

Talbot County v. Town of Oxford No. 1509 Appellant's Reply to Brief
of Miles Point Property LLC and the Midland Companies, Inc.

Sept. 2006

USA_5_1831_14

**In The
Court of Special Appeals of Maryland**

No. 01509
September Term, 2006

TALBOT COUNTY, MARYLAND

Appellant,

vs.

TOWN OF OXFORD, MARYLAND, et al.

Cross-Appellant and
Appellees.

APPEAL FROM THE CIRCUIT COURT FOR
TALBOT COUNTY, MARYLAND
(Honorable John W. Sause, Judge)

**APPELLANT'S REPLY TO BRIEF OF MILES POINT
PROPERTY LLC AND THE MIDLAND COMPANIES, INC.**

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Leslie Gradet

Clerk

Court of Special Appeals of Maryland

Courts of Appeals Building

Rowe Boulevard & Taylor Avenue

Annapolis, Maryland 21401-1699

RE: My File No.: 324-231
Talbot County, Maryland v. Town of Oxford, et al.

Dear Ms. Gradet:

Enclosed for filing in the above-referenced case please find fifteen (15) copies of Appellant's Reply to Miles Point Property LLC and the Midland Companies, Inc.'s brief.

Sincerely yours,

KARPINSKI, COLARESI & KARP



By: Victoria M. Shearer

VS:bjap

Enclosures

cc: Mike Pullen, Esquire, Talbot County Attorney
Mike Hickson, Esquire
David Thompson, Esquire
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Sincerely yours,

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I. BILL 933 AFFECTS ONLY COUNTY GROWTH ALLOCATION AND DOES NOT "TAKE" ANY MUNICIPAL GROWTH ALLOCATION.

The "question presented" by Miles Point is "whether it was within the CAC's legislative prerogative to decline to approve Bill 933 as a program amendment based upon the County's failure to coordinate with the affected municipalities by proposing legislation that conflicts with the Towns of Oxford's and St. Michael's local critical area programs?" Miles Point's brief, p. 2. However, in rejecting Bill 933, the CAC did not act "legislatively," nor did it base its decision upon a failure to coordinate with the affected municipalities. Rather, the CAC rejected Bill 933 on the bases that it would "negate" the Strausburg annexation growth allocation and create "conflicts" with the Towns' approved Critical Area programs. E. 1817-18.

That Bill 933 may (or may not) be applied to the Miles Point growth allocation application should be reserved for another day. The present question is more fundamental: may a private corporation properly intervene as a party in the Talbot County Council's legislative process and assert private rights to prevent adoption of legislation by the County's duly elected representatives? There is no actual, existing controversy between Talbot County and Miles Point. Rather, Miles Point has simply projected a hypothetical application of Bill 933 to its project, and uses its own forecast of doom to prevent adoption of proposed legislation by the County Council. Miles Point inserts itself in this proceeding as a party with standing to prevent the County Council from adopting legislation. The supreme irony is, in doing so, Miles Point claims that the duly elected representatives of all County citizens (including municipal voters, who also elect the County Council) have no right to participate in the decision-making process concerning use of *County* growth allocation.

Miles Point asserts that the Town Commissioners of St. Michael's "awarded growth

allocation to Miles Point to convert approximately 71 acres of the Property from Resource Conservation Area (“RCA”) to an Intense Development Area (“IDA”).” Miles Point’s brief, p. 5. This statement fails to recognize that the 71 acres of growth allocation was County growth allocation, and that the County was wholly excluded from that process. Under the Critical Area statute, each local jurisdiction was given growth allocation based on the same formula, 5% of its critical area RCA at the time the jurisdiction’s program was initially adopted. Bill 933, in Section 2, Para. 1 (b), recognizes that each Town has 5% of its own RCA as growth allocation and does not affect municipal growth allocation. St. Michael’s allocated all of its 5% to the Strausburg property. It did not have any growth allocation left for the Miles Point project. Thus, the growth allocation utilized was part of the County’s growth allocation, which had been reserved in the County’s initial program for use by St. Michael’s. Despite the fact that County growth allocation was utilized, the County was not able to participate in the process for awarding that County growth allocation. Miles Point negotiated terms of a settlement with the CAC regarding use of the County’s critical area growth allocation, yet the County was completely left out of the entire process. Bill 933 cures that lack of coordination and cooperation by “unreserving” the County growth allocation and replacing the 1989 reservation with a joint County-municipal review process.

