Circuit Court for Washington County
Case No. C-21-CV-22-000500

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 299

September Term, 2023

JAMES BLACK, ET AL.

v.

THE BOWMAN GROUP, LLC, ET AL.

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 28, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be citated as persuasive authority only if the citation conforms to Md. Rule 1-104(a)(2)(B).

Less than two hours before the start of a long-scheduled hearing on a motion for preliminary injunction, a number of parties moved to intervene and asked the court to dismiss the complaint. The court denied the motion to intervene on the ground that it was untimely.

The putative intervenors appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 29, 2022, a lame-duck Board of County Commissioners adopted a zoning code amendment to the Washington County Zoning Code. The amendment, which was approved on a 3-2 vote, eliminated truck stops as a permitted use and allowed certain large warehouses only as special exception uses.

On December 6, 2022, appellees Bowman Group LLC and Bowman-Spielman LLC (collectively, "Bowman") commenced this civil action by filing a verified complaint in the Circuit Court for Washington County. As the sole defendant, Bowman named the Board of County Commissioners. In summary, Bowman alleged that the Board had ignored several procedural requirements before it approved the amendment. Among other things, Bowman asked the court to declare that the amendment was invalid and to issue an injunction preventing the amendment from becoming law. A motion for a temporary restraining order accompanied the complaint.

The following day, an attorney purported to enter her appearance on behalf of four "prospective intervenors." None of the "prospective intervenors" moved to intervene at that time.[1]

On December 12, 2022, the circuit court denied the motion for a temporary restraining order. In a brief memorandum opinion, the court acknowledged that the complaint, to which the Board of County Commissioners had yet to respond, "raise[d] serious legal issues about the adoption" of the zoning code amendment. The court, however, found that Bowman would not suffer immediate and irreparable harm before a full adversary hearing could be held on the request for a preliminary injunction.

On December 14, 2022, the court scheduled a hearing on the request for preliminary injunction for February 21, 2023, at 1:30 p.m. On that same day, the court informed the parties and the attorney for the "prospective intervenors" of the hearing date.

On December 28, 2022, the court issued a writ of summons for the Board of County Commissioners. On January 30, 2023, the Board filed its answer. In its answer, the newly constituted Board admitted all of the factual allegations in the verified complaint and asserted no defenses.

At 11:53 a.m. on February 21, 2023, 97 minutes before the hearing on the motion for a preliminary injunction was to begin, the attorney for the "prospective intervenors"

[1] It is unclear how an attorney can enter an appearance on behalf of someone who is not yet a party and has made no effort to become a party by moving to intervene.

e-filed a motion to intervene on behalf of 11 residents of Washington County, including the four "prospective intervenors" whom she had identified more than two months before.

The motion to intervene was accompanied by a 12-page motion to dismiss Bowman's complaint on the ground that it failed to allege taxpayer standing.[2] Counsel for Bowman represents that he was on his way from his office in Frederick to the circuit court in Hagerstown when these motions were e-filed.

Before the hearing began, the counsel for the actual parties to the case—Bowman and the Board of County Commissioners—met briefly in chambers with the circuit court judge. Counsel for the putative intervenors had not yet arrived at the courthouse and did not participate in the meeting.

[2] "Challengers to comprehensive zoning ordinances . . . are required to satisfy the requirements of taxpayer standing[.]" *Anne Arundel County v. Bell*, 442 Md. 539, 575 (2015). "The common law taxpayer standing doctrine permits taxpayers to seek the aid of courts, exercising equity powers, to enjoin illegal and *ultra vires* acts of public officials where those acts are reasonably likely to result in pecuniary loss to the taxpayer." *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 538 (2014). To have taxpayer standing, the complainant must demonstrate two requirements. The first requirement is taxpayer status, which requires the plaintiff to "demonstrate that: (a) 'the complainant is a taxpayer,' and (b) 'the suit is brought, either expressly or implicitly, on behalf of all other taxpayers.'" *George v. Baltimore County*, 463 Md. 263, 275 (2019) (quoting *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. at 547). The second requirement is that a complainant "must assert a 'special interest[.]'" *Id.* "Special interest requires a taxpayer to allege: [(1)] an action by a municipal corporation or public official that is illegal or *ultra vires*[;] and [(2)] that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes." *Id.* at 275-76 (quoting *Kendall v. Howard County*, 431 Md. 590, 605 (2013)).

When the hearing began, at 1:37 p.m., the court announced that it had agreed to advance the trial on the merits and to consolidate the trial with the preliminary injunction hearing, as it is empowered to do under Maryland Rule 15-505(b). Counsel for the putative intervenors had not yet arrived in the courtroom when the court made that announcement.

