

**BEFORE THE TALBOT COUNTY BOARD OF APPEALS**

APPEAL OF HUGH SMITH, et al. \* FINDINGS AND DECISION  
\* Appeal No. 23-1743

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The Talbot County Board of Appeals (the "Board") held a hearing on July 17, 2023 in the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland to consider the Appeal of Hugh M. Smith, Chata R. Smith, Harry S. Hassan, Trustee, John R. Watkins, Barbara C. Watkins, Timothy R. Furey, Elizabeth H. Furey, James E. Britt, Martha D. Britt, James C. Killen, Fairleigh D. Killen, and Christine M. Dayton.

The Appellants were participants in the matter of Agnes Warfield-Blanc (STN-22-24) whereby the Short Term Rental Review Board ("STRRB") granted a Short-Term Rental License to Agnes Warfield-Blanc ("Appellee").

Voting Board Members present for this hearing were Chairman Frank Cavanaugh, Vice Chairman Louis Dorsey, Jr., Paul Shortall, Jr., Patrick Forrest and Jeff Adelman.

**STATEMENT OF THE CASE**

This matter is brought forth under Article VII of the Talbot County Code, § 190-63.2(H), which provides that "Any party that participated in the hearing and is aggrieved by the [STRRB] Board's decision may file an appeal to the Talbot County Board of Appeals within 30 days of the issuance of the written decision. Such appeal shall be on the record." This Board's review of STRRB decisions is to assure that the decision is in conformance with law and supported by substantial evidence. *Monkton Preservation Ass'n v. Gaylord Brooks Realty*, 107 Md. App. 573, 580 (1995).

The property at issue is located at 27457 West Point Rd., Easton, Maryland 21601 ("Property"). On January 26, 2023, the STRRB conducted a public hearing that considered the application of Appellee to obtain a Short-Term Rental License for the Property. As set forth in Article VII of the Talbot County Code, § 190-63.2(G)(6):

- The [STRRB] Board shall approve an application for a new short-term rental license unless the Board finds that:
- a. The license application is incomplete;
  - b. The applicant has made false, inaccurate, incomplete or incorrect statements in connection with the application;
  - c. The applicant has not complied with the application notice requirements;
  - d. Issuance of the license would unduly disturb the peace of the residents of the neighborhood in which the short-term rental will be located; and/or

- e. There are other substantial reasons in the discretion of the Board why the license should not be issued, in which event the Board shall deny the license.

The STRRB, by a unanimous five votes, granted the Short Term Rental License. It issued a written decision, dated February 24, 2023. The written decision addressed each of the criteria set forth in § 190-63.2(G)(6). The written decision found that:

- a. The license application was complete.
- b. The applicant had not made false, inaccurate, incomplete or incorrect statements in connection with the application.
- c. The applicant complied with all notice requirements.
- d. The issuance of the license would not unduly disturb the residents of the neighborhood in which the short-term rental will be located.
- e. There are no other substantial reasons to support denial of the license.

Appellants contend that the STRRB made errors in its determination to grant the license. Specifically, Appellants contend that the license should not have been granted for the following reasons (as stated in the Appellant's Appeal Application):

1. The Applicant [Appellee] provided false, inaccurate and misleading information in connection with the number of bedrooms legally approved as well as the existence of subdivision covenants.
2. The subdivision restrictions prohibit commercial uses. The ordinance provides that a short term rental is an accessory use, not a residential use.
3. The accessory use is taxed by the county in the same manner as hotels, motels and inns.
4. The Applicant [Appellee] produced no evidence to dispute the neighbors' testimony that the use would be detrimental to the peaceful life of their community and would be disconcerting, at the least, to the equine residents of the community.
5. § 190-63.2(H) as applied by the STRRB does not provide the opponents with notice of the written decision, and therefore fails to notify the opponents of the date of the decision, depriving them of the opportunity to be heard on appeal.
6. The STRRB has imposed an arbitrary 3 minute limit on the opponents, (while allowing the Applicant to speak without limitation), thus violating the opponents' right to be heard and receive procedural due process of law.
7. The factual findings in the written decision of the STRRB are non-existent and do not meet the requirements of *Bucktail LLC v. Talbot County*, 352 Md. 530 (1999) in that they do not provide the factual basis for the decision.

All Board of Appeal members visited the Property prior to the hearing.

## SUMMARY OF ARGUMENTS

The Appellants were represented by attorney Anne C. Ogletree who submitted a Pre-Hearing Statement and provided oral argument. The Appellee was represented by attorney Jesse B. Hammock who submitted a Pre-Hearing Statement and provided oral argument. A summary of the respective arguments, in response to the Appellant's bases for appeal, are as follows.

