Circuit Court for Baltimore City
Case No. 24-C-19-002642

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0420

September Term, 2020

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

v.

ALIZA HERTZMARK

Kehoe,
Shaw Geter,
Zic,

JJ.

Opinion by Zic, J.

Filed: October 20, 2021

This appeal concerns an application for a conditional use permit and variance to consolidate two adjacent lots located in Baltimore City, Maryland, construct a second-floor addition on an existing building, and use the entire premises as a healthcare clinic. The application was submitted by appellee Aliza Hertzmark on behalf of BayMark Health Corporation, MedMark Treatment Centers, and Skyrise Investors, LLC. The Baltimore City Board of Municipal and Zoning Appeals ("Board") declined to authorize the proposed conditional use and did not address the variance request. Ms. Hertzmark sought judicial review and the Circuit Court for Baltimore City reversed the Board's decision and remanded the matter to the Board for consideration of the variance request. Thereafter, appellants Mayor and City Council of Baltimore and the Board (collectively "City") noted this appeal.

QUESTIONS PRESENTED

The City presents the following question for our review, which we have slightly rephrased[1]:

1. Is the Board's decision to deny Ms. Hertzmark's conditional use request to operate a healthcare clinic supported by substantial evidence?

[1] The City phrased the question as follows:

> Does sworn testimony of multiple credible witnesses constitute substantial evidence, i.e., more than a scintilla of evidence, in support of [the Board]'s decision that a set of irregular intersections just north of Seton Hill pose greater-than-typical vehicular and pedestrian traffic difficulties such that allowing a 1,500-patient-per-day clinic to open next to those intersections would increase those difficulties?

In addition to posing a question akin to the one presented by the City, Ms. Hertzmark raises two additional issues,[2] which have also been reworded:

> 2. Did the Board, in its Resolution, sufficiently articulate its findings supporting the denial of Ms. Hertzmark's conditional use request for purposes of enabling meaningful judicial review?
>
> 3. Did the Board commit legal error in denying Ms. Hertzmark's conditional use request?

For the following reasons, we answer the first two questions in the affirmative and the final question in the negative. Accordingly, we reverse the judgment of the circuit court and remand to that court with instructions to affirm the Board's decision.

[2] Ms. Hertzmark raises these issues without filing a cross-appeal. As this Court has previously explained, in the absence of such a filing, a party who received a favorable judgment, as "appellee[,] could only argue 'ground[s] for affirmance' of the circuit court's decision." *Uninsured Emps.' Fund v. White*, 219 Md. App. 410, 423 (2014) (second alteration in original) (quoting *Archers Glen Partners, Inc. v. Garner*, 176 Md. App. 292, 326 n.1 (2007), *aff'd*, 405 Md. 43 (2008)); *see also Geier v. Maryland State Bd. of Physicians*, 223 Md. App. 404, 428 (2015) ("[O]ne who seeks to attack, modify, reverse, or amend a judgment (as opposed to seeking to affirm it on a ground different from that relied on by the trial court) is required to appeal or cross appeal from that judgment." (quoting *Paolino v. McCormick & Co.*, 314 Md. 575, 579 (1989))). This Court has, however, considered an appellee's argument that required, but was not raised by, a cross-appeal. *See Archers*, 176 Md. App. at 318-26 (addressing the merits of appellee's argument that there was not substantial evidence to sustain the agency's decision even though this did not constitute a ground for affirming the circuit court's decision to remand for further proceedings). To the extent the first issue raised by Ms. Hertzmark necessitated a cross-appeal in light of the circuit court's reversal of the Board's decision, *see E. Outdoor Advert. Co. v. Mayor of Baltimore (E. Outdoor II)*, 146 Md. App. 283, 320 (2002) (explaining that when an agency's written decision lacks sufficient detail, "the case should be remanded[, rather than reversed,] for the purpose of having the deficiency supplied" (quoting *Mortimer v. Howard Resch. & Dev. Corp.*, 83 Md. App. 432, 442, (1990))), we will nonetheless consider this issue given that it bears on whether we are able to conduct a meaningful review. *See Archers*, 176 Md. App. at 307 ("[A] reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking.").

BACKGROUND

MedMark Treatment Centers ("MedMark"), which is a subsidiary of BayMark Health Corporation ("BayMark"), operates healthcare clinics in Baltimore City, Maryland and is seeking to relocate one of those clinics, which specializes in opioid addiction treatment. The proposed location, which is only a few blocks from the clinic's current location at 821 North Eutaw Street, consists of two adjacent lots located at 701 McCulloh Street and 501 West Madison Street. Each lot is currently improved by industrial-type buildings. The two lots are owned by Skyrise Investors, LLC. Ms. Hertzmark is the project manager with the civil engineering firm that was hired to assist with the relocation.

On December 12, 2018, Ms. Hertzmark, on behalf of BayMark, MedMark, and Skyrise Investors, LLC, applied to the Board for conditional use approval and a variance in order to consolidate 701 McCulloh Street and 501 West Madison Street, construct a second-floor addition, and further renovate the existing building for use as a healthcare clinic.[3] The subject properties are located at the edge of the C-1 Neighborhood Business Zoning District. Within that zoning district, healthcare clinics are designated as a conditional use, which requires authorization by the Board under the standards set forth

[3] The parties do not dispute that the proposed use of the subject properties qualifies as a "health-care clinic" under Article 32 of the Baltimore City Code ("Zoning Code" or "ZC"). The Zoning Code defines "health-care clinic" as "a facility for the examination and treatment of individuals on an outpatient basis by 1 or more physicians, dentists, chiropractors, physical therapists, or other licensed healthcare practitioners." ZC § 1-307(f).

in Article 32 of the Baltimore City Code ("Zoning Code" or "ZC") and Maryland caselaw as discussed below. Conversely, the clinic's current location is within the Hospital Campus Zoning District where healthcare clinics are deemed permitted uses, meaning they are allowed without the need for special administrative review and approval. Similar to a conditional use, a variance, which is needed in this case to construct the second-floor addition, must be approved by the Board.

The subject properties make up a triangle-shaped parcel surrounded by three one-way streets: West Madison Street, McCulloh Street, and North Paca Street. North Paca Street includes two lanes traveling north while West Madison Street and McCulloh Street, which are also each comprised of two lanes, are westbound. Additionally, Saint Mary Street converges into McCulloh Street at the point the latter intersects with North Paca Street, and Orchard Street intersects with West Madison Street shortly before it merges with McCulloh Street. After West Madison Street and McCulloh Street merge, the street intersects with Martin Luther King Jr. Boulevard. The two lots border the Seton Hill neighborhood, which is primarily comprised of properties zoned as the R-8 Rowhouse and Multi-Family Residential Zoning District.

After one postponement, the Board held an evidentiary hearing on February 12, 2019. During the hearing, which lasted almost three hours, a variety of evidence in support of and in opposition to Ms. Hertzmark's application was presented. The Board also received, prior to the hearing, the Baltimore City Department of Planning's report,

which recommended approval of the conditional use and variance requests, and a report from the Board's staff detailing the proposal.

On April 16, 2019, the Board issued its Resolution, denying Ms. Hertzmark's conditional use request by unanimous vote with four members present and one member absent. It determined that the request did not satisfy the requirements of the Zoning Code and Maryland caselaw because the proposed healthcare clinic would have uniquely adverse effects, would be detrimental to the public health, safety, and welfare of the surrounding communities and the patients of the proposed clinic, and would be contrary to public interest and inharmonious with the purpose of the Zoning Code. It also explained that the proposed use "does not fit within the general scheme of C-1 development as outlined in the Zoning Code . . . or the Seton Hill Master Plan." The Board did not evaluate the variance request.

Ms. Hertzmark filed a petition for judicial review in the Circuit Court for Baltimore City on May 2, 2019. After hearing oral arguments in September 2019, the circuit court reversed the Board's decision on the conditional use request and remanded the matter to the Board to address the variance request. In its Memorandum and Order dated January 23, 2020, the court reasoned that there was insufficient evidence before the Board of the proposed healthcare clinic's adverse impact, rendering the Board's denial of Ms. Hertzmark's application illegal. The court did not address the Board's other findings. This appeal followed.

