

Circuit Court for Anne Arundel County  
Case No. C-02-CV-20-405

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0594

September Term, 2020

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DAVID HINES, *et al.*

v.

ALEKSANDR PETUKHOV, *et al.*

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Berger,  
\*\*Gould,  
Zic,

JJ.

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Opinion by Gould, J.

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Filed: September 27, 2021

\*\* Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants David Hines and Theresa Lacuesta (together, the “Hineses” or “appellants”), dispute the propriety of a license granted by appellee, Maryland Department of Environment (the “MDE” or the “Department”), to appellees Aleksandr and Shannon Petukhov (the “Petukhofs” or “appellees”), to build a shared pier between two parcels of land owned by the Petukhofs. The Hineses argue that their property already shares a pier with one of the Petukhofs’ parcels; thus, under an MDE policy which limits each property to a single pier, the Petukhofs are not entitled to build a new shared pier between their two parcels. The MDE granted the Petukhofs’ application over the Hineses’ objection. The Circuit Court for Anne Arundel County denied the Hineses’ petition for judicial review, and the Hineses timely appealed to this Court.

For the reasons that follow, we hold that the MDE’s grant of the license to the Petukhofs for the construction of a new shared pier was arbitrary and capricious. We shall, therefore, vacate the judgment of the circuit court and remand for further proceedings.

## **BACKGROUND**

### *The Properties*

This dispute involves three adjacent waterfront properties along Divided Creek on the Magothy River in Anne Arundel County. The Hineses own the property at 105 Shore Road, Arnold, MD. The Petukhofs own the immediately adjacent property at 116 Cresston Road, and the adjacent property to that—112 Cresston Road—is owned by Shannon Petukhov.

Prior to 2001, 105 Shore Road and 116 Cresston Road were part of a single 1.36-acre waterfront parcel (the “original parcel”) served by a fixed wooden pier (the “existing

pier”). In 2001, the original parcel was subdivided into four lots—aptly identified as Lots 1 through 4—pursuant to a subdivision plat (the “Plat”) and a declaration of covenants, conditions, and restrictions (collectively, the “Declaration”), both duly recorded in the land records of the Circuit Court for Anne Arundel County. The original parcel was carved up such that the existing pier was located along Lot 4, which became 105 Shore Road, leaving Lot 1, which became 116 Cresston Road, ostensibly without a pier.

To solve that problem, the Declaration included provisions designed to grant Lot 1 the same rights of access and use to the existing pier as Lot 4. The Declaration provided:

WHEREAS, Dreamcraft is the owner of Lots 1, 2, 3 and 4 (hereinafter collectively called the “Property”), as shown on a plat entitled “Plat One of One, Administrative Plat Cresston Park,” which plat is recorded among the Plat Records of Anne Arundel County in Plat Book 240, page 11, Plat No. 12538.

WHEREAS, Dreamcraft desires to establish certain covenants, restrictions and easements affecting the use and enjoyment of the Property.

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1. The owners of Lots 1 [116 Cresston Road] and 4 [105 Shore Road] in the above-referenced plat shall jointly use, maintain and repair the existing pier shown on the above-referenced plat. All costs in connection with said use, repair and maintenance shall be borne equally by owners of Lots 1 and 4. The owner of Lot 1 shall be entitled to the exclusive use of the western side of the pier, including the inside end of the “L” pier end, and the owner of Lot 4 shall be entitled to exclusive use of the eastern and northern sides of the pier. Each of the parties hereby grants, establishes and creates for the benefit of the other a mutual, reciprocal and nonexclusive easement, license, right and privilege to so much of its property, and the riparian area attendant thereto, as is necessary for the maintenance and repair of the said pier and for the joint ingress and egress to and from, access to and use and enjoyment of the same. The rights and privileges granted and conferred by this paragraph shall be exercised and enjoyed in common solely by the owners of Lots 1 and 4.

