Circuit Court for Worcester County
Case No. C-23-CV-22-000134

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 729

September Term, 2023

ANN L. ZANG, ET AL.

v.

STEPHEN PEROUTKA, ET. AL.

Arthur,
Leahy,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: December 31, 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).

The Town of Ocean City Board of Zoning Appeals ("Board") granted an application for variances from two zoning regulations, and reasonable accommodations under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165, to allow for the construction of an elevator shaft on the side elevation of a privately-owned oceanfront townhouse. The Board voted unanimously to grant the requested variances as a reasonable and necessary accommodation to a qualified individual with a disability.

Ann L. Zang and Matthew H. Lubart ("Appellants"), who own a condominium unit on neighboring property, filed a petition for judicial review of the Board's decision. The Circuit Court for Worcester County affirmed. Appellants timely noted this appeal and present three questions for our review, which we have rephrased to reflect the substantive arguments presented in their brief:[1]

1. Was there substantial evidence in the record to support the Board's determination that requested accommodation was reasonable and necessary?

2. Did the Circuit Court apply the incorrect standard of law in reviewing the Board's decision?

[1] Appellants present the following questions in their brief:

1. Did the Circuit Court incorrectly determine that the variance was reasonable for failure to analyze the requested accommodation under the three prong test as set forth by Maryland courts and legal precedent?
2. Did the Circuit Court incorrectly hold that [the Peroutkas'] request for a variance to build an elevator does not "fundamentally alter the service, program or activity in question and therefore it is automatically a reasonable accommodation that should be granted under the ADA [Americans with Disabilities Act]?
3. Did the Circuit Court err in finding that appellant Lubart was not denied due process?

3. Did the Board deny Mr. Lubart due process of law by not allowing him to cross-examine a witness?

For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

Stephen and Deborah Peroutka[2] own a four-story oceanfront townhouse ("Townhouse") located on Lot 3A, Block 52 of the Oceanbay City Plat, which is located on the west side of Atlantic Avenue between 84th and 85th Street, and has an address of 8405A Atlantic Avenue. At that location, Atlantic Avenue is a ten-foot-wide alley.

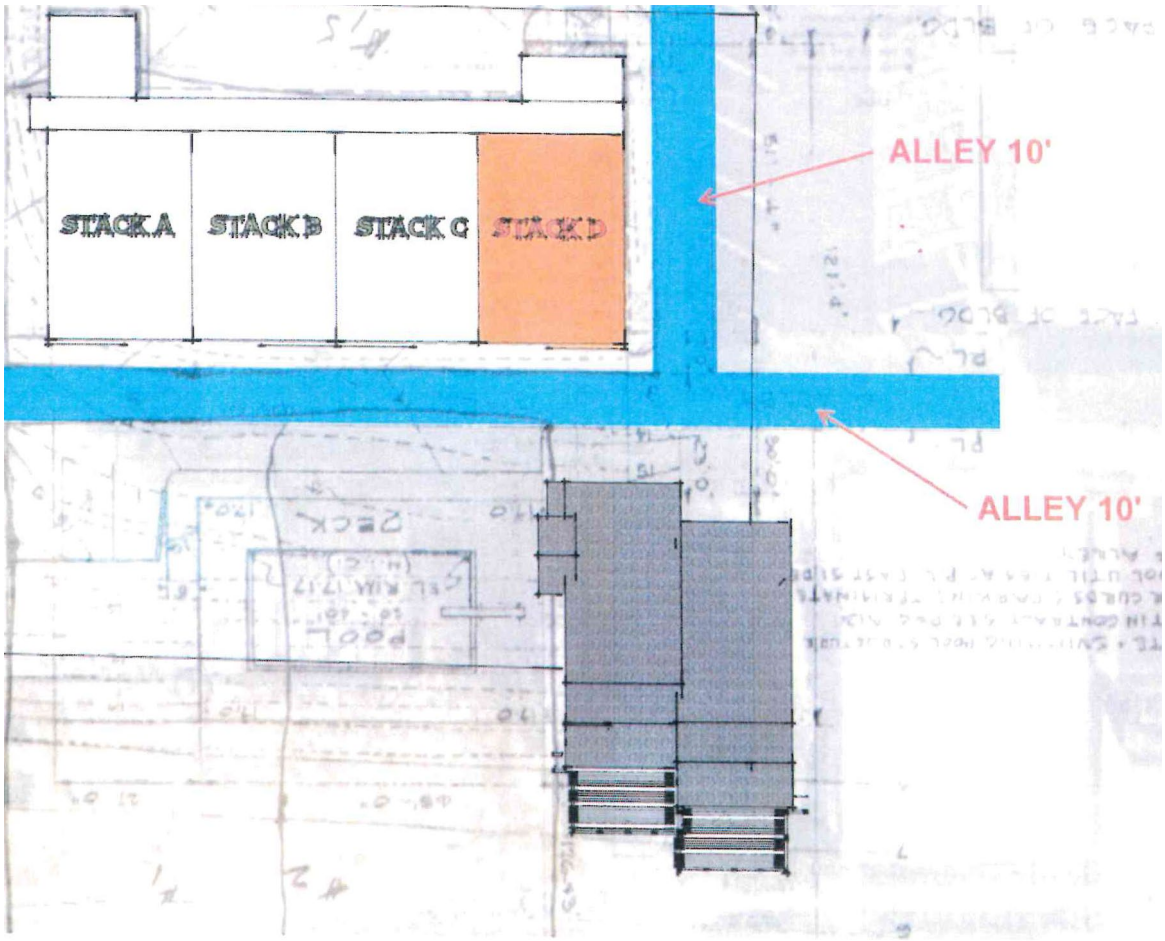
The Peroutkas bought the Townhouse in 2010 or 2011, as a second home. It is used exclusively by the Peroutkas and members of their family.

