Circuit Court for Calvert County
Case No. C-04-CV-20-000256

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 335

September Term, 2021

IN THE MATTER OF
TIMOTHY M. & AMY E. DENT, et al.

Fader, C.J.,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: February 14, 2022

This case involves a permit issued by the Calvert County Department of Planning & Zoning, which was upheld by the Calvert County Board of Appeals ("the Board"), to reconstruct a community pier originally constructed in the 1980's in the Spout Farm Association, Inc. subdivision. Appellants, Timothy M. Dent, Amy E. Dent, Vankirk E. Fehr, Cynthia Fehr, and Patrick McGlohn, sought judicial review of the Board's decision in the Circuit Court for Calvert County, which affirmed the Board's decision.

On appeal, appellants present the following questions for this Court's review, which we have reordered and rephrased slightly, as follows:

1. Was the Board's decision supported by substantial evidence?
2. Did the Board act arbitrarily and capriciously?
3. Did the Board make an erroneous conclusion of law in interpreting the Zoning Ordinance?

For the reasons set forth below, we shall vacate the judgment of the circuit court with instructions for that court to remand to the Board for further proceedings consistent with this opinion.

Overview of Calvert County Zoning Ordinances

Before discussing this specific case, we will briefly set out the provisions of the Calvert County Zoning Ordinance. Calvert County, Md., Zoning Ordinance ("CCZO") § 2-6.02.A (2012) defines a nonconforming structure as one that "lawfully existed prior to the adoption or amendment of this Ordinance, but which, by virtue of the adoption or amendment of the Ordinance, no longer conforms to the requirements of this Ordinance in terms of such requirements as area, setback, or height requirements, etc." CCZO § 2-

6.02.C (2012) provides that "[a]ny structure existing at the time of the adoption or amendment of this Ordinance may continue to be used even though such structure does not conform to the provisions of the Zoning District in which it is located." CCZO § 2-6.02.F (2012) provides that nothing in the regulations prevents the replacement of a nonconforming structure "destroyed by fire, wind storm, flood, explosion or act of public enemy or accident."

The Zoning Ordinance also addresses nonconforming uses. CCZO § 2-6.02.A.2 provides that a "[n]on-[c]onforming [u]se is defined as a use which lawfully existed prior to the adoption or amendment of this Ordinance, but, by virtue of the adoption or amendment of this Ordinance, is no longer a permitted use in the Zoning District within which it is located." CCZO § 2-6.01.E (2012) provides that a nonconforming use may be changed to another nonconforming use with approval from the Board, or it can be replaced with a conforming use without approval from the Board.

A critical issue in this case is whether the community pier "lawfully existed" when it was initially built in 1982. CCZO Article 15.11.C, when adopted in 1967, provided that "[n]o marine facility, permanent or temporary, shall be located within 25' of a lateral line." Article 15.11.D provided that the lateral line could be reduced if a letter of no objection was obtained by the adjacent property owner and "a rendered covenant to the property filed in the land records of Calvert County." In 1981, CCZO § 4.38.A defined a lateral line as "[a]n imaginary line from the shoreline to the harbor line separating useable waterway areas." The current ordinance, CCZO § 12-01, defines a lateral line as "[a] line projecting

from the shoreline to the harbor line separating useable waterway areas and determined by bisecting the angles formed by the shoreline at property corners." The 25-foot distance referenced in the ordinance is known as a "setback," which is defined by CCZO § 12-01 as "[t]he minimum distance by which any . . . structure . . . must be separated from a . . . Zoning District boundary." This setback requirement still exists. CCZO § 9-5.04.C currently provides that "[n]o marine facility, permanent or temporary, shall be located within 25 feet of a lateral line."

Prior to 1979, there was no restriction on the construction of private and community piers within the same subdivision, and there was no limit on the number of slips available for a community pier. In 1979, however, based on a "concern for the capacity of Calvert County's waterways to handle increased marine traffic," Calvert County enacted Resolution Number 29-79, which imposed a moratorium on the construction of community piers for a twelve-month period beginning October 16, 1979. The County referred the issue to the Planning Commission "for study and recommendation."

On June 2, 1981, the Board of County Commissions adopted a resolution revising the Zoning Ordinance. Article 15.01 of the Marine Facilities Regulation provided that "a riparian owner may not be deprived of any right, privilege, or enjoyment of riparian ownership (as access to or use of a water way) legally exercised prior to April 21, 1981." Article 15.07.A required that a permit be issued by Calvert County to construct "any marine facility." Article 27.02.A provided that a "subdivision may have only one community pier

which contains not more than six (6) slips." A slip is defined by CCZO § 12-01 as a "[b]erthing arrangement for a single vessel."

In amendments enacted in 2006, changes were made regarding the propriety of community and private piers in the same subdivision. CCZO § 9-6.01.B.2 was changed to provide: "If the lot or parcel lies within a subdivision created after April 21, 1981 (date of original legislation on community piers) which contains a community pier, no private piers shall be permitted." CCZO § 9-6.02 was changed to state: "A community pier for a subdivision replaces the private piers ordinarily permitted for waterfront land owners, thereby protecting the sensitive aquatic environment, saving the waterfront from a proliferation of piers, and preserving the aesthetics of the waterfront." CCZO § 9-1.01.A–B provided, however, that "an owner of waterfront property may not be deprived of any right, privilege, or enjoyment of such ownership (as access to or use of a waterway) legally exercised prior to April 21, 1981."

In 2009, Calvert County changed the limitation that a community pier have no more than six slips, and provided instead that the number of available slips would be calculated based on various factors. *See* CCZO § 9-6.02.C. Neither party disputes that, under the current ordinance, Spout Farm would be eligible for nine slips on its community pier.

FACTUAL AND PROCEDURAL BACKGROUND

A.

Spout Farm's Original Community Pier

On April 6, 1981, Ken Lawyer applied for subdivision of Spout Farm Group, requesting to build a community pier with ten slips. In the preliminary plan submitted to the Planning Office, Spout Farm indicated that there "shall be a community pier 10' in width having 10 slips." The plan stated that the "owners of the lots shown herein shall be restricted from the construction of individual piers," and instead, the community pier would provide a slip for their use.

On June 2, 1981, the Department of Planning & Zoning recommended denial of Mr. Lawyer's application for the Spout Farm community pier, on the ground that a community pier with ten slips was not consistent with the recently adopted changes to the Zoning Ordinance. In a letter dated July 1, 1981, Frank A. Jacklitsch, Director of the Department of Planning & Zoning, advised that, to construct a pier, Spout Farm would have to "obtain Corps of Engineer approval and a County building permit." No more than six slips per pier were permitted and the proposed pier had to stay within the adopted lateral lines, which were illustrated in the Zoning Ordinance.

After the Planning Commission approved the Spout Farm subdivision, certifying that Spout Farm had complied with all the conditions stipulated in the preliminary approval, Mr. Lawyer requested a variance for the pier, from six slips to ten slips. The

Department of Planning & Zoning denied his request. Mr. Lawyer appealed this decision to the Board, alleging that the Department erred in not granting the variance.