II. THE COMMISSION ACTED ARBITRARILY AND OUTSIDE ITS LEGAL BOUNDARIES IN REJECTING BILL 933.

A. Bill 933 Establishes a Process That Coordinates with the Towns and Accommodates Their Growth Needs.

Miles Point claims that Bill 933 was enacted without any coordination with the Town of St. Michael’s or the other municipalities affected by the legislation. Miles Point’s brief,

pp. 18-22. First, this cannot be a basis for affirming the CAC's decision because it was not one of the reasons that the CAC refused to approve Bill 933. Further, Miles Point has no standing to assert that claim.

Second, Miles Point's proposed construction of COMAR 27.01.02.06(A)(2) cannot withstand scrutiny. COMAR 27.01.02.06(A)(2) requires that "counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities." Miles Point (and Oxford) misconstrue this regulation to require the County to obtain the permission or "pre-approval" of the Towns before it may act to establish (or amend) the required process.¹ This has never been required by the CAC in any other county. Many counties have never reserved county growth allocation for municipal use. Many counties require municipalities to apply to the county *as applicants*, like developers or private applicants, and go through the county-established process for awarding growth allocation. In those counties, the municipalities are applicants, not decision-makers. The joint municipal-county process established by Talbot County in Bill 933 would allow both municipalities and County government to jointly participate in a coordinated decision-making process.

The regulation cannot reasonably be construed as Miles Point asserts. If "coordination" required a county to obtain the consent of its municipalities, then a mere disagreement between a county and even one of its municipalities regarding the appropriate process for utilizing the county's growth allocation would prevent the county from

¹ Counsel for the CAC (Ms. Mason) adopted this misconstruction of the COMAR provision, claiming that it required the County to obtain the Towns' "consent." E. 2167.

establishing the very process the regulation *requires* it to establish. A reasonable construction of this COMAR regulation, particularly when viewed in the context of the statutory scheme, is that it requires the counties to establish a process for utilizing county growth allocation which coordinates with its municipalities and accommodates their growth needs. Bill 933 complies with COMAR 27.01.02.06(A)(2) by establishing a process for joint review, thus “coordinating” with the affected municipalities to accommodate their growth needs. If, as Appellees assert that “coordination” means “participation at the very least.” If so, the County *cannot* be precluded from participating in decisions regarding use of County growth allocation.

The process to be utilized under Bill 933 is the same joint review process that was already established by Bill 762 with respect to supplemental growth allocation requests from the Town of Easton. Bill 762 was approved by the CAC as a local program refinement and its joint review process has proven very successful. The Towns had input regarding adoption of the joint review process in Bill 762. Bill 762 was circulated to the Towns and they made comments, which were incorporated into Bill 762. Through the joint review process established by Bill 762, Talbot County enacted Bill 925 (coincidentally, virtually simultaneously with adoption of Bill 933) and awarded 155 acres, roughly half of its remaining (County) growth allocation, to the Town of Easton for a development outside the Town of Easton. Contrary to Miles Point’s assertions, the Town of Easton approved of the joint review process established by Bill 762. E. 1933 (Easton attorney Chris Kehoe testified in support of Bill 925, which approved a supplemental growth allocation award under Bill 762’s joint review process for the Cooke’s Hope project). The Town’s attorney commended

the joint review process as “another example of the Town and County working cooperatively together to try to get things accomplished to benefit the whole.” E. 1933.

