

Circuit Court for Baltimore City
Case No. 24C21002362

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 2018

September Term, 2021

IN THE MATTER OF THE PETITION OF
MARY NOWLIN, ET AL.

Graeff,
Reed,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: July 18, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

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

Appellants, Mary Nowlin, Arica Gonzalez, and Monalisa Diallo, challenge a decision by appellee, the Baltimore City Board of Municipal and Zoning Appeals (“BMZA” or “Board”), approving a drive-through restaurant as a conditional use under the Zoning Code of Baltimore City. On judicial review in the Circuit Court for Baltimore City, the court affirmed the BMZA’s decision.

On appeal, appellants present two questions for this Court’s review,¹ which we have consolidated and rephrased, as follows:

Did the BMZA err in approving a drive-through restaurant as a conditional use where the proposal failed to comply with Baltimore City Zoning Code requirements, there was substantial evidence of unique harm and safety concerns at the site, and there was no evidence that the proposed use could be conducted without detriment to the neighborhood?

For the reasons set forth below, we shall vacate the judgment of the circuit court and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2020, Sparks Land Development (“Owner”) submitted an application to the BMZA for approval to build a Checkers drive-through restaurant at 2600 Gwynns Falls

¹ Appellants’ questions presented include:

1. Did the [BMZA] err in approving a drive-through restaurant as a conditional use where the proposal failed to comply with Baltimore City Zoning Code requirements?
2. Did the [BMZA] err in approving a drive-through restaurant as a conditional use for a drive-through restaurant where there was substantial evidence of unique harm and safety concerns at the site, and there was no evidence that the proposed use could be conducted without detriment to the neighborhood?

Parkway in Baltimore City (the “Property”). The Property is located on the corner of Tioga Parkway and Gwynns Falls Parkway in a C-2 zoning district, which allows for the construction of a restaurant. Because the proposal includes a drive-through, however, the BMZA must approve the drive-through as a separate conditional use. The Property currently has a “one-story detached commercial building, last authorized for use as a ‘motor vehicle service and repair.’”

On January 26, 2021, the BMZA held a public hearing on the application. Livhu Ndou, the Executive Director of the BMZA, noted that there were several letters that she would read into the record, and the BMZA would focus only on the drive-through because the restaurant was “permitted by right.”² Ms. Ndou read a letter from Councilman James Torrence, supporting the community’s opposition and expressing concern regarding traffic congestion and danger resulting from impeding the flow of traffic due to the entrance/exit of the proposed drive-through. Councilman Torrence stated that the community had many “unanswered questions and concerns, including a potential for traffic congestion and other accompanied dangers resulting from impeding flow of traffic.” Ms. Ndou also read letters from several members of the community who expressed concern over potential problems resulting from the drive-through. In addition to traffic concerns, there were concerns regarding the safety of the children who would have to walk past the drive-through to get to and from school.

² The BMZA also heard testimony on environmental issues and socioeconomic concerns. It took notice of these concerns but deemed them not sufficiently important to the issue before it.

In addition to the letters, several members of the community testified at the hearing and expressed concern regarding the possible increase of cars constantly circulating through the parking lot and the potential backup of cars on the parkway trying to exit and enter the Property. One person stated that there is “no place on [the] street for cars to [queue] or line up,” and there is only “one ingress and one egress” for the entire corner lot. Another person noted that, because of the proposed single entrance for the exit/entrance, “parents will have to worry about their children having to walk past the drive-through that will constantly have cars turning onto and off of [the] parking lot.”

On the issue of safety, the BMZA heard testimony from Sheena Ham, the President of the Gwynns Falls Elementary School Parent Teacher Organization. She testified that children, ages four to 18, would be affected by the proposed drive-through. “There is no crossing guard at the intersection,” and a new drive-through on the Gwynns Falls Parkway sidewalk would increase safety risks for children walking to and from school. Additionally, Ms. Ham noted the major traffic congestion issue in the area, stating that this drive-through would only increase problems for children. Finally, community members noted that many similar applications for a conditional use had been denied for the Mondawmin Mall, which is close in proximity to the Property.

Martin French, a member of the Baltimore City Department of Planning testified that the Department had reviewed the application for a conditional use, but the Site Plan Review Committee had not reviewed the alternative site plan proposed. He noted the importance that the use not have a negative effect on traffic, given the existing traffic

volume on Gwynns Falls Parkway. He encouraged Owner to consult with the Department of Transportation about potential traffic impacts before preparing a final preliminary site plan for the Site Plan Review Committee, given the concerns of the community, particularly with respect to queuing “of traffic on Tioga Parkway.” Mr. French reiterated that the current plans had not yet been reviewed to see if they were feasible, noting that they may not be able to meet agency requirements. He testified that, “[a]t the very least,” the Department of Planning recommended that approval of the application be subject to the condition that all improvements be completed and installed in accordance with a development plan approved by the Departments of Planning and Transportation, acknowledging “that this might not be possible to accomplish.”

