Circuit Court for Talbot County
Case Nos. 20-C-16-009443
20-C-16-009444

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2485

September Term, 2016

LOWES WHARF MARINA, LLC, *et al.*

v.

MARYLAND BOARD OF PUBLIC WORKS, *et al.*

Nazarian,
Reed,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: July 2, 2018

This appeal asks us to determine whether the Maryland Board of Public Works (the "Board") erred when it granted a tidal wetlands license to the Maryland Port Administration ("MPA"), a Maryland State agency, for the proposed Phase III expansion of the Paul S. Sarbanes Poplar Island Environmental Restoration Project (the "Poplar Island Project" or the "Project"). Jefferson Island, LLC and Lowes Wharf Marina, LLC (collectively the "Opponents") opposed the application before the Board and, after it was granted, sought judicial review. The Circuit Court for Talbot County affirmed the Board's decision, the Opponents appeal, and we affirm.

I. BACKGROUND

A. The Wetlands Licensing Process

We begin with a general overview of the wetlands licensing process. Section 16-202(a) of the Environment Article ("EN") precludes a person from dredging[1] or filling[2] on State wetlands without a license. The requirement for a wetlands license and the Board's authority to issue one is found in the Wetlands Act, Environment Article Subtitles 1 and 2 of Title 16.

The procedure for obtaining a license is set forth in the Board's regulations. The Maryland Department of the Environment (the "Department") receives license applications

[1] Dredging is "the removal or displacement by any means of soil, sand, gravel, shells, or other material, whether or not of intrinsic value, from any State or private wetlands." EN § 16-101(e).

[2] Filling means "[t]he displacement of navigable water by the depositing into State or private wetlands of soil, sand, gravel, shells, or other materials" or "[t]he artificial alteration of navigable water levels by any physical structure, drainage ditch, or otherwise." EN § 16-101(f).

and evaluates them against nineteen criteria set forth in COMAR 26.24.02.03. The criteria include, among other things: (i) the ecological, developmental, recreational, and aesthetic values of tidal wetlands, (ii) the proprietary interests of the Board over State wetlands, and (iii) the degree to which dredging and filling activities can be avoided or minimized, will alter or destroy tidal wetlands, are consistent with Federal, State, and local land use plans, will provide facilities for the handling of storm water runoff and sanitary wastes, and will benefit the public. COMAR 26.24.02.03. When reviewing an application for a license to dredge or fill State wetlands, the Department is required to issue a public notice, hold any requested hearings, take any evidence the Secretary deems advisable, and submit a report recommending whether the license should be granted and, if so, on what, if any, terms, conditions, and considerations. EN § 16-202(f); *see also* COMAR 23.02.04.06A. If the Department holds a hearing, it must provide the applicant and any interested person the opportunity to present facts and arguments for or against the license. COMAR 23.02.04.06C. Participants may ask questions, but may not cross-examine. *Id.*

After any hearing, and after evaluating the nineteen criteria, the Department must produce and submit its report and recommendations to the Wetlands Administrator. The report and recommendations must be based on five criteria: (i) legal requirements; (ii) information compiled during site visits; (iii) consultations with governmental units; (iv) evidence admitted during the hearing; and (v) any comments submitted in response to the application. COMAR 23.02.04.07. The report and recommendations must state whether the license should be granted, any terms and conditions to which the license should be

subject, and all relevant findings and documentation. *Id.*; EN § 16-202(f). Upon receiving the report and recommendations, the Administrator must make an independent recommendation to the Board indicating whether a license should be granted. COMAR 23.02.04.08B(1).

Once the Administrator makes a recommendation to the Board, an interested person has one more chance to oppose the license, COMAR 23.02.04.09, when the Administrator reviews any issues raised by opponents and then "attempts to resolve" them. COMAR 23.02.04.09A. If the Administrator is unable to resolve the issues, the interested person may ask to appear before the Board. *Id.* The Board may, but is not required to, permit persons to appear and testify. COMAR 23.02.04.09B ("The Board reserves the right to decline to hear personal appearance testimony based upon the merits of the information before it.").

In deciding whether to grant or deny a license, the Board considers the Department's and Administrator's recommendations, public testimony at any hearing and information available in the public record, and the ecological, economic, developmental, recreational, and aesthetic values the application presents. The ultimate standard is whether granting the license is in the State's best interest. EN § 16-202(g)(1); COMAR 23.02.04.10.

B. The Poplar Island Project and Subsequent Proceedings

The project underlying this proceeding is the third phase of a long-running reclamation project. Poplar Island is a barrier island in the Chesapeake Bay, approximately a mile west of the Talbot County mainland. In the mid-1990s, the MPA and the U.S. Army

Corps of Engineers (the "Corps") proposed to restore Poplar Island to its 1847 size, approximately 1,140 acres, using material dredged from the Baltimore Harbor. The MPA applied for a wetlands license covering Phases I and II of the Project, and in 1996, the Board granted a license with a thirty-year term. This case involves a new license authorizing a proposed Phase III of the Project, in which the MPA would use approximately 28 million cubic yards of clean dredged material to create an additional 575 acres of mixed use habitat on Poplar Island. Once completed, the new portion of the island will include 259 acres of upland habitat, 206 acres of tidal wetlands, and a 110-acre protected open water embayment.

Because Phase III involves dredging and filling on State wetlands, the MPA applied for a new tidal wetlands license, No. 15-0131 (the "License") on February 24, 2015. Upon receiving the application**,** the Department issued a public notice on its website, to various local newspapers, and to adjacent property owners, including the Opponents. The Department sought public comment from June 15, 2015 to July 15, 2015, and held two public hearings on July 7th and 8th in Easton and Millersville, respectively. The Department also solicited feedback from the Maryland Department of Natural Resources, the Maryland Historical Trust, the Corps, the U.S. Coast Guard, and the Talbot County Department of Planning and Zoning.

Paul Zelinske is the co-owner of Jefferson Island, a member of Jefferson Island, LLC and the owner of Lowes Wharf Marina, LLC (the "Marina"). He submitted written comment opposing the License, and at the July 7th hearing, he shared concerns and asked

questions about the impact of Phase III on Jefferson Island and the Marina. He maintained the Project would erode Jefferson Island, that the level of noise from construction would be a nuisance, and that the additional land would attract flocks of cormorants.[3]

The MPA responded to Mr. Zelinske's concerns in writing on September 18, 2015.[4] After reviewing the concerns and comments, the Department determined that the MPA's response, which included information submitted from monitoring conducted during the previous phases, sufficiently addressed most of those concerns. According to the Department, the two concerns not directly addressed by the MPA could be "addressed through Special Conditions placed within the authorization" of the license. But the Department acknowledged the MPA was unable to address one concern: a reduction of the unobstructed view for the two private islands, Jefferson Island and Coach Island. The Department acknowledged that "Jefferson Island's open water view will be significantly reduced due to the close proximity of Jefferson Island to the proposed Poplar Island project expansion area" and that this "unavoidable impact resulting in a reduced view area cannot be minimized or eliminated because of the location of the project." Ultimately, the Department "concluded that the benefits of the project to the citizens of the State outweigh

[3] A cormorant is an aquatic bird that feeds almost exclusively on fish, which can adversely affect fish populations. Also, its waste can kill grasses and trees.
See UNITED STATES FISH & WILDLIFE SERVICE, *Double-crested cormorant*, https://www.fws.gov/southeast/faq/double-crested-cormorants/ (last updated Nov. 29, 2017); *see also* Linda Wires, *Cormorants: the world's most hated bird?*, NEW SCIENTIST (Feb. 4, 2015), https://www.newscientist.com/article/mg22530071-100-cormorants-the-worlds-most-hated-bird/.

[4] The letter responded to all of the comments and questions raised at both hearings.

the impacts on the reduction in view to neighboring properties," and submitted a report to the Wetlands Administrator that recommended approval of the license.

The Wetlands Administrator, William Morgante—a Board employee—distributed the report to interested persons, including Mr. Zelinske, and asked them to state in writing any continuing exceptions to the application. Mr. Morgante received three responses, including one from Mr. Zelinske, who "strongly opposed the expansion." In his December 2015 letter to Mr. Morgante, Mr. Zelinske expressed concerns about water quality, avian botulism, noise levels, and diminished viewshed, and he attached a letter he sent to the Department expressing similar concerns. Mr. Morgante met with Mr. Zelinske in person as well. In his report to the Board, Mr. Morgante concurred with the Department's recommendation and recommended that the Board should grant the MPA a license to begin Phase III of the Project.

The Opponents disagreed with Mr. Morgante's recommendation in a letter dated February 17, 2016, and asked to appear before the Board. At its February 24, 2016 meeting, the Board considered the MPA's license application and heard testimony from Mr. Morgante, counsel for the Opponents, and Mr. Zelinske. Mr. Morgante spoke first and provided the Board with a background of the Project, the MPA's purpose for seeking the license, and the overall process that led to his ultimate recommendation that the Board grant it. Mr. Zelinske and counsel for the Opponents opposed the license. They echoed Mr. Zelinske's previous concerns about the Project's impact on Jefferson Island's viewshed and water quality, contamination and noise. They also highlighted some "deficiencies" in

the MPA's application, notably that it didn't include an analysis of the Project's erosive effects on Jefferson Island, and they argued that Phase III went beyond restoring Poplar Island to its historic footprint and created new island. Mr. Zelinske likewise expressed his opposition to the Project, focusing mainly on the resulting construction noises and its impacts on his viewshed.

The Board voted to grant the License. The Opponents filed petitions for judicial review of the Board's decision in the Circuit Court for Talbot County.[5] The circuit court affirmed the Board's decision in a memorandum opinion, and the Opponents appeal. We will supply additional facts as necessary below.

II. DISCUSSION

The Opponents raise four contentions on appeal[6] that we have rephrased and condensed into three. *First*, the Opponents contend the Board erred because the license

[5] The circuit court consolidated the petitions.

[6] In their brief, the Opponents phrased their Questions Presented as follows:

> I. Did the BPW err by authorizing island creation, as opposed to island restoration, in violation of Environment Article 5-1102?
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> II. Did the BPW err by approving the License where the record lacks an erosion-control study or other evidence of the erosive impacts of Phase III?
>
> III. Did the BPW err by failing to fully or properly consider the negative impacts of Phase III on neighboring properties?
>
> IV. Did the procedures utilized by the BPW in approving the License violate Appellants' due process rights?

authorized island creation, not island restoration, a purpose not authorized under Maryland law. *Second*, they contend the Board erred by failing to consider the all of the adverse impacts the Project would cause to the wetlands and its surrounding properties in deciding that issuance of the license was in the State's best interest. And *third*, they contend the Board's license issuance process violated their due process rights. The Board and MPA filed separate briefs in response, both arguing that the Board properly exercised its legal authority in issuing the license, and that the Board's process in issuing the license did not violate the Opponents' due process rights, and "provided [them] with all of the process they were due."

A. The Board Acted Within Its Legal Authority.

First, the Opponents contend that the License improperly authorized the MPA to create, rather than restore, new island mass, and thus that in approving the License, the Board exceeded its statutory authority. When reviewing an administrative agency's decision, we review the agency's decision itself, not the circuit court's initial review. *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012) (citation omitted). And generally speaking, we "affirm the agency's decision if there is sufficient evidence such that a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 573 (2015) (cleaned up).

In reviewing the Board's decision to grant this License, we also must consider the capacity in which the Board acted at the time, a question that has a less-obvious-than-usual

answer in this context. In *Maryland Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, ("*Four Seasons I*"), the Court of Appeals concluded that the Board acts in both quasi-judicial and quasi-legislative capacities when it acts on a wetlands license application. 425 Md. 482, 515 (2012). The Board acts in a quasi-judicial capacity when the Board focuses on an "individual, as opposed to general, grounds, and scrutinizes a single property . . . and there is a deliberative fact-finding process with testimony and the weighing of evidence." *Four Seasons I*, 425 Md. at 515 (quoting *Md. Overpak Corp. v. Mayor & Cty. Council of Baltimore*, 395 Md. 16, 33 (2006)). But the Board also acts in a quasi-legislative capacity when it relies on general "legislative facts"—facts that "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." *Talbot Cty. v. Miles Point Prop., LLC*, 415 Md. 372, 388 (2010) (citation omitted); *see Four Seasons I*, 425 Md. at 515. So although the Board has "a great deal of largely unguided discretion in determining whether to issue a license and on what terms and conditions," the Court declined to hold that the Board acts exclusively in either capacity. *Four Seasons I*, 425 Md. at 514–15.

When reviewing quasi-judicial agency decisions, we ask whether (a) substantial evidence in the record before the agency supported its findings of fact; (b) the agency committed any substantial or procedural error during the process; and (c) the agency acted arbitrarily or capriciously in applying the law to the facts. But if the agency acted in a quasi-legislative capacity, we are concerned only with whether it acted within its legal boundaries. *Id.* at 514 n.15 (citations omitted). The Opponents, of course, argue the Board

acted in a quasi-judicial capacity, and urge us to adopt the more stringent standard of review. The Board contends it prevails under either standard of review. And we don't need to resolve the bigger-picture question: for present purposes, we are prepared to treat the Board's decision to grant the license as a quasi-judicial act and to review it against the more stringent standard—which, as we explain, it satisfies.

The Opponents contend that the Board lacked authority to issue the License because the Dredge Material Management Act ("DMMA"), EN §§ 5-1101 to 5-1108, prohibits that use of dredged materials. Among other things, the DMMA restricts open water placement of material dredged from the Chesapeake Bay and its tributaries "except when used for a beneficial use project undertaken in accordance with State and federal laws." EN § 5-1102(c). "Beneficial use of dredged material" includes, among other things, the restoration of islands, the creation or restoration of wetlands, and the creation, restoration, or enhancement of fish or shellfish habits. What it does not include, the Opponents argue, is the *creation* of islands. They posit that because Phase III expands Poplar Island beyond its 1847 footprint, the Project strays beyond the authorized purpose of restoring the island constitutes island creation, which is not one of the beneficial uses outlined in the DMMA and is therefore illegal. The Board responds *first* that "the record establishes that Phase III is a 'beneficial use project' under the statute," and *second* that the Board has no authority to determine whether the expansion is or isn't a beneficial use project.

We agree that the Board acted within its authority in granting the License because the appropriate statutory authority is the Wetlands Act, not the DMMA. The Board's role

here is to determine whether to allow the MPA to use State wetlands, and specifically whether the requested use is in the best interests of the State. "[I]n deciding whether to issue a wetlands license, the Board does not act—is not authorized to act—as a super land use authority." *Four Seasons I*, 425 Md. at 517. The Board's regulations require it to consider the recommendations of the Department and the Wetlands Administrator and to take into account the ecological, economic, developmental, recreational, and aesthetic values "to preserve the wetlands and prevent their despoliation and destruction." COMAR 23.02.04.10. And that is what the Board did. The Board was not required to balance these factors in a particular manner—its discretion under the Wetlands Act is "largely unguided." *Four Seasons I*, 425 Md. at 515. Nor is the Board empowered to review the DMMA-created Executive Committee's decision that Phase III qualifies as a beneficial use project under that statute. That is a separate agency decision, a prerequisite to filing the application in the first place, and enforced in separate proceedings by the Attorney General or State's Attorney. *See* EN §§ 5-1104.2 through 1106. We look next at whether the record supported the Board's decision, but we agree with the State that the Board had the authority under the Wetlands Act to grant this License and that the Board was not required to analyze its ultimate compliance with the DMMA as part of that decision.

B. Substantial Evidence Supported The Board's Decision to Approve The License.

Second, the Opponents contend the Board approved the License arbitrarily and capriciously, that "the record before [the Board] was legally inadequate" and could not support a finding that the License was in the State's best interest. They contend that the

MPA failed to conduct an erosive impact study, relied on an outdated Supplemental Environmental Impact Statement ("SEIS"), and failed to submit the SEIS to the Board for consideration. The Opponents assert that COMAR 23.02.04.01 required the Board to "balance the universe of benefits versus the costs," including the Project's impact on Opponents' viewshed, escalated erosion of Jefferson Island, and resulting contamination and construction noise. The State responds that it wasn't legally required to conduct or consider a study assessing the Project's erosive impact on Jefferson Island, and that even if it were, the evidence indicates that the Project "actually *protect[s]* Jefferson Island from erosion." We affirm the agency's decision if there is substantial evidence in the record as a whole to support its findings and conclusions. *Chesapeake Bay Foundation, Inc. v. DCW Dutchship, LLC*, 439 Md. 588, 611 (2014).

Our review of the record reveals that the Board considered all of the supporting evidence submitted by the MPA, the Department, and the Wetlands Administrator, along with testimony from the public hearings, and that the evidence supports its conclusion that the benefits of the Project outweighed its impact on the Opponents' viewshed. COMAR 23.02.04.01 was intended "to allow the Board, if it finds demonstrable environmental, social, and economic costs of the proposed action or activity . . . to consider whether the ultimate project and beneficial purposes to be served exceed those costs, thereby, on balance making the license consistent with the State's interest." *Four Seasons I*, 425 Md. at 520 (cleaned up). We agree with the State that the Wetlands Act doesn't prescribe how

much weight the Board must give each form of evidence, nor does it specify the evidence the Board must consider.

Upon receiving the application, the Department sought and received public comment and asked the MPA to respond to each concern in writing, with supporting documents and plan revisions as appropriate. The MPA in turn responded to each comment with a detailed explanation and accompanied its responses with supporting information and data from monitoring conducted during Phases I and II of the Project. The Department then reviewed the MPA's responses and determined they satisfactorily addressed most of the concerns. For those that remained, the Department recommended special conditions and, in recommending approval, concluded that "the benefits [of the Project] to local, regional, State, and national commerce exceed the unavoidable view reduction to neighboring properties." The Department's technical experts and Mr. Morgante reviewed and relied on portions of the SEIS in their respective reports recommending the issuance of the License to the Board. Mr. Morgante, a Board employee, analyzed the benefits of the Project using data and information from the Department's report and MPA's responses to the public comments. His report noted that Phase III would alter Jefferson Island's current viewshed, and acknowledged that the expansion would "have a detrimental effect on the aesthetic values of the Jefferson Island property owners." Even so, he concurred with the Department's recommendation and recommended that the Board issue the License to the MPA. The Board then considered all of the evidence and determined that issuance of the License was in the State's interest. On this record, the Board's decision was a reasonable

one, *see Alviani v. Dixon*, 365 Md. 95, 108 (2001) (in applying the substantial evidence test, "[t]he test is reasonableness, not rightness."), and sufficient evidence supports it.

We appreciate the Opponents' dissatisfaction with the loss of their Chesapeake Bay view. But we decline their invitation to recognize a riparian right "to an existing view unimpeded by State action." The statute and regulations that govern the Board's wetlands licensing process don't vest the Board with the authority to determine whether a loss of viewshed amounts to a compensable property right. Maryland law is clear that "[a]n owner of property that is adjacent to a body of water has riparian rights under both common law and statute," *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 508–12 (2004), and "[f]undamental among those rights is access to the water." *Id.* But access to water is not the same as access to unobstructed water views. Nor does any evidence in the record demonstrate that the Project impedes the Opponents' ability to "use, improve, and build out from" their land. *Rayne v. Coulborne*, 65 Md. App. 351, 366 (1985). We see no legal error in the Board's decision not to recognize a riparian right to viewshed.

C. The Board's Approval Process Did Not Violate The Opponents' Due Process

Finally, the Opponents contend the Board's approval process violated their due process rights because they weren't given an opportunity to present evidence or to cross-examine witnesses supporting the MPA's application. They rely exclusively on zoning cases to support this contention, most notably *Hyson v. Montgomery Cty. Council*, which held that "when an administrative board or agency is required to hold a public hearing and to decide disputed adjudicative facts based upon evidence produced and a record made . . .

a reasonable right of cross-examination must be allowed the parties." 242 Md. 55, 67 (1966). But as the Opponents acknowledge in their brief, neither COMAR 23.02.04.09 nor EN § 16-201 requires the Board to hold an adjudicatory hearing on an application for a dredging or filling license. *See Four Seasons I*, 425 Md. at 515 ("at no point in the application process—not before [the Department], the Wetlands Administrator, or the Board—is anything approaching a contested hearing required."); EN § 16-202(e)(3) (noting any hearing requested after the Department issues public notice is not a contested hearing); EN § 16-204 (explaining that a contested case hearing may not occur on appeal of a decision of the Board).

The Board responds that "[r]equiring a full adversary hearing . . . would be unworkable before an entity like the Board," and we agree that the process due has to take into account the unique nature of the Board. The Board is comprised of three of the most senior Executive Branch officials—the Governor, the Comptroller, and the Treasurer—and meets semi-monthly to review and vote on a myriad of agency proposals. *See generally* Alan M. Wilner, THE MARYLAND BOARD OF PUBLIC WORKS: A HISTORY (1984). The Board must consider and sign off on dozens, if not hundreds, of State contracts and licenses at each meeting, and it's not equipped to provide a full-blown evidentiary hearing to each proposal. Instead, each application is vetted before the Board meeting by the Board's staff, which provides the detailed report and recommendations the Board considers. The Wetlands Administration arm of the Board, through its Administrator, oversees the tidal wetlands licensing process from beginning to end—it processes applications, receives and

responds to comments and objections, holds hearings, prepares recommendations, coordinates with other agencies and landowners and the public and, after Board approval, issues tidal wetlands permits. The Board considers the Administrator's recommendation and makes the ultimate decisions. But given that the Board itself isn't required to hold any kind of hearing at all, the Opponents didn't suffer any due process violations when the Board allowed them to speak at the Board meeting but not to cross-examine other speakers.

Moreover, the Opponents had ample notice of the evidence and positions and had multiple opportunities to be heard. At each step of the process, the MPA, the Department, the Wetlands Administrator, and the Board considered and addressed each of the Opponents' concerns. After receiving the MPA's license application**,** the Department issued public notice on its website, to various local newspapers, and adjacent property owners, including the Opponents, took public comment for thirty days, and held two public hearings. Mr. Zelinske submitted written comments and shared his concerns and questions at one of the hearings. After the public hearings, the MPA responded to the Opponents' concerns in writing and in great detail, and included supporting data from monitoring conducted during the Project's previous phases. The Department reviewed the concerns and comments and determined that the MPA addressed all but two—noise levels and contaminants—for which the Department recommended special conditions to ensure the impacts would be "avoided and minimized to the maximum extent possible," and to which the MPA agreed. In response to Mr. Zelinske's comments, Mr. Morgante met with him and attempted to resolve them. The Opponents' counsel had the opportunity to submit letters,

exhibits, maps, and diagrams to the Administrator. In his Wetlands Administrator Report, Mr. Morgante considered the full record, and acknowledged that Phase III is not "without its adverse impact on individual property owners" and would "result in a substantial loss of viewshed for Jefferson Island." Nevertheless, he also addressed each of Mr. Zelinske's concerns, such as water quality, the Project's attraction of cormorants to Jefferson Island, the alleged erosion of Jefferson Island, avian botulism, and noise. Mr. Morgante strengthened the Department's recommended special condition on water quality control by requiring the MPA to take samples from *each new* dredged material location every three years, as opposed to taking samples of *any* dredged material without specifying the location. He acknowledged that the impact on the Opponents' viewshed couldn't be mitigated because of the Project's location, but concluded, and the record supports the finding, "that the benefits of the project to the citizens of the State outweigh the impacts on the reduction in view to neighboring properties."

We recognize that the Board meeting itself does not resemble an evidentiary proceeding. But we consider the Opponents' due process rights in context, *i.e.*, as a wetland permit grounded in a best interest standard, and a decision committed to the discretion of three of our State's most senior public officials. The Board wasn't required to hear the Opponents at all, but it did, and it considered their testimony before granting the License. Viewed as a whole, we hold that the process leading up to the Board's decision afforded the Opponents appropriate notice and opportunities to develop a record and have their views heard and considered.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. APPELLANT TO PAY COSTS.