

IN THE MATTER OF
TODD PATERNITI, ET AL.

* IN THE
* CIRCUIT COURT
* FOR
* HARFORD COUNTY
* Case No. C-08-37

* * * * *

MEMORANDUM OPINION AND ORDER

INTRODUCTION

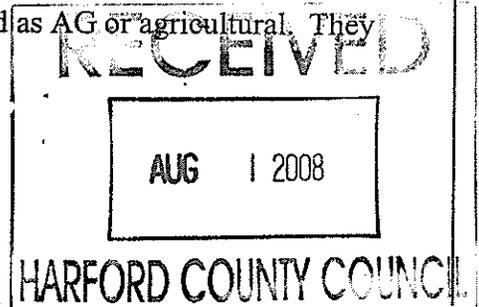
This matter is before the Court on a Petition for Judicial Review of the Decision of the Harford County Board of Appeals filed by Todd and Karen Paterniti (hereinafter “the Petitioners”). The Harford County Board of Appeals (hereinafter “the Board”) denied the Petitioners’ application for special exception approval to conduct a lawn maintenance services business as a construction services and supplier use under the Harford County Code §267-53(H)(1) and special exception approval to store commercial vehicles under Harford County Code §267-53(D)(1). The Petitioners are represented by John Gessner, Esquire of Gessner, Snee, Mahoney, and Lutche, P.A. The Office of People’s Counsel is represented by Lisa Sheehan, Esquire.

FACTS

Petitioners Todd and Karen Paterniti own two acres of land at 1642 Castleton Road in Darlington, Maryland where they live with their three children and their niece. Under the Harford County Code (HCC), their flat, rectangular plot is zoned as AG or agricultural. They

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are appealing the Board's denial of their special exception requests to conduct a lawn maintenance services business and to store commercial vehicles on their property.

The parties appeared before the zoning hearing examiner, Robert F. Kahoe, Jr. (hereinafter the "Hearing Examiner") on April 4, 2007. Mr. Paterniti testified to the activity on the property. His business day begins between 8:00 and 8:30 a.m. when his workers arrive at the property in question. They get into trucks, go to the worksites, and return when the work is completed or at sunset. During the day, there is usually one employee's truck on his driveway. His daughter, who does work study, returns home, with her boyfriend who also parks on the property. (T. 19) During the summer, his son and his friends have their motorcycles, golf carts, and other recreational vehicles on the land. (T. 20) In addition to three personal vehicles, he has two trucks that are used for both personal and business use, two trailers for business use, and his personal motor home. (T. 21) Mr. Paterniti had multiple cars that he refurbished as a hobby. Those cars are no longer on the property. (T. 29) The business equipment stored on the land also includes four rider mowers that are used on a daily basis, one walk behind mower, and two plows that he attaches to his truck for snow removal. (T. 26-28)

During the hearing, Anthony McClune of the Department of Planning and Zoning (hereinafter "the Department") testified that the plot met the minimum acreage requirements for a residential lot in the AG district. (T. 56) Additionally, he also contended that surrounding neighbors and passers-by could see anything on the property because of the land's rectangular shape and flat topography. *Id.* Therefore it would take a substantial amount of landscaping and time for the property to be fully screened. *Id.* He concluded that the Department found that the

Petitioners did not meet the criteria for the proposed use because that use would have an adverse impact on the adjacent property as a result of its small size and accordingly, its close proximity to neighboring homes. (T. 58-59).

