MARYLAND MUNICIPAL
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SOME RECENT MARYLAND COURT OF APPEALS'S DECISIONS OF POSSIBLE INTEREST TO YOUR CLIENTS

1. *MDE v. Anacostia Riverkeeper*, ___Md.___(2016) (Nos. 42-44, Sept. Term, 2015; op. filed 11 March 2016); Opinion by Adkins, J.

Facts:

The Maryland Department of the Environment ("MDE") issued separate municipal storm sewer system ("MS4") discharge permits ("the Permits") to Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County ("the Counties"). Certain natural resource organizations ("The Water Groups") challenged the Permits in the various counties where MDE issued them.

The Circuit Court for Montgomery County remanded for MDE to revise the Permit in accordance with its opinion and order. In a reported opinion, the Court of Special Appeals affirmed. MDE then filed a petition for writ of certiorari, which the Court of Appeals granted.

The Circuit Courts for Baltimore County, Anne Arundel County, and Prince George's County affirmed MDE's decision to issue the Permits issued to those counties. The Water Groups filed notices of appeal to the Court of Special Appeals and, upon MDE's motion, the Court of Special Appeals consolidated the cases. MDE then filed a petition for writ of certiorari to the Court of Appeals with questions nearly identical to those MDE submitted in its petition for writ of certiorari with respect to the Montgomery County Permit.

Finally, the Circuit Court for Baltimore City also affirmed MDE's decision to issue the Baltimore City Permit. The Water Groups filed a notice of appeal, and the Mayor & City Council of Baltimore ("Baltimore City") filed a petition for writ of certiorari with a request that the Court of Appeals consider this petition in conjunction with MDE's petitions. The Court of Appeals granted the City's petition.

Held: In Case No. 42: Reversed. In Cases Nos. 43 & 44: Affirmed.

The Water Groups challenged first a provision of the issued permits that required the Counties to restore 20% of the impervious surface areas in their watersheds that have not been restored to the maximum extent practicable ("MEP"). The purpose of the 20% restoration requirement is to use stormwater management practices to restore the natural,

beneficial processes in our environment that have changed due to development of impervious surfaces. The Water Groups argued that the 20% restoration requirement is too opaque to comply with 33 U.S.C. § 1342(p)(3)(B)(iii), the MEP standard; however, 33 U.S.C. § 1342(p)(3)(B)(iii) imposes no minimum standard or requirement on MDE other than to establish controls for MS4s to reduce the discharge of pollutants. Moreover, the record reflects that MDE established a performance standard, the water quality volume standard ("WQv"), that defines as acceptable those practices from which the Counties may choose in order to fulfill the 20% restoration requirement.

The Water Groups argued also that MDE did not explain why it selected 20% as the restoration goal or how this Permit provision will promote necessary pollution reduction. The Court disagreed with the Water Groups' position because the applicable law affords permitting authorities flexibility in establishing controls for MS4s. That is, MS4s shall require controls "and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added). MDE justified its decision also based on a well-developed and vetted strategy for restoring the Chesapeake Bay. MDE selected the 20% restoration requirement from a state plan called a Watershed Implementation Plan whose pollution reduction targets the EPA found were attainable.

Finally, with respect to the 20% restoration requirement, the Water Groups objected to MDE's method of calculating impervious surface area not restored to the MEP. The Court disagreed with the Water Groups because MDE reasonably justified its decision based on the accurate determination that 2002 marked a significant milestone in the State's treatment of water quality. Around 2002, MDE subjected best management practices ("BMPs") to performance standards to better treat water quality. Thus, the Water Groups' challenges to the 20% restoration requirement failed.

Next, the Water Groups argued that MDE failed to comply with 40 C.F.R. § 122.44(d)(1)(vii)(B), a federal regulation that requires MDE to establish effluent limitations that take into account wasteload allocations ("WLAs"). They contended that MDE committed legal error by designing the Permits so that MDE will review the effluent limitations one year after issuing the Permits, thereby precluding the agency from knowing whether the effluent limitations are consistent with the WLAs. The reasoning of the Water Groups failed because 40 C.F.R. § 122.44(d)(1)(vii)(B) is, like the MEP standard, flexible as to how a permitting authority complies with this regulation. The EPA set a minimal, flexible requirement in which the permitting authority is to design a scheme where effluent limits are compatible or in agreement with WLAs. Moreover, MDE complied with the regulation by incorporating the WLAs into the Permits and by using an "iterative" process of agency review and program change to ensure progress in meeting the WLAs.

Next, the Water Groups challenged the Permits' monitoring provisions in two ways. As required by federal regulations, the Water Groups contend first that the provisions do not produce representative data in the MS4 jurisdictions. MDE ensured, however, that the

Counties monitor stormwater discharges at monitoring locations that represent an adequate range of land uses statewide, and the agency has increased also the frequency of monitoring in this version of the Permits to yield more representative information at the County level. Thus, the Court concluded that MDE's monitoring program will produce representative data.

The Water Groups argued secondly that the Permits' monitoring provisions fail to assure compliance with Permit requirements. Through its monitoring and modeling scheme and the concept of adaptive management, however, MDE assured compliance with the two applicable requirements: (1) controls to reduce the discharge of pollutants and (2) the restoration of 20% of impervious surface area not restored to the MEP.

With respect to pollutant controls (also known as BMPs), MDE relies on an approach known as adaptive management, whereby the agency imposes program changes based on annual report data obtained from monitoring. In addition, because, BMPs are subject to estimation and prediction in this context, MDE uses focused monitoring and modeling to produce high quality assessments of BMPs. Consequently, all interested parties understand better the effects that restoration activities like BMPs will have on the State's waters. Through adaptive management, MDE will force the Counties to select BMPs that will reduce the discharge of pollutants if those Counties submit data indicating that their activities are ineffective at pollution reduction.

With respect to the 20% restoration requirement, MDE incorporated a clear evaluation tool into the Permits—the Guidance—to assess restoration of impervious surfaces. Under the Guidance, to ensure that the Counties implement satisfactory BMPs on their untreated surfaces, MDE requires the Counties to translate activities into credits. Because the Counties must adhere to the credit system, MDE can evaluate the jurisdictions' performances uniformly. This accounting system is also flexible enough to accommodate more non-traditional activities for which restoration credits are available. Importantly, the applicable monitoring provision the Water Groups raised contemplates a flexible approach to monitoring. Moreover, the Counties must report annually on their progress in achieving the 20% restoration requirement, thereby allowing MDE to review the Counties' progress.

Finally, the Water Groups contended that MDE "unlawfully circumvent[ed]" federal and state public participation requirements because the TMDL restoration plans, which include significant new requirements, come into existence more than one year after the Permits are issued, without providing for public notice and comment. They view the TMDL plans that must be submitted to MDE as a modification of the Permits. The Permits direct, however, the Counties to develop the restoration plans using BMPs that are found in documents that MDE incorporated into the Permits during the notice-and-comment period: the Manual and the Guidance. When the Counties submitted (or will submit) restoration plans using these BMPs, no modification will occur because the Counties will draw merely from the same pool of BMPs that the agency had analyzed and approved previously for restoration purposes.

For these reasons, the Court found also find unavailing the Water Groups' argument that the restoration plans violate federal and state laws on public notice and comment because the Groups could not comment meaningfully about decisions yet to be made. As the Court explained, the BMPs were available previously for the public to comment on because the Counties select BMPs from publicly available documents, the Manual and the Guidance. Moreover, although the Counties create the restoration plans after the Permits are approved, the public is able nonetheless to participate in the formulation of the plans. The Permits provide explicitly for "[a] minimum 30 day comment period" before finalization of the restoration plans. Critically, the Counties must include also a summary in their annual reports of how they "addressed or will address any material public comments received." The failure by any County to comply with this requirement constitutes a violation of the CWA and is grounds for an enforcement action.

The Water Groups relied on the Second Circuit's decision in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), in support of their argument that the contents of the TMDL plans are subject to public participation requirements. In contrast to the nutritional plans discussed in *Waterkeeper Alliance*, however, the most critical element of the restoration plans—the BMPs— is already included in the Permits because the Permits incorporate the Manual and Guidance, which set forth those practices.

The Water Groups argued further that MDE must incorporate formally the restoration plans through modification procedures because the plans contain compliance schedules. A schedule of compliance is "any restriction *established by a State*." 33 U.S.C. § 1362(11) (emphasis added). The restoration plans contain schedules. The schedule in the restoration plan, however, is set by the *Counties*. States are not required to set compliance schedules, 40 C.F.R. § 122.47, and MDE has not exercised its discretion to do so.