2. Dreamcraft hereby establishes and creates for the benefit of the owner of Lot 1 a mutual and nonexclusive easement, license, right and privilege to use and enjoy for the purpose of ingress and egress a path/walkway over Lot 4, as the same is shown on the above-referenced plat to the Property.
3. No user charges or fees shall be assessed against or payable by either the owners of Lot 1 or Lot 4 for their mutual use of the pier. The pier shall be maintained in a state of repair comparable to that now existing, ordinary wear and tear excepted. All repairs shall be done in good and workmanlike manner.
4. Notwithstanding the mutual obligation of the owners of Lots 1 and 4, as hereinabove set forth, for the maintenance and repair of the pier, the owner of each lot (1 and 4) shall indemnify and hold the other harmless from and against any and all damage to the said pier or to the property of the other caused by any extraordinary use thereof or negligence by such owner or its agents, guest, invitees or tenants.

***The Petukhovs' Application to Improve the Existing Pier***

In February 2019, the Petukhovs applied for a tidal wetlands license to construct two additional boat slips/lifts on the existing pier (the “First Application”). In their application the Petukhovs certified that they held a “real property interest in the contiguous upland” of 105 Shore Road. The Hineses objected to the application.<sup>1</sup> Responding to the Hineses’ objections, the Department characterized the Declaration as a “shared pier agreement” between Lots 1 and 4, stating:

We have reviewed your comments received December 3, 2018 and January 18, 2019 regarding the proposed project to construct boat lifts and a pwc lift located on the *pier shared* by 105 Shore Rd and 116 Cresston Rd, Arnold, Anne Arundel County, MD. Your comments have been placed in the file.

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<sup>1</sup> Appellants state in their brief that their objections to the improvements “were related to concerns about the structural integrity of the pier and that the proposal to add large boat lifts to an older pier would damage it.”

During the review, the Department considered all of the available information received, including *the December 10, 2001 shared pier agreement*, and conferring with Anne Arundel County officials. Based on this review and examination, we have determined that the proposed activities are consistent with our regulations and the applicant is entitled to propose improvements to the western side of the pier. Therefore, we are issuing the above authorization.

(Emphasis added). That same day, on February 28, 2019, the MDE approved the proposal and granted the Petukhovs a tidal wetlands license for their contemplated improvements to the existing pier (the “First License”).

***The Petukhovs’ Application to Construct a  
New Shared Pier for 112 and 116 Cresston Road***

On August 25, 2019, the Petukhovs applied for a general tidal wetlands license to build a new pier straddling the boundary between 112 and 116 Cresston Road (the “Second Application”). As noted above, 112 Cresston Road is owned by Ms. Petukhov, but was not part of the same original parcel from which Lots 1 and 4 were created. Attached to the Second Application were multiple exhibits, including a cropped copy of the Plat.<sup>2</sup>

After receiving the Second Application, the MDE’s permit reviewer verified that the proposal satisfied Anne Arundel County’s property line set back requirements. In an exchange of multiple emails, representatives from Anne Arundel County and the MDE noted that—in reference to the Declaration—116 Cresston was already subject to a “shared pier agreement” with 105 Shore Road.

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<sup>2</sup> We do not impute any ill intent or bad faith onto the Petukhovs in submitting the cropped copy of the Plat, but we note that the section on the Plat specifying that 116 Cresston Road “is not permitted to have an individual pier” was illegible in this copy.

On September 23, 2019, the MDE issued to the Petukhovs' contractor, Bay Bridge Companies, its comments to the Second Application. Again, the MDE referred to the Declaration as a shared pier agreement. The MDE stated:

- 1) Based on information available to MDE, 116 Cresston Road currently has a Shared Pier Agreement with 105 Shore Road. This Agreement must be invalidated in order for 116 Cresston Road to have a shared pier with 112 Cresston Road. If the Shared Pier Agreement between these properties has already been invalidated, please provide documentation that this agreement is no longer valid.
- 2) Thank you for providing a copy of the Shared Pier Agreement between 116 and 112 Cresston Road. According to MDE's Office of the Attorney General, the following language must be included in all Shared Pier Agreements:
  - a. The property known as Parcel 0166 is a single parcel of real property, that under applicable law may be improved by only one pier structure; and
  - b. The property known as Parcel 0168 is a single parcel of real property, that under applicable law may be improved by only one pier structure; and
  - c. Parcel 0166 and 0168 shall be improved by a XX-footlong by 6-foot wide pier (hereinafter "shared pier") emplaced along the property line; and
  - d. In consideration for the right to construct a shared pier as a joint improvement to Parcel 0166 and 0168, there shall be no additional piers or associated structures constructed other than improvements made to the shared pier until such time as the shared pier is removed; and
  - e. Upon removal of the shared pier, all riparian rights to perform additional work, construction, or improvements on Parcel 0166 and Parcel 0168 shall be restored.