1. *The Applicant [Appellee] provided false, inaccurate and misleading information in connection with the number of bedrooms legally approved as well as the existence of subdivision covenants.*

Section 190-63.2(G)(6)(b) requires the STRRB to consider whether the Applicant has made false, inaccurate, incomplete or incorrect statements in connection with the application. Appellants contend that the STRRB should not have granted the Short-Term license because the Applicant provided two statements that are false, inaccurate, or misleading.

The first alleged false, inaccurate or misleading statement is that the Applicant applied for a four bedroom license. The STRRB decision states that the Applicant submitted an application for a 4-bedroom primary dwelling, with a maximum occupancy of eight (8) individuals. Appellants Hugh Smith and Barbara Watkins searched the Property records at the Talbot County Health Department and discovered a record indicating that, at some point in the past, it was only approved by the Health Department for three bedrooms.

At the STRRB hearing, County staff testified that the site plan approved for the Property included four bedrooms and that the County ultimately approved a four bedroom dwelling. By email dated February 3, 2023, Bryce Yelton of the Talbot County Department of Planning and Zoning concluded that, after consultation with the Health Department, the property is large enough to accommodate 4 bedrooms but that the existing septic can only support 3 bedrooms. He instructed Appellee to place a deadbolt on one of the bedrooms and that the application will be amended as a three bedroom rental license request.

The Appellee agreed to modify the application to a three bedroom rental. Appellee contends that it was harmless error to state that the Property was 4 bedrooms on her application. It is, in fact, a four bedroom dwelling. She was not aware of the prior Health Department determination and purchased the property after it was constructed as a four bedroom dwelling. The Appellee voluntarily modified the application to a three bedroom application and that is what the STRRB ultimately approved.

The second alleged false, inaccurate, or misleading statement is that the application affirmed there are no covenants that prohibit the Property from being used as a short term rental. Appellee submitted her application affirming that there are no covenants that specifically prohibit a Short-Term Rental License.

Appellants asserted that two covenants recorded in the land records are contrary to Appellee's affirmation. Appellants argue that language in a recorded covenant that burdens the

subdivision for which the Property lies prohibits short-term rentals. The Appellants also argue that a recorded covenant that burdens a nearby subdivision is relevant. Appellant's reasoning is that the nearby subdivision will also be impacted by the rental license and, therefore, represents homeowner expectations of what will be permitted in the community as a whole.

The covenant that applies specifically to certain homes in a nearby subdivision provides that "All dwellings shall be used for private residential purposes only and not for purposes of any trade, business or profession."

The covenant that applies specifically to homes within the Appellee's subdivision provides: "That no store or other place of business shall be erected, constructed or maintained on the property hereby conveyed, and no commercial enterprise of any kind or nature shall be kept, operated or maintained on said property." Appellants argue that a short-term rental is a commercial enterprise and thereby prohibited by restrictive covenant.

Appellee contends that the application is not false, misleading, or inaccurate because the application asks whether a covenant *specifically* prohibits rental of properties or Short-Term Rentals. The covenant does not specifically prohibit the rental of properties or Short-Term rentals. Appellee also argues that the STRRB is not a body that enforces private covenants. Appellee also states that the Appellee's deed does not contain the restricted covenant and any deed within the chain of title is not on the record of this Appeal and cannot be considered.

Appellee further relies on the Maryland Supreme Court's decision in *Lowden v. Bosley*, 395 Md. 58 (2006). *Lowden* holds that short-term rentals are a residential use and not a commercial use. Appellants counter that *Lowden* does not hold that all short term rentals are residential but "that a court must first see if the language of the covenant is unambiguous."

2. *The subdivision restrictions prohibit commercial uses. The ordinance provides that a short term rental is an accessory use, not a residential use.*

Appellant's second basis for appeal is similar to its first. The second is that the subdivision covenant itself restricts commercial uses whereas the first basis of appeal focuses on the alleged false, misleading, or inaccurate statement.

Appellants argue that because the Talbot County Code includes Short Term Rentals as an accessory use it is not a residential use. *See*, Talbot County Code Art. IV § 190-33.20. Appellants argue that residential uses are only set forth in § 190-27.

Appellee counters that the *Lowden* case is the controlling precedent. That case held that Short-Term Rentals are a residential use. Following the rationale in *Lowden*, Appellee urges the board to consider the underlying activities associated with the use; that is, eating, sleeping, etc., that occurs within the residence.