In an order entered on August 17, 1981 ("the 1981 Order"), the Board determined that the moratorium on community piers terminated on March 31, 1981. It found that, because Spout Farm's preliminary plan, submitted on April 6, 1981, was submitted after the moratorium was terminated, but before the new ordinance became effective on April 21, 1981, the regulations in effect were those before the moratorium and the change in the Zoning Ordinance became effective. Accordingly, there was no limit on the number of slips available for a community pier, and Spout Farm should be able to construct ten slips on its community pier.[1]

On January 22, 1982, Vivian Marsh, Environmental Planner for the Calvert County Department of Planning & Zoning, sent Spout Farm a letter stating that it was "apparent that the proposed pier does not meet the required setbacks of Article 15.11.C of the Zoning Ordinance," which provided that a marine facility shall not be located within 25 feet of a lateral line. Mr. Marsh requested that Spout Farm submit a "new drawing" that showed all dimensions, including lateral lines. The letter stated that, once that was received, and it was determined that the setbacks met the requirements, the Department would finish processing the application and issue a building permit.

[1] As previously stated, Article 15.01 of the Marine Facilities Regulation provided that "a riparian owner may not be deprived of any right, privilege, or enjoyment of riparian ownership (as access to or use of a water way) legally exercised prior to April 21, 1981."

In a "Spout Farm Newsletter" dated January 28, 1982, there was reference to, among other things, the community pier. The newsletter stated that there was a "building permit hang-up with respect to intrusion of the pier over the 'lateral line' between the Common Area and Lot No. 2," and Spout Farm needed "cooperation of Charles and Sandy Everly to solve the problem."

On February 5, 1982, the Calvert County Division of Inspections and Permits issued a building permit to Spout Farm Association to erect its pier. The record does not reflect, because the County apparently did not retain records, how the issue of the setbacks was resolved.[2] A "Notice of Authorization" issued by the Department of the Army Corps of Engineers granted a permit to construct a pier that had 5 finger piers and 24 mooring piles.[3]

B.

Application to Replace Community Pier

On September 16, 2018, 36 years later, Spout Farm applied for a building permit to replace and elevate the community pier. In an email sent on October 5, 2018, John D. Schwartz, Planner for the Calvert County Department of Planning & Zoning, advised that the permit application could not be approved. He stated that the "community pier is a

[2] Although the parties disagree regarding whether the lateral line issue was rectified at the time the pier was built, it is not in dispute that the community pier, as it exists now, is not in accordance with the setback requirements.

[3] CCZO §12-01 defines mooring pile as "[a] heavy beam of timber, concrete, or steel, driven into the bottom of a waterway and used to secure boats." A finger pier has been defined as a "short, narrow pier projecting into the sea and used as a docking place for vessels." *Finger Pier*, Lexico, https://www.lexico.com/en/definition/finger_pier.

nonconforming structure as [CCZO § 9-6.02] states a community pier for a subdivision replaces private piers," and to continue the nonconforming status of the pier, it had to "retain its original configuration," which meant that it could not be elevated or altered, but it was only permitted to be replaced "in-kind." Mr. Schwartz stated that, to continue his review, Spout Farm needed to submit plans showing the replacement pier "unmodified from its present configuration." On October 10, 2018, Mary Beth Cook, Zoning Officer of the Department of Planning & Zoning, added in an email that, not only could the pier only be replaced in-kind, but CCZO § 2-6.02.F.1 "restricts the replacement of non-conforming structures to those destroyed by fire, wind storm, flood, explosion or act of public enemy or accident," and thus the pier could not be "intentionally destroy[ed]."

On October 17, 2018, counsel for Spout Farm met with Mr. Schwartz and Ms. Cook to discuss Spout Farm's permit application. In a follow-up email sent on October 29, 2018, counsel for Spout Farm explained that the April 1981 change to the Zoning Code was not applicable to Spout Farm because, as the Board of Appeals determined in 1981, Spout Farm's community pier was to be regulated under the law prior to the code changes when the private and community piers existed together in subdivisions. Counsel also stated that the community pier was not nonconforming due to the lateral line setback requirement, stating that the issue of the setback of the lateral line was raised in 1982, but the permit was ultimately issued, indicating that the setback issue was resolved with a reduced lateral

line setback.[4] Counsel argued that, once the pier was built pursuant to a valid permit, the community's rights vested in the configuration of the pier, including the reduced lateral line setback. Alternatively, counsel argued that the community pier could be restored in its current configuration if it was destroyed, noting that, over the years, the pier was destroyed by "sun, wind storms, ice and general weather."

The Department did not issue a written reconsideration decision prior to 30 days after its denial of the building permit application. Spout Farm, therefore, filed an appeal with the Board, Case Number 19-3967. In February 2019, the Board allowed Spout Farm to postpone this appeal to submit a new community pier application with a revised configuration meeting the 25-foot lateral line setback.

Spout Farm then revised its permit application to abide by the 25-foot lateral line setback. The Division of Inspections and Permits approved the permit to replace the community pier with another community pier, which included nine slips instead of ten and abided by the setback provisions.

Appellants noted an appeal to the Board.

[4] Counsel noted that a newsletter indicated that the community would need the cooperation of the Everlys to proceed with the pier, and *presumably*, that cooperation was obtained by agreement pursuant to the Zoning Code because a permit was issued shortly thereafter.

C.

Board of Appeals Proceedings

1.

Pre-Hearing Memoranda

Prior to the date scheduled for the hearing, the parties filed prehearing memoranda. The County Attorney, on behalf of the Department of Planning & Zoning, stated in his hearing memorandum that the permit to replace the community pier was approved after Spout Farm respected the setback requirements. He stated that the Board's 1981 Order "decided that the community pier at Spout Farm be approved," and that was "the beginning and the end" of the issue. He noted that CCZO § 9-4.04.B provided that "[a]ny alteration of an existing non-conforming marine facility or use is subject to the provision of Section 2-6 of this Ordinance, except that the setbacks described in Section 9-5.04 shall apply," and the plan approved respected the setback requirements.

Richard Spigler, an owner of a lot in Spout Farm and one of the appellees, argued that appellants were asking the "Board to make an after the fact evaluation of the legality of the building permit for the community pier which has been unchallenged for 38 years." He stated that there was "no factual dispute" that the community pier as approved met the zoning ordinance requirements, including abiding by the lateral line setbacks and the number of slips permitted. He argued that the current zoning ordinance placed restrictions on "*private piers* in neighborhoods with community piers, not vice versa." Although Mr. Fehr, one of the appellants, had a private pier, it pre-existed the community pier. The

community pier had been used since its inception in 1982, and "[n]o appeals, objections or other legal challenges of any kind were made to the County's issuance of the community pier building permit in 1982.

