Circuit Court for Prince George's County
Case No. CAL22-02650

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2239

September Term, 2022

EMPIRIAN VILLAGE OF MARYLAND LLC, ET AL.

v.

GB MALL LIMITED PARTNERSHIP, ET AL.

Wells, C.J.,
Nazarian,
Tang,

JJ.

Opinion by Wells, C.J.

Filed: November 16, 2023

This appeal concerns Detailed Site Plan 20020 ("DSP-20020"), a large-scale construction project, and objections opponents of the project raised about building heights at different stages of the county's zoning approval process.

At the initial stage, appellee GB Mall, Limited Partnership ("GB Mall") submitted to the Prince George's County Planning Board a proposal to redevelop the sixty-year-old Beltway Plaza Shopping Mall into a mixed use residential and commercial area. The Planning Board approved the project over the objections of the owners of a neighboring apartment complex, Empirian Village of Maryland LLC, and several county residents who opposed it (hereafter, these appellants will simply be called "Empirian Village").

At the second stage, Empirian Village appealed the Planning Board's decision to the Prince George's County Council, sitting as the county's administrative zoning authority, the District Council. The District Council also approved the project.

Empirian Village next sought judicial review in the Circuit Court for Prince George's County. The circuit court found that Empirian Village's opposition to the proposed heights of some buildings had not been preserved because Empirian Village had not raised that specific objection to the District Council, whose decision the circuit court was reviewing.

Empirian Village timely appealed. They ask us whether the Planning Board legally erred by approving DSP-20020 when it did not conform to a zoning requirement that "[t]he tallest buildings [on a site] should be located within the corridor node at MD 193 and Cherrywood Lane and in the center of the Beltway Plaza site."

For the reasons that follow, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

A. Planning and Zoning in Prince George's County

Planning and zoning within the Prince George's County portion of the Maryland-Washington Regional District (the "Regional District") is governed by the Maryland-Washington Regional District Act (the "RDA"). *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 523 (2015). The RDA allocates planning functions specific to Prince George's County to its Planning Board. *See Heard v. Cnty. Council of Prince George's Cnty.*, 256 Md. App. 586, 600 (2022) (citing Md. Code Ann., Land Use ("LU") Article § 20-202). It also delegates much of the zoning and planning authority for the area of the Regional District contained within Prince George's County to the County Council, sitting in its administrative capacity as the county's zoning authority, the District Council. *See id.* at 599.

The Planning Board considers approval of a specific site's development with reference to several overarching plans. *Id.* "Within the Regional District, two types of plans are required: (1) a 'general plan' containing, at a minimum, recommendations for development in the respective county and supporting analysis; and, (2) 'area master plans' pertaining to local planning areas into which each county is divided." *Zimmer*, 444 Md. At 521–22. The current General Plan is Prince George's 2035 Approved General Plan ("Plan 2035"); the sector plan relevant to the subject property is the 2013 Approved Greenbelt Metro Area and MD 193 Corridor Sector Plan and Sectional Map Amendment (the "Sector

Plan").[1]

For properties falling within certain specially designated zones, unique development standards apply in addition to general planning provisions. These include Mixed-Use Infill ("M-U-I") zones, pursuant to PGCC §§ 27-546.15–27-546.19, and Development District Overlay ("D-D-O") zones, pursuant to PGCC §§ 27-548.19–548.26.01. PGCC § 27-548.24(c) provides, "Development District Standards shall be prepared for each Development District Overlay Zone. Development District Standards shall be stated in a Sectional Map Amendment and conform generally to recommendations in the applicable Master Plan, Master Plan Amendment, or Sector Plan."