DISCUSSION

The City urges this Court to reverse the circuit court's ruling, claiming that the court "usurp[ed] the role of the administrative agency" by reweighing the evidence and that there is an adequate evidentiary basis for the Board's conclusion that the proposed clinic would have uniquely detrimental effects, thereby requiring denial of Ms. Hertzmark's request under Zoning Code § 5-406(a)(1) and Maryland caselaw. Conversely, Ms. Hertzmark argues that the Board's finding of adverse effects is insufficiently detailed in its Resolution and unsupported by substantial evidence. She also alleges that the Board committed legal error in making that finding and in determining that the proposed clinic would be contrary to public interest and inharmonious with the intent of the Zoning Code pursuant to Zoning Code § 5-406(a)(3)-(4). As explained below, we hold that the Board's Resolution is sufficiently detailed and that its decision to deny the conditional use request based on the proposed clinic's uniquely adverse impact is supported by substantial evidence and premised upon the proper application of law. We structure our analysis so that we first address the sufficiency of the Board's Resolution, then the Board's alleged legal errors, and finally the adequacy of the evidence.

I. STANDARD OF REVIEW

When reviewing an administrative agency's decision, this Court "look[s] 'through the circuit court's . . . decision[], although applying the same standards of review, and evaluate[s] the decision of the agency.'" *Clarksville Residents Against Mortuary Def.*

Fund, Inc. v. Donaldson Props., 453 Md. 516, 532 (2017) (quoting *People's Couns. for Baltimore County v. Loyola Coll.*, 406 Md. 54, 66 (2008)). Our role is generally limited "to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determin[ing] if the administrative decision is premised upon an erroneous conclusion of law." *Montgomery County v. Butler*, 417 Md. 271, 283 (2010) (alteration in original). "The 'substantial evidence' test requires the reviewing court to decide 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Clarksville*, 453 Md. at 532 (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68 (1999)). In other words, the relevant inquiry is whether the issue decided by the administrative body is "fairly debatable." *Mills v. Godlove*, 200 Md. App. 213, 223 (2011). When applying this test, this Court must "not engage in an 'independent analysis of the evidence'" and "proceed[s] from the premise that an agency's decision is prima facie correct and presumed valid." *Butler*, 417 Md. at 284 (quoting *Armstrong v. Mayor of Baltimore*, 410 Md. 426, 444 (2009)). "No deference is owed, however, when the local zoning board's decisions are based on an error of law." *Clarksville*, 453 Md. at 533. Lastly, we note that the reviewing court "may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency." *E. Outdoor Advert. Co. v. Mayor of Baltimore (E. Outdoor I)*, 128 Md. App. 494, 516 (1999).

II. LEGAL STANDARDS GOVERNING CONDITIONAL USES

Before turning to the substantive issues, we briefly outline the standards governing the consideration and approval of conditional use requests in Baltimore City. Pursuant to the Zoning Code, the Board, or in some cases the City Council, must evaluate each conditional use application based on the evidence presented at a public hearing. ZC § 5-404(a). In doing so, the Board's primary consideration is "the impact of [the requested conditional] use[] on neighboring land and . . . the public need for the particular use at the particular location." ZC § 5-401(a).

The Board may grant a conditional use permit only upon finding that the following four criteria are satisfied:

> (1) the establishment, location, construction, maintenance, or operation of the conditional use would not be detrimental to or endanger the public health, safety, or welfare;
>
> (2) the use would not be precluded by any other law, including an applicable Urban Renewal Plan;
>
> (3) the authorization would not be contrary to the public interest; and
>
> (4) the authorization would be in harmony with the purpose and intent of this Code.

ZC § 5-406(a). Failure to satisfy any one of those criteria requires denial of the application. *See id.* Additionally, the Zoning Code provides a number of factors the Board must consider "where appropriate," such as "the nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures," "the resulting traffic patterns," "the nature of the surrounding area and the extent to

which the proposed use might impair its present and future development," "the proximity of dwellings, churches, . . . and other places of public gathering," "the character of the neighborhood," and "the intent and purpose of this Code." ZC § 5-406(b).

In addition to the Zoning Code, the Board's review of a conditional use request is governed by *Schultz v. Pritts*, 291 Md. 1 (1981). There, the Court of Appeals articulated a standard for assessing the degree to which a proposed use's adverse impact affects the outcome of a conditional use application. *See id.* at 11-15. The Court explained that:

> [T]he appropriate standard to be used in determining whether a requested special exception use[4] would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

Id. at 15. In announcing this standard, the Court recognized that a conditional use, by virtue of its inclusion in a local zoning regulatory scheme, is presumptively valid absent facts or circumstances showing the existence of noninherent, adverse effects. *See id*. at 11, 13-14.

Importantly, the *Schultz* standard "is not a second, separate test (in addition to the statutory requirements) that an applicant must meet in order to qualify for the grant of a special exception." *Loyola*, 406 Md. at 69. Rather, it overlays or "exists within a

[4] "The terms 'special exception,' 'conditional use,' and 'special use permit' are understood in modern Maryland land use law to be interchangeable." *Butler*, 417 Md. at 275 n.1.

county's regulatory scheme governing conditional uses." *Clarksville*, 453 Md. at 551; *see Loyola*, 406 Md. at 69 ("[T]he test announced in *Schultz* essentially adds language to statutory factors to be considered in evaluating proposed special exceptions." (citing *Mossburg v. Montgomery County*, 107 Md. App. 1, 21 (1995))). As explained by the Court in a subsequent decision, "absent some clear legislative direction to the contrary, if a particular kind of impact is required to be taken into account in considering a special exception, the impact is to be measured by the test enunciated in *Schultz*." *Butler*, 417 Md. at 302 (quoting *Gotach Ctr. for Health v. Bd. of County Comm'rs*, 60 Md. App. 477, 485 (1984)).

When applying the *Schultz* standard, the Court clarified that the disqualifying adverse effect on the surrounding properties "'must be more than mere annoyance[]' because by classifying such uses as . . . conditional uses, [as opposed to permitted uses,] the legislature assumes that those uses will include some adverse impacts." *Clarksville*, 453 Md. at 541 (first alteration in original) (quoting *Mayor of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 542 (2002)). Additionally, the Court explained that the *Schultz* standard does not involve a comparison of the potential adverse effects of the requested conditional use at the proposed location to the potential effects of that use at other similarly zoned locations. *Loyola*, 406 Md. at 66. And it explained that the conditional use's potential adverse impact should not be measured against the detrimental effects of permitted uses at the same proposed location. *Schultz*, 291 Md. at 10-11. Instead, the proper focus is on the characteristics of the "particular locality involved around the

proposed site" that may significantly exacerbate the problems inherent to the placement and operation of the requested conditional use at that site. *Loyola*, 406 Md. at 95, 102-04.

III. SUFFICIENCY OF THE BOARD'S RESOLUTION

We first consider whether the Board's written decision is amenable to meaningful judicial review. Maryland courts have consistently required that administrative agencies, including local zoning boards, clearly articulate the evidence in support of its conclusions. *See, e.g.*, *Critical Area Comm'n for the Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 128-29 (2011); *Clarksville*, 453 Md. at 543-48 (holding that the zoning board's "decision regarding adverse impacts was carefully evaluated and sufficient to permit meaningful judicial review"). When an agency merely presents its conclusions without referencing the evidentiary basis for those conclusions, not only is meaningful judicial review unattainable but the parties' "fundamental right to be apprised of the facts relied upon by the agency in reaching its decision" is violated. *E. Outdoor II*, 146 Md. App. 283, 320-21 (2002).

In analyzing the sufficiency of an agency's written decision, Maryland courts have emphasized that an agency's findings "cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 553, 556-58 (1999) (holding that county council's factual findings supporting its denial of a growth allocation application were insufficient as they were conclusory statements repeating the statutory criteria and "d[id] not advise [the

applicant], in terms of the facts and circumstances of the record, in which aspect(s) [his] application fail[ed]"); *see also Mills*, 200 Md. App. at 236-39 (citing *Bucktail* as instructive and holding that the zoning board failed to adequately articulate evidence in support of its conclusion that the requested special exception would not have uniquely adverse effects). Rather, the agency should clearly express the evidentiary foundation for its findings, though it need not do so immediately after stating each finding. *Moreland*, 418 Md. at 128-29. As explained by the Court in *Critical Area Commission for the Chesapeake & Atlantic Coastal Bays v. Moreland, LLC*, 418 Md. 111 (2011),[5] meaningful judicial review is still possible when a zoning board summarizes the pertinent supporting evidence in a separate section from its conclusory findings because "[i]t requires no great training in logic to infer reasonably that the prior recitation of relevant adverse testimony became the persuasive fulcrum which leveraged the Board into concluding as it did." *Id.* at 129 n.14, 134-35 (noting that "to find the organizational structure of the Board's written decision defective or incomprehensible would be to elevate form over substance").

