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Court of Special Appeals
Gregory Hilton
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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

75-80 Properties, LLC, et al.,	*	
Appellants,	*	**No. 1689 September Term, 2017**
vs.	*	**(CSA-REG-1689-2017)**
RALE, Inc., et al.,	*	
Appellees.	*	

* * * * * * * * * * * * * *

MOTION TO STRIKE BRIEFS AND APPEARANCE OF FREDERICK COUNTY, MARYLAND

Pursuant to Maryland Rule 8-431, Appellants 75-80 Properties, L.L.C. and Payne Investments, LLC (collectively, "Appellants" or "Developers"), with the consent of Appellant C. Paul Smith ("Commissioner Smith"), move this Court to strike the briefs and appearance of Frederick County, Maryland ("County") because the County is not a proper party to this appeal.

INTRODUCTION

"Maryland Rule 8-111 defines the parties to an appellate proceeding as being 'the party' first appealing the decision of the trial court (appellant) and the 'adverse party' (appellee)." *Surland v. State*, 392 Md. 17, 23 n.1 (2006). Of utmost importance here, Rule 8-111 "does not afford persons who were not parties in the trial court party status in the appellate court." *Id.* When such persons file briefs, Maryland appellate courts have stricken their briefs and appearances. *See, e.g.*, *id.*; *State v. Merritt Pavilion, LLC*, 230 Md. App. 597, 612 (2016). Such is precisely the situation here.

This case arises from an appeal from rulings by the Circuit Court for Frederick County, in the context of a petition for review of zoning actions by the Frederick County Board of County Commissioners ("BOCC"). In particular, Residents Against Landsdale Expansion, Inc. ("RALE") petitioned for review of the BOCC's approvals related to the Monrovia Town Center project.

In this context, the Maryland General Assembly instructs that the County may not petition for judicial review of its own decision. Initially, Section 4-401 of the Land Use Article only allows certain classes of "persons" to petition for judicial review, and the County is ***not*** a "person" under the statute, but is, in contrast, a "legislative body." *See* Md. Code, Land Use, §§ 1-101, 4-401(a). To state the obvious, a legislative body is not (and should not be) able to appeal from its own enactments and, thus, Section 4-401's exclusion of the County as a petitioner on a petition for review makes eminent sense. Moreover, and entirely consistent with the foregoing, Section 5-862 of the General Provisions Article, respecting ex parte communications in the context of zoning cases, only allows a "party of record" before a "governing body" to assert that the body's ultimate decision requires reconsideration because of the failure to record an ex parte communication. *See* Md. Code, Gen. Provs. § 5-862. Here, the County was not a "party of record" before the BOCC; rather, it was the "governing body" responsible for the decision. *See* Md. Code, Gen. Provs. §§ 5-857, 5-862.

Furthermore, the Maryland Rules of Procedure provide that only parties who actually file petitions for review may proceed as parties challenging the zoning action that is the subject of the petition. *Accord Egloff v. Cty. Council of Prince Georges Cty.*,

130 Md. App. 113, 130 (2000) (discussing Title 7, Chapter 200 of the Maryland Rules), *abrogated in part on other grounds*, *Gosain v. Cty. Council of Prince George's Cty.*, 420 Md. 197, 208-09 (2011). Here, the County could not, and it did not, file a petition—in fact, it filed a response in opposition to the petition.

In sum, the County lacks standing in this appeal. First, Maryland law did not allow the County to appear as a petitioner to (A) challenge its own zoning approval or (B) raise an alleged ex parte communication as a basis for reconsideration or avoidance of its own zoning approval. Second, because the County was not—and could not have been—the party below that challenged the zoning approvals, it does not have standing to serve as an appellee in this appeal. Accordingly, this Court should strike the County's briefs and notice of appearance.

STATEMENT OF FACTS

Appellants set forth the following facts in support of this motion:

1. In May 2014, after one of the most thorough review processes in the history of Frederick County, the BOCC enacted a rezoning ordinance for the Monrovia Town Center Planned Unit Development, and approved and executed a related Development Rights and Responsibilities Agreement and Adequate Public Facilities Ordinance Letter of Understanding (collectively, "MTC Approvals"). E2206-38; E2136-205.[1]

2. On June 26, 2014, RALE petitioned the Circuit Court to review the MTC Approvals. E251-54.

[1] Such citations are to the record extract in this case, which Appellants filed with the Court on March 29, 2018.