Miles Point and the Towns both fail to recognize that municipal zoning authority stems wholly from and is completely dependent upon State law as enacted by the Maryland General Assembly. The General Assembly has full authority to amend, change, or repeal its own statutes. Enactment of the State 5% formula in Natural Resources Article §8-1808.1 (b) and adoption of COMAR 27.01.02.06(A)(2) that give *counties*, because of their size, the vast bulk of growth allocation, and requires *counties*, in coordination with affected municipalities, to develop a process to accommodate the growth needs of municipalities, clearly gave Maryland’s *counties* primary control over the use of growth allocation. Maryland’s counties have responded in a number of different ways to how that control and coordination will be achieved. However, in no other instance has a county been deprived of its own growth allocation; in no other instance has a county been wholly deprived of a say in the decision-making process of how its own growth allocation is to be utilized. In effect, Miles Point and the municipalities are attacking the very system put in place by the General Assembly and usurping and excluding the County’s legitimate role in this process.

The County growth allocation reserved for use of the Towns in 1989 was not within the Towns. Growth allocation has no fixed location until it is actually used. Growth allocation is a finite and exhaustible resource based upon the State formula’s calculation (5%) of the amount of a local jurisdiction’s RCA at the time its initial program was adopted.²

² The Critical Area law provides the “5% rule,” *i.e.*, that “[g]rowth allocation for a local jurisdiction shall be calculated based on 5 percent of the total resource conservation area in the local jurisdiction **at the time of the original approval of the local jurisdiction’s**

Annexation of county land does not alter this provision of the Critical Area statute. Each local jurisdiction has growth allocation, and Bill 933 does not affect municipal growth allocation. To the extent the Towns wish to expand and grow outward, the Towns County growth allocation. Bill 933 appropriately provides the County with a seat at the table and the opportunity to have equal participation with the Towns regarding development utilizing County growth allocation. Oxford and Miles Point inexplicably seek to exclude the County altogether from having any voice in the process. Under the Critical Area Law, the County is the governmental entity required to establish the "process" for expansion in the Critical Area outside the Towns and within the County (see COMAR 27.01.02.06(A)(2)) and, thus, the County is plainly entitled, at the very least, to participate in that process. There are many other counties in the State with joint review processes for growth allocation (or solely County controlled processes), and those processes have been approved by the CAC, albeit without the vociferous opposition the Towns have raised in this case with respect to Bill 933. Exclusion of Talbot County from the very process is clearly contrary to the intent of the General Assembly and the purposes of the Critical Area law.

At page 20-21 of its brief, Miles Point asserts that the County is not permitted to change its policy or is somehow estopped from changing the method of awarding growth allocation. This is clearly not the case. Talbot County is a charter county. The General Assembly has delegated police power to the Talbot County Council. Md. Code, Art. 25A §5 (S). The County Council has absolute discretion to formulate policy, and a legislative body

program by the Commission, not including tidal wetlands or land owned by the federal government." Md. Code, Nat. Res. Art., §1808.1(b)(emphasis added).

cannot be “estopped” to change public policy by amending an ordinance. In 1989, the elected officials of Talbot County voluntarily “reserved” some of the County’s growth allocation for use of the Towns. In 2003, the elected representatives of *all* County citizens, through the County Council, decided to change this 1989 policy based upon the changes that had occurred in the intervening 14 years. Miles Point’s assertion that the elected officials of Talbot County cannot “undo” a prior policy that was never required by law in the first place is plainly incorrect. Talbot County had the right to “unreserve” that portion of its growth allocation which it voluntarily reserved for use of the towns in 1989 and, instead, to choose to provide a process in which the County participates jointly and equally with the Towns. Furthermore, the Critical Area statute contemplates just such a change in policy by defining “program amendment” to include a change that is “not consistent” with the method for using the growth allocation contained in its initial adopted program. §8-1802 (a)(16)(ii)(“Program amendment includes a change to a zoning map that is not consistent with the method for using the growth allocation contained in an adopted program.”).

