IN THE COURT OF APPEALS

OF MARYLAND

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Case No. _____

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HUNTINGTON TERRACE CITIZENS ASSOCIATION

Petitioner,

v.

SUBURBAN HOSPITAL

Respondent.

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PETITION FOR WRIT OF CERTIORARI

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From an appeal to the Court of Special Appeals
Case No. Case No. 01251; September Term 2011

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November 14, 2013

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Huntington Terrace Citizens Association (”HTCA”) respectfully petitions the Court, pursuant to Md. Rule 8-302(a), to review a decision of the Court of Special Appeals issued on September 10, 2013. Reconsideration was denied and the mandate issued on October 31, 2013.

Proceedings Below

Suburban Hospital (“SH”) applied to the Montgomery County Board of Appeals (“BOA”) for a modification of its special exception for an expansion of its hospital facilities. HTCA, representing the residents in the surrounding 400-home community, was not opposed to an expansion but sought changes in the proposal because its design included closure of the community’s main street and demolition of 23 homes. The matter was referred to a Hearing Examiner (“Examiner”). Hearings were conducted over 34 days at which over 50 witnesses testified and more than 400 exhibits were submitted, resulting in some 7,000 pages of hearing transcript. The Examiner issued a 200-page Report and Recommendation (“Report”) extensively discussing the evidence and making recommended findings of fact and law. The Examiner did not recommend approval, and further recommended that the BOA remand the matter to the Examiner to provide SH with an opportunity to revise its plan so as to lessen the adverse impacts on the community and meet other requirements of the Zoning Code.

The BOA rejected the Examiner’s Report and approved SH’s application, with conditions (BOA Case No. S-274-D). HTCA appealed to the Montgomery County Circuit Court, Petition of Huntington Terrace Citizens Association, Case No. 342309-V. The circuit court affirmed the BOA decision by an oral ruling on June 22, 2011

(**Attachment No. 1**) and a written Order dated July 6, 2011 (**Attachment No. 2** with docket entries).

A timely appeal of the circuit court decision was made to the Court of Special Appeals. An unreported decision was issued on September 10, 2013 affirming the judgment of the circuit court (**Attachment No. 3**). On October 31, 2013 the Court of Special Appeals denied reconsideration and issued its mandate (**Attachment No. 4**).

QUESTIONS PRESENTED

This petition raises four questions of great public importance and wide applicability regarding the proper legal standards governing quasi-judicial boards and their decisions.

I. WHAT IS THE STANDARD FOR RECUSAL OF A MEMBER OF A QUASI-JUDICIAL BOARD AND DOES THAT STANDARD REQUIRE RECUSAL OF A MEMBER WHO HAS TO EVALUATE THE VALIDITY OF THE TESTIMONY OF THE MEMBER'S SPOUSE?

This case provides a much needed opportunity for this Court to resolve confusion in the case law and establish a clear standard for evaluating denial of a recusal motion made to a quasi-judicial board. In contrast to judicial recusals, there are few decided cases dealing with recusal of quasi-judicial board members. In the instant case, HTCA moved for the BOA chair to recuse herself on the grounds of appearance of impropriety. In Regan v. State Board of Chiropractic Examiners, 355 Md. 397 (1999), this Court stated that it would "assume, for purposes of this case, 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…." Id. at 410 (emphasis added).[1]

This case presents the opportunity for the Court to confirm what was assumed in Regan and to provide clear guidance on application of the "appearance of impropriety" standard. The opinion of the Court of Special Appeals demonstrates the need for such guidance. The lower court asserted that to establish an appearance of impropriety, one must overcome "the presumption of impartiality" and show that the board member was "so biased" that the board member "could not act impartially." Op. 7 (**Attachment No. 3**). In fact, this was the sole criteria stated by the BOA member in refusing to recuse herself: "I do not have any bias in favor or against any party before this Board…" (Statement of Board Chairman…in Response to Renewal of Request for Recusal…" (June 30, 2010). These observations confuse and conflate the distinct questions of actual bias with the appearance of bias. The presumption of impartiality and actual bias are factors applicable to determining actual partiality or bias. The operative rule is that it is in the discretion of the judge to determine, based on these and other factors, whether he

