Circuit Court for Anne Arundel County
Case No. C-02-CV-22-001942

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0619

September Term, 2023

In the Matter of Fernando Berra III

Zic,
Kehoe, S.
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: August 15, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant Fernando Berra III owns and lives on property near a fresh pond bog, which is subject to development limitations. Mr. Berra sought a variance pursuant to the Anne Arundel County Code ("AACC") in order to construct a 20-foot by 40-foot swimming pool surrounded by a 40-foot by 60-foot deck, with a 20-foot by 20-foot "prefabricated" cabana structure on the deck during the summer months. Mr. Berra's variance application was subsequently reviewed by various agencies and departments within Anne Arundel County and the application was granted in part and denied in part by the Anne Arundel County Board of Appeals (the "Board"). The Board granted Mr. Berra a variance to construct a reduced-in-size swimming pool of 20 feet by 30 feet and a deck of four feet wide, but all other structures were denied.

Mr. Berra appealed the Board's decision to the Circuit Court for Anne Arundel County, which affirmed the Board's determination. Mr. Berra filed this timely appeal, arguing against the denial and size-reduction, while the appellee, Anne Arundel County, defends the Board's decision.

QUESTIONS PRESENTED

Mr. Berra presents one question for our review, which we have recast and rephrased as follows:[1]

[1] Appellant phrased the question as follows:

> Whether the Board of Appeals erred in denying Mr. Berra's variance application in part, and granting in part, by ordering a reduction in size of Mr. Berra's proposed pool; where such a determination as to size was not supported by evidence; and was arbitrary and capricious. (all-capitalization format omitted).

Whether the Board properly granted in part and denied in part Mr. Berra's application for a variance.

For the following reasons, we vacate and remand back to the Board.

BACKGROUND

Mr. Berra bought the property and single-family home in March 2014. His property is subject to AACC § 3-1-207(b) and (e) because the property is located in a bog protection area.[2] In accordance with the AACC, Mr. Berra submitted a variance application on October 8, 2021 for the construction of a 20-foot by 40-foot swimming pool surrounded by a 40-foot by 60-foot deck, with a 20-foot by 20-foot "prefabricated" cabana structure on the deck during the summer months.

The Anne Arundel County Office of Planning and Zoning ("OPZ") held a hearing on Mr. Berra's variance application and issued a report with findings and recommendations. The OPZ recommended a denial of the application.[3]

[2] The Board determined that Mr. Berra only needs to comply with the "Bog Protection Overlay" regulations, specifically AACC § 3-1-207(b) and (e). The Board determined that AACC § 3-1-207(b)(1) and (b)(2)(i) do not apply to Mr. Berra because those sections are relevant "only to the County's Critical Area Program and not the Bog Protection Overlay."

A bog is defined as a "ecosystem consisting of peatland characterized by sphagnous mat, organic soils, or accumulated peat and soils saturated to the surface throughout the year with minimal fluctuation in water level and contiguous nontidal wetlands." AACC § 18-1-101(22). A bog protection area is defined as "an area shown on the Bog Protection Area Guidance Map, consisting of a bog, contributing streams, a one-hundred foot upland area buffer, the limited activity area, and contributing drainage area." AACC § 18-1-101(223).

[3] The County's brief argues that Mr. Berra's brief incorrectly states that the OPZ "denied" the variance. The County contends that the OPZ can only make recommendations and cannot decide an application. The County's brief states that only

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Both parties state in their briefs—but do not provide a citation to the record—that Mr. Berra had a hearing before the Anne Arundel County Office of Administrative Hearings at some point during this process, and that the variance was denied. Again without citation to the record, both parties agree that Mr. Berra subsequently appealed to the Board.

The Board conducted a two-day hearing on May 18, 2022 and August 11, 2022. On November 2, 2022, the Board issued a Memorandum and Order granting in part and denying in part Mr. Berra's application. The Board granted a variance for the pool at a reduced size of 20 feet by 30 feet with a reduced size deck of four feet wide. The Board denied the other "accessory structures."[4] Regarding Mr. Berra's underlying rationale for the variance request, the Board's "[s]ummary of [e]vidence" indicated that:

> [a]s a result of previous injuries, [Mr. Berra] must swim for exercise as he can no longer run or strength train. Prior to the pandemic, [Mr. Berra] would swim 1-2 miles a day for his health. Since the pandemic, he is unable to utilize public pools and his aches and pains are more frequent. [Mr. Berra]'s family has become very conscious of exposure since his daughter is asthmatic.

