IN THE MATTER OF 2627, LLC - Owner/Developer For the property located on E/S of Caves Road, S of Intersection With Park Heights Avenue 3rd Election District 2nd Council District RE: Appeal of Granting of Development Plan HOH No. 03-0499	* * * * * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY Case No. CBA-17-008

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OPINION

This matter comes to the Board of Appeals on appeal by Protestants of approval of a Development Plan that was initially denied on April 28, 2016 by the ALJ in accordance with the development review and approval process contained in Article 32, Title 4 of the Baltimore County Code ("BCC"). This denial was based on the ALJ's holding that the Department of Planning had failed to make finding regarding RC5 performance standards. Petitioner's filed a Motion for Reconsideration requesting that the ALJ allow the Applicant to submit to the Department of Planning ("DOP") the requisite material necessary for Planning to issue the finding required under BCZR 1A04.4. On May 17, 2016 the ALJ granted the Motion and instructed the Applicant to consult with, and to provide material to, the Department of Planning and to schedule a hearing for additional testimony to be given regarding the RC5 performance standards. An additional day of hearings was conducted on August 16, 2016 and the ALJ issued an Amended Development Plan Opinion and Order approving the Development Plan on August 25, 2016. That Order was timely appealed to this Board. The Petitioner was represented by David Karceski, Esquire and Christopher Mudd, Esquire of Venable, LLC. The Protestants were Valleys Planning Council, Kathleen Pontone, and David and Betsy Wilmerding (collectively the "Protestants"). The Protestants were represented by Michael R. McCann, Esquire.

A hearing on the record was held before this Board on November 9, 2016. Closing Memoranda were received on December 12, 2016 and a public deliberation was held before this Board on January 17, 2017.

STATEMENT OF FACTS

The development at issue proposes four single-family detached residential lots on 24.18 acres of RC 5 land. The four dwellings will be accessed from Caves Road by way of a shared driveway. The site is currently unimproved and is primarily wooded with ponds and a stream on the western and southern portions of the property. The Stemmer House (a Baltimore County Landmark) and delineated historic environment setting are adjacent to the site.

Details of the proposed development are more fully depicted on the red lined and blue lined three-sheet Development Plans that were marked and accepted into evidence in the hearing before the ALJ as Developer's Exhibits 1A-1C and 20A-20C. Baltimore County Administrative Law Judge ("ALJ"), John Beverungen conducted the hearing over the course of five days.

ALJ's (Hearing Officer's) Hearing

BCC §32-4-227 sets out the general requirements for a Hearing Officer's (the ALJ's) hearing in evaluating a development plan. By taking testimony and receiving evidence, the Hearing Officer shall consider any unresolved comments or conditions that are relevant to the Development Plan under § 32-4-228(a)(1).

As for conducting the hearing, BCC §32-4-228(b) provides that the Hearing Officer:

> (i) shall conduct the hearing in conformance with Rule IV of the Zoning Commissioner's rules (Baltimore County Zoning Regulations, Appendix B); (ii) shall regulate the course of the hearing as the Hearing Officer considers proper, including the scope and nature of the testimony and evidence presented; and (iii) may conduct the hearing in an informal manner.

BCC §32-4-229(b)(1) requires that the Hearing Officer grant approval of a development plan

> ...that complies with these development regulations and applicable policies, rules and regulations adopted in accordance with Article 3, Title 7 of the Code, provided that the final approval of a plan shall be subject to all appropriate standards, rules, regulations, conditions, and safeguards set forth therein.

The Hearing Officer is not affiliated with any Baltimore County agency. He or she acts independently in reviewing the development plan.

Petitioner's Case before the ALJ

As noted by the ALJ in his Opinion, the Petitioner presented several expert witnesses. As the record reflects, professional engineer Douglas L. Kennedy testified regarding the development proposal, which is reflected on the Plan marked as Developer's Exhibit 1A-1C from the hearing before the ALJ. Mr. Kennedy reviewed the "red line" changes on the Plan, which he explained were made in response to County agency comments. Mr. Kennedy further discussed the historical environmental setting which was created on the adjacent property in 2006, surrounding the Stemmer House, which is on the Baltimore County Final Landmarks List. Mr. Kennedy testified that the environmental easements created at the site, the forest buffer easement and forest conservation easement, will exceed eight acres, and that an underground stormwater management system would be provided. Consequently, an outfall would not be created on a steep slope which exists on portions of the site. In summary, Mr. Kennedy opined the Petitioner satisfied all Baltimore County rules and regulations.

Next to testify before the ALJ was Henry A. Leskinen, an environmental specialist. Mr. Leskinen indicated the Petitioner would be required to obtain a special variance from DEPS to remove one specimen tree from the area where the driveway will be created. (Developer's Exhibit 7 from Hearing before ALJ.) Mr. Leskinen noted that by doing so, the Petitioner would avoid disturbing approximately a quarter acre of forest to gain access to the proposed dwellings, as reflected on Developer's Exhibit 8 from the Hearing before the ALJ.

Mr. Leskinen next testified concerning forest harvesting activities which took place on the site prior to 2013. Mr. Leskinen stated that the former owner contracted with a logging company to cut oak trees out of the forest, which he deemed not to be ideal. Mr. Leskinen made clear that other than the one tree noted above (referenced on the Plan as "Tree T") no Priority I forest will be cleared by the Petitioner.

The next witness was Sally Malena, a registered landscape architect who was accepted as an expert. Ms. Malena reviewed the plan depicting the landscaping to be provided along the shared access road, which will screen the Stemmer House at 2627 Caves Road from the proposed dwellings. (Developer's Exhibit 11 from the Hearing before the ALJ) Ms. Malena also prepared and explained an exhibit concerning the sight lines from Caves Road into the property. (Developer's Exhibit 10 from the Hearing before ALJ) Ms. Malena opined that proposed Lots 3 and 4 (2609 and 2611) would not be visible to motorists traveling along Caves Road due to the grade change at the site.

The Petitioner next presented testimony from Mitchell Kellman, a land use and zoning planner accepted as an expert witness. Mr. Kellman stated that the lot sizes proposed in this project are similar to existing properties and homes located to the southeast of Caves Road. He further testified that Master Plan 2020 designates the site as a "rural residential area" (Developer's Exhibit 17 from Hearing before the ALJ) and that the site is located within the T2R[1] transect. (Developer's Exhibit 18 from Hearing before the ALJ) Mr. Kellman opined that the proposed development was consistent with Master Plan 2020 and satisfied all requirements of the zoning regulations.

The Petitioner next elicited the testimony of Kathryn Kuranda, an architectural historian accepted as an expert. Ms. Kuranda testified that the Caves Valley National Register Historic

[1] Master Plan 2020 Proposed Land Use Map indicates T2R transect is a Rural Residential area.

District ("District" or "NRHD") was listed in 1988, and she explained that the District contains approximately 2,100 acres. Ms. Kuranda explained that the National Register of Historic Places is a "planning tool," and does not restrict in any way an owner's right to use their property. Ms. Kuranda presented a series of exhibits (Developer's Exhibit Nos. 24, 26A and 26B from the Hearing before the ALJ) which illustrated the new development that has taken place in the Caves Valley Historic District since its designation in 1988. Ms. Kuranda opined that new construction does not automatically harm or negatively impact a historic district. With regard to this case, Ms. Kuranda opined that the District still retains the rural open space and agricultural qualities for which it was nominated. Ms. Kuranda testified that the four proposed building lots would be on the edge of the District in a currently forested area, and she was unable to locate any documentation which would show this area to be of any particular significance. She further opined that the proposed construction can take place with "appropriate guidelines," and though there is no requirement that it do so, the Petitioner submitted a proposed list of covenants which would be recorded among the Land Records. (Developer's Exhibit 28 from the Hearing Before the ALJ.) Assuming such a covenant agreement was to be recorded, Ms. Kuranda concluded that there would be no adverse effect to the historic district. She further concluded that the proposed construction would be compatible with other residential properties in the area.