B. Planning Board Detailed Site Plan Decisions and District Council Review

An applicant for development of certain properties must submit site plans for the Planning Board's review and approval prior to commencing development. *See Cnty. Council of Prince George's Cnty. v. FCW Just., Inc.*, 238 Md. App. 641, 656–58 (2018) [hereinafter cited as "*FCW Justice*"]. In such cases, a Conceptual Site Plan (CSP) then a Detailed Site Plan (DSP) must be approved for development to proceed. PGCC § 27-270(a).[2]

[1] Plan Prince George's 2035, Approved Greenbelt Metro Area and MD 193 Corridor Sector Plan and Sectional Map Amendment (2013), https://www.mncppcapps.org/planning/publications/PDFs/278/07%20Chapter%206%20%20Sectional%20Map%20Amendment.pdf [https://perma.cc/W6DU-69MC].

[2] Required approvals include, in order, (1) zoning; (2) CSP; (3) a preliminary plat of subdivision; (4) DSP; (5) a final plat of subdivision (which may be approved, subject to technical staff approval, prior to a DSP); and (6) grading, building, use and occupancy permits. *See id.*

The requirements for Planning Board consideration of a DSP are set forth at PGCC §§ 27-281–89. These include that the DSP "provide for development in accordance with the principles for the orderly, planned, efficient and economical development contained in the General Plan, Master Plan, or other approved plan . . . ." PGCC § 27-281(b)(1)(A). Upon an application for approval of a DSP, the Planning Board reviews the DSP for compliance with relevant provisions of the Prince George's County Code, PGCC § 27-285(a), and may then approve the DSP if it makes certain required findings. *Id.* at (b). The Planning Board then must state its reasons for approving or denying the application, then set forth its decision in a resolution adopted at a regularly scheduled public meeting. *Id.* at (a)(5)–(6).

In the D-D-O zone, the DSP is also reviewed for compliance with applicable Development District Standards. PGCC § 27-548.19. The Planning Board may approve modified or alternative Development District Standards, but only "after a finding that the proposed standard would benefit the development of the Development Overlay District and will not substantially impair implementation of the Master Plan, Master Plan Amendment, or Sector Plan." *Heard*, 256 Md. App. at 602 (citing PGCC § 27-548.25(c)).

Following a Planning Board decision on a DSP application, the District Council may exercise review, either by appeal of a party of record in the proceeding or upon the Council's own election. *FCW Justice*, 238 Md. App. at 658–59 (citing PGCC § 27-228.01); *see also* LU § 25-210; PGCC § 27-290.[3] "The Zoning Ordinance also provides that, in such

[3] PGCC § 27-290(a) states, in pertinent part:

proceedings (whether by an appeal or by the District Council's decision to 'call up' the Planning Board's decision), the District Council exercises 'original jurisdiction.'" *Id.* at 659 (citing PGCC § 27-132(f)(1)).

C. Development History of the Subject Property

On March 28, 2019, the Planning Board approved CSP-18010, GB Mall's CSP application for Phase 1 of the subject property's redevelopment. The Planning Board then approved the applicants' Preliminary Plan of Subdivision, PPS 4-19023, on March 12, 2020.

GB Mall then filed Detailed Site Plan (DSP)-20020, Type 2 Tree Conservation Plan (TCP2)-030-00-01, and thirteen Alternate Development District Standards[4] deviating from those required due to the subject property's location in the D-D-O zone. These included Developmental Standards regarding lot occupation, built-to lines, massing, access to off-street parking lots and structured parking, parking lots, loading and service areas, structured

> The Planning Board's decision on a Detailed Site Plan may be appealed to the District Council upon petition by any person of record. The petition shall specify the error which is claimed to have been committed by the Planning Board and shall also specify those portions of the record relied upon to support the error alleged.

[4] PGCC § 27-6101. Purpose and Intent states:

The purpose of this Section is to clearly identify the development standards of this Part which would apply to development within the County. The standards of this Part establish a consistent design and placemaking framework to ensure quality in future development and redevelopment. This Section identifies global exemptions from the development standards and incorporates an applicability table that directs users of this Zoning Ordinance to the development standards that apply, depending on the type of development proposed.

parking, signage, water efficiency and recharge, and open space. A staff report dated August 25, 2021, prepared by the Prince George's County Planning Department Development Review Division, recommended that GB Mall's request be approved with eleven conditions.