With these principles in mind, we turn to the written decision at issue here. The Board's Resolution started with a summary of the application and the applicable Zoning

[5] Although *Moreland* involved a zoning board's decision on a variance request, the Court's discussion on the requisite level of detail that agencies should employ in announcing their findings is seemingly applicable to rulings on conditional use or special exception applications. *See Mills*, 200 Md. App. at 236-39 (referencing *Moreland* multiple times for the principle that supporting evidence must be clearly enunciated and applying that principle when reviewing a zoning board's written decision granting a special exception).

Code provisions and then provided a high-level overview of the germane evidence presented by Ms. Hertzmark:

> [Ms. Hertzmark] submitted and the file contains several letters of support from the Baltimore City Substance Abuse Directorate, Behavioral Health System Baltimore, and one community member. [Ms. Hertzmark] proffered testimony and offered two witnesses on direct examination including a property manager and the existing health-care clinic's director. This testimony provided information about the clinic's general operation and the medical and mental health services provided at their current location and at other locations in Baltimore City, the proposed hours of operation, the number of patients and intensity of use of the current location as well as the proposed location, and included testimony as to the increased space, the addition of employees, and the possible increase in number of patients from the current number of 1,100 patients per day to possibly 1,300 patients.

It also referenced a "non-empirical" traffic report introduced by Ms. Hertzmark:

> [Ms. Hertzmark] also submitted a report from Street Traffic Studies, Ltd., which provided a non-empirical evaluation of the traffic impacts of the proposed health-care clinic. That report indicated a possible increase in the number of patients from 1,358 to 1,500 patients with an increase in square footage from 6,000 sq. ft. to 15,793 sq. ft. Despite this testimony and evidence, [Ms. Hertzmark] asserts that the operation of the proposed health-care clinic will not lead to a significant increase in the number of patients served, but will, rather, provide increased space for more wraparound care and services.

Next, the Board summarized opposition testimony and evidence and expressly noted that it found such evidence to be "credible":

> Numerous members from the community testified in opposition to the proposed use. That testimony supported the

> position of the Seton Hill Association ("Association")[6] as stated in their letter in opposition to this application. The Association makes essentially two claims as to why the proposed use should be denied by this Board under both Article 32 and the *Schultz* standards: (l) traffic safety, traffic patterns, and traffic congestion are particularly poor at this location and the proposed use would greatly exacerbate those existing problems; and (2) the proposed health-care clinic would create adverse impacts on this community above and beyond those impacts normally associated with health-care clinics because of the intensity of use of the proposed health-care clinic (l,200-l,500 patients per day). Parallel to and underlying these arguments, the Association claims that for both these reasons the proposed health-care clinic would not be in harmony with the underlying C-l zoning of these properties or with the recently adopted Seton Hill Master Plan.
>
> Opposition testimony included assertions that this unique triangular property is situated in a location in which three or four one-way city streets converge (McCulloh, West Madison, North Paca, and Saint Mary Street) and that traffic congestion and pedestrian safety is already a public danger in its present state. The Association asserts that the proposed use would exacerbate this already problematic series of intersections and that the Seton Hill Master Plan denotes this particular traffic grid as a "transportation barrier" for future development. The Association also asserts that the proposed use of a health-care clinic at this location would "disrupt the harmony of the comprehensive plan of zoning and the Seton Hill Master Plan . . . ."
>
> . . . Significant testimony and evidence was offered by community members in opposition to this appeal and the Board finds that evidence credible.

It then further evaluated the evidence presented by the parties:

[6] The Seton Hill Association ("Association") is a nonprofit organization that represents the residents of the Seton Hill neighborhood of Baltimore City.

> Much of this evidence was undisputed including the health-care clinic's current location in a Hospital zoning district rather than a commercial zoning district and the basis for its planned relocation to the subject site, its current intensity of use of 1,100 patients per day, and the projected increased intensity of use between 1,300-l,500 patients per day. The evidence offered by [Ms. Hertzmark] as to the number of patients served was ambiguous and ranged from a qualitative "no significant increase" [paraphrased] to testimony alluding to approximately 1,200 patients served daily, to a non-empirical traffic evaluation listing the potential of 1,500 patients served. Even if the traffic evaluation totals were merely projections based on capacity, the resulting intensity of use would be more impactful to this community at this particular location than the health-care clinic's existing location. Aside from the range of potential patient totals, much of the evidence was not in dispute and the argument, therefore, lies in the Board's application of the conditional use standards and the City Council's intent for the intensity of uses that operate in a C-l Zoning District.

(second alteration in original).

After correctly noting the *Schultz* standard, the Board announced its findings and briefly explained the factual basis for its conclusion:

> The Board finds that the proposed health-care clinic does create burdens that fail the *Schultz* test and also fail the standards for approval under ZC §5-406.
>
> Under ZC §10-201, C-1 Neighborhood Business Districts are areas intended for commercial clusters or pedestrian-oriented corridors of commercial uses that serve the immediate neighborhood. Development standards in the C-1 District are crafted to ensure compatibility between neighboring residential and commercial uses, maintain the proper scale of commercial use, and address the unique issues related to smaller commercial sites. ZC §10-201(b). Suffice it to say, the C-1 neighborhood business district is the *least* intense commercial zoning district of the commercial zoning districts in Baltimore City. While the designation of health-

care clinics generally would fit into the intended small-scale commercial development of C-1, the proposed clinic with a potential patient load of nearly 1,500 persons *per day*, each requiring differing levels of care, does not fit within the general scheme of C-1 development as outlined in the Zoning Code for Baltimore City (Article 32) or the Seton Hill Master Plan.

After a thorough review of the file, evidence, and testimony submitted in support of this application as well as the evidence and testimony offered in opposition to the proposed uses, the Board evaluated this application under the conditional use standards provided under Article 32 and Maryland law. After a complete and comprehensive review of all the evidence, the Board finds by competent evidence that the proposed healthcare clinic will have adverse effects above and beyond those inherently associated with healthcare clinics irrespective of its location within the zone because of the nature of the proposed site, the intensity of use at this site, the existing traffic patterns, and its proximity to large sections of residentially zoned properties. As such, the Board finds that the presumption of validity has been sufficiently rebutted in this case and the Board turns its attention to the conditional use standards provided under ZC §5-406.

For the reasons stated above with regard to nature of the proposed site, the intensity of use at this site, the existing traffic patterns, and its proximity to large sections of residentially zoned properties, the Board finds that the establishment, location, construction, maintenance, and operation of the proposed healthcare clinic will be detrimental to and endanger the public health, safety, and welfare of the surrounding communities as well as patients of the proposed healthcare clinic. The Board further finds that the authorization of the proposed healthcare clinic would be contrary to the public interest and the proposed use is not in harmony with the purpose and intent of Article 32 as the scope of commercial activity supported in the C-1 Zoning District is intended for small-scale commercial and related development. Lastly, the Board finds that the proposed use is not precluded by any other law, including any applicable Urban Renewal Plan.

Ms. Hertzmark contends that the Board's Resolution is deficient because it insufficiently articulated the evidentiary support for its finding that the proposed healthcare clinic would have a noninherent, adverse impact. The Board, she argues, failed to explain "what constituted competent evidence" and to "clarify how the four reasons why it found adverse effects above and beyond those inherently associated with a health-care clinic exist." Ms. Hertzmark also contends that the Board's Resolution "lack[s] clarity on how this particular use at this particular location would create adverse effects that exceed the inherent adverse effects." Conversely, the City claims that the Board did point to supporting evidence, specifically the traffic-related testimony and evidence offered by the Association and community members, which it summarized and explicitly referred to as "credible" evidence.