[1] Rule 16-813 of the Maryland Code of Judicial Conduct, Rule 2.11 provides:

> "Rule 2.11 DISQUALIFICATION
> (a) A judge shall disqualify himself or herself in any proceeding in which the judges' impartiality might reasonably be questioned…." [emphasis in original]

The first Comment states:

> "Under the Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (a)(1) through (5) apply. In this Rule "disqualification" has the same meaning as 'recusal'. [Emphasis in original].

or she is biased, and that exercise of discretion will not be overturned except for abuse. Jefferson-El v. State, 330 Md. 99, 107 (1992). By contrast, such factors are not applicable where only the appearance of impropriety is alleged. In that situation, as present in this case, the appearance of impropriety standard involves an "objective" test. As stated in In re Turney, 811 Md. 246, 253 (1987):

> The test…is an objective one…whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned.

See, Jefferson-El, supra, 330 Md. at 108. Using such an objective standard "precludes the necessity of delving into the subjective mindset of the challenged judge." Surratt v. Prince George's County, 320 Md. 439, 468 (1990). Quite plainly, the BOA member failed to apply this standard to the recusal request here. Review by this Court would provide needed clarification as to what the standard for recusal of a quasi-judicial board member is and the components of that standard.

Whatever the applicable standard, also needing this Court's review is the Court of Special Appeals' holding that recusal is not required where the board member must evaluate and reject the testimony of the member's spouse in order to rule in favor of the opposing party. Op. 8-9. (**Attachment No. 3**). In the instant matter, an issue that had to be decided by the BOA was whether an office building to be rented to physicians was so essential to a hospital that it was an "inherent" part of the hospital. If it was inherent,

under a local law,[2] its adverse effects alone could not be the basis for denial. In support of SH's position that the physician's office building was inherent, SH cited a prior BOA decision granting a previous application of SH for an on-site physician's office building. That prior opinion expressly summarized and relied upon the testimony of the BOA chair's husband, which testimony was that an on-site physician's office building was so essential to hospital operations that if it were not allowed, the denial "would accelerate the closing of Suburban." In the current case, however, the record evidence establishes that SH never constructed the physicians' office building (although authorized to do so), and the hospital, nevertheless, continued to operate successfully in the ensuing years. HTCA contended that this clearly demonstrated the office building was not so essential as to be inherent.

Thus, in order to rule in favor of HTCA on the claim that the physicians' office building was not an inherent part of a hospital, the chair of the BOA would have been required to evaluate and reject her own husband's testimony. Plainly, a "reasonable member of the public knowing all the circumstances would be led to the conclusion" that in rejecting HTCA's claim, the BOA member's "impartiality might reasonably be questioned."[3] In re Turney, supra 811 Md. at 253; See, Maryland Rules, 2-111,

[2] The Montgomery County Zoning Code, §59-G-1.2.1, provides in relevant part: "Inherent adverse effects alone are not a sufficient basis for denial of a special exception."

[3] Other facts of record which created the appearance of impropriety of the chair of the BOA included:

(1) The BOA member's spouse served 14 years on the SH Board of Trustees, and the last 3 years of which as the SH Board chair;

Disqualification. If the public's confidence in the integrity of the quasi-judicial process is to be maintained, it is essential that this Court set forth a clear standard governing recusals of quasi-judicial board members and make equally clear that such a standard precludes a board member from being in a position where she must credit or discredit her spouse's testimony.[4] If the Court of Special Appeals' ruling is allowed to stand, it effectively gives notice that a member of a quasi-judicial board need only proclaim his or her lack of bias in order to successfully resist recusal, no matter how blatant the partiality appears to reasonable members of the public.