Next, Ms. Kuranda testified she was aware that the Baltimore County Landmarks Preservation Commission ("LPC") designated a historic environmental setting for the Stemmer House. She explained that such a designation helps a property retain its integrity, and she indicated that the setting is all that is required to protect the resource. Ms. Kuranda noted that if the LPC envisioned the environmental setting protection to encompass the entire property, it would have so indicated in its Order. Ms. Kuranda opined that only portions of the proposed access driveway and certain storm water features would be located within the environmental setting, and that no

structures are proposed therein. Consequently, Ms. Kuranda concluded, LPC review would not be required. As noted by the ALJ Opinion, Ms. Kuranda commented that the Caves Valley District was "not freeze dried after the 1988 designation," as evidenced by the construction of the cell towers and Caves Valley Golf Course project, both of which were constructed after that date. On cross examination, Ms. Kuranda conceded that the Historic District nomination documents do reference "forested ridges," but she believes those ridges can be preserved with appropriate covenants. With regard to the historic environmental setting surrounding the Stemmer House, Ms. Kuranda testified that the proposed access driveway and storm water management devices would not be considered "structures," and as such LPC review would not be required. The witness further opined that there would be at most "temporary" impacts upon the historic environmental setting during the construction phase of the project.

As the hearing before the ALJ progressed, the Petitioner presented an amended blue lined Plan, which was marked as Developer's Exhibit 20A-20C. Douglas Kennedy provided further testimony concerning this amended blue line Plan. Mr. Kennedy explained that his firm previously overlooked a 20 ft. ingress and egress easement on the subject property, which required the Petitioner to reconfigure slightly Lots 1 and 4. Mr. Kennedy explained that the blue lined changes on the Plan were done in response to revised agency comments (Developer's Exhibit 21A and 21B from the Hearing before ALJ). Mr. Kennedy concluded that the blue lined Plan satisfied all County requirements.

In response to questions on cross-examination, Mr. Kennedy explained that he first learned of the access easement on or about November 11, 2015, and submitted the new blue lined development Plan on January 7, 2016. Mr. Kennedy testified that he believes the prior development case involved a "totally different piece of property," and that he did not consider that case in preparing the present Plan. With regard to the RC5 Performance Standards, Mr. Kennedy

explained that Note 28 on the Plan references an agreement with the Department of Planning whereby that agency will evaluate the Petitioner's compliance at the time of building permit application.

The Petitioner next recalled Henry Leskinen, who testified regarding the amended blue lined plan. Mr. Leskinen testified that he had to reconfigure the forest conservation easements on the site. As a result, Mr. Leskinen testified that forest conservation easement Nos. 1 and 2 got slightly smaller, while forest conservation easement No. 3 was expanded to "make up" for the area within the access easement, some of which was within a forest conservation easement as shown on the original Development Plan. Mr. Leskinen explained that 8.1 acres of the site will be dedicated to Baltimore County and subject to environmental easements.

<u>Protestants' Case before the ALJ</u>

As noted in the ALJ opinion, the first witness called by the Protestants' was Barbara Holdridge. Ms. Holdridge testified that she lived for 40 years in the historic Stemmer House located adjacent to this project. Ms. Holdridge sold the property in 2012, and explained that in 2004 she was in fact seeking development approval for her property. Ms. Holdridge explained she regrets her involvement in the prior 2004 development proposal, which called for 14 single-family dwellings on the site. Ms. Holdridge testified that she fears that the walls and gardens surrounding the Stemmer House could be harmed during construction. She is also concerned with the disruption of wildlife in the area and the impact upon a pond she constructed on the site, not shown on the Development Plan. On cross-examination, Ms. Holdridge admitted that during the time she lived at the property she undertook three timber harvests to thin the forest and to provide income.

Next, the Protestants presented testimony from several residents in the area who opposed the development project. These residents expressed concern with storm water run-off and the effects in the rural setting as well as the adverse effects on wildlife. Additionally, area residents

testified that constructing four homes in this location would have a significant and irreversible impact upon the Caves Valley historic district. As noted in the ALJ opinion, community witnesses testified the historic designation "ought to have some weight" and that constructing four single family dwellings was "asking too much of the site," as Deputy Zoning Commissioner Murphy held in the 2004 case. These witnesses also stated that unlike the Caves Valley Golf Course development, in which the Developer placed environmental easements on large portions of the site, this project has no community benefit to mitigate the negative impacts of the new dwellings.

Next, Tom Finnerty, President of the Greater Greenspring Association (GGA), testified that the GGA opposes this project. Mr. Finnerty believes that the proposed homes are too close to the Historic District. As noted in the ALJ Opinion, Mr. Finnerty testified that he is an antique dealer, and that the "patina" of the Stemmer House would be negatively impacted by the four new homes, which would be visible from the second floor of the Stemmer House.

The next witness in Protestants' case was Janet Davis, who was accepted as an expert as an historic preservation specialist. Ms. Davis explained her extensive credentials in the historic preservation field. Ms. Davis noted that the Stemmer House is one of only three (3) "A" rated structures within the Historic District, and the only structure on the east side of Caves Road. Ms. Davis explained that the Stemmer House was relocated in or about 1930 from eastern Baltimore County, and that while that was "not the best thing" to do, the move was largely successful. Ms. Davis opined that the Caves Valley District has "extraordinarily high" integrity. Ms. Davis further concluded that the proposed development would negatively impact the Historic District, primarily because the proposed homes would be on the ridgeline, which is a key element of the Historic District. In addition, she noted that the proposed dwellings are close to the Stemmer House, and that the driveway would in essence be a road. Ms. Davis concluded that the historic environmental setting should encompass the entire property as represented by the 1931 property boundary when

the Stemmer House was moved to the site.

Protestants next presented the testimony of Michael Brassart, a filmmaker who prepared aerial photography and video using a drone which flew over the property at a height of approximately 83 feet. The 2 ½ minute video was submitted as a DVD (Protestants' Exhibit 25 from the Hearing before the ALJ)

The next witness called by the Protestants was Phillip Jones, an architect, who was accepted as an expert witness. Mr. Jones testified that he was provided the aerial footage taken by Mr. Brassart, and that based on that footage and the Development Plan, he prepared a rendering (using computer modeling software). Mr. Jones explained that the renderings, submitted as Protestants' Exhibits 29 and 30 from the Hearing before the ALJ, illustrate the height of the proposed dwellings and their location on the lots. In response to questions on cross-examination, Mr. Jones conceded that he had never visited the site and could not make a determination regarding the square footage of the houses depicted on Protestants' Exhibits 29 and 30.

Daniel J. O'Leary, a professional engineer accepted as an expert, was the next witness in Protestants' case. Mr. O'Leary began his testimony by noting a discrepancy between the initial Development Plan in this case (Developer's Exhibit 1B from the Hearing before the ALJ) which indicated a driveway profile of 566.6 ft. at the peak, and the blue lined Plan marked as Developer's Exhibit 20A which listed the peak at 568.0 ft. Mr. O'Leary explained that such a discrepancy could alter the projected drainage areas, and he therefore opined that the drainage map (admitted as Protestants' Exhibit 43 from the Hearing before the ALJ) was incorrect. Mr. O'Leary opined that all three drainage areas would be altered and that drainage area 2 shown on the Plan should be divided into two separate sub-watersheds, given that the majority of the development would occur in that area.

Mr. O'Leary next expressed concerns that the curb cuts shown on the proposed access

driveway would be effective in stormwater management. Mr. O'Leary testified that the driveway would have a level profile, and that the surface water would be required to make a left turn to enter through the curb cuts. He believed it was not realistic to expect this to occur. The witness opined that the curb cuts would need to be between 32 and 45 ft. wide to effectively capture 100% of the surface water runoff. Mr. O'Leary explained that the State Highway Administration (SHA) would consider a 10 ft. curb cut to be wide. Using that figure, he opines that stormwater runoff to Caves Road will have an effect on the adjacent receiving stream.

