

Circuit Court for Anne Arundel County
Case No. C-02-CV-16-001734

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2448

September Term, 2016

JAMES WAGNER

v.

ANNE ARUNDEL COUNTY
BOARD OF APPEALS

Eyler, Deborah S.,
Friedman,
Moylan Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 23, 2018

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

James Wagner, the appellant, sought two variances from development prohibitions imposed by the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program (“CAPP”) in order to construct a roofed sunporch on his waterfront property in Anne Arundel County. The Anne Arundel County Board of Appeals (“Board”) denied his requests on the ground that they did not satisfy the statutory criteria necessary to permit a variance, including a demonstration that strict compliance with the CAPP would result in an unwarranted hardship. Wagner filed a petition for judicial review in the Circuit Court for Anne Arundel County, which affirmed the Board’s decision. This appeal followed.

Wagner presents three questions for review, which we have consolidated into one:¹ Did the Board err by denying Wagner’s variance requests; or, stated differently, did the Board err by finding that Wagner did not satisfy all the variance criteria? We hold that because Wagner failed to prove that the denial of his variance requests would result in an unwarranted hardship, the Board correctly denied them.

¹ In his own words, Wagner’s questions are:

I. Did the Board err by failing to properly assess the environmental impacts of Mr. Wagner’s proposal in accordance with the [Anne Arundel County Code] § 3-1-207(b) variance criteria and basing its decision on unsupported assumptions that contradict the unrefuted record evidence?

II. Did the Board err by misapplying the applicable legal standards and ignoring the undisputed record evidence in concluding that Wagner’s proposal failed to satisfy the variance criteria set forth in [Anne Arundel County] Code § 3-1-207(b)?

III. Did the Board err in concluding that Mr. Wagner’s proposal failed to satisfy the requirements of [Anne Arundel County] Code § 3-1-207(e)?

FACTS AND PROCEEDINGS

Statutory Framework

The General Assembly enacted the CAPP to minimize harm to the water quality and natural habitat of the Chesapeake Bay “by fostering more sensitive development activity for certain shoreline areas[.]” Md. Code (2000, 2012 Repl. Vol.), § 8-1801(b)(1) of the Natural Resources Article (“NR”). The CAPP is a state law, but the primary responsibility for developing and implementing the requisite protection program falls upon the local jurisdictions. NR § 8-1808(a). Each jurisdiction’s protection program “must meet several requirements, including creating a comprehensive zoning map for the critical area, and crafting a system for the granting of variances to these zoning schemes.” *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 613 (2014) (citing NR § 8-1808(c)(1)(iii)).

The CAPP regulates development within the Chesapeake Bay Critical Area (“Critical Area”), which is “[a]ll waters of and lands under the Chesapeake Bay and its tributaries[.]” as well as “a 1000-foot swath of land adjacent to the” landward boundaries of wetlands. *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 118 (2016); NR § 8-1807(a).² The CAPP divides land within the Critical Area into three categories: intensely developed areas, limited development areas, and resource conservation areas.

² The CAPP also regulates development in the Atlantic Coastal Bays Critical Area, which, similar to the Chesapeake Bay Critical Area, consists of all waters of and lands under the coastal bay and a 1000-foot swath of land adjacent to those coastal bays. NR § 8-1807(b).

NR § 8-1802(a)(13), (15), (22). The case at bar concerns limited development areas.

They are

those areas which are currently developed in low or moderate intensity uses. They also contain areas of natural plant and animal habitats, and the quality of runoff from these areas has not been substantially altered or impaired.

COMAR 27.01.02.04(A). Local jurisdictions charged with creating protection programs for limited development areas are required to follow policies established in state regulations, such as the mandate to “[m]aintain or . . . improve the quality of runoff and ground water entering the Chesapeake bay and its tributaries[.]” COMAR 27.01.02.04(B)(1).

The CAPP further requires that local jurisdictions establish “buffers” within the Critical Area. NR §§ 8-1801(a)(4) & 1808(c)(1)(iii). A buffer is

an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from manmade disturbances.

