IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PETITION OF: COSTCO WHOLESALE CORPORATION	*	
FOR THE JUDICIAL REVIEW OF THE FINAL DECISION OF: THE BOARD OF APPEALS FOR MONTGOMERY COUNTY, MARYLAND	*	CIVIL ACTION NO.: 404629-V
IN THE CASE OF: BOA CASE NO. S-2863	*	

* * * * * * * * *

OPINION OF THE COURT

I. INTRODUCTION

This matter came before the Court on November 13, 2015 for a hearing on the Petition for Judicial Review regarding the Board of Appeals Final Order in Case No. S-2863 dated April 3, 2015, which denied Petitioner's application for a special exception based upon the findings of the Hearing Examiner and Technical Staff of the Montgomery County Planning Department. The Court heard oral argument from five attorneys/interested persons: John E. Griffith, Jr., Esq. on behalf of Petitioner Costco; Associate County Attorney Barbara L. Jay, Esq. on behalf of Montgomery County; Karen Cordry, Esq. on behalf of the Kensington Heights Civic Association and Stop Costco Gas Coalition; Donna R. Savage, interested person; and Dr. Mark Adelman, interested person. For the reasons set forth below, the Court affirms the Board of Appeals Final Order in Case No. S-2863. An Order to this effect is being filed herewith.

II. STATEMENT OF FACTS

Petitioner seeks a special exception to permit the construction and operation of an automobile filling station with 16 gasoline pumps located at 11160 Veirs Mill Road, Silver Spring, Maryland, also known as the Westfield Wheaton Mall. The Westfield Wheaton Mall is about 75 acres in size, and is located west of the intersection of Georgia Avenue and Veirs Mill Road in Wheaton, Maryland. The proposed gas station would be located in the parking lot immediately to the west of the Costco Warehouse at that site, with vehicular access from the Mall's southern ring road.

The general neighborhood was defined "to include all properties that may be impacted by traffic, noise, glare, vibrations or fumes associated with the proposed use," including "the entire Mall property and the first ring of properties adjacent to the south and west of the Mall." (Hearing Examiner Report, "HER" 18). There is a residential community with single-family detached houses and some townhouses to the south and west of the Mall property. The nearest residence is located at 10812 Melvin Grove Court, and is approximately 118 feet south of the site. The Kenmont Swim and Tennis Club property is located approximately 375 feet northwest of the site, and the Stephen Knolls School (a public school for students with mild to severe cognitive deficits and multiple disabilities) is located approximately 874 feet to the southeast. There is a significant grade difference between the Mall property and the residences to the south and west, with the Mall being higher, and a green buffer of vacant land with trees and understory between the ring road and adjacent residences to the south. (HER 19-20).

III. PROCEDURAL HISTORY

Petitioner first applied for the special exception in 2010. However, opponents of the station persuaded Montgomery County to adopt Zoning Text Amendment 12-07 (Ordinance No. 17-19) requiring a 300-foot setback between large volume gas stations and certain other

land uses. To comply with the new requirement, Petitioner changed its proposed location by several hundred feet.

Petitioner then renewed its application for the special exception, based upon the new location. The Technical Staff of the Montgomery County Planning Department ("Technical Staff") recommended denial for the following reasons: (1) the location, size, and queuing of vehicles had the potential to create adverse health effects for residents living to the south; (2) Petitioner had not shown by a preponderance of the evidence that their proposal would have no adverse health effects on neighboring residents and others, as required by § 59-G-1.21(a)(8); and (3) Petitioner had not met its burden of proof under § 59-G-1.21(c)(2) regarding potential health impacts.

On February 28, 2013, the Montgomery County Planning Board voted 3-2 to recommend denial of the exception, although their rationale differed somewhat from that of the Technical Staff. The Planning Board found that the proposal did not meet the "vision" of the Wheaton Central Business District and Vicinity Sector Plan, primarily because it did not promote transit oriented development. On April 26, 2014, Hearing Examiner Martin L. Grossman began hearing evidence for the Montgomery County Board of Appeals. He conducted 37 days of hearings over a period of 17 months.

