Circuit Court for Baltimore County
Case No. 03-C-17-007659

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 978

September Term, 2018

TOM GRAUL, ET AL.

v.

RIVERWATCH, LLC, ET AL.

Meredith,*
Leahy,
Beachley,

JJ.

Opinion by Leahy, J.

Filed: November 12, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of the Court, and, after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

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

In this appeal, which arises out of one of the oldest towns in Baltimore County, we explore one of the newest issues in land use and zoning—statutory vesting. The sprawling procedural history of the underlying case is rooted in the 2015 decision of the Board of Appeals of Baltimore County (the "Board") to approve a special exception to allow the appellees, Riverwatch, LLC and Two Farms, Inc. (collectively, "Royal Farms"), to build a fuel service station, convenience store, and carry-out restaurant in Hereford, Maryland. The Sparks-Glencoe Community Planning Council, Tom Graul, Ken Bullen, Jr., and Ruth Mascari (the "Protestants") and the People's Counsel for Baltimore County (collectively, "Appellants"), petitioned for judicial review of the Board's decision to the Circuit Court for Baltimore County. Following a hearing, the court remanded the case to the Board for further proceedings to consider additional evidence.

In the time period between the remand order and the next Board hearing, the Baltimore County Council enacted Bill 56-16, which changed the zoning classification of the subject property. On remand before the Board, Appellants moved to dismiss Royal Farms' petition for a special exception on the basis that the new zoning classification applied and prohibited the fuel service station. The Board denied the motions to dismiss, holding that the former zoning classification applied because Royal Farms had obtained vested development rights by recording a plat in accordance with the provisions of Baltimore County Code ("BCC") § 32-4-264(b)(2) (2009). After holding another hearing to address the issues from the remand order, the Board affirmed its decision to grant the

special exception to Royal Farms.

Protestants and People's Counsel sought judicial review, and during their second sojourn to the circuit court, challenged both the denial of their motions to dismiss and the Board's decision to grant the special exception. The court affirmed the Board's decisions, prompting the timely appeals by Protestants and People's Counsel to this Court.

We consolidate the two questions presented by Protestants, and five by People's Counsel, into the following two issues:[1]

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[1] The questions presented in Protestants' brief are:

> "1. Whether the Board of Appeals erred in denying the motions to dismiss filed by Appellants and concluding that Royal Farms' rights had vested by virtue of its recordation of a plat?
>
> 2. Whether the Board of Appeals erred in granting Royal Farms a special exception for a fuel service station and convenience store/carryout restaurant?"

The questions presented in People's Counsel's brief are:

> "1.A. Does the Bill 56-16 legislative rezoning apply, based on the common law Yorkdale Rule for pending litigation, and did Bill 58-09 lack any explicit intent to alter it?
>
> B. Anyway, does Maryland Declaration of Rights Article 5 effectively prohibit the County Council from alteration of this Maryland common law rule in the absence of authority from the General Assembly?
>
> 2. Furthermore, did the Circuit Court initial remand and effective reversal of the [Board of Appeals] zoning approval effectively invalidate the interim record plat approval and so erase any basis to

(Continued)

1. Did the Board of Appeals err in denying the motions to dismiss filed by Appellants after concluding that Royal Farms' development plan had vested by virtue of its recordation of a plat in accordance with BCC § 32-4-264?

2. Did the Board of Appeals err in granting Royal Farms a special exception for a fuel service station and convenience store?

In addressing these questions, we examine several predicate issues; such as whether "final" zoning approval, including any necessary special exception approval, is a prerequisite to vesting under BCC § 32-4-264. We hold that the Board did not err in denying the motions to dismiss brought by Appellants on the basis that Royal Farms had vested rights. We further hold that the Board did not err in granting a special exception because the Board's determination that there was a "need" for the products and services offered at Royal Farms was not in error and was supported by substantial evidence in the record.

BACKGROUND

A. The Property

Hereford is one of two designated rural villages in Baltimore County. Only eleven of Hereford's 104 buildings were built within the last 25 years, and Protestants claim that 42 of its 104 buildings are in the Maryland Inventory of Historic Properties.

argue for vested rights flowing from such plat approval?

3.A. Did the [Board of Appeals] improperly immunize Royal Farms' record plat approval from scrutiny and accountability and deny procedural due process to the opponents?

B. Was the record plat approval here invalid ab initio because approved irregularly and without supporting analysis and reasoning?"

The Hereford Community Plan, adopted by the Baltimore County Council in 1991, states that "[t]he land use goal for Hereford is to provide for limited appropriate commercial growth in a centralized area that does not exceed environmental constraints." According to the Plan, "[c]ommercial services are to be limited to serving the needs of Hereford residents, the agricultural community, as well as tourists."

Riverwatch, LLC, owns roughly 5.88 acres of land at 118 Mount Carmel Road in the Hereford area of Baltimore County (the "Property"). Originally an unimproved cornfield, the Property has been subdivided into a 3.37-acre lot ("Lot 1") and a 2.51-acre lot ("Lot 2"). The Property is situated on the north side of Mt. Carmel Road between York Road to the east and I-83 to the west. It is located within a Tier IV area under the State's Sustainable Growth and Agricultural Preservation Act of 2012, which means that it is not planned for sewerage service and is zoned to prioritize preservation and conservation. To the east of the Property are several cottage-style houses occupied by residents and businesses. Just to the west, on Mount Carmel Road, is the Hereford Shopping Center, which includes a Graul's Market, the Hereford Pharmacy, and an M&T Bank. Other businesses in the vicinity include an Exxon fuel station, other banks, another pharmacy, and a 7-Eleven.

B. Initial Administrative Proceedings

Riverwatch, LLC and Two Farms, Inc.[2] proposed to build a fuel station,

[2] The Petition for Zoning Hearing listed Two Farms, Inc. as the "Contract Purchaser/Lessee" and Riverwatch, LLC as the "Legal Owners (Petitioners)." (Continued)

convenience store, and carryout restaurant site (collectively, the "Project") on Lot 2. The fuel station, as proposed, would consist of a canopy with six dual-sided fuel dispensers to permit up to 12 cars to pump fuel at the same time.

On December 6, 2013, Royal Farms filed a Petition for Zoning Hearing with the Office of Administrative Law for Baltimore County, requesting: (1) a special hearing for approval of illuminated signage; (2) a special exception to allow, as uses in combination, a fuel service station, a convenience store with a sales area larger than 1,500 square feet, and a carry-out restaurant; and (3) a variance to permit a wall-mounted enterprise sign exceeding the permitted size.[3] At that time, the Property was zoned B.L.-C.R., a Business Local zone in the Commercial, Rural District. Because the Property is outside of the Urban-Rural Demarcation Line ("URDL"), the fuel service station was permitted only by special exception under section 405.2.B.2 of the Baltimore County Zoning Regulations ("BCZR"). A special exception was also required, under BCZR 405.4, for a carry-out restaurant in combination with a fuel service station and, under BCZR section 405.4.E.1, for the proposed convenience store with a sales area larger than 1,500 square feet.

Subsequent site and development plans listed Two Farms, Inc. as the "Developer / Contract Purchaser" and Riverwatch, LLC as the "Owner / Contract Seller."

[3] Royal Farms later amended the petition to seek another variance to allow a front-yard setback exceeding the maximum allowed, contingent on the State Highway Administration's widening of Mount Carmel Road. On July 22, 2014, during the first hearing, Royal Farms presented an amended petition and revised site plan withdrawing the requests for variances for the mounted enterprise sign and front yard setback.

People's Counsel for Baltimore County filed an Entry of Appearance as an interested party to the petition. A hearing on the petition was held before an administrative law judge ("ALJ") in the Office of Administrative Hearings for Baltimore County on January 27, 2014. Two days later, the ALJ granted all of Royal Farms' requests, subject to certain conditions.[4]

On February 18, 2014, Royal Farms filed an application under BCC § 32-4-106 with the Development Review Committee ("DRC"), for limited exemptions from the development review process.[5] Specifically, Royal Farms filed under § 32-4-106 (b)(8) as "[a] minor development that does not exceed a total of three lots[,]" for an exemption from the requirements for a community input meeting and a Hearing Officer's hearing. With the application, Royal Farms submitted copies of a development plan that showed, among other things, the area of the Project site, applicable setbacks and zoning information, and the heights and dimensions of the proposed structures.

In a letter dated March 19, 2014, the Department of Permits Approvals and Inspections ("PAI") adopted the DRC's recommendations that Royal Farms' Project met

[4] The ALJ's "Opinion and Order" contained the standard warning that "Petitioners may apply for appropriate permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition."

[5] In addition to the required approvals for use of the Property under Baltimore County's zoning ordinance, Royal Farms was also required to obtain development plan approval under the development regulations contained in Article 32 of the County Code.

the requirements of a limited exemption under § 32-4-106(b)(8). The letter advised Royal Farms of the documents that they needed to submit to further process the development plan. The letter from PAI constituted a final administrative order and decision.

The Protestants filed timely notices for a de novo appeal to the Board from both the January 29, 2014 ALJ Opinion and Order and the March 19, 2014 PAI approval of the limited exemption. The Board consolidated the appeals and held public hearings on eight days, starting on July 22, 2014 and concluding on March 26, 2015. While the appeals were before the Board, Royal Farms was simultaneously pursuing approval of the development plan by County agencies, including the Department of Environmental Protection and Sustainability ("DEPS").

On October 20, 2015, the Board issued a 67-page Opinion and Order approving the special hearing for illuminated signage; granting the special exception to allow a fuel service station and a convenience store and carry-out restaurant as uses in combination; and granting the limited exemption from the development review process. The Board's decision to grant the special exception was based, in part, on the finding that Royal Farms satisfied its burden of demonstrating a "need" for the Project, as required by BCZR § 259.3.E.

C. Plat is Recorded in Land Records

Several weeks after the Board issued its Opinion and Order, on November 13, 2015, PAI issued final approval of Royal Farms' Store #185 Development Plan (the

"Development Plan"). On the same day, PAI and DEPS approved the plat for the Project (the "Plat"), and Royal Farms recorded the Plat in the land records of Baltimore County. As the Board noted in a later decision in this case, "[i]t is undisputed that neither the Protestants nor People's Counsel appealed the final approval of the [Development] Plan."

D. Proceedings in the Circuit Court

On November 18, 2015, Protestants filed a petition for judicial review in the Circuit Court for Baltimore County and, on March 8, 2016, filed a memorandum in support of their motion requesting that the court reverse the decision of the Board to grant the special exception or, in the alternative, remand the case for another hearing. Specifically, Protestants contended that the Board committed reversible error by actions such as refusing to accept the testimony of their expert witness, Christopher Jakubiak; refusing to accept into evidence a petition signed by members of the community, and; construing narrowly the definition of "need" under BCZR § 259.3.E. The Protestants did not appeal the Board's decision to grant the limited exemption and only appealed the special exception approval.

On June 3, 2016, the parties participated in a hearing in the Circuit Court for Baltimore County. At the end of the hearing, the judge delivered a lengthy oral ruling from the bench, setting forth his findings and remanding the case to the Board. He found that the "Board was manifestly wrong to exclude the testimony of Mr. Jakubiak" and directed the Board to allow his testimony on remand. Next, after reviewing the applicable procedures of the Board of Appeals, along with rulings from the Court of

Appeals instructing that "hearsay is admissible in administrative proceedings," the judge determined that the Board erred in excluding the petition on the ground that it was hearsay.[6]

Finally, the court addressed the issue of whether the Board erred in making its determination of "need" for granting a special exception in a C.R. District[7] under BCZR

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[6] Accordingly, the judge directed that the petition be admitted if the Board, after permitting Protestants to present an authenticating witness, was satisfied of its authenticity. He further noted that Protestants "[would not] have to call 1300 people to authenticate [the petition]," and that the Board could decide how much weight to give the petition.

[7] Section 259.2.A of the BCZR provides the following statement of legislative intent for the C.R. (Commercial, Rural) District:

> 1. The C.R. District is established to provide opportunities for convenience shopping and personal services that are customarily and frequently needed by the rural residential and agricultural population and tourists. It is intended that the C.R. District be applied only to areas where such facilities are not available within a reasonable distance, where sewerage treatment and a potable water supply can be provided without an adverse effect on the environment and neighboring uses, and where public roads are capable of handling the anticipated increase in traffic without adverse impacts on surrounding areas. The commercial centers within C.R. Districts are not intended to be regional facilities providing specialty goods to a population outside of the rural area.
>
> 2. C.R. Districts may be assigned to areas of commercial development beyond the urban-rural demarcation line for which C.R. District designation is recommended in the Master Plan. The underlying zone may be B.L., B.M., B.R. or R-O. The C.R. District may also be applied to land zoned R.C.5 which is adjacent to a C.R. District, provided that the location, configuration and physical characteristics of the site and the potential for access to an adequate public road make the land suitable for commercial development.