Mr. O'Leary further expressed concerns with the trenches and porous pavers that will be used to provide stormwater management for each of the residential lots. Mr. O'Leary testified that the use of trenches as a stormwater management device has not always been successful in the past, and he noted that leaves and other yard waste will frequently clog the inlets. He noted that the Plan reveals slopes greater than 25% which he does not believe would cause a catastrophic slope failure, but may cause surface water runoff and erosion issues. He further questioned whether the trenches were uniformly distributed throughout the site, given the incorrect alignment of the drainage areas discussed earlier in his testimony. Finally, Mr. O'Leary opined that Lot 4 was not eligible for a disconnection credit (a facet of environmental site design) since the driveway is recessed and exceeds 75 ft. in length, which would prevent the sheet flow of water across an impervious surface and onto an area of vegetation.

Upon cross-examination, Mr. O'Leary conceded that the design and implementation of a stormwater management plan is an evolving "dynamic" process. Mr. O'Leary further agreed that following the approval of a conceptual stormwater management plan, further review and analysis would be required before the County approved a final design. Mr. O'Leary described the area of the site as rural in nature, and he noted that stormwater management practices have now shifted responsibility to the homeowner individually, which raises maintenance concerns. In referring to

Protestants' Exhibit 49 from the Hearing before the ALJ (Stormwater Design Guidance from the Maryland Department of the Environment), the witness conceded that the guidance does not require that the trenches and stormwater management devices be "uniformly distributed," such that the "runoff curve number method" is not applicable in this setting.

Elizabeth Watson, a planner with Heritage Strategies, LLC was next to testify in the Protestants' case. Ms. Watson explained that she is a strategist and planner, and she described in some detail the definition of a "cultural landscape." Ms. Watson testified that the Caves Valley Historic District is one of Baltimore County's most protected landscapes. Ms. Watson testified that there is a continuous "band of trees" at this site, and that the proposed homes would alter the tree line. Ms. Watson concluded that the Caves Valley Golf Course development was well designed, while the proposed development would essentially be chopping into a preserved forest area.

Ms. Watson opined that there was a small market of potential purchasers for the Stemmer House, and that if the development was approved it would destroy the value and experience of this historic landmark, and thus discourage future purchase. She also opined that the LPC was incorrect for not adhering to the property boundary lines when designating the historic environmental setting for this site. As noted in the ALJ's opinion, in response to questions on cross-examination, Ms. Watson testified that "what is missing here are rules of the game" to protect these viewsheds and historic settings.

The next witness called by the Protestants was Margaret De Arcangelis who is employed by Preservation Maryland. Ms. De Arcangelis testified that she is an advocate for historic properties, and her organization has concerns about this proposed development and its impact on the historic setting for the Stemmer House. Ms. De Arcangelis testified that the proposed access driveway would bring traffic to the area, negatively impacting the setting of the Stemmer House.

Bruce Doak, a property line surveyor accepted as an expert was called as the final witness in the Protestants' case. Mr. Doak opined that the Developer has not complied with the requirements set forth in B.C.C. § 32-4-409 concerning panhandle driveways. Mr. Doak testified that there is nothing in the record to indicate that the DOP has reviewed and/or approved the panhandles in this case (which would serve Lots 1 through 3), and the witness also noted that the Petitioner did not submit a neighborhood plan, photo montage and written narrative to justify the panhandles. He stated that in his experience the DOP requires such materials to be submitted prior to approving such driveways.

Mr. Doak next opined the Petitioner has not satisfied the performance standards set forth at B.C.Z.R. § 1A04.4, which are applicable in the RC5 zone. Mr. Doak testified that at this point in the process there should have been written comments provided by the DOP. Mr. Doak further testified that in his experience the DOP would require preliminary elevation drawings and other materials to be submitted for review so that it could make a finding under this regulation, which was not done in this case.

Petitioner's Rebuttal before the ALJ

The Petitioner presented in its rebuttal case additional testimony from Mitchell Kellman and Douglas Kennedy. Mr. Kellman testified that during the course of the hearing before the ALJ, he visited the site and took photographs (Developer's Exhibit 38 from the Hearing before the ALJ), many of which featured the Caves Valley Golf Course property. Mr. Kellman testified that the photographs were taken during the weekday morning rush hour, from approximately 7:30 A.M. to 8:00 A.M.

Mr. Kennedy testified the Petitioner would be granting easements to Baltimore County (for inspection and/or maintenance if necessary) in connection with all structural stormwater management facilities at the project. Mr. Kennedy noted that such easements are shown in detail

on the Plan (Developer's Exhibit 20B from the Hearing before the ALJ), and he underscored that if a homeowner does not maintain the facilities the county would be authorized under such an easement to step in and perform the necessary repairs or maintenance. Finally Mr. Kennedy testified regarding the distinction between the various types of stormwater management plans submitted during the development process. As noted in the ALJ's Opinion, Mr. Kennedy stressed that at this phase a concept stormwater management plan has been approved, and that it will "evolve" prior to the ultimate approval of a final development stormwater management plan. Mr. Kennedy further noted that it is not uncommon for changes and amendments to be made following the approval of a concept stormwater management plan and before approval of a final stormwater management plan.

Standard of Review

Protestants have alleged in their appeal that the Petitioner misstated the standard of review to be employed by this Board when reviewing the decision of the ALJ. For clarification, this Board will follow the standard of review as explained below.

An appeal before this Board on a development plan is heard on the record of the Hearing Officer pursuant to BCC §32-4-281(d). The standard of review of the Hearing Officer's decision is governed by BCC §32-4-281(e):

> *Actions by Board of Appeals.*
> (1) In a proceeding under this section, the Board of Appeals may:
> (i) Remand the case to the Hearing Officer;
> (ii) Affirm the decision of the Hearing Officer; or
> (iii) Reverse or modify the decision of the Hearing Officer if the decision:
> 1. Exceeds the statutory authority or jurisdiction of the Hearing Officer;
> 2. Results from an unlawful procedure;
> 3. Is affected by any other error of law;
> 4. Is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
> 5. Is arbitrary or capricious.

> (2) Notwithstanding any provisions to the contrary, if the Hearing Officer fails to comply with the requirements of § 32-4-229(a) of this subtitle and an appeal is filed under § 32-4-229(a) of this subtitle, the Board of Appeals may impose original conditions as are otherwise set out in § 32-4-229(c) and (d) of this subtitle.

The Court in the case of *Monkton Preservation Ass'n v. Gaylor Brooks Realty Corp.*, 107 Md. App. 573, 581 (1996) explained that, as to the Board's authority for reversing or modifying a decision of a Hearing Officer:

> The first three of these reasons involve errors of law, and, as to them, no deference is due to the hearing officer. The Board clearly must make its own independent evaluation. That is also true with respect to paragraph (e) -- whether the hearing officer's decision is arbitrary or capricious. When it comes to reviewing the factual basis for the hearing officer's decision, however, the standard is the traditional one of looking only to whether there is substantial evidence to support the findings. In that examination, the Board does *not* make independent evaluations, for to do so would require the Board to make credibility decisions without having heard the testimony.

The Court in *Gaylor Brooks* further explained the role of the Board of Appeals as follows:

> A county board of appeals is not intended to be that kind of policy-making body; at least with respect to reviewing development plans, it is not vested with broad visitatorial power over other county agencies, but acts rather as a review board, to assure that lower agency decisions are in conformance with law and are supported by substantial evidence.

Id. at 580.

The Board must examine the record as a whole to determine whether or not substantial evidence exists to support the findings of the Hearing Officer, and if so, the Board may affirm those findings. Toward that end, the Board takes note that "substantive evidence" has been defined to mean more than a "scintilla of evidence." *Prince George's County v. Meininger*, 264 Md 148, 152 (1972).

Decision

Issues on Appeal

A. Should the Petitioner's Development Plan been dismissed on grounds of res judicata?

During the hearing before the ALJ, the Protestants made a preliminary motion to dismiss the case based on *res judicata.* Protestants argued that former Deputy Zoning Commissioner Murphy's denial of the development plan in Case No. 3-462 (Protestants' Exhibit 9 from the Hearing before the ALJ) bars the Petitioner from submitting another Plan and re-litigating issues already decided. The ALJ denied the Protestants' motion, finding that *res judicata* is not applicable is this circumstance.