Please provide a copy of the Shared Pier Agreement that includes the above language. The highlighted areas should be updated appropriately. The revised Agreement must also be filed with the County Land Records. MDE can issue the License without the revised Agreement, but Special Condition will be included that states that a copy must be provided to MDE prior to the start of construction.

- 3) Mr. and Mrs. Petukhov received License (18-PR-1136) earlier this year for two boat lifts on the pier at 105 Shore Road. On all plan sheets, please note that these lifts are proposed and have not been constructed. Additionally, this License was issued to Mr. Petukhov and must be transferred to the owner of 105 Shore Road. Please contact Mr. Hines of 105 Shore Road and find out if he wants to transfer the License or have it invalidated. If Mr. Hines wants to transfer the License, then he will need to request name change on the License.

(Highlighting in original.)

In response, the Petukhavs argued that “the pier at 105 Shore [Road] is not a shared pier.” The Petukhavs claimed that the existing pier did not “straddle a common/shared lot line” or “utilize riparian area of more than one lot.” The Petukhavs claimed that the Declaration granted only “a declaratory easement to use” the existing pier. The Petukhavs insisted that “the issue of the existing license to add proposed lift[s] and piles to the existing pier at 105 Shore Rd is irrelevant.” They asserted that the Declaration’s “easement” did not convert the existing pier into a shared pier, but instead granted them rights to add the lifts and piles to the existing pier.

In its October 8, 2019 response to these objections, the MDE changed its position and agreed that the pier at 105 Shore Road was not a shared pier, and that the First License would not have to be “transferred to Mr. Hines or invalidated” as the MDE had initially stated. But before issuing the license, the Hineses had the opportunity to voice their concerns.

And when they did, they vehemently opposed the Petukhavs’ request for a new shared pier. Mr. Hines expressed his objections in an email exchange with the MDE, in

which the MDE informed him that the Existing Pier is a “jointly used pier” opposed to a shared pier, that the Declaration is not a shared pier agreement, and that its prior determinations to the contrary were incorrect. The MDE informed Mr. Hines that a shared pier agreement “must include a statement . . . that the shared pier is exercising both of the adjacent property owners’ riparian rights to a pier.” Mr. Hines reminded the MDE that when he opposed the Petukhovs’ application to improve the existing pier on the basis that their rights to the pier were limited to using the pier, not improving it, the MDE concluded otherwise and determined that the existing pier was a shared pier subject to a shared pier agreement—the Declaration. Mr. Hines also noted that the proposed drawing for the Petukhov’s improvements to the Existing Pier stated “Note: riparian use rights for 116 Cresston Road by recorded agreement[.]”

On December 2, 2019, counsel for Mr. Hines followed up with a detailed letter outlining the Hineses’ objection to the Petukhovs’ proposed shared pier. Among other things, counsel’s letter explained that (1) the Existing Pier served the original parcel, from which Lots 1 and 4 were carved out; (2) the Declaration makes clear that with the approved subdivision, the existing pier serves both Lots 1 and 4 and grants exclusive rights to the owners of both Lots; (3) the Declaration has “all the attributes of what has been referred to as a ‘shared pier agreement’ by the MDE and the Petukhovs’ consulting engineer. . . .”; and (4) Petukhovs had previously certified that they had, pursuant to the Declaration, a “contiguous real property interest to the Existing Pier, i.e. a riparian property right. . . .” Counsel’s letter also asserted that the “one pier per lot” rule would be violated if the proposed shared pier between 112 and 116 Cresston Road were approved.