In the final argument in their public participation challenge, the Water Groups alleged that the 20% restoration requirement "is not specific, measurable, or enforceable." Thus, they argued, MDE created a requirement on which the Water Groups cannot comment or seek judicial review. The Court disagreed. Although the Water Groups do not know in advance which specific practices the Counties will select to restore their impervious surfaces, MDE permitted the Counties to select from among practices that satisfied a specific performance standard, WQv, as set out in the Manual.

The Water Groups attempted to bolster their argument by averring that MDE incorporated an assessment tool, the Guidance, which provides only assumptions about stormwater practices, not an enforceable standard. Thus, according to the Water Groups, MDE could not know whether the Counties' efforts would be adequate when it issued the Permits because "whether the chosen practices actually meet these [pollution reduction] expectations depends entirely on the details of a permittee's restoration plans." This argument, however, failed because it overlooks the nature of the 20% restoration requirement: it is a surrogate. Because the 20% restoration requirement is a surrogate for reducing pollution, MDE has created logically an accountability system in the Permits,

including through the Guidance, based on an assessment of compliance *with the surrogate*, not on assessment of pollution reduction in fact.

2. *Toms v. Calvary Assembly of God,* _____Md.___(2016) (No. 26, Sept. Term, 2015; op. filed 29 February 2016); Opinion by Greene, J. (Harrell, J., joins judgment only).

Facts:

Petitioner, Andrew David Toms ("Toms"), operates a dairy farm in Frederick County, Maryland, and maintains a herd of approximately 90 head of cattle. On 9 September 2012, a church-sponsored fireworks display, which was open to the public, took place on property adjacent to Toms' dairy operation. A permit to discharge fireworks had been obtained. The event was supervised by a deputy fire marshal. No misfires or malfunctions took place. At the time of the event, Toms' cattle were inside his barn. According to Toms, the fireworks display was so loud that it startled his cattle, causing a stampede inside the barn. The stampede resulted in the death of four dairy cows, property damage, disposal costs, and lost milk revenue.

Toms filed suit against the respondents, collectively, Calvary Assembly of God, Inc. ("Calvary"), Zambelli Fireworks Manufacturing Co. ("Zambelli"), Zambelli employee Kristopher Lindberg, and Auburn Farms, Inc.[1]in the District Court of Maryland sitting in Frederick County ("District Court"). Toms sought damages of $13,148.20 under theories of negligence, nuisance and strict liability for an abnormally dangerous activity. On the issue of strict liability, Toms alleged that the noise produced by a fireworks discharge was abnormally dangerous to livestock. The District Court did not find any basis for liability, and entered judgment in favor of the respondents. Pursuant to Md. Rule 7-113, Toms noted an appeal on the record to the Circuit Court for Frederick County. The Circuit Court affirmed the District Court's judgment. Tom's petition for a writ of certiorari was granted by the Court of Appeals.

Held: Affirmed.

The Court of Appeals held that lawful fireworks displays are not an abnormally dangerous activity because the statutory scheme regulating the use of fireworks reduces significantly the risk of harm associated with the discharge of fireworks. Instead of focusing solely on the noise produced by a fireworks display, the Court considered all of the characteristics and risks associated with discharging fireworks. The Court applied the multi-factor test for strict liability for an abnormally dangerous activity, and determined that all of the factors weighed against the application of no-fault liability. Restatement (Second) of Torts § 520 (Am. Law Inst. 1977). The respondents obtained a permit to

[1] Auburn Farms, Inc. participated in the District Court proceedings, however, it was dismissed as a party and did not participate in the case on appeal.

discharge fireworks, and did not violate the conditions of the permit. All applicable laws and regulations were complied with.

In enacting Md. Code (2003, 2011 Repl. Vol.), §§ 10-101 et seq. of the Public Safety Article, the General Assembly took care to implement sufficient precautions so as to ensure that lawful fireworks displays can be a safe and enjoyable activity. Special events requiring the use of large, professional "display fireworks" are regulated heavily in Maryland. A lawful fireworks display does not pose a high degree of risk, because the statutory scheme is designed to mitigate the risks associated with fireworks, namely mishandling, misfires, and malfunctions. Notably, the Public Safety Article does not regulate the audible effects of display fireworks, but § 10-103(c)(1) recognizes that other authorities may further regulate this field.[2] Frederick County, however, does not have a noise ordinance regulating the decibel level of fireworks. If Frederick County enacted regulations restricting further the use of fireworks, respondents would be obliged to comply with those regulations, in addition to applicable State laws. It is not the province of the Judiciary, but rather, the Legislature to determine zoning classifications and enact noise ordinances that would further regulate the use of fireworks.

3. *F.O.P. v. Montgomery County*, _____Md. __(2016) (No. 45, Sept. Term 2015; op. filed 23 February 2016); Opinion by Wilner, J.

Facts:

The Montgomery County Code authorizes the County to bargain collectively with the certified representative of police officers below the rank of lieutenant- Petitioner Fraternal Order of Police, Lodge 35 ("FOP"). In addition to the usual mandatory items specified for collective bargaining (wages, benefits, hours, and working conditions), the County Code, prior to 2011, also made "the effect on employees of the employer's exercise of [management] rights listed in [the collective bargaining law]" a mandatory subject of collective bargaining. The management rights listed in the Code included, among others, transferring and assigning employees, providing standards governing the promotion of employees, hiring and selecting employees, determining the organizational structure of the police force, making job classifications, and setting the overall budget and mission of the police force. Mandatory "effect" bargaining was unique to Code provision governing collective bargaining with police and was not part of collective bargaining for other County employees.

In early 2011, a County reform commission recommended that the unique "effect" bargaining provision for police be eliminated (the commission believed that the provision hampered the ability of the police department to make and implement management

[2] Pursuant to § 10-103(c)(1) of the Public Safety Article, a permit to discharge fireworks "does not authorize the holder of the permit to possess or discharge fireworks in violation of an ordinance or regulation of the political subdivision where the fireworks are to be discharged. . .."

directives). In response to that recommendation, the County Council passed a bill limiting "effect" bargaining to situations where the county's exercise of its management rights causes a loss of jobs in the bargaining unit. The FOP organized a successful effort to petition the ordinance to referendum, which had the effect of suspending the law pending the result of the referendum.

The referendum question was slated to appear on the ballot during the November 2012 general election. A "yes" vote would sustain the law, while a "no" vote would nullify it.

The County Executive directed an effort by the County government to encourage voters to uphold the law. He authorized the County's Director of Public Information, who managed that effort, to expend up to $200,000 from appropriated funds for such things as bus ads, posters in libraries, bumper stickers on County cars, ads in the local media, flyers, lawn signs, and mass mailings.

The FOP objected to the County's advocacy on behalf of the ordinance and, in particular, to the use of County funds and personnel in that effort. The FOP complained to various public officials, and ultimately filed a law suit in the Circuit Court for Montgomery County the day before the election. At the election the next day, the voters approved the ordinance by a large margin. The FOP's complaint sought declaratory, injunctive, and monetary relief, but did not ask the court to overturn the election result. In particular, the FOP asserted that County officials and employees lacked authority to engage in electioneering and campaigning and that they had violated the campaign finance provisions of the State Election Law and provisions of the County Code and Local Government Article of the Md. Code restricting on-the-job political activities of government employees. The County contested the merits of those claims. In addition, the County asserted that the FOP lacked standing to bring the action and that its claims were barred by laches.

Following a bench trial, the Circuit Court awarded declaratory and injunctive relief to the FOP, but declined to award monetary damages. At the heart of its decision, the Circuit Court concluded that the County Executive and the Director of Public Information lacked authority to engage in electioneering. Both the FOP and the County noted appeals to the Court of Special Appeals.

The intermediate appellate court affirmed the Circuit Court's rejection of the County's standing and laches defenses, but reversed the Circuit Court's judgment awarding declaratory and injunctive relief. The Court of Special Appeals concluded that the doctrine of "government speech" authorized the County's activities, that County officials were not required to comply with the campaign finance provisions of the State Election Law, and that the Local Government Article did not prohibit those activities.

The Court of Appeals granted the FOP's petition for a writ of certiorari and the County's cross-petition.

Held: The legal conclusions of the Court of Special Appeals were affirmed, but its judgment was vacated and the case remanded for entry of declaratory judgments consistent with the opinion of the Court.