The ALJ noted that the 2004 case involved a 73-acre tract on which 14 single family dwellings were proposed and that in the present proposal, the tract is one third that size (i.e., 24 acres) and only four single family dwellings are proposed. The ALJ concluded that while *res judicata* is applicable in the context of administrative hearings, it does not apply where there is significant change in circumstances between the earlier and subsequent actions. *Alvey v. Hedin*, 243 Md. 334, 340 (1966). The ALJ additionally noted that a change in substantive law (as occurred here) renders the doctrine of *res judicata* inapplicable. *Gertz v. Anne Arundel County*, 339 Md. 261, 271-72 (1995); *Woodlawn Area Association v. Prince George's County*, 241 Md. 187, 197 (1966); *Jack v. Foster Branch Homeowner's Assoc.,* 53 Md. App. 325, 333 (1982). The ALJ noted the fact that the B.C.C. provision cited in Deputy Zoning Commissioner Murphy's 2004 Order (B.C.C. § 32-4-416, Protestants' Exhibit 10, p.10) was repealed as rationale that *res judicata* is not applicable in this matter.

As argued by the Petitioner, in Maryland, *res judicata* may only be applied where the following conditions are met:

(1) the parties in the present litigation are the same or in privity with the parties to the earlier dispute;
(2) the claim presented in the current action is identical to the one determined in the prior adjudication; and
(3) there has been a final judgment on the merits.

See R & D 2001, LLC v. Rice, 402 Md. 648, 663 (2008). The absence of any one of the conditions renders the doctrine inapplicable. *See Surrey Inn, Inc. v. Jennings*, 215 Md. 446, 456 (1958) Additionally, in Maryland that *res judicata* does not apply where, following the original decision, there has been a relevant change in the law (*see Jack v. Foster Branch Homeowner's Ass'n No. 1, Inc.*, 53 Md. App. 325, 333 (1982) (*citing Whittle v. Board of Zoning Appeals*, 211 Md. 36 (1956)) or "substantial changes in fact and circumstances" (*see Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 737 (2010)). The Petitioners argue that, here, there have been significant changes in both fact and law since the 2004 Case, which demonstrate that the "claim" presented in the 2004 Case is not identical to the "claim" in this case, and, therefore, *res judicata* is inapplicable.

The Petitioner notes that the test for determining whether two claims or causes of action are the same for the purposes of *res judicata*, known as "the transaction test," requires consideration of whether (1) the facts involved in both claims are related in time, space, origin, or motivation; (2) the facts form a convenient trial unit; and (3) treatment of the facts as a unit conforms to the parties' expectations or business understanding or usage. *See Gertz v. Anne Arundel Cty.*, 339 Md. 261, 269-70 (1995); *see also Kent Cty. Bd. of Educ. V. Bilbrough*, 309 Md. 487, 499 (1987).

In undertaking the *res judicata* analysis it is necessary to compare the facts in the present matter to those presented in 2004 case, so that the Board can make a determination as to whether they are so substantively different that they are not sufficiently "related in time, space, origin or motivation." It is clear from the record that the 2004 Plan proposed the Stemmer House lot, plus thirteen lots accessed via a new roadway off of Park Heights Avenue (a scenic route), compared to the four lots proposed on the Development Plan accessed via an existing driveway (that is to be improved) off of Caves Road (not a scenic route) (*see* HO Original Order, p. 15; *see also* Prot. Ex.

10, p. 5-6, 17; Prot. Ex. 9; Dev. Ex. 20A-C from the Hearing before the ALJ). It is also noted from the record that the three homes proposed on the 2004 Plan on the Property were oriented away from the Stemmer House and Caves Road, compared to four homes on the Development Plan that are now oriented toward the Stemmer House and Caves Road (*see* Prot. Ex. 9; *see also* Dev. Ex. 20A-C from the Hearing before the ALJ). Additionally, the 2004 Plan proposed a larger impervious area that required six stormwater management ponds, some of which were to outfall on or near erodible slopes. The Petitioner notes that the current plan involves a compact and effective micro-bioretention-based stormwater management design proposed for the modest impervious area on the Development Plan, with no outfalls on or near erodible slopes (*see* Prot. Ex. 10, p. 18-19; *see also* Prot. Ex. 9; Dev. Ex. 20A-C from the Hearing before the ALJ; November 5, 2015 Tran. at 115-125). It was also noted on the record that the 2004 Plan proposed homes to be built "on slopes greater than 25%" (i.e., steep slopes), which is not proposed on the Development Plan (*see* Prot. Ex. 10, p. 21; *see also* Prot. Ex. 9; Dev. Ex. 20A-C from the Hearing before the ALJ). Testimony was given that a significant amount of "priority 1" forest clearing was proposed under the 2004 Plan, but due to subsequent logging activity on the Property, there is now virtually no "priority 1" forest proposed for removal under the Development Plan – i.e., just a single specimen tree (which qualifies as "priority 1" forest) (*see* Prot. Ex. 10, p. 9; *see also* HO Original Order, p. 3-4; Prot. Ex. 9; Dev. Ex. 20A-C from the Hearing before the ALJ). Importantly, the record reflects that the 2004 Plan included the Stemmer House, but due to the 2012 lot line adjustment, it is now located on a separate parcel and is not part of the Development Plan (*see* Prot. Ex. 9; *see also* Dev. Ex. 20A-C from the Hearing before the ALJ). Finally, the LPC established an historic environmental setting around the Stemmer House in 2006, which did not exist on the 2004 Plan and which now excludes the area where the newly proposed houses are to

be constructed (*see* Prot. Ex. 9, 38; *see also* Dev. Ex. 20A-C from the Hearing before the ALJ; HO Original Order, p. 16-18).

These factual differences are particularly important because, when denying the 2004 Plan and noting that three of the proposed homes were within the NRHD, the Hearing Officer noted several facts in making his decision. Specifically, regarding the homes in the NRHD, he found:

> If this were the only consideration, I might decide to approve the homes as they are on the fringe of the district. However, when I consider that the Developer is proposing storm water outfalls onto slopes 10% or greater with highly erodible soils, I am convinced that the Developer is asking too much of this site. In addition, the Developer proposes to build homes on slopes greater than 25% which poses its own danger of erosion along with the possibility of disposing sediment into the sensitive trout streams below...Finally, the fact that the Developer is proposing six storm water management facilities for only 13 homes tells me that this plan is simply too much on this ridge.

Prot. Ex. 10, p. 21.

Petitioner further argues that there have been substantive and significant changes in the law that also makes *res judicata* inapplicable in this circumstance. First, a provision within one of the Sections of the BCC that the Hearing Officer relied upon when addressing NRHD-related issues in 2004 – BCC §32-4-416 – has been repealed. *See* County Bill No. 26-07. The Code no longer "requires each development plan to preserve historic structures or sites referred to in Section 32-4-223(8)," as it did in 2004. *See* Prot. Ex. 10, p. 19; *see also* BCC §32-4-416.

Petitioner further notes that the laws and regulations pertaining to stormwater management have significantly changed since the 2004 Case, with the newly adopted provisions implementing the "environmental site design" approach to management of stormwater. *See* BCC §33-4-101, *et seq.; see also* Nov. 5, 2015 Tran. at 123-25. These changes in law contribute to a different stormwater management design proposed on the Development Plan, which excludes any large ponds to manage stormwater for the project and, therefore addresses some of the issues identified by the Hearing Officer in his rationale for denying 2004 plan.

The Protestants argue that the language "[t]herefore, I will not approve a plan with homes in the historic district, not only to preserve the district but also to relieve pressure to build on this ridgeline" from the 2004 Opinion illustrates that the 2004 plan was denied on both environmental and historic preservation issues and that although there may have been a change in law, the environmental issues still exist. The majority of Board finds that the previously noted differences between the present plan and the 2004 plan, encompasses some of these environmental issues, creating factual differences that would render *res judicata* inapplicable.

