

# THE MARYLAND BAR

JOURNAL

Volume LI • Number 5

November/December 2018

LAND  
USE

Zoning and the  
"Sorting Hat"

Page 4

Harvesting the Sun on  
Maryland Farmland

Page 18

Peculiar Problems  
with Variance Ordinances

Page 24



# A Possible Avenue to Reach Judicial Review of a “Garden Variety” Administrative Decision Through Alleging Common Law Taxpayer Standing

By Timothy Dugan

Recent Maryland Court of Appeals decisions suggest that a person may achieve judicial review from an adverse “garden variety” administrative proceeding by properly alleging “common law taxpayer standing” instead of “property owner standing,” also referred to as “proximity standing.” See *Anne Arundel County v. Bell*, 442 Md. 539, 113 A. 3d 639 (2015) (“*Bell*”); and *State Center, LLC v. Lexington Charles Limited Partnership*, 438 Md. 451, 92 A. 3d 400 (2014) (“*State Center*”). See also, *Greater Towson Council of Community Associations v. DMS Development, LLC*, 234 Md.App. 388, 172 A.3d 939 (Md.App. 2017) (“*Towson*”). Preliminarily, the Courts use the term “taxpayer standing.” I am using the words “common law taxpayer standing” to highlight the common law source of the right, rather than by statute, and to distinguish it from access to the courts through allegations that are grounded on a person’s proximity to the property in question. Also, the term “garden variety” administrative proceeding is intended to refer to, for example, a special exception application proceeding before a board of appeals for a non single family use in a residentially zoned area, such as certain senior housing or a dental office.

The tests for establishing common law taxpayer standing do not appear so burdensome not only for “garden variety” administrative proceedings but also for appeals of legislative actions, like master plans and comprehensive rezonings. For this reason, the dissenting judges’ concern in *Bell* that a party seeking judicial review, under common law taxpayer standing, will have a difficult time reaching the courts may be misplaced. *Bell*, 442 Md. at \_\_\_, 113 A.

3d at 672.

Before discussing common law taxpayer standing, a short summary of the Court’s elements for alleging property owner/proximity standing may be helpful. A party who participated in the administrative proceeding and whose land is adjoining or confronting the property whose entitlements are under dispute meets the *prima facie* test for standing. For a property owner who participated in the administrative proceeding and whose property is located further away, “almost *prima facie*” cases, as described in detail in *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, \_\_\_, 59 A.3d 545, 555 (2013) (“*Ray*”), (and as referenced in *State Center*, 438 Md. at \_\_\_, 92 A. 3d at 449), the *Ray* Court noted:

Although there is no bright-line rule for who qualifies as “almost” *prima facie* aggrieved, we have found no cases, in which a person living over 2000 feet away, has been considered specially aggrieved. Rather, as we discussed above, this category has been found applicable only with respect to protestants who lived 200 to 1000 feet away from the subject property.

In addition, such almost *prima facie* property owners must establish some additional harm that distinguished their harm from those of the general public, known as a “plus factor.” *Ray*, 430 Md. at \_\_\_, 59 A.3d at 551. Examples of plus factors are: harm from a change in the character of the neighborhood, harm from increased traffic, and harm from the project interrupting sight or views. *Ray*, 430 Md. at \_\_\_, 59 A.3d at 556. A litigant must actually own the land being affected; thus, a

community association that owns no land may not be the entity that is the “anchor” for the appeal. See *Towson*. A local law or regulation may establish reasonable limits on statutorily established property owner standing. See *Sugarloaf Citizens Association v. Department of Environment*, 344 Md. 271, \_\_\_, 686 A. 2d 605, 613 (1996), and as cited in *Chesapeake Bay Foundation v. DCW Dutchship Island*, 439 Md. 588, \_\_\_, 97 A. 3d 135, 141 (2013). Property owner/proximity standing allegations do not provide access to the courts when opposing a comprehensive rezoning. See *Bell*. A thorough discussion of property owner/proximity standing may be found in the recent *Towson* decision by the Court of Special Appeals decision as well as *Bell* and *State Center*.

There are, however, limitations with respect to property owner/proximity standing that a party might be able to overcome by successfully alleging the necessary elements of common law taxpayer standing. For instance, in *State Center*, the Court explains that a taxpayer, who is able to make the allegations properly, has access to the courts arising from a common law right, not one arising from a statute.