The Court addressed first whether the FOP lacked standing and whether its claims were barred by laches. The Court held that the FOP had standing because it had a special interest in sustaining "effect" bargaining and in assuring that the County did not use unlawful means to repeal that provision. With respect to laches, the Court determined that the County did not suffer any prejudice from the FOP's decision to file its complaint on the eve of the election. The Court explained that the FOP's delay in bringing the action was not inordinate and that the FOP's claims could be adjudicated as easily after the election as before. The Court noted that the FOP did not seek to overturn the results of the election; rather, it sought only monetary relief and to prevent the County officials from engaging in similar conduct in the future.

The Court discussed then the County's "government speech" defense. The Court noted that issues relating to government advocacy in an election had traditionally been resolved by reference to various laws governing the particular agency and the particular election process. The doctrine of "government speech" was newer and derived from First Amendment case law. The Court explained that "government speech" permits a government entity to inform the public of its views regarding legislative measures that may affect significantly its operations or programs, including ballot questions, provided that there are no clear and specific prohibitions under applicable State or federal law.

In regard to authority under State law, the Court noted that nothing in the Express Powers Act applicable to charter counties either authorized or limited advocacy with respect to ballot measures. Recent decisions of the Court, however, had read the delegated powers as "an expansive grant of authority." In that regard, the Court highlighted the express power, now codified in LG §I 0-206, that authorizes a county council to pass any ordinance consistent with State law that may aid in executing and enforcing any power in Title 10 of the Local Government Article or "may aid in maintaining the peace, good government, health, and welfare of the county." Pursuant to that statute, the Court held that the County expended appropriately funds to inform voters of the impact of nullifying the law and how the law would improve the welfare of the County. Thus, the County engaged appropriately in "government speech" because it provided information on a ballot question that would affect County operations and did so without violating any prohibitions under applicable law. The Court cautioned that this case did not involve a partisan political cause, such as the election of particular candidates to office or a politically-tainted ballot measure involving issues of social policy that would neither hamper nor enhance the operations or programs of County government.

The Court addressed also the FOP's allegations that the County officials engaged in unauthorized or unlawful activity. The Court noted first that the FOP did not assert that the County itself was subject to the campaign finance provisions of the State Election Law. The Court concluded that those provisions also did not apply to individual County officials, who were simply acting on behalf of the County, as a contrary conclusion would lead to absurd consequences.

The Court concluded also that the use of County employees in furtherance of the County's advocacy efforts did not violate State and local laws limiting the political activities of government employees while on the job. Because the advocacy efforts of the

County Executive and Director of Public Information were an authorized and proper instance of government speech, it followed that any assistance in those activities by subordinate county employees acting at their direction was also a proper County function and fell within the scope of the official duties of those employees.

Finally, the Court denied the FOP's request for attorneys' fees. Because the FOP did not prevail on any claim in the case, the Court determined that there was no basis for an award of attorneys' fees.

Although the Court of Appeals affirmed essentially the legal conclusions of the Court of Special Appeals, it vacated the lower court's judgment and remanded the case for entry of new declaratory judgments consistent with the opinion of the Court.

4. *Montgomery County, Maryland v. Ajay Bhatt*, 446 Md. 79, 130 A.3d 424 (2016). Opinion by Harrell, J.

Facts:

Respondent Ajay Bhatt owns a subdivided, single-family residential lot improved by a dwelling in Chevy Chase, Montgomery County, Maryland. The lot abuts the Georgetown Branch of the Baltimore & Ohio Railroad/Capital Crescent Trail. In 1890, the right-of-way that was the rail line (and is today a hiker/biker trail) was conveyed in a fee-simple deed from George Dunlop, grantor, to the Metropolitan Southern Railroad Company ("the Railroad"), grantee. The Deed conveyed a fee simple right-of-way 45 feet on either side of the center line of the tracks throughout the rail line. A freight-hauling operation was maintained on the rail line right-of-way until 1985. The right-of-way was obtained by the County via quitclaim deed in 1988 from the Railroad, for consideration of $10 million, pursuant to the federal Rails-to-Trails Act. Under a "Certificate of Interim Trail Use" pursuant to 49 CFR 1152.29, the County is allowed to preserve the land as a hiker/biker trail until the County chooses whether and when to restore a form of rail service within the right-of-way. The County's announced intent is to establish in the right-of-way commuter rail service (the so-called "Purple Line").

On 18 October 2013, Montgomery County issued to Bhatt a civil citation asserting a violation of § 49-10(b) of the Montgomery County Code, which prevents a property owner from erecting or placing "any structure, fence, post, rock, or other object in [a public] right-of-way." The factual predicate of the claimed violation was the placement and maintenance by Bhatt's predecessors-in-interest of a fence and shed within the former rail line (and current hiker/biker trail) right-of-way, without a permit.

On 21 January 2014 in the District Court of Maryland, sitting in Montgomery Count, the court found Bhatt guilty of a violation of § 49-10(b) and ordered him to remove the fence and shed encroaching upon the County's right-of-way. Bhatt appealed to the Circuit Court for Montgomery County. The parties stipulated that the fence and shed were beyond Bhatt's actual property line. Bhatt argued that he had gained title to the land on which the fence encroached through adverse possession. Bhatt argued that, because the fence had

been located beyond his property line since at least 1963, the Railroad was obliged to take action to remove it prior to the maturation of the twenty year period for adverse possession. On 31 December 2014, the Circuit Court vacated the District Court's judgment and dismissed the violation citation issued by the County. The Circuit Court concluded that the County did not have a "right of way" easement over the former rail line, but rather had been conveyed a fee simple interest in 1988 and thus, Bhatt could not be considered in violation of § 49-10(b), i.e., a right-of-way exists only as an easement and, thus, § 49-10(b) did not apply to a fee-simple interest. The Circuit Court concluded ultimately that Bhatt had a creditable claim for adverse possession.

On 17 June 2015, the Court of Appeals granted the County's Petition for a Writ of Certiorari, *Montgomery County v. Ajay Bhatt*, 443 Md. 234, 116 A.3d 474 (2015), to consider the following questions:

> 1) Did the lower court err in holding that the 1890 deed from George Dunlop to the Metropolitan Southern Railroad Company did not convey a right-of-way?
> 2) Did the County prove that the Respondent's fence and shed encroached upon the right-of-way that was originally purchased by the Metropolitan Southern Railroad Company and later conveyed to the county for the Georgetown Branch/Capital Crescent Trail?
> 3) Is a railroad right-of-way susceptible to a private claim for adverse possession via an adjacent landowner's encroachment when the right-of-way was actively used for a railway line and when there was no evidence of abandonment by the railroad?
> 4) Did the lower court err in holding that the Respondent acquired title to a former railroad right-of-way by adverse possession?

Held: Judgment of the Circuit Court for Montgomery County reversed and case remanded with instructions to affirm the judgment of the District Court.

The Court of Appeals determined that a private landowner adjacent to the rail line may not acquire by adverse possession a portion of the right-of-way through erection of a fence and installation of a shed that encroached for more than twenty years upon the railroad right-of-way because the right-of-way was not abandoned and had been maintained continuously for the public use.

The Maryland courts "have long considered a railroad line as analogous to a public highway," *see Chevy Chase Land Co. v. United States*, 355 Md. 110, 147, 733 A.2d 1055, 1075 (1999), and the Court found no compelling reason in the present case to reject that analogy. Because even a private owner of a railroad is a quasi-public corporation under established Maryland law, it follows, the Court held, that its real property is not subject to a claim of adverse possession under all but the most narrow circumstances. The Court of Appeals explained that because "time does not run against the state, or the public," public

highways are not subject to a claim for adverse possession, except in the limited circumstances of a clear abandonment by the State. *See Ulman v. Charles St. Avenue Co.*, 83 Md. 130, 34 A. 366 (1896). By parity of reasoning applied to the present case, railway lines would also not be subject to a claim for adverse possession, without evidence of clear abandonment or a clear shift away from public use. The Court regarded as not material to the circumstances of the case whether the Railroad's or the County's interest in the right-of-way was held as easement or in fee simple.

There was no evidence adduced by Bhatt supporting a conclusion that the right-of-way was abandoned and was not being used by the public, even during the period from 1985 when the freight service ended and 1988 when the property was conveyed to the County and became a hiker/biker trail as an interim public use. The right-of-way granted to the Railroad (and Montgomery County subsequently) by the 1890 Dunlop Deed was a general conveyance that placed no restriction on its use. Thus, the transition from railway to interim hiker/biker trail under the federal Rails-to-Trails Act is a reasonable public use of the right-of-way and this transition from rail travel to a footpath did not constitute abandonment.

Because no evidence was presented by Bhatt to show that the current use of the right-of-way by Montgomery County is unreasonable or that the Railroad or the County abandoned the right-of-way, no claim for adverse possession was possible. The Court of Appeals held ultimately that Bhatt's encroachment upon the right-of-way was in violation of Montgomery County Code § 49-10(b).

