

PRINCE GEORGE'S COUNTY	:	
COUNCIL, <i>et al.</i>	:	IN THE
	:	
Petitioners,	:	COURT OF APPEALS
	:	
v.	:	OF MARYLAND
	:	
CONCERNED CITIZENS OF PRINCE	:	
GEORGE'S COUNTY, <i>et. al</i>	:	September Term, 2022
	:	
Respondents.	:	Docket No.COA-PET-0206-2022

**AMICUS CURIAE PETITION IN SUPPORT OF PETITIONERS' WRIT
OF CERTIORARI FROM THE COURT OF SPECIAL APPEALS**

Kinley R. Bray
CPF #0212170235
David M. Plott
CPF #8912190161
YUMKAS, VIDMAR, SWEENEY &
MULRENIN, LLC
185 Admiral Cochrane Dr., Ste. 130
Annapolis MD 21401
(443) 569-5974
kbray@yvslaw.com
dplott@yvslaw.com

*Attorneys for Amicus Curiae NAIOP
Maryland*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION	2
Purely Legislative Enactments are Not Directly Appealable	3
CSA’s interpretation of the Uniformity Rule may invalidate conditional uses, special exceptions, and other zoning tools	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES

<i>Bucktail, LLC v. County Council of Talbot County</i> , 352 Md. 530, 543 (1999) ..	5
<i>In re Concerned Citizens of PG County District 4</i> , 2022 WL 2339411 (Md. Ct. Spec. App. June 29, 2022)	1
<i>Kim v. Comptroller of Treasury</i> , 350 Md. 527, 534 (1998).....	4
<i>Maryland Overpak Corp. v. Mayor & City Council of Baltimore</i> , 395 Md. 16 (2006)	4, 5
<i>Mayor and Council of Rockville v. Pumphrey</i> , 218 Md. App. 160 (2014).....	4, 5
<i>Mossburg v. Montgomery County</i> , 107 Md. App. 1 (1995)	6
<i>Town of Upper Marlboro v. Prince George’s County Council</i> , 2022 WL 3025099 at 9	4, 5, 6

STATUTES

Anne Arundel County Code Land Use Art. § 22-201(a)	2
Anne Arundel County Code Land Use Art. § 22-201(b)(1)	2
Anne Arundel County Code Land Use Art. § 22-201(b)(2)(ii)	7
Anne Arundel County Code Land Use Art. § 22-407(a)(1)	3
Anne Arundel County Code Land Use Art. § 4-201	2
Anne Arundel County Code Land Use Art. § 4-401(a)	3
Prince George’s County Code § 27-441	7

INTEREST OF *AMICUS CURIAE*

NAIOP Maryland (“NAIOP”) is a 400-member organization in the Maryland commercial real estate industry including developers, contractors, architects, and legal services providers engaged in the business of commercial real estate; its sister chapter, NAIOP DC MD, adds another 400 such members. NAIOP, through its undersigned counsel and pursuant to Md. Rule § 8-511(e), respectfully requests this Court grant the Petition for Writ of Certiorari filed by Freeway Realty, LLC in *In re Concerned Citizens of PG County District 4*, 2022 WL 2339411 (Md. Ct. Spec. App. June 29, 2022). The Court of Special Appeals’ (“CSA”) decision directly contradicts well-established caselaw limiting appeal of a legislative or quasi-legislative action, employed an incorrect standard of review, and raises serious questions about the validity of conditional uses, special exceptions, and other zoning tools under the Court’s interpretation of the zoning uniformity rule.

The effects of this decision are far-reaching and adversely impact every jurisdiction with zoning powers, as well as NAIOP’s members and every landowner relying on such zoning schemes. CSA’s reported decision ostensibly renders every legislative action to enact or amend local zoning laws in the Regional District directly appealable to the Circuit Court. Review of the CSA’s decision is desirable and in the public interest to avoid costly and unpredictable outcomes associated with the risk of an appeal of purely

legislative enactments. CSA's tortured interpretation of the uniformity requirement cannot be squared with canons of zoning law and jeopardizes conditional and special exception uses, which are legislatively predetermined to be permissible and compatible within a certain zoning district if enumerated conditions are met. CSA's decision below begs the question: is every conditional use or special exception use violative of the uniformity requirement?

INTRODUCTION

The Prince George's District Council (the "Council") is empowered by the Regional District Act ("RDA"), to "divide the portion of the regional district located within its county into districts and zones of any number, shape, or area it may determine." Land Use Art. § 22-201(a). "Within these districts and zones, the district council may regulate...the uses of land..." subject to the requirement that "zoning laws shall be uniform for each class or kind of development throughout a district or zone." *Id.* at (b)(1) (the "Uniformity Rule"). A mirror provision applying to all other jurisdictions in the State with zoning powers is found in Land Use Art. § 4-201.¹

¹ Notably, neither the provisions applicable to Single-Jurisdiction Planning and Zoning nor the RDA define the terms "district" or "zone," yet "zoning district" is used in the Prince George's County Code and in zoning ordinances throughout the State to categorize and classify discrete areas and uses permitted therein.

