Circuit Court for Anne Arundel County
Case No. C-02-CV-22-001044

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2096

September Term, 2022

SAMANTHA RASZEWSKI, ET AL.

v.

TOWERCO 2013, LLC

Graeff,
Shaw,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 8, 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 persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

Appellants, Samantha and Michael Raszewski, challenge the issuance of a building permit (the "Permit"), which allowed TowerCo 2013, LLC ("TowerCo"), appellee, to construct a 100-foot-tall cell tower (the "Tower") approximately 390 feet from appellants' home and 97.75 feet from appellants' property line. Appellants appealed the decision to issue the permit to the County Board of Appeals of Anne Arundel County (the "Board"), which determined that the Permit met all requirements. The Circuit Court for Anne Arundel County upheld the Board's decision.

On appeal, appellants present several questions for this Court's review,[1] which we have consolidated as follows:

[1] Appellants raise the following five questions:

1. Whether the BOA erred as a matter of law in determining that the Permit could legally authorize construction of the Cell Tower within 200' of the Appellants' home without a variance to the provisions of Anne Arundel County Code § 18-11-117(2)(ii).

2. Whether the BOA erred as a matter of law in determining that the provisions of Anne Arundel County Code § 18-11-117(2)(ii) only prohibit construction of the Cell Tower within 200 feet of residentially occupied properties located in non-residential zoning districts.

3. Whether the BOA erred as a matter of law in determining that the provisions of Anne Arundel County Code § 18-11-117(2)(i)-(iv) constitute requirements, in the alternative, which permit the location of a cell tower so long as it is located more than 200 feet from any of one of the following: (i) a residentially zoned property lot line, or (ii) a residentially occupied property lot line, or (iii) a school property lot line, or (iv) a park property lot line, or (v) a platted open space property lot line.

1. Did the Board err as a matter of law in granting TowerCo the Permit to construct the Tower within 200' of appellants' home;

2. Can the courts uphold the Board's decision on any grounds other than those stated by the Board?

For the reasons set forth below, we answer the first question "no," and therefore, we need not reach the second question. We shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Proceedings Leading to the 2021 Building Permit

In 2017, TowerCo became a lessee of property owned by Michael and Elizabeth Faraci in Edgewater, Maryland (the "Faraci Property"). The Faraci Property is a 21.13-acre lot, and it is zoned in an R1 – Residential district.[2]

4. Whether the BOA erred as a matter of law in determining that a variance to the provisions of § 18-11-117(2)(ii) was not needed because no residential structure existed at the time a variance was issued to the provisions of § 18-11-117(2)(i) or the time of Permit issuance?

5. Whether the courts may uphold the BOA decision on any grounds other than those stated by the BOA?

[2] The Anne Arundel County Zoning Classifications Guide defines an R1 – Residential district as:

> [a district that] is generally intended for low-density suburban single-family detached residential development at a subdivision density of 1 dwelling unit per 40,000 square feet. Minimum lot size is 40,000 square feet. Maximum lot coverage by structures is 25%. Maximum height is 45 feet.

In 2017, TowerCo sought a special exception to build a 100-foot-high monopole telecommunications tower in an R1 – Residential district.[3] It also sought a variance from the setback requirements of Anne Arundel County Code ("AA Code") § 18-11-117(2) (2005), which provides, in relevant part:

> A commercial telecommunication facility[4] shall comply with all of the following requirements.

[3] The Anne Arundel County Code does not define monopole, but it includes a monopole as an example of a "[c]ommercial telecommunications facility." Anne Arundel County Code § 18-1-101(32) (2005). Montgomery County Zoning Ordinance § 59-1.4.2 (2014) defines a monopole as: "A single, freestanding pole-type structure, tapering from base to top and supporting one or more antenna for wireless transmission." Calvert County Zoning Ordinance § 12-01 (2004) defines a communications tower, monopole as: "A self-supporting pole-type structure, tapering from base to top and supporting a fixture designed to hold one or more antennas for transmitting or receiving radio, mobile telephone communications or electromagnetic waves."

[4] Anne Arundel County Code § 18-1-101(32) defines a "[c]ommercial telecommunication facility" as:

> a structure, such as a tower, antenna, monopole, panel, microwave dish, or in-building wireless communication enhancement system, including accessory structures, used for the wireless electromagnetic transmission of information, but the term does not include a satellite earth station, a structure used for amateur or recreational purposes such as a ham radio or citizens band radio, a small cell system, or a facility owned by a public utility that is used to control the utility's distribution systems.