NR § 8-1802(a)(4). The Anne Arundel County Code, 2005 (“AACC”) requires “a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands.” AACC § 18-13-104(a). It also establishes the buffer modification area, which is subject to its own development criteria. AACC § 18-13-104(c); COMAR 27.01.01.01(39-2)(a)(ii). A buffer modification area is an “area established . . . with respect to all or part of a lot created before December 1, 1985 on which the existing pattern of development prevents the 100-foot buffer from performing its protective functions.” AACC § 18-13-104(c).

In accordance with the CAPP’s directive, Anne Arundel County has adopted zoning restrictions as part of its protection program. Two of those restrictions are pertinent here. What we shall call the “New Lot Coverage restriction” provides that “[n]o new lot coverage [within the buffer modification area] shall be placed nearer to the shoreline than the closest façade of the existing principal structure[.]” AACC § 17-8-702(b)(1). What we shall call the “Steep Slope restriction” provides that

[d]evelopment in the limited development area . . . may not occur within slopes of 15% or greater unless the development will facilitate stabilization of the slope; is to allow connection to a public utility; or is to provide direct access to the shoreline. All disturbances shall be limited to the minimum necessary.

AACC § 17-8-201(a).

A person who seeks to develop on property in the Critical Area in violation of the zoning restrictions may request a variance from the County Administrative Hearing Officer, and then, if that request is denied, from the Board. AACC Art. V, § 535(b); AACC § 3-1-207. The AACC sets forth “specific standards and detailed criteria for granting variances to properties located in the [C]ritical [A]rea.” *DCW Dutchship Island*, 439 Md. at 613. These criteria, thirteen in total, are set forth in AACC sections 3-1-207(b) and (e).³ A variance will not be granted unless the Board finds that *all* of the

³ AACC § 3-1-207(b) states:

Variances in the critical area or a bog protection area. For a property located in the critical area or a bog protection area, a variance to the

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requirements of the County critical area program or bog protection program may be granted only upon an affirmative written finding that:

(1) because of certain unique physical conditions, such as exceptional topographical conditions peculiar to and inherent in the particular lot, or irregularity, narrowness, or shallowness of lot size and shape, strict implementation of the County's critical area program would result in an unwarranted hardship, as that term is defined in the Natural Resources Article, § 8-1808, of the State Code, to the applicant;

(2)

(i) a literal interpretation of COMAR, Title 27, Criteria for Local Critical Area Program Development, or the County critical area program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas, as permitted in accordance with the provisions of the critical area program, within the critical area; or

(ii) the County's bog protection program will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the bog protection area of the County.

(3) the granting of a variance will not confer on an applicant any special privilege that would be denied by:

(i) COMAR, Title 27, or the County critical area program to other lands or structures within the County critical area; or

(ii) the County's bog protection program to other lands or structures within a bog protection area;

(4) that the variance request:

(i) is not based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance was filed; and

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(ii) does not arise from any condition relating to land or building use on any neighboring property;

(5) that the granting of the variance:

(i) will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the County's critical area or a bog protection area; and

(ii) will be in harmony with the general spirit and intent of the County critical area program or bog protection program;

(6) the applicant for a variance to allow development in the 100-foot upland buffer has maximized the distance between the bog and each structure, taking into account natural features and the replacement of utilities, and has met the requirements of § 17-9-208 of this Code; and

(7) the applicant, by competent and substantial evidence, has overcome the presumption contained in the Natural Resources Article, § 8-1808, of the State Code.

AACC § 3-1-207(e) states:

Required findings. A variance may not be granted under subsection (a) or (b) unless the Board finds that:

(1) the variance is the minimum variance necessary to afford relief;

(2) the granting of the variance will not:

(i) alter the essential character of the neighborhood or district in which the lot is located;

(ii) substantially impair the appropriate use or development of adjacent property;

(iii) reduce forest cover in the limited and resource conservation areas of the critical area;

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criteria are satisfied. AACC § 3-1-207(b); *see also* NR § 8-1808(d)(5)(ii) (“A variance to a local jurisdiction’s critical area program may not be granted unless . . . [t]he local jurisdiction finds that the applicant has satisfied each one of the variance provisions.”).

Wagner’s Property and Variance Request

Wagner’s property is 1.78 acres, bordered by Broad Creek on the west and the South River on the south (“the Property”). It lies entirely within the Critical Area. Most of the Property is classified as limited development area.⁴ Additionally, nearly 50% of the Property contains steep slopes, and 80% of it is within the buffer modification area.

