UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 178

September Term, 2016

MCSHANE WALDRON GLOVER

v.

BOARD OF APPEALS OF THE
CITY OF ANNAPOLIS

Leahy,
Reed,
Shaw-Geter

JJ.

Opinion by Reed, J.

Filed: May 10, 2017

The appellant, McShane Waldron Glover, is the owner of the property located at 518 Burnside Street, Annapolis, Maryland 21403, as well as the structure thereon. In July 2013, she submitted an application to the City of Annapolis Department of Planning and Zoning ("DPZ") for the complete demolition of the existing structure and the construction of a new, single family residence to replace it. After the DPZ denied her application, Ms. Glover appealed to the Annapolis Board of Appeals ("Board"). The Board affirmed the DPZ's denial, and the Circuit Court for Anne Arundel County subsequently affirmed the Board upon judicial review. This timely appeal followed.

On appeal from the circuit court, the appellant presents us with the following two questions:

> 1. Are the demolition criteria applicable within the City of Annapolis' R2-NC Zoning District impermissibly vague and contradictory?
>
> 2. Did the Board of Appeals err as a matter of law in applying the City's demolition criteria to wrongly deny Appellant's demolition application?

For the following reasons, we shall not address the merits of the first question and shall answer the second question in the negative. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2013, the appellant submitted an application to the DPZ to demolish the structure located on her 518 Burnside Street property in Annapolis, Maryland ("Burnside Street Property"). The Burnside Street Property is zoned within the City of Annapolis's R2-NC Single-Family Residence Neighborhood Conservation district ("R2-NC") and is

improved with a single family residence built around 1905. The existing structure consists of two stories and a basement. The appellant's application requested permission to completely demolish the existing structure and replace it with a new single family residence.

By letter dated November 15, 2013, the DPZ denied the appellant's demolition application. Thereafter, on December 9, 2013, the appellant filed a timely appeal of the DPZ's decision to the Board. The Board conducted *de novo* review hearings on March 19, April 1, May 15, and June 3, 2014. Following the hearings, on September 2, 2014, the Board issued an Opinion and Order affirming the DPZ's denial of the appellant's demolition application.

The appellant filed for judicial review of the Board's decision in the Circuit Court for Anne Arundel County on September 24, 2014. The appellant and the Board both filed memoranda with the circuit court in support of their positions and participated in a hearing before the court on October 5, 2015. Several months later, by Memorandum Opinion and Order dated March 4, 2016, the circuit court affirmed the Board's denial of the demolition application.[1]

On April 1, 2016, the appellant noted a timely appeal to this Court.

[1] The appellant devotes approximately a page and a half of the Statement of the Case section of her Brief to the fact that, when the record was being prepared for judicial review by the circuit court, it was discovered that the City of Annapolis taped over the entire recording of her approximately two-and-a-half hour-long case-in-chief before the Board. However, because the appellant was permitted to file a Statement in Lieu of Record, which was subsequently accepted by the circuit court and made part of the administrative record, she did not suffer any prejudice, and, thus, the lost portion of the hearing transcript is not relevant to our consideration of the issues at hand.

STANDARD OF REVIEW

In cases such as this, where the appeal comes to us by way of a circuit court order affirming the decision of an administrative agency, we

> . . . "[assume] the same posture as the circuit court . . . and limit our review to the agency's decision." *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 244, 935 A.2d 746 (2007) (internal citation omitted). The circuit court's decision acts as a lens for review of the agency's decision, or in other words, "we look not *at* the circuit court decision but *through* it." *Emps. Ret. Sys. of Balt. Cnty. v. Brown*, 186 Md. App. 293, 310, 973 A.2d 879 (2009), *cert. denied*, 410 Md. 560, 979 A.2d 708 (2009) (emphasis in original) (internal citations omitted).
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> We "review the agency's decision in the light most favorable to the agency" because it is "prima facie correct" and entitled to a "presumption of validity." *Anderson v. Dep't of Pub. Safety & Corr. Servs.*, 330 Md. 187, 213, 623 A.2d 198 (1993) (internal citation omitted).
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> The overarching goal of judicial review of agency decisions is to determine whether the agency's decision was made "in accordance with the law or whether it is arbitrary, illegal, and capricious." *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 274, 47 A.3d 1087 (2012) (internal citation omitted). With regard to the agency's factual findings, we do not disturb the agency's decision if those findings are supported by substantial evidence. *See id.* (internal citations omitted). Substantial evidence is 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, 709 A.2d 749 (1998) (internal citations omitted) (internal quotation marks omitted). We are not bound, however, to affirm those agency decisions based upon errors of law and may reverse administrative decisions containing such errors. *Id.*

Sugarloaf Citizens Ass'n v. Frederick Cty. Bd. of Appeals, 227 Md. App. 536, 546 (2016).

