

IN THE MATTER OF:

Sec Square Holding LLC
(Security Square Mall)
6901 Security Boulevard
Baltimore, Maryland 21201

* BEFORE THE
*
* BOARD OF APPEALS
*
* OF BALTIMORE COUNTY
*
* Case No. CBA-18-016

OPINION AND ORDER

This matter comes before the Board of Appeals ostensibly as a *de novo* appeal of the November 22, 2017 letter by the Director of the Department of Permits, Approval and Inspections (PAI), Arnold Jablon, that denied Petitioner Sec Square Holding LLC’s application, pursuant to Baltimore County Zoning Regulation §409.13, to reduce the parking space requirements imposed upon its property. Baltimore County filed a Motion to Dismiss, as did Protestants’ Shirley and Jeff Supik. For the reasons that follow, the Board of Appeals grants the Motions to Dismiss.

Factual and Procedural History

Security Square Mall, which opened in the early 1970s, consists of five separate parcels. The five parcels have different owners. Baltimore County land records identify the parcels as follows: (1) the “Sears Tract”; (2) the “H-K Tract”; (3) the “Developer Tract”; (4) the “Penney Tract”; and (5) the “May Tract”. When Security Square Mall was being developed, the owners of the parcels upon which the Mall was built entered into an agreement entitled “Construction, Operation and Reciprocal Easement Agreement,” (the “COREA”). The COREA provided easements and other agreements which enabled the tracts to cohesively function as regional shopping mall, which Security Square Mall did for many years. One of those easements concerned shared parking.

In 2013, a Complaint for Declaratory Relief in the matter of *Security Wards, LLC v. Sec Square Holding, LLC, et al.* was filed in the Circuit Court for Baltimore County. As is relevant to

this appeal, on January 19, 2017, the Circuit Court for Baltimore County entered a Final Declaratory Judgment declaring that the COREA had terminated.

Petitioner Sec Square Holding LLC presently owns the Developer Tract. On August 25, 2017, Petitioner submitted an application to PAI Director Jablon, requesting that the Director exercise his authority pursuant to BCZR §409.13 and approve of a 30% reduction of parking spaces from what Petitioner identified as 1,781 required spaces to 1,247 spaces.

Director Jablon responded in writing on November 22, 2017 and denied Petitioner's request. Within that response, Director Jablon identified several factors to support his denial, including:

- (1) Petitioner's parcel benefitted from the parking-related zoning variance in Case No. 1988-0200-A, which granted a Petition for Variance to permit 5,966 parking spaces in lieu of the required 6,231 spaces;
- (2) Section 409.2b of the zoning regulations applicable at the time of the aforementioned Petition calculated all shopping center-related parking requirements based on each type of tenant use, which resulted in a Mall-wide shortage of parking spaces, necessitating the Petition for Variance;
- (3) The current site conditions and the variance granted comply in every respect with the BCZR in place as of November 25, 1987; and
- (4) BCZR §409.13 states, as is relevant: "Any prior reduction of parking space requirements through the grant of a variance (if still applicable) shall be considered the required amount of parking for the purpose of calculating the requested reduction," and BCZR §409.13 does not permit a further reduction under the current regulations on top of a reduction pursuant to the regulations in place at the time the variance was granted.

As such, Director Jablon saw no need to "simultaneously apply old and new regulations to the continued and current site conditions." (emphasis in original). Director Jablon added that "if there are additional (non-County) issues preventing this site from continuing the current conditions (i.e. as an integrated parking lot), those issues can only be addressed through petitioning of a zoning Special Hearing before the Administrative Law Judge (ALJ)." The Director also identified

“Transit Adjustment,” “Ridesharing Adjustment,” or “Shared Parking Adjustment” as potential avenues for relief if building changes are proposed. Even still, Petitioner could petition for parking variances under the present BCZR requirements. Therefore, given the prior history and existence of other avenues for relief, Director Jablon denied Petitioner’s request for the Director to exercise his authority under BCZR §409.13 and reduce the parking requirements as identified.

Petitioner appealed. Baltimore County, as noted above, filed a Motion to Dismiss, as did Protestants.¹ On March 27, 2018, the Office of People’s Counsel submitted to the Board of Appeals a written letter in support of the Motions to Dismiss. A hearing was held on April 5, 2018. On that day, Petitioner was represented by Jeffrey H. Scherr, Esquire, of Kramon & Graham, P.A., Brady Locher, Esquire, represented Baltimore County, J. Carroll Holzer, Esquire, represented Protestants, and Peter Max Zimmerman, Esquire, appeared on behalf of the Office of People’s Counsel.