Anne Arundel County, Maryland, *Zoning Classifications Guide*, https://perma.cc/LMZ6-GTVW. *Merriam-Webster Dictionary* defines the term "residential" as, among other things, "used as a residence or by residents," and "restricted to or occupied by residences." *Residential*, Merriam-Webster, https://www.merriam-webster.com/dictionary/residential (last visited Aug. 5, 2024).

* * *

> (2) A structure permanently located on the ground shall be located at least 200 feet or one foot for each foot of height, whichever is greater, from the lot line of a:
>
> (i) *property located in a residential district*;
> (ii) *residentially occupied property*;
> (iii) school;
> (iv) public park; *or*
> (v) platted open space.

(Emphasis added). "Property located in a residential district" and "residentially occupied property" are not defined anywhere in the AA Code.

II.

Application Hearing

In its application for a special exception, TowerCo proposed to site the 100-foot-high Tower 77 feet, five inches, from the front lot line of the Faraci Property, and 95 feet, nine inches, from the southwest side lot line of the Faraci Property.[5] At the hearing before the Administrative Hearing Officer on August 29, 2017, TowerCo presented a letter of explanation, stating that the proposed Tower was "necessary to provide effective telecommunications service." TowerCo's letter stated that "the facility is to be sited in close proximity to the forested area to provide screening," and that the Tower's "height complies with the height established by the Code." Counsel for TowerCo stated that its

[5] We do not have much of the record of the special exception proceedings. Accordingly, we cite to the facts set forth by the Administrative Hearing Officer in his September 19, 2017 Order approving the zoning variances.

"application meets all the requirements of the Code except for the requested setback variances." Counsel explained that

> [t]he need for the variance to the 200-foot setback to the lot line along Pocahontas is caused by the narrow depth of the [Faraci P]roperty, which is 390 feet wide at this point. The location of the [T]ower has been shifted toward Pocahontas Drive because of the presence of wetlands in the northwest corner of the site. The need for the variance to the 200-foot setback to the lot line along the undeveloped area to the southwest is caused by the location of the dwelling on the site. The location also seeks to take advantage of existing vegetation to screen the [T]ower in the southwest corner of the property. The other end of the [Faraci P]roperty cannot be used because it contains horse paddocks and equestrian activities. Furthermore, there are no trees to screen the [T]ower if it were located on the other side of the dwelling on the [Faraci P]roperty.

Several neighbors opposed TowerCo's Permit request because they did not want a commercial structure in their residentially-zoned neighborhood. Neighbors testified that they had lived in the "pristine" area for many years, that the Tower would impact the value of their land, and that they opposed living across from "a commercial facility in a wooded area."

In the September 19, 2017 Order, the Administrative Hearing Officer noted that TowerCo sought a "special exception approval to locate a 100-foot high monopole telecommunications tower and 60' by 40' fenced area" on the Faraci Property. The Hearing Officer granted TowerCo a special exception to place the Tower on the Faraci Property. He granted TowerCo variances from the setback requirements under the AA Code as follows:

1. A zoning variance of one hundred twenty-three (123) feet to the 200-foot setback requirement of § 18-11-117(1) to construct the proposed

telecommunications facility 77.5 feet from the front lot line, as shown on the site plan admitted into evidence as County Exhibit 2; and

2. A zoning variance of one hundred five (105) feet to the 200-foot setback requirement of § 18-11-117(1) to construct the proposed telecommunications facility 95.9 feet from the southwest lot line, as shown on the site plan admitted into evidence as County Exhibit 2.[6]

The Administrative Hearing Officer provided that the special exception and variance were subject to the following conditions:

A. The facility shall be screened from exterior view, and all screening shall comply with the Landscape Manuel, as required by § 18-16-304(9).

B. The applicant shall comply with any instructions and necessary approvals from the Development Division and Permit Center, as well as instructions and necessary approvals from any state or federal agency with regulatory jurisdiction over the subject property or the use authorized by this special exception.

C. The applicant shall obtain approval from the Department of Health.

D. The monopole shall not be lighted.

Roger Kalthoff and Heather Kalthoff appealed TowerCo's special exception and variance approvals. *See County Board of Appeals of Anne Arundel County*, Memorandum of Opinion, BA 44-17S, (November 27, 2018), at *1-2, https://perma.cc/7DHC-HSVY.[7]

[6] We note that the Administrative Hearing Officer incorrectly cited to § 18-11-117(1), instead of § 18-11-117(2).

