Circuit Court for Talbot County
Case No. C-20-CV-18-000011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2842

September Term, 2018

ANGEL ENTERPRISES LIMITED PARTNERSHIP, et al.

v.

TALBOT COUNTY, MARYLAND

Graeff,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 20, 2020

Angel Enterprises Limited Partnership and its general partner, Morton Bender, appellants, own property in St. Michaels, Talbot County, Maryland ("the Property"). In early 2009, Robert Graham, the Chief Code Compliance Officer ("CCCO") for Talbot County, issued two Abatement Orders relating to violations of the Talbot County Code ("TCC") due to the construction of a road through a heavily wooded area. The Abatement Orders required appellants to, among other things, submit a plan for removal of the illegal roadway and perform "restoration of the affected area to its pre-existing natural habitat." Appellants appealed the Abatement Orders, and the orders were affirmed by the Talbot County Board of Appeals ("the Board") on November 4, 2009.

This appeal involves penalties assessed after the Abatement Orders were affirmed. On December 2, 2009, Mr. Graham issued six civil penalty assessments against appellants for the violations set forth in the Abatement Orders. The assessments stated that the penalty for continuing violations would accrue for each day the violation continued. On December 29, 2009, appellants appealed the penalties to the Board.

On December 15, 2017, the Board upheld the imposition of the penalties assessed, but it determined that they were stayed once appellants filed their appeal. Talbot County, appellee, appealed the ruling that the penalties were stayed beginning December 29, 2009, and appellants cross-appealed. On November 9, 2018, the Circuit Court for Talbot County affirmed the validity of the penalties but reversed the Board's decision that the penalties were stayed once the appeal was filed. The circuit court ordered that appellants owed civil penalty assessment fines in the amount of $713,400.

On appeal, appellants present multiple questions for this Court's review,[1] which we have consolidated and reordered as follows:

[1] The appellants' questions presented are as follows:

1. Is the Board's determination that the civil penalties imposed by Talbot County were stayed upon the filing of Appellants' appeal, as expressly provided in Talbot County Code § 58-12A(3) and § 20-6B(3), legally correct and supported by substantial evidence?

2. Did the Board err in denying Appellants' due process challenge to the Board's procedure that required Appellants to bear the burden of proof in the de novo penalty proceeding before the Board and to present their defense of the penalties before the County presented its case for penalties?

3. Did the Board err in finding that Talbot County has the legal authority to impose continuing violation penalties under the County Code and where the Express Powers Act limits the County to civil fines not exceeding $1,000.00 and does not expressly authorize continuing violation penalties?

4. Did the Board err in finding that Talbot County has the legal authority to impose continuing violation penalties for each day that Appellants failed to restore the property to the subjective demands of the County?

5. Did the Board err in upholding 21 days of civil penalties and by failing to conduct a de novo review?

6. Did the Circuit Court err and exceed its jurisdiction by usurping the discretion and authority of the Board by imposing excessive penalties on Appellants where the Board concluded that the County could not impose more than 21 days of penalties and did not impose most of the penalties sought by the County?

7. Did the Circuit Court err by failing to consider TCC § 58-12A(3) which expressly provides for the stay of all actions by the Chief Code Compliance Officer seeking enforcement or compliance, including civil penalties, and by only considering TCC § 206B(3)?

1. Did the Board properly determine that the civil penalties were stayed from December 29, 2009, the date appellants filed their appeal of the penalties?

2. Were appellants denied due process?

3. Did the Board properly determine that the County has the legal authority to impose continuing civil penalties?

4. Did the Board properly uphold the County's assessment of civil penalties against appellants?

The County presents an additional question, which we have rephrased slightly:

> Are appellants barred by the doctrine of judicial estoppel from asserting that the enforcement of civil zoning penalties was stayed based on prior contradictory arguments on the matter?

For the reasons set forth below, we shall affirm, in part, and vacate, in part, the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Initial Abatement Orders

This case began with two Abatement Orders issued by the County against appellants in 2009. Appellants challenged these Abatement Orders in a case that came before this Court in 2013. We discussed the background facts in our opinion in that case, *Angel Enterprises Ltd. P'ship. v. Md. Dep't. of the Env't.*, No. 1155, Sept. Term, 2012 (filed October 8, 2013) (unreported), as follows:

> Angel purchased the property at 7751 Rollyston Drive on September 10, 2002. The lot contained a restriction in its deed denying the landowner

> direct access to Maryland Highway No. 33 ("Md. Rt. 33") unless approved by the Maryland State Highway Administration, Talbot County Planning and Zoning and Talbot County Public Works. Despite this restriction, Bender continuously tried to build a direct access road from Angel's property to Md. Rt. 33. . . . On February 3, 2005, Bender met with County representatives, and he was told explicitly that Angel could not have direct access from tis property to Md. Rt. 33 due to safety and environmental concerns. A private road to Md. Rt. 33 raises safety issues because Md. Rt. 33 is an undivided single-lane highway with oncoming traffic speeds that could reach near 100 mph. Moreover, the County desired to protect the forest, non-tidal wetlands and environmentally sensitive areas that would be impacted by the building of a road to Md. Rt. 33.
>
> Despite the County's repeated lack of approval to create a roadway from Angel's property to Md. Rt. 33, Bender hired a contractor to clear trees and build a roadway in early 2006. The project was ongoing when the County was alerted to the violation by the MDE [Maryland Department of the Environment]. In response, the County mailed Angel an Administrative Abatement Order on January 23, 2009. This Order was followed by a Supplemental Abatement Order on February 19, 2009 to Angel and Bender. The Orders directed Angel and later, Bender, to remove the construction, and restore the affected areas.
>
> On March 20, 2009, Angel and Bender filed an administrative appeal of the Abatement Orders with the Talbot County Board of Appeals ("the Board"). On November 4, 2009, the Board affirmed the County's decision to issue the 2009 Abatement Orders. On December 2, 2009, Angel and Bender filed a Petition for Judicial Review of the Board's decision. Also, on December 2, 2009, the County filed Assessments of Civil Penalties against Angel and Bender that are pending. On February 3 and 11, 2011, the MDE filed criminal and civil complaints against Angel and Bender. On June 13, 2012, the Talbot County Circuit Court affirmed the Board's decision to issue the Abatement Orders. This timely appeal followed on July 12, 2012. On April 24, 2013, the Talbot County Circuit Court approved a consent decree to resolve the civil complaints from MDE. The consent decree required Angel and Bender to remove the partially constructed road, and to pay civil fines totaling $40,000. On May 25, 2013, Angel entered into a plea bargain and the State entered a nolle proseqi on the criminal charges against Bender.

