning Hrg Examiner's Decision, p. 12) The Hearing Examiner concluded that the Protestants' argument claiming that the use had expanded beyond the permitted scope was with "substantial merit." (Zoning Hrg. Examiner's Decision, p. 13)

However, this is not the standard as stated by the Court in Schultz, and was improperly applied in this case. Under both Schultz and Mossburg, once the Petitioner has shown that the special exception meets the standards of the ordinance, the burden shifts to the protestants to establish that the impact of the exception would be worse at this location than any other location in the community. In the instant case, neither Protestant, through her testimony, has shown that the impact of the special exception would be worse at this location than at any other location in the district.

In its brief, the Board argues that "[t]here merely needs to be sufficient evidence to permit a finding of material negative impact on the surrounding properties and/or neighborhood such that a reasonable mind could find negative impacts which are greater at this location than in other areas within the agricultural zone." (Respondents' Memorandum, p. 10, July 17, 2006) This interpretation of Schultz cannot be reconciled with the numerous Court of Appeals' decisions interpreting the case. Because the Board has misstated or improperly applied these legal principles, the Board's decision must be reversed, and Petitioners' request for modification should be granted.

In Pierce v. Montgomery County, 116 Md. App. 522, 698 A.2d 1127 (1997), the Court of Special Appeals ruled that, "when considering a modification of a special exception, the Board is limited to the proposed modification and those aspects of the special exception that are related to the proposed modification." 116 Md. App at 531, 698 A.2d at 1132. In Pierce, a homeowner appealed from the decision of the Circuit Court of Montgomery County, which affirmed the decision of the Montgomery County Board of Appeals, and granted a neighboring homeless shelter's request for modification of a special exception. 116 Md. App at 524, 698 A.2d at 1128-1129. The Board and subsequently the Circuit Court ruled that only the modification was at issue and not the underlying special exception or use of the property as a homeless shelter. *Id.* at 532, 698 A.2d at 1132.

However, in this case, the Hearing Examiner did exactly what the Court in Pierce advises against. The Hearing Examiner, in his decision, initially, examines the prior decisions of the Petitioners' previously granted special exceptions and the intent of those decisions. The Hearing Examiner goes on to state that the "requested special exception is beyond any reasonable scope of the original request as proposed in 1989 and modified in 1999." (Zoning Hrg. Examiner's Decision, p. 17) Therefore, by reviewing the prior special exceptions, the Hearing Examiner raised issues outside of the scope of what was permissible under Pierce. In essence, the Hearing Examiner was using this denial of the modification to back-peddle and curb the effects of the prior approvals. This is not permissible under either Pierce or Schultz because it is outside of the scope of the standard set forth by the Court.

B. The Board's decision should be reversed because the Board failed to make proper findings of fact; thus the decision was not based on substantial evidence.

The standard to be applied when reviewing an agency's factual findings is whether the issue before the agency is "fairly debatable," or whether there was substantial evidence in the record to support the Board's decision. Lewis, 377 Md. at 406, 833 A.2d at 578. No deference is due to the Board's factual conclusions when its decision is not based on "competent or substantial evidence." *Id.* at 407, 833 A.2d at 578. In Lewis, the Court of Appeals held that, "the record contains little or no empirical data to support the Board's conclusions or to refute the studies and reports of petitioner's experts. The Board's decision is thus arbitrary and capricious." *Id.* at 409, 833 A.2d at 578.

Like the petitioners in Lewis, the Petitioners in this case presented the testimony of a number of neighbors, stating that they had no objection to the proposed modification. In addition, the Petitioners presented the testimony of Mr. Glidden, an expert land planner and Mr. Sigler, a representative of the Harford County Department of Planning and Zoning. Mr. Glidden testified that Mr. McMillan's use conformed to the Code and met the conditions of the special exception. (Transcript, p. 115-117) Also, Mr. Sigler testified that the modification, including the land exchange with Ms. Mingo, would actually improve the situation, and was necessary for the McMillan Parcel. (Transcript, p. 127-128) Both, Mr. Glidden and Mr. Sigler also stated that the modification would not "generate any adverse effects significantly different in character or intensity from the effects inherent operation of a motor vehicle repair shop located elsewhere in the agricultural district." (Transcript, p. 116; p. 127)

Opposed to the granting of the requested modification were only two neighbors, Mrs. Felix and Ms. Allen. Their testimony was that the modification would have negative impact on their respective properties. They also described loud noises and fumes that arose in connection with Mr. McMillan's business. (Transcript, p. 139-141; p. 144-147) However, on rebuttal, the Petitioners showed that the existing building was not visible from Mrs. Felix's property, and that the business had not adversely impacted property values for the Felix property. (Transcript, p. 152-154; p. 156)