DISCUSSION

I. Whether the Demolition Criteria Are Impermissibly Vague

A. Parties' Contentions

The appellant argues that "[a number of t]he demolition criteria applicable within the City of Annapolis' R2-NC zoning district are impermissibly vague and contradictory." The specific criteria with which the appellant takes issue, as well as her reasons for doing so, are outlined below. Generally, however, the appellant asserts that the R2-NC zoning standards are "riddled with inconsistencies and 'Catch-22s,'" and, thus, that "neither the [DPZ] nor the Board can be expected to systematically, correctly, and fairly administer such criteria, nor can any demolition applicant have hope of successfully understanding or navigating them within the boundaries of the Code."

Further, the appellant contends that "[t]he 'financial hardship' element of the Code's general demolition criteria is . . . [also] void for vagueness." Specifically, the appellant argues that the general demolition criteria "directs the City to examine '[t]he extent to which the retention of the structure would cause financial hardship to the owner,'" but don't provide any "guidance on what information the applicant must provide, . . . factors to be evaluated, . . . direction as to what level of hardship might be deemed sufficient for administrative relief, . . . [or] relevant definitions." Therefore, according to the appellant, the Board's application of the general demolition criteria, like its application of the R2-NC zoning standards, violated her due process rights and deprived her of her rights pertaining to her use of her property.

The Board responds, first and foremost, that the appellant "[n]ever raise[d] the issue that the zoning code provisions are void for vagueness" before the Board or the DPZ. Thus, the Board argues that issue of vagueness is not preserved for our review.

Preservation notwithstanding, the Board "vehemently disagrees" with the appellant's assertion that the demolition criteria applicable within the R2-NC zoning district are impermissibly vague and contradictory. In support of its assertion that the review criteria as a whole are neither vague nor contradictory, the Board points out that "[n]one of the [appellant's] witnesses complained that they had difficulty comprehending the demolition review criteria or difficulty in explaining the rationale they provided to persuade the Board . . . to grant the appeal." That, according to the Board, is because "the . . . demolition review criteria are not difficult to comprehend. There are no hidden meanings in the language."

Regarding the general demolition criteria's "financial hardship" element, the Board contends that the lack of itemized standards in the Annapolis City Code "does not restrict the B[oard] from doing a thorough evaluation of evidence relating to financial hardship." In this case, according to the Board, it "did nothing more than review all the evidence of record and not limit itself to only evidence of the cost differential." The Board argues that there is nothing unconstitutionally vague about this type of analysis.

B. Analysis

The Burnside Street Property, as we previously mentioned, is located within the City of Annapolis's R2-NC zoning district. Demolition applications for structures located

within this district are subject to two Sections of the Code of the City of Annapolis ("City Code"). The first is Section 21.40.060, which applies only to the R2-NC zoning district. Section 21.40.060 provides, in relevant part:

> A. Purpose. The purpose of the R2-NC Single-Family Residence Neighborhood Conservation district is to preserve patterns of design and development in residential neighborhoods characterized by a diversity of styles and to ensure the preservation of a diversity of land uses, together with the protection of buildings, structures or areas the destruction or alteration of which would disrupt the existing scale and architectural character of the neighborhoods. The general purpose includes:
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> 1. Protection of the architectural massing, composition and styles as well as neighborhood scale and character;
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> 2. Compatibility of new construction and structural alterations with the existing scale and character of surrounding properties;
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> 3. Encouragement of existing types of land uses that reflect the mixture and diversity of uses that have historically existed in the community; and
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> 4. Preservation of streetscapes.
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> C. Development Standards.
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> 2. Site Design Plan Review.
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> a. Except as provided in Subsection (C)(2)(b) of this section, new construction including new buildings, enlargements to building size or bulk, or structural alterations to existing structures which have an impact upon any exterior façade of a structure or building are subject to review and approval, with emphasis placed on façades visible from the public view, by the Department of Planning and

Zoning in accordance with the provisions of Chapter 21.22, Site Design Plan Review.

