Circuit Court for Baltimore City
24-C-17-002519

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 93

September Term, 2018

IN THE MATTER OF TARYN GRIFFITH
SYLVIA HERR, ET AL

v.

BOARD OF MUNICIPAL AND ZONING APPEALS

Meredith,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: May 29, 2019

This zoning appeal challenges a decision by the Baltimore City Board of Municipal and Zoning Appeals ("the BMZA") to grant an application filed by Aida and David Gamerman seeking variances of height, rear yard setback, and lot coverage relative to a renovation of their end-unit rowhome at 2244 Essex Street in Canton ("the Property"). That decision was affirmed on judicial review by the Circuit Court for Baltimore City.

The named appellants are Taryn Griffith Sylvia Herr and her husband, Thomas Herr, who did not participate before the BMZA but participated in the circuit court. Ms. Herr was, until very recently, the owner of 2242 Essex Street, which is the rowhome adjoining the Property.[1] While the appeal was pending in this Court, Ms. Herr sold 2242 Essex Street to Jeffrey Reis and Stephanie Hoffman ("the New Owners"). The Mayor and City Council of Baltimore ("the City"), on behalf of the BMZA, is the appellee.

The City moves to dismiss the appeal for lack of standing. On the merits, the Herrs present two questions, which we have rephrased:

> I. Did the BMZA lack authority to grant the requested variances pursuant to sections 13-506 and 13-507 of the Baltimore City Zoning Code because the expansion exceeded those permitted for a noncomplying structure?
>
> II. Was the BMZA's decision otherwise legally correct and supported by substantial evidence in the record?

For the following reasons, we shall deny the motion to dismiss but conclude that the Herrs failed to exhaust administrative remedies and, thus, affirm the judgment on that

[1] 2242 Essex Street was titled only in Ms. Herr's name.

basis. In addition, on the merits, we conclude that the BMZA had authority to grant the variances and the decision was supported by substantial evidence. We answer the first question in the negative and the second question in the affirmative. We thus affirm the judgment of the circuit court on alternative grounds.

FACTS AND PROCEEDINGS

The Property is a triangular-shaped lot in an R-8 Zone within the Canton Waterfront Urban Renewal area. It is situated on the northwest corner of the intersection of Essex Street and Patterson Park Avenue and is improved with a three-story end-unit rowhome and a one-story attached accessory structure. The first-floor of the Property previously was used as a plumbing contractor's shop, a non-conforming use, and the upper levels were apartment units.

The Gamermans purchased the Property in 2015. They proposed to convert the Property into a single-family home by constructing "a three-story rear addition including a first-floor front accessed garage and a new fourth floor with rooftop deck." To accomplish that plan, the Gamermans applied to the BMZA for three variances. First, they sought a variance from the lot coverage regulation at section 4-1106(a) of the Baltimore City Zoning Code ("the Zoning Code" or "ZC"), which provides that the maximum lot coverage for a single-family attached dwelling is 60 percent. The existing structures on the Property covered 78 percent of the lot and the proposed construction would cover 100 percent of the lot. Second, they sought a variance from the rear yard setback regulation at ZC section 4-1107(a), as reduced by application of ZC section 3-

208, which requires a minimum 18.75 foot set back. The existing rear yard setback was 16 feet and the proposed construction would result in no rear yard setback. Finally, the Gamermans sought a variance from the height regulation at ZC section 4-1108(a), which permits a maximum height of 35 feet. The proposed construction of a fourth floor would reach 40 feet in height.

On February 28, 2017, the BMZA held a public hearing on the application. Twenty-five people appeared at the hearing who were opposed to the application and five of them testified in opposition. Four letters from neighbors on Patterson Park Avenue and Essex Street also were entered into the record before the BMZA. The Canton Community Association, in part, supported the project and, in part, took no position. Neither of the Herrs appeared at the hearing or sent a letter in opposition to the application.

After hearing testimony, which we shall discuss, *infra*, the BMZA deliberated on the record and voted unanimously to grant the requested variances. On March 22, 2017, the BMZA issued a resolution approving the Gamermans' application, subject to the grant of a waiver from the Commissioner for Housing and Community Development relative to the height of the proposed structure. We shall discuss the BMZA's reasoning, *infra*.

On April 20, 2017, six neighboring property owners,[2] all of whom had appeared before the BMZA, filed a petition for judicial review in the Circuit Court for Baltimore

[2] The first petitioners are: Jennifer Calhoun, Peter Chesner, Nicole Folks, Paul Jesson, Janie DiPaula Stevens, and William Stevens. The Stevenses lived on Patterson (continued…)

City ("the First Petition"). On May 8, 2017, the Herrs filed a petition for judicial review ("the Second Petition"). By order of June 20, 2017, the First and Second Petitions were consolidated under the case number for the Second Petition.