§ 259.3.E(1).[8] Deferring to the Board's decision on how much weight to give the testimony of each party's expert witnesses, he found that there was substantial evidence in the record to support the Board's findings of supply and demand in relation to whether the Project was needed. However, the court noted the Board's failure to consider duplication of services as one of the criteria for "need," and stated that "under the law it should have been considered." To conclude, the judge announced,

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[8] Section 259.3 of the BCZR contains special regulations for C.R. Districts, and subsection 259.3.E details the additional requirements for granting a special exception in the C.R. District:

> In addition to the requirements generally imposed in the issuance of special exceptions by Section 502.1, the following requirements shall apply to the granting of special exceptions in C.R. Districts:
>
> 1. ***The petitioner shall document the need for the development at the proposed location***.
> 2. The proposed development shall take into account existing and proposed roads, topography, existing vegetation, soil types and the configuration of the site. The proposed development . . . will minimize disturbance to vegetated areas, wetlands and streams . . . Infiltration will be maximized and stormwater management discharge will be decentralized.
> 3. Architecturally or historically significant buildings and their settings shall be preserved and integrated into the site plan.
> 4. The buildings shall be sited to protect scenic views from public roads and so that the natural rural features, including but not limited to pastures, croplands, meadows and trees, are preserved to the extent possible. Additional open space may be required to preserve and enhance the enjoyment of the natural amenities and visual quality of the site.
> 5. The proposed development will not be detrimental to neighboring uses and the tranquility of the rural area through excessive noise and will not result in a nuisance or air pollution from dust, fumes, vapors, gases and odors.

(Emphasis added).

> I don't know that this is going to change the Board's decision, and I'm not reversing the decision. I'm only remanding this to consider the evidence and after they consider the evidence, the Board can decide the case possibly the same way. . . . [A]nd I'm not directing how it should be decided only that this evidence, this additional evidence, should be considered.

Subsequently, the court issued an order remanding the case to the Board for further proceedings for the purposes of allowing the expert witness testimony; receiving the petition into evidence upon satisfactory authentication; and considering the "duplication or availability of services and products in the area" in evaluating whether there is a need for the Project.

E. On Remand to the Board of Appeals

1. Downzoning

In September 2015, during the public filing period for the 2016 Comprehensive Zoning Map Process (CZMP), Protestant Ken Bullen had filed an application requesting a change in the zoning classification of the Property from B.L.- C.R. to R.C.C. (Resource Conservation – Commercial). The County Council concluded the 2016 CZMP on August 30, 2016, when it called for a final reading and vote on the CZMP bills for each of the seven Council Districts. The Council considered Mr. Bullen's request as part of Bill 56-16, the Comprehensive Zoning Map for the Third District. The requested change from B.L.- C.R. to R.C.C. was not included in the recommendations of the Planning Board, but, during the August 30 meeting, the councilman for the Third District moved to add the change and the motion passed unanimously. Significantly, the R.C.C. zone does not permit fuel service stations as of right or by special exception, though it does permit, on a

smaller scale and subject to restrictions, convenience stores and carry-out restaurants as of right under BCZR §§ 1A06.2-3.

2. Motion to Dismiss

In September 2016, People's Counsel sent a letter informing the Board of the rezoning and requesting the Board to dismiss the case. The letter stated, in relevant part:

> In view of the [c]ircuit [c]ourt's June 8, 2016 remand of the [Board's] prior approval of the zoning petition, there is no doubt that the new zoning classification controls and supersedes the zoning upon which the petition depends and is premised. This is especially true here, where the Court remand negated the [Board's] approval.
>
> The case law is longstanding and consistent that new zoning legislation applies generally to pending litigation. **Generally speaking, there can be no vested rights until there is absolutely final court approval. Such new legislation applies retroactively unless the legislation explicitly has a prospective provision.** As with every such Baltimore County CZMP enactment, Bill 56-16 has no such prospective provision.

(Emphasis added).

The Board heard argument on the issue raised in People's Counsel's letter on October 6, 2016, the date set for a hearing on remand from the circuit court. People's Counsel, later joined by Protestants, moved to dismiss the proceedings as forecast in the October 6 letter, arguing that the rezoning barred Royal Farms from further pursuing the special exception.

Royal Farms countered that, pursuant to BCC § 32-4-264, the Development Plan vested when Royal Farms recorded the Plat well prior to the rezoning. Thus, according to Royal Farms, they were entitled to continue to pursue the special exception under the B.L.-C.R. zone and laws in effect at the time the Development Plan approval was

obtained and the Plat was recorded.

3. Board Decides Vesting Issue

On November 7, 2016, the Board accepted legal memoranda from each party, and on December 6, the Board held a public deliberation. The Board's "Ruling on Motion to Dismiss" was issued on March 10, 2017.

The Board framed the issue before it as "whether Royal Farms obtained vested development rights by recording the Plat in the Land Records for Baltimore County." The Board considered the language of BCC § 32-4-101(ccc) which defines "vesting" as a "protected status conferred on a *Development Plan*" and further instructs that a "vested Development Plan shall proceed in accordance with the approved Plan and the laws in effect at the time Plan approval is obtained." (Emphasis added). Determining next that the subject Development Plan was for a non-residential development, the Board referred to the vesting statute, BCC § 32-4-264, which provides, in relevant part:

> (a) *In general.* A Development Plan vests in accordance with the provisions of this section.
>
> (b) *Non-residential Plan.*
> (1) A non-residential Plan for which a plat is not recorded vests when substantial construction occurs with respect to any portion of the Plan.
> (2) A non-residential Plan for which a plat is recorded vests when plat recordation occurs for any portion of the Plan**.**

The Board reviewed the procedures for approval of a plan and the "sequence of events which must be met before a plat may be submitted to PAI for approval[,]" further noting that "a plat can be recorded the same date that a plan is approved." Accordingly,

the Board determined that both the Development Plan and the Plat complied with all of the requirements for approval, and that "[o]nce the Plat was recorded, Royal Farms acquired vested development rights under BCC, § 32-4-264(b)(2)."

The Board rejected the Protestants and People's Counsel's arguments that the Development Plan should not have been approved because the Board had only issued an initial decision on the special exception on October 20, 2015, and the parties were still within the thirty-day appeal period in the special exception litigation when the County agencies issued final approval of the Plan on November 13, 2015. They argued that the Plan must comply with the zoning laws under BCC § 32-4-114(a) and that there was no zoning basis for the Plan since the special exception litigation was still pending. Because the Plan should not have been approved, Protestants continued, the Plat was a nullity.

The Board noted that "BCC § 32-4-281 (f) [] prohibits the recordation of a plat that is connected to a development plan when the plan is the subject of an appeal to this Board." The Board highlighted that "[i]t is undisputed that neither the Protestants nor People's Counsel appealed the approval of the Plan," and "[t]here is a critical distinction between the appeal of the special exception for the fuel service station and the appeal of a development plan." Consequently, the Board determined that it did not have jurisdiction to consider whether the Plan "should have been approved; should have been approved with conditions; or should have been disapproved."

The Board explained that "the BCC permit[ed] Royal Farms to simultaneously and separately pursue the special exception case and the Plan approval." The Board

"acknowledge[d] that the special exception status may ultimately be denied since it is still subject to appeal[,]" but still posited that "the BCC does not prohibit a developer from making a business decision to expend costs obtaining plan and plat approval before obtaining zoning approval."

Agreeing with People's Counsel that the "*Yorkdale* Rule" applied, the Board quoted the rule from that seminal case, highlighting the language it found to be determinative:

> A change in the law after a decision below and before final decision by the appellate Court will be applied by that Court <u>unless vested or accrued substantive rights would be disturbed</u> or <u>unless the legislature shows a contrary intent.</u>

Yorkdale Corp. v. Powell, 237 Md. 121, 124 (1964) (emphasis added by Board). Looking to the legislative history of BCC § 32-4-264, the Board found evidence of the "County Council's intent to change the way vesting is accomplished – from building permits and substantial construction to plat recordation." Starting with the statutory language, the Board observed that in Bill 58-09, "the County Council expressed its unequivocal intent to change the process for vesting by use of the words 'supersedes' and 'abrogates[.]'"

After tracking the development of the Council's codification of vested rights, the Board concluded:

> In summary, Bill 58-09 reveals that plat recordation is the operative, watershed event as to whether a development plan would ever vest[.] The County Council made clear that if a plat is not recorded, a development plan only vests if there is substantial construction. BCC[] § 32-4-264(b)(1).

> Conversely, if the plat is recorded, a non-residential plat vests upon recordation.

The Board concluded, "[w]ith regard to People's Counsel's argument that general common law vesting principles apply here, we find the legislative history shows a deliberate intent by the County Council to move away from vesting by building permits for every development plan, and to require substantial construction only in the specified situation."

The Board then distinguished *Powell v. Calvert County*, 368 Md. 400 (2002), and *Antwerpen v. Baltimore County*, 163 Md. App. 194 (2005), on which People's Counsel relied. The Board distilled the significance of those cases to be that, "when vesting is claimed *as a result of the very zoning relief which is being sought*, then rights will not vest until the final approval of the special exception or special hearing is granted." (Emphasis in original.) By contrast, in Royal Farms' case, "vesting [wa]s not claimed as a result of th[e] Board's initial grant of the special exception relief for Royal Farms' fuel service station, carryout restaurant or convenience store." Instead, "vesting [wa]s claimed by virtue of a statute that specifically dictates the moment in time when vesting of a plan will occur."

Having ruled that once the Plat was recorded, Royal Farms acquired vested development rights under § 32-4-264(b)(2), the Board denied People's Counsel's motion to dismiss.

4. Hearing on Remand

The Board held a hearing on the issues remanded from the circuit court on March

27, 2017 and, on July of 2017, issued an "Opinion After Remand From Circuit Court and Order" reaffirming its prior Opinion and Order dated October 20, 2015. The Board first determined "that the testimony of [Mr. Jakubiak] has been assigned no weight." The circuit court had found that Mr. Jakubiak "testified to a level of knowledge and experience that demonstrated a sufficient level of expertise and special knowledge to assist [the Board] as triers of fact." Though the Board, as directed by the Remand Order, accepted Mr. Jakubiak as an expert, the Board "unanimously agree[d] that Mr. Jakubiak's testimony, and the exhibits he provided, did not persuade the Board to change any of the factual findings or decisions contained in [the] Opinion and Order." The Board also stated that "none of Mr. Jakubiak's testimony assisted the Board in understanding any issue that [it] did not already understand."

The Board next determined "that the Petition signed by members of the community . . . was admitted into evidence and has been assigned no weight[.]" The Board again asserted that the petition was hearsay because it "was offered for the truth of the matter asserted; i.e. that the Royal Farms was not needed because 1,283 citizens from Hereford were against the Plan." According to the Board, the petition "[was] not appropriate evidence for the Board to consider, even if 'need' for the proposed store/station is a factor for the Board to consider[,]" because "[the] Board – unlike legislators – does not represent the voters of Baltimore County, nor should [the] Board ever make a decision based on popular vote." Further, the Board said that "admitting this type of evidence eliminates the ability of the other party to cross examine the signers[,]"

which then "eliminates the Board's ability to judge the credibility of the signers[;] to assess their understanding of the Plan[;] to verify their age of majority[;] to judge their competency, intent, motive(s), bias, relationship to the Protestants, relationship to the person conduction the Petition drive(s) and/or coercion, if any." Though the Board stated that the petition was "admitted without authentication by the alleged signers[,]" the Board ultimately concluded that "the only way to assign weight to [the] Petition per the Remand Order [was] for the Board to scrutinize each signature for genuineness, duplication, address location, correctness, completeness, and age of majority." After excluding all but 352 signatures, the Board determined that the remaining signatures did not change its conclusion about "need."

Lastly, the Board stated that it "considered the issue of duplication or availability of services and products in the area in making [its] determination of whether there is a 'need' for the proposed development . . . and found, based on the evidence, that the products and services offered and sold by Royal Farms are neither duplicated nor available in the area and therefore, the Royal Farms . . . is 'needed' in the area." In its Opinion, however, the Board stated that "[it] still [found] that the duplication of services is not a criteri[on] for determining whether a use is 'needed.'" Nevertheless, the Board was "persuaded by the evidence produced by Royal Farms, that the products and services sold [by] Royal Farms are not available or otherwise duplicated in Hereford."

F. Further Proceedings in the Circuit Court

Protestants and People's Counsel filed petitions for judicial review in the circuit

court challenging the Board's determination that Royal Farms' rights had vested. Both parties, citing *Yorkdale Corp. v. Powell*, 237 Md. 121 (1964), asserted, as they did before the Board, that although statutes are generally presumed to apply prospectively, in the zoning context, statutes that impact land use issues are applied retrospectively, unless the statute states otherwise. Because Bill 56-16 did not say that the downzoning on August 30, 2016 was to apply prospectively, they reasoned that the rezoning applied retroactively to preclude the Royal Farms Project. Quoting *Powell v. Calvert County*, 368 Md. 400, 409 (2002), Protestants urged that "[u]ntil all necessary approvals, including all final court approvals, are obtained, nothing can vest or even begin to vest[.]" Consequently, they claimed Royal Farms' Development Plan had not vested prior to the downzoning on August 30, 2016 because litigation was ongoing. The parties maintained, in light of the "rule" that "statutes are presumed not to alter or repeal common law," that BCC § 32-4-264(b)(2) did not alter or supersede the "common law principles" set forth in *Yorkdale* and *Powell*.

