UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1297

September Term, 2014

BALTIMORE COUNTY, MARYLAND

v.

DANIEL AND VIENNA DIETRICH

Eyler, Deborah S.,
Nazarian,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: October 20, 2015

Daniel and Vienna Dietrich own a unique and irregular parcel of property in Baltimore County. After obtaining variances, they razed the existing structure and built anew. Their neighbor complained that their new addition and garage violated the setback requirements, and after investigating, Baltimore County zoning officials agreed. The County issued a correction notice and recommended that the Dietrichs apply for variances to cure the violations, solicit a survey to prove their compliance, or remove the encroaching structures. The Dietrichs didn't take any of these actions, so the County issued citations. After a hearing, an Administrative Law Judge echoed the County's original recommendations in an Order, then stayed enforcement to allow the Dietrichs an opportunity to apply for new variances. The Dietrichs appealed, and the County Board of Appeals (the "Board") affirmed. They sought judicial review, and the Circuit Court for Baltimore County interpreted the Board's decision to require the Dietrichs to demolish their addition and garage, a sanction it found arbitrary and capricious. We reverse.

I. BACKGROUND

In 1998, the Dietrichs purchased a 2.11 acre lot in Glen Arm ("the Property"). They razed the existing "dilapidated dwellings" and built a new residence, including a garage and addition. The Property has several irregular characteristics: triangular shape, steep slopes, limited level area, and environmental constraints. These irregularities make it impossible to locate a dwelling anywhere else on the Property without violating local regul-

ations. So the Dietrichs obtained a variance that reduced the setback requirement from 50 feet to 24 feet, and that change allowed them to proceed.[1]

After the construction was completed, Ms. Sarant, through her proxy, Edward Zimmer,[2] complained by telephone and in person to the Baltimore County Building Inspection Office and asked the County to inspect the new buildings. Chief Building Inspector Glenn Berry visited the Property and reviewed a survey of the Property prepared by G.W. Stephens, Jr. & Associates, Inc. ("GWS") that showed the Dietrichs' southwest garage wall to lie 2.1 feet from the boundary line of Ms. Sarant's property, in violation of Baltimore County Zoning Regulation ("BCZR") § 400.1, which requires accessory structures to sit at least 2.5 feet from boundary lines. Mr. Berry also found that the addition violated the setback requirements, even with the variance, because part of the addition sat 22-23 feet from the boundary line.

As a result, Mr. Berry issued a correction notice to the Dietrichs. The notice apprised the Dietrichs of the violations and suggested various remedial measures, including commissioning a new survey to refute the County's findings, an application for further variance relief, or moving the encroaching structures. In response, the Dietrichs apparently opted for "none of the above," and after months of inaction, Mr. Berry issued two citations.

[1] This variance request was unsuccessfully opposed by the adjacent property owner, Virginia L. Sarant, the same neighbor whose complaint led to this action.

[2] The record does not disclose Mr. Zimmer's relation to Ms. Sarant, other than his status as her "agent/power of attorney." He has, however, advocated on behalf of Ms. Sarant throughout, and zealously so—to the point of being barred from an OAH meeting for improper conduct.

As directed, the Dietrichs appeared for an administrative hearing before the Baltimore County Office of Administrative Hearings. After taking evidence and testimony, the administrative law judge (the "ALJ") found that the Dietrichs violated BCZR § 400.1 by constructing their garage less than 2.5 feet from the adjacent property, and violated variance requirements by constructing an addition less than 24 feet from their boundary line. As to both violations, the ALJ ordered the Dietrichs to "restore the [P]roperty *to the extent possible* to its condition before violation, including the removal of the source of the violation." (Emphasis added.) But the ALJ also ordered that enforcement of the Order "shall be stayed upon the filing of a variance or other zoning relief request to cure [the violation]."

The Dietrichs appealed again, and the Board of Appeals of Baltimore County ("the Board") affirmed the findings of fact, mandate, and stay imposed by the ALJ, and the Dietrichs then sought judicial review in the circuit court. After another hearing, the court found in the County's favor as to various evidentiary challenges and agreed with the factual finding that the Dietrichs violated both variances. Nevertheless, the court found that the remedy the Board had imposed was "not reasonable or proportionate":

> Based on all of the facts presented in the record, the law applied, the Findings of Fact and Conclusions of Law of the ALJ, the memoranda submitted by the parties, and argument heard, the Court finds that as to the remedy imposed against [the Dietrichs], the ALJ abused his discretion, was not reasonable, and was further arbitrary and capricious. In his Findings the ALJ states only that "Admittedly, the distances of violation herein are not great, but they do in fact exist." The ordered relief requires [the Dietrichs] to demolish the existing addition and garage as opposed to paying a less restrictive