Slip op. at 2–4 (footnote omitted).

Appellants' appeal of the Abatement Orders included several grounds, including that there was a violation of due process in the administrative appeal. We stated that no relief was available to appellants because they had agreed to "the essential aspects of the Abatement Orders in their consent decree with [the Maryland Department of the Environment ("MDE")]," noting that the consent decree required appellants to pay a $40,000 fine, remove the roadway constructed, and restore the areas of land affected by the construction of the road, including nontidal wetland restoration and reforestation. *Id*. at 5. Accordingly, "the validity of the Abatement Orders [was] irrelevant, and the appeal [was] moot."

We rejected appellants' argument "that the appeal [was] not moot because the County ha[d] assessed its own civil penalties based on the Abatement Orders." *Id.* at 5. We noted that those penalties, which were separate from the penalties assessed by the MDE, "are not before this Court on this appeal, never having been decided by the Board or [c]ircuit [c]ourt[.]" *Id*. at 6. Accordingly, we dismissed the appeal. *Id*. Appellants filed a Petition for Writ of Certiorari, which the Court of Appeals denied on January 27, 2014. *Angel Enterprises Ltd. P'ship v. Talbot County*, 436 Md. 501 (2014).

II.

Procedural History in this Case

The civil penalties, which were not before us in the prior appeal, are at issue in this appeal. On December 2, 2009, Mr. Graham issued six civil penalty assessments against appellants. The assessment sent to Mr. Bender advised that the daily fine would begin to

accrue on December 8, 2009, and the penalty for continuing violations would accrue for each day that the violation continued.

The chart below summarizes the violations listed on the six Assessment of Civil Penalty notices:

	Talbot County Code	**Facts Describing Alleged Violation**	**Daily Fine**	**Critical Area Violation**
1	§ 73-3C(6)(a)	Failure to meet retention, afforestation and reforestation requirements of Chapter 73, Talbot County Code, as required by Administrative Abatement Orders dated January 23, 2009 and February 19, 2009, and as required by decision of Talbot County Board of Appeals, Appeal No. 1519 dated November 4, 2009	$300	No
2	§ 73-10B(2)	Failure to leave contiguous forest that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site in an undisturbed condition; failure to effect retention required by decision of Talbot County Board of Appeals, Appeal No. 1519 dated November 4, 2009	$150	No
3	§ 58-7(1)	Ongoing failure to correct, discontinue, or abate ongoing non-critical area violation as required by administrative abatement order dated January 23, 2009, February 19, 2009, and by decision of Talbot County Board of Appeals, Appeal No. 1519 dated November 4, 2009	$200	No
4	§ 73-10B(1)	Failure to leave trees, shrubs, and plants located in nontidal wetlands and their buffers and critical habitats in an undisturbed condition; failure to effect retention required by decision of Talbot County Board of	$300	No

	Talbot County Code	Facts Describing Alleged Violation	Daily Fine	Critical Area Violation
		Appeals, Appeal No. 1519 dated November 4, 2009		
5	§ 190-134 (incorrectly written as § 190-93D on the penalty form)	Performing development activities in the critical area without submission of Forest Preservation Plan	$200	Yes
6	§ 58-7(1)	Ongoing failure to correct, discontinue, or abate ongoing critical area violation as required by administrative abatement order dated January 23, 2009, February 19, 2009, and by decision of Talbot County Board of Appeals, Appeal No. 1519 dated November 4, 2009	$350	Yes

The collective amount of these continuing penalties was $1,500 a day.

The Penalty Assessment states that the person responsible for the violations has several options: (1) compliance – give notice to the CCCO that the violation has been or will be brought into compliance; (2) request administrative review – limited to an evaluation of the amounts of civil penalties imposed; or (3) file an appeal to the Board of Appeals – including any claim for relief.

On December 9, 2009, appellants filed a Request for Administrative Review of the six penalties. On December 29, 2009, appellants filed six separate administrative appeals to the Board, challenging each penalty assessment.

On April 12, 2010, the Board issued a consent scheduling order consolidating the six appeals and deferring the hearing in the penalty appeal until after an Administrative Review had concluded. Specifically, the April 2010 order deferred the hearing until: (1) "the Hearing Officer has conducted and concluded the administrative hearing(s) concerning the County's assessment of civil and monetary penalties and issued his written opinion"; and (2) the circuit court had conducted a hearing on appellants' Motion to Stay the decision of the Board in the abatement appeal, as well as the assessment of continuing penalties, while the petition for judicial review was pending.

On May 27, 2010, a hearing on the motion to stay occurred. The parties state that, at this hearing, the County consented to a stay of the continued tolling of penalties while the abatement appeal in circuit court was pending. On June 13, 2012, the circuit court affirmed the issuance of the Abatement Orders.[2]

Appellants then took steps to comply with the Abatement Orders. On August 31, 2015, the County approved final restoration of the Property. Continuing violation penalties stopped accruing at that time.

At this point, the appeal of the penalty assessments was still pending. Pursuant to the April 12, 2010, scheduling order, the Board's hearing on the penalty appeal had been stayed until the Hearing Officer concluded the administrative hearing. On July 26, 2016,

[2] The County asserts on appeal that, based on its agreement, the continuing penalties were stayed from May 27, 2010, until June 13, 2012.

however, appellant's right to administrative review was terminated.[3] As the Board explained, prior to July 26, 2016, there was an unqualified right to Administrative Review, but Bill No. 1346, passed by the Talbot County Council in 2016, limited the right of "administrative review of penalty challenges to matters in which the cumulative total of penalties assessed is less than Five Thousand Dollars ($5,000.00), thus mooting Applicant's request for Administrative Review under [TCC] § 58-2." Both the Board and the circuit court determined that this enactment terminated the agreed deferral in the April 12, 2010, consent order.

On August 26, 2016, the County filed a civil complaint in the circuit court "seeking a money judgment for the [p]enalties that began accruing on December 8, 2009." The complaint alleged that appellants owed the County $713,400 in unpaid penalties. On October 18, 2016, the circuit court issued a consent order requiring appellants to post a $713,400 cash bond as security for penalties that may be assessed in the penalty case. It stayed further proceedings "until the conclusion of 'the pending administrative proceedings and all ensuing judicial reviews and appeals have been exhausted or otherwise terminated.'"

