Circuit Court for Baltimore City
Case No. 24-C-17-002902

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2119

September Term, 2017

IN THE MATTER OF THE PETITION OF ANGELA TAYLOR, *ET AL.*

Meredith,
Nazarian,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 7, 2019

> The Bible tells us to love our neighbors, and also to love our enemies; probably because they are generally the same people.
>
> G.K. Chesterton, *Illustrated London News*, July 16, 1910

As a practical matter, this appeal asks us to resolve a neighborhood conflict—specifically, whether a homeowner will be required to comply with a setback requirement by moving his 4,000 square foot house, built after the requisite permits were granted by the City of Baltimore, ten feet farther back from the street. As a legal matter, this appeal asks us to examine whether the zoning board erred in its determination that the homeowner was entitled to a ten-foot setback variance—and therefore would not be required to move the house.

In or about August 2015, Guy Naylor obtained a permit to construct a new single-family dwelling in the north Roland Park area of Baltimore City. The permit authorized him to build a house with a thirty-foot front yard setback. After the home was built and over a year after the permit had been issued, the City of Baltimore (the "City") informed Mr. Naylor by letter that it had "discovered an error in the issued [building] permit," namely that the Baltimore City Code required a forty-foot front yard setback, and that he "must apply" to the Baltimore City Board of Municipal & Zoning Appeals (hereinafter, the "Board") for a ten-foot variance.

The Board, in a 3 to 1 vote, ultimately granted the variance request. Angela and Daniel Taylor, who live two doors down from Mr. Naylor, filed a petition for judicial review with the Circuit Court for Baltimore City, which affirmed the Board's decision. The

Taylors appeal. We vacate and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The parties do not dispute that Mr. Naylor's failure to build the house within the required forty-foot setback was a mistake. Indeed, the City has acknowledged that it mistakenly granted the permit that allowed the house to be built in compliance with a City (but not neighborhood-) standard thirty-foot setback.[1] But that a mistake was made is—for better or for worse—not relevant to the legal question of whether the Board erred in granting the variance request. *See Cromwell v. Ward*, 102 Md. App. 691, 725 (1995). That question depends mostly on an analysis of two factors: whether Mr. Naylor's property is unique and whether that uniqueness creates a practical difficulty. Baltimore City Zoning Code ("ZC") § 15-218, 15-219; *Cromwell*, 102 Md. App. at 694–95. But before we get to that analysis, we summarize the relevant facts and procedural history.

In 2014, Mr. Naylor bought a vacant lot (the "Property") in the north Roland Park neighborhood of Baltimore.[2] In or about August 2014, the City approved Mr. Naylor's

[1] The City's letter to Mr. Naylor stated that "The error made by the City during permit review has been discussed with the employee involved and appropriate action taken." The City also offered to "assist [Mr. Naylor] with the appeal process in any way possible."

[2] The lot had been part of a larger two-acre parcel that had been subdivided into three lots. The Taylors assert that in or about 1998, during the course of negotiations over the subdivision of the larger parcel, the parcel's owner (Victoria Park Associates Limited Partnership) and the neighborhood association (North Roland Park Improvement Association) entered into an agreement that included a covenant requiring any dwelling constructed on the Property to have a front yard setback of eighty-two feet. The Taylors also cite the Final Subdivision Plat, which appears to show the eighty-two-foot setback. But the Taylors did not assert or argue before the Board or the circuit court, and they do not assert or argue here, that Mr. Naylor was required to build his house with an eighty-

application for a building permit to construct a single-family dwelling on the Property. The home was constructed and is about 4,000 square feet, with an attached three-car garage. The house lies thirty feet from the western edge of the Property, which was consistent with the requirements of the generally applicable front yard setback for the type of residential zone ("R-2") in which the Property was located, as set forth in ZC § 4-507(a).

In reviewing Mr. Naylor's building permit application, the City apparently did not consider another section of the Zoning Code that requires a forty-foot setback,[3] a provision that the parties agree applies here. And so Mr. Naylor proceeded to build his house according to the plans approved by the City with a thirty-foot setback. No timely appeals

two-foot setback. The only question before this Court is whether the Board erred in granting the variance for the forty-foot setback.

[3] Specifically, ZC § 4-107(b)(1) requires front yard "averaging" with neighboring properties in order to determine the appropriate setback:

> (1) This subsection applies to a subsequently-erected or -expanded structure on a block where lots having 50% or more of the frontage on the same side of a street and within 200 feet of either of the structure's side lot lines have already been improved with structures that have front yards of more or less depth than required by this title.
>
> (2) The required front-yard depth for the subsequently-erected or -expanded structure within that frontage is the average depth of the front yards of the already-improved lots, but in no case more than 40 feet.