> remedy of a civil fine. The ALJ gives no specific reasoning or insight as to why he imposed injunctive relief. Further, the Court cannot find in the materials provided to it by the parties, that injunctive relief was sought by the County.
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> The ALJ did stay his Order stating that since the Circuit Court for Baltimore County already settled the issue of whether [the P]roperty was "unique," the [Dietrichs] could "conceivably cure" the violations by pursuing yet additional variance requests. However, when viewing the litigious history of this case, it is also conceivable that [the Dietrichs] might not have been successful in having the Code deficiencies cured in further proceedings.
>
> The remedy imposed against the [Dietrichs] is not reasonable or proportionate to the nature and extent of the violations. There is no evidence suggesting that [the Dietrichs] intentionally acted in disregard of the property setbacks. Rather, the record is clear that they provided detailed survey plat information when they applied for permits on the two (2) structures at issue. [Mr.] Dietrich further testified as to his actions in determining whether he was in compliance before construction. There is testimony from [two experts] that surveys performed on the hilly topography such as the one at issue is not an exact science. [One expert] testified that surveys of large tracts can show tolerances of three (3) or four (4) inches, represented by plus or minus signs. This court determines that [the Dietrichs] acted on a good faith belief that the building setbacks were complied with. Their actions were not rash, ill-informed, or "self-inflicted." *Cromwell v. Ward*, 102 Md. App. 691, 722 (1995). This court is of the opinion that a lesser penalty, a civil fine, is more appropriate under all of the circumstances.
>
> The [Dietrichs] raise the legal principle of *de minimis non curat lex* in Argument IV. This legal principle has been cited in at least a dozen older Maryland cases, however, this Court declines to apply it in the case at bar.

(Citations omitted.)

The court reversed the Board's decision and remanded "for further proceedings on the appropriate remedy that should be imposed." The County filed a timely appeal.

II. DISCUSSION

There is no dispute, and the Dietrichs concede, that their garage and addition both violate the applicable setback rules, even as amended by the pre-construction variance. The only question is whether the Board erred in requiring them to remedy the violation, a directive they have repeatedly, and inaccurately, mischaracterized as requiring them to demolish their new structures. The County argues that the circuit court overstepped in second-guessing the remedy the Board imposed in favor of a civil fine.[3]

Our review is deferential—we review the agency's findings of fact in the light most favorable to the agency, and consider only "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Anderson v. Dep't of Pub. Safety and Correctional Servs.*, 330 Md. 187, 213 (1993) (citations omitted). We do not "make independent findings of fact or substitute [our] judgment for that of the agency." *Id.* at 212-13 (quoting *Balt. Lutheran High Sch. Ass'n, Inc. v. Emp't Sec. Admin.*, 302 Md. 649, 662 (1985)). Moreover, "assess[ing] a penalty is within the discretion of the administrative agency," and the "agency has broad latitude to fashion sanctions within legislatively designated limits." *Neutron Prods, Inc. v. Dep't of the Environ*, 166 Md. App. 549, 584

[3] The County's brief phrased its Question Presented as follows:

> Did the circuit court err in setting aside the corrective sanction and remanding the sanction determination back to the Board?

(2006). We disrupt the agency's penalty decision "if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision . . . is arbitrary and capricious." Md. Code (1984, 2014 Repl. Vol.) § 10-222(h)(3) of the St. Gov't Article; *Spencer v. Md. St. Bd. of Pharm.*, 380 Md. 515, 527-28 (2004). Reviewing courts do not modify or reverse agency decisions on the grounds of disproportionality or abuse of discretion. Md. Code Ann. § 10-222; *see also Maryland Transportation Authority v. King*, 369 Md. 274, 291 (2002). And an agency's action becomes arbitrary and capricious only if its decision is unreasonable or without a rational basis. *Harvey v. Marshall*, 389 Md. 243, 297 (2005). Put another way, any disproportionality or abuse of discretion must be "so extreme and egregious" that it rises to the point of being arbitrary and capricious. *Id.* at 300. We agree with the County that it was neither unreasonable nor arbitrary for the Board to require the Dietrichs to restore the property, especially since the Board specifically limited that order "to the extent possible."

At the outset, it is worth a closer look at the actual order. The Dietrichs argued in the circuit court, and they argue here, that the Board required them to demolish their new addition and garage. The circuit court also seems to assume that the Board and the ALJ ordered the demolition of both the addition and the garage. *See* slip op. at 5-6 ("Petitioners' Arguments IV and V concern this issue; *i.e.*, *demolition* of the addition and garage, as opposed to imposing a civil penalty . . . . The ordered relief requires Petitioners to *demolish* the existing addition and garage as opposed to paying a less restrictive remedy of a civil fine."). (Emphases added.) That's not what the Board said. The Board (like the ALJ

before it) ordered the Dietrichs to "restore the property *to the extent possible* to its condition before violation, and remov[e] of the source of the violation." (Emphasis added.) The Dietrichs argue in their brief here that restoration is, "as a practical matter," the same as demolition. But they cite nothing in the record to support that all-or-nothing proposition, though, and they made no such record in the administrative process.[4] And although it may be true that "a lesser penalty, a civil fine, is more appropriate under all of the circumstances," that is not the question we ask when reviewing an administrative agency action.

