Circuit Court for Baltimore County
Case No. C-03-CV-19-002504

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 771

September Term, 2022

IN THE MATTER OF PAUL AND
CATHERINE MURPHY

Berger,
Beachley,
Ripken,

JJ.

Opinion by Beachley, J.

Filed: April 19, 2023

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellants Paul and Catherine Murphy appeal the judgment of the Circuit Court for Baltimore County, which affirmed the decision of the Baltimore County Board of Appeals ("BOA") that the Murphys violated Baltimore County Code ("BCC") provisions governing forest conservation by grading their property without complying with applicable environmental regulations. However, the circuit court remanded the matter to the Office of Administrative Hearings for Baltimore County ("OAH") to reconsider the fine imposed by the County. The Murphys present the following five questions for our review, which we have rephrased and reordered as:[1]

[1] The Murphys present the following five questions for our review:

1. Did the lower [c]ourt err by finding that BCC §§33-6-103(a)(1) and 33-6-105(a) were violated when the [Administrative Law Judge ("ALJ")] found that an application was never made as is required by both ordinances?

2. Did the ALJ erroneously admit into evidence satellite photos taken by a third party, that cannot be authenticated, in violation of the 4th Amendment of the United States' Constitution?

3. Did the ALJ err by admitting evidence obtained by the [a]ppellees on their March 29, 2017 inspection/trespass of [a]ppellant's property in violation of the 4th Amendment and a posted No Trespassing sign and after being directed not to go onto the property without the [a]ppellant being present?

4. Were the ALJ's findings of fact supported by substantial evidence in finding that 30,000 square feet of [a]ppellants' property were in violation of forest conservation easements, assessing a $.50 fine per square foot and issuing a $30,000.00 fine?

5. Did the admission of evidence by the Administrative Law Judge that the [a]ppellees failed to provide in its response to [a]ppellants' Public Information Act request create reversible error?

1. Did the BOA err when it found the Murphys violated BCC §§ 33-6-103(a)(1) and 33-6-105(a)?

2. Did the BOA err in concluding that admission of satellite photos of the Murphys' property did not violate the Fourth Amendment?

3. Did the BOA err when it ruled that the photos taken by a county inspector (Mr. Batchelder) were properly admitted?

4. Did the BOA err when it found that the admission of Mr. Batchelder's notes did not constitute reversible error?

5. Did the BOA err when it found the penalties issued by the County were appropriate?

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

FACTS AND PROCEEDINGS[2]

The Murphys own a 3.3-acre property at 12510 Harford Road, Hydes MD 21082. The Murphys' property is not visible from public roads and the entrance to the private road accessing the property has a "No Trespassing" sign. In 2011, the Murphys applied for and obtained a building permit to construct a pole barn on their property. To secure that permit, Mr. Murphy signed a Declaration of Intent that gave him a five-year exemption from applicable forest conservation regulations on the condition that he would clear no more than 20,000 square feet of forest. In 2017, Mr. Murphy, without securing any permits, cut 49 trees on his property. He contended that the trees needed to be removed because they were "rotten." Thereafter, the Murphys planted 67 replacement trees.

[2] Because the Murphys do not substantially challenge the ALJ's fact findings, our factual recitation is substantially based on the ALJ's written opinion dated January 4, 2019.

On January 23, 2017, Mr. Murphy went to Baltimore County's Department of Environmental Protection and Sustainability ("Department") and met with Charles Batchelder, a "Natural Resources Specialist II," to request another building permit. During this meeting, Mr. Batchelder observed that aerial photographs available on Baltimore County's Geographic Information System ("GIS")[3] showed that the Murphys' property was "heavily forested." Mr. Batchelder informed Mr. Murphy that he would have to comply with forest conservation regulations and thus he would have to sign a Declaration of Intent "requiring him to limit his clearing of the property to under 20,000 square [feet]." Mr. Murphy then "asked what would happen if he had already cleared more than 20,000 square feet," to which Mr. Batchelder replied that such a circumstance would require further investigation. Mr. Murphy then stated, "well- -I just won't get a permit." In response, Mr. Batchelder told Mr. Murphy that he "can't forget that you've been here" and that he would have to investigate the potential violation on the property. Mr. Batchelder and Mr. Murphy agreed to set up an appointment to meet at the property.

After their January 23, 2017 meeting, Mr. Batchelder called Mr. Murphy numerous times in an attempt to arrange a meeting at the property. Mr. Murphy did not respond to Mr. Batchelder's calls. Eventually, on March 29, 2017, Mr. Batchelder went to the property with a coworker, Tom Krispin. They knocked on the front door, but no one

[3] "GIS is a computer system that assembles, stores, manipulates, and displays geospatial information." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1145 (8th Cir. 2011).

answered. Once on the property, according to Mr. Batchelder, it was "obvious to the naked trained eye that the [Murphys] had created a huge lawn by removing a large number of trees[.]" Mr. Batchelder took pictures of the property. While on the property, a neighbor spotted Mr. Batchelder and Mr. Krispin and called Mr. Murphy. After the neighbor handed the phone to Mr. Batchelder, Mr. Murphy told him to get off his property. Mr. Batchelder complied.