3. *The accessory use is taxed by the county in the same manner as hotels, motels and inns.*

Appellant's third basis for appeal is also similar to its first and second. Here, Appellants argue that because the accessory use is taxed by the county in a similar manner as hotels, motels, and inns, the use is commercial in nature.

Appellee disagrees that taxation of a property establishes its zoning use.

4. *The Applicant [Appellee] produced no evidence to dispute the neighbors' testimony that the use would be detrimental to the peaceful life of their community and would be disconcerting, at the least, to the equine residents of the community.*

The STRRB shall approve an application for a new Short-Term Rental License unless, among other things, the STRRB finds that issuance of the license would unduly disturb the peace of the residents of the neighborhood in which the short-term rental will be located. § 190-63.2(G)(6)(d). The STRRB found that the license would not unduly disturb the peace of the residents.

The Appellants participated in the STRRB hearing expressing their concern that a short-term rental in the neighborhood would be detrimental to the peaceful life of their community. The Appellants argue that their subdivision should be treated differently than other neighborhoods in the County because of its small size and because it is on a peninsula with limited vehicular access in and out. One of the Appellants is specifically concerned that short-term residents will disturb their horses. Counsel for Appellants acknowledges that the Property has not caused undue disturbances yet but that they could happen.

Appellants argue that the Appellee has not provided any evidence to counter their assertions. Appellee responds that there is no evidence presented by Appellants to respond to. The assertions are merely conjecture or speculation.

5. *§ 190-63.2(H) as applied by the STRRB does not provide the opponents with notice of the written decision, and therefore fails to notify the opponents of the date of the decision, depriving them of the opportunity to be heard on appeal.*

The Appellants argue that the County Code fails to give opponents effective notice of an STRRB decision depriving them of their due process right to be heard on appeal. Appellants also argue that the Code does not provide opponents of a Short-Term Rental License enough time to appeal a decision.

6. *The STRRB has imposed an arbitrary 3 minute limit on the opponents, (while allowing the Applicant to speak without limitation), thus violating the opponents' right to be heard and receive procedural due process of law.*

The Appellants allege impropriety in the STRRB hearing because participants were limited to a three minute presentation per participant.

7. *The factual findings in the written decision of the STRRB are non-existent and do not meet the requirements of Bucktail LLC v. Talbot County, 352 Md. 530 (1999) in that they do not provide the factual basis for the decision.*

The STRRB decision listed the criteria that the STRRB must consider and, for each criteria, stated that the Board did not find any of the criteria to be reason for denying the license.

Appellants argue that the written decision of the STRRB was insufficient. Appellants allege lack of due process because the written decision lacks specificity. Appellants state that the written decision cannot merely mirror the statutory language as set forth in *Bucktail Ltd., LLC v. Talbot County*, 352 Md. 530 (1999).

#### **FINDINGS OF FACT AND LAW**

The Board makes the following findings of fact and legal conclusions based on the evidence of record and arguments made by counsel of record in this matter.

1. *The Applicant [Appellee] provided false, inaccurate and misleading information in connection with the number of bedrooms legally approved as well as the existence of subdivision covenants.*

The Board finds that Appellee did not falsely, inaccurately, or misleadingly describe the Property as a four bedroom dwelling. Foremost, the Property does have four bedrooms and the County permitted the construction of a four bedroom dwelling prior to Appellee's purchase of the Property.

The Board finds that the Appellee's lack of knowledge of the Health Department determination of septic capacity is not grounds for determining that Appellee should have known that determination. Again, the house was constructed with four bedrooms. A new homeowner would not necessarily search Health Department records to determine whether such a discrepancy existed. Board member Forrest had a similar experience with his own home unbeknownst to him for many years.

To the extent the application erroneously described the Property as a four bedroom dwelling, it was harmless error. The discrepancy was discovered prior to the STRRB hearing and Appellee agreed to modify the application to a three bedroom rental. The application was approved as a three bedroom rental.

The Board also finds that Appellee did not falsely, inaccurately, or misleadingly, affirm that there are no covenants that specifically restrict use of the Property as a short-term rental property.

The Board dismisses the contention that language attached to the deeds of homes in a nearby subdivision is relevant. Applicants for short-term rental license are not required to consider covenants affecting nearby properties. The County Code does not require it.

The Short-Term Rental License application asks whether there are any covenants that specifically prohibit the Property from being used as a short-term rental. Appellee's deed does not have any restrictions or covenants described therein. Deeds in the chain of title are not on the record. However, a search of public land records shows that the Property is restricted by a covenant that states: "No store or other place of business shall be erected, constructed or maintained on the property hereby conveyed, and no commercial enterprise of any kind or nature shall be kept, operated or maintained on said property." (Liber 444 / Folio 674).

