IN THE COURT OF APPEALS OF MARYLAND

HUNTINGTON TERRACE CITIZENS ASSOCIATION	*	
Petitioner	*	
v.	*	
SUBURBAN HOSPITAL	*	Petition Docket No. 523
	*	September Term, 2013
Respondent	*	

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RESPONDENT SUBURBAN HOSPITAL'S ANSWER IN OPPOSITION TO PETITIONER HUNTINGTON TERRACE CITIZENS ASSOCIATION'S PETITION FOR A WRIT OF CERTIORARI

Pursuant to Maryland Rule 8-303(d), and in answer to the above-captioned Petition, Respondent Suburban Hospital, Inc. ("Suburban" or "Hospital"), by its attorneys, Barbara A. Sears, Erin E. Girard, Phillip A. Hummel, and Linowes and Blocher LLP, states that the Petition should be denied as further review is not desirable or in the public interest.

I. INTRODUCTION

The instant case involves the needed expansion and modernization of Suburban Hospital, a critical healthcare facility designated by the State as Montgomery County's only trauma center.[1] The Hospital's last significant clinical expansion occurred in 1979. On March 26, 2008, Suburban filed a petition with the Board of Appeals for Montgomery County (the "Board") to modify its special exception use (the "Modification") and expand the hospital to correct a

[1] State-designated trauma centers are responsible for and certified to provide advanced medical and surgical services 24 hours a day. E. 408 (Apx. 8). This includes specialized trauma resuscitation care and prompt availability of operating rooms and surgical teams for trauma patients around the clock. E. 239 (Apx. 6), E. 978 (Apx. 19).

number of identified physical deficiencies on its existing campus and address current healthcare standards and needs. Contrary to Petitioner's assertions to this Court, Petitioner, Huntington Terrace Citizens' Association ("HTCA"), has opposed the Modification during every step of the administrative process, which has lasted for over five and a half years.[2]

In September 2008, the Modification was recommended for approval by both the Technical Staff of the Maryland-National Capital Park and Planning Commission ("Technical Staff") and the Montgomery County Planning Board ("Planning Board"). After extensive review of a record containing over 7,000 pages of transcript and over 450 exhibits, the Modification was approved by the Board, which issued a meticulous 23-page opinion (the "Opinion"), effective December 9, 2010, granting, with conditions, the Modification and concluding that the Modification satisfied all applicable statutory requirements and standards of the Montgomery County Code (the "Code"). The Board's decision was affirmed by the circuit court (Case No. 342309-V, Craven, J.) (Attachments 1 and 2 to Petition) and the intermediate appellate court in a unanimous and unreported decision (September Term 2011, Case No. 1251, Meredith, J.) (Attachment 3 to Petition). Petitioner's Motion for Reconsideration ("Reconsideration Motion") (Apx. 35-50) was denied by the Court of Special Appeals by Order dated October 31, 2013 (Attachment 4 to Petition). This Petition followed.

Although Petitioner claims to raise "questions of great public importance and wide applicability," (Petition at 2) the instant case reflects nothing more than a factual dispute, not uncommon in zoning cases. The matter involves the straightforward application of well settled legal principles that are of interest solely to the parties. The essence of the Petition is a request that this Court substitute its judgment for that of the Board's on matters of discretion and

[2] HTCA's President testified that Petitioner has never endorsed a concept or plan for the expansion of the Hospital. E. 1026 (Apx. 32).

substantial evidence. Indeed, the public interest is best served by denying the Petition and allowing the Modification to proceed. *See S. Easton Neighborhood Ass'n, Inc. v. Town of Easton*, 387 Md. 468, 498 (2005) (holding that the necessity of a hospital expansion with new facilities in the context of a road abandonment "constitute[d] a public purpose that promotes clearly the public welfare").

II. STANDARD OF REVIEW

A writ of certiorari should be granted only "[i]f the Court of Appeals finds that review of the case . . . is desirable and in the public interest[.]" Maryland Code (1973, 2013 Repl. Vol.), § 12-203 of the Courts and Judicial Proceedings Article. Former judges of this Court have stated that "public interest" means "public importance," namely, issues that are important not just to the parties themselves, but to the public at large. Paul Mark Sandler & Andrew D. Levy, Appellate Practice for the Maryland Lawyer: State and Federal, 325, 339-40 (3rd ed. 2007). The need for this Court to grant a petition for a writ of certiorari "may be triggered by such considerations as novelty, complexity, conflicting precedents, impact or importance and the breadth or extent thereof and likelihood of recurrence." *Koenig v. State*, 368 Md. 150, 151 (2002) (Bell, C.J., dissenting from Dismissal of Petition for Certiorari). The purpose of the discretionary nature of the writ ensures judicial economy and effective use of limited judicial resources by allowing the Court "to control [its] caseload by accepting only those cases that have substantial precedential value" or satisfy the statutory test of § 12-203 of the Courts and Judicial Proceedings Article. *Arrington v. State*, 411 Md. 524, 561 (2009) (Battaglia, J., dissenting). In matters involving factual findings or discretionary judgments, a request to grant a writ of certiorari is not proper as this Court does not "substitute [its] judgment for the expertise of those persons who constitute

the administrative agency." *HNS Dev., LLC v. People's Counsel for Balt. Cnty.*, 425 Md. 436, 449 (2012) (internal quotations omitted).