The matter came before the Planning Board for hearing on September 9, 2021, at which the Board took testimony on the record from concerned parties. The Planning Board voted to approve GB Mall's application, then issued written notice of the decision as Resolution No. 2021-113 on October 5, 2021, approving the DSP, TCP2, and the thirteen alternative Developmental Standards, with conditions. On October 25, 2021, the County Council of Prince George's County, sitting as the District Council, waived its right to review.

On October 29, 2021, Empirian Village petitioned for the District Council to review the Planning Board's approval of the site plan. In their brief, Empirian Village pointed to five points of error by the Planning Board: (1) DSP-20020 conflicts with the planning objectives set forth in Plan 2035 and the Sector Plan, (2) DSP-20020 conflicts with CSP-18010, (3) in approving TCP2-030-00-01, the Resolution No. 2021-113 failed to articulate how the Applicant satisfied, or made substantial efforts to satisfy, required findings for 9.11 acres of off-site mitigation, (4) the Planning Board erroneously relied on a Stormwater Concept Plan approval not in compliance with Prince George's County law, and (5) the Planning Board improperly approved the thirteen requested alternate Developmental Standards.

On January 10, 2022, the District Council heard oral arguments from counsel for

GB Mall and counsel for Empirian Village. The District Council affirmed the Planning Board as to all of Empirian Village's objection, rendering its Notice of Final Decision on January 31, 2022.

On February 11, 2022, Empirian Village filed a Petition for Judicial Review in the Circuit Court for Prince George's County, raising only one issue: whether the Board erred as a matter of law by approving DSP-20020 due to alleged conflicts with Plan 2035 and the Sector Plan. In correspondence to the Circuit Court dated January 4, 2023, the Appellants referred to as the "core of [their] argument" the contention that the Planning Board failed to adequately consider the height Developmental Standards in granting the resolution to approve DSP-20020. They pointed to a Developmental Standard contained in the Sector Plan, pertaining to the subject property, which provides that "[t]he tallest buildings should be located within the corridor node at MD 193 and Cherrywood Lane and in the center of the Beltway Plaza site." Sector Plan at p. 220.

The parties presented oral arguments on the Petition and responsive pleadings to the circuit court on December 15, 2022, and the court issued its Opinion and Order on February 15, 2023. The court held that the Planning Board did not err by approving DSP-20020 despite Empirian Village's allegations that it conflicted with the General Plan and Sector Plan, in light of this Court's decision in *Heard v. County Council of Prince George's County* that a DSP need not strictly comply with the language of those plans. *See generally* 256 Md. App. 586 (2022). More importantly, the court found that Empirian Village had waived any objection about the Planning Board's alleged disregard of the height Developmental Standard by failing to argue it on appeal to the District Council and by

failing to adequately plead the issue in their opening brief to the Circuit Court.

Empirian Village timely appealed to this Court. Additional facts will be discussed as needed.

DISCUSSION

Standard of Review

As we recently explained in *Heard*:

> [T]he appropriate standard of review of an administrative agency's action is analogous to that used by courts in judicial review:
>
> "Judicial review of administrative agency action based on factual findings, and the application of law to those factual findings, is limited to 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 based on an erroneous conclusion of law. The reviewing court may not substitute its judgment for that of the administrative agency. Rather, the court must affirm the agency decision if there is sufficient evidence such that a reasoning mind reasonably could have reached the factual conclusion the agency reached."