Bill 933 affects only *County* growth allocation. No municipal growth allocation is affected and no vested property rights are affected. By “unreserving” the growth allocation acres originally “reserved” for use of the Towns in 1989, Bill 933 merely returns to the status quo ante under the Critical Area law as originally enacted by the General Assembly and before the County voluntarily reserved those acres. There is no provision within the Critical Area statute that requires counties to “reserve” part of their growth allocation for use by municipalities, and no provision requiring them to do so without at least retaining for themselves some participation in the process of how that county growth allocation will be

utilized.

Bill 933 is part of a comprehensive quadrennial review based upon near exhaustion of remaining available County growth allocation (more than half of it having been given to the Town of Easton under the joint review process established by Bill 762), the non-use of the 1989 reservation, and the many changes which occurred since 1989. The municipalities (except Easton) have utilized very little of the County's growth allocation acres that were reserved for the Towns in 1989. Accordingly, the County was (and is) prevented from accessing the other half of its growth allocation acres because the remaining 50% of the total growth allocation may not be accessed until 90% of the first 50% is utilized. One of the reasons the Council enacted Bill 933 was so that the County would be able to seek the release of the remaining 50% of its total growth allocation acres from the CAC, as stated in Bill 933 as one of its purposes. Bill 933's purposes include the reallocation of County growth allocation equally and uniformly, and rendering the process of joint review for supplemental growth allocation already adopted in 2000 through Bill 762 (and already approved by the CAC and used for the Town of Easton), applicable to all requests for use of County growth allocation.

Miles Point asserts that "Bill 933 does not contain legislation establishing a new process for growth allocation within the Town of St. Michael's (or Oxford)." Miles Point's brief, p. 23. Bill 933 does not need to contain "legislation" within it establishing the County-municipal joint review process that would be utilized under Bill 933 because that process has already been made part of the Talbot County Code through Bill 762. Moreover, the "new process for growth allocation" is not applicable "within" the Town of St. Michael's or

Oxford because, again, Bill 933 does not apply to municipal growth allocation.

B. The CAC Incorrectly Determined That Bill 933 Would Create “Conflicts” Based Upon the Erroneous Concept That the Towns “Relied” Upon the 1989 Voluntary Reservation of County Growth Allocation for the Towns.

Miles Point argues that the CAC was correct in rejecting Bill 933 on the basis it would create “conflicts” between the County program and the municipal programs in the County. However, neither the CAC nor Miles Point have ever provided any details regarding the alleged conflicts. Indeed, there are none. The only “conflict” that has ever been identified as allegedly created by Bill 933 is that Bill 933 will “unreserve” County growth allocation previously voluntarily reserved for use of the Towns in 1989. If accepted, Miles Point’s arguments would prevent the County Council from ever legislatively changing its policy regarding reservation of growth allocation acres for use of municipalities in Talbot County. This would be contrary to the provision of the Critical Area Statute specifically providing that a “program amendment” contemplates a change in the method for allocating growth allocation that is “inconsistent” with the initial program adopted by that jurisdiction. No inconsistency between the process established by Bill 933 and the programs of the Towns has *ever* been identified. Moreover, the 1989 reservation was voluntary and was not required by any provision of the Critical Area statute.

Assuming that such alleged reliance could have the effect urged by the Towns and Miles Point, there was no such reliance by the Towns. Miles Point argues that there was such reliance, claiming that “the municipalities’ critical area programs are premised on the process that was established in 1989 . . .” Miles Point’s brief, p. 26. This assertion is false, as St. Michael’s’ Critical Area Local Program was enacted June 1, 1988, more than *one year before*

the County's Local Program was adopted. Oxford's local program was approved by the CAC on March 3, 1988, *over a year and a half prior* to the County's program. Thus, even assuming that the alleged "reliance" was a proper topic for consideration by the CAC, and assuming further that such alleged reliance were relevant to the legal issue in this case, it is nevertheless undisputed that there was no such reliance. Instead, it is the County that "relied" in 1989 upon growth occurring around the Towns. Such growth never occurred, as the Towns barely used any of the growth allocation reserved for them (except Easton), while the County's reserve is nearly exhausted. Thus, it is the County's "reliance" which was misplaced. Moreover, if the Towns relied, they had no legal right to do so because the County acted voluntarily in reserving County growth allocation acres for the Towns, as there was nothing in the Critical Area law that required it to do so.

