Circuit Court for Baltimore County
Case No. C-03-CV-22-004713

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0387

September Term, 2024

IN THE MATTER OF NORMAN BARTON,
ET AL.

Beachley,
Tang,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: August 19, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

The present case involves a 13.888-acre parcel of land, in the Overshot subdivision of Baltimore County, Maryland, on which the Bartons, a husband and wife, want to build a single-family home. The difficulty they face is that in 1990, when they purchased the land, known as Tract A, which is adjacent to the parcel on which they currently have a residence, known as Lot 12 or 19 Overshot Court, they had notice that, "No further development . . . shall be permitted and provisions restricting future development of the subject area . . . shall be incorporated in the deeds . . . being conveyed to the owners . . . .," as well as in the deeds of other lot owners in the community. This language was referenced in their deed when they bought the property and included in a plat of Overshot Court.

The Bartons filed a petition in January of 2021 for a Zoning Hearing, more specifically, a "Special Hearing under Section 500.7[1] of the Zoning Regulations of

[1] Baltimore County Zoning Regulation (BCZR) § 500.7 provides in its entirety:

> The said Zoning Commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the Zoning Commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations.
>
> With respect to any zoning petition other than a petition for a special exception, variance or reclassification, the Zoning Commissioner shall schedule a public hearing for a date not less than 30 days after the petition is accepted for filing. If the petition relates to a specific property, notice of the time and place of the hearing shall be conspicuously posted on the property

(…continued)

Baltimore County, to determine whether or not the Zoning Commissioner should approve" the Bartons' Requested Relief which enumerated three tenets:

1. Special Hearing to remove the condition in Case No. 1990-183-SPH that did not allow any future development of Tract A.
2. Special Hearing to determine that the property qualifies as an existing lot under BCZR Section 1A07.8.B.4.
3. Also, for such further relief as the Administrative Law Judge may require.

The Administrative Law Judge (ALJ), after a hearing, denied the relief requested. He determined that res judicata[2] did not serve to bar the Bartons' petition, because there had been a substantial change in the law and a substantial change in the fact that the land had purportedly passed a perc test.[3] The Bartons had alleged and proven that the County

> for a period of at least 15 days before the time of the hearing. Whether or not a specific property is involved, notice shall be given for the same period of time in at least two newspapers of general circulation in the county. The notice shall describe the property, if any, and the action requested in the petition. Upon establishing a hearing date for the petition, the Zoning Commissioner shall promptly forward a copy thereof to the Director of Planning (or his deputy) for his consideration and for a written report containing his findings thereon with regard to planning factors.

[2] Res judicata is a doctrine that precludes the re-litigation of claims from a prior suit where "(1) the parties in the present litigation are the same or in privity with the parties to the earlier action; (2) the claim in the current action is identical to the one determined in the prior adjudication; and (3) there was a final judgment on the merits in the previous action." *Becker v. Falls Road Community Association*, 481 Md. 23, 46 n.6 (2022) (citing *Bank of New York Mellon v. Georg*, 456 Md. 616, 667 (2017)). The doctrine bars claims that were actually litigated as well as those that could have been litigated. *Id.* (citing *Bank of New York Mellon*, 456 Md. at 667-68).

[3] A percolation test or "perc" test "is used to determine if the soil will absorb and drain water adequately enough to install and use a domestic sewage-disposal system. The testing procedure, generally speaking, involves digging several holes, filling them with water, and measuring the rate at which the water-level decreases." *Neifert v. Department of*

(…continued)

Council of Baltimore County created the RC 6 zoning classification in the legislative session of 2000 by Bill No. 73-00, which permitted a "retirement parcel." Through Baltimore County's 2004 Comprehensive Zoning Map Process, the RC 6 zone was first utilized with the change of certain RC 4 properties to RC 6; specifically, the Overshot Court area was re-zoned from RC 4 to RC 6.