The Council adopted a zoning text amendment creating a conditional use in the R-A Zone (assigned CB-17-2019, hereinafter be referred to as the “ZTA”). The ZTA’s stated purpose was to permit “Townhouses and One-family detached dwelling uses in the R-A zones of Prince George’s County, under certain circumstances.” CB-17-2019.

Appellants petitioned for judicial review of the ZTA in the Circuit Court for Prince George’s County, which petition was ultimately removed to Anne Arundel County. The Anne Arundel County Circuit Court affirmed the Council’s adoption of the ZTA. Appellants appealed to CSA, and the CSA reversed. On August 17, 2022, the Council and Freeway Realty, LLC, Appellees in the CSA action below, filed Petitions for Writ of Certiorari in this Court.

Purely Legislative Enactments are Not Directly Appealable

The RDA authorizes judicial review of “any final *decision* of the district council, including an individual map amendment or sectional map amendment” by any person or entity aggrieved by the decision of the district council who meet certain criteria enumerated in Land Use Art. § 22-407(a)(1). Outside the Regional District, a companion provision permits any person aggrieved to “file a request for judicial review of a decision of a board of appeals or a zoning action of a legislative body...” Land Use Art. § 4-401(a).

The Council was acting in a purely legislative capacity when it enacted the ZTA. It was not adjudicating; the ZTA was not a “zoning action” as that term is understood under *Mayor and Council of Rockville v. Pumphrey*, 218 Md. App. 160 (2014) and *Maryland Overpak Corp. v. Mayor & City Council of Baltimore*, 395 Md. 16 (2006). It follows that the ZTA is not a “decision.” The ZTA was initiated by the Council (as opposed to a property owner), impacted more than a single parcel of land, and did not decide the use of any parcel, but rather created a process by which a landowner could elect to seek conditional approval in a subsequent administrative or quasi-judicial action. In *Overpak* and *Pumphrey*, the Court found that for these reasons, the circuit court lacked jurisdiction pursuant to the enabling statute to undertake judicial review of zoning text amendments, because the action was not a “zoning action.”

While the language of the RDA differs from the zoning enabling statute applied elsewhere, this Court has recently found that a “final decision” of the Council is one in which “the order or decision...dispose[s] of the case by deciding all questions of law and fact and leave nothing further for the administrative body to decide.” *Town of Upper Marlboro v. Prince George’s County Council*, 2022 WL 3025099 at 9, (internal citations omitted). “In simple terms, this Court has explained “[o]rordinarily an agency order is not final when it is contemplated that there is *more for the agency to do.*” *Id.*, quoting *Kim v. Comptroller of Treasury*, 350 Md. 527, 534 (1998)(emphasis in

original). In *Town of Upper Marlboro*, the Court found an initiating ordinance was not a final action subject to appellate review. A subsequent ordinance adopted by the Council removing two school properties from protected status was, however, a final action, because there was nothing left for the Council or Planning Board to decide regarding the matter. *Id.* at 11. In the instant case, the Council was acting in a strictly legislative capacity enacting a text amendment that applied generally to the R-A (Rural Agricultural) Zone and did not require a decision of law or fact by the Council. The ZTA was not self-effectuating; in order to avail itself of the permitted use under the newly-adopted ZTA, a property owner must file an application for a conditional use and seek other development approvals. As such, the ZTA was not an independently appealable “final action” of the Council. To hold otherwise would directly contradict the holdings and analysis in *Pumphrey, Overpak, and Town of Upper Marlboro, supra*.

Assuming, *arguendo*, that a legislative action of the Council is independently appealable under § 22-407(a), the appropriate standard of review, as articulated in *Town of Upper Marlboro*, is “whether the Council acted within its legal boundaries when it adopted” the ZTA. *Town of Upper Marlboro, supra*, at 13, citing *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 543 (1999). The CSA opinion dismissed the Appellants’ assertions that the “Council’s quasi-legislative decisions are subject to

judicial review that is ‘the narrowest in scope and most deferential to the agency’ and instead adopted the erroneous position that a court may reverse or modify the Council’s action whether the Council was acting within a quasi-judicial or quasi-legislative capacity. *Concerned Citizens*, fn 10. The opinion below contradicts this Court’s holding, issued just days ago, in *Town of Upper Marlboro*.

