UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1450

September Term, 2015

A. THOMAS GOLDBERGH ET AL.

v.

CR GOLF CLUB, LLC

Eyler, Deborah S.,
Kehoe,
Shaw Geter,

JJ.

Opinion by Kehoe, J.

Filed: October 11, 2016

This is an appeal from a judgment of the Circuit Court for Baltimore County in a judicial review proceeding. At issue is a decision by the Baltimore County Board of Appeals (the "Board"). The Board concluded that a preliminary site plan submitted by CR Golf Club, LLC, in 2012 was sufficiently detailed to satisfy the "grandfathering" provision of the Sustainable Growth and Agricultural Preservation Act of 2012 (the "2012 Act"), which is codified at § 9-206 of the Environment Article of the Maryland Code.[1] The circuit court, the Honorable Colleen Cavanaugh, presiding, affirmed the Board's decision.

[1] Environment Article § 9-206 provides in pertinent part (emphasis added):

§ 9-206. On-site sewage disposal system requirements for residential subdivisions

(a)(1) In this section the following words have the meanings indicated.

(2) "Community sewerage system" means a publicly or privately owned sewerage system that serves at least two lots.

(3) "Growth tiers" means the tiers adopted by a local jurisdiction in accordance with Title 1, Subtitle 5 of the Land Use Article.

(4) "Lot" includes a part of a subdivision that:

(i) Is used or is intended to be used as a building site; and

(ii) Is not intended to be further subdivided.

(5) "Major subdivision" means:

(i) The subdivision of land:

1. Into new lots, plats, building sites, or other divisions of land defined or described as a major subdivision in a local ordinance or regulation:

A. That is in effect on or before January 1, 2012; or

B. Adopted on or before December 31, 2012, if a local jurisdiction chooses to create a definition or description applicable solely to this section or if a local ordinance or regulation does not define or describe a major subdivision under item A of this item; or

2. If a local jurisdiction has not adopted a definition or description of a major subdivision on or before December 31, 2012, under item 1 of this item, into five or more new lots, plats, building sites, or other divisions of land; and (cont.)

(ii) If the local ordinance or regulation has multiple definitions or descriptions of a major subdivision under item (i) of this paragraph, the definition or description of a major subdivision that is determined by the local jurisdiction to apply for the purposes of this section.

(6) "Minor subdivision" means:

(i) The subdivision of land:

1. Into new lots, plats, building sites, or other divisions of land defined or described as a minor subdivision in a local ordinance or regulation:

A. That is in effect on or before January 1, 2012; or

B. Adopted on or before December 31, 2012, if a local jurisdiction chooses to create a definition or description applicable solely to this section or if a local ordinance or regulation does not define or describe a minor subdivision under item A of this item, provided that a minor subdivision defined or described in the adopted ordinance or regulation does not exceed seven new lots, plats, building sites, or other divisions of land; or

2. If a local jurisdiction has not adopted a definition or description of a minor subdivision on or before December 31, 2012, under item 1 of this item, into fewer than five new lots, plats, building sites, or other divisions of land; and

(ii) If the local ordinance or regulation has multiple definitions or descriptions of a minor subdivision under item (i) of this paragraph, the definition or description of a minor subdivision that is determined by the local jurisdiction to apply for the purposes of this section.

. . . .

(12) "Subdivision" means a division of a tract or parcel of land into at least two lots for the immediate or future purpose of sale or building development.

(b)(1) Subsections (f) through (i) and subsection (l) of this section apply to residential subdivisions.

(2) Subsections (f) through (i) do not apply to an application for approval of a residential subdivision under § 9-512(e) of this title if:

(i)1. By October 1, 2012, a submission for preliminary plan approval is made to a local jurisdiction that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development;

2. By July 1, 2012, in a local jurisdiction that requires a soil percolation test before a submission for preliminary approval:

A. An application for a soil percolation test approval for all lots that will be included in the submission for preliminary approval is made to the local health department; and (cont.)

