Circuit Court for Baltimore City
Case No. 24-C-18-004603

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 187

September Term, 2019

ANETA SPILMAN, ET AL.

v.

BOARD OF MUNICIPAL AND ZONING APPEALS, ET AL.

Berger,
Leahy,
Shaw Geter,

JJ.

Opinion by Leahy, J.

Filed: April 10, 2020

This appeal springs from a dispute between neighbors in the 1800 block of Lancaster Street in the Fells Point neighborhood of Baltimore City. Appellees, Ilan Goldberg and Sarah Mandel, applied to the Baltimore City Department of Housing and Community Development ("DHCD") and obtained a permit to "construct new matching 2nd floor deck on side elevation of existing condo measuring 8ft x 19ft as per plans[.]" Although not evident from the phrasing of the permit, the permit was for construction of an 8-foot extension to an already existing 8 by 19-foot deck. The new 16 by 19-foot deck extends to within one foot of the house and backyard garden owned by Aneta and Craig Spilman, the appellants in this case.

The Zoning Administrator determined that the extended deck did not comply with Article 32 of the Baltimore City Code (the "Zoning Code"),[1] but recommended that the Baltimore City Board of Municipal and Zoning Appeals ("BMZA") grant a variance for retention of the deck structure. The BMZA held a public hearing, and on September 11, 2018, issued a resolution granting Mr. Goldberg and Ms. Mandel's request to retain the deck without requiring a variance from the applicable provisions of the Zoning Code. On petition for judicial review filed by the Spilmans, the Circuit Court for Baltimore City affirmed the BMZA's decision on February 26, 2019.

[1] In this opinion, unless otherwise indicated, we refer to the provisions of the 2017 Zoning Code (as enacted and corrected by Ords. 16-581 and 17-015) in effect at the time of the BMZA's hearing and decision. A new Zoning Code has been in effect since 2018.

The Spilmans timely noted their appeal and present two questions for our review, which we have consolidated and rephrased slightly:[2]

1. Did the BMZA err in determining that Mr. Goldberg and Ms. Mandel could build the extension of their deck by right under the applicable provisions of the Zoning Ordinance without seeking a variance?

We hold that the BMZA erred in its application of the relevant provisions of the Zoning Ordinance and in its failure to consider its prior determination with regard to whether a side yard was provided for the subject property. Accordingly, the BMZA resolution shall be vacated and the case remanded back to the BMZA for further proceedings consistent with this opinion.

BACKGROUND

1. The Properties

Mr. Goldberg and Ms. Mandel's townhouse is part of a condominium regime—Ragtime Condominium—that was established several decades earlier by Ragtime Associates through a declaration signed on May 4, 1987 and recorded in the land records of Baltimore City at liber 1277, folio 26. The Ragtime Condominium is located in the C-

[2] The Spilmans' questions presented in their brief are as follows:

1. Did the BMZA misconstrue the applicable statutory scheme when it determined that Zoning Ordinance § 10-401 does not require a variance to reduce an interior-side yard in the C-1 District?
2. Was there insufficient evidence to support the BMZA's determination that the interior-side yard provisions of Zoning Ordinance § 10-401 are not applicable to the subject building and lot?

1 zoning district[3] and consists of two structures—an Apartment Building and a Townhouse Building.

The Apartment Building has 23 units and, because of its configuration, has a street address that is different from the townhouses. The Townhouse Building is comprised of six single-family townhouse units, numbered 24 through 29 and addressed as 1821 through 1831 Lancaster Street. Although the townhouse units have Lancaster Street addresses, their front doors face Wolfe Street, which runs perpendicular to Lancaster Street. The fronts of the townhomes also overlook Thames Street Park, located between the townhouses and Wolfe Street. The first level of the Townhouse Building consists primarily of a parking area—a general common element of the Ragtime Condominium Association. Within each townhouse unit, the Wolfe Street entrance opens to a small first-floor foyer with a set of steps leading to the second level. Another staircase on the second level leads to the upper third level of the townhouses. As shown in floor plans from 1987, each townhouse was designed to have a deck, measuring approximately 7 feet by 19 feet, extending from the rear of the second level.