At the hearing, counsel for Bowman presented the facts by way of stipulation. The pertinent stipulations were as follows:

Bowman owns a property in Williamsport, in Washington County. The property is adjacent to Interstate 81, where a number of truck stops are located.

On or about April 6, 2022, Bowman applied to the Washington County Board of Zoning Appeals for a special exception that would permit it to operate a truck stop and convenience store on that property. Following a contentious public hearing on June 8, 2022, the Board of Zoning Appeals approved Bowman's application.

The opponents of Bowman's application, who included some of the putative intervenors in this case, filed a petition for judicial review in the Circuit Court for Washington County. A hearing on the petition for judicial review was scheduled for April 5, 2023.

On or about October 25, 2022, while the petition for judicial review was pending, the Board of County Commissioners expressed a desire to amend the County's zoning ordinance in order to remove truck stops as a special exception use in the highway interchange district and to prohibit warehouses with a gross building area greater than or

equal to one million square feet. Bowman had already sought and obtained a special exception from the Board of Zoning Appeals for a truck stop.

At some point between October 25, 2022, and November 15, 2022, the Board of County Commissioners submitted an application to amend the zoning ordinance. At around the same time, the Board of County Commissioners informed the Washington County Planning Commission that it had submitted an application to amend the zoning ordinance by text amendment.

The Planning Commission informed the Board that it would hold a hearing on the text amendment on December 5, 2022, the date of the Planning Commission's next scheduled meeting.[3] By December 5, 2022, however, several of the incumbent county commissioners would have left the Board because they had not been re-elected.

On November 15, 2022, after the Planning Commission had informed the Board that it would hold a hearing on the text amendment on December 5, 2022, the Board of County Commissioners published a notice in a local newspaper. The notice informed the public that the Board of County Commissioners would consider the text amendment at a hearing on November 29, 2022. According to the notice, a copy of the proposed

[3] Under section 27.1 of the Washington County zoning ordinance, the Board of County Commissioners "shall" refer any proposed amendments to the Planning Commission for "analysis, study, and recommendation." According to the Board's Zoning Text Amendment Procedures, the Planning Commission "shall" prepare a report analyzing a text amendment. The Zoning Text Amendment Procedures envision that the Planning Commission will conduct a hearing after the report is filed and make a recommendation to the Board.

amendment was available for review on the Washington County website, and it gave a hyperlink to the place on the website where one could find the amendment.[4]

Despite the statement in the published notice, the proposed zoning amendment did not appear on the Washington County website until November 16, 2022. On November 24, 2022, the Washington County website suffered a "cyber-security incident," which made the hyperlink unavailable from that day until November 29, 2022, the day of the hearing.

The Planning Commission did not hold a hearing on the proposed text amendment before November 29, 2022. Nor did the Planning Commission make a recommendation to the Board of County Commissioners before November 29, 2022.[5]

The date of the public hearing—November 29, 2022—was one week before the terms of the current commissioners would expire. It was also the date of the last regularly scheduled meeting of the Board of County Commissioners as it was then constituted.

At a hearing before the Board of County Commissioners on November 29, 2022, one of the commissioners introduced a zoning text amendment that differed from the

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[4] Section 4-203(b)(2)(i) of the Land Use Article of the Annotated Code of Maryland (2012) states that "[a] legislative body," such as the Board of County Commissioners, "shall publish notice of the time and place" of a public hearing "on a proposed zoning regulation or boundary[.]" Section 4-203(b)(2)(i) of the Land Use Article states that the "legislative body shall publish the first notice of the hearing at least 14 days before the hearing."

[5] See *supra* n.3 for a discussion of the requirement that the Planning Commission conduct a public hearing on text amendments and make a recommendation to the Board.

amendment that had been advertised to the public.[6] The commissioners approved the amendment by a 3-2 vote. Of the three commissioners who voted to approve the amendment, two left the Board only a week later, on December 6, 2022, when the newly elected commissioners began their terms.

After the adoption of the text amendment, Bowman's adversaries in the judicial review proceeding used the zoning text amendment to argue that the Board of Zoning Appeals' decision was inconsistent with the amended zoning ordinance and that a truck stop was no longer a permissible use in a highway interchange district. On those bases, Bowman's adversaries had asked the circuit court to vacate the decision in which the Board of Zoning Appeals granted Bowman a special exception to construct its convenience store.

On the basis of these stipulations, Bowman contended that the zoning text amendment was void *ab initio*. In support of that contention, Bowman argued, among other things, the outgoing Board of County Commissioners had not given proper notice of its intention to consider the amendment and had failed to follow its own procedures by adopting the amendment before the Planning Commission could hold a hearing and make a recommendation.

[6] As advertised, the amendment would eliminate truck stops as a special exception use and remove the definition of a "truck stop." As introduced, the amendment would eliminate truck stops as a special exception use, but keep the definition of a "truck stop."

