UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1310

September Term, 2015

FRED R. ROSEN

v.

SHARON UNDERKOFFLER, ET AL.

Kehoe,
Berger,
Nazarian,

JJ.

Opinion by Kehoe, J.

Filed: July 11, 2016

*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.

Section 158.071(E) of the Carroll County Zoning Ordinance (the "Ordinance") permits offices for certain types of professions as accessory uses in residences located within the County's Conservation District. Fred R. Rosen's residence is located in the Conservation District and he wishes to continue to operate his business, Diversified Technologies, Inc., from his home. Mr. Rosen filed an application with the Carroll County Zoning Administrator seeking a ruling that his business is a professional office and thus permitted as an accessory use pursuant to § 158.071(E). He met with mixed success.

After a public hearing, the Zoning Administrator denied the application because, in his view, the evidence demonstrated that Mr. Rosen "is operating a contracting business from the property, not a professional office[.]" Mr. Rosen appealed that decision to the Carroll County Board of Zoning Appeals (the "Board"). The Board granted the application. It found "that the applicant's business was similar to a professional office and for the purpose of this case should be considered like a professional office."

Sharon Underkoffler, together with several other of Mr. Rosen's neighbors, filed an action in the Circuit Court for Carroll County for judicial review of the Board's decision. The circuit court reversed the Board for two reasons. First, the court concluded that the evidence demonstrated that Mr. Rosen "operates an electrical contracting business" and not a "professional office," as that term was used in the Zoning Ordinance.

Second, the court concluded that accepting Mr. Rosen's proposed definition of "professional office" would not be consistent with other provisions of the Ordinance.

Mr. Rosen has appealed the circuit court's judgment and presents two issues, which we have re-worded slightly:

> 1. Did the circuit court apply the proper standard of review to the Board's decision?
>
> 2. Was the circuit court correct when it concluded that the provisions of § 158.071(E)(11) precluded Mr. Rosen's proposed use?

We conclude that the Board misinterpreted § 158.071(E)(11). As a result, the Board's fact-based conclusions were irrelevant to the actual issues posed by Mr. Rosen's application. Under the circumstances, it is appropriate to remand the case to the Board with guidance as to the correct way to approach the case.

Background

The Pertinent Provisions of the Ordinance

The Carroll County Zoning Ordinance is codified as § 158 of the County Code. Section 158.071 contains the use regulations for the "C" or "Conservation" zoning district. The purpose of the Conservation District is "to conserve open spaces, water supply sources, woodland areas, wildlife, and other natural resources." Section 158.071(A). Consistent with these purposes, the scope of permitted uses is limited to agriculture, forestry, golf courses, residential, and certain institutional uses, such as

schools. Section 158.071(C). In the Conservation District, conditional uses are similarly restricted: shooting ranges, religious establishments, landscaping operations, bed-and-breakfast and country inns, blacksmith shops, wineries, veterinary clinics, conference centers, and nursing homes. Section 158.071(D).

Of particular significance to this case is § 158.071(E), which sets out permitted accessory uses. The statute reads in pertinent part:

> **Accessory uses.** Accessory uses shall be as follows:
>
> * * * *
>
> (8) Home occupation[s],[1] subject to Zoning Administrator approval after a public hearing[;]
>
> * * * *
>
> (11) Within a dwelling, the professional office of a physician, insurance agent, realtor, or other profession determined by the Zoning Administrator

[1]The Zoning Ordinance defines a "home occupation" as:

> HOME OCCUPATION. Any use of a dwelling, conducted solely by a resident, or use of any accessory building which is incidental or subordinate to the main use of the principal building for dwelling purposes, provided that the use:
> (1) Utilizes space equal to not more than 500 square feet;
> (2) Does not generate vehicular parking or nonresidential traffic to a greater extent than would normally result from residential occupancy;
> (3) Does not involve retail sales from the premises;
> (4) Involves no evidence from the outside of the dwelling to indicate it is being used for anything other than residential purposes, other than a sign not exceeding three square feet; and
> (5) May involve mail order or internet-based sales, provided no customers come to the dwelling.
>
> Section 158.002.

> to be similar in use and characteristics, subject to Zoning Administrator approval after a public hearing[.]

The Zoning Ordinance does not contain a definition of "profession," "professional," or "professional office." The Ordinance does, however, define "contractor" as:

> A person or entity engaged in the following or similar: carpentry, cleaning, construction, electrical, excavation, exterminating, heating/air conditioning, home improvement, landscaping, masonry, painting, paving, plumbing, roofing, septic system, snow removal, and well drilling.

Section 158.002.