The Spilmans have owned the residential property located at 1807 Lancaster Street (the "Spilman Property") since 1983. The Spilman Property lies contiguous to the Townhouse Building property, but unlike the townhouses, the Spilmans' house faces Lancaster Street. Accordingly, the back decks of the Townhouse Building overlook the

[3] The C-1 district, or the "Neighborhood Business Zoning District," "is intended for areas of commercial clusters or pedestrian-oriented corridors of commercial uses that serve the immediate neighborhood." Zoning Code §§ 6-205, 10-201(a).

side and rear of the Spilman Property, including the Spilmans' backyard garden and "Juliet balcony" on the rear of their house. As originally built, the decks left approximately 9 feet between the Townhouse Building decks and the Spilman Property. A masonry wall that runs inside the Spilmans' eastern lot line, which is visible from the parking area, separates their garden from the Townhouse Building property.

Mr. Goldberg and Ms. Mandel own Unit 28 of the Townhouse Building, the second unit in from Lancaster Street, which has an address of 1823 Lancaster Street (the "Goldberg/Mandel Unit"). Mr. Goldberg told the BMZA that he purchased the condominium sometime in March of 2013. The unit had the same deck as was depicted in the 1987 floor plans, measuring approximately 7 to 8 feet by 19 feet. According to Ms. Mandel, she and Mr. Goldberg had a "clear vantage point of the Spilmans' [] garden and Juliet balcony" from the original deck.[4]

2. The New Deck

In 2006, about a decade before the dispute in the underlying case arose, Robert Baumann, the owner of 1821 Lancaster Street, Unit 29—immediately adjacent to the Goldberg/Mandel Unit—removed his 8 by 19-foot deck and replaced it with a 14 by 19-foot deck (the "2006 Deck"). Sometime in the fall of 2016, Mr. Goldberg and Ms. Mandel decided that they wanted to expand their deck to create more space for their growing family

[4] The photographs and drawings in the record show that the deck behind the first townhouse unit backs up to the side-wall of the Spilmans' house, which faces Lancaster Street. With regard to the new deck behind the Goldberg/Mandel Unit, however, the width of the deck extends beyond the back of the Spilmans' house, so that part of the deck backs up to the side-wall of the Spilmans' house and part of it directly overlooks the Spilmans' garden.

by building a deck extension similar to the 2006 Deck. On February 27, 2017, Mr. Goldberg emailed Dr. Spilman "to follow up on the conversation that [they] had in October about the back deck expansion of [his and Ms. Mandel's] home." In his reply, Dr. Spilman informed Mr. Goldberg that the Spilmans "would vigorously oppose any extension of [the] current 2nd floor deck facing [their] property or any other deck that faces [their] east property line."

Despite the Spilmans' opposition, Mr. Goldberg and Ms. Mandel began seeking the necessary approvals for the construction of the new deck. In October of 2017, Mr. Goldberg contacted the Design Review Committee of Fells Point (the "DRC") about the proposed construction. In turn, the DRC informed Eddie Leon, a member of the Baltimore City Commission for Historical and Architectural Preservation ("CHAP"), that Mr. Goldberg's "application look[ed] good" and a "full DRC meeting [wa]s not required." About a week later, Ms. Mandel submitted an Authorization to Proceed ("ATP") application package to CHAP, seeking permission to:

> Construct new matching 2nd floor deck on side elevation of existing condo.
> Measuring 8ft x 19ft. as per plans.
> Construct deck from timber frame as per plans and per code[.]

CHAP determined that the work, as described in the ATP application, was "not detrimental to the Fells Point **Historic District**" and issued an ATP on October 23, 2017.[5] The ATP

[5] The record contains an email, dated April 4, 2018, from Mr. Leon in which he responded to an email from Ms. Spilman inquiring into CHAP's position on the new deck for 1823 Lancaster Street and speculating that the "decision might have been based on false and misleading information provided by the applicant." Mr. Leon's email stated, in (Continued)

noted that "[n]o work is to be started until a Building Permit is issued by the Permits Section, Construction and Building Inspection Division, Department of Housing (if required)" and that the ATP would "become valid at that time."

The DHCD issued Permit No. COM2017-14095 to Mr. Goldberg and Ms. Mandel on November 11, 2017. The permit gave the authorization, verbatim, reflected in the request set out above. According to Mr. Goldberg and Ms. Mandel, the plans attached to the permit demonstrate that the "8ft" referred to an 8-foot extension of the existing 8-foot deck, for a total of 16 feet.