* * *

c. The following guidelines shall be applied at the time of site design plan review, shall control in the event of conflict with the provisions of Chapter 21.22, and shall be applied to all uses in the R2-NC district. No design plans shall be approved by the Department of Planning and Zoning until findings consistent with these guidelines have been made:

i. Where new buildings, structures, structural alterations or structural rehabilitations, enlargements or reductions are proposed, their design shall be compatible with the historic character and design of the area and shall promote the existing spatial and visual qualities in the R2-NC area, including height and scale of buildings, orientation, spacing, site coverage, and exterior features such as porches, roof pitch and direction and landscaping.

ii. All buildings shall observe the established, historic front setbacks and building heights pursuant to Section 21.50.050, if any, for the block on which they are proposed.

iii. All new structures or buildings, enlargement of existing structures or buildings and all substantial rehabilitation, reduction and/or alteration of existing structures or buildings shall have bulk, massing and scale similar to the structures on the block face.

iv. The proposed alterations or new construction shall preserve and enhance the vernacular streetscape of the neighborhood.

v. Exterior structural alterations to historic and contributing structures along the street frontage shall be kept to a minimum.

* * *

3. Demolitions.

* * *

b. In addition to the Review Criteria in Section 21.14.040, the Director of Planning and Zoning shall make additional written findings based on the following:

i. Loss of the structure or building would not be adverse to the R2-NC district or the public interest by virtue of the structure's uniqueness or contribution to the significance of the district;

ii. The proposed demolition would not have an adverse effect on the design and historic character of the structure and surrounding environment of the R2-NC district;

iii. Demolition is not for the purposes of assembling properties for the construction of a large-scale structure, if such assemblage is determined to be incompatible with the purposes and intent of the R2-NC district;

iv. The replacement structure or parts of the structure is designed and sited in a fashion that reflects the compatibility objectives of this chapter;

v. The proposed partial demolition will not impact the stability or structural integrity of the remaining portions of the structure and appropriate measures are proposed to stabilize the building during demolition and construction. In the case of total demolition a structural analysis and evaluation has been conducted and determined the building to be unsound and is a threat to the public health and

> safety. The department of planning and zoning may require that such an evaluation be prepared by a certified structural engineer at the applicant's cost;
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> vi. In order to approve any demolition request, the Director of Planning and Zoning may require a structural analysis of a structure or building, by a registered structural engineer, to determine if it is sound and not a threat to public health and safety before a demolition is authorized.

In addition, demolition applications for structures located within the R2-NC zoning district are also subject to the general review criteria contained in City Code § 21.14.040. These criteria apply to demolition applications throughout the City of Annapolis, not just in the R2-NC zone. Relevant to this appeal is § 21.14.040.G, which provides:

> In deciding demolition applications, the Planning and Zoning Director shall make written findings based on the following:
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> * * *
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> G. Financial Hardship. The extent to which the retention of the structure would cause financial hardship to the owner.

On appeal, the appellant argues that §§ 21.40.060.C.3.b & 21.14.040.G, *supra*, are unconstitutionally void for vagueness. For the following reasons, this argument is not properly preserved, and, therefore, we shall not address its merits.

As the Board points out, the appellant did not raise the issue of vagueness before the Board. That is important because, "[u]nder settled Maryland law, appellate review of administrative decisions is limited to those issues and concerns raised before the administrative agency." *Capital Commercial Properties, Inc. v. Montgomery Cty. Planning*

Bd., 158 Md. App. 88, 96 (2004) (citing *Mayor & City Council of Rockville v. Woodmont Country Club*, 348 Md. 572, 582 n.3 (1998)). Moreover, as the Court of Appeals explained in *Robinson v. State*, 404 Md. 208 (2008), "[i]t is particularly important not to address a constitutional issue not raised in the trial court in light of the principle that a court will not unnecessarily decide a constitutional question." *Id.* at 218 (quoting *Burch v. United Cable Television of Baltimore Ltd. P'ship*, 391 Md. 687, 695 (2006)). In *Robinson*, because "[t]he trial court was not asked, ever, to decide any claim that the statute was unconstitutionally vague," the Court of Appeals refused to consider such a claim. 404 Md. at 218. In the present case, the appellant did raise the issue of vagueness before the circuit court upon judicial review. However, we "limit our review to the agency's decision" in this case, *Sugarloaf*, 227 Md. App. at 546, and the appellant did not raise the issue of vagueness before the DPZ or the Board. Therefore, we decline to address whether § 21.40.060.C.3.b or § 21.14.040.G of the City Code is void for vagueness.