The circuit court held a hearing and, by opinion and order entered February 13, 2018, affirmed the BMZA's decision. On March 9, 2018, the Herrs noted this timely appeal. None of the first petitioners noted an appeal.

MOTION TO DISMISS

The City moves to dismiss the appeal for two independent reasons. First, because on August 23, 2018,[3] Ms. Herr sold her property to the New Owners, the Herrs no longer are aggrieved by the BMZA's decision. Second, because neither the Herrs nor the New Owners were parties to the administrative proceedings before the BMZA, they lacked standing to seek judicial review from that decision or to complain on appeal about errors made by the BMZA.

On the first point, the attorney who represented the Herrs before the circuit court responds that he now represents the New Owners, who "stand in the shoes of the prior owners." Because the New Owners are adjoining property owners, they assert that they are *prima facie* aggrieved by the BMZA's decision. As to the second argument, the New

(…continued)
Park Avenue and the remaining petitioners lived on Essex Street. All but Mr. Stevens had testified at the BMZA hearing.

[3] The sale occurred more than a month after the Herrs filed their opening brief in this Court, but before the City's brief was due.

Owners assert that the BMZA waived its right to challenge the standing of their predecessors in interest, the Herrs, on the ground that they were not parties before the BMZA because they did not move to dismiss the Herrs' petition for judicial review on that basis, or join in the motion to dismiss filed by the Gamermans. Alternatively, the New Owners maintain that aggrievement is the only requirement for standing to seek judicial review of a BMZA decision. Thus, in their view, the Herrs' non-party status before the BMZA has no bearing on their standing to challenge the grant of the variances in the circuit court and before this Court.

a.

With respect to waiver, in the Herrs' Second Petition, they asserted that they had been "parties to the proceedings below *and* [were] persons aggrieved" by the BMZA decision. (Emphasis added.). In its opposition to the Herrs' petition, the City rebutted that assertion:

> Although the first set of Petitioners did indeed appear before the Board and made their objections to the variances sought by the Gamermans know[n] to the administrative agency deciding the case, the record in this matter reflects that the Petitioners in the second action neither testified nor submitted correspondence or made other communication to the Board that they opposed the Gamermans' proposed construction and wished to raise certain issues relating to the proposal for the Board to decide.

The City attached to its opposition memorandum a copy of the sign-in sheet from the BMZA hearing and copies of all letters received by the BMZA. The City explicitly declined to argue that the Second Petition should be dismissed for lack of standing but argued that the Herrs had failed to exhaust administrative remedies.

Mr. Gamerman filed a *pro se* motion to dismiss the Second Petition arguing, *inter alia*, that the Herrs lacked standing because they were not parties to the BMZA proceedings. In a later filed memorandum in opposition to the Second Petition, the Gamermans, through counsel, adopted and incorporated by reference the City's memorandum, and made additional arguments in support of their positions.

At the hearing before the circuit court, the Gamermans' attorney argued that the Second Petition should be dismissed for lack of standing, citing this Court's recent decision in *Greater Towson Council of Cmty. Ass'n v. DMS Dev., LLC*, 234 Md. App. 388 (2017), *cert. denied*, 457 Md. 406 (2018).[4]

Counsel for the City reiterated that it was not seeking dismissal because, as a practical matter, given that the first petitioners all had standing and the First and Second Petitions had been consolidated, the issue of the Herrs' standing, *vel non*, did not impact the justiciability of the petitions. *See, e.g., Bd. of License Comm'rs for Montgomery Cnty. v. Haberlin*, 320 Md. 399, 404 (1990) ("Where there exists a party having standing to bring an action or take an appeal, we shall not ordinarily inquire as to whether another

[4] In *Greater Towson*, this Court held that an umbrella group representing various community organizations in Baltimore County was not aggrieved by two decisions of the Baltimore County Board of Appeals so as to have standing to seek judicial review of that decision and that intervening parties before the circuit court lacked standing because they had not been parties to the Board proceedings. For both of those reasons, we vacated the circuit court judgment on judicial review and remanded with direction that the court dismiss the petition for judicial review. The governing statute in that case required that a petition for judicial review be filed by a person who was both aggrieved by the decision and a party to the underlying proceeding. *See* Md. Code (2013 Repl. Vol.), § 10-305(d) of the Local Government Article. As discussed below, this distinction is not determinative of standing.

party on the same side also has standing."). Nevertheless, the City noted that it was an "interesting issue that may come up in another case where there is only one petitioner and they didn't participate before the [BMZA]."