Subsequently, Mr. Goldberg and Ms. Mandel, on March 17, 2018, signed a sublease agreement with Ragtime Associates, the majority owner of Ragtime Condominium Association with a leasehold interest in all "General Common Elements of the Association, including all parking areas, driveway areas, and drive thru areas," to lease "two areas of the General Common Elements, each area being 6 inches in [d]iameter located at the westerly side of the Association property . . . to be used only for two deck post timber footings, one per area, and for no other use." On March 23, 2018, the Construction and Building Inspection Division of the DCHD indicated on an inspection slip that it was "Ok to pour" the footing for the new deck. Having received approval from the Ragtime

pertinent part, that: "[t]he application was for the construction of the current structure 16 x 19 ft. The description stated referred to replicate the adjoining deck . . . I understood the description to be for the original 8 x 19 ft. decks, not the [2006 Deck]. . . . The applicants[']request to build a matching 16 x 19 deck maybe [sic] incorrect if Zoning was never followed properly in the [2006 Deck]."

Condominium Association and the DRC, an ATP from CHAP, and a permit from DHCD, Mr. Goldberg and Ms. Mandel commenced construction on the new deck.

3. The Counteroffensive

The Spilmans hired Brian Dietz, a professional land surveyor, to perform a boundary survey on their property. Mr. Dietz found that "the concrete footers of the new deck expansion of the adjoining property to the East, known as 1823 Lancaster Street, encroach over the property line by 0.19 feet and 0.10 feet respectfully."

The Spilmans contacted the office of the Zoning Administrator for Baltimore City, during construction of the deck, "inquir[ing] as to the nature of the work and whether it was in compliance with applicable Zoning regulations." In a letter to the BMZA in "Appeal BMZ2018-00150," Zoning Administrator Geoffrey Veale noted that "1821 Lancaster Street [the 2006 Deck] has a deck constructed in a similar fashion to the deck at 1823 Lancaster Street; however, there is no record of a permit being issued for this work."[6] Mr. Veale noted the applicable Zoning Code provisions, including a reference to Table 10-401 listing minimum and maximum front, rear and side-yards requirements in the C-1 and other zones. Mr. Veale determined that the townhouse "properties represent a unique situation in applying the normal regulations regarding the lot line, required yards and permitted

[6] The record reflects that a permit was issued for the 2006 Deck, although the parties present different versions of Mr. Baumann's permit application. The Spilmans suggest that that application suffered from the same problems as the permit application in the underlying case, however, the Spilmans did not present documentation to support this contention to the BMZA. Accordingly, we will not consider the documents that the Spilmans offer on appeal on this issue because, 1) they were not considered by the BMZA, and 2) they concern another property and would not be contained in the government's file history for 1823 Lancaster Street.

projections applicable to these condo structures[.]" Accordingly, he recommended "that the retention of the deck structure be approved by variance of the BMZA[.]"

Mr. Veale "acknowledge[d] the unintended misapplication of the code per the issued permit" but expressed that "revoking the subject permit would subject the applicant/owner to a separate administrative review of the revocation under the Building Code when the relief sought . . . is clearly couched in the provisions of the Zoning Code and requiring a variance as a positive appeal." Thus, Mr. Veale requested "a hearing before the BMZA for the retention of the deck approved under permit number COM2017-14095" and to consider how to apply the "required yards and permitted projections" under the Zoning Code.

On April 20, 2018, Mr. Goldberg and Ms. Mandel filed an application for review with the BMZA, seeking to "[r]etain newly-constructed deck, built pursuant to permit number COM2017-14095." In the statement of intent filed with their appeal, Mr. Goldberg and Ms. Mandel noted that the deck, "an extension of [their] previous deck," had been completed.

4. Proceedings Before the BMZA

On June 19, 2018, the Spilmans, through counsel, submitted to the BMZA a letter noting their "opposition to Unit 28's owners' request for a variance to retain the Exten[s]ion Deck" and their intent to participate in the hearing on Mr. Goldberg and Ms. Mandel's appeal. The Spilmans asserted that the extended deck violated the Zoning Code because it "reduces the 10-foot interior-side yard required for C-1 districts by Table 10-

401" and "encroaches into the interior-side yard in violation of § 15-601."[7] They further argued that a variance should not be issued because the extended deck did not meet the approval standards for obtaining a variance set forth in § 5-308.[8] The Spilmans urged that

[7] Section 15-601 of the Zoning Code provides that "[e]xcept for the projections and obstructions specified in *Table 15-601: Permitted Encroachments into Required Yards*, every part of a required yard or of any other required open space must be open and unobstructed from the ground to the sky."

[8] The approval standards of § 5-308 of the Zoning Code are as follows:

(a) *Required finding of unnecessary hardship or practical difficulty*.