5. *Gail B. Litz v. Maryland Department of the Environment, et al.*, _____Md._____ (2016) (No. 23, September Term, 2015; op. filed 22 January 2016); Opinion by Harrell, J.; Concurring and dissenting opinion by Watts, J. joined by Battaglia and McDonald, JJ.

Facts:

In this litigation, Ms. Litz makes a second appearance before the Court of Appeals regarding a parcel of real property (containing a lake known as Lake Bonnie) in the Town of Goldsboro in Caroline County, Maryland, that was contaminated allegedly by run-off from failed septic systems serving homes and businesses in the Town of Goldsboro. The Litz family operated a recreational campground business on the property, which had campsites, swimming, fishing, and boating, centered on the lake. Lake Bonnie receives its water from two local streams. The septic systems within the Town began to fail. The septic fields overflowed into the open drainage system, and contaminated the two streams, which led to the contamination of Lake Bonnie. By 1988, the Caroline County Health Department reported to the Maryland Department of the Environment ("MDE") that the shallow wells tested in Goldsboro contained pathogens found in human bodily waste. On

18 September 1995, the Caroline County Health Department concluded that the conditions in Goldsboro had gotten to "crisis proportions."

On 8 August 1996, MDE and Goldsboro's mayor entered into an administrative consent order which required Goldsboro to implement changes to the sewage system to reduce pollution. The Town did not comply allegedly with the provisions of the consent order. Because Lake Bonnie was being polluted continually by the pollutants in the water flowing through the drainage system into the two streams and then into Lake Bonnie, Ms. Litz alleged that her property had been devalued substantially, which resulted in a financial loss for her and the eventual foreclosure action by her lender on 14 May 2010.

Ms. Litz's original complaint, filed on 8 March 2010 in the Circuit Court for Caroline County, sought a permanent injunction and alleged counts of negligence, trespass, private and public nuisance, and inverse condemnation against the Town of Goldsboro and the Caroline County Health Department, acting as a state agency, and negligence and inverse condemnation against MDE. Ms. Litz's second amended complaint added the State Department of Health and Mental Hygiene ("DHMH") and the State of Maryland as defendants, seeking a permanent injunction and alleging negligence, trespass, private and public nuisance, and inverse condemnation against the newly added defendants.

After a hearing and an additional amendment to her complaint, the Circuit Court dismissed all of Ms. Litz's claims on the basis of sovereign immunity and the failure to abide by the notice provisions of the Maryland Tort Claims Act ("MTCA") and the Local Government Tort Claims Act ("LGTCA"). Ms. Litz appealed to the Court of Special Appeals the dismissal of her inverse condemnation claim against all defendants and her tort claims against the Town. The intermediate appellate court affirmed, in an unreported opinion, the Circuit Court's dismissal based on its narrow conclusion that Ms. Litz's claims were barred by the relevant statutes of limitation. The Court of Appeals granted Ms. Litz's first Petition for Certiorari, *Litz v. Maryland Dep't of Env't,* 429 Md. 81, 54 A.3d 759 (2012) and remanded the case to the Court of Special Appeals after concluding that it was error to affirm the grant of a motion to dismiss on the basis of statute of limitations. *Litz v. Maryland Dep't of Env't*, 434 Md. 623, 642, 76 A.3d 1076, 1087 (2013). The dismissal of Ms. Litz's nuisance counts was affirmed.

On remand, the Court of Special Appeals reviewed the legal sufficiency of Ms. Litz's remaining tort and inverse condemnation claims, the applicability and satisfaction of the notice requirements under the tort claim acts, and the defense of governmental immunity. In an unreported opinion, the Court of Special Appeals held "that the circuit court properly dismissed the State and its agencies from the case," but that it was "error to dismiss the negligence, trespass and inverse condemnation claims against the Town." At the conclusion of the intermediate appellate court's second review, Ms. Litz's remaining causes of actions included only those three claims against the Town.

The Court of Appeals granted Ms. Litz's second Petition for a Writ of Certiorari to consider the following questions:

1) Whether the Court of Special Appeals erred when it held that Petitioner failed to state a cause of action for inverse condemnation against the State government Respondents?
2) Whether an inverse condemnation claim comes within the notice requirements of the Maryland Tort Claims Act and the Local Government Tort Claims Act?
3) Whether the Court of Special Appeals exceeded the scope of this Court's remand order when it considered an issue disavowed expressly by Respondents, to wit, Petitioner's claim for inverse condemnation against the State government Respondents was subject to the Maryland Tort Claims Act?
4) Whether a trespass claim is covered by the notice requirement of the Local Government Tort Claims Act?

Held: Affirmed in part and reversed in part, and remanded for further proceedings in the Circuit Court.

The Court of Appeals held that Ms. Litz stated adequately in her Third Amended Complaint a facial claim for inverse condemnation against Respondents. Moreover, a claim for inverse condemnation is not covered by the notice provisions of either tort claims act. The Court affirmed the intermediate appellate court's holding that the tort of trespass is covered by the notice requirement of the LGTCA.

An inverse condemnation claim is a taking of property without formal condemnation proceedings being instituted. A plaintiff must allege facts showing ordinarily that the government action constituted a taking. Because Ms. Litz's claim of a "taking" focused predominantly on the inaction of Respondents, rather than any affirmative action, and because there was no controlling Maryland law as to a distinction between action and inaction in pleading inverse condemnation, the Court of Appeals looked to other states for guidance. The Court of Appeals held it was appropriate (and, in this case, fair and equitable, at least at the pleading stage of litigation) to recognize an inverse condemnation claim based on alleged "inaction" when one or more of the defendants may have an affirmative duty to act under the circumstances.

Cases from Florida, Minnesota and California provided support for the conclusion that when governmental actors had knowledge of a risk and an affirmative duty to act, but failed to do so, inaction may support an inverse condemnation claim. Ms. Litz's Third Amended Complaint alleged that the Town and the State were aware of the failure of the community sewage systems, the contamination of the surface and groundwater, and the conveyance of the sewage to Lake Bonnie via the community drainage system. Although questions of which Respondents had statutory or legal duties with regard to abatement of the contamination are open in the proceeding as far as it has advanced, the Court of Appeals concluded that it was not frivolous to hypothesize that state, county, and municipal agencies may have duties to step in to protect the public health, as illustrated by the execution of the 1996 Consent Order.

Without discovery regarding the origins of and seeming failure to enforce the Consent Order and its terms, the Court of Appeals concluded that it was premature to resolve Ms. Litz's claim for inverse condemnation by the grant of the motions to dismiss. The Court cautioned that because of the current stage of these proceedings and given the Court's "novel" holding regarding governmental inaction as a basis for an inverse condemnation claim, the parties have not briefed or argued the applicable law under these circumstances.

With regard to the applicability of the respective tort claims acts notice requirements, because a claim for inverse condemnation is not a tort in a traditional sense, it is only logical that courts would treat eminent domain and inverse condemnation claims differently from common law or statutory torts because the remedy afforded to the respective plaintiff is different. Because the remedy afforded to a plaintiff in the case of a taking is fair market value, the damages "cap" associated with the LGTCA and the MTCA should not apply. By parity of reasoning, the Court of Appeals held the notice requirements of each tort claims act would not apply either.

On the trespass claim, the Court of Appeals affirmed the intermediate appellate court's conclusion that the claim was subject to the LGTCA and its notice requirements. To determine that a claim for trespass was covered by the LGTCA, the Court of Special Appeals relied on a case interpreting the MTCA (*see Lee v. Cline*, 384 Md. 245, 863 A.2d 297 (2004)). The Court of Appeals concluded that there was not a vast chasm between the language of the two statutory tort claim schemes as to the tortious conduct covered. The LGTCA was enacted for a purpose similar to the MTCA and "applies to all torts without distinction, including intentional and constitutional torts." *Thomas v. City of Annapolis*, 113 Md. App. 440, 457, 688 A.2d 448, 456 (1997). Because the language of the LGTCA makes no different distinctions than the MTCA, the Court of Appeals concluded that Ms. Litz's trespass claim against the Town of Goldsboro would be subject to the LGTCA and its notice requirement.

Thus, the Court of Appeals held that Ms. Litz was entitled to continue to litigate her tort claims (negligence and trespass) against the Town, but must show compliance with the notice requirements of the LGTCA. Her inverse condemnation claims against the State Respondents and the Town may proceed, without regard to the notice provisions of the MTCA or the LGTCA. The Court did caution that this decision should not be seen by any party as either an unqualified victory or calamity because discovery may yet blur or clarify Ms. Litz's ability to meet the requirements entitling her to maintain further her complaint or to relief against any of the defendants.