The ALJ, however, denied the Bartons' request, based on the recordation of the restrictive plat, as well as the limitations on the development of Lot A that had been included in the recorded deeds for Lot A and Lot 12,[4] as ordered by the Zoning Commissioner on December 29, 1989 in Case No. 90-183-SPH, based upon the 4th Final Development Plan (4th FDP) for the Overshot subdivision; that order in part provided:

> The Petition for Special hearing to approve the 4th Amendment to the Final Development Plan for Overshot, in accordance with Petitioner's Exhibit 1, be and is hereby GRANTED, subject, however, to the following restrictions which are condition precedents to the relief granted herein:
> 1. No further development of Tract A shall be permitted and provisions restricting future development of the subject area as described in Petitioner's Exhibit 1 shall be incorporated in the deeds for the portions of Tract A being conveyed to the owners of Lots 12, 13, 30 and 31;
> 2. Petitioner shall file copies of the above-described deeds with the Zoning Office and those deeds shall also incorporate an express reference to this Order and this zoning case.

Environment, 395 Md. 486, 492 n.1 (2006). The Bartons had offered testimonial evidence regarding the perc test.

[4] The limitations on the development of Lot A were also recorded in deeds to Clifford and Ruth Chillemi, Paul and Maryanne Tiburzi, and Michael Milwid, the owners of Lots 13, 30, and 31, respectively, who also each purchased portions of Lot A around the time the Bartons purchased the section of Lot A under contention.

This Order was admitted as Protestants' Exhibit 1 and Petitioners' Exhibit 7 during the hearing before the ALJ.

The ALJ emphasized the purpose clause of BCZR § 1A07.8.B.4 in his denial: "The purpose clause of BCZR § 1B01.3.A.1.a. governs this scenario and states that the law is intended '*to provide for the disclosure of development plans to prospective residents and to protect those who have made decisions based on such plans from inappropriate changes therein*.'" The ALJ also explained the logic of his opinion that removing the development prohibition would violate the 4th FDP and the deeds for Lot A and 12:

> In this case removing this express condition of the Order in Case No. 90-183-SPH, as expressly stated on the 4th FDP, and on the Deeds for the affected parcels, would violate the spirit and intent of the 4th FDP, and of BCZR § 1B01.3.A.1.a. This leads to my conclusion that BCZR § 1A07.8.B.4 does not apply here. People's Counsel and Mr. McCann are correct that this "grandfathering" provision does not apply to lots or parcels that are part of existing development plans. Especially where, as here, the existing development plan expressly prohibits development of the very lot or parcel in question. In my view this grandfathering provision logically applies only to lots or parcels that are not part of existing development plans. To allow this provision to be used to fundamentally amend the 4th FDP, and to remove the condition in Case No. 90-183-SPH would be to eviscerate the very purpose of BCZR § 1B01.3.A.1.a. In sum, how could removal of the development prohibition ever be within the "spirit and intent" of the 4th Amended FDP when a *condition precedent* for the approval of the 4th FDP was the development prohibition itself?

The Board of Appeals, after a de novo hearing, also denied the Bartons' Petition, but premised their decision on the principles of res judicata. The Board found that the change in zoning to RC 6 and the potential of the property passing a perc test were not "substantial changes of circumstances" to avoid the preclusive effect of res judicata. In his Concurring and Dissenting opinion, Board Member Fred M. Lauer did not agree with the

majority that res judicata applied. He determined that, "[t]here has been a substantial and material change in facts, circumstances, parties and the law which prohibits the application of this doctrine."

In the Circuit Court, the Bartons then petitioned for judicial review of the Board of Appeals' Decision. The reviewing judge determined that res judicata was "not applicable" to the case, and "the Board did not do the analysis it was required to do as an administrative agency to produce the result it did when applying the *res judicata* doctrine." The Court remanded the case to the Board, directing that res judicata no longer be considered as "it would not be legally permissible that *res judicata* would be applicable in this case."