Mr. Peroutka has been diagnosed with various medical conditions that affect his ability to walk and climb stairs.[3] To accommodate his disability, the Peroutkas wish to construct a five-foot wide elevator shaft on the side elevation of the Townhouse.

Appellants are the owners of a condominium unit ("Condo") on the second floor of "Stack D" of the Surfside 84 Condominiums, which is located across the alley from the Townhouse. The record includes a diagram that illustrates the location of the Townhouse relative to the Condo (the diagram shows the proposed location of the five-foot-wide elevator shaft in the side yard setback):

[2] The Board and the Peroutkas filed a joint brief. All references to "Appellees" from this point forward includes both the Peroutkas and the Board.

[3] Because Appellants do not dispute that Mr. Peroutka is a "qualified disabled individual" within the meaning of the ADA, it is not necessary to include more specific information about his medical conditions.



The Townhouse is half of a duplex residential dwelling. The adjoining home (on the right in the above diagram) is owned by Mark and Maureen Chandler, who are not parties to this appeal. Located on the other side of the Townhouse is an oceanfront pool owned by Surfside 84.

The Townhouse was built in 1990, with a side yard setback of five feet. Current local regulations require a ten-foot side yard setback for four- or five-story buildings.

In September 2021, the Peroutkas filed the underlying application for a variance from § 110-396 of the Code of the Town of Ocean City ("Code"), which requires a

minimum side yard setback of ten feet.[4] In addition, the Peroutkas applied for a variance from § 30-553(8)(h)(iii) of the Code, which requires a two-foot, six-inch landscape area at adjacent properties and public alleyways. The Surfside 84 Condominium Association ("Surfside 84") objected to the variance on grounds that it would interfere with the view of the ocean from the condominium units located closest to the Townhouse. Following a public hearing on September 9, 2021, the Board denied the variances. After the required minimum four-month waiting period to reapply for the variances had expired,[5] the Peroutkas filed an application for the same two variances as a request for accommodation under the ADA.

The Board held a public hearing on the Peroutka's application on May 12, 2022. Surfside 84 was represented by counsel. Mr. Lubart participated in the hearing in his individual capacity as a unit owner.

Kay Gordy, the Zoning Administrator for the Town of Ocean City, submitted her department's report for the Board's consideration, which explained the need for a variance as follows:

> In order to install the four-story elevator shaft on the south side of the existing duplex structure known as 8405A, the 5' wide shaft will encroach into the southern side yard setback, resulting in a 0' setback instead of 10' as would be required by today's code for a 4-story

[4] The Code is available at: https://library.municode.com/md/ocean_city/codes/code_of_ordinances?nodeId=PTIICOOR_CH110ZO_ARTIVDI_DIV6GEREDI_S110-396BURE (last visited June 28, 2024).