The Board's "[f]indings and [c]onclusion" regarding Mr. Berra's underlying rationale addressed only Mr. Berra's desire for low-impact physical activity. The Board stated,

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"the Administrative Hearing Officer" as "neutral adjudicators . . . can grant or deny a variance." While Mr. Berra does not respond or provide clarification, the County's brief contains no citations to the record, case law, or applicable code in order to support its claim. This issue does not have bearing on this Court's decision, so we do not address it.

[4] The Board's order referenced a "patio" in addition to the cabana. Whether a patio in addition to a cabana was requested in the variance application is not clear, however, this issue does not affect this Court's decision.

"[Mr. Berra] provided testimony that the pool would be the minimum necessary to afford the relief he needs to engage in low impact physical activity."

Mr. Berra petitioned for judicial review in the circuit court on November 21, 2022, arguing that the proposed pool should not have been reduced in size. During the May 8, 2023 hearing, the circuit court affirmed the decision of the Board.

Mr. Berra now appeals the Board's decision.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, "this Court 'looks through' the decision of the circuit court, applying the same standards of review to determine whether the agency itself erred." *Matter of Homick*, 256 Md. App. 297, 307 (2022) (internal citation omitted); *see also Matter of Md. Office of People's Counsel*, 486 Md. 408, 436-37 (2024) ("In an appeal from judicial review of an agency decision, we review the agency's decision . . . ."); *Comptroller of Md. v. FC-GEN Operations Investments LLC*, 482 Md. 343, 359 (2022).

This Court limits its review of administrative agency decisions, "such as the Board of Appeals, [] to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determin[ing] if the administrative decision is premised upon an erroneous conclusion of law." *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 611 (2014) (internal quotation marks and citation omitted).

"Under this standard [of substantial evidence], reviewing courts 'consider whether a reasoning mind reasonably could have reached the factual conclusion' reached by the

agency." *Comptroller of Md.*, 482 Md. at 359. Factual conclusions are reviewed "in the light most favorable to the agency." *Id.* (citations omitted) (cleaned up). We "trust[] the agency's resolution of conflicting evidence and inferences drawn therefrom." *Id.* (internal citations omitted).

While we give deference to the factual findings of agencies, we review *de novo* the legal conclusions. *Id.* at 360-64 (explaining that some extent of deference "occasionally" may be afforded to agency decisions "when reviewing errors of law related to" the legal challenge of "whether the agency correctly interpreted an applicable statute or regulation.").

When reviewing agency decisions, we "may not uphold an agency decision on any basis other than the findings or reasons stated by the agency." *Comptroller of the Treasury v. Two Farms, Inc.*, 234 Md. App. 674, 697 (2017) (internal citation omitted).

DISCUSSION

I. THE BOARD'S DECISION IS INSUFFICIENTLY EXPLAINED AND IS REMANDED.

In response to the "importance, fragility, and documented decline in the state of the Chesapeake Bay and its tributaries," the Maryland General Assembly "conferred the 'primary responsibility'" of environmental protections "to each local jurisdiction in Maryland." *Chesapeake Bay Found.*, 439 Md. at 612-13 (internal citation omitted). Thus, "Anne Arundel County promulgated specific standards and detailed criteria for granting variances to properties located" in Anne Arundel County for these environmental areas. *Id.* at 613.

The AACC outlines the required process for granting variances to develop on the relevant properties. AACC § 3-1-207. After the County Administrative Hearing Officer hears the variance request, the decision can be appealed to the Board. *Becker v. Anne Arundel County*, 174 Md. App. 114, 119 (2007). The Board is charged with deciding whether the variance applicant satisfied the criteria set forth in AACC § 3-1-207, and the Board can only grant the variance if all criteria are satisfied. *Chesapeake Bay Found.*, 439 Md. at 613-14. The variance applicant bears the burden of proof and persuasion that each criterion is met. *Id.* at 614.

Here, Mr. Berra's property is subject to the bog protection program governed by AACC § 3-1-207(b). Beyond the general criteria in section (b), section (e) specifies additional findings the Board must make before granting a variance.[5] This appeal

[5] AACC § 3-1-207(e) states:

> (e) Required findings. A variance may not be granted under subsection (a) or (b) unless the Board finds that:
>
> (1) the variance is the minimum variance necessary to afford relief;
>
> (2) the granting of the variance will not:
>
> (i) alter the essential character of the neighborhood or district in which the lot is located;
>
> (ii) substantially impair the appropriate use or development of adjacent property;
>
> (iii) reduce forest cover in the limited and resource conservation areas of the critical area;
>
> (iv) be contrary to acceptable clearing and replanting practices required for development in the critical area or bog protection area; or

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specifically concerns AACC § 3-1-207(e)(1), which requires the variance to be the "minimum variance necessary to afford relief."