We conclude that the Board adequately articulated the evidence in support of its findings under Zoning Code § 5-406(a)(1) and the *Schultz* standard concerning the proposed healthcare clinic's detrimental impact.[7] While the Resolution could have been

[7] Although Ms. Hertzmark's attack on the sufficiency of the Resolution appears to solely focus on the Board's finding under the *Schultz* standard (i.e., that the proposed clinic would have unique, noninherent adverse effects), we also analyze the Board's finding pursuant to Zoning Code § 5-406(a)(1) (i.e., that the proposed clinic would be detrimental to public health, safety, and welfare). We do so because, as explained above, the *Schultz* standard "is not a second, separate test (in addition to the statutory requirements) that an applicant must meet"—it "essentially adds language to statutory factors to be considered in evaluating proposed special exceptions." *Loyola*, 406 Md. at 69 (citing *Mossburg*, 107 Md. App. at 21). Moreover, here, the two findings are premised on the same four factors and thus are presumably based on identical evidence in the record.

more detailed in explaining these findings, we believe it is sufficient for purposes of enabling meaningful judicial review and apprising the parties of the facts relied upon by the Board in reaching its decision. The Board did not "simply repeat statutory criteria[] [or] broad conclusory statements." *Bucktail*, 352 Md. at 553. Rather, similar to the decision at issue in *Moreland*, the Board summarized the evidence supporting its adverse findings, albeit in a separate section from those findings. For example, the Board referenced testimony from Ms. Hertzmark and employees of MedMark and BayMark about the proposed clinic's projected daily patient totals, service offerings, and hours of operation. It also referred to the testimony and other evidence introduced by community members concerning the one-way streets surrounding the triangular-shaped subject properties and the existing traffic problems and pedestrian safety concerns at that location. And the Board expressly found the community's evidence to be credible. It then stated its conclusion that neither Zoning Code § 5-406(a)(1) nor *Schultz* was satisfied and its underlying rationale, explaining that the proposed clinic would have detrimental effects because of the nature of the proposed site, the intensity of use at that site, the existing traffic patterns, and its proximity to residentially zoned properties. It is reasonable to conclude that this decision was based on the evidence summarized earlier in the Board's Resolution.

The separation of the supporting evidence from the Board's conclusion does not "deprive[] [its] conclusory findings of adequate evidentiary support." *Moreland*, 418 Md. at 134. "It requires no great training in logic to infer reasonably that the prior

recitation of relevant adverse testimony became the persuasive fulcrum which leveraged the Board into concluding" that the proposed clinic would have adverse effects above and beyond those inherently associated with healthcare clinics and would be detrimental to public welfare. *Id.* at 129 n.14. Moreover, by identifying four specific characteristics relating to the subject properties and proposed clinic as the basis for its adverse findings, we believe, contrary to Ms. Hertzmark's assertion, that the Board adequately explained "how this particular use at this particular location would create adverse effects that exceed the inherent adverse effects" of a healthcare clinic. In sum, when considering the Resolution as a whole, we hold that the Board provided sufficient detail in announcing its findings under Zoning Code § 5-406(a)(1) and the *Schultz* standard such that we, as well as the parties, "know how and why the agency reached its decision." *E. Outdoor II*, 146 Md. App. 283, 320-21 (2002) (quoting *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 220 (1993))

IV. LEGAL CHALLENGES

Ms. Hertzmark's legal challenges to the Board's evaluation of the proposed conditional use can be divided into two general contentions. First, she claims that the Board committed reversible legal error in analyzing the proposed clinic's adverse effects under the standards set forth in the Zoning Code and *Schultz*. Second, Ms. Hertzmark alleges that the Board, in concluding that the proposed clinic would be contrary to public interest and inharmonious with the purpose of the Zoning Code pursuant to Zoning Code § 5-406(a)(3)-(4), erroneously "found that the City Council did not intend for this intense

of a use to be permitted in the C-1 zoning district." In regard to Ms. Hertzmark's first contention, we conclude that the Board did not err in evaluating the adverse effects. Because we also hold, as discussed in the following section, that there is substantial evidence supporting the Board's adverse impact determination, which itself requires denial of the application, we need not address her second legal challenge. We limit the following discussion accordingly.

According to Ms. Hertzmark, the Board's assessment of the proposed healthcare clinic's adverse impact is legally flawed for two reasons. She first argues that the Board "failed to make a distinction between [the proposed] methadone clinic and any other health-care clinic" when analyzing its potential detrimental effects. Put differently, the Board, Ms. Hertzmark alleges, "incorrectly applied the conditional use test as if the inherent adverse effects of a methadone clinic and a dentist's office were to be treated the same." As evidence of this alleged error, she references the Board's assertion in its Resolution that the Zoning Code "does not make a distinction between different types of health-care clinics or the medical practices contained therein so long as they comport with the definition provided in ZC §1[]-307(f)." While Ms. Hertzmark's argument is not quite clear, she seems to allege that because the proposed clinic and, for example, a dental clinic are different types of "specific uses" that fall under the "general use" of "health-care clinic" as these terms are defined in the Zoning Code,[8] they necessarily must

[8] The Zoning Code provides the following explanation of a "generic use" and "specific use": "Certain uses in this Code are defined to be inclusive of many specific uses so as to minimize overly detailed lists of uses for the various zoning districts

be treated differently when analyzing their detrimental effects. In response, the City argues that the Zoning Code does not proscribe such differential treatment.

As for the Board's other purported flaw in its adverse impact analysis, Ms. Hertzmark claims that the Board erroneously applied the *Schultz* standard by comparing the effects of the proposed clinic at the subject properties with the effects of the clinic at its current location, where it is classified as a permitted use. She bases this contention on the Board's statement in its Resolution that the "resulting intensity of use would be more impactful to [the neighboring] community at this particular location than the health-care clinic's existing location." The proper application of this standard, according to Ms. Hertzmark, is to "compare the proposed location with other locations within the same zone when evaluating the inherent adverse impacts." As further indication of the Board's misapplication of the *Schultz* standard, she points to a Board member's question during the hearing inquiring whether the clinic would remain at its current location if the application is denied.[9]

The City counters that the quoted language from the Board's Resolution was not an application of *Schultz* but rather a summary of the community members' testimony that "such an intense use would have a much greater negative impact on them if moved from the current to the proposed location." Moreover, the City claims that when the

established by this Code. These inclusive uses are referred to in this Code as 'generic uses.'" ZC § 1-217(a).

[9] This question was addressed to Mary Lynn Logsdon, the regional vice president of MedMark, who offered the following response: "Our lease there is for four more years. We would still look for another location."

Board did apply the *Schultz* standard, it did so correctly. The City notes that the Board, in its Resolution, accurately recited the standard multiple times and then explained that "the undisputed intensity of the proposed use and the credible testimony of irregular, congested, and dangerous traffic patterns at this particular location next to a residential neighborhood combined to create an adverse impact above and beyond the adverse impact associated with a healthcare clinic generally in the C-1 district."

Based on our review of the Resolution and the legal principles outlined earlier in this opinion, we conclude that the Board did not commit legal error in its evaluation of the proposed clinic's detrimental effects under the Zoning Code and the *Schultz* standard. The Board correctly set forth the four criteria for approving conditional uses as provided in Zoning Code § 5-406(a) and the fourteen required considerations enumerated in § 5-406(b). It also accurately explained the standard articulated in *Schultz* and, in doing so, properly acknowledged the presumption of validity afforded to conditional use requests. Although the City seemingly suggests otherwise, the fact that the Board repeatedly and correctly stated the governing law does not necessarily mean it applied that law without error. *Cf. E. Outdoor I*, 128 Md. App. 494, 527 (1999) ("The mere invocation of *Schultz*'s name cannot immunize the Board's decision from reversal."). Nonetheless, we conclude that the Board did not err in evaluating the proposed clinic's adverse effects under Zoning Code § 5-406(a)(1) and the *Schultz* standard.