Where the setbacks of the neighboring properties are longer than thirty feet, this averaging results in a setback requirement longer than thirty feet. In this case, according to the Board's analysis, this "averaging" results in a setback of 82–93 feet, which is consistent with the lengths of the front yard setbacks of the neighboring properties. But that is not what was required here because Zoning Code § 4-107(b)(1) provides for a cap of forty feet in cases where "averaging" is required. That is the setback requirement Mr. Naylor's neighbors seek to enforce here.

of the building permit were filed.[4] But at some point during 2016, neighbors complained to the City about Mr. Naylor's house. In apparent response to those complaints, the City sent a letter, dated September 26, 2016, informing Mr. Naylor that it had made an "error" during permit review, and that as a result "[t]he structure as constructed on the Property is

[4] No one is asserting here that timely appeals should have been filed. But that issue apparently was raised below, and we reproduce for context the Board's recitation of the procedural history of this case in its earlier January 13, 2017 decision (which is not being challenged in this appeal):

> The opposition to this appeal . . . testified and submitted evidence to indicate that various City officials were contacted about this perceived mistake [about the applicable setback requirement], but submitted no evidence to indicate that they filed official, timely complaints through DHCD (which issues permits), or with this Board (a "negative appeal"), to stop construction or otherwise halt the issuance of permits for this property before the work was completed. It was not until August 30, 2016, one year after the initial permits were issued authorizing construction on this lot, that a "negative appeal" was filed with the [Board]. That negative appeal did not follow [Board] rules for the filing of a negative appeal, but this Board considered it nonetheless at its regularly scheduled hearing on September 20, 2016, and scheduled the matter for a negative appeal review for October 18, 2016, to "determine whether the [Board] has the authority to schedule a merits hearing in this matter." []
>
> Before the [Board] was scheduled to review the negative appeal on the original permits, Appellant filed a positive appeal requesting a variance for the construction of a new single-family detached dwelling with detached garage for this property, presumably in an attempt to cure the alleged front yard setback error. This was done in compliance with a [September 26, 2016] letter received by Appellant from DHCD.

At the March 28, 2017 hearing that led to the decision challenged here, the Board and the parties discussed the failure to file timely appeals to the building and other permits issued in this case. But again, neither party raised that issue on appeal, and so it is not before us.

non-conforming with Baltimore City Code." The City told Mr. Naylor that he "must" apply for a variance: "In order to resolve the non-conformity, you as the owner must apply to the Board of Municipal Zoning Appeals ("BMZA") for a 10-foot variance to the front yard setback requirement."

Mr. Naylor filed another permit application, this time requesting a variance. That application was denied, and on October 13, 2016, Mr. Naylor appealed the denial to the Board. The Board heard that appeal at a public hearing on December 13, 2016, and dismissed it in a written opinion on January 13, 2017 (*see* above, n. 4), reasoning that it lacked jurisdiction because neither the original building permit nor the subsequent use and occupancy permit had been revoked.

On February 6, 2017, the City revoked the use and occupancy permit for the Property, presumably as a way to get the matter properly before the Board. Mr. Naylor appealed the revocation, and, in conjunction with that appeal, requested a variance for the front yard setback. On March 28, 2017, the Board held a hearing on Mr. Naylor's appeal. On April 19, 2017, the Board issued a written opinion granting Mr. Naylor's variance request. The Taylors petitioned for judicial review, and after a hearing on November 27, 2017, the Circuit Court for Baltimore City affirmed the Board's decision in a written order dated November 28, 2017. The Taylors appealed.

Additional facts will be supplied as necessary below.

II. DISCUSSION

The Taylors raise five questions on appeal that we rephrase and consolidate into

one: Did the Board err in granting the setback variance?[5]

"When reviewing the decision of an administrative agency, this court looks through

[5] The Taylors state their questions presented as follows:

> A. Did the Board of Appeals err in approving the requested variance when the subject property has no unique "physical surroundings, shape, or topographical conditions," as required by section 15-218 of the Zoning Code?
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> B. Did the Board err in approving the variance when Mr. Naylor could have constructed the exact same house and garage on the Property without the need for a variance?
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> C. Did the Board err in approving the variance when the alleged hardship or difficulty was self-created by Mr. Naylor's construction of the house in violation of the Zoning Code and the Covenant Agreement?
>
> D. Did the Board improperly shift the burden of proof to Appellants to demonstrate how the 10-foot deficiency in setback materially impacted its interests?
>
> E. Did the Board err in finding that the other requirements set forth in section 15-219 were met?