On March 31, 2017, Mr. Murphy and Mr. Batchelder met on the Murphy property. During that meeting, Mr. Batchelder again could see the whole front of the property. Mr. Batchelder saw a large "stockpile" of soil, including root mats, indicative of grading. Because there was a heavy rain that day, Mr. Batchelder also noticed "run-off" caused by the grading and tree removal. At that meeting, Mr. Batchelder informed Mr. Murphy that "he was in violation of the Forest Conservation Regulations of Baltimore County and that he would need to comply with [the] regulations[.]" At the conclusion of the meeting, Mr. Batchelder "informed [Mr. Murphy] that he would prepare a worksheet to determine what the [Murphys'] Forest Conservation Regulations compliance would be, and would send it to him[.]"

On June 2, 2017, the Department sent a letter to the Murphys informing them that the Department had determined that they cleared 50,000 square feet of forest on their property in violation of Baltimore County's Forest Conservation Regulations. Attached to the letter was a "Forest Conservation Worksheet" that showed the County's calculations. On June 6, 2017, the Department sent a second letter with a corrected worksheet that

adjusted the land the Murphys cleared to 30,000 square feet on the basis that the Department was unable to determine if some of the land was cleared in compliance with the 2011 Declaration of Intent. The June 6, 2017 letter set forth options available to the Murphys to bring their property into compliance. After receiving this letter, the Murphys hired an attorney and filed a Maryland Public Information Act ("MPIA") request. On August 24, 2017, the Department emailed documents to the Murphys in response to their MPIA request. On January 19, 2018, the Department sent the Murphys a notice informing them that the Department had not received "documentation indicating any of the compliance items detailed in [the] June 6, 2017 letter were completed." On June 5, 2018, the Department sent a code enforcement citation to the Murphys proposing a $30,000 civil penalty for noncompliance with the forest conservation regulations.

On July 24, 2018, and September 7, 2018, an Administrative Law Judge ("ALJ") with the OAH conducted an evidentiary hearing to consider the $30,000 civil penalty issued by the Department. During the hearing, the Murphys "moved to exclude all of the aerial photos used by the [Department] as well as the notes and photographs taken by [Mr.] Batchelder." The ALJ admitted the evidence over objection. In a written decision dated January 4, 2019, the ALJ found that the Murphys "removed a significant number of trees from [their] property" in violation of "sections [6-]103 (a)(1) and 105 (a) of the Baltimore County Forest Conservation Regulations." The ALJ further found that the Murphys graded the property without a permit. The ALJ imposed the requested $30,000 civil penalty, but further ordered that $25,000 of the fine would be suspended if, by July 1, 2019, the

Murphys

> planted, pursuant to an approved Forest Conservation Plan a total of 1.7 acres of the site with 1 inch caliber Maryland Native Trees or other trees and/or vegetation to be determined by Baltimore County Department of Environmental Protection and Sustainability and execute[ed] a Forest Conservation Easement on the subject property to protect those trees.

The Murphys appealed the ALJ's decision to the BOA. On April 23, 2019, the BOA held a "record appeal" hearing.[4] The Murphys advanced numerous arguments at the hearing, including the following which are relevant to this appeal: (1) a condition precedent to a violation of BCC §§ 33-6-103(a)(1) and 33-6-105(a) is the filing of an application, and because the Murphys did not file an application, they could not be in violation of the cited sections; (2) the satellite photos and Mr. Batchelder's photos should have been excluded as they were taken during illegal searches of the Murphys' property in violation of their Fourth Amendment rights; (3) Mr. Batchelder's notes should not have been admitted because the Department violated the MPIA by not disclosing these notes; and (4) the penalties assessed were "arbitrary and capricious." On July 9, 2019, the BOA issued an opinion that affirmed the ALJ's opinion and, relevant to this appeal, found:

1. The record demonstrated that the Murphys were on notice of the alleged violations and the Department sufficiently made a prima facie case for violations

[4] According to BCC § 3-6-303, during a hearing on the record, "the Board of Appeals hearing shall be limited to the record created before the Hearing Officer, which shall include: 1. . . . the recording of the testimony presented to the Hearing Officer; 2. All exhibits and other papers filed with the Hearing Officer; and 3. The written findings and final order of the Hearing Officer."

of BCC §§ 33-6-103(a)(1) and 33-6-105(a).

2. The satellite photos were properly admitted because they were not taken during a Fourth Amendment search.
3. Mr. Batchelder's photos were admissible for impeachment purposes, irrespective of any Fourth Amendment violation.
4. Although the Department violated the MPIA when it failed to provide Mr. Batchelder's notes to the Murphys, and therefore the ALJ improperly admitted these notes into evidence, this error did not constitute reversible error.
5. The Department did not abuse its discretion in assessing a penalty of $30,000 because the Forest Conservation Worksheet substantiated a penalty of $37,026.

