

Circuit Court for Allegany County
Case No. C-01-CV-20-000334

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 314

September Term, 2021

ROCON, LLC, *et al.*

v.

JEROME S. GERSTEIN, *et al.*

Graeff,
Friedman,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 22, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. MD. RULE 1-104.

This case presents several questions regarding the interpretation of the Cumberland City Code. In the following pages, we will explain that the Zoning Board of Appeals correctly interpreted and applied the City Code and that the Circuit Court for Allegany County erred by not affirming the Board's decision.

BACKGROUND

Communications towers are permitted uses in all zoning districts in Cumberland, CUMBERLAND, MD., CITY CODE ("CCC") ch. 25, art. VI, § 25-132(b), but wherever they are built they are subject to certain statutory standards, set forth in CCC § 25-206(g):

- (g) *Communications towers.*
- (1) The tower shall have a setback of one (1) foot from all adjacent property lines for every foot of height of the tower.
 - (2) The tower shall be certified by a qualified and licensed professional engineer to conform to the latest structural standards and wind loading requirements of the Uniform Building Code and the Electronics Industry Association.
 - (3) The tower shall be protected to discourage climbing of the tower by unauthorized persons.
 - (4) Towers greater than fifty (50) feet in height shall be located at least two hundred (200) feet from existing dwellings.
 - (5) Requests for modifications of the setbacks requirements set forth herein shall be treated as conditional uses. The zoning board of appeals may not provide for a setback which is less than the fall zone of the tower, as set forth in its engineering specifications.

CCC § 25-206(g).

Rocon, LLC is in the business of constructing cellular communications towers. Rocon has leased real property (zoned in the Industrial-General (I-G) zoning district)

located in Cumberland, Maryland on which it proposes to build a communications tower. After several amendments, Rocon has proposed to build a 195-foot tower that neither complies with subsection (g)(1) regarding distance from adjacent property lines nor complies with subsection (g)(4) regarding distance from existing dwellings. As we shall discuss further, Rocon understood that both shortcomings could be rectified by the Zoning Board of Appeals as a conditional use pursuant to subsection (g)(5). The Board agreed and granted Rocon's conditional use application. Neighbors of the property—Jerome Gerstein, Natalie Gerstein, Timothy Mullaney, and Big Red Box, LLC, whom we shall refer to as the neighbors—petitioned for judicial review of the Board's decision. The Circuit Court for Allegany County reversed and remanded the matter to the Board for further proceedings. Timely cross-appeals followed.

The parties together present five questions for our analysis. Rocon provides three of the questions:

1. Did the Circuit Court err in disturbing the Board's decision remanding it to treat the Application as a request for variance from the generally applicable 50-foot height limit in the Tower's zoning district?
2. Did the Circuit Court err in disturbing the Board's decision remanding it to treat the Application as a request for variance from the 200-foot distance requirement for communications towers greater than 50 feet in height?
3. Did the Circuit Court err in disturbing the Board's decision by reversing and remanding it to include input from the City's Planning Commission?

The neighbors present two more questions:

4. Does the Zoning Code violate its enabling act by allowing area restrictions to be modified by conditional use instead of variance?
5. Did the requested conditional use authorization fail to achieve the four votes required for approval by the City of Cumberland Charter?

We will address each of these questions in turn.

ANALYSIS

We look through the decision of the circuit court and review the Board’s decision. *Anne Arundel County v. 808 Bestgate Realty, LLC*, ___ Md. ___, No.38, Sept. Term, 2021, slip op. at 13 (July 7, 2022).¹ In reviewing the decisions of administrative agencies as here, we apply two standards of review. *Id.* at 14. As to its factual determinations, we apply great deference and look only to see if there is substantial evidence to support its findings and conclusions. *Id.* As to its legal conclusions, we review for correctness without deference, but “frequently give weight to an agency’s expertise in interpretation of a statute that it administers.” *Id.* Here, each of the questions that we are asked to resolve are legal questions about the interpretation of the Cumberland City Code. When we interpret local ordinances, we apply the same canons of construction that we apply when interpreting State statutes. *Id.* Our goal is to “ascertain and effectuate” the city council’s intent in adopting the ordinance. *Id.* at 15.

¹ In this opinion, we have found it useful as a means to explain the issues presented and our holding to describe the circuit court’s opinion. But our doing so should not be misinterpreted as us reviewing the circuit court’s decision.

1. The Board Did Not Err in Granting Rocon’s Request for Modification of the Setback from Adjacent Property Lines Requirement as a Conditional Use.

As noted above, Rocon’s proposal calls for a tower that is 195-feet tall and is situated less than 195 feet from all adjacent property lines. As a result, as proposed, the tower does not comply with subsection (g)(1). CCC § 25-206(g)(1) (“The tower shall have a setback of one (1) foot from all adjacent property lines for every foot of height of the tower.”). Quite logically, however, the Board understood Rocon’s request to be a request for modification of one of the “setbacks requirements” and that it could therefore be—and in fact was—treated as a conditional use application pursuant to subsection (g)(5).