3. The County filed a memorandum in opposition to the petition. E345-54. In its opposition, the County sided with Appellants, and argued, contrary to RALE's position, the MTC Approvals "were made in accordance with applicable law and with substantial evidence in the record." E346.

4. RALE then moved to remand the entire proceeding under Section 5-862 of the General Provisions Article of the Maryland Code. E548-56. RALE argued that the MTC Approvals were invalid because Commissioner Smith purportedly violated Section 5-859 of the General Provisions Article when he did not file a report with the County Administrative Officer after referencing the MTC project during a public meeting of the Frederick Area Committee for Transportation ("FACT"). E548-56.

5. The Circuit Court remanded the case to the Frederick County Council "for further proceedings, including testimony, to resolve the issues" related to the FACT Meeting. E51-52.

6. On remand, the County Council voted to return the matter to the Circuit Court, E4707-10, and, subsequently, identifying itself as "Respondent," asked the Circuit Court to vacate the MTC Approvals, E872.

7. Developers countered, among other arguments, that the County had no standing to argue as a party in support of the petition for judicial review seeking to vacate its own zoning decision.[2] E984-86. In particular, Developers asserted that Section 4-401

[2] The County Council replaced the BOCC as the governing body in Frederick County in 2014, but there is no question that the County Council was bound by law to uphold the actions taken by the BOCC. *See* Frederick Cty. Charter, Art. 8, §§ 802, 804.

of the Land Use Article of the Maryland Code did not provide the County standing to file a petition for review and, in any event, this Court's precedent did not allow the County to seek immediate judicial review of its own decisions. E984-86.

8. Without addressing the County's standing, the Circuit Court vacated the MTC Approvals. E53-65.

9. On appeal, Developers again argued that the County lacked "standing to attack its own Approvals." Developers' Br. at 29 n.13.

10. Now, the County has filed two briefs, as a purported appellee, without even addressing whether it has standing to do so under Maryland law. *See generally* Cty.'s Br. Resp. 75-80 Props.; Cty.'s Br. Resp. C. Paul Smith.

STATEMENT OF GROUNDS AND AUTHORITIES

"[I]t is of the very essence of a judicial function . . . that it shall be a proceeding between parties." *Reyes v. Prince George's Cty.*, 281 Md. 279, 295 (1977) (quoting *Robey v. Prince George's Cty.*, 92 Md. 150, 162 (1900)). The question of whether complainants have standing to maintain a suit "is not a mere matter of procedure, but involves a consideration of some of the fundamental concepts of our constitutional law." *Hammond v. Lancaster*, 194 Md. 462, 471 (1950). Specifically, "[t]he American doctrine of judicial review may be considered as correlative to the doctrine of the separation of powers, and must always be exercised with due regard to the legislative prerogative." *Id.* In short: while "the issue of standing may not be jurisdictional in nature, it does go to the very heart of whether the controversy before the court is justiciable" and "[i]f a

controversy is nonjusticiable, it should not be before the court[.]" *Sipes v. Bd. of Mun. & Zoning Appeals*, 99 Md. App. 78, 87 (1994) (citations omitted).[3]

The County has no standing to appear as a party to this appeal. Initially, Maryland law prohibits the County from seeking judicial review of its own zoning decisions, even with respect to the ex parte communication that formed the basis for the Circuit Court's rulings. Moreover, the County did not (and could not) appear as a party-petitioner before the Circuit Court, so it cannot argue as one now. With due regard to the legislatively defined boundaries of party-status in petitions for judicial review, this Court should strike the County's briefs and appearance.

[3] It may be a "settled principle of Maryland law that, where there exists a party having standing to bring an action," appellate courts do not "inquire as to whether another party on the same side also has standing," *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 54 (2008) (quoting *Sugarloaf Citizens' Ass'n v. Dep't of Env't*, 344 Md. 271, 297 (1996)); that principle, however, does not apply here for multiple reasons. At the outset, the Maryland appellate courts have taken the exact opposite approach when faced with motions to strike. *See, e.g.*, *Merritt Pavillion*, 230 Md. App. at 612 (granting motion to strike despite conceding that brief "would have no effect on the outcome"). Furthermore, this is a "rule of appellate procedure, designed to streamline appellate cases by avoiding unnecessary questions of standing." *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 598 (2014). This Court should not extend the rule to circumstances where a decision-maker lacked standing to maintain its position before the trial court, and then seeks to perpetuate its untenable stance before the appellate court. *See id.* Finally, this prudential rule only applies when "*another party* on the same side also has standing." *See Archers Glen*, 405 Md. at 54 (quoting *Sugarloaf*, 344 Md. at 297) (emphasis added). The rule, by its very terms, only applies when two proper *parties* are involved in the case—otherwise, the use of the word *another* would be superfluous. Here, the County is not a proper party at all, so the rule does not apply.

