Circuit Court for Frederick County
Case No. C-10-CV-19-000960

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0960

September Term, 2020

CLEANWATER LINGANORE INC., ET AL.

v.

5703 URBANA PIKE LLC, ET AL.

Berger,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: October 7, 2021

Following a *de novo* hearing, the Frederick County Board of Appeals reached a two-to-two tie vote on a motion to deny a site plan for a proposed asphalt plant. Pursuant to the Board of Appeals' bylaws, the tie vote resulted in a denial of the site plan. Double M, LLC ("Double M") and 5703 Urbana Pike, LLC ("Urbana Pike"), the applicants for site plan approval, petitioned for review in the Circuit Court for Frederick County, which "reversed, vacated, and remanded" the Board's decision for further fact finding. Howard Crum, Virginia Crum, Patricia Fowler, Scott W. French, LouWanna K. French, Alta Kraft, Bernard J. Sellers, Terrie D. Sellers, Daniel P. Shaw, Brittany A. Shaw, Cleanwater Linganore, Inc., and St. Johns Catholic Preparatory School Inc. ("Appellants") appeal the order of the circuit court. They seek affirmance of the Board of Appeals' decision denying the site plan.

Because the Board's explanation for its decision is inadequate to allow for judicial review, we shall vacate the circuit court's order with instructions that the decision of the Board of Appeals shall be remanded, without affirmance or reversal.

FACTUAL AND PROCEDURAL BACKGROUND

Double M and Urbana Pike applied to the Frederick County Planning Commission for approval of a site development plan to build a hot-mix asphalt plant on a twenty-five-acre lot along Buckeystown Pike. Approximately twenty-two acres of the lot are within an area of Frederick County zoned as mineral mining. Approximately three acres are zoned as agricultural. The site would be used for the manufacture of hot asphalt, stockpiling of materials, and quality testing.

Following a hearing, the Planning Commission split three-to-three in a vote on a motion to approve the site plan. Under the Planning Commission's rules of procedure, a tie vote results in a failure to approve the motion upon which the vote was taken. Hence, the site plan was not approved. Double M and Urbana Pike appealed to the Frederick County Board of Appeals. The Board of Appeals determined to hear the matter *de novo*. Evidence was admitted and testimony was taken from the applicants, county staff, and interested parties, including on the propriety of the proposed asphalt plant in the mineral mining district. One of the important issues before the Board concerned the definition of "site" in the zoning ordinance: the code permits "[m]ineral extraction and processing, including grinding, polishing, washing, mixing and sorting, stockpiling, and manufacture of finished products which contain at least 40% of material derived on site." Frederick County Code § 1-19-10.400.6. Double M's quality control manager, Mr. Utz, testified that there would not be a quarry operation on site and all of the "crushed aggregate" would be "derived from the mineral mining district that adjoins it."

Another contentious issue concerned the minimum size for lots within the mineral mining district. Section 1-19-10.400.7(A)(1) states that the "[m]inimum lot size shall be 25 acres." Although the lot at issue is twenty-five acres, only twenty-two of those acres are within the mineral mining district.

At the conclusion of the hearing, a member of the Board moved to deny the site plan. The transcript reads as follows:

> MR. NEALE: . . . In the last presentation, staff, Ms. Mitchell showed this map and was arguing that the dotted area, the extraction area from 1959,

> defined the site. I disagree with that. As the Board of Code Appeals, our job is to determine whether or not staff interpreted the law correctly. We're ruling administratively on their decisions. I contend that they did not interpret the term "site" correctly. Mr. Utz in his own testimony today said that there would be no quarry on the site. They're deriving their material from the adjoining quarry. And in accordance with section 1-19-10.400.6, they're not [] able to get the 40 percent of material off the site.
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> * * *
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> It's been a site plan. They've referred to it as the site, and consensus we agree that there's no definition of what constitutes a site, but I think anybody, my opinion, would rationally look at that and say that's the site, not there. . . . So I'm gonna move that in the matter of B-19-13 . . . I move the project proposal is not in compliance with the Frederick County Zoning Ordinance because, one—
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> One, the proposed activity does not include a, quote, quarry type operation as specified in section 1-19-10.400.6, and two, the applicant cannot guarantee 40 percent of the material will be derived on site, per 1-19-10.400.6(A)(1).