CSA’s interpretation of the Uniformity Rule may invalidate conditional uses, special exceptions, and other zoning tools

“A special exception or conditional use involves a use which is permitted, once certain statutory criteria have been satisfied. It is a desirable use, which is attended with detrimental effects which require that certain conditions be met, and once met, it is a permitted use because the legislative body has made that policy decision.” *Mossburg v. Montgomery County*, 107 Md. App. 1 (1995) (emphasis added).²

The Prince George’s County Zoning Ordinance allows many special exception and conditional uses. The Court found the ZTA to be invalid because it violated the Uniformity Rule by allowing the proposed townhouse use on certain properties in the R-A zone, but not all properties. Yet there are

² It is instructive that that this Court has recognized adoption of a conditional use or special exception provision as a *legislative* action; either the Council’s action was not appealable as a final *decision*, or the incorrect standard of review was employed by the Court below.

many uses that are available to certain properties in a zone but not others; this is precisely the nature of a conditional use. The legislature has decided that a particular use may be permitted on land within a zone, but only if the required conditions are met.³

In addition to the townhouse use proposed in the ZTA, at the time of the enactment, the R-A Zone permitted a number of other conditional uses. See Prince George's County Code § 27-441. Additional uses are permitted by special exception. All such conditions for these permitted (conditional) uses and special exceptions have been *legislatively* adopted in a policy-making action by the Council. If, as the Court found, a use permitted on one (or a few) properties within a zone cannot be employed on every property in the zone, it would follow that such use violates the Uniformity Rule. This would produce an absurd result, calling into question all conditional uses in Prince George's County, not to mention those allowed elsewhere in Maryland, which are subject to a mirror provision as noted above. This holding is not consistent

³ We wish to draw the Court's attention to the somewhat bizarre conflation of Councilmanic Districts and zoning districts in Footnote 11 of the CSA Opinion. The interpretation that Land Use § 22-201(b)(2)(ii)'s admonition that "zoning laws in one district or zone may differ from those in other districts or zones" somehow allows for different laws between the R-A zone in one Councilmanic District (e.g., District 4) than another, but requires that the zoning laws be uniform within the R-A Zone *in District 4* is not supported by a plain reading of the statute or a common understanding of zoning districts and Councilmanic Districts.

with this Court's jurisprudence concerning conditional uses and special exceptions, let alone overlay zones, planned unit developments, and other specialized zoning tools available because of predeterminations by the legislature that certain uses are compatible in a zone *but only if certain conditions are met*.

Purely legislative determinations are not "zoning actions" or "final decisions" of the Council; alternatively, the Council was acting as an administrative agency in a quasi-legislative capacity, and therefore the ZTA is subject to an extraordinarily narrow and deferential standard of review by an appellate court. We urge the Court to consider the implications of a finding that the Uniformity Rule was violated in determining that townhouses were allowed as a conditional use. Review of this decision is of critical importance statewide. Constituents must be able to rely on the finality of a legislative determination. The proper avenue of challenge of legislation lies in the political process, not in the Courts. Finally, whether conditional uses are permitted under the Uniformity Rule has wide-ranging ramifications Statewide warranting further appellate review.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted. If granted, NAIOP Maryland intends to seek agreement from all parties or will file a motion with this Court to file a brief as *amicus curiae*.

Respectfully submitted,

YUMKAS, VIDMAR, SWEENEY &
MULRENIN, LLC

/s/ Kinley R. Bray

Kinley R. Bray, CPF #0212170235

David M. Plott, CPF #8912190161

185 Admiral Cochrane Dr., Suite 130

Annapolis MD 21401

(443) 569-5974

kbray@yvslaw.com; dplott@yvslaw.com

On behalf of Amicus Curiae NAIOP Maryland

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 1,899 words, excluding the parts exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Kinley R. Bray

Kinley R. Bray

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2022, the foregoing was filed and served electronically through MDEC and two paper copies were sent via first-class mail, postage prepaid to:

Rajesh A. Kumar, Esq.
Office of the County Council
County Administrative Building
14741 Gov. Oden Bowie Drive
Second Floor, Room 255
Upper Marlboro, MD 20772

J. Carroll Holzer, Esq.
J. Carroll Holzer, P.A.
508 Fairmount Ave.
Towson, MD 21286

Timothy F. Maloney, Esq.
Alyse L. Prawde, Esq.
Joseph, Greenwald & Laake, P.A.
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770

Dennis Whitley III, Esq.
Robert J. Antonetti, Jr., Esq.
Shipley & Horne, P.A.
1101 Mercantile Lane, Suite 240
Largo, Maryland 20774

Matthew C. Tedesco, Esq.
McNamee Hosea, P.A.
6411 Ivy Lane, Suite 200
Greenbelt, Maryland 20770

/s/ Kinley R. Bray
Kinley R. Bray