6. *Timothy Everett Beall v. Connie Holloway-Johnson*, 446 Md. 48, 130 A.3d 406 (2016). Opinion by Harrell, J.

Facts:

This case arose out of a fatal motor vehicle collision between a Baltimore City police cruiser operated by Petitioner, Officer Timothy Everett Beall, and a motorcycle operated by Haines E. Holloway-Lilliston. Respondent Connie Holloway-Johnson, on her own behalf and as the personal representative of the estate of her deceased son, initiated a wrongful death suit against Officer Beall in the Circuit Court for Baltimore City, alleging negligence, gross negligence, battery, and a violation of Article 24 of the Maryland Declaration of Rights. Compensatory and punitive damages were sought.

The collision occurred on 25 July 2010 in Baltimore County, Maryland. At the beginning, Officer Beall was on duty in a marked police car in Baltimore City and overheard a call on his radio about a car and a motorcycle "racing each other" up I-83 North in Baltimore City. After receiving a second transmission stating that the car had been stopped by other officers, Officer Beall merged onto I-83 North and noticed a motorcycle that was traveling at the time about 35 m.p.h. in a 50 m.p.h. zone. Officer Beall was following the motorcycle in an attempt to ascertain license plate information, when the motorcyclist "popped a wheelie" and sped away. In response, Officer Beall turned on his siren and lights to pursue the motorcycle, in violation of the Baltimore City Police Department's General Order regarding high-speed pursuits without justifiable exigent circumstances.

The pursuit continued, at speeds of 75 m.p.h., onto I-695 East into Baltimore County in the direction of Towson, after which the motorcyclist reduced his speed to the posted speed limit of 50 m.p.h. Officer Beall continued to follow the motorcycle, but acknowledged that his Shift Commander advised to disengage from the pursuit. Officer Beall turned off his siren and lights and called the State Police to inform them of his location. To return to Baltimore City, Officer Beall followed the motorcycle onto the exit ramp for Dulaney Valley Road where the police cruiser made contact with the motorcycle. The motorcyclist, later identified as Holloway-Lilliston, was ejected from the bike. His body made contact with the hood of Officer Beall's car and he died upon hitting the pavement. The accident reconstruction expert concluded that the collision occurred because Officer Beall failed to maintain a safe and proper following distance from the motorcycle. The case was tried to a jury between 24 July 2012 and 3 August 2012.

At the close of Ms. Holloway-Johnson's case-in-chief, Officer Beall made a motion for judgment on the basis that insufficient evidence was presented as to each of the claims. The presiding judge, Judge Marcus Shar granted the motion in part as to the battery, gross negligence, and Article 24 claims, as well as the prayer for punitive damages. The only claims that were allowed to go to the jury were the negligence claim and the prayer for compensatory damages. On 3 August 2012, the jury returned a verdict in favor of Ms. Holloway-Johnson and the estate of her son for $3,505,000, which was reduced on Officer Beall's motion to $200,000 to conform to the damages "cap" in the Local Government Tort Claims Act ("LGTCA").

Respondent appealed to the Court of Special Appeals, which reversed the judgment in a reported opinion and remanded the case for a new trial. *Holloway-Johnson v. Beall*, 220 Md. App. 195, 103 A.3d 720 (2014). The Court of Special Appeals held that there was sufficient evidence for each of Ms. Holloway-Johnson's claims to have been submitted to the jury and determined that the battery and Article 24 counts could qualify as "predicates for punitive damages" under a theory of "malice implicit" in the elements of those two causes of action. The intermediate appellate court upheld the application of the LGTCA's cap on damages. On 27 March 2015, we granted Officer Beall's Petition for a Writ of Certiorari, and Ms. Holloway-Johnson's Cross-Petition to consider the following questions, as re-framed by us:

> 1) Did the Court of Special Appeals modify improperly established standards to conclude that there was sufficient evidence to support the counts for gross negligence, battery, and a violation of Article 24?
>
> 2) Did the Court of Special Appeals err when it held that Respondent's counts could support an award of punitive damages, contrary to the long-established law that actual, not implied, malice was necessary and remanding the case for further proceedings which might result also in the award of duplicative compensatory damages?
>
> 3) Did Officer Beall waive the damages cap and judgment avoidance afforded by the Local Government Tort Claims Act, having failed to raise the defense until after trial and entry of judgment?

Held: Affirmed in part, reversed in part, and remanded with instructions to reinstate the Circuit Court's judgment

Viewing the evidence in the light most favorable to the non-moving party, the Court of Appeals held that Ms. Holloway-Johnson presented sufficient evidence to have her gross negligence, battery, and Article 24 claims considered by a jury, but determined that reversal and remand for a new trial to consider those claims, and possibly punitive damages, was unwarranted in the context of this case.

Relying on precedent that only minimal evidence was required from which a reasonable jury could find for a plaintiff, the Court concluded that the Circuit Court should have denied Officer Beall's motion for judgment on the issue of sufficiency of the evidence. Ms. Holloway-Johnson was able to adduce admissible facts as to the elements of each of her substantive claims. The evidence showed that Officer Beall commenced trailing the motorcycle surreptitiously, his conduct was in violation of BCPD General Order 11-90, and his pursuit was in contravention of a directive from his Shift Commander to discontinue the pursuit.

This decision did not warrant, however, a new trial because Maryland law provides that a plaintiff is only entitled to one recovery for an injury, even if multiple claims are pled. The injuries must have arisen from separate, unique transactions; otherwise, the multiple "claims" are essentially different legal theories premised on a single set of facts.

Here, Ms. Holloway-Johnson's multiple claims all arise from the same set of facts and, therefore, she would have been entitled to but one compensatory recovery, which she received in the jury's award of compensatory damages on the negligence count.

The Court of Appeals turned its discussion to the issue of punitive damages. The Court agreed with the Court of Special Appeals that negligence and gross negligence claims would not support submission of a prayer for punitive damages to the jury. The Court, however, disagreed with the decision of the Court of Special Appeals concluding that "malice implicit" in the foundational elements of the battery and Article 24 violation would be sufficient to allow a jury to consider an award of punitive damages, in the absence of additional proof of actual malice to a clear and convincing standard. It is possible for a plaintiff to establish the elements of a civil battery or Article 24 violation to a preponderance of the evidence standard without proving actual malice. Thus, the Court of Appeals determined that a standard of "malice implicit" would expose inappropriately defendants to punitive damages without requiring a plaintiff to prove actual malice by clear and convincing evidence. Here, no evidence was produced by Ms. Holloway-Johnson to establish directly or by reasonable inference that Officer Beall was acting with malicious intent during the pursuit or that he intended to harm Holloway-Lilliston on the exit ramp. Without evidence from which a reasonable jury could find or infer actual malice, even had the battery and Article 24 claims survived the close of Plaintiffs' case-in-chief, Ms. Holloway-Johnson would not be entitled to have punitive damages submitted to the jury and, therefore, a remand was unwarranted.

On the issue of the applicability of the LGTCA damages "cap," the Court of Appeals affirmed the Court of Special Appeals. The LGTCA provides Baltimore City police officers an "indirect statutory qualified immunity" when they are acting within the scope of their employment and not proven to have acted with actual malice. The Court of Appeals agreed with the analysis that the LGTCA protection could not be waived by Officer Beall because it was not his to waive. Because the evidence was not sufficient to prove that Officer Beall acted with actual malice (and he was operating within the scope of his employment), the LGTCA cap of $200,000 applied.

7. *Clough v. Mayor & City Council of Hurlock*, 445 Md. 367 (2015); Opinion by McDonald, J.

Facts:

According to the complaint, on 25 November 2009, the Mayor-elect of Hurlock, Joyce Spratt, met with Kathleen Clough and requested that Ms. Clough serve as the Clerk-Treasurer of Hurlock, MD. Ms. Clough indicated her willingness to serve as Clerk-Treasurer, provided that she had the security of an employment agreement. Ms. Spratt and Ms. Clough agreed to the terms of an agreement. Ms. Clough reduced it to a written employment agreement, dated 25 November 2009, setting forth the agreed-upon terms, which included a four-year term of employment.

On 8 December 2009, the Hurlock Council convened in executive session. Ms. Spratt presented Ms. Clough to the Hurlock Council for appointment to the position of Clerk-Treasurer. The Hurlock Council approved the appointment of Ms. Clough pursuant to the terms of the employment agreement.