Before us, the Appellants, who are nearby property owners Michael Jacobs and Michael and Selby Vaughan,[5] raise the following questions:

> 1) Did the Board of Appeals correctly determine that the Appellees' request for relief was barred, under principles of res judicata, by the 1989 decision of the Zoning Commissioner?[6]

[5] The issue of standing of the adjacent property owners, the Appellants, although mentioned in the circuit court, was not pursued as preclusive and is not before us. *See County Council of Prince George's County v. Zimmer Development Company*, 217 Md. App. 310, 319 (2014).

[6] Counsel for the Appellants conceded at oral argument that they were not challenging that res judicata was not applicable:

> Counsel for the Appellants: I think res judicata and collateral estoppel don't fit nicely into this circumstance. We're not seeking to relitigate an issue or a claim that had previously been decided . . .
> Court: So, you're accepting that res judicata did not preclude anything?

(…continued)

2) Did the Board of Appeals err in not finding, as additional grounds for denial of the requested relief, that section 1A07.8.B.4 of the County's Zoning Regulations[7] does not permit the construction of a dwelling on the subject property?[8]

. . . .

Counsel for the Appellants: We are arguing that. More specifically, your honor, is that the zoning commissioner's decision of 1989 is entitled to preclusive effect and is not affected by the change in zoning because the law tells us that there has to be a substantial change in circumstances.

[7] Section 1A07.8.B.4 of Bill 73-00 provides:

> Minimum development allowance. Any lot or parcel of land lawfully existing on the effective date of Bill [73]-00 may be developed with a single dwelling, regardless of the existence or extent of forest patch or forest conservation areas. If such lot or parcel is 100 acres or greater and cannot be developed in accordance with this section because the entire lot is categorized as a patch of forest or forest conservation area, it may be subdivided at a maximum density of one dwelling per 50 acres of gross area.

[8] Before us, the Appellees argued that the Appellants waived the issue of whether Section 1A07.8.B.4 of the County's Zoning Regulations permits the construction of a dwelling on the property because they did not file a petition for judicial review to the Circuit Court. Rule 7-207(a) governing judicial review proceedings, such as the present one, provides:

> Within 30 days after the clerk sends notice of the filing of the record, a petitioner shall file a memorandum setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on. Within 30 days after service of the memorandum, any person who has filed a response, including the agency when entitled by law to be a party to the action, may file an answering memorandum in similar form. The petitioner may file a reply memorandum within 15 days after service of an answering memorandum. Except with the permission of the court, a memorandum shall not exceed 35 pages. In an action involving more than one petitioner or responding party, any petitioner or responding party may adopt by reference any part of the memorandum of another.

(…continued)

3) Did the Board of Appeals err in not finding, as additional grounds for denial of the requested relief, that the Appellees' 5th Amended Final Development Plan was invalid?[9]

Preservation is not mentioned in Rule 7-207(a), but the Rules Committee Comment to Rule 7-207 helps to elucidate the greater flexibility for preservation of issues in judicial review proceedings:

> The Committee intends that all issues and allegations of error be raised in the memoranda, and that ordinarily an issue not raised in a memorandum should not be entertained at argument. The Committee does not intend to preclude a person who has filed a preliminary motion, but not an answering memorandum, from arguing the issues raised in the preliminary motion.

Md. Rule 7-207, Committee Note (1996). To the extent that the Bartons cite *DiCicco v. Baltimore County*, 232 Md. App. 218, 222 (2017), it is noteworthy that this case was not an appeal of a judgment entered in a judicial review proceeding but involved the imposition of civil penalties. As a result, the Appellants' second issue has been addressed herein.

[9] The Administrative Law Judge found that a Fifth Amended Final Development Plan (FDP) had been approved which enabled a residence to be built on the subject property. The Administrative Law Judge noted certain reservations about the proper approval procedure not being followed:

> Even if the 4th FDP could be lawfully amended it does not appear that the proper procedures of BCZR § 1B01.3.7.c were followed here. First, the Director of Planning and the ALJ did not "concur" with the 5th Amended FDP. Instead, the Plan was signed by Jeff Perlow of the Zoning Office "for" the Director, and the Plan had never even been presented to the Office of Administrative Hearings before it was "approved" by Mr. Perlow. Further, the owner of 21 Overshot Court testified that she lives within 300' of Tract A and she was never notified that the Bartons were filing the 5th Amended FDP, and would not have consented. Finally, the DOP ZAC comment, which was submitted months after the 5th Amended FDP was filed, does not "certify that the amendment does not violate the spirit and intent of the original plan." It is troubling that no mention of the 5th FDP was even made at the Special Hearing until the undersigned inquired about it.