256 Md. App. at 612 (quoting *Zimmer*, 444 Md. at 573). We continued:

> Further, because the Planning Board has discretion to approve or disapprove detailed site plans, *see* PGCC §§ 27-281(a)(1) and 27-285(b), its decisions regarding detailed site plan applications receive even more deference. *FCW Justice*, 238 Md. App. at 675, 193 A.3d 241.
>
> "Agency decisions receive an even more deferential review regarding matters that are committed to the agency's discretion and expertise. In such situations, courts may only reverse an agency decision if it is arbitrary and capricious. Logically, the courts owe a higher level of deference to functions specifically committed to the agency's discretion than they do to an agency's legal conclusions or factual findings."

Id. at 612–13 (quoting *Zimmer*, 444 Md. at 573–74).

I. UNDER LU § 22-407 WE CONSIDER FINAL DECISIONS OF THE DISTRICT COUNCIL

A. Parties' Contentions

As a threshold issue, the parties dispute whether the decision of the Planning Board or the District Council is properly considered the final administrative agency decision for this appeal. GB Mall argues that, as the Supreme Court noted in its recent decision in *Crawford*, it is the decision of the District Council which constitutes the final agency decision for the purpose of judicial review:

> Because the District Council's role in reviewing [Comprehensive Design Plans] and [Specific Design Plans] "mimics the standard of review" applied by the courts to agency decisions, *Zimmer*, 444 Md. at 573, 120 A.3d 677, the courts might seem to "look through" the District Council decision directly to the decision of the Planning Board. This interpretation, however, is technically incorrect: the courts may only review final agency action, which, here, is the affirmance by the District Council of the Planning Board's approval of SDP-0007-03.

Crawford v. Cnty. Council of Prince George's Cnty., 482 Md. 680, 693 n.15 (2023).

Empirian Village respond that it is the Planning Board's decision which is properly the final agency decision. Because the District Council merely considers DSP applications in an appellate capacity, Empirian Village argues, it is the Planning Board which renders a "final decision" for judicial review. They contend that the Planning Board's decision constitutes the original agency action, and that reviewing courts "look through to review the Planning Board directly." *FCW Justice*, 238 Md. App. at 679.

B. Analysis

The parties conflate two interrelated but ultimately distinct issues: (1) which of two

bodies' decisions is the "final administrative agency decision" for judicial review, and (2) whether the Planning Board or District Council have original jurisdiction over DSP applications.

Judicial review of an order or action of an administrative agency by the circuit court, pursuant to Maryland Rule 7-201 *et seq.*, is available when authorized by statute. *See* Md. Rule 7-201(a). Two pertinent statutory provisions authorize review of decisions regarding a DSP. The first, LU § 25-210, applies where the District Council has not reviewed the Planning Board. *See also* PGCC § 27-528.01(a)–(b). The second, LU § 22-407, applies where the District Council has reviewed the application, either on its own initiative or on the application of a concerned party. Under that provision, any person or entity aggrieved by any final decision of the District Council may request judicial review.[5]

However, other law also affects the delineation of responsibility between the Planning Board and District Council. A variety of zoning and planning proceedings come before the two commissions, and the District Council's reviewing authority differs. In some cases, the Planning Board presents a recommendation to the District Council, who then render a final decision which may be the subject of judicial review. In other cases, all meaningful factfinding activities occur at the Planning Board level, and the District Council is limited to an appellate capacity. We and the Supreme Court have been called upon on several occasions to determine whether the District Council acts within its original or appellate function.

[5] This includes, as here, individuals in the county and property owners affected by a final decision. LU § 22-407 (a)(i)–(ii).

Zimmer, *FCW Justice*, and *Heard* dealt with questions of which agency has original jurisdiction; that is, whether the Planning Board or District Council reached the relevant zoning or planning decision considered for judicial review.[6] In *FCW Justice*, we held that the Planning Board is "authorized to make *de novo* fact finding with regard to the merits of [a DSP] application." 238 Md. App. at 668–76. A court reviewing whether the District Council's decision on a DSP application was, for instance, arbitrary and capricious, necessarily considers the record before the Planning Board when it made its initial findings of fact.