On January 16, 2020, the MDE issued a general wetlands license authorizing the Petukhovs to construct a shared pier between 112 and 116 Cresston Road (“Second License”). That same day, the Department responded to Mr. Hines’s counsel’s letter, stating, among other things:

On February 28, 2019, the Maryland Department of the Environment (“the Department”) issued General Tidal Wetlands License No. 18-PR-1136 authorizing the property owner at 116 Cresston Road to make improvements to the pier located at 105 Shore Road. As part of the review for improvements to the pier located at 105 Shore Road, the Department reviewed the declaration dated December 10, 2001 by Dreamcraft Homes Inc. (“Declaration”) and conferred with Anne Arundel County officials as part of this review. The Department determined that this Declaration established joint use, repair, and maintenance of the pier located at 105 Shore Road, allowing the applicant to make improvements to the western side of this pier. Although this Declaration allows the owner of 116 Cresston Road to access and use the existing pier at 105 Shore Road, it does not meet the definition of “shared pier agreement,” in which the owner of 16 Cresston Road—by virtue of constructing shared pier along the boundary of two separate parcels—forgoes any independent right to construct an additional pier on their property. Because each parcel of real property may be improved by one pier structure, and there is no existing pier shared or otherwise at 116 Cresston Road, the owner of 116 Cresston Road retains the right to construct new pier on their property.

Appellants petitioned for judicial review in the Circuit Court for Anne Arundel County, which was denied.

The Hineses timely appealed and present us with the following questions:

1. Did MDE err by issuing a general wetlands license for the construction of a shared pier between 112 Cresston [Road] and 116 Cresston [Road], including authorizing at least five new boat lifts/slips, where 116 Cresston [Road] already has a shared pier arrangement and exclusive rights in and to the existing pier at 105 Shore Road, including at least two boat slips/lifts?
2. Did MDE err in concluding that 116 Cresston [Road] had a riparian right to construct the proposed shared pier between 112 Cresston [Road] and

116 Cresston [Road], where 116 Cresston [Road] already has access to the water via the existing pier and boat slips/lifts at 105 Shore Road and a subdivision plat and applicable law precluded it from building a pier?

### STANDARD OF REVIEW

Title 1, Subtitle 6, of the Environmental Article of the Maryland Annotated Code (“EN”) governs our review of licenses issued by the MDE, including residential piers in tidal wetlands. Md. Code Ann. EN § 16-204(c)(2) (1987, 2014 Repl. Vol.). When the circuit court has reviewed a decision of an administrative agency, such as the MDE, we analyze the agency’s decision and “look past the circuit court’s decision[.]” *See Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 647 (2015). A “court may not uphold the agency order unless it is sustainable on the agency’s findings and for the reasons stated by the agency.” *United Steelworkers of Am. AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984) (internal quotations omitted). Thus, we must determine whether the MDE “examined the relevant data and articulated a satisfactory explanation for its action.” *Md. Dep’t of Env’t v. Anacostia Riverkeeper*, 447 Md. 88, 121 (2016) (cleaned up).

Our review consists of two parts—we analyze whether (1) there is substantial evidence in the administrative record to support the factual findings made by the agency; and (2) “the administrative decision is premised upon an erroneous conclusion of law.” *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 611 (2014). Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]” *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998) (cleaned up).

We also examine the MDE’s decision under the arbitrary and capricious standard of review. *Anacostia Riverkeeper*, 447 Md. at 118-20. This is an “extremely deferential” standard that examines the decision-making process of the agency. *Id.* at 120 (internal citation and quotations omitted). A decision is generally arbitrary and capricious when the agency relies on irrelevant factors or factors outside of its discretion, fails “to consider an important aspect of the problem,” offers a decision that is “counter to the evidence before the agency,” or is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 121 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Inconsistent or contradictory treatment of similarly situated individuals may also rise to the level of arbitrary and capricious. *Harvey v. Marshall*, 389 Md. 243, 303-04 (2005).

## **DISCUSSION**

### **I.**

#### **THE PARTIES’ CONTENTIONS**

The Hineses contend that the MDE erred by issuing a general tidal wetlands license for the construction of a shared pier and additional boat slips because 116 Cresston Road already has exclusive rights to the existing pier. The Hineses contend that the MDE applied inconsistent standards to the First and Second Applications, that 116 Cresston Road had an unused riparian right to build a new pier, and that the MDE lacked a sufficient record to determine the nature and extent, if any, of 116 Cresston Road’s remaining riparian rights.

The Petukhovs and the MDE argue that the Petukhovs do not have an ownership interest in the 105 Shore Road pier; thus, the pier at 105 Shore Road is not a shared pier

that would trigger the one pier per property limitation. According to the Petukhovs, the Declaration establishes a mere easement that grants the owners of 116 Cresston Road a nonpossessory interest in the pier. Thus, they argue, because there is no pier located at either 112 or 116 Cresston Road, the one pier per property limitation would not be violated and their common law and statutory riparian rights remain fully intact. The Petukhovs also contend that the MDE applied properly the criterion established in COMAR 26.24.02.03 to their Second Application.