(…continued)

Standard of Review

In reviewing a decision of an administrative agency on judicial review, this Court does not review the decisions of the circuit court but rather determines whether the administrative agency itself erred. *Becker v. Falls Road Community Association*, 481 Md. 23, 42 (2022). This Court reviews the agency's decision "solely on the grounds relied upon by the agency." *Id.* (quoting *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001)). On the agency's factual findings, this Court "is limited to determining if there is substantial evidence in the record as a whole to support the agency's [factual] findings." *Id.* (quoting *United Parcel Serv., Inc. v. People's Couns. for Balt. Cty.*, 336 Md. 569, 577 (1994)). Substantial evidence is that which "a reasonable mind might accept . . . as adequate to support a conclusion." *Id.* (quoting *Broadway Servs., Inc. v. Comptroller*, 478 Md. 200, 214 (2022)). On legal conclusions, this Court must "determine if the administrative decision is premised upon an erroneous conclusion of law." *Id.* (quoting *United Parcel Serv., Inc.*, 336 Md. at 577)**.**

Background

The Board of Appeals Opinion of November 22, 2022, encapsulates the early history of the Overshot subdivision, taken from Petitioner's Exhibit 6 before the Board, which consisted of the 4th Amended Final Development Plan:

> In 1986, a County Review Group ("CRG") Plan was approved permitting Overshot's subdivision into 33 lots and two additional tracts

However, he admitted the document, showing the Fifth Amended FDP's approval, into the record.

known as Tract A and Tract B. A Final Development Plan ("FDP") corresponding to the CRG Plan was also approved in 1986. *See* Petitioners' Exhibit 6. The record reflects that the FDP was amended three times without a hearing. *See Id.* The First Amendment was for the purpose of adding easements to Lots 28 and 29. The Second Amendment added lots to the development by subdividing Tract A into Lot 12 and Tract A and subdividing Tract B into Lots 33, 34, and Tract A. At that time, Overshot's total permitted density units and the total lots proposed was 35. *Id.* There were also revisions to Lots 31 and 32, and the FDP confirms that a CRG waiver was granted for this amendment. *Id.* The Third Amendment revised the location of Lot 34, revised the well area for Lot 30, and added perc tests to Lot 33. *Id.* In 1989, Overshot's developer sought approval for a Fourth Amendment to the FDP. The request involved the creation of a "non-density parcel" so the Petitioners were required to file a Petition for Special Hearing to approve the requested relief, resulting in Case No. 1990-183-SPH (the "1990 Case"). Subsequent to the 1990 Case, the developer sought to sell pieces of Tract A to the adjacent owners, including the Bartons. *Id.* The former Zoning Commissioner approved the requested amendment to the FDP and conditioned the relief as follows:

> No further development of Tract A shall be permitted and provisions restricting future development of the subject area as described in Petitioner's Exhibit 1 shall be incorporated in the deeds for the portions of Tract A being conveyed to the owners of Lots 12, 13, 30 and 31.

See, Order, admitted as part of the case file in Petitioner's Exhibit 7 and Protestant's Exhibit 1.

On September 5, 2000 Bill 73-2000 went into effect resulting in the codification of BCZR § 1A07.8.B.4. The purpose of this bill was to create a new RC 6 zoning classification.

BCZR § 1A07.8.B.4 states that:

> Any lot or parcel of land lawfully existing on the effective date of Bill 73-2000 may be developed with a single dwelling, regardless of the existence or extent of forest patch or forest conservation areas.