The voting members split two-to-two. The Board's bylaws state:

> The majority of the votes cast are required to grant an application or appeal. Failure to obtain the majority of the votes cast shall have the effect of a denial. A tie vote shall constitute a denial of the requested relief.

The tie voted resulted in the denial of the site plan.[1]

The Board issued a written decision reciting the procedural history of the site plan application. Concerning the merits of the site plan application, it noted that the member moved to deny the site plan "because the Applicant [did] not meet the requirements listed in Zoning Ordinance Section 1-19-10.400.6 and 1-19-10.400.6.A.1., and that Staff

[1] The County explained at oral argument before this Court that, due to an informal procedural mechanism, tie votes typically do not occur. For a variety of reasons, that procedure was not followed in this case.

misinterpreted the definition of *site*." No further explanation was provided.

The applicants petitioned for review in the circuit court. The county, along with the Appellants, responded in opposition to the petition. The circuit court held a hearing, at which it noted "there is not enough information in this findings and decisions for the Court to make a decision or because counsel cannot make the proper arguments based on the lack of information in it." The circuit reversed, vacated, and remanded for further factual finding before the Board. This timely appeal followed.

ISSUES PRESENTED FOR REVIEW

Appellants present a single question for our review,[2] but we refocus our decision on two threshold questions which Appellants suggest we may answer in the affirmative:

I. Whether a tie vote of the Board of Appeals may be affirmed without a written decision?

II. Whether the Board's findings of fact and conclusions of law are adequate for judicial review?

For the reasons discussed below, we shall vacate the circuit court's order with instructions to remand to the Board of Appeals without affirmance or reversal.

DISCUSSION

I. THE TIE VOTE DOES NOT ALTER OUR STANDARD OF REVIEW OR OBVIATE THE REQUIREMENT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The parties disagree as to the applicable standard of review. Appellants contend that

[2] Appellants present the question as: "Must the BOA denial be sustained when (1) a "reasonable mind" could conclude the Site Plan fails to satisfy governing code standards; (2) substantial evidence of record supports that conclusion; and (3) the circuit court found no error of law?"

the tie vote necessitates a distinct standard of review. They first argue that the tie vote has the effect of a "statutory denial," for which the Board was not required to issue a written decision or make findings of fact. They argue that the reviewing court must undertake an independent review of the record to determine whether evidence in the record could support a conclusion to deny the site plan for any reason. Alternatively, they argue that the court must review the entire record to determine if the evidence could support the reasoning offered by the members voting to deny. Double M and Urbana Pike, along with the County, argue that this Court must review findings of fact set forth by the Board to determine whether they are supported by substantial evidence and review its conclusions of law *de novo*.

Appellants' arguments in favor of a standard of review akin to the standard in cases involving the denial of a zoning action by operation of a statute are unavailing. *Mayor of Baltimore v. Biermann*, which involved a statute requiring the vote of four out of five board members to grant an application for a special exception, is exemplary of the standard of review in challenges to a statutory denial. 187 Md. 514, 519–20 (1947). After the board of appeals in *Biermann* reached a three-to-two vote, resulting in denial of an exception, the circuit court reversed and directed the board to grant the exception. *Id.* at 516–18. The Court of Appeals reversed the circuit court, noting that the court failed to apply the proper standard of review. *Id.* at 523. The Court of Appeals set out the standard of review in that case:

> Considering the action of the Board as an exercise of delegated legislative or quasi legislative[] power, the scope of review is different and in some respects more limited than where the action is quasi judicial; e.g. the court must find that the result of the action is beyond the police power and deprives the applicant of property without due process of law. On this question the property owner has the heavy burden of overcoming the presumption of constitutionality of legislative action, even if the legislative body acted without evidence at all. . . . If the legislature substituted, for an absolute prohibition, an authority to grant a permit subject to the veto of a minority of the Board, the burden of setting aside the negative action is no less than in the case of an absolute prohibition.