The circuit court affirmed the BMZA's decision, implicitly denying the motion to dismiss. Given that the issue of standing was raised in the circuit court, albeit by the Gamermans, and, as we shall discuss, was not dispositive at that time in light of the presence of the first petitioners, we conclude that the City did not waive this issue for appellate review.

b.

Although not raised by the parties, preliminarily, we note that the New Owners did not move in this Court pursuant to Rules 8-401 and 2-241 to substitute themselves in place of the Herrs as appellants.[5] The attorney who represented the Herrs in the circuit court attached to his reply brief an affidavit in which he avers that the New Owners have retained his services to represent them and that they wish to maintain the instant appeal as the assignees of the Herrs' interest. Considering that this issue could be remedied by

[5] Rule 8-401(b) provides that the "proper person may be substituted for a party on appeal in accordance with Rule 2-241." Rule 2-241, in turn, provides in pertinent part that "[t]he proper person may be substituted for a party who: . . . (3) transfers an interest in the action, whether voluntarily or involuntarily . . . ."

motion, we decline to decide the case on this basis. We shall treat the New Owners as assignees of the Herrs. [6]

c.

The landmark Maryland appellate decision on standing to seek judicial review in land use cases is *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137 (1967). There, the Court of Appeals held that "[u]nder the applicable statutory law, two conditions precedent" must be satisfied before a person has standing to seek judicial review of a land use decision: "(1) he must have been a party to the proceeding before the Board, and (2) he must be aggrieved by the decision of the Board." *Id*. at 143. *Bryniarski* was decided under Md. Code (1957, 1966 Supp.) Article 25A, section 5U, which

[6] In an out-of-state case brought to our attention by the City during oral argument in this Court, *Bradley v. Zoning Hearing Bd. of the Borough of New Milford*, 63 A.3d 488 (Pa. Commw. Ct. 2013), the Commonwealth Court of Pennsylvania affirmed a trial court's dismissal of a zoning appeal brought by neighboring property owner (Bradley) objecting to grant of a use variance. While the appeal was pending in the trial court, Bradley had transferred his interest in his property to a corporation owned and managed by him. The opposing party moved to dismiss on the basis that Bradley no longer was aggrieved by the decision, having sold his interest in the property. Bradley responded by filing an "Affidavit of Ownership" explaining that "he remained the beneficial owner of the parcel . . . because he [was] the sole owner, shareholder and presiding officer of the corporation." *Id.* at 490. The corporation never "sought leave to appear or to intervene in the appeal[,]" however. *Id*. The trial court quashed the appeal and the appellate court affirmed. One judge dissented, reasoning that Bradley's controlling interest in the corporate entity, which was aggrieved by the zoning decision, gave him standing to pursue the action in the circuit court. As noted, we decline to dismiss the appeal on this basis.

explicitly required that a person petitioning for judicial review must have been a party to the proceedings before the Board *and* be aggrieved by the decision under review.[7]

There is no dispute that the Herrs, as adjoining neighbors, were aggrieved by the BMZA's decision to grant the variances. *See, e.g.*, *Greater Towson*, 234 Md. App. at 410 (adjoining property owners are *prima facie* aggrieved by zoning decisions). It also is undisputed that, even under Maryland's "liberal standards . . . for party status at an administrative hearing," *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59, 72 (2003), the Herrs were not parties to the BMZA proceedings. This is so because the Herrs did not testify at the hearing; they did not sign in as protestants; they did not write a letter in opposition to the Gamermans' application; and they were not identified by anyone present at the hearing as individuals who would be aggrieved by the decision of the BMZA.[8] *See Md.-Nat'l Capital Park & Planning Comm'n v. Smith*, 333 Md. 3, 10 (1993) (appearing before the administrative body and testifying is a sufficient, but not necessary, prerequisite for party status); *Wright v. McCubbin*, 260 Md. 11, 14 (1970) (being identified as a person who would be aggrieved by a decision of a local board of appeals is sufficient to confer party status); *Baxter v. Montgomery Cnty. Bd. of Appeals*, 248 Md. 111, 113 (1967) (submitting one's name in a writing as a protestant is sufficient to confer party status).

[7] As pertinent, the statute provided that "[a]ny person aggrieved by the decision of the board and a party to the proceeding before it may appeal to the circuit court . . . ." Md. Code (1957, 1966 Supp.) Art. 25A, § 5U.

[8] For obvious reasons, the New Owners also were not parties before the BMZA.