In applying the tenets of *res judicata* to this case in relation to the 2004 plan which was denied, the majority of the Board finds that the claims involved in the 2004 Case and this matter are not identical; and there have been significant changes in both law and fact since the 2004 decision. Consequently, the majority of the Board finds that the Hearing Officer was correct in refusing to apply the doctrine of *res judicata* and affirms the Hearing Officer's findings on this issue.

B. Has the Developer failed to meet its burden regarding Stormwater Management?

On appeal before this Board the Protestants have alleged that "the Development Plan should be denied because the stormwater management plan falls short of meeting the developer's burden in this case." As noted by the ALJ, the Protestants raised several issues regarding stormwater management throughout the hearing and in their memorandum. Protestants argue that the stormwater management plan for the project is defective, and that the devices proposed will be inadequate, or may be compromised by a lack of maintenance by the future homeowners. The ALJ, in his Opinion, found that the trenches and pervious pavement shown on the Plan are deemed acceptable by Maryland Department of the Environment (MDE) and DEPS. He noted that whether or not Mr. O'Leary regards them as desirable is not germane. The ALJ further found that at this stage of the process, DEPS has approved a "concept" stormwater management plan. The ALJ

found that the stormwater management design is merely conceptual, as recognized by both Mr. O'Leary and Mr. Kennedy. He further found that the plan will evolve throughout what they described as a "dynamic" process. *Monkton Preserv. Assoc. v. Gaylord Brooks*, 107 Md. App. 573, 584-85 (1996) (describing development process as "ongoing process").

The ALJ agreed with Mr. Kennedy's assessment that the "concept stormwater management plan" is "the first of three required plan approvals that contains information necessary to allow an initial evaluation of a proposed project." B.C.C. § 33-4-101(h). Among other things, this conceptual plan must show the "type, size and location of proposed ESD practices, supporting computations, and all points of discharge from the site." B.C.C. § 33-4-107(b)(2). The ALJ further found that the concept plan (Protestants' Exhibit 8 from the Hearing before ALJ) contains these details, and based on that exhibit, the testimony of Mr. Kennedy, and the review by DEPS, the Petitioner has satisfied the requirements of the B.C.C. B.C.C. § 32-4-224(a)(10).

In reviewing the basis for the ALJ finding on this issue, it is clear that his finding was the result of choosing between the expert testimony of Mr. Kennedy and Mr. O'Leary. In reviewing the ALJ's choice as to which expert he found to be more persuasive, the Board does *not* make independent evaluations, for to do so would require the Board to make credibility decisions without having heard the actual testimony. *Monkton Preservation Ass'n v. Gaylor Brooks Realty Corp.*, 107 Md. App. 573, 581 (1996). Consequently, the Board defers to the ALJ's decision on this issue and unanimously affirms his finding in regards to stormwater management and finds that here exists a substantial factual basis for his decision.

C. Did the ALJ err in concluding that he has no authority to determine the impact of the development plan on the historic district?

On appeal Protestants argue that the ALJ erred in concluding that he has no authority to determine the impact of the development plan on the historic district. The ALJ conceded that the

Stemmer House is listed as a Baltimore County landmark, and the Caves Valley Historic District is a recognized and notable example of a picturesque "cultural landscape." The ALJ found that he is not permitted to deny a development proposal that offends his/her sensibilities or aesthetic judgment. Rather, a Protestant must identify a specific shortcoming in the Plan. *People's Counsel v. Elm Street Development, Inc.*, 172 Md. App. 690, 703 (2007).

The ALJ noted that the LPC established an historic environmental setting (HES) surrounding the Stemmer House. Under the B.C.C., that "means the property or lot or portion thereof, as delineated by the Commission, which is historically, architecturally, archeologically, or culturally related to the historic significance of a landmark structure." B.C.C. § 32-7-101(p). The ALJ noted that members of the community and Protestants' experts were extremely critical of the LPC's failure to designate the entire Holdridge property as constituting the HES.

The ALJ found the reasoning behind that decision to be unimportant; he found it to be binding on the ALJ and found that the LPC process is the exclusive avenue to address these issues. B.C.C. § 32-7-301(h). The ALJ held that the property upon which the four (4) single family dwellings would be constructed is not within the HES, and is therefore not deemed to be "connected to the historic significance of a landmark structure." B.C.C. § 32-7-101(p). The ALJ he noted what he viewed as an analogous setting involving an expansion of the Broadmead retirement community in Hunt Valley. The former Chief of the DOP's Bureau of Preservation Services (Karin Brown) noted that as long as "the future comprehensive care center is built outside the bounds of the HES [of the Holly Hill House], the LPC has no purview over the design or siting of the proposed structures." (*See* letter dated March 9, 2012 from Karin Brown to Richard F. Compton.)

Protestants note that former Deputy Zoning Commissioner Murphy, in denying the Holdridge Development Plan in 2004, found that the construction of the dwellings at this site

would have a negative impact upon the Stemmer House and the historic district. However, the ALJ correctly notes that Opinion and Order was issued prior to the delineation of the HES surrounding the Stemmer House and that, the Code provision relied upon by the Hearing Officer (former B.C.C. § 32-4-416) was repealed by the Baltimore County Council. That section required each development plan to "preserve historic sites and structures," and the Hearing Officer in the 2004 case did not believe that provision was satisfied. (Protestants' Exhibit 10, pp. 19-20 from the Hearing Before the ALJ.)

In his Opinion, the ALJ finds that there is no provision in the B.C.C. or B.C.Z.R. which requires the ALJ to "preserve" historic sites, nor is there any code or regulation which imposes any particular requirements for a development project proposed in the vicinity of a historic district or structures. The ALJ cited the testimony of the historic preservation witnesses that noted, the federal historic district designation is merely a planning tool and does not regulate how an owner is permitted to use his or her property. Additionally, the ALJ cited the testimony of Elizabeth Watson, who stated that Baltimore County does not provide "rules of the game" concerning how best to preserve historic districts and viewsheds. Consequently the ALJ found that, he cannot deny a plan proposing single family dwellings outside of the HES surrounding a County landmark and adjoining the Caves Valley Historic District.

Petitioner notes that the Hearing Officer's authority when approving or denying a development plan is derived from, and limited by, statute. Specifically, BCC §32-4-229 – entitled "HEARING OFFICER'S HEARING – DECISION OF THE HEARING OFFICER" – requires, among other things that "[t]he Hearing Officer shall grant approval of a Development Plan that complies with these development regulations and applicable policies, rules and regulations adopted in accordance with Article 3, Title 7 of the Code, provided that final approval of a plan

shall be subject to all appropriate standards, rules, regulations, conditions, and safeguards set forth therein." BCC §32-4-229(b)(1).

As noted by the ALJ, Historic preservation experts for both Applicant and Protestants likewise agreed that the NRHD designation is merely a planning tool and does not regulate how an owner is permitted to use his or her property Additionally, Mr. Lloyd Moxley indicated that Planning was aware of the existence of the NRHD, and the Department had no issues with the Plan when recommending approval. (*See* Nov. 5, 2015 Tran. at 35; 39-43.)

The majority of this Board finds, in this case, it is clear that the Stemmer House is located on a parcel of land that is adjacent to the Property and that it is not part of the Development Plan. (*See* Dev. Ex. 20A-C from the Hearing before the ALJ; *see also* Nov. 5, 2015 Tran. at 108-09.) It is also clear that a portion of the historic environmental setting associated with the Stemmer House is located on a portion of the Property, but that none of the houses proposed on the Development Plan will be constructed within the setting. (*See* Dev. Ex. 20A-C from the Hearing before the ALJ; *see also* Aug. 16, 2016 Tran. at 69-70.) As noted by the Petitioners, Mr. Moxley testified that Planning was aware of the historic structure on the adjacent property and the existence of the setting on a portion of the Property, and the Department recommended that the Development Plan, as proposed, be approved by the Hearing Officer. (Nov. 5, 2015 Tran. at 35-43.) Additionally, Planning made no recommendation for referral of the plan in its Development Plan Conference Comment.