On July 23, 2019, the Murphys filed a petition for judicial review. On May 2, 2022, a hearing was conducted in the circuit court. On June 3, 2022, the circuit court generally affirmed the BOA; however, the court remanded the matter to the ALJ to reconsider the penalties imposed by the Department. In that regard, the circuit court stated:

> [T]his Court finds that the fines and sanctions imposed by the County dated June 6, 2017 are disproportionate, considering the County's rationale in calculating the fine. The County letter indicates that the fine was determined by charging $0.50 per square foot; if the size of the alleged violation is 30,000 square feet, then the fine should be $15,000.00 instead of the $37,026.00 imposed by the County. The alternative options of giving 1.7 acres of land to Baltimore County, or planting three hundred and forty (340) Maryland native trees is arbitrary in comparison to the actions of Petitioners. In other words, Petitioners cutting down forty-nine (49) trees but having to remedy the situation by planting 340 trees is disproportionate and uncalculated.

The Murphys filed this timely appeal. Additional facts will be provided as necessary to resolve the issues on appeal.

STANDARD OF REVIEW

"On appellate review of a decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision." *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 354 (2013) (quoting *Long Green Valley Ass'n v. Prigel Fam. Creamery*, 206 Md. App. 264, 273 (2012)). And, "[w]e 'review the agency's decision in the light most favorable to the agency' because it is 'prima facie correct' and entitled to a 'presumption of validity.'" *McClure v. Montgomery Cnty. Plan. Bd. of Md.-Nat'l Cap. Park & Plan. Comm'n*, 220 Md. App. 369, 379-80 (2014) (quoting *Anderson v. Dep't of Pub. Safety & Corr. Servs.*, 330 Md. 187, 213 (1993)). "The overarching goal of judicial review of agency decisions is to determine whether the agency's decision was made 'in accordance with the law or whether it is arbitrary, illegal, and capricious.'" *Id.* at 380 (quoting *Long Green Valley Ass'n*, 206 Md. App. at 274). "With regard to the agency's factual findings, we do not disturb the agency's decision if those findings are supported by substantial evidence." *Id.* "We are not bound, however, to affirm those agency decisions based upon errors of law and may reverse administrative decisions containing such errors." *Id.*

DISCUSSION

I. THE BOA DID NOT ERR WHEN IT FOUND THE MURPHYS VIOLATED BCC §§ 33-6-103(a)(1) AND 33-6-105(a)

The Murphys were charged with violating BCC §§ 33-6-103(a)(1) and 33-6-105(a), which provide:

> § 33-6-103. - Scope.
>
> (a) *In general*. Except as provided in subsection (b) of this section, this title

applies to:

(1) A person **making application** for a development, subdivision, project plan, building, grading, or erosion and sediment control approval on units of land 40,000 square feet or greater[.]

§ 33-6-105. - General Requirements for Regulated Activities.

(a) *In general*. Unless exempt under § 33-6-103(b) of this title, a person **making application** after January 19, 1993, for development or subdivision approval, project plan approval, a building permit, a grading permit, grading plan approval, or erosion and sediment control plan approval for an area of land of 40,000 square feet or greater shall:

(1) Submit to the Department a forest stand delineation and a forest conservation plan for the lot or parcel on which the project is located; and

(2) Use methods approved by the Department to protect retained forests and trees during timber harvesting, tree cutting, clearing, grading, and construction and to maintain forest conservation areas, including retained, afforested, and reforested areas, after project completion.

(Emphasis added). The Murphys assert that "[b]efore the ordinances apply, a person must make an application." From that premise, they proceed to argue that because they never submitted an application pursuant to these code sections, "the County never established a prima facie case[.]"

The Department characterizes the Murphys' argument as "nonsensical." In the Department's view, the BCC forest conservation regulations apply to the Murphys' activities regardless of their failure to submit an application as described in BCC §§ 33-6-103(a)(1) and 33-6-105(a). The Department argues that, when viewing these regulations within the context of the entire regulatory scheme concerning environmental protection, "[t]here is little question that both [regulations] *assume* that a proper application is made to [the Department] *before* any forest clearing or grading activities occur[]." We agree

with the Department.

"An agency decision based on regulatory and statutory interpretation is a conclusion of law." *Kor-Ko Ltd. v. Md. Dep't of the Env't*, 451 Md. 401, 412 (2017) (quoting *Carven v. State Ret. & Pension Sys. of Md.*, 416 Md. 389, 406 (2010)). Even though an agency's statutory interpretation is reviewed *de novo*, "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Halici v. City of Gaithersburg*, 180 Md. App. 238, 261 (2008) (quoting *Miller v. Comptroller of Md.*, 398 Md. 272, 281 (2007)).