187 Md. at 523. Appellants also cite to *Levy v. Seven Slade, Inc.*, which applied this standard to a board of appeal's review of a similar action. *See Levy v. Seven Slade, Inc.*, 234 Md. 145, 150–51 (1964) (applying the *Biermann* standard of review where the Baltimore Board of Appeals, exercising appellate review, "produced a continuance" of the zoning commissioner's denial of an application for a special exception following a one-to-one split decision); *see also Armstrong v. Mayor of Baltimore*, 169 Md. App. 655, 668 (2006) ("Unlike ordinary statutory and nonstatutory judicial review of administrative decisions, legislative actions are subject to much more limited review."). Appellants have not identified any case where a reviewing court treated a tie vote or an applicant's failure to meet a burden of proof in a quasi judicial proceeding as a statutory denial. *Nat'l Waste Managers, Inc. v. Forks of the Patuxent Improvement Ass'n, Inc.*, makes clear that a tie vote does not alter the standard of review on its own. 453 Md. 423, 441–42 (2017).

Here, the parties agree that the Board of Appeals was not exercising a delegated legislative power, and Appellants have not identified a statute comparable to the one in *Biermann* creating a "veto power." Sitting *de novo*, the Board stepped into the role of the

Planning Commission, which is tasked with an adjudication. The Planning Commission must assess a site plan's compliance with particular criteria. Frederick County Code § 1-19-3.230(D) (*de novo* review); § 1-19-3.300.3-4 (site plan review and approval criteria). Appellants forthrightly indicate that the cases they rely on to support their proposed standard of review all concern legislative or quasi-legislative acts. The Board's bylaws do not create a statutory veto power for the Board and do not change the nature of the Board's task.

The case law firmly establishes that we may affirm an agency's action only on the grounds set forth in its decision. In appellate review of a trial court judgment, generally, the appellate court may "search the record for evidence to support the judgment and . . . sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court." *Mayor of Baltimore v. ProVen Management, Inc.*, 472 Md. 642, 667 (2021) (quoting *United Steelworkers v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984)). "By contrast, in undertaking judicial review of an agency action, the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency." *Id.* Agencies are required to set forth findings of fact and conclusions of law to "apprise the parties of the basis for the agency's decision" and to "facilitate judicial review"; "[j]udicial review cannot occur in the absence of an administrative agency's stated findings of fact and conclusions of law to support its decision." *Id.* at 668. "[W]here the administrative agency has not rendered sufficient or meaningful factual findings upon which a reviewing court can undertake judicial review,

we have remanded the case to the administrative agency for the purpose of having the deficiency remedied." *Id.*

In the event of a tie vote, our review focuses on the findings and conclusions set forth by the members who voted to deny the site plan. *Nat'l Waste*, 453 Md. at 441–42. The tie vote—or the failure to obtain the required majority—does not "render [the Board's] action a nullity[] or open the question to unlimited review." *Biermann*, 187 Md. at 522; *see Lohrmann v. Arundel Corp.*, 65 Md. App. 309, 315–17 (1985) (distinguishing the effect of a tie vote where a multimember board acts *de novo* from a tie vote where it exercises appellate jurisdiction). The reviewing court "must decide as if the [petition for review] had been taken from a majority decision by the Board." *Stocksdale v. Barnard*, 239 Md. 541, 547 (1965). The "no" votes of the members voting to deny the action are the "dispositive" votes in a tie vote, and those members' findings and conclusions offer the basis for judicial review. *Nat'l Waste*, 453 Md. at 441–42. Those findings and conclusions are reviewed under the substantial evidence test:

> Our scope of review is narrow and is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. We defer to the regulatory body's fact-finding and inferences, provided they are supported by evidence which a reasonable person could accept as adequately supporting a conclusion.

Kenwood Gardens Condos., Inc. v. Whalen Properties, LLC, 449 Md. 313, 325 (2016) (citations and internal quotation marks omitted). We look through the decision of the circuit court to review the Board of Appeals' decision. *Id.* at 324

II. THE BOARD'S DECISION IS INADEQUATE FOR JUDICIAL REVIEW.

Appellants ask this Court to affirm the site plan denial. They argue that the Board's findings are clear concerning the definition of "site" in 1-19-10.400.6(A)(1) and that definition does not permit Double M and Urbana Pike's proposed use. The County argues that the Board's tie vote was a "non-decision" and this Court should remand so that "the Board as a whole will have a chance to make findings and decisions in this case." Double M and Urbana Pike ask this Court to affirm the circuit court. For the reasons explained below, the case shall be remanded to the Board of Appeals, without affirmance or reversal, to set forth the findings and conclusions that supported the decision of the members voting to deny. In so far as the circuit court reversed and vacated the Board's decision, the circuit court's order shall be vacated.