Mr. Rosen's Application

Mr. Rosen filed an application with Jay Voight, the Carroll County Zoning Administrator, seeking a ruling from Mr. Voight that his business was a profession and was similar in use and characteristics to offices of physicians, insurance agents, and realtors, that is, the criteria set out in § 158.071(E)(11). After a public hearing, Mr. Voight concluded that Mr. Rosen's business was more properly characterized as a contractor's business, as opposed to a profession. He denied the application. Mr. Rosen appealed the decision to the Board of Appeals.

After a hearing, the Board granted Mr. Rosen's application. The evidence presented to the Board at the hearing is known to the parties and there is no reason to set it out in detail because we will be remanding the case back to the Board for it to make

new findings. The Board's written opinion contained the following findings and conclusions (emphasis added):

> The Board was convinced that granting the applicant's request was consistent with the purpose of the zoning ordinance and would not unduly affect the residents of adjacent properties, the values of those properties, or public interests. The Board approved the applicant's request. *The Board found that the applicant's business was similar to a professional office and for the purpose of this case should be considered like a professional office*. The Board approved the request with a number of conditions:
>
> 1. The business could not be transferred to someone else;
> 2. The business would be limited to four commercial vehicles;
> 3. There would be no weekend hours except for emergencies;
> 4. There would be deliveries by UPS or parcel deliveries only;
> 5. There would be no more than the existing four employees for the business;
> 6. There would be no signage for the business and no customers coming to the business.

The circuit court reversed the Board's decision. The court stated that "the necessary legal analysis involves a determination as to whether [Mr. Rosen's] use is, first, an office; second, of a profession; and third, similar in use and characteristics to that of a physician, insurance agent or realtor." The court concluded that Mr. Rosen's proposed use could be characterized as an office, but that his occupation was not a "profession" as that term is used in the context of residential accessory use regulations in land use ordinances. Moreover, the court concluded that treating Mr. Rosen's business as a profession for purposes of § 158.071(E)(11) would yield illogical results:

> It is illogical to suggest that the drafters intended to limit and enumerate principal permitted and conditional uses, but to grant a virtual "blank check" as to accessory use types. Finally, if "profession" is given the Respondent's proffered definition it would, in large part, make the limitations on "home occupation" as set forth in §158.071(E)(11) unnecessary, if not irrelevant. The Court does not read this statute in a way that would create such illogical results.[2]

Analysis

(1) The Standard of Review

In a judicial review proceeding, the issue before an appellate court "is not whether the circuit . . . court erred, but rather whether the administrative agency erred." *Bayly Crossing, LLC v. Consumer Protection Division*, 417 Md. 128, 136 (2010) (citations, internal quotation marks, and brackets omitted). For that reason, we "look through" the circuit court's decision, in order to "evaluate the decision of the agency" itself. *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 66 (2008).

In a quasi-judicial proceeding such as the one before us, administrative agencies typically perform three functions: (1) making findings of fact; (2) identifying and interpreting the relevant legal standards; and (3) applying the law to the facts.

[2]The circuit court reversed the Board's decision. As we will explain later in this opinion, we believe that the more appropriate course of action is to remand the case to the Board.

First, courts accept an agency's factual findings if they are supported by substantial evidence, that is, there is relevant evidence in the record that logically supports the agency's factual conclusions. *Bayly Crossing*, 417 Md. at 139.

Second, judges have particular expertise in matters of legal interpretation, including construing statutes. Therefore, a reviewing court is not bound by an agency's legal conclusion. With that said, courts "frequently give weight to an agency's experience in interpretation of a statute that it administers." *Schwartz v. Maryland Department of Natural Resources*, 385 Md. 534, 554 (2005). This principle has exceptions and two of them are at least arguably relevant to this appeal. First, deference is inapplicable when the administrative record "does not reveal much, if anything, about the administrative practice of [the] agency." *Green v. Latter-Day Saints*, 430 Md. 119, 134 (2013) (citing *Montgomery County v. Deibler,* 423 Md. 54, 62–63 n.2 (2011)). Second, courts will not defer to an agency's interpretation if that interpretation is not consistent with the plain meaning of the statute. *Macke Co. v. Comptroller*, 302 Md. 18, 22–23 (1984).