II. Whether the BOA Erred in Applying the Demolition Criteria

A. Parties' Contentions

Notwithstanding her earlier arguments pertaining to vagueness, the appellant asserts that "[t]he Board erred as a matter of law in applying the . . . demolition criteria" to deny her application. She contends that the Board's financial hardship finding is unsupported by substantial evidence in light of the evidence she presented that "rehabilitating her house would cost approximately $200,000 [–or 27%–] more than demolishing and rebuilding her house." Those figures, she argues, are very similar to the

ones in "a prior R2-NC demolition at 122 Chesapeake Avenue [that] was approved in part because of a finding of financial hardship compared to restoring its deteriorated state." The appellant points out that, in the case of the house at 122 Chesapeake Avenue, "rehabilitation was approximately 30-35% more than new construction." She asserts that applying "an 'each case is taken individually' approach under the ostensible cloak of 'reasonableness,'" as the Board did in this case, "does not salvage the Board's erroneous decision."

In addition, because the 2009 Annapolis Comprehensive Plan contained a recommendation that the R2-NC district be reevaluated, and because the representative of Eastport[2] on the Annapolis City Council testified before the Board that the R2-NC standards have "some deficiencies," the appellant contends that "R2-NC is an ongoing problem which, in [this] instance, has resulted in the Board's improper denial of her application."

The Board responds that it did not err in applying the demolition criteria to deny the appellant's application. In short, the Board argues that its application of the applicable zoning criteria in this case is supported by substantial evidence on the record. It asserts that it was presented with testimony that "some of the numbers reported by the appellant to address financial hardship . . . were questionable." Regarding the prior demolition application for the 122 Chesapeake Avenue house, the Board contends: "[A witness] was able to distinguish that case from this case in one very significant way. Unlike in the 122

[2] Eastport is the historic neighborhood in Annapolis where the R2-NC zoning district is located.

Chesapeake Avenue case, the structure here is not imminently hazardous." Moreover, the Board argues that "[o]ne [alderman's] opinion about a provision in the City Code, which was adopted by a majority of the City's legislative body, is irrelevant." Finally, the Board points out that the 2009 Annapolis Comprehensive Plan does not say that the R2-NC zoning district "shall" or "must" be reevaluated; instead, according to the Board, it "merely recommends such action."

B. Analysis

The appellant's argument that the Board erred as a matter of law in denying her application is premised exclusively on the allegation that the Board was incorrect where it found that she was not suffering enough financial hardship for her application to merit approval. Therefore, we begin our analysis with the "financial hardship" section of the Board's September 2, 2014, Opinion and Order:

> G. Financial Hardship. The extent to which the retention of the structure would cause financial hardship to the owner.
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> There are no standards in the City Code by which to judge how the Applicant is to prove financial hardship. Therefore, the Board . . . must evaluate the evidence presented and apply reasonableness to the concept.
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> Financial hardship should not exist simply because the cost of renovation exceeds the cost of demolition. There may be some amount that, by virtue of being so extraordinary, in and of itself would constitute financial hardship. The Applicant does not advance this proposition and the [DPZ] appears not to address such a proposition.
>
> The existence of structural problems in a residence should not, in and of itself, constitute automatic evidence of financial hardship. If such problems can be corrected at

> reasonable and prevailing expense, then there would seem to be no reason to find financial hardship. If structural problems are so immense and hazardous and overwhelming and are placing the structure in imminent danger of failing and doing damage to adjacent properties, then it would seem that, for the sake of public health and safety, demolition would be approved. Barring that situation, which the evidence makes clear is not the case here, it would appear that a balancing approach is advised.
>
> Clearly, there is evidence that the Applicant will spend about $200,000 more to renovate rather than to demolish and replace. This is her only basis for asserting a financial hardship. Mr. Carlisle,[3] who did the estimates and felt that the existing residence was not about to fall, indicated that the major difference in pricing is bringing the residence up to Code and changing the floor layout to the Applicant's preferences. He noted that the two projects would be similar in all phases of new construction and those costs are roughly the same.
>
> Some of the numbers reported by the Applicant to address financial hardship numbers were questionable to Mr. Smith.[4] He stated that the [DPZ] does not use a specific conclusive differential to determine when costs of reconstruction versus the costs of demolition and replacement warrant or do not warrant a finding of financial hardship. He did note that, in each of six recent demolition application denials by the [DPZ], costs of demolition that were less than costs of reconstruction. In this case, the differential was 27%. In the case of a demolition application approved for 122 Chesapeake Avenue, where there was a determination that the residential structure was hazardous, the differential was 30-35%.
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> The evidence is demolition at 122 Chesapeake Avenue seems to have been focused on the presence of a hazardous

[3] Tom Smith is the DPZ's Chief of Current Planning. As the appellant puts it, Mr. Smith "has considerable experience with demolition applications in [Annapolis] and in the R2-NC district in particular."