During the hearing, Mel Braun and Cindy Pugh, members of the community, testified in opposition to the Petitioners' application. Mr. Braun lives at 1701 Castleton Road and also owns four other nearby properties. (T. 62) His home is across the street from the Petitioners' house. He was concerned about the amount of debris that travels from the property onto his land. (T. 63). He would not object to the proposed use if the Petitioners screened their property and limited the amount of equipment on the land. However he was not aware whether screening could be done effectively. (T. 66) In response, Mr. Paterniti testified that all of his equipment would be parked behind the house to minimize debris. He also contended that he would add to the existing line of cypress trees on the back and sides of his house. (T. 73) Lastly, he said that he would do anything else that his neighbors or the Board asked him to do, however, no requests had been made. (T. 49)

Mrs. Pugh's objection was premised on her concerns about employees coming in and out of the property. She did not have a problem with the Petitioners running their business from the home, the amount of equipment, or the number of employees. (T. 75) Rather, she was concerned that the business would grow and bring more equipment and employees. With two teenage daughters, Mrs. Pugh worried about more strangers coming around the neighborhood. (T. 76)

On June 6, 2007, the Hearing Examiner denied the Petitioners' application. He concluded that they could not fully screen the special uses from their neighbors and passers-by as a result of the large amount of equipment on the property, the flatness of the topography, and the short height of the trees that are currently being used for screening. Furthermore, the Hearing Examiner opined that the Petitioners' suggestion of seven foot cypress trees was "found to be totally ineffective in screening this use. "(Dec. 8)." It is not the Board's responsibility to devise screening and, even if it were, no effective screening can be envisioned." (Dec. 10). The Board adopted the Hearing Examiner's recommendations unanimously and denied the Petitioners' request. The Petitioners appealed that decision to this Court.

STANDARD OF REVIEW

The parties concur as to the standard of review that is applicable in this case. For the convenience of the Court, I will adopt the version set forth in Respondent's Memorandum, as follows. "In order for any special exception request to be approved in Harford County, the Zoning Code (hereinafter "Code") provides that the following basic requirements must be met:

"Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1."

Harford County Code, Section 267-51. The applicable case law on special exceptions, most clearly discussed in *Schultz v. Pritts* and its progeny, has been set forth in Petitioners' Memorandum, 291 Md. 1 (1981). In brief, the *Schultz* court held:

...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.

When analyzing the evidence regarding such adverse effects, one cannot ignore the rationale articulated by the courts in setting this standard:

...[t]he special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any facts or circumstances negating the presumption*. The duties given the Board are to judge whether the *neighboring properties in the general neighborhood* would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.

(Emphasis in original). *Schultz*, 291 Md. at 11-12; *see also*, *Turner v. Hammond*, 270 Md. 41 (1973).

This Court is governed by the general standard of judicial review in its analysis of the Board's decision. That analysis is threefold: 1) determine whether the Board recognized and

applied the correct principles of law governing the case; 2) if there is no error of law, then determine if the factual findings of the Board are supported by the evidence, with deference given to the Board's authority to resolve conflicting evidence and to draw inferences from same; and 3) examine the application of the law to the facts, and determine "whether a reasoning mind reasonably could have reached a factual conclusion the agency reached; this need not and must not be either judicial fact finding or a substitution of judicial judgment for agency judgment." *Board of County Commissioners v. Holbrook*, 314 Md. 273 (1988); see *Hikmat v. Howard County*, 148 Md. App. 502 (2002).

Further, "It has long been settled that the zoning authority's determination is correct if there were legally sufficient evidence as would make the question fairly debatable." *Kirkman v. Montgomery County Council*, 251 Md. 273, 276 (1968). The "fairly debatable" test is analogous to the "clearly erroneous" standard under Maryland Rule 8-131(c). A decision is fairly debatable if it is supported by substantial evidence on the record taken as a whole. *Howard County v. Dorsey*, 25 Md. App. 692 (1980), *Sedney v. Lloyd*, 44 Md. App. 633 (1980). See also *Mayor and the City Council of Baltimore v. Bruce*, 46 Md. App. 704 (1980). An issue is fairly debatable if the Council's decision is supported by "competent material and substantial evidence on the record." See *Entzian v. Prince George's County*, 32 Md. App. 256 (1976). Substantial evidence "means a little more than a 'scintilla of evidence.'" See *Stansbury v. Jones*, 372 Md. 172 (2002); *Floyd v. County Council of Prince George's County*, 55 Md. App. 246 (1983).