Although we look to the plain meaning of the statute, "[o]ur review of the plain language is not exclusively limited to the provision in question." *Shivers v. State*, 256 Md. App. 639, 658-59 (2023) (citing *Berry v. Queen*, 469 Md. 674, 687 (2020)). Thus, when interpreting a regulation:

> We . . . do not read [regulatory] language in a vacuum, nor do we confine strictly our interpretation of a [regulation's] plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the [regulatory] scheme to which it belongs, considering the purpose, aim, or policy of the [agency] in enacting the [regulation]. We presume that the [agency] intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a [regulation], to the extent possible consistent with the [regulation's] object and scope.

Kor-Ko Ltd., 451 Md. at 417-18 (alterations in original) (quoting *Lockshin v. Semsker*, 412 Md. 257, 275-76 (2010)).

A contextual review of the BCC provisions relevant in this case demonstrates the speciousness of the Murphys' argument. Title 5 of Article 33 is titled "Excavations,

Grading, Sediment Control, and Forest Management." Section 33-5-201 provides that "[a] grading permit is required for all land-disturbing activities" that are not exempted. The Murphys do not contend that their property falls within any of the six delineated exemptions provided in the regulation, nor do they challenge the ALJ's finding that they had engaged in significant grading and land clearing. Section 33-5-202(a)(1) dictates: "When a permit is required under the provisions of this title, the owner of the affected property or the owner's authorized agent shall file an application for the permit with the Department of Permits, Approvals and Inspections." Thus, Title 5 is very clear that a person must obtain a grading permit before engaging in any non-exempt "land-disturbing activities."[5]

Under Title 6 ("Forest Conservation"), a "[d]evelopment project" is defined as "grading or construction activities occurring on a specific tract that is 40,000 square feet or greater." BCC § 33-6-101(l)(1). Further, if a person makes an "application for . . . grading, or erosion and sediment control approval on units of land 40,000 square feet or greater[,]" BCC § 33-6-103(a)(1), then the applicant must abide by BCC § 33-6-105(a), which requires the applicant to:

> (1) Submit to the Department a forest stand delineation and a forest conservation plan for the lot or parcel on which the project is located; and
>
> (2) Use methods approved by the Department to protect retained forests and trees during timber harvesting, tree cutting, clearing, grading, and

[5] We note that the record is replete with references to the necessity of obtaining a permit before engaging in "land disturbing" activity. For instance, Mr. Batchelder testified that the forest conservation regulations applied regardless whether an application was filed.

> construction and to maintain forest conservation areas, including retained, afforested, and reforested areas, after project completion.

The plain language of Title 5 and Title 6, when read together, undermines the Murphys' argument. There is substantial evidence that the Murphys' "land-disturbing activities" required a permit under Title 5. Indeed, in their brief they concede that "under the broad definition provided in BCC 33-5-101(z), grading did occur as land was disturbed."[6] Likewise, there is substantial evidence that the Murphys were required to submit a forest stand delineation and a forest stand conservation plan pursuant to BCC § 33-6-105(a). The Murphys concede that they substantially altered their property by removing 49 trees without submitting a forest stand delineation and a forest conservation plan. Accordingly, the evidence is clear that the Murphys violated BCC §§ 33-6-103(a)(1) and 33-6-105(a). The Murphys' argument that "making an application" is an element of the Department's prima facie case elevates form over substance; in short, they were required to obtain a permit, but failed to do so. We therefore agree with the agency's interpretation that the Murphys violated §§ 33-6-103 and 33-6-105 because those regulations presume that a proper application for a permit has been made. Accordingly, we hold that the BOA was correct when it found "no error on the ALJ's part in not dismissing the violation . . . for the

[6] In their reply brief, the Murphys stated: "Contrary to [ap]pellee's claims, the [a]ppellants never admitted to grading their property as they did not grade the property." The Murphys cannot argue in their reply brief an issue that they conceded in their opening brief. *See Strauss v. Strauss*, 101 Md. App. 490, 509 n.4 (1994) ("the scope of a reply brief is limited to the points raised in appellee's brief, which, in turn, address the issues originally raised by appellant. . . . A reply brief cannot be used as a tool to inject new arguments.").

alleged shortcomings of the actual citation issued to the Murphys."

II. THE USE AND ADMISSION OF SATELLITE IMAGES DID NOT VIOLATE THE FOURTH AMENDMENT

The Murphys argue that the BOA erred when it found the satellite images from Google Earth and the GIS program were not taken as a result of an unlawful search under the Fourth Amendment of the United States Constitution. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. "The Fourth Amendment . . . is a limitation on the actions of government and not a command to private citizens." *Fitzgerald v. State*, 153 Md. App. 601, 658 (2003). "It has always been recognized that the restraints of the Fourth Amendment apply only to agents of government (including those acting in cooperation with them) and not to searches or seizures carried out by private persons." *Id.* (citations omitted). "When the threshold inquiry, therefore, determines that the Fourth Amendment does not apply to the person of the searcher, . . . the Fourth Amendment analysis is over." *Id.*

Pursuant to these long-standing principles, we have no hesitation in concluding that because the Google Earth photos were taken by a non-governmental entity, the Fourth Amendment is not implicated.[7] The record is less certain whether the GIS photos were

[7] The Murphys admit that these satellite images were "taken by a third party" and state that "satellite images of the world are readily available to the public from Google Earth[,]" but argue that "historical photos like the kind used by the [Department] . . . are not readily available." We note that any member of the public can access Google Earth "historical" photos.

taken by a non-governmental entity. The law is clear that the Murphys bore the burden of proving the applicability of the Fourth Amendment. *Smith v. State*, 186 Md. App. 498, 520 (2009). We see no attempt by the Murphys in this record to demonstrate that the taking of the GIS photos amounted to government action, and for that reason alone their argument fails.