In support of the application, counsel for Owner stated that it had made significant alterations to the initial site plan based on feedback from others, including the community and the Department of Planning. These changes included removing the secondary entrance onto Tioga Parkway and adding extra buffering and landscaping to help with concerns regarding noise and crowd control. He stated that Owner “would work with the Site Plan Review Committee and the Department of Transportation to finalize the site plan” as recommended.

Counsel argued that “the test [under relevant case law and the code] is whether the presumed adverse effects of the drive-through on Gwynns Falls Parkway are greater than any other location in the C-2 Zone.” He asserted that the proposed plan would not change the safety concerns in the area, and “there already are two large entrances, ingress and

gress, on both Tioga and on Gwynns Falls at this site.” He further pointed to the testimony from the community regarding the other dangerous intersections in the same zone, and argued that “it’s not [the BMZA’s] job to try to address all the problems associated with car accidents in the [c]ity when it comes to this very narrow review of this issue.”

On April 22, 2021, the BMZA issued a resolution. It noted that the restaurant was a permitted use, but the “drive-through facility” was considered a separate use that must be approved as a conditional use. The BMZA granted the conditional use application.

In doing so, the BMZA first examined the criteria set forth in BALT. CITY, MD., ZONING CODE, art. 32 (“ZC”) § 5-406 (2017) (amended 2023).³ The BMZA noted community concerns about traffic, and it stated that, although it believed that traffic was a problem in the area, it was “not persuaded that the proposed use [would] adversely impact traffic patterns, above and beyond those already experience[d] on and around Gwynns Falls Parkway.” The BMZA believed that any traffic risks would be mitigated by Owner’s involvement of the Departments of Planning and Transportation prior to construction. The BMZA was not persuaded that the proposed use would create additional safety concerns for children traveling to the school beyond those that already exist. The BMZA explained:

After a complete and comprehensive review of all the evidence, the Board finds by competent evidence that the establishment, location, construction,

³ BALT. CITY, MD., ZONING CODE, art. 32 (“ZC”) § 5-406 (2017) was subsequently repealed and re-ordained with amendments during the 2022 legislative session, which made technical changes to the code not relevant to the issues on appeal. *See* 2022 BALT. CITY, MD., Ordinance 22-181 (effective date Jan. 21, 2023). The amendment switched subsection (b) with subsection (a) but otherwise, the substance of the code was essentially unchanged. *See id.* For purposes of clarity, we shall refer to the language in effect at the time of the proceedings before the BMZA in this opinion.

maintenance, and operation of the proposed Drive-Through Facility would not be detrimental to or endanger the public health, safety, or welfare; the proposed use is not precluded by any other law, including any applicable Urban Renewal Plan; this authorization is not contrary to the public interest; and this authorization and proposed use is in harmony with the purpose and intent of this Code. In consideration of these standards including those imposed by ZC § 5-406(b), and on review of the file, testimony, and evidence submitted in support of this conditional use application, the Board finds by competent evidence that [Owner's] request meets the requirements of Article 32, the Zoning Code of the City of Baltimore.

The BMZA therefore granted Owner's conditional use application on the condition that "[a]ll improvements are completed and installed in accordance with development plans approved by the Department of Planning and Transportation."⁴

On May 19, 2021, appellants filed a petition for judicial review in the Circuit Court for Baltimore City. On December 15, 2021, and January 5, 2022, the court held hearings on the matter. Counsel for appellants argued that the BMZA "abdicated its legal responsibilities under the zoning code and blatantly misinterpreted and misapplied controlling law," as expressed in *Schultz v. Pritts*, 291 Md. 1 (1981). Specifically, counsel argued that the BMZA's finding that traffic concerns would be similar to those created by any commercial business was plain error and grounds for reversal under *Schultz*. Counsel also argued that Owner had the burden of proof to show that the conditional use would conform to all applicable requirements under the code, including curb cuts and traffic concerns defined in ZC § 14-311. Finally, counsel argued that the BMZA failed to properly

⁴ Pursuant to ZC § 5-405: "Before approving any conditional use, the [BMZA] or the City Council, as the case may be, may impose on the establishment . . . of the conditional use any condition, restriction, or limitation that it considers necessary for the protection of the public interest."

apply the zoning code when considering the close proximity of an elementary school to the Property and the adverse effects associated with increased traffic. Counsel requested that the court reverse the BMZA's decision because Owner had not produced substantial evidence to address the requirements laid out in the zoning code.