On November 15, 2016, appellants resubmitted the consolidated appeal of the penalties to the Board.

[3] Counsel for the County, in response to a question regarding the delay in proceedings, advised the Board that administrative hearings had been scheduled, but appellants had requested postponements.

A.

The Board Hearing and Decision

On April 24, 2017, the Board held its first hearing on the civil penalties appeal. It held six additional evidentiary hearings between May 2017 and September 2017.

Robert Graham testified that the MDE informed him about the violations taking place at the Property. On January 23, 2009, he wrote the first Abatement Order, and on February 19, 2009, his attorney wrote the second, supplemental Abatement Order. Mr. Graham testified that his procedure for issuing Abatement Orders usually involves visiting the site, assessing the violation of the code, writing an Abatement Order, giving the recipient a timeline to fix the violation, and, if they do not fix the violation, issuing a monetary penalty to "incentivize" the property owner to fix the violation.

On December 2, 2009, after the Board upheld the Abatement Orders, Mr. Graham issued the six Civil Penalty Assessments. The penalties were to begin accruing six days later, on December 8, 2009, which Mr. Graham thought was an appropriate timeline because he had not heard from Mr. Bender. Mr. Graham acknowledged that he did not think it was possible for appellants to fix all the violations in six days, but he stated that they "could start the ball rolling," and appellants could stop the penalties from accruing by informing the County of their intent to abate the violations and asking for an extension.

Mr. Graham testified that the December 29, 2009, appeal from the Board's decision affirming the Abatement Orders did not stop the civil penalties, and they would continue to accrue until the violations were abated. Mr. Graham testified that the appeal stayed

enforcement actions. He explained, however, that he meant that additional penalties would be stayed; the accrual of the pending penalties would not be stayed.

Mr. Graham testified that he determined the amount for each violation by looking at, and applying, the criteria set forth in, TCC § 58. For the non-critical area violations, he had to consider "the severity of the violation," the "presence or absence of good faith of the violator," and "any history of prior violations." For the critical area violations, he had to consider the "gravity of the violation," the "willfulness of negligence, if any, of the violation," the "environmental impact of the violation," the "cost to restore the affected resource, mitigation for damage to that resource[,]" and costs involved in "performing, supervising or assisting with restoration and mitigation." Mr. Graham testified that he believed the environmental impact of these violations was severe. Although all the penalties related to the same property and project, he believed that they were all separate. He further testified that the assessed amounts were approximately six percent of the total penalties he could have assessed for the penalties under the guidelines in the TCC.

Ms. Elisa Deflaux, the Talbot County Environmental Planner, testified that the violations were related because they related to one project, but each penalty addressed a distinct harm, and the penalties were not duplicative. Other witnesses testified regarding the penalties and the environmental impact of the development and the clearing of the trees, with differing views regarding whether the damage to the Property was severe.

On December 15, 2017, after hearing all the testimony, the Board issued its 48-page decision. As discussed in more detail, *infra*, it determined, among other things, that the

"penalty assessments were valid and enforceable," and the appeal to the Board stayed all actions, including daily penalties, after December 29, 2009. Accordingly, it determined that the civil penalties that appellants owed were only those that accrued from December 8, 2009 to December 29, 2009.[4]

B.

The Circuit Court Decision

On January 16, 2018, the County appealed the Board's ruling. It argued that the Board erred in finding that the daily penalties were stayed after the appeal was filed on December 29, 2009.

Appellants cross-appealed. They asserted that the Board erred in finding that the County had the authority to impose continuing violations, in upholding the penalties assessed, and in refusing to consider appellants' due process claim by finding that it was barred by collateral estoppel.

On November 9, 2018, the circuit court issued its decision. It affirmed in part, and reversed in part, the Board's decision. First, the court determined that the Board "did not err in denying [appellant's] procedural due process challenge," finding that, in a proceeding before a county board of zoning appeals, the applicant bears the burden of proving that the assessments are not valid. Second, the court held that the County has the legal authority to impose continuing violation penalties under TCC § 58-5D. Third, the court upheld the

[4] This time period is 21 days, which, at $1,500 a day, amounts to a total of $31,500 in penalties due.

Board's determination that the penalties assigned by the CCCO were not arbitrary or capricious. Finally, the court determined that the Board erred in finding "that the Civil Penalty Assessments did not accrue while the stay of enforcement was in place." The court reasoned that the accrual of fines for penalties that had already been assessed did not constitute a "further" action under the stay provision, and therefore, those penalties were not stayed. Accordingly, it found that appellants owed, and the County could seek to collect, Civil Penalty Assessment fines in the amount of $713,400.

This appeal followed.

STANDARD OF REVIEW

In *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 430 (2015), this Court set forth the proper standard of review of an administrative decision:

> Judicial review of an administrative decision "generally is a 'narrow and highly deferential inquiry.'" *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 733, 995 A.2d 1068 (2010) (quoting *Maryland-Nat'l Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83, 985 A.2d 1160 (2009)). This Court looks "through the circuit court's decision and evaluates the decision of the agency," *Chesapeake Bay Foundation, Inc. v. Clickner*, 192 Md. App. 172, 181, 993 A.2d 1163 (2010), determining "'if 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.'" *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638, 42 A.3d 596 (2012) (quoting *Bd. of Phys. Quality Assurance v. Banks*, 354 Md. 59, 67–68, 729 A.2d 376 (1999)).
>
> With respect to the Board's factual findings, we apply the substantial evidence test, which "'requires us to affirm an agency decision, if, after reviewing the evidence in a light most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Miller v. City of Annapolis Historic Pres. Comm'n*, 200 Md. App. 612, 632, 28 A.3d 147 (2011) (quoting *Montgomery [Cty] v.*

Longo, 187 Md. App. 25, 49, 975 A.2d 312 (2009)). Administrative credibility findings likewise are entitled to great deference on judicial review. Credibility findings of hearing officers who themselves have personally observed the witnesses "'have almost conclusive force.'" *Kim v. [Md.] State Bd. of Physicians*, 196 Md. App. 362, 370, 9 A.3d 534 (2010), *aff'd*, 423 Md. 523, 32 A.3d 30 (2011) (quoting *Anderson v. Dep't of Pub. Safety and Corr. Srvs.*, 330 Md. 187, 217, 623 A.2d 198 (1993)). A reviewing court "'may not substitute its judgment for the administrative agency's in matters where purely discretionary decisions are involved.'" *Mueller v. People's Counsel for Baltimore [Cty].*, 177 Md. App. 43, 82–83, 934 A.2d 974 (2007) (quoting *People's Counsel for Baltimore [Cty.] v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007)), *cert. denied*, 403 Md. 307, 941 A.2d 1106 (2008). With respect to the Board's conclusions of law, "a certain amount of deference may be afforded when the agency is interpreting or applying the statute the agency itself administers." *Employees' Ret. Sys. of Balt. v. Dorsey*, 430 Md. 100, 111, 59 A.3d 990 (2013). "We are under no constraint, however, 'to affirm an agency decision premised solely upon an erroneous conclusion of law.'" *Id.* (quoting *Thomas v. State Ret. & Pension Sys.*, 420 Md. 45, 54–55, 21 A.3d 1042 (2011)).

