Circuit Court for Baltimore County
Case No. C-03-CV-19-2639

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0436

September Term, 2020

FALLS ROAD COMMUNITY ASSOCIATION, et al.

v.

ARTHUR BECKER, et al.

Nazarian,
Wells,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: April 22, 2021

This appeal concerns the efforts of appellees, Arthur Becker, Nancy Miller, and Gaylord Brooks Realty (collectively referred to as "the developer"), to construct homes on a large tract of land located in Baltimore County. The developer filed its first plan with the county in 2004. At that time, the county's Deputy Zoning Commissioner, citing several specific safety concerns, denied that part of the plan which sought development of 10 houses on a parcel that abuts Falls Road.

A dozen years later, in 2016, the developer sought county approval for a modified plan that reduced the number of houses from 10 to 8. An Administrative Law Judge ("ALJ") denied that plan, finding that the concerns raised by the Deputy Zoning Commissioner had not been resolved. Two years later, in 2018, the developer submitted a third plan, this time reducing the number of houses from 8 to 5 and changed the designation of a public road to a private driveway. The ALJ found that these were "substantial" changes from previous proposals and approved the 2018 plan.

Appellants, Falls Road Community Association, et al., ("the community association") appealed. The Board of Appeals determined that the developer's reduction of the number of houses and re-designating a roadway did not alleviate the safety concerns that the Deputy Zoning Commissioner had identified. The Board reversed the ALJ's approval of the plan concluding that it was barred by collateral estoppel.

The developer sought judicial review in the Circuit Court for Baltimore County. After a hearing, the circuit court ruled that the Board of Appeals had erred. The circuit

court found that collateral estoppel did not bar the plan, because it was substantially different from the 2004 iteration.

The community association filed a timely appeal and poses one question, which we have slightly rephrased: Did the County Board of Appeals correctly find that collateral estoppel barred the developer's 2018 plan?[1] As we explain below, we agree with the Board. We, therefore, reverse the circuit court and reinstate the Board of Appeals' decision.

FACTUAL AND PROCEDURAL BACKGROUND

I. The 2004 Plan

In 2004, the developer filed a plan with Baltimore County ("the 2004 plan") to develop a total of 20 lots on approximately 100-acres owned by the Becker family. The Beckers have owned the land for generations and formerly operated a commercial fruit orchard there. The land is bisected (east to west) by Beaver Dam Run, a tributary that feeds the Loch Raven Reservoir, which in turn provides drinking water for the metropolitan area. Beaver Dam Run divides the tract into what has been described as a "southern pod," on which the developer sought to build 9 homes,[2] and a "northern pod," where 10 new homes were to be constructed.

[1] The community association's question, as written, is: "Did the County Board of Appeals correctly rule that the development plan filed by Appellee is barred by collateral estoppel?"

[2] The plat map shows that 8 of the homes were to be developed around a cul-de-sac at the terminus of Ridgemont Road, located in the southeast corner of the property.

On January 29, 2004, Deputy Zoning Commissioner, John Murphy, held a public hearing on the 2004 plan taking testimony over five days. Several witnesses testified, including the developer, county officials, civil engineers, an ecologist, and two traffic engineers: John Seitz, who testified on behalf of the community association, and Wesley Guckert, who testified for the developer.

Commissioner Murphy recognized that the topography of the Becker property called for the development of three unique parcels. With minor adjustments, Commissioner Murphy approved the development plan for the two southern pods. But he concluded that the northern pod posed several interrelated problems and denied its development. Because Commissioner Murphy's decision plays a major role in this appeal, his findings and conclusions regarding the northern pod are worth reviewing in detail.

First, Commissioner Murphy determined that the developer "own[ed] only approximately 100 feet of frontage on the west side of Falls Road. This mean[t] that any road from the [northern] pod [was] severely limited where it can be located." Second, Commissioner Murphy considered the testimony of the two traffic experts, Messers Seitz and Guckert. Both experts used the American Association of State Highway Transportation Officials (AASHTO) standards for evaluating the impact that the northern pod would have for traffic on Falls Road. But the two experts came to conflicting conclusions.

Another house was to be developed several hundred feet away in the southwest corner of the parcel, next to the existing but separate residences of Mr. Becker and Ms. Miller located at the end of Wally Court. All of these homes lie south of Beaver Dam Run.

Mr. Seitz testified that his main concern was for drivers entering Falls Road from Rose Court—the proposed public roadway that gave access to the northern pod. Mr. Seitz explained that traffic engineers use two different measurements of distances that a driver would need to avoid a collision. The first, "stopping sight distance," is the safe stopping distance for drivers who encounter something unexpected on the road. Mr. Seitz mentioned, for example, "a child wandering out into the roadway or a disabled vehicle in the road over the crest of a hill." The other measure, "intersection sight distance," is the distance a driver needs to merge from a minor road into traffic on a major road. Mr. Seitz explained that this calculation "included the time it would take for the vehicle pulling out to accelerate to safe speed."