On December 12, 2014, the Hearing Examiner issued his 262-page recommended decision. The Hearing Examiner found that the non-inherent characteristics identified by Technical Staff, alone and in combination with the inherent characteristics of the automobile filling station, would have significant adverse effects on the general neighborhood. (HER 247).

Regarding the specific standards set forth in § 59-G-2.06, the Hearing Examiner found that all were met by the proposed station except § 59-G-2.06(a)(l), relating to fumes, which the Hearing Examiner found would constitute a nuisance (HER 248, 253). With respect to the

general conditions set forth in § 59-G-1.21, the Hearing Examiner concluded that Costco's application failed to meet § 59-G-1.2l(a)(2) (lack of compliance with § 59-G-2.06(a)(l) (fumes)) (HER 248); § 59-G-1.21(a)(4) (proposed use not in harmony with the general character of the neighborhood to the south, southwest and southeast of the site due to the traffic congestion, parking congestion, additional physical activity, and potential health impacts) (HER 250); § 59-G-1.21(a)(5) (proposed use "detrimental to the peaceful enjoyment of the general neighborhood") (HER 250); § 59-G-1.21(a)(6) (proposed use will generate "considerable physical activity... and objectionable fumes") (HER 251); and § 59-G-1.21(a)(8) (failure to prove, "by a preponderance of the evidence, that the proposed use will not adversely affect the health, safety, and general welfare of residents, visitors or workers in the area at the subject site") (HER 251).

The Board of Appeals adopted the decision of the Hearing Examiner without modification on April 3, 2015, and Petitioner filed its Petition for Review on April 30, 2015.

IV. STANDARD OF REVIEW

The scope of judicial review of an administrative proceeding is limited to determining whether "there was substantial evidence on the record as a whole to support the agency's findings of fact and whether the agency's conclusions of law were correct." *Motor Vehicle Administration v. Atterbeary,* 368 Md. 692, 700 (1996). The task of the reviewing court, "is not to substitute its judgment for the expertise of those persons who constitute the administrative agency[,]" but rather to give considerable weight to the findings of that agency, as the Court must not "make independent findings of fact or substitute its judgment for that of the agency." *Annapolis Marketplace, LLC v. Parker,* 369 Md. 689, 703-704 (2002). However, while an administrative agency's interpretation and application of the statute should ordinarily be given

considerable weight, reviewing courts "owe no deference to agency conclusions based upon errors of law." *State Ethics Comm'n v. Antonetti,* 365 Md. 428, 447 (2001).

V. ANALYSIS

Petitioner's arguments focus primarily on the failure of the Board of Appeals ("the Board") to follow National Ambient Air Quality Standards ("NAAQS") when evaluating the potential adverse risk to health from the proposed gas station. In support of this contention Petitioner argues: (1) that the Board was preempted from denying the special exception based on concerns regarding air quality when the proposed station complies with NAAQS; (2) that the Board's failure to apply a cognizable health standard to their evaluation of air quality rendered their ruling arbitrary and capricious; and (3) that to the extent the Board's finding of incompatibility was not based on car emissions, those findings are not supported by substantial evidence.

A. Preemption was not Raised Below and, in any Event, is not Applicable.

Taking these arguments in turn, the Court first looks to Petitioner's assertion that Maryland's adoption of NAAQS represented such a comprehensive regulation of air quality that it preempted the use of any other standard in the review of the application for special exception. As a threshold matter, the County maintains that this argument was not made before the Hearing Examiner or Board of Appeals and therefore is not properly preserved.

The County argues that at no time did Petitioner assert that the Hearing Examiner or Board were preempted from using a standard other than the NAAQS for their evaluation. Petitioner, however, maintains that the issue was presented during closing argument before the Hearing Examiner.