III. QUESTIONS PRESENTED

A. Did both Chair Titus and reviewing Courts properly identify and apply well settled legal principals regarding recusal in determining that Chair Titus did not abuse her discretion when declining to recuse herself due to an alleged appearance of impropriety?

B. Did the decision below correctly conclude that the Board's Opinion was supported by sufficient findings of fact regarding the Modification's economic impact, master plan compliance, and the need for an employee-only entrance?

C. Did the decision below correctly conclude that the Board applied the correct legal standard regarding setbacks in approving the Modification?

D. Did the decision below correctly conclude that the Board applied the correct legal standard regarding the Modification's adverse effects?[3]

IV. FACTUAL CONSIDERATIONS

Suburban adopts the facts set out in the September 10, 2013 opinion of the Court of Special Appeals.

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[3] The Petitioner incorrectly styles this question as "whether the Court gave proper effect to the State's Open Meetings Act[.]" (Petition at 15). As this issue was not plainly raised for review below and there was no ruling on it by the circuit court or the Court of Special Appeals, the issue has not been preserved for review by this Court and should not be considered for further appellate review. Md. Rule 8-131(a)&(b); *Md. State Bd. of Elections v. Libertarian Party of Md.*, 426 Md. 488, 517 (2012) (noting that the purpose of Rule 8-131 is to, among other things, "require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings") (internal quotations omitted). *See also*, Section IV.D, *infra*.

Certain essential facts have been mischaracterized throughout the Petition and should be addressed. HTCA incorrectly characterizes isolated references to, and incomplete statements from, the Board's October 20, 2010 worksession as "findings." (Petition at 7-10). These statements are not "findings" by the Board. Courts are charged with reviewing final administrative decisions, *Smith v. Cnty. Comm'rs of Kent Cnty.*, 418 Md. 692, 712-13 (2011), and the Board's decision containing its findings was not final under Montgomery County law until it issued the Opinion. Maryland Code (2012), § 22-301(a)(1) of the Land Use Article, §§ 59-A-4.123(a), 4.125(b), and 4.62(c) of the Code. HTCA largely ignores the Board's written Opinion, and when it does refer to it, makes misleading or conclusory statements regarding its contents, as explained more fully below. Therefore, Petitioner's characterization of statements made during the Board's October 20, 2010 worksession as "findings" and its avoidance of the final decision of the Board are misleading and advance a set of purported facts that are incorrect and stylized to support Petitioner's arguments.

V. REASONS FOR DENYING THE PETITION

As noted above, review of the instant case by this Court is not desirable or in the public interest because the matter either involves unassailable and consistently applied legal principles that render any reexamination unnecessary, or inappropriately requests this Court to weigh the substantial evidence of record and reach a decision different than that reached by the Board. Although presented as questions of law, the Petition asks this Court to substitute its judgment for both that of the Board Chair, who exercised her discretion in denying to recuse herself, as well as for the unanimous Board which, using its administrative expertise, made detailed factual findings on all relevant matters under the Code. *See HNS Dev., LLC*, 425 Md. at 449. There are no issues of public importance or precedential value presented by the Petition. The gravamen of HTCA's

contentions is a disagreement with the decision itself based on the conflicting facts presented. Petitioner's issues have been rigorously analyzed in accordance with well settled precedents and authorities and determined to be unmeritorious by the Board, the circuit court, and the Court of Special Appeals. Therefore, the Petition is lacking in public interest and should be denied as an improper effort to reargue unsuccessful claims that are of interest only to the parties and the review of which by this Court would be an inefficient use of scarce judicial resources.

A. Chair Titus, the Circuit Court, and the Court of Special Appeals Correctly Identified and Applied the Proper Legal Standard to Determine that the Chair Did Not Abuse Her Discretion in Declining to Recuse Herself

As in the previous proceedings, Petitioner once again alleges that Board Chair Catherine Titus ("Chair Titus") erred by failing to recuse herself not due to actual bias, but on account of an appearance of impropriety. Although Petitioner claims that this case presents an opportunity for this Court to "resolve confusion in the case law and establish a clear standard for evaluating denial of a recusal motion," (Petition at 2), Petitioner fails to make a compelling case that any confusion actually exists. In fact, judicial review of recusal decisions involves the application of clear and indisputable case law that was faithfully employed in this case by Chair Titus and reviewing courts. Additionally, Petitioner misrepresents Chair Titus' recusal decision, the Court of Special Appeals' opinion, and the purported relevancy of 23-year-old testimony given by Chair Titus' husband, Roger Titus, from a previous case in an attempt to support its threadbare argument.