There was no dispute that the posted speed on Falls Road is 40 mph. County traffic studies found that the average driver speed on Falls Road was 39.2 mph, with a significant percentage exceeding the speed limit. Mr. Seitz, who did on-site calculations, opined that the intersection sight distance for drivers coming from Rose Court and entering Falls Road created a safety hazard for drivers on Falls Road coming from the south. Using AASHTO tables, Mr. Seitz concluded that the stopping sight distance was 305 feet. He found that the intersection sight distance was 445 feet. Mr. Seitz's concern was that drivers coming from Rose Court and trying to get on Falls Road could not get up to speed fast enough to safely merge with drivers who were traveling at or above the posted speed.

The developer's traffic expert, Mr. Guckert, agreed that the stopping sight distance specified by AASHTO was 305 feet. But he noted that vehicles traveling northbound on

Falls climbed a 6% grade hill near the intersection with Rose Court, thereby reducing the stopping sight distance from 305 to 278 feet. Mr. Guckert opined that this was still an adequate stopping distance. Further, the number of drivers coming from Rose Court would be relatively low as the development only had 10 homes. Critically, Mr. Guckert agreed with Mr. Seitz that the intersection sight distance did not meet AASHTO's safety standards.

Both traffic experts also identified two more safety concerns. One was that Hickory Hill Road, an intersecting road on the opposite side of Falls Road from the northern pod, "[did] not directly face the new intersection of Rose Court." Mr. Seitz and Mr. Guckert agreed that the best design would be "[to] align the new road with Hickory Hill Road from a safety standpoint." And, if that was not possible, "have the new [Rose Court] and existing [Hickory Hill Road] roadways 100 feet apart."[3] Commissioner Murphy noted that because the developer had, at best, 100 feet of frontage on Falls Road, a 100-foot separation between the two roadways was not possible. Complicating the issue further, the experts disagreed whether the 100-foot separation was mandatory or merely a guideline. [4]

The other issue concerned a neighbor, Mary Ann Jones. Ms. Jones testified at the hearing that she wanted to build a 6-foot privacy fence on the property line with Rose Court. Both experts suggested that if Ms. Jones built the fence it would further reduce the

[3] In 2004, Hickory Hill Road served about 40 homes.

[4] Baltimore County's *Plans Review Policy Manual* requires a 100-foot separation between intersections, "where possible."

sight distance for drivers leaving Rose Court as they tried to gauge the speed of vehicles on Falls Road.

In his written report, Commissioner Murphy found both experts credible. The Commissioner noted that both experts agreed that the intersection did not met AASHTO's standards for intersection sight distance. Yet, both experts agreed that AASHTO's standard for stopping sight distance was satisfied, although Mr. Guckert calculated a lower safe stopping distance. But Commissioner Murphy determined that because the developer owned so little frontage on Falls Road "that he cannot himself guarantee clear sight distance to the south, no matter what standard is used." And, Commissioner Murphy found that the developer could not align Rose Court with Hickory Hill Road nor separate the two roadways by 100 feet. Even though Rose Court would serve a "low number of homes," Commissioner Murphy concluded that this combination of factors created an "unsafe" situation.[5]

The Commissioner gave the following example to illustrate his concerns:

> On a workday morning, drivers are coming out of Applecroft Lane [another intersection to the northwest], Rose Court, Hickory Hill Road and the Jones driveway to get onto Falls Road to go to work or school. Traffic is flowing both ways on Falls Road and as shown by the traffic data a significant portion of this traffic exceeds the 40-mph speed limit. The vehicle coming from Applecroft wants to turn right and go [north] onto Falls Road. The vehicle on Hickory Hill [across the street] wants to go north on Falls Road. And last, but certainly not least, Mrs. Jones wants to go north on Falls Road. All traffic from these side roads stops waiting for a break in Falls

[5] Commissioner Murphy also found that it was unlikely that Mrs. Jones would build the privacy fence as it "would also cut off her own view of traffic [coming] from the north making her entrance onto Falls Road most hazardous."

> Road Traffic. Their attention is riveted on Falls Road traffic. When a break comes in the flow of traffic, who goes first?
>
> Adding to the "Who Knew" category, Mr. Guckert tells us that vehicles must yield to those on the right even if the vehicles are parallel to one another. I am sure he is correct in the law. But I did not know that and I doubt drivers have ever heard of such a rule. Is a driver across Falls Road on one's right? **What I foresee are drivers frustrated by having to wait for Falls Road traffic coming out of Applecroft, Rose Court, Hickory Hill and the Jones driveway in a mad and dangerous scramble to accelerate onto Falls Road.** They are not going to be looking for traffic coming from the other side roads.
>
> **This problem of acceleration leads me to adopt the AASHTO intersection stopping distance as the proper standard for this intersection**. I find it more persuasive in this situation to take into account that vehicles must get up to speed to safely enter Falls Road. Drivers from the side roads will be challenged to weave their way onto Falls Road. I am not satisfied, given the scramble in front of them, that vehicles on Falls Road should not have the additional distance to avoid accidents with vehicles coming from side roads. **I am not persuaded by the cumulative weight of evidence that the proposed intersection is safe and I will not approve the northern pod under the present situation**.