[7] We take judicial notice of the Board's Memorandum Opinion, addressing the Kalthoffs' appeal of the decision of the Administrative Hearing Officer to conditionally grant a special exception to allow a commercial telecommunication facility in an R1-Residential district, and a variance to allow a commercial telecommunications facility with fewer setbacks than required in an R1-Resdiential district on the Property. *See Evans v. Cnty. Council of Prince George's Sitting as Dist. Council*, 185 Md. App. 251, 255, n.2 (2009) (an appellate court may take judicial notice of public records).

TowerCo moved to dismiss the Kalthoffs' appeal for lack of standing on the following grounds: (1) Mr. Kalthoff passed away on May 19, 2018; and (2) Mrs. Kalthoff sold the Property to appellants in 2018. *Id.* at *2-3. On November 27, 2018, the Board dismissed the Kalthoffs' appeals for lack of standing. *Id.* at *3. The Memorandum of Opinion stated that,

> the new owners of Mr. Kalthoff's property, [appellants] (who appeared at the October 17, 2018 hearing), do not have the ability to obtain "piggy-back" standing. The Court of Appeals has clearly held that "piggy-back" standing is not recognized in administrative appeals. *Chesapeake Bay Foundation v. DCW Dutchship Island, LLC*, 439 Md. 588, 589 (2014). Furthermore, they were not a party to the administrative proceeding as required by Section 3-1-104(a).[8]

Id.

III.

The Building Permit

On March 19, 2021, the Department of Inspections and Permits issued TowerCo the Permit to construct "a 40-foot by 60-foot fenced telecommunications equipment yard,

[8] Anne Arundel County Code § 3-1-104 (2005) states, in relevant part:

> (a) **Generally**. A person aggrieved by a decision of the Administrative Hearing Officer who was a party to the proceedings may appeal the decision to the Board of Appeals, except that a person who meets the threshold standing requirements under federal law has standing to appeal a decision of the Administrative Hearing Officer granting or denying a critical area variance for development in the buffer to the Board of Appeals.

including a 100-foot-tall monopole" on the Faraci Property.[9] On April 16, 2021, appellants filed an appeal of the Permit with the Board.

IV.

Appellants' Administrative Appeal

On April 20, 2022, the Board held a hearing. In opening statement, counsel for appellants stated that TowerCo was incorrectly issued the Permit, and despite the appeal, it had "gone ahead at [its] own risk and constructed a very tall tower very close to the appellants' home." Counsel stated that, if the Board revoked the Permit, it could order that the Tower be removed "or just say at a minimum [TowerCo] need[ed] to go back and get those additional approvals . . . to validly obtain a building permit."

TowerCo called Mr. Brian Siverling, an expert in structural engineering, as its first witness.[10] Mr. Siverling had been involved with the construction of the Tower since 2015. Mr. Siverling testified that the Permit complied with County regulations.

Marilee Tortorelli, an expert in land development and planning, explained that her company, Morris & Ritchie, prepared, among other things, the Permit submittal. In January 2020, her office submitted a preliminary plan to the Office of Planning and Zoning ("OPZ") for the Tower's construction, which received approval on September 30, 2020. In October 2020, her office prepared and submitted a site development plan to the OPZ,

[9] TowerCo states in its brief that it was granted an extension of time to obtain a building permit due to the COVID-19 pandemic.

[10] Counsel for the Board advised that the applicant for the Permit had the burden to prove that the Permit was issued correctly because the Board reviewed the issue *de novo*.

which was approved on December 22, 2020. After the site development plan was approved, the Permit was issued. In Ms. Tortorelli's expert opinion, the Permit was issued in compliance with the AA Code.

In questioning Ms. Tortorelli on cross-examination, counsel for appellants explained his contention that the AA Code contains multiple categories, which in this case required multiple variances, but only one was obtained. Ms. Tortorelli disagreed, stating that her office did not have to obtain separate variances for each of the items listed in the AA Code.[11] Only one variance was needed because "property located in a residential district and residentially occupied property . . . were one and the same." There "was one variance for all of the setbacks," and "[t]here were two setbacks that [her office] reduced in that variance." She concluded that there was no need for a second variance for another setback.