DISCUSSION

I.

Stay of Penalties

The first issue on appeal is whether the penalties that began to accrue on December 8, 2009, were stayed on December 29, 2009, when appellants noted their appeal to the Board. The Board found that the accruing penalties were intended to enforce compliance with the Abatement Orders and were automatically stayed upon the filing on the appeal.

Appellants contend that the Board's determination in this regard is correct, and the circuit court erred in reaching a contrary conclusion. They assert that there are two automatic stay provisions in the TCC, §§ 58-12A and 20-6B(3), both of which "operate to

stay enforcement actions, including continuing penalties, upon the filing of an appeal to the Board." They contend that the plain meaning of the text makes this conclusion clear.

The County contends that the circuit court properly reversed the Board's decision that the penalties were stayed after appellants filed their appeal on December 29, 2009.[5] It asserts that the stay regulations provide that the filing of an appeal stops enforcement actions, and as such, they prevented the County from seeking to collect the Civil Penalty assessments, but they do not have any impact on "what was done before" the appeal, i.e., assessments for continuing violation civil penalties.

As the parties note, there are two stay provisions. TCC § 58-12A(3) provides:

> **An appeal stays all actions by the Chief Code Compliance Officer seeking enforcement or compliance with the order or decision being appealed**, unless the Chief Code Compliance Officer certifies to the Board of Appeals that (because of facts stated in the certificate) in his/her opinion, such stay will cause imminent peril to life or property. In such a case, action by the Chief Code Compliance Officer shall not be stayed except by order of the Board of Appeals or a court upon application of the party seeking the stay.

(Emphasis added.)

TCC § 20-6B(3) provides:

[5] The circuit court's ruling in this regard was as follows:

> This Court finds that Civil Penalty Assessments accrued fines from December 8, 2009, through the date upon which each violation was abated. The County is entitled to seek payment of any fines that accumulated during that period. That the County may consent to waive the fines that would have accrued between May 27, 2010, and June 13, 2012, is a matter of the County's enforcement discretion, which it apparently chooses to exercise here. Therefore, the County is entitled to enforce and collect from Respondents fines in the amount of $713,400.

> **An application for administrative appeal shall automatically stay all further proceedings to enforce compliance with the order, requirement, decision, or determination,** and shall automatically stay all further subdivision, site plan, and related development reviews. There shall be no automatic stay when, in the judgment of the official having administrative authority to decide the question, a stay would cause immediate peril to life or property. A stay shall not limit the County's ability to obtain appropriate injunctive or other relief from a court.

(Emphasis added.)

Interpretation of a statute is a question of law that we review *de novo*. *See Merchant v. State*, 448 Md. 75, 94 (2016). In doing so, there are well-established rules of statutory construction. We apply those same canons of construction when interpreting ordinances. *Mueller v. People's Counsel for Baltimore Cty.*, 177 Md. App. 43, 85 n.17 (2007), *cert. denied*, 403 Md. 307 (2008).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature." *Bey v. State*, 452 Md. 255, 265–66 (2017) (quoting *State v. Johnson*, 415 Md. 413, 421–22 (2010)). Our "primary goal in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny." *Id.* As the Court of Appeals has explained:

> To ascertain the intent of the [legislature], we begin with the normal, plain meaning of the statute. If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction. We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with "forced or subtle interpretations" that limit or extend its application.

> We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the [l]egislature in enacting the statute. We presume that the [l]egislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope.
>
> Where the words of a statute are ambiguous and subject to more than one reasonable interpretation, or where the words are clear and unambiguous when viewed in isolation, but become ambiguous when read as part of a larger statutory scheme, a court must resolve the ambiguity by searching for legislative intent in other indicia, including the history of the legislation or other relevant sources intrinsic and extrinsic to the legislative process. In resolving ambiguities, a court considers the structure of the statute, how it relates to other laws, its general purpose and relative rationality and legal effect of various competing constructions.
>
> In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical or incompatible with common sense.

Id. at 265–66. *Accord Phillips v. State*, 451 Md. 180, 196–97 (2017); *Evans v. State*, 420 Md. 391, 400–01 (2011).

Accordingly, we begin our analysis with the words of the TCC. The stay provisions provide that filing an appeal stays: (1) "all actions by the Chief Code Compliance Officer seeking enforcement or compliance with the order or decision being appealed," § 58-12A(3); and (2) "all further proceedings to enforce compliance with the order, requirement, decision, or determination." § 20-6B(3). Pursuant to the plain language of the TCC, once the appeal of the penalty assessments was filed, any proceedings the County filed, or any action the CCCO took, seeking enforcement or compliance with the order being appealed, the assessment of penalties, needed to be stayed. Thus, when the County filed, on August

26, 2016, a civil complaint in the circuit court seeking a monetary judgment for penalties that had accrued, that case was stayed pending appeal of the penalty assessments.[6]

In concluding that the continuing penalties were stayed by TCC § 58-12A(3) and § 20-6B(3), the Board construed the continuing civil penalties as actions and/or proceedings that were "intended to enforce compliance with the abatement orders." The stay provisions, however, apply to actions or proceedings to enforce compliance with the order on appeal, which were the Civil Penalty Assessments, not the Abatement Orders, which already had been affirmed on appeal. The Board, therefore, erred in determining that the automatically accruing penalties for non-compliance with the Abatement Order were stayed after the appeal of the penalties was filed. Accordingly, we affirm the circuit court's ruling reversing the Board's decision in this regard.[7]

Appellants further contend that, even if the circuit court properly determined that the continuing penalties were not stayed pending appeal, it "erroneously imposed grossly excessive penalties of $713,400." Appellants argue that the court had no legal authority to

[6] The attorney for the County advised the Board that they filed the complaint because the construction of the house on the Property was completed, and Mr. Bender was seeking a certificate of occupancy, which would have allowed him to sell the house to a third party, and the third party to take title free and clear of the County's claim for civil penalties. The County, however, agreed to a stay of that action until the appeal of the penalties was resolved.

