

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JASON AMSTER, *et. al* :  
and :  
DR. CAROL S. NEZZO, *et. al.* :  
Petitioners :  
 : CAL 12-25136  
v. : CAL 12-25253  
 : (Consolidated)  
COUNTY COUNCIL OF PRINCE :  
GEORGE'S COUNTY, MARYLAND, :  
SITTING AS THE DISTRICT :  
COUNCIL, *et. al.* :

**MEMORANDUM AND ORDER**

Jason Amster and Dr. Carol S. Nezzo<sup>1</sup>, residents of University Park and College Park respectively, (collectively "Petitioners") appeal the adoption of Zoning Ordinance No. 11-2012 ("the Ordinance") by the Prince George's County Council sitting as the District Council ("District Council or Respondent(s)").<sup>2</sup>

The Ordinance involves the 2012 rezoning of 35.71 acres of vacant property ("Cafritz Property") owned by Applicant Calvert Tract, LLC<sup>3</sup> ("Calvert Tract or Respondent(s)") from the R-55 Zone (Single-Family Detached Residential) to the M-U-TC Zone (Mixed-Use Town Center). The Ordinance additionally expands the Town of Riverdale Park Mixed-Use Town Center Zone Development Plan and amends the 2004 Approved Town of Riverdale Park Mixed-Use Town Center Zone Development Plan to accommodate the proposed development of commercial, retail and office use at the intersection of Baltimore Avenue and East West Highway.<sup>4</sup>

<sup>1</sup> The additional Petitioners in this action are not listed for brevity.

<sup>2</sup> Petitioners filed separate actions in this matter and subsequently filed separate petitions for judicial review. Upon motion by the District Council, the actions were consolidated by Court Order on January 4, 2013.

<sup>3</sup> Calvert Tract, LLC, pursuant to Md. Rule 7-204, filed a timely notice of intent to participate in these consolidated actions.

<sup>4</sup> The 2004 Approved Town of Riverdale Park Mixed-Use Town Center Zone Development Plan and corresponding M-U-TC was approved by the Prince George's County Council on January 20, 2004. The approved plan amends the 1994 Approved Master Plan and Sectional Map Amendment for Planning Area 68. See, Planning Board Resolution (PBR) Ex. 13 p. 3.

## FACTUAL AND PROCEDURAL BACKGROUND

The Cafritz Property is located approximately 1400 feet north of the intersection of Baltimore Avenue (US Route 1) and East-West Highway (MD Route 410) in Prince George's County, Maryland. The parcel is legally described as Parcel 81, Tax Map 42, Grid D-1. The properties to the north, west and south of the Cafritz Property are zoned R-55. The property to the east of the tract is zoned M-U-TC. The portion of the Cafritz Property which is at issue in this judicial review is completely within the municipal boundaries of the Town of Riverdale Park.<sup>5</sup> Immediately adjacent to the property is the City of College Park to the north and the Town of University Park to the west.

On October 14, 2011, Calvert Tract submitted an application to the Planning Board of the Maryland National Capital Park and Planning Commission ("Planning Board") requesting rezoning of the Cafritz Property.<sup>6</sup> The application sought to accomplish three things: (1) rezone the Cafritz Property from R-55 Zone to M-U-TC Zone; (2) expand the Town of Riverdale Park's M-U-TC Zone Development Plan to include the 35.71 acres of Cafritz Property located along the northern boundary of the eastern portion of the existing mixed-use town center; and (3) amend the 2004 Approved Town of Riverdale Park Mixed Use Town Center Zone Development Plan to accommodate the proposed development.<sup>7</sup>

Calvert Tract's application was accepted by the Planning Board and ultimately two Planning Board hearings were held regarding the application.<sup>8</sup> During the hearings, the Planning Board staff and city officials from the neighboring areas of University Park and College Park, as well as the Mayor of Riverdale Park testified. Additionally, over 40 citizens and residents of Riverdale Park and its adjacent municipalities, University Park and College Park testified. The Planning Board also extended the public comment period and considered a

---

<sup>5</sup> The Town of Riverdale Park filed a memorandum in support of affirming the decision of the District Council in adopting Zoning Ordinance No. 11-2012.

<sup>6</sup> Calvert Tract amended its application (No. A-10018) for rezoning on January 12, 2012 to remove a sliver of land located in the City of College Park. This Court's reference to Calvert Tract's application refers to the application as amended.

<sup>7</sup> See, Calvert Tract, LLC's Response to Amster, et. al's Memorandum in Support of Judicial Review, p. 4

<sup>8</sup> Hearing dates were January 12, 2012 and February 2, 2012.

multitude of written comments during its process.<sup>9</sup> On February 16, 2012, the Planning Board approved Calvert Tract's application with conditions by adopting PGCPB Resolution No. 12-09.<sup>10</sup>

On February 21, 2012, the Planning Board's recommendation was transmitted to the District Council. The District Council subsequently held five public quasi-judicial evidentiary hearings in which extensive testimony was taken. Additionally, numerous citizens testified and several written comments regarding the application were considered by the District Council.<sup>11</sup>

On July 12, 2012, the District Council adopted Zoning Ordinance No. 11-2012 which accepted the recommendations of the Planning Board and approved the application. The effect of the action of the District Council essentially amended the zoning classification for the Cafritz property from R-55 to M-U-TC and amended the 2004 Approved Town of Riverdale Park Mixed-Use Town Center Zone Development Plan.

Petitioners in this action filed a timely appeal for judicial review of the District Council's decision to this Court.