Based on this evidence, the Board found that there was substantial evidence to indicate that the Petitioners had expanded beyond the scope of the original approvals and that if granted, the modification would have a greater impact there than any other place in the district. However, there is little evidence to support this conclusion, as required by Lewis. Because the Board's decision seems to rely on little empirical evidence and insubstantial evidence, under Lewis, the decision can be described as "arbitrary and capricious." Therefore, this Court owes no deference to the Board's factual conclusions. Thus, based on the foregoing, the Board's decision should be reversed.

The Petitioners' expansion beyond the scope of the original appeal was inevitable, due to the approval in Case No. 4974 for the modification of the special exception. The changing nature of the use is therefore due to the original modification that was approved in Case No. 4974, and cannot be a basis for denying approval in the instant case. Furthermore, if the Board was concerned that in granting this modification, the Petitioners' operation would expand beyond what was desirable, the Board was authorized to impose conditions on the modification to prevent further expansion. However, it failed to do so.

In Colao v. County Council of Prince George's County, 109 Md. App. 431, 460-461, 675 A.2d 148, 163-164 (1996), the Court of Special Appeals expressly provided that it is acceptable when the council adopts the decision of a zoning hearing examiner, "so long as the adopted findings and conclusions within each of those reports are sufficiently articulated, clear, and specific." *Id.* In Colao, the Court held that the decision did not contain specific findings or the statutory analysis necessary to come to a sound conclusion. *Id.* In a similar case, in Eastern Outdoor Advertising Company v. Mayor and City Council of Baltimore, applicants applied to the zoning board for a conditional use permit for a billboard to be placed in an urban renewal district. 146 Md. App. 283, 291-292, 807 A.2d 49, 53-55 (2002) (hereinafter "Eastern"). The zoning board denied the use permit, the Circuit Court affirmed, and the applicant appealed to the Court of Special Appeals. *Id.* This process was repeated on remand, and the Court of Special Appeals held that the board failed to make any factual findings in support of its decision on remand. *Id.* The Court, in Eastern, held that the Board's "findings of fact were merely conclusory, speculative, or 'bald assertion[s],'" where the Board, first in its initial hearing and later on remand, "issued a decision that [wa]s replete with conclusions." *Id.* at 299, 807 A.2d at 58 (*quoting*, Eastern I, 128 Md. App. at 530, 739 A.2d 854); *Id.* at 311, 807 A.2d at 65.

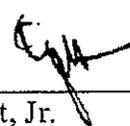
The Board in this case, asserts that, "it is clear that the increased impact of the proposed use at this location is excessively beyond what one would expect at another location within the zone." (Zoning Hrg. Examiner's Decision, p. 17) This conclusion is clearly incorrect. This is an example of what the Court of Special Appeals described in Eastern, as "conclusory, speculative, or bald assertion[s]." Eastern, 146 Md.App at 299,

807 A.2d at 58. It is neither clearly articulated nor specific as required by Colao. In addition, no specific findings were made by the Board in order to come to a sound conclusion, as required by the Court of Appeals in Colao, Eastern, and their progeny. There was absolutely no evidence in the record to support this finding by the Board. To the contrary, evidence was presented by Petitioners through the testimony of Mr. Glidden and Mr. Sigler that the modification would not have an adverse impact in this area greater than the impact in any other area. *See*, Transcript, p. 116, 127. Also, as the Petitioners point out in their Memoranda in Support of Judicial Review, the test to be applied is the Schultz test in determining whether to grant the modification. The standard as stated by the Board as "... excessively beyond what one would expect at another location," is not the proper test to be applied in this case; therefore the Board's decision should be reversed.

In summary, the Board has attempted to limit the effects of its prior special exceptions approvals to Mr. McMillan by denying his application for modification. This is both an unfair and legally unjustifiable result. The Board based its decision to deny on vague and legally insufficient considerations. It did not seem to give much weight to the fact that thirteen (13) neighbors, as well as a land planning expert and a zoning official, were all in favor of the Board granting the request. However, the Board erroneously relied upon the testimony of merely two individuals, who were opposed to the modification. While a modification or special exception may have some adverse impact, in this case, it is not sufficient to justify denying Petitioners' request. Therefore, Petitioners' request for modification should be reversed.

A separate Order of even date herewith is being entered.

Dated: 10/20/06



Emory A. Plitt, Jr. Judge

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