On July 9, 2012, Ms. Spratt terminated, without cause, Ms. Clough from the position of Clerk-Treasurer. At that time, there were approximately 18 months remaining of the four-year term provided for in the written employment agreement.

On 5 July 2013, Ms. Clough filed a complaint against the Mayor & Council of Hurlock ("Town") with the Circuit Court for Dorchester County, which she later amended. The Town moved to dismiss the amended complaint. Among other reasons, the Town contended that the four-year term in the employment agreement conflicted with the Hurlock Charter; and, as a result, the employment agreement was void ab initio – that is, void from the beginning. Following a hearing, the Circuit Court granted the Town's motion in part on the ground that the four-year term in the employment agreement was inconsistent with the Hurlock Charter.

Ms. Clough noted timely an appeal to the Court of Special Appeals. The intermediate appellate court affirmed in an unreported opinion. It reasoned that the provision in the Hurlock Charter that all agency heads "serve at the pleasure of the Mayor" meant that the position of Clerk-Treasurer was an at-will position. Therefore, that court held that it was inconsistent with the Hurlock Charter for the Town to enter into an employment agreement that conferred a term of years on the Clerk-Treasurer.

Held: Affirmed.

The Court of Appeals considered whether the Hurlock Charter precluded the Town from entering a four-year term of employment with the Clerk-Treasurer. The Hurlock Charter provides that "[a]ll office, department, and agency heads shall serve at the pleasure of the Mayor." Ms. Clough contended that the operative phrase in that provision, "serve at the pleasure of," allowed the mayor to exercise that discretion to enter into an employment agreement with the Clerk-Treasurer for a fixed term of years.

The Court concluded, however, that the operative phrase precluded the Town from entering into an employment agreement with the Clerk-Treasurer for a fixed term of years. The Court reasoned that the operative phrase is understood commonly to refer to at-will employment. The Hurlock Charter did not indicate a contrary intent. The Court pointed out that Ms. Clough's interpretation would create inconsistencies with other provisions of the Hurlock Charter. Lastly, the Court noted that the Hurlock Charter embodied a public policy that a mayor should have the ability to assemble and retain key personnel and that Ms. Clough's interpretation contradicted that public policy.

After determining that the Hurlock Charter precluded the Town from entering into an employment agreement with Ms. Clough for a fixed term of years, the Court concluded that neither Ms. Spratt nor the Hurlock Council had authority to enter into the four-year

employment agreement with Ms. Clough. Because municipalities are not bound by contracts entered into by agents who exceed their authority, the Court held that the employment agreement was void and unenforceable.

8. *Cooper v. Rodriguez*, 443 Md. 680, 118 A.3d 829 (2015). Opinion by Watts, J.

Facts:

In the early morning hours of 2 February 2005, inmate Kevin G. Johns, Jr. ("Johns") murdered fellow inmate Philip E. Parker, Jr. ("Parker"), in plain sight of other inmates and correctional officers, while they were traveling together on a prison transport bus among thirty-four other inmates and five correctional officers. In the Circuit Court for Baltimore City ("the Circuit Court"), Parker's parents, Respondents, sued, among others, the State of Maryland and the five individual correctional officers who staffed the prison transport bus, including Larry Cooper ("Cooper"), Petitioner, the Officer in Charge during the bus ride.

At trial, the following evidence was adduced. During the bus trip, Johns got up from his seat, reached over the seat in front of him, hooked his arm around Parker's head from behind, pulled Parker's head over the back of the seat, and began choking Parker with his arm. Eventually, Johns released Parker, thinking that Parker was dead. At some point, another inmate, who was sitting next to Parker, got up from his seat and moved to a vacant seat across the aisle, leaving the space next to Parker empty. Although it was a violation of policy for inmates to get up and move around the bus, none of the five correctional officers took any action. After the initial choking, Parker started to move and snore or breathe heavily. Johns got up, moved into the seat next to Parker, and began choking Parker again. During the attack, Johns pulled down on Parker's head while Parker tried to push up, and Johns held Parker's head while turning his body toward the aisle of the bus, "trying to snap [Parker's] neck off." Johns said, among other things, "this is what I do best." Johns cut Parker's neck with a razor blade that had been smuggled onto the bus, and Parker yelled loudly. After the second round of choking, Johns stuffed Parker's limp body between the two seats. There was blood on top of the back of the seat and Johns was covered in a large amount of blood. This two-part attack occurred approximately seven and one-quarter feet from where Cooper was seated in a rear elevated officers' cage, yet Cooper—who was required to be "alert and observant at all times" – claimed not to have witnessed the attacks.

The jury returned verdicts in one officer's favor, finding that the officer had not been negligent, and in Respondents' favor against Cooper, three other officers, and the State. The jury found the other three officers negligent; Cooper grossly negligent; and, that the combined negligence and gross negligence were the proximate causes of Parker's death. Cooper and the three officers filed a post-trial motion, seeking judgment notwithstanding the verdict as to the jury's finding that Cooper had been grossly negligent and as to the liability of the individual correctional officers. The Circuit Court granted the motion, striking the jury's finding of gross negligence as to Cooper and ordering that a finding of negligence be entered and determining that the correctional officers were immune from liability under common law public official immunity and the Maryland Tort Claims Act ("MTCA"), Md. Code Ann., State Gov't (1984, 2014 Repl. Vol.) § 12-101 to 12-110.

Respondents and the State appealed. The Court of Special Appeals affirmed in part and vacated in part the judgment of the Circuit Court. The intermediate appellate court held that the Circuit Court erred in striking the jury's finding of Cooper's gross negligence and in concluding that Cooper was immune from liability. Specifically, the Court of Special Appeals held that the Circuit Court erred in ruling that there was no special relationship between Cooper and the inmates and that, because Cooper owed a duty arising out of a special relationship with the inmates in his custody, Cooper was not entitled to common law public official immunity. Cooper petitioned for a writ of certiorari. The Court of Appeals granted the petition.

Held: Affirmed.

The Court of Appeals held that the Circuit Court erred in striking the jury's finding that Cooper acted with gross negligence. The Court concluded that, when viewed in its totality and in the light most favorable to Respondents, the evidence was sufficient to support the conclusion that Cooper, as the Officer in Charge, failed to fulfill the duty to protect Parker's safety and acted with reckless disregard for Parker's life. Indeed, the evidence was sufficient to support the conclusion that Cooper, who claimed to have not seen or heard the attack occurring in front of him, and who testified that he was unaware of several departmental policies meant to ensure inmates' safety, was "so utterly indifferent to the rights of others that he act[ed] as if such rights did not exist." *Barbre v. Pope*, 402 Md. 157, 187, 935 A.2d 699, 717 (2007) (citations omitted).

The Court of Appeals held that, because Cooper acted with gross negligence, he was not entitled to immunity under the MTCA.

The Court of Appeals concluded also that the special relationship exception, rather than being a limitation on common law public official immunity, is a limitation on the public duty doctrine; in other words, the existence of a special relationship does not prevent the application of common law public official immunity. The Court held that the Court of Special Appeals erred in concluding that, because a special relationship existed between Cooper and the inmates, and because the relationship gave rise to a duty which was breached, the Circuit Court erred in finding that Cooper was entitled to common law public official immunity.

Nonetheless, the Court of Appeals held that the Court of Special Appeals was correct in concluding that Cooper was not entitled to common law public official immunity, not because Cooper owed a duty arising out of a special relationship with the inmates in his custody, but rather because entitlement to common law public official immunity ends at gross negligence; i.e., gross negligence is an exception to common law public official immunity.

The Court of Appeals held further that, in accordance with the dictates of Article 19 of the Maryland Declaration of Rights, gross negligence is an exception to common law public official immunity; in other words, if a public official's actions are grossly negligent, the public official is not entitled to common law public official immunity. The Court stated

that to hold otherwise would leave effectively a void in liability, leaving plaintiffs, such as Respondents, without a remedy for a public official's gross negligence.

In cases of gross negligence, where immunity exists under both the MTCA and common law common law public official immunity, the State could be liable for negligence, a public official could be liable for malice, but neither the State nor the public official could be liable for gross negligence—stated otherwise, there would be no remedy for the public official's gross negligence. Such a result could lead potentially to disconcerting consequences, including giving a public official and the State an incentive to avoid liability by arguing that the public official acted with gross negligence, and requiring the plaintiff to argue in response that the public official was merely negligent or malicious.

The Court of Appeals concluded that holding that gross negligence is an exception to common law public official immunity is consistent with the reasoning underlying the MTCA because one of the core principles of the MTCA is that the State is immune from liability for the gross negligence of State personnel, although allowing State personnel to be liable for gross negligence. The Court noted that it would be illogical not to accord Cooper immunity under the MTCA, but extend immunity as a public official.