In conclusion, the majority of the Board concurs with the finding of the ALJ that there is no provision in the B.C.C. or B.C.Z.R. which requires the ALJ to "preserve" historic sites, nor is there any code or regulation which imposes any particular requirements for a development project proposed "in the vicinity" of a historic district or structures, consequently, it was not required for

the ALJ to make specific findings regarding the issue. Accordingly, the majority of Board finds that the ALJ's ruling on this issue is affirmed.

D. Was the fact that the Petitioner submitted amended red and blue lined Plans after the hearing began, a violation of the Development Management Policy Manual?

In their appeal to this Board, the Protestants argue that the Petitioner submitted amended red and blue lined Plans after the hearing began, in violation of the Development Management Policy Manual. The ALJ noted that, such an argument was rejected by the Court of Special Appeals in an unreported 2012 opinion. *FRCA v. Maryvale Prep. School*, No. 400, Sept. Term 2011 (July 10, 2012). The ALJ noted that practice is now commonplace and that the real issue at hand is whether a party is prejudiced by the amendments, such that it cannot prepare a defense or have the revised plan reviewed by consultants. The ALJ reasoned that while it may be that violation of the policy could be a valid issue in certain instances, it is not in this case and this Board agrees with that assessment. Protestants had over two months to review the amended blue lined Plan (Developer's Exhibit 20A-20C from the Hearing before the ALJ), and Mr. O'Leary's testimony focused upon various aspects of that Plan. Consequently, the ALJ found no prejudice, and this Board unanimously concurs, and thus, affirms the ALJ's finding on this issue.

E. Should the plan be denied because the proposed lots are "panhandle Lots" that do not comply with B.C.C. § 32-4-409.

As part of their appeal to this Board Protestants argue that the Development Plan should be denied because the proposed lots are "panhandle Lots" that do not comply with B.C.C. § 32-4-409. The ALJ found that unlike other sections of the Code which specifically require an agency to make findings or recommendations to the ALJ or Hearing Officer (i.e., B.C.C. §§ 32-4-402 and 402.1, both of which are also found in Subtitle 4, General Design Standards), the section on panhandle lots contains no such requirement or procedure. B.C.C. § 32-4-409. Nor does the Comprehensive Manual of Development Policies (CMDP) shed further light on the subject. The

ALJ notes that manual simply notes "panhandle lots are not considered matters of right but rather a project design solution that may be approved under the proper circumstances." CMDP, p. 15. The ALJ found that it is therefore unclear how such a mandate is to be enforced.

The Petitioner contends that by approving the Plan, the County implicitly approved the panhandle lots shown thereon, and that nothing further is required. Protestants elicited testimony from Bruce Doak, a property line surveyor, wherein he described how in his many years of experience panhandles are approved after meeting and consulting with the DOP. The ALJ noted that while this might be the case, such a practice does not change the fact that is not mandated by statute and that § 32-4-409 does not specify an applicant must submit a "neighborhood map" or "photo montage," as described by Mr. Doak. Lloyd Moxley testified and indicated the DOP recommended approval of the Plan, and the ALJ is entitled to give "considerable weight" to the testimony and opinions expressed by agency representatives. *Caldes v. Elm Street Dev.*, 415 Md. 122 (2010). "Administrative officers are presumed to have properly performed their duties" and it was Protestants burden under the case law to elicit testimony from the witness to establish that the panhandle lots (shown on the Plan since it was first submitted) were overlooked by the DOP. *People's Counsel v. Elm Street*, 172 Md. App. at 703-05. The ALJ held that without such evidence, he does not believe the Development Plan can be denied on this basis. The Board unanimously concurs with his assessment and affirms his findings on this issue.

F. Has the Petitioner complied with the RC 5 performance standards?

At the conclusion of the first Hearing of this matter, the ALJ concluded that the Development Plan should not be approved because Petitioner had not complied with the "performance standards" in B.C.Z.R. § 1A04.A. The ALJ found that:

> While it is abundantly clear the DOP has adopted a practice whereby it defers analysis of the performance standards until building permit application, and the undersigned has in many uncontested matters granted zoning relief on such terms,

> such an administrative interpretation cannot alter the clear language of the statute. The regulations expressly require the DOP to submit to the ALJ "findings" on the performance standards, and the Hearing Officer is obligated to 'adopt the findings presented by the Department of Planning.' B.C.Z.R. 1A04.4.C.

Upon the denial of the development plan due to the reason outlined above, the Petitioner filed a Motion for Reconsideration, which was granted on May 17, 2016. As contemplated by that Order, an additional hearing was held before the ALJ at which additional testimony was taken and exhibits submitted concerning the RC-5 zone performance standards.

At the reconvened hearing the Petitioner submitted a "Performance Standards Narrative" (Dev. Exhibit 40 from the Hearing Before the ALJ), a 39-page document containing architectural elevations for six unique house designs, photos of adjacent dwellings and other information pertinent to the performance standards. These materials were submitted to the Department of Planning (DOP) in a timely manner by the Petitioner on June 16, 2016.

The record reflects that Lloyd Moxley of the DOP testified at the reconvened hearing and provided notes on the "site planning" requirements in B.C.Z.R. §1A04.4.D. These notes contain a detailed analysis of each of the site planning factors found in the performance standards. Mr. Moxley testified that the proposed dwellings would each face large open areas with substantial setbacks. Consequently, he believed B.C.Z.R. §1A04.4.E was satisfied. Mr. Moxley further testified only a minimum of tree clearing is proposed and he believed the significant forest conservation easement on site would further the goals set forth in the "landscape design" section of the standards. B.C.Z.R. §1A04.4.F.

As noted by the ALJ, Mr. Moxley explained that the Performance Standards Narrative primarily enabled his agency to evaluate the "buildings" requirements in B.C.Z.R. §1A04.4.G. Mr. Moxley testified the area has a wide variety of housing types in a wide range of sizes. Mr. Moxley's belief is that the proposed dwellings will feature high-level materials. He further noted

that it is unlikely the homes will be visible from Caves Road. Mr. Moxley opined the massing and height of the proposed dwellings are appropriate for the site, and that the first floor footprints are in keeping with nearby houses.

Mr. Moxley testified he reviewed the Code and Comprehensive Manual of Development Policies (CMDP) concerning the requirements for panhandles, which are referenced in the RC-5 performance standards. Mr. Moxley stated panhandles are not a matter of right and that the DOP "looks for better solutions first." Even so, he believes Developer satisfies the requirements set forth at B.C.C. §32-4-409 and the CMDP since the lots are unique and the panhandle allows the dwellings to be situated outside of the environmental buffer areas.

With regard to the other factors in the panhandle regulations, he testified the Fire Department confirmed it can safely access the lots. As such, he did not believe there would be a detrimental impact to the health, safety and welfare of the community. Mr. Moxley noted the nearest dwelling is approximately 500 feet from the proposed homes, which led him to believe the panhandle lots would not be "detrimental to adjacent properties." B.C.C. §32-4-409(a)(1)(iii). He testified there will not be a front-to-rear juxtaposition of the dwellings and that the access drive is about 900 ft. in length, which is less than the 1,500 ft. maximum specified in the regulations.

As the record reflects, the Protestants presented testimony from Barton Ross, an architect, architectural historian and planner accepted as an expert. Mr. Ross opined the Petitioner has not satisfied the performance standards, and that the Performance Standards Narrative does not provide a sufficient level of specificity and detail. He believes the site design is arbitrary and the mass and scale of the homes would be a "huge blow" to the historic site, which he asserted should figure prominently in the performance standards analysis. Mr. Ross testified the proposed dwellings are "wildly out of scale" and that they should be smaller in "deference" to the Stemmer House. He indicated the houses should be of a vernacular style, which would complement the

Stemmer House and the historic setting. The ALJ found this testimony is significant in that the witness implicitly recognized dwellings could be constructed at the site without undermining the integrity of the district, provided they were designed properly. The ALJ noted that other witnesses in Protestants' case at the original hearing argued no dwellings should be constructed.