A. We Shall Remand to the Board of Appeals.

"Even in the absence of a statutory requirement for written findings of fact, where findings of fact are not in the record, the Court has remanded for the purpose of making such findings." *Ocean Hidewaway Condo. Ass'n v. Boardwalk Plaza Venture*, 68 Md. App. 650, 656 (1986). "Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." *Bucktail, LLC v. Cnty. Council*, 352 Md. 530, 553 (1999). There are sound reasons for this requirement:

> Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision thus arrived at should be sustained.

Gough v. Board of Zoning Appeals, 21 Md. App. 697, 702 (1974) (quoting 3 R.M. Anderson, *American Law of Zoning* § 16.41, at 242 (1968)). "An agency's written findings must at least be sufficiently detailed to apprise the parties as to the basis for the agency's decision." *West Montgomery Cty. Citizens Ass'n v. Montgomery Cty. Planning Bd.*, 248 Md. App. 314, 335 (2020) (internal quotation marks omitted).

In this case, the decision simply states: "On a motion by Mr. Neale, second by Mr. Miller, the Board voted to deny the site plan because the Applicant does not meet the requirements listed in Zoning Ordinance Section 1-19-10.400.6 and 1-19-10.400.6.A.1, and that Staff misinterpreted the definition of *site*." This sentence does not adequately explain the basis for the denying members' decision. And although Mr. Neale's statements on the record, which are somewhat more developed, provide some insight into his reasoning, they lack sufficient clarity for judicial review. It is not the role of this Court to divine the basis for an agency decision. As the circuit court noted, the interpretation of the Ordinance is essential for judicial review as well as for informing the applicants about the controlling interpretation of Frederick County's zoning laws. *See West Montgomery Cnty. Citizens Ass'n*, 248 Md. App. at 335–36.

The County asserts that, as a result of the tie vote, it was impossible for the Board to agree "as a body" on specific reasoning and facts that led to the site plan denial. It further characterizes the Board's denial as a "non-decision." We do not agree with this characterization: the site plan application was denied through a valid, final action. *See Lohrmann*, 65 Md. App. at 320. We see no basis to conclude that the tie vote, expressly

anticipated in the Board's bylaws, precludes a reasoned decision. The Board's responsibility following a tie vote is no different than if a majority of members had voted to deny the application—it must explain that basis for its action. *See Nat'l Waste*, 453 Md. at 441–42. It did not do so here.

Despite the written decision's shortcomings, reversal is not warranted. "Reversal" implies the direction of a different outcome based on a legal error; reversal is premature without an opportunity for meaningful review. *See United Steelworkers*, 298 Md. at 679 ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong."); *ProVen Mgmt. Inc.*, 472 Md. at 669 ("[W]here the administrative decision or order fails to supply detailed findings of fact or conclusions of law, the appropriate disposition is for the reviewing court to remand the matter to the administrative agency for further proceedings.").

B. Instructions on Remand

Accordingly, the circuit court order is vacated. We instruct the circuit court to remand to the Board without affirmance or reversal for a decision setting forth dispositive findings and conclusions reflecting the views of the members who voted to deny the site plan.[3] As in a majority decision, the decision should identify the material facts and apply the law to the facts. The decision need not offer an exhaustive analysis of all arguments. We remand for the Board to remedy the deficiency identified in this opinion.

[3] We note that although the County, Double M, and Urbana Pike ask that the remand order include further evidentiary hearings, they have not identified any additional evidence that should or would need to be considered for the purposes of this limited remand.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY VACATED WITH INSTRUCTIONS TO REMAND THE DECISION OF THE FREDERICK COUNTY BOARD OF APPEALS CONSISTENT WITH THIS OPINION. FIFTY PERCENT OF COSTS TO BE PAID BY APPELLANTS, FIFTY PERCENT BY APPELLEES.