II. WHAT CONSTITUTES SUFFICIENT FINDINGS OF FACT TO SUSTAIN A DECISION OF A QUASI-JUDICIAL BOARD INCONSISTENT WITH THE DECISION OF THE BOARD'S HEARING EXAMINER?

As noted, in the instant case the Examiner did not recommend approval of the special exception modification, and recommended remand to provide SH with an opportunity to make changes in its proposal to address compatibility problems with the hospital expansion. The Examiner's Report was based upon extensive findings of fact compiled from the evidence presented over 34 days of hearing, the testimony of some 50

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(2) The BOA member, and her spouse, donated money to SH in the amount of $1,000 to $4,999 in the year prior to the BOA hearing;

(3) At a BOA worksession, prior to the motion for recusal, on an SH-related matter, the BOA member, a non-lawyer, tried to convince the other BOA members to vote immediately to deny a motion that SH opposed, even though the BOA's own attorney advised that no vote could be taken as the required number of BOA members necessary to take a vote was not present.

[4] "Courts…should and must be like Ceasar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in his government." In re Turney, supra 311 Md. at 253 (1987) (citations omitted).

witnesses and the submission of over 400 exhibits. The Board rejected the Report and the factual findings upon which it was based.

The Court of Special Appeals' opinion correctly notes that a quasi-judicial board need not follow its Examiner's Report and can ignore its findings. Op. 17 (**Attachment No. 3**). However, the cases make clear that a board must make its own findings of fact to explain and support its conclusion. As stated in Board of Physicians v. Elliott, 170 Md. App. 369, 402 (2006): "… the question to be decided is not whether the agency has 'erred' in 'overruling' the ALJ's findings but whether its own findings are reasonably supported on the entire record". See, Carriage Hill Cabin John, Inc. v. Maryland Health Resources Planning Commission, 125 Md. App. 183, 221 (1999) (Commission "adequately addressed, directly and indirectly, those matters with which it disagreed" with the Examiner.) As this Court noted in Harford County v. Preston, 322 Md. 493, 505 (1991), not only must a board make findings to support its decision, "the court may only uphold the agency's order if it is sustained by the agency's findings and for the reasons stated by the agency."

The BOA's findings of fact here on crucial issues ranged from non-existent to clearly inadequate. The Court of Special Appeals nevertheless held that the BOA made sufficient findings. As detailed below, this was tantamount to making the fact-finding requirement meaningless. Further, the lower court has rendered the entire hearing process and Examiner's Report meaningless. Direction from this Court is needed, at a minimum, to clarify the standard as to what constitutes sufficient findings of fact by a quasi-judicial board generally, and particularly, in the context of its rejection of an

Examiner's Report. Petitioners set forth several examples demonstrating the need for this Court's guidance.

A. Economic Detriment

For approval of a special exception or modification thereof, the BOA must find that the proposal "[w]ill not be detrimental to the…economic value or development of surrounding properties…." (Montgomery County Zoning Code, §59-G-1.21(a)(5)). The Examiner found that SH failed to meet its burden of proof on this statutory requirement. SH relied upon the reports and testimony of its appraiser. The appraiser's testimony was lengthy and subject to very extensive cross-examination as to the correctness of his methodology and opinion. The Examiner's Report, after a thorough and careful analysis of this evidence, found HTCA's criticisms were "valid" and that the appraiser's efforts "were not persuasive." She cautioned the BOA not to rely on the appraiser's report and testimony.

After 2-3 minutes of discussion, the BOA rejected the Examiner's Report on this issue. The BOA's "findings" consisted of: (1) the BOA chair stating during public deliberations that the applicant's report "addressed the questions that I had initially, conclusively addressed them."[5] (**Attachment 5**, E.899 tr. 60); and (2) the BOA's written opinion states the Report submitted by SH's appraiser "is substantial evidence."

[5] As discussed below, the Open Meetings Act requires the board to deliberate and make its decisions on special exceptions in open session. *State Government*, §10-403(b)(2), Md. Code Ann. Accordingly, in open session the BOA made its decision and purported to explain the basis for it. The quote is from the deliberations and decision set forth in the October 20, 2010 Transcript (**Attachment 5**). Subsequently, the decision was reduced to writing (**Attachment 6**).

