

Circuit Court for Montgomery County
Case No. 452622-V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1318

September Term, 2019

LONGMEAD CROSSING COMMUNITY
SERVICES ASSOCIATION, INC.

v.

DEREK HYPOLITE, et. al.

Beachley,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: November 5, 2020

*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.

This is an appeal from a judgment of the Circuit Court for Montgomery County reversing a decision by the Commission on Common Ownership Communities (“CCOC”). In 2018, appellees, Derek and Maureen Hypolite, filed a complaint with the CCOC, after receiving a notice from their homeowners’ association, ordering them to cease construction of a home improvement project that deviated from its prior approval. Following a hearing, the Commission ordered the Hypolites to return their home to its original state. The Hypolites then filed a petition for judicial review in the circuit court and the court reversed the CCOC’s decision.

Appellant timely appealed and presents the following question for our review:

1. Whether the Panel’s decision was legal and supported by substantial evidence?

For the reasons discussed below, we reverse the judgment of the circuit court.

BACKGROUND

The Hypolites reside in the Longmead Crossing Community, located in Silver Spring, Maryland. In accordance with Longmead Crossing’s Declaration of Covenants and Restrictions, improvements to the exterior of homes in the community cannot be made “without the prior approval of the Architectural Review Board.” Appellees, in 2016, sought to have a basement window on the side of their home replaced with a door and stairs. They submitted an application to Longmead’s Architectural Change Committee (“ACC”) on October 30, 2016, with the required consenting signatures from four “property owners who [were] most affected” based on their proximity or property view, a written description of the proposed change, and a hand drawn depiction of the proposed

construction prepared by Mrs. Hypolite. The hand drawn sketch included in the application showed the following:

1. steps to the basement running parallel to the side of the house;
2. a 12-foot setback of the parallel retaining wall from the nearest common property line;
3. a walkway on the front side of the construction and house;
4. two retaining walls, one to be located parallel to the side of the house;
5. one retaining wall to be located perpendicular to the side of the house at the rear of the construction site; and
6. a covering over the stairs.

When a homeowner submits an application requesting such a change, the ACC reviews the application and makes a recommendation to the Architectural Review Board (Board). Once approved by the Board, the homeowner must then obtain the proper permits from Montgomery County officials in order to begin construction. In accordance with this process, the ACC reviewed the Hypolites' application and recommended approval. The application was submitted to the Board and the Board granted final approval on December 15, 2016, excluding the proposal for a covering over the stairwell. The Hypolites then hired APAC Engineering, Inc. (APAC) to develop engineered drawings and a plan for construction to apply for a county building permit. APAC's blueprint included the following:

1. steps running perpendicular to the home;
2. a reduced distance between the top of the egress and the property line to 9 feet and the distance from the sidewalk pad to the property line to 5 feet; and

3. a walkway on the side of the house.

According to Maureen Hypolite’s testimony, APAC was not provided with her application, sketch or the approval document from the Board. On January 24, 2017, the Hypolites were issued a building permit by Montgomery County and construction began on the house in the spring of 2017.

In September 2017, the Hypolites received several letters from Tom Van Pelt, Longmead Crossing’s property management agent. The letters requested construction be halted as the construction had deviated from the design approved by the Board. Van Pelt notified them that their presence was requested at a Board meeting on October 17, 2017 to discuss the matter. He asked the Hypolites to present documentation to show whether there were discrepancies between the sketch that was submitted in their application for ACC and Board consideration and the actual construction. At the meeting, the Board concluded that the construction did not comport with the design approved by them. On November 1, 2017, the Hypolites filed a complaint with the CCOC, seeking to remove the cease and desist notice.

CCOC Panel Hearing

A hearing was held before the CCOC Panel on April 3, 2018. Maureen Hypolite, Van Pelt, and Mark Schweber, Vice President of the Longmead Crossing Board, testified at the hearing. Maureen Hypolite testified that the drawing she attached to the ACC application “was to show exactly where [she] would make the changes.” She also stated, “I did not have any dimensions or drawings to scale on my application, the sketch on my

application, I didn't know that is what they were going to use." She further explained that the reason APAC positioned the stairs "perpendicular [to the house] was because of the sloping of [her] land."

Mark Schweber testified as to the applications process. He stated that the Hypolites' application was initially submitted to the ACC and then forwarded to the Board for final approval. According to him, the ACC does not require a "fully engineered drawing for a proposed project" in order to avoid residents spending "a lot of money on engineered drawings in advance of, if they are going to be turned down." When asked if the sketches submitted by homeowners with their applications are expected to "represent [] the ultimate engineer drawing," Schweber responded "[i]t should be a true representation of what the project is to be." He stated that the Board approved the Hypolites' application because "the neighbors had granted permission, that there was . . . nothing in the guidelines that would say, no, you can't. So it was approved. So the notes were made about the construction material and the covering."