In order to grant a variance, the Zoning Administrator, the Board of Municipal and Zoning Appeals, or the City Council, as the case may be, must find that, because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, an unnecessary hardship or practical difficulty, as distinguished from a mere inconvenience, would result if the strict letter of the applicable requirement were carried out.

(b) *Other required findings*.

The Zoning Administrator, the Board of Municipal and Zoning Appeals, or the City Council, as the case may be, must also find that:

(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 Code 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 is in harmony with the purpose and intent of this Code;

(6) the variance is not precluded by and will not adversely affect:

(i) any Urban Renewal Plan;

(Continued)

(1) "[a]pplication of the Zoning Code produces no unnecessary hardship or practical difficulty"; (2) "[a]ny unnecessary hardship or practical difficulty . . . was created by Unit 28's owners' intentional action"; and (3) "[a] variance will be injurious to the use and enjoyment of the Spilman Property and will reduce the value of the Spilman Property." In addition, the Spilmans noted that they did not "actively object" to the 2006 Deck "because it does not directly border the garden yard and is tucked back on the windowless side of their home," unlike the "front and center" extended deck on the Goldberg/Mandel Unit.

At the start of the hearing before the BMZA on July 10, 2018, the Planning Department stated that it had no comment on the application. The BMZA then heard argument from Mr. Goldberg and Ms. Mandel's counsel, who began by outlining the "two respects" in which the case is "unusual." First, counsel noted that the Goldberg/Mandel Unit is affiliated with three different streets as the front door faces Wolfe Street, the address according to the State Department of Assessments and Taxation is Lancaster Street, and the mailing address is on Thames Street. Second, counsel pointed out that Mr. Goldberg and Ms. Mandel constructed the new deck—after receiving approval from the condominium association, the DRC, CHAP, and the requisite Baltimore City departments—to be the same length as the 2006 Deck, which "got approval from Baltimore City under [a] permit[.]" According to counsel, no variance was needed for the new deck

(ii) the City's Comprehensive Master Plan; or
(iii) any Historical and Architectural Preservation District; and
(7) the variance will not otherwise:
(i) be detrimental to or endanger the public health, safety, or welfare; or
(ii) be in any way contrary to the public interest.

because it was "construction within one property" and the situation was too unusual to apply the Zoning Code's lot line definitions.

In turn, counsel for the Spilmans argued that the Goldberg/Mandel Unit "really isn't all that unusual," and that the front property line is on Lancaster Street because "how the individual condominium building is subdivided internally is really not relevant." On that basis, counsel contended that the extended deck was constructed in an interior-side yard and was subject to the requirements of Table 10-401 of the Zoning Code, which provides that no interior-side yard is required in the C-1 district, but "if one is provided, it must be a minimum of 10 feet." Zoning Code, Tbl. 10-401. Counsel asserted, in response to a question from the Chairman, that an interior-side yard was provided for the Townhouse Building and that, while the 2006 Deck created an obstruction, it could not just eliminate the entire interior-side yard. Because an interior-side yard was provided, counsel concluded, "it must be 10 feet."

At the close of the hearing, counsel for Mr. Goldberg and Ms. Mandel emphasized that they were seeking to retain the deck properly built under their approved permit, rather than to obtain a variance. Following deliberations, the BMZA voted to approve Mr. Goldberg's and Ms. Mandel's application to retain the extended deck by four votes in approval and one abstention.

5. The BMZA's Resolution

On September 11, 2018, the BMZA issued a written resolution granting Mr. Goldberg's and Ms. Mandel's request to retain the extended deck constructed pursuant to their approved permit. The BMZA concluded that a variance was not necessary in this

"unusual appeal" and found "good cause to approve and authorize [Mr. Goldberg and Ms. Mandel] to retain the existing deck for two reasons":

> [F]irst, the impossibility of applying yard setbacks to the currently improved property per the opinion of the Zoning Administrator; second, the fact that side yards are not require in this C-1 Zoning District.

In support of the first reason, the BMZA explained that the Goldberg/Mandel Unit "[b]y its construction [] would appear to 'front' on Thames Street Park to the east, with perceived 'rear'-facing decks constructed on units 24-29 running perpendicular to Lancaster Street." The townhouse units, however, are "formally addressed on Lancaster Street" and the Zoning Code instructs that the "location of front, rear, and side yards is determined by the location of the front lot line of a particular lot." Because decks are permitted encroachments in rear yards but are prohibited in side yards, the BMZA reasoned that the "current condominium common area space in which the decks project was never intended to be a side yard requiring application of a side yard setback." The BMZA added that "[u]nder the opposition's theory as to the applicability of side yard setbacks, this [sic] would make all of the existing decks for units 24-29 unpermitted encroachments, or at the very least, nonconforming structures, into the required side yard." Finally, the BMZA pointed out that the condominium complex has one legal property frontage but each of the individual units[9] may be impacted differently, which "creates a difficulty in the fair and consistent determination and application of yard setbacks under the zoning code."