This Court discussed the relevant touchstones for recusal in *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397 (1999), and cases cited therein, all of which already provide the "clear guidance" that Petitioner now seeks and which were consistently cited to by *both* Petitioner and the Hospital in previous proceedings. First, courts "begin with the presumption of impartiality." *Id.* at 410. "[T]here is a strong presumption in Maryland . . . and

elsewhere . . . that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified[.]" *Id.* at 410-11 (alterations in original) (quoting *Jefferson-El v. State*, 330 Md. 99, 107 (1993)). Furthermore, "the 'appearance of impropriety' standard set forth in our cases involving judges and some others is applicable generally to the participation of members of Maryland administrative agencies performing quasi-judicial or adjudicatory functions." *Regan*, 355 Md. at 410. The test to determine an appearance of impropriety "'is an objective one which assumes that a reasonable person knows and understands all the relevant facts . . . . Like all legal issues, judges determine appearance of impropriety - not by what a straw poll of the only partly informed man-in-the-street would show - but by examining the record facts and the law, and deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.'" *Regan*, 355 Md. at 411 (quoting *Jefferson-El*, 330 Md. at 107-08). This Court has also consistently stated that "[u]nless grounds for mandatory recusal are met, a judge's decision not to recuse himself or herself will be overturned only upon a showing of an abuse of discretion." *Town of Easton*, 387 Md. at 499.

In accordance with these well-established standards, Chair Titus issued two thoughtful statements on November 8, 2008 and June 30, 2010 declining HTCA's recusal requests that Petitioner failed to include with its Petition and are attached hereto. E.370-72 (Apx. 9-11); E.812-815 (Apx. 14-17). After noting that the County's Code of Ethics and County law did not compel recusal in her November 8, 2008 statement, Chair Titus appropriately addressed the above presumption of impartiality standard and correctly stated that "[i]t is a discretionary decision where the basis of the request to recuse is, *as here, the appearance of impropriety as opposed to an allegation of personal misconduct.*" E.372 (Apx. 11) (Emphasis added). In her

June 30, 2010 statement, Chair Titus referred back to her November 8, 2008 statement and again concluded that neither County law nor "any principle applied by the courts," which included the appearance of impropriety identified in her earlier statement, required recusal. E.813 (Apx. 15). Therefore, Petitioner's allegation that Chair Titus failed to apply the objective "appearance of impropriety" standard to its recusal request is completely unfounded.

Relying on the recusal principles discussed above, the circuit court (Attachment 1 to Petition at 3-5, Attachment 2 at 1) and the unanimous panel of the Court of Special Appeals (Attachment 3 to Petition at 4-8) appropriately determined that Chair Titus was not required to recuse herself. The circuit court identified Petitioner's argument, properly applied the objective test discussed in *Regan* regarding the existence of an appearance of impropriety, determined that recusal was unnecessary, and accordingly commented "that [recusal] would have been unnecessarily disruptive to this very intricate, expensive, and well thought out . . . legislatively dictated pattern of decisionmaking." (Attachment 1 to Petition at 3-5). After considering whether Chair Titus' participation created an appearance of impropriety, the Court of Special Appeals also concluded that it "f[ound] no merit in any of HTCA's recusal arguments." (Attachment 3 to Petition at 7). The Court of Special Appeals subsequently denied Petitioner's Reconsideration Motion, which alleged, among other things, that the Court did not properly consider its recusal arguments. Apx. 35-37.

The Petition also misrepresents the Court of Special Appeals' decision, as well as the law regarding recusal. Relying on incomplete phrases taken out of context from the court's opinion, Petitioner asserts that the Court of Special Appeals confused and incorrectly applied the recusal standards for actual bias instead of those related to the appearance of impropriety. (Petition at 3-4). The Court of Special Appeals, however, did no such thing. What the Court of Special

Appeals did was accurately identify Petitioner's allegation that Chair Titus was required to recuse herself, not on account of actual bias, but rather because her "partiality might reasonably be questioned" and correctly applied the objective "appearance of impropriety" test discussed in *Regan*. (Attachment 3 to Petition at 4-8). Petitioner is also incorrect that the presumption of impartiality is only applicable to determining actual partiality or bias. (Petition at 3-4). As this Court noted in *Regan*, "[i]n determining whether there is either actual bias *or an appearance of impropriety on the part of a decision maker in a judicial or quasi-judicial proceeding*, we begin with the presumption of impartiality." 355 Md. at 410 (emphasis added).

Finally, Petitioner's assertion that Chair Titus was compelled to recuse herself because she was required to evaluate the validity of her husband's 1987 testimony from a previous case is flawed because such testimony was not at issue in this case. Neither Chair Titus nor Suburban referenced or relied upon it.[4] Rather, HTCA first raised the testimony before the Board and then utilized it as a basis for its recusal motion.[5] E.785-86 (Apx. 29-30). A reading of the Board's Opinion confirms that, when concluding that physician office space was an inherent part of a hospital use, the Board only relied on the extensive evidence of record produced by the Hospital

[4] With regard to Petitioner's other assertions in footnote 3 of the Petition concerning other alleged facts creating a purported appearance of impropriety, Suburban notes: 1) Roger Titus' voluntary and uncompensated service on the Board of Trustees ended in 2000, he has had no continuing involvement with Suburban, and an entirely new board was in place at the time of the filing of the Modification; 2) the Titus' $1,244.20 in donations to Suburban between January of 2006 and October of 2008 were all made in celebrations of specific life events (e.g., retirement, birthday, anniversary) and in memory of two deceased individuals; and 3) the Chair reasonably concluded that the plain and unambiguous language of a Code provision requiring the affirmative vote of at least four Board members to modify a special exception did not apply to Petitioner's motion to dismiss or defer the Modification. All of Petitioner's recusal claims were exhaustively considered during judicial review and consistently rejected. (Attachment 1 to Petition at 3-5; Attachment 2 to Petition at 1; Attachment 3 to Petition at 4-8)

[5] As this Court noted in *Regan*, "[a] litigant ordinarily should not be permitted to create an appearance of impropriety in order to disqualify a judge." 355 Md. at 415.

on that issue and on its own recent hospital special exception cases in which the Board conclusively made the same determination.[6] (Attachment 6 to Petition at 11-12).

