Circuit Court for Baltimore City
Case No. 24-C-17-001585

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1592

September Term, 2017

REBECCA ROYAL, ET AL.

v.

BOARD OF MUNICIPAL AND
ZONING APPEALS

Wright,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: June 7, 2019

In 2017, the Baltimore City Board of Municipal and Zoning Appeals ("Board") granted a rear yard setback variance to facilitate the construction of a 70-unit apartment building in Federal Hill, on property located at 211-301 Warren Avenue. Two groups of neighbors ("Appellants") sought judicial review of the Board's decision to grant the variance.[1] We conclude that there was substantial evidence in the record as a whole to support the Board's findings and conclusions, and so affirm the Circuit Court for Baltimore City, which had upheld the Board's decision.

BACKGROUND & PROCEDURAL HISTORY

The developer, SEC Harbor Hill LLC ("Harbor Hill"), sought the rear yard setback variance as part of a project to construct a four-story apartment building. The lot in question is bordered to the north by Warren Avenue, to the south by Grindall Street, to the east by Riverside Avenue, and to the south and west by Lois Lane and Lanasa Lane. The 70 new apartments would be built on a portion of the property that was being used as a surface parking lot: the property already contains 74 apartment units, and the proposed construction would be a new addition built behind the current apartment complex. (The new building would be connected to the existing apartments by a third-floor pedestrian breezeway. The breezeway's elevated location is due to a "no-build" utility easement that runs through the middle of the property.).

[1] The first group of neighbors consists of Rebecca Royal and various residents who live along Riverside Avenue or Grindall Street. The second group consists of Susie Chisholm and the Grindall's Yards Homeowners Association. Here, we collectively refer to both groups as "Appellants."

To facilitate this development, Harbor Hill sought a variance to reduce the rear setback line—that is, the proposed building's distance from Grindall Street—from 25 feet to 4 feet.[2] Although the new apartments will appear to "front face" Grindall Street (i.e., there will be entrance doors to the new building on Grindall Street), the property as a whole faces Warren Avenue, so Grindall Street still constitutes the property's rear setback line.

Prior to a public hearing before the Board, the Baltimore City Department of Planning's Urban Design and Architectural Review Panel recommended approval of the project's schematic design. Harbor Hill's proposal also obtained approval from the Site Plan Review Committee, a multi-agency committee consisting of the Baltimore City Departments of Planning, Public Works, and Transportation. Additionally, the Baltimore City Department of Planning reviewed the proposal and testified before the Board that it supported the variance.

After a zoning administrator denied Harbor Hill's variance petition, Harbor Hill appealed to the Board. On February 28, 2017, the Board held a public hearing. The five-hour hearing featured testimony from neighborhood residents who opposed the variance,

[2] The property is located in the R-8 residential zoning district, which requires a minimum 25-foot rear yard setback.

In this opinion, we refer to the provisions of the Baltimore City Zoning Code in effect at the time of the Board's hearing and decision. A new Zoning Code and Zoning Map has been in effect since June 5, 2017; however, § 2-203(j)(1) of the new rules sets forth that "[a]ll variances and conditional uses granted before June 5, 2017 . . . remain effective . . . ."

as well as from three experts put forward by Harbor Hill: Susan Williams, a planner who used to be the Department of Planning's community planner for Federal Hill; Peter Fillat, the project's architect; and Barbara Mosier, a traffic expert. After deliberating, the Board voted 4-1 to approve the rear yard setback variance.[3] Subsequently, on March 22, 2017, the Board issued a written resolution containing its findings. Appellants sought judicial review in the Circuit Court for Baltimore City, which affirmed the Board's decision in a bench ruling on September 8, 2017. Appellants timely appealed.

DISCUSSION

Appellants take issue with the Board's decision to grant a variance based upon its findings and conclusions that: (1) the property was unique; (2) a practical difficulty would result absent the grant of a variance; (3) the variance granted was the minimum necessary to afford relief; (4) the variance was not based exclusively on a desire to increase the value of the subject property; (5) the variance would not be injurious to the use and enjoyment of other property; and (6) the variance would not impair other property values in the neighborhood. The second group of Appellants also contests Grindall Street's status as the project's rear lot line. For the reasons we will explain further, we determine that the Board's findings and conclusions were supported by substantial evidence.