The Herrs maintain, however, that party status is not a prerequisite for standing to seek judicial review of a decision of the BMZA because Md. Code (2012), section 10-501 of the Land Use Article ("LU") does not so require. It provides:

> (a) A request for judicial review by the Circuit Court for Baltimore City may be filed by any person, taxpayer, or officer or unit of Baltimore City aggrieved by
>
> (1) a decision of the [BMZA]; or
> (2) a zoning action by the City Council.
>
> (b) The judicial review shall be in accordance with Title 7, Chapter 200 of the Maryland Rules.
>
> (c) This section does not change the existing standards for judicial review of a zoning action.

LU § 10-501.

While the Herrs are correct that LU section 10-501 does not make administrative party status an explicit precondition to seek judicial review, cases decided under former Art. 66B, section 2.09, the substantively identical predecessor statute, adopted the *Bryniarski* two-part test for standing. In *Committee for Responsible Development on 25th Street v. Mayor and City Council of Baltimore*, 137 Md. App. 60, 85 (2011), we cited *Bryniarksi* for the proposition that "in order to have standing to appeal a decision of an administrative agency to the circuit court, an individual (1) must have been a party to the proceeding before the Board, and (2) must be aggrieved by the decision of the Board." Likewise, in *Ray v. Mayor & City Council of Baltimore*, 203 Md. App. 15, 24-25 (2012), *aff'd*, 430 Md. 74 (2013), we characterized *Bryniarksi* as the "authoritative tap root" for "standing purposes in zoning challenges[,]" reasoning that it established two "threshold

requirement[s]" for standing: party status and aggrievement. In each of those cases, the petitioner's party status was undisputed. Nevertheless, this Court made clear *Bryniarkski* establishes the benchmark for standing to petition for judicial review from a land use decision regardless of the particular statute at issue.

Dismissal of the Herrs' appeal is not the appropriate remedy, however. In *Dorsey*, 375 Md. at 59, the Court of Appeals reversed this Court's dismissal of an appeal taken from a judgment dismissing an action for judicial review as premature in a zoning case. We had dismissed the case on the basis that none of the parties to the appeal had standing to seek judicial review. In reversing that decision, the Court of Appeals reasoned that "the individual petitioners were parties in the Circuit Court, were aggrieved by the Circuit Court's dismissal of their action, did sign a timely notice of appeal, and were properly parties-appellants in the Court of Special Appeals." *Id*. at 68. Consequently, they were "entitled to appeal to the Court of Special Appeals." *Id*. "[T]heir alleged lack of standing to have instituted the action in the trial court furnishes no ground for dismissal of the appeal." *Id* at 69. Rather, if they lacked standing to petition for judicial review, that issue was raised in the circuit court, and the trial court erroneously ruled that they had standing, the remedy would be to "reverse or vacate the trial court's judgment" and remand for the circuit court to dismiss the action for judicial review. *Id*. On the other hand, if the appeal was taken from a judgment granting a motion to dismiss for lack of standing, the remedy would be to affirm the circuit court judgment on that basis. *Id*.

We return to the case at bar. The Herrs were parties to the consolidated circuit court case, were aggrieved by the circuit court's affirmance of the BMZA's decision and noted a timely appeal from the circuit court judgment. They were thus "entitled to appeal" to this Court and their alleged lack of standing in the circuit court "is not a ground for dismissal of [their] timely and proper appeal." *Dorsey,* 375 Md. at 69. Further, as discussed, there were petitioners with standing in the circuit court. In that circumstance, as the City argued below, the Herrs' non-party status was not dispositive in the circuit court. *See, e.g.*, *Greater Towson*, 234 Md. App. at 420 (explaining that "the circuit court typically need not concern itself with the standing of other parties" on judicial review so long as there are parties with standing before it); *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md. App. 636, 652 (2012), *aff'd on other grounds*, 432 Md. 292 (2013) ("[w]here there exists a party having standing to bring an action or take an appeal, we shall not ordinarily inquire as to whether another party on the same side also has standing") (citation omitted)). Because the presence of the first petitioners conferred jurisdiction upon the circuit court to decide the action for judicial review and the absence of the first petitioners from this appeal does not impact our jurisdiction over this timely appeal taken from a final judgment, the appeal is properly before us for decision and dismissal is not appropriate. The question is whether the judgment should be affirmed or reversed.

d.

Although the Gamermans are aggrieved, and assuming they stand in the shoes of the Herrs, their objections are not preserved because the Herrs failed to exhaust administrative remedies. They did not object before the BMZA. We decline to hold that non-participant adjacent owners, *i.e.*, the Herrs, or their assignees, can raise issues raised by other participants in the administrative proceeding when they raised none. By not participating before the BMZA, the Herrs failed to exhaust administrative remedies relative to their challenge to the authority of the BMZA to grant the variances and the New Owners, as their successors in interest, are barred from challenging that aspect of the BMZA decision on the same basis. We affirm on that basis.