Mr. Spigler also discussed the Spout Farm Bylaws, which provide that each owner has "a 1/9 beneficial interest in the Association and a non-exclusive easement to use" the community pier. Each lot owner has a fiduciary responsibility to keep in good repair all community amenities, including the community pier. Mr. Spigler argued that appellants regularly "rely on the community pier to safely berth their boats with deeper drafts and in severe weather conditions." Appellants' attempts to block the repair of the community pier would work to the detriment of the rest of the lot owners "justifiably relying on the language of the [Bylaws] which provides that the community pier is to be kept in good repair and maintenance by a joint effort of all 9 lot owners, as has been the case for decades."

Mr. Spigler also argued that the delay in challenging the pier, almost 40 years after it was built, barred the challenges. He argued that appellants failed to exhaust their administrative remedies, and the challenge was barred by the statute of limitations[5] and the equitable doctrines of laches and estoppel.

With respect to the argument that zoning ordinances banned the contemporaneous use of community and private piers, Mr. Spigler argued that CCZO § 9-6.02(G)(5)

[5] *See* Md. Code Ann., Cts. & Jud. Proc. §5-114(b)(1) (A person must initiate a proceeding challenging a failure to comply with a setback line no "more than 3 years after the date on which the violation first occurred").

"actually states that if a community pier, slips or moorings are provided as part of a *new* development, *private piers* in the development are not allowed." The ordinance, therefore, did not restrict "building community piers in subdivisions with private piers." He noted that a private pier existed at the time of the Board's 1981 Order and when the community pier was constructed in 1982.

Mr. Spigler argued that, even if the community pier was a nonconforming use or structure, CCZO §§ 2-6.01 and 2-6.02 specifically provide for nonconforming uses or structures to be replaced. He asserted, however, that appellants' argument that the community pier was nonconforming based on lateral lines was "a red herring" because the "setback regulation pre-dated the construction of the community pier," and to qualify as a nonconforming use, there must be an amendment to the code subsequent to the structure or use being in existence that makes it no longer allowed.

Appellants argued in their memorandum that there was "no question that the lateral line was crossed," and in 1981 and 1982, the zoning ordinance did not allow lateral lines to be crossed, even with a covenant. Appellants also alleged that there was "no question" that the community pier was not built in accordance with the permit that limited the pier to 24 mooring piles and 4 finger piers. Based on these facts, they asserted that there was "no question" that the community pier "fails/failed to conform" with applicable laws, and as such it was unlawful.

A community pier at Spout Farm was limited to nine slips under current ordinances, and there was "no question" that the community pier currently had ten slips. Accordingly,

the community pier was nonconforming. Because it was unlawful and nonconforming, it could not be rebuilt in its existing configuration under CCZO §§ 2-6.01 and 2-6.02.

Appellants argued that the community pier could not be repaired as long as the residents of Spout Farm have private piers. They asserted that CCZO § 9-6.01 provided that a community pier replaces private piers for waterfront landowners ordinarily permitted to have a private pier, and therefore, the property could not enjoy both a community pier and a private pier. If the Board allowed the community pier to be repaired, "every private pier permit issued after that adoption is illegal unless the community pier is an unlawful, nonconforming use." They noted that three piers at Spout Farm were built before the adoption of CCZO §§ 9-6.01 and 9-6.02, and they currently were nonconforming uses because the ordinance no longer allows private piers in a subdivision served by community piers. This could lead to the "harsh results" that "[a]ny permit for the installation of a private pier at Spout Farm issued after the date of the adoption §9-6.01 and §9-6.02 is void and any the private pier [] constructed pursuant to any such permit is unlawful," and this result could be avoided by finding that the community pier was an unlawful, nonconforming use.

Regarding the Spout Farm Bylaws, appellants argued that they provide that unanimous consent for all lot owners is required for any purchase over $2,000. During community discussions regarding repairing the pier in 2015, appellants declined to approve reconstructing the pier and questioned why the community pier needed to be replaced given that many lot owners had their own private piers. Appellants did not object to the building

of a community pier, but they "simply did not want to pay for it," and they worried that building a community pier would impact the lot owner's rights to private piers. The majority agreed to amend the Bylaws and reduced the number of votes required to approve an expenditure of over $2,000 to a majority. The majority then agreed to repair the community pier. Appellants referenced this history to inform the Board that there was "another side to the story," and appellants were not acting as unfairly as Mr. Spigler indicated.

Spout Farm submitted a memorandum adopting Mr. Spigler's memorandum and arguing that the community pier was a "legal conforming structure" that was permitted to be repaired. It argued that the 1981 Order, which was not appealed, was "final and [was] binding upon the property and upon Calvert County today," and because of that 1981 Order, the community pier "was and continues to be legal, conforming use."

Spout Farm argued that Article 12 of the Zoning Ordinance defined an in-kind replacement as one that is "smaller or identical to the original structure." The approved configuration of the community pier was smaller than its original footprint, which adheres to the 1981 Order, and this time adhered to the lateral line setback. This qualifies as an in-kind replacement.

Moreover, CCZO § 9-6.02.E.4 provides that a nonconforming use may be replaced by a conforming use without approval by the Board. The proposed pier would conform to the code, with its nine slips and setbacks from lateral lines, and as such it did not need approval by the Board.

Appellants filed a reply to Spout Farm's memorandum. They argued that Spout Farm failed to dispute the unlawfulness of the pier in that it never addressed the fact that no zoning ordinance has ever allowed a lateral line to be crossed, the community pier crossed the lateral line as constructed, no covenant was ever filed to reflect an agreement to disregard the setback, and the community pier was not constructed in accordance with the permit issued.

Appellants argued that the 1981 Order was not "a blanket decision by the Board of Appeals that the use of community property at Spout Farm . . . was lawful or conforming under the current zoning ordinance." It did not indicate that the community pier could be constructed in violation of the permit or that it could cross a lateral line. The 1981 Order had "nothing whatsoever to do" with appellants' appeal of the recent permit for a replacement community pier.

Appellants disagreed with Spout Farm's argument that the pier was lawful because the County issued a permit to build it. A permit did not give Spout Farm the right to fail to comply with the provisions of the ordinance at the time, namely, crossing the lateral lines. Regarding Spout Farm's argument that CCZO § 2-6.01.E.4 allows a nonconforming use to be replaced with a conforming use, appellants argued that CCZO § 9-6 provided that community piers and private piers cannot exist in the same subdivision.

2.

Hearing

At the beginning of the March 5, 2020 hearing, the Board discussed the procedural posture of the case. It noted that there were several cases pending.

Case No. 19-3967, which originally was scheduled for a hearing on February 7, 2019, involved the denial of Spout Farm's initial request for a community pier permit, but it was postponed to allow Spout Farm to propose a smaller pier that was "less offensive to the neighbors." The Board decided to delay hearing that case until it ruled on Case No. 20-4012, the 2019 appeal from the approval of the second request for a permit for a replacement pier. At the end of the proceedings, counsel for Spout Farm withdrew the appeal in Case No. 19-3967.

The Board then addressed Case No. 20-4012, the approval of the second request for a permit for a replacement pier.[6] After introducing exhibits, counsel for appellants argued that the pier as it existed at that point did not conform to existing law because it had ten slips as opposed to nine slips. Additionally, the law limited use by a "live owner," and it was used by someone else, so the pier was a nonconforming use and a nonconforming configuration. Moreover, there was a violation of the setback provisions.