The parties also perceived various deficiencies in the plat approval and recordation process and argued that, as a result, Royal Farms' attempt to vest by recording a plat was ineffectual or invalid. Finally, both Protestants and People's Counsel asserted that the circuit court's remand extinguished any zoning approval that Royal Farms may have obtained.

Protestants further challenged the Board's decision on the merits that Royal Farms was entitled to a special exception and to a limited exemption under the development

regulations.

A hearing on Protestants and People's Counsel's challenges took place in the circuit court on April 13, 2018. On June 18, 2018, the court issued an Opinion and Order affirming the Board's denial of the motion to dismiss and affirming the prior orders of the Board granting the petition for special exception. The court found that Royal Farms obtained vested rights under BCC § 32-4-264(b)(2) by recording the Plat. Because Royal Farms was not claiming vested rights under the common law, the court distinguished *Powell* and *Yorkdale* and concluded that "[o]btaining a final special exception is not a precondition to vesting under BCC § 32-4-264(b)(2)."

The court addressed the arguments challenging the Plat approval and recordation, beginning with Protestants' argument that because an appeal was pending before the Board, BCC § 32-4-281(f)(1) prohibited plat recordation. The court determined this argument had no merit because there was no appeal pending regarding the Development Plan, as required by BCC § 32-4-281(f)(1). The court also disagreed with People's Counsel's and Protestants' arguments that they were denied due process because the Plat was not approved in accordance with the requirements of BCC § 32-4-274. The court concluded that Royal Farms *was* required to obtain a special exception before recording a plat, and, contrary to the assertions of Protestants and People's Counsel, Royal Farms *did* have a special exception before the Development Plan was submitted for approval and the Plat was recorded. Furthermore, the court explained that by remanding the Board's decision for consideration of further evidence, the court had not reversed, vacated, or

modified the special exception. Finally, on the merits of the special exception case, the court determined that the Board followed the court's remand instructions on all three issues.

Protestants and People's Counsel timely noted their appeals to this Court.

DISCUSSION

Standard of Review

The scope of judicial review of agency action is narrow. *United Parcel Serv., Inc. v. People's Counsel for Balt. Cty.*, 336 Md. 569, 576 (1994). In reviewing the final decision of an administrative agency such as the Board of Appeals, the appellate court "looks through the circuit court's . . . decision[], although applying the same standards of review, and evaluates the decision of the agency." *People's Counsel for Balt. Cty. v. Surina*, 400 Md. 662, 681 (2007) (citations omitted). "The applicable level of judicial scrutiny depends often on the nature of the agency's process and/or action[.]" *Kor-Ko Ltd. v. Md. Dep't of the Env't*, 451 Md. 401, 409 (2017). Generally, "[a] court's role 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." *United Parcel*, 336 Md. at 577.

In matters involving purely discretionary decisions, particularly those involving "areas within that agency's particular realm of expertise," the appellate court "may not substitute its judgment for the administrative agency's . . . so long as the agency's determination is based on 'substantial evidence.'" *Surina*, 400 Md. at 681 (citations

omitted). The appellate court inquires whether the agency's determination "was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and quotation marks omitted).

When reviewing the legal conclusions of an administrative agency, the appellate court is less deferential and "may reverse those decisions where the legal conclusions reached by that body are based on an erroneous interpretation or application of the zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute." *Id.* at 682 (citations omitted). Appellate courts should, however, "give 'considerable weight' to 'an administrative agency's interpretation and application of the statute which the agency administers.'" *Bd. of Liquor License Comm'rs for Balt. City v. Kougl*, 451 Md. 507, 514 (2017) (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 572 (2005)). Similarly, if the agency's decision involves "interpret[ation of] ordinances and regulations the agency itself promulgated[,]" the appellate court should accord a degree of deference to the position of the agency. *Surina*, 400 Md. at 682 (citation omitted).

In *Layton v. Howard County Board of Appeals*, the Court of Appeals addressed the following question:

> Whether one who challenges a decision of a zoning board may have, as Petitioners here seek, (a) the benefit of a legislated change in the basis of a decision of the zoning board and (b) demand application on judicial appeal of the 'new law'?

399 Md. 36, 38 (2007). The petitioners in *Layton* filed a petition for judicial review in the Circuit Court for Howard County after the Board of Appeals denied their request for

an exception to operate an exotic wildlife sanctuary. *Id.* at 40, 44. Before any hearing took place before the circuit court, Howard County amended pertinent provisions of its Code. *Id.* at 44. Petitioners incorporated the change in law into their arguments before the circuit court, contending that the provisions should be retrospectively applied to their petition for the exception. *Id.* at 46. The circuit court declined to accept petitioner's argument, and this Court affirmed the decision. *Id.* at 46-48.

The Court of Appeals noted that the case did not turn on the Board's initial disposition of the case, as the Board made its determination pursuant to the Code in effect at the time. *Id.* at 50. Instead, the question of "whether the Circuit Court should have retrospectively applied (or remanded the case for the Board to consider) the changed Code" was "purely one of law" and thus was subject to de novo review. *Id.* at 50-51 (citing *Nesbit v. GEICO*, 382 Md. 65, 72 (2004) ("When the trial court's order 'involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a de novo standard of review.'") (citation omitted)). In this case, the question regarding the new zoning and vesting of rights similarly involves "an interpretation and application of Maryland statutory and case law[.]" *Nesbit*, 382 Md. at 72. Unlike in *Layton*, however, the issue was first presented to the Board, and then in circuit court. Therefore, in reviewing whether the Board erred in its determination that Royal Farms obtained vested rights, we give appropriate deference to the Board's interpretation and application of the statutes it administers.

I.

ROYAL FARMS' DEVELOPMENT PLAN VESTED WHEN THE PLAT WAS RECORDED IN ACCORDANCE WITH BCC § 32-4-264

A. Applicable Law: Vested Rights in Zoning

The vesting issue in this case implicates common law and statutory construction principles. We begin with a brief overview of the applicable laws before we zoom in on the issues presented.

1. Prospective and Retrospective Application

A retrospective[9] statute is one that "operate[s] on transactions which have occurred or rights and obligations which existed before passage of the act." *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 57 (2011) (citation and quotation mark omitted). Generally, statutes that operate retroactively are disfavored, and therefore, "a statute is presumed to apply prospectively unless there is a 'clear legislative intent to the contrary[.]'" *United Ins. Co. of Am. v. Md. Ins. Admin.*, 450 Md. 1, 28 (2016) (quoting *Langston v. Riffe*, 359 Md. 396, 406 (2000)). *See also John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 146 (2008) ("Generally, the presumption is that statutes operate prospectively unless there is evidence of a contrary intent. We have said that [r]etroactivity, even where permissible, is not favored and is not found, except upon the plainest mandate in the act." (citation and quotation marks omitted)). The

[9] The terms "retroactive" and "retrospective" may be used interchangeably as they have the same meaning in judicial usage. *Langston v. Riffe*, 359 Md. 396, 406 (2000).

presumption in favor of prospectivity "is particularly applicable where the statute adversely affects substantive rights, rather than only altering procedural machinery." *John Deere*, 406 Md. at 146-47 (citation and quotation mark omitted). "Retrospective statutes that abrogate vested rights are unconstitutional generally in Maryland[.]" *Muskin*, 422 Md. at 557.

The Court of Appeals, in *Allstate Insurance Company v. Kim*, summarized the foregoing and established "four basic principles of Maryland law" regarding prospective and retrospective application of statutes:

> (1) statutes are presumed to operate prospectively unless a contrary intent appears; (2) a statute governing procedure or remedy will be applied to cases pending in court when the statute becomes effective; (3) a statute will be given retroactive effect if that is the legislative intent; but (4) *even if intended to apply retroactively, a statute will not be given that effect if it would impair vested rights*, deny due process, or violate the prohibition against *ex post facto* laws.

376 Md. 276, 289 (2003) (emphasis added). Building on these principles, the Court articulated a two-part analysis to apply "[w]hen an issue is raised regarding whether a statute may be given retroactive effect." *Id.* The first step is to determine whether the General Assembly intended for the statute to have retroactive effect:

> That implicates the first and third principles. Applying the presumption of prospectivity, a statute will be found to operate retroactively only when the Legislature "clearly expresses an intent that the statute apply retroactively."

Id. at 289-90 (quoting *Waters v. Montgomery County*, 337 Md. 15, 28 (1994)). Upon concluding that the "Legislature *did* intend for the statute to have retroactive effect," the

next step is to "examine whether such effect would contravene some Constitutional right or prohibition":

> That implicates the second and fourth principles. As we pointed out recently in *Dua v. Comcast Cable,* 370 Md. 604[] (2002), that analysis must take into account both Federal and Maryland provisions, as to which the standards differ.

Id. at 290. The Court of Appeals noted in *John Deere* that, "although [the Court of Appeals] ha[s] clearly established the analysis to be used *when* applying a statute retroactively, [it] has only provided limited analysis of *what* constitutes a retrospective application of a statute." 406 Md. at 147 (emphasis added).

2. Land Use and Zoning Statutes: Retrospective Application "Generally"

In land use and zoning matters, "legislated change of pertinent law, which occurs during the ongoing litigation of a land use or zoning case, generally, shall be retrospectively applied." *Layton v. Howard County Bd. of Appeals*, 399 Md. 36, 38 (2007); *see also Grasslands Plantation, Inc. v. Frizz-King Enters., LLC*, 410 Md. 191, 220 (2009). The rule traces back to *Yorkdale v. Powell*, in which the Court of Appeals explained:

> an applicant for zoning to a more intense use of his property, who has been successful before the zoning authorities and the circuit court does not acquire a vested or substantive right which may not be wiped out by legislation which takes effect during the pendency in this Court of the appeal from the actions below.

237 Md. 121, 126 (1964). Accordingly, as observed more recently in *McHale v. DCW Dutchship Island, LLC*, the *Yorkdale* Court ruled that "in the context of a zoning or land use matter, [the Court] will apply a substantive change to a statute during the course of

litigation." 415 Md. 145, 160 (2010) (citing *Yorkdale*, 237 Md. at 126-27). The *Yorkdale* Court further noted that its holding was "consistent with decisions in other areas of administrative law," including the "special rule of statutory construction that rights which are of purely statutory origin and have no basis at common law are wiped out when the statutory provision creating them is repealed, regardless of the time of their accrual, *unless the rights concerned are vested*." *Yorkdale*, 237 Md. at 127 (citation omitted) (emphasis added).

"*Yorkdale* and its progeny have never been overruled," so "[t]hey are still good law and are determinative in evaluating whether, in a land use or zoning case, a change in statutory law taking place during the course of a litigated issue should have retrospective application." *Layton*, 399 Md. at 58. The Court of Appeals clarified application of the rule in *McHale v. DCW Dutchship Island, LLC,* when the Court considered whether a recently amended provision of the Critical Area Law, Maryland Code (1973, 2007 Repl. Vol., 2009 Supp.), Natural Resources Article ("NR"), §§ 8-1801-8-1817, applied to a variance application that was filed three and one-half years before the General Assembly amended the statute "and where the object of the application was to cure violations of the Critical Area Law occurring prior to the effective date of the amendment." 415 Md. at 149.[10] The Court affirmed the judgment of the Circuit Court for Anne Arundel County

[10] The amendment at issue required that an applicant must prepare, and the local jurisdiction approve, a "'restoration or mitigation plan . . . to abate the impacts to water quality or natural resources as a result of the violation'" before a local jurisdiction could issue a permit, approval, variance, or special exception in the critical area. *McHale*, 415 (Continued)

and concluded that the amended provision of the statute did not apply retrospectively to the variance application because, upon careful reading of the statute, the General Assembly intended for the amendment to be applied prospectively only. *Id*. at 150, 173. Judge Harrell, writing for the Court, explained:

> Our review of *Yorkdale* and its progeny indicates that, in land use and zoning cases, the general presumption is that, in the absence of contrary legislative intent, a substantive change to the law occurring during the pendency of land use litigation and before any substantive rights vest, is to be applied to the pending litigation matter, i.e., understood therefore to be applied retrospectively to some extent. *Yorkdale,* however, recognized the primacy of the Legislature's intent when determining whether a change to the law applies prospectively or retrospectively. *See Yorkdale,* 237 Md. at 124 [] (**"[A] change in the law after a decision below and before final decision by the appellate Court will be applied by that Court unless vested or accrued substantive rights would be disturbed or *unless the legislature shows a contrary intent.*"**) (emphasis added) (citations omitted). The *Yorkdale* doctrine thus is actually the default rule that we apply where there is no clear legislative intent directing retrospective application. The doctrine does not engage where there is clear legislative intent that the law shall be applied prospectively only.