(Emphasis supplied).

Commissioner Murphy then wrote the following, which has proven to be a focus of litigation:

> Having found the proposed intersection unsafe, I cannot provide some exact criteria under which I will approve the northern pod. However, I can provide some general concepts. First, Rose Court should not be a public road, which may mislead travelers at the intersection with Falls Road. The number of lots should be reduced to that number allowed to be developed using a private driveway.

In the accompanying order, Commissioner Murphy stated the he would "allow the developer to submit revised designs, which provide a safe intersection of any driveway,

which serves the pod and Falls Road[.]" The order duly approved the southern pod and denied development of the northern pod.

II. The 2006 Modification

While it is not particularly important to this appeal, the next event chronologically was the developer's 2006 motion for reconsideration in which he offered a modified plan. Commissioner Murphy set the motion for a hearing. Significantly, the developer did not contest the Commissioner's prior findings and conclusions regarding the northern pod. Instead, the developer resubmitted a modified plan for development of the 9 lots in the southern pod. The developer left the northern pod as one large parcel, described as "lot 10," that would be subject to "future development." At the community association's urging, Commissioner Murphy repeated verbatim the findings and conclusions from the 2004 order in a new order dated December 11, 2006 which stated in pertinent part, that "[f]uture development of lot 10 is subject to the findings and order of the March 12, 2004 order (sic) in this case as above as well as the findings and Order of this date[.]"

III. The 2016 Plan

The developer submitted another modification in 2015, this time focused solely on the northern pod. The significant feature of this plan was that the developer reduced the number of lots slated for development from 10 to 8. The matter was duly set for a hearing

before Administrative Law Judge John Berverungen.[6] The hearings on "the 2016 plan" occurred on December 17, 2015, May 16, 2016, and concluded on June 24, 2016.

After taking testimony from several witnesses, ALJ Beverungen issued a detailed set of findings that ultimately concluded that the 2016 plan was barred by res judicata and/or collateral estoppel. Focusing on Commissioner Murphy's 2004 and 2006 rulings, ALJ Beverungen noted that Commissioner Murphy "cited three reasons he denied development of the northern pod: '(1) inadequate intersection sight distance; (2) the proposed access road was not aligned with Hickory Hill Road; and (3) the proposed access was designated as a public road.'" Further, Commissioner Murphy made clear after he granted the developer's 2006 motion for reconsideration "that the factual findings and legal conclusions set forth in the 2004 Order would be applicable to any future development of the northern pod (i.e. Lot 10)."

ALJ Berverungen found that Peachwood Lane, formerly called Rose Court, was still designated a public roadway. And, Peachwood Lane's access still did not align with Hickory Hill Road "and both traffic experts testified the AASHTO intersection sight distance was not met." The ALJ noted that this was the case in 2004 when Commissioner Murphy ruled, and, more importantly the developer had not appealed that decision or otherwise modified the plan. Consequently, the ALJ concluded that either res judicata or collateral estoppel barred the 2016 plan.

[6] Baltimore County amended its Code after 2004. The Zoning Commissioners Office was changed to the Office of Administrative Hearings. Consequently, Administrative Law Judges now heard zoning cases.

In the last paragraph of his report, ALJ Beverungen wrote:

> Of course, res judicata and/or collateral estoppel will not apply if the later case is "distinct" from the earlier proceeding, or if there has been a change in circumstances. But the case law indicates the change must be "substantial," and the only salient difference between the plans is that the current proposal is 8 rather than 10 lots. I do not believe this is sufficient to render either doctrine inapplicable.

The August 6, 2016 order denied the 2016 plan. The developer's subsequent motion for reconsideration was denied.

IV. The 2018 Plan

In 2018, the developer submitted a third modification. The main differences from the 2016 plan were: (1) the number of houses to be developed in the northern pod was now set at five, and (2) Peachwood Lane was re-designated as a private driveway. On January 18, 2019, John Beverungen, the same ALJ who had heard the developer's petition on the 2016 plan, heard evidence on the latest development plan.

The main witness was Joshua Sharon, a civil engineer, who testified on the developer's behalf. Mr. Sharon said that the differences between the 2016 plan and the 2018 plan were "significant." And, he testified that the 2018 development plan satisfied all the county's zoning requirements. According to ALJ Beverungen's report, "Mr. Sharon testified [that] granting the petition would not have a detrimental impact upon the health, safety and welfare of the community." The relevant county agencies approved the plan as well.

For its part, the community association provided witnesses who expressed concern about the amount of traffic along Falls Road. The residents had specific safety concerns

about children getting on and off school buses in the area and an increased volume of traffic.