[3] Harbor Hill also sought a side variance that would have allowed it to construct a pool. The Board unanimously voted to deny this side variance. Harbor Hill did not appeal the Board's denial of the side variance.

"In an appeal from judicial review of an agency action, we review the agency's decision directly and not the decision of the Circuit Court . . . ." *Hollingsworth v. Severstal Sparrows Point, LLC*, 448 Md. 648, 654 (2016). In doing so, our review is narrow: we are "limited to determining if 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." *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012) (Citation omitted). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *McClure v. Montgomery County Planning Bd.*, 220 Md. App. 369, 380 (2014) (Citation omitted). Under this standard, we must "defer to the agency's fact-finding and drawing of inferences if they are supported by the record" and "review the agency's decision in the light most favorable to it." *Motor Vehicle Admin. v. Carpenter*, 424 Md. 401, 413 (2012); *see also Md. Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 120 (2016) ("We should accord deference to the agency's fact-finding and drawing of inferences when the record supports them"). (Internal quotation marks and citation omitted). Nor do we substitute our judgment "on the question [of] whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness." *Anacostia Riverkeeper*, 447 Md. at 120 (quoting *Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399 (1979)). Nevertheless, we do not defer to agency conclusions "based upon errors of law." *State Ethics Comm'n v. Antonetti*, 365 Md. 428, 447 (2001).

A. The Board's Finding of Uniqueness

Section 15-219(1) of the Baltimore City Zoning Code requires that, to grant a variance, the Board must find that "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[.]" Here, the Board found that the subject property was unique in part because of the property's size and the arrangement of its physical surroundings, the property's "L" shape, and the fact that a 40-foot-wide "no-build" easement runs through the middle of the property.[4]

Appellants argue that the property is not actually unique, on the basis that there are other properties in the area that are either "double-fronted,"[5] L-shaped, or have no-build easements. However, Appellants overlook that the Board's resolution found that it was the *combination* of these factors here that contribute to a unique lot: "All these factors *combine* to create both a unique lot and existing structure. . . ." (Emphasis added). As Appellees point out, Appellants are focusing on the property's characteristics in isolation, when it is the combination of these features that create a unique property unlike any other

[4] A 40-foot-wide utility and services easement runs over the former bed of Hamburg Street, which sits in the middle of the property. By creating a "no build" area, and by constraining the placement of other structures that would consequently not be able to meet certain building requirements (i.e., building width and emergency access), the easement constrains permitted as-of-right development. Given these constraints, the no-build easement portion of the property has been used for off-street parking.

[5] As we will explain further, the property at large is "double fronted" because it extends from Warren Avenue to Grindall Street, and the new apartments will appear to front on Grindall Street (i.e., there will be entrance doors and stoops on Grindall Street) even though, because there can only be one front lot line, the "front" of the property will still be on Warren Avenue.

in the neighborhood. As Appellees further note, Harbor Hill's expert witnesses testified about the property's shape, large size, multiple street fronts, and the easement running through the middle of the property. The Board relied on this testimony, referencing it in its resolution. Accordingly, there was substantial evidence for the Board to have concluded that the property was unique in a manner that caused a practical difficulty.

B. The Board's Finding of Practical Difficulty

Section 15-218 of the Zoning Code requires the Board to find that a practical difficulty "would result, as distinguished from a mere inconvenience, if the strict letter of the applicable requirement were carried out." Appellants challenge the Board's practical difficulty determination on two fronts. First, Appellants contend that the Board's practical difficulty finding was fatally flawed because it flowed from the Board's purportedly erroneous finding of uniqueness. Second, Appellants claim that the Board—by not including the term "mere inconvenience" in its resolution, and by failing to address the difference between a "practical difficulty" and "mere inconvenience"—failed to make the finding required by § 15-218.