(**Attachment 6**, E.30, ¶5). Such a "finding" is clearly deficient. The Court of Special Appeals' decision that such conclusory "findings" are sufficient, is inconsistent with standards set forth in decisions of this Court as well as earlier decisions of that court. See, e.g., Annapolis Market Place, LLC v. Parker, 369 Md. 689, 718-19 (2002) (Board's finding expert testimony "persuasive" without explaining findings was held inadequate); People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership, 107 Md. App. 627, 661 (1995), *cert. denied*, 342 Md. 472, 677 A.2d 565 (1996) (The court notes its disapproval of the "almost cavalier attempt to finesse the requirement of precise and considered findings of fact by the casual incorporation of all of the testimony…of [the expert] into a brief allusion to it….). Findings must be "meaningful" and "resolve all significant conflicts in evidence and then chronicle, in the record, full, complete and detailed findings of fact and conclusions of law." Mehrling v. Nationwide Ins. Co., 371 Md. 40, 62-64 (2002) (citations omitted); Rodriguez v. Prince George's Co., 79 Md. App. 537, 550 (1988) (Take "account" of the "specific concerns and issues raised by the parties.")

The BOA's "finding" is particularly insufficient in light of the extensive analysis and findings of the Examiner in the Report and in light of the case law that the BOA address "matters with which it disagreed" with the Examiner. Carriage Hill, supra, 125 Md. App. at 221. This failure to make adequate findings effectively rendered meaningless the Examiner's Report as well as HTCA's extensive testimony of its own witnesses and cross-examination of SH's expert witnesses, all demonstrating the invalidity of SH's appraiser's opinion. The Court of Special Appeals' "liberal" holding

as to what constitutes adequate findings of fact is in conflict with this Court's requirement that such findings be meaningful. Mehrling, supra, 371 Md. at 62-64. Such findings fail to meet the purpose of findings,

> …in recognition of the fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision and to permit meaningful judicial review of those findings.

Harford County v. Preston, supra, 322 Md.at 505 (citations omitted).

B. Master Plan

For approval of the application, the BOA had to find the proposal was "consistent" with the Master Plan. Montgomery County Zoning Code §59-G-1.21(a)(3). Extensive evidence on the issue was presented before the Examiner, including expert testimony by land planners for both SH and HTCA. There was also a report, prepared by the staff of the Planning Board, one page of which addressed the Master Plan. The Examiner, after complete analysis of the entire Master Plan, expert land planner testimony and other evidence, found the proposal was not consistent. The BOA, without any discussion, rejected the finding of inconsistency stating it would simply rely on the Planning Board staff report. The BOA chair stated "I think we should defer to the Planning Board on master plan. They are the master plan experts." (**Attachment 5**, E.897, tr. 50). The BOA's written opinion states that the "Board agrees with the conclusion of the Technical Staff for the Planning Board that the proposed modification is consistent" with the Master Plan. (**Attachment 6**, E.28 ¶(a)(3)).

The BOA failed to recognize that the staff report was prepared and submitted to the Examiner for review prior to the commencement of the 34 days of hearings before the Examiner. Thus, the staff's comments obviously did not have the benefit of the extensive expert testimony and other factual evidence before the Examiner. Further, the BOA failed to recognize, as reflected within the staff report itself, that even the Planning Board staff was divided. The Planning Board's "Community Based Planning" section, responsible for Master Plan interpretation, found the proposed expansion was "unacceptable and should be denied."

The Court of Special Appeals' opinion also ignores these factors. It appears to have based its conclusion to uphold the BOA's consistency finding, which relied solely on the staff report, on the fact that there is other evidence that could support such a finding. Op. 22 (**Attachment No. 3**). This is contrary to the requirement that an agency decision can "only" be upheld "for the reasons stated by the agency". E.g., Preston, supra, 322 Md. at 505.