I. MARYLAND LAW DOES NOT PROVIDE THE COUNTY STANDING TO PETITION FOR JUDICIAL REVIEW OF ITS OWN ZONING DECISIONS.

This Court has "long recognized" the "legislative prerogative to give finality to administrative decisions, provided the exercise of the power is not arbitrary." *Md. Employment Sec. Bd. v. Poorbaugh*, 195 Md. 197, 199 (1950). Accordingly, this Court has explained that it would be nonsensical to permit a governmental body to take action, and then turn around and challenge that very action in court:

> The reference . . . to "any officer, department, board, [or] bureau of the jurisdiction" must necessarily exclude the agency or official whose decision is being challenged. Otherwise, it would give the decision-making agency the right to challenge its own decision in court, which is hardly a reasonable construction.
>
> . . .
>
> It would be anomalous, of course, for the county commissioners to be able to seek immediate judicial review of their own zoning decisions, and we do not suggest that they have any such authority.

Bd. of Cty. Comm'rs of Washington Cty. v. H. Manny Holtz, 60 Md. App. 133, 142 n.3, 144 (1984).

Consistent with *Manny Holtz* and the "legislative prerogative to give finality to administrative decisions," the law prohibits the County from seeking judicial review of its own decisions. First, Section 4-401 of the Land Use Article permits only a "person" to petition for judicial review of a zoning action by a legislative body. Md. Code, Land Use, § 4-401(a). The County is not a "person," it is a legislative body. *See* Md. Code, Land Use, § 101. Second, Section 5-862 of the General Provisions Article permits only a "party of record" to proceedings on a zoning application to challenge the decision of a

"governing body" because a legislator did not report a purportedly ex parte communication. Md. Code, Land, § 5-862. The County was not a "party of record" but the "governing body" responsible for the decision. *See* Md. Code, Land, §§ 5-857, 5-862. Accordingly, this Court should strike the County's briefs and appearance.

A. Under Section 4-401 of the Land Use Article, the County cannot file or pursue a petition for review because it is not a "person."

Section 4-401 is a "standing statute" that delimits a person's right to petition for judicial review of a zoning decision. *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 150 Md. App. 479, 505 (2003) (construing Section 4.08 of the Land Use Article, which was repealed and re-adopted in identical form as Section 4-401 pursuant to a reorganization of the Maryland Code). The "essential purpose" of Section 4-401 "is to define the world of people and entities who have an affected interest in a zoning decision . . . and therefore may lodge a judicial challenge to it." *Id.* at 506.

Maryland law permits only the following "persons" to "file a request for judicial review of . . . a zoning action of a legislative body by the circuit court": "(1) a person aggrieved by the decision or action; (2) a taxpayer; or (3) an officer or unit of the local jurisdiction." Md. Code, Land Use, § 4-401(a). A "person," as defined in this subsection, expressly "does not include a governmental entity or unit." Md. Code, Land Use, § 101, Revisor's Note (2012). "Legislative body," meanwhile, "means the elected body of a local jurisdiction" and includes "the board of county commissioners," the "county council," and "the governing body of a municipal corporation." Md. Code, Land Use, § 1-101(g).

Thus, under Section 4-401, the County does not have the right to petition for judicial review of zoning actions because it is a governmental entity and, by definition, not a "person." Section 1-101(g) clarifies that the County is a "legislative body." The fact that the County filed a "response" to a petition for judicial review does not thereby morph it into an actual "party" or petitioner in support of the petition for judicial review challenging its own legislative enactments. The County was merely a respondent, and that did not—nor can it—make the County a party.

This is not to say that Maryland law bars a county from participating in *any* capacity on a petition for review of its own decisions. In *Manny Holtz*, the Court held that a board of county commissioners could appeal ***after*** a circuit court removed special conditions imposed pursuant to the board's rezoning. 60 Md. App. at 144-45. But this Court emphasized that the board would not be permitted to argue *against* its own rezoning. *Id.* at 144. On this point, the Maryland Code and *Manny Holtz* agree: a sovereign, legislative body has no right to take legislative action and then use the courts as a mechanism to reverse course and abrogate that action because the political winds shifted in a different direction. This Court should not permit the County to do so in this appeal.