The County’s Motion to Dismiss primarily asserted that Director Jablon’s November 22, 2017 letter was not an operative event and could not be appealed, and that, therefore, the Board of Appeals did not have subject-matter jurisdiction over this matter. The County argued the November 22, 2017 letter did not foreclose relief from the parking requirements and, rather, informed Petitioner of other avenues to try to obtain the relief sought. At the hearing, Petitioner first sought to exclude People’s Counsel from participating and then challenged the standing of Protestants, before tendering arguments in opposition to the County’s Motion. On April 11, 2018, the Board of Appeals deliberated on the Motion and unanimously agreed to grant the Motion.

¹ Protestants’ Motion duplicated the County’s Motion. Therefore, for this Opinion, references to “the County’s Motion” are also references to the Protestants’ Motion.

Opinion

First, to dispense with the preliminary issues raised by Petitioner, the Board finds that People’s Counsel has the right to appear in cases with zoning issues. Baltimore County Charter §524.1(a)(3) states that People’s Counsel “shall appear as a party before ... the county board of appeals ... on behalf of the interests of the public in general ..., and in any matter or proceeding now pending or hereafter brought involving zoning ...variance from or special exception under the Baltimore County Zoning Regulations ... in which [People’s Counsel] may deem the public interest to be involved.” See also, People’s Counsel for Baltimore Cty. v. Crown Dev. Corp., 328 Md. 303, 317; 614 A.2d 553, 560 (1992) (“People’s Counsel has been given a broad charge to protect the public interest in zoning and related matters.”).

Second, the Board finds that Protestants are interested parties in the matter and can participate. “The requirements for administrative standing in Maryland are not very strict... [O]ne may become a party to an administrative proceeding rather easily.” Dorsey v. Bethel A.M.E. Church, 375 Md. 59, 72; 825 A.2d 388, 395 (2003), quoting, Sugarloaf v. Department of Environment, 344 Md. 271, 286–287; 686 A.2d 605,613 (1996). As relied upon in Dorsey, “the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation, we think that absent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings.” Id., 375 Md. at 72–73, 825 A.2d at 395–96, quoting Sugarloaf, 344 Md. at 286-287; 686 A.2d 613, quoting Morris v. Howard Res. & Dev. Corp., 278 Md. 417, 423; 365 A.2d 34, 37 (1976).

With respect to the merits of the Motion, Baltimore County Charter §602 states the County Board of Appeals “shall have and may exercise the following functions and powers:...(d) Appeals from executive, administrative and adjudicatory orders. The county Board of Appeals shall hear and decide appeals from all other administrative and adjudicatory orders ...”. Therefore, for the Board of Appeals to be able to entertain Petitioner’s appeal, by necessity, Director Jablon’s November 22, 2017 letter must constitute an administrative or adjudicatory order.

The Board finds that Director Jablon’s letter is not an order arising from administrative action (or agency) that is dispositive of “the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval ... or other form of permission” to constitute an operative event. See, United Parcel Service, Inc. v. People’s Counsel for Baltimore County, 336 Md. 569, 583-584; 650 A.2d 226, 233 (1994). Similarly, as Director Jablon’s letter does not follow a contested case, it cannot be considered an adjudicatory order. See, e.g., Baltimore Cty. v. Penn, 66 Md. App. 199, 205–06; 503 A.2d 257, 260 (1986) (“An adjudicatory order is one that decides what the Administrative Procedure Act defines as a ‘contested case’—an agency proceeding that involves ‘a right, duty, statutory entitlement, or privilege of a person....’”, citing, State Govt. Art. § 10–201(c)(1), now embodied in State Govt. Art. §10-202(d).

Petitioner’s requested Director Jablon to exercise his authority pursuant to BCZR §409.13.

The introductory paragraph to BCZR §409.13 states:

In order to prevent the establishment of a greater number of parking spaces than is actually required to serve the needs of shopping centers with 100,000 square feet or more of gross leasable area, a reduction of the number of required off-street parking spaces is permitted. On application, the [PAI] Director **may** reduce the number of required parking spaces by up to 40% if the following procedures and conditions are satisfied: ...” (emphasis added).

Paragraph (C) echoes the framework of the introductory paragraph when it states “The Director **may** grant a parking reduction only after consideration of agency recommendations.” BCZR

§409.13(C) (emphasis added). Similarly, paragraph (B) states “[i]n determining **whether** to grant any parking reduction,” the Director may prescribe any site improvements for the proper function of the shopping center or that are in the public interest.” BCZR §409.13(B) (emphasis added). Therefore, the Director has the ability to improve upon the plan submitted with the application and still can deny the application.