Chair Titus, as well as the circuit court and the intermediate appellate court, all appropriately concluded, in light of this Court's precedents, that Petitioner did not overcome the considerable burden arising from the strong presumption of impartiality to establish an appearance of impropriety. Maryland courts have already answered Petitioner's call to "set forth a clear standard governing recusals of quasi-judicial board members" (Petition at 6), some of which were cited in the Petition, and the reviewing courts properly applied these standards to conclude that Chair Titus was not required to recuse herself due to an appearance of impropriety. The notion that this case is unique because Chair Titus was "in a position where she must credit or discredit her spouse's testimony" (Petition at 6) is nothing more than a distraction, as no such weighing of this evidence was at issue. Therefore, granting a writ of certiorari would not be desirable and in the public interest because Petitioner's recusal arguments involve axiomatic and static legal principles that need not be reexamined by this Court.

B. The Reviewing Courts' Decisions Correctly Concluded that the Board's Decision was Supported by Legally Sufficient Factual Findings and the Board was not Required to Provide a Justification for Rejecting Recommendations of the Hearing Examiner

Effectively ignoring the Board's written Opinion, Petitioner asserts that the Board's decision was not supported by sufficient factual findings. A summary reading of the Opinion, however, reveals that the Board provided exhaustive, detailed, and precise factual findings on all relevant issues that permit judicial review and are supported by substantial evidence. This Court

[6] The record established that, in addition to Suburban being the only hospital in Montgomery County without physicians' offices, the 38,000 square feet of physician's office space approved in the Modification was the minimum necessary to serve the acute care needs of the Hospital, was integrated into the addition building and not a stand-alone building, and was significantly less than the amount located on any other Montgomery County hospital campuses. Apx. 25; Attachment 6 to Petition at 1, 13; E.514 (Apx. 12).

has recently reaffirmed that to be legally sufficient, an agency's findings must be adequate to facilitate judicial review, and "when the Board [] refers to evidence in the record in support of its findings, meaningful judicial review is possible." *Critical Area Comm'n v. Moreland, LLC*, 418 Md. 111, 128-29, 134-35 (2011).[7] These requirements are clearly met in this case, as the Board issued affirmative, factual findings on all material issues with clear evidentiary support from the considerable record. Therefore, it is unnecessary for this Court "to clarify the standard as to what constitutes sufficient findings of fact by a quasi-judicial board[.]" (Petition at 7).

Petitioner also claims that appellate review is needed to clarify what constitutes sufficient findings of fact for a quasi-judicial board "in the context of its rejection of an Examiner's Report." (Petition at 7-8) In support of its contention, Petitioner implies that a higher standard is applied where an agency disagrees with preliminary recommendations, by claiming, for example, that "[t]he BOA's 'finding' is *particularly insufficient* in light of the extensive analysis and findings of the Examiner in the Report[.]" (Petition at 9 (Emphasis added)). However, it is indisputable under Maryland law that an administrative board is not required to present any detailed discussion or rationale for rejecting the recommended factual findings of its hearing examiner, nor is it held to a higher standard when it does so. As previously noted by the Court of Special Appeals,

> [b]ecause the substantial evidence test remains the ultimate and absolutely controlling consideration on judicial review, it does not matter that the agency may have ignored the findings and the proposed decision of the [hearing examiner], even without having had any rational basis for doing so, just so long as there still exists some other basis for the agency's decision that would be enough, in and of itself, to satisfy the substantial evidence test.

[7] The Court in *Moreland* also warned against elevating form over substance regarding the organizational structure of a written decision and held that the requisite evidentiary support for findings can be located in different sections of an opinion. *Critical Area Comm'n v. Moreland, LLC*, 418 Md. 111, 134-35.

Md. Bd. of Physicians v. Elliott, 170 Md. App. 369, 386, *cert. denied*, 396 Md. 12 (2006). This holding is entirely consistent with past rulings of the Court of Special Appeals and this Court:

> Merely because the [agency] delegated to a hearing office the responsibility to hold hearings and prepare a proposed decision, it does not follow that the [agency] was obligated to adopt the [hearing examiner]'s proposal or satisfy a higher standard in order for a disagreement with a hearing officer to withstand appellate scrutiny. Moreover, we are unaware of any requirement imposing on the [agency] the burden of addressing, line by line, the content of a [hearing examiner]'s recommendation.