The common law taxpayer standing doctrine permits taxpayers to seek the aid of courts, exercising equity powers, to enjoin illegal and *ultra vires* acts of public officials where those acts are reasonably likely to result in pecuniary loss to the taxpayer. [Citing, *120 West Fayette Street, LLLP v. Mayor of Baltimore*, 407 Md. 253, 267, 964 A.2d 662, 669–70 (2009)]

...

[C]ourts often require that the com-

plainant not have an adequate remedy at law. [citations omitted.] Where the complainant does not have an adequate remedy at law, however, the common law demands that we permit the suit unless the General Assembly has preempted this common law right.

*State Center*, 438 Md. at \_\_\_, 92 A. 3d at 451, and at 454.

The Court further explains common law taxpayer standing as follows:

In other words, [common law taxpayer standing], when asserted properly, provide[s] both the cause of action (or claim) and the right of the individual to assert the claim in the judicial forum. Moreover, [common law taxpayer standing] provide[s] [an] avenue[] for a complainant to challenge what may be termed as a 'public wrong.'

*State Center*, 438 Md. at \_\_\_, 92 A. 3d at 439.

The Court in *State Center* outlines the allegation elements for common law taxpayer standing. *State Center*, 438 Md. at \_\_\_, 92 A. 3d at 451, *et seq.* which are paraphrased below.

The complainant must be a taxpayer (and not a pass through entity). The person must pay the type of taxes that are the subject matter of the grounds for the taxpayer's standing.

By inference, but not explicitly set forth in the case law regarding common law standing, the taxpayer must remain in the case throughout the appeal. See *Towson*, a proximity standing case. In *Towson*, the appeal was dismissed for lack of standing, because of the withdrawal of the only party who held the right to judicial appeal, a property owner.

It appears that "piggyback standing" would be allowed, where one or more persons would be allowed to participate in the appeal, even though they do not have independent judicial standing themselves, as long as those who hold common law taxpayer standing remain. An example of the Court's determination is found in *Sugarloaf Citizens Association v. Department of Environment*, 344 Md. 271, \_\_\_, 686 A. 2d 605, 618 (1996).

Where there exists a party having standing to bring an action, we shall not ordinarily inquire as to whether another party on the same side has standing.

The taxpayer must allege sufficiently that the case is proceeding on behalf of the taxpayer and on behalf of all other taxpayers similarly situated. The allegation will be deemed adequate if it is stated explicitly or implicitly (by necessary implication). *State Center*, 438 Md. at \_\_\_, 92 A. 3d at 457-461. The prudent appellant would allege explicitly that the appeal is being brought on behalf of the taxpayer and all taxpayers similarly situated.

The next element explained in *State Center* is the allegation that the governmental action is a primary action and that such action is illegal or *ultra vires*. *State Center*, 438 Md. at \_\_\_, 92 A. 3d at 462. In *Bell*, the Court cites several cases where taxpayer standing was upheld to challenge administrative determinations in the courts. See *Bell*, 442 Md. at \_\_\_, 113 A. 3d at 663-664. The cited cases do not involve a "garden variety" administrative appeal, such as an appeal of a board of appeals decision; however, the nature of an alleged illegal act or alleged *ultra vires* action should not be limited to just those fact patterns. In the case of an administrative appeal, the taxpayer would allege that a board of appeals, for example, misinterpreted the zoning provision and, thus, illegally applied the requirement, or that the board of appeals exceeded its authority, because the ruling was not within the bounds of the board's authority. The standing determination might have been different in the case, *Committee for Responsible Development on 25th Street v. Mayor and City Council of Baltimore*, 137 Md. App. 60, 767 A.2d 906 (2001), if common law standing allegations were plead correctly. A person unsuccessfully argued standing as a taxpayer only under the now MD Code, Land Use Section 10-501 "Procedure, Baltimore City" standing for judicial review, which is based on "property owner standing" or "proximity standing." The appellant did *not* allege appellate standing under

common law standing.

The common law taxpayer standing allegations must include that the illegality or *ultra vires* action caused or will cause the taxpayer a "pecuniary loss or an increase in taxes." In *Bell*, the Court instructed that if individual taxpayers (in that case, opposing the comprehensive rezoning action) had alleged in its original pleadings, not later, that it would suffer a pecuniary loss or an increase in taxes, the persons might have achieved taxpayer standing. In footnote 30, the Court references a memorandum where there were allegations of property value decrease [arguably a pecuniary loss], tax assessment increases [an express element of taxpayer standing], increases in traffic, and alteration of neighborhood character. The Court notes:

As these statements were not made in support of allegations contained in the Complaint for Declaratory Judgment nor the Amended Petition for Judicial Review, they are not available to make out a *prima facie* showing of the "harm" required by taxpayer standing.