The City and Mr. Naylor phrase the questions as follows:

> A. Does substantial evidence support the Board's finding that the subject property is unique, as required by § 15-219 of the Baltimore City Zoning Code?
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> B. Does substantial evidence support the Board's finding that a practical difficulty exists absent the grant of the variance, as required by §§ 15-218 and 15-219 of the Baltimore City Zoning Code?
>
> C. Does substantial evidence support the Board's finding that the practical difficulty was not self-created by a person with a present interest in the subject property?
>
> D. Does substantial evidence support the Board's finding that the Naylor home being 30 feet from the road instead of 40 feet will not materially impact Appellants' interests?
>
> E. Does substantial evidence support the Board's finding that the remaining requirements for a variance set forth in § 15-219 of the Baltimore City Zoning Code were met?

the circuit court's decision and evaluates the decision of the agency." *Dan's Mountain Wind Force, LLC v. Allegany Cty.*, 236 Md. App. 483, 490 (2018) (cleaned up). We review the Board's "factual findings for whether they are supported by substantial evidence in the record, and its legal conclusions without deference." *Id.*

In reviewing factual findings, we decide whether they were "supported by such evidence as a reasonable mind might accept as adequate to support a conclusion." *Critical Area Comm'n for the Chesapeake and Atlantic Coastal Bays v. Moreland, LLC*, 418 Md. 111, 123 (2011) (quotation marks and citation omitted). Put another way, where the evidence makes a factual issue "fairly debatable," we defer to the agency's finding:

> [C]ourts may not substitute their judgment for that of the legislative agency, if the issue is rendered fairly debatable. The basic reason for the "fairly debatable" rule is that zoning matters are, first of all, legislative functions and, absent arbitrary and capricious actions, are presumptively correct if based upon substantial evidence; even if substantial evidence to the contrary exists.

North v. St. Mary's Cty., 99 Md. App. 502, 509 (1994) (cleaned up). But where there is *no* evidence in the record to support the Board's findings, then the Board's action is arbitrary and capricious and must be reversed. *Id.*

A. The Applicable Law And The Board's Decision

A variance permits a use of property that "is prohibited and presumed to be in conflict with [an] ordinance." *Dan's Mountain*, 236 Md. App. at 491 (*quoting North v. St. Mary's Cty.*, 99 Md. App. 502, 510 (1994)) (brackets in original). The party seeking the variance has the burden to establish that a variance is warranted. *Id.*

Courts in Maryland have recognized a two-part test to determine whether a variance

should be granted. The deciding authority asks, *first*, whether the subject property is "unique" compared to neighboring properties such that the zoning provision affects the subject property disproportionately and, *second*, whether a "practical difficulty" or "unnecessary hardship" results from that uniqueness. *Id.* at 492.

We begin by looking at the particular ordinance here.[6] The relevant sections of the Baltimore City Zoning Code do not set forth the standard for granting a variance as a two-part test *per se*. But the ordinance does contain both the uniqueness and practical difficulty requirements, among numerous others:

> [ZC § 15-217] A variance may not be granted unless, after public notice and hearing, the Board or the Mayor and City Council, as the case may be, makes the following findings.
>
> [ZC § 15-218] The Board or Mayor and City Council must find that, **because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, an unnecessary hardship or practical difficulty would result**, as distinguished from a mere inconvenience, **if the strict letter of the applicable requirement were carried out**.
>
> [ZC § 15-219] The Board or Mayor and City Council must also find that:
>
> (1) **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**;

[6] Some counties do not have ordinances governing the standards for granting a variance, in which case the court looks to state common law for the standard. *See, e.g.*, *Dan's Mountain*, 236 Md. App. at 491. But both this Court and the Court of Appeals have applied Maryland's common law regarding variances in interpreting local ordinances, and we do the same here. *See, e.g.*, *North*, 99 Md. App. at 512; *Evans v. Shore Commc'ns, Inc.*, 112 Md. App. 284, 306–10 (1996); *Chesley v. City of Annapolis*, 176 Md. App. 413 (2007).