To properly preserve an issue in an administrative appeal, it must be raised before the administrative agency in order to allow the agency the opportunity to decide the matter before

it is reviewed by an appellate court. Otherwise stated, the courts "do not allow issues to be raised for the first time in actions for judicial review of administrative agency order...because to do so would allow the court to resolve matters ab initio that have been committed to the jurisdiction and expertise of the agency." *Delmarva Power & Light Company v. Public Service Commission,* 370 Md. 1, 32 (2002). Petitioner maintains that the issue was properly preserved through its closing argument before the Hearing Examiner. The relevant section of that closing argument Petitioner references is as follows:

> These are the standards that must be applied. And why is that? Well, Maryland has the opportunity to apply different standards, higher standards if it so chooses. It has none done so. It has affirmatively decided to apply the EPA standards. Similarly, Montgomery County has not imposed any higher standard or any higher threshold that it would impose on the gas station. So, in the absence of any viable alternative, you have to measure the emissions by the subjective standard. To apply subjective, a discretionary standard, we believe would be arbitrary and would not be supported by the record.
>
> ...
>
> If we comply with the standards, then we have met our burden that there are no adverse health effects. And, these are standards that are applied routinely by the federal courts. They've not been overturned. They have force of law. Nothing else that's been discussed in this case has the force of law.

(Costco Reply Memorandum at App. 15-16). As is pellucid, these arguments of counsel contain no explicit mention of the doctrine of preemption. Although Petitioner contends that it nonetheless referenced the substance of such an argument, the Court finds this position unpersuasive. As such, the issue is not properly before this Court.

In any event, even assuming arguendo the preemption argument is properly before the Court, it has no merit. Petitioner relies primarily on three cases in support of its argument, *East Star v. County Commissioners,* 203 Md. App. 477 (2012), *Days Cove Reclamation Co. v. Queen Anne's County* 146 Md. App. 469 (2002), and *Talbot County v. Skipper,* 329 Md. 481 (1993). In each of these cases, it was found that the comprehensive nature of state regulations regarding landfills, mining, and sewage preempted administrative agencies from applying or

enacting alternative standards. However, a review of Title 2 of the Environment Article, Md. Ann. Code ("Ambient Air Quality Control") demonstrates that the State law in this instance is not as comprehensive as those analyzed in the cases cited by Petitioner. Here, the applicable statute makes specific reference to local zoning authority and explicitly allows local governments to adopt their own ordinances, rules, or regulations that set emissions or ambient air quality standards. Md. Code Ann., Envir. § 2-104, § 2-301(b).

Furthermore, the Court agrees with Montgomery County that *Ad+ Soil, Inc. v. Cnty. Comm'rs of Queen Anne's Cnty.,* 307 Md. 307 (1986), is more analogous to the instant case. In *Ad+ Soil, Inc.*, the Court of Appeals found that the state legislation manifested "a general policy of fostering local control under state supervision, rather than to totally prohibit the enactment of laws on the subject at the local level." *Id.* at 326. Reflecting on Title 2 of the Environment Article, Md. Ann. Code, it is clear that the State's purpose was not to exercise exclusive control over air quality, but rather to establish clear mechanisms for local administrative control. Therefore, the Board was not preempted from denying the special exception application despite the State's adoption of NAAQS.

Ultimately, while the NAAQS may serve as a tool to analyze compatibility, they do not change the broader scope of the Board's inquiry in determining whether to grant a special exception. It is the Board's task to look at the specific proposed use at a particular site and determine whether there would be any adverse effects. The NAAQS standards were not adopted for this purpose, nor were they adopted with a specific neighborhood (or use) in mind. Therefore, compliance with the NAAQS is not equivalent to an affirmative establishment that no adverse health effects would arise from a proposed use.

B. The Board of Appeals Ruling was not Arbitrary and Capricious.

Petitioner further argues that the Board's failure to apply a cognizable health standard to their evaluation of air quality rendered the denial of the special exception arbitrary and capricious. However, the mere fact that that the Board failed to identify a specific standard upon which to base its findings is insufficient to find error in their ruling. As discussed above, the Board's inquiry involves more than a mere analysis of broad emissions standards. It requires analysis of the specific area to be affected based on the nature of the proposed use. If determinations of this kind were strictly limited to following state or even local regulations, there would be no opportunity for the Board to consider potential adverse health impacts due to circumstances not considered by established standards. In this case, the Stephen Knolls School stands as a perfect example of why such specific inquiry is necessary. While the NAAQS are designed to protect sensitive populations, they are not designed to protect the "most sensitive" populations, such as the medically fragile children at the Stephen Knolls School. Given the nature of the inquiry and the need for highly specific findings, the Board's failure to apply a cognizable emissions standard does not represent reversible error.