Counsel for the BMZA argued that, although the proximity of the elementary school was a relevant factor, the school is not an adjoining property, and it is 0.4 miles away from the Property. He noted that the BMZA was not persuaded that the adverse impacts were above and beyond those already present around the Property, and he argued that the approval was conditioned on the Department of Transportation assisting with the new site design to mitigate any potential traffic concerns. Counsel also argued that the "comparison between a conditional use and a permitted use was not the appropriate analysis and emphasized that the test specifically asked courts to evaluate whether a particularized proposal has detrimental effects above and beyond those ordinarily associated with those uses."

On January 5, 2022, the hearing continued. Counsel for the BMZA contended that, due to the legislative decision to zone the area as C-2, which allows for commercial restaurants, including fast food restaurants, "a drive-through facility is designated as a conditional use" and is "presumed to be valid." He further argued that "reviewing bodies must only look to whether the proposed conditional use has an adverse impact that goes above and beyond the inherent adverse impacts" of the area.

On January 24, 2022, the circuit court affirmed the BMZA’s decision. The court first addressed appellants’ argument that the BMZA failed to apply the appropriate legal standard. It found that the BMZA’s resolution properly cited the correct legal proposition from *Schultz*, 291 Md. at 22–23, i.e., “that the test was whether, ‘the proposed use has adverse effects above and beyond those inherently associated with such a [conditional use] irrespective of its location within the zone.’” The BMZA also cited the applicable zoning code and the factors under ZC § 5-406. Therefore, the court concluded that the BMZA’s “decision was not based on an erroneous conclusion of law.”

The court then addressed appellants’ argument regarding the sufficiency of evidence to support the BMZA’s decision to grant the application to use the Property as a restaurant with a drive-through facility. The court noted that the BMZA “reviewed the file and evidence, heard arguments at the hearing, evaluated the presentation by the City’s Planning Department, required that [Owner] work with the Department of Transportation to mitigate traffic concerns, [and] reviewed and considered the concerns raised by the community members.” The court found that reasonable minds could conclude that the BMZA properly granted the conditional use application, and there was substantial evidence to support the BMZA’s decision.

This appeal followed.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, “this Court reviews the agency’s decision, not the circuit court’s decision.” *Halici v. City of Gaithersburg*, 180

Md. App. 238, 248 (citing *Anderson v. General Cas. Ins. Co.*, 402 Md. 236, 244 (2007)), *cert. denied*, 406 Md. 113 (2008). This review is “limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised on an erroneous conclusion of law.” *Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Prop.*, 453 Md. 516, 532–33 (2017) (quoting *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 67–68 (1999)). “Substantial evidence” requires the court to decide “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Id.* (quoting *Banks*, 354 Md. at 68).

DISCUSSION

Appellants contend that the BMZA erred in granting the conditional use. They argue that the BMZA failed to ensure that the proposed conditional use satisfied ZC § 14-311 because: (1) the site plan features a double cut entry across the sidewalk; (2) the plan requires improper queuing of cars on Gwynns Falls Parkway; and (3) the proposed use will have a severe adverse impact on traffic and safety in the area. They assert that, although ZC § 5-406(b)(4) requires the BMZA to consider school “proximity,” and despite the testimony relating to the safety of school children, the BMZA did not take this issue seriously. Appellants argue that there was no evidence provided regarding a solution to “the serious traffic concerns posed by a Checkers drive-through,” and instead of addressing these concerns, the BMZA improperly opted to defer the issue to the Department of Transportation to resolve.

The BMZA contends that appellants’ argument regarding queuing and curb cuts is not properly before this Court because it was not raised at the public hearing. In any event, the BMZA asserts that it “correctly applied [the] applicable law and concluded that substantial evidence supported approval of the drive-through, with the express condition that the final version of any plan for obtaining a construction permit must be reviewed and approved by the City’s Departments of Planning and Transportation.”

In *Schultz*, 291 Md. at 11, the Supreme Court of Maryland⁵ discussed a conditional use, or special exception, as follows:

The 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 fact or circumstance negating the presumption.