Despite this conclusion, we shall address the merits of the appeal.

DISCUSSION

I.

Standard of Review

In an appeal from a decision on judicial review of an administrative body's decision, we review the decision of the administrative body, not that of the circuit court. *See Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012). Our review of the final agency decision, here the BMZA's resolution granting the variances, is circumscribed and follows a three-step process. *Sterling Homes Corp. v. Anne Arundel Cnty.*, 116 Md. App. 206, 216 (1997). We ask whether: "1) the agency recognized and applied the correct principles of law governing the case, 2) the agency's

factual findings are supported by substantial evidence, and 3) the agency applied the law to the facts reasonably." *Id*. (citing *Evans v. Shore Commc'ns, Inc.* 112 Md. App. 284, 299 (1996)). A factual finding is supported by substantial evidence in the record if "a reasoning mind could have reached the factual conclusions reached by the agency." *Eng'g Mgmt. Servs., Inc. v. Md. State Highway Admin*., 375 Md. 211, 226 (2003) (citations omitted).

II.

The New Owners challenge the authority of the BMZA to grant the requested variances because they maintain that two provisions of the Zoning Code prohibit expansion of a non-complying structure, except in a very limited manner that was exceeded here. The BMZA did not exceed its authority under the Zoning Code. We explain.

The New Owners contend that ZC §§ 13-506 and 13-507, read together, prohibited the grant of the variances. ZC § 13-506 governs "Expansions of structure – General restrictions[,]" and provides:

> (a) *Scope of section.*
> This section applies to all expansions of a noncomplying structure[9], **except as specifically authorized under:**
>
> > (1) [ZC] § 13-507 {"Expansions of structure – attached or semi-detached, single family dwellings"} of this subtitle; or

[9] A noncomplying structure is "any lawfully existing structure that does not comply with the applicable bulk regulations of the district in which it is located." ZC § 13-101(b).

(2) **Title 15 {Variances} of this article.**

(b) *Restriction on expansion*.
A noncomplying structure may not be expanded if the expansion would either:

(1) create a new noncompliance; or

(2) increase the degree of noncompliance of any part of the structure.

(Bolded emphasis added.)

ZC § 13-507, cross-referenced above, provides a means to minimally expand a noncomplying structure that applies only to "attached or semi-detached, single-family dwellings," such as the Property. It permits a structure with a noncomplying lot coverage percentage to increase its lot coverage by up to 10% and a structure with a noncomplying setback to decrease the rear yard setback by up to 2 feet. ZC § 13-507(a). In either case, the property owner must apply to the Zoning Administrator for permission to expand the noncomplying structure; the Zoning Administrator must refer the application to the Planning Director; and the Planning Director must make a recommendation relative to the application. ZC § 13-507(b)-(c). The application may then be approved, denied, or approved with conditions by the Zoning Administrator. ZC § 13-507(e).

The New Owners read ZC §§ 13-506 and 13-507 to prohibit any expansion of a noncomplying structure beyond a 10% lot coverage increase and/or a 2-foot rear setback decrease. Thus, they maintain that the BMZA exceeded its authority by granting lot coverage and setback variances in excess of that allowed by ZC § 13-507(a) and by granting the height variance, which is wholly prohibited in their view.

The BMZA responds that ZC § 13-506(a) creates alternative methods to expand a noncomplying structure, one of which is by applying for a variance with the BMZA. If the latter route is followed, the limitations and procedures imposed by ZC § 13-507 are not implicated.[10]

[10] This argument was raised for the first time in the Herrs' petition for judicial review in the circuit court. In its memorandum in opposition to the Second Petition in the circuit court, the City argued that the Herrs failed to exhaust administrative remedies as to this issue, citing this Court's decision in *Halici v. City of Gaithersburg*, 180 Md. App. 238 (2008). In *Halici*, we explained that "[o]rdinarily, a court reviewing the decision of an administrative agency 'may not pass upon issues presented to it for the first time on judicial review . . . .'" *Id*. at 248 (quoting *Schwartz v. Md. Dep't of Natural Resources*, 385 Md. 534, 556 (2005)). "The failure to raise an issue before the administrative agency is a failure to exhaust administrative remedies and an improper request for 'the courts to revolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency.'" *Id*. at 249 (quoting *Chesley v. City of Annapolis*, 176 Md. App. 413, 427 n.7 (2007)). A limited exception to this principle exists where a party raises for the first time on judicial review a "challenge to the statutory authority of the administrative body to take the action at issue." *Id*. at 249; *see Harbor Island Marina, Inc. v. Bd. of Cnty. Comm'rs of Calvert Cnty*., 286 Md. 303 (1979) (issue of county's statutory authority to regulate the use of navigable waters was properly raised for the first time before the circuit court even though not raised before the agency); *Cnty. Council of Prince George's Cnty. v. Dutcher*, 365 Md. 399 (2001) (district council's authority to review a planning board's approval of a preliminary subdivision plan properly considered *sua sponte* on appeal though not raised by either party before the agency). We characterized those types of challenges as going to the "subject matter jurisdiction" of the agency and, like a challenge to the subject matter jurisdiction of a court, could not be waived. *Halici*, 180 Md. App. at 252. In contrast, challenges to how a statute or regulation has been applied by an administrative agency "must have been raised before the administrative agency to avoid waiver." *Id.* at 250.