#### **STANDARD OF REVIEW**

The role of the Prince George's County Council sitting as the District Council is that of a local administrative body. To that end, a final decision of an administrative body, such as the District Council, must be upheld upon review if there is substantial evidence in the record as a whole-- meaning evidence that is more than a mere "scintilla" and is such that a reasonable person could come to more than one conclusion thus making the issue before the administrative body "fairly debatable" (citations omitted).

Additionally, this Court is mindful that in reviewing an administrative agency's decision, its task is "not to substitute its judgment for the expertise of those persons who constitute the administrative agency." *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 576-577, 650 A.2d

---

<sup>9</sup> The Planning Board hearing record consist of 276 pages for the Jan 12 hearing and 296 pages for the Feb 2 hearing.

<sup>10</sup> The 96 page Planning Board Resolution was extensive in its findings based upon the evidence presented at the hearings. See, PBR Ex. #13

<sup>11</sup> The hearing dates were: April 11 & 30, May 4, 7 & 11 of 2012. The record of the hearings consists of over 1200 pages. Additionally 150 exhibits were introduced during the hearings.

226 (1994)(quoting *Bulluck v. Pelham Woods Apts.*, 283 Md. 505, 513, 390, A.2d 1119 (1978)). But instead it must adhere to a “restrained and disciplined judicial judgment so as not to interfere with the agency’s factual conclusions.” *State Administration Board of Election Laws v. Billhimer*, 314 Md. 46, 58-59, 548 A.2d 819 (1988) *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1644, 104 L. Ed. 2d 159 (1989) (quoting *Supervisor or Assessments of Montgomery County v. Asbury Methodist Home, Inc.*, 313 Md. 614, 625, 547 A.2d 190 (1988)).

Given this standard of review, a Court’s review of a final zoning decision is limited. As such, the Court of Appeals (Harrell J.) in *Montgomery County v. Butler*, 417 Md. 271, 283, 9 A. 3d 824 (2010), opined that the “judicial review of the final zoning action of a local administrative body.... is narrow” and is “usually limited to determining whether there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determin[ing] if the administrative decision is premised upon an erroneous conclusion of law.” *Id.* at 283 citing *Marzullo v. Kahl*, 366 Md. 158, 171, 783 A.2d. 169, 177 (2001) quoting *Bd. Of Physician Quality Assurance v. Bnks*, 354 Md. 59, 67-68, 729 A.2d 376,380 (1999). (quotation marks and citations omitted).

In *George Stover v. Prince George’s County*, 132. Md. App. 373, 380-382 (2000), the Court set out the steps by which a court reviews an administrative decision. The court stated: “First the reviewing court must determine whether the agency recognized and applied the correct principals of law governing the case; second if it is determined that the agency did not err in its determination or interpretation of the applicable law, the reviewing court next examines whether there was substantial evidence before the administrative agency on the record as a whole to support its conclusions and finally the reviewing court must examine how the agency applied the law to the facts.”

This Court’s authority to review the decision of the District Council is set forth in §22-407 of the Land Use Article of the Annotated Code of Maryland.

Pursuant to that section, a court may:

- (1) affirm the decision of the district council;
- (2) remand the case for further proceedings;

(3) or reverse or modify the decision *if the substantial rights* of the *petitioner have been prejudiced* because of the district council's action is :

- (i) unconstitutional;
- (ii) in excess of statutory authority or jurisdiction of the district council;
- (iii) made on unlawful procedure;
- (iv) affected by other error of law;
- (v) unsupported by competent, material and substantial evidence in view of the entire record as submitted or
- (vi) arbitrary or capricious.

Md. Code, Land Use §22-407(e) (*emphasis added*).

#### **DISCUSSION**<sup>12</sup>

Petitioners allege that the District Counsel committed a plethora of statutory, and various due process violations which singularly or cumulatively require this Court to reverse or remand the decision of the District Council.

Petitioners allege that the District Council: (1) lacked jurisdiction to hear and rule on Calvert Tract's application because it violated §27-198.03(b); (2) failed to follow its own rules of procedure in violation of the Accardi Doctrine; (3) failed to adhere to ethics laws; (4) failed to reject Calvert Tract's Application based upon Petitioner's view that Calvert Tract failed to accept, in writing, the conditions within 90 days of the ordinance's passage; (5 ) failed to make appropriate findings of facts and conclusions as it relates to the Applicant's "proffered conditions" numbered 11 through 27; (6) failed to make appropriate findings to establish that the Cafritz Property met the criteria for M-U-TC zoning especially as it relates to §27-198.05(a)(1)(C); (7 ) committed numerous due process and other procedural violations in approving Calvert Tract's application; (8) engaged in illegal "spot zoning"; and (9 ) that applicant Calvert

---

<sup>12</sup> Subtitle 27 of the Prince George's County Code comprises the County Zoning Ordinance. All references to the Zoning Ordinance will be §27-\_\_\_\_. Title 22 of the

Tract lacked standing to apply for the M-U-TC zone. Petitioners additionally alleged that the Planning Board failed to comply with §27-198.03(b)<sup>13</sup>

Upon this Court's review of the record as a whole, the memoranda and oral arguments of counsel and in consideration of this Court's standard of review, for the reasons stated below, this Court finds that Petitioners' assignments of error, either singularly or cumulatively fail to establish that the substantial rights of the Petitioners have been prejudiced in such a manner to cause this Court to reverse or remand the decision of the District Council. Additionally, this Court finds that the District Council's decision is not premised upon any error of law, but is supported by substantial evidence in the record as a whole. Accordingly this Court affirms the July 12, 2012 decision of the Prince George's County Council sitting as the District Council in adopting Zoning Ordinance No. 11-2012.

a. Petitioners' allegation that the District Council lacked jurisdiction is without merit

Petitioner's first argument is that the District Council lacked jurisdiction to hear Calvert Tract's application because the Planning Board failed to transmit its recommendations to the District Council within 105 days pursuant to §27-198.03(b)<sup>14</sup>

---

Annotated Code of Maryland comprises the Land Use Article. All references to the Land Use Article will be referenced as §22-\_\_\_\_\_.