On January 5, 2021, Petitioners contend that Baltimore County approved a Fifth Amended FDP for Overshot permitting the proposed home that the Bartons wish to build on Tract A. *See* Petitioners' Exhibit 6. The Fifth Amended FDP's stated purpose is "to develop Tract A." Consistent with the Zoning Commissioner's Policy Manual, the Petitioners contend all homeowners within 300 feet of the proposed change to the Overshot FDP signed the FDP indicating their consent to the amendment. No zoning hearing was held for the amendment.

According to the Appellees, no appeal was filed to the Fifth Amended FDP.

The Issue

The instant case has been mired in res judicata from its inception before the ALJ to the briefs before us. The Board of Appeals decided that res judicata precluded the Bartons' petition, but the circuit court judge determined that res judicata did not apply. In oral argument before us, however, Counsel for the Appellants conceded that "res judicata [doesn't] fit nicely into this circumstance" but that "the zoning commissioner's decision of 1989 is entitled to preclusive effect and is not affected by the change in zoning because the law tells us that there has to be a substantial change in circumstances."

The Appellees, the Bartons, challenge the assertion that they are precluded by any doctrine. They assert that the Board failed to appropriately analyze whether they are precluded from building on Lot A , because the parties were not the same in 1990 and now; a different claim is being presented than in 1990; and most importantly, that the change from an RC 4 to an RC 6 zone "altered the entire legal framework under consideration in this case," because a single family house is now permitted on Lot A.

Res judicata formerly did not apply to administrative decisions in Maryland. *See Whittle v. Board of Zoning Appeals*, 211 Md. 36, 44 (1956) ("[T]he doctrine of *res judicata* had been held not to be applicable where the earlier decision was made not by a court of record, but by a board of zoning appeals, an administrative agency."); *see also Gaywood Community Association v. Metropolitan Transit Authority*, 246 Md. 93 (1967) (noting that

res judicata does not apply when the earlier and later decisions were made by an administrative agency).

Res judicata itself, however, was applicable in *Whittle*, 211 Md. at 38, in which the Supreme Court of Maryland[10] reviewed a decision of the Board of Zoning Appeals of Baltimore County that had granted a special permit to a funeral home to operate in a building in a residential area after the board had denied a similar petition 6 years earlier. The original denial had been appealed to the circuit court, which had affirmed the denial. Ultimately, the Court held that the petitioner's second petition was barred by res judicata, because the circuit court, not an agency, had ruled on the original denial. Although the Court had relied on res judicata because of the role of the circuit court, it did comment on the importance of the "substantial change in conditions" to avoid the preclusive effect of an earlier zoning decision.

> The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit **only if there has been a substantial change in conditions**. See *Bassett on Zoning* (2nd Ed., 1940), pp. 119-120; *Yokely on Zoning Law and Practice* (1953 Ed.), § 128; 168 A.L.R. 124; *St. Patrick's Church Corporation v. Daniels*, 113 Conn. 132, 154 A. 343; *Burr v. Rago*, 120 Conn. 287, 180 A. 444; *Rommell v. Walsh*, 127 Conn. 272, 16 A.2d 483; *Rutland Parkway, Inc. v. Murdock*, 241

[10] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland. . . .").

> App.Div. 762, 270 N.Y.S. 971. **This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.**

Id. at 45 (emphasis added).

Other factors to avoid the preclusive effect of earlier administrative law decisions were recommended in *Gaywood Community Association*, 246 Md. at 99, in which the Supreme Court considered whether a decision of the Public Service Commission to set bus routes operated as res judicata to prevent a change in the routes by the Metropolitan Transit Authority. Although not a zoning case, the Court noted that res judicata did not apply in situations in which the earlier decision and the later decision were made by an administrative agency. *Id.* The Court also noted in dicta that "mere change of mind" when decision making is engineered by the same agency is not sufficient:

> [T]his does not mean that such agencies are completely free to disregard prior rulings, for it is well settled that a mere change of mind is not an adequate or valid reason for reversing a previous finding. On the contrary, there must be evidence of fraud, surprise, mistake, inadvertence, or some change in fact or in law in order to justify the reversal.