As discussed above, the Board's uniqueness finding was valid; as such, the contention that the practical difficulty finding fatally emanated from an erroneous uniqueness finding is without merit. Furthermore, the same factors that caused the property to be unique—the property's shape and size, and the no build easement running through the middle of the property—spurred the Board's determination that Harbor Hill faced a practical difficulty in building an addition. The Board noted that Harbor Hill is

constrained from building "upwards" within the existing rear yard setback (i.e., above four stories) because the property's location within the Montgomery Urban Renewal Plan imposes a 40-foot height restriction. Moreover, the Board recognized, based on the expert testimony regarding the cost of constructing underground parking, that reducing the number of apartment units (if the rear yard setback requirement's strict letter were carried out) "would result in the inability to provide the necessary on-site parking, and would result in poor urban design." Thus, there was relevant evidence that the Board could reasonably accept as adequate to support its conclusion that a practical difficulty merited granting the variance. *McClure*, 220 Md. App. at 380.

C. The Board's Finding That the Variance Granted Was the Minimum Necessary to Afford Relief

Section 15-219(9) of the Zoning Code requires the Board to find that "the variance granted is the minimum necessary to afford relief[.]" Appellants contend that the Board neglected to consider whether the variance that was sought was, in fact, the minimum outcome necessary to afford relief, or whether a reduced variance might be possible. Along these lines, Appellants maintain that Harbor Hill's experts portrayed the variance as simply an "either/or" proposition and did not discuss whether a reduced-scale variance might be feasible.[6]

[6] During questioning, the Board established that denying the variance would eliminate 15 of the 70 planned apartments. In other words, this "no variance" option would have resulted in 55 new apartments, instead of the 70 new apartments that will result with the granting of the variance.

Appellees counter that this characterization is inaccurate. Appellees point out that the Board's resolution specifically notes that it heard testimony considering the feasibility of "reducing . . . the need for a rear yard variance," and that such a reduction (1) would not be economically feasible, (2) would result in an inability to provide the necessary on-site parking, and (3) would result in poor urban design. When Peter Fillat, the project architect, was asked whether the construction could yield "a smaller building with fewer units and fewer parking spaces," Fillat stated that a 25-foot setback would yield a "problem space" between the project and Grindall Street; he added that, from a design perspective, "[i]t's better to have buildings face the street on the street." Later, Fillat reiterated that a "design oriented" motive called for putting the building on the street. Planner Susan Williams agreed that good design called for having a building front the street. The Department of Planning also testified that the 4-foot setback request "[wa]s the minimum amount of relief needed for the project" to properly align with the existing neighborhood. The Board resolution credited Fillat's testimony that a reduced variance would yield "poor urban design." We need not substitute our judgment as to whether a different inference might have been better supported from the evidence in the record; substantial evidence supports the Board's decision on this point as reasonable. *Anacostia Riverkeeper*, 447 Md. at 120.

D. The Board's Finding That the Variance Was Not Based Exclusively on a Desire to Increase the Value of the Property

Section 15-219(3) of the Zoning Code requires the Board to find that "the purpose of the variance is not based exclusively on a desire to increase the value or income

potential of the property[.]" Appellants argue that the record indicates that Harbor Hill was motivated to seek the variance solely out of a desire to build a certain number of revenue-generating apartments, and that Harbor Hill's "need" to secure a 4-foot rear yard setback was strictly a financial concern. To that end, Appellants point to a statement made by the Board's chairman (who voted against the variance) that he did not "see a hardship for any reason other than economic[.]"

Appellees acknowledge that a reduced variance would have financial implications, given both the cost of constructing underground parking and the reduction in income that would result from having fewer apartments to market. However, Appellees note that denying the variance would leave more space between the new building and Grindall Street, which would "constitute poor urban design and create a problem area between the sidewalk and structure." As mentioned above, the project's architect testified that a full 25-foot setback would create an unsupervised "problem space" between the building and Grindall Street, which could attract vagrancy or crime, whereas having the development front the street would create a safe place "that people want to be in." By crediting the urban design principles that supported a 4-foot setback, the Board determined that financial considerations were not the "exclusive" factor supporting a full variance. Regardless of whether we might agree with the Board as a matter of urban design policy, there was sufficient evidence in the record to support the Board's finding and conclusion that the variance was not based exclusively on a mere desire to increase value.

E. The Board's Finding That the Variance Would Not Be Injurious to the Use and Enjoyment of Other Property

Section 15-219(4)(i) of the Zoning Code requires the Board to find that the variance will not "be injurious to the use and enjoyment of other property in the immediate vicinity[.]" Appellants contend that not only did the Board's resolution lack this requisite finding, but that nearby property owners had testified at the hearing that the new apartment building would reduce or eliminate views and breezes, and that some of the neighboring properties would be cast in shadow during the winter.