After Bowman concluded its presentation, an attorney for the Board of County Commissioners told the court that no material facts were in dispute and that the parties would await the court's application of the law to the undisputed facts.

At some point during the hearing, the attorney for the putative intervenors arrived. At the very end of the hearing, she interjected to inform the court that her clients had moved to intervene and to dismiss the complaint. The court took the matter under advisement.

On March 8, 2023, Bowman filed a written opposition to the motion to intervene. In that opposition, Bowman argued, among other things, that the motion was untimely. At the same time that it filed its opposition to the motion to intervene, Bowman filed a motion for leave to file an amended verified complaint. The amended complaint, which Bowman attached to its motion, alleged, in great detail, that Bowman had taxpayer standing.

The court resolved the case through three orders that were docketed on March 16, 2023.

First, the court denied the motion to intervene because it was not "'timely,'" "as is required by Rule 2-214."

Second, the court denied Bowman's motion for leave to amend its complaint, because Bowman did not ask for leave until after the court had conducted the trial and taken the matter under advisement.

Finally, the court filed a memorandum opinion and order in which it concluded that the Board of County Commissioners had "illegally adopted" the zoning text amendment. In support of that conclusion, the court reasoned that, in adopting the amendment, the Commissioners had violated § 4-203 of the Land Use Article and their own written procedures for considering zoning text amendments. The court specifically cited the Commissioners' failure to give proper notice of the public hearing and their failure to permit the Planning Commission to hold a public hearing and to issue its own recommendation.

In a separate document filed on that same day, the court declared, among other things, that the zoning text amendment was "void ab initio and unenforceable" and issued a permanent injunction restraining the Board of County Commissioners from enforcing the amendment.

The putative intervenors noted a timely appeal. Bowman noted a cross-appeal from the denial of its motion for leave to amend.

QUESTIONS PRESENTED

The putative intervenors present two questions, which we quote:

> A. Did the circuit court err when it denied appellants' motion to intervene before addressing whether Bowman had standing to maintain the pending lawsuit?
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> B. Did the circuit [court] err when it denied appellants' motion to intervene as untimely?

In its cross-appeal, Bowman presents two questions, which we quote:

1. Did the circuit court err and abuse its discretion when it denied appellants' motion to intervene?

2. In the event this Court finds that appellants' motion to intervene was improperly denied and vacates the order declaring rights and granting injunctive relief, did the circuit court err and abuse its discretion when denying the motion for leave to file amended verified complaint filed by appellees?[7]

For the reasons discussed below, we conclude that the court did not err or abuse its discretion in its handling of the motion to intervene. Our resolution of that issue makes it unnecessary to decide the cross-appeal. We shall affirm the judgment.

DISCUSSION

The putative intervenors argue, first, that the court erred in denying their motion to intervene before it considered whether Bowman had standing. Their argument puts the cart before the horse.

When the putative intervenors moved to intervene, no party to the case challenged whether Bowman had standing. The court had no obligation to consider an issue that no party had raised. And the court had no obligation to consider an issue raised by the putative intervenors unless and until they became parties—i.e., unless and until it had permitted them to intervene.

We turn to the second issue: whether the court erred or abused its discretion in denying the motion to intervene on the ground that it was untimely.

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[7] Bowman's first question is not a proper basis for a cross-appeal; it is simply a reformulation of one of the questions presented in the putative intervenors' brief.

Maryland Rule 2-214 governs intervention. The rule recognizes two classes of intervenors: those who are entitled to intervene as a matter of right[8] and those who may be permitted to intervene.[9] In either case, the rule permits a person to intervene only "[u]pon timely motion." Md. Rule 2-214(a); Md. Rule 2-214(b)(1).

In this context, "'[t]imeliness depends upon the individual circumstances in each case, and . . . consideration of those circumstances rests initially with the sound discretion of the trial court[.]'" *Doe v. Alternative Medicine Maryland, LLC*, 455 Md. 377, 415 (2017) (quoting *Maryland-Nat'l Cap. Park & Planning Comm'n v. Town of Washington Grove*, 408 Md. 37, 70 (2009)). "[W]hether a motion to intervene is timely depends on 'the purpose for which intervention is sought, the probability of prejudice to the parties already in the case, the extent to which the proceedings have progressed when the movant [mov]es to intervene, and the reason or reasons for the delay in seeking intervention.'"

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[8] A person may intervene as a matter of right "(1) when the person has an unconditional right to intervene as a matter of law; or (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties." Md. Rule 2-214(a).