Ms. Tortorelli confirmed that there was community participation at the two community hearings. The community did not "want to see the [T]ower." Her office chose to place the Tower in the woods to hide the Tower.

Ms. Tortorelli clarified that the 200-foot setback requirement was measured to the lot line of the Faraci Property. She confirmed that, "[n]o matter what was surrounding the residential property, be it . . . residentially occupied or located in a residential district . . .

[11] As indicated, the requirements for a commercial telecommunications facility include that it be at least 200 feet from the lot line of a: 1) property located in a residential district; 2) residentially occupied property; 3) school; 4) public park; or 5) platted open space. AA Code § 18-11-117(2) (2005).

that exact variance would be to the same lot line no matter what numeral it [fell] under [in the AA Code]." Ms. Tortorelli further stated:

> In the 36 years that I have been working in Anne Arundel County, the variance, the setbacks for these types of things have always been from the property line that the structure, whatever it is you are asking for the variance, is located on. And so[,] it would still, whether it was commercial, it would still be the 200 feet from the property line.

Craig Hartman, the national director of Build to Suit & Acquisitions of Tower Co., testified that TowerCo acted in compliance with the County requirements when building the Tower, which was completed. Appellants knew that the variance and special exception had been granted.

After TowerCo rested its case, Mrs. Raszewski testified that she and her husband purchased the Property from the Kalthoffs in 2018. On April 30, 2020, they applied for a building permit to construct a single-family home on the Property. On May 6, 2021, after construction of the home was complete, she and her husband began living in the home. Construction of the Tower began in July 2021, after appellants noted an appeal of the issuance of the Permit.

Mrs. Raszewski testified that the Tower was "95 feet and nine inches" from the lot line of her property. The trees surrounding the Tower pursuant to TowerCo's landscaping plan did not sufficiently block her view of the Tower from her home. Many of the trees planted had died, and even as initially planned, they were not effective in screening her home from view of the Tower.

On cross-examination, Mrs. Raszewski stated that, during the process of applying for the building permit for her home, she was aware that the Tower "was in the process of getting approvals[,] but nothing was approved yet." On re-direct, she indicated that she had purchased the Property with plans to build a home there prior to the approval of the Permit. She lived on the Property when builders began construction on the Tower.

Kelly Krinetz, a Planning Administrator with the OPZ, testified that she was part of the review of the Permit. The application was distributed to and approved by all the necessary departments for review.

Ms. Krinetz testified that, for TowerCo to receive the Permit to build the Tower, it needed variance approval for the setback, which it obtained. In measuring the setback for § 18-11-117, her office measured from the Tower to the closest relevant property line, which, here, was the closest residential district.

In response to questioning by a member of the Board, Ms. Krinetz testified that, when a variance is granted, it is valid for a certain amount of time, even if conditions change. The OPZ assumes that, in a residentially zoned property, there will, at some point, be an occupied home. Ms. Krinetz testified that the separate provision in § 18-11-17(2) for a residential occupied property

> is intended for a non-conforming commercial property that may have a house on it, a marina property that is allowed to have a house on it, to make sure that in both cases, in both requirements, you are always going to pick up a home that someone is living in, regardless of whether it's on a residentially zoned property or it's non-conforming and it's on a commercial property. You are still going to be looking at a lot that a home exists or will exist [on] when you are making these decisions.

Members of the Board then called Ms. Tortorelli back for questioning, where she clarified that TowerCo was issued one variance to "two separate lot lines that had variances to [both property lines]." That the Property was now residentially occupied did not change the fact that the Property was "located in a residential district."

Counsel for TowerCo argued in closing that the Permit was "properly issued." Pursuant to the AA Code, the variances were issued to the lot line of the residential lot located in a residential district. That there was now owner-occupied property "doesn't change the fact that it's a property located in a residential district." To the extent that there were landscaping issues, that was "irrelevant," because landscaping is "an enforcement issue."

Counsel for appellants argued that the AA Code sets forth five separate and distinct setback requirements. Accordingly, "property located in a residential district is a separate setback requirement from a residentially occupied property," and therefore, if both of those were present, two variances would be needed before a building permit could be issued.