This process resembles how appellate courts "look through" the ruling of the Circuit Court on judicial review, considering the agency's decision directly. However, as we noted in *Heard*, this should be thought of as an *analogy* to review by the appellate courts. 256 Md. App. 586 at 612. That the process *resembles* "looking through" the circuit court does not disturb LU § 22-407, which only permits only review of the District Council decisions. The Supreme Court's footnote in *Crawford*, cited by Empirian Village, merely draws attention to this distinction.

What is more, questions related to which of the two agencies had original jurisdiction only arises where the District Council *reverses* the Planning Board's decision. *See Crawford*, 482 Md. at 692. Where the District Council sustains the Planning Board's

[6] The basic delineation of jurisdiction between the Planning Board is set by LU § 20-202(b), which places certain "local functions" of planning and zoning, and mandatory referrals by the county government, within the jurisdiction of the Planning Board. PGCC § 27-132 (f)(1) also provides, "In deciding an appeal to the District Council, or Council election to review a decision made by the Zoning Hearing Examiner or the Planning Board, the Council shall exercise original jurisdiction."

decision, the distinction is largely academic: the record before the District Council includes the entire record considered by the Planning Board in reaching a decision. But, pursuant to LU § 22-407, only the extent of the record that survives to become a part of the Council's decision may be considered upon judicial review.

The consequence of this two-tiered process is therefore that the legal and factual issues before the circuit court on judicial review are winnowed down to include *only* those issues that came before the District Council for its final decision. This limitation was critical in the circuit court's ruling below. The circuit court determined that the height Developmental Standard was not among the issues before the District Council, and therefore it held that judicial review was improper and declined to reach the merits. We discuss this issue at length later in this opinion.

We now proceed to whether the circuit court erred in declining to reach the merits in this case, beginning with whether Empirian Village raised the issue of the height Developmental Standard before the District Council.

II. THE ISSUE OF CONFORMANCE TO THE DEVELOPMENTAL STANDARD REQUIREMENT REGARDING THE TALLEST BUILDING LOCATION WAS NOT PLACED AT ISSUE BEFORE THE DISTRICT COUNCIL

A. Parties' Contentions

GB Mall argues that this appeal must be dismissed because Empirian Village presented arguments that the District Council failed to adequately consider a Developmental Standard that "[t]he tallest building [on the site] should be located within the corridor node at MD 193 and Cherrywood Lane and in the center of the Beltway Plaza

site," Sector Plan at p. 220, to the circuit court without having first raised the issue before the District Council. The District Council contends that Empirian Village thereby failed to preserve that argument for the circuit court's review.[7]

Empirian Village respond that they sufficiently raised the issue of Developmental Standards compliance to preserve their challenge.[8] They contend that, even if they did not make specific reference to the supposed non-compliance with the height requirements they "brought up the matter of Developmental Standards compliance in a general sense throughout the record" and "vigorously argued that the DSP was not properly complying with various segments therein . . . ."

We first consider whether Empirian Village did, in fact, present an argument that the Planning Board failed to consider the height Developmental Standard to the District Council, or otherwise sufficiently brought that issue to the District Council's attention.

B. Analysis

[7] In their oral arguments, Appellees also contended that the District Council need not have considered issues related to the height DDS even if Appellants had argued them. Appellees note that DSP-20020 only concerns Phase 1 of redevelopment of the subject property; any development of the "center of the Beltway Plaza site" would occur in a later phase, and it is therefore not possible to know where the tallest building or buildings on the site will be located following redevelopment. However, further consideration of this issue would require us to reach whether the District Council appropriately considered the height Development Standard. Because we find that the height Development Standard was not properly before the Council, we will decline to do so.

[8] Empirian Village also argues that the issue of waiver is not properly before this Court, and that GB Mall cannot present argument on it without having filed a cross-appeal. We disagree. That Empirian Village waived the issue of whether the Planning Board adequately considered the height Developmental Standard was, in fact, the central reason upon which the circuit court affirmed the District Council's decision, which in turn gave rise to this appeal. Waiver is therefore squarely at issue before this Court.