[5] The Code provides: "Whenever an application for special exception or variance has been denied by the board, such application, or one substantially similar, shall not be reconsidered sooner than four months after the previous denial." Code § 110-97(b).

> structure. The structure was built in 1990 with a 5' setback, not counting the ground level parking as the [first] story. The elevator machine room next to the alley will be constructed as [one] story only.
>
> The proposed 0' setback would also cause removal of any existing landscape or not provide the 2'6" necessary for perimeter landscaping at the adjacent property line[.]

The report drew the Board's attention to § 110-905(a) of the Code, which provides that "[r]etrofitted stairs, landings, and ramps required to meet Americans with Disabilities Act (ADA) regulations for ingress and egress within existing buildings," are allowed in front, side, and rear setbacks, provided that such structures are "designed to minimize adverse conditions within the required setbacks." The report did not include a recommendation for any particular action on the variance application but asked only that the Board "weigh the evidence and craft the decision including findings of fact with advice from the Board['s] attorney."

Mr. Peroutka testified about his medical conditions and the resulting effects on his ability to walk and climb stairs. He stated that his symptoms became "exponentially worse" in the year or two prior to the hearing. In the eight months prior to the hearing, he had used stairs only about five times. Three months before the hearing, he fell and hit his head while climbing a set of three steps in the garage of his primary residence. He experienced a loss of blood and required emergency treatment. He told the Board that "[i]t would be a major thing for [him] to go up and down the stairs[,]" and that, if the variances were denied, he did not think he would be able to use the Townhouse.

Letters from Mr. Peroutka's medical providers were submitted for the Board's consideration. His internist explained that Mr. Peroutka "had to be non[-]weightbearing

on multiple occasions in the past and uses a rolling scooter when he is [non-weightbearing]. He will likely need the same in the future and of course cannot use the stairs with a scooter." According to his physical therapist, Mr. Peroutka lacked neuromuscular control of his right leg, and was "an unsafe ambulator, especially with stair negotiation." He was advised to "avoid excessive stair usage and to utilize an elevator . . . where it is available, in order to avoid further falls and injury." His podiatrist wrote that Mr. Peroutka had "difficulty ambulating" and that, "if he is forced to use the stairs in his home[,] he could fall[,] leading to morbidity."

The Peroutkas introduced testimony from Steven Cirile, an architectural consultant who analyzed the Townhouse to determine the potential location of the elevator and assess any resulting interference with the view from Surfside 84 units. According to Mr. Cirile's report, it was "not feasible" to construct the elevator on the east/oceanfront side of the Property as it would entail the "added cost for demolition of existing structural decks [and] removal of bedroom windows." He noted that an elevator in that location would open into the bedrooms on the third and fourth floor on that side, rendering them "unusable for any actual bedroom furniture placement as [the bedrooms] would become a hallway to access the elevator." He testified that such a placement would "abut up against" the oceanfront balcony of the neighboring or adjoining townhouse, "severely impacting" their view at every level.

Mr. Cirile testified that constructing the elevator on the west/alley side of the Townhouse would block access to the only available off-street parking. He noted that, even if a variance to off-street parking requirements was granted, which he doubted, the

location would not "work within the floor plan." He explained that the elevator would either open "at intermediate landings" of the "scissor" stairs within the Townhouse, which would "defeat[] the purpose of access," or it would require relocating the kitchen.

According to Mr. Cirile's analysis, "the only practical placement" for the elevator was on the side yard of the Property because it would "allow[] the user to traverse the structure at all levels unassisted and at a point of access at each level that makes sense from a floor plan perspective (at the landing areas of [the] staircase)." He added that such a placement would allow the user to access the elevator from the existing, weather-protected entry vestibule.

Mr. Cirile performed a computerized analysis of the impact of the proposed elevator location on the view of the ocean from the Surfside 84 condominiums. According to Mr. Cirile's analysis, the primary bedroom of the Condo would retain a clear view of the ocean. The view from the balcony of the Condo, which was already partially obscured by the Townhouse, would not be completely blocked. Mr. Cirile submitted to the Board a three-dimensional computerized model that illustrated the view from appellants' Condo after construction of the elevator.