Furthermore, the mere fact that the emission from the proposed gas station may have met NAAQS or any other applicable regulation is insufficient to render the Board's decision invalid. The Montgomery County's Zoning Ordinance clearly states that "...[t]he fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted." § 59-G-l.21 (a)(2); *see Montgomery County v. Butler,* 417 Md. 271, 301-03 (2010). Under the Zoning Ordinance, the Board must not grant a special exception unless it finds that the proposed use complies with all of the general conditions and specific standards set forth in Article 59-G. § 59-G-1.2. l. The burden of

proving that the general and specific special exception standards are met is squarely on the petitioner, and merely proving compliance with national, state, or even local regulations is not sufficient to meet that burden.

C. The Board of Appeals Findings are Supported by Substantial Evidence.

Finally, Petitioner argues that to the extent the Board's finding of incompatibility was not based on car emissions, those findings are not supported by substantial evidence. In addition to the impact of emissions, the Hearing Examiner found that the proposal would be detrimental to the peaceful enjoyment of the area due to the adverse effects of traffic congestion, parking congestion, and additional physical activity. (HER 169-189, 202-207). While the Hearing Examiner found that the additional cars would not amount to a traffic "hazard" or "nuisance" per se, it was determined that there would be additional interactions between vehicles and pedestrians, and some additional delays and inconvenience to the neighborhood. The examiner also found that these elements of "traffic congestion added to the incompatibility of the proposed use at this particular location and must be considered in connection with the other impacts of the station, including its potentially adverse health effects." (HER 184-85).

Petitioner first argues that these additional findings of incompatibility related to traffic congestion, parking congestion, and physical activity all ultimately relate back to increased emissions. However, the Court finds this position unpersuasive. While emissions were clearly a focal point of the analysis, other potential impacts such as increased interactions between pedestrians and vehicles, increased delays, and inconvenience stand apart from considerations of air pollution.

In the alternative, Petitioner argues that even if the finding of incompatibility was based on more than emissions, the Board's ruling should be reversed as such findings are not

supported by substantial evidence. The Court finds this argument unpersuasive as well. In reaching their decision, the Board relied primarily on the findings of the Hearing Examiner, who took testimony over a period of 17 months, with some 37 days of hearings, culminating in a 262-page opinion. Reflecting on the far reaching scope and exceedingly thorough nature of this examination, the Court is unable to find such a lack of evidence that the ruling of the Board must be reversed. While there is certainly some ambiguity in the record regarding the potential impact of traffic congestion and physical activity, and it is possible that another fact finder may have reached a different conclusion, there is nonetheless sufficient evidence to support the finding of the Board.

VI. CONCLUSION

The Board of Appeals did not err in its Final Order against Petitioner when it denied the application for a special exception zoning permit. Considering the findings of the Board, Hearing Examiner, and Technical Staff, the ruling was not arbitrary or capricious, was based on substantial evidence, and was not premised on an error of law. Therefore, this Court affirms the ruling of the Board of Appeals for Montgomery County, Maryland.

12-18-2015
DATE

GARY E. BAIR, Judge
Circuit Court for Montgomery County, Maryland

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PETITION OF: *
COSTCO WHOLESALE CORPORATION
*

FOR JUDICIAL REVIEW OF THE
FINAL DECISION OF: *
THE BOARD OF APPEALS FOR
MONTGOMERY COUNTY, MARYLAND * CIVIL ACTION NO.: 404629-V
100 Maryland Ave., Suite 217
Rockville, MD 20850 *

IN THE CASE OF: *
BOA CASE NO. S-2863

ORDER

Upon consideration of the record in the case, memoranda filed by counsel, and argument presented before the Court on November 13, 2015, having found that the conclusions of the Board of Appeals are based on substantial evidence in the record, that its conclusions were not legally erroneous, and for the reasons set forth in the Opinion of the Court filed herewith, it is this the 18th day of December, 2015, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Final Decision and Order of the Board of Appeals in Case No. S-2863 is AFFIRMED.

Gary E. Bair

GARY E. BAIR, Judge
Circuit Court for Montgomery County, Maryland