Even if we were to assume *arguendo* that the Google and GIS photos constituted government action, the Murphys' argument still fails. A Fourth Amendment violation occurs when the government invades an individual's reasonable expectation of privacy, and we review the question of whether an individual had a reasonable expectation of privacy *de novo*. *Powell v. State*, 139 Md. App. 582, 597, 599 (2001). "A two-part test is to be used to determine whether the government has invaded an individual's reasonable expectation of privacy: '[f]irst, an individual must demonstrate that he had an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable.'" *McGurk v. State*, 201 Md. App. 23, 35 (2011) (quoting *Kitzmiller v. State*, 76 Md. App. 686, 690 (1988)).

Accepting for purposes of argument that the Murphys had a subjective expectation of privacy in the areas photographed, that expectation would not be objectively reasonable as required by the second part of the constitutional test. In *California v. Ciraolo*, the Supreme Court of the United States found that police flying over a home did not constitute a search because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." 476 U.S. 207, 213-14 (1986).

Thus, there is no reasonable expectation of privacy in what may be spotted with "the naked eye." *Id.* at 213. In contrast, in *Kyllo v. United States*, 533 U.S. 27, 33 (2001), the Supreme Court examined a case that "engaged in more than naked-eye surveillance of a home." In that case, the Court held that the use of sense-enhancing technology to see into someone's home was a search because the technology was used "to explore details of [a] home" and was "not in general public use." *Id.* at 40.

Here, as noted in the BOA opinion, the satellite photos were not of the Murphys' "actual residence[.]" Additionally, the BOA stated "[t]he use of such aerial photos as the ones at issue is commonplace before the ALJ and this Board[,]" and the ALJ found that this technology is "available to the public with no restrictions." Because "[a]ny member of the public flying in this airspace who glanced down could have seen everything" depicted in the GIS and Google photos, *Ciraolo*, 476 U.S. at 213-14, we conclude that the GIS and Google photos were not protected by the Fourth Amendment. What the *Ciraolo* Court stated in 1986 is equally applicable today: "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant[.]" *Id.* at 215.

Embedded in their Fourth Amendment argument is a separate argument that the GIS and Google Earth photos "are impossible to corroborate as no witness can possibly authenticate the dates of the photos. Any testimony regarding the dates they were taken is uncorroborated hearsay." We initially note that the Murphys do not challenge the proposition that more relaxed evidentiary rules apply in administrative proceedings. *See*

Para, 211 Md. App. at 379; *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 32-33 (1996); *Travers v. Balt. Police Dep't*, 115 Md. App. 395, 408 (1997).

Relevant to this relaxed evidentiary standard, the following exchange occurred at the OAH hearing regarding one of the GIS photos:

MR. BATCHELDER:	It was taken March 22nd, 2017. So, that's literally seven days prior to my visit. So, that aerial represents the best representation of what I saw when I went out to the property. And like I said, I only made two visits, the 29[t]h, which, where I was asked to leave and then the 31st in the pouring rain.
[MURPHYS' COUNSEL]:	And, and, and I would object to that (inaudible) testimony, because there's no basis to believe that it's March 22nd, 2017.
[DEPARTMENT'S COUNSEL]:	Okay. Why --
MR. BATCHELDER:	I can provide documentation.
[DEPARTMENT'S COUNSEL]:	-- what, why do you --
ALJ:	Well, he's also under oath telling us that's the day he went, that's --
[DEPARTMENT'S COUNSEL]:	Yeah, yeah.
[MURPHYS' COUNSEL]:	Well, no, that, I'm sorry, the authenticity of the picture, not the --
ALJ:	Well, he told us he, how he was able (inaudible) was how do you know what date it was, then we looked on the (inaudible).
MR. BATCHELDER:	I asked our computer GIS people to track down the exact date and that's

	what, you know, that's the information that they gave me.
ALJ:	Oh, all right.
[MURPHYS' COUNSEL]:	And so that was hearsay then.
ALJ:	Yeah, it's hearsay (inaudible).
[MURPHYS' COUNSEL]:	I know.
[DEPARTMENT'S COUNSEL]:	We'll bring in the GIS professional to testify that that's the date in the system, I mean, --
ALJ:	*No, no, it's an administrative hearing.*
[DEPARTMENT'S COUNSEL]:	Yeah, okay.
[MURPHYS' COUNSEL]:	*Right.*