<sup>13</sup> See, Petitioners' individual Memorandum of Law in Support of Judicial Review.

<sup>14</sup> This Court is mindful that the focus of its judicial review is upon the actions and decision of the District Council in rendering its decision in this case and not necessarily upon the legal and procedural errors allegedly committed by the Planning Board as set forth in Petitioners memoranda. Under the M-U-TC Zone procedures, which take the place of any other Zoning Map Amendment provisions contained in the zoning subtitle, (See, §27-198.01 (Applicability)), the Planning Board's role in this matter is one of an advisory body to give *recommendations* to the District Council regarding the rezoning of property to the M-U-TC zone. Absent from the M-U-TC zone provisions are any mechanisms for the applicant or other interested parties to seek reconsideration of the Planning Board's recommendation or to appeal its recommendation to the District Council or to seek judicial review of the recommendation by the Circuit Court. The lack of such mechanisms is understandable given that the District Council is the only body with legal authority to recommend final approval of a M-U-TC Zone. Therefore, this Court finds that, under its standard of review, in addition to determining whether the administrative record is based upon substantial evidence and is "fairly debatable" it need only determine if the District Council *itself* made legal or procedural errors which would compel this Court to reverse or remand its decision. Nevertheless, as the actions

It is not disputed by Respondents that the Planning Board committed the aforementioned procedural violation. However they argue that Petitioners waived this objection because they failed to object or join the objection of other parties before the District Council.<sup>15</sup> This Court agrees. Many Maryland cases have consistently held that issues not properly preserved for judicial review cannot be considered by the reviewing court. *Motor Vehicle Administration v. Weller*, 390 Md. 115, 887 A. 2d. 1042 (2005), *Schwartz v. Maryland Department of Natural Resources*, 385 Md. 534, 554-56, 870 A.2d 168, 180-81 (2005), *Delmarva Power & Light Co. v. Public Serv. Comm'n of Md.*, 370 Md.1, 32, 803 A.2d 560, 478 (2002).

The reasons for such a rule are at the heart of a reviewing court's deference to the decision of an administrative body. For as the Court of Appeals (Wilner, J.) stated in *Delmarva*, "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not therefore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling and state the reasons for its action. We do not allow issues to be raised for the first time in actions for judicial review of administrative agency orders entered in contested cases because to do so would allow the court to resolve matters *ad initio* that have been committed to the jurisdiction and expertise of the agency." *Id.* at 478, referencing *Bulluck v. Pehlam Wood Apartments*, 283 Md. 505 at 518-19, 390 A.2d 1119 at 1127 (1978) quoting, *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155, 67 S. Ct. 245, 91 L.Ed. 136 (1946).

This Court gives little weight to Petitioners' argument that they need not have personally objected or joined in the objection of another party below in order to preserve the issue for judicial review. Petitioners' reliance on criminal law principles of preservation are misplaced and this Court finds that such principles are not applicable to the facts of this contested *administrative* hearing.

---

of the Planning Board and the District Council are intertwined in this matter this Court will also address Petitioner's allegations of error at the Planning Board level.

<sup>15</sup> The issue of the violation of the 105 day rule was raised by other parties before the District Council who are not parties to this action.

Finally, assuming *arguendo* that Petitioners did properly preserved their objection for judicial review, this Court finds that the District Council's violation of procedural rule §27-198.03(b) fails to rise to the level of a substantial right that was prejudiced necessary to compel this Court to reverse or remand the District Council's decision.<sup>16</sup> This Court agrees with Respondents that the purpose of the statute is to "protect applicants from unreasonable delays in the consideration of their application."<sup>17</sup> Any other interpretation of the statute would unfairly penalize the applicant and the District Council in whose authority the final decision of whether property is zoned under the M-U-TC ordinances rests.<sup>18</sup> This Court further agrees with Respondents that to adopt Petitioner's argument and strictly construe the statute would lead to "an absurd result" which would unfairly penalize applicants who seek to rezone land to the the M-U-TC Zone. Accordingly, this Court finds no error.

b. Petitioners' argument that the District Council violated the Accardi doctrine fails to provide a basis upon which this Court may reverse or remand the decision of the District Council

Second in Petitioners' argument is their attempt to use the *Accardi* doctrine to overturn the District Council's decision.<sup>19</sup> The *Accardi* doctrine has its genesis in the United States Supreme Court Case of *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499 (1954).

---

<sup>16</sup> Petitioners fail to articulate any actual prejudice from the delay. This Court also notes that the District Council heard this case as a quasi-judicial proceeding which was effectively a *de novo* hearing.

<sup>17</sup> Respondent Calvert Tract's Response Memorandum, p. 10

<sup>18</sup> As noted by Ms. M. Andree Green, the County Attorney, in reference to a question by Councilwoman Mary Lehman at the hearing before the District Council "If a *final* decision is not made by the administrative body, then nothing has changed. So the citizens or anyone who was in opposition to the case would not be affected." *District Council Trans.* (4/11/2012), p. 95 (lines 2-14)

<sup>19</sup> Petitioner alleges that the District Council failed to follow its statutory rules of procedures because: (1) testimony was limited to 3 minutes per person (2) Planning Board Technical Staff representative Ms. Laruse was allowed to testify for hours and was "not under oath" for much of her testimony (3) objections that the District Council failed to follow its own rule were ignored, (4) objections made were unresolved or ruled on by People's Zoning Council or the Zoning Hearing Examiner (5) Reserved rulings were never addressed (6) rules were being made up as the hearing progressed (7) documents introduced by the state or government agencies were treated differently than others (8) Lawyers were treated differently than other attendees.