(2) **the unnecessary hardship or practical difficulty is caused by this article and has not been created by the intentional action or inaction of any person who has a present interest in the property**;

(3) the purpose of the variance is not based exclusively on a desire to increase the value or income potential of the property;

(4) the variance will not:

(i) be injurious to the use and enjoyment of other property in the immediate vicinity; or

(ii) substantially diminish and impair property values in the neighborhood;

(5) the variance will not:

(i) impair an adequate supply of light and air to adjacent property;

(ii) overcrowd the land;

(iii) create an undue concentration of population;

(iv) substantially increase the congestion of the streets;

(v) create hazardous traffic conditions;

(vi) adversely affect transportation;

(vii) unduly burden water, sewer, school, park, or other public facilities;

(viii) increase the danger of fire; or

(ix) otherwise endanger the public safety;

(6) the variance is not precluded by and will not adversely affect:

(i) any Urban Renewal Plan; or

(ii) the City's Master Plan;

(7) the variance will not otherwise:

(i) be detrimental to or endanger the public health, security, general welfare, or morals; or

(ii) in any way be contrary to the public interest;

(8) the variance is in harmony with the purpose and intent of this article; and

> (9) within the purpose and intent of this article, the variance granted is the minimum necessary to afford relief, to which end a lesser variance than that applied for may be permitted.

(Bold and underline emphases added.)

The Board's analysis essentially followed the ordinance. The Board began by identifying the ways in which the Property is unique, and specifically identified the following factors: (1) the Property's small size relative to other properties in the neighborhood, (2) a 15-foot wide utility and sewer easement, and (3) a forest conservation easement:

> Between West Melrose Avenue to the south, and Lake Avenue to the north, this subject lot contains 18,226 square feet and is one of the smallest lots along this Roland Avenue corridor. Nearby lots contain upwards of 40,000 square feet. The northern boundary of this lot is encumbered by a fifteen (15) foot wide utility and sewer easement; the southern and eastern portions are encumbered by a sizeable forest conservation easement which includes at least one protected "specimen tree." This forest conservation easement impacts only the subject lot and the adjacent lot located at 5716 Roland Avenue. **These easements together restrict buildable development to within a narrowly defined portion of the property made all the more restrictive as the topography of this lot requires enhanced stormwater controls which further restrict development on the buildable portion of the lot**.
>
> ***
>
> **The conditions on which this application is based are <u>unique</u> to this particular property because of the restrictions placed on development of this particular lot by the Zoning Code and the specific easements for the proposed detached single-family dwelling structure.**

(Emphasis added.) The Board concluded that those distinguishing factors resulted in a "practical difficulty," although, as discussed further below, it did not explain what exactly

it is:

> Abiding by a front yard setback requirement in this case of forty (40) feet as prescribed under ZC § 4-107(b)(2) would result in an unnecessary hardship or practical difficulty as the allowable buildable space for a detached single-family dwelling – when taking into account easements and side yard setbacks – is reduced to a portion of the property approximately 57′ x 83′. The Board finds by competent evidence that because of the particular physical surroundings, shape, and topographical conditions of the land involved, **a strict application of the Zoning Code would result in an unnecessary hardship or practical difficulty beyond that of merely an inconvenience**.
>
> ***
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> Despite opposition testimony to the contrary, **the Board finds that the unnecessary hardship or practical difficulty caused by a strict application of the Zoning Code has not been created by the intentional action or inaction of any person who has a present interest in the property**.

(Emphases added.) It also found the other factors listed under ZC § 15-219.

B. The Board Did Not Err In Finding The Property To Be Unique.

We examine first whether the Board erred in finding the Property unique. Although the applicable ordinance contains a long list of requirements, uniqueness of the property is the threshold requirement—no uniqueness, no variance. As we explained in *Cromwell v. Ward*, 102 Md. App. 691, 694 (1995), obtaining a variance "is at least a two-step process." If the deciding authority finds that the property is not unique, the inquiry ends. But if it does find uniqueness, it goes on to determine whether the uniqueness gives rise to a practical difficulty or unnecessary hardship:

> The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is—in and of

> itself—unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, *i.e.*, a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance *caused by* the property's uniqueness, exists. Further consideration must then be given to the general purposes of the zoning ordinance.

Id. at 694–95 (emphasis in original) (footnote omitted). The Baltimore City ordinances here are consistent with the process described in *Cromwell*.[7]

As we observed in *Dan's Mountain*, 236 Md. App. at 492 n.7, "[t]here is very little case law in Maryland that discusses the uniqueness requirement with any detail." That said, the cases do lay out several dimensions of uniqueness. Among its purposes, the uniqueness requirement protects against situations in which a variance might "act as a precedent" for other properties in the area, thus overwhelming the zoning restrictions on the entire area.