The Board's analysis focused on the proposed clinic's impact at the proposed location. *See Loyola*, 406 Md. at 102 ("*Schultz* speaks pointedly to an individual case

analysis focused on the particular locality involved around the proposed site."). It expressly referenced specific characteristics of the subject properties and surrounding area, explaining that the nature of the proposed site, the existing traffic patterns at that site, and its proximity to residential properties, in conjunction with the intensity of the proposed use, would result in the proposed clinic having uniquely detrimental effects on the neighboring property, thereby failing to satisfy Zoning Code § 5-406(a)(1) and the *Schultz* standard. The Board employed the proper analysis enunciated in *Schultz*, which in turn guided its consideration of the Zoning Code criterion, by focusing solely on this particular use at this specific location and inquiring "whether [that] use will have a greater impact here than one would ordinarily expect." *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 289 (2017); *see Loyola*, 406 Md. at 95 (explaining that the Court in *Board of County Commissioners v. Holbrook*, 314 Md. 210 (1988), properly "highlighted characteristics of the particular neighborhood that exacerbated the problems inherent to the placement of [the proposed] mobile home there," justifying denial of the special exception); *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469, 487 (2002) (stating that "*Schultz* is not satisfied simply by identifying some unique characteristic of the neighborhood"—rather, "it is necessary that the ordinary adverse effects of the conditional use be greater at the location in question[] because of the unique characteristics of that location's neighborhood"). Ms. Hertzmark's assertion that the "appropriate test is to compare the proposed location with other locations within the same

zone" is thus inaccurate. *See Loyola*, 406 Md. at 105 (holding that the *Schultz* standard does not involve a "comparative, multiple site impact analysis").

We believe Ms. Hertzmark is correct that the *Schultz* standard does not entail a "compar[ison of] the impact of a proposed use in different zoning classifications." *See Schultz v. Pritts*, 291 Md. 1, 15 (1981) (emphasis added) (holding that "the appropriate standard . . . is whether . . . the *particular use proposed* at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use"); *id.* at 10-11 (emphasis added) (concluding that a special exception's adverse impact *should not be measured against* the detrimental effect of those uses classified as *permitted uses* at the proposed location). But we disagree that the Board engaged in such an analysis by comparing the impact of the healthcare clinic at its current location, where it is classified as a permitted use, with its impact if located at the subject properties, where it is designated as a conditional use. In its Resolution, the Board did note that "the resulting intensity of use would be more impactful to this community at this particular location than the health-care clinic's existing location." But it did so in the section of its Resolution where it summarized the relevant evidence, which preceded the section where it applied the governing law and announced its findings. Moreover, in that latter section, the Board explained its adverse findings by referencing four characteristics of the subject properties and proposed clinic. It did not state or otherwise indicate that its findings were based on the impact, or any other aspect, of the clinic at its existing location. Indeed, the Board recognized that "the direct and indirect

impacts of a particular conditional use can and should be considered when any zoning entity decides whether a particular conditional use . . . meets the *Schultz* test." (emphasis added). As such, we conclude that the Board did not erroneously measure the adverse effect of the proposed healthcare clinic against that of the existing clinic when applying the legal criteria set forth in *Schultz* and the Zoning Code.

Additionally, we do not believe that one Board member's question at the hearing concerning the plans for the existing clinic in the event the application is denied is evidence that the Board misapplied *Schultz*. This fact is not mentioned anywhere in the Resolution, and we have come across no language suggesting that it formed any part of the Board's conclusion about the existence of unique adverse effects. We will not assume that it was a factor in the Board's analysis simply because one Board member inquired about it during the hearing.

As for Ms. Hertzmark's contention regarding the Board's alleged failure to distinguish the proposed clinic from other types of healthcare clinics, we conclude that this issue is inadequately briefed under Maryland Rule 8-504(a). Our understanding of this argument is that by virtue of the proposed clinic's qualification under the Zoning Code as a "specific use" included within the "generic use" of "health-care clinic," the clinic's detrimental effects must be analyzed differently than those of other types of healthcare clinics, which the Board allegedly failed to do. Ms. Hertzmark, however, offers no explanation as to exactly how the Board treated the proposed clinic the same as other medical clinics falling under the "generic use" of "health-care clinic" or in what

way the Board should have analyzed the adverse effects differently. In addition, she fails to point to any legal authority mandating a different analysis of the adverse effects based on the type of healthcare clinic at issue.[10] We therefore decline to address the merits of this argument. *See, e.g.*, *HNS Dev., LLC v. People's Couns. for Baltimore County*, 425 Md. 436, 459-60 (2012) (deeming argument waived when the party failed to cite any controlling law to support its "sweeping accusations and conclusory statements"); *Rollins v. Cap. Plaza Assocs., L.P.*, 181 Md. App. 188, 201-02 (2008) (explaining that an appellate court will not search for law to sustain a party's position).

V. ADEQUACY OF THE EVIDENCE

The final step in our analysis is to determine whether the Board's findings of noncompliance with Zoning Code § 5-406(a)(1) and the *Schultz* standard are supported by substantial evidence. We hold that the record contains adequate, credible evidence to support the Board's adverse findings and thus its decision to deny Ms. Hertzmark's conditional use request.[11] We explain, starting with an outline of the relevant evidence presented in support of and in opposition to Ms. Hertzmark's application.

[10] In this section of the brief, Ms. Hertzmark cites to the Zoning Code's definitions for "health-care clinic" and "dental clinic," which merely states "[s]ee 'Health-care clinic.'" *See* ZC §§ 1-305(c), 1-307(f). She also cites to the zoning provision defining and discussing the relationship between a "specific use" and "general use." *See* ZC § 1-217. And she references Zoning Code § 10-301 and corresponding Table 10-301, which provide that healthcare clinics are allowed by conditional use in the C-1 Zoning District. These zoning provisions, however, are silent on this issue.

[11] We need not analyze the evidence pertaining to the Board's other findings, specifically that the proposed use would be contrary to public interest and inharmonious with the purpose of the Zoning Code, because the Board's adverse finding pursuant to

Ms. Hertzmark produced three witnesses at the hearing who provided information about the operation of the clinic at its existing location and at the proposed site. William Marshall, the construction project manager at BayMark, testified about the renovations needed to ensure the proposed clinic satisfies the local building code and the factors considered in selecting the subject properties, such as proximity to public transportation and to areas with high overdose numbers. The Board also heard testimony from Mary Lynn Logsdon, the regional vice president of MedMark. In pertinent part, Ms. Logsdon testified about the reason for the treatment center's planned relocation, explaining that it has "outgrown the space" as its "services are very much in demand" and that it would like to offer additional services, such as a food pantry, which it currently lacks the physical capacity to provide. Ms. Logsdon further explained that the proposed clinic will "have more group rooms," "a larger waiting room[,] . . . . [m]ore exam rooms, [and] more dosing windows so people can get through faster." But despite the need for additional space, she stated that the number of patients treated at the new location is not expected to increase. She also testified that the location was chosen because of its proximity to the existing clinic's patients, which will allow the proposed clinic to continue serving those same patients.

The third witness introduced by Ms. Hertzmark was Brian Krebs, the director of the existing treatment center. Mr. Krebs described the services offered at the clinic, such

Zoning Code § 5-406(a)(1) is dispositive of Ms. Hertzmark's conditional use request. *See Gotach Ctr. for Health v. Bd. of County Comm'rs*, 60 Md. App. 477, 485-86 (1984).

as medication to stabilize patients' cravings and individual and group counseling. He explained that the existing clinic's peak hours are from 5:30 a.m., when its doors open, to 10:00 a.m. and that approximately 200 patients per hour are treated during that timeframe. He also stated there are about 50 to 80 patients waiting outside the clinic when it opens each morning. The proposed facility, according to Ms. Logsdon's testimony, may open an hour earlier.

Mr. Krebs testified that, in addition to morning peak hours, "there's always [a] mad rush to get in before 1[:00 p.m.]" He also provided various estimates of the number of patients currently served each day, which ranged from 1,100 to 1,400 patients,[12] and opined that the daily number of patients treated at the proposed location will be roughly the same. He testified that approximately half of the clinic's current patients "reside in either the Seton Hill zip code or the zip codes that touch that [area]" and that about "80 to 85 percent [of its patients] use public transportation."[13]

In addition to the above, evidence was proffered concerning the proposed clinic's traffic impact, specifically a traffic report prepared by Street Traffic Studies, Ltd. ("Street

[12] The larger projection is based on Mr. Krebs's testimony that the existing clinic is comprised of two suites that each treat around 600 to 700 patients per day.