The neighbors argue (and the circuit court agreed) that despite the seemingly plain language of CCC § 25-132(b) that communications towers are permitted in all zones and that the height and setback distances for communications towers are governed by CCC § 25-206(g), the real operative language is found in CCC § 25-133, which limits the heights of all permitted uses in the I-G zoning district to 50 feet. Moreover, the neighbors argue that to change this height restriction from a 50-foot limit requires a zoning variance.²

We reject this interpretation. Although we will always attempt to harmonize inconsistent provisions, there are times when conflicting statutory provisions cannot be harmonized. When they cannot be harmonized, we are instructed to treat the more specific

² Because we find that the height of communications towers is governed by CCC § 25-206(g) and not by CCC § 25-133, we need not delay ourselves to consider what would be the downstream implications of the opposite holding. Suffice it to say that there is a considerable difference between the standards for approving a conditional use and approving a variance. CCC § 25-23 (*compare* “Conditional use” *with* “Variance”).

provision as an exception to the more general provision. *Md.-Nat'l Cap. Park & Plan. Comm'n v. Anderson*, 395 Md. 172, 194 (2006); *State v. Ghajari*, 346 Md. 101, 116 (1997). Here, we find that the general height restrictions of CCC § 25-133 and the communications tower height provisions of CCC § 25-206(g) are in conflict and impossible to harmonize. We, therefore, hold that the Board was correct, as a matter of law, to apply the more specific provision (CCC § 25-206(g)) as an exception to the more general (CCC § 25-133). As such, communications towers in the I-G zone may exceed 50 feet in height. Moreover, the Board was correct to use the conditional use process rather than the variance process to determine whether it was appropriate to grant Rocon's proposed modification. Finally, there is no argument that if subsection (g)(5) is applicable that Rocon's proposed modification was improper, that is, that Rocon's proposed setback is "less than the fall zone of the tower, as set forth in its engineering specifications." CCC § 25-206(g)(5). Therefore, we affirm the Board's decision (and reverse the circuit court's decision to the contrary).

2. The Board Did Not Err in Granting Rocon's Request for Modification of the Setback from Existing Dwellings Requirement as a Conditional Use.

As described above, Rocon's proposed communications tower was 195-foot tall, (and therefore, greater than 50-foot tall) and less than 200 feet from existing dwellings. As a result, as submitted, Rocon's proposal did not comply with subsection (g)(4). CCC § 25-206(g)(4) ("Towers greater than fifty (50) feet in height shall be located at least two hundred (200) feet from existing dwellings."). As best we understand it, the neighbors argue in this Court (and below) that the requirement of subsection (g)(4) does not use the term "setback," is therefore not a "setback," and is, therefore, not subject to modification

pursuant to subsection (g)(5). We are not impressed. That is not the commonsense way in which statutes are written or interpreted. Despite not using the word, “setback,” subsection (g)(4) clearly describes a setback. Moreover, subsection (g)(5) uses the plural form of the word, i.e., “setbacks” to indicate that both subsection (g)(1) *and* subsection (g)(4) provide “setbacks requirements” that are capable of being modified pursuant to subsection (g)(5).³ Therefore, we affirm the Board’s decision (and reverse the circuit court’s decision to the contrary).

3. The Board Did Not Err in Approving Rocon’s Conditional Use Application in the Absence of Written Comment from the Planning Commission.

For reasons that are not plain to us, the circuit court went outside the record to find that the Board erred in approving Rocon’s conditional use application because it had not received written comment from the Planning Commission. That’s not how this works.

³ Although we hold that this is the plain meaning of subsections (g)(1), (4), and (5), this understanding was confirmed both by the preamble to the legislation and by testimony from the City Solicitor regarding the legislative intent. *See Blackstone v. Sharma*, 461 Md. 87, 113 (2018) (holding that court may review legislative history even when statute is unambiguous to confirm interpretation and eliminate allegations that different version of legislative intent is latent in statutory language). The preamble to the bill said:

[T]he [prior] standards for specific uses applicable to communications towers ... do not include provisions that take into account modern designs and advances in engineering applicable to ... fall zones of such structures

These standards are overly burdensome as applied to towers that are designed to have smaller fall zones.

Cumberland City Ordinance No. 3831 pmb. (2018) (bill to permit requests for modifications of setback requirements to be presented as conditional uses). The City Solicitor testified that: “[T]his standard with respect to fall zones was intended to take the place of the other setback requirements. ... [T]he criteria or subsection for item numbers

The governing statute provides:

The planning commission shall, within forty-five (45) days of receipt of the site plan and application for which the conditional use is pending, submit to the zoning administrator its comments The zoning board of appeals shall not take action on the application until receipt of written comments from the planning commission or after the forty-five (45) day period, whichever is first.