Petitioner in that action, ultimately brought a petition for habeas corpus which charged the Attorney General of the United States with “dictating” the Board of Immigration Appeals (“Board”) decision regarding Petitioner’s application for suspension of deportation under the provisions of §19(c) of the Immigration Act of 1917. *Id.* at 261.

Petitioner alleged that the Attorney General included his name on a confidential list of ‘unsavory characters’ that the Attorney General planned to deport. *Id.* at 264. This list, it was alleged, was circulated to members of the Board and effectively created a chilling effect on the members to the extent that they felt they lacked *discretion*, which was provided for in their existing regulations, to potentially act contrary to the Attorney General’s stated intentions.

In short, the Court found that the letter penned by the Attorney General was an attempt to bypass three levels of review provided in the Board’s agency regulations. The Court found that the Attorney General’s actions usurped the Board’s “independent discretion” by failing to provide a “fair hearing” which was to be afforded to him under the Board’s regulations. *Id.* at 267, 268. As such, the principles set forth in *Accardi*, have evolved into the general rule that “regulations adopted by an administrative agency cannot be waived, suspended or disregarded in a particular case so long as those regulations remain in force.” *Massy v. Sec’y Dep’t Public Safety & Corr. Servs.*, 389 Md. 496, 518, 886 A.2d 585, 597 (2005), *citing Hopkins, v. Md. Inmate Griev. Comm’n* 40 Md. App. 329, 391 A.2d 1213(1973), *cert dismissed sub nom., Secretary v. Hopkins*, 285 Md. 120 (1979). Or put another way, “an agency of the government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.” *Hopkins*, 40 Md. App. 329,336, *citing, United States v. Heffner*, 420 F. 2d 809,811 (4<sup>th</sup> Cir.,1970).

As stated by the court in *Hopkins*, “this doctrine has been broadly applied.” *Id.* at 335. However, its broad application has been curtailed by the requirement, in Maryland, that in order to prevail under the doctrine, a showing of prejudice is required. *See, Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 501, 823 A.2d 626 (2003) (“...and the version of *Accardi* we now

adopt for Maryland, prejudice to the complainant must, generally, be shown. Prejudice is a key.”)

For the reasons stated below, Petitioners’ argument fails to provide a basis upon which this Court can reverse or remand the District Council’s decision. Petitioners have failed to adequately articulate and sufficiently show any prejudice. Moreover, from this Court’s review of the extensive record in this case, it finds that each of Petitioners’ alleged points of procedural error constitute harmless error or fall within the Accardi exception allowing agencies to depart from procedural rules for the orderly transaction of agency business.<sup>20</sup> See, *Massy v. Sec’y. Dep’t of Pub. Safety & Corr. Serv.*, 389 Md. 518, 886 A.2d 585, 597 (2005); *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 823 A.2d 626 (2003).

Petitioners first allege that it was error to limit testimony before the District Council to three minutes. In the case *sub judice*, the issues addressed at the District Council level as well as at the Planning Board level generated widespread public interest. As it stands the Planning Board hearings comprised two full days. The District Council hearings stretched over 5 days. The transcript of the District Council proceedings consists of more than 1200 pages and evidentiary exhibits consists of 150 documents.<sup>21</sup> Given the manifest fervor of the public concerning Calvert Tract’s application, this Court finds that the three minute time limitation imposed on testimony was a necessary procedural safeguard to balance the need of those that wished to be heard on the issues with the District Council’s need for the hearing not to consume an “inordinate amount of time.” See, *Washington County Taxpayers Assoc. v. Board of County Comm’rs*, 269 Md. 454, 306 A.2d 539 (1973).<sup>22</sup> Additionally, this Court finds that not limiting the testimony would, more probably than not, have

---

<sup>20</sup> This Court questions whether *all* of Petitioner’s alleged violations mentioned in their memoranda are such that they trigger the Accardi doctrine. However, because this Court finds that Petitioners have fail to show any substantial prejudice as a result of the alleged violations, or that the alleged violations fall into the “Accardi exception” or are harmless error, this Court need not address this issue.

<sup>21</sup> The transcripts and evidence in this case fill 3 large cardboard file boxes.

<sup>22</sup> Contrary to Petitioner Nezzo’s Reply Memorandum of Law, (p. 21) this Court finds that the application and rationale of the court in *Washington County Taxpayers*

deprived interested parties of their procedural due process right to orally express their views given the number of people who wished to speak.<sup>23</sup>

Additionally, the Court finds no merit in Petitioners' argument that Ms. Laruse, a planning board technical staff member, was allowed to depart from the imposed three minute limitation and "testify for hours." The record shows that Ms. Laruse first provides orientation details of the development and application in order to give context to the issues before the District Council. People's Zoning Council made reference to this in the record and as stated by the District Council's Chair, such an overview was customary given the magnitude of the issues and the public's interest.<sup>24</sup>

Finally, Petitioner's remaining bases that the District Council either ignored or did not follow its own rules; failed to rule on objections or allowed People's Zoning Council or the Zoning Hearing Examiner to rule; failed to address reserved rulings; engaged in disparate treatment with respect to documentary evidence and those in attendance and that the District Council failed to provide a "required" quasi-judicial hearing in this matter, this Court finds whether taken singularly or cumulatively lacks sufficient prejudice for this Court to overcome the presumption of the correctness of the District Council's decision.<sup>25</sup>

c. Applicant Calvert Tract complied with the State Ethics Laws

Title 15 of the Annotated Code of Maryland State Government Article ("Maryland Public Ethics Laws") sets forth the ethical rules governing certain

---

regarding a time limitation on testimony is applicable to the case *sub judice* and therefore this Court adopts its rationale.