[4] David Carlisle is a contractor who was hired by the appellant to estimate the cost differential between the cost of demolition and the cost of renovation.

> condition. The evidence to this effect, however, is unclear. Nevertheless, there is no reason given by the [DPZ] as to why a 30-35% differential was good in one case and a 27% differential was not in this case. The [DPZ] indicates that in six other properties at which demolition was disapproved, costs of demolition were less than costs of repair or replacement. However, there is no evidence presented of analysis of demolition review criteria in those other cases.
>
> The sum and substance here is that the Applicant has the burden to prove financial hardship. The Applicant's sole basis for claiming financial hardship was the $200,000 differential. The Applicant did not prove that this financial hardship had to be incurred. There were alternatives to demolition available to the Applicant that were theoretical and plausible to achieve her goal of aging in place, such as building an addition to the existing residence or building a second residence on her zoning lot, which the evidence indicates was large enough to do. The cost of doing so and still renovating the existing residence would likely be very high, but in balancing that with the retention of a property that is historically, culturally and architecturally significant as opposed to replacing it with a new residence that has Craftsman features but that is not sufficiently compatible in scale and character with the surrounding neighborhood, it is reasonable that financial burdens that do not necessarily have to be incurred must be found to be subservient to historic factors in order to meet the purposes of the zoning district. Applying a standard of reasonableness, the Board . . . finds that evidence establishes that the cost comparison presented by the Applicant falls short of proof of financial hardship.

In Section I, *supra*, we declined to address whether the financial hardship provision of the City of Annapolis's general demolition criteria is void for vagueness, as the appellant failed to properly preserve that issue for our review. Now, in arguing that the Board erred as a matter of law in *applying* the financial hardship provision, the appellant repeats a number of her earlier arguments pertaining to vagueness. The only argument advanced by

the appellant regarding "whether the [Board]'s decision was made 'in accordance with the law or whether it is arbitrary, illegal, and capricious,'" *Sugarloaf*, 227 Md. App. at 546 (quoting *Long Green Valley Ass'n*, 206 Md. App. at 274), is that the $200,000 cost differential was sufficient to require a finding of financial hardship, especially in light of the earlier demolition application that was approved for 122 Chesapeake Avenue.

Indeed, showing that an administrative agency acted in a manner that is inconsistent with its previous decisions can prove that it acted arbitrarily or capriciously in any given case. *See Bd. of Educ. of Somerset Cty. v. Somerset Advocates for Educ.*, 189 Md. App. 385, 402 (2009) ("Other viable theories of arbitrary or capricious [actions] may include taking improper information into consideration . . . or *deviating unexplainably from prior established precedents*." (quoting *Maryland State Bd. of Soc. Work Exam'rs v. Chertkov*, 121 Md. App. 574, 586 (1998)) (emphasis added)). The appellant makes no such showing here, however. The Board's careful, thorough, and reasoned analysis of financial hardship makes clear that it took a number of factors into consideration, including: how the 122 Chesapeake Avenue house, unlike the Burnside Street Property, was imminently dangerous; how "[s]ome of the numbers reported by the Applicant to address [the cost differential] . . . were questionable to Mr. Smith," the DPZ's Chief of Current Planning; how the appellant's own contractor testified that "the major difference in pricing is bringing the residence up to Code and changing the floor layout to the Applicant's preferences;" how the Burnside Street Property is "historically, culturally and architecturally significant;" and how the appellant desired to replace one of the oldest houses in Eastport

with "a new residence that has Craftsman features but . . . is not . . . compatible in scale and character with the surrounding neighborhood."

The fact that one member of the Annapolis City Council testified that the City Code has "some deficiencies" is irrelevant, as is the fact that the 2009 Annapolis Comprehensive Plan recommended a reevaluation of the R2-NC district.[5] What matters is that the Board was presented with evidence that the appellant's cost differential estimate was problematic, that the appellant was proposing to demolish a conventional, turn-of-the-19th-century-style residence and replace it with a California ranch-style residence with bungalow features, and that the 122 Chesapeake Avenue application could be distinguished on the basis of an imminent hazard. In light of this evidence, as well as the purposes of the R2-NC zoning district, *see* City Code § 21.40.060.A, we cannot say that the Board erred in affirming the DPZ's denial of the appellant's demolition application for the Burnside Street Property.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[5] The financial hardship provision is not even part of the R2-NC zoning standards; rather, it is contained in the City of Annapolis's general demolition criteria.