On cross-examination Mr. Ross testified he was not completely familiar with the Caves Valley neighborhood, but he drove through the Historic District in his car to evaluate the size and scale of homes in the area. Mr. Ross testified he performed this analysis by visual inspection only, and did not consult tax or property records. He further conceded that when analyzing the RC-5 performance standards, there can be legitimate differences of opinions among planners and design professionals. In his Opinion, the ALJ took particular note of the fact that in concluding his testimony, Mr. Ross agreed the Stemmer House is not "technically" part of the development "site."

Mr. Kellman was the final witness, and he noted the "site" at issue for the RC-5 standards is only the lot being developed, which does not include the Stemmer House. He testified the proposed dwellings would be located outside of the Historic Environmental Setting (HES) designated for the Stemmer House. Consequently, he opined the Landmarks Preservation Commission (LPC) has no authority to review or regulate the location of the proposed dwellings. Finally, Mr. Kellman concluded the performance standards do not evaluate or consider the presence of an historic structure or the proximity of a proposed dwelling to such a structure.

As acknowledged by the ALJ in his opinion, under the zoning regulations, the Administrative Law Judge and this Board in its appellate capacity in this matter is required to adopt the DOP's findings before a development plan is approved unless the findings constitute an "abuse of discretion or are unsupported by the documentation and evidence" presented to the agency. B.C.Z.R. §1A04.4.C.2. Consequently, this Board unanimously agrees with the ALJ that based on the review of the testimony and the narrative presented to the DOP, the agency's findings

do not constitute an abuse of discretion. County officials are "presumed to have properly performed their duties and to have acted regularly and in a lawful manner. " *People's Counsel v. Elm Street Dev., Inc.*, 172 Md. App. 690, 705 (2007). Additionally, the Court of Appeals has held "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Marzullo v. Kahl*, 366 Md. 158, 172 (2001). Under Maryland law, an agency will be found to have abused its discretion if (among other things) it based its decision on irrelevant factors, made a decision based on prejudice or preference rather than reason or fact, acted inconsistently with its earlier decisions on similar matters, and/or failed to provide an adequate explanation of its decision. *See, e.g., Harvey v. Marshall*, 389 Md. 243, 298 (2005). The ALJ also had the opportunity to hear the testimony of Protestant's expert, Mr. Ross and made a choice as to which party's witnesses were more persuasive. In reviewing the ALJ's decision in such an instance, the Board gives great weight to the ALJ's discretion. Consequently, this Board unanimously affirms the ALJ's holding that the DOP's findings regarding RC 5 Performance Standards are supported by facts in the record and do not constitute an abuse of discretion.

ORDER

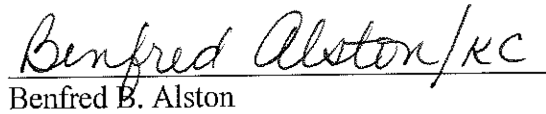
THEREFORE IT IS, it is this 1St day of February, 2017, by the Board of Appeals of Baltimore County,

ORDERED that the August 25, 2016 Administrative Law Judge's Amended Development Plan Opinion and Order approving the Red-lined and Blue-lined Development Plans (ALJ Pet. Ex. 1A – 1C and 20A – 20C), be and is hereby **AFFIRMED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Andrew M. Belt, Chairman



Benfred B. Alston

IN THE MATTER OF 2627, LLC - Owner/Developer For the property located on E/S of Caves Road, S of Intersection With Park Heights Avenue 3rd Election District 2nd Council District RE: Appeal of Granting of Development Plan HOH No. 03-0499	* * * * * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY Case No. CBA-17-008

* * * * * * * * * * * *

DISSENT

This matter relates to a development plan which allows for the building of four houses on a wooded parcel on the eastern ridgeline of Caves Valley. The four homes are within a few hundred feet of the Stemmer House, which is one of the most significant historical landmarks in Baltimore County. After extensive hearings, the Administrative Law Judge (ALJ) ruled in favor of the Developer/Applicant (Developer) on all substantive issues, but denied approval of the plan because of the failure of the County to conduct an RC 5 performance standard review. The Developer filed a request for reconsideration in order to comply with that requirement. The ALJ granted that motion, held an additional hearing regarding the RC 5 standards, and gave final approval to the plan. This appeal, on the record, followed.

The Protestants raised a number of issues throughout the ALJ hearings, many of which had significant merit, but were rejected factually by the ALJ. For many of the issues, the ALJ listened to the witnesses for both sides on the question, and ultimately ruled based on his assessment of the witnesses and their testimony. Of course, those determinations are the sort of factual questions to which this Board should defer to the ALJ's fact-finding and credibility assessments, absent a finding that it was clearly erroneous or unjustified by the evidence.

I mention this simply to contrast it to the two legal questions which characterize the analysis in this Dissent. These two questions are questions of law, and this Board reviews those questions *de novo*. BCC § 32-4-281(e).

ISSUES TO BE ADDRESSED

The first issue concerns the preclusive effect of a decision in 2004 to deny a development plan that, in part, covered the same area as the present proposal.

The second issue is whether the ALJ correctly found that the question of historic impact was no longer a factor that he could consider in evaluating the overall development plan.

THE 2004 MURPHY OPINION

In 2004, Deputy Zoning Commissioner John V. Murphy denied approval of a development plan larger in size and scope than the one at issue here, but which specifically encompassed the area in which the present four homes are proposed. The 2004 plan sought 13 new houses on a 73 acre parcel clearly much larger than the 24 acre parcel at issue here. But what is significant for these purposes is that Commissioner Murphy singled out 3 of those 13 houses for special treatment. As indicated below, the four houses sought in this plan lies on the footprint of those 3 houses -- numbered 7, 8, and 9- denied in 2004.

As to the 3 houses in 2004, Commissioner Murphy determined that the plan could not be approved, and this conclusion was clearly based on two independent reasons. First, he found that the three lots in question were "incompatible" with "the cultural landscape associated with a rural agricultural valley", even though the three homes were on the fringe of the district. Id. at 21. Secondly, he went on to find that the storm water management coupled with building homes on steep slopes would create too much erosion and cause environmental damage. He concluded by saying that the plan was "asking too much on this ridge". *Id.*

Much has been made by the parties to this action as to whether Commissioner Murphy had one reason or two reasons for his final decision, and there is some initial ambiguity by his use of the phrase "[i[f this [impact on the historic area] were the only consideration, I might decide to approve these homes as they are on the fringe of the [historic] district." Without more, this language could suggest that the historic impact concern was not enough to preclude these three houses. But his subsequent language clearly states that there are two independent bases for his decision. The final part of his analysis reads: "Therefore, I will not approve a plan with homes in the historic district, **not only** to preserve the district **but also** to relieve pressure to build on this ridgeline." (Emphasis supplied). The conjunction "not only/but also" denotes two separate considerations; it is a correlative conjunction used to join words and phrases of equal weight in one sentence. If this were not enough, he then concludes by stating that "[r]educing the number of lots by three will hopefully give him [the developer] the room to make a more reasonable design from **both** an environmental and preservation standpoint." (Emphasis supplied). *Id.* The use of the word "both" makes the only reasonable understanding of Commissioner Murphy's decision as a finding that the plan is flawed for two independent reasons: the environmental impact and the impact on the historic area.

Finally, for the purposes of this case, it appears that the precise flaw in the 2004 development plan related to the three lots that correspond to the four lots at issue here. Interestingly, Commissioner Murphy concludes by suggesting that he might look favorably on a re-design that eliminated the three lots. In other words, it appears that the three lots were at the very center of the denial of the development. *Id.* As discussed later, this is obviously relevant to the question of whether there is a material change in the circumstances that would cause the Murphy decision to not have preclusive effect today.