Id. (citing *Schultze v. Montgomery County Planning Board*, 230 Md. 76 (1962); *Kay Construction Co. v. County Council for Montgomery County*, 227 Md. 479 (1962); *Whittle v. Board of Zoning Appeals of Baltimore County*, 211 Md. 36 (1956); and *Board of Zoning Appeals v. McKinney*, 174 Md. 551 (1938)).[11] The Court then also specifically quotes the

[11] Cases that have considered the preclusive effect when an administrative agency reconsiders its earlier opinion include *Board of Zoning Appeals v. McKinney*, 174 Md. 551, 564 (1938) ("It may be conceded without discussion that the Board has the right to correct (…continued)

explanation in *Whittle* that "[t]his rule seems to rest not strictly on the doctrine of *res judicata*." *Id.* at 99-100 (quoting *Whittle*, 211 Md. at 45). The Court explained that "[w]hile the action of an administrative agency reversing itself or a predecessor agency may resemble *res judicata*, it is *not*, as the cases show, the same as the final decision of a proceeding on its merits by a court of competent jurisdiction." *Id.* at 100.

We have also had occasion to discuss the reconsideration of agency decisions. In *Board of County Commissioners of Cecil County v. Racine*, 24 Md. App. 435 (1975), a zoning board first denied a landowner's requested use based on its own erroneous interpretation of law that the desired use was not permitted. This Court held that this decision of the board, based on principles "akin to res judicata" did not preclude subsequent reconsideration of the matter before the board. This Court recognized that "at least some of the principles of the doctrine of *res judicata* are applicable to decisions by zoning boards." *Id.* at 447. However, the Court also noted that when res judicata is applied to judicial decisions, "the fact that [a] final judgment was erroneous or irregular will not prevent that judgment from acting as a bar to a relitigation." *Id.* at 450. The Court determined that such an inflexible rule of law should not be applied to errors of law by

errors in its decisions caused by fraud, surprise, mistake or inadvertence, which any agency exercising judicial functions must have to adequately perform its duties."); *Schultze v. Montgomery County Planning Board*, 230 Md. 76 (1962) (overturning a county planning board's disapproval of a re-subdivision plan when that disapproval amounted to a mere change of mind because it was not founded upon fraud, surprise, mistake, inadvertence, or any new or different factual situation); and *Calvert County Planning Commission v. Howlin Realty Management, Inc.*, 364 Md. 301 (2001) (holding that reconsideration was permissible, even in the absence of a specific rule authorizing reconsideration, when the original decision was based on a mistaken belief).

administrative bodies. *Id.* This Court cited to *Gaywood* for the proposition that "the legal doctrine giving binding effect to decisions by zoning boards should not be fully equated with the doctrine of *res judicata*." *Id.*

Later cases, though, have undermined the earlier rule that res judicata cannot apply to earlier administrative opinions. In *Batson v. Shiflett*, 325 Md. 684, 704 (1992), the Supreme Court of Maryland adopted the *Exxon* test, which determines if administrative agency findings are afforded preclusive effect through collateral estoppel or res judicata. Under this test, for the findings to be given preclusive effect, the agency must be operating in a judicial capacity, the issue presented to the court must have been actually litigated by the agency, and the resolution of the issue must have been necessary to the agency's action. *Batson*, 325 Md. at 701; *see Seminary Galleria, LLC v. Dulaney Valley Improvement Association, Inc.*, 192 Md. App. 719, 735 (2010) ("Although there were cases decided several decades ago in which the [Supreme Court of Maryland] held that principles of *res judicata* did not apply to rulings of administrative agencies, . . . [t]he more recent Maryland cases have held that, when an administrative agency is performing a quasi-judicial function, the principles of *res judicata* are applicable."). For res judicata to apply to agency decisions, it must be when the agency is performing a quasi-judicial function, as opposed to a legislative function. A quasi-judicial function in the context of land use is one in which a decision is reached "on individual, as opposed to general, grounds, . . . scrutinize[ing] a single property," and using "a deliberative fact-finding process with testimony and the weighing of evidence." *Maryland Overpak Corp. v. Mayor and City Council of Baltimore*,

395 Md. 16, 33 (2006). "The principal characteristic of a quasi-judicial proceeding is that of fact-finding by the undertaking body." *Id.* at 37.