Further, the Court of Special Appeals' opinion is in conflict with the cases holding that acceptance of another agency's conclusion in a report is not an adequate finding. See Outdoor Advertising Co. v. Mayor and City Council of Baltimore, supra, 146 Md. App. 283 at 316-17; Rodriquez, supra, 70 Md. App. at 448 (Reliance upon another agency's determination is not an adequate finding unless the agency has taken account of the "specific concerns and issues raised by the parties.") It is particularly improper to rely on the staff report here. Since it was prepared without the benefit of the information subsequently presented at the hearing, it could not be afforded the conclusory, definitive

weight the BOA gave to it. See Calao v. County Council of Prince George's County, 109 Md. App. 431, 458-63 (1996), *affirmed*, 346 Md. 342 (1997). To get around the Examiner's well-supported finding of Master Plan inconsistency, the BOA merely cited the staff report, without analysis (which report actually provided supported for a conclusion contrary to the BOA's). *If merely referencing another agency's report prepared prior to the record compiled at a subsequent hearing is deemed a legally sufficient finding, it would mean the entire hearing process and the Examiner's Report would have been a complete waste of time and effort*. This is the effect of the Court of Special Appeals' opinion and as such it is one that compels correction.

C. Garage Entrance

An issue was whether the Southwick Street (a residential street) entrance to the proposed 1,176 SH car garage should be restricted to emergency use only and not used, as SH proposed, by employees. The Planning Board staff, SH's engineer and SH's traffic expert all agreed that this entrance could be limited to emergencies as the main entrance had the adequate capacity to handle the employee traffic. The Examiner found that the "dramatic increases" in traffic on Southwick Street would cause "a significant adverse effect" on the single family houses on that street. The Examiner found the benefit of having the Southwick Street entrance did not justify its adverse effects and recommended it be limited to emergencies. In its deliberations, the BOA rejected the requested restriction without discussing, considering, or even mentioning the testimony of SH's

experts as to the lack of need for the entrance.[6] At a minimum, a meaningful finding on this major issue involving unanimous expert opinion required an explanation as to why those expert opinions were rejected.

The Court of Special Appeals' opinion confirming the BOA's decision appears to be based on the premise that since there is something in the record that will support the finding, that is all that is necessary. This premise needs to be reconciled (or rejected) with the principles that an agency must make "meaningful" findings of fact which "resolve all significant conflicts in evidence" taking account of the "specific concerns and issues raised by the parties", Mehrling, supra, 371 Md. at 62-64; Rodriquez, supra, 79 Md. App. at 550, and that the agency's decision can be upheld "only" for the reasons stated by the agency. Preston, supra, 322 Md. at 505.

The instant matter provides this Court with the opportunity to establish or clarify the standards to be applied in evaluating the adequacy of fact-finding by a quasi-judicial board relying upon reports of other agencies, in general, and specifically in the context of the matter having been heard by an Examiner, followed by a board decision contrary to the Examiner's.

[6] The closest the BOA got to considering need was the comment that the Examiner noted a need to separate streams of traffic. (**Attachment No. 5**, E.892 tr. 30-31; **Attachment No. 6** E.23). The BOA erroneously failed to comprehend that the Examiner's comment related to separate entrances on a completely different street, in order to separate ambulance traffic from other traffic.

III. WHETHER A DECISION BASED UPON THE WRONG LEGAL STANDARD MAY BE IGNORED IF THERE IS OTHER EVIDENCE SUPPORTING THAT DECISION