<sup>23</sup> This Court also notes that the District Council accepted written comments, in addition to and in lieu of oral testimony at the hearing in an effort to allow all those interested, a right to be heard.

<sup>24</sup> See, 4/11/2012 District Council Transcript (DCT). p. 156 & pp.158-160.

<sup>25</sup> This Court views some of the alleged violations more as evidentiary matters as opposed to being matters which may trigger the *Accardi* Doctrine, *See, Pollock v. Patuxent Inst. Bd.of Review*, 574 Md. 463, 501 (2003). Additionally, this court is unable to locate any rule or statute which prohibits either the Zoning Hearing Examiner or People's Zoning Council from assisting the District Council. This Court finds that such assistance is not tantamount to the District Council "abrogating its role as the judge in the quasi-judicial proceeding or that it "so skewed the adjudicatory process so as to eliminate any pretense of neutrality by the fact-finder." (*See, Petitioner Amster's Memorandum in Support of Judicial Review*, p.7 and *Amster's Reply Responses*, p. 6) Additionally, this Court finds that Petitioners' 'disparate treatment' arguments are meritless *per se*.

public officials and employees. These rules were enacted by the General Assembly of Maryland to ensure the “impartiality and independent judgment” of certain public officials and employees in our representative form of government. *See*, Maryland State Government Article §15-101.

Pursuant to §15-101 (c), the ethics laws, except with respect to its provisions for criminal sanctions, are to be “*liberally construed*” to accomplish its purpose to guard against improper influence (emphasis added). With this stated purpose in mind and for the reasons set forth below, this Court finds no basis upon which to reverse or remand the decision of the District Council as a result of Calvert Tract’s filing of its ethical affidavit.

Maryland State Government Article §15-831 (c), states in pertinent part that after an application is filed the applicant “shall file an affidavit, under oath, stating to the best of the applicant’s information, knowledge and belief that no payments have been made to *inter alia*, a member of the County Council... or to a slate that includes...a member of the Council during the 36-month period before the filing of the application and during the pendency of the application....” The section goes on to state that “the affidavit may be filed any time prior to consideration of the application by the District Council, at the discretion of the applicant. However in no event *may* the affidavit be filed less than 30 calendar days prior to consideration by the District Council of the application. *See*, §15-831 (2) (emphasis added). The section also provides that “supplemental affidavits” shall be filed whenever a payment is made after the original affidavit was filed.<sup>26</sup> *See*, §15-831(3)

In the case *sub judice*, Calvert Tract states that it submitted its ethics affidavit on December 11, 2011.<sup>27</sup> Petitioners “contest the accuracy” of Calvert

---

<sup>26</sup> This Court notes that the word *may* in a statute generally denote discretionary and not mandatory action (case cites omitted). In the case *sub judice*, because the language in the first part of the statute denotes a time frame in which disclosures shall be made (i.e., 36 months before the filing of the application and during the pending of the application), one could interpret the latter part of the statute to mean that although the ethics affidavit shall be filed, there is some discretion regarding whether the affidavit need be filed 30 calendar days prior to consideration by the District Council. However given this Court’s ruling, it need not reach this issue.

<sup>27</sup> *See*, Calvert Tract LLC’s Response to Amster et. al’s Memorandum in Support of Judicial Review. Pp. 18-19.

Tract's claim.<sup>28</sup> However, the fact that the affidavits have been produced, are under oath and could subject the affiant to criminal sanctions, if found to be false, is a sufficient basis for this Court to find no merit in Petitioners' arguments.

However, even if the Calvert Tract's ethics affidavit was submitted outside the 30 day statutory guidelines, it would not provide a basis upon which this Court would reverse or remand the District Council's decision. As gleaned from the statutory language and legislative intent of the public ethics laws, the crux of the statute is to ensure that there is transparency and trust by the public in our representative form of government. Specifically in this case the affidavit is filed to ensure the public that the County Council members, sitting as the District Council, considering and/or voting on Calvert Tract's application, discloses any political contributions within a specified period, so as to ensure impartiality and independence in their decision.

In this case the affidavit was filed indicating no contributions were made by the applicant to any statutorily covered party during the 36 months prior to the District Council's consideration of Calvert Tract's application. Thus the import of the statute, to ensure impartially and independence in its decision making, is preserved.<sup>29</sup> Moreover, as stated *infra*, this title, except its provisions for criminal sanctions, shall be liberally construed to accomplish its purpose. Accordingly, this Court finds as fact that the required affidavit was submitted in accordance with Md. State Gov't Code. Ann. §15-831 (c).