(Emphasis added). In response to the Department's offer to "bring in the GIS professional" to authenticate the GIS photos, the ALJ implicitly recognized the relaxed evidentiary rules in administrative law, *i.e.*, that "hearsay evidence that is [generally] inadmissible in a judicial proceeding **is not necessarily inadmissible in an administrative proceeding**." *Para*, 211 Md. App. at 381 (alterations in original) (quoting *Travers*, 115 Md. App. at 408). In an administrative proceeding, "[f]irst, one must consider the hearsay's reliability and probative value." *Id.* "Once the offered hearsay is deemed sufficiently reliable and probative, one must then consider whether the hearsay's admission contravenes due process." *Id.* at 381-82. Mr. Batchelder testified that the Department regularly uses and relies on the GIS system, and the BOA noted that it is "commonplace" in Board proceedings to use satellite photos like those at issue here. The Murphys failed to make

any argument that the GIS photos are unreliable. Moreover, these photos were probative as they showed the difference in the property before and after the Murphys cut their trees. "[T]he basic tenet of fairness in administrative adjudications is the requirement of an opportunity for reasonable cross-examination[.]" *Id.* at 384 (quoting *Travers*, 115 Md. App. at 416-17). But "fairness also requires the complaining party to avail itself of the opportunity to cross-examine." *Id.* (citing *Travers*, 115 Md. App. at 418). The Murphys did not argue that they should have had the opportunity to cross-examine the GIS professional, and by saying "Right" in response to the ALJ's ruling, their counsel ostensibly accepted the ALJ's determination that formal authentication is not required in an administrative proceeding. We discern no error in the admission of the GIS photos.

The following exchange regarding one of the Google Earth images occurred at the OAH hearing:

MR. BATCHELDER:	This was, according to the Google imagery, this was October of 2014.
[DEPARTMENT'S COUNSEL]:	And when you say according to Google imagery, how are you able to tell that it was taken in October of 2014?
MR. BATCHELDER:	Because on the page after that page, you can see at the bottom where it says imagery date 10/23/2014.
[DEPARTMENT'S COUNSEL]:	And there's some coordinates after that?
MR. BATCHELDER:	Yes.
[MURPHYS' COUNSEL]:	Your Honor, I have an, ongoing objection. I don't see coordinate objections, I mean, I don't see this, you know, --

ALJ:	Yeah, I'm not quite sure what he, what numbers he's referring.
	***
[DEPARTMENT'S COUNSEL]:	Okay. Could you explain where on page, County Exhibit 4-A you're referring to the imagery date?
MR. BATCHELDER:	So, it's on the, it's on the --
ALJ:	You can hold it up so I can see it. (inaudible).
MR. BATCHELDER:	Right there, it says imagery date 10/23/2014.
ALJ:	Yes.
[DEPARTMENT'S COUNSEL]:	This is directly above that, adobe acrobat.
ALJ:	Yep, yep.
[DEPARTMENT'S COUNSEL]:	File.
[MURPHYS' COUNSEL]:	Wait, I'm looking, I don't see it.
ALJ:	I mean, --
[MURPHYS' COUNSEL]:	*Oh, I see it, okay. I gotcha, I see it.*

(Emphasis added). The Murphys implicitly waived any objection to the date of this Google image when their counsel stated "Oh, I see it, okay." Additionally, the Murphys did not object when later in the hearing Mr. Batchelder identified the imagery date on another Google image. *See DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." (citing *Peisner v. State*. 236 Md. 137, 145-46 (1964))). Even if we assumed that the

Murphys did not waive their objection, the Google images are admissible under the more relaxed evidentiary rules in administrative proceedings. Administrative agencies only have to "observe the basic rules of fairness as to parties appearing before them and . . . admit evidence that has sufficient reliability and probative value to satisfy procedural due process." *Cole*, 342 Md. at 32 (citing *Dal Maso v. Bd. of Cnty. Comm'rs*, 238 Md. 333, 337 (1965); *Powell v. Md. Aviation Admin.*, 336 Md. 210, 220 (1994)). The Google images are from a well-known reliable source and showed the difference before and after the Murphys removed the trees on their property. Thus, the Google images were properly admitted.[8]

III. MR. BATCHELDER'S PHOTOS WERE PROPERLY ADMITTED

The Murphys argue that because Mr. Batchelder trespassed on their property and took photos, the ALJ erred in admitting those photos as evidence because they were obtained as a result of an "illegal search." The Department argues that there was no "illegal search" because the photos were taken in plain sight from the Murphys' driveway. The BOA's opinion did not address whether Mr. Batchelder's photos were taken as a result of an illegal search of the Murphys' property, but rather found that these photos were admissible because they were used for the limited purpose of impeachment. In so ruling, the BOA relied on *Harris v. New York*, 401 U.S. 222, 223 (1971). In *Harris*, the Supreme

[8] We also note that because Mr. Batchelder described the Murphys' removal of trees and land-clearing based on his personal observations, the Google Earth and GIS photos constituted cumulative evidence, the admission of which would be harmless.