[13] We note that, as recognized by both parties, a portion of Mr. Krebs's and Ms. Logsdon's testimony as well as some of the opposing community members' testimony addressed the proposed clinic's potential adverse impact arising from the type of medical care provided, specifically drug activity and related security concerns. These particular adverse effects, however, were irrelevant to the Board's decision—its adverse findings were expressly based on the proposed clinic's intensity of use and the nature of and existing traffic patterns at the subject site rather than the treatment center's service offerings.

Traffic") and the testimony of Ms. Hertzmark, who was accepted by the Board as an expert in land use zoning and development. In her testimony, Ms. Hertzmark summarized the traffic consultant's report, which she explained was procured in response to concerns raised by the community about the increase in vehicular traffic and pedestrian safety when crossing the streets at the proposed site. Ms. Hertzmark also offered her own opinion on the impact of the requested conditional use. She testified, in relevant part, that the operation of the proposed clinic would not be detrimental to public safety or the general welfare because the clinic "is moving just a few blocks from its current location" and "the general users of the site would not be changing." And she stated her belief that "the existing [patients] are not going to dramatically change their traffic, transportation, walking paths between . . . . the existing facility and the proposed facility."

Ms. Hertzmark also opined about the proposed clinic's effect on traffic and the surrounding properties:

> [COUNSEL FOR MS. HERTZMARK]: Okay. And do you have an opinion as to whether the nature of the proposed site, including its size and shape and the proposed size, shape and arrangement of structures, will cause the proposed healthcare clinic at this location to have a greater impact on the inherent adverse effects normally associated with a healthcare clinic in the C-l District?
>
> [MS. HERTZMARK]: Yes, and I have an opinion. The opinion is no. Again, the site is -- as we've stated, it's actually uniquely located sort of as a standalone site at the intersection of three streets, which -- you know, it kind of -- it gives it its own block. It's not adjacent. It's not touching any other neighbors. People are specifically going to that site and leaving that site. I think the uniqueness of that location on a standalone block is a positive thing for this use.

* * *

[MS. HERTZMARK]: There's a proposal to do pavement markings and add bike lanes to some of the streets. Paca Street will be becoming -- there will only be one lane instead of two now. . . . The overall effect is that the space for vehicles is going to be narrowed a little bit to make more space for bikes, which does have also an effect of creating a safer condition, we feel, for pedestrians, in that the vehicle travel lanes are more narrow. Less for pedestrians to cross.

* * *

[COUNSEL FOR MS. HERTZMARK]: Okay. Do you have an opinion as to whether the resulting traffic patterns and adequacy of the proposed offshoot parking and loading will cause the proposed healthcare clinic at this location to have a greater impact than the inherent adverse impacts -- effects normally associated with a healthcare clinic in a C-1 District?

[MS. HERTZMARK]: I have an opinion. My answer is no.

* * *

[COUNSEL FOR MS. HERTZMARK]: Okay. And what is the basis for that opinion?

[MS. HERTZMARK]: The C-l neighborhood business district is intended for pedestrian-oriented corridors of use, and use is that service to the immediate neighborhood. So by design, the site is going to be close to other uses and is going to be accessible in that kind of way.

[COUNSEL FOR MS. HERTZMARK]: Okay. Do you have an opinion as to whether the nature of the surrounding area and the extent to which the proposed use might impair its present and future development will cause the proposed healthcare clinic at this location to have a greater impact than the inherent adverse effects normally associated with a healthcare clinic in the C-l zone?

> [MS. HERTZMARK]: Yes, I have an opinion. The opinion is no.
>
> [COUNSEL FOR MS. HERTZMARK]: And what's the basis for that opinion?
>
> [MS. HERTZMARK]: The use already exists, again, just a few blocks north. We're relocating the existing use. And again, it's on a standalone block.
>
> [COUNSEL FOR MS. HERTZMARK]: Do you have an opinion as to whether the proximity of dwellings, churches, schools, public structures and other places of public gathering will cause the proposed healthcare clinic at this location to have a greater impact than the inherent adverse impacts normally associated with a healthcare clinic in the C-l District?
>
> [MS. HERTZMARK]: Yes, I have an opinion. The opinion is no.
>
> [COUNSEL FOR MS. HERTZMARK]: And what is the basis for that opinion?
>
> [MS. HERTZMARK]: Again, as stated before, it's the C-1 neighborhood business district, and the uses are intended to serve the community. And in previous testimony, most of the users are from this zip code and adjacent zip codes. These are people in the community who also use these other dwellings, churches, schools, public structures, et cetera. They are community members.

Street Traffic's report, which is dated February 7, 2019, focused on determining "the net change upon the traffic in the neighborhood expected between the current facility . . . and the proposed . . . location." It defined the relevant neighborhood as "the area bounded by Martin Luther King Jr[.] Boulevard, Druid Hill Avenue, and N[orth] Eutaw Street," which encompasses both the current and proposed locations. Street Traffic then

explained that, based on its assumption "that employees and patients will utilize the same travel modes [or] patterns to reach the new location," it limited its review to studying the impact of the 5 additional employees and 142 additional patients served per day at the proposed location rather than the total number of employees and patients projected.[14] The only justification provided in the report for that assumption is the close proximity of the current facility and proposed site.

Street Traffic, as expressly noted in its report, utilized data from two traffic studies conducted in 2008 and 2014 for roadways in the vicinity of the subject site, though the 2014 study used the same base data from the earlier study. The primary focus of both studies was Martin Luther King Jr. Boulevard, but the 2008 study did consider traffic flow at the intersection of North Eutaw Street and West Madison Street. Street Traffic also reviewed the Maryland State Highway Administration's "mainline MLK Jr[.] traffic counts [from 2005 and 2010] . . . for a location just north of Franklin Street." It does not appear that Street Traffic personally studied the current vehicular and pedestrian traffic conditions on the one-way streets surrounding the proposed location.

[14] According to Street Traffic's report, the existing clinic has 40 employees and serves 1,358 patients per day while the proposed clinic will have 45 employees and will serve 1,500 patients per day. During the hearing, Mr. Krebs clarified the discrepancy between his estimate of 1,100 patients treated daily at the existing facility with the traffic report's estimate of 1,358 patients. He explained that the number provided by the report represents all patients currently enrolled in the clinic's treatment program while his estimate represents only those enrolled patients who come to the clinic to receive treatment.

Ultimately, Street Traffic's report concluded that "the net [e]ffect of the proposed relocation of the [clinic] . . . is not expected to have a significant impact o[n] traffic and pedestrian facilities." It projected that there may be "an increase in peak hour vehicle trips between one and two cars per hour" and an "increase [in pedestrian trips] by approximately 20 trips per hour during the peak times." It then stated that "[t]he net change from the traffic generation perspective is very limited with the overall impact spread out over the typical day."

The pertinent opposition evidence consisted of testimony from four community members about the current traffic issues and pedestrian safety concerns at the subject properties and a letter from the Association. Nicholas Blendy, the Association president, testified to the unique nature of the subject properties and described the Seton Hill neighborhood. He then explained the Association's belief that the proposed clinic "will have a detrimental effect to the health, safety and welfare of Seton Hill residents because of both specific challenges related to the site of the property, which is the traffic pattern." Mr. Blendy elaborated on this belief:

> [MR. BLENDY]: Seton Hill sits right at the epicenter of the northwest-to-southeast running traffic pattern grid and the north/south traffic pattern grid, and as such, has unique challenges related to how vehicles, pedestrians, bicycles and, you know, movement in and around the neighborhood for regions and for travel within the neighborhood. There are frequently accidents at this intersection, this -- where Saint Mary[], Paca, Druid Hill, and then up to where the instant property is: McCulloh and Madison. . . .
>
> * * *

> [BOARD MEMBER]: So you're saying there's a lot of accidents at this intersection?
>
> [MR. BLENDY]: I'm saying there's a lot of accidents at the -- surrounding the parcel, because of the uniqueness of the traffic pattern.

He also expressed concerns about patients and other pedestrians safely navigating the intersections surrounding the proposed location:

> It's precisely the pedestrian traffic that we have concerns about in the neighborhood. Because while [Ms. Hertzmark] argued that folks are coming -- you know, they're substantially just one block in the other direction. The current facility is actually located about four blocks from the current site. And this proposal that they're moving is actually moving it farther away from the state center metro system, farther away from the bus stops. Yes, they're there, but you do have to navigate this strange Paca/Madison [intersection.]