[7] ZC §§ 15-218 and 15-219 encompass the uniqueness inquiry: ZC § 15-218 requires that the zoning provision at issue affect "the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved," and ZC § 15-219(1) requires 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." Both sections also encompass the "practical difficulty" part of the test. ZC § 5-218 requires that whatever impact the zoning provision has on the property presents a practical difficulty (or unnecessary hardship—which is not at issue in this case) for the applicant. And ZC § 5-219(2) requires that "the [] practical difficulty is caused by this article and has not been created by the intentional action or inaction of any person who has a present interest in the property."

Id. at 495. The analysis itself requires, as an initial matter, an examination of the property's unusual characteristics relative to other properties in the area, then an analysis of the "nexus", *i.e.*, the connection, between the unusual characteristics and the application of the zoning law. *Id.* at 494.

The unusual characteristic(s) must be "related to the land." *Dan's Mountain*, 236 Md. App. at 496 (*quoting* Barlow Burke, *Understanding the Law of Zoning and Land Use Controls* 159 (3d ed. 2013)). In other words, the property's uniqueness must be "inherent" in the property itself:

> Uniqueness of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, *i.e.*, its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions.

North, 99 Md. App. at 514. But since every property is unique in the sense that it's not identical to any other, the "nexus" requirement asks "whether the property is unique in the way that this particular aspect of the zoning code applies to it." *Dan's Mountain*, 236 Md. App. at 496; *see also Mueller v. People's Counsel for Balt. Cty.*, 177 Md. App. 43, 70 (2007) (*citing Cromwell*, 102 Md. App. at 694).

The zoning requirement at issue here is the forty-foot setback. To establish uniqueness, Mr. Naylor was required to show, *first*, that his Property had unusual characteristics compared with other properties in the area and, *second*, that the forty-foot setback requirement affected his Property differently than it affected neighboring

properties.

The Taylors argue that the Board erred in finding the Property unique because Mr. Naylor failed to prove that other properties in the area lacked the unique features he asserted—*i.e.*, (1) the Property's small size compared to neighboring lots, (2) the fifteen-foot wide utility and sewer easement, and (3) the forest conservation easement at the back of the Property. We find that substantial evidence supports the Board's finding that the Property had unusual characteristics when compared with neighboring properties. Mr. Naylor and the City identify the following supporting evidence:

- A tax map showing the relatively larger dimensions of some neighboring properties and the testimony of a neighbor (Norman Haughly) that his lot on Roland Avenue is about 20,000 square feet support the finding that the Property is one of the smaller lots in the area.[8] (It is undisputed that Mr. Naylor's lot is 18,226 square feet.)
- The Property is one of the only in the area encumbered by a forest conservation easement: a 1999 subdivision plat showed that the forest conservation easement applies to two of the three lots depicted, including Mr. Naylor's Property; Mr. Haughly testified that there is no forest conservation easement on his property; and two aerial photographs of the area showed "that no other homes on this block of Roland Avenue have stands of forest behind them nearly as large as the one to the rear of the Property."
- The tax map supports Mr. Naylor and the City's assertions that the Property is one of the only in the vicinity that has a fifteen-foot utility and sewer easement and "that only one other lot on the block is similarly positioned between another lot and Roland Avenue such that it could conceivably contain a sewer access easement" (although "that lot, 5709 Roland, is more than twice the Property's size").

[8] The Taylors assert that, according to the tax map, the size the neighbor's lot is in fact about 14,600 square feet, but this factual dispute is not significant because the outcome here would be the same regardless of whether the 20,000 or 14,600 figure were accepted.

Our task on appeal is not to make our own factual findings, but rather to determine whether the evidence was sufficient that a "reasonable mind might accept as adequate to support" the conclusion that the Property is unique and that the zoning restriction affected it differently than neighboring properties. *Moreland*, 418 Md. at 123. And this record, while perhaps not overwhelming, was sufficient to meet this relatively low burden. *North*, 99 Md. App. at 509 (a zoning board's decision is "presumptively correct if based upon substantial evidence; even if substantial evidence to the contrary exists"). The evidence supports a finding that the Property's allowable building space (which the Board found to be approximately 57′ x 83′) is smaller than that of its neighbors, and that the forty-foot setback requirement affects the Property more significantly than it affects neighboring lots.