The Property is improved with a large two-story house, with an attached waterfront deck; a concrete patio below the deck; a driveway; slate steps; and an electric tram leading from the house to the shoreline. There is a pier and deck at the water. The Property is in the R2 District (Residential) and is more than three times the minimum lot size for that district. Wagner lives at the Property.

Wagner wanted to build an attached 20-by-22 foot (440 square feet) screened-in porch with a roof and ceiling fans (“the Structure”). Wagner, who is in his late 70s,

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(iv) be contrary to acceptable clearing and replanting practices required for development in the critical area or bog protection area; or

(v) be detrimental to the public welfare.

⁴ A small portion of Wagner’s property also is classified as resource conservation area. Wagner’s requested variance does not involve that portion of the Property.

believed the Structure would allow him to enjoy the outdoors while being protected from the sun and heat. He wanted the Structure to be attached to his house at a location that would give him a view of the waterfront and of his driveway at the same time. He considered that to be important because trespassers often entered on his driveway to look at the water and eat lunch. According to Wagner, his existing deck, which is uncovered and faces away from the driveway, does not provide him the advantages the Structure will.

To build the Structure, Wagner sought two variances from the County Administrative Hearing Officer. One variance was from the New Lot Coverage restriction. The Structure was to be built in the buffer modification area, extending beyond the façade of the house toward the waterfront, resting approximately 60 feet from the shoreline. It would add 440 square feet of impervious surface (*i.e.*, the roof) nearer to the shoreline. Wagner planned to build the Structure in a way that would prevent any adverse environmental impact, however. Specifically, he proposed 1) to construct a storm water management system that would collect rainwater from the roof of the Structure and carry it to an underground filtration system beneath the driveway and 2) to reduce the total amount of impervious surface coverage in the buffer modification area by 140 square feet by building nearly half of the Structure directly above the existing slate walkway and by removing 545 square feet of driveway.

The other variance was from the Steep Slopes restriction. The Structure would sit 8 feet above ground and be supported by four 4-by-4 posts, two of which would be footed

in steep slopes. Installation of those posts into the slopes would require a temporary disturbance of 32 square feet. To keep potential runoff to a minimum, Wagner proposed that the posts be installed by hand and that the installation be accomplished in one day.

After the Administrative Hearing Officer denied Wagner's variance requests, he appealed to the Board, which held a hearing on the matter on June 19, 2014. Wagner testified and called two expert witnesses. They opined that the Structure would be reasonable, that it would benefit the environment, and that other properties in Anne Arundel County's Critical Area have multiple covered decks. The County, as the party opposing the variance requests, called Sterling Seay as a witness. Seay was the planner with the County Office of Planning and Zoning who had made findings and recommendations against Wagner's variance requests. She testified that granting the variances would effectively give Wagner a special privilege because "[o]ther property owners would not be permitted to construct impervious outdoor living spaces in the buffer"; that denying the variances would not cause an unwarranted hardship to Wagner because the Property already had "a reasonable amount of outdoor living space"; that granting the variances "would adversely affect the environment[]" because of construction in the buffer modification area; and that Wagner's proposal was not the minimum necessary to afford relief because the 440-square-foot screened porch Structure would be "excessive in steep slopes and the buffer."

On September 3, 2014, the Board issued a written final decision denying Wagner's variance requests. Wagner filed a petition for judicial review in the Circuit Court for

Anne Arundel County. The circuit court remanded the matter to the Board, instructing it to 1) consider the environmental benefits of the Structure as proposed, 2) consider the evidence of the existence of similar structures in neighboring properties, 3) distinguish between Wagner's two variance requests, and 4) clarify the standard utilized to evaluate whether Wagner would suffer an unwarranted hardship.

On remand, the Board heard additional legal arguments from the parties. On May 6, 2016, it issued a supplemental memorandum opinion, again denying Wagner's variance requests. The Board made clear that it was denying both variances, explained that Wagner did not provide sufficient evidence to demonstrate the existence of similar structures on neighboring properties, and described the unwarranted hardship standard as the denial of a "reasonable and significant use of the entire parcel or lot for which the variance is requested." (Quoting NR § 8-1808(d)(1)). The Board declined to evaluate the environmental benefits of Wagner's proposal, reasoning that such an evaluation was outside the purview of the variance criteria.