Miles Point asserts that Bill 933, if effective, would cost the Town of St. Michael's "millions of dollars." Miles Point's brief, pp. 13-15. This assertion is both irrelevant and untrue. In fact, the truth is that St. Michael's spent over a million dollars ~~opposing~~ the Miles Point project when its then-elected members opposed it. It was only after Miles Point itself spent millions of dollars in legal fees and made certain concessions that the Town of St. Michael's newly elected Council eventually supported the development.³

³ The remainder of Miles Point's brief misstates the basis for the CAC's decision not to approve Bill 933 as a local program amendment, and then states reasons why the CAC was correct in doing so. Since Miles Point offers no new arguments regarding the CAC's rejection of Bill 933 not already set forth by Oxford or the CAC, the County incorporates herein as if fully set forth the arguments in its Replies to Oxford's and the CAC's briefs.

III. ALLEGED LEGISLATIVE "MOTIVES" ARE IRRELEVANT.

Miles Point claims that the purpose of Bill 933 is to "stop" the Miles Point project. This assertion is both false and completely irrelevant inasmuch as the alleged motives of individual legislators, or a legislative body as a whole, are completely irrelevant. See, e.g., Fletcher v. Peck, 10 U.S. 87 (1810)(considering challenge to enactment of Georgia legislature and establishing principle that court will not examine legislative motive); Tenney v. Brandhove, 341 U.S. 367, 377 (1951)(that "it was not consonant with our scheme of government to inquire into the motives of legislators, has remained unquestioned."); Wallace v. Jaffree, 472 U.S. 38, 74 (1984)(O'Connor, J., concurring)("a court has no license to psychoanalyze the legislators."); Holt v. City of Richmond, 459 F.2d 1093, 1098 (4th Cir. 1972)(en banc)(same); South Carolina Educ. Ass'n v. Taylor, 883 F.2d 1251, 1261-62 (4th Cir. 1989)(references to the motives of individual members of legislature enacting a statute are uniformly disregarded for interpretative purposes except as expressed in the statute itself); Hammond v. Lancaster, 194 Md. 462, 476, 71 A.2d 474 (1950)("[w]e cannot inquire into the legislative motives."); County Council for Montgomery County v. Dist. Land Corp., 274 Md. 691, 704, 337 A.2d 712 (1975)("the judicial branch of government cannot institute an inquiry into the motives of the legislature in the enactment of laws"); Montgomery County v. Md. Soft Drink Assoc., Inc., 281 Md. 116, 133, 377 A.2d 486 (1977)("we do not examine the motives of legislators"); Mears v. Oxford, 52 Md. App. 407, 413, 449 A.2d 1165 (1982). Accordingly, Miles Point's recitation of statements by a Council member or a planning official are plainly irrelevant. It does not matter that one Council member opposed the passage of Bill 933, nor is it at all relevant that the Planning Commission did not recommend

its adoption. Rather, the only legal issue is whether the Critical Area Commission was legally authorized to reject Bill 933 as a program amendment or if it acted arbitrarily and outside its legal boundaries in doing so. The fact that Miles Point finds it necessary to recite such irrelevant facts is telling with regard to the weakness of its position.

CONCLUSION

This Court should hold that the CAC acted illegally, arbitrarily and capriciously and either (1) remand this case to the Circuit Court for entry of an Order determining that Bill 933 is deemed approved by operation of law due to the CAC's failure to timely act upon it; or (2) reverse the decision of the CAC and remand this case to that agency with an Order requiring it to approve Bill 933 as a local program amendment.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2007, fifteen copies of the foregoing Reply Brief of Appellant were filed with the Court and two copies were mailed, first-class, postage prepaid to:

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FONT AND TYPE SIZE

The Reply Brief of Appellant Talbot County, Maryland was prepared using Times New Roman 13-point proportionally spaced type.