[7] Because we conclude that there was no stay of the penalties, we need not address the County's argument that appellants were barred by the doctrine of judicial estoppel from arguing that the penalties were stayed.

impose penalties on appellants in an amount greater than that imposed by the Board. The Board does not address this argument.

The amount of the penalties owed is determined by multiplying the daily penalty assessment of $1,500 (which was upheld by the Board) by the number of days that the penalties continued. The amount of $713,400 was the amount the County claimed in the separate civil suit for a money judgment. The County, however, did not ask the Board to determine the amount of money appellants owed, stating that the Board was limited to determining the propriety of the penalties Mr. Graham assessed. The County argued that the assessment of the amount of the money judgment appellant owed needed to be done in a separate action in circuit court, noting that it had agreed to stay the penalties for some time, but there was a dispute regarding whether there was an additional number of days stayed by consent.

Under these circumstances, where the Board did not make a factual finding in this regard, we agree with appellants that the circuit court erred in making a factual finding that appellants owed $713,400. *See Maryland Sec. Comm'r v. U.S. Sec. Corp.*, 122 Md. App. 574, 586 (1998) ("A reviewing court may not make its own findings of fact, or supply factual findings that were not made by the agency."). Accordingly, although we affirm the circuit court ruling that the continued penalties were not stayed by the December 29, 2009, appeal, we vacate the portion of the judgment providing that appellants owe $713,400. The number of days that the violations continued, and the total amount due, is a determination to be made in a separate proceeding.

II.

Due Process

Appellants contend that the Board erred in rejecting their due process challenge to the procedure requiring them to bear the burden of proof and present their evidence first. The County contends that the circuit court properly sustained the Board's decision that appellants were not denied due process.

The Board decided to conduct the evidentiary proceedings pursuant to the TCC and the Board's rules of procedure. It noted that TCC § 20-17 "prescribes the order of proof" in a proceeding before the Board, providing for "[p]resentation of testimony and exhibits by the applicant," followed by "[p]resentation of testimony and exhibits by County officials and staff," and then rebuttal evidence by the applicant. TCC § 20-17B–C. Additionally, TCC § 20-19 provides that the applicant has "the burden of proof which shall include the burden of going forward with evidence and the burden of persuasion, by a preponderance of the evidence, on all issues of fact." The Board noted that if it proceeded in a way other than that prescribed, it would be arbitrary and capricious and deny the County substantive due process. The Board also noted that appellants previously had challenged the Board's procedure in the Abatement Order case, and because the issue had been litigated in that case, the doctrine of collateral estoppel applied.

The circuit court stated that, although the Board may have erred in finding issue preclusion, the Board's procedure did not deny appellants' due process rights. The court noted, as did the Board, that the Code sets forth the procedures to be followed in

proceedings before the Board. It stated that appellants' arguments were "wholly out of step with concepts of administrative law that have existed for roughly a century," noting that due process in administrative appeals requires only "adequate notice of the proceedings and a meaningful opportunity to be heard." The court stated that the requirement that the applicant have the burden of proof made sense because violations reported by an administrative officer are presumed valid, and the applicant has the burden to rebut the presumption of validity. Accordingly, the circuit court found that the procedure followed by the Board did not violate appellants' due process rights.

On appeal to this Court, appellants contend that the Board erred in applying collateral estoppel to their due process argument. We agree with the circuit court that the collateral estoppel argument is not dispositive because the appellants' claim that the procedures followed by the Board violated their due process rights is without merit.

Due process requires fair procedure for all parties involved in an action. *Boehm v. Anne Arundel County*, 54 Md. App. 497, 511–12, *cert. denied*, 297 Md. 108 (1983). The Court has explained that, in "the absence of evidence to the contrary, administrative officers will be presumed to have properly performed their duties and to have acted regularly and in a lawful manner." *Maryland Sec. Comm'r*, 122 Md. App. at 588. An administrative decision "will be presumed to be correct and valid, as long as the parties involved have been given a reasonable opportunity to be heard." *Id*. Given this presumption of validity, the procedure set forth in TCC § 20-17B–E, where the person objecting to the penalties assess presents evidence first to show why the penalty was

improper makes sense. Appellants have cited no cases to support the argument that the procedure violates due process.

In administrative proceedings, Maryland courts have consistently held that "[d]ue process requires that a person 'be given notice and an opportunity to be heard.'" *Md. Real Estate Comm'n v. Garceau*, 234 Md. App. 324, 350 (2017) (quoting *Md. Racing Comm'n v. Belotti*, 130 Md. App. 23, 55 (1999)), *cert. dismissed*, 457 Md. 670 (2018). A party typically is given the right to present evidence and rebut adverse evidence. *Boehm*, 54 Md. App. at 512. The requirement of due process is not a rigid formula, but rather, it is a requirement that the party be given "a meaningful opportunity to present their case." *Baltimore Parking*, 194 Md. App. at 594 (quoting *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

Here, appellants had a meaningful opportunity to be heard, where they presented their evidence and had the opportunity to rebut the County's evidence. Appellants' claim that they were denied due process is without merit.

III.

Legal Authority to Impose Continuing Violation Penalties

Appellants contend that the Board erred, for two reasons, in finding that the County has the legal authority to impose continuing violation penalties. First, they assert that the Express Powers Act, which limits the County to fines not exceeding $1,000, does not authorize continuing violations of $1,000 per day. Second, they argue that, even if continuing penalties ordinarily are authorized, the County could only assess such penalties

for days on which they performed clearing activities, not for days on which they failed to implement a remedy.

The County contends that the Board properly found that it had the legal authority to impose continuing civil penalties. It argues that its authority to assess the penalties here derived from the Natural Resources Act, not the Express Powers Act. It further notes that TCC § 58-3 provides that "each calendar day that a violation continues shall be a separate offense," and it asserts that, "(a)s a result, a single violation may comprise multiple offenses, but each daily offense is subject to the cap on civil fines imposed by [LG] § 10-202(b)."

A.

Express Powers Act

We address first the argument that the Express Powers Act limited the County's authority to fines of $1,000. To do that, a discussion of the relevant statutes is helpful.

1.