---

<sup>28</sup> See, Calvert Tract Response to Amster Memorandum in Support of Judicial Review, Exhibit B; Peititoner Nezzo Reply Memorandum p. 3; Petitioner Amster Reply Responses p.2

<sup>29</sup> Council for Petitioner Nezzo in its Reply Memorandum and at hearing cited a decision by the Circuit Court for Prince George's County (Honorable Leo E. Green) in *Accokeek, Mattawoman, Piscataway Creeks Communities Council, et. al. v. District Council, Prince George's County, et. al.*, CAL 09-31402 & CAL09-32017 in support of its position that this Court should reverse the decision of the District Council due to their assertion that Calvert Tract failed to file the required ethics affidavit within the prescribed time period. Although the Circuit Court's decision is of no precedential value, the cases are distinguishable in that Calvert Tract, the applicant in this case, filed the required ethics affidavit. In the case cited by Nezzo, the ethics affidavit was never filed, even after the

d. The Planning Board/District Council had the legal authority to “approve with conditions” Calvert Tract’s application and Calvert Tract’s “failure to advise” the District Council in writing pursuant to §27-157 (b)(5) of the local zoning code, of its position regarding the conditions does not void the District Council’s decision

Petitioners next put forth a two-pronged approach in its effort to persuade this Court to reverse or remand the District Council’s decision. First they argue that the Planning Board and/or the District Council lacked the “legal authority” to approve Calvert Tracts application “with conditions.”<sup>30</sup> Secondly they argue that Calvert Tract’s failure to accept or reject all “conditions” in writing within 90 days, pursuant to §27-157 (b)(5), voids the District Council’s decision and reinstates the original R-55 zone.<sup>31</sup> For the reasons set forth below this Court rejects both arguments.

This Court finds no merit in Petitioners’ argument that because §27-198.05 fails to contain any provisions “implementing conditional zoning approval under §22-214(a)” that the District Council lacked the legal authority to approve Respondent’s application with “conditions.”<sup>32</sup>

Pursuant to §27-198.03(b)(1) the Planning Board “may recommend approval, or approval with modifications of the proposed M-U-TC Zone.” The interpretations and rules of construction of the County Zoning Code state: “The word approve includes “approve with conditions, modifications or amendments.” Thus, the plain language of the statute, as defined by its own

---

court granted an extension for the applicant to file the required affidavit. *See, Nezzo Reply Memorandum of Law, Exhibit 3.*

<sup>30</sup> *See, Petitioner Nezzo’s Memorandum of Law, pp. 19-21.*

<sup>31</sup> *See Petitioner Amster’s Memorandum in Support of Judicial Review, pp. 8-9*

<sup>32</sup> Land Use Art. §22-214(a)(1)(2) states in pertinent part: “In approving any zoning map amendment, the district council may consider and adopt any reasonable requirements, safeguards and conditions that may be necessary to protect surrounding properties from adverse effects that might accrue from the zoning map amendment or would further enhance the coordinated, harmonious and systematic development of the regional district.” Petitioners allege that “the County Council has adopted ordinance provisions in other local zoning laws (§27-157 Conventional Zones, §27-176 Residential Planned Community, §27-195 Comprehensive Design Zone) to implement the authority provided for in §22-214(a)(1)(2). *See Petitioner Nezzo’s Memorandum pp19-20.* Although the County Council previously has adopted certain language to carry out the spirit of Land Use Art. §22-214(a) in other zoning ordinances, this Court is unaware of any rule or law which required the County Council, when promulgating the provisions of the M-U-TC Zone, to replicate the same or similar language in other ordinances.

rules of interpretation illustrates that the words “modifications” and “conditions” are synonymous. Accordingly, this Court finds that the Planning Board possessed the legal authority to recommend approval of Calvert Tract’s application with conditions. See, §27-108.01(10)<sup>33</sup>

Concomitantly, the District Council is the only body authorized to give final approval to either change the boundaries of an approved M-U-TC Zone or to approve an initial application for approval of classifying property as M-U-TC. See, County Zoning Code §27-198.02(a) & (d) & §27-198-05 (d)(1)(B)<sup>34</sup>

Petitioners second argument is that the District Council’s decision should be reversed or remanded by this Court because Calvert Tract failed to, in writing, accept or reject the conditions imposed by the Planning Board pursuant to §27-157(b)(5). In response, Respondents urge this Court to find that §27-157(b)(5) is at variance with §22-214(a) and that the latter section is controlling.

This Court finds, for the reasons set forth below, that §27-157(b)(5) is inapplicable when classifying property in the M-U-TC Zone, therefore Calvert Tract’s failure to either accept or reject the conditions in writing pursuant to §27-157 (b)(5) is a nullity.<sup>35</sup>

Pursuant to §22-104(a) “...the Prince George’s County district council....may (1) by local law adopt and amend the text of the zoning law for

---

<sup>33</sup> § 27-108.01 address Interpretations and Rules of Construction.

<sup>34</sup> § 27-198.02(a) & (d) state, respectively, in pertinent part:

(a) “The Planning Board may initiate an M-U-TC Zone Map Amendment only upon the concurrence (by resolution) of the District Council. (d) “...the Planning Board shall take action on the proposal and shall transmit its recommendation to the District Council for another public hearing and final action. § 27-198.05(d)(1)(B) states in pertinent part: “Amendments to change the boundaries of an M-U-TC Zone shall be approved by the District Council in accordance with the provisions of this Subdivision for initial approval.”

<sup>35</sup> At Oral Argument, Respondent District Council advanced another theory. Respondents argued that because Petitioners filed its Request for Judicial Review within 30 days after the date of the approval by the District Council that this issue is not ripe for review by this Court. Respondents argue that the applicant, pursuant to §27-157, has 90 days in which to accept or reject the conditions. Petitioner’s Request for Judicial Review filed within 30 days divested the District Council of jurisdiction over this matter. Petitioners argue that its Request for Judicial Review pursuant to §22-407 does not stay this action. Land Use Art. §22-407 (a)(4) states: “The filing of the petition does not stay enforcement of the final decision of the district council, but the district council may stay enforcement of its final decision or the reviewing court may order a stay on terms it considers proper.” Given this Court’s ruling on this issue , this Court need not address Respondents’ ripeness argument.

that county; and (2) by local law adopt and amend any map accompanying the text of the zoning law for that county.” To that end, Subtitle 27 of the Prince George’s County Code contains the zoning laws for the County which are promulgated by the County Council.