As Appellees note, although the Board resolution did not directly quote § 15-219(4)(i), it made findings, based on the hearing testimony and documentary exhibits (including sun studies) that the variance would not impair the light, air, or property values of neighboring properties. *See Critical Area Comm'n for the Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 134 (2011) ("[W]hen the Board of Appeals refers to evidence in the record in support of its findings, meaningful judicial review is possible . . . [in such situations] [t]hat evidence, intellectually and logically, can be viewed only as bearing on what persuaded the Board to conclude as it did"). Here, the Board had heard testimony from the project's architect that a sun study showed that—except for one building whose light may be affected by the new development around 4:00 p.m. in the winter—the variance would not impact the surrounding properties' light. The architect also told the Board that the project would not have any negative impact on the use and enjoyment of properties in the area, and that the building would comply with the Zoning Code's requirements for parking, density, and height. Barbara Mosier, a traffic expert,

testified that the new apartments would yield a "fairly negligible . . . relatively low volume" impact on traffic. The Department of Planning conveyed to the Board that "the proposed density [is] reasonable for this lot, and it will not contribute to congestion of traffic." Furthermore, the Department of Planning also stated that the variance "will not limit access to light and air[.]" The record reflects that the Board considered this testimony, evincing that there was sufficient evidence to support the Board's decision concerning the use and enjoyment factor.

F. The Board's Finding Concerning Property Values in the Neighborhood

Section 15-219(4)(ii) of the Zoning Code requires the Board to find that the variance will not "substantially diminish and impair property values in the neighborhood[.]" Appellants claim that the Board's resolution lacked any supporting evidence as to whether or not the variance would impair neighboring property values. Appellants further argue that, in contrast to the opposed neighborhood property owners who offered "informed testimony" that the project would reduce their property values, Harbor Hill did not produce any expert testimony on property values, but only offered conclusions without supporting evidence.

Appellants' characterization overlooks the fact that, during the Board hearing, Harbor Hill's counsel specifically asked planning expert Susan Williams whether the project would impair property values in the neighborhood. Williams responded that the project "really won't have an effect on the other buildings and the use of other properties in the neighborhood." Williams went on to explain that the project was designed "to be

compatible with the surrounding area, and have buildings at the street edge just like any other street." In a similar vein, the Board heard from architect Peter Fillat (who was recognized as an expert) that the project's design would positively "create a sense of place" by putting more "eyes" on the street, improving circulation, and "enliven[ing] the street."[7] We note that the Board heard from the Department of Planning at the outset of the hearing that "[t]he Department believes the variances will not impair development or diminish property values in the area." Additionally, Susan Williams explained that the fact that the project had already received schematic design approval from the City's Urban Design and Architectural Review Panel means, by definition, that a panel of professional architects had "look[ed] at how the building fits in" with the public realm and concluded that it was "in keeping with the context of the surrounding area." In short, there was sufficient evidence in the record as a whole to reasonably support the Board's conclusion that the project was consistent with the neighborhood and would neither diminish nor impair property values.[8]

[7] Later during Peter Fillat's testimony, Harbor Hill's counsel asked him: "I'll just cut right to the chase. In your professional opinion as an expert architect, will the proposed addition have any negative impact on the property values or use and enjoyment of properties in the surrounding area?" Fillat succinctly responded: "No."

[8] Appellees further note that the Board's findings regarding light, views, and air (discussed above) could be construed as constituting equivalent reasoning with respect to property values, given that these factors are intrinsically linked to property values, and—indeed—are largely the basis for the Appellants' own suggestion that property values would be negatively affected by the project.