Counsel for appellants argued that, if the Board agreed with that position, the next question was to determine whether an additional variance would be needed when another one of the setback requirements became present after the initial variance was granted. Counsel argued that it would. He asserted that the variance standards for a residentially zoned property and "a property that is actually inhabited by inhabitants" are very different, particularly as to screening and making sure that the variance "doesn't impair the use and development" or constitute a "detriment to the public welfare." Counsel asserted that the

legal question here was whether the "timing of the building permit's issuance and the occupancy of the house should affect [the Board's] decision to require two variances."

Counsel stated that, for rights in the Permit to vest,

> First, you have to make actual physical commencement of some significant visible construction, which we have here. And the commencement must be undertaken in good faith toward the intention to continue the construction and carry it through to completion. And the third, the commencement of construction must be pursuant to a validly issued building permit.

Counsel argued that TowerCo did not have vested rights here because there was not a validly issued building permit, and once the appeal was filed, TowerCo could not begin construction in good faith.

The County asked the Board to uphold the Permit because TowerCo met the requirements of the AA Code. It received a variance to the setback requirements, which are to the property line, not the house. Counsel argued that TowerCo was not required to seek an additional variance after appellants "decided to build [their] house and then occupy the home." Counsel noted that the Permit was issued in March 2021, and appellants moved into their home on May 6, 2021, so they were aware that the Tower was going to be constructed. Counsel reiterated the County's position that TowerCo did not need to "come back and then get another variance after the fact."

Counsel for TowerCo argued that, in issuing the variance and special exception, the Department of Inspection and Permits contemplated that a residence would be built on the lot. The use of the word "or" in the AA Code shows that there need not be compliance

with each of the criteria set forth. The Permit was properly issued based on the variance approved for property in a residential district.

On June 3, 2022, the Board issued a Memorandum of Opinion and Order, concluding that the Permit "meets all requirements and is granted." The Board found that, when TowerCo obtained the variance to build the Tower, it obtained a variance pursuant to § 18-11-117(2)(i) for a property located in a residential district, which was all it needed. It disagreed with appellants' argument that, because they had moved into the Property, and it was now "residentially occupied property," an additional variance was needed, and therefore, the Permit was unlawfully granted. It concluded that "[t]he provision set forth in Section 18-11-117(b)(ii) that requires a setback from 'residentially occupied property' pertains to land that is not within a residential zone. Section 18-11-117(b)(ii) is simply not applicable to the instant case."

V.

Judicial Review in the Circuit Court

On June 20, 2022, appellants filed, in the Circuit Court for Anne Arundel County, a Petition for Judicial Review of the Board's order finding that the Permit met all requirements. On January 9, 2023, the court held a hearing.

Counsel for appellants argued that the court could not uphold the Board's decision on a ground other than that relied upon by the Board, and the Board made an error of law in its decision that § 18-11-117(2)(ii) did not apply. If the court agreed that this was error,

appellants asked the court to rescind the Permit.[12] Counsel for appellants argued that each of the criteria set forth in § 18-11-117 must be satisfied, and although TowerCo obtained a variance for the criteria that "a cell tower cannot be built within 200 feet of a residentially zoned property," when the facts changed before TowerCo's rights vested, it was required to get another variance for the separate requirements that "a cell tower cannot be built within 200 feet of a residentially occupied property." A separate variance was needed because there are different considerations for an occupied house.

In response to TowerCo's res judicata argument, counsel stated that appellants were not "challenging the variance that was [previously] approved." Rather, they were challenging "whether or not an additional variance is needed" to secure a valid permit.[13]

Counsel for TowerCo argued that the Board properly interpreted § 18-11-117(2)(ii) as not applicable in this case. Counsel argued that the "or" in the Code "acts as a conjunction, to indicate an alternative, equivalent, or substitute condition," and it was "clear that the intent was to give alternate conditions." Moreover, the hearing officer testified that the Board contemplated a home being built on the Property, "so it would be the same variance, to the same lot line, with the same considerations made by the hearing

[12] Counsel also noted that it did not matter that appellants had not occupied the house before the Permit was issued because an appeal had been filed regarding the issuance of the Permit, so there was not a validly issued building permit, and TowerCo's rights had not vested.

[13] Counsel also noted that the original variance was appealed by the former owners of appellants' property, and although appellants did seek to prosecute that appeal, they were told that they did not have standing to continue because they were not the party who filed the appeal.

officer." Counsel further noted that appellants did not occupy the Property until after the Permit was issued, and therefore, the Property was not to be residentially occupied when the Permit was issued. Finally, counsel argued that appellants were attempting to relitigate the setback issue that was decided in 2017, and its appeal to the Board was barred by res judicata.