Whether a short-term rental is a "commercial enterprise" has been resolved by the Maryland Supreme Court in *Lowden v. Bosley*, 395 Md. 58 (2006). The issue in that case, as described by the Supreme Court "is whether a restrictive covenant, which requires that building lots ... be used for 'single family residential purposes only,' prohibits the owners of homes on those lots from renting their homes to residential tenants on a short-term basis."

The Supreme Court analyzed whether renting a home on a short-term basis was a residential use of the property. The court found that renting homes on a short-term basis was a residential use. The court stated that "the transitory or temporary nature of such use does not defeat the residential status." *Id.* at 68. The court noted that over 30 percent of homes are rented and also provide a commercial benefit to the owner but that the use remains residential, nonetheless. *Id.* at 69. For this reason, the Board does not find that the STRRB erred in determining that the covenant affecting the Property does not specifically prohibit short-term rentals.

2. *The subdivision restrictions prohibit commercial uses. The ordinance provides that a short term rental is an accessory use, not a residential use.*

The gist of Appellant's contention here is that the Talbot County Code establishes what is residential use and what is not. Short Term Rentals are included in the "accessory use" section of the Code and the Code has another section that establishes residential uses. *See*, § 190-27.

As described above herein, the *Lowden* case determined that short-term rentals are a residential use. The Board finds that the distinction between accessory use and residential use in the Talbot County Code is of little relevance. The Code also has a separate section for commercial uses. *See*, § 190-29. Short-term rentals are not included in that section of the code and the covenant at issue prohibits "commercial" activities, not short-term rentals specifically. The fact that the Code identifies short-term rentals as an accessory use means that the use is an accessory to another primary use, which could include residential use. The Board finds that the Property is a residential property and will be used for residential purposes.

3. *The accessory use is taxed by the county in the same manner as hotels, motels and inns.*

The Board does not find the argument that accessory uses are taxed similarly to hotels, motels, and inns as persuasive. First, the Board is not presented with any evidence showing how the Property is taxed. The Board is not presented with any legal authority that would indicate the STRRB should consider taxation for the purpose of issuing a short-term license. The taxation issue is tied to Appellant's contention that the restrictive covenant prohibits commercial activities. The *Lowden* case establishes that short-term rentals are a residential use for purposes that are relevant to the issuance of the license.

4. *The Applicant [Appellee] produced no evidence to dispute the neighbors' testimony that the use would be detrimental to the peaceful life of their community and would be disconcerting, at the least, to the equine residents of the community.*

The Board does not find that there is any evidence presented to find error in the STRRB's judgment. The Appellant's concerns are conjecture or speculation of something that *might* occur. The standards in the Code for granting a license are not premised on what might occur. If the short-term rental applicant had a history of non-compliance, that could be evidence for a Board to consider. There is nothing akin to that in this matter.

The concerns of the Appellants are addressed by the short-term rental regulations and the conditions of the short-term license. Additionally, there was testimony that the Property has house rules that address the concerns and there is a 24-hour hotline that neighbors can call to report any disturbances.

For these reasons, we find no error in the STRRB's failure to find that there is an undue detriment to the peaceful life of the neighborhood.

5. *§ 190-63.2(H) as applied by the STRRB does not provide the opponents with notice of the written decision, and therefore fails to notify the opponents of the date of the decision, depriving them of the opportunity to be heard on appeal.*

This Board's review of STRRB decisions is to assure that the decision is in conformance with law and supported by substantial evidence. *Monkton Preservation Ass'n*, 107 Md. App. at 580 (1995). This Board is not granted authority to determine whether the short-term rental provisions of the code are legally sufficient. Notwithstanding, the Appellants did timely appeal the issuance of the short-term rental license and, therefore, their arguments in this regard are moot.



6. *The STRRB has imposed an arbitrary 3 minute limit on the opponents, (while allowing the Applicant to speak without limitation), thus violating the opponents' right to be heard and receive procedural due process of law.*

It is not within this Board's purview to address the STRRB's parliamentary procedures. Additionally, there is no allegation by the Appellants that they were precluded from presenting any relevant evidence that would affect this Board's review of that decision.

7. *The factual findings in the written decision of the STRRB are non-existent and do not meet the requirements of Bucktail LLC v. Talbot County, 352 Md. 530 (1999) in that they do not provide the factual basis for the decision.*

Appellants state that the written decision cannot merely mirror the statutory language as set forth in *Bucktail Ltd., LLC v. Talbot County*, 352 Md. 530 (1999).