In determining "whether the variances [are] the minimum necessary," the Board must consider "the context of the purpose of the proposed construction" because "appellants are entitled to build some type of reasonable structure." *Becker*, 174 Md. App. at 144. When determining a variance application, "the Board must provide some reasonable justification" for any of its decisions. *Chesapeake Bay Found.*, 439 Md. at 631-32; *see also Fowler v. Motor Vehicle Admin.*, 394 Md. 331, 353 (2006) ("Administrative law judges must fully explain their decisions so that this Court and others may perform the function of review accurately and effectively.").

A. Parties' Contentions

Mr. Berra argues that the Board's decision was "arbitrary and capricious" because the findings lacked explanation and were not supported by the evidence. Mr. Berra contends that the Board's lack of explanation violated legal precedent requiring that an agency "cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." Mr. Berra emphasizes the Board's acknowledgement of insufficient evidence to oppose the variance being the required minimum necessary, yet paradoxically imposing a reduction in pool size. Mr. Berra also argues that the County did not offer any evidence "as to what, if anything, would have been the minim[um]

(v) be detrimental to the public welfare.

necessary," and did not provide any "substantial evidence" to support reducing the size of the proposed pool.[6]

The County responds by arguing that it was Mr. Berra's burden of proof, not the County's, to prove that the requested 20-foot by 40-foot pool was the minimum size necessary to afford relief. The County contends that Mr. Berra failed to meet his burden of proof and the Board instead correctly determined that a 20-foot by 30-foot pool was the minimum necessary to afford relief.[7] The County disagrees with Mr. Berra about the legal standard for reviewing the Board's decision, arguing that the standard of review is legal error and substantial evidence, rather than arbitrary and capricious as Mr. Berra contends.

[6] Mr. Berra's brief often focuses solely on the pool size reduction, omitting argument for the other structures; however, his attorney clarified during oral arguments on June 10, 2024 that the brief's arguments apply to all structures.

[7] The County additionally argues that Mr. Berra's testimony before the Board adjusted Mr. Berra's variance application. Mr. Berra's variance application requested a pool of 20 feet by 40 feet, however, when asked by a Board member during the hearing before the Board whether the variance requested is the minimum size necessary, Mr. Berra responded that he would "love" a "larger" pool and "would love to [have] a 25[-]foot[-]long pool so I can do less laps, just like I used to swim." The County argues that this testimony constitutes Mr. Berra requesting a 25-foot pool, and therefore, the Board surpassed Mr. Berra's request by granting a variance of 30 feet. Mr. Berra's brief argues that this testimony is "a slip of the tongue," and that Mr. Berra meant 25 yards instead of 25 feet. During the testimony that same day, Mr. Berra referred to the pool as 20 feet by 40 feet, the measurements requested in the variance application.

The Board's Memorandum characterizes Mr. Berra's request as a 20-foot by 40-foot pool. Per the standard of review, we look only to the "basis" that the agency "stated." *Comptroller of the Treasury*, 235 Md. App. at 697. Accordingly, we analyze this opinion guided by the Board and the variance application itself: the requested pool measures 20 feet by 40 feet.

B. Analysis

We will preliminarily resolve the parties' competing arguments regarding the standard of review and burden of proof before analyzing the Board's determination of the minimum variance necessary to provide relief.

1. Standard of Review and Burden of Proof

As discussed above, the standard of review is legal error and substantial evidence. *Chesapeake Bay Found.*, 439 Md. at 611 (stating that "[o]ur role in reviewing the final decision of an administrative agency, such as the Board of Appeals, is 'limited to'" substantial evidence and error of law (quoting *Critical Area Comm'n for Chesapeake & Atlantic Coastal Bays v. Moreland, LLC*, 418 Md. 111, 122-23 (2011)); *Crawford v. County Council of Prince George's County*, 482 Md. 680, 693 n.16 (2023) (explaining that questions of law are reviewed *de novo*, questions of fact are reviewed under the substantial evidence standard, and agency action on "'matters committed to the agency's discretion'" that include "actions 'specific to its mandate and expertise'" are reviewed under the arbitrary and capricious standard (internal citations omitted)). We review the Board's opinion following this standard.

When requesting a variance, the AACC makes clear that the burden of proof is on the applicant—not the Board and not the opposing party. AACC § 18-16-301(c) ("The applicant has the burden of proof, including the burden of going forward with the production of evidence and the burden of persuasion[.]"); *Becker*, 174 Md. App. at 127 ("We specifically reject any argument that this Board should determine the minimum variance necessary to afford relief to this or any other applicant. It is not the burden of

this Board to determine what variance would be the minimum necessary to afford relief to an applicant. The State law places this burden of proof and persuasion firmly on the shoulders of an applicant for a variance."). Accordingly, Mr. Berra's argument that the County did not bring forth evidence regarding the minimum necessary to provide relief does not prevail.