In addition to the Petukhovs' argument that the Declaration grants only a simple easement, the MDE asserts that only a court can determine whether the Plat or any other documentation sufficiently stripped 116 Cresston Road of its riparian right to construct a pier. The MDE also contends that because the Plat was not part of the administrative record, it properly relied on the statutory presumption that the Petukhovs had a riparian right to construct a shared pier. Further, the MDE maintains that it appropriately considered all required regulatory and design factors.

## II.

### OVERVIEW OF TIDAL WETLANDS REGULATORY SCHEME

The State of Maryland owns the submerged land underneath the waters within its borders.<sup>3</sup> See *Kerpelman v. Bd. of Pub. Works of Md.*, 261 Md. 436, 445 (1971). And, generally, “state law defines property interests, [] including property rights in navigable

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<sup>3</sup> Maryland obtained this interest as successors to the Lord Proprietary. *Kerpelman*, 261 Md. at 445. The Lord Proprietor obtained these lands from Caecilius Calvert, Baron of Baltimore. *Id.*

waters and the lands underneath them[.]”<sup>4</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 707 (2010) (internal citations omitted).

A riparian landowner is “a property owner whose land borders on tidal wetlands or waters of the State” and, by virtue of this ownership, is entitled to certain riparian rights, including the right to reasonable access to navigable waters. *People’s Couns. for Balt. Cnty. v. Md. Marine Mfg. Co.*, 316 Md. 491, 502 (1989); EN § 16-201; COMAR 26.24.01.02(48). Riparian rights consist of a bundle of rights that relate to “the physical relationship of a body of water to the land abutting it.” *Gunby v. Olde Severna Park Improvement Ass’n, Inc.*, 174 Md. App. 189, 239, *aff’d*, 402 Md. 317 (2007). This bundle of rights includes, but is not limited to:

- (i) of access to the water;
- (ii) to build a wharf or pier into the water;
- (iii) to use the water without transforming it;
- (iv) to consume the water;
- (v) to accretions (alluvium); and
- (vi) to own the subsoil of nonnavigable streams and other “private” waters.

*Id.* at 239-40. Some riparian rights to navigable waters are based in common law, while others are grounded in statute. *See Cnty. Comm’rs of Kent Cnty. v. Claggett*, 152 Md. App. 70, 89, 92 (2003), *aff’d sub nom. Worton Creek Marina, LLC v. Claggett*, 381 Md. 499 (2004).

In Maryland, “the right to extend improvements such as wharves and piers into the water is a statutory one, granted by the State . . . to enhance the right of riparian access to

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<sup>4</sup> Waters are considered navigable “if, and only if, they are subject to the ebb and flow of tides.” *Wicks v. Howard*, 40 Md. App. 135, 136 (1978).

the waters[.]” *Howard*, 40 Md. App. at 136; *see also* EN §§ 16-101-16-503. The regulatory scheme is designed to “preserve the wetlands and prevent their despoliation and destruction” while taking into account “varying ecological, economic, developmental, recreational, and aesthetic values[.]” EN § 16-102(b). The State enjoys broad authority and discretion over improvements such as docks and piers. *See* Md. Code Ann., Transportation § 5-104(a) (1977, 2020 Repl. Vol.) (“[S]overeignty in the space above the lands and waters of this State rests in this State.”).

Under EN § 16-201(a), the potential opportunity to construct or make improvements to a pier belongs to the “owner of land bounding on navigable water[.]” To obtain that right, the owner must submit an application to the MDE and demonstrate compliance with its requirements and criteria.<sup>5</sup> EN § 16-202. Although “owner” is not defined in the statute, by regulation, such an application may be submitted by one who has a “riparian interest in private tidal wetlands or upland adjacent to State tidal wetlands[.]”<sup>6</sup> COMAR 26.24.02.02A(1). This regulation “codifies the common law principle that only ‘[t]hose who have riparian rights may make such structures as wharves, piers, and landings that are connected to the waterfront and built out into the water.’” *Gunby*, 174 Md. App. at 258 (quoting *Gwynn v. Oursler*, 122 Md. App. 493, 497-98 (1998)). An applicant must also

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<sup>5</sup> The statute authorizes the Board of Public Works to grant such a license, but the Board has delegated its authority to approve or reject uses of State wetlands such as piers to MDE. *See* COMAR 23.02.04.04A.