Because public official immunity is a common law doctrine, it was deemed appropriate for the Court to define its contours. Although, under the MTCA (and in other instances), the General Assembly waived expressly sovereign or governmental immunity—and it was appropriate for the General Assembly to have acted in this regard—immunity pursuant to common law public official immunity is not a matter that requires action by the General Assembly. Instead, the Court has authority under the Maryland Constitution to change the common law. The Court of Appeals observed that common law public official immunity is a principle developed through case law by the Courts of this State and, thus, the General Assembly would not be charged with determining whether gross negligence is an exception to common law public official immunity absent codification of public official immunity. The Court concluded that, because the courts are the keepers of the common law and the Maryland Constitution instills within the Court the ability to determine the common law, holding that gross negligence is an exception to common law public official immunity neither ran afoul of the Maryland Constitution nor invaded the province of the General Assembly.

Cooper, having acted with gross negligence, was not entitled to immunity under common law public official immunity.

9. *Anne Arundel County v. Bell*, 442 Md. 539 (2015); *Anne Arundel County v. Harwood Civic Ass'n*, 442 Md. 595 (2015); Opinion by Harrell, J.; Dissenting opinion by Adkins, J., joined by Battaglia and McDonald, JJ.

Facts of *Bell*

Bill 12-11, a comprehensive zoning ordinance adopted in 2011 by the County Council for Anne Arundel County ("the County"), embraced two districts in the County comprising approximately 59,045 individual parcels or lots totaling 4,265 acres in area. Of

those 59,045 individual parcels or lots, Bill 12-11 changed the previous zoning classifications of 264 parcels or lots and maintained essentially the pre-existing zoning of the rest. Bill 12-11 was the culmination by local government of a 5-year comprehensive and thorough consideration of the zoning in the Districts.

The adoption of Bill 12-11 was challenged by various Anne Arundel County property owners and community associations ("the Citizens"), who objected to some, but not all, of the rezonings. Two suits (an Amended Petition for Judicial Review or, in the Alternative, for a Writ of Administrative Mandamus and a Complaint for Declaratory Judgment) were filed in the Circuit Court for Anne Arundel County, which were consolidated. The Citizens challenged the rezoning of multiple parcels of land, alleging that the County engaged in illegal spot and contract zoning with regard to those rezonings and failed to provide the public with the required notice of the proposed zoning changes.

Several Anne Arundel County property owners and ground leaseholders whose properties had been rezoned to classifications desired by them (collectively, with the County, referred to as "Petitioners") intervened to protect their interests. Petitioners moved to dismiss the Citizens' suit, arguing, among other things, that the Citizens lacked standing. The Circuit Court granted Petitioners' motion to dismiss, concluding that the Citizens lacked standing because, irrespective of the proximity of any of the Citizens' properties to any of the rezoned properties, they failed to meet the burden of proving special aggrievement.

On direct appeal, the Court of Special Appeals disagreed with the Circuit Court, concluding that the Citizens enjoyed property owner standing to challenge Bill 12-11. Relying on *120 W. Fayette St., LLLP v. Mayor and City Council of Baltimore*, 407 Md. 253, 964 A.2d 662 (2009) [*"Superblock I"*] and *Long Green Valley Association v. Bellevale Farms, Inc.*, 205 Md. App. 636, 46 A.3d 473, aff'd on other grounds, 432 Md. 292, 68 A.3d 843 (2013), the intermediate appellate court concluded that the prima facie aggrievement standards of property owner standing principles apply to challenges to comprehensive zonings, as well as administrative and executive land use decisions. After examining the allegations of owners of several discrete parcels, the Court of Special Appeals concluded that at least some of the Citizens had alleged harm sufficient to show that the Citizens were specially aggrieved. Because that court concluded that at least one of the Citizens was prima facie aggrieved, based solely on the proximity of his/her property to a single property rezoned in Bill 12-11, all of the Citizens had standing with respect to the select parcels rezoned in Bill 12-11.

Petitioners, in their successful petition for a writ of certiorari to us, asked us to consider: (1) "Whether the prima facie aggrievement standard established in [*Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 294 (1967)] should be expanded beyond challenges to administrative land use decisions to include challenges to comprehensive zoning?"; (2) "Whether the "almost prima facie" standard as established in [*Ray v. Mayor and City Council of Baltimore*, 430 Md. 74, 59 A.3d 545 (2013)] should be

expanded beyond challenges to administrative land use decisions to include challenges to comprehensive zoning?"; and (3) "Whether noise from a predicted increase in traffic constitutes "special damages"?"

Held: Reversed, with directions to affirm the Circuit Court.

Plaintiffs wishing to challenge in Maryland courts the legislative action of adoption of a comprehensive zoning ordinance are required to demonstrate taxpayer standing—a standing doctrine required for challenges to legislation. The doctrine of property owner standing (i.e., a proximity-driven standing doctrine) is not the appropriate basis upon which a judicial challenge to a comprehensive zoning legislative action may be maintained.

The Court of Appeals distilled the first two certiorari questions into the following: are the principles of property owner standing applicable to plaintiffs maintaining a judicial challenge to the adoption of a comprehensive zoning ordinance, as has been the standard by which judicial challenges to quasi-judicial and other administrative "land use" actions have been measured?

The Court compared quasi-judicial and administrative land use decisions with comprehensive zoning actions. Although comprehensive zoning is legislative fundamentally and no significant quasi-judicial function is involved, quasi-judicial processes and administrative land use actions result from a decidedly un-legislative process (including typically a deliberative fact-finding process, which entails the holding of at least one evidentiary hearing (generally), factual and opinion testimony, documentary evidence, cross-examination of the witnesses, and objections to the weighing of evidence) which results in a particularized set of written findings of fact and conclusions of law as to the zoning proposal for the parcel or assemblage in question.

Bearing in mind the differences between various zoning actions, the Court turned to examine the two standing doctrines available to complainants by which they might maintain suits regarding land use actions generally: the doctrines of property owner standing and taxpayer standing. The Court began its discussion of property owner standing with the requirements and historical underpinnings of the doctrine, examining *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 92 A.3d 400 (2014), *Ray*, and *Bryniarski*. The Court elaborated then on the outer limits of the variety of land use decisions to which property owner standing applies. The Court discussed in depth the trilogy of *Superblock* cases, and especially *Superblock I* and *120 West Fayette St., LLLP v. Major and City Council of Baltimore*, 426 Md. 14, 43 A.3d 355 (2012) [hereinafter "*Superblock III*"], in addition to *State* Center. The Court of Appeals deduced from *Superblock I*, *Superblock III*, and *State Center* that the doctrine of property owner standing may apply to administrative land use decisions and other land use actions undertaken as executive functions. The Court has not applied heretofore the doctrine to purely legislative processes and actions, nor does the Court's body of case law on the subject warrant applying the

doctrine to judicial challenges to legislative acts reached through solely legislative processes.

Finally, the Court of Appeals explained why further expansion of the property owner standing doctrine to the purely legislative process and act of comprehensive zoning is ill-advised. The Majority expressed reticence to construe standing doctrines so broadly as to eviscerate the doctrine of property owner standing, as would be the case if, hypothetically, thousands of plaintiffs with the benefit of property owner standing could have standing to challenge comprehensive zoning legislation. The Court observed instances in Ray and State Center where similar policy concerns underscored the court's analysis of standing.

The Court of Appeals then proceeded to discuss the doctrine of taxpayer standing, which the Court identified as the standing doctrine that challengers to comprehensive zoning ordinances must satisfy. The Court first discussed the requirements and historical underpinnings of the doctrine of taxpayer standing. To establish eligibility to maintain a suit under the taxpayer standing doctrine, a complainant must allege two things: (1) that the complainant is a taxpayer and (2) that the suit is brought, either expressly or implicitly, on behalf of all other taxpayers. A party satisfies the special interest, also called special damage, standing requirement by alleging both 1) an action by a municipal corporation or public official that is illegal or ultra vires, and 2) that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes. Naturally, there must be a nexus between the showing of potential pecuniary damage and the challenged act, which is true not only for the complainant, but also all similarly situated taxpayers.