In addition to existing traffic conditions at the subject site, Mr. Blendy emphasized the proposed clinic's intensity of use in opining about the adverse effects:

> We believe, as a neighborhood with 1[,]249 residents as of the 2010 census, that 1[,]100 people coming for treatment at any healthcare facility every day, including standing up outside at 5:30 in the morning with 60 to 80 people, I think is what was stated, would provide -- that business model provides a unique detrimental effect that is a type of consideration that a factfinder should look at here.
>
> In fact, if it was a dental clinic with 1[,]100 people being treated a day, same issues would be raised by the neighborhood. It's the intensity of the use, bringing pedestrians, vehicular traffic . . . .

Next, the Board heard the following testimony from David Mitchell, the managing director of Arena Players, Inc., which is a community theater located across from the subject properties on McCulloh Street:

> [T]his isolated location that they're talking about, quite frankly, it's horrible. I don't even know why they would want to choose that location, given the expense that they have to put into it and the traffic pattern, the ugly traffic pattern, that exists around it. . . . Because we are dealing with -- every week, we see a car turn off of MLK and go down McCulloh Street in the wrong direction. All right?
>
> There are several accidents that happen. There are blind spots. When this area -- where West Madison reaches McCulloh Street, and there's a merge, there are blind spots on both sides. I mean, you should watch the people try and negotiate to get out into the intersection to get across MLK. And they don't have much time to do that because there's a traffic light right there on MLK, right? So time and time again, we see challenges there.
>
> In the summertime, all of this increases significantly because everybody's outside . . . .

Mr. Mitchell also explained that the "300-seat theater" puts on 8 to 10 shows each year and receives 2,500 to 3,000 patrons per month.

Karen French, a Seton Hill resident, also testified during the hearing. She commented:

> And the fact that you said, have we seen anyone killed driving around this area? You just have to be trying to walk or drive in that traffic area to see that when you have two l[a]nes merging and then crossing to go MLK opposite way, is -- what a chaotic situation that is. And I cannot imagine hundreds of people trying to walk and cross that road. It's crazy enough with cars, but adding all those pedestrians. I can't imagine what it would do.

And Susan Findley, another Seton Hill resident, testified:

> Now I know a lot has been said about we -- the neighborhood can't absorb 1[,]200 to 1[,]400 people in that area. That area is not technically Seton Hill, but it's a street away from Seton Hill. So effectively, for me to leave my street, if I go straight out Saint Mary, I'm going to hit their building. So it's in my community.
>
> . . . I've lived in the community. I know the community. I know the community can't support that facility.

The last piece of opposition evidence to discuss is a letter written by Mr. Blendy on behalf of the Association in which he explained its position on Ms. Hertzmark's application. He stated that the Association board members voted to oppose the proposed clinic because, among other reasons, they believe it will have "detrimental effects on the neighborhood above and beyond the inherent ones ordinarily associated with such a health-care clinic use given the traffic safety concerns of the site and the high-volume of patients being served." In describing those traffic-related concerns, the letter referenced the Seton Hill Master Plan's[15] evaluation of the problematic neighborhood traffic patterns and its suggested solutions[16]:

[15] The Seton Hill Master Plan was adopted by the Baltimore City Planning Commission in 2012. *See Neighborhood Plans*, Balt. City Dep't of Plan., https://planning.baltimorecity.gov/planning-plans/neighborhood (last visited Aug. 11, 2021).

[16] The analysis in the Seton Hill Mater Plan was based on a traffic study conducted in 2008 by consultants to the Baltimore City Department of Transportation as part of the planning process. *See* Balt. City Dep't of Plan., *Seton Hill Master Plan* 43 (2012), https://planning.baltimorecity.gov/sites/default/files/Seton%20Hill%20Master%20Plan%20January%202012.pdf.

> The Master Plan also identified the unusual coming together of the City's traffic grids as one of the "transportation barriers" to the development of Seton Hill. Notably, the area between the intersection of McCulloh and Madison Streets on the northwest, eastward to Paca Street, [s]outhward to Druid Hill Avenue, westward to St. Mary Street, and north by northwestward to the starting point at the intersection of McCulloh and Madison Streets were specifically identified as the core location for closure to vehicular traffic with the idea that it could be repurposed as "usable land."
>
> The properties involved in the instant case are known [as] 701 McCulloh Street & 401 W. Madison Street and are located directly at the heart of the most complicated and oftentimes dangerous intersection of Seton Hill's complex traffic pattern, referenced in both the above paragraph and in the Master Plan.

(footnotes omitted). The letter further stated that the proposed use "will harm Seton Hill residents . . . with the negative impacts of increased foot traffic, an additional 100+ vehicles parked in the neighborhood intermittently, and the pedestrian and other . . . significant traffic safety concerns associated with the traffic pattern specific to this site." (footnote omitted).

With the above evidence in mind, we turn to the parties' arguments. The City argues that the sworn testimony of community members, specifically Mr. Blendy, Mr. Mitchell, Ms. Findley, and Ms. French, regarding the hazardous traffic conditions caused by the unique configuration of one-way streets surrounding the subject site constitutes substantial evidence that the proposed clinic would have a uniquely adverse impact on the traffic and safety of this particular location. This testimony, the City alleges, carries probative value as the residents discussed their personal observations of the existing

traffic conditions rather than merely speculating about the proposed clinic's traffic impact.[17]

Ms. Hertzmark makes a myriad of arguments in support of her assertion that the Board's decision lacks evidentiary support. After broadly alleging that none of the Board's findings are supported by evidence in the record, she argues that the community members' testimony about the existing traffic congestion and pedestrian safety issues does not constitute competent evidence, stating that these "same concerns . . . would be present whether the conditional use request was for other C-1 zoned properties in this neighborhood or at the proposed location." Ms. Hertzmark further challenges the opposition evidence by claiming that "witnesses for Arena Players testified that they and elderly and young patrons cross these streets without anyone being harmed"[18] and by

[17] The City devoted a significant portion of its brief to the argument that the circuit court committed legal error by reweighing the evidence and by reaching a decision unsupported by the record. More specifically, it argues that the court erroneously disregarded the Board's evidentiary evaluation and "incorrectly assert[ed] that [Ms. Hertzmark]'s evidence had substance that it lacked and incorrectly assert[ed] that the community's evidence lacked substance that it had." But under the applicable standard of review outlined above, "we reevaluate the decision of the agency, not that of the court." *Eller Media Co. v. Mayor of Baltimore*, 141 Md. App. 76, 84 (2001). Thus, we focus our analysis on the Board's ruling.

[18] Ms. Hertzmark cites the following portions of Donald Owens's, the artistic director of Arena Players, Inc., testimony:

> [MR. OWENS]: I live on Calvert and Chase, which is Mount Vernon. I walk from there over to Arena Players, 801 McCulloh Street. And when I walk through in the morning, I go through this whole mass of people out there from their program who, among other things, are trying to sell me stuff. The youth in the summer have the same problem.
>
> * * *

contending that the testifying community members indicated a "preference that the proposed use not be closer to the residential community," which is an improper basis for denying a conditional use request. She also argues that the Board failed to consider the Department of Planning's recommendations and "disregarded expert testimony[] without basis," though she does not identify the individual whose testimony was allegedly disregarded. Lastly, Ms. Hertzmark claims that "[t]here is no evidence to contest the fact that the [traffic report] . . . does not constitute empirical evidence" and notes that evidence was introduced establishing that "the proposed site is closer to the public transportation stops than other properties in the vicinity which are zoned C-l."

In reviewing the agency record, we must keep in mind that "opinion testimony[, whether offered by an expert or layperson,] is of no greater probative value than that allowed by the soundness of its foundation of reason and fact." *Moseman v. County*

> [COUNSEL FOR MS. HERTZMARK]: . . . does everybody that comes to your facility actually drive there, or do people actually walk there? . . .
>
> [MR. OWENS]: People walk. People drive.
>
> [COUNSEL FOR MS. HERTZMARK]: And they cross the street over here where pedestrians are in peril?
>
> [MR. OWENS]: They cross the street. And even when they park they cross the street, because some of them had to park here. And you have to watch them. They're not always very mobile. Some of them get out the car and --
>
> [COUNSEL FOR MS. HERTZMARK]: Has anybody been killed or injured crossing the street?
>
> [MR. OWENS]: We're not -- we're talking about --

It is unclear what street Ms. Hertzmark's counsel was referring to in his question.