In his report, ALJ Beverungen first addressed whether collateral estoppel barred the plan. The ALJ, citing Mr. Sharon's testimony, found that the changes the developer made to the current plan were "significant, and no evidence was presented to rebut this testimony." He found that "[a] 50% reduction in density" was by definition a "substantial" change. Additionally, re-designating Peachwood Lane from a public road to a private driveway was also a substantial change. The ALJ noted that "[f]ormer Deputy Zoning Commissioner Murphy referenced both of these issues in his 2004 order when discussing the circumstances under which the 'northern pod' might be approved, and thus he obviously considered these to be material or substantial issues." Citing additional passages from Commissioner Murphy's 2004 findings and order, ALJ Beverungen concluded that collateral estoppel was inapplicable, noting that Commissioner Murphy's

> denial of the northern pod in 2004 was based upon his belief the intersection with Falls Road was unsafe. While he did expressly state what changes needed to be made, he noted that: (1) the number of lots should be reduced; and (2) the access road should be private, so drivers are not misle[]d. Mr. Murphy expressly stated that "a large part of the problem (i.e. an unsafe intersection) arises with the fact that Rose Court is to be a public road."

Addressing the community association's objection that the distances of the center points of Peachwood Lane and Hickory Hills Road were less than 100 feet apart, the ALJ noted that the County's Plans Review Policy Manual required a 100-foot separation, "where possible." Because the developer shifted the opening of Peachwood Lane by twelve feet, the distance from the center line of both roadways was now 50 feet. In 2004

the distance was 38 feet. In the ALJ's view, this was an improvement. Furthermore, the ALJ pointed out that in 2016, the State Highway Administration ("SHA") said that the "minimum required sight distance can be achieved at the entrance of MD 25 [Falls Road]." ALJ Beverungen concluded that because the SHA said the alignment of the roadways satisfied the State's safety requirements, he could not deny the plan based on unsubstantiated safety concerns.

As the developer had sustained his burden of proving that the plan complied with all county and State requirements, the ALJ approved the 2018 plan.

V. Board of Appeals' Decision

The community association filed an appeal to the Baltimore County Board of Appeals ("the Board"). After conducting an "on-the-record" hearing on May 1, 2019, the Board issued a written opinion.

The Board saw the threshold issue as whether the ALJ erred in the application of collateral estoppel. After providing a legal definition of the doctrine and supporting cases, the Board examined the facts to determine whether collateral estoppel applied. The Board focused on Commissioner Murphy's 2004 findings and conclusions. They saw that the Commissioner "define[d] the primary safety concern as the ability of the drivers entering Falls Road to see oncoming traffic, particularly [drivers] entering from the proposed Rose Court." The Board focused on (1) the Commissioner's concern about "a mad and dangerous scramble [of drivers] to accelerate onto Falls Road," (2) the fact that Rose Court/Peachwood Lane was less than 100 feet from Hickory Hills Road and (3) the

roadways could never be properly aligned because of the developer's insufficient frontage. The Board found that, overall, Commissioner Murphy's 2004 decision was based on safety concerns for drivers in the area. Some of these drivers, the Board noted, would be coming from no less than eight adjacent and intersecting roadways.

After recounting the administrative findings and orders from 2006 and 2016, the Board next focused on ALJ Beverungen's findings regarding the 2018 plan. The Board noted the two significant changes from the 2016 plan were the reduction of the number of homes to be developed dropped from eight to five, and Peachwood Lane was now to be a private driveway. But the Board disagreed these were material changes from previous plans.

The Board noted that the developer presented no testimony from a witness who had expertise in traffic safety, like Commissioner Murphy had, to explain how the reduction from eight to five houses and changing a public roadway a private driveway resolved the safety concerns that Commissioner Murphy identified in 2004. The dearth of expert testimony on these issues, the Board said, was a particular concern because there likely had been an increase in traffic on Falls Road between 2004 and 2019. Similarly, the Board observed that there was no expert testimony about how the re-designated private driveway rendered the intersection safe, noting that "[e]ven the Board members in their public deliberations acknowledged difficulty understanding the significance of this change."

The Board found that the developer's "attempt to bring his new plan within the parameters of Deputy Zoning Commissioner Murphy's 2004 musings," fell short of

demonstrating that empirical measures of safety had been achieved. "The question of material change[s] in circumstances is an **objective** question to be decided based on the present facts and circumstances" (emphasis in the original). "This is not an exercise to guess what Deputy Zoning Commissioner Murphy's findings might have been fifteen years ago if the facts had been different." The Board acknowledged that a layman might have an understanding of why a reduction in the number of homes, for example, might improve safety at the intersection. But, the Board countered, approval of the 2018 development plan required "presenting affirmative **contemporary** evidence that shows that there has been a material change in the circumstances by which the safety of the Falls Road/Peachwood Lane intersection is assessed" (emphasis in the original).

The ALJ had concluded that the SHA's letters "approved" the intersection of Falls Road with Peachwood Lane. In contrast, the Board found that the SHA's letters were "marginally relevant, at best." The Board read the SHA's letter of January 22, 2016 to mean that the SHA agreed with the developer's sight distance evaluation. In the Board's opinion, the SHA did not specifically "approve" the intersection, but, instead, established a list of criteria that, if met, would allow the developer to obtain a SHA permit. The Board found that another letter, dated December 18, 2018, reiterated the same criteria for the SHA's approval. Additionally, the Board noted that no one from the SHA testified before the ALJ to explain how its position had evolved from 2004, when the SHA explicitly rejected the developer's plan, to 2018 when the SHA was seemingly prepared to issue the developer a permit.