The Code mandates that the STRRB *shall* grant a license *unless* it finds one or more of the five findings set forth in § 190-63.2(G)(6).

For example, subsection (c) of that provision calls for the Board to consider: "The applicant has not complied with the application notice requirements." If the applicant had not complied with the application notice requirements, the decision would necessitate an explanation of why the STRRB found that the applicant had not complied with notice requirements; e.g., the applicant did not provide notice to owners of contiguous properties as required by § 190-63.2(G)(2). If, as occurred here, the STRRB did not find any violations of the notice requirements, there is nothing for the STRRB to articulate, other than a finding that the applicant did comply with the notice requirements.

The *Bucktail* opinion cited by Appellants was affirmed and further explained by the Maryland Supreme Court in *Critical Area Comm'n v. Moreland, LLC*, 418 Md. 11 (2010). The Supreme Court explained:

Moreland's assertion that the Board of Appeals must describe the evidentiary foundation for each of its findings, immediately following each finding, to enable meaningful judicial review does not have a foundation in our jurisprudence. What does have a grounding in our jurisprudence is that there has to be articulated evidence in support of a conclusion finding.

*Id.* at 128.

[Describing its finding in *Bucktail* as they pertained to a developer who was denied growth allocation under the Chesapeake Bay Critical Area Protection Program.] We granted certiorari prior to any proceedings in the intermediate appellate court and reversed, reasoning that the relevant findings were merely 'conclusory statements' and failed to advise the developer, 'in terms of the facts and circumstances of the record,' the manner in which the application failed, thereby evading 'meaningful judicial review.' We emphasized that because the 'planning

staff and the Planning Commission ha[d] recommended approval of Bucktail's project and found that it complied[d] with all applicable requirements, it [wa]s not sufficient for the Council simply to express conclusions, without pointing to the facts found by the Council that form[ed] the basis for its contrary conclusion.'

*Id.* at 129-30. In other words, the court found fault with a Board decision because it denied a substantive privilege to an applicant that was contrary to recommendations by the planning staff and planning commission, without any evidence on the record for its reasons, and without explanation of its reasons. That is not analogous to the present matter. In this matter, there is a transcript of the STRRB hearing that contains facts presented and considered by the STRRB and its decision is consistent with recommendations by the County Office of Planning and Zoning. The STRRB decision states that its findings are made "upon consideration of the staff report and testimony and evidence given at the hearing."

The Supreme Court concluded, regarding that Board's decision:

...when the Board of Appeals refers to evidence in the record in support of its findings, meaningful judicial review is possible."

For these reasons, we find that the STRRB decision is sufficient in its statement of findings and that the decision is in conformance with law and supported by substantial evidence.


### **EVIDENCE ON THE RECORD**


The Board accepted and considered the following documents as part of the record in this appeal:

1. Application for Administrative Appeal with Attachment A.
2. Checklist for Administrative Appeal.
3. Notice of Intent to Participate.
4. List of Witnesses to be Summoned.
5. Tax Map with subject property highlighted.
6. Notice of Public Hearing for Advertisement in local paper.
7. Newspaper Confirmation.
8. Public Notice with Adjacent Property Owner List attached.
9. Sign Maintenance Agreement.
10. Acknowledgement Form for Administrative Appeal.
11. Short Term Rental Decision, File No. STN-22-24.
12. Email from Bryce Yelton, dated 2/3/23.
13. Letter to Agnes Warfield-Blanc, dated 1/6/23.
14. Certificate of Service, from Anne Ogletree.
15. Withdrawal of Notice of Intent to Participate from Andrew Meehan and attached original request to participate.
16. Notice of Intent to Participate from Agnes Warfield-Blanc.

17. Transcript from STRRB Meeting on 1/26/23, File No. 22-24.
18. Appellants Pre-Hearing Statement filed by Anne Ogletree and received on 6/15/23.
19. Appellee's Pre-Hearing Statement filed by Jesse Hammock along with Certificate of Service and Exhibit 1 and 2.
20. Certificate of Service by Heather Williamson, Received July 10, 2023.
21. Certificate of Service by Heather Williamson, Received July 12, 2023.

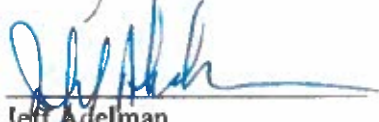
**IT IS THEREFORE**, this 15th day of August, 2023, **RESOLVED** that the decision of the Short Term Rental Review Board is **AFFIRMED**.

  
Frank Cavanaugh, Chairman

  
Louis Dorsey, Jr., Vice-Chairman

  
Patrick Forrest

  
Paul Shortall, Jr.

  
Jeff Adelman