Mr. Cirile was cross-examined by counsel for Surfside 84. Counsel asked whether the elevator could be constructed within the existing garage. Mr. Cirile responded that it would be "virtually impossible" because of the structural framework of the Townhouse. He added that there was "no reasonable place" to locate an elevator inside the Townhouse without "completely destroy[ing] the floor plan." Counsel asked Mr. Cirile if the kitchen could be relocated so that the elevator could be constructed on the west/alley side of the

house. Mr. Cirile restated that placing the elevator in that location would eliminate all parking, and that it would "destroy the integrity of the floor [plan]."

After counsel for Surfside 84 finished questioning Mr. Cirile, Mr. Lubart asked for an opportunity to conduct his own cross-examination. Counsel for the Board advised Mr. Lubart that he would have an opportunity to make comments later in the hearing, but that he was not entitled to cross-examination.

Joseph Metrecic, a contractor who had previously done "extensive" remodeling in the Peroutka's unit and in the adjoining unit, also testified that the only place for the elevator shaft was in the side yard setback. He stated, as had Mr. Cirile, that putting the elevator on the east/oceanfront side would require extensive structural remodeling and would render the bedrooms on that side of the house useless for their intended purpose. He added that, in his experience, it would be "almost impossible" to "stage" a construction area on the oceanfront side due to rules and regulations of state and federal agencies. Mr. Metrecic testified that construction on the west/alley side would not only eliminate all parking and require relocation of the kitchen, but would also require modifying the entire roof line to protect from water damage.

After the Peroutkas had presented their case, counsel for Surfside 84 introduced testimony from Terry Riley, a real estate broker in Ocean City. According to Mr. Riley, construction of the elevator in the side yard setback would affect the view of up to 12 of the 36 units in the building. He stated that, as a consequence, the affected units would lose value, which would, in turn, negatively impact the value of rest of the units. In Mr. Riley's opinion, the value of all 36 units would decrease by a minimum of $30,000 to

$50,000 per unit. He arrived at that figure by comparing recent sales of one Surfside 84 unit with an unimpaired view against another Surfside 84 unit with a "slightly impaired" view. Mr. Riley added that the addition of the elevator would increase the value of the Townhouse by approximately $100,000.

Mr. Lubart addressed the Board in opposition to the requested variances. He asserted that, if the elevator shaft was constructed as proposed, his Condo would no longer have a view of the ocean, and that all the units in his building would lose value. He argued that it would be "offensive" to the zoning laws to allow a zero-foot setback, and that the Board should consider "less intrusive alternatives," which, he posited, was to locate the elevator on the east/oceanfront side of the Townhouse.

Board's Decision

The Board voted unanimously to grant the requested variances as a reasonable and necessary accommodation to a qualified individual with a disability. The Board found that Mr. Peroutka was entitled to protection under the ADA, and that the requested variances were necessary to allow him continued use of his property. The Board further found that the side yard was the only reasonable location for the construction of the elevator.

The Board rejected Mr. Riley's testimony regarding the diminution of value to the Surfside 84 units that would result if the elevator was constructed as proposed, stating that, based on the Board's knowledge and experience, property value was not based solely on the view from the balcony, and that Mr. Riley's opinion regarding loss of value did not take into account other factors, such as the proximity to the beach and the

condition of the property. The Board found that the partial loss of ocean view from the four "D Stack" condominium units, including Appellants' condo, was a reasonable and necessary accommodation, and that the requested modifications to the zoning code would not fundamentally alter the plan for development and regulation of Ocean City.

Proceedings in the Circuit Court

Appellants filed a timely petition for judicial review of the Board's decision. The Peroutkas participated in the action, as did the Board. The parties filed memoranda of law in support of their positions. The court heard oral argument on the petition on February 15, 2023, after which it took the matter under advisement. On May 12, 2023, the court issued a written order denying the petition to reverse the Board's decision. This timely appeal followed.