G. Other Findings Made by the Board

The first group of Appellants conclude their brief with a laundry list of other findings that are required by § 15-219 of the Zoning Code, and which, in cursory fashion, Appellants claim the Board failed to make (or insufficiently made) when granting the variance. On the one hand, we need not address these claims. *See DiPino v. Davis*, 354 Md. 18, 56 (1999) ("[I]f a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it."). Additionally, several of the purported omissions concern topics that the Board addressed elsewhere in its findings, and that are inextricably tied to other determinations—for instance, findings that the variance would not impair an adequate supply of light and air to adjacent properties; that the variance would not adversely affect an Urban Renewal Plan; and that the variance would not be contrary to the public interest. We further observe that Harbor Hill's counsel specifically asked Susan Williams about all the factors that are listed in this final section of Appellants' brief, and Williams testified that the variance would not cause any of the relevant harms. Finally, we agree with the Appellees that even if we were to find fault with the Board on these particular matters, "it would not be a sound use of public or private resources to remand this case for the sole purpose of requiring the Board to go through the sterile formality of restating what it has already said[.]" *Assateague Coastal Tr., Inc. v. Schwalbach*, 223 Md. App. 631, 657 (2015), *aff'd*, 448 Md. 112 (2016).

H. The Property's Front Lot Line

Separately, the second group of Appellants comprised of Susie Chisholm and the Grindall's Yards Homeowners Association argues that, based on the proposed project design, the project's rear is not really Grindall Street, but Lois Lane—meaning that there should be a requisite 25-foot rear setback from Lois Lane. In other words, these Appellants contend that Warren Avenue should not be considered the front lot line for this proposed project (as it is for the subject property at large), given that only the side of the new project will face Warren Avenue. Additionally, these Appellants claim that the Board ignored their position on this matter.

Appellees counter that the Baltimore City Zoning Code is "absolutely clear that by definition there can be only one front lot line and one rear lot line for any lot, and that all other lot lines which are not the front or rear lot line are deemed side lot lines." We agree with Appellees that the most natural reading of the Zoning Code is that a lot only has one front lot line.

Section 1-156(b) of the Zoning Code defines a front lot line as "the lot line that . . . coincides with the right-of-way line of an existing or dedicated public street." It then defines a rear lot line as "the lot line that is most distant from and is opposite the front lot line," and a side lot line as "any lot line that is neither a front lot line nor a rear lot line."

If Appellants were correct that a lot could have multiple front lot lines, that would mean that certain lot lines could simultaneously be front lot lines as well as rear lot lines. For instance, given that a rear lot line is defined as "the lot line that is most distant from

and is opposite the front lot line," if Grindall Street were to be considered the project's front lot line (due to the fact that the project will have front entrances and stoops facing Grindall Street), that would make Warren Avenue a rear lot line—yet Warren Avenue would still be the front lot line for the entire property writ large. Likewise, were Appellants correct that Riverside Avenue should be considered the project's front lot line, that would make Lois Lane a rear lot line. But then, metaphysically, Lois Lane should no longer be considered a side lot line, as it currently is for the property at large, because § 1-156(b) defines a side lot line as "any lot line that is neither a front lot line nor a rear lot line." Simply put, we do not believe that the Zoning Code intended such absurd implications.[9] *See Mayor & Council of Rockville v. Rylyns Enters., Inc*., 372 Md. 514, 550 (2002). And notwithstanding Appellants' claim that the Board ignored this argument, it would be "futile" to remand to the Board when "the only possible finding would be that there is a complete lack of any evidence" to support Appellants' claim. *Gough v. Bd. of Zoning Appeals for Calvert County*, 21 Md. App. 697, 703 (1974) (quoting *Hooper v. Mayor & City Council of Gaithersburg*, 270 Md. 628, 637-38 (1974)).

[9] Buttressing our conclusion, § 1-309 of the City's amended Zoning Code now in effect defines a front lot line as: "the lot line that coincides with . . . the right-of-way line of an existing or dedicated public street *from which the property derives its address* . . ." (Emphasis added). Additionally, the current Zoning Code's definitions of "front lot line" and "rear lot line" each refer to "*the* lot line," whereas the definitions for side lot lines and interior-side lot lines refer to "*a* lot line." (Emphasis added).

CONCLUSION

We conclude that there was substantial evidence in the record as a whole to support the Board's findings and conclusions that: the subject property was unique; a practical difficulty would result absent the grant of a variance; the variance was the minimum necessary to afford relief; the variance was not exclusively based on a desire to increase the property's value; the variance would not be injurious to the use and enjoyment of other property; and the variance would not impair other property values in the neighborhood. Additionally, we determine that Warren Avenue remains the property's only front lot line.

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