In the instant case, the New Owners' challenge to the BMZA's authority to grant the variances is not in the nature of a jurisdictional challenge that need not have been raised before the agency. They disagree with the BMZA's interpretation of two interrelated zoning regulations, as applied to the Property. In addition to the general failure to exhaust administrative remedies by failing to appear before the BMZA, as discussed above, the New Owners' predecessors in interest necessarily failed to raise this

(continued…)

We conclude that the BMZA had authority to grant the variances. ZC § 13-506 restricts expansion of a noncomplying structure except as "specifically authorized" by ZC § 13-507(a) ***and*** by Title 15 of the Zoning Code, which governs variances. Under Title 15, a property owner may apply to the BMZA for a variance to expand a structure beyond the dictates of ZC § 13-507(a), including by obtaining a variance to permit a "lot coverage that is more than that otherwise allowed by the applicable regulation," ZC § 15-202(b); a "setback that is less than that otherwise required by the applicable regulation," ZC § 15-203; and/or a "height that is more or less than that otherwise allowed by the applicable regulation." ZC § 15-204(a).

Contrary to the arguments raised by the New Owners, this construction of ZC § 13-506(a) does not render ZC § 13-506(b) "meaningless and nugatory." Subsection (b) makes clear that though a noncomplying structure may be continued, repaired, maintained, and structurally altered consistent with the Zoning Code, *see* ZC §§ 13-502 – 13-503, the noncompliance may not be expanded without applying to the Zoning Administrator pursuant to ZC § 13-507[11] *or* by applying to BMZA pursuant to Title 15.

(…continued)
specific challenge before the BMZA; thus, they failed to exhaust administrative remedies and have waived this issue for appellate review.

[11] In its brief, the Board explains that ZC § 13-507 was enacted to address the existence of more than 80,000 rowhouses that are noncomplying structures because they are less than 16-feet wide. Modest expansions of those structures are allowed by ZC § 13-507 without requiring a homeowner to apply for a variance because, in many cases, the homeowners are unable to make the threshold showing of uniqueness under Title 15.
(continued…)

The Gamermans sought an expansion that exceeded that allowed by ZC § 13-507 and, thus, they applied to the BMZA for a variance. The BMZA was specifically authorized to adjudicate those variance requests consistent with Title 15 and did not exceed its authority by so doing.

III.

The New Owners contend that the BMZA erred by finding that the Property was unique, by finding that strict compliance with the Zoning Code would cause a practical difficulty, and by its other findings (or lack thereof) pursuant to ZC § 15-219. The City responds that all the BMZA's findings were supported by substantial evidence in the record and were legally correct.

a.

Before a variance may be granted, the administrative body must undertake a two-step threshold inquiry:

> The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is – in and of itself – unique and unusual in a manner different from the nature of surrounding properties such that the

(…continued)

In their reply brief, the New Owners dispute this legislative history, arguing that the amendment of ZC § 13-506 and the enactment of ZC § 13-507 were in response to an unreported decision of this Court in *Bernadette Price v. Mayor & City Council of Baltimore*, No. 1670, Sept. Term 2007 (Md. App. Apr. 14, 2009). An unreported opinion properly may be cited for a "purpose other than as precedent within the rule of stare decisis or as persuasive authority," but under those circumstances, a copy of the opinion must be attached to the brief. Md. Rule 1-104(b). No copy of this opinion was attached. In any event, our resolution of this issue turns upon the plain language of the Zoning Code, not the legislative history.

> uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. . . . If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, *i.e.*, a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance *caused by* the property's uniqueness, exists.

Cromwell v. Ward, 102 Md. App. 691, 694-95 (1995) (emphasis in original) (footnote omitted); *see also* ZC § 15-218 (before the BMZA may grant a variance, it must make two threshold findings: (1) "because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved," (2) "an unnecessary hardship or practical difficulty would result, as distinguished from a mere inconvenience, if the strict letter of the applicable requirement were carried out").