The circuit court found that Empirian Village failed to preserve the building height issue because it was not adequately raised in their initial petition in the circuit court and, in any case, Empirian Village did not present that argument to the District Council. As previously noted, Empirian Village argues that they raised the issue "in a general sense." We agree with the circuit court.

Empirian Village made no express argument that the Planning Board failed to adequately consider the height Developmental Standard either in their opening brief to the District Council, or in oral argument before the Council. Empirian Village's argument before the District Council, that the Planning Board failed to consider conflicts between DPS-20020, Plan 2035, and the Sector Plan included discussion of the Sector Plan's overall vision and objectives for Beltway Plaza, as well as contending that the Council failed to adequately consider conformance to special requirements for the M-U-I and D-D-O zones. However, in all of this Empirian Village made no mention of the height Developmental Standard.

Before the District Council, Empirian Village also argued that the Planning Board erred in approving the thirteen requested deviations for Developmental Standards mandated in the D-D-O zone. However, Empirian Village's argument was not that the Planning Board failed to consider the height Developmental Standard specifically but that it erred in its decision to approve thirteen Alternate Developmental Standards.

Thus, nothing appears in the record before the District Council regarding the height Developmental Standard or any alleged failure by the Planning Board to consider it. Empirian Village had a full and fair opportunity to argue at that time that the Planning

Board had failed to consider the height Developmental Standard in its decision to approve the Site Plan but did not do so. Empirian Village therefore did not argue to the District Council that the Planning Board failed to consider the height Developmental Standard.

In response to the absence of a specific argument in the record, Empirian Village's contention is, in essence, that bringing *any* alleged non-conformance with a relevant Developmental Standard to the District Council's attention is sufficient to challenge *every* Developmental Standard on appeal. We disagree. Administrative agency appeals allow aggrieved persons to challenge agency actions on judicial review, but the challenging party must point to the agency's alleged error with particularity. As we noted in *Concerned Citizens of Cloverly v. Montgomery County Planning Board*, "[t]he question in determining whether an issue was preserved [for judicial review] is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it." *Concerned Citizens of Cloverly v. Montgomery Cnty. Plan. Bd.*, 254 Md. App. 575, 602 (2022) (quoting *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015)).

Empirian Village did not provide the District Council with this type of notice. They challenged whether the Planning Board had erred in approving deviations from a set of specific Developmental Standards and generally departing from overarching standards in the Sector Plan. Empirian Village did not discuss whether the Planning Board failed to consider other Developmental Standards not mentioned in the record, including the height Developmental Standard. Consequently, neither Empirian Village's brief nor oral argument before the District Council gave the Council fair notice that Empirian Village

believed compliance with *all* Developmental Standard in the Sector Plan to be at issue.

We hold Empirian Village failed to present their arguments regarding the height Developmental Standard, or otherwise place the matter before the District Council.

III. THE DISTRICT COUNCIL DID NOT PRESERVE ALL ISSUES RELATED TO THE PALNNIING BOARD'S DECISION BY REFERENCE

A. Parties' Contentions

Empirian Village argues in the alternative that, even if their concerns regarding the height Developmental Standard was not brought to the District Council's attention, the District Council "incorporates and upholds" the final decision of the Planning Board; therefore, any and all errors attributable to the Planning Board are properly the subject of judicial review.

B. Analysis

Empirian Village essentially argues that, so long as the District Council upholds the Planning Board's decision, any error allegedly made by the Planning Board in reaching a decision may properly be reviewed by the circuit court. We find no support for this approach.