[9] "[A] person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action." Md. Rule 2-214(b)(1). In addition, "[u]pon timely motion the federal government, the State, a political subdivision of the State, or any officer or agency of any of them may be permitted to intervene in an action when the validity of a constitutional provision, charter provision, statute, ordinance, regulation, executive order, requirement, or agreement affecting the moving party is drawn in question in the action, or when a party to an action relies for ground of claim or defense on such constitutional provision, charter provision, statute, ordinance, regulation, executive order, requirement, or agreement." Md. Rule 2-214(b)(2).

Id. (quoting *Maryland-Nat'l Cap. Park & Planning Comm'n v. Town of Washington Grove*, 408 Md. at 70).

When a court denies a motion to intervene on the ground that it is untimely, we review the decision for abuse of discretion. *See*, *e.g.*, *Maryland-Nat'l Cap. Park & Planning Comm'n v. Town of Washington Grove*, 408 Md. at 65. In general, a trial court abuses its discretion when "'no reasonable person would take the view adopted by the [trial] court,'" or when the court acts "'without reference to any guiding rules or principles.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (alteration in original) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)). Typically, for an appellate court to find an abuse of discretion, "'[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id.* at 313 (quoting *North v. North*, 102 Md. App. at 14).

The circuit court did not abuse its discretion in this case. The deficiencies, if any, in Bowman's complaint were apparent when the complaint was filed two and a half months before the hearing. Counsel for the prospective intervenors knew of the complaint and its alleged deficiencies almost as soon as it was filed, as she purported to enter an appearance on the following day. The court had scheduled the preliminary injunction hearing more than two months in advance, and counsel for the putative intervenors received notice of the hearing when the court scheduled it. Three weeks before the hearing, the Board of County Commissioners announced that it did not dispute

Bowman's allegations and did not intend to raise any defenses, including the defense that Bowman had failed to allege taxpayer standing. Bowman might have been able to cure any alleged deficiencies in the complaint had the putative intervenors raised the issue at a reasonable time before the hearing. Yet, the putative intervenors filed nothing until less than two hours before the hearing was to begin. Even then, their counsel did not appear in court until sometime after the hearing had commenced.

In these circumstances, the circuit court could reasonably conclude that the motion to intervene was designed to delay the hearing on the motion for a preliminary injunction while the litigants briefed and argued whether the putative intervenors were actually entitled to intervene, whether Bowman's complaint adequately alleged taxpayer standing, whether Bowman could adequately allege taxpayer standing in an amended complaint, etc. The delay could easily be envisioned to extend for five or six weeks, until after April 5, 2023, the scheduled date of the hearing on the petition for judicial review of the administrative decision that granted a special exception to Bowman. The court did not abuse its discretion in denying the motion on the ground that it was untimely.

At oral argument, the Court asked the putative intervenors why they waited until less than two hours before the preliminary injunction hearing before moving to intervene. In response, the putative intervenors attempted to downplay the importance of the hearing. We find the response unpersuasive.

Even if the court had not converted the preliminary injunction hearing into a hearing on the merits, the decision to grant or deny a preliminary injunction would have

been a major event in the case. Experience teaches that the grant or denial of a preliminary injunction is often the central decision in an action for injunctive relief: that is one reason why the legislature generally permits a person to take an immediate appeal of those orders even though they are interlocutory. *See* Md. Code (1974, 2020 Repl. Vol.), § 12-303(3)(i) of the Courts and Judicial Proceedings Article; *id*. § 12-303(3)(iii). Furthermore, the grant or denial of a preliminary injunction would have had an obvious impact on the judicial review proceeding, in which Bowman's adversaries, including some of the putative intervenors, relied on the zoning text amendment to attack the grant of the special exception to Bowman. If the court had not enjoined the enforcement of the amendment at the time of the hearing on the petition for judicial review, Bowman's adversaries could rely on the amendment to argue against the grant of the special exception. If, on the other hand, the court had enjoined the amendment—even preliminarily—at the time of the hearing on the petition for judicial review, an argument based on the validity of the amendment would retain little, if any, force.

Finally, the putative intervenors' own conduct belies their assertions about the unimportance of the hearing on the motion for a preliminary injunction. If the motion for a preliminary injunction was a non-event, why did they move to intervene and to dismiss the complaint just before the hearing began? Why did their counsel appear at the hearing (albeit belatedly)? It appears as though the putative intervenors were trying to get their motions on the court's agenda before it ruled on the preliminary injunction. They waited as long they could before acting because they wanted to deprive Bowman of the ability to

cure the alleged deficiencies in its complaint before the preliminary injunction hearing had begun. The motion to intervene was untimely.

In conclusion, the court had no obligation to consider the putative intervenors' motion to dismiss until it had allowed them to intervene, and the court did not abuse its discretion in denying the motion to intervene on the ground that it was untimely.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.