[6] The Board also addressed, and ultimately delayed, hearing Case No. 20-4021, a challenge to a permit for a private pier for one of the residents of Spout Farm, on the ground that issuing a private pier in the same year the Zoning Officer issued the permit for the community pier violated the current zoning ordinance. Appellants advised in their brief that the Board subsequently found that it was error to issue that permit, and an appeal to the circuit court is pending.

Counsel acknowledged that the replacement pier that was proposed was structurally conforming, given changes to the setback and slip requirements, but he argued that there was not a conforming use given the presence of community and private piers. Although the law allowed private and community piers in a subdivision prior to the amendment enacted in April 1981, counsel argued that the amendment applied to Spout Farm because, although it applied for subdivision approval prior to the amendment's effective date, the subdivision was not created until it was approved in June. A community pier in a subdivision served by a private pier is not a conforming use, and the permit should not have been issued. Counsel also argued that the pier did not comply with the zoning ordinance when it was built because it crossed lateral lines and there was no covenant filed in the land records putting the owner of lot 2-R on notice that the setbacks had been reduced.

Counsel for appellee Mr. Spigler stated that this should have been a simple matter, Spout Farm was merely trying to rebuild a 40-year-old pier. There had been no complaints or challenges to the pier in 40 years. He argued that there were multiple doctrines, including "[d]octrine of laches, estoppel, failure to exhaust administrative remedies," that should prevent the Board from having to litigate the legality of a pier permit issued 38 years ago. He asserted that the equities dictated that the community pier should be allowed to be rebuilt.

Counsel for Spout Farm stated that the question was whether the 1981 Order allows the community pier to exist. He stated that it did.

Counsel for the Department of Planning & Zoning acknowledged that the community pier, as built, with its ten slips, was nonconforming with the current law, which allowed at most nine slips. The 1981 Order permitted a community pier with ten slips because the request was filed prior to the time that law went into effect and at a time there were no rules limiting the number of slips. The community pier conformed in 1981 and was lawfully nonconforming now.

Counsel acknowledged that the Department had a problem with Spout Farm, in that a private pier pre-existed the community pier, and since then the Department had been permitting the lot owners of Spout Farm to construct their own private piers. These permits "technically" should not have been issued because Spout Farm was already served by a community pier. He explained the dilemma as follows:

> And the problem is we've got the original pier, private pier that pre-existed the community pier, then we have now, today, we have I believe five more private piers and we have an application for a new pier.
>
> And on one hand the Department has to say well no, you probably shouldn't get it, but on the other hand we're also bound by equity which says well why are you treating this person differently than you've treated them in the '80s, the '90s, the 2000s, the 2000 teens.
>
> We, I mean we're – you would set us up for a lawsuit.

Witnesses were then called to testify. Josh Gibbons, owner of Gibbons Marine Construction, a marine contracting company that builds piers and performs erosion control, testified that he had been a marine contractor for approximately 20 years, and he had constructed hundreds of new piers. The typical lifespan of a pier on the Patuxent River is approximately 25 to 30 years. The community pier was failing. Several pilings had been

"eaten through with the worms . . . the pier is collapsing, decking board is coming off, it's just reached its life expectancy." He explained that the piles on the piers are treated with chemicals that protect it from deteriorating, but once the chemical wears off, "shipworm . . . will then attack the piling and it will start to eat through it," similar to a termite. The pier had also experienced "normal weathering from . . . the elements." His opinion was that the pier needed to be replaced in its entirety.

Mr. Gibbons had no conclusion whether the pier was legal in 1981, noting that it was "before [his] time." He did not have any knowledge regarding how the lateral line would have been drawn.

Mary Beth Cook, Zoning Officer for the Department of Planning & Zoning, testified that she understood a conforming use to be "[s]omething that meets the current regulations of the Calvert County zoning ordinance" and a nonconforming use to be a "use that existed legally until . . . the time the Calvert County zoning ordinance changed making it nonconforming." She testified that the zoning office typically makes a determination that something is a legal nonconforming use when it comes to their attention, such as through a permit application or some application that requires zoning approval.

In approving the permit for the community pier in this case, she assessed whether the community pier was lawfully constructed in 1982. In that regard, she was "able to determine that a permit was issued for the pier and that it was constructed and inspected."

In addition to getting the County to issue a permit, an applicant would also have to get a permit from the Maryland Department of the Environment, referred to as the Corps

of Engineers in 1982. Ms. Cook did not know if the pier would have to comply with that permit to be lawful because her office enforces their own regulations.

She acknowledged that, in 1981 and 1982, if a lateral line was to be ignored, Calvert County required that a covenant be recorded in the land records, which reflected the agreement not to abide by the setback rule, and failure to do so would be failure to comply with the law. She also testified that she was unable to find a covenant reflecting a reduction in the setback in the land records for Calvert County. She said, however, that her office was unable to find a permit issued by the county describing how it should have been constructed, and they were unable to find an inspection dictating where the lateral lines should be located, so they did not get to the point where they were sure that they had to record anything.[7]

Ms. Cook testified that the existing pier is a nonconforming structure. The initial application to rebuild the pier was denied because it did not comply with the setback requirements. The second application was approved because it complied with the setback provisions, had nine slips, and was limited to the use of the property owners of Spout Farm. The structure of the new proposed community pier, which abided by the setback requirements from the lateral lines, conformed with the current law.

[7] Ms. Cook, however, answered "correct" to the following statements/questions: (1) the zoning law required that a covenant be filed; (2) a covenant was not recorded; and (3) that was failure to comply with the law. Counsel then asked her if there was a failure to comply with the law in 1982, was not the pier at the time of the hearing was unlawful. The Board sustained the County's objection.

Ms. Cook's testimony regarding a nonconforming use was inconsistent. She stated initially that her office did not discuss whether the use was conforming given the presence of private piers because CCZO § 2 allows the replacement of a lawful use. She agreed that a person was not entitled to a replacement of an unlawful use. She then stated that Spout Farm could replace a nonconforming use "whether or not it's lawful."

Ms. Cook testified that the current zoning ordinance went into effect in approximately 2006. She acknowledged that, after this ordinance went into effect, any permits for a private pier in Spout Farm should not have issued. She characterized the piers, both the private piers and the community pier, as "all nonconforming because with a community pier you can't have private piers and the community pier is nonconforming because of the lateral lines."

On cross-examination, Ms. Cook reiterated that the community pier as it currently existed was a nonconforming structure because it did not comply with the lateral line setback. She did not know how to calculate lateral lines or whether they changed with time. She agreed, however, that assuming that lateral lines are calculated based on a shoreline, shorelines change over time. She did not know whether the pier was a conforming structure in 1982 when it was built, and she did not have any drawings or other building plans showing the lateral lines in 1981 when the permit was issued. She did not have "any evidence one way or the other" regarding where the lateral line was drawn in 1982, and the pier could have been a conforming legal structure in 1982. If the lateral lines

subsequently changed to cause an encroachment, that would render the pier at this point a legal nonconforming structure.