Third, an agency's application of the law to the evidence presents a mixed question of law and fact. If the agency has correctly identified the applicable legal standard, courts of review defer to the agency's application of the law to the facts before it, as long as the findings are supported by substantial evidence. *See Baltimore Lutheran*

High School Assoc. v. Employment Security Administration, 302 Md. 649, 662 (1985). On the other hand, conclusions based upon an incorrect legal premise merit no deference from a reviewing court. Under that scenario, reviewing courts generally remand the case to the agency for the agency to reconsider the matter in light of the court's explanation of the applicable legal standard. *See Board of Public Works v. K. Hovnanian's Four Seasons*, 425 Md. 482, 522 (2012) ("The error committed by the Board was one of law—applying the wrong standard in formulating its decision. The appropriate remedy in such a situation is to vacate the decision and remand for further proceedings designed to correct the error.").

(2) Mr. Rosen's Contentions

In his brief, Mr. Rosen makes essentially two arguments. The first is that the circuit court failed to give appropriate deference to the Board's conclusion that his business "was similar to a professional office and for the purpose of this case should be considered like a professional office." He characterizes the Board's conclusion as "a mixed question of law and fact" and continues:

> It is true that the BZA did not devote a substantial amount of attention in its written decision to the interpretive method it used to conclude that Rosen fit within the meaning of § 158.071 (E)(11). No discussion of the canons of statutory construction can be found in the written decision; however, the Record shows that the BZA heard, considered, and focused on the language of the statute as well as its place within the context of the Zoning Ordinance. After doing so, it concluded

> that the land use characteristics of a proposed use "trumped" the label applicable to a particular occupation.
>
> When the BZA found that "the applicant's business was similar to a professional office and for the purpose of this case should be considered like a professional office," it was interpreting the Zoning Ordinance and its decision was reasonably based on the language of the statute and on the extensive evidence before it.

(Citations omitted).

Second, Mr. Rosen contends that the circuit court erred in focusing on dictionary definitions of the term "profession" and concluding from those definitions that the "'term 'professional' in a zoning context distinguishes learned and artistic pursuits from those more commonly viewed as trades or businesses.'" (Citation omitted; quoting from the circuit court's opinion.)[3] Mr. Rosen argues that the court's approach "ignores what should have been the main focus of anyone analyzing the meaning and intent of Section 158.071, namely the language of the entire zoning provision at issue[.]"

[3]Mr. Rosen also argues that the court's conclusion, that the language of the Ordinance is unambiguous, is inconsistent with the court's analysis of:

> the meaning of the Zoning Ordinance under other canons of statutory interpretation, pointing out that "a contrary ruling [regarding the definition of profession] would yield a number of illogical results" and then going on to analyze the entire zoning ordinance (and specifically, its use of the term business versus profession) as an aid in discerning the intent of the drafters.

We see no error on the court's part. *See Town of Oxford v. Koste*, 204 Md. App. 578, 586 (2012), *aff'd*, 431 Md. 14 (2013) ("An examination of interpretive consequences, either as a comparison of the results of each proffered construction, or as a principle of avoidance of an absurd or unreasonable reading, grounds the court's interpretation in reality." (Citations omitted)).

(3) The Correct Legal Standard: Section 158.071(E)(11) permits professionals to have offices in residences. It does not permit businesses to operate out of residences because the business has an office that is similar to a professional office.

Turning to the merits, we conclude that the Board did not apply the appropriate legal standard to Mr. Rosen's application. Our conclusion is based on a comparison of the relevant statutory language to the pertinent part of the Board's decision.

We start with § 158.071(E)(11), which, for purposes of analysis, is best considered in two parts. First, the statute permits physicians, realtors and insurance agents to have profession offices in residences. Second, subsection (E)(11) authorizes the Zoning Administrator (or the Board on appeal from the Administrator's decision) to approve home professional offices for practitioners of other professions when the proposed home office is "similar in use and characteristics" to the home offices of physicians, realtors, and insurance agents. We agree with the circuit court that the statute requires a three-part inquiry as to: (1) whether the commercial activity within the dwelling is an "office"; (2) whether the commercial activity constitutes a profession; and (3) whether the professional office is "similar in use and characteristics" to physicians', realtors', and insurance agents' offices.

With all due respect to the Board, it answered neither of the latter questions in its decision. Instead, the Board found that (emphasis added):

> the applicant's business was *similar to a professional office* and for the purpose of this case *should be considered like a professional office*.

Section 158.071(E)(11) permits physicians, realtors, and insurance agents to have home offices. The statute also authorizes the Board to allow persons who engage in *professions* to have home offices if the home office in question is "similar in use and characteristics" to the offices of physicians, realtors, and insurance agents. Section 158.071(E)(11) does not permit an individual to operate a business that isn't a profession from a residence simply because the business "is similar to a professional office."