If those threshold findings are satisfied, the BMZA also must make the following nine multi-part findings:

> (1) the conditions on which the application is based are unique to the property for which the variance is sought and are not generally applicable to other property within the same zoning classification;
> (2) the unnecessary hardship or practical difficulty is caused by this article and has not been created by the intentional action or inaction of any person who has a present interest in the property;
> (3) the purpose of the variance is not based exclusively on a desire to increase the value or income potential of the property;
> (4) the variance will not:
>
> (i) be injurious to the use and enjoyment of other property in the immediate vicinity; or
> (ii) substantially diminish and impair property values in the neighborhood;
>
> (5) the variance will not:
>
> (i) impair an adequate supply of light and air to adjacent property;
> (ii) overcrowd the land;
> (iii) create an undue concentration of population;
> (iv) substantially increase the congestion of the streets;

(v) create hazardous traffic conditions;
(vi) adversely affect transportation;
(vii) unduly burden water, sewer, school, park, or other public facilities;
(viii) increase the danger of fire; or
(ix) otherwise endanger the public safety;

(6) the variance is not precluded by and will not adversely affect:
(i) any Urban Renewal Plan; or
(ii) the City's Master Plan;

(7) the variance will not otherwise:
(i) be detrimental to or endanger the public health, security, general welfare, or morals;
or
(ii) in any way be contrary to the public interest;

(8) the variance is in harmony with the purpose and intent of this article; and

(9) within the purpose and intent of this article, the variance granted is the minimum necessary to afford relief, to which end a lesser variance than that applied for may be permitted.

ZC § 15-219.

b.

At the BMZA hearing, Ms. Gamerman testified that the Property is unique because it is a triangle. Mr. Gamerman added that it was a "very sharp angle triangle too" and characterized it as "unconventional and unique." Mr. Gamerman further testified that the Property did not have a useable basement and, thus, he and his wife hoped to convert the first floor into a garage, which would further restrict their living space. As a direct consequence of the unique shape of the lot (and the existing structure), the "useful living space" on each floor was significantly restricted. For that reason, the Gamermans sought to expand the Property to provide more useable living space to allow them to live and work in the home and, eventually, provide living space for their elderly parents as well.

Ms. Stevens, who owned two properties on Patterson Park Avenue across the street, one that she rented and one that she lived in, testified that she was concerned about the Property infringing upon her sunlight if the height variance were granted. Ms. Folks, who lived eight to ten houses down on Essex Street, questioned whether the Gamermans met the practical difficulty standard given that they simply wanted more living space in the house they had purchased. Ms. Folks further testified that the Property was not unique, in her view, because there were numerous "oddly shaped" triangular homes near the Property.

Mr. Gamerman countered that the nearby triangular shaped lot was much larger than the Property, making the unusual interior angles less significant**.**

The Chairman of the BMZA noted that the zoning map that was in evidence demonstrated that "generally speaking the properties in this area are typical rowhouse properties. That is, they are rectangular in shape lots."

Mr. Gamerman was asked about the setback and lot coverage variances he sought. He explained that rear of the lot already was covered with "impervious surfaces," including poured concrete and "outbuildings" that were attached to the main structure. A photograph in evidence showed that the rear of the lot also is surrounded by a low concrete wall. The proposed rear expansion of the Property would encompass all that area within the wall.

c.

In its resolution granting the variance request, the BMZA made the following pertinent findings. It found that the "triangular . . . shape" of the lot caused it to "progressively narrow[] at its western and eastern vertices to 0 feet of depth." Although other triangular shaped lots exist in Baltimore City, there were "few other structures or lots" with similarly restricted space. The BMZA concluded that the shape of the lot, coupled with its size and other features, made it unique as that term is used in the ZC section 15-218.

The BMZA further found that the "unusual lot and building" resulted in a "restrict[ion of] livable and usable space" and made it difficult to convert it to a single-family home, which was the zoned use for the Property. This amounted to a practical difficulty.