Applicable Code Provisions

Article XI-A § 2 of the Maryland Constitution authorizes the General Assembly to grant express powers to a charter county. Pursuant to this authority, Md. Code (2013), § 10-101–330 of the Local Government Article ("LG"), the Express Powers Act, grants charter counties like Talbot County authority to enact ordinances. Appellants rely on LG § 10-202, which provides:

> (a) A county may enact local laws and may repeal or amend any local law enacted by the General Assembly on any matter covered by the express powers in this title.
>
> (b) A county may provide for the enforcement of an ordinance, a resolution, a bylaw, or a regulation adopted under this title:
> (1) by civil fines not exceeding $1,000[.]

Counties, however, are not limited to the powers set forth in LG § 10-202. Another section of the Code, LG § 10-102(a), provides that, "**[i]n addition to other powers granted to charter counties**, each charter county may exercise by legislative enactment the express powers provided in Subtitles 2 and 3 of this title." (Emphasis added.)

LG § 10-206 provides:

> (a) *In general.* — A county council may pass any ordinance, resolution, or bylaw not inconsistent with State law that:
> (1) may aid in executing and enforcing any power in this title; or
> (2) may aid in maintaining the peace, good government, health, and welfare of the county.
> (b) *Limits on exercise of* powers. — A county may exercise the powers provided under this title only to the extent that the powers are not preempted by or in conflict with public general law.

As the Board noted, pursuant to this statute, a charter county may, based on other State laws, adopt an ordinance aiding in the "peace, good government, health, and welfare of the county," as long as it is not inconsistent with State law. For example, Maryland Code (2018 Repl. Vol.), § 5-1603(a)(1) of the Natural Resources Article ("NR"), upon which the County relies, provides: "A unit of local government having planning and zoning authority shall develop a local forest conservation program, consistent with the intent, requirements, and standards of this subtitle." It provides that the County's forest

conservation program should either meet or be "more stringent than the requirements and standards of" the Natural Resources Article. *Id*. at (c)(1). Pursuant to NR § 5-1612(d)(1),

> [a] person who violates any provision of this subtitle or any regulation, order, plan, or management agreement under this subtitle is liable for a penalty not exceeding $1,000 which may be recovered in a civil action brought by the Department or a local authority. **Each day a violation continues is a separate violation under this subtitle.**

(Emphasis added.)

The County's Forest Conservation Ordinance, which applies to property outside the Chesapeake Bay Critical Area, TCC § 73-1D, seeks to protect existing forest and "prohibit certain development disturbances to occur before a forest stand delineation and forest conservation plan have been prepared and approved." TCC §73-1B(1). These "regulations receive their authority from Natural Resources Article §§ 5-1601 through 5-1612, Annotated Code of Maryland, and COMAR 08.19.01–08.19.06." TCC § 73-1C(1).

TCC § 73-18 mirrors the penalties set forth in NR § 15-1612(d), providing that "a person who violates a provision of this chapter or a regulation or order adopted or issued under this chapter is liable for a penalty not to exceed $1,000, which may be recovered in a civil action brought by the Department." TCC § 73-18A(3)(a). "Each day a violation continues is a separate violation." *Id*. at A(3)(b).[8]

[8] COMAR 08.19.03.01 contains a Model Forest Conservation Ordinance to guide the development of a local program and assist a "local government with planning and zoning authority to determine the size, location and orientation of forest to be retained, and prioritize tracts of land for reforestation and afforestation." With respect to penalties for noncompliance, it states that "a person who violates a provision of this Ordinance or a regulation or order adopted or issued under this Ordinance is liable for a penalty not to

TCC Chapter 58 addresses enforcement of the TCC. Section 58-5A states that each violation of the TCC "shall be punishable by a civil penalty of up to $1,000 per calendar day," and "[f]or each continuing violation, the amount of the civil penalty shall be determined per day." Section 58-5D provides:

> Civil penalties for continuing violations shall accrue for each violation, every day each violation continues, with no requirement for additional assessments, notice, or hearings. The total amount payable for continuing violations shall be the amount assessed per day for each violation multiplied by the number of days that each violation has continued.

TCC § 190-134 addresses forestry activities in Critical Areas, with the purpose of conserving forests and minimizing the removal of trees.[9] TCC § 190-64[10] explains the enforcement method for critical area violations as follows:

> This chapter shall be administered and enforced by the Planning Director and the Chief Code Compliance Officer, who may delegate such duties and responsibilities as they determine appropriate and who may be assisted by subordinate enforcement officials. Such enforcement officials shall have authority to issue administrative orders, determine reasonable abatement periods and procedures, enter into abatement agreements on behalf of Talbot County, issue civil citations, and exercise such other incidental powers as are necessary or proper to enforce the terms of this chapter in accordance with Chapter 58 of the Talbot County Code. The Chief Code Compliance Officer shall have authority pursuant to Chapter 58 to assess civil monetary penalties for violations of this Chapter 190.

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exceed $1,000, which may be recovered in a civil action brought by the Department," *Id*. at XV(B)(1), and "[e]ach day a violation continues is a separate violation." *Id*. at XV(B)(2).

[9] TCC § 190-134 is no longer in existence. After the violations and the Board hearing in the Abatement Orders, Chapter 190 was repealed and replaced with new ordinances relating to critical areas. TCC § 190-1.3. No issue is raised on appeal relating to this action.

[10] Previously TCC (2009) § 190-188, without change.

TCC § 190-1.3 provides: "The County's local Critical Area Program is adopted pursuant to [the] Natural Resources Article[.]"

2.

Proceedings Below

In addressing appellants' argument that the Express Powers Act limited the imposition of possible penalties to $1,000, the Board noted that LG § 10-102(a) made clear that other State laws allowed for the County to enact ordinances to provide for the "peace, good government, health, and welfare" of the County. The Board noted that the State had an interest "in the conservation and retention of forests to enhance the health and welfare of its citizens," and it concluded that the County had delegated authority to enforce continuing violations.

The circuit court affirmed the ruling of the Board. The court found that three of the six civil penalties derived from the County's Forest Conservation Ordinance, and the regulatory authority for that ordinance was derived from NR §§ 5-1601 through 5-1612, not the Express Powers Act. With respect to the other penalties, the circuit court similarly found that the enforcement authority derived from the Natural Resources Article, not the Express Powers Act.