Her office had evidence that a building permit was issued and there was an inspection, but she did not know whether there was a final inspection on the pier. She presumed that when a permit is issued, a final inspection is completed. Her office found a "card," the type that was used in 1981 for "evidence of an inspection," but they were unable to determine whether a final inspection ever took place. She testified that she did not have any information to suggest that the pier as constructed in 1982 violated the lateral line setback.

She testified that, under the current regulations, the use of a community pier "replace[d] the private piers ordinarily permitted." The regulations do not say that the use of private piers precludes the use of a community pier.

John Schwartz, a planner for the Department of Planning & Zoning, testified that he worked on the applications for the replacement of the community pier at Spout Farm. In an email sent on October 5, 2018, he advised that he could not approve the initial building permit application to replace the community pier because it was a nonconforming structure under CCZO § 9-6.02 "which states that a community pier for a subdivision replaces private piers." He determined, through consultation with the County Attorney, that to continue the nonconforming status of the community pier, it had to retain its original configuration and be "replaced in-kind." The proposed pier could not be elevated or altered

in any way. He acknowledged, however, that the pier that was later approved did not "retain the original configuration," although it addressed the lateral line setbacks.

Patrick McGlohn, a property owner in Spout Farm whose house was under construction, testified that he performed a title search when he purchased his property, and the title search did not reflect any covenants related to the community pier setback. He and the other property owners in Spout Farm were aware that the community pier needed to be replaced after a groundskeeper suffered a fall because of the poor condition of the pier. In the summer of 2017, the community pier was closed because a portion of it collapsed. It was repaired in the winter of 2018, but the community pier "never reopened" from its collapse in the summer of 2017.

Mr. McGlohn also discussed exhibits, including minutes from the Spout Farm Association Annual Meetings. At the annual meeting held on November 4, 2018, the members decided that the pier would remain closed, despite being repaired, until the members decided what to do with it, and those who still used the community pier, which included at least two members, would do so at their own risk.

Mr. Spigler testified that he owns a private pier that was already on the property when he purchased it. Some of the property owners, including Mr. Spigler, use the community pier, but others do not.

The parties then gave closing arguments. Appellants' counsel argued that the Board was not a court of equity, but it was there to enforce the laws of Calvert County, and the question at issue was a legal one. He argued that the issue to be addressed was whether

the community pier, as it currently exists, is nonconforming, but the County failed to address whether "the pier as constructed is unlawful." The zoning ordinance in effect at the time provided that, if a setback or a lateral line was to be ignored, a covenant was to be filed, and there was no covenant filed. Even if Mr. Everly gave permission for a pier to cross a lateral line, that permission, without filing a covenant, did not bind the subsequent purchaser of the property. Moreover, the pier as built also violated the building permit, which provided for the pier "to be constructed on a specified number of mooring pilings," which did not happen. Accordingly, the pier was unlawful when it was constructed, and it is an unlawful nonconforming use.

Counsel argued that the next question was whether the existing pier was nonconforming under present-day ordinances. He asserted that Ms. Cook testified that the current ordinance permitted only nine slips, and the Spout Farm community pier had ten slips.[8] Moreover, a community pier cannot exist in the same subdivision as a private pier under the new ordinance. With respect to the argument that, pursuant to CCZO § 2-6.01.E.4, a nonconforming use may be replaced with a conforming use without approval

[8] Ms. Cook gave conflicting testimony on this. She initially testified that ten slips were allowed at Spout Farm under current regulations. She stated that a "[m]aximum of two slips may be provided for each waterfront lot." With nine waterfront lots in Spout Farm, she calculated that the community pier would be permitted 18 slips. Later, she stated that this testimony was "incorrect," stating that she "did not read far enough" in the statute, specifically to CCZO § 9-6.02.H, which limited a subdivision such as Spout Farm to nine slips. The parties agree that Spout Farm is eligible for nine slips.

of the Board, he argued that a community pier is not a conforming use in this development because there are existing private piers.

Counsel for Department of Planning & Zoning argued that the Board had approved the community pier in 1981, and the appeal time expired 40 years ago. Although the first application to replace it was rejected because it violated lateral line setbacks, once the proposal was redesigned to fix that problem, the permit to replace it was properly approved. The community pier was nonconforming because it had ten slips, and the current ordinance only allows nine. The pier, however, was legally built in 1981, and the structure "doesn't become illegal just because there's an illegal encroachment."[9]

Counsel for Mr. Spigler noted that no one involved when the pier was constructed testified. He argued that there was "just simply no evidence set forth" to prove that the pier violated the lateral setback lines as they existed in 1982, asserting that "lateral lines change all the time with the shoreline." He noted that no one challenged the community pier until recently, and he argued that appellant had failed to meet their burden. The plan submitted for the replacement pier reduced the slips from ten to nine and fixed the lateral line issue as it existed in 2019. Counsel stated: "The County approved it. We think that's the end of the story."

With respect to CCZO §§ 9-601 and 9-602, counsel argued that he was "not even sure" that these provisions applied to Spout Farm, noting that the 1981 Order from the

[9] Counsel noted that there was "a piece that was illegal, it encroached," but there were enforcement remedies other than tearing the pier down, such as imposing fines if the problem was not fixed.

Board determined that "the regulations in effect applying to Spout Farm are those that applied before the moratorium and before the change in the zoning ordinance became effective." Before the change in zoning ordinances, a community was allowed to have both community and private piers, so these ordinances might not apply to Spout Farm. CCZO § 9-602 "deals with new subdivisions" "created after April 21st, 1981," and Spout Farm was created before that date. Finally, CCZO § 9-602 is "very clear" that a community pier displaces a private pier, and the ordinance does not say that a private pier can displace a community pier. The community pier, therefore, should be approved. The pier is four decades old, and it needs to be replaced.

Counsel for Spout Farm, discussed the history of the 1981 Order, in which the original residents of Spout Farm asked the Board to approve ten slips on its pier, instead of the permitted six, because having six slips would "really inhibit the common scheme of development of Spout Farm." The Board's 1981 Order "effectively said you are grandfathered under the old law."

After the building plans were drawn up, the file shows some issues with regard to the 25-foot setback line. There is no documentation of what happened after this initial letter, but the County did issue a building permit, there was an inspection, and the pier was then built. Accordingly, "the presumption has to be that the pier that was constructed in 1981 was a legal structure and it was a legal use as of 1981 and 1982." Spout Farm is now requesting merely to "go from the nonconforming 10 slips to nine slips and to pare back so that the 25 foot lateral line setback is respected." In this sense, the Board did not have to

decide anything about the private piers, as it was a "proverbial red herring." Spout Farm's history is unique, and the issue really was "preserving those vested property rights" that the Spout Farm community had enjoyed since 1982.