B. Under Section 5-862 of the General Provisions Article, the County cannot assert that the failure to report an allegedly ex parte communication is procedural error because the County was not a "party of record."

When a statute requires party-status to maintain judicial actions, non-parties may not maintain such actions, regardless of whether (a) they are aggrieved or (b) the Circuit

Court considered their position. *See Montgomery Cty. v. One Park N. Assocs.*, 275 Md. 193, 200-01 (1975). In *One Park*, a county attempted to appeal to the circuit court from a decision by an administrative board of review. *Id.* at 198. The circuit court held that the county had standing to do so, even though the county had not participated as a party in the proceedings before the board, because the board's decision aggrieved the county. *Id.* at 198-99. The Court of Appeals vacated the circuit court's order, observing that the applicable statute permitted only a "*party* aggrieved" to seek judicial review. *Id.* at 200 (emphasis added). "That the County may have been 'aggrieved' by the Board's order," the Court observed, "does not afford it standing as a party to the proceeding." *Id.*

Like the statute in *One Park*, Section 5-862 of the General Provisions Article provides that only "[t]he Frederick County Ethics Commission or another aggrieved *party of record* may assert as procedural error a violation of this part in an action for judicial review of [a pending] application." Md. Code, Gen. Provs., § 5-862(a)(1) (emphasis added). A "party of record" is defined as "a person that participated in a proceeding on an application before the governing body[.]" Md. Code, Gen. Provs. § 5-857(j). The "governing body" is "the governing body of Frederick County." Md. Code, Gen. Provs., § 5-857(h).

Section 5-862 thus does not provide the County standing to assert that the failure to report an allegedly ex parte communication invalidates its own decisions, here the MTC approvals. Only the Frederick County Ethics Commission or a "party of record" may assert that a purported violation of Section 5-859 constitutes procedural error. Obviously, the County was not a "party of record" in the zoning proceedings below

because it did not "participate in a proceeding on an application before the governing body"; rather, it *was* the "governing body." The County may not transgress the bounds of authority expressly delineated by the General Assembly and challenge its own actions on zoning applications, and this is so specifically with respect to a challenge based upon the failure to report an allegedly ex parte communication. Section 5-862 did not provide the County with the right to assert this purported procedural error before the Circuit Court, and it does not provide the County with the right to assert it here. This analysis is not only clear from the language of Section 5-862, but is entirely consistent with the broader proposition that the County ought not be permitted to evade an approval that is supported by substantial evidence and consistent with applicable law because one of its own members failed to record an otherwise permissible communication.

While the Court of Appeals "has recognized a non-party's right to bring a limited appeal from decisions affecting the party's direct and substantial interests," it has never "afforded a right to appeal in the light of a clearly contrary legislative intent." *Lopez-Sanchez v. State*, 388 Md. 214, 227 (2005), *abrogated by statute on other grounds as stated in Hoile v. State*, 404 Md. 591, 607 (2008). Here, Section 5-862 provides this Court with clearly contrary legislative intent by specifically limiting the right to assert allegedly unreported ex parte communications as procedural errors to a "party of record." Regardless of the County's interest in this litigation,[4] the Maryland General Assembly set

[4] The County did not seek permission to file an *amicus curiae* brief. Leaving aside whether such permission would be appropriately granted here, the time to pursue this course has long since passed, *see* Md. R. 8-511(c)(1) (requiring filing before time specified for filing principal brief of appellee), and the County's briefs are too long to

boundaries for who may assert such procedural errors. Because the County falls outside of those boundaries, this Court must strike the County's briefs and appearance.

II. THE MARYLAND RULES OF PROCEDURE DO NOT AFFORD THE COUNTY STANDING TO SUPPORT A PETITION FOR JUDICIAL REVIEW BECAUSE THE COUNTY FILED A RESPONSE TO THE PETITION.

The Constitution of Maryland grants the Court of Appeals the power to "adopt rules and regulations concerning the practice and procedure . . . and the administration of . . . courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." Md. Const., art. IV, § 18. Accordingly, "'[t]he Maryland Rules of Procedure, within their authorized scope, are legislative in nature." *Hudson v. Housing Auth. of Baltimore City*, 402 Md. 18, 29 n.9 (2007) (quoting *Ginnavan v. Silverstone*, 246 Md. 500, 505 (1967)).