The court further stated that, even if the County's enforcement authority was limited by the Express Powers Act, the penalty would still be valid because the TCC uses a system where "a single violation may comprise multiple offenses," and the CCCO can use his or her discretion to "assess fair daily fines." The court then stated:

> The principle against absurd interpretations of statutes requires that the Court affirm the Board's ruling here. To adopt [appellants'] position that all continuing violations are impermissible under the Express Powers Act would directly undermine the legislative purpose of § 10-202(b)(1). Such a reading would mean that property owners could blatantly ignore lawful orders from the County to abate Code violations and yet face no more than [a] $1,000 fine. That interpretation would render the threat of fines for disobeying County orders a nullity—it would completely bar the County from exerting financial pressure on willful violators of the County Code, such as the [appellants] here.

3.

Analysis

With this background in mind, we address the specific penalties involved. We note that Mr. Graham generally testified that all of the violations arose from the driveway project and the tree cutting, as well as appellants' failure to restore the site.

Three of the penalty assessments were based on violations of the Forest Conservation Ordinance: (1) TCC § 73-3C(6)(a), "[f]ailure to meet retention afforestation, and reforestation requirements"; (2) § 73-10B(1), "[f]ailure to leave trees, shrubs, and plants located in nontidal wetlands and their buffers and critical habitats in an undisturbed condition"; and (3) § 73-101B(2), "[f]ailure to leave contiguous forest that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site in an undisturbed condition." Mr. Graham testified that these penalties were for removing vegetation and failing to keep it in place.

As indicated, TCC § 73-1 states that the County's authority relating to the Forest Conservation Ordinance derives from NR § 5-1612(d)(1). The Natural Resource Article specifically allows for penalties for continuing violations. Accordingly, the Board and the

circuit court properly held that the Express Powers Act did not preclude the continuing penalties for these three violations.

Two penalties were based on violations of TCC § 58-7(1): (1) "[o]ngoing failure to correct, discontinue, or abate ongoing critical area violation as required by administrative abatement order"; and (2) "ongoing failure to correct, discontinue, or abate ongoing non-critical area violation as required by administrative abatement order." At the hearing, Mr. Graham testified that these two violations were identical, except one referred to the critical area and the other referred to the non-critical area.

NR § 8-1815(a)(1)(iii)1 provides that "[a] local authority that identifies a violation of [the Critical Area Protection Program] shall take enforcement action." The County's authority for a violation of TCC § 58-7(1), failure to abate an ongoing critical area violation, was derived from the Natural Resources Article, and the Express Powers Act did not limit the County's authority in that regard. With respect to the § 58-7(1) penalty for failing to abate a non-critical area violation, we agree with the circuit court that this penalty related to a failure to comply with the Abatement Orders requiring appellants to mitigate the harm from the Forest Conservation Ordinance violations. Because authority for the Forest Conservation Ordinance derives from the Natural Resources Article, the Board and the circuit court properly concluded that the Express Powers Act did not limit the County's enforcement authority for this penalty assessment.

The last penalty was for a violation TCC § 190-134, "[p]erforming development activities in the critical area without submission of Forest Preservation Plan." Mr. Graham

testified that the construction of the driveway required a Forest Preservation Plan and County approval, and appellants did not comply with these requirements.

As indicated, Chapter 190 of the TCC addresses critical areas. TCC § 190-1.3. It derives its authority "pursuant to Natural Resources Article § 8-1801." TCC § 190-1.3. NR § 5-1612(d)(1) specifically allows for continuing violations. Additionally, TCC § 190-64 provides for enforcement pursuant to TCC § 58, which also allows for containing violations. The Board and the circuit court properly found that the Express Powers Act did not limit the authority of the County's enforcement power for this violation, or the other violations at issue.

B.

The Continuous Nature of the Violations

Appellants contend that the Board erred in finding that the County had the legal authority to impose continuing violation penalties for another reason. They assert that the tree-cutting and driveway construction occurred in 2006-2007, and the violative actions were concluded several years before the penalties were imposed. Appellants argue that "[n]one of the continuing violation penalties imposed on appellants were for days where a violation occurred, and, thus, they fail as a matter of law."

The County contends that "[t]he circuit court correctly sustained the Board of Appeals' decision that Talbot County has the legal authority to impose continuing civil penalties for zoning violations." It asserts that "the civil penalties authorized by the Code are assessed for violations that began on the day of the violation and continued until they

are abated or reversed on appeal." It characterizes appellants' contention as "specious," permitting penalties only if they are "caught in the act."

Mr. Graham testified that penalties for continuing violations accrued "[e]very day until . . . such time as the violations are abated." The circuit court agreed. It rejected the "unorthodox argument" that the County could not impose continuing violations penalties because there was no "temporal relationship" between the development activities and the dates the penalties were assessed. The court stated:

> The ordinance [appellants] violated exist to prevent habitat destruction and environmental degradation in areas that are particularly important to the health and character of the Chesapeake Bay and its surrounding communities. The issuance of abatement orders serve, *inter alia*, to "correct, discontinue, or abate any violation," and "restore any property to its condition as it existed before any violation of this Code." § 58-7. The civil penalties exist to incentivize compliance with those orders. The penalties are assessed for violations that began on the day of cutting and continued until they were abated–there is a direct relationship.

The circuit court did not cite, nor has the Board cited on appeal, any cases in support of the proposition that a continuing violation includes a failure to correct a violation. There is, however, authority in other courts, and other contexts, for the proposition that each day a person or entity fails to remedy a code violation is a violation of the code provision. *See Hamer v. City of Trinidad*, 924 F.3d 1093, 1097 (10th Cir.) (a public entity violates the Americans with Disabilities Act each day that it fails to remedy a noncompliant service program or activity), *cert. denied sub nom. City of Trinidad, Colorado v. Hamer*, 140 S. Ct. 644 (2019); *Comm'r of Envtl. Prot v. Connecticut Bldg. Wrecking Co.*, 629 A.2d 1116,

1129 (1983) (continuing violation includes number of days debris illegally deposited as well as subsequent time allowing it to remain there).

To address this issue, we would need to address the language of each ordinance violated. *See State v. Shortall*, 463 Md. 324, 337 (2019) (in context of determining whether there were continuing violations of a statute, court concluded that statute prohibited disposing of waste, and therefore, Shortall was guilty only on the days he actually disposed of the waste, not the days it took for him to rectify the violation). The County, however, did not undertake this analysis before the Board, or on appeal, arguing in the brief only that the argument is "specious."