The Court then discussed some of the instances in which taxpayer standing applies, including cases pertaining to executive, administrative, or quasi-land use actions as well as challenges to legislation generally. The Court concluded, after examining *Boitnott v. Mayor and City Council of Baltimore*, 356 Md. 226, 738 A.2d 881 (1999), among other cases, that taxpayer standing is the appropriate standing doctrine that challengers to comprehensive zoning ordinances must satisfy in order to maintain their suit. Finally, the Court analyzed the Citizens' suit in light of the requirements of taxpayer standing. The Court assumed that at least two of the Citizens were taxpayers, and the Citizens alleged that the actions taken by the County in adopting the zoning reclassifications in Bill 12-11 were illegal; however, the Citizens did not satisfy the requirements of taxpayer standing because they did not allege that the illegal action would result in a pecuniary loss or an increase in taxes. Because the Citizens did not allege properly that they would suffer the requisite harm, the Court did not determine whether the Citizens alleged sufficiently that their suit was brought on behalf of all other taxpayers similarly situated.

Facts of *Harwood Civic Association, Inc., et al.*,

Bill 44-11, a comprehensive zoning ordinance adopted in 2011 by the County Council for Anne Arundel County ("the County"), embraced two districts in the County, referred to colloquially as "South County." Property owners desiring rezoning were given an opportunity to submit applications to the County. The County's Office of Planning and Zoning ("OPZ") evaluated the applications in light of the recommendations of County's comprehensive land use master plan (the "General Development Plan," or "GDP"), made a recommendation as to each application, and incorporated its various other recommendations in a draft of what became Bill 44-11. The County Council adopted Bill 44-11, with certain amendments to the draft bill submitted by the OPZ and not vetoed by the County Executive, after which point Bill 44-11 became "final" and effective.

Several non-profit community associations and individual property owners (collectively, the "Protestants" or "Respondents") filed in the Circuit Court for Anne Arundel County a complaint for declaratory judgment, in which they sought specifically a declaration that certain provisions of Bill 44-11 were void because assertedly they granted illegal spot zoning and were inconsistent with the recommendations of the GDP. In the Complaint, the individual property owners each alleged that they owned property and resided near or adjacent to one of the properties rezoned by Bill 44-11 and that the value of their property and enjoyment thereof would be reduced substantially as a result of the rezoning. Owners of some of the properties rezoned by Bill 44-11 (collectively, the "Defendants") filed motions to intervene, all of which were granted.

The County and several Defendants filed motions to dismiss the complaint in which they challenged the Protestants' standing. One of the intervening Defendants argued in a motion to dismiss that the Protestants did not allege facts sufficient to establish either taxpayer standing or property owner standing. In their response to that motion, the Protestants disclaimed taxpayer standing and argued instead that they maintained property owner standing.

The Circuit Court dismissed the Protestants' amended complaint. In a footnote of the trial judge's opinion, he recognized that Protestants conceded that they did not claim to have taxpayer standing, and he then considered whether they satisfied property owner standing. He concluded, based on his reading of *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967), that all Protestants lacked standing.

The Protestants filed a Second Amended Complaint, adding additional plaintiffs and defendants yet again. The Protestants reiterated generally the proximity of their properties to the rezoned properties, and alleged further various discrete injuries, including reduced property values, reduced enjoyment of the properties, increased traffic, increased noise and light pollution, fear of damage to trees and mailboxes on their properties as a result of increased traffic, damage to the rural nature of the properties, increased run-off from storm water, and the pressure to permit additional and more intense commercial uses in the future. One Protestant, Shirley Harrison ("Ms. Harrison"), who owns and resides on a property "adjacent to" a property rezoned in Bill 44-11, reiterated her allegations that enjoyment of

her property would be reduced substantially and that the rezoning would cause an increase in traffic. She alleged further that she feared that her property taxes would increase due to the rezoning on the adjacent rezoned property. In response to the Second Amended Complaint, some of the Defendants, including the County, filed new motions to dismiss, asserting that the Protestants lacked standing. The Protestants, in their opposition to the motion to dismiss the Second Amended Complaint filed by the County, reiterated, among other things, their argument that their allegations of special aggrievement were sufficient to establish their standing.

One of the Defendants focused pointedly in its motion to dismiss on the allegations of Ms. Harrison. They argued that Ms. Harrison's allegations failed to satisfy the special damage requirements of *Bryniarski* and that she failed to allege that she would be affected specially in a way different from that suffered by the public generally. Finally, the Defendant maintained that, if Ms. Harrison was arguing that she maintained taxpayer standing, she did not allege sufficient pecuniary losses. The Protestants filed an opposition to that motion to dismiss, but did not address in any way the arguments regarding taxpayer standing, nor did they disavow explicitly their earlier disavowal of taxpayer standing. The Protestants also opposed another motion to dismiss, where they maintained again that they enjoyed standing as "adjoining property owners" and relied indiscriminately on cases discussing both property owner standing and taxpayer standing.

The Circuit Court dismissed the Second Amended Complaint. Regarding Ms. Harrison, the trial judge noted, in a footnote, that "an increase in property value by definition is not 'harm' and that a tax increase for more valuable property does not constitute a viable zoning complaint." The Circuit Court went on to conclude that Ms. Harrison's allegations were too generalized to satisfy the requirement of "special harm." The trial judge concluded that most of the Protestants lacked standing to challenge Bill 44-11, but two enjoyed property owner standing because of their allegation that the rezoning of a nearby parcel "will result in a loss of or a deterioration of the wildlife habitat and will destroy or drive off the currently abundant wildlife there." He dismissed, however, the Second Amended Complaint as to all of the Protestants because he concluded that they failed to state a claim upon which relief could be granted.

The Protestants appealed to the Court of Special Appeals, where they argued again that they enjoyed property owner standing by virtue of their proximity to various rezoned parcels. The parties did not argue taxpayer standing before the intermediate appellate court, nor did that court discuss taxpayer standing in the process of concluding that the doctrine of property owner standing applies to declaratory judgment actions challenging comprehensive zoning legislation. The Court of Special Appeals concluded that the Protestants did state a claim upon which relief could be granted and remanded the case for further proceedings in light of its opinion in *Bell v. Anne Arundel County, Md.*, 215 Md. App. 161, 79 A.3d 976 (2013), *rev'd*, *Anne Arundel County, Maryland v. Steve Bell*, 442 Md. 539, 113 A.3d 639 (2015).

The County and several Defendants (collectively, the "Petitioners") petitioned for a writ of certiorari, asking the Court of Appeals to consider a number of questions, including whether the doctrine of property owner standing should be extended to cases in which private citizens challenged the validity of legislatively enacted comprehensive zoning. In their briefs to the Court of Appeals, the Protestants argued that they maintained property owner standing, while some of the Petitioners argued that they did not. One of the Petitioners reiterated its arguments in a footnote that Ms. Harrison did not enjoy taxpayer standing.

Held: Reversed, with directions to affirm the judgment of the Circuit Court.

In *Anne Arundel County, Maryland v. Steve Bell*, 442 Md. 539, 113 A.3d 639 (2015), filed immediately prior to the opinion in the present case, the Court of Appeals concluded that the doctrine of property owner standing is not the appropriate test for a judicial challenge to a comprehensive zoning action. Rather, plaintiffs wishing to challenge in Maryland courts the legislative process and final action adopting a comprehensive zoning are required to demonstrate taxpayer standing—the standing doctrine applicable to judicial challenges to legislative actions. Accordingly, *Bell* answered the first two questions presented to the Court in this appeal.

The Court of Appeals proceeded to determine whether the Protestants in this matter alleged sufficiently a basis for their standing to challenge the adoption by the County Council for Anne Arundel County in 2011 of a comprehensive zoning ordinance for a large, different portion of Anne Arundel County than was involved in *Bell*.

The Court concluded that Respondents did not satisfy the requirements of the taxpayer standing doctrine based on the record generated below, and they waived any arguments they may have had to that effect. For the sake of argument, the Court of Appeals was willing to assume that Ms. Harrison—the only Respondent to make any arguable effort at demonstrating taxpayer standing—was a taxpayer and that her allegations of "impermissible" spot zoning satisfy the requirement of alleging a governmental action that is illegal or *ultra vires*. Although Ms. Harrison alleged that her taxes would be increased, satisfying the requirement that she allege pecuniary loss, she waved any arguments in favor of taxpayer standing. At no point before the Court of Special Appeals or before the Court of Appeals did any Respondent assert that he, she, or it enjoyed taxpayer standing or satisfied the requirements thereof. Pursuant to Maryland Rules 8-131(b) and 8-504(a)(6), because their arguments in favor of taxpayer standing were not presented in a brief nor presented with particularity, the Court did not consider them on appeal. Because Respondents waived the taxpayer standing argument, the Court did not consider whether Ms. Harrison alleged sufficiently that Respondents' suit was brought on behalf of all other taxpayers situated similarly, or if she alleged sufficiently a nexus between the challenged illegal or *ultra vires* act and pecuniary loss suffered by her.