[9] The BMZA incorrectly stated that the condominium complex has "54 individual residential units." As was noted, the Apartment Building has 23 units and the Townhouse Building has six units, creating a total of 29 condominiums.

In support of its second line of reasoning, the BMZA posited that, even if its conclusion that it could not determine the required yard setback was incorrect, the case would not turn on variance standards, "but on the fact that under [Zoning Code] Table 10-401 side yards are not required in the C-1 Zoning District." Assuming that a side yard existed, the BMZA continued, "Table 10-401 provides that no side yard is required" so "the existing decks projecting into the condominium common space from Units 28 and 29 are constructed by-right (for zoning purposes) and under a valid permit." According to the BMZA, Table 10-401 contains "no affirmative requirement to provide a side yard in the first place." The BMZA noted that if the Ragtime development "were demolished and reconstructed, a new property owner could construct a new building covering the entire portion of the existing decks and expand to the arguable 'side' lot for condominium units 24-29" without any need for a variance.

6. Proceedings in the Circuit Court

The Spilmans filed a petition for judicial review in the Circuit Court for Baltimore City on August 8, 2018, about a month before the BMZA issued its written resolution. Shortly after the BMZA issued its resolution, Mr. Goldberg and Ms. Mandel and the BMZA noted their intent to participate in the judicial review.

After receiving memoranda from the parties and conducting a hearing, the circuit court, on February 26, 2019, issued a Memorandum and Order affirming the decision of the BMZA. The court noted that its role was to determine "whether there is substantial evidence in the agency record to support the agency's findings and conclusions." On that basis, the court determined that "the evidence presented substantially supported the

BMZA's decision to approve [Mr. Goldberg and Ms. Mandel's] building permit" for the new deck. The court found that there was evidence to support the BMZA's finding that the condominium property did not have an existing side yard setback at the time of construction of the new deck and that, therefore, no variance was necessary for the deck.

The Spilmans timely noted their appeal to this Court on March 27, 2019.

DISCUSSION

Standard of Review

In an appeal from judicial review of an agency action, we look through the decision of the circuit court and review the agency's decision directly. *Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Props.*, 453 Md. 516, 532 (2017) (citation omitted). Our review is narrow, and "we may not uphold the final decision of an administrative agency on grounds other than the findings and reasons set forth by the agency." *Frey v. Comptroller of Treasury*, 422 Md. 111, 137 (2011). Our role in this case is limited to determining whether there is substantial evidence in the record as a whole to support the BMZA's findings and conclusions, and then to determine if the BMZA's decision is premised upon an erroneous conclusion of law. *See United Parcel Serv., Inc. v. People's Counsel for Baltimore Cty.*, 336 Md. 569, 577 (1994).

In determining whether the BMZA's factual findings are based on substantial evidence, we review the record to see if they are supported by evidence that "a reasonable mind might accept as adequate to support a conclusion." *Ware v. People's Counsel for Baltimore Cty.*, 223 Md. App. 669, 681 (2015) (citation and internal quotation marks omitted). Although we review purely legal decisions de novo, "we give considerable

weight to the agency's interpretation and application of the statute which the agency administers." *Mayor & Council of Rockville v. Pumphrey*, 218 Md. App. 160, 194 (2014) (citation and internal quotation marks omitted).

The Parties' Contentions

According to the Spilmans, the "BMZA misconstrued the applicable statutory scheme when it determined that [Zoning Code] § 10-401 does not require a variance to reduce an interior-side yard in the C-1 District." The Spilmans assert that, pursuant to Table 10-401, "an interior-side yard in the C-1 District may not be reduced below the minimum without a variance." In other words, the Spilmans read Table 10-401 to require that "a pre-existing interior-side yard [] be maintained to the minimum prescribed depth" and to prohibit "a pre-existing interior-side yard, like the one in this case, to be reduced 'by right' to anything less than ten feet." In the Spilmans' view, the BMZA "rewrites the provision" by ignoring the portion which states that "if an interior-side yard is required, it must be a minimum of 10-feet."