Carriage Hill Cabin John, Inc. v. Md. Health Res. Planning Comm'n, 125 Md. App. 183, 220 (1999); *Anderson v. Dep't of Pub. Safety & Corr. Servs.*, 330 Md. 187, 215-16 (1993) ("[T]he 'substantial evidence' standard is not modified in any way when the [agency] and its examiner disagree.") (second alteration in original) (internal quotations omitted). Thus, Maryland caselaw is also clear regarding the role of preliminary recommendations in the quasi-judicial process, and is not in need of further evaluation by this Court.

Consistent with the clear guidance discussed above, the circuit court properly reasoned that the Board was not required to discuss each witnesses' testimony or every exhibit introduced into evidence in its final written decision. (Attachment 1 to Petition at 6). Furthermore, the Court of Special Appeals held that "[a]n agency is expected to support its own final decision with substantial evidence. But it does not need to provide a point-by-point refutation, supported by substantial evidence, of preliminary recommendations." (Attachment 3 to Petition at 15). The intermediate appellate court also appropriately cited to *Elliott*, noting that an agency is free to ignore the recommendations of a hearing examiner as long as the agency's final decision is supported by substantial evidence, and concluded that it found "no support" for Petitioner's argument "that the Board was required to articulate why it disagreed with the recommendation of

the Hearing Examiner." (Attachment 3 to Petition at 17).[8] Therefore, despite Petitioner's disagreement and apparent frustration with this established, ample, and consistent caselaw, it is not in need of further analysis by this Court.

Petitioner's arguments do not bear on the sufficiency of existing caselaw, but rather constitute a request that this Court wade through the vast administrative record and reweigh the evidence consistent with the Hearing Examiner's recommendations, thus substituting its judgment for that of the Board's. As noted above, it is inappropriate for reviewing courts to "substitute [their] judgment for that of the [agency], assess the weight and credibility of that evidence, make specific findings of fact, and then draw and articulate conclusions of law therefrom." *Colao v. Cnty. Council of Prince George's Cnty.*, 109 Md. App. 431, 463 (1996), *aff'd*, 346 Md. 342 (1997).

As explained below, the specific examples provided by Petitioner do not compel a conclusion different than the circuit court and intermediate appellate court's that the Board's factual findings were legally sufficient and supported by substantial evidence.

(1) Economic Impact

With regard to § 59-G-1.21(a)(5) of the Code, the Board relied on the real estate market analysis of Ryland Mitchell, Suburban's real estate appraisal and valuation expert, to find that neither the Hospital's existence nor the Modification would be detrimental to the economic value or development of surrounding properties. (Attachment 6 to Petition at 13-14). This finding is legally sufficient as it refers to specific evidentiary support from the administrative record.

[8] Contrary to Petitioner's assertions, however, the Opinion demonstrates that the Board noted its agreement with the Hearing Examiner on a number of issues, incorporated her findings thereon, and likewise noted where it disagreed with her findings and why. *See* Attachment 6 to Petition at 3 ("The Board [] has carefully considered ... the Hearing Examiner's Report and Recommendation ... The Board agrees in part and disagrees in part with the Hearing Examiner's findings and recommendations, as discussed below.").

Petitioner's reliance on *Annapolis Market Place, LLC v. Parker*, 369 Md. 689, 718-19 (2002) and *People's Counsel for Baltimore County v. Beachwood I Limited Partnership*, 107 Md. App. 627, 661 (1995), *cert. denied*, 342 Md. 472 (1996), for the proposition that reliance on an expert's testimony and report to make certain findings is insufficient is unpersuasive. In *Annapolis Market Place*, this Court found that the Board of Appeals for Anne Arundel County erred by relying on the *negative* declaration of a witness that "there were no issues related to the adequacy of public facilities except for transportation systems" to satisfy the county code provision requiring an *affirmative* finding regarding the adequacy of, among other things, off-site water, sewerage and storm drainage systems. 369 Md. at 718-19. Ryland Mitchell, however, provided extensive direct and affirmative evidence in his report and through testimony regarding the economic impact of the Hospital and the Modification on surrounding properties and the general neighborhood. The Court of Special Appeals in *Beachwood* held that the Board of Appeals for Baltimore County's opinion was deficient by relying on expert testimony to satisfy certain code requirements when that testimony concerned only one of three requisite findings. 107 Md. App. at 660-61. In the current matter, Mr. Mitchell's testimony covered the exact legal proposition for which the Board relied upon it, namely, that the Modification "[w]ill not be detrimental to the . . . economic value or development of surrounding properties or the general neighborhood at the subject site[.]" § 59-G-1.21(a)(5) of the Code. Thus, the facts in the present case are materially distinguishable from those in *Annapolis Market Place* and *Beachwood.*

Additionally, although Petitioner asserts that the Board's findings on economic impact "render meaningless" the Hearing Examiner's recommendation and HTCA testimony, the undisputed case law cited above holds that the Board was free to weigh the evidence based on its

expertise and experience and ignore the Hearing Examiner's recommendation on this issue, even if Petitioner disagrees with the ultimate result (Petition at 9).