Ultimately, two of the three members of the Board decided that the developer did not prove that the "modest changes" to the 2018 plan addressed the major safety concerns raised by Commissioner Murphy and rejected the plan. One dissenting member agreed that collateral estoppel was the threshold question but concluded that the record was insufficiently developed to decide whether collateral estoppel barred the 2018 plan, or not. He opted to send the case back to the ALJ to "amplify the underlying factual basis" for the ALJ's decision. With a 2 to 1 vote against it, the Board rejected the 2018 plan.

VI. The Circuit Court's Decision

The developer sought judicial review in the Circuit Court for Baltimore County. Without recounting the factual findings that the court made, it is enough to know that after hearing argument from counsel and reviewing the record, the court determined that the ALJ had a sufficient basis upon which to approve the 2018 plan. Essentially, the court found that the changes to the plan that we have discussed were, in fact, material. In the circuit court's opinion, collateral estoppel did not apply. Having found that the Board erred, the circuit court reinstated the ALJ's order.

The community association then filed a timely appeal to this Court. Additional facts will be discussed below.

ANALYSIS

I. Standard of Review

When an appellate court reviews a decision of an administrative agency, that court must look past the circuit court's decision to review the agency's decision. *Garrity v. Md.*

State Bd. of Plumbing, 447 Md. 359, 368 (2016); *Sizemore v. Town of Chesapeake Beach*, 225 Md. App 631, 647-48 (2015) (citations omitted). This Court must primarily "determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious." *Md. Dept. of the Env't v. Ives*, 136 Md. App. 581, 585 (2001) (quoting *Gigeous v. E. Correctional Inst.*, 132 Md. App. 487, 494 (2000)). "In other words, '[w]e apply a limited standard of review and will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists.'" *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 274 (2012) (quoting *Tabassi v. Carroll Cty. Dep't of Soc. Servs.*, 182 Md. App. 80, 86 (2008) (additional citation omitted)).

In *Maryland-Nat'l Capital Park & Planning Com'n. v. Anderson*, 65 Md. 172, 180 (2006), the Court of Appels reiterated that "[a] court's role in reviewing an administrative agency adjudicatory decision is narrow . . . it 'is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law'" (quoting *United Parcel v. People's Counsel*, 336 Md. 569, 576-77 (1994)); *Bd of Directors of Cameron Grove Condo., II v. State Comm'n on Hum. Relations*, 431 Md. 61, 80 (2013); *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 354 (2013); *Stidwell v. Md. State Bd. of Chiropractic Exam'rs*, 144 Md. App. 613, 616 (2002). The Court, however, has the authority "to overrule an agency's factual finding only when the finding is 'unsupported by competent, material, and substantial evidence in light of the entire record as submitted.'"

Spencer v. Bd. of Pharmacy, 380 Md. 515, 529 (2004) (citing Md. Code Ann., State Gov't § 10-222(h)(3)(v)).

II. Collateral Estoppel

The doctrine of collateral estoppel, sometimes called "claim preclusion," is applied when "factual issues resolved in the adjudication of one claim are binding for purposes of subsequent adjudication of another claim." 8 John A. Lynch, Jr. & Richard W. Bourne, *Modern Maryland Civil Procedure* 1242–43 (2d ed. 2004, 2014 Supp.). The purpose of the doctrine, like res judicata, is "to avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions." *Rourke v. Amchem Prods., Inc*., 384 Md. 329, 359 (2004) (quoting *Murray Int'l Freight Corp. v. Graham*, 315 Md. 543, 547 (1989)).[7]

In most circumstances, collateral estoppel may be invoked when "in a second suit between the same parties, even if the cause of action is different, any determination of fact

[7] In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the United States Supreme Court discussed the distinction between res judicata and collateral estoppel, remarking that:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes re-litigation of issues actually litigated and necessary to the outcome of the first action.

Id. at 326 n.5. These factors are incorporated in prongs two and three of the test set forth in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845–46 (9th Cir.1987), namely, that the issues be actually litigated and necessary to the outcome of the first action.

that was actually litigated and was essential to a valid and final judgment is conclusive." *Id.* at 340–41 (emphasis in original). A four-part test is used, generally, to determine whether the doctrine of collateral estoppel applies:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?
>
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Burruss v. Bd. of Cty. Comm'rs of Frederick Cty., 427 Md. 231, 249–50 (2012) (quoting *Wash. Suburban Sanitary Comm'n v. TKU Assocs.*, 281 Md. 1, 18–19 (1977)). "[F]or the doctrine of collateral estoppel to apply, the probable fact-finding that undergirds the judgment used to estop must be scrutinized to determine if the issues raised in that proceeding were actually litigated, or facts necessary to resolve the pertinent issues were adjudicated in that action." *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 391–92 (2000) (citation omitted).