STANDARD OF REVIEW

In reviewing a circuit court decision on petition for judicial review, "this Court evaluates the agency's decision using the same standards used by the circuit court." *City of Hyattsville v. Prince George's Cnty. Council*, 254 Md. App. 1, 23 (2022). When reviewing the agency's factual findings, the "substantial evidence" standard applies, "by which the court defers to the facts found and the inferences drawn by the agency when the record supports those findings and inferences." *Comptroller v. FC-GEN Operations Invs. LLC*, 482 Md. 343, 359 (2022). Under this standard, we "consider whether a reasoning mind reasonably could have reached the [agency's] factual conclusion." *Id.* (quoting *Frey v. Comptroller of Treasury*, 422 Md. 111, 137 (2011)).

We have observed that the "scope of judicial review of administrative fact-finding is a narrow and highly deferential one." *City of Hyattsville,* 254 Md. App. at 23 (quoting *Trinity Assembly of God of Baltimore City v. People's Counsel for Baltimore Cnty.*, 407 Md. 53, 78 (2008)). "A conclusion by a local zoning board satisfies the substantial evidence test if a reasonable mind might accept as adequate the evidence supporting it." *Id.* (quoting *Trinity*, 407 Md. App. at 78). "If substantial evidence supports the conclusion of the zoning agency, the courts may not disturb that conclusion, 'even if substantial evidence to the contrary exists.'" *Id.* (quoting *Cremins v. Cnty. Comm'rs of Washington Cnty.*, 164 Md. App. 426, 438 (2005)).

On the other hand, we review the agency's conclusions of law "*de novo* for correctness." *FC-GEN*, 482 Md. at 360 (quoting *Schwartz v. Md. Dep't of Nat. Res.*, 385 Md. 534, 554 (2005)). That said, "we may apply a degree of deference to an administrative agency's legal conclusion . . . premised upon an interpretation of the statutes that the agency administers." *Id.* at 362 (citations omitted). Further, when determining how much weight to accord the agency's statutory interpretation, we must "keep[ ] in mind that it is 'always within [our] prerogative to determine whether an agency's conclusions of law are correct.'" *Id.* (quoting *Md. Dep't of the Env't v. Cnty. Comm'rs of Carroll Cnty.*, 465 Md. 169, 203 (2019)).

DISCUSSION

I.

REASONABLENESS AND NECESSITY OF ACCOMODATIONS

A. Parties' Contentions

Appellants do not dispute that Mr. Peroutka fulfills the statutory criteria for protection under the ADA. They contend, however, that the Board erred in determining that the requested variances were (1) reasonable and (2) necessary. Appellees assert that there was substantial evidence before the Board to support its conclusions. The parties' contentions are discussed in greater detail below.

B. Legal Framework

"Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *Id.* at 675 (footnotes omitted).

This appeal concerns a request for accommodation under Title II of the ADA, which provides, in pertinent part, that "[n]o qualified individual with a disability[6] shall,

[6] The ADA defines "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility

by reason of such disability, be excluded from participation or be denied the benefit of the services, programs[,] or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. § 12132. A "public entity" includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]" 42 U.S.C § 12131(1). Although the ADA does not explicitly define "services, programs, or activities," that language has been construed to include municipal zoning decisions. *See, e.g., In re Gendell*, 262 Md. App. 557, 574 (2024); *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 838-39 (7th Cir. 2001); *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730-32 (9th Cir. 1999).

"Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility." *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (citing 42 U.S.C. § 12132(2)). Pursuant to regulations promulgated under the ADA, a public entity must make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i).

> requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Whether a requested accommodation is reasonable is "highly fact-specific, and determined on a case-by-case basis by balancing the cost to the [public entity] and the benefit to the [disabled individual]." *Dadian*, 269 F.3d at 838 (citation omitted); *see also In re Gendell*, 262 Md. App. at 572.

"Whether a requested accommodation is necessary requires a 'showing that the desired accommodation will affirmatively enhance a disabled [individual's] quality of life by ameliorating the effects of the disability." *Dadian*, 269 F.3d at 838 (quoting *Bronk v. Ineichen*, 54 F.3d 425, 429 (1995)); *see also Wis. Corr. Servs. v. City of Milwaukee*, 173 F. Supp. 2d 842, 855 (E.D. Wisc. 2001) ("'Necessary' within the context of the ADA means capable of providing direct amelioration of a problem facing qualified individuals with disabilities.").