The Taylors offer several arguments challenging the Board's finding, but none succeeds. *First*, they present separate arguments relating to each feature and imply that the features should not be considered collectively in determining whether the Property is unique. But that approach is mistaken. When considering the question of whether a property is unique, the deciding authority must take into consideration all the various features of the property. *See, e.g.*, *Frankel v. City of Balt.*, 223 Md. 97, 104 (1960) (landowner met burden to establish uniqueness in pointing to, among other things, irregularity of lot's shape, frontage on arterial highway and another street, previous utilization as bus terminal, and that it was bounded on two sides by parking lots and public and semi-public institutions). Considering each feature in isolation doesn't account for the uniqueness of the whole, and the Board did not err in considering the features collectively.

The Taylors argue *second* that the easements cannot give rise to uniqueness because those features are not inherent in the land, *i.e.*, they do not relate to the "particular physical surroundings, shape, or topographical conditions of the specific structure or land involved" as required by ZC § 15-218. But we have stated that the "'[u]niqueness' of a property for zoning purposes" can include "practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions," and the easements here fall within that category. *North*, 99 Md. App. at 514.

Third, and finally, the Taylors argue that the evidence was not sufficient to support Mr. Naylor's initial evidentiary burden because, they assert, Mr. Naylor offered "no" evidence either that the Property was the only one in the neighborhood encumbered by forest and/or sewer and utility easements, or that the Property was the only one in the neighborhood that was flat and, therefore, required enhanced stormwater controls (and specifically a "Landscape Infiltration Facility"). The Taylors do not dispute that as a result of its relatively small lot size and restrictions resulting from the easements and the stormwater control requirements, the Property's allowable buildable space was indeed smaller than that of neighboring lots. Their argument is a procedural one, that Mr. Naylor and the City failed to meet their initial burden of proof to establish uniqueness. But as discussed above, the record does contain evidence that Mr. Naylor's Property is unique when compared to neighboring lots. As the Board stated, "[n]earby lots contain upwards of 40,000 square feet" while "this subject lot contains 18,226 square feet and is one of the smallest lots along this Roland Avenue corridor," and contained further restrictions that

resulted in a relatively small allowable building area. In short, the finding of the Property's uniqueness is "fairly debatable" under the evidence in the record, and we find that the Board did not err in finding the Property to be unique for the purpose of variance analysis. *McLean*, 270 Md. at 215 (*quoting Sembly v. Cty. Bd. of Appeals*, 269 Md. 177, 184 (1973)) ("This rule (if the issue is 'fairly debatable,' we will not substitute our judgment for that of the administrative body) will be adhered to even if we were of the opinion that the administrative body came to a conclusion we probably would not have reached on the evidence.").

C. The Board's Decision Concerning Practical Difficulty Is Not Reviewable And Is Remanded For Further Proceedings.

Next, we consider whether the Board erred at the second step of the analysis. We hold that the Board's legal analysis and finding concerning practical difficulty is insufficient to permit appellate review, and we remand the case for further proceedings consistent with this opinion.

Neither party discusses in any detail the standard for determining whether a practical difficulty exists. The Taylors state the standard in the negative, describing what they assert is *not* sufficient to establish practical difficulty: "It is not enough for an applicant to demonstrate that his or her proposal, if allowed, would be suitable or desirable, would do no harm, or would be convenient for the applicant." But they fail to describe the affirmative standard. Mr. Naylor and the City recognize the distinction between the "practical difficulty" standard—which applies in cases where the party seeks an "area" variance, such as this one—and the "unnecessary hardship" standard—which is a more stringent standard

and applies in cases where a party seeks a "use" variance (not at issue here). *See Montgomery Cty. v. Rotwein*, 169 Md. App. 716, 728–29 (2006). But Mr. Naylor and the City, like the Taylors, do not describe the standard in the affirmative.

Similarly, the Board did not explain the standard it was applying, and references both "unnecessary hardship" and "practical difficulty" without explaining which standard it believes applies here. Its discussion of the standard simply recites the language of the ZC § 15-218:

> Under ZC § 15-217, a variance may not be granted unless, after public notice and hearing, the Board makes the requisite findings contained within Title 15 of the Zoning Code of the City of Baltimore. Uncer ZC §15-218, **the Board must find that, because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, an unnecessary hardship or practical difficulty would result, as distinguished from a mere inconvenience**, if the strict letter of the applicable requirement were carried out. **E.207**

(Emphasis added.)