Notably, as evidenced by the conditional language and express use of the word “may” multiple times throughout BCZR §409.13, Director Jablon’s authority is discretionary. See, Brodsky v. Brodsky, 319 Md. 92, 98; 570 A.2d 1235, 1237 (1990) (The word “may” is generally understood as permissive language, and therefore, not mandatory). Even if all procedures and conditions are met, even if improvements can be prescribed, the Director may still deny the application for parking reduction.

The intent of the regulation is abundantly clear --- the Director has, essentially, complete discretion in choosing to deny an application. On the other hand, the Director may grant an application only if certain information is provided and certain procedures and conditions are satisfied. For example, for any proposed reduction, “[a]ny prior reduction of parking space requirements through the grant of a variance (if still applicable) **shall** be considered the required amount of parking for the purpose of calculating the requested reduction.” BCZR §409.13(C) (emphasis added). Therefore, to grant an application for parking space reduction, the Director must use the previously determined required number of parking spaces to calculate what, if any, reduction can occur.

In fact, in his November 22, 2017 letter, Director Jablon expressly considered the prior parking variance order (“November 25, 1987 Variance Order”), which decreased the number of required parking spaces collectively applicable to all parcels, including present-day Petitioner’s,

that formed the Security Square Mall to 5,966. The November 25, 1987 Variance Order still collectively applies to all parcels, even if the COREA has terminated, and will continue to do so absent relief from the Variance Order. Therefore, had the application advanced, the required number of spaces for evaluation is 5,966, not 1,781 as identified by Petitioner.

BCZR §409.13(C) mandates Director Jablon to use 5,966 as the number of required parking spaces, a point clearly recognized by Director Jablon at the outset, thus, rendering the application procedurally defective and functionally futile. As such, the only road closed to Petitioner is whether Petitioner can proceed via BCZR §409.13 to obtain that relief.

Director Jablon identified alternative avenues to obtain the relief sought by Petitioner. As noted by the County, if Director Jablon's letter foreclosed any possibility of relief, as had occurred in Beth Tfiloh Congregation of Baltimore City, Inc. v. Glyndon Community Assoc., Inc., 152 Md. App. 97; 831 A.2d 93 (2003), the letter may be considered an operative event for purposes of appeal. However, this case is more analogous to Meadows of Greenspring Homeowners Association, Inc., et al. v. Foxleigh Enterprises, Inc., et al., 133 Md.App. 510, 518; 758 A.2d 611, 615 (2000), where the Court of Special Appeals determined that the letter at issue therein "does not make any decision and is not an order...it does not modify any license, permit, or approval. [Director] Jablon's letter only informs Foxleigh that the proposed plan is a material change from the previously approved plan and that, in order to be approved, new plans must be submitted for consideration."

Director Jablon's denial of the application is not tantamount to a denial of all possibility for administrative relief. Petitioner has several alternative approaches to try to obtain parking space relief. Director Jablon's letter does not preclude Petitioner from availing itself of those remedies, and, to the contrary, Director Jablon's letter encourages Petitioner to do so. Because

Director Jablon's November 22, 2017 letter was not adjudicatory or administrative order, and therefore, not an operative event, Petitioner could not take an appeal from that letter. As such, this Board does not have subject-matter jurisdiction.

ORDER


THEREFORE, ON THIS 14th day of August, 2018, by the Board of Appeals of Baltimore County, it is hereby:

ORDERED, that the County's and Protestants' Motion to Dismiss are **GRANTED**, and it is further,


ORDERED, that this case is **DISMISSED** for lack of jurisdiction.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

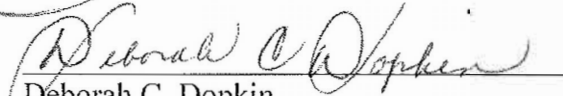
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Jason S. Garber, Chairman



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Board of Appeals of Baltimore County

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RE: *Sec Square Holding LLC*
(Security Square Mall)
Case No.: CBA-18-016

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Multiple Original Cover Letters

c: See Distribution List Attached

SEC SQUARE HOLDING LLC
(SECURITY SQUARE MALL)
CASE NO.: CBA-18-016
DISTRIBUTION LIST

c: Sec Square Holding LLC
 Shirley and Jeff Supik
 W. Carl Richard, Jr., Chief of Zoning Review/PAI
 Arnold Jablon, Deputy Administrative Officer, and Director/PAI
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