Id. at 170-71 (italicized emphasis in original, bolded emphasis added). Thus, *McHale* clarifies that, as when the Legislature has expressed an intent that a statute apply prospectively, the "default" *Yorkdale* rule *does not* apply—with equal force—in cases in which "vested or accrued or substantive rights would be disturbed." *Id.*

We turn now to the methods by which a property owner can obtain a vested right and thereby avoid the retrospective application of a change in the zoning classification.

Md. at 154 (quoting NR § 8-1808(c)(4)(ii)). "Because [the applicant] had not prepared or carried out an approved restoration or mitigation plan, McHale alleged in her complaint that the variances granted by the Board of Appeals were null and void by operation of § 8-1808(c)(4), as amended." *Id.*

3. Establishing a Vested Right

i. Common Law Vesting Methods

Historically, "in order to obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use," the owner needed to obtain a valid permit and, in reliance on the valid permit, "make a substantial beginning in construction and in committing the land to the permitted use before the change in the zoning ordinance has occurred." *O'Donnell v. Bassler*, 289 Md. 501, 508 (1981) (citations omitted). *See also Steuart Petroleum Co. v. Bd. of Cty. Comm'rs of St. Mary's Cty.*, 276 Md. 435, 443 (1975) ("A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations." (citation and quotation mark omitted)).

In *Prince George's County v. Sunrise Development Ltd. Partnership*, the Court of Appeals clarified the law of vested rights in the zoning context, noting that "[p]art of the rationale for the test of whether rights have vested is public recognition that the law is being observed or enforced." 330 Md. 297, 314 (1993). The Court reasoned that "[i]f the public could have seen that construction had started before the zoning change, the public can appreciate that the new law is not being violated[,]" but if construction had not

started before the zoning change, the "public will expect the new law to be enforced." *Id.* Accordingly, in addition to the requirement that the work be completed pursuant to a validity issued building permit, the Court held that, "in order for rights to be vested before a change in the law, the work done must be recognizable, on inspection of the property by a reasonable member of the public, as the commencement of construction of a building for a use permitted under the then current zoning." *Id.*

In 2015, we apprised the state of the common law method for obtaining vested rights in Maryland:

> In [*Sunrise Development, Ltd. Partnership*], the Court of Appeals held that rights to continue construction after a change in the zoning law vest when (1) the work done is recognizable by a "reasonable member of the public," and (2) construction commenced pursuant to a building permit for a use then permitted under the zoning law. 330 Md. 297, 314[] (1993). Stated another way, vested rights are acquired when (1) there is actual physical commencement of some "significant and visible construction," (2) the construction was commenced in "good faith," with the intention to complete the construction, and (3) the construction was commenced "pursuant to a validly issued building permit." *Town of Sykesville v. W. Shore Commc'ns, Inc.,* 110 Md. App. 300, 305[] (1996).

Sizemore v. Town of Chesapeake Beach, 225 Md. App. 631, 648 (2015). In addition, we explained that "[o]nce acquired, a vested right in the permit protects the permit holder from changes to the zoning ordinance that would otherwise disallow the use being constructed." *Id. See also Sykesville*, 110 Md. App. at 328 (noting that once a property owner obtains a vested right, the owner's "right to complete and use [a] structure cannot be affected by any subsequent change of the applicable building or zoning regulations"). And just this year, the Court of Appeals summarized, "[w]ith respect to common law

vested rights, this Court has explained that in order to vest rights in an existing zoning use that will be protected against a subsequent change in zoning use, the owner must obtain a valid permit and undertake a substantial beginning in construction before the change in zoning has occurred." *75-80 Properties, L.L.C. v. Rale, Inc.*, 470 Md. 598, 640 (2020) (citing *Sunrise Dev. Ltd.*, 330 Md. at 307–08).[11]

ii. Statutory Vesting Methods

Vested rights in zoning litigation has, in large part, centered on what constitutes "substantial" construction or expenditures. 4 American Law of Zoning § 32:2 (5th ed.) (database updated April 2020). "The case-by-case, equitable determinations of vested rights and estoppel are difficult to reconcile and result in great uncertainty, particularly for the development community." Land Use Planning and Development Regulation Law ("LUPDRL") § 5:30 (3d.ed). Developers and banks are less likely to make substantial investments in planning when it is possible that no rights will vest in a proposed development, so "it is helpful for the developer to know exactly when his rights will vest in the proposed or begun development." 4 American Law of Zoning § 32:9 (5th ed.)

[11] The vested rights rule as articulated in these Maryland cases aligns with the "general majority rule [] that a vested right exists when a building permit has been issued by the municipality, substantial construction or expenditures in reliance on the building permit are in evidence, and the landowner acted in good faith." 4 American Law of Zoning § 32:2 (5th ed.). *See also* Land Use Planning and Development Regulation Law ("LUPDRL") § 5:28 (3d ed.) ("Under the majority rule to acquire a vested right a developer must (1) show substantial expenditures, obligations, or harm (2) incurred in good faith reliance (3) on a validly issued building permit."). In other words, the common law majority rule requires landowners to show "substantial reliance on a validly issued permit" and to "make expenditures in good faith." LUPDRL, § 5:28.

(database updated April 2020). Accordingly, as observed by Professor Patricia Salkin, "[s]everal states are moving to earlier vesting from the majority requirement of a building permit." *Id.*, § 32:9. *See also id.*, § 32:2 ("[M]any states, either by common law or legislation, are relaxing the requirements of the landowner and letting rights vest earlier in the development process."); LUPDRL, § 5:30 ("[S]ome courts have changed the common law rule to be more developer protective. Legislatures also increasingly have stepped into the fray to pass statutes that enhance developer rights.").

The Maryland General Assembly addressed the vesting issue during the 1995 session when it adopted legislation that authorized certain local governments to enter into Development Rights and Responsibilities Agreements (DRRA) with persons having an interest in real property. *See* 1995 Md. Laws, ch. 562 (H.B. 700). The General Assembly defined a DRRA as "an agreement made between a governmental body of a jurisdiction and a person having a legal or equitable interest in real property for the purpose of establishing conditions under which development may proceed for a specified time."[12] *Id.* The Act included a "freeze provision," which stated that "the laws, rules, regulations, and policies governing the use, density, or intensity of the real property subject to the agreement shall be the laws, rules, regulations, and policies in force *at the time the*

[12] The provisions governing DRRAs are now codified in Maryland Code (2012, 2015 Supp.), Land Use Article ("LU"), §§ 7-301 to 7-306. The current definition for DRRA is: "an agreement between a local governing body and a person having a legal or equitable interest in real property to establish conditions under which development may proceed for a specified time." LU § 7-301(b). The term "local governing body" means "the legislative body, the local executive, or other elected governmental body that has zoning powers under this division." LU § 7-301(c).

parties execute the agreement." *Id.* (emphasis added); *see also Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 277 (2017) ("[O]ne of the key aspects of a DRRA is controlled by the "freeze provision" of the DRRA statute [] which permits parties to agree to freeze certain laws, rules, regulations, and policies as of the time of the execution of the DRRA."). In addition, the Act instructed that "except to the extent affected by a development rights and responsibilities agreement, this Act is not intended to otherwise abrogate Maryland common law." 1995 Md. Laws, ch. 562 (H.B. 700).

Local ordinances that address the vesting of development rights, such as the BCC provision at issue here, have also become more common, although we have not found a reported opinion in Maryland that directly examines how such an ordinance applies against the common law rule. Other jurisdictions have viewed statutory vesting methods as providing an alternative to the common law vesting methods. *See generally* LUPDRL, § 5:30 ("Generally, statutory vested rights laws do not abrogate the common law rule, which remains an alternative argument for one who does not gain protection from the statute."). In North Carolina, for example, there are "two methods for a landowner to establish a vested right in a zoning ordinance: (1) qualify with relevant statutes …; or (2) qualify under the common law[.]"[13] *Browning-Ferris Indus. Of S. Atl., Inc. v. Guilford Cty. Bd. of Adjustment*, 484 S.E.2d 411, 414 (1997).

[13] The North Carolina Court of Appeals characterized the common law vested rights doctrine as a "constitutional limitation" on the state's police powers. *Browning-Ferris Indus.*, 484 S.E.2d at 415. Maryland's appellate courts have similarly noted that the doctrine of vested rights "has a constitutional foundation." *Prince George's Cty. v.*
(Continued)

Fortunately, we need not speculate here because BCC § 32-4-264 clearly establishes that recordation of an approved plat for a non-residential development plan is an alternative to the common law vesting of development rights in Baltimore County.

4. Vesting Provisions of the Baltimore County Code

i. Roads to Nowhere Lead to Bill 58-09

In Baltimore County, before 2009, vesting under the BCC was governed primarily by § 32-4-273(d), which provided for the lapse of subdivision plats according to specified time limits, if the subdivision, section, or parcel had not been developed as provided. The predecessor to § 32-4-273(d), added by Bill 56-82 during the 1982 session of the County Council, provided that a subdivision, section, or parcel was considered developed if building permits had been issued *or* if substantial construction on required public or private improvements had occurred. Following the 2006 Supplement to the 2003 BCC, § 32-4-273(d) provided that a subdivision, section, or parcel was considered vested if a building permit had been issued *and* substantial construction had occurred, as confirmed by inspection by the county. Thus, prior to 2009, § 32-4-273 served as a partial codification of the common law vesting rule as articulated in cases such as *Sunrise* and *O'Donnell*.

Equitable Tr. Co., 44 Md. App. 272, 278 (1979*). See also Md. Reclamation Associates, Inc. v. Harford County*, 382 Md. 348, 360 (2004) ("It is the vested rights doctrine itself that allows a landowner to raise[] issues of constitutional protections.").

Then, on July 6, 2009, the Baltimore County Council enacted Bill 58-09, which amended various development provisions of the BCC and first introduced § 32-4-264 "Vesting of Development Plans." The Fiscal Note contained the observation that, following the effects of the economic downturn on the residential construction industry, "[b]uilders and lenders in particular want[ed] greater certainty regarding the concept of vesting." Baltimore County Council, Fiscal Note for Bill 58-09 (August, 2009). The Fiscal Note explained the "vesting" concern that the bill intended to address:

> Once a plan is approved and a plat is recorded for a residential subdivision, building may proceed in accordance with the plan and the plat and with the law in effect at the time of plan approval. However, laws and zoning classifications change. If a subdivision does not "vest", changes that occur to the law and the zoning after plan approval may affect the ability to build out in accordance with the laws and zoning in effect when the plan was approved.

Id. The Fiscal Note highlighted the issues with the vesting caused by the County's development laws, including the incentive to "construct phantom roads to nowhere":

> In practice, builders obtain an approved development plan, and then attempt to vest. The concept of vesting, as applied in Baltimore County, traditionally has meant that the development plan, once vested, is forever protected from any future changes in the law, including future zoning changes. This is not what the County development laws have ever provided or intended. Since a plat expires 8 years after plan approval, it is not possible to "forever" vest. Yet, in practice, this is what has been permitted.
>
> As a result of this practice, many builders attempt to artificially "vest" by needlessly clearing land, building crusher run roads, or digging sewer lines, not because they are ready to build the project to completion, but simply to protect their options forever.
>
> With the economic downturn, lenders are now forcing builders to vest so that the security for the loan is protected. So instead of a lot remaining in its original state, awaiting an upturn in the economy, the builder is required to construct phantom roads to nowhere.

Id. The goal of Bill 58-09, was not to "increase development or relax the rules for developers"; rather, the bill aimed to "[p]rovide security to the lending and building community as to how a project 'vests';" "[a]void the artificial disturbing of the land in order to 'vest';" and "[r]equire adherence to all future laws – including future downzonings – after expiration of the vesting period*[.]" Id.*

On August 3, 2009, the County Council passed Bill 58-09, repealing § 32-4-273 and adding the statute at issue in this appeal, § 32-4-264.

ii. BCC § 32-4-264

The vesting of development plans in Baltimore County is now governed by BCC § 32-4-264, which provides, in relevant part:

1. *In general.* A Development Plan vests in accordance with the provisions of this section.

2. *Non-residential Plan.*
   a. A non-residential Plan for which a plat is not recorded vests when substantial construction occurs with respect to any portion of the Plan.
   b. A non-residential Plan for which a plat is recorded vests when plat recordation occurs for any portion of the Plan.

3. *Residential Development Plan.*
   a. A residential Development Plan for which a plat is not recorded vests when substantial construction occurs with respect to any portion of the Plan.
   b. A residential Development Plan for which a plat is recorded vests when plat recordation occurs for any lot, tract, section or parcel thereof.