Granted, the failure to explain the standard is not itself an error because we assume that the Board knows the law—including that the less stringent practical difficulty standard applies in this case—even if it does not articulate it. The problem here is that the Board didn't identify the practical difficulty it found, and we cannot review the Board's decision regarding practical difficulty if we don't know what that decision is. All the Board said, in conclusory fashion, was that the relatively small allowable building space created an "unnecessary hardship or practical difficulty," without explaining why:

> Abiding by a front yard setback requirement in this case of

> forty (40) feet as prescribed under ZC § 4-107(b)(2) would result in an unnecessary hardship or practical difficulty as the allowable buildable space for a detached single-family dwelling – when taking into account easements and side yard setbacks – is reduced to a portion of the property approximately 57′ x 83′. The Board finds by competent evidence that because of the particular physical surroundings, shape, and topographical conditions of the land involved, a strict application of the Zoning Code would result in an unnecessary hardship or practical difficulty beyond that of merely an inconvenience.

This leaves us with no ability to review the Board's final conclusion. *See Bucktail, LLC v. Cty. Council of Talbot Cty.*, 352 Md. 530, 553 (1999) ("Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions."); *Moreland*, 418 Md. at 134 ("When the Board of Appeals merely states conclusions, without pointing to the evidentiary bases for those conclusions, such findings are not amenable to meaningful judicial review and a remand is warranted . . . ."); *see also Mortimer v. Howard Res. and Dev. Corp.*, 83 Md. App. 432, 441–42 (1990) (*citing Board of Cty. Comm'rs for Prince George's Cty. v. Ziegler*, 244 Md. 224, 229 (1966)) ("Without this reasoned analysis, a reviewing court cannot determine the basis of the agency's action. . . . In such an instance, the case should be remanded for the purpose of having the deficiency supplied.").

On remand, the Board must articulate the particular practical difficulty caused by the Property's unique physical characteristics. We recognize, based on the briefs and oral argument, that the asserted practical difficulty could be the placement of the Landscape Infiltration Facility. The parties agree that there is a 10-to-12.5-foot gap between the end

of the house, garage, and parking pad and the edge of the forest conservation easement, and that the Landscape Infiltration Facility is located within that gap. Mr. Naylor and the City contend that the Stormwater Management Plan is sufficient to "allow a logical inference" that "the stormwater management facilities had to be in the exact places and in the exact shape and size that they appeared" on the Plan. And the Taylors' position is that "[t]here was no testimony from Mr. Naylor or other evidence—none—that this was the only location for stormwater management or that adjustments in its size or shape would not be made." It could be that without a thirty-foot setback, the house could not have been built as designed because the Landscape Infiltration Facility could not have been located anywhere other than within the 10-to-12.5-foot gap. But perhaps it could have been—we simply don't know. Although the Board discussed the location of Landscape Infiltration Facility at the hearing, the issue is absent from its written order, and we can't assume that the Board resolved the question in that way. This leaves us unable to discern what the practical difficulty is or, if it is the placement of the Landscape Infiltration Area, what else, if anything, constituted or contributed to the practical difficulty finding—or, for that matter, if *anything* can qualify.[9]

In addition, the Board and the parties should set forth and apply the governing legal standard. We acknowledge that, as with the uniqueness requirement, there is not a great

[9] We can see, but are not considering, the elephant in the room, *i.e.*, the practical difficulty that will result if the variance is not granted and Mr. Naylor is required to move the already-built house back ten feet. As the Board recognized, it must consider the application as if it were filed before construction, and we have done the same here.

deal of case law applying the standard for practical difficulty. Indeed, the legal standards for determining practical difficulty appear to vary from jurisdiction to jurisdiction. 3 RATHKOPF, THE LAW OF ZONING AND PLANNING § 58:5 (2006). Generally speaking, though, "the hardship or practical difficulty necessary for a nonuse variance will consist of the unnecessary deprivation of the full enjoyment of a permitted use." *Id.* at p. 58-31. As discussed above, there is no dispute here that the more lenient "practical difficulty" standard applies. And Maryland case law provides some guidance. In 1973, the Court of Appeals recognized three factors that a zoning board may consider in deciding the practical difficulty question:

> 1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
>
> 2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
>
> 3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

McLean v. Soley, 270 Md. 208, 214–15 (1973) (*quoting* 2 RATHKOPF, THE LAW OF ZONING AND PLANNING (3d ed. 1972) 45-28–29) (The citation to these factors in the current edition of the treatise is 3 RATHKOPF, THE LAW OF ZONING AND PLANNING 58-117 (2006)). The Court of Appeals has re-"adopted" this standard explicitly. *Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. Cty.*, 407 Md. 53, 83 (2008) ("In *McLean* we

adopted, from Professor Rathkopf's treatise, a three-part inquiry to guide local zoning authorities in determining whether a landowner has established [practical difficulty].").

