UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1324

September Term, 2014

RAYMOND DANIEL BURKE ET UX

v.

BOARD OF APPEALS FOR BALTIMORE COUNTY

Kehoe,
Reed,
*Hotten, Michele D.

JJ.

Opinion by Kehoe, J.

Filed: September 2, 2016

*Michele D. Hotten, J., participated in the hearing of this case while an active member of this Court but did not participate in either the preparation or adoption of this opinion.

This is an appeal from a judgment of the Circuit Court for Baltimore County in a judicial review proceeding that affirmed a decision by the Baltimore County Board of Appeals (the "Board"). The Board denied Raymond Daniel Burke and Vickey L. Burke's application for a waiver or variance from the regulations for the forest buffer easement (the "Buffer Easement") and the forest conservation easement (the "Conservation Easement") that encumber portions of the Burkes' property. The Burkes raise four issues on appeal, which we have re-phrased:

1. Did the Board err in determining that the Burkes' mowing of grass in the Buffer Easement violated Baltimore County Code ("BCC") § 33-3-112(b)?

2. Is the County barred from enforcing the mowing restriction in BCC § 33-3-112(b) against the Burkes by the statute of limitations?

3. Did the Board err in failing to state in its order that the existing trails on the Burkes' property may be maintained pursuant to BCC § 33-3-112(c)?

4. Did the Board err in concluding that the Burkes would not face a practical difficulty or unreasonable hardship by complying with the Buffer Easement restrictions?

We will vacate the judgment of the agency.

Background

The Burkes' property lies within a six-lot subdivision known as Corbett Valley. Prior to the subdivision's development, Corbett Valley lay completely, or nearly completely, within the Buffer Easement. The Burkes' predecessor-in-title was able to

create the subdivision by obtaining a variance from the County Department of Environmental Protection and Resource Management—now the Department of Environmental Protection and Sustainability (the "Department"). The Department concluded that the developer faced a practical difficulty because "the entire site would be located within a Forest Buffer Easement and would be undevelopable." In essence, the variance permitted the developer to establish a building envelope on each proposed lot but part of each lot—or at least, part of the Burke's lot—remained subject to the Forest Buffer Easement. The variance was granted subject to the condition that good grass cover be established in the Buffer Easement prior to final approval of the subdivision.

The grass cover was not planted prior to the final approval of the subdivision, but was planted by the Burkes after they moved into their newly constructed home in 2000. Subsequently, the Burkes have regularly mowed the grass in the Buffer Easement. In 2011, the Department wrote a letter to the Burkes informing them that they had conducted activities on their property in violation of BCC § 33-3-112.[1] The letter cited several

[1]BCC § 33-3-112 states in relevant part:

(a) In general.
(1) The forest buffer, including wetlands and riverine floodplains, shall be managed to enhance and maximize the unique value of these resources.
(b) Prohibited practices.
(2) (i) The following practices and activities are restricted within the forest buffer.

(continued...)

activities that were labeled as disturbances in the Buffer Easement. The two activities at issue in this appeal are: mowing of grass in the Buffer Easement and clearing of vegetation to create a trail to the stream bank. The letter stated that if the Burkes failed to address these violations, the Department would initiate an enforcement action.

In response, the Burkes wrote to the Department proposing that they should be allowed to continue to mow the grass in the Buffer Easement. The Department interpreted the Burkes' letter as a request for a waiver or variance pursuant to BCC § 33-3-106[2] and

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[1](...continued)

(ii) Except as provided in subsection (c) of this section, the existing vegetation within the forest buffer may not be disturbed, including disturbance by tree removal, shrub removal, clearing, mowing, burning, spraying, and grazing.

[2]BCC § 33-3-106 states:

(a) Authority to grant. The Director of the Department may grant a variance:

(1) For those projects or activities where strict compliance with the requirements of this title would result in practical difficulty or unreasonable hardship;

(2) For those public improvement projects or activities where no feasible alternative is available;

(3) For the repair and maintenance of public improvements where avoidance and minimization of adverse impacts to nontidal wetlands and associated aquatic ecosystems have been addressed; or

(4) For developments that have had stream buffers/forest buffers applied in conformance with the requirements outlined in the county water quality management policy (February 1, 1986) or the County Executive order for the protection of water quality, streams, wetlands, and floodplains (June 4,

(continued...)

denied the request. Following an exchange of several other letters between the Burkes and the Department, the Burkes filed an appeal with the Board. The Burkes' arguments before the Board were substantially the same as those raised in this appeal. The Board concluded that BCC § 33-3-112(b) was applicable to the Burkes' activities, and that they were in violation of the statute's prohibition against mowing. It declined to examine the statute of limitations argument, stating that the issue was not yet ripe, given that the Department had not yet initiated an enforcement action against the Burkes.