CCC § 25-174(i)(2)(c). The meaning of the ordinance is plain. The planning commission has 45 days after it receives a conditional use application to offer comments. If it doesn't offer its comments within 45 days, however, the Board may act without its comments. That's what happened here.⁴ We affirm the Board's decision to proceed without timely comment from the planning commission (and we reverse the circuit court's decision to the contrary).

4. The Cumberland City Code does not Violate State Law.

In their cross-appeal, the neighbors argue that the Cumberland City Code violates the State zoning enabling statute. Their theory operates in two steps. *First*, they argue that

five replaces one and four. It's not in addition to one and four, it replaces one and four." Thus, the available legislative history supports our plain meaning interpretation.

⁴ Rocon submitted its application to the planning commission on August 28, 2020. The Board approved the conditional use on October 21, 2020, which is more than 45 days later. Despite, this, the neighbors suggest (and the circuit court agreed) that it is unclear from the record whether or when the site plan and application were submitted to the planning commission or that it had sufficient time to respond. Those questions, however, were not presented to the Board and were not part of its decision. In the absence of an objection or evidence to the contrary, we have no choice but to presume the correctness and regularity of administrative proceedings. *Wilson v. Md. Dep't of Env't*, 217 Md. App. 271, 284 (2014) (courts may only review grounds for decision presented to administrative agency); *Dal Maso v. Bd. of Cnty. Comm'rs of Prince George's Cnty.*, 238 Md. 333, 336 (1965) (establishing presumption of correctness in administrative proceedings).

constructing a communications tower of more than 50 feet in height in the I-G zoning district requires a variance. And then they argue, *second*, that such a variance would violate State law, which restricts variances to “density, bulk, dimensional, or area requirements” but not height requirements. MD. CODE, LAND USE (“LU”) § 1-101(s).

The answer, however, as we have previously discussed, is that the 50-foot height limit in CCC § 25-133 does not apply to communications towers, that communications towers must comply instead with the height and setback requirements of CCC § 25-206(g)(1) and (g)(4), and if they do not comply, must obtain conditional use approval—not a variance—pursuant to subsection (g)(5). Thus, the neighbors’ argument is defeated at its first step. There is no conflict with State law. The Board properly rejected this argument, the circuit court agreed, and we affirm.

5. The Conditional Use Application Received Sufficient Votes to Pass.

The Cumberland City Charter provides for a Board of Adjustment that reviews the decisions of administrative agencies. Charter, § 211. This Board of Adjustment had 5 members and required the affirmative vote of 4 members to reverse an administrative decision. *Id.* The neighbors note the similarity of function between the old Board of Adjustment and the current Zoning Board of Appeals and hypothesize that the current Board is the descendent of the old Board and must operate according to its rules.

We begin by noting that State law requires local legislative bodies to create local boards of appeal. LU § 4-301(a) (“A legislative body shall provide for the appointment of a board of appeals.”). If the local legislative body of the City of Cumberland, its City Council, had chosen to, it could have assigned the powers and duties of a local board of

appeals to the pre-existing Board of Adjustment. *See generally* LU §§ 4-304 (duties), 305 (powers). Despite that the City Council could have assigned the old Board of Adjustment to fulfill the powers and duties of a local board of appeal, it did not. Instead, it created a new entity, CCC § 25-171(a) (“A zoning board of appeals is hereby established...”) and gave this new Board the powers and duties as set forth in CCC § 25-172. Because the current Zoning Board of Appeals is not the old Board of Adjustment, the current Board need not follow rules that apply to the old Board.⁵ We, therefore, reject the neighbors’ argument here too. This argument was not presented to the Board, was properly rejected by the circuit court, and we affirm.

CONCLUSION

We hold that the decision of the Zoning Board of Appeals approving the conditional use application of Rocon, LLC to build a communications tower was, in all respects, correct. We, therefore, vacate the judgment of the Circuit Court for Allegany County and remand this matter to that court with instructions to enter judgment affirming the decision of the Board in all respects.

**JUDGMENT OF THE CIRCUIT COURT
FOR ALLEGANY COUNTY VACATED.
CASE REMANDED TO THE CIRCUIT
COURT WITH INSTRUCTIONS TO
ENTER JUDGMENT CONSISTENT WITH**

⁵ The neighbors’ argument demonstrates why code revision and charter revision are useful and important government activities. Public documents must be kept up-to-date and reflect current practice. Keeping archaic provisions “on the books” breeds confusion. The old Board of Adjustment no longer exists, its functions have been taken up by a new Zoning Board of Appeals, and, as a result, § 211 should have been removed from the Charter.

THIS OPINION. COSTS ASSESSED TO APPELLEES.