RES JUDICATA/COLLATERAL ESTOPPEL

There is no dispute between the parties that an administrative decision can have preclusive effect if the same issue is raised at a later date. The parties also agree that an old matter can be re-raised if there is a substantial change in the law or the facts such that the basis for the earlier determination is no longer applicable. The Developer has argued that both the law and the facts have changed so that the Murphy opinion no longer has any operative effect, and this is where the analysis starts and finishes.[1]

Change in the Law

One basis for the Murphy decision was the operation of BCC § 32-4-416 which, at the time, required a development plan to "preserve natural features . . . including [h]istoric structures or sites identified on any of the lists referred to in § 32-4-223(8)". This latter section included federal historical trusts. It appears to have required Commissioner Murphy to take the historic site into account deciding whether to approve the plan, and he assuredly did. Opinion at p. 20-21. Indeed, as indicated above, one of the (independent) bases of his decision was the impact on the historical site.

The parties agree that County Bill 26-07 removed the specific language quoted above from § 32-4-016. From this silent deletion, the Developer has argued that it is no longer necessary, or even proper, for development plan approval to account for historic sites. In effect, the Developer is suggesting that the Baltimore County Council intended to eliminate considerations of impact on historic areas out of the development process. Even if there was no larger context to look to, this is a spectacularly grand inference from a silent record. Fortunately, however, there is a larger context,

1 There was some discussion about whether the correct legal rubric is res judicata or collateral estoppel. For the purposes of this case, the elements for the two different theories are completely congruent, so the "name" of the doctrine makes no difference. Moreover, the Developer has known about, and fully addressed, the question of preclusion from the inception of the case in front of the ALJ, if not from before as it guided and counseled its client into the matter. The Murphy decision from 2004 took no one by surprise in 2016.

and that context is the other portions of 26-07 as well as the remaining portions of the BCC which obviously continued to place a high regard on historic landmarks and sites. *See e.g.* § 32-4-418 which was enacted, largely re-stating the deleted language from § 32-4-416, and indicating the ongoing importance of accounting for historical buildings and sites. Bill 26-07 itself is titled "Landmarks Preservation" and the purpose clause of the bill makes no mention of a relaxed review of development plans, the subordination of concern about landmarks or historic sites, or the intention in any way to alter the law so as to reduce the status of landmarks and historic sites in the development process.

The Protestants note, as well, that even without the old § 32-4-416, there were then, and continue to be, other code provisions which support the conclusion that impact on a historic site is well within the spectrum of issues to be considered in the review of a development plan. This is important, first, because the continued existence of these provisions provides further support for the conclusion that the deletion of the language from § 32-4-416 was not intended to remove such concerns from the development plan process. Secondly, these provisions provide an independent basis for the consideration of historic impact in the development process separate and apart from the old § 32-4-416. Section 32-4-401(b) requires "all development" to "[c]onform to the policy and intent of this Title". The intent of the Title is contained in § 32-4-102. Specifically, § 32-4-102(b)(2) states that development plans provide for a number of identified issues. One of those issues is recited in § 32-4-102(b)(2)(vi), which specifically mandates "...protection of floodplains, steep slopes, watersheds, nontidal wetlands, tidal wetlands, vegetation, **other natural features and historical sites or areas**;". (Emphasis supplied). Finally, § 32-4-223(8) requires that a development plan identify "any building, property, or site within or contiguous to the proposed development that is included in" a list of historic places and sites. If consideration of historic places and sites has been eliminated from

the development plan process, as the Developer here suggests, there would seem to be little reason for bothering to identify them in the context of pre-existing site conditions.

In short, I see no reason in the record presented to the ALJ to conclude that there has been a material change in the law such that issue preclusion should not apply.

Change in the Factual Circumstances

The question of whether there has been a substantial change in the factual circumstances is relatively straight forward.

The 2004 plan was obviously much larger – 13 new houses on 73 acres compared to 4 on 24 acres. Protestants note the obvious that no later submitted plan will match the first, because if it did, there would be no point in bothering to submit it. Rather, the analysis turns on whether the new plan concerns an issue that was, of necessity, resolved in the original decision. It cannot be reasonably disputed that the 4 new houses now proposed sit on virtually the same "footprint" of the specific 3 houses that Commissioner Murphy determined were the reason that the entire 13 house development plan had to be rejected. In fact, he invited the developer to re-submit a plan without those 3 houses and implied that without the offending 3, and with a little tweaking, he might well look favorably on the redrafted development plan. Murphy opinion at 21.

As the record reflects, and without serious dispute, lots 1 and 2 are in the same location and overlap lots 8 and 9 from the Murphy opinion. Lot 3 is only a short distance from old lot 7. Finally, all 4 new lots are further into the historic district and closer to the Stemmer House than were the 3 lots from 2004. In other words, the 4 lots in the present plan barely represent little change, much less "substantial change", from the 3 rejected lots in 2004. It is clear to me that there is no substantial difference between the most significant part of the 2004 decision and the present development plan.

Conclusion as to Issue Preclusion

The ALJ's opinion gave little space to the res judicata/collateral estoppel issue. It took the unreasonably narrow view that the deletion of the language from § 32-4-416 and the reduction of the scale of development from 13 new houses to 4 new houses resolved the question without further thought. In my view, his issue preclusion analysis runs afoul of § 32-4-281(e)(3) and (5) because it is an error of law and because it is arbitrary and capricious.

THE IMPACT OF HISTORIC PRESERVATION

The ALJ concluded that there was no authority which required him to "preserve" historic sites, or to account for development in the "vicinity of a historic district or structures." ALJ Opinion at p. 17-18. He based this conclusion on the deletion of the language discussed above from § 32-4-416 and the absence of formal guidance from Baltimore County as to how to best "preserve historic districts and viewsheds". ALJ opinion at p. 16-18. According to the ALJ opinion, the County's failure to codify just how to implement preservation policies results in the inability to even consider the issue in the course of a development plan. ALJ opinion at p. 18. The authority of the ALJ to review a development plan includes the requirement that approval of the plan "...shall be subject to all appropriate standards, rules, regulations, conditions, and safeguards set forth [in Title 7]". The ALJ viewed his authority in this matter far too narrowly.

The question of historic impact permeates the BCC and the BCZR, and several of these provisions are cited above in the discussion of res judicata. It is not necessary to repeat that description. It is enough to say that there is no reason for there to be any such laws or regulations if it is a topic that any ALJ reviewing a development plan cannot consider. And, again, the deletion of the language in former 32-4-416 camot rationally be viewed as divesting the ALJ of such authority. It fails to take into account the many development plans reviewed since the 2007 deletion of the magic

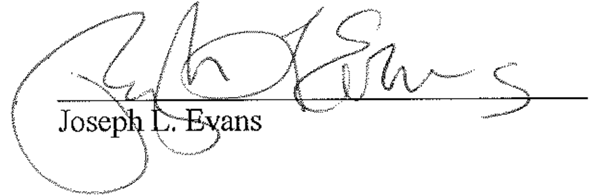
language which do address historic impact in a meaningful way. Moreover, it is not clear that the County has ever codified rules to implement historic preservation, either before or after the modification of § 32-4-416. Yet development plans routinely receive historic impact scrutiny. While a set of rules and standards would be nice, its absence has not prevented Baltimore County from engaging in authentic and meaningful actions to preserve, protect, and maintain historic buildings and sites in the face of development pressure.

The ALJ had the authority to account for historical impact, yet the ALJ declined to make any findings or conclusions about the historic impact issue in any of its possible forms. He could have found that the present plan satisfied any such concerns; he could have found that the present plan represented a far too serious compromise of those issues; or he could have found anywhere in between those two poles. But the point is he explicitly chose to set the issue aside under the theory that he lacked the authority to address it. I view that as an error of law that requires reversal of his decision by reason of § 32-4-281(e)(3) and (5).

CONCLUSION

For all of the reasons recited above, I respectfully dissent. I would rule that the development plan is barred by res judicata and/or collateral estoppel. In the alternative I would reverse the development plan approval because the ALJ failed to address the question of historic impact.

Date: 2/1/17



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RE: *In the Matter of: 2627, LLC – Legal Owner/Developer*
Case No.: CBA-17-008

Dear Counsel:

Enclosed please find a copy of the final Majority Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter, as well as a copy of Mr. Evans' Dissent.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Sunny Cannington /tam

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosures
Duplicate Original Cover Letter

c: Howard P. Sugarman/2627, LLC
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