Court of the United States held that a statement acquired in violation of the Fifth Amendment was admissible for impeachment purposes. *Id.* at 226. The Supreme Court has also applied this principle to evidence otherwise inadmissible under the Fourth Amendment. *See United States v. Havens*, 446 U.S. 620 (1980); *Walder v. United States*, 347 U.S. 62 (1954); *Hall v. State*, 47 Md. App. 590, 597 n.4 (1981). In the hearing before the ALJ, the photos taken by Mr. Batchelder were admitted only for impeachment purposes during Mr. Murphy's cross-examination. Indeed, the Department explicitly proffered that the photos were "not being introduced as substantive evidence," but rather "for the credibility of Mr. Murphy's claim." We also note that the Murphys did not object to the use of Mr. Batchelder's photos after the Department proffered them for impeachment purposes. We therefore conclude that the BOA was correct in determining the photos, even if illegally obtained, were admissible as impeachment evidence.[9]

IV. THE ADMISSION OF MR. BATCHELDER'S NOTES WAS HARMLESS ERROR

The Murphys next argue that Mr. Batchelder's notes should not have been admitted

[9] Even if used as substantive evidence, Mr. Batchelder's photos would likely be admissible because they were taken from the Murphys' driveway. *See McGurk*, 201 Md. App. at 39 ("[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g. walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment."). The presence of a "no trespassing" sign at the entrance to the Murphys' property does not change our analysis. *See Jones v. State*, 178 Md. App. 454, 473 (2008) ("For Fourth Amendment purposes, appellant could not have had a reasonable expectation that the "No Trespassing" sign would or should prevent visitors with a legitimate purpose from walking to the front door, including police officers in furtherance of an investigation.").

because they were a "surprise" to the Murphys at the hearing. The genesis of the Murphys' argument on this point is their MPIA request for the Department's case file. The Department conceded that it failed to provide Mr. Batchelder's notes in response to the MPIA request. The BOA found:

> that the introduction of these notes into evidence was improper. However, we do not find [it] to be reversible error. If these notes were presented into evidence without the accompanying testimony of Mr. Batchelder himself, the Board would view this differently. However, Mr. Batchelder did testify in person to his investigation and his observations and was subject to cross-examination. Consequently, the Board finds that this error had no bearing on what evidence came to light during the hearing before the ALJ and their exclusion would have not affected the ALJ's final decision.

"It is the policy of this Court not to reverse for harmless error[,] and the burden is on the appellant in all cases to show prejudice as well as error." *Washington Suburban Sanitary Comm'n v. Lafarge North America, Inc.*, 443 Md. 265, 289 (2015) (quoting *Crane v. Dunn*, 382 Md. 83, 91 (2004)). "In Maryland, the harmless error doctrine has been applied in judicial review of agency decisions." *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 764 (2006). When evaluating whether erroneously admitted evidence is harmless error, we have noted that "[i]f the agency's error in relying on the [evidence] was *de minimis*, a remand is not required. However, if there is substantial doubt that the agency would have reached the same result absent the erroneously considered evidence, the case should be remanded for the agency to decide anew." *Id.* at 765.

The Murphys make no substantive challenge to the accuracy of Mr. Batchelder's notes, but argue the notes were "crucial to [the Murphys'] ability to prepare a defense as [the Murphys] had no recollection of when they first went to the [Department's] office[.]"

The Murphys have not explained the significance of their first visit to the Department's office to their "ability to prepare a defense." Thus, the Murphys have not met their burden of showing that they were prejudiced by the admission and use of Mr. Batchelder's notes. Furthermore, Mr. Batchelder's notes were wholly consistent with his testimony at the hearing. *See Brown v. Daniel Realty Co.*, 180 Md. App. 102, 124 (2008) (holding that the deposition testimony and trial testimony were consistent and thus "the admission of such cumulative testimony was harmless"). We hold that any error in admitting Mr. Batchelder's notes was harmless.[10]

V. WE AFFIRM THE CIRCUIT COURT'S DECISION TO REMAND THE FINES AND SANCTIONS IMPOSED AGAINST THE MURPHYS

On June 2, 2017, the Department issued three penalty options based upon its finding that the Murphys "cleared approximately 50,000 square feet of forest on [their] property." According to the Department's "Forest Conservation Worksheet," the Murphys had a "forest conservation obligation" of 1.8 acres. The Department advised the Murphys that their obligation could be satisfied by complying with one of the following options:

1. Plant 1.8 acres of [the] property with 360 1-inch caliper Maryland native trees and put a forest conservation easement on [the] property to protect those trees;

2. Purchase 1.8 acres of credit in an offsite planting or retention bank; or

[10] At the OAH hearing, the Department asserted that Mr. Batchelder's notes were disclosed to the Murphys in a meeting before the hearing, but the Murphys disagreed. We need not resolve this controversy because we conclude that the admission of Mr. Batchelder's notes constituted harmless error.