C. Analysis

i. Reasonableness of Accommodation

In arguing that the Board erred in finding the requested variances to be a reasonable accommodation, Appellants rely on *Bryant Woods Inn, Inc. v. Howard Cnty.*, 124 F.3d 597 (4th Cir. 1997), which involved an action for failure to make a reasonable accommodation in zoning laws, in violation of the Fair Housing Act ("FHA"). Controlling precedent holds that, because the FHA and ADA "offer the same guarantee that a covered entity . . . must provide reasonable accommodations in order to make the entity's benefits and programs accessible to people with disabilities," the question of

what constitutes a reasonable accommodation is subject to the same analysis.[7] *Logan v. Matveevskii*, 57 F.Supp.3d 234, 253 (S.D.N.Y. 2014) (and cases cited therein).

In *Bryant Woods*, the United States Court of Appeals for the Fourth Circuit mentioned various factors that can be considered in determining the reasonableness of a requested accommodation:

> a court may consider as factors the extent to which the accommodation would undermine the legitimate purposes and effects of existing zoning regulations and the benefits that the accommodation would provide to the handicapped. It may also consider whether alternatives exist to accomplish the benefits more efficiently. And in measuring the effects of an accommodation, the court may look not only to its functional and administrative aspects, but also to its costs.

Bryant Woods, 124 F.3d at 604. Appellants argue that the Board erred in concluding that the variance to the side yard setback was a reasonable accommodation, because, according to appellants, (1) the variance undermines the purposes of the Town of Ocean City zoning ordinance; (2) other alternatives could accommodate the disability without the need for a variance; and (3) construction of the elevator as proposed "would result in great cost to surrounding property owners."[8]

[7] The FHA "makes it unlawful, *inter alia*, to discriminate in the sale or rental of housing or otherwise to make housing unavailable to a buyer or renter because of that buyer's or renter's handicap or the handicap of certain persons associated with the buyer or renter." *Bryant Woods Inn, Inc. v. Howard Cnty.*, 124 F.3d 597, 602–03 (4th Cir. 1997) (citing 42 U.S.C. § 3604(f)). The definition of "discrimination" under the FHA includes: "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Id.* at 603 (quoting 42 U.S.C. § 3604(f)(3)(B)).

[8] Appellants also maintain that Board erred in granting the setback and landscaping variances because, according to appellants, the elevator cannot be constructed without a variance to other provisions of the Code. This issue is not properly

Undermining of Zoning Regulations

Appellants contend that the variance to the side yard setback is not reasonable because it undermines the purposes of the zoning regulations, which, among other things, are "to provide adequate light and air; to prevent the overcrowding of land; . . . [and] to conserve the value of buildings and other structures[.]" Code § 110-7. Appellees respond that the Town Code of Ocean City permits the Board to grant variances, and that the application process is a common zoning tool used across the country to facilitate such relief.

We are not persuaded that the Board erred in determining that the variances were reasonable. The Code expressly provides for the waiver of zoning regulations in certain circumstances, "so that carrying out the strict letter of the terms of [the zoning regulations] may not occasion unnecessary hardship or practical difficulty[.]" Code § 110-95. The Code also recognizes that "[p]eople with special needs should be able to enjoy public and private places[,] [t]herefore it is important to provide access" according to the ADA. Code § 110-865.18. Notably, the Code specifically allows for

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before this Court in the context of this appeal. *See Concerned Citizens of Cloverly v. Montgomery Cnty. Planning Bd.*, 254 Md. App. 575, 601 (2022) ("a reviewing court 'may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.'") (quoting *Mesbahi v. Maryland State Bd. of Physicians*, 201 Md. App. 315, 333 (2011) (further citation omitted).