<sup>6</sup> The statute grants the MDE the authority to promulgate regulations to administer its tidal wetlands program. EN §§ 16-201–16-205. Such regulations are set forth in COMAR Title 26, Subtitle 24.

obtain county and/or local approval, COMAR 26.24.02.04D(1), and provide notice of the application to adjoining riparian property owners. COMAR 26.24.01.04C.

The MDE's evaluation includes consideration of, among other things, the extent to which:

(1) Dredging and filling activities can be avoided or minimized;

(2) The proposed activity is water-dependent;

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(4) The proposed activity would alter natural water flow, water temperature, water quality, and natural tidal circulation regimes;

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(7) The proposed activity would impact local, regional, and State economic conditions;

(8) The proposed activity is consistent with State, federal, and local land use plans and laws, including Critical Area laws;

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(10) The natural, scenic, historic property, and aesthetic values can be retained or enhanced;

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(15) Shore erosion is controlled;

(16) Maintenance and operation of the proposed project is assured;

(17) Recreational and navigational access to beaches and waters of the State is provided;

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COMAR 26.24.02.03B.

The MDE has also established design requirements for piers. COMAR 26.24.04.02B. A pier may not “[i]nclude more than six mooring piles, four boat lifts or hoists, or four boat slips.” COMAR 26.24.04.02B(2)(c)(v). Although there is no regulatory distinction between a shared pier and an individual pier, the MDE has a policy that the one pier per property requirement applies to shared piers as well as non-shared piers. Also, the MDE requires that the rights and responsibilities as to a “shared pier” be memorialized in a “shared pier agreement” recorded in the land records that explicitly states “that the shared pier is exercising both of the adjacent property owners’ riparian rights to a pier.”

### III.

#### ANALYSIS

As noted above, an agency’s decision is arbitrary and capricious when it treats similarly situated individuals in an inconsistent manner. *See Harvey*, 389 Md. at 303-04. That threshold has been met here. When the Petukhovs submitted their First Application to improve the existing pier, they certified that they held a “real property interest in the contiguous upland” of 105 Shore Road. Faced with the Hineses’ objection, the Department was compelled to determine the extent and nature of the rights conferred by the Declaration. After “consider[ing] all of the available information received,” the Department characterized the existing pier as a shared pier and referred to the Declaration as a “shared pier agreement.” Thus, the Department concluded that the Petukhovs were “entitled to propose improvements to the western side of the pier,” and, on that basis, granted the license over the Hineses’ objections.



Less than one year later, in connection with the Second Application, the Department interpreted the same Declaration and came to a very different conclusion. But not at first. The Department initially indicated its intent to apply consistent standards by continuing to characterize the Declaration as a shared pier agreement. In fact, to ensure consistent treatment between the First and Second Applications, the Department told the Petukhovs that they would have to either transfer the First License to the “owner of 105 Shore Road” or provide proof that it had already been invalidated “in order for 116 Cresston Road to have a shared pier with 112 Cresston Road.”

After the Petukhovs weighed in, however, the Department changed its mind. Notably, as reflected in the Department’s letter to the Hineses’ counsel on January 16, 2020, the Department acknowledged that the proposed shared pier for 112 and 116 Cresston Road would not be permitted if the existing pier was a “shared pier” under a “shared pier agreement.” However, at the Petukhovs’ urging, the Department abandoned its characterization of the existing pier as a “shared pier,” and instead characterized it as a “jointly used pier.” The Department also abandoned its characterization of the Declaration as a “shared pier agreement” because, according to the Department, it lacked specific language stating that the owner of 116 Cresston Road “foregoes any independent right to construct an additional pier on their property.” Same owners, same pier, same Declaration, and in the span of less than 12 months, the Department applied different standards and drew irreconcilable and inconsistent conclusions as to the nature of the existing pier and Declaration. Under these circumstances, we have no difficulty concluding that the Department acted arbitrarily and capriciously in granting the Second License.