In rebuttal, counsel for appellants reasserted his argument that there was an unlawful nonconforming use. With respect to the County's argument that it could replace the pier if it was a conforming use under the present code, the question was whether "the use of the property at Spout Farm for a community pier when there are already private piers at Sport Farm" is a conforming use. The 1981 Order had no bearing on this issue because in 1981, private piers and community piers were allowed in the same community. It had nothing to do with the issue in front of the Board, i.e., whether the community pier was a conforming use under present-day ordinances. The pier could be replaced only if the replacement is a conforming use, which it was not because there were private piers in the subdivision.

An oral discussion by the Board ensued. John Ward, Board Member, moved that the Board find that the community pier is a conforming use pier and approve repair or replacement as approved by the County to meet the regulations in existence at this time. He noted that the initial intent was to have a community pier, and the community pier's replacement design was within the lateral lines. He stated that he was not sure how he could say whether the initial pier was improperly placed, but "the intent to fix the problem takes, carries weight over the fact that the first one was a little bit off, off line."

Daniel O. Baker, Vice Chair of the Board, stated that the permit issued to the Spout Farm for the new community pier was the "modernization of the . . . 1981 Order." He

stated that "[e]very 40 years or every 30 years . . . we can't throw things out that we've approved and do something else." There was an opportunity to object, but there was no objection by the community prior to this time. The problem with the first request for a replacement pier was corrected, so the "alleged error" did "not exist anymore."

Ms. Sanders, legal counsel for the Board, also noted the lack of action for 38 years and added that "the current property owners . . . should have been aware of the lateral line issue, and I believe that there was testimony that Mr. McGlohn was aware at least around 2017, which again would cut off your ability to appeal those lateral lines issues."

Chairwoman Hance-Wells added that, in the preliminary site plan, "it clearly was the intent of the association to have a community pier." The 1981 Order "recognized that there was a small window that legalized that pier, so it was a legal structure and for legal use and community use." The pier later became nonconforming when the new regulations came into effect, and the second application for the repair of the pier brought the pier into compliance with the current laws. Accordingly, she thought the County was correct in issuing the permit.

Counsel for the Board stated that it should list as a finding that the original intent of Spout Farm was to have a community pier, and that the 1981 Order "recognized . . . the legality of the pier." The Board then approved the motion to uphold the ruling of the

Department of Planning & Zoning approving the application for a rebuild of the community pier.[10]

3.

Order

The Board issued its written order on July 23, 2020. It initially discussed the testimony of the witnesses and the exhibits presented.[11] The Board then set forth the following findings of fact and conclusions:

> The [1981 Order] recognized that there was a small window that legalized the community pier. The pier became nonconforming after the ordinance went into effect.
>
> The first permit did not address this change, but the second application did. This followed current laws for non-conforming uses.
>
> The Board finds the intent for Spout Farm Homeowners' Association to have a community pier was shown on the preliminary subdivision plan.
>
> The pier may be repaired or replaced according to a design approved by, as necessary, the Spout Farm Homeowners' Association, Calvert County, the State of Maryland, and the Army Corps of Engineers.
>
> The Board does not find the community pier to be in an abandoned state. Individuals have the ability to use the pier at their own risk. Therefore, the issue of abandonment does not have bearing on this case.

[10] There was another appeal in Case No. 20-4013, which appellant advises was identical and filed in an excess of caution based on ambiguities in the Rules. The parties stipulated that "everything that happened in 4012 applies to 4013, same evidence, same results." The Board then voted to approve the decision in 4013, issuing the permit.

[11] In setting forth Ms. Cook's testimony, the Board recounted that she said that the pier as constructed crossed the lateral line setback, but no covenant was recorded. A review of her testimony as a whole, however, indicates that she did not know if the pier, as initially constructed, violated the setback.

The Board ordered, by a unanimous decision, that the Zoning Officer did not err in issuing the permit to reconstruct the community pier, and it upheld the decision of the Zoning Officer.

D.

Judicial Review in the Circuit Court

On December 28, 2020, appellants petitioned for judicial review of the Board's decision, arguing that the Board's decision was "premised on erroneous conclusions of law," and the permit should be rescinded. They argued that, pursuant to CCZO § 9-6.02, a subdivision is prohibited from having both a community pier and private piers. They asserted that the community pier never lawfully existed, and therefore, Spout Farm could not receive the "protections afforded to lawful non-conformities under Article 2 of the Zoning Ordinance." Appellants presented two questions for judicial review: whether the community pier was lawful, and if it was not lawful, whether the permit for reconstruction of the community pier should have been issued.

In support of their argument that the community pier was not lawful as initially constructed, appellants reiterated their arguments that the pier violated the permit issued by the Army Corps of Engineers in 1981 by exceeding the permitted number of mooring piles and finger piers, and it violated the requirement of a mandatory setback of 25 feet from the lateral lines adjacent lots. They noted that the zoning ordinance in 1982 allowed for the lateral line setback to be reduced through the use of a covenant filed in the land records, but no such covenant existed for the community pier. Moreover, even if there had

been a recorded covenant, the ordinance only allowed for a covenant to *reduce* a setback from a lateral line; there was no provision allowing a pier to *cross* a lateral line. Appellants maintained that the pier crossed the lateral line, as it does currently, when it was constructed in 1982.

Appellants argued that, to qualify as a nonconforming use or structure, and thereby continue to be used when the use is no longer permitted or the structure no longer conforms to the ordinance, the use or structure must be "lawfully existing" at the time the ordinance was enacted. Under CCZO §§ 2-6.01 and 2-6.02, however, if the use or structure did not lawfully exist at the time of the adoption of the zoning ordinance, the use or structure is unlawful, and the use cannot continue and the structure cannot continue to be used, expanded, or replaced.

Appellants asserted that, although the Board found that the community pier was nonconforming, it did not make any "explicit findings with respect to the lawfulness of the non-conformities posed by the community pier at Spout Farm." It merely "opined," in its Order, without any basis for the opinion, that the permit submitted by Spout Farm "followed current laws for nonconforming uses." The evidence presented to the Board at the hearing, however, proved that the community pier at Spout Farm has never been lawful due to the failure to comply with the lateral line setback and the permit requirements, but the Board ignored this evidence.

Appellants argued that, because the pier was not lawful as originally built, the safe harbor for non-conformities found in CCZO §§ 2-6.01 and 2-6.02 was not applicable.

Thus, the community pier must be evaluated under the current zoning ordinance, which bans the "contemporaneous use of property for a community pier and a private pier" because of the detrimental effects having both of these piers plays on the environment. The Board had a "statutory obligation" to enforce these laws, which protect the environment.

Appellants argued that the "law contemplates, in such instances, that the incompatible use should be phased out as circumstances allow. One of those circumstances is physical obsolescence." The testimony presented to the Board showed that the "community pier at Spout Farm is and has been obsolete for some time." As the community pier never complied with the regulatory schemes in place at the time of its construction, appellees did not have the right to reconstruct it. Appellants requested that the court either reverse the Board's decision and deny the permit for the reconstruction of the community pier at Spout Farm or remand the matter to the Board with instructions to make findings regarding the lawfulness of the community pier.