Appellants also assert that the Townhouse was built in violation of the Code. However, at the public hearing on the variance application, the zoning administrator testified that when the Townhouse was built, the ground level (which has no living space but only a garage, bathroom/laundry room, and access to an interior staircase to the upper floors) was not considered a "floor" of the house. Thus, a five-foot setback was allowed at the time the Townhouse was built.

retrofitted stairs, landings, and ramps to be built in the front, rear and side yard setbacks, for purposes of handicapped accessibility. Code § 110-905. Furthermore, we must give appropriate deference to the Board's express finding that granting variances to allow the construction of an elevator in the side yard setback would not fundamentally alter the plan for development and regulation of the Town of Ocean City. *See Concerned Citizens of Cloverly v. Montgomery Cnty. Planning Bd*., 254 Md. App. 575, 598 (2022) ("[I]n construing a law that the agency has been charged to administer, the reviewing court is to give careful consideration to the agency's interpretation."); *Najafi v. Motor Vehicle Admin*., 418 Md. 164, 174 (2011) ("[T]he expertise of the agency in its own field should be respected.") Therefore, we decline to hold that the Board's decision granting a variance to Appellees was contrary to public policy or violated the Town of Ocean City's zoning regulations.

Alternative Accommodation

Appellants maintain the Board failed to consider "less intrusive" alternatives to an elevator that would help Mr. Peroutka access his home. To the contrary, Appellees insist that the Board was not required to consider less intrusive means, arguing that *Bryant Woods*, the case cited by Appellants, "uses *directory*, rather than *mandatory* terminology." *See* 124 F.3d at 604 ("It may also consider whether alternatives exist to accomplish the benefits more efficiently."). Appellees also point out that Appellants failed to propose any alternatives in the record before the Board.

We conclude that there was substantial evidence before the Board demonstrating that, because of Mr. Peroutka's medical conditions, he was unable to safely navigate

stairs, and that he had been and would continue to be dependent on a scooter for mobility for extended periods of time. Appellants suggest that the Board should have considered the west side of the Townhouse as an alternative location for the elevator. However, the record reflects that the Board did carefully consider the testimony by Mr. Cirile and Mr. Metrecic concerning alternative placements for the elevator shaft and found that these alternatives were unreasonable. Appellants do not explain what alternatives to an elevator the Board might have considered. Therefore, we decline to overturn the Board's decision based on a failure to consider less intrusive alternatives.

Costs Associated with Accommodation

Appellants assert that the Board erred in finding that the requested variances were reasonable because there was no evidence to rebut Mr. Riley's opinion that it would result in a loss of value to all 36 of the Surfside 84 units. We disagree. "[T]he assessment of the credibility of the witnesses is a matter entrusted to the Board." *Cnty. Comm'rs of Carroll Cnty. v. Uhler*, 78 Md. App. 140, 146 (1989). "[T]he mere fact of presentation of testimony to the Board does not entitle that testimony to be credited and the Board's determination not to credit it, in and of itself, provides substantial evidence for the Board's conclusion." *Id.* at 147.

Here, the Board expressly discounted Mr. Riley's opinion based on the Board's knowledge of factors that were not considered in assessing local property values. To hold that the Board erred in declining to accept Mr. Riley's testimony would "constitute usurpation of the Board's function and, necessarily, substitution of our judgment,

including assessment of credibility, for that of the Board." *Id.* at 146-47. We decline to do so.

ii. Necessity of Accommodation

Appellants contend that the Board erred in finding that the variances were a necessary accommodation because there was no evidence that, without the requested variances, Mr. Peroutka would be denied the use and enjoyment of the Property. Appellants further maintain that the Board erred in determining that the requested accommodations are necessary because the variances provide Mr. Peroutka with a "greater opportunity than non-handicapped" property owners, in that it allows him to build into the setback and increases the value of the Townhouse. Appellants cite *Bryant Woods*, which states that "[t]he FHA does not require accommodations that increase a benefit to a handicapped person above that provided to a nonhandicapped person with respect to matters unrelated to the handicap." 124 F.3d at 604. In response, Appellees point to evidence before the Board, including Mr. Peroutka's testimony and doctors' reports, establishing that Mr. Peroutka was unable to traverse stairs and needed the variances to compensate for his disability.

As we have already concluded, there was substantial evidence before the Board to support a conclusion that Mr. Peroutka's disability prevented him from safely using the stairs, and that, without an elevator, he would be unable to access the living floors of the Townhouse. In addition, it is evident that any benefit afforded by the grant of the variances to allow for the construction of an elevator is related to Mr. Peroutka's

disability. Therefore, the Board correctly concluded that the variances were a necessary accommodation.