2. The Board's Determination

An administrative body may not "merely state[] conclusions, without pointing to the evidentiary bases for those conclusions." *Chesapeake Bay Found.*, 439 Md. at 628 (quoting *Moreland*, 418 Md. at 134); *see also Chesapeake Bay Found., Inc. v. Creg Westport I, LLC*, 481 Md. 325, 333 n.15 (2022) ("Where an administrative agency is required to make findings of fact, our case law requires that the agency do more than simply recite the criteria under the statute." (citations omitted)). Without an evidentiary basis, the Board's findings are "not amendable to meaningful judicial review" and "warrant" remand. *Chesapeake Bay Found.*, 439 Md. at 628 (quoting *Moreland*, 418 Md. at 134). We are "strict in requiring concrete, detailed fact findings." *Id.* at 629. The Board's factual findings must be "'meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions.'" *Id.* (quoting *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 553 (1999)).

References by the Board "to evidence in the record in support of its findings" are sufficient. *Id.* at 629 (quoting *Moreland*, 418 Md. at 134).

Here, the Board's full statement regarding the minimum variance needed is as follows:

> Next, the Petitioner has the burden of proving that "the variance is the minimum variance necessary to afford relief." § 3-1-207(e)(1). The Petitioner is proposing a pool with dimensions of 20 feet by 40 feet, with decking approximately 40 feet by 60 feet around the pool, and a 20-foot by 20-foot cabana. The Petitioner provided testimony that the pool would be the minimum necessary to afford the relief he needs to engage in low impact physical activity. Furthermore, the addition of the pool will provide numerous other stormwater management devices in the area which is a net benefit to the environment. *Scant testimony was provided to the contrary that the variance itself was not the minimum necessary.* Most of the County's opposition centers on labeling this property Critical Area and applying Critical Area standards despite the Code handling the bog protection area differently. *However, we do not believe that the size of the requested variance is the minimum necessary to afford relief.* If the plan was reduced to a swimming pool no larger than 20 feet by 30 feet with a 4-foot deck with quarter inch gaps between the decking surrounding the pool and the elimination of the patio and cabana, we believe it would be the minimum necessary to afford relief.

(emphasis added).

Becker is instructive here. *See Chesapeake Bay Found.*, 439 Md. at 628 ("This Court has not addressed the substance of the minimum necessary criterion with great particularity, but it was discussed by the [Appellate Court of Maryland] in *Becker*[.]"). In *Becker*, we held that "[t]here was no finding by the Board as to appellants' reasonable needs, or reference to evidence, and why the proposed structure was not the minimum necessary to meet those needs.[] On remand, the Board must provide an explanation." 174 Md. App. at 144. We stated that the Board in *Becker* "failed to articulate any evidence supporting its adverse findings." *Moreland*, 418 Md. at 128. While the Board does not have to "describe the evidentiary foundation for each of its findings,

immediately following each finding, . . . there has to be articulated evidence in support of a conclusory finding." *Id.* at 128-29.

Here, the Board made findings that were not adequately supported by evidence. First, the Board stated that there was "scant testimony . . . to the contrary that the variance itself was not the minimum necessary," yet the Board proceeded to find that the requested variance is not the minimum necessary. Just as in *Becker*, here, the Board did not make any "credibility findings adverse to appellant[]" regarding the minimum variance necessary, but then ruled against the applicant. 174 Md. App. at 144 n.13. The Board then, without reference to any evidence to support this ruling, decided a different figure entirely—20 feet by 30 feet for the pool and four feet for the deck—is the minimum necessary. While the Board's order denied the "accessory structures," the opinion failed to mention any accessory structures. Because the Board's opinion lacked the required evidence to support its ruling and order regarding the minimum necessary pool, deck, cabana, and/or patio, we vacate and remand to the Board.

The Board has an obligation to explain its decision whether it grants or denies the requested variance.[8] *Becker*, 174 Md. App. at 146.

[8] As previously indicated, the Board determined that Mr. Berra requested the pool for swimming laps as a way to engage in low-impact physical activity. While we are mindful of our role in this case as an appellate panel and that we are not fact finders or expert witnesses, based on the life experiences of the members of this panel, it is hard for us to imagine that a pool of 20 feet by 30 feet is adequate for swimming laps.

CONCLUSION

We hold that the Board did not adequately substantiate its decision denying in part and granting in part the variance application. Accordingly, we remand this case to the Board to explain the decision.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED; CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO REMAND THE CASE TO THE COUNTY BOARD OF APPEALS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.