B. Within 18 months after approval of the soil percolation tests for the lots that will be included in the submission for preliminary approval, a submission for preliminary approval is made to a local jurisdiction that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development; or

3. By July 1, 2012, in a local jurisdiction that requires a soil percolation test before a submission for preliminary approval and the local jurisdiction does not accept applications for soil percolation tests year round:

A. Documentation that a Maryland professional engineer or surveyor has prepared and certified under seal a site plan in anticipation of an application for soil percolation tests;

B. An application for a soil percolation test approval for all lots that will be included in the submission for preliminary approval is made to the local health department at the next available soil percolation test season; and

C. Within 18 months after approval of the soil percolation tests for the lots that will be included in the submission for preliminary approval, a submission for preliminary approval is made to a local jurisdiction that includes, at a minimum, the preliminary engineering, density, road network, lot layout, and existing features of the proposed site development; and

(ii) By October 1, 2016, the preliminary plan is approved.

. . . .

(f) On or after December 31, 2012, a local jurisdiction:

(1) May not authorize a residential major subdivision served by on-site sewage disposal systems, community sewerage systems, or shared systems until the local jurisdiction adopts the growth tiers in accordance with § 5-104 of the Land Use Article; or

(2) If the local jurisdiction has not adopted the growth tiers in accordance with § 5-104 of the Land Use Article, may authorize:

(i) A residential minor subdivision served by on-site sewage disposal systems if the residential subdivision otherwise meets the requirements of this title; or

(ii) A major or minor subdivision served by public sewer in a Tier I area.

(g)(1) Except as provided in subsection (f)(2) of this section and subject to subsection (i) of this section, a local jurisdiction may authorize a residential subdivision plat only if:

(i) All lots proposed in an area designated for Tier I growth will be served by public sewer;

(ii) All lots proposed in an area designated for Tier II growth:

1. Will be served by public sewer; or (cont.)

The appellants are A. Thomas Goldbergh and other neighbors of the CR Golf property. They present two issues, which we have consolidated into one for the purposes of our analysis:

> Was the development plan submitted by CR Golf sufficient to constitute a "submission for preliminary plan approval" pursuant to Envir. § 9-206(b)?

We will dismiss the appeal as moot.

Analysis

(1) The Standard of Review

In a judicial review proceeding, the issue before an appellate court "is not whether the circuit . . . court erred, but rather whether the administrative agency erred." *Bayly Crossing,*

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2. If the subdivision is a minor subdivision, may be served by on-site sewage disposal systems;

(iii) Except as provided in subsection (h) of this section, the subdivision is a minor subdivision served by individual on-site sewage disposal systems in a Tier III or Tier IV area;

may enact a local law or ordinance for the transfer of the right to subdivide, up to 7 lots, by an owner of property used for agricultural activities to the owner of another property used for agricultural activities in accordance with this subsection.

(3) The local law or ordinance shall provide for the recordation of any rights to subdivide that are transferred under this subsection.

(4) A property used for agricultural activities the owner of which receives rights to subdivide under this subsection:

(i) Is limited to a total of 15 lots; and

(ii) Shall cluster the lots on the property.

(5) Rights to subdivide may not be transferred from the owner of property used for agricultural activities in a Tier III area to the owner of property used for agricultural activities in a Tier IV area.

. . . .

LLC v. Consumer Protection Division, 417 Md. 128, 136 (2010) (citations, internal quotation marks, and brackets omitted). For that reason, we "look through" the circuit court's decision, in order to "evaluate the decision of the agency" itself. *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 66 (2008).

Courts accept an agency's factual findings if they are supported by substantial evidence, that is, if there is relevant evidence in the record that logically supports the agency's factual conclusions. *Bayly Crossing*, 417 Md. at 139.

A reviewing court is not bound by an agency's legal conclusions. With that said, courts "frequently give weight to an agency's experience in interpretation of a statute that it administers." *Schwartz v. Maryland Department of Natural Resources*, 385 Md. 534, 554 (2005).

(2) The Parties' Contentions Summarized

Appellants contend that CR Golf did not submit a preliminary plan within the meaning of the Maryland Environment code because the developer did not include the "concept plan." The phrase "'preliminary plan' as used by 9-206(b)(2) means the plan which precedes or introduces the main development plan, work or design for a development approval process, which in Baltimore County is a 'concept plan' under County Code 32-4-211." Because CR Golf did not file its concept plan until August 2013, the plan is not grandfathered.

For its part, CR Golf contends its 2012 submission satisfied the requirements of § 9-206(b)(2). Therefore, it reasons, it preserved the right to have the County treat its

property as a Tier III property for purposes of its 2013 subdivision application. Before addressing the merits of the parties' contentions, however, we must consider whether this appeal is moot.