The court ruled from the bench, concluding that the categories of properties set forth in § 18-11-117(2)(i) through (iv) are separate and distinct, and the Board was not clearly erroneous in determining that the term "residentially occupied property" describes properties not located in a residential district. The court found it inappropriate to require TowerCo to get a new variance based on acts that occurred years later, after the Permit was issued. The court concluded that the Board did not commit clear legal error, and it properly determined that the variance was proper "under (i) because it's a non-R1 district." It further stated that res judicata was another ground on which the petition for judicial review was denied. On January 11, 2023, the court issued a "Hearing Sheet signed as order of court," stating that the petition for review was denied.

This appeal followed.

STANDARD OF REVIEW

This Court has set forth the proper standard of review of an administrative decision, as follows:

> When reviewing a decision of an administrative agency, we look through the circuit court's decision and evaluate the decision of the agency. Our primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious. We conduct a two-fold

> inquiry, examining whether there is substantial evidence in the record to support the agency's findings and conclusions and whether the agency's decision is premised upon an erroneous conclusion of law. We will uphold the agency's decision as long as it is not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven. We review *de novo* an agency's conclusions of law. This includes questions of statutory interpretation.

Hayden v. Md. Dep't of Nat. Res., 242 Md. App. 505, 520-21 (2019) (internal citations and quotations omitted).

DISCUSSION

Appellants challenge the issuance of the Permit for the Tower, alleging that TowerCo did not properly obtain a variance to the setback requirements of the AA Code, which required the Tower to be at least 200 feet from the lot line of a: 1) property located in a residential district; 2) residentially occupied property; 3) school; 4) public park; or 5) platted open space. AA Code § 18-11-117(2). Appellants contend that the Board erred in determining that the Permit legally authorized construction of the Tower within 200 feet of their home because, although TowerCo obtained a variance to the 200-foot setback requirement under AA Code §18-11-117(2)(i) for a residentially zoned property, TowerCo did not have a vested right to construct the Tower as anticipated once the Property became residentially occupied, and a new variance, based on § 18-11-117(2)(ii), was needed. There are several steps that need to be addressed with respect to appellants' arguments.

I.

Vested Rights

Initially, we look to the timing of the events here. On September 19, 2017, TowerCo obtained a special exception and a variance to build the Tower. The previous owners of the Property appealed in October 2017, but that appeal was ultimately dismissed in November 2018 for lack of standing because appellants had purchased the Property. TowerCo continued submitting plans for the Tower, and on March 19, 2021, after the site development plan was approved, the Department of Inspections and Permits granted the Permit for the Tower. On April 16, 2021, appellants filed an administrative appeal of the Permit. On May 6, 2021, appellants moved into their home on the Property, making it residentially occupied. In July 2021, TowerCo began construction of the Tower.

As indicated, planning administrator, Ms. Krinetz, testified that, when a variance is granted, it is valid for a certain amount of time, even if conditions change. Appellants argue, however, that TowerCo's right to continue with the initial variance approval was subject to changes that occurred only if its rights to construct the Property had vested. They assert that TowerCo had no vested rights to construct the Tower at the time they moved into their home, and therefore, "the Permit must be revoked unless a variance is obtained [pursuant] to the provisions of §18-11-117(2)(ii)."[14]

[14] TowerCo argues that the issue of vesting is not properly before this Court because it was not previously argued. The record, however, reflects that appellants raised this issue during the hearing on April 20, 2022.

The Maryland appellate courts have explained that "three conditions must be satisfied" before a right to proceed with construction under existing zoning or approvals vests:

> (1) there must be the actual physical commencement of some significant and visible construction; (2) the commencement must be undertaken in good faith, to wit, with the intention to continue with the construction and to carry it through to completion; and (3) the commencement of construction must be pursuant to a validly issued building permit.

Town of Sykesville v. West Shore Commc'ns, Inc., 110 Md. App. 300, 305 (1996). *Accord Evans v. Burruss*, 401 Md. 586, 601 n.19 (2007), *cert. denied*, 552 U.S. 1187 (2008); *Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 648 (2015). A valid permit takes final effect when the decision approving the construction has reached its final conclusion. *See Powell v. Calvert Cnty.*, 368 Md. 400, 415 (2002) (a '"valid permit' never took final effect because the litigation dealing with the special exception had not reached its final conclusion"); *Antwerpen v. Baltimore Cnty.*, 163 Md. App. 194, 210 (2005) (vested rights do not accrue until completion of litigation, including resolution of an appeal).