II.

STANDARD APPLIED BY CIRCUIT COURT

Appellants also contend that the circuit court did not apply the correct legal standard in reviewing the Board's decision.[9] Specifically, Appellants argue that the circuit court solely considered whether the requested accommodation requires "a fundamental alteration in the nature of a program or imposes undue administrative burdens [on the defendant]," (quoting *Trovato v. City of Manchester*, 992 F. Supp. 493, 497 (D.N.H. 1997)), without considering whether the requested accommodation is reasonable.

At the outset, we observe that Appellants misread the circuit court's opinion. Following the passage from the circuit court's opinion to which Appellants cite, the opinion addresses the reasonableness of the accommodation in detail. Over several pages, the court identifies the testimony by the architectural consultant and the construction contractor on which the Board relied to conclude that "placing the elevator shaft of the south side of the Peroutkas' unit was the only reasonable location due to several factors, including the availability of parking and the interior layout of the unit." Regardless, the question before this Court "is not whether the circuit court erred, but rather whether the administrative agency erred." *Comptroller of the Treasury v. Clise Coal, Inc*., 173 Md. App. 689, 697 (2007) (citation omitted); *see also Allmond v. Dep't of*

[9] Appellants do not claim that the Board also misapplied the law.

Health & Mental Hygiene, 448 Md. 592, 608 (2016) ("In a case concerning the merits of a final administrative agency decision . . . we review directly the administrative decision, not the decisions of the courts that previously reviewed the agency decision before it came to us."). On appeal, we independently evaluate the Board's decision, considering all relevant factors.

III.

DUE PROCESS

Appellants' third and final contention is that the Board denied Mr. Lubart due process of law by refusing to allow him to question Mr. Cirile. Appellants point to the Rules of Procedure of the Town of Ocean City Board of Zoning Appeals, which states: "The applicant, or his representative, shall present his case and all proponents may offer testimony in support of the case. The members of the Board and interested parties may ask questions." Appellants argue that this Rule gave Mr. Lubart the right to cross-examine any witness, and that the Board violated this right.

Appellees maintain that Mr. Lubart was not denied due process because, as a Surfside 84 Condominium unit owner, Mr. Lubart was represented by counsel who appeared at the hearing on behalf of the unit owners of the Surfside 84 Condominium. Appellees point to *Bayer v. Siskind* 247 Md. 116, 124 (1967), in which the Supreme Court of Maryland stated that "[o]nce reasonable cross-examination has occurred, it is the burden of the persons seeking additional cross-examination to show that their questions would be meaningfully different, although they must be given reasonable opportunity to

do so." Appellees argue that Mr. Lubart had the opportunity to provide a list of potential questions, but failed to do so.

We agree with Appellees that there was no due process violation. "Under Maryland law, regardless of the language of a particular county zoning ordinance or the procedural rules for its board of appeals, due process affords interested parties a reasonable right to cross-examine witnesses in a proceeding in which an administrative agency performs adjudicatory functions." *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 607 (2014) (quoting *Ross v. Mr. Lucky*, *LLC*, 189 Md. App. 511, 522 (2009)). Nonetheless, "[t]he opponent's right to due process in such context does not mean that every single person present has the right to cross-examine. If that were the rule, administrative hearings could be extended for unreasonable lengths of time." *Id.* at 610. "The rule requiring that administrative bodies ruling on zoning matters allow cross-examination will be satisfied if one or more representatives of the views of other opponents is permitted full cross-examination." *Id.* at 609-10. "Once reasonable cross-examination has occurred, it is the burden of the persons seeking additional cross-examination to show that their questions would be meaningfully different, although they must be given reasonable opportunity to do so." *Id.* at 610.

At no time did Mr. Lubart identify to the Board the questions he would have asked and proffer how they would be "meaningfully different" than the questions asked by counsel for the unit owners as a whole. Although he claimed that Mr. Cirile's description of the Condo was "inaccurate[] and unfair[]," he was given an opportunity to address the

Board and explain any perceived inaccuracies. On this record, we are unable to conclude that the Board erred in denying Mr. Lubart an opportunity to cross-examine Mr. Cirile.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.