3. Pay a fee-in-lieu of $39,204 (1.8 acres = 78,408 square feet x $0.50/square-foot).

Just four days later, on June 6, 2017, the Department issued a new penalty that superseded the June 2, 2017 letter based on the Department's determination to give the Murphys "the benefit of the doubt that [they] could have legally cleared up to 20,000 square feet of forest." The Department reduced the 50,000 square feet violation area described in the June 2, 2017 letter to 30,000 square feet. Based on that square footage reduction, the Department recalculated the penalties using 1.7 acres as calculated on the forest conservation worksheet and provided the Murphys the following options:

1. Plant 1.7 acres of [the] property with 340 1-inch caliper Maryland native trees and put a forest conservation easement on [the] property to protect those trees;

2. Purchase 1.7 acres of credit in an offsite planting or retention bank; or

3. Pay a fee-in-lieu of $37,026 (1.7 acres = 74,052 square feet x $0.50/square-foot).

The Department attached forest conservation worksheets to both the June 2 and June 6, 2017 letters evidencing their calculations.

In his opinion, the ALJ expressly provided the Murphys "an opportunity to bring the property into compliance." The ALJ then imposed a civil penalty of $30,000, but further provided:

> [T]hat $25,000.00 (Twenty Five Thousand Dollars) of the fine will be suspended if by July 1, 2019 the Respondent has planted, pursuant to an approved Forest Conservation Plan a total of 1.7 acres of the site with 1 inch caliber Maryland Native Trees or other trees and/or vegetation to be determined by Baltimore County Department of Environmental Protection and Sustainability and execute[ed] a Forest Conservation Easement on the subject property to protect those trees.

The BOA affirmed the ALJ's decision concerning the civil penalty.

Although the circuit court affirmed the BOA's decision that the Murphys violated BCC's forest conservation regulations, it concluded that the "fines and sanctions imposed by the County dated June 6, 2017," were "disproportionate," and that the "alternative options of giving 1.7 acres of land to Baltimore County, or planting three hundred and forty (340) Maryland native trees" were arbitrary in comparison to the Murphys' removal of forty-nine (49) trees. Accordingly, the court "remanded to the Administrative Law Judge to hear the issue of the fine imposed by the County."

Focusing on the ALJ's determination that the Murphys' forest conservation violation amounted to 30,000 square feet rather than the 50,000 square feet alleged by the Department in its June 2, 2017 letter, the Murphys assert that the "amount of the fine and the conclusions of the [BOA] and the ALJ are inconsistent with simple math and therefore unsupported by substantial evidence."

The Department does not address the merits of the penalty in its brief. Instead, it is the Department's view that "because the penalty was remanded back to OAH for reconsideration, there is not a final appealable judgment on that issue."

We can summarily address—and reject—the Department's contention that there is no final judgment as to the imposition of a penalty. In *Metro Maintenance Systems South,*

Inc. v. Milburn, the Supreme Court of Maryland[11] stated:

> It is not unusual for a circuit court tasked with conducting judicial review of an agency decision to remand the case back to the agency at some point. In many, if not most, instances, the circuit court's order does not determine and conclude the rights of the parties. For example, if, applying the appropriate standard of review, the court finds that there was not substantial evidence to support the agency decision or that the agency made an error of law, it will likely remand the case to the agency, which will ultimately determine the parties' rights by applying the law as directed by the circuit court. Such a remand may appear to be non-final in nature, but under the principles of finality in Maryland law . . . , many such remands are appealable final judgments.

442 Md. 289, 301 (2015) (footnotes omitted). The Court held that remands following judicial review are appealable final judgments because

> when the circuit court orders a remand after judicial review, it does so because it has found that the agency's decision is inconsistent with law or unsupported by substantial evidence. The parties can no longer defend or challenge that agency decision in the circuit court and there is nothing further for that court or the parties to do. Thus, that remand terminates the circuit court proceedings.

Id. at 307. A final judgment results when a decision "terminates the proceedings in that court[.]" *Id.* at 299. In the case at bar, the circuit court's decision unquestionably terminated the circuit court proceeding. Because the circuit court remanded the issue of the penalty to the OAH *after* judicial review, the circuit court's decision, including the penalty issue, constitutes an appealable final judgment.

What we are left with is the Murphys' claim that the penalties imposed were

[11] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

arbitrary—a claim with which the circuit court agreed—and the absence of any argument to the contrary by the Department. In fact, the Department's brief does not set forth any objection to the circuit court's decision to "remand[] this case back to OAH for a reassessment of the penalty."[12] For these reasons, we shall affirm the circuit court's decision to remand the matter to the ALJ for reconsideration of the assessed penalty.[13]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANTS TO PAY COSTS.

[12] At oral argument, the Department confirmed that it does not object to a remand for reassessment of the penalty.

[13] The Murphys summarily state in their brief "the final sanction violated Amendment VIII of the United States' Constitution[,]" and make no further argument. Thus, this argument was not properly briefed and therefore we will not consider it. *Klauenberg v. State*, 355 Md. 528, 552 (1999) (stating that "arguments not presented in a brief or not presented with particularity will not be considered on appeal"). In any event, our opinion requires reconsideration of the penalty on remand.