4. *Limitation on vesting.* Unless an extension has been granted under § 32-4-274, construction relating to a vested **residential** Development

> Plan that occurs more than 9 years after the Plan was granted final, non-appealable approval shall comply with all laws in effect at the time permits are issued unless the Development received growth allocation under Title 9 of this article in which case construction related to a vested residential Development Plan must occur within the latter of 15 years after: (1) the plan was granted final, non-appealable approval, or (2) the effective date of Bill No. 58-09.[14]

(Emphasis added). The definitions under BCC § 32-4-101 for "vested" and "non-residential plan" (also modified in 2009) are:

> (ccc) *Vested.* The term "vested" or "vesting" is a protected status conferred on a Development Plan. **A vested Development Plan shall proceed in accordance with the approved Plan and the laws in effect at the time Plan approval is obtained.** A property owner, developer or applicant obtains vested rights for a Development Plan in accordance with § 32-4-264 of this title.
>
> (ddd) *Non-residential Plan.* "Non-residential Plan" means a Plan of Development in which the dominant element of the Plan is (1) a commercial development, (2) an industrial development, or (3) a senior housing, assisted living, life care, continuing care or elderly housing facility, church, school, or other institutional use.

(Emphasis added).

By recording the plat for a development plan, a property owner demonstrates to the public that the plan complies with the zoning regulations and has received the requisite approvals. Accordingly, the process for obtaining vested rights under BCC § 32-4-264 aligns with the reasoning from *Sunrise Development Ltd.* that "[p]art of the

[14] As explained in the Fiscal Note: "If the plan vests, neither it nor the plat (if required) expires. However, with respect to a residential development plan, the vested status may expire." Baltimore County Council, Fiscal Note for Bill 58-09 (emphasis in original).

rationale for the test of whether rights have vested is public recognition that the law is being observed or enforced." 330 Md. 297, 314 (1993).

B. Vesting During "Ongoing Litigation"

1. The Parties' Contentions

According to Protestants, "[i]f, during litigation, there is a change in law, that new law applies because there can be no vesting of rights while litigation is ongoing." Under what Protestants label the "*Yorkdale* Rule" or the "Ongoing Litigation Rule," "to the extent any rights are created during litigation, they are merely inchoate and remain subject to changes in the law." Indeed, Protestants continue, "[i]t is a rule of law based on the fundamental principle that zoning rights cannot vest (under any method) until all litigation is completed." In support, Protestants rely on the following "rule" from *Powell v. Calvert County*:

> In instances where there is ongoing litigation, there is no different "rule of vested rights" for special exceptions and the like. Until all necessary approvals, including all final court approvals, are obtained, nothing can vest or even begin to vest. Additionally, even after final court approval is reached, additional actions must sometimes be taken in order for rights to vest.

368 Md. 400, 409 (2002).

Protestants contend that BCC § 32-4-264 "did not abrogate the ongoing litigation rule" so any attempt by Royal Farms to vest pursuant to the statute would be ineffective while litigation was ongoing. In Protestants' view, "the common law applies to any and all County statutes unless there is 'clear and unambiguous' language or legislative history indicating the Council intended otherwise. Here, there is none." Similarly, People's

Counsel argues that nothing in the text of Bill 58-09 repeals or alters the common law principles from *Yorkdale*.[15]

Protestants assert that "[w]hen the zoning was changed on August 30, 2016, Royal Farms still did not have a final special exception because litigation was still ongoing."

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[15] People's Counsel makes an additional argument that Article 5 of the Maryland Declaration of Rights prohibits the County from altering the common law principles in the absence of authority from the General Assembly. Royal Farms asserts that this argument has not been preserved for review because People's Counsel did not raise this argument before the Board or the circuit court.

Our cases recognize a narrow "constitutional exception" to the administrative exhaustion requirement. *See YIM, LLC v. Tuzeer*, 211 Md. App. 1, 49 (2013). Judicial determination without administrative exhaustion is permitted for "attack[s] made to the constitutionality of the statute as a whole and not merely as to how the statute has been applied." *Goldstein v. Time–Out Family Amusement*, 301 Md. 583, 590 (1984). People's Counsel's argument falls within the "constitutional exception," and thus was not waived *before the circuit court* by a failure to raise it before the Board, because People's Counsel challenges the County's authority to pass Bill 58-09, not merely the application of it in this case. *See United Ins. Co. of Am. v. Md. Ins. Admin.*, 450 Md. 1, 36 (2016) ("[W]hen challenging the statute as a whole, an aggrieved party may proceed immediately to the court to seek a declaratory judgment or equitable remedy, regardless of the availability of an administrative remedy, because the 'sole contention raised in the court action is based on a facial attack on the constitutionality of the governmental action.'" (quoting *Ehrlich v. Perez*, 394 Md. 691, 700 n.6 (2006)). However, because the issue was not raised before the circuit court, it is not preserved for consideration in this appeal. This Court "ordinarily" will not decide an "issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). In addition, even when a constitutional issue is properly raised and decided by the circuit court, "this Court will not reach the constitutional issue if it is unnecessary to do so." *Robinson v. State*, 404 Md. 208, 217 (2008) (citation omitted). "In light of this strong policy against reaching a constitutional issue unnecessarily, this Court has normally exercised its discretion to decide a constitutional issue, not raised below, only when the issue falls within a well-established exception to Rule 8-131(a), such as a jurisdictional matter." *Id.* at 218 (quoting *Burch v. United Cable Tel. of Balt. Ltd. P'ship*, 391 Md. 687, 696 (2006)).

People's Counsel's constitutional argument, raised for the first time on appeal, does not involve a jurisdictional issue or another exception to Maryland Rule 8-131(a). Therefore, we will not consider it.

Without a "final" special exception, Protestants continue, "Royal Farms' recordation of a plat on November 13, 2015 . . . was ineffective to fully vest any rights[.]" Again, relying on *Powell*, Protestants conclude that "Royal Farms did not obtain a vested right because it 'never obtained a final, valid special exception, as [it] did not obtain a special exception that was free of all pending litigation."

Royal Farms contends that "the 'ongoing litigation' rule is part and parcel of the common law method of vesting" and "simply does not apply in this case" because Royal Farms acquired vested rights pursuant to the local vesting statute. Assuming that the "rule" did apply, Royal Farms continues, "there was no ongoing litigation at the time of plat recordation that could suspend the vesting of Royal Farms'[s] rights."

2. Analysis

Appellants misconstrue *Yorkdale* and its progeny. In *Yorkdale*, the Court of Appeals instructed that "*unless vested or accrued substantive rights would be disturbed*" "a change in the law after a decision below and before final decision by the appellate Court will be applied by that Court." *Yorkdale*, 237 Md. at 124 (emphasis added). Appellants claim the vested rights qualification articulated in *Yorkdale* does not apply in this case and train their argument on the Court's more recent statement in *Powell* that, "a special exception approval, whose validity is being litigated, is not finally valid until all litigation concerning the special exception is final. Persons proceeding under it prior to finality are not 'vesting' rights; they are commencing at 'their own risk' so that they will be required to undo what they have done if they ultimately fail in the litigation process."

368 Md. at 410. Appellants miss the mark.

To begin with, the facts in *Powell* are fundamentally different from the facts in this case. In *Powell*, the Calvert County Board of Appeals granted a landowner a special exception to store certain materials, and his neighbors sought judicial review in the circuit court. *Id.* at 402. After the circuit court affirmed the Board's decision, the neighbors filed an appeal with this Court. *Id.* at 404. While the appeal was pending, Calvert County amended its Zoning Ordinance to repeal the section under which the landowner had obtained approval of his special exception. *Id.* at 405. Our predecessors, in an unreported opinion, instructed the circuit court to *vacate* the Board's decision and remand to the Board for further proceedings. *Id.* The Board decided to grant the special exception on remand, so the neighbors again sought judicial review. *Id.* at 406. The circuit court "found that although there was a change to the Zoning Ordinance so that a special exception could not have been granted, [the landowner] had obtained a vested right which protected him from the intervening change in the Zoning Ordinance." *Id.* The case eventually reached the Court of Appeals. *Id.* at 407.

The Court of Appeals held that the landowner "never obtained a final valid exception prior to the change in the law and, therefore, never obtained a vested right." *Id.* at 410. The critical distinction between *Powell* and the instant case is that the landowner in *Powell* relied on the very special exception that was being challenged in the ongoing litigation for the right to store his materials. He never attained a vested right under the common law to store his materials, however, as the Court observed that "[a]t no time was

[the landowner] proceeding under a 'valid permit.'" *Id.* at 415. Rather, "[h]e started out storing his materials unlawfully and he never obtained a special exception clear of litigation that would have allowed him to store his materials under a valid special exception. Therefore, he never satisfied the criteria for a vested right." *Id.* at 416. The Court instructed, "we have held that a vested right does not come into being until the completion of any litigation ***involving the zoning ordinance from which the vested right is claimed to have originated.***" *Id.* at 412 (emphasis added).

Royal Farms does not claim its vested rights originated under the common law rule or in the special exception that was granted under BCZR § 259.3. Royal Farms claims that its rights in the prior zoning laws that applied to its Development Plan, including the right to a special exception, vested because pursuant to BCC § 32-4-264 it obtained Development Plan approval and then recorded the Plat in the land records. The text of BCC § 32-4-264(b)(1) specifies that recordation of a non-residential development plat is an alternative to the common law requirement of substantial construction to obtain vested rights in a development plan.

We conclude that the underlying special exception litigation does not involve the ordinance "from which the vested right is claimed to have originated." *Powell,* 368 Md. at 412. Before we can declare that the *Yorkdale* "ongoing litigation" rule does not apply in this case, however, we must decide whether the Development Plan had vested when the Plat was recorded in accordance with BCC § 32-4-264.

C. Various Challenges to Royal Farms' Vested Rights

Appellants claim Royal Farms did not obtain vested rights on several additional grounds that, in many respects, overlap each other. First, Appellants urge that an approved special exception for the Project was required before Royal Farms could obtain vested rights through approval of the Development Plan and Plat and recordation of the Plat. Next, they contend that Royal Farms lacked "final, valid zoning approval" for the Project because when the Plat was recorded, the Board "had only just issued its ruling and the appeal period had not yet expired." Protestants also point to BCC § 32-4-281(f)(1), which states that "a plat may not be recorded while an appeal is pending before the Board of Appeals," and assert the special exception case was still "pending" before the Board prior to November 18, 2015 (when the petition for judicial review was filed) because it was subject to the Board's revisory power. Even though Appellants did not appeal the Development Plan approval, they claim Royal Farms and PAI failed to comply with various procedures in the development plan and plat approval process. People's Counsel adds that "there was no effective public notice for development plan and record plat approval" for the Project. Finally, Protestants argue that the circuit court's remand order rendered the special exception only provisional; while People's Counsel asserts that Royal Farms' zoning approval was "invalidated" by the court's June 2016 order and that, "[g]iven remand of the initial approval, there was not any basis for vested rights."

1. Special Exception Approval

Protestants argue that Royal Farms did not obtain any vested rights by recording

the Plat because Royal Farms lacked zoning approval at the time of recordation. Protestants note the "distinction and relationship between 'development' and 'zoning'": "in order for land to be *developed* under the development regulations, the property owner must **first** have *zoning* approval, *i.e.*, the right to use the property for the intended purpose." (Emphasis in original). Protestants assert that development approval must precede plat approval and recordation, and that a plat is a "nullity" if it is recorded without zoning approval. They claim Royal Farms lacked "final, valid zoning approval for the development it proposed" when it recorded the Plat because the Board "had only just issued its ruling and the appeal period had not yet expired."

People's Counsel asserts similar arguments. People's Counsel points to § 32-4-104(b), which provides that "[p]roposed development shall be in compliance with the present zoning classification on the property to be developed." People's Counsel then offers the following "algebra[] and logic[]":

(1) A fuel service station was permitted by special exception in the B.L.-C.R. Zone/District outside the URDL, but not at all in the R.C.C. Zone.
(2) It is required that a development comply with zoning law.
(3) To complete development approval, a developer must obtain not only development plan approval, but also record plat approval.

People's Counsel concludes that it "was thus necessary for Royal Farms to have special exception approval lawfully in place [] to have or retain valid development plan and record plat approval" and thereby obtain vested rights.

Royal Farms counters that no provision of the BCC or BCZR makes special exception approval a prerequisite to development plan approval or plat recordation, and,

thus, special exception approval is not a prerequisite to vesting under § 32-4-264. Citing to provisions of the development subtitle of the BCC, Royal Farms asserts that "vesting by plat recordation is not contingent upon prior special exception approval." Royal Farms emphasizes that "zoning" and "development" are "distinct land use processes" that are addressed in separate administrative proceedings and governed by separate provisions of the BCC. Royal Farms asserts that the requirement from § 32-4-104(b) that a proposed development comply with the present zoning classification was satisfied because the zoning classification was B.L.-C.R. at the time the Plat was recorded, and § 32-4-104(b) "does not require that any needed special exception be approved before a Development Plan is approved."

The parties do not dispute that, if Royal Farms has vested rights in the application of the B.L.-C.R. zoning classification, Royal Farms needs an approved special exception to build the convenience store, carryout restaurant, and fuel service station. The parties clearly disagree, however, as to whether Royal Farms needed the approved special exception before it could obtain vested rights through approval of the Development Plan and Plat and recordation of the Plat.