(3) Mootness

A case is moot when there is "no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant." *Suter v. Stuckey,* 402 Md. 211, 219–20 (2007) (citing, among other cases, *Dep't of Human Res. v. Roth,* 398 Md. 137, 143 (2007)). As a rule, courts do not entertain moot controversies. *Suter,* 402 Md. at 219. The mootness doctrine plays a particularly important role in land use cases because "an appellate court is bound to decide a case according to existing laws, even though a judgment rightful when rendered by the court below should be reversed as a consequence." *Yorkdale v. Powell*, 237 Md. 121, 124 (1964) (citation omitted). Application of the so-called *Yorkdale* rule renders land use appeals moot when zoning or other land use regulations change while the case is pending. *See, e.g., Armstrong v. Mayor & City Council of Baltimore,* 409 Md. 648, 670 (2009) ("[B]ecause the present litigation was ongoing at the time [the zoning ordinance was amended], the substantive zoning textual amendment applies retrospectively to this case, with the result that Cresmont does not need [the ordinance at issue in the appeal] to sanctify the construction of the parking lot[.]"). With these principles in mind, we turn to the facts of the case before us.

We begin with the 2012 Act, a complicated law with many moving parts. For our purposes, the 2012 Act authorized jurisdictions, such as Baltimore County, that exercise

land use authority to classify property within its boundaries into one of four "growth tiers" on or before December 31, 2012. Land Use Article § 1-502. Tier I and Tier II areas are those that are served by public sewer systems or otherwise designated for relatively dense residential development. Land Use Article § 1-508(a)(1) and (2). Tier III areas are those that:

> (i) are not planned for sewerage service and not dominated by agricultural or forest land;
> (ii) are not planned or zoned by a local jurisdiction for land, agricultural, or resource protection, preservation, or conservation; and
> (iii) are one of the following:
> 1. municipal corporations not served by a public sewerage system;
> 2. rural villages as described in § 5-7B-03(f) of the State Finance and Procurement Article;
> 3. mapped locally designated growth areas; or
> 4. areas planned and zoned for large lot and rural development;

Land Use Article § 1-508(a)(3).

Tier IV are areas that:

> are not planned for sewerage service and are:
> (i) areas planned or zoned by a local jurisdiction for land, agricultural, or resource protection, preservation, or conservation;
> (ii) areas dominated by agricultural lands, forest lands, or other natural areas; or
> (iii) rural legacy areas, priority preservation areas, or areas subject to covenants, restrictions, conditions, or conservation easements . . . for the purpose of conserving natural resources or agricultural land.

Land Use Article § 1-508(a)(4).

Initially, Baltimore County classified the CR Golf property as Tier IV. Ordinarily, this would have had the effect of significantly reducing the development potential of the CR Golf property. However, the 2012 Act provided that its development restrictions did not

apply to properties if an application for a preliminary plan approval was submitted on or before October 1, 2012, and the application was approved on or before October 1, 2016. *See* Envir. § 9-206(b)(2).[2] CR Golf asserted that its 2012 submission to the County constituted a preliminary plan, and that it accordingly was entitled to develop its property according to the density restrictions for Tier III properties, as opposed to the significantly more restrictive Tier IV requirements.

The Board agreed with CR Golf. Appellants think the Board erred. If we were to agree with appellants and reverse the Board's decision, the CR Golf property would be classified as Tier IV—except that it wouldn't. This is because the County administratively reclassified the CR Golf property from Tier IV to Tier III on March 27, 2015.[3] Thus, regardless of how we decide this case, the CR Golf property will remain classified as Tier III. Under these circumstances, there is no effective remedy that we can give to the parties.

APPEAL DISMISSED. APPELLANTS TO PAY COSTS.

[2] We're painting with a rather broad brush—§ 9-206(b)(2) sets out several other conditions for an exemption but there is no dispute that CR Golf met them.

[3] The legality of the County's action is not before us but does not appear to be contested by appellants. Additionally, we were informed by the parties at oral argument that the Baltimore County Council had very recently approved legislation rezoning the CR Golf property from "Resource Conservation" (R.C.7) to "Rural Residential" (R.C.5), subject to a condition that no more than forty houses be built on the property.