Title 7, Chapter 200 of the Maryland Rules of Procedure governs party status in judicial review of administrative agency actions. *Egloff*, 130 Md. App. at 130. "A person who seeks to challenge an administrative agency decision must file a petition either within 30 days after the triggering event or within 10 days after the date the agency mails notice that another person has filed a petition." *Id.* at 132.

In *Egloff*, this Court held that a group of investors did not have standing to pursue a petition for judicial review because the group merely filed a response in support of the petition, rather than an original petition. *Id.* at 134. The Court rejected the group's

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qualify as proper amicus briefs, *see* Md. R. 8-503(d)(4)(A) (limiting an amicus curiae brief to 3,900 words).

attempt "to ride on the coat tails" of the petitioners, and held that only a person who files a petition has standing as a party in support of the petition. *Id.* at 132.

This Court explained that "[t]he plain language of the rules, read together, makes clear that . . . a person who files a response to a petition for judicial review is a person who opposes the petition for judicial review." *Id.* at 131-32. Rule 7-202(d)(3)(b), for example, "states that the agency must notify all parties to the agency proceeding that 'a party *wishing to oppose the petition* must file a response within 30 days'" after the mailing of the notice of the petition. *Id.* (quoting Md. R. 7-202(d)(3)(b)) (emphasis in *Egloff*). Likewise, "Rule 7-207(a) provides that 'any person who has filed a response . . . may file an *answering* memorandum' after the petitioner has filed its memorandum" and "[i]t is axiomatic" that an answer is an oppositional pleading. *Id.* (quoting Md. R. 7-207(a)) (emphasis in *Egloff*).

"Even if we believed that the applicable rules were ambiguous—and we do not—the history of Title 7, Chapter 200 establishes beyond cavil," the Court continued, that only those who file petitions may act as party-petitioners. *Id.* at 133. "Any suggestion that a petitioner need not actually file a petition but need only make his intention to participate in the case known," the Court emphasized, "flies in the face of the Court's intent that Rule 7-203 serve as a strict time limitation" on the filing of petitions for review. *Id.* Further, contemporaneous legislative history, such as reporter's notes and committee meeting minutes, indicate that "the term 'response' as used in [Rule 7-204] is shorthand for 'answer' or 'preliminary motion,'" and "a response is the equivalent of a 'notice of participation as an appellee.'" *Id.* at 134 (citations omitted).

A person must file a petition to be a proper party in support of the petition. The County did not file—and could not have filed—such a petition. But more to the point, in the proceedings below, the County filed a "response," arguing in opposition to the petition. E345-54. Even after remand, when the County asked the Circuit Court to vacate the MTC Approvals, the County continued to refer to itself as "Respondent." E872. At the final oral argument before the Circuit Court, the County continued to do the same. E185. The County simply could not appear, consistent with either the plain language or the legislative history of Title 7, Chapter 200 of the Maryland Rules of Procedure, as a petitioner before the Circuit Court. To permit the County to proceed as an appellee at this late stage would allow the County, in effect, to circumvent the statute of limitations on petitions for review.

Notably, the County has never even tried to reconcile its status as respondent with its *de facto* advocacy as another petitioner. While the County may not be estopped from changing its position in the same litigation, *see Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 297 (2017), the Rules of Procedure do not permit the County to treat the "v." as a revolving doorway that it can pass through whenever the public elects new Councilmembers. If *Egloff* stands for anything, it is this: petitioners are petitioners, and respondents are respondents, and a party who enters an appearance as a respondent cannot simply become a petitioner by virtue of what it says in its court filings.[5]

[5] Importantly, it is not as though the County is sitting in the passenger seat while RALE drives the petition and the appeal. The record reflects that the exact opposite is true, and

CONCLUSION

For the aforementioned reasons, the County is not a proper party to this appeal. Accordingly, this Court should strike the County's briefs and its notice of appearance.

Date: June 29, 2018

Respectfully submitted,

s/

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that the County—the party *without* standing—is driving RALE—the party *with* standing. For example, at the final hearing before the Circuit Court, the County's outside counsel spoke for longer than anyone else, and over three-times longer than RALE's counsel. *See generally* E183-250. As another example: on appeal, the County filed a brief in response to Developers and a separate brief in response to Commissioner Smith, while RALE filed only one consolidated brief in response. *Compare* Cty.'s Br. Resp. 75-80 Props. at 34; Cty.'s Br. Resp. C. Paul Smith at 34 *with* RALE's Br. at 30.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2018, the foregoing Motion was served via electronic filing on the following counsel of record:

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