(2) Master Plan Consistency

One of the more egregious factual misrepresentations in the Petition relates to how Petitioner characterizes the Board's findings regarding master plan consistency under §59-G-1.21(a)(3) of the Code. Petitioner repeatedly asserts that the Board relied "solely" on the Technical Staff report in finding the Modification complied with the applicable master plan.[9] (Petition at 10-12). The clear content of the Opinion, however, refutes Petitioner's claim and undermines the credibility of its argument. After agreeing with the conclusion of the Technical Staff for the Planning Board and incorporating Staff's reasoning on master plan compliance, the Board continues:

> The Board finds that the Land Use and Zoning Plan of the Master Plan supports large land users, and, in its description of Community Land Use Objectives, specifically excepts community serving uses, of which a hospital is certainly one, from its recommendation against special exceptions along Old Georgetown Road. The Master Plan recognizes that some existing special exceptions along Old Georgetown Road may need to be modified and recommends that any building addition not be more than 50% of the existing building, and the proposed expansion is not. The Master Plan guidelines for special exceptions support special exceptions that contribute to the service and health objectives of the Plan, which the hospital clearly does. Also, Suburban Hospital proposes to make improvements to the sidewalks and pedestrian cross-walks along Old Georgetown Road which are consistent with recommendations of the Master Plan. (Attachment 6 to Petition at 12-13).

[9] Although the Board relied on more than just the Technical Staff report to support its findings regarding master plan compatibility, Petitioner misstates the law that "acceptance of another agency's conclusion in a report is not an adequate finding." (Petition at 11). *See Md.-Nat'l Capital Park and Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 110 (2009) ("It is not unreasonable for the Planning Board to rely on a Staff Report, as the Planning Board did in this case, if the Staff Report is thorough, well conceived, and contains adequate findings of fact.").

This analysis clearly represents substantial findings of fact that go far beyond simply incorporating Technical Staff's report,[10] and these findings were made as part of the final decision of the agency, which reflects the Board's consideration of all of the expert testimony and other factual evidence of record.

(3) Southwick Street Entrance

Although HTCA misdirects this Court's attention by focusing on the findings of the Hearing Examiner and specific testimony of record rather than on the Board's findings,[11] such deflections do not undermine the fact that the Board's findings on the Southwick Street entrance are also legally sufficient and based on substantial evidence. Specifically, the Board found that the entrance, as conditioned, would not rise to the level of a non-inherent adverse effect due to time restrictions on use, signage informing drivers of the same, utilization of a design making turns into the residential community difficult, if not impossible, and the existence of a currently operational driveway off Southwick Street. (Attachment 6 to Petition at 6-7, 14, 20 (Condition 13)). Petitioner's claim that legally sufficient findings on this issue demanded an explanation as to why certain testimony was rejected is without merit because the Board's analysis referred to specific and considerable evidence of record, thereby permitting judicial review.

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[10] Petitioner further attempts to undermine the Board's incorporation of the findings of the Technical Staff report because the Community-Based Planning division of Technical Staff recommended denial of the Modification. (Petition at 11). Petitioner fails to note, however, that this recommendation was later demonstrated to be misleading and incomplete, and was rejected by the Planning Board and Technical Staff. E. 302 (Apx. 2), E. 982 (Apx. 21), E. 366-67 (Apx. 3-4)

[11] Petitioner claims that "the Planning Board staff, Suburban Hospital's engineer and Suburban Hospital's traffic expert all agreed that this entrance *could* be limited to emergencies." (Petition, p. 12 (emphasis added)). What Petitioner fails to mention, however, is that, while all three acknowledged the entrance could be limited to emergencies, they also found that it was preferable to keep the entrance open to employees to enhance circulation in and around the site. E.1004 (Apx. 23-25), E.1007 (Apx. 27), Apx. 13.

Thus, the Board supported its decision with legally sufficient factual findings, including extensive references to specific testimony and exhibits of record. These findings, as determined by the circuit court and Court of Special Appeals, were supported by substantial evidence. As noted in the case law cited above, Maryland appellate courts have already clearly established the standards to be applied in evaluating the adequacy of fact-finding by a quasi-judicial board, as well as how those standards are affected by preliminary recommendations from another body. Petitioner's dissatisfaction with how the Board viewed the evidence of record and its rejection of recommendations of the Hearing Examiner does not result in a determination of legally insufficient findings as contended by Petitioner. Review of Petitioner's claim, therefore, would not be desirable or in the public interest as it merely invites this Court to reweigh the evidence of record and inappropriately substitute this Court's judgment for that of the Board's.

C. The Decisions Below Correctly Concluded that the Board Applied the Correct Legal Standards Regarding Setbacks in Approving the Modification

Before the circuit court and the Court of Special Appeals, Petitioner asserted that the Board erroneously interpreted the special exception setback standard for hospital uses when it rejected the 100' setback recommended by the Hearing Examiner.[12] According to Petitioner, the Board erroneously interpreted § 59-G-2.31(3) of the Code to mean that "the [Board] has no discretion to require a greater than 50' setback[.]" (Petition at 14). The reviewing courts found no merit in this argument. The Petitioner argues that this Court should consider the same issue, incorrectly framing it as a question of whether a decision based on the wrong legal standard may be ignored if there is other evidence supporting that decision. (Petition at 14). In reality, the

[12] It is worth noting that the 100' setback recommended by the Hearing Examiner was adapted from a setback standard found in a completely unrelated zone. (Attachment 6 to Petition at 6).

issue raises only a factual dispute which, based on substantial evidence, was resolved by the Board.