With regard to the Burke's variance application, the Board stated:

> In *Cromwell v. Ward*, 102 Md. App. 6911 (1995), [the Court] articulated the standards that administrative bodies were required to consider in the granting of variances. The first step enunciated required that the subject

(...continued)

> 1989) and for which the potential for water quality and aquatic resource degradation is minimal.
> (b) Application.
> (1) The applicant shall submit a written request for a variance to the Director of the Department.
> (2) The application shall include specific reasons justifying the variance and any other information necessary to evaluate the proposed variance request.
> (3) The Department may require an alternatives analysis that clearly demonstrates that no other feasible alternative exists and that minimal impacts will occur as a result of the proposed project, activity, or development.
> (c) Conditions. In granting a request for a variance, the Director of the Department may require site design, landscape planting, fencing, the placement of signs, and the establishment of water quality best management practices in order to reduce adverse impacts on water quality, streams, wetlands, and riverine floodplains.

> property be unique. *The need for the variance must be due to the unique circumstances of the property* and not to the general condition in the neighborhood.
>
> * * * *
>
> [T]he Board is unable to determine any uniqueness as to the Burke property that would qualify if as "unique" in accordance with the standards imposed by higher Maryland Courts.

(Emphasis added; some quotation marks and a citation omitted.)

The Board stated that the Burkes had "failed to prove circumstances which amount to the practical difficulty or unreasonable hardship contemplated by the statute" and denied the variance application.

The Burkes appealed the Board decision, the circuit court affirmed, and this appeal followed.

Analysis

I. Standard of Review

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

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

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

Second, judges have particular expertise in matters of legal interpretation, including construing statutes. Therefore, a reviewing court is not bound by an agency's legal conclusions. With that said, courts "frequently give weight to an agency's experience in interpretation of a statute that it administers." *Schwartz v. Maryland Department of Natural Resources*, 385 Md. 534, 554 (2005). This principle has exceptions. The one that arises most frequently is that courts will not defer to an agency's interpretation if that interpretation is not consistent with the plain meaning of the statute. *Macke Co. v. Comptroller*, 302 Md. 18, 22–23 (1984).

Third, an agency's application of the law to the evidence presents a mixed question of law and fact. If the agency has correctly identified the applicable legal standard, courts of review defer to the agency's application of the law to the facts before it, as long as the findings are supported by substantial evidence. *See Baltimore Lutheran High School Assoc. v. Employment Security Administration*, 302 Md. 649, 662 (1985). On the other hand, conclusions based upon an incorrect legal premise merit no deference

from a reviewing court. Under that scenario, reviewing courts generally remand the case to the agency for the agency to reconsider the matter in light of the court's explanation of the applicable legal standard. *See Board of Public Works v. K. Hovnanian's Four Seasons*, 425 Md. 482, 522 (2012) ("The error committed by the Board was one of law—applying the wrong standard in formulating its decision. The appropriate remedy in such a situation is to vacate the decision and remand for further proceedings designed to correct the error.").

II. Appellants' *De Facto* Declaratory Judgment Claims

The Burkes' first three contentions are that: a) BCC § 33-3-112(b)(ii) is inapplicable to their mowing activities in the Buffer Easement; b) the statute of limitations prevents the Department from bringing an enforcement action against them; and c) the Burkes may continue to maintain the existing trails on their property under BCC § 33-3-112(c). All three claims essentially seek what would be the administrative equivalent of a declaratory judgment. *See* Md. Code Ann. (1974, 2013 Repl.) § 3-406 of the Courts and Judicial Proceedings Article ("CJP") (stating that the Act may be used to determine "any question of construction or validity arising under the instrument, statute, ordinance, administrative rule or regulation[.]"). Generally, an action for a declaratory judgment must be filed in a civil court, not before an administrative agency.

The Baltimore County Zoning Regulations ("BCZR") does allow the Zoning Commissioner to hold "special hearings" in order to "pass such orders . . . as shall, in his

discretion, be necessary for the proper enforcement of all zoning regulations [including] to determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations." BCZR § 500.7. A "request for a special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005). While the BCZR contains a provision providing the Zoning Commissioner jurisdiction to declare rights affected by the regulations, the BCC does not contain an analogous provision providing such authority to the Department. The Department is only authorized to grant variances from the Buffer Easement regulations pursuant to BCC § 33-3-106. This authority does not include declaring a person's rights under the regulations.

As such, we conclude that the Department and Board were without authority to decide these three issues.