As previously discussed, judicial review under LU § 22-407 is limited to the final decision of the District Council. That sets issues that were outside the Council's final decision outside of the proper scope of judicial review. The entirety of the record before the Planning Board can *potentially* influence the District Council's final decision, but that does not mean that the entire record before the Planning Board is *always* relevant to the District Council's decision. Approaching matters not considered by the District Council in

reaching its final decision would plainly be beyond the scope of judicial review of an administrative agency decision.

What is more, if this Court were to accept Empirian Village's argument, it would render the District Council's review proceedings needlessly duplicative—if not meaningless—and undermine the finality of District Council decisions. Opponents of building projects within the county might choose to bring certain arguments before the District Council and present others for the first time upon judicial review, or to reiterate an argument before the circuit court that the Council rejected. That result would be at odds with the appellate jurisdiction that the District Council holds over Planning Board decisions on Detailed Site Plans, as we recognized in *FCW Justice*, 238 Md. App. at 641. Therefore, we decline to adopt Empirian Village's argument.

IV. BY FAILING TO ARGUE THE ISSUE OF THE HEIGHT DEVELOPMENTAL STANDARD BEFORE THE DISTRICT COUNCIL, EMPIRIAN VILLAGE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

A. Parties' Contentions

The District Council argues that Empirian Village failed to advance an argument that the District Council's findings and conclusions were in error. It also argues that Empirian Village's failure to raise the issue of the height Developmental Standards before the Council constitutes a failure to exhaust administrative remedies before seeking judicial review. Because zoning appeals "have been committed to the jurisdiction and expertise of the agency," *Chesley v. City of Annapolis*, 176 Md. App. 413, 427 n.7 (2007) (cleaned up). The District Council argues, Empirian Village failed to avail themselves of the remedy of

appeal to the District Council by raising their arguments relating to the height Developmental Standard for the first time before the circuit court.

B. Analysis

We hold that the circuit court was correct to deny judicial review on both bases advanced by the District Council: first, the issue of the height Developmental Standard was not encompassed within the District Council's final decision, and second, the Empirian Village failed to exhaust their administrative remedies by not arguing the height Developmental Standard issue before the District Council.

1. The District Council did not consider the height Developmental Standard issue in its final decision.

Under the Maryland Administrative Procedure Act, Md. Code Ann. §§ 10-201–10-226, when the circuit court undertakes judicial review of an administrative agency's decision, the court may only consider issues actually determined by the administrative agency. We have held that a question that "was neither raised, briefed, nor argued" to an administrative agency is not encompassed in the agency's final decision. *Schwartz v. Maryland Dep't of Nat. Res.*, 385 Md. 534, 556 (2005); *see also Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001) (reviewing court "may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency"). As discussed *supra*, the Appellants' arguments regarding the heigh DDS were not actually presented the District Council, either by brief or oral argument. Therefore, they were not part of the agency's final decision.

Even if Empirian Villages had presented the building height issue to the District

Council, that alone would not have preserved the issue for appeal. To be the subject of judicial review, an issue must constitute the basis for the agency's decision, not merely appear in the record:

> This Court's holding in *United Steelworkers* . . . reveals the distinction for preserving an issue at the trial court level as opposed to the agency level, the latter of which is relevant to the case at bar. Though the Tax Court contemplated the personal representative's constitutionality argument, not base its final decision on the issue. Rather, the Court's Memorandum and Order focused on statutory interpretation. . . . Because we conclude that any constitutional issues were not preserved, we decline to review the merits of the personal representative's constitutionality argument.

Comptroller of Treasury v. Taylor, 465 Md. 76, 98–99 (2019).

Consideration of the height Developmental Standard appears nowhere in the record of the January 10, 2022 hearing before the District Council. There is no mention, let alone consideration of it, in the Council's Notice of Final Decision. It therefore cannot be said that the issue constituted any part of the District Council's final decision, and therefore could not be the subject of judicial review by the circuit court.