Whether an administrative agency's decisions should be given preclusive effect "hinges on three factors: (1) whether the [agency] was acting in a judicial capacity; (2) whether the issue presented to the…court was actually litigated before the [agency]; and (3) whether its resolution was necessary to the [agency's] decision." *West Coast Truck Lines v. Am. Indus.*, 893 F.2d 229, 234–35 (9th Cir.1990). This test was first enunciated

in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845–46 (9th Cir.1987), and its three prongs are supported by the Supreme Court precedent on issue preclusion.

The rule in Maryland does not differ in any material respect from that adopted by the federal courts. *Sugarloaf v. Waste Disposal*, 323 Md. 641, 658–59 n.13 (1991) (giving no preclusive effect to conclusions made after a non-trial type hearing by Air Management Administration of the State Department of the Environment); *White v. Prince George's Cty*., 282 Md. 641, 658–59 (1978) (giving preclusive effect to quasi-judicial proceeding of Maryland Tax Court, which is an administrative agency). In *Sugarloaf*, the Court of Appeals stated that:

> [i]t is well settled that the doctrine [of res judicata or collateral estoppel] is only applicable to agency decisions in which:
>
> "[the] agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." ... The threshold inquiry is whether the earlier proceeding is the essential equivalent of a judicial proceeding."

323 Md. at 658 n.13 (quoting *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1194 (D.C.App.1980)). Thus, current Maryland law on the preclusive effect of administrative agency decisions, under principles of res judicata or collateral estoppel, incorporates parallel considerations to those reflected in the *Exxon* test.

The threshold question then is whether Commissioner Murphy's decision may be accorded preclusive effect. We think it can, as it satisfies the three-pronged test outlined in *West Coast Truck Lines*. First, there is no question that the Deputy Zoning Commissioner was sitting in a quasi-judicial capacity when he rendered the 2004 decision.

Second, it is equally true that the development plan for the northern pod was litigated before him over multiple days. That hearing considered the testimony of several witnesses and several pieces of evidence. Finally, resolving the question of traffic safely accessing the northern pod was unquestionably central to Commissioner Murphy's decision. *See id.* at 893 F.2d at 234-35; *Sugarloaf*, 323 Md. at 658–59 n.13. Having met all of the factors, we conclude that the Commissioner's decision may be given preclusive effect.

After resolving the threshold issue, we now consider whether the findings from 2004 preclude adoption of the 2018 plan. Working in reverse order with the factors outlined in *TKU Assocs*., 281 Md. at 18–19, we think that beyond cavil that the third and fourth prongs are satisfied. If Commissioner Murphy's decision precludes approval of the 2018 plan, then the developer will be the party against whom the decision is rendered. The developer is and remains a party to the litigation. Additionally, the developer, like the community association, has had ample opportunity to present evidence at each first-level administrative hearing and to fully participate in all the proceedings below. Once the safety of the intersection in this case became the administrative agency's focus, unquestionably, the developer has been able to address the safety concerns by presenting evidence in the developer's favor.

For similar reasons, we conclude that the second prong of the *Exxon* test has also been satisfied. Commissioner Murphy's decisions in 2004 and 2006 were final judgments rendered against development of the northern pod. Generally, a final judgment exists when, "(1) the court intends for the judgment to constitute an unqualified final disposition

of the matter; (2) the court adjudicates all of the claims of the parties; and (3) the clerk properly records the judgment in accordance with Maryland Rule 2–601." *Royal Fin. Servs., Inc. v. Eason*, 183 Md. App. 496, 499 (2008) (citation omitted). An administrative appeal becomes final once an aggrieved party may seek judicial review. *Anderson, supra*, 95 Md. at 181. The administrative orders in this case are final, as all administrative remedies have now been exhausted.

The remaining prong is whether the safety issues raised in the 2004 plan were "identical" to the 2018 plan, or whether those changes were materially different. Preliminarily, we think that the safety of drivers remains **the** issue to be resolved to make the northern pod viable. Significantly, the developer also saw that the safety of the intersection had to be addressed before they could obtain the county's approval to develop the northern pod. To that end, the developer proposed three different iterations of the development plan over 14 years in hopes of finally resolving the concerns that Commissioner Murphy originally raised.

Consequently, the question is whether the Board properly concluded that the 2018 plan was not materially different from the 2004 plan. We are mindful of our limitations in this regard as an appellate court. In reviewing an administrative decision such as this, we look to see if there is "substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Anderson*, 65 Md. at 180. We, therefore, examine the factors the Board considered when it concluded that there was not a material difference

between the 2004 and the 2018 plans. To do this, by necessity, we must look at what the ALJ found in 2018 because the Board was reviewing the ALJ's decision.

At oral argument, the developer argued that there were five significant differences between the 2004 and 2018 plans:

- The reduction of the number of houses to be developed from 8 to 5;
- Re-designating Peachwood Lane as a private driveway;
- Conservation of certain trees;
- SHA approval of the intersection;
- Compliance with stormwater management policies.

We acknowledge that the reduction of the number of houses would bring the development into compliance with the county's stormwater management plan and that under the latest plan certain trees might be conserved. However, these issues are minor compared with the overall safety of the intersection. And that overriding issue is what the developer, the ALJ, and the Board considered in assessing whether the plans were significantly different for the purposes of the application of collateral estoppel. We focus on the developer's three remaining differences.