A review of the Board's decision confirms that the appropriate setback standard was properly applied. The Board began its setback analysis by disagreeing with the Hearing Examiner's recommended finding that the building addition and garage included in the Modification were too close to surrounding homes. (Attachment 6 to Petition at 5). Relying on multiple and detailed exhibits of record depicting the Modification, the Board found that the Modification's building addition and garage complied with § 59-G-2.31(3) of the Code and related well with its surroundings in terms of size, bulk, and location. (Attachment 6 to Petition at 5-6).

Petitioner's argument that the Board's interpretation "eviscerates the meaning of the plain language" is without merit (Petition at 14). The Board found that the Modification "me[t] or exceed[ed] required development standards," which include § 59-G-2.31(3) of the Code, and made an independent judgment based on its institutional expertise and experience, as well as the considerable evidence of record, that the proposed setbacks were appropriate, complied with the legislatively established setbacks for a hospital special exception use, and did not adversely affect the character of the neighborhood. (Attachment 6 to Petition at 5-6). Moreover, contrary to Petitioner's assertions that the Board did not realize it had discretion under § 59-G-1.22(a) of the Code to supplement specific requirements, the Board limited the height of the proposed garage to 36 feet as a condition of approval, which is well below the 50 feet allowed by Code at that location. (Attachment 6 to Petition at 20 (Condition No. 14)). Therefore, it is clear from the record that the Board understood that it had discretion to impose stricter development standards

to ensure compatibility when it deemed necessary, but declined to do so with respect to the setbacks based on the facts presented.

Both the circuit court in its Order and the intermediate appellate court, in its opinion and denial of Petitioner's Reconsideration Motion, concluded that the Board applied the proper legal standards, including the setback regulation, in upholding the approval of the Modification. (Attachment 1 to Petition at 5-7; Attachment 2 to Petition at 1-2; Attachment 3 to Petition at 11-12; Attachment 4, Apx. 37-40; Apx. 55-57; Attachment 4 to Petition). Simply because the Board declined to use its discretionary authority to require deviation from the specific standards created for hospital uses in § 59-G-2.31(3) of the Code, with which the Modification complied, does not compel a conclusion that the Board applied an incorrect legal standard. The Petition, therefore, does not present the purported issue identified by Petitioner, but instead presents only disagreements by Petitioner with the Board's rejection of the Hearing Examiner's recommendation, the Board's weighing of the substantial evidence, and the reviewing courts' affirmance of the Board's decision. As such, further appellate review is neither desirable nor of public importance.

D. The Decisions Below Correctly Concluded that the Board Applied the Correct Legal Standards Regarding the Modification's Adverse Effects Based Upon its Particular Location

In an effort to give a gloss of public importance to the straightforward issue of whether the Board applied the correct legal standard when determining the adverse impacts of the Modification on surrounding properties, Petitioner mischaracterizes the issue as one concerning "the proper effect to be given to the public decisionmaking process" under the Open Meetings Act, including whether the clear language of the [October 20, 2010 Board worksession] transcript is to be overridden by implications drawn from interpreting the written decision." (Petition at 19). As noted earlier, this issue was not plainly presented to the circuit court or the

Court of Special Appeals and no clear decision on it was sought or obtained by Petitioner in the courts. The issue has, therefore, not been preserved for appellate review. *See* Rule 8-131(a)&(b); *Md. State Bd. of Elections v. Libertarian Party of Md.*, 426 Md. 488, 517 (2012), and footnote 4, *supra.*

Even assuming, *arguendo,* that this issue was properly preserved for this Court's consideration, which it was not, Petitioner's argument contains numerous flaws rendering it improper for review. First, Petitioner does not actually allege a violation of the Open Meetings Act, nor could it sensibly assert one. The Open Meetings Act requires certain administrative bodies to meet in open session, give notice of its sessions, entitle the public to attend open sessions, meet in closed session only to discuss certain topics after undertaking specific procedures, and prepare written minutes with certain contents. Maryland Code (1984, 2009 Repl. Vol., 2013 Supp.), §§ 10-505, 10-506, 10-507, 10-508, & 10-509 of the State Government Article. The Board adhered to all of these requirements during its consideration of the Modification and Petitioner concedes such. (Petition at 16).

As discussed earlier, Petitioner improperly elevates the purported relevance of the Board's October 20, 2010 worksession transcript to direct the court away from the Board's Opinion, which is the final agency decision subject to judicial review. Petitioner takes isolated statements made at the worksession out of context to allege that the Board applied the "wrong legal standard" in determining adverse effects by not considering those effects on the surrounding properties. (Petition at 16). Petitioner misrepresents the Board's discussion at the worksession and incorrectly asserts that the transcript is the "only source of determining the legal standard applied as the written decision of the B[oard] and makes no reference to the legal standard used." (Petition at 16).