The presumption in favor of a conditional use results from a legislative policy decision that such a use is permissible if certain criteria are satisfied. *E. Outdoor Advert. Co. v. Mayor & City Council of Baltimore*, 128 Md. App. 494, 525 (1999), *cert. denied*, 358 Md. 163 (2000). The burden to prove that a special exception should be granted is on the applicant. *People’s Couns. Balt. Cnty. v. Loyola Coll.*, 406 Md. 54, 83 (2008). The applicant “must persuade [the BMZA] ‘by a preponderance of the evidence that the special exception will

⁵ At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

conform to all applicable requirements [under the code].” *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 286 (2017) (quoting *Loyola Coll.*, 406 Md. at 109).

To approve a conditional use, the BMZA must find by substantial evidence that: (1) the conditional use “would not be detrimental to or endanger the public health, safety, or welfare”; (2) the use is not prohibited under any law or relevant Urban Renewal Plan; (3) the use is not “contrary to the public interest”; and (4) “authorization would be in harmony with the purpose and intent of [the] Code.” ZC § 5-406(a). When making this determination, ZC § 5-406(b) requires the BMZA to consider:

(1) the nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures; (2) the resulting traffic patterns and adequacy of proposed off-street parking and loading; (3) the nature of the surrounding area and the extent to which the proposed use might impair its present and future development; (4) the proximity of dwellings, churches, schools, public structures, and other places of public gathering; (5) accessibility of the premises for emergency vehicles; (6) accessibility of light and air to the premises and to the property in the vicinity; (7) the type and location of adequate utilities, access roads, drainage, and other necessary facilities that have been or will be provided; (8) the preservation of cultural and historic landmarks and structures; (9) the character of the neighborhood; (10) the provisions of the City’s Comprehensive Master Plan; (11) the provisions of any applicable Urban Renewal Plan; (12) all applicable standards and requirements of this Code; (13) the intent and purpose of this Code; and (14) any other matters considered to be in the interest of the general welfare.

A drive-through is considered a separate use, rather than an accessory to a principal use, and therefore, it is subject to the additional zoning requirements outlined in ZC § 14-311. *See* ZC § 14-311(a). As relevant to the issues on appeal, the BMZA must consider the following:

(e) Effect on traffic.

- (1) All drive-through lanes must be located and designed to ensure that they will not adversely affect the safety and efficiency of traffic circulation on adjacent streets.
- (2) A drive-through facility on an interior lot is limited to 2 curb cuts. A drive-through facility on a corner lot is limited to 1 curb cut along each street frontage.

ZC § 14-311(e).

Thus, the zoning code requires the applicant to prove, among other things, that the conditional use will not “adversely affect the safety and efficiency of traffic circulation,” ZC § 14-311(e)(1), or “be detrimental to or endanger the public health, safety, or welfare,” ZC § 5-406(a)(1). Based on our review of the record, we conclude that Owner failed to make such a showing by substantial evidence, and therefore, the BMZA erred in approving the conditional use.

In its resolution approving the conditional use, the BMZA noted that it heard “[s]ubstantial testimony at the hearing concern[ing] traffic and safety on Gwynns Falls Parkway.” The testimony in this regard, however, was limited to remarks from community members opposing the conditional use based on traffic and safety concerns. Owner offered virtually no evidence at the hearing regarding whether the additional traffic generated by the drive-through would adversely affect safety. Counsel for Owner primarily relied on testimony from the community that traffic was already a problem in areas near the Property.

Given the extensive community concern about danger the conditional use could cause, and the lack of evidence presented to show to the contrary, we conclude that there

was not substantial evidence to support the BMZA's finding that the proposed use "would not increase traffic congestion," "adversely impact traffic patterns, above and beyond those already experienced," or "be detrimental to or endanger the public" safety. Because there was insufficient evidence to support the BMZA's decision, we remand for the BMZA to conduct further fact finding and consider all requirements of the zoning code.⁶ *See Johnson v. Crim. Injs. Comp. Bd.*, 145 Md. App. 96, 115 (2002) (remand is permitted if an agency's record is "devoid of substantial evidence" and further fact finding is needed to consider essential points). We therefore vacate the judgment of the circuit court and remand to that court with instructions to remand the case to the BMZA for further proceedings.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY VACATED;
CASE IS REMANDED TO THAT COURT
WITH INSTRUCTIONS TO VACATE THE
DECISION OF THE BMZA GRANTING
THE CONDITIONAL USE AND REMAND
TO THE BMZA FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
THE BMZA.**

⁶ On remand, the BMZA may hear additional evidence in this regard. Although the community did not specifically object in the initial hearing regarding whether the conditional use satisfied the requirement that a drive-through on a corner lot be limited to one curb cut along each street frontage pursuant to ZC § 14-311(e)(2), that is a requirement for approval of a conditional use that the BMZA should address.