Ultimately, the Board denied Wagner's requested variances because he failed to satisfy the criteria for them for the following reasons: denial of the variances would not result in an unwarranted hardship (AACC § 3-1-207(b)(1)); he failed to prove that he would be deprived of a right commonly enjoyed by owners of other properties in similar areas (AACC § 3-1-207(b)(2)(i)); the Structure would equate to a special privilege (AACC § 3-1-207(b)(3)); the Structure would adversely impact the environment within the Critical Area (AACC § 3-1-207(b)(5)); he failed to produce substantial evidence to

show that his variances conformed to the purpose of the CAPP (AACC § 3-1-207(b)(7)); the requested variances were not the minimum necessary to afford relief (AACC § 3-1-207(e)(1)); and the Structure would be detrimental to the public welfare (AACC § 3-1-207(e)(2)(v)).

Wagner again filed a petition for judicial review. On January 3, 2017, the circuit court entered an order affirming the Board’s decision. The court stated that it was “satisfied that the Board . . . had substantial evidence to find that the Petitioner did not meet his burden to be granted either variance[.]” Wagner noted a timely appeal.

We shall include additional facts as necessary to our discussion.

DISCUSSION

When reviewing a decision by the Board, an administrative agency, “we look through the circuit court’s . . . decision[], . . . and evaluate the decision of the agency.” *Schwalbach*, 448 Md. at 124 (quoting *People’s Counsel for Baltimore Cty. v. Loyola College*, 406 Md. 54, 66 (2008)). “Judicial review of administrative agency action is narrow. The court’s task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency[.]” *Loyola College*, 406 Md. at 66–67 (quoting *United Parcel Serv. Inc. v. People’s Counsel for Baltimore Cty.*, 336 Md. 569, 576–77 (1994)).

With regard to judicial review of administrative decisions on variances, we have explained:

[T]he correct test to be applied is whether the issue before the administrative body is fairly debatable, that is, whether its determination is

based upon evidence from which reasonable persons could come to different conclusions. In order to be fairly debatable, the administrative agency overseeing the . . . decision must have substantial evidence on the record supporting its decision. In that regard, we inquire whether the zoning body's determination was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion.

Mills v. Godlove, 200 Md. App. 213, 223–24 (2011) (internal quotations and citations).

We review an agency's decision in a light most favorable to it and presume that it is valid. *Schwalbach*, 448 Md. at 124. “However, we do not defer to the agency on the applicable legal standard.” *Id.*

It is well-established that the agency may not grant a variance request unless it finds that all the criteria are satisfied. *DCW Dutchship*, 439 Md. at 613; *Becker v. Anne Arundel Cty.*, 174 Md. App. 114, 142 (2007); AACC § 3-1-207(b); NR § 8-1808(d)(5)(ii) The variance “applicant ‘bears the burden of proof and persuasion’ as to each of the variance criteria.” *DCW Dutchship*, 439 Md. at 614 (quoting *Critical Area Comm’n for Chesapeake and Atlantic Coastal Bays v. Moreland, LLC*, 418 Md. 111, 119 (2011)); NR § 8-1808(d)(4)(i). In sum, in Anne Arundel County, if the variance applicant fails to satisfy even one criterion set forth in AACC sections 3-1-207(b) and (e), the Board must deny the variance request.

As discussed above, the Board found that Wagner failed to satisfy several of the variance criteria, including his failure to demonstrate that the denial of his variance requests “would result in an unwarranted hardship.” AACC § 3-1-207(b)(1). The Board relied on the statutory definition of unwarranted hardship, which is that, “without a variance, an applicant would be denied reasonable and significant use of the entire parcel

or lot for which the variance is requested.” NR § 8-1808(d)(1). The Board concluded that Wagner would not experience an unwarranted hardship without the Structure on his Property for multiple reasons. It found that Wagner is “unwilling to adopt security or surveillance measures that would avoid the necessity of intensifying the Critical Area development of” the Property. It also found that the Property is “substantially developed” and Wagner already “enjoys a reasonable and significant use of” it. And, it found that “there are large areas of land, beyond the reach of the Critical Area restrictions, to the east and north of the house” on which Wagner could build a covered structure. In conclusion, the Board stated that “in denying [Wagner’s] variance requests, [it] has not denied him a reasonable and significant use of his [P]roperty.”