Van Pelt testified the neighbors "directly adjacent" to the Hypolites "contacted [him], stating that what was being built was not what was supposed to be built" and the construction "was too close to their property line." He later found "other items" to be an issue. He reported the neighbors' complaint to the ACC and thereafter he was directed to inform the Hypolites that their construction was not in conformity with prior approval. He sent them a cease and desist notice.

The CCOC issued its decision on July 11, 2018 and concluded the following:

. . . the governing documents make it clear that the [Hypolites’] sketch [was] the essence of its ACC application and is intended to demonstrate the construction for which approval is sought. The governing documents also make it clear that alterations from ACC approval require resubmission to the ACC for its prior approval. [The Hypolites] do not have carte blanche [sic] to alter the approved construction of design without prior ACC approval which they neglected to obtain. The Panel agrees with [Longmead] that the expectation is that what is shown in the sketch is built. In these circumstances, the Panel finds and concludes that the project construction, particularly as concerns the construction of the stairs does not comport with the ACC authorization.

We further find and conclude that the [Hypolites] failed to comply with ACC guidelines by neglecting to provide the four supporting adjacent neighbors with the ACC application sketch that depicted the steps as parallel to the [Hypolites’] house. [The Hypolites] simply told the neighbors that there would be a stairway egress, the location of which was left unstated. If [they] had shown the sketch to the supporting neighbors, the complaining neighbors could have registered opposition in the initial stage, requisite neighbor support would have been lacking, the ACC would not have had the opportunity to review the [Hypolites’] sketch, and the project would not have gone forward.

We also find and conclude that Complainant overstates its case that the APAC design was necessary because of the grading of Complainant’s side-lot. The APAC letter and design is premised on financial concerns. The letter stated that it would cost more money to build out because it would require more steps.

As a result of its conclusions, the CCOC ordered that the [Hypolites’] request for removal of the cease and desist order be denied and that they “restore their property to its former condition at their own expense.” The Hypolites petitioned for judicial review in the Circuit Court for Montgomery County.¹

Circuit Court Hearing

On May 7, 2019, the court held a judicial review hearing and took the matter under

¹ Mont. Cty. Code, Sections 2A-11 and 10B-13(e), (h).

advisement. On July 29, 2019, the court granted the Hypolites’ petition and reversed the CCOC’s decision. The court noted that in “reading the plain language” of the ACC application, “the ACC’S application process is vague” and the engineer’s drawing with stairs running perpendicular from the property was not consistent with the ACC approval of the Hypolites’ application to build stairs. The court concluded that “the specific direction of the stairs was unnecessary detail not required to be in the application.” “Because the position of the stairs was not expressly contemplated, the subsequent engineered drawing was not a variation of the approved application.”

STANDARD OF REVIEW

When appellate courts review a local administrative agency’s decision, it is a “judgmental process involving a mixed question of law and fact, and great deference must be accorded to the agency.” *Pringle v. Montgomery Cty. Planning Bd. M-NCPPC*, 212 Md. App. 478, 488 (2013) (quoting *Gray v. Anne Arundel Cnty.*, 73 Md. App. 301, 308–09 (1987)) (emphasis in original). Appellate review “is limited to determining whether ‘there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.’” *Maryland Real Estate Comm’n v. Garceau*, 234 Md. App. 324, 349 (2017) (quoting *Regan v. Bd. of Chiropractic Exam’rs*, 120 Md. App. 494, 508 (1998)).

“Judicial review of an administrative agency’s action is narrow.” *Meadows of Greenspring Homeowners Ass’n, Inc. v. Foxleigh Enterprises, Inc.*, 133 Md. App. 510, 514 (2000). When using the substantial evidence test to review an agency decision ““we are mindful that we must not engage in judicial fact-finding or substitute our judgment for that

of the agency.” *Tochterman v. Baltimore Cty.*, 163 Md. App. 385, 407–08 (2005) (emphasis in original) (quoting *Hill v. Baltimore County*, 86 Md. App. 642, 657 (1991)). We must determine if a reasonable person would find the evidence sufficient to maintain the finding. *Doe v. Allegany Cty. Dep’t of Soc. Servs.*, 205 Md. App. 47, 55 (2012). “When an agency is acting in a discretionary capacity, such as when it fashions a sanction, then the standard is more deferential than either substantial evidence or de novo review. . . . [the] sanction should only be overturned if the decision is arbitrary or capricious.” *Maryland Real Estate Comm’n v. Garceau*, 234 Md. App. 324, 350 (2017).