Mr. Spigler filed a response memorandum, which was adopted and incorporated by appellee Spout Farm, arguing that the Board's Order was supported by substantial evidence. At the time of Spout Farm's inception, it "meant to have a community pier," and the Board recognized as such in its Order. In 1981, the Board approved a ten-slip community pier for Spout Farm, the 1981 Order was not appealed, and it was binding at this time.

Spout Farm subsequently obtained a building permit, the pier was constructed in 1982, and it was inspected by the County. Due to the "passage of time" between then and now, the record did not have any evidence of

> any County plans indicating what the original approved configuration of the community pier was, what the shoreline looked like in 1982 and thus how the lateral lines were drawn at that time versus the current shoreline/lateral lines, how many pilings or finger piers the original County community pier building permit allowed, how and/or where the community pier was actually constructed, nor what changes were made to the community pier from the time it was built in 1982 to the present.

The record also did not include any appeals of the 1981 Order, and two appellants, the Fehr's, although owners of lots during this time, did not object to the 1981 Order or the issuance of the permit. Based on this record, they argued that appellants were wrong in asserting that the Board "ignored" evidence that the community pier was unlawful when it was built.

Rather, Ms. Cook provided evidence at the hearing about the legality of the pier as it relates to the County permit. She testified that her office was able to determine that a permit was issued for the pier, and the pier was constructed and inspected because her office found an inspection card, which were regularly used for inspections in 1981.

With respect to the argument that the community pier has never been a lawful nonconforming structure based on alleged violations of lateral lines and an alleged violation of the original Corps of Engineers permit, appellees noted that appellants did not offer evidence indicating where the shoreline was in 1981 and 1982 or show how many mooring pilings or finger piers were initially approved by the County versus how the

configuration changed during the pier's 38 years in existence. In contrast, the record reflected that Spout Farm received approval from the Board in the 1981 Order to construct a ten-slip community pier, which was permitted and inspected by the County.

Appellees asserted that the Board recognized the significance of the fact that there had been no objections to the construction of the community pier for many years, noting that one Board member stated that the case "boils down" to the fact that the pier had been in existence for 38 years before it was ever challenged. Appellees argued that, given the failure to appeal the 1981 Order, appellants failed to exhaust their remedies and the action was barred by laches, estoppel, and the statute of limitations.

Regarding appellants' argument that, pursuant to the current regulations, the community pier and the residents' private piers cannot coexist, appellees argued that there has never been a County regulation that prohibited community piers if private piers were present in the community. When the community pier was built, there was no prohibition on the use of private and public piers in Calvert County. The current regulations prohibit *private piers* in new developments with a community pier. There was, however, "no Code restriction on building community piers in subdivisions with private piers."[12]

[12] Ms. Cook testified that her office issued private pier permits for Spout Farm "knowing there was already an existing community pier in Spout Farm" because there was a private pier existing at the time the community pier was built, and the Department wanted to be consistent.

Appellees argued that the approved community pier took a lawful nonconforming use, to be replaced by a conforming use. The Board properly applied the regulations and upheld the issuance of the permit.

Appellants submitted a reply brief. In addition to reiterating arguments already made, appellants clarified that they were not challenging what happened in 1981 or 1982; they were challenging whether the Zoning Officer erred in determining that the permit to reconstruct the pier should be issued in 2019. The Zoning Officer had to make a "mandatory assessment" regarding conformity or lawfulness. That is the issue presented, not decisions made in 1981. Thus, appellees' equitable arguments regarding estoppel and laches did not have a bearing on this action.

Appellants argued that the Board "obviously misunderstood" the concept of nonconformity. Nonconformity requires a change in the ordinance, and the ordinance governing lateral lines and setbacks from the lateral lines had never changed. Therefore, failure to abide by these rules can only be classified as unlawful failures to comply with the law, which should have led to the denial of the permit.

On April 29, 2021, the Circuit Court for Calvert County issued its decision affirming the Board's decision. The court noted that the "issue central" to the case was whether the community pier is nonconforming, which was determined by the following two questions: whether the use and structure lawfully existed prior to a change in the applicable ordinance; and whether there was a change in the ordinance that made the use and structure no longer conforming. Appellees conceded that the pier no longer conformed with the Calvert

County Zoning Ordinance, so the issue in the case was whether the community pier was conforming when it was first installed.

The court discussed the history of the pier and the 1981 Order allowing the community pier to have 10 slips. It also discussed the letter from Mr. Marsh discussing the required setbacks and the newsletter addressing the same. It noted that the permit was issued, the pier was built, and Ms. Cook testified that "there was evidence an inspection of the pier occurred." It also noted that the record had some missing relevant evidence, including any appeal of the 1981 Order, County plans documenting the approved configuration of the pier, how the pier was constructed in 1982, any changes made to the pier over the years, and the lateral lines as they were drawn in the 1980's as compared to now. This lack of facts presented a dispute in which each party drew contrasting inferences about the lawfulness of the pier in 1981 and 1982.

The court pointed to these "large gaps in the information presented from the time of the community pier's construction." There was no testimony regarding lateral lines and shorelines in 1981 and 1982 or the original approved configuration of the community pier. Although appellant presented Mr. Marsh's letter and the newsletter, which both addressed an issue with the lateral lines, the County subsequently issued the permit, and the pier was built and inspected. The Board could infer that the issues were resolved by the time the permit was issued and the inspection was performed.

The court found that, contrary to appellants' claims, the Board did consider the lawfulness of the community pier at the time it was built. The court pointed to the Board's

Order that stated there was a small window during which the 1981 Order legalized the community pier. Although the 1981 Order only found the structure, not the use, lawful, because it approved ten slips instead of six, "the Board's decision does not note any other events that made the pier nonconforming."

The court found that the Board's decision was supported by substantial evidence in the record, and the inferences and assumptions the Board made were reasonable. The permit issued by the County after the issue with the lateral lines was flagged indicates that this issue was rectified prior to the pier's construction. If the lateral lines were violated at the time of construction, or if the pier exceeded the number of mooring piles and finger piers permitted, then the permit would not have been issued and the pier would not have passed inspection. In fact, the opposite presumption, that the office never inspected the pier and allowed an unlawful pier to exist for almost forty years, was unreasonable. The court gave deference to the Board's expertise in this regard; if the Board inferred that the permit and inspection "signaled all issues with the permit were resolved," then the court would defer to the Board's expertise.

The court next addressed appellants' statutory argument that the community pier and private piers could not coexist in the subdivision. The court noted that "the community pier and at least one private pier existed together before the ordinance was changed to disallow private piers with community piers." The ordinance does not state that a community pier cannot be built where a private pier exists. Moreover, the Zoning

Ordinance does not suggest that a community pier must be removed. The Board did not make an erroneous conclusion of law.

This appeal followed.