In *Becker v. Falls Road Community Association*, 481 Md. 23 (2022), the Supreme Court of Maryland considered whether a new application for an FDP was collaterally estopped by a prior FDP and held that substantial changes existed between the original plan and the plan proposed 14 years later so that collateral estoppel did not bar the new plan. While this case relied on a collateral estoppel analysis, its discussion touched on both res judicata and collateral estoppel as "the two leading doctrines that serve to preserve" the conclusive effect of judgments. *Id.* at 46.

Further, there is a statutory basis in Baltimore County for the preclusive effect of a decision of a zoning entity when a motion for reconsideration is considered, absent specific conditions. The Baltimore County Zoning Regulations, Appendix H, provides that such a motion for reconsideration of an opinion by the Board of Appeals: " . . . shall be filed within thirty days after the date of the original order. The motion shall state with specificity the grounds and reasons for the motion, including, but not limited to: newly discovered evidence; change in law; and/or fraud, mistake or irregularity."[12]

In *Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 662-63 (2015), this Court commented on the various notions of preclusion and their development:

[12] *See also Kay Construction Co. v. County Council for Montgomery County*, 227 Md. 479, 489 (1962) (interpreting an ordinance requiring "good cause shown" to reconsider a zoning decision as disallowing a "mere change of mind" of the councilmembers).

> Generally, "the doctrine of *res judicata* has been held not to be applicable where the earlier decision was made not by a court of record, but by a board of zoning appeals, an administrative agency." *Whittle v. Bd. of Zoning Appeals of Baltimore Cnty.,* 211 Md. 36, 44, 125 A.2d 41 (1956). . . . In 1967, the Court of Appeals, in *Gaywood Community Association v. Metropolitan Transit Authority,* stated that "[w]hile the action of an administrative agency . . . may resemble res judicata, it is not . . . the same as the final decision of a proceeding on its merits by a court of competent jurisdiction." 246 Md. 93, 100, 227 A.2d 735 (1967). However, the Maryland courts have since retreated from this position, acknowledging that "'innumerable controversies are decided today, by boards of legislative creation, of a character that traditionally fell within the scope of judicial inquiry.'" *Bd. of Cnty. Comm'rs of Cecil Cnty. v. Racine,* 24 Md. App. 435, 446, 451, 332 A.2d 306 (1975) . . . Thus, although "the legal doctrine giving binding effect to decisions by zoning boards should not be fully equated with the doctrine of res judicata," this Court has concluded that "[i]t is quite plain . . . that at least some of the principles of the doctrine of res judicata are applicable to decisions by zoning boards." *Racine,* 24 Md. App. at 450, 447, 332 A.2d 306. The Court of Appeals has also recognized that, under certain circumstances, such as where an administrative agency is performing a quasi-judicial function, the principles of res judicata are applicable. *Cicala v. Disability Review Bd. For Prince George's Cnty.,* 288 Md. 254, 264, 267, 418 A.2d 205 (1980) . . . . Accordingly, the principles of res judicata apply to the present matter involving two decisions of the same administrative body regarding the application of the same facts and law.

It is within this historical context that the present action has been adjudicated, although without sufficient analysis by the Board of Appeals.

Before us, Counsel for the Appellants conceded that, "res judicata [doesn't] fit nicely into this circumstance." We agree.

In so doing, we are persuaded that the changes in the law in 2000 and 2004 were substantial, such that building a retirement home on Lot A could be envisioned, absent any application of res judicata or any other preclusive doctrines.