Determining the appropriate remedy is another matter. The Hineses urge us to, at a minimum, vacate the issuance of the Second License and send the matter back to the MDE to reconsider the Second Application under consistent standards based on all relevant information. The Hineses would prefer, however, that we rule as a matter of law that the owners of 112 and 116 Cresston Road have no right to construct a new pier on their property. In that regard, the Hineses contend that the Declaration, considered alone or in conjunction with the notation on the Plat stating that “Lot one [i.e. 116 Cresston Road] is not permitted to have an individual pier,” forecloses any right to construct the proposed shared pier. The Petukhovs and Department contend that, because a legible copy of the Plat was not part of the record before the agency, we should not consider the Plat’s limiting language.

Indisputably, the Declaration was central to the Department’s consideration of the Petukhovs’ applications. Further, it is the applicant’s and Department’s responsibility to ensure that the Department has the relevant information, not the Hineses. *See* COMAR 26.24.02.02(B)(3) (“The person who signs an application is responsible for the truth, accuracy, and completeness of all information in the application.”); COMAR 26.24.02.02(D) (“The Department shall review an application to determine whether it is complete for processing.”) The Declaration identified the two lots served by the existing pier by specifically referencing Lots 1 and 4 “as shown on” the Plat; thus, the Plat was part of the Declaration. *See Emerald Hills Homeowners’ Ass’n, Inc. v. Peters*, 446 Md. 155, 170 (2016) (“It is well-settled that reference to a plat in a deed incorporates that plat as part of the deed.”); *see also Lindsay v. Annapolis Roads Prop. Owners Ass’n*, 431 Md. 274, 291

(2013) (“Under the common law, a reference to a plat in a deed incorporates generally that plat as part of the deed.”); *see also City of Bowie v. Mie Properties, Inc.*, 398 Md. 657, 682, n.13 (2007) (noting that covenants are interpreted under standard contract principles); *see also Ray v. William G. Eurice & Bros.*, 201 Md. 115, 128 (1952) (noting that where a writing references another document, the other document should be construed as part of the writing). Accordingly, the notes and any other relevant information on the Plat should have been included in the Department’s consideration and review of the Second Application.<sup>7</sup>

We lack the expertise to understand the entire gamut of considerations that go into the MDE’s decision-making process, and therefore, in the current posture, we decline to foreclose the possibility as a matter of law as to whether a consistent application of the standards used by the MDE in granting the First License would allow for the issuance of the Second License. Accordingly, we shall vacate the judgment of the circuit court and remand this case to the circuit court with instructions to vacate the Second License and to

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<sup>7</sup> The MDE states that it didn’t consider the notes in the Plat because the Hineses failed to provide a legible copy, and that therefore, it was not part of the administrative record on which it granted the Second License. Thus, it contends it appropriately applied the statutory presumption “that waterfront property owners hold riparian rights.” The MDE further states that it takes no position on whether the Plat “has the effect of prohibiting the owners of 116 Cresston Road from having an additional pier.” We are not persuaded that the MDE applied a statutory presumption. As we stated above, the record indicates that in connection with the First Application, the MDE concluded that the existing pier was a shared pier and that the Declaration constituted a shared pier agreement, and then made a contrary decision on the Second Application. In both instances, the MDE was reviewing and interpreting the Declaration—not applying a presumption. On remand, the parties shall ensure that the MDE has all of the information it needs to make a decision on the Second Application.

remand the matter to the MDE for further review of the Second Application in a manner consistent with this opinion.<sup>8</sup>

**JUDGMENTS OF THE CIRCUIT COURT  
FOR ANNE ARUNDEL COUNTY  
VACATED; CASE REMANDED TO THE  
CIRCUIT COURT FOR ANNE ARUNDEL  
COUNTY WITH INSTRUCTIONS TO  
VACATE THE SECOND LICENSE AND  
REMAND THE MATTER TO THE MDE  
FOR FURTHER REVIEW OF THE  
SECOND APPLICATION CONSISTENT  
WITH THIS OPINION. COSTS TO BE  
PAID BY THE PETUKHOVS.**

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<sup>8</sup> Because we conclude that the MDE acted arbitrarily and capriciously by applying inconsistent standards to the Second Application, we need not resolve appellants' remaining contentions.