Wagner contends he satisfied all the variance criteria and the Board erred in finding otherwise. With respect to unwarranted hardship, he argues that the Board applied an incorrect legal standard. Specifically, he asserts that it was improper for the Board to consider the other amenities he has on the Property because none of them offered what he sought via the proposed structure—“an outdoor living space with a roof” from which he could surveil his driveway. He further argues that the Board incorrectly found that he could build the Structure elsewhere on the Property. He maintains that building an outdoor living space in another location would be “awkward” and points to testimony from one of his expert witnesses that “it’s difficult to improve the property without a variance.”

The County maintains that the Board correctly found that Wagner would not experience an unwarranted hardship because, as the Board stated, he had many amenities and enjoyed a reasonable and significant use of the entire Property.

After the Board made its decision in this matter, the Court of Appeals, in *Schwalbach*, clarified the unwarranted hardship standard, *i.e.*, what it means to be deprived of a reasonable and significant use of the entire property. The *Schwalbach* Court concluded from an examination of the case law and the legislative history regarding the CAPP that “there is no support . . . for a reading of the definition of ‘unwarranted hardship’ that requires an applicant to show a deprivation of *all* reasonable and significant use of the actual property. Indeed, there is the opposite.” 448 Md. at 138 (emphasis in original). Ultimately, the Court explained the prevailing standard as follows:

[I]n order to establish an unwarranted hardship, the applicant has the burden of demonstrating that, without a variance, the applicant *would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance.*

Id. at 139 (emphasis added).

Wagner needed both variances to build the Structure at his location of choice on the Property, and his choice of location was based on two alleged needs: to be able to see his driveway from the Structure (in order to keep trespassers away) and to have a roof to protect him from the sun and heat. The Board found that Wagner could secure the Property from trespassers on his driveway without any variance, by “enhancing his

security by constructing a gate.” At the hearing, when asked whether he could build a gate at the entrance of his driveway, Wagner acknowledged that that was “a possibility.” However, as the Board found, Wagner was “simply unwilling to adopt security or surveillance measures that would avoid the necessity of intensifying the Critical Area development” on the Property. It was Wagner’s burden to prove that without the Structure he could not secure his property from trespassers entering his driveway. He plainly failed to satisfy that burden. As was clear from the Board’s questions and decision, Wagner could have secured his driveway from trespassers simply by erecting a gate.

Next, the Board found that if Wagner desired to build an outdoor living space that offered him protection from the sun, he could build that elsewhere on the Property. Specifically, the Board explained that Wagner could build a covered structure to the north or east side of his house. Again, Wagner failed to prove that he could not build a covered structure elsewhere on the Property without a variance. Wagner’s expert testified that “it is difficult to improve the property without a variance.” That, however, does not mean that it could not be done. The mere fact that Wagner wanted to construct the proposed structure to the west of the Property because it was a less “awkward” spot is not a sufficient reason to justify the granting of a variance.⁵ Nor are we convinced by the

⁵ We doubt that Wagner was spoiled for choice when it came to finding places to construct a covered outdoor living space. Eighty percent of the Property lies within the buffer modification area, and nearly fifty percent of the Property contained steep slopes.

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argument Wagner makes in his reply brief, that “there is no evidence, much less substantial evidence, in the record establishing that . . . [he] could actually build a roofed deck anywhere else on his property without the need to apply for” a variance. Wagner bore the burden of proof and production to demonstrate that he could not build the structure elsewhere on his property without a variance. Beyond this, it is plain that Wagner could place umbrellas or other screening devices on his already existing waterfront deck to protect him from the sun.

Accordingly, Wagner failed to demonstrate that denial of the variances sought would result in an unwarranted hardship. Because he failed to satisfy this specific variance criterion, the Board could not have granted his variance request; for that reason, we need not address whether the Board correctly analyzed the other variance criteria.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

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Nevertheless, we cannot say that the Board erred by finding that there was *some*, albeit less desirable, space on which Wagner could construct a covered outdoor living space.