Here, TowerCo obtained the Permit before appellants moved into their house, but it did not begin construction of the Tower until July 2021, after appellants filed their April 2021 appeal of the decision to grant the Permit and moved into their residence. Although an applicant is authorized to begin construction after a valid permit is issued, despite pending appeals, "the applicant undertakes such action at his own risk that the underlying preliminary approval may be invalidated at a future time." *City of Bowie v. Prince George's Cnty.*, 384 Md. 413, 417 (2004) (where an applicant proceeds to final plat

approval before the planning board while the preliminary subdivision plan approval is on appeal to the courts, rights have not vested, and the applicant is proceeding at their own risk and may be required to undo what they have done if they ultimately fail in the litigation process). Given that this appeal was pending, TowerCo conceded at oral argument that its right to construct the Tower had not vested. Thus, we turn to the argument that, once the property became residentially occupied, a new variance, based on AA Code § 18-11-117(2)(ii), was needed before the Tower could be built.

II.

§ 18-11-117(2)

The Board upheld the Permit because the variance to the 200-foot set back from "property located in a residential district" was "all the variance needed." It stated that § 18-11-117(2)(ii), which requires a setback of 200 feet from the lot line of a residentially occupied property, applies only to land that is not within a residential zone, and therefore, it was not applicable to this case.

Appellants contend that the Board erred in so concluding. They assert that the plain language of the Code indicates the intent for § 18-11-17(2)(ii) to apply to all residentially occupied property because the words "located in a non-residential district" do not appear in the Code. Moreover, appellants contend that the "or" in subsection four of the Code does not create "alternative requirements," and each item requires a separate variance.[15]

[15] Appellants further assert that previously issued variances for cell towers in Anne Arundel County support the argument that subsection (ii) of the AA Code, residentially

TowerCo contends that "[t]he Board correctly applied the law in § 18-11-117(2) when granting the issuance of the Building Permit." It argues that subsection (ii) of the Code, which requires a setback from a "residentially occupied property," pertains to "land that is not within a residential zone," asserting that a logical interpretation of the ordinance is that each category in the statutory scheme is separate and distinct. TowerCo argues that the AA Code

> was constructed to encompass all scenarios of protected persons in a broad sense. Residential properties are protected, schools are protected, parks are protected, open spaces are protected, and in the event that there is a residentially occupied property that is not in a residential district, that will be protected, too.

TowerCo argues that the Hearing Officer in 2017 granted a broad variance to "§ 18-11-117(2) in its entirety, not just to one of the enumerated reasons."[16] It further contends that the "clear intent of the enacting body was to give alternative conditions" because the Code uses the word "or," and therefore, if one condition is applicable to a property, i.e., a property is located in a residential district, an issued variance is not invalidated "simply because a second condition also applies." The variance is to the lot line of the Property,

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occupied property, applies to residentially occupied properties in residential districts. Appellants ask this Court to "take judicial notice of those publicly available decisions" on the Anne Arundel County website. These decisions, which TowerCo argues are distinguishable, are not binding on us, and we will not address them.

[16] In the findings in his Memorandum of Opinion, however, the Hearing Officer stated that the variance was granted for an R1 Residential District under § 18-11-117(2), (the Hearing Officer mistakenly cited § 18-11-117(1) in his decision), and he indicated, by underlining subsection (i), that the "property located in a residential district" provision applied to that section. The Memorandum of Opinion by the Board, finding that the Permit met all requirements, also cited § 18-11-117(2)(i) as the applicable provision.

not to the residential structure, and the lot line under either (i) or (ii) is the same. Accordingly, TowerCo asserts that, because the Property was located in a residential district when the Board granted the variance and the Permit, and it continues to be located in a residential district, that there is now a residentially occupied house on the Property "does not nullify that it is a property in a residential district."

TowerCo further argues that, even if the Property became a "different and distinct category" under § 18-11-117(2)(ii) when there was a "residentially occupied property," appellants did not occupy the Property until after the Permit was issued.[17] Thus, the Board properly issued the Permit.