The Spilmans further contend that "[t]here was insufficient evidence to support the BMZA's determination that the interior-side yard provisions of [Zoning Code] § 10-401 are inapplicable to the subject building and lot." According to the Spilmans, the determination "was based on the erroneous conclusion that it is somehow impossible to apply interior-side yard requirements to this supposedly problematic property." The Townhouse Building has a relationship to existing lot lines, the Spilmans continue, and thus "setbacks may be calculated and discussed." The Spilmans assert that despite all of the evidence before the BMZA that there was "an established and existing interior-side

yard"—including the original plats for the Townhouse Building, the boundary survey the Spilmans commissioned, and contemporary photographs—the BMZA failed to analyze and understand the relevant facts about the property. Finally, the Spilmans point to the BMZA's 1984 resolution authorizing construction of the Townhouse Building, and argue that it "establishes, unequivocally, that the area between the building and the interior-side lot line was officially considered by the BMZA to be an *interior-side yard*."[10]

Mr. Goldberg and Ms. Mandel reply that the BMZA "did not state that no variance was necessary to reduce a side yard in the C-1 Zoning District[.]" Instead, they contend, "the BMZA found that the Condominium Property does not have a side yard" and

[10] Mr. Goldberg and Ms. Mandel contend that the Spilmans' argument regarding the 1984 BMZA resolution was not preserved for appellate review because it was not presented before the BMZA. Although we agree that the BMZA's 1984 resolution was not presented by the Spilmans to the BMZA, we do not agree that the Spilmans' argument was not preserved for judicial review. During the BMZA hearing, the Spilmans argued that a side yard existed and introduced the original building plans for Ragtime Condominium that show that an interior-side yard "was provided." Those plans were obviously approved by the BMZA. Because they show an interior-side yard measuring less than the 10-foot interior-side yard required at the time, the plans also indicate that the property owner must have obtained some form of approval from the BMZA, such as a variance, to build within the 10-foot side yard requirement. We conclude that the Spilmans' argument about the history of the property at issue was sufficient to preserve their argument about the 1984 resolution before the circuit court. *See HNS Dev., LLC v. People's Counsel for Baltimore Cty.*, 425 Md. 436, 458 (2012) (considering the issue of whether a taking occurred "preserved (barely)" after a party presented, in oral argument to the Board of Appeals, "a vague, but notice-worthy, takings argument").

Moreover, as the reviewing court, neither the circuit court nor this Court are precluded from considering "matters of public record which directly relate to the arbitrary, capricious or discriminatory quality of the conduct of the zoning authority" that affects the property at issue. *Aspen Hill Venture v. Montgomery Cty. Council*, 265 Md. 303, 317 (1972) (concluding that it would have been proper for the circuit court to consider the zoning agency's subsequent zoning decisions, which granted commercial zoning on a nearby tract on "basically the same evidence," for the limited purpose of determining whether the agency acted arbitrarily in denying commercial zoning).

"[b]ecause the Condominium Property does not have a side yard and the Zoning Code does not require a side yard in the C-1 Zoning District, [] no variance was necessary." In their view, the 2006 Deck was an obstruction that "eliminat[ed] any side yard that may have existed." Thus, even if the BMZA's 1984 resolution proved the existence of a side yard, any yard was eliminated in 2006 with the construction of Mr. Baumann's deck.

Also, Mr. Goldberg and Ms. Mandel assert that the BMZA did not err in concluding that it is impossible to apply the yard setbacks to the condominium property. They claim the BMZA carefully analyzed the orientation of the condominium property in conjunction with the lot line definitions and made the "factual determination" that the property presents a unique situation that precludes the BMZA from fairly and consistently applying the Zoning Code. Thus, they conclude, the "BMZA's determination is supported by substantial evidence, and the BMZA properly applied the correct principles of law to the facts."

The BMZA argues that it correctly determined that Mr. Goldberg and Ms. Mandel did not need a variance because it correctly determined that the Zoning Code does not require a side yard. The BMZA reads the Zoning Code to "give[] the property owners the choice of having either no side yard or a side yard of at least ten feet in width." The BMZA continues, "[o]ne of these two choices is having no side yard, and that is the choice that [Mr. Goldberg and Ms. Mandel] have elected." The BMZA disagrees with what it characterizes as the Spilmans' "baseless assertion that, once a property owner has made a selection – choosing either to have no side yard or of a yard of at least ten feet – that selection then becomes binding on that owner and all future owners of that property."