A. The Number of Houses to be Developed

The ALJ suggested it was almost axiomatic that halving the number of houses in the northern pod, from 10 in 2004 to 5 in 2018, was per se "substantial." "A 50% reduction in density is in my opinion—based on the plain meaning of the term—a 'substantial' change." The ALJ based this conclusion on two things: (1) Commissioner Murphy's

comments at the end of his findings, where he suggested that "the number of lots should be reduced." And (2) on the testimony of the developer's expert, Mr. Sharon, who opined that the reduction in the number of houses was "significant." Based almost exclusively on this evidence, the ALJ ruled that collateral estoppel did not apply to bar the 2018 plan.

After reviewing the evidence presented to the ALJ in 2018 we, like the Board, cannot come to the same conclusion. First, we agree with the Board, that on the issue of housing density, the only person who testified that the decrease in the number of homes was material was Mr. Sharon. The Board noted that Mr. Sharon testified as a civil engineer and not as a traffic expert, as were Messrs. Seitz and Guckert. The Board found that the civil engineer's opinion was irrelevant to determine how the development of five houses at the site would impact the health or welfare of the community. We concur. Mr. Sharon did not have the credentials to render an opinion about the safety of the intersection in particular.

And while the ALJ pointed out that no one rebutted Mr. Sharon's testimony, rebuttal testimony is not what was required. The Board properly found that the developer bore the burden of proving that the reduction of houses abutting Falls Road would have made the intersection safer. We cannot say that the Board erred when it found that the ALJ heard no evidence that suggested how a reduction in the number of homes from 8 to 5 affected the safety of the intersection under the conditions as they now exist. We conclude that the Board was correct in finding that there was not substantial evidence to support the ALJ's conclusion. *Anderson*, 65 Md. at 180.

B. Driveway Versus Public Road

We understand Commissioner Murphy's position on why the change from a public road to a private driveway should be considered. In his report, the Commissioner suggested that changing Rose Court to a private driveway would reduce the likelihood that drivers on Falls Road would "expect a 'normal' intersection by with physical amenities of a public road." The Commissioner's fear was that drivers would be "misled" about what kind of traffic to expect at the intersection. The Commissioner said that Mr. Seitz's testimony about driver expectations led him to conclude that the intersection would be less than safe. We note that Commissioner Murphy said that changing the roadway's designation was "a general concept" that could lead to a safer intersection.

But the Board pointed out that no one testified that Commissioner Murphy's "general concept" was, in fact, correct. And more to the point, if the Commissioner's theory was correct, no one testified that the safety concerns the Commissioner identified had been alleviated by 2018.

C. The SHA letters

The ALJ noted that in 2016, the SHA, in a letter, opined that the "minimum required sight distance can be achieved at the entrance to Md 25 [Falls Road]." The ALJ seemed to accept the SHA letter as sanctioning the development project.

The Board disagreed, finding from its review of the record that the ALJ erroneously concluded that the SHA letter found that the intersection could be made safe. The letter in question is reproduced in the record extract at page 199. It states, in pertinent part:

> This letter is a follow-up to the State Highway Administration (SHA) comments dated December 4, 2015. That letter requested a sight distance profile be submitted demonstrating that the minimum required sight distance can be achieved at the proposed site access. The design engineer has provided the requested sight distance evaluation which demonstrates that the minimum required sight distance can be achieved at the entrance to MD 25 [Falls Road]. In continuation of the SHA's review of the development plan for the Becker Property residential development the SHA offers the following response.

The letter goes for several paragraphs describing the specific requirements that the developer will have to meet to obtain a permit from the SHA.

Our reading of the letter comports with the Board's interpretation. The SHA's letter says that the minimum sight distance can be achieved as part of obtaining a SHA permit, not overall approval of the project. Further, as the Board noted, the letter says nothing about the intersectional sight distance. Both of the traffic experts, Messrs. Seitz and Guckert, opined that the intersection did not meet the ASHTO intersection sight distance requirements. And, more importantly, Commissioner Murphy found that because the developer had only 100 feet of frontage on Falls Road, "that he cannot himself guarantee clear sight distance to the south, **no matter what standard is used**" (emphasis supplied). We hold that the Board's reading of the SHA letter is not erroneous. The SHA letter only granted approval for a SHA permit which may or may not have satisfied the SHA's requirements for Falls Road. The letter did not signal county approval, nor did it signal that the intersection addressed the specific safety issues the Commissioner raised.

Of equal importance, the Board found that the distance from the midpoint of the two roads—Peachwood Lane and Hickory Hill Road—had been widened from 38 feet to 50

feet. But as the Board noted, no one testified that the change in distance by 12 feet made the intersection any safer. The Board (and the ALJ) noted that that the County Plans Policy Review Manual states that the 100-foot distance between the center points of roadways should be maintained "where possible." The Board did not find that the testimony of Mr. Sharon, a civil engineer, was compelling on this point, however. Mr. Sharon, the Board observed, only stated the plan generally satisfied the county's "development and zoning regulations." The Board concluded that Mr. Sharon's unqualified statement said nothing about whether the increased distance of 12 feet between the roadways, in fact, made the conditions safer for drivers on Falls Road. The Board concluded that Mr. Sharon's flat statement did not constitute the "substantial evidence" required to sustain the ALJ's findings.