STANDARD OF REVIEW

The Court of Appeals has explained the standard of review of administrative decisions, as follows:

> For fact findings, a reviewing court applies the "substantial evidence" standard, under which the court defers to the facts found and inferences drawn by the agency when the record supports those findings and inferences. [*Dep't of the Env't v. Anacostia Riverkeeper*, 447 Md. 88, 120 (2016)]. In particular, with respect to factual issues that involve scientific matters within an agency's area of technical expertise, the agency is entitled to "great deference." *Id.*
>
> * * *
>
> With respect to an agency's legal conclusions, a reviewing court accords the agency less deference than with respect to fact findings or discretionary decisions. *Anacostia Riverkeeper*, 447 Md. at 122. In particular, a court will not uphold an agency action that is based on an erroneous legal conclusion. *Id.* However, in construing a law that the agency has been charged to administer, the reviewing court is to give careful consideration to the agency's interpretation.

Maryland Dep't of the Env't v. Cnty. Comm'rs of Carroll Cnty., 465 Md. 169, 201–03 (2019).

Our role in reviewing an agency decision "'is precisely the same as that of the circuit court.'" *Mid-Atlantic Power Supply Ass'n v. Maryland Pub. Serv. Comm'n*, 143 Md. App. 419, 432 (2002) (quoting *Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 303–04 (1994)). We do not consider the circuit court's findings of fact and

conclusions of law. *Id. Accord Maryland Off. of People's Couns. v. Maryland Pub. Serv. Comm'n*, 226 Md. App. 483, 500 (2016).[13]

DISCUSSION

Appellants contend that the Board erred in upholding the decision of the Zoning Office to approve a permit for the reconstruction of the Spout Farm community pier for two reasons. First, they argue that the safe harbor zoning provisions upon which Spout Farm relies, which permit replacement of nonconforming structures or uses, apply only if the community pier qualifies as a nonconforming structure or use, which requires a finding that the use or structure was lawfully existing prior to the time there was a change to the zoning ordinance that rendered it nonconforming. Appellants argue that they presented substantial evidence that the initial pier was constructed unlawfully because (a) it crossed the lateral line of an adjacent lot, without the requisite covenant being filed in the land records binding the land owner to a reduced setback; and (b) it failed to abide by the Corps of Engineers permit restricting the number of mooring piles and finger piers. They contend that, based on this evidence, the Board should have reversed the decision to issue the permit for construction of the community pier. They assert that the Board ignored this evidence and did not consider or address the issue of unlawfulness, the order makes no findings in this regard, and therefore, the decision was arbitrary and capricious.

[13] To the extent that appellants argue that the circuit court erred in its ruling, we will not consider these arguments. Instead, we will focus on the arguments relating to the propriety of the Board's decision.

Second, appellants argue that, because the evidence showed unlawfulness, and the safe harbor provisions did not apply to give Spout Farm the right to rebuild the pier, application to rebuild the pier must be evaluated under the zoning ordinance in effect in 2019, which, they assert, bans "the contemporaneous use of property for a community pier and a private pier." They argue that, because the community pier did not comply with the regulatory scheme when it was built, appellees have no vested right to reconstruct a nonconforming structure.

Appellees contend that the Board's decision approving the issuance of the permit to rebuild the pier should be upheld. They dispute that the Board ignored evidence, asserting that there was no evidence in the record "supporting an inference of 1982 construction illegality." Appellees argue that the Board found that the community pier was legal as constructed, and this finding is based on reasonable inferences supported by substantial evidence in the record.[14]

Counsel for appellants acknowledged at oral argument that they had the burden to show that Spout Farm could not rely on the safe harbor provisions for a nonconforming structure or use because the pier was unlawful when it was initially constructed in 1982. He asserted, however, that the evidence showed that the pier was not lawfully constructed in 1982. Although the circuit court discussed permitted inferences that the Board could

[14] Spout Farm argued to the Board that the community pier was a "legal conforming structure." On appeal, however, appellees agree that the pier currently is a nonconforming structure, but they argue that it is a legal nonconforming structure, which can be replaced as long as the replacement conforms to the lateral lines setback requirement.

have drawn from the evidence to determine that the pier was lawful in 1982, counsel asserted that the Board did not address the issue or make any findings in this regard. Accordingly, he argued that a remand to the Board is required.

We have explained the need for factual findings in an agency decision:

> A reviewing court may not make its own findings of fact, *Board of County Comm'rs v. Holbrook*, 314 Md. 210, 218 (1988), or supply factual findings that were not made by the agency. *Ocean Hideaway Condo. Ass'n v. Boardwalk Plaza*, 68 Md. App. 650, 662 (1986). Findings of fact made by the agency are essential in order for the reviewing court meaningfully to review the agency's decision. *See Gray v. Anne Arundel Co.*, 73 Md. App. 301, 307–09 (1987). Moreover, it is the agency's function to determine the inferences to be drawn from the facts.

Dep't of Lab., Licensing & Regul. v. Muddiman, 120 Md. App. 725, 733–34 (1998). *Accord Pringle v. Montgomery Cty. Plan. Bd. M-NCPPC*, 212 Md. App. 478, 488 (2013) ("[I]t is the agency's province to resolve conflicting evidence and to draw inferences from that evidence."). *Accord Lawson v. Bowie State Univ.*, 421 Md. 245, 265 (2011) (remanding the case to the ALJ because it failed to make the necessary factual findings).

Here, there were a lot of different arguments made before the Board. With respect to the argument that the pier was illegal as constructed because it crossed lateral lines or failed to conform to the Corps of Engineers permit, the Board did not make any explicit findings. In the "Findings of Fact and Conclusions" section of the order, there was only one sentence that addressed the legality of the pier as constructed. The Board's 2020 written order stated:

> The [1981 Order] recognized that there was a small window that legalized the community pier. The pier became nonconforming after the ordinance went into effect.

The 1981 Order, however, determined that a pier could be built pursuant to the law as it existed prior to a new ordinance enacted on April 21, 1981.

The Board never explicitly addressed, or made a finding with regard to, what is now presented as the critical issue, i.e., whether the pier complied with lateral lines or with the Engineer Corps permit. Because there is a dispute of fact on this issue, and the Board did not address it (or it is not clear to this Court based on the language in the Order that it did so), and because a finding regarding whether the pier was lawful when initially constructed is crucial to resolving the issue whether the pier is a nonconforming structure or use that may be replaced, we remand for further proceedings.[15]

JUDGMENTS OF THE CIRCUIT COURT FOR CALVERT COUNTY VACATED, WITH INSTRUCTIONS TO REMAND TO THE BOARD FOR FURTHER FINDINGS CONSISTENT WITH THIS OPINION. COSTS SPLIT BY THE PARTIES, 50% BY APPELLANTS AND 50% BY APPELLEES.

[15] Appellants' second contention is the community pier should not be allowed because the law at this time provides that community piers and private piers are not allowed in the same subdivision. *See* Calvert County, Md., Zoning Ordinance § 9-6.01.B.2 ("If the lot or parcel lies within a subdivision created after April 21, 1981 (date of original legislation on community piers) which contains a community pier, no private piers shall be permitted."). Counsel for appellants conceded at oral argument, however, that we get to this contention only if there is a conclusion that the pier does not receive safe harbor as a nonconforming structure or use. Because we remand for further findings on that issue, we do the same on this issue.