Instead, we look at whether the Board acted within its statutory authority when it ordered the Dietrichs to cure the violation they committed. There is no dispute that the County has the authority to enforce its zoning regulations and to issue citations to violators. In the words of the Code itself, the citation "may require the violator to comply with the correction notice" and may also impose civil penalties. Balt. Cty. Code § 3-6-205(c)(1)(ii), (c)(3)(i). The ALJ also had the authority to impose "reasonable conditions as to the time and manner of correction" and "any civil penalty that may be imposed." *Id.* at § 3-6-207(1), (3). There can be no dispute, then, that the operative regulations permitted the ALJ and the Board to order corrective measures or monetary sanctions (or, for that matter, both).

[4] For its part, the County sets forth specific alterations, *e.g.,* removal of the exterior brick layer of the addition, that would bring the structures into compliance. The Dietrichs disagree. It is neither our gift nor our role to resolve a dispute of constructional fact—it is enough for our purposes that neither the ALJ nor the Board was asked to do so.

And, again, there is no dispute that the addition and the garage both violate the setback requirements.

A decision is arbitrary or capricious if it is made "impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms." *Harvey*, 389 Md. at 299. Maryland courts consistently equate this standard with "extreme and egregious" decision-making, and afford agencies an appropriately high level of deference. *Id.* at 299-301 (quoting *King*, 369 Md. at 291). It is difficult to imagine how requiring the Dietrichs to bring the Property into compliance could run afoul of this standard. The whole purpose of the County's Code Enforcement Office is to ensure compliance with property regulations and standards, and the Board simply ordered the Dietrichs to remedy their undisputed violation. *See Christopher v. Montgomery Cty. Dep't of Health & Human Servs.*, 381 Md. 188, 215 (2004) (declining to overturn an agency decision because there was no evidence that the offender was treated any differently than others who committed the same violation). An agency is not required to justify its choice of sanction; so long as the sanction chosen was within its statutory power, we defer to its discretion as to which remedies to order. *Md. Aviation Admin. v. Nolan*, 386 Md. 556, 581 (2005). And even if there were a question about the proportionality of requiring restoration—and we don't agree that there is—the ALJ and Board eliminated that concern by limiting that requirement "to the extent possible." We have no reason to dispute Mr. Dietrich's good faith belief at the time of construction that his garage and addition would comply with the zoning requirements. But there is neither a *scienter* requirement nor any

good faith exception to the zoning regulations, and we discern nothing arbitrary or capricious about requiring the Dietrichs to fix the problem they created.

We would be remiss if we didn't point out as well that the supposedly draconian penalty has been stayed so that the Dietrichs can seek yet another variance. The correction notice issued on January 26, 2012 apprised the Dietrichs of the process for filing a variance request to "allow a reduction in property line setbacks equal to those distances determined by the Survey Report . . . ." The notice offered the Dietrichs two options, and cautioned that failure to act would result in citations. The Dietrichs failed (or refused) to act, and the County followed through. Even so, the County has offered the Dietrichs yet another chance:

> [T]he immediate stay of the [ALJ]'s order pending a full variance proceeding should indicate how far Baltimore County has been willing to bend in order to provide the [Dietrichs] with "outs" before the imposition of the more severe penalty—the restoration of the property to its condition prior to the violation. Having failed to . . . seek out a variance, [the Dietrichs have] left the County with one remaining option to enforce.

The County opens its brief in this Court by noting that "[t]he Orders of the ALJ and Board grant [the Dietrichs] a wide berth to cure the violations without physically altering the structures on the property." In its argument, the County asserts that "a variance is not only feasible but likely[,]" and goes on to explain why the Dietrichs are proper candidates for a variance grant. The ALJ stayed enforcement of his Order specifically so that the Dietrichs could apply for a variance, and his Order highlighted the fact that "the Circuit Court for Baltimore County has already settled the issue of whether or not the [Dietrichs'] property

is unique, as found by the Zoning Commissioner and confirmed by the Baltimore County Board of Appeals."

The Dietrichs respond that they cannot know the outcome of another variance request, and that's true. We recognize as well that neither the ALJ's statements nor the County's predictions in its brief about the likelihood of success are binding on the County if the Dietrichs do seek a variance. That said, the County is all but begging the Dietrichs to solve this problem with an administrative solution, one that is in the County's power to grant. That seems as strong a hint as an admitted zoning violator is likely to get, and it undermines the Dietrichs' claim that their new buildings face certain demolition without intervention from the courts.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. COSTS TO BE PAID BY THE APPELLEE.