Further, the BMZA argues, substantial evidence demonstrated that there is no side yard provided because—as shown by photographs, testimony, and documentary evidence presented to the BMZA—"there is no unoccupied, open, and unobstructed space from the ground to the sky between the structures on [Mr. Goldberg and Ms. Mandel's] property and the adjoining lot line." In the BMZA's view, "the decks went all the way to the property line and eliminated any side yard that might have previously existed."

The Relevant Regulatory Scheme

The Zoning Code defines a required yard as "the space between a building and the adjoining lot lines that, except as otherwise permitted by th[e] Code, is unoccupied, open, and unobstructed by any part of a structure from the ground to the sky." Zoning Code § 1-315(a). Required front yards are those extending "the full width of the lot between side lot lines for the required minimum depth, as specified by the zoning district in which the lot is located, measured perpendicular to the front lot line." Zoning Code § 1-315(c). Required rear yards are those extending "between the side lot lines for the required minimum depth, as specified by the zoning district in which the lot is located, measured perpendicular to the rear lot line." Zoning Code § 1-315(e). Finally, a required interior-side yard is defined as "the yard that extends along an interior-side lot line, between the front and rear yards, for the required minimum depth, as specified for the district in which the lot is located, measured perpendicular to the interior-side lot line." Zoning Code § 1-315(d).

As the definitions for required yards demonstrate, the location of front, rear, and interior-side yards is determined by the location of the front lot line. Under the Zoning Code, the front lot line is the lot line that coincides with either "the right-of-way line of an

existing or dedicated public street from which the property derives its address" or "where no public street exists, the right-of-way line of a public or private way from which the property derives its address." Zoning Code § 1-309(c). The rear lot line is the "lot line that is most distant from and opposite the front lot line." Zoning Code § 1-309(e). Interior-side lot lines are lot lines that do "not adjoin a street" and are "not a rear lot line." Zoning Code § 1-309(d). Finally, side lot lines are those that are "neither a front lot line nor a rear lot line," including interior-side lot lines and corner-side lot lines. Zoning Code § 1-309(f). The applicable yard regulations for the commercial districts, including the C-1 district where the properties at issue are located, are set forth in Table 10-401 of the Zoning Code. Zoning Code § 10-401. For the "minimum interior-side yard" in C-1 districts, Table 10-401 provides "[n]o interior-side yard required but, if one is provided, it must be a minimum of 10 feet[.]"

In its written resolution, the BMZA considered all of the above definitions and concluded that it was impossible to apply yard setbacks to the condominium complex. The BMZA explained that "if a property has a formal address located on Lancaster Street," as the Townhouse Building does, "its front yard would be located on Lancaster Street, its rear yard would be direct rear of that parcel, and its side yard would extend along an interior-side lot line, between the front and rear yards." Because the Townhouse Building is addressed on Lancaster Street despite the configuration of the individual units, the BMZA reasoned, the units could be impacted differently, "creat[ing] a difficulty in the fair and consistent determination of yard setbacks under the [Z]oning [C]ode." The BMZA also noted that Table 15-601 of the Zoning Code permitted decks as encroachments into rear

yards but not into side yards,[11] so the Zoning Code would seem to "make all of the existing decks for units 24-29 unpermitted encroachments, or at the very least, nonconforming structures, into the required side yard." Thus, the BMZA concluded, the "current condominium common area space in which the decks project was never intended to be a side yard requiring application of a side yard setback."

The building plans and plats on which the original building permits were granted tell a different story. Ragtime Associates received approval from the BMZA to construct the Apartment Building in January of 1984. The plans on which that approval was based (which should have been in the BMZA and DHCD files for the same property), and that were introduced in the underlying hearing by the Spilmans, show a yard between the back (decks) of the Townhouse Building and the Spilman Property line. Given the address assigned to the Townhouse Building at that time, under the applicable Zoning Code, the yard should have been treated as an interior-side yard. And, because those plans show an interior-side yard measuring less than the 10-foot interior-side yard required at the time, the plans also indicate that Ragtime Associates may have obtained some form of approval from the BMZA, such as a variance, to build within the 10-foot side yard requirement. At the time, the Ragtime property was in a B-1-3 zoning district and the applicable zoning regulations stated that "a rear yard not less than 30 feet in depth and an interior side yard 10 feet wide is required where an interior side yard is provided." Zoning Ordinance (1971),

[11] As the Spilmans point out in their brief, the reference to a "deck" as a permitted encroachment into a rear yard was removed by Ordinance 18-171, which was signed by the mayor on September 17, 2018 and took effect 30 days thereafter.