As the parties note, this case involves a legal issue involving the construction of AA Code § 18-11-117(2). In interpreting this ordinance, we follow well-settled principles of statutory construction, as follows:

> When undertaking an exercise in statutory interpretation, we start with the cardinal rule of statutory interpretation—to ascertain and effectuate the General Assembly's purpose and intent when it enacted the statute. *75-80 Properties, L.L.C. v. RALE, Inc.*, 470 Md. 598, 623, 236 A.3d 545 (2020). "A court's primary goal in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny." *Lockshin v. Semsker*, 412 Md. 257, 274, 987 A.2d 18 (2010) (citations omitted).
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> To ascertain the intent of the General Assembly, our analysis begins with the

[17] As indicated, on March 19, 2021, the Office of Planning and Zoning issued the permit, on April 16, 2021, appellants filed their appeal, and appellants started occupying the Property on May 6, 2021. Appellants disagree with the argument that they did not occupy the Property until after the Permit was issued. They assert that the Board considers building permits *de novo*, and because the Board granted the Permit in its decision on June 3, 2022, the Property was residentially occupied when the Permit was granted. Based on our resolution of the case, we need not address this argument.

> normal, plain meaning of the language of the statute. *Id.* at 275, 987 A.2d 18. In doing so, we read the plain meaning of the language of the statute "as a whole, so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Koste v. Town of Oxford*, 431 Md. 14, 25-26, 63 A.3d 582 (2013) (internal quotations omitted). Additionally, "[w]e neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute 'with forced or subtle interpretations' that limit or extend its application." *Lockshin*, 412 Md. at 275, 987 A.2d 18 (citations omitted). "If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resorting to other rules of construction." *Id.*

Wheeling v. Selene Fin. LP, 473 Md. 356, 376-77 (2021). We further give the ordinance a "reasonable interpretation, not one that is absurd, illogical, or incompatible with common sense." *Id.* at 377 (quoting *Lockshin*, 412 Md. at 276).

Accordingly, we begin with the plain language of the Code. As indicated, AA Code § 18-11-117(2) provides that the Tower "shall be located at least 200 feet . . . from the lot line of a:

(i) property located in a residential district;
(ii) residentially occupied property;
(iii) school;
(iv) public park; or
(v) platted open space[.]"

The critical dispute here is what is covered under § 18-11-117(2)(ii). TowerCo argues that the plain language of "residentially occupied property" refers to occupied homes in non-residential districts. In its Memorandum of Opinion, the Board agreed, finding that "residentially occupied property" refers to "land that is not within a residential

zone." Appellants argue, however, that the plain language of "residentially occupied property" does not "include the limitation to non-residential districts."

In construing this ordinance, we note that the five categories set out in § 18-11-117(2) are linked by the conjunction "or." The Supreme Court of Maryland has explained that "or" and "and" are both "conjunctions used to link other words, phrases, or clauses," but that "and" has a "conjunctive meaning," while "or" has a "disjunctive meaning." *SVF Riva Annapolis LLC v. Gilroy*, 459 Md. 632, 642 (2018). *Accord Cnty. Council of Prince George's Cnty. v. Dutcher*, 365 Md. 399, 418 (2001) (the General Assembly recognized two distinct administrative processes by joining them with "the disjunctive 'or'"); *Schlossberg v. Citizens Bank of Md.*, 341 Md. 650, 657 (1996) (the term "or" in a confessed judgment rule has a disjunctive meaning).

Interpreting the "or" disjunctively means that a variance is required for each of the five categories. The items listed operate independently of one another, with property located in a residential district, residentially occupied property, schools, public parks, or platted open spaces to be considered independently in addressing a variance when a structure seeks to be built within 200 feet of their respective lot lines.

The Board determined that the category of "residentially occupied property" referred to a separate and distinct category of property, i.e., residentially occupied property located in a non-residential district. That construction is reasonable. Ms. Krinetz testified that the OPZ assumes that, in a residential district, there will ultimately be residentially occupied property, but there could be instances where a person lives on property that is not

zoned residential. Adding a *separate* category for such a situation makes sense. Because appellant's property was in a residential district, the Board properly found that AA Code § 18-11-17(2)(ii) did not apply, and the Permit was properly granted based on the variance obtained pursuant to § 18-11-17(2)(i).[18]

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

[18] Based on this conclusion, it is not necessary to address the issue of whether the appeal of the permit was barred by res judicata.