The way that the Board framed its findings compounds the problem. Even if the Board's interpretation of the statute were correct—and it wasn't—the opinion provides no insight as to what facts the Board relied upon to conclude that Mr. Rosen's business was similar to a professional office. This is a very serious problem in a judicial review proceeding because "[a] reviewing 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 Parcel Serv. v. People's Counsel for Baltimore County*, 336 Md. 569, 577 (1994) (quotation marks and citation omitted).

One of the issues before the Board illustrates our point. There was undisputed evidence that Mr. Rosen and his employees use three utility vans and a truck for business purposes and that those vehicles are parked at his residence during non-business hours. Physicians, insurance agents, and realtors do not typically use such vehicles for

professional purposes. If the Board decides to grant Mr. Rosen's application, it must explain why a business with utility vans and a truck is "similar in use and characteristics" to offices of physicians, insurance agents, and realtors.

To reiterate, the Ordinance requires the Board to decide: (1) whether the commercial activities within Mr. Rosen's home are an office; (2) if so, whether Mr. Rosen's business is a profession; and (3) if it is, whether his business's office is similar in use and characteristics to offices of physicians, realtors, and insurance agents. The Board's interpretation of § 158.071(E)(11) avoided addressing whether Mr. Rosen's electrical business constituted a profession. The Board's interpretation is inconsistent with the plain language of the statute and the Board erred when it failed to apply the correct statutory criteria to Mr. Rosen's application.[4]

[4]We do not give weight to the Board's interpretation of § 158.071(E)(11) for two reasons. First, as we have explained in the main text, the Board's construction cannot be squared with the plain meaning of the words of the statute.

Second, the record doesn't show a long-settled administrative practice supporting the Board's current interpretation. The parties have cited prior decisions in which the Board has interpreted the term "profession" or "professional." None of these decisions interpreted § 158.071(E)(11) or a similar provision in a manner that is consistent with the Board's interpretation in Mr. Rosen's case.

Appellees direct our attention to *Application of John S. Mertens and Ann L. Mertens*, No. 2906 (March 28, 1988). In that case, the Mertens sought a conditional use permit to operate "a plumbing contractor's office within the residence." At the time, the Ordinance permitted as conditional uses:

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Because the Board applied the incorrect legal standard, it made no relevant findings of fact. For this reason, we will vacate its decision and remand the case to the Board so that it can re-examine the evidence using the correct legal standard. *See O'Donnell v. Bassler*, 289 Md. 501, 511 (1981) ("'[T]he function of the reviewing court ends when an error of law is laid bare.'" (quoting *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952))). We think it might be useful to the Board and the parties if we provide some guidance as to the proper interpretation of § 158.071(E)(11), specifically, how the Board should interpret the terms "profession" and "professional" as they are used in the statute.

(4) The Meanings of "Profession," "Professional," and "Professional Office"

Interpreting a statute is primarily an exercise in identifying legislative intent. It consists of considering the ordinary meaning of the words in question in the context of

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(...continued)

> Within a dwelling, the professional office of the resident physician, insurance agent, realtor, or other profession determined by the Board to be similar in use in characteristics.

This language is substantively identical to what is contained in § 158.071(E)(11).

The Board in *Mertens* concluded that the "record reveals no indication that the operation of a plumbing contractor's office would be similar in use and characteristics to the specified professions."

Appellees are correct that the Board's decision in *Mertens* is not consistent with its analysis in the current case. However, one swallow does not a summer make. *See Deibler,* 423 Md. at 62–63 n.2 (A single award from the Workers' Compensation Commission does not establish an agency practice.).

the statute as a whole. Judges search for the ordinary meanings of words in dictionaries. We consider context in order to better identify the intent of the legislature and to avoid an interpretation that would make other provisions of the statute meaningless or superfluous. Courts can consider "interpretive consequences, either as a comparison of the results of each proffered construction, or as a principle of avoidance of an absurd or unreasonable reading, ground[ing] the court's interpretation in reality." *Koste*, 204 Md. App. at 586.

In this process, we are bound by the words of the statute. It is not the role of this Court, nor, for that matter, the Board of Appeals, to rewrite the Ordinance to meet the exigencies of a particular case.

We start with the relevant dictionary definitions of "profession."[5] The circuit court consulted two dictionaries[6] for definitions of "profession" and "professional," and

[5]"Profession" has other meanings and usages, e.g., a "profession of faith," that are not related to the questions raised by this appeal.