Section 59-G-2.31(3) of the Montgomery County Zoning Code provides that no portion of a hospital building "shall be nearer" to a single family home lot line than the distance equal to the height of the building and "in all other cases not less than 50 feet". (emphasis added). The Examiner found incompatible the proximity of the 200' to 300' long hospital addition, predominantly 50' in height, located behind homes on Southwick Street.[7] The proximity of the large garage to Southwick Street residences was also found to be incompatible. The Examiner found a 100' setback would mitigate the adverse impacts. In its deliberations, the BOA rejected the 100' setback by erroneously interpreting §59-G-2.31(3) to mean that "the Council has decided," that the BOA has no discretion to require a greater than 50' setback no matter the length of the building, as long as the building is not over 50' in height. (**Attachment 5** E. 890, Tr. 22).[8] This interpretation of the governing statute eviscerates the meaning of the plain language by converting the statutory requirement from a 50' minimum into a 50' maximum that the BOA may require. It is also inconsistent with §59-G-1.22, which expressly permits the

[7] The Examiner found that under the Montgomery County Zoning Code, §59-G-1.2.1, proximity of a building was not an inherent characteristic so that its adverse effects could be a basis for denial of the application. The finding was not disputed before the BOA.

[8] BOA Vice Chair Purdue stated that the "County Council has similarly made a judgment for the required setback…and their judgment for hospitals is 50 feet, or the height of the building, whichever is greater…. It seems like the Council has decided." (**Attachment 5** E. 890, Tr. 21-22). The written opinion of the BOA states that the 50 foot hospital setback "was legislatively established by the County Council, and the Board finds that is the setback that shall be applied." (**Attachment 6**, E. 22).

BOA to "supplement the specific requirements…with any other requirements necessary to protect nearby properties…."

Since the BOA's rejection of the Examiner's Report citing incompatibility was based upon the wrong legal standard, the matter should have been reversed and remanded to apply the correct standard. See, e.g., Board of County Comm'rs v. Southern Resources Management, Inc., 154 Md. App. 10, 34 (2003) (citations omitted). (When "an administrative agency renders a decision based on incorrect legal standards…the case should be remanded to the agency so the agency can reconsider the evidence using the correct standard.") But rather than do what was required, the Court of Special Appeals has instead apparently adopted the position that since there is other evidence which could support a finding of compatibility, the BOA's use of the wrong legal standard need not be addressed. This Court needs to make clear that the law requires, and the parties are entitled to, a decision not based upon, or materially influenced by, the wrong legal standard.

IV. WHETHER THE COURT GAVE PROPER EFFECT TO THE STATE'S OPEN MEETINGS ACT?

The State's Open Meetings Act, *State Government Art.*, §10-501(a)(2)(ii) and §10-503(b)(2), requires that the "deliberations and decisions" of the BOA be made at meetings open to the public, including those for special exceptions. As stated by this Court in Wesley Chapel Bluemont Ass'n v. Baltimore County, 347 Md. 125, 127-28 (1996), public decision making allows citizens "to observe the performance of public officials and the deliberations" which "ensures the accountability of government and

increases the faith of the public in government." In complying with this statute, the BOA deliberated and decided the issues in public session. (**Attachment No. 5**) These decisions were reduced to writing in the BOA's written opinion. (**Attachment No. 6**). The transcript of that session plainly discloses that in deciding the issues, the BOA applied the wrong legal standard. The transcript is the only source of determining the legal standard applied as the written decision of the BOA makes no reference to the legal standard used.

It was undisputed in the court proceedings below that the correct legal standard is whether the special exception modification would have "an adverse effect upon neighboring properties in the general area" and if so, it must be denied. People's Counsel for Baltimore County v. Loyola College, 406 Md. 54, 64 (2008). HTCA asserted that the transcript of the BOA's deliberations and votes demonstrated that the BOA applied an erroneous standard: that the adverse effects must be "above and beyond, i.e., greater" than they would be generally elsewhere in the County.

For example, when BOA Member Shawaker expressed concern regarding certain adverse effects, the Chair and Vice Chair forced her to abandon that position citing the wrong legal standard.

- The Vice-Chair stated: "The question in this case is not whether a hospital has adverse effects….The question is also not whether the hospital at issue here will have adverse effects at this proposed location….The proper question is whether those adverse effects are above and beyond, i.e., *greater here than they would be generally elsewhere within the areas of the County where they can be established*." (**Attachment 5**, E.894, Tr. 39-40). (emphasis added).