We agree and hold that Mr. Sharon's unexplained comment did not address the misalignment of the intersections. In 2004, Commissioner Murphy wrote that even taking into account "**the low number of homes to be served by Rose Court**," because Rose Court could not be "aligned with nor far away enough from Hickory Hill Road . . . **the situation passes from marginal to unsafe**" (emphasis supplied). The Board correctly concluded that Mr. Sharon's testimony did not explain how a change in relation of the roads by 12 feet moved the intersection from being unsafe to safe.

In its brief and at oral argument the developer cited *Reaching Hearts International v. Prince George's County*, 831 F. Supp. 2d 871 (D.Md.2011) in support of its assertion that the plans are substantively different. *Reaching Hearts* concerned a religious

congregation's efforts to build a church on land in Prince George's County. The county denied several of the church's applications for a development permit citing, primarily, concerns over the water and sewer needs of the church and their impact on the area. *See Reaching Hearts Int'l, Inc. v. Prince George's Cty*., 584 F.Supp.2d 766 (D.Md.2008).

A federal jury found that the county had violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") by consistently denying the church a building permit. *Id.* at 874. In other words, the jury found that the county's denials demonstrated religious animus, rather than legitimate concerns about water and sewer capacities. The court denied the county's post-trial motion for reconsideration of the motion for judgment. Instead, the court confirmed the judgment in favor of the church and declared that a county ordinance passed to deny the church a building permit was unconstitutional as it placed a substantial burden on the church's free exercise of religion. *Id.*

After the jury's verdict, the county denied yet another building permit claiming, among several grounds, that res judicata and collateral estoppel barred the church's latest proposal. *Id.* at 879-80. The court disagreed, finding that neither res judicata nor collateral estoppel acted as a bar for two reasons. *First*, the court reiterated that the jury's verdict was a finding that the county had engaged in a pattern of discriminatory behavior. *Id.* at 881. *Second*, the court noted that the issues resolved in prior state court actions were different from the issues resolved in the federal court. And the church's most recent

application changed "the size of the church's footprint, the parking, the percentage of lot coverage, the required extension of the sewer line and the water hook-up[.]" *Id.* at 882.

The developer takes from *Reaching Hearts*, that its change in the number of houses to be built and the re-designation of Peachwood Lane constitute substantial changes from the previous plans. But our understanding of *Reaching Hearts* is that the court found that collateral estoppel did not apply based not merely on the change in the church's footprint, as one example, but because of the county's discriminatory practices. More importantly, in *Reaching Hearts*, the trial court's prior factual findings provided a substantial basis for the court to later conclude that the plans were different. The difference here is that the Board found that there was a lack of substantial evidence for the ALJ to have concluded there was a material difference between the 2018 plan and prior iterations. We agree.

This does not mean that we hold that Commissioner Murphy's 2004 findings have rendered development of the northern pod impossible. To the contrary; we merely analyze whether the Board was correct when it concluded that Commissioner Murphy's findings have a preclusive effect when comparing the two plans. And, more to the point, whether the Board was correct when it found that the developer failed to produce substantial evidence that the two plans were materially different. After reviewing the record, we conclude that a majority of the Board of Appeals was correct when they wrote:

> The operative question is not what Deputy Zoning Commissioner would have found in 2004, or on a blank slate now, or at any time on a different record, if the houses had been limited to five and Peachwood Lane was private. **The true question is whether there have been objective material changes, no matter what they may be, that alter the factual conclusions actually made by Deputy Zoning Commissioner in 2004.** No

> such evidence was presented in the 2018 hearing before ALJ Beverungen, and as a result, there is no basis to conclude that Deputy Zoning Commissioner Murphy's factual findings no longer control, his fifteen-year-old ruminations notwithstanding.

(Emphasis supplied).

Perhaps Commissioner Murphy was not clear enough when he wrote, "I cannot provide some exact criteria under which I will approve the northern pod." In providing "general concepts," such as lowering the housing density and changing the designation of Rose Court, Commissioner Murphy did not suggest that if those two items were accomplished then the northern pod should be summarily approved. The Commissioner painstakingly outlined his concerns with the proposed intersection and Falls Road. He took ample testimony to bolster his conclusions. From his report, the Board recognized that the safety of the intersection was Commissioner Murphy's overriding concern. Those issues could not be resolved by simply addressing two of the "general concepts" about which the Commissioner wrote. Instead what is required is "substantial evidence" of the impact that the intersection will have on Falls Road based on empirical data. Again, we stress that the community association was under no obligation to present evidence to rebut the developer's evidence. To the contrary, the developer bore the burden of proving that the conditions proposed rendered the intersection safe in the first instance. The developer did not meet this burden. Consequently, we reverse.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. APPELLANT TO PAY THE COSTS.