§ 6.1-2-b. All of this evidence should have prompted the BMZA to investigate the basis for the original building permit approval, rather than simply conclude, without any investigation into the permit history, that a side yard was never provided because it would have meant that "all of the existing decks for units 24-29 [were] unpermitted encroachments, or at the very least, nonconforming structures, into the required side yard."

The December 18, 1984, written resolution authorizing construction of the three-story Townhouse Building only confirms what the plans suggest. The resolution states that "[t]he Board may authorize a yard or setback less than a yard or setback required under the applicable regulations under Section 11.0-3e-2(c)."[12] Thus, the BMZA granted a variance in order to approve construction of a "three story, rear addition, *projecting to within six feet of the interior side lot line* and within four feet of the rear lot line,"[13] finding that "*the exception to the yard requirements* [wa]s reasonable and would not adversely affect the community." (Emphasis added).

In the matter at hand, the BMZA determined that the yard setbacks and lot line definitions could not be applied to the subject property, and that "the current condominium common area space in which the decks project was never intended to be a side yard

[12] Section 11.0-3e-2 contained the variance provisions of the Baltimore City Zoning Ordinance (1971). Pursuant to § 11.0-3e-2(c), the BMZA could grant a variance from the zoning regulations "to authorize a yard or setback less than a yard or setback required by the applicable regulations[.]"

[13] Although Ragtime Associates obtained permission to project four feet less than the 10-foot minimum side yard requirement, as constructed, the side yard measured from the end of the townhouse decks to the property line was only one foot less than the minimum requirement.

requiring application of a side yard setback." But clearly, the BMZA had, on a prior occasion, already identified the area as a side yard and determined that "an exception to the yard requirements" of the Zoning Code was reasonable. Although administrative agencies like the BMZA "are afforded ample latitude to adapt their rules and policies to the demands of changing circumstances[,] . . . an administrative agency decision may be deemed arbitrary or capricious . . . if it is irrationally inconsistent with previous agency decisions." *Frederick Classical Charter Sch., Inc. v. Frederick Cty. Bd. of Educ.*, 454 Md. 330, 406 (2017) (citations and quotation marks omitted). Accordingly, "when an agency changes a position clearly established in its own prior precedent it 'must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" *Id.* at 407 (citing *Montgomery Cty. v. Anastasi*, 77 Md. App. 126, 137 (1988)). In this case, the BMZA should have been aware of its 1984 resolution regarding the same property in deciding whether a side yard was provided between the Townhouse Building and the Spilman Property in 1984 when construction of the Townhouse Building was approved. If a side yard was "provided," the BMZA should have determined whether another variance to the 10 foot "minimum interior-side yard" requirement in the C-1 district was warranted. Zoning Code § 10-401.

Moreover, we are not persuaded by the BMZA's interpretation of the applicable Zoning Code provisions; that, if a property owner can build all the way to an interior-side lot line (because an interior-side yard is not required under the Zoning Code), then even where a side lot "is provided," the property owner can build a structure in a portion of the side yard that spans the 10-foot area up to the interior-side lot line and thereby eliminate

all zoning requirements that pertain to the entire side yard. That would mean that a property owner could build a wall, or shed—or, as in this case—a deck, across a portion of the side yard up to the property line and declare the entire side yard eliminated so that the zoning restrictions do not apply.

The language of Table 10-401 is clear, and the BMZA's interpretation and application of it in this case effectively rewrites the ordinance and would lead to results that render the minimum yard requirements meaningless. Although we may give deference to the BMZA's interpretation of the Zoning Ordinance, *Shaarei Tfiloh Congregation v. Mayor & City Council of Baltimore*, 237 Md. App. 102, 127 (2018), the BMZA "does not have the authority to expand" the ordinance beyond its clear meaning. *Bennett v. Zelinsky*, 163 Md. App. 292, 305 (2005). *See also Maryland Ins. Comm'r v. Cent. Acceptance Corp.*, 424 Md. 1, 16 (2011) ("[W]hen the language of the statute is clear and unambiguous, no deference is due the administrative interpretation.").

Accordingly, for the reasons stated above, we reverse and remand this case to the circuit court with instructions to vacate the decision of the BMZA and remand in order that the BMZA may determine whether a variance to the 10 foot "minimum interior-side yard" requirement is warranted to permit the new deck in the C-1 district and for any further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE THE DECISION OF THE BOARD OF MUNICIPAL AND ZONING APPEALS AND REMAND THE CASE TO THE BOARD FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.