The Concurring and Dissenting opinion of Board Member Lauer succinctly and eloquently summarized why res judicata does not apply in the present instance and why the tenets of Bill 73-00 and the 2004 rezoning must be applied in the present circumstance:

> There has been a substantial and material change in facts, circumstances, parties and the law which prohibits the application of this doctrine. Also, I believe we must follow the language and intent of the current law and therefore should remove the previous restriction on this property penned 32 years ago by the Zoning Commissioner.
>
> *Res judicata* is an affirmative defense which precludes the same parties from relitigating a case based upon the same cause of action. Here, the Protestants argue that the 1990 Zoning Commissioner's restrictive language, which in relevant part states "No further development of Tract A shall be permitted", meaning that the Barton[s'] parcel cannot be developed for a single-family home.
>
> *Res judicata* does not apply if there is a change in the parties, circumstances, facts, and/or law. In this matter there has been a change in all of these factors. The parties are not the same. In the 1990 decision, the Developer was the one that accepted the change regarding Tract A. The law in place when the Zoning Commissioner put this restriction on the property - was that the property was zoned RC 4. The density for this development had been completely exhausted and there was no provision in the RC 4 Zoning District which allowed for single home development such as that now permitted in the RC 6 Zoning District. Thereby, the Zoning Commissioner had a completely different factual, legal and circumstantial basis to make the determination to include the restrictive language. Thus, *res judicata* does not apply.
>
> It is clear that the Zoning Commissioner wanted to make sure that Tract A was not developed. What the Zoning Commissioner really did was to create a parcel which could not be developed that would be a forested conservation area or undeveloped parcel forever.
>
> The Board, as well as other governmental agencies, must follow the statutory law as prescribed by the legislature. Here, the County Executive and County Council chose in Bill 73-2000 to put a provision in the RC 6 Zoning District which allows for a "retirement parcel". In 2004 the County Executive and County Council chose to re-zone the entire Overshot Court area from RC 4 to RC 6 during the comprehensive re-zoning of Baltimore County. At the hearings before the Board on this matter, there was no evidence presented that anyone testified in opposition to the above legislative changes.

> In looking at the plain language of Section 1A07.8.b.4, as cited above, it is clear that the legislation provides for the development of a single dwelling **regardless of the existence or extent of a forest patch or forest conservation area.** Even if there is a conservation area a single dwelling can be developed under the plain reading of this provision. Therefore, I conclude that this provision in the RC 6 Zoning District allows the development of this single dwelling even with the Zoning Commissioner's restriction. In essence, the restriction placed by the Zoning Commissioner created an undevelopable parcel that would be a conservation area. Following the legislature's plain language and intent, the RC 6 current zoning laws must be followed.

The Board of Appeals determined that BCZR 1A07.8.B.4 provided that a residence can be built on existing "lots" and "parcels," and that Lot A qualifies as a "parcel" and ergo, a "lot":

> The Board, however, cannot ignore the plain meaning of the language found in § 1A07.8.B.4 that clearly states that an additional single dwelling is permitted for a lot or parcel existing prior to September 5, 2000. While the exact reasoning for why the County Council included this provision is unknown, its existence cannot be ignored. Consequently, this Board finds that the Barton[s'] property on Tract A qualifies as an existing lot pursuant to the plain meaning of BCZR § 1A07.8.B.4, allowing for the construction of a single dwelling on the parcel.

As a result, the 1990 restriction imposed by the Zoning Commissioner has been rendered ineffective by the rezoning of the Bartons' property to RC 6 and in particular BCZR § 1A07.8.B.4, which permits a residence on "[a]ny lot or parcel of land lawfully existing on the effective date of Bill [73-2000]," which established the RC 6 zone.

The third issue raised by the Appellants, whether the Board of Appeals erred in not finding, as additional grounds for denial of the requested relief, that the Appellees' 5th Amended FDP was invalid, was not addressed by the Zoning Board of Appeals. The ALJ admitted the 5th Amended FDP and referred to it in his opinion, but the issue was not

addressed by the Board of Appeals. On remand, the Board should address the application of the 5th Amended FDP to the development of Lot A.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED AND CASE REMANDED FOR THAT COURT TO REMAND THIS CASE TO THE BOARD OF APPEALS FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.