DISCUSSION

The Petitioners' special exception requests are governed by Sections 267-53 (H)(1) and 267-53 (D)(1) of the Harford County Development Regulations. Under Section 267-53 (H)(1), construction services and suppliers use "may be granted in the AG and VB Districts, provided that a buffer yard ten feet wide shall be provided around all outside storage and parking areas when adjacent to residential lot or visible from a public road."

Section 267-53 D(1) states:

D. Motor Vehicle and related services.

- (1) Commercial vehicle and equipment storage and farm vehicle and equipment sales and service. These uses may be granted in the AG District, and commercial vehicle and equipment storage may be granted in the VB District, provided that:
 - (a) The vehicles and equipment are stored entirely within an enclosed building or fully screened from view of adjacent residential lots and public roads.
 - (b) The sales and service of construction and industrial equipment may be permitted as an accessory use incidental to the sales and service of farm vehicles and equipment.
 - (c) A minimum parcel area of two (2) acres shall be provided.

As previously noted, the Hearing Examiner's found that the existing landscaping on the Petitioners' property was not sufficient to screen any part of their equipment, that there was no screening whatsoever between Castleton Road and the equipment, that the six to seven foot cypress trees as proposed in the Petitioners' May 31, 2007 submission were not sufficient to provide adequate screening for the property, and that the property could not be adequately fully

screened from view of the neighbors and passers-by. He also determined that if the equipment cannot be adequately screened, it would constitute an adverse impact on adjoining properties and neighboring residents. He then concluded, based on the above findings, that:

- (1) The applicants could comply with the requirements of Section 267-53 (H)(1) as the property is zoned AG and a buffer yard there is a sufficient area for the buffer yard if the equipment were removed from the 50 foot use setback.
- (2) Notwithstanding the proper zoning and size of the property, the inability of the property to be fully screened precludes granting of the special exception pursuant to Section 267-53 (D)(1).
- (3) In accordance with *Schultz v. Pritts*, 291 Md. 1 (1981), that the business use on the property, specifically the storage of the commercial equipment on the property, would have an adverse impact above and beyond those inherently associated with such a special exception in due to the Applicants' inability to fully screen the property.

The Petitioners contend that the Board is illegally requiring applicants for the construction services and suppliers use special exception under Section 267-53 (H)(1) to also obtain a special exception for commercial vehicle and equipment pursuant to Section 267-53 (D)(1). Citing Section 267-26, they argue that the storage of the commercial vehicles and equipment is an accessory use to the principal use of the subject property, i.e. a lawn maintenance business, and that customary accessory structures and uses are permitted in any district in connection with the principal permitted use with such district.

Respondent disputes the Petitioners' assertion that they are not required to satisfy the conditions set forth in Section 267-53 (D)(1) for storage of commercial vehicles and equipment because such an interpretation would render Section 267-53 (D)(1) a nullity. Respondent argues that the rules of construction for interpreting legislative enactments support its position. It also argues that, if anything, the storage of commercial vehicles and equipment is the principal use, not an accessory use, since all actual lawn maintenance is performed off-site.

The primary purpose in interpreting a statute or other legislative enactment is to ascertain, and to carry out, the true legislative intention. *McKeon v. State for Use of Conrad*, 211 Md. 437 (1956). Respondent's Memorandum accurately recites appellate authority in this regard as it was last stated in *The Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 551 (2002):

We have acknowledged that, in ascertaining a statute's meaning, we must consider the context in which a statute appears. In this regard we have instructed: When the statute to be interpreted is part of a statutory scheme, it must be interpreted in that context. That means that, when interpreting any statute, the statute as a whole must be construed, interpreting each provision of the statute in the context of the entire statutory scheme. Thus, statutes on the same subject are to be read together and harmonized to the extent possible, reading them so as to avoid rendering either of them, or any portion, meaningless, surplusage, superfluous or nugatory. *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 302-03, 783 A.2d 667, 671 (2001) (internal quotations omitted) (citations omitted).