III. Practical Difficulty or Unreasonable Hardship

The Burkes' final contention is that the Board erred in failing to grant them a variance due to an alleged practical difficulty or unreasonable hardship. The Burkes claim that their inability to engage in the activity of mowing the grass in the Buffer Easement causes them practical difficulties or an unreasonable hardship for the following reasons:

- The house will be more infested with wildlife, such as snakes, mice, and insects, if they are not allowed to mow up to the Conservation Easement.

- If a wildfire catches in the tall grass and brush in the Buffer Easement, it could spread to the house and cause property damage.
- Due to BCC § 33-3-111(d)(1)[3], which requires that residential buildings be at least 35 feet set back from a Forest Buffer, the Burkes will be unable to build an expansion to their home, which will in turn effect the resale value.

The Board did not reach the issue of whether the reasons cited by the Burkes amount to an unreasonable hardship or practical difficulty because it concluded that the Burkes provided no testimony or other evidence that distinguished their property from other properties; i.e., there was "no testimony concerning the unique aspect of their home and was not compelling as to the uniqueness factor." Citing *Cromwell v. Ward*, 102 Md. App. 691 (1995), the Board concluded that this lack of evidence concerning any unique qualities in the Burkes' property was dispositive because "[t]he need for a variance must be due to the unique circumstances of the property and not to the general condition in the neighborhood." The Board's characterization of the Burkes' evidence is accurate.

[3]BCC § 33-3-111(d)(1) states:

(d) Standards for building setbacks.
(1) At a minimum, the primary or principal structure on a parcel or lot shall be set back from the outer edge of the forest buffer as follows:
(i) Residential dwellings, 35 feet; and
(ii) Commercial structures and industrial structures, 25 feet.

However, the rule ennunciated in *Cromwell* and other cases isn't applicable to this proceeding for the reasons that we shall now explain.

Cromwell held that the variance in that case could only be granted if the property had a unique characteristic that worked a practical difficulty or unwarranted hardship on the landowner. However, *Cromwell*'s holding is not applicable to all variance analyses; rather *Cromwell*'s holding was based on the language of the governing county ordinance and State enabling statute. *See Cromwell*, 102 Md. App. at 703 ("The requirement of uniqueness of the subject property . . . is specifically set out for noncharter counties in the State enabling legislation and it is also set out in the Baltimore County ordinance applicable here.") (internal citation omitted).

The Court of Appeals clarified this point in *White v. North*, 356 Md. 31 (1999). In *White*, 356 Md. at 45, the Court analyzed the requirements for granting a variance pursuant to a local ordinance which stated that one may be granted when (emphasis added):

> [D]ue to the *features of a site or other circumstances* other than financial considerations, strict implementation of the County's critical area program would result in an unwarranted hardship to the applicant[.]

The Court noted that, pursuant to this ordinance, "[t]here is . . . no requirement that the features of the site be 'unique,' or even considered, if 'other circumstances' exist." *Id.* at 46. Thus, the Court concluded, "in most instances under this particular ordinance, the

'unwarranted hardship' standard may be the only prong of the variance consideration." *Id.* at 48.

In the present case, the relevant County ordinance is BCC § 33-3-106(a)(1), and the State enabling statute is contained in Title 5, Subtitle 16 of the Natural Resource Article ("NR"), Md. Code Ann. (1974, 2012 Repl.). BCC § 33-3-106(a)(1) allows a variance to be granted by the Department:

> For those projects or activities where strict compliance with the requirements of this title would result in practical difficulty or unreasonable hardship.

In contrast, NR § 5-1611(a) states that a variance may be granted under local forest conservation programs where: "owing to special features of a site *or* other circumstances, implementation of this subtitle would result in unwarranted hardship to an applicant." (Emphasis added.)

BCC § 33-3-106(a)(1) makes no mention of special circumstances or unique characteristics and NR § 5-1611(a) states that a variance may be granted when an unwarranted hardship results from either a special feature of the site, *or* other circumstances. "Or" generally has a disjunctive meaning, that is, the word is used to indicate "an alternative between unlike things, states or actions[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1585 (1986). Taken together, neither law requires that a property possess a unique quality in order to grant a variance. Thus,

the Board erred in failing to analyze the Burkes' claims in the absence of any evidence of the property containing any unique qualities.

Because the Board applied the incorrect legal standard, we must vacate its decision and remand the case to the Board so that it can re-examine the evidence using the correct legal standard. *See O'Donnell v. Bassler*, 289 Md. 501, 511 (1981) ("'[T]he function of the reviewing court ends when an error of law is laid bare.'" (quoting *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952))).

We will reverse the judgment of the circuit court and remand this case to it so that it, in turn, may remand it to the Board so that the Board may consider the Burkes' application according to the appropriate legal standard.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS REVERSED AND THIS CASE REMANDED TO IT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.