Turning to the ZC § 15-219 findings, the BMZA found that the conditions described above were "unique to this particular building on this particular lot" because, as already mentioned, there were few triangular properties in the vicinity and none of the same size. *See* ZC § 15-219(1). The practical difficulty was not created by the Gamermans because the lot shape and the shape and size of the existing structures predated their ownership of the Property. *See* ZC § 15-219(2). The Gamermans' application for variances was not "based exclusively on a desire to increase the value or income potential of the [P]roperty" given that no evidence to that effect had been introduced at the hearing. *See* ZC § 15-219(3). The BMZA found that the Gamermans

adequately rebutted the claim that the expansion of the Property would impair light and air for neighboring properties and found that the improvements to the Property would increase, not diminish, property values. *See* ZC § 15-219(4). The proposed renovation would not overcrowd the land and would reduce the density from multi-family to single-family for the Property, which would not have any impacts on traffic, parking, or public facilities, or increase any public safety hazards. *See* ZC § 15-219(5). The proposed variances were not otherwise detrimental to public health, security, general welfare, and morals, or contrary to the public interest. *See* ZC § 15-219(7). The height variance requested conflicted with the Urban Renewal Plan but was subject to a waiver request from the Commissioner for Housing and Community Development and, thus, was not expressly prohibited. *See* ZC § 15-219(6). Finally, the variances were "in harmony with the purpose and intent of the Zoning Code of the City of Baltimore [and] . . . [were] the minimum necessary to afford relief under th[e] application." ZC § 15-219(9).

d.

The New Owners contend that the BMZA's finding that the Property is unique was "legally erroneous" under controlling decisions of this Court. They rely upon *Cromwell*, 102 Md. App. at 691, and *Dan's Mountain Wind Force, LLC v. Allegany County Board of Zoning Appeals*, 236 Md. App. 483 (2018). *Cromwell* involved the grant of an after-the-fact height variance "for an accessory building already built by [the applicant]." 102 Md. App. at 693. Mr. Ward hired a contractor to construct a two-story garage and wine cellar on his property in the Ruxton area of Baltimore County. The total

height was 21 feet, six feet higher than permitted by the applicable zoning regulation. He applied for and was granted an after-the-fact variance. A neighbor, Mr. Cromwell, appealed that decision to the Baltimore County Board of Appeals, which granted the variance, and the circuit court affirmed on judicial review. Thereafter, the case reached this Court, which reversed. We observed that the Board of Appeals had "revers[ed] the required process" for a variance by "first determining whether a practical difficulty or unreasonable hardship exists" and then using that affirmative finding to "create a unique and unusual situation as to the subject property because surrounding properties do not experience the hardship or difficulty." *Id*. at 695. Mr. Ward's property had been deemed unique because of the hardship he would experience were he forced to modify the two-story accessory building that violated the zoning ordinance. We held that "the variance that is desired (and the difficulties that would exist if it is not granted) cannot be the source of the first prong of the variance process – an inherent uniqueness of the subject property not shared by surrounding properties." *Id*.

In *Dan's Mountain*, we held that the Allegany County Board of Zoning Appeals had "erred in its uniqueness analysis" and reversed a decision to deny setback variance requests to eight co-applicants to construct 17 wind turbines. 236 Md. App. at 497. We remanded the matter for the Board to make additional findings. Specifically, we reasoned that the Board should have first identified the unusual features of the properties, if any, and then should have looked to surrounding properties to determine if they shared those features. Instead, the Board had compared the co-applicant properties to each other

and determined that they shared the same unusual features, and thus were not unique. We further held that the Board erred by not focusing on the unique features that specifically related to the variance request, *i.e.*, topography and other characteristics that impacted the placement of turbines within setback areas.

We return to the case at bar. Unlike in *Cromwell*, where the applicant's violation of the zoning regulations created the unique condition that resulted in a practical difficulty, here, the Gamermans' application for a variance was based upon an inherently unique feature of the Property: its shape. Consistent with *Dan's Mountain*, the BMZA first considered the shape of the lot and the existing structure thereon and then compared it to surrounding properties, concluding that while it was not singular, it was nevertheless unusual enough to be unique as compared to neighboring rectangular lots. The BMZA's findings in that regard were supported by substantial evidence in the record and were not erroneous.

Having made a "supportable finding of uniqueness or unusualness," the BMZA moved on to consider the practical difficulty prong. *Cromwell*, 102 Md. App. at 695. It did not err by finding that the unique shape of the lot and existing structure created a practical difficulty because it restricted the useable living space on each floor of the Property, thus creating a nexus between the unique shape and the variance requests. The New Owners suggest that the BMZA was obligated to review each variance separately to determine if a nexus existed. Because all three variances were requested to address the same issue – restricted useable living space within the Property caused by its triangular

shape – the BMZA did not err by finding more generally there was a nexus between the shape and the disproportionate impact of the lot coverage, setback, and height regulations on the Property.

The BMZA's findings on the nine overlapping ZC § 15-219 factors all were supported by substantial evidence in the record and were not erroneous. For all of these reasons, the judgment of the circuit court upholding the BMZA decision is affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.