On remand, the Board should discuss its findings of fact, and the practical difficulty caused by the characteristics of the Property that make it unique, within the legal framework of the three *McLean* factors.[10] *See Red Roof Inns, Inc. v. People's Counsel for Baltimore Cty.*, 96 Md. App. 219, 225 (1993).

The Taylors also argue that the Board erred in finding a practical difficulty because the difficulty was "self-created," which is contrary to the requirement in ZC § 15-219(2) that the asserted difficulty "has not been created by the intentional action or inaction of any person who has a present interest in the property." Mr. Naylor and the City argue that the Board did not err in finding the difficulty here was not self-created because it considered the variance application as if the house had not been built, and the features that make the Property unique existed before Mr. Naylor acquired his interest. The absence of findings makes it impossible for us to assess this argument and to see if the relevant practical

[10] We also note, without deciding, that Mr. Naylor and the City's arguments about Mr. Naylor's alleged loss of a "reasonable and significant use" of the Property, and the cases on which they rely, seem inapposite. *Dutchship Island* involved the application and interpretation of Anne Arundel County's Critical Area Law, which contains a provision concerning "unwarranted hardship" that is expressly defined in part as the denial of a "reasonable and significant use of the entire parcel or lot for which the variance is requested." *Dutchship Island*, 439 Md. at 615 (*quoting* Md. Code, Section 8-1808(d)(1) of the Natural Resources Article). No party contends that either the Critical Area Law or the common law "unwarranted hardship" standard applies here. Similarly, in *Alviani v. Dixon*, 365 Md. 95, 117 (2001), the Court of Appeals addressed whether the Board complied with the requirement to define the relevant neighborhood. The Court did not address the standard for deciding whether a practical difficulty exists, though, and the case isn't relevant here.

difficulty is connected to the Property's uniqueness—put another way, it's impossible to know if a practical difficulty is self-inflicted before the difficulty is identified. On remand, once the practical difficulty has been identified, if one can be identified, the Board must also explain how the parameters of ZC § 15-219(2) are fulfilled.

D. Other Requirements Of Section 15-219.

The Taylors additionally argue that the Board erred in finding that the other requirements of Section 15-219 were met. We find no error in the Board's findings in this regard.

First, the Taylors challenge the Board's finding that Mr. Naylor failed to establish that "the purpose of the variance is not based exclusively on a desire to increase the value or income potential of the property." *See* ZC § 15-219(3). But they don't dispute the Board's conclusion that "no such evidence was adduced at the hearing or can be inferred from the plans," and in reviewing the record, we see no error in that determination.

Second, the Taylors challenge the Board's findings under ZC § 15-219(4), (5), and (7) that the variance will not, briefly and in summary, diminish property values in the neighborhood, adversely affect neighboring properties by, for example, impairing an adequate supply of light and air, or otherwise be detrimental to the public interest. But again, we find no error in the Board's findings in this regard. The Board considered the testimony of the neighbors concerning these factors and found it not credible,[11] and the

[11] The Board's findings concerning the credibility of witness testimony were:

> Despite opposition to the contrary, the Board finds by competent evidence that the variance requested will not impair

standard of review does not allow us to reweigh the evidence.

Finally, the remainder of the Taylors' arguments about the other requirements of ZC § 15-219(6) repeat arguments made with respect to the uniqueness and practical difficulty requirements, and our analysis of those issues resolves them as well.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.

light, air, or neighboring property values, will not overcrowd the land, create undue concentration in population or increase traffic on streets or parking, unduly burden public utilities, or increase public safety hazards. This neighborhood contains spacious lots with large detached homes and the proposed 10-foot variance will not impair light or air to adjoining properties. Much of the opposition testimony concerned the appearance of the existing home – the home referred to as an "eyesore" and that it "stood out" from other homes along Roland Avenue. The Board considered this testimony as well as testimony regarding a decline in neighboring property values but does not find this evidence credible. The variance requested is a mere 10 feet and both from the evidence presented by the Appellant as well as visualizing a 40-foot setback with the aid of photographs contained in the file, the Board finds no appreciable difference in access to light or air between a detached single-family home setback 30 feet from Roland Avenue or that same home setback 40 feet from Roland Avenue, and further finds that no prospective decline in neighboring property values will likely occur as a result of this variance. The Board further finds that this variance will not be detrimental to or endanger the public health, security, general welfare, or morals, or be contrary to the public interest.