2. Empirian Village did not exhaust their administrative remedies.

In general, judicial review is unavailable where the petitioner failed to exhaust administrative remedies. *See, e.g.*, *Sprenger v. Pub. Serv. Comm'n of Maryland*, 400 Md. 1, 24 (2007) ("It is the general rule in this State that when an administrative remedy is provided by the General Assembly, administrative process must be exhausted before the aggrieved party may resort to the courts for other relief.") (cleaned up). We have held that a party must pursue intra-agency appeals, where required, in order to exhaust administrative remedies prior to seeking judicial review. In *Department of Human*

Resources, Baltimore City Department of Social Services v. Hayward, concerning judicial review taken from an intra-agency "appeal" of an initial finding of unsubstantiated child abuse or neglect, we noted:

> Section 5-706.1, in subsections (b) and (c), provides for a review procedure, which it denominates an "appeal." This "appeal" as we shall see, infra, is an intra-agency procedure and does not refer to the judicial review of an administrative decision by a court. This Court has made clear that the "judicial review" process is not an appellate process . . . . Being able to appeal pursuant to § 5-706.1(c), is, however, a prerequisite to the right of that party to obtain judicial review.

Dep't of Hum. Res., Baltimore City Dep't of Soc. Servs. v. Hayward, 426 Md. 638, 643 n.1, (2012). Here, where the administrative "appeal" is from one agency to another, the result is the same: a party must first appeal to the District Council to later seek judicial review.

These principles apply where a petitioner fails to appeal a zoning decision to a board of zoning appeals. *See Josephson v. City of Annapolis*, 353 Md. 667, 680 (1998) (trial court erred by failing to dismiss petition for review of zoning action not appealed to local board of zoning appeals); *Queen Anne's Conservation, Inc. v. Cnty. Comm'rs Of Queen Anne's Cnty.*, 382 Md. 306, 327–29 (2004).

Planning decisions closely mirror zoning. Where the District Council does not spontaneously act upon a decision of the Planning Board or upon the application of a concerned party, the Planning Board's decision is final. LU § 25-210(a) (the Planning Board makes a "final decision" regarding DSP applications); *see also Crawford*, 482 Md. at 693, ("The District Council may act on a [Comprehensive Design Plan] or [Specific Design Plan] application at the request of a 'person of record' or on the Council's own motion. Otherwise, the Planning Board's decision becomes the final action, reviewable by

the circuit court."). Thus, where a concerned party fails to present their objections to a Planning Board ruling on a detailed site plan to the District Council, then file for judicial review by the circuit court, that party has failed to exhaust their administrative remedies. This is the case whether or not the individual presented other grievances about that same decision to the District Council's attention. As to the issue not argued before the District Council, the effect of failing to present an argument along with other issues presented is the same as not appearing before the Council at all.

Here, Empirian Village failed to place the height Developmental Standard issue before the District Council before seeking judicial review. That Empirian Village sought an appeal regarding other issues is immaterial; they failed to "obtain a final administrative decision" regarding the issue of the height Developmental Standard "before resorting to the courts." *Priester v. Baltimore Cnty., Maryland*, 232 Md. App. 178, 193–94 (2017) (quoting *Laurel Racing Ass'n, Inc. v. Video Lottery Facility Location Comm'n*, 409 Md. 445, 460 (2009)). Therefore, Empirian Village failed to exhaust their administrative remedies with respect to the height Developmental Standard.

CONCLUSION

Empirian Village did not raise the issue of Developmental Standards regarding the height of buildings in the Beltway Plaza redevelopment project, DPS-20020, before the District Council, despite the full opportunity to do so, and thereby failed to bring that issue within the scope of the Council's final decision. By declining to avail themselves of the opportunity to argue their grievance regarding the height DDS to the Council, Empirian Village failed to exhaust administrative remedies, and thereby could not request judicial

review as to that issue. Therefore, the circuit court was correct in declining to reach the merits of the Planning Board's consideration of the height Developmental Standard.

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. APPELLANTS TO PAY THE COSTS.