Section 267-26 provides that "except as otherwise restricted by this Part 1, customary accessory structures and uses shall be permitted in any district in connection with the principal permitted use within such district." Principal permitted uses are scheduled in Sections 267-32 (Table I)

and 267-34. Table I Services, specifically designates construction services and suppliers use as a special exception as opposed to a principal permitted use. Accordingly, the authority for customary accessory structures and uses contained in Section 267-26 is inapplicable to construction services and suppliers use.

The general regulations for special exceptions are set forth in Section 267-53, and to the extent possible, Sections 267-53 (D) and (H) should be considered together so as to give them both meaning. The language used in these two sections is clear and unambiguous. Section 267-53 (H) permits a construction services and supplier use in a AG District provided that a ten foot buffer yard is provided to screen outside storage and parking areas. There are many construction services and supplier uses that would not require the storage of commercial vehicles and equipment on the premises. In that instance, compliance with Section 267-53 (D) would not be necessary, but if the property is to be used for storage of commercial vehicles and equipment, Section 267-53 (D) imposes more stringent screening requirements to protect adjoining properties from an unsightly view. Viewing Sections 267-53 (D) and (H) as a whole in the context of this statutory scheme, both sections are given effect and meaning. Accordingly, this Court finds that the Board recognized and applied the correct principles of law governing the case.

The Hearing Examiner determined that the Petitioners failed to propose a method by which the commercial vehicles and equipment can be fully screened from the surrounding residential properties or from the motorists using Castleton Road. The Hearing Examiner specifically rejected the screening proposed in the Petitioners May 31, 2007 submission and

further indicated that he could not envision any method by which the property can be fully screened. A review of the record supports the Hearing Examiner's findings of fact in this regard based on the competent and substantial evidence contained in the record. The Petitioners failed to produce the requisite plan for satisfying the requirements of Section 267-53 (D).

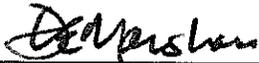
Finally, the application of the law to the facts by the Hearing Examiner is accorded great deference by the court, and will not be disturbed if a reasoning mind could have reached the same conclusion as the Hearing Examiner. In this instance, this Court finds that the decision of the Hearing Examiner, as adopted by the Board, is sustainable based on the facts and law for the reasons stated.

In addition to its decision based on Section 267-53 (D), the Board also adopted the Hearing Officer's determination based on *Schultz v. Pritts*, 291 Md. 1 (1981). As noted above, in *Schultz*, the Court of Appeals opined that the appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location with the zone. *Id.* at 14-15. In his opinion denying the Petitioners' special exception, the Hearing Examiner stated that:

For reasons set forth above, it is found that the equipment and the business activities on site would cause an adverse impact above and beyond that inherently expected from such a use. This unusual impact is caused primarily by the inability of the Applicants to fully screen, or fully enclose, the uses from adjoining neighbors and passers-by. (Dec. 10).

It is clear that the Hearing Examiner correctly applied the *Schultz* standard for special exceptions use, that the findings of fact were supported by substantial evidence, and that a reasoning mind could have reached the same conclusion.

Date: 7/30/08



Thomas E. Marshall, Judge

cc:
John Gessner, Esquire
Lisa D. Sheehan, Esquire

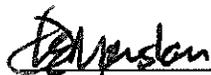
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* * * * *

ORDER

It is hereby **ORDERED** that the Final Decision of the Harford County Board of Appeals dated December 4, 2007 is affirmed.



7/30/08

Thomas E. Marshall, Judge

cc:
John Gessner, Esquire
Lisa D. Sheehan, Esquire

FILED

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CLERK OF CIRCUIT COURT
HARFORD COUNTY, MD.