Without conceding that the transcript is a proper subject of this Court's review, Suburban notes that Chair Titus commenced the October 20, 2010 proceedings by quoting § 59-G-1.2.1 of the Code that the Board "must consider the inherent and non-inherent adverse effects of the use *on nearby properties and the general neighborhood at the proposed location*, irrespective of the adverse effects the use might have if established elsewhere in the zone," and identifying this standard "as familiar to many." (Attachment 5 to Petition at 7) (Emphasis added). The Board's vice chair also confirmed during the worksession both the evolution of special exception case law and the correct legal standard for considering the inherent and non-inherent adverse effects only at the specific location proposed. (Attachment 5 to Petition at 85-87). Importantly, Petitioner falsely asserts that the vice-chair's statement of the correct legal standard "was made well after all of the votes were recorded," when the transcript plainly establishes that the vice chair's statement was made prior to the motion to grant the Modification. (Petition at 18; Attachment 5 to Petition at 85-87).

Although Petitioner maintains the intermediate appellate court "ignored this erroneous application of the wrong legal standard so clearly reflected in the transcript" and "assert[s] its interpretation of the written opinion as a justification for ignoring the application of the wrong legal standard as shown in the transcript," (Petition at 18), the Court of Special Appeals squarely addressed Petitioner's claims and correctly found them to be unpersuasive. The intermediate appellate court aptly determined that "[i]t is plain from reading the entire [O]pinion that the Board applied the proper standard." (Attachment 3 to Petition at 11). Accordingly, the court found there was "no merit in HTCA's apparent contention that, because other cases that did not state the correct standard were mentioned at one point during the Board's deliberation – before the discussion was later steered in the proper direction by the Board's vice-chair – we should

find that the entire deliberation and the written opinion were fatally tainted." (Attachment 3 to Petition at 12).

Contrary to Petitioner's unsubstantiated assertions that the Opinion "makes no reference to the legal standard used" and "does not contain a statement as to what standard of review the B[oard] applied" (Petition at 16, 18), the Opinion, which represents the final agency decision reviewed by courts, is organized around, and explicitly quotes in their entirety, all applicable legal standards relevant to their review and decision, including the specific special exception standards for hospital uses (§ 59-G-2.31 of the Code), the general standards for all special exception uses (§ 59-G-1.21), the general development standards (§ 59-G-1.23 of the Code), and, most relevant to the instant matter, the localized standard for evaluation of adverse effects at the specific proposed location (§ 59-G-1.2.1 of the Code). The Board transparently applied these standards, properly evaluated the Modification's potential adverse effects solely on nearby properties and the general neighborhood, and suitably issued numerous findings that the Modification did not produce sufficient adverse effects at the proposed location to warrant denial[13] (Attachment 6 to Petition at 5-6, 11, 13-14, and 17-18). The Board's analysis in this regard was entirely consistent with its worksession discussion. Thus, there is no evidence of, or reliance upon, an improper geographic comparative analysis of the Modification's adverse effects in the Board's Opinion. This Court has "said time and time again, that [it] will review an adjudicatory agency decision solely on the grounds relied upon by the agency." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 111 n.1 (2001).

[13] In recognition of the propriety of the Board's analysis, both the circuit court and the Court of Special Appeals correctly determined that the Board utilized the appropriate legal standard when considering the Modification's adverse effects. (Attachment 1 to Petition at 5-7, Attachment 2 to Petition at 1-2, Attachment 3 to Petition at 8-12, Attachment 4 to Petition).

The substance of Petitioner's argument is dissatisfaction with how the Board applied the evidence of record to the standards contained in the Code. Petitioner's improper framing of the issue as implicating the Open Meeting Act distracts the Court from the Board's final decision, emphasizing only isolated and incomplete statements from the Board's worksession, ignoring the Board's accurate and faithful application of all standards from the Code, and rearguing the unpersuasive claim that the Board applied the wrong legal standard regarding adverse effects. Once again, the issue raised does not involve a disputed interpretation of the Code, but rather Petitioner's disagreement with how the Board applied the evidence of record to the applicable law and, as such, presents only a question of substantial evidence which has been confirmed by the reviewing courts. Therefore, further appellate review is neither desirable nor in the public interest.

VI. CONCLUSION

For the foregoing reasons, this Petition should be denied, further review being neither desirable nor in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 26 day of November, 2013, that a copy of the foregoing Answer in Opposition, along with the accompanying Order, was mailed via first-class mail, postage prepaid, to:

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IN THE COURT OF APPEALS OF MARYLAND

HUNTINGTON TERRACE CITIZENS ASSOCIATION	*	
Petitioner	*	
v.	*	
SUBURBAN HOSPITAL	*	Petition Docket No. September Term, 2013
Respondent	*	

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ORDER DENYING PETITIONER HUNTINGTON TERRACE CITIZENS ASSOCATION'S PETITION FOR A WRIT OF CERTIORARI

It is this ____ day of _____, 2013, by the Court of Appeals of Maryland,

ORDERED, that Petitioner Huntington Terrace Citizen Association's Petition for a Writ of Certiorari is **DENIED**.

_____
Judge, Court of Appeals of Maryland

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