The Court of Appeals has described zoning regulations and subdivision controls as "regulat[ing] different aspects of the land use regulatory continuum." *Surina*, 400 Md. at 688 (citations omitted). "While zoning laws define the uses that are permitted in a particular zoning district, . . . subdivision regulations inform how, when, and under what circumstances a particular tract may be developed." *Id.* at 689 (citing *Remes v.*

Montgomery Cty., 387 Md. 52, 74 (2005)). Though "zoning laws and subdivision regulations are separate forms of regulation, and typically are administered by different governmental agencies or bodies, they operate in practical application to ensure that land in a particular locality is developed in a relatively uniform and consistent manner."[16] *Id.* at 690.

Because of the complementary nature of the two areas of regulation, "all proposed subdivision developments must comply with the applicable zoning ordinances in effect at the time the subdivision is proposed." *Id.* at 691-92 (citing BCC §§ 32-4-104 and § 32-4-114(a); *Wesley Chapel Bluemount Ass'n v. Baltimore Cty.*, 347 Md. 125, 129 (1997)). Stated differently, a property owner's ability to obtain approval of a development plan hinges on the property owner's compliance with zoning regulations. As explained in the American Law of Zoning:

> While the zoning power and authority to review plats are separate, it seems clear that plats should not be approved which violate existing zoning regulations. There is little to be said for approving a plat, for example, which discloses substandard lots. Such an approval would be a disservice to the developer who would be unable to build on the lots, and it would

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[16] In support of its argument that the Development Plan could be approved without approval of a special exception, Royal Farms notes "zoning" and "development" are "distinct land uses processes" that are addressed in separate administrative proceedings and governed by separate provisions of the BCC. In *Surina*, the Court made the same observation that zoning laws and subdivision regulations are administered by different governmental agencies and addressed in separate regulations. 400 Md. at 690. Contrary to Royal Farms' contention, however, the separate proceedings and provisions do not divide completely the two processes. Rather, as explained in *Surina*, the processes complement each other as proposed development must comply with any applicable zoning ordinances. *See id.* at 689-90.

> encourage deviation from those portions of the comprehensive plan which are implemented by the zoning regulations in issue.

4 American Law of Zoning § 31:24.

We followed this reasoning in *Miller v. Forty West Builders*, when we held that because the appellee's proposed subdivision plan, which had been reviewed under the Development Regulations of Baltimore County, "did not satisfy the applicable zoning requirements, the [County Review Group's] action in approving the plan was not in conformance with law." 62 Md. App. 320, 339 (1985). We noted that the "case arose within the context of approval of a subdivision plan, under the Development Review and Approval Process of the Development Regulations of Baltimore County[,]" but found that "[a]pproval by the [County Review Group] will necessarily entail review of and compliance with the applicable zoning regulations." *Id.* at 333. Accordingly, we "reverse[d] and remand[ed] the case to the circuit court with directions to reverse the determination made by the Board to approve the plan." *Id.* at 339.

When considered together with the principle that a development complies with zoning regulations when the use is permitted either as of right or by special exception, *see Surina*, 400 Md. at 688, *Miller* can be read to require compliance with zoning regulations, including obtaining approval of any necessary special exceptions, before a development plan can be approved.[17] The plain language of the Baltimore County Code, examined in

[17] During Oral Argument, Royal Farms cited *Miller* to support its argument that an approved special exception is not a requirement for development or subdivision approval. Royal Farms contended that its Development Plan complied with the zoning
(Continued)

both *Surina* and *Miller*, supports this interpretation.

The BCC defines "development" as including "[t]he improvement of property for any purpose involving building" and "[t]he subdivision of property[;]" and defines "development plan" as "a written and graphic representation of a proposed development[.]" BCC §§ 32-4-101(p), (q). Section 32-4-104(b) requires that proposed development "be *in compliance* with the present zoning classification on the property to be developed." (Emphasis added). The circuit court in this case reasoned,

> BCC § 32-4-104(b) does not mean merely that the development comply with the zoning regulations when it is ultimately built as Royal Farms argues. Rather, the "proposed development" must be "in compliance" with the zoning classification. To be "in compliance" with the present zoning classification, if a special exception is required, it must be approved for the proposed development.

Sections 32-4-221 through 32-4-224 set forth filing requirements and the required information for development plans. The required background information for development plans includes "[c]urrent zoning of the property and surrounding properties," and "[p]etitions for variances, special exceptions, [and] special hearings[.]" BCC §§ 32-4-222(a)(6), (9). While, as Royal Farms notes, BCC § 32-4-222(a) does not specify that the development plan contain approval of these petitions, we note that BCC § 32-4-225(a) instructs that PAI shall accept a development plan for filing only if the plan

classification because the proposed use was permitted by way of special exception, even assuming the special exception was not fully in place. We do not agree, and read *Miller*, instead, to require compliance with the applicable zoning regulations, *Miller*, 62 Md. App. at 333-335; which in this case, required approval of the special exception *before* the Development Plan could be validly be approved.

contains the required information *and* "[*c*]*omplies* with other related laws, regulations, or policies[.]" (Emphasis added).

Regarding the procedure for plats, for any subdivision, applicants must prepare a plat in accordance with the approved development plan. BCC § 32-4-271(a). The BCC defines "plat" as "the graphic representation of a development prepared in accordance with the approved Development Plan for the purpose of recording in the land records of the county." BCC § 32-4-101(kk). Section 32-4-272(a)(1) provides that applicants may submit a plat to PAI *after* development plan approval, again underscoring the fact that development plan approval is required before a property owner may validly submit a plat for filing. Applicants may only record a plat that has been "unanimously approved by the Directors of Permits, Approvals and Inspections and Environmental Protection and Sustainability" and has the approvals "noted on the plat." BCC § 32-4-272(d). *See also* BCC § 32-4-109(a) ("A person may not offer and the Clerk of the Circuit Court may not accept a plat for recording in the plat records of the county unless the plat has been approved for recording as required by this title."). "If a plat that has not been approved is recorded, the recording shall be considered a nullity." BCC § 32-4-109(b).

We conclude that compliance with applicable zoning regulations is a prerequisite to filing a development plan for approval under the Baltimore County Code. This interpretation is consistent with the Court's statement in *Surina* that "all proposed subdivision developments must comply with the applicable zoning ordinances in effect *at the time the subdivision is proposed*." 400 Md. at 691-92 (citation omitted) (emphasis

added). In this case, Royal Farms needed a special exception for the Project in order to comply with the B.L.-C.R. zoning classification, *before* it could submit the Development Plan and Plat for approval, and then record the approved Plat.

The record in this case establishes that the Board granted Royal Farms a special exception to allow a fuel service station and a convenience store and carry-out restaurant as uses in combination on October 20, 2015. Royal Farms had the zoning approvals that were required before it received PAI approval of the Development Plan and then recorded the Plat on November 13, 2015. Appellants do not point us to any provision of the Code that required Royal Farms to wait until the time that Appellants had to file an appeal from the Board's approval of the special exception expired before they could pursue approval of their Development Plan and Plat. But regardless, even if the decision by the PAI to approve the Development Plan was premature, "or should have been approved with conditions; or should have been disapproved[,]" for the reasons explained in further detail in our discussion below, we agree with the Board's determination that, because the Appellants abandoned their appeal of the limited exemption, and there was never an appeal from the final approval of the Development Plan, the Board did not have jurisdiction to decide whether "the County agencies did something wrong and the Plan should not have been approved." We further note that simply because Royal Farms' rights in the prior zoning vested at the time the Plat was recorded, Appellants' right to challenge the special exception, under the prior zoning, was preserved when Appellants

filed a timely appeal from that decision.[18]

2. No "pending appeal" Before Board

Protestants assert that an appeal was still "pending" on November 13, 2015, when Royal Farms obtained approval of the Development Plan and then recorded the Plat, "because the 30-day period for filing a [petition for judicial review in] the [c]ircuit [c]ourt had not expired," and because "[Protestants] had not yet filed their [petition], and until they did, the Board retained jurisdiction of the case." Protestants also point to BCC § 32-4-281(f)(1), which states that "a plat may not be recorded in connection with a Development Plan that is the subject of the appeal." Protestants contend that the special exception case was still "pending" before the Board, prior to the petition for review filed in the circuit court, because it was subject to further consideration by the Board through a motion for reconsideration, and subject to the exercise of the Board's revisory powers. Protestants claim the Board erred in reading BCC § 32-4-281(f)(1) to apply only to appeals to the Board from a decision on the development plan itself. People's Counsel adds that the Board "made the sophistic excuse that the Plan appeal case was not before them and they lacked jurisdiction." People's Counsel urges that the Express Powers Act and County Charter give the Board "plenary review over agency approvals, originally or on review, of every agency approval."

[18] In its Ruling on the Motion to Dismiss, the Board noted, after determining that it did not have jurisdiction to consider Appellants' challenge to the Development Plan, that "the BCC permits Royal Farms to simultaneously and separately pursue the special exception case and the Plan approval. We acknowledge that the special exception status may ultimately be denied since it is still subject to appeal."

Royal Farms asserts that "[w]hether a case remains 'pending' for decision by the Board and whether a party has time to seek judicial review (or move for reconsideration …) after a decision by the Board are two very different inquiries." (Emphasis in original). Royal Farms argues that even if an appeal from the special exception case was "pending" when the Plat was recorded, that appeal did not trigger BCC § 32-4-281(f)(1) because Protestants chose not to appeal the approval of the Development Plan and thus it was never the "subject of the appeal."

In construing statutes, we do not "analyze statutory language in a vacuum. Rather, statutory language must be viewed within the context of the statutory scheme to which it belongs[.]" *Johnson v. Md. Dep't of Health*, 470 Md. 648, 674 (2020) (citations and quotation marks omitted). Section 32-4-281 of the Baltimore County Code sets out the procedure by which "[a] person aggrieved or feeling aggrieved by final action on a Development Plan" may appeal to the Board of Appeals. As defined in § 32-4-101(t), "final action" on a Development Plan is "[t]he approval of a Development Plan as submitted; . . . [t]he approval of a Development Plan with conditions; or . . . [t]he disapproval of a Development Plan by the Hearing Officer[.]" Pursuant to § 32-4-281(b), the person may file a notice of appeal with the Board and with PAI "within 30 days after the date of the final decision of the Hearing Officer." Section 32-4-281(f)(1) provides a restriction on issuing permits and recording plats during the appeal process: "*While an appeal is pending before the Board of Appeals*, a permit may not be issued and a plat may not be recorded in connection with a *Development Plan that is the subject of the appeal*."

(Emphasis added). Reading BCC § 32-4-281 in its entirety, the statute provides an avenue of appeal—for persons "aggrieved or feeling aggrieved by final action *on a* ***Development Plan****"—to "***the Board of Appeals*** *and the Department of Permits, Approvals and Inspections* within 30 days after the date *of the final decision of the Hearing Officer*." BCC § 32-4-281(b)(1) (emphasis added).

Appellants' appeal of the special exception proceeded under an entirely separate process under the BCZR from the final decision of the PAI approving the Development Plan under subdivision regulations. As the Board pointed out in its Ruling on the Motion to Dismiss, "[t]here is a critical distinction between the appeal of the special exception for the fuel service station and the appeal of a development plan." Consequently, Appellants' argument that the appeal of the special exception qualifies as an "appeal" that was "pending before the Board of Appeals" in "connection with a Development Plan that is the subject of the appeal" under BCC 32-4-281(f)(1) is not supported by a plain reading of the statutory scheme in this case. Moreover, Appellants' argument ignores the procedural history in the underlying case whereby Appellants abandoned the procedural path to a "pending appeal" under BCC 32-4-281(f)(1).

Let us recall that Royal Farms filed under § 32-4-106 (b)(8) as "[a] minor development that does not exceed a total of three lots[,]" for an exemption from the requirements for a community input meeting and a Hearing Officer's hearing on the Development Plan. In a letter dated March 19, 2014, the PAI adopted the DRC's recommendations that Royal Farms' Project met the requirements of a limited exemption

under § 32-4-106(b)(8) as a "[a] minor development that does not exceed a total of three lots." The letter from PAI constituted a final administrative order and decision, from which Protestants could, and did, file a Notice of Appeal to the Board on April 11, 2014. As we noted earlier, Protestants filed de novo appeals to the Board from both the Special Exception and the PAI approval of the limited exemption. After the Board affirmed the Hearing Officer's grant of the limited exemption, the *Protestants elected to appeal only the approval of the Special Exception to the circuit court*. As a result, Royal Farms pursued the approval of its Development Plan under a limited exception, "exempt from the community input meeting and the Hearing Officer's hearing[.]" BCC § 32-4-106(b). In short, there was no "pending appeal" relating to the Development Plan because Protestants declined to continue their challenge to the limited exemption. Accordingly, the restriction contained in subsection (f)(1)—that prohibits the recording of a plat or issuance of a building permit "*in connection with a Development Plan that is the subject of the appeal*—was not triggered.