The Board similarly did not undertake this analysis. Indeed, it did not address this issue at all. It limited its assessment of the issue whether the County had the legal authority to impose penalties for continuing violations to the Express Powers Act. Accordingly, because the Board did not address this issue, we will vacate the circuit court's ruling in this regard and remand for further consideration of this issue. *See Motor Vehicle Admin. v. Krafft*, 452 Md. 589, 612 (2017) (given absence of finding on critical issue, Court remanded to Office of Administrative hearings for further proceedings).

IV.

Assessment of Penalties

Appellants' final contention is that the Board erred in upholding the County's daily penalties against them because the penalties were arbitrary and capricious, duplicative, and "grossly excessive in relation to [a]ppellants' relatively minor forest clearing violation."

The County contends that the circuit court correctly sustained the Board's decision that the penalties were properly assessed. It asserts that the penalty assessments were based on substantial evidence, and therefore, they were not arbitrary and capricious.

A.

Proceedings Below

The Board made the following findings of fact regarding the penalty assessments issued by Robert Graham, a code enforcement officer for 14 years:

> a. With respect to the violations in the non-critical areas of the Property [Mr. Graham] found that: (i) The clearing of the driveway created a severe impact on the forest and wetlands; (ii) The [appellants'] failure to abate the violation or, at a minimum, take steps to start that process and lack of communication were evidence of bad faith; and (iii) The [appellants] had had a prior critical area shoreline buffer violation that was eventually, but not promptly, abated. . . . As a result of these findings about conditions in the non-critical area of the [P]roperty, he exercised his discretion and assessed penalty amounts that, in his judgment and experience, 'fit the crime.' All amounts set were within the authority delegated to him by Code. . . .
>
> b. With respect to the critical area violations [Mr. Graham] found that: (i) Clearing the critical area portion of the [P]roperty without going through the permitting process resulted in a definite impact on the environment. He considered it to be serious[;] (ii) The [appellant] had created the driveway without permits but was aware permits would be required due to previous discussions with Lane about creating a driveway and the [appellant] knew the Board had found the activity to be willful in its 1519 decision on November 4, 2009; (iii) The [appellants] had cut trees in the critical area resulting in a loss of resources and habitat; (iv) The CCCO considered the cost of restoring the site and the cost of mitigation planting. . . . As a result of his observations of considerations in the critical area of the [P]roperty, he exercised his discretion and assessed penalty amounts that, in his judgment and experience, 'fit the crime.' All amounts set were within the authority delegated to him by Code. . . .

> c. The total of six (6) daily penalty assessments were less than the maximum daily total that could have been assessed, and were intended to encourage compliance.

The Board noted that there was disagreement among the experts regarding the impact that appellants' activities had on the forest and wetlands. It stated: "If the highly qualified experts could not agree on the extent of the impact, the Board finds it was certainly within the discretion of the CCCO, operating independently, to assess the site conditions and determine what violations had occurred and to characterize the impact as grave or severe."

The Board ultimately concluded that, although Mr. Graham could not recall the exact details of how he made his decisions given the passage of almost nine years, he clearly considered all relevant factors, as well as his experience, in setting the penalty amounts. The Board found that Mr. Graham did not err in assessing the monetary penalties.

The circuit court affirmed the Board's finding. With respect to the argument that the penalties were duplicative, the court stated:

> The various Code provisions that [appellants] violated exist to prevent or ameliorate different harms and are intended to implement related but nonetheless distinct legislative and regulatory objectives. That abating a Critical Area Violation may involve some of the same actions as abating a Forest Preservation violation renders separate penalties for each neither duplicitous nor duplicative. One addresses the threat of unpermitted development in close proximity to waters of the Chesapeake Bay watershed; the other seeks to preserve meaningful forest habitat in the State.

B.

Analysis

Under TCC § 58-5A, the CCCO is given authority to determine and impose civil penalties.[11] The assessment of a penalty is a discretionary decision, and "an agency has broad latitude in fashioning sanctions within legislatively designated limits." *Neutron Prod. v. Dep't of the Env't*, 166 Md. App. 549, 584, *cert. denied*, 392 Md. 726 (2006).

We explained in *Communication Workers of America v. Public Service. Commission of Maryland.*, 424 Md. 418 (2012), our standard of review in such a situation:

> [T]he court applies the arbitrary and capricious standard when it reviews an agency's discretionary functions. As we observed in *Spencer* [*v. Maryland State Bd. of Pharm.*, 380 Md. 515, 846 A.2d 341 (2004)], when an agency acts in its discretionary capacity, it is taking actions that are specific to its mandate and expertise and, unlike conclusions of law or findings of fact, have a non-judicial nature. For this reason, we 'owe a higher level of deference to functions specifically committed to the agency's discretion.' *Spencer*, 380 Md. 515, 529–31, 846 A.2d 341, 349–50.... '[A]s long as an

[11] TCC § 58-5A reads:

> Subject to the limitation set forth in Subsection C, below, each offense shall be punishable by a civil penalty of up to $1,000 per calendar day. The amount of a civil penalty shall be administratively imposed by the Chief Code Compliance Officer by written notice. The amount of the civil penalty for each violation, including each continuing violation, shall be determined separately. For each continuing violation, the amount of the civil penalty shall be determined per day. Except for Critical Area violations governed by § 58-10.1B, below, to set the amount of a civil penalty the Chief Code Compliance Officer shall consider:
>
> (1) The severity of the violation for which the penalty is to be assessed;
>
> (2) The presence or absence of good faith of the violator;
>
> (3) Any history of prior violations.

> administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily unreviewable by the courts.' *Maryland State Police v. Zeigler*, 330 Md. 540, 557, 625 A.2d 914, 922 (1993). Courts thus generally only intervene when an agency exercises its discretion 'arbitrarily' or 'capriciously.' *Id*. at 558.

Id. at 434 (quoting *Christopher v. Montgomery Cty. Dep't of Health & Human Servs.*, 381 Md. 188, 199 (2004)).

Here, the Board properly determined that the penalties imposed were not duplicative or arbitrary and capricious. The CCCO testified, and the Board found as a fact, that he considered all the requisite factors, as well as his experience, in assessing the penalties. Ms. Deflaux testified that the penalties were not duplicative because they involved different aspects of fixing the violations. There were several witnesses, including Mr. Graham, who testified that the damage done by the violations was severe, and Mr. Graham testified that the penalties imposed were approximately six percent of the total amount of penalties he could have issued.

Under these circumstances, the Board did not err in upholding the penalties.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED, IN PART, AND VACATED, IN PART. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REMAND THE CASE TO THE BOARD FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT BY THE PARTIES.