Council of Prince George's County, 99 Md. App. 258, 265 (1994). "Thus, unsupported conclusions of witnesses to the effect that a proposed use will or will not result in harm . . . amount to nothing more than vague and generalized expressions of opinion[,] which are lacking in probative value" and thus cannot sustain a finding of adverse effects. *Anderson v. Sawyer*, 23 Md. App. 612, 618, 622 (1974); *see also E. Outdoor I*, 128 Md. App. 494, 528 (1999) (stating that the denial of a conditional use application may not "based upon unspecific and unsupported protestations and concerns" (quoting *Mayor of Baltimore v. Foster & Kleiser*, 46 Md. App. 163, 171-72 (1980))).

For example, the testimony of protesting neighbors who simply state their belief that the proposed use will cause traffic-related issues without providing any facts or reasons supporting that conclusion merely equates to the expression of a generalized fear and thus is accorded no probative value. *See Anderson*, 23 Md. App. at 617-21. But community members' testimony about their personal observations of the hazardous traffic conditions in the vicinity of the proposed site can qualify as probative evidence supporting the denial of a conditional use. *See Tauber v. County Bd. of Appeals*, 257 Md. 202, 208-12 (1970). In fact, the Court has upheld a zoning board's denial of a special exception that was solely based on such layperson testimony concerning the traffic impact of the proposed use, even though expert testimony to the contrary was introduced. *See id*; *see also Gerachis v. Montgomery County Bd. of Appeals*, 261 Md. 153, 159 (1971) (noting that the "Court has previously affirmed the denial of special exceptions . . . based solely on the evidence of hazardous traffic conditions").

We believe that the record, while not overwhelming, contains substantial evidence to support the Board's conclusion that the proposed healthcare clinic would produce uniquely adverse effects, thereby justifying the denial of Ms. Hertzmark's application under Zoning Code § 5-406(a)(1) and *Schultz*. The Board heard sworn testimony from various community members explaining, based on their personal observations while living or working in the vicinity, the existing vehicular and pedestrian traffic issues on the streets surrounding the subject properties. As summarized above, they testified that they witnessed car accidents and instances of unsafe driving. And they explained that these existing traffic conditions create difficulties for pedestrians navigating the triangular configuration of streets. This testimony generally supported the position and reasoning of the Association as stated in its opposition letter.

When testifying before the Board, the neighboring residents did not provide "unsupported conclusions . . . to the effect that a proposed use will . . . result in harm." *Anderson*, 23 Md. App. at 618. Rather, by testifying about the current traffic conditions personally observed at the proposed location in addition to opining that the proposed clinic would exacerbate those conditions, the community members' testimony constitutes probative evidence on the question of adverse effects. *See Tauber*, 257 Md. at 208-12. We therefore disagree with Ms. Hertzmark's argument to the contrary. The evidence offered by the community, in conjunction with Ms. Hertzmark's evidence establishing the proposed clinic's potential daily patient load and other facets of its intensity of use, is credible evidence supporting the Board's denial based on the unique, noninherent adverse

effects of the clinic. In other words, this evidence renders the Board's determination—that the proposed clinic's intensity of use and the irregular, problematic traffic patterns at the subject site located next to residential properties would result in detrimental effects to the surrounding area—"fairly debatable." *Mills v. Godlove*, 200 Md. App. 213, 223 (2011).

The Board, in its role as factfinder, was responsible for assessing and weighing the evidence presented by the parties. The Board seemingly gave more weight to the community members' evidence, which it referred to as "credible," than the traffic report, which the Board identified as a "non-empirical evaluation," and other contrary evidence introduced by Ms. Hertzmark. This task is "exclusively the function of the agency" and the reviewing court may not substitute its judgment for that of the agency when, like in the instant appeal, there is substantial evidence supporting the agency's decision. *E. Outdoor II*, 146 Md. App. 283, 301-02 (2002).

Ms. Hertzmark's challenges to the sufficiency of the community members' testimony are unavailing. By arguing that the same traffic concerns testified to by the community would be present if the proposed clinic was located at other similarly zoned properties, she appears to misunderstand the relevant inquiry under *Schultz*. The Court expressly rejected such a comparative geographical analysis of a proposed use's adverse impact. *See People's Couns. for Baltimore County v. Loyola Coll.*, 406 Md. 54, 66 (2008). Ms. Hertzmark is, however, correct that a conditional use application cannot be denied purely because the proposed location is adjacent to residences. *See Montgomery*

County v. Butler, 417 Md. 271, 308 (2010). But the Board's decision was based on multiple factors in addition to the proposed clinic's proximity to residential properties. Moreover, Ms. Hertzmark's reliance on Mr. Owens's statements, which we note did not expressly address his or the theater patrons' safety when crossing the street, is misplaced. At best, this was another piece of evidence for the Board to weigh against the opposition evidence concerning the vehicular and pedestrian safety concerns. As previously indicated, "we do not engage in an 'independent analysis of the evidence.'" *Id.* at 284 (quoting *Armstrong v. Mayor of Baltimore*, 410 Md. 426, 444 (2009)).

We are also unpersuaded by Ms. Hertzmark's assertion that the Board "disregarded expert testimony" and ignored the Department of Planning's recommendations. Assuming the former contention pertains to Ms. Hertzmark's testimony, we disagree. While the Board's Resolution did not mention her commentary on the traffic impact or other potential effects of the proposed clinic, it did expressly recognize that she testified at the hearing and briefly summarized the other topics she discussed during her testimony. We are unaware of any rule obligating the Board in its written decision to provide every detail of the evidence presented on both sides. *Cf.* ZC § 5-404(b)(3) (providing that the Board must issue a "written decision, approving, approving with conditions, or denying the application"); *Critical Area Comm'n for the Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 128-29 (2011) (emphasis added) (requiring that a local zoning board "articulate[] evidence in *support* of a conclusory finding"). We will not assume that, because the Board failed to mention

Ms. Hertzmark's testimony on the proposed clinic's impact, the Board ignored that evidence. *See Mid-Atl. Power Supply Ass'n v. Maryland Pub. Serv. Comm'n*, 143 Md. App. 419, 442 (2002) (refusing to "conclude from the mere failure of the [agency] to mention a witness's testimony [in its written decision] that it did not consider that witness's testimony"). As for the Department of Planning's recommendations, we have come across no evidence, and Ms. Hertzmark fails to point to any, indicating that the Board did not consider those recommendations. The Board did, however, specifically acknowledge in its Resolution that the Department prepared a memorandum evaluating Ms. Hertzmark's application.

Finally, regarding Ms. Hertzmark's contention that there is no evidence indicating that Traffic Street's report was "nonempirical," we again recognize that it is not our function to second guess the factfinder and perform an independent analysis of the record. *See Butler*, 417 Md. at 284. We will not disturb the Board's assessment of the evidence when we have determined that there is an adequate evidentiary foundation for its decision. *See Armstrong*, 410 Md. at 443. The fact that Ms. Hertzmark may have produced evidence contrary to the Board's decision, such as a map showing the subject properties in close proximity to public transportation, does not affect our resolution of this appeal. Indeed, "[i]f there is some evidence pointing in each direction, the issue is, by definition, 'fairly debatable,' and the decision of the administrative agency, whichever way it goes, may not be reversed." *Futoryan v. Mayor of Baltimore*, 150 Md. App. 157, 172 (2003); *see also Prince George's County v. Meininger*, 264 Md. 148, 154 (1972)

(sustaining the denial of a special exception and noting that the applicant presented a strong case but that "this is beside the point, as neither this Court nor the lower court may substitute its judgment for that of the zoning authority, if . . . the issue decided is fairly debatable").

For all the foregoing reasons, we reverse the circuit court's judgment and remand the case to that court with instructions to enter judgment affirming the Board's decision.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE DECISION OF THE BALTIMORE CITY BOARD OF MUNICIPAL AND ZONING APPEALS. COSTS TO BE PAID BY APPELLEE.