We agree with the Board's determination that there was no appeal pending before the Board, within the meaning of BCC § 32-4-281(f)(1), on November 13, 2015 when Royal Farms recorded the Plat.[19]

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[19] Appellants also raise several arguments about the validity of Royal Farms' submission and recordation of the Plat. Primarily, the Appellants assert that Royal Farms did not comply with certain procedural requirements, including those set forth in § 32-4-272. Protestants point to several "technical violations" to illustrate their point. First, in violation of § 32-4-272(a)(1), "the Plat was submitted to PAI on November 12, 2015, the day *before* the Development Plan was signed and allegedly approved by PAI and DEPS."
(Continued)

3. Notice and Documentation

People's Counsel asserts that "there was no effective public notice for

(Emphasis in original). Second, the Plat and Development Plan were both signed by PAI and DEPS on November 13, 2015, and there is no evidence showing whether, on November 13, 2015, the Plat was signed and approved after the Development Plan, as required by § 32-4-272(a)(2). Finally, Appellants claim there is no evidence showing "whether the stormwater management plans or public works agreements were approved or whether the Directors of PAI and DEPS reviewed the Plat and determined that it conforms with the Development Plan[,]" as required by §§ 32-4-272(b).

Royal Farms asserts that "[a]ll of Appellants' challenges to the Store Plat approval run afoul of BCC § 32-4-272(e), which provides that '[a]ppeal from the plat approval process is prohibited.'"

We agree with Royal Farms that the BCC specifies than an appeal from plat approval is prohibited (and, we have already established that Protestants abandoned their appeal of the Development Plan).

Despite this, we note that Appellants did have an opportunity to raise these contentions before the Board. As the circuit court observed, during the hearing before the Board of Appeals on October 6, 2016, the Board never "prevent[ed] or stop[ped] People's Counsel or [Protestants'] Counsel from presenting evidence, arguing or inquiring into the plan or plat approval process." At the close of the hearing, the Board chairman invited counsel to submit briefs on "[a]ll of the issues that you guys all raised here today[] . . . [w]hatever it is that you feel we need to look at ahead of time."

Accordingly, even if Appellants' challenges were properly before us, we would defer to the factual findings of the Board and reject Appellants' contentions that Royal Farms violated §§ 32-4-272(a)(2) and (b) by failing to offer evidence of compliance. As the Board explained, section 32-4-272(a)(2) does provide that PAI "*may not* approve the plat *until* approval is issued, if required" for specified items, including stormwater management plans, public works agreements, and a "Development Plan, if required by the Baltimore County Zoning Regulations." (Emphasis added). The Board found, however, that "[t]he Plan was approved by representatives of the County agencies[;] [c]onsequently, under BCC § 32-4-272(a)(2), the Plat could be submitted for approval." Indeed, Appellants acknowledged that the Plat and Development Plan had been signed by both PAI and DEPS. Regarding the timing of plat approval, § 32-4-272(c)(1) provides that PAI and DEPS "[w]ithin 10 days after receipt of the plat, . . . shall" approve; disapprove; or, with the consent of the applicant, modify the plat. There is, therefore, no restriction on same-day approval, nor is there a requirement that the applicant provide evidence of the order in which the approvals occurred.

development plan and record plat approvals."[20] More specifically, People's Counsel complains that the Property "was not posted"; "[c]itizens were provided no opportunity to be heard or participate"; and the County approvals occurred "within the space of one working day." In addition, People's Counsel, citing *United Steelworkers v. Bethlehem Steel Corp.*, 298 Md. 665, 673-81 (1984), argues that there is "no County documentation of review or reasoning for their approvals . . . flout[ing] the settled rule that agencies must conduct an intelligent review and articulate the basis and reasoning for approvals."

In turn, Royal Farms emphasizes that the approval of the Development Plan "was not done in secret" because the Board proceedings reveal that all Appellants were aware that the Development Plan was being reviewed by and progressing through Baltimore County Agencies. Royal Farms then cites *People's Counsel for Baltimore County v. Elm Street Development, Inc.*, 172 Md. App. 690, 701-02 (2007) for the proposition that administrative officials need only explain the reasoning for their decisions when it is required by County law. According to Royal Farms, neither the BCC nor BCZR imposes any such requirement.

We reiterate that the Board granted Royal Farms a limited exemption under § 32-4-106(b)(8), so the Project was exempt from the community input meeting and the Hearing Officer's hearing. As the Board found, though there is a "chronological procedure to obtain plat approval," there is no restriction preventing a plat from being

[20] Although People's Counsel's notice and documentation arguments suffer from the same jurisdictional problems as Appellants' other challenges to the Development Plan and Plat, we elect to address them here.

recorded on the same date that a plan is approved. People's Counsel does not refer this Court to any other requirements for public notice or participation in the BCC or elsewhere.

We reject People's Counsel's argument that the County failed to document properly its review and reasoning, in the absence of such a requirement in the applicable law. Though the Court in *United Steelworkers* noted that an agency official failed to document sufficiently his decision and thus his findings were inadequate for judicial review, 298 Md. at 679-80, the case does not represent any "settled rule" that agencies must articulate their reasoning, as suggested by People's Counsel. We have held that "when either the BCZR or the Code requires that the basis of an agency's opinion be set forth, it plainly imposes such a requirement." *Elm St. Dev.*, 172 Md. App. at 702. In *Elm Street Development*, the Court rejected the argument that the Board erred in accepting and relying on recommendations from certain agency directors because the recommendations were "not supported by facts and reasons." *Id.* at 701. We declined to "read a requirement into the BCZR or the Code that the Directors . . . must articulate the 'facts and reasons' underlying their decisions." *Id.* More recently, in *West Montgomery County Citizens Ass'n v. Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission,* we declined to impose a requirement on a county planning board to "restate all facts upon which [the board's determination to approve a preliminary plan] rests" to enable judicial review. __ Md. App. __, __, No. 579, Sept. Term 2019, slip op. at 22 (filed Oct. 29, 2020). "The [p]lanning [b]oard was

required to do no more than determine whether the [p]reliminary [p]lan fulfilled" the statutory requirements. *Id.* at 30.

Here, § 32-4-272(a)(3)(ii) requires "[a]n agency that disapproves an item [to] provide a written statement of the reasons for the disapproval." In addition, § 32-4-272(c)(2) requires the Directors of PAI and DEPS, or their designees, to "notify the applicant in writing of the reasons for modification or disapproval" of a plat. All necessary agencies approved Royal Farms' Plat, so there was no documentation requirement. Section 32-4-272(d) only requires that the unanimous approvals of the Directors of PAI and DEPS be "noted on the plat" before an applicant may record the plat. The record shows that the requisite approvals were noted on the Plat. We cannot find, and People's Counsel does not point to, any other documentation requirements for the plat approval process. As a result, we agree with the circuit court's finding that "[t]here is no requirement that the County document its reasons for approving the plat."

4. Effect of the 2016 Remand Order

Protestants' next contention is that the circuit court's June 2016 order remanding the case back to the Board for further proceedings prevented Royal Farms from having a valid special exception or vested rights in the Development Plan before the zoning of the Property was changed in August 2016.[21] According to Protestants, "[i]n this context, the

[21] Protestants repeat their contentions that "(i) zoning approval was still the subject of ongoing litigation, (ii) an appeal was pending before the Board at the time of the putative recordation of the Plat and therefore such recordation was a nullity, and (iii) Royal Farms did not have zoning approval at the time of the putative recordation." On (Continued)

distinction between a reversal and a remand is an artificial one. A decision subject to further proceedings on remand is not a final decision and affords no rights." Protestants clarify that they do not contend the remand "was actually a reversal" or that it "destroyed" already vested rights; rather, Protestants' argument is that Royal Farms lacked "a valid and final special exception because the case had been remanded and was subject to further consideration and decision by the Board."

People's Counsel asserts that Royal Farms' zoning approval was "invalidated" by the court's June 2016 order and that, "[g]iven remand of the initial approval, there was not any basis for vested rights." The remand order, People's Counsel contends, "judged the 2015 zoning approval as defective and erroneous," requiring the Board to "decide anew if it were persuaded to approve the special exception." People's Counsel views the remand as "functionally equivalent to such an appellate reversal for improper and prejudicial exclusion of evidence" because of the "necessity [] for a new hearing, consideration, and decision." People's Counsel compares the present circumstances to those at play in *O'Donnell v. Bassler*, 298 Md. 501 (1981): "There, the special exception, use permit, and at-risk construction became invalid upon judicial review. Here, it was the special exception and dependent record plat which became invalid." In People's Counsel's view, the situations are "not distinguishable" for "the purpose of the vested

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the basis of those points, Protestants assert, "it does not matter if the [c]ircuit [c]ourt remanded the case or reversed the Board's decision." As we already discussed, however, there was no "ongoing litigation" that triggered the *Yorkdale* Rule, there was no appeal pending before the Board, and Royal Farms did have zoning approval when it recorded the Plat.

rights analysis."

In response, Royal Farms contends that the court "only remanded the matter for the narrow purpose of requiring the Board to consider evidence offered by [a]ppellants" and "expressly did not vacate or reverse the Board's approval of the special exception." The special exception, according to Royal Farms, "has never been 'invalidated' in this litigation."[22]

As we set out above, at the conclusion of the June 2016 hearing in the circuit court, the judge explained that he was remanding the case so that the Board could reconsider certain evidence:

> I don't know that this is going to change the Board's decision, and I'm not reversing the decision. I'm only remanding this to consider the evidence and after they consider the evidence, the Board can decide the case possibly the same way. . . . [A]nd I'm not directing how it should be decided only that this evidence, this additional evidence, should be considered.

As the court explained in its subsequent June 18, 2018 Opinion and Order, it "**did not** modify the Board of Appeals' decision" or "**reverse** the Board's decision." Rather, the court "remanded the case to the Board of Appeals for further proceedings to receive and consider additional evidence."

As stated by the Court of Appeals, "[i]t is a fundamental principle of administrative law that a reviewing court should not substitute its judgment for the

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[22] In further support of its argument that the circuit court's 2016 remand order did not destroy its vested rights, Royal Farms repeats its contention that special exception approval is not a prerequisite to vesting under the BCC. As we explained above, special exception approval is a prerequisite to vesting under the circumstances, and we need not rehash that discussion here.

expertise of the administrative agency from which the appeal is taken." *O'Donnell*, 289 Md. at 509. It follows that,

> if an administrative function remains to be performed after a reviewing court has determined that an administrative agency has made an error of law, the court ordinarily may not modify the agency order. Under such circumstances, the court should remand the matter to the administrative agency without modification.

Id. Moreover, "if an administrative function remains to be performed, a reviewing court may not modify the administrative agency's action even when a statute provides that the court may 'affirm, modify or set aside' because a court may not usurp administrative functions." *Id.* at 510-11.

Appellants argued before the circuit court that *O'Donnell* supported their argument that a judicial remand to the Board invalidated the special exception. In *O'Donnell*, the special exception use permit was held invalid because both the Board of Appeals and the circuit court exceeded their authority in imposing and removing special conditions on the special exception use. *Id.* at 514. "The special exception use permit obtained by the owner was not valid as originally granted by the Board or as modified by the [c]ircuit [c]ourt." *Id.*

In his final Opinion and Order in this case, the circuit court judge distinguished *O'Donnell*:

> The facts in the present case are distinguishable from the facts in *O'Donnell.* This [c]ourt did not modify the Board of Appeals' decision. This [c]ourt expressly did not reverse the Board's decision. . . . This [c]ourt did not set aside or vacate the Board's decision. In contrast to the [c]ircuit [c]ourt in *O'Donnell*, this [c]ourt remanded the case to the Board of Appeals for further proceedings to receive and consider additional

evidence.

We agree that the circuit court judge in this case properly declined to substitute his judgment for the expertise of the Board by remanding the matter without modifying the Board's order. Because the Board's order granting Royal Farms a special exception was not reversed or modified, the subsequent downzoning could not take away Royal Farms' vested right to the Board's consideration, on remand, of the special exception under the B.L.- C.R. zoning requirements in the ongoing special exception litigation.

Conclusion (proper denial of motion to dismiss)

We conclude that Royal Farms had the requisite special exception approval, granted on October 20, 2015, before it obtained approval of the Development Plan and Plat and recorded the Plat on November 13, 2015. Because no appeal from the limited exemption, or, consequently, from approval of the Development Plan was "pending," Royal Farms was not precluded from recording the Plat on November 13, 2015. We further determine that the circuit court's remand order explicitly did not invalidate the special exception.

The text of BCC § 32-4-264(b)(1) specifies that recordation of a non-residential development plat is an alternative to the common law requirement of substantial construction to obtain vested rights in a development plan. Accordingly, although we agree with Appellants that BCC § 32-4-264 does not abrogate the common law, we also agree with the Board and the circuit court that by recording the Plat in 2015, pursuant to BCC § 32-4-264(b)(2), Royal Farms obtained vested rights, and, therefore, the 2016

rezoning does not apply retroactively to the Development Plan. *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145,170–71 (2010).