Within Subtitle 27, the section labeled *Division 2: Zoning Map Amendments*, encompasses several independent sections centered on specific zoning classifications. Each of these independent sections referred to under Division 2 as “subdivisions” contain a particular section labeled “map amendment approval” which lists and clarifies the requirements for submitting a request for a map amendment and obtaining approval from the District Council. Because these conspicuously labeled sections are independent of each other, one must look to the section relevant to the particular zoning issue under consideration when trying to determine which procedures apply. Accordingly, this Court looks to the Subdivision 3A-M-U-TC Zone<sup>36</sup> in determining this matter as Calvert Tract, the applicant in this case, sought to (1) rezone the subject property from R-55 Zone to M-U-TC Zone; (2) expand the Town of Riverdale Park’s M-U-TC Zone Development Plan to include the subject property and (3) to amend the 2004 Approved Town of Riverdale Park Mixed Use Town Center Zone Development Plan to accommodate the subject property.

Section 27-198.01(a) (Applicability) of the M-U-TC Zone states in pertinent part “This Section contains the procedures for classifying property in the M-U-TC Zone and approval of a Town Center Development Plan. *Unless otherwise specified, these procedures take the place of any other Zoning Map Amendment provisions contained in this Subtitle*” (emphasis added). In conjunction with the above analysis, this subsection further clarifies that this section controls when deciding any matter regarding a M-U-TC Zone.

Within the M-U-TC Zone, the County Council promulgated no provisions which require that the applicant accept or reject conditions imposed by a reviewing authority in order to classify property as M-U-TC. Therefore, in the case *sub judice* the fact that Calvert Tract failed to accept or reject the conditions in writing pursuant to §27-157 (b)(5) is a nullity as that provision, this Court finds, is not applicable.

---

<sup>36</sup> See, §27-198.01 through §27-198.05

- e. The District Council committed no error in adopting the findings and conclusions of the Planning Board.

This Court finds that Petitioners' argument that it was error for the District Council to adopt the findings and conclusions of the Planning Board and that the District Council failed to make findings of fact and conclusions with respect to the applicants proffered conditions (11 through 27) is without merit.

It is well established by statute and case law that in disputed cases, the District Council is required to make findings of fact and conclusions to support its decision (case cites omitted) <sup>37</sup>.

Pursuant to §27-141 of the zoning ordinance, the District Council may "take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property for the proffered conditions..." *Rodriguez v. Prince George's County*, 79 Md. App. 537, 549, 558 A.2d 742 (1989).

In this case the Planning Board, with the assistance of the Technical Staff, issued an excruciatingly detailed recommendation regarding Calvert Tract's requested rezoning of the subject property.<sup>38</sup> The plain language of §27-141 encourages the District Council to incorporate and adopt any earlier phases of the approval process.

With respect to Petitioners' argument regarding applicants "proffered conditions numbers 11 through 27", this Court finds no merit in their arguments and questions whether the "conditions numbers 11 through 27" are in fact conditions at all. Regardless, there are detailed findings and conclusions as adopted from the Planning Board to support the District Council's decision. Accordingly, given the detailed and extensive nature of the Planning Board's recommendations and in light of this Court's standard of review, this Court finds no basis upon which to reverse or remand the decision of the District Council.

---

<sup>37</sup> See, *Land Use Article §25-204 & §27-141.*

<sup>38</sup> See, *PBR Ex. #13*

- f. The District Council complied with the procedures set forth in the M-U-TC Zone including §27-198.05 and it did not engage in illegal spot zoning

This Court's review of the record in this case finds no evidence to support the Petitioner's argument on this issue. On the contrary, the record establishes that the District Council, in adopting the Planning Board's recommendations complied with the requirements the M-U-TC Zone including §27-198.05(a)(1)(C) enabling the Board to recommend to the District Council that the subject property be re-zoned. Included in the Planning Board's findings, *inter alia*, is the finding that the "area is demonstrated to be an older substantially developed mixed-use community."<sup>39</sup> See, PBR Ex.#13 p. 29 at number13 and pp.30 through 32. This Court also agrees and adopts by reference Petitioner's argument that the subject property in this case is a floating zone. Accordingly, this Court, given its standard of review, finds no basis upon which to modify, reverse or remand the decision of the District Council.

- e. The District Council did not violate any procedural or substantive due process rights

Petitioners put forth several procedural and substantive due process arguments in an effort to persuade this Court that these violations, either singularly or cumulatively compels this Court to vacate or remand the decision of the District Council.<sup>40</sup> Based upon this Court's review of the record as a whole, this Court finds that Petitioner failed to preserve the issues raised. However assuming for argument sake that Petitioners issues are preserved, this Court finds no colorable basis that a violation of procedural or substantive due

---

<sup>39</sup> This Court notes that under County Zoning Ordinance §27-198.05(a)(1)(C), "Prior to approving the M-U-TC Zone, the Council shall make the following findings: An approved Master Plan recommends a mixed use town center zone **or** the area is demonstrated to be an older, substantially developed mixed-use community."

<sup>40</sup> Petitioners put forth the following individual arguments regarding due process violations: (1) Whether the District Council's decision to adopt the "findings and conclusions" of the Planning Board failed to adhere to trial-like procedures required by the §27-129? (d);(2) Whether the failure to administer lawful oaths under penalty of perjury to witnesses testifying before the District Council failed to provide trial-like procedures?; (3) Whether the Planning Board violated its procedures for recessed hearings and notice? (4) Whether §27-109.03 (b) violates due process by not permitting the denial of a M-U-TC application.

process occurred at the Planning Board level or in the hearings before the District Council such that it impinged upon the fundamental fairness of the proceedings or prejudiced a substantial right of the Petitioners in such a manner to as to cause this Court to reverse or remand the decision of the District Council. Accordingly, this Court finds no merit in any of Petitioners due process arguments.<sup>41</sup>

g. Applicant, Calvert Tract, LLC had standing to apply for the M-U-TC Zone

There is no dispute that Calvert Tract, LLC is the owner of the subject property. Pursuant to §27-198.05(d)(1)(A) "A request to change the boundaries of an approved M-U-TC Zone, or to amend an approved Town Center Development Plan, may be made by a property owner or any municipality within which any portion of the zone is located." This Court's reading of the plain language of §27-198.05(d)(1)(A) establishes that Calvert Tract has standing to apply for the M-U-TC Zone. This Court agrees with Respondents that any other reading of the statute would lead to an "absurd result." Accordingly Petitioners' argument on this issue fails.

Based upon the foregoing, this Court has determined that the District Council applied the correct principals of law in this matter. This Court also finds that the District Council did not err in its determination or interpretation of the applicable law. Next the Court must examine whether there was substantial evidence in the record such that a reasonable person could come to more than one conclusion thus making the issue "fairly debatable."

This Court's review of the record as a whole finds that there was substantial evidence in the record upon which reasonable persons could come to different conclusions.

This highly contested zoning hearing consisted of several days of quasi-judicial public hearings which produced over 1200 pages of transcripts in which arguments, legal and non-legal for and against approval, were debated.

---

<sup>41</sup> With respect to Petitioner's argument that the Planning Board "violated its procedures for recessed hearings and notice" this Court again notes that its review in this case is not of whether the Planning Board adhered to its procedures but whether the District Court in its actions, committed error. Accordingly this Court finds no basis to assign error.

In light of this record, it seems somewhat of an understatement to say that the issues before the District Council were fairly debatable. Accordingly, this Court finds that the District Council carried out its fact finding function and as such the District Council's factual findings meet the substantial evidence test this Court must apply and has applied upon review. See, *Department of Health and Mental Hygiene v. Riverview Nursing Centre, Inc.*, 104 Md. App 593, 602 657 A.2d 372, *cert denied*, 340 Md. 215,665 A.2d 1058 (1995)(*citation omitted*). As such, this Court finds no error.

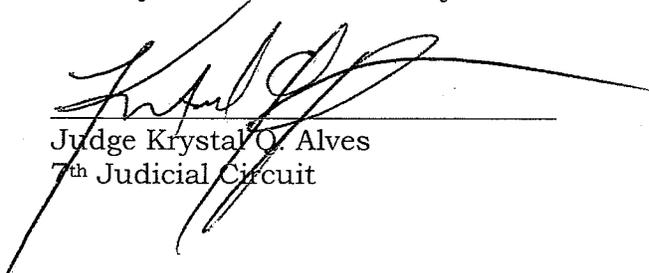
As a final matter, this Court is tasked with examining how the agency applied the law to the facts. In reviewing the District Council's action, this Court is acutely aware that the test for review of this function is "whether... a reasoning mind could reasonably have reached the conclusion reached by the [agency], consistent with a proper application of the [controlling legal principles]." *Comptroller of the Treasury v. World Book Childcraft Int'l, Inc.* 67 Md. App. 424, 438-439, 508 A.2d 148, *cert denied*, 307 Md. 260, 513 A.2d 314 (1986)(*quoting Ramsay, Scarlett & Co., Inc. v. Comptroller of the Treasury*, 302 Md. 825, 834-838, 490 A.2d 1296 (1985)). Based upon the review of the record, again, this Court finds no error.

Accordingly it is therefore on this 17 day of September, 2013 by the Circuit Court of Prince George's County, Maryland,

**ORDERED**, that the decision of the Prince George's County Council sitting as the District Council for Prince George's County, Maryland be and is hereby **AFFIRMED**, and it is further

**ORDERED**, that the Petitioners shall pay the costs of these proceedings as taxed by the Clerk of the Court; and it is further,

**ORDERED**, that this case be and hereby is closed statistically.

  
\_\_\_\_\_  
Judge Krystal O. Alves  
7<sup>th</sup> Judicial Circuit

Copies sent by the Court to:

Jason Amster, Esq.  
14416 Old Mille Road Suite 101  
Upper Marlboro, MD 20772

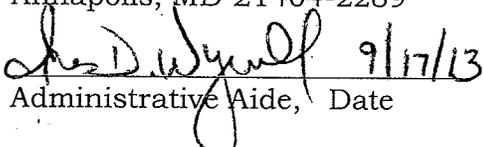
Thomas E. Dernoga, Esq.  
15611 Straughn Drive  
Laurel, Maryland 20702

Timothy F. Maloney, Esq.  
Joseph M. Creed, Esq.  
Hina Z. Hussain, Esq.  
Joseph, Greenwald & Laake, P.A.  
6404 Ivy Lane Suite 400  
Greenbelt, MD 20770

Richard K. Reed, Esq.  
Christopher L. Hatcher, Esq.  
Rifkin, Livingston, Levitan & Silver, LLC  
7979 Old Georgetown Road, Suite 400  
Bethesda, MD 20814

Rajesh A. Kumar, Esq.  
Principal Counsel  
Prince George's County Council  
County Administrative Building Rm. 2055  
Upper Marlboro, MD 20772

Frederick C. Sussman, Esq.  
Council, Baradel, Kosmerl & Nolan, P.A.  
P.O. Box 2289  
Annapolis, MD 21404-2289

 9/17/13  
Administrative Aide, Date