*Bell*, 442 MD. at \_\_\_, 113 A. 3d at 667.

The types of harm alleged as arising from illegal or *ultra vires* acts that the Court has been asked to consider include: harm from invalid statutes, harm from decreases in governmental efficiency, harm from costs to fend off illegality, and harm from the waste of public funds. *State Center*, 438 Md. 451, \_\_\_, 92 A. 3d at 466-467.

The Court also requires that the person allege (that is, not establish before the appeal is underway) that it is reasonable to conclude that a nexus exists between the alleged illegal or *ultra vires* actions and the person's allegation that such acts will cause pecuniary loss or an increase in taxes. *State Center*, 438 Md. 451, \_\_\_, 92 A. 3d at 472. For the individual taxpayer, the amount of the alleged loss or increase need not be significant. *State Center*, 438 Md. 451, \_\_\_, 92 A. 3d at 477.

It seems that a person who opposes a garden variety administrative decision could allege common law taxpayer standing as follows, using some hypo-

thetical facts for illustration purposes:

1. The person is claiming standing through common law taxpayer standing.
2. Whether the taxpayer person did or did not participate in the administrative proceeding might be irrelevant.
3. The person is a taxpayer. In this hypothetical, assume that the taxpayer pays real property taxes and individual state and local county or city income taxes.
4. The person is bringing the appeal on its own behalf and on behalf of the other taxpayers similarly situated, in the role of a private attorney general. In this example, the "attorney general" would allege that it is looking out for the taxpayers who live not only as adjoining and confronting property owners/taxpayers but also for those who live further away in the general neighborhood or even further away and perhaps pass by the subject property every day or very infrequently, if at all. The "attorney general" would allege that the class's property values will depreciate and their taxes will increase because of the additional burden from the proposed to-be-redeveloped property. The fundamental argument is that the common law taxpayers would not be limited to those who could satisfy "property owner standing/aka proximity standing."
5. Assuming that the taxpayers remain and anchor the appeal, non-taxpaying entities like community associations could also participate even though they are not taxpayers. (*Sugarloaf*)
6. Allege that the board of appeals (in this example), an administrative body and a government official, illegally and *ultra vires* ruled that:
  - a. The zoning statute allows height to be measured from "X" location versus "Y" location.
  - b. The zoning statute allows setback to be measured from "X" location versus "Y" location.
  - c. The project would be compatible with the neighborhood generally.
  - d. The project would not unduly burden the roads.
  - e. The project would not unduly impact the environment.
  - f. The architecture is compatible with the neighborhood.
  - g. The applicant must install off site landscaping and the government must assume maintenance responsibility.
7. The taxpayer would allege that if the project were allowed to be developed, the common law taxpayers would suffer pecuniary losses. Their homes would be less valuable because of the presence of the project and its activities in the neighborhood. The taxpayers would pay more real property taxes and individual in-

come taxes. The taxes would be reasonably expected to increase to construct and maintain new infrastructure that will not be paid for entirely by the applicant, including, off site roadways, off site sidewalks, schools, and off site stormwater management facilities.

8. The remedy of not allowing the project to be approved, based on the alleged illegal and *ultra vires* actions of the government officials, will be that the opposition will *not* suffer pecuniary losses and will *not* pay more taxes arising from the project.

For the above reasons, it seems that securing judicial review might be easier using adequately pled common law taxpayer standing allegations than allegations under "property owner/proximity standing."

**Mr. Dugan is Co-Chair of the Zoning and Land Use Practice Group at Shulman Rogers in Potomac, Maryland.**



## FIRST MARYLAND Disability Trust

**We recognize the importance of assisting individuals with disabilities regardless of age or disability.**

For the Individual with disabilities we offer a Pooled Special Needs Trust to protect assets and preserve eligibility for benefits.

For the Individual's family, we offer a Third Party Special Needs Trust to help you plan for the future.

- We facilitate case management and care coordination as needed.
- We distribute funds to increase the Individual's quality of life and enhance independence.
- We provide a corporate alternative to the Individual Trustee, for both Pooled Trusts and Individual Trusts.

**410-296-4408  [www.firstmdtrust.org](http://www.firstmdtrust.org)**

The First Maryland Disability Trust, Inc., a Non-Profit organization.