- Chair: "But what David [Vice-Chair] just stated, and from the Mossburg case and whatever is, you know, *the standard, that we have to show that*

adverse effects from this modification rose above the adverse effects of any other special exception use in the zone, that they were unique to this. And they are not." (**Attachment 5**, E.895, tr. 41) (emphasis added).

- Vice Chair: "But you have to remember, again, *we can only deny on the basis of adverse effects that are above and beyond what would ordinarily have been associated by the insertion of this use into a residential neighborhood.*" Chair: *And it has to rise to a unique level at this place that would not occur at any other*." (**Attachment 5**, E.900, tr. 62, 64) (emphasis added).

Boardmember Shawaker backed off from her position that the requirement for "peaceful enjoyment of properties" was not met after the Chair and Vice Chair demanded proof that the adverse impacts would be "above and beyond" those elsewhere in the County, i.e., "unique".

- Vice Chair: "*And I would be interested in hearing what the grounds are for denial on the basis of the enjoyment and peaceful enjoyment of the adjoining properties will be adversely impacted above and beyond*…."

  Chair: "*That they would be unique…. Or that your use and enjoyment would be uniquely adversely affected at this site, more so than any other site in the zone that have this condition*." (**Attachment 5**, E.903, tr. 73) (emphasis added).

For example, when BOA members Boyd and Shawaker indicated that they thought the other compatibility requirements were not met, the Vice Chair again misinformed them of the law.

- Vice Chair: "So it's not enough to say that the surrounding community is adversely affected. There has to be *and in <u>Loyola</u> and other cases the Court has said that if you're going to deny the special exception*, you need strong and substantial probative evidence to support findings of adverse effects, *and not just any adverse effects, but adverse effects that go above and beyond the effects that would occur in other residential zones.*" (**Attachment 5**, E.894, tr. 40) (emphasis added).

The Court of Special Appeals ignored this erroneous application of the wrong legal standard so clearly reflected in the transcript. Instead, the court relied upon a self-serving statement made by the BOA Vice Chair reciting the correct legal standard. (**Attachment No. 3**, Op. 9). This statement was made late in the deliberations and after the break for lunch which provided an opportunity for the BOA to confer with its attorney. (**Attachment 5**, E.905, tr. 81; E.906, tr. 85-86). The statement was made well after all of the votes were recorded, as discussed above, employing the wrong legal standard, and no votes were revisited. The court below also asserted its interpretation of the written opinion as a justification for ignoring the application of the wrong legal standard as shown in the transcript. Although the court acknowledges the written opinion does not contain a statement as to what standard of review the BOA applied, the court interprets the opinion as implying the correct standard was used. (**Attachment No. 3**, Op. 12).

As noted, the purpose of the Open Meetings Act is to permit the public to observe the basis of the BOA's decision and "increase the faith of the public" in the quasi-judicial process. Accordingly, it is essential that a Court fairly and correctly interpret the transcript of the proceedings and not adopt an interpretation the public would find inconsistent with a fair reading. The standard to be applied in reviewing a transcript of the BOA's decision deliberations must be made clear – no strained interpretations in an effort to avoid finding legal error. Further, as detailed above, the Open Meetings Act requires that it is the public deliberations are where the basis of the BOA's decision is to

be disclosed. That basis is not to be found in a subsequent written opinion which expressly or by implication differs from the reasons set forth in the public proceedings.

The instant case provides this Court with the opportunity to consider the proper effect to be given to the public decision making processes under the Open Meetings Act, including whether the clear language of the transcript is to be overridden by implications drawn from interpreting the written decision.

Given proper effect to the public deliberations, the court below should have found, at a minimum, that the BOA's decision was influenced by the wrong legal standard, requiring remand for application of the correct one. Southern Resources Management, supra, 154 Md. App. at 34.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 14, 2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 14th day of November 2013 a copy of the Petition for Writ of Certiorari, with attachments, was mailed, first class, postage prepaid to:

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