DISCUSSION

I. The Panel’s decision was supported by substantial evidence.

Appellant argues, notwithstanding the Circuit Court’s ruling, the CCOC’s decision was supported by substantial evidence and therefore, should not have been reversed. Appellees, conversely, contend the approval process was vague and the evidence did not support the Commission’s decision. They argue Maureen Hypolite is not a professional artist, engineer or architect and her drawing was just “intended to show stairs would be built.” According to them, “the orientation of the stairs was not a material consideration of the project’s approval and the CCOC misinterpreted the APAC design letter regarding “financial concerns” underlying the difference between its plans Mrs. Hypolite’s drawing.

We find the ACC application and application guidelines, when read as a whole, are clear as to the requirements for submittal of an owner’s request for external improvements as well as the consequences for noncompliance. Further, the owners’ signatures, affixed to the application, signified that they understood and agreed to its terms. For example, the

Owner’s Acknowledgment Ten in the guidelines specifies: “. . . that any variation from the original application must be resubmitted for approval.” Determination of the significance of a variation, i.e., whether it is substantive or not,—is in the first instance for the agency to decide. “In this regard, the expertise of the agency in its own field of endeavor is entitled to judicial respect. An agency is granted further deference when it interprets a regulation it promulgated, rather than a statute enacted by the Legislature.” *Bd. of Liquor License Commissioners for Baltimore City v. Kougl*, 451 Md. 507, 514 (2017) (internal quotations and citations omitted). Appellate courts “will not uphold an agency action that is based on an erroneous legal conclusion.” *Maryland Dep’t of the Env’t v. Cty. Commissioners of Carroll Cty.*, 465 Md. 169, 203 (2019), *cert. denied sub nom. Cty. Commissioners of Carroll Cty., Maryland v. Maryland Dep’t of Env’t*, 140 S. Ct. 1265 (2020).

Mark Schweber, Vice President of the Board, testified that the ACC application does not require an engineered sketch, but, “we assumed that the sketches provided are a true and honorable representation of the desired project.” He stated that “clearly the change in the direction of the stairs, widening the project, placing the walkway in a different area, these are all variations from the original application.” In our view, the altered setback between the retaining wall and the nearest common property line (12’ versus 9’) would reasonably be deemed material.

Appellees’ drawing, with specifications as to the orientation direction of the stairs, was not a requirement and while we agree, we note that appellee did provide a drawing with such details. The parties do not dispute that the actual construction differed from the Hypolites’ sketch as the direction of the stairs changed and there was a lessening of the

County’s required 12-foot setback. Thus, based on this record, the evidence supported the Commission’s determination, that in accordance with the application they submitted, the Hypolites were bound by that document until they applied for and received an updated approval.

Appellees also argue the CCOC erred in interpreting a letter from the Hypolites’ engineering consultant regarding the positioning of the stairs. At the hearing, Maureen Hypolite explained that the APAC design was based upon “the sloping of the land.” The engineers’ letter was admitted and stated the following:

When preparing plans for your new areaway basement entrance on the right side of the home our goal was to maximize the space at the bottom of the stairs. The existing grading of the home slopes away from the right wall of the home. If the stairs are placed perpendicular to the right wall of the home the top of the stairs will be lower due to the grading thus requiring fewer stairs and less space. In speaking to the zoning officials at Montgomery County it was clear that the stairway is allowed to encroach into any setback requirements from the property line. With this as the basis we prepared a design with the stair perpendicular to the side wall of the home to maximize the space at the basement stair landing.

The Commission’s Conclusions of Law stated:

Complainant overstates its case that the APAC design was necessary because of the grading of Complainant’s side-lot. The APAC letter and design is premised on financial concerns. The letter stated that it would cost more money to build out because it would require more steps.

We find the Commission’s conclusion that the APAC letter regarding the design was premised on financial concerns was not unreasonable. Although the letter did not specify the word “financial,” its implication was that APAC’s design proposal would be less costly. The Commission’s conclusion to that effect was not, therefore, unsupported by the record.

To be sure, the review of an administrative decision is narrow and requires this Court not to engage in judicial fact-finding. Here the application process was defined and unambiguous and the CCOC’s decision that “the project construction, particularly as concerns the construction of the stairs, does not comport with ACC authorization” and its determination that the Hypolites “must restore their property to its former condition” was based on substantial evidence in the record and was not an erroneous conclusion of law.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
REVERSED AND REMANDED WITH
INSTRUCTION TO AFFIRM THE
DECISION OF THE COMMISSION ON
COMMON OWNERSHIP COMMUNITIES.
COSTS TO BE PAID BY APPELLEES.**