[6]Specifically, the court relied upon: (1) WEBSTER'S NEW COLLEGIATE DICTIONARY (9th Ed.) which, as the court noted, lists multiple definitions of "profession" in order of common usage: 4a) a calling requiring specialized knowledge and often long and intensive academic preparation; 4b) a principle calling, vocation or employment; 4c) the whole body of persons engaged in a calling; (2) BLACK'S LAW DICTIONARY (8TH ED.), defining "profession" as: "a vocation requiring advanced education and training; especially, one of three learned professions - law, medicine and the ministry"; and (3) BLACK'S LAW DICTIONARY, defining "professional" as "A person who belongs to a learned profession or whose occupation requires a high level of training and

(continued...)

concluded that the County Commissioners intended the terms to "distinguish[] learned and artistic pursuits from those more commonly viewed as trades or businesses."

In addition to the sources cited by the circuit court, we note that Webster's Third New International Dictionary of the English Language, Unabridged (1986) provides the following relevant definition of "profession":

> A calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continue to study and to a kind of work which has for its prime purpose the rendering of a public service.

Id. at 1811.

Additionally, a widely-used on-line dictionary provides the following relevant definition of "profession":

> a : a calling requiring specialized knowledge and often long and intensive academic preparation
> b : a principal calling, vocation, or employment
> c : the whole body of persons engaged in a calling

http://www.merriam-webster.com/dictionary/profession (last visited June 26, 2016).

These definitions have substantial areas of overlap. We hold that, for purposes of § 158.071(E)(11), "profession" means an occupation that requires specialized knowledge

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[6](...continued)
proficiency." (The same definitions of "profession" and "professional" appear in the current edition of Black's Law Dictionary.)

which is derived through long and intensive academic education and training.[7] A "professional" is an individual who is engaged in such an occupation. A "professional office" is the office in which the professional engages in his or her profession. We agree with the circuit court that the term "profession" in § 158.071(E)(11) refers to a category of occupations that are distinct "from those more commonly viewed as trades or businesses."

These somewhat restrictive meanings make sense in the context of the Zoning Ordinance as a whole. The statement of purpose of the Conservation District, as well as the list of permitted and conditional uses, indicate that the County Commissioners intended to limit commercial activity in the Conservation District. We agree with the circuit court that overly-broad interpretations of "profession" and "professional" could enable property owners to accomplish an end run around the Ordinance's limitations on home occupations.[8]

[7]We do not believe that § 158.071(E)(11) should be limited to the so-called "learned professions," e.g., the law, medicine, and the ministry. *See* John W. Wade, *Public Responsibilities Of The Learned Professions*, 21 LA. L. REV. 130 (1960). The concept of learned professions does not include occupations such as engineering, architecture, and certified public accountancy, all of which are indisputably considered professions in today's society.

[8]The Ordinance provides a definition of "contractor" in § 158.002. The meanings of "professional" and "profession" do not overlap with the definition of "contractor."

Finally, and although the appellate courts in Maryland do not appear to have addressed the issue, a somewhat restrictive definition of "profession" is in accord with decisions from courts of other states that have considered the issue in the land use context. *See, e.g.*, *Mack v. Bd. of Appeals, Town of Homer,* 807 N.Y.S.2d 460, 463–64 (N.Y. App. Div. 2006) (The term "professional" refers to "'the learned professions, exemplified by law and medicine,' which share qualities including 'extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violating those standards.'" (citing *Chase Scientific Research v. NIA Group*, 96 N.Y.2d 20, 29 (N.Y. 2001))); *Colker v. D.C. Bd. of Zoning Adjustment*, 474 A.2d 820, 820 (D.C. 1983) (Members of professions "must (1) have professional education, (2) be bound by a code of ethics and some principles of practice through a professional organization, and (3) be professionally licensed." (citation omitted)).

(5) The Board's Role On Remand

On remand, the task of the Board is three-fold. The Board must determine:

(1) Can Mr. Rosen's business activities in his residence be reasonably characterized as an office use?

(2) If the answer to the first question is "yes," then the Board must decide whether Mr. Rosen's business constitutes a "profession" as we have defined that term in this opinion.

(3) Finally, if the Board concludes that Mr. Rosen is engaged in a profession, then the Board must decide whether his business is similar in use and characteristics to offices of physicians, insurance agents, and realtors.

In making its decision, the Board must explain its reasoning and the factual bases for its conclusions. A conclusory statement without explanation is legally insufficient. *See, e.g., Bucktail, L.L.C. v. Talbot County Council*, 352 Md. 530, 553 (1999) ("Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions."). This requirement is particularly important in this case if further judicial review is necessary.

THE JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY IS REVERSED AND THIS CASE REMANDED TO IT SO THAT THE COURT MAY REMAND THE CASE TO THE BOARD OF APPEALS FOR CARROLL COUNTY FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.