Because Royal Farms had obtained vested rights in the Development Plan, we further conclude: (1) that the *Yorkdale* "ongoing litigation" rule did not apply in the underlying special exception litigation; and, (2) that the prior B.L.-C.R. zoning applies to the Project in accordance with BCC § 32-4-101(ccc), which provides that a "vested Development Plan shall proceed in accordance with the approved Plan and the laws in effect at the time the Plan approval is obtained." We hold, therefore, that the Board did not err in denying the motions to dismiss brought by Protestants and People's Counsel on the basis that Royal Farms had vested rights in the B.L.-C.R. zoning.

II.

The Special Exception

Protestants challenge the merits of the Board's decision granting Royal Farms a special exception on several grounds. First, Protestants contend that the Board misunderstood the relevance of the petition they presented and erred in giving it no weight. According to Protestants, the Board failed to appreciate that the petition was offered to demonstrate "that there is no 'need' for products and services offered by a Royal Farms." Protestants further assert that the Board did not have authority, following the court's remand, to revisit the issue of whether the petition should be considered by assigning the petition no weight and determining that it was not appropriate evidence. Second, Protestants assert that the Board erred in concluding that there is a "need" for the

products and services offered at Royal Farms. In the Protestants' view, the Board ignored the circuit court's remand ruling on the definition of "need," and urge that the evidence demonstrates that there is no need in Hereford for the products and services sold by Royal Farms.

To the contrary, Royal Farms asserts the Board appreciated the court's remand order in respect to the petition because the Board "made repeated references to the 'need' issue in analyzing the [p]etition." Royal Farms also contends that the Board admitted the petition into evidence without requiring Protestants to produce evidence of admissibility, rather than revisiting the admissibility of the petition as Protestants assert. Finally, Royal Farms maintains that the Board applied the correct standard of "need," and that Royal Farms demonstrated the 'need' for the Project in Hereford.

A particular use complies with the applicable zoning ordinance when it is permitted either as of right or by special exception. As articulated by the Court of Appeals,

> It must be conceded, as a general rule, that, when a zoning ordinance enumerates specifically the permitted uses within a particular zone, the ordinance "establish[es] that the only uses permitted in the [] zone are those designated as uses permitted as of right and uses permitted by special exception. Any use other than those permitted and being carried on as of right or by special exception is prohibited."

People's Counsel for Balt. Cty. v. Surina, 400 Md. 662, 688 (2007) (alteration in original) (quoting *Kowalski v. Lamar*, 25 Md. App. 493, 499 (1975)). The special exception use is a zoning mechanism which allows for "some flexibility in the land use process," by permitting the local legislature to "identif[y] additional uses which may be conditionally

compatible in each zone, but which should not be allowed unless specific statutory standards assuring compatibility are met by the applicant at the time separate approval of the use is sought." *Mayor of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 541 (2002). *See also id.* at 542 (citations omitted) ("Put another way, a special exception use is an additional use which the controlling zoning ordinance states will be allowed in a given zone unless there is showing that the use would have unique adverse [e]ffects on the neighboring properties within the zone."). Special exceptions thus serve as "a 'middle ground between permitted uses and prohibited uses in a particular zone." *Mills v. Godlove*, 200 Md. App. 213, 228 (2011).

As mentioned already, judicial review of the final zoning action of a local administrative body, such as the grant of the special exception in this case, "is narrow." *Montgomery Cty. v. Butler*, 417 Md. 271, 283 (2010). On appeal, "'we look through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluate[] the decision of the agency.'" *Grant v. Cty. Council of Prince George's Cty.*, 465 Md. 496, 509 (2019) (quoting *People's Counsel for Balt. Cty. v. Loyola Coll. in Md.*, 406 Md. 54, 66 (2008)). Following our independent evaluation of the agency's decision, we may fully concur with the well-reasoned decision by the circuit court, as we do in this case, especially when the issues that we are reviewing concern the agency's compliance with the circuit court's remand order.

To briefly review the relevant facts, the circuit court heard Protestants' arguments about the Board's decision to grant Royal Farms a special exception on June 3, 2016. In

his oral ruling and subsequent written order, the judge remanded the matter to the Board with instructions to receive the petition Protestants offered, upon authentication satisfactory to the Board, and give the petition "the weight that the Board considered appropriate"; and to consider the duplication or availability of services and products in the area in determining whether there is a "need" for the Project under BCZR § 259.3.E.1.

A. Weight Given to Petition

In its 37-page "Opinion After Remand From Circuit Court," the Board provided detailed reasons why it decided not to accord any weight to the petition. First, the Board noted that the petition was hearsay because it "was offered for the truth of the matter asserted; i.e. that the Royal Farms was not needed because 1,283 citizens from Hereford were against the Plan." According to the Board, the petition "[was] not appropriate evidence for the Board to consider, even if 'need' for the proposed store/station is a factor for the Board to consider[,]" because "[the] Board – unlike legislators – does not represent the voters of Baltimore County, nor should [the] Board ever make a decision based on popular vote." The Board further explained:

> Even if one of the requirements that must be met under BCZR, §259.3.E.1 in this case is the "Petitioner's obligation to document the need for the development at the proposed location," the Board does not interpret that section as being satisfied by the majority vote among "concerned citizens." It is not the same as a homeowner's association vote or a community association vote. If that were true, then §259.3.E.1 requirement would be reduced to a popularity contest; the party with the most votes would win.
>
> The intended purpose of submitting this Petition was to impress upon the Board that there were 1,283 people from Hereford than those who testified, or would be testifying, who were opposed to the Plan. Mr.

> Jakubiak made this same point when he testified that he saw the Petition and thought it was "worth mentioning" that "1,300 people from the community" did not want the Royal Farms store[.]

The Board also observed that "admitting this type of evidence eliminates the ability of the other party to cross examine the signers[,]" which then "eliminates the Board's ability to judge the credibility of the signers[;] to assess their understanding of the Plan[;] to verify their age of majority[;] to judge their competency, intent, motive(s), bias, relationship to the Protestants, relationship to the person conduction the Petition drive(s) and/or coercion, if any." Though the Board stated that the petition was "admitted without authentication by the alleged signers[,]" the Board ultimately concluded that "the only way to assign weight to [the] Petition per the Remand Order [was] for the Board to scrutinize each signature for genuineness, duplication, address location, correctness, completeness, and age of majority." After excluding all but 352 signatures, the Board determined that the remaining signatures did not change its conclusion about "need."

On petition for review, the circuit court determined that the Board, as fact finder, "can give the Petition the weight it determines it should be given, even if that is no weight." The Court observed:

> The Board of Appeals admitted the Petition into evidence, and reviewed and analyzed the Petition in depth and devoted a significant amount of time and effort in its opinion to discussing the Petition. . . .The Board did consider the Petition on the question of whether the Royal Farms store is needed, not merely that the signatories opposed the store.

We hold that the Board's determination of the weight that it ultimately assigned to the petition signed by members of the community was supported by substantial evidence

in the record. We also conclude that Protestants' claim that the Board failed to appreciate that the petition was offered to demonstrate no 'need' for the Project is not supported by the record.

B. Determination of Need

Section 259.3 of the BCZR contains special regulations for C.R. Districts, and subsection 259.3.E details the additional requirements for granting a special exception in the C.R. District:

> In addition to the requirements generally imposed in the issuance of special exceptions by Section 502.1, the following requirements shall apply to the granting of special exceptions in C.R. Districts:
>
> 1. ***The petitioner shall document the need for the development at the proposed location***.
> 2. The proposed development shall take into account existing and proposed roads, topography, existing vegetation, soil types and the configuration of the site. The proposed development . . . will minimize disturbance to vegetated areas, wetlands and streams . . . Infiltration will be maximized and stormwater management discharge will be decentralized.
> 3. Architecturally or historically significant buildings and their settings shall be preserved and integrated into the site plan.
> 4. The buildings shall be sited to protect scenic views from public roads and so that the natural rural features, including but not limited to pastures, croplands, meadows and trees, are preserved to the extent possible. Additional open space may be required to preserve and enhance the enjoyment of the natural amenities and visual quality of the site.
> 5. The proposed development will not be detrimental to neighboring uses and the tranquility of the rural area through excessive noise and will not result in a nuisance or air pollution from dust, fumes, vapors, gases and odors.

(Emphasis added).[23]

On remand, the Board considered "need" under BCZR § 259.3.E.1 and concluded that, based on the evidence presented by Royal Farms, "the products and services sold b[y] Royal Farms are not available or otherwise duplicated in Hereford." Specifically, the Board "found more persuasive [Royal Farm's expert] opinion that there was an abundant demand for products and services within the 4 mile radius of the Mt. Carmel location." The Board found that "each food item prepared at Royal Farms has an individual taste, a distinctive quality, a specific presentation and price," which "makes the Royal Farms products different than those sold at other places in Hereford." While other restaurants, gas stations, and grocery stores in Hereford sell some of same items offered by Royal Farms, the Board found "the availability and combination of foods

[23] "Special exception factors are applied by the Board against the backdrop of the case law governing special exceptions." *Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC,* 464 Md. 610, 629 (2019). The seminal case in Maryland on special exceptions is *Schultz v. Pritts*, 291 Md. 1 (1981). *See People's Counsel v. Loyola Coll.*, 406 Md. 54, 87-101 (2008) (describing *Schultz* and its progeny). In *Schultz*, the Court summarized the special exception use as follows:

> The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

291 Md. at 11; *see also Loyola*, 406 Md. at 88.

prepared by Royal Farms, plus the selection of grocery and convenience store items, plus the availability of gas, makes the Royal Farms gas station and convenience store 'needed' in Hereford." No other store in Hereford "offer[s] all of the products and services that Royal Farms sells at one place."

The circuit court in its June 18, 2018 Opinion and Order determined that the Board did follow its remand instructions. First, the court noted that the Board "reviewed the evidence and found that food sold at Royal Farms is different and distinctive from food sold at other establishments in the Hereford area." Second, the court noted that there was no other combination of convenience store, gas station, and carry-out restaurant in Hereford. The judge concluded that the Board "did consider the duplication or availability of services and products in the area" and that "there [wa]s substantial evidence in the record to support the Boards' decision."

In making his determinations, the circuit court judge relied on *Neuman v. City of Baltimore*, 251 Md. 92 (1967). In that case, the Board of Municipal and Zoning Appeals in Baltimore City granted a special exception to permit a "general practitioner of medicine, to occupy and use, as a non-resident doctor, an office" in a large apartment building. *Id.* at 93-94. Before the board, neighboring homeowners at the apartment building urged that there was no need for the doctor to have an office at the building because "anybody who need[ed] medical attention c[ould] very easily get it within the immediate neighborhood." *Id.* at 94. The board analyzed its zoning ordinance, which "permit[ted] the office of a non-resident physician where a need is established" and

concluded that "there [wa]s a need for [the doctor] in this area and that the continued use of the premises by him would not be detrimental to the health, safety or welfare of the community nor would it have an adverse effect upon the neighborhood." *Id.* at 95. The circuit court affirmed, and the homeowners appealed and argued, among other things, that the board erred in finding a need for the doctor's services in the area which warranted the special exception. *Id.* at 99. The Court of Appeals determined that "need . . . must be considered as elastic and relative. Clearly, it does not mean absolute necessity. Need has been judicially held to mean 'expedient, reasonably convenient and useful to the public.'" *Id.* at 98-99 (collecting cases). In applying this definition, the Court held "there was enough before the [b]oard . . . to show a population density within a reasonable distance of the [] apartments intense enough to make it expedient, reasonably convenient and useful to the public that a doctor practice from an office there located[.]" *Id.* at 99. *Accord Lucky Stores, Inc. v. Bd. of Appeals of Montgomery Cty.*, 270 Md. 513, 527 (1973) (citing *Neuman*); *Friends of the Ridge v. Balt. Gas & Elec. Co.*, 120 Md. App. 444, 488 (1998) ("The judicial gloss given to the definition of the 'need' requirement in Maryland special exception lore has been that it means 'expedient, reasonably convenient and useful to the public.'" (quoting *Neuman*, 251 Md. at 99.)), *vacated on other grounds*, 352 Md. 645 (1999); *see generally* Sara C. Bronin & Dwight H. Merriam, *Sufficiency and interpretation of standards—Public need, necessity or convenience standards*, 3 Rathkopf's The Law of Zoning and Planning § 61:26 (database updated Sept. 2020).

Applying *Neuman*, the circuit court concluded that "the mere fact that these items can be bought somewhere else in Hereford does not mean there cannot be a need for them to be sold in another store, particularly if they are distinctive, different, and sold in combination with other products and services." We agree. According the Board the appropriate deference due under the law, we hold that the Board's determination that there is a "need" for the products and services offered at Royal Farms was not in error and was supported by substantial evidence in the record.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.