Circuit Court for Prince George's County
Case No. CAL 11-13616

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 107

September Term, 2015

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL

v.

BARNABAS ROAD ASSOCIATES, LLC

Woodward,*
Kehoe,
Leahy,

JJ.

Opinion by Kehoe, J.

Filed: February 15, 2019

* Woodward, J., now retired, participated in the hearing and conference of this case while an active member of this Court. He participated in the decision and the preparation of this opinion after being recalled pursuant to the Article IV, Section 3A of the Constitution of Maryland.

** 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. *See* Md. Rule 1-104.

The County Council of Prince George's County, sitting as the District Council, has appealed from a judgment of the Circuit Court for Prince George's County reversing the Council's decision to deny the application of Barnabas Road Associates, LLC ("Barnabas") for a special exception to operate a concrete recycling facility. The District Council presents three issues, which we have reworded and divided into four:

> (1) Did the circuit court err by: (a) permitting Barnabas to incorporate previously-asserted arguments by reference in its Md. Rule 7-202(a) memorandum, or (b) allowing the parties to submit proposed findings of fact and conclusions of law before it entered judgment?
>
> (2) Do the doctrines of res judicata and law of the case prevent Barnabas from arguing that: (a) the District Council exceeded its authority by engaging in *de novo* factfinding, or (b) the District Council's decision should be reversed because it was not supported by substantial evidence?
>
> (3) Did the District Council properly exercise original, as opposed to appellate, jurisdiction in reviewing the proposed decision of the zoning hearing examiner?
>
> (4) Was the District Council's decision denying Barnabas's application for a special exception supported by substantial evidence?

In our view, the District Council's res judicata and law of the case contentions are unpersuasive. We reach the same conclusion with regard to the Council's contentions of procedural error on the part of the circuit court. On the other hand, we are not persuaded by Barnabas's contention that the District Council can reach a decision that is different from that of the zoning hearing examiner only if it concludes that the hearing examiner's decision was not supported by substantial evidence, affected by legal error, or otherwise arbitrary. However, after reviewing the evidentiary record in light of relevant case law, we

conclude that the District Council's decision is supported by substantial evidence. Therefore, we will reverse the judgment of the circuit court, and remand this case with instructions for the court to enter judgment affirming the District Council's decision.

1. An Abbreviated Statutory Overview

Prince George's County derives its authority to engage in land use regulation from the Maryland-Washington Regional District Act (the "RDA").[1] *Prince George's County v. Zimmer Development*, 444 Md. 490, 524–25 (2015); *County Council of Prince George's County v. Brandywine Enterprises, Inc.*, 350 Md. 339, 342 (1998). The RDA is now codified as Md. Code Ann. (2012), Division II of the Land Use Article ("LU"). Regarding applications for special exceptions, LU § 22-301 states:

> (a)(1) A district council may adopt zoning laws that authorize the board of appeals, the district council, or an administrative office or agency designated by the district council to grant special exceptions and variances to the zoning laws on conditions that are necessary to carry out the purposes of this division.
>
> * * *
>
> (b) Subject to § 22-309 of this subtitle,[2] an appeal from a decision of an administrative office or agency designated under this subtitle shall follow the procedure determined by the district council.

[1] The Maryland-Washington Regional District includes all of Prince George's County "except for the City of Laurel, as its boundaries existed on July 1, 2008." Md. Code Ann., Land Use Article § 20-101(b)(2).

[2] LU § 22-309 establishes the Prince George's County Board of Appeals. The Board plays no role in special exception cases. *See* LU § 22-310(a).

The District Council has enacted such laws, and they are found in Title 27, Part 4 of the Prince George's County Code ("PGCC"). In summary, the responsibility for the review and possible approval of a special exception application is divided between the County Planning Board and the District Council. The Planning Board handles the review process. Its technical staff[3] reviews the application, and submits a proposed recommendation to the Board.[4] The Board holds a public hearing and makes a recommendation to the District Council.

Although the District Council retains the ultimate authority to grant or deny a special exception application,[5] it has delegated the responsibility of conducting evidentiary hearings on special exception applications to the County's zoning hearing examiner.[6] The

[3] "Technical staff" is a term of art in the Zoning Ordinance. It means "[t]he staff of the Prince George's County Planning Board." PGCC § 27-311.

[4] *See* PGCC §§ 27-206 (form and contents of application) and 27-311 (report and recommendation).

[5] *See* PGCC § 27-314 ("The District Council may approve Special Exceptions, in accordance with the requirements of this Subtitle (subject to the delegation of this authority to the Zoning Hearing Examiner in Subdivision 7, above)").

[6] PGCC § 27-312 provides states in pertinent part:

> (a) The Zoning Hearing Examiner shall have the authority to approve or deny an application for Special Exception or variance in accordance with the following:
>
> (1) The Zoning Hearing Examiner shall have all the authority, discretion, and power given the District Council in this Part and in Part 3, Division 5, Subdivision 2, in the absence of a provision to the contrary.

zoning hearing examiner conducts a public hearing on the application, prepares a written decision "containing specific findings of basic facts, conclusions of law, and . . . a recommended disposition of the case[.]" PGCC § 27-127(c). The zoning hearing examiner's decision becomes final unless a party to the proceeding files an appeal to the District Council or the District Council elects to review the decision, a process known as "calling up."[7] *See* PGCC § 27-312(a). Although the District Council considers the case upon the record developed before the zoning hearing examiner, it exercises "original jurisdiction" in its review of the zoning hearing examiner's decision. PGCC § 27-132(f).[8]

> (2) The Zoning Hearing Examiner's decision on an application for Special Exception shall be final thirty (30) days after filing the written decision, except:
>
> (A) Where timely appeal has been made to the District Council pursuant to Section 27-131; [or]
>
> * * *
>
> (C) In any case where, within thirty (30) days after receipt of the Zoning Hearing Examiner's decision, the District Council, upon its own motion and by a majority vote of the full Council, elects to make the final decision on the case itself[.]
>
> * * *

[7] *See County Council of Prince George's County v. FCW Justice*, 238 Md. App. 641, 658–59 (2018).

[8] Section 27-132(f) states:

> (1) In deciding an appeal to the District Council, or Council election to review a decision made by the Zoning Hearing Examiner or the Planning Board, the Council shall exercise original jurisdiction. (2) For any appeal or review of a decision made by the Zoning Hearing Examiner or the Planning

The standards for granting a special exception application are set out in PGCC § 27-317, which states in relevant part:

> (a) A Special Exception may be approved if:
>
> (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
>
> (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
>
> (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
>
> (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
>
> (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood . . . .
>
> * * *

Finally, PGCC § 27-343.03 sets out performance and review standards[9] specific to concrete recycling facilities, which are defined as a "facility that processes concrete

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> Board, the Council may, based on the record, approve, approve with conditions, remand, or deny the application.

[9] Sec. 27-343.03 states in pertinent part:

> (a) A concrete recycling facility may be permitted, subject to the criteria below.
>
> (1) Concrete recycling facility components and other parts of the operation having the potential for generating adverse noise, dust, or vibration impacts shall be located at least three hundred (300) feet from the boundary lines of the subject property adjoining any land in any Residential or Commercial Zone (or land proposed to be used for residential or commercial purposes in a Comprehensive Design, Mixed Use, or Planned Community Zone), and one hundred (100) feet from the boundaries of the subject property adjoining

any land in any Industrial Zone (or land proposed to be used for industrial purposes in a Comprehensive Design, Mixed Use, or Planned Community Zone). Other fixed installations (including automobile parking, settling ponds, and office uses) shall be located at least one hundred (100) feet from the boundaries of the subject property adjoining any land in any Residential Zone (or land proposed to be used for residential purposes in a Comprehensive Design, Mixed Use, or Planned Community Zone).

(2) The site plan and information accompanying the application for Special Exception shall be reproducible, or twelve (12) copies shall be submitted. In addition to the [generally applicable] requirements of [for information to support a special exception application], the site plan and accompanying information shall show:

(A) The components of the concrete recycling facility;

(B) The daily capacity of the facility;

(C) The location of all material stockpiles;

(D) The settling ponds, if any;

(E) The source of water to be used in the operation;

(F) Truck wash-out facilities, if any;

(G) The methods of disposing of waste materials;

(H) The internal traffic circulation system;

(I) The parking and storage areas for all vehicles and equipment; and

(J) The identification of the trucks and heavy equipment to be used in the facility operation.

(3) Driveways for ingress and egress shall be identified on the site plan, and shall be located so as to not endanger pedestrians or create traffic hazards. The applicant shall identify the dust-control measures to be used on the driveways and the interior traffic circulation system. Any ingress or egress driveway shall have a minimum width of twenty-two (22) feet, and shall be paved for a distance of at least two hundred (200) feet from the boundary line of the Special Exception.

(4) In addition . . ., all applications shall be accompanied by the following:

(A) A stormwater concept plan approved pursuant to . . . this Code;

demolition material by crushing to remove reinforcing metals, if any, and to reduce the size of concrete material to a commercially usable size." PGCC § 27-107.01.

2. The Property and the Application

Barnabas owns a 54-acre tract of land in Temple Hills, Maryland (the "Property"). The Property is zoned I-1 (Light Industrial) in a neighborhood that consists of a mix of industrial, commercial, and residential uses. It is located in Master Planning Area 76A ("The Heights and Vicinity").

(B) A preliminary noise assessment;

(C) A horizontal profile illustrating all structures and stockpiles; and

(D) A grading plan that illustrates existing and proposed topography.

(E) A traffic analysis which includes the volume of traffic expected to be generated by the operation and identifies the streets to be used between the site and the nearest other street (to be used) that has a minimum paved width of twenty-four (24) feet for its predominant length.

(b) All information required as part of the Special Exception application shall be referred to the Prince George's County Department of Public Works and Transportation, Prince George's County Soil Conservation District, Washington Suburban Sanitary Commission, Prince George's County Department of Permitting, Inspections, and Enforcement, Maryland State Highway Administration, Maryland State Department of Health and Mental Hygiene, and Maryland State Water Resources Administration for comment. These agencies shall be given forty-five (45) calendar days to reply. A copy of the same information shall also be submitted to the Prince George's County Sand and Gravel Advisory Committee.

* * *

The Property is bounded on the south by the Inner Loop of the Capital Beltway, and on the west by a residential neighborhood that includes a retirement community known as the Manor at Victoria Park. The Victoria Park development is located immediately adjacent to the Property. There is an area of existing commercial and light industrial uses that extends from the northerly boundary of the Property for a distance of about 1,150 feet to St. Barnabas Road. There is a similar commercial and light industrial area to the east of the Property that extends to Beech Road. The dominant physical feature on the Property is a 390-foot high grass-covered mound. The neighborhoods to the north of the St. Barnabas Road corridor and to the east of the Beech Road corridor are residential.

Beginning in the 1950s, the Property was used as a sand and gravel mining facility, together with associated uses, such as a concrete processing plant. Barnabas acquired the Property in 1997. In 1998, an affiliate of Barnabas operated a rubble landfill on the Property. In 2007, Barnabas filed an application for a special exception to use part of the Property (the "Site") as the location for a concrete recycling facility.

The Site is an irregularly-shaped parcel consisting of approximately 13 acres located on the north-easterly corner of the Property. The Site lies to the east of the grass-covered mound that we mentioned previously. Clifton Road provides direct access to the Site from Saint Barnabas Road, a travel distance of about 1100 feet. Stamp Road provides access from the Site to Saint Barnabas Road (again, a travel distance of approximately 1100 feet), and also to Branch Avenue (Maryland Route 5) via Beech Road (a travel distance of about

1.7 miles). Despite its arboreal name, Beech Road serves the commercial and light industrial uses located to the east and north of the Property.

3. The Procedural History of the Application

The application was submitted to the Planning Board's technical staff for evaluation and review. On March 19, 2008, Clara Fenwick, a member of the Board's community planning staff for the southwest portion of Prince George's County, sent a memorandum (the "Planning South Report") to Cynthia Fenton, a member of the Board's Development Review Division. Although the Planning South Report was but the first in a series of evaluations of Barnabas's application by the Board's professional staff, the District Council's decision relies heavily upon it, and so we will describe it in some detail.

Ms. Fenwick stated that Barnabas's development proposal was "not inconsistent" with the County's 2002 General Plan policies for the Developed Tier,[10] and was "in general conformance" with relevant land use recommendations contained The Heights and Vicinity (Area 76A) Master Plan. Nonetheless, Ms. Fenwick noted that she and her colleagues[11]

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[10] *See Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 78 n.4 (2009):

> The General Plan divides the County for planning purposes into three "tiers": the Developed Tier, the Developing Tier, and the Rural Tier. Md.-Nat'l Capital Park and Planning Comm'n, 2002 Approved General Plan 4–5 (2002).

[11] We gather this from Ms. Fenwick's use of the term "we" in her memorandum.

"took issue" with several assertions made by Barnabas in its application as to possible adverse impacts on surrounding uses, truck traffic, and noise and air quality. Specifically, the report stated in pertinent part (emphasis added):

> The applicant believes that this use complies with the criteria set forth in [PGCC] Section 27-317 [standards for granting special exception applications], however we take issue with the following assertions [made by Barnabas in its application]:
>
> 1. The concrete recycling facility will promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development.
>
> > Planning Comment: The proposed use is not in keeping with the existing lighter industrial [uses]. Also, *adjoining industrial and residential areas that are in close proximity may adversely be affected by dust and noise that is generated from this type of business.*
>
> 2. The development will prevent the overcrowding of land.
>
> > Planning Comment: *The plan does not indicate how safe circulation by vehicles and pedestrians will be accomplished.* Nor does it indicate how the trucks will be stacked if several are waiting to be serviced.
>
> 3.Traffic congestion and danger is lessened due to staggered entry time of three to ten minutes.
>
> > Planning Comment: *Consideration should be given to a more definitive safety plan other than an estimate of the time it will take each truck to enter and exit the facility.*
>
> 4. The development will meet all regulations pertaining to noise, water and air quality.
>
> > Planning Comment: The *applicant is not considering the impact of noise and air quality on surrounding properties derived from truck traffic* on route to the recycling facility. Plans to redevelop Saint Barnabas Road have been included in the Branch Avenue Sector Plan and Sectional Map Amendment. *Truck traffic traveling along that route could discourage reinvestment in the area*.

Finally, the report stated (emphasis added):

> A joint public hearing for the Preliminary Branch Avenue Corridor Sector Plan and Proposed Sectional Map Amendment was held by the County Council and Planning Board on January 29, 2008. The vision for St. Barnabas Road is to create a safe, vibrant, and attractive community that encourages residents to walk, shop and socialize at the upgraded commercial areas. Attractive landscaping and streetscape will link the residential neighborhoods to . . . shopping, recreational, and transit. The final County Council action on the plan and its recommendations is anticipated in the summer or fall of 2008.
>
> The Silver Hill Industrial Area is not within the project boundaries of the sector plan; however, the plan acknowledges that the industrial area potentially could have a negative effect on the growth and stability of the adjoining commercial and residential communities. The preliminary plan recommends that the study be conducted of the industrial land uses adjacent to the St. Barnabas commercial corridor for their impact and develop a plan to mitigate the effect of operational uses such as dump trucks ingress and egress, noisy equipment. etc. *It is important to note that the property is situated at the end of Clifton Road (1,150 feet south of St. Barnabas Road). St. Barnabas Road is the only access point which would allow travel [in] any direction from the proposed recycling facility.*
>
> Truck traffic and other heavy equipment that would support a concrete recycling facility would negatively impact the residential, office, and retail uses that are proposed for St. Barnabas Road. Careful attention should be paid not only to the design of the site but also to the impact of the use to the St. Barnabas commercial area and the additional traffic on St. Barnabas Road.

Barnabas addressed the issues flagged in the Planning South Report through a series of engineering studies. These consisted of:

(1) An amended traffic study, which concluded that "the proposed St. Barnabas Concrete Recycling use will not result in any adverse traffic impacts on the surrounding area road network."

(2) An air quality analysis, which concluded that the facility would comply with federal and State environmental requirements as long as Barnabas used certain equipment and techniques, e.g., "atomizing water spray bars to capture fugitive particulate omissions" from plant operations.

(3) A noise impact analysis, which concluded that "noise emissions for the recycling facility will be below the daytime Maryland COMAR standard of 67Dba." The report noted that the concrete recycling facility would have "no significant noise impact" on the Manor at Victoria Park retirement community because of "intervening terrain," and that for properties fronting on Clifton Road, traffic noise from the street itself would exceed noise generated by the recycling facility. Finally, the report suggested that stockpiles of materials to be recycled "can be effectively used" to further attenuate noise. *Id.*

(4) A land planning analysis, which stated that, "if minor technical changes are made to the site plan in accordance with the conditions proposed by the [Board's] Technical Staff, the proposed use . . . will be in conformance with all applicable requirements and regulations in the [Prince George's County] Zoning Ordinance."

Additionally, the Board's technical staff prepared a staff report to the Planning Board. It was originally filed on April 8, 2009, and supplemented by an addendum dated July 14, 2009. Both reports recommended approval of the special exception application subject to conditions. After summarizing the data contained in the report, the technical staff commented:

> The noise analysis has demonstrated that the noise levels at all affected property lines all be well below the state standard . . . for industrial uses and that the predicted noise levels are within or close to those for residential uses. No additional information is needed.

The staff report also stated that the Board's environmental planning section had not reviewed the air quality study but rather sent it to the Maryland Department of the Environment for comment, and that no response from the MDE had been received. Both reports recommended approval of the special exception application. The July 2009 report recommended that approval be subject to 43 conditions. Most of these were technical in nature (for example, amending the site plan to show the location of sediment traps), but several were more substantive. Relevant to some of the issues on appeal, the technical staff recommended:

> If the Class 3 fill and concrete recycling facilities are operated concurrently, the total average daily capacity of the two uses shall not exceed 2,000 tons per day. Once the fill site is no longer operating, the entire 2,000 ton per day average daily capacity shall be applied to the concrete recycling facility.
>
> The proposed development on the site shall be limited to no more than 92 total trips (46 trips in/46 trips out) during the AM peak hour, and 72 total trips (36 trips in/36 trips out) during the PM peak hour, as indicated in the applicant's traffic study. Any expansion or intensification of the concrete recycling use resulting in additional peak hour trips will require revision of the site plan.

Copies of all of these reports were matters of public record and were forwarded to the District Council and the zoning hearing examiner. On June 25, 2009, the zoning hearing examiner completed the evidentiary hearing. Only one witness testified in opposition to the application. The Planning Board then conducted a separate public hearing. At this hearing,

the Technical Staff presented a revised report and recommendation. The revisions reflected information submitted by Barnabas to the zoning hearing examiner, which had not been previously reviewed by the Technical Staff. On September 10, 2009, the Planning Board passed a resolution recommending approval of Barnabas's application subject to a number of conditions. On October 21, 2009, the zoning hearing examiner issued its decision approving the application, subject to the conditions recommended by the Planning Board. (E. 249-265).

On November 9, 2009, the District Council elected to "call up" the zoning hearing examiner's decision. After its public hearing, and responding to concerns that the public notices had not caught the attention of nearby residents and property owners, the Council remanded the case back to the zoning hearing examiner for another hearing "to permit these persons to register as persons of record and to allow them to submit whatever testimony or other evidence or argument they deem appropriate." (E. 229).

Pursuant to the Council's directive, the zoning hearing examiner held another evidentiary hearing. (E. 105). A number of individuals testified in opposition to the special exception application. Barnabas asserts that all of this testimony was irrelevant because it was directed at the existing land use and gravel extraction uses on the Property, and not the merits of Barnabas's application. We will address this contention in part 9.B of this opinion. On April 23, 2010, the zoning hearing examiner issued a second decision, again approving the approving the special exception application. (E. 85-104).

On July 12, 2010, the District Council held a hearing on the zoning hearing examiner's second decision. A member of the District Council requested that the application be remanded to the zoning hearing examiner for another hearing to elicit evidence regarding possible violations of environmental regulations by a company operating on the Property. The District Council issued a second remand order. This prompted Barnabas to file a mandamus action. In it, Barnabas alleged that the remands were nothing more than an attempt to frustrate Barnabas's right to seek judicial review of the District Council's actions. (E. 73). This action was mooted when the District Council issued a decision on April 5, 2011 denying the application.

Barnabas filed an action in the circuit court for judicial review. On June 26, 2012, the circuit court issued its Opinion and Order reversing the District Council's denial of the application. (E. 15-22). The District Council appealed that judgment to this Court, which was captioned as *County Council of Prince George's County, Sitting as the District Council v. Barnabas Road Associates, LLC*, No. 00982, September Term, 2012. In an unreported opinion ("*Barnabas I"*) filed on July 26, 2013, a panel of this Court vacated the judgment of the circuit court and remanded the case to the District Council for it to issue a new decision (we will address *Barnabas I* in greater detail in part 5 of this opinion). The District Council filed a petition for a writ of certiorari, which was denied by the Court of Appeals. *Barnabas Road Associates, LLC vs. County Council of Prince George's County,*

Maryland, Sitting as the District Council, Petition Docket No. 383, September Term, 2013. (Apx. 111).

On January 17, 2014, the circuit court issued an order directing the District Council to render a decision consistent with the *Barnabas I* opinion. On May 13, 2014, the District Council issued a final decision denying Barnabas's application for a second time. The Council reached the following conclusions:

(1) The Council was not persuaded that Barnabas "has shown that the proposed use—concrete recycling at Clifton Road—would be conducted without real detriment to the neighborhood."

(2) Approval of Barnabas's application would "substantially impair the integrity of The Heights and Vicinity Master Plan of 2000 and the Branch Avenue Corridor Sector Plan of 2008" because "[the] proposed concrete recycling at Clifton Road, will . . . create unique adverse effects, effects not to be anticipated elsewhere in the I-1 Zone[.]

(3) The testimony from residents and business operators in the area "directly refuted Barnabas's claims that a concrete recycling plant will not create actual detriment to the neighborhood and adjacent properties[.]"

(4) The testimony demonstrated that the special exception application could be denied because the area already suffers from one noxious use, and "that the existence of one noxious special exception use at a location could preclude another such use."

Barnabas filed another petition for judicial review. The circuit court concluded that there was no substantial evidence in the record that supported the District Council's denial of Barnabas's application, and, as a result, reversed the District Council's decision. Subsequently, the District Council filed this appeal.

4. The Standards of Review

The parties' appellate contentions invoke three modes of appellate decision-making. First, the Council asserts that the doctrines of res judicata and law of the case limit the universe of contentions that Barnabas can present to us regarding the Council's decision. How these two principles of law apply to the current appeal is a legal question that we decide *de novo.* Second, the Council contends that the trial court erred by permitting Barnabas to incorporate arguments by reference in its memorandum filed in the judicial review proceeding, and by accepting proposed findings of facts and conclusions of law from the parties. These are matters for the circuit court's discretion, and we will not disturb the court's rulings absent a clear showing of abuse of discretion.

Finally, in a judicial review proceeding, the issue before an appellate court "is not whether the circuit . . . court erred, but rather whether the administrative agency erred." *Bayly Crossing, LLC v. Consumer Protection Division*, 417 Md. 128, 136 (2010) (citations, internal quotation marks, and brackets omitted). For that reason, we "look through" the circuit court's decision in order to "evaluate the decision of the agency" itself. *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 66 (2008).

Land Use Article § 22-407 authorizes judicial review of land use decisions by the District Council. Subsection (e) of the statute states that:

> The court may:
> (1) affirm the decision of the district council;
> (2) remand the case for further proceedings; or
> (3) reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the district council's action is:
> (i) unconstitutional;
> (ii) in excess of the statutory authority or jurisdiction of the district council;
> (iii) made on unlawful procedure;
> (iv) affected by other error of law;
> (v) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
> (vi) arbitrary or capricious.

In quasi-judicial proceedings, administrative agencies typically perform three functions: (1) making findings of fact; (2) identifying and interpreting the relevant legal standards; and (3) applying the law to the facts. Courts accept an agency's factual findings if they are supported by substantial evidence, that is, if there is relevant evidence in the record that logically supports the agency's factual conclusions. *Bayly Crossing*, 417 Md. at 139. We review the agency's legal conclusions *de novo*. *Id*. at 137. An agency's application of the law to the evidence presents a mixed question of law and fact. If the agency has correctly identified the applicable legal standard, courts of review defer to the agency's application of the law to the facts before it, as long as the findings are supported by substantial evidence. *See Baltimore Lutheran High School Assoc. v. Employment Security Administration*, 302 Md. 649, 662 (1985). Finally, "[a]n agency's decision is to be reviewed in the light most favorable to it and is presumed to be valid." *Assateague*

Coastal Trust v. Schwalbach, 448 Md. 112, 124 (2016) (citation and quotation marks omitted).

5. Res Judicata and Law of the Case

In the present appeal, and among other contentions, Barnabas argues that: (1) the District Council exercised appellate, as opposed to original, jurisdiction when it reviewed the zoning hearing examiner's decision in this case; and (2) the District Council's decision in this case was not supported by substantial evidence. The District Council argues that the doctrines of res judicata and law of the case preclude Barnabas from making either contention. The District Council's analysis is not persuasive.

We begin with some background information. "The doctrine of res judicata bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated *and as to those which could have or should have been raised in the previous litigation*." *Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 106–07 (2005) (emphasis added). The doctrine of law of the case is one application of the principle of res judicata. As the Court of Appeals explained in *Garner v. Archers Glen Partners, Inc.*:

> The law of the case doctrine is one of appellate procedure. . . . Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record . . . such a ruling becomes the "law of the case" and is binding on the litigants and courts alike, unless changed

> or modified after reargument, and neither the question decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal.

405 Md. 43, 55–56 (2008) (quotation marks, brackets, and citations omitted).

Deciding how the law of the case doctrine applies to this appeal requires us to look more closely at what was raised and decided in *Barnabas I.* In that appeal, the District Council presented six issues, which the *Barnabas I* panel distilled into three:

> 1. Was the District Council's decision denying the special exception supported by substantial evidence in the record and free from legal error?
>
> 2. Did the circuit court abuse its discretion in denying [the District Council's] motion to strike the transcripts of oral arguments at the District Council?
>
> 3. Did the circuit court abuse its discretion in denying [the District Council's] motion for remand?

Barnabas I slip op. at 2–3.

In addressing the first issue, the panel decided that the District Council had used an incorrect legal standard in deciding whether Barnabas had met its burden of proof, and, further, as conceded by the District Council at oral argument in that appeal, the Council's decision may have been based in part on irrelevant evidence that was not part of the administrative record. *Id.* at 11–13, 15. The panel stated:

> Accordingly, we conclude the District Council's decision was (a) tainted by an erroneous statement as to the applicable law, and (b) may have relied upon evidence outside of the administrative record. Because the District Council is the final arbiter of zoning decisions, we may not simply review the record and substitute our judgment for that of the District Council. We, therefore, vacate the judgment of the circuit court and remand the case with instructions for that court to vacate the ruling of the District Council and remand the case

> to that body for further proceedings. On remand, the District Council will have the opportunity to apply the correct legal standard and render a decision based solely on the administrative record.

Id. at 15.

The mandate in *Barnabas I* instructed the circuit court to "vacate the ruling of the District Council and remand the case to the District Council for further proceedings not inconsistent with this opinion." *Id.* at 17 (capitalization altered).

Returning to the case before us, the District Council argues that Barnabas could have presented its current argument that there is no legally sufficient evidence in the record to support the Council's *current* decision, in the judicial review proceeding that was brought by Barnabas as a result of the Council's *prior* decision. Without belaboring the point, we hold that Barnabas was not required to present arguments as to deficiencies in the District Council's current decision in the *Barnabas I* proceeding, because the Council's current decision did not exist when *Barnabas I* was decided. *See Reier v. State Dep't of Assessments & Taxation*, 397 Md. 2, 21 (2007) (The law of the case doctrine precludes a party from raising "on the subsequent appeal of the same case any question that could have been presented in the previous appeal *on the then state of the record, as it existed in the court of original jurisdiction*." (emphasis added.)). Moreover, Barnabas could not have raised its argument as to the nature of the District Council's jurisdiction because that argument is based on *Prince George's County v. Zimmer Development*, 444 Md. 490

(2015), and the Court of Appeals filed its opinion in *Zimmer* two years after *Barnabas I* was decided.

6. The District Council's Contentions as to Procedural Errors by the Circuit Court

The District Council next argues that Barnabas impermissibly incorporated by reference the arguments it made in its memorandum of law in *Barnabas I* into its memorandum of law in *Barnabas II*. It levies two arguments in support of this contention; namely that: (1) by vacating the District Council's denial of Barnabas's application in *Barnabas I*, this Court also vacated the parties' filings in that case; and (2) Barnabas circumvented the 35 page limit for briefs by incorporating additional arguments by reference. See Rule 7-207(a).[12]

The District Council cites no meaningful support for either argument, nor were we able to find any. Regarding its first argument, the District Council cites cases, such as *Young v. Progressive Cas. Ins. Co*., 108 Md. App. 233, 240 (1996), which state that a vacated

[12] Rule 7-207(a) states in pertinent part:

> [A] petitioner shall file a memorandum setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on. . . . Except with the permission of the court, a memorandum shall not exceed 35 pages. In an action involving more than one petitioner or responding party, any petitioner or responding party may adopt by reference any part of the memorandum of another.

judgment "ceases to exist," but that does not mean that the parties' filings likewise "cease to exist." As to the second argument, nothing in Rule 7-207 nor any other Maryland Rule, states that a party cannot incorporate arguments from other filings in the record into a legal memorandum, and, as Barnabas notes, Rule 7-207 expressly permits parties to incorporate by reference any part of a memorandum filed by another party. Moreover, the same rule authorizes the court to permit longer memoranda. While the circuit court did not expressly authorize Barnabas to incorporate parts of its earlier memorandum by reference, the District Council did not appear to have objected. *See* Md. Rule 8-131(a) (With the exception of questions as to jurisdiction, "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

Finally, the District Council argues that the circuit court violated the Maryland Rules by permitting Barnabas and the Council to submit post-hearing filings of proposed findings of fact and conclusions of law for the assistance of the Court. The District Council presents no basis for us to conclude that the circuit court abused its discretion or otherwise erred in permitting the parties to do so.

7. Original or Appellate Jurisdiction?

Barnabas contends that the District Council exercises appellate, as opposed to original, jurisdiction when it reviews decisions by zoning hearing examiners. If Barnabas is correct, then the District Council could reverse the hearing examiner's decision only if the latter "was not supported by substantial evidence, was arbitrary, capricious, or illegal otherwise[.]" *Zimmer*, 444 Md. at 584. Whether the District Council exercises original or appellate jurisdiction in a particular case is a legal issue which we decide *de novo*. *Id.* at 553.

As we previously noted, PGCC § 27-132(f)[13] states that the Council exercises original jurisdiction when it reviews decisions of the Planning Board or the zoning hearing examiner. In *Zimmer*, the Court held that § 27-132(f) does not empower the District Council to exercise original jurisdiction if doing so would conflict with the Regional District Act. 444 Md. at 526 n.30. ("To the extent that the Charter, or the ordinances adopted thereunder, conflict with the RDA, the Charter and ordinances are invalid and the RDA governs." (citation omitted)). The *Zimmer* Court proceeded to hold that § 27-132(f)

[13] Section 27-132(f) states:

> (1) In deciding an appeal to the District Council, or Council election to review a decision made by the Zoning Hearing Examiner or the Planning Board, the Council shall exercise original jurisdiction. (2) For any appeal or review of a decision made by the Zoning Hearing Examiner or the Planning Board, the Council may, based on the record, approve, approve with conditions, remand, or deny the application.

did not authorize the District Council to exercise original jurisdiction in reviewing Planning Board decisions to grant comprehensive design plan and specific design plan applications because the authority to grant those applications were local zoning functions not specifically excluded from the Planning Board's exclusive jurisdiction by the Regional District Act. *Id.* at 569–71. Barnabas argues that we should extend *Zimmer's* holding to include cases, such as the present one, in which the District Council reviews zoning hearing examiner decisions to grant special exception applications.

We decline the invitation. As this Court has noted, the *Zimmer* Court's "analysis was primarily one of statutory interpretation," specifically LU §§ 20-202(b)(i).[14] *County Council of Prince George's County v. FCW Justice*, 238 Md. App. 641, 668–69 (2018). In this regard, the *Zimmer* Court explained (emphasis added):

> [T]he RDA grants to the Planning Board and to the District Council certain powers. *LU § 20–202(b)(i) provides that the county planning boards have "exclusive jurisdiction" over "local functions,"* but does not detail each of the local functions within each jurisdiction. These functions may include any local matter related to planning, zoning, subdivision, or assignment of street names and house numbers. See LU § 20–202(a). *The functions delegated to*

[14] LU § 20-202(b)(i) states in pertinent part:

> A county planning board has exclusive jurisdiction over:
>
> (i) local functions, including:[ ]
>
> 1. the administration of subdivision regulations;
>
> 2. the preparation and adoption of recommendations to the district council with respect to zoning map amendments; and
>
> 3. the assignment of street names and house numbers in the regional district[.]

> *the county planning boards pursuant to LU § 20–207 are among the unlisted local functions over which the planning boards have exclusive jurisdiction.* The Legislature did not itemize expressly or exhaustively each such intended function, for apparent good reason.
>
> The RDA makes particular provision for the local functions that the Legislature did not intend to be within the planning boards' exclusive jurisdiction. LU § 20–503(c) authorizes the District Council to refer for advice only some or all building permits to the Maryland–National Capital Park & Planning Commission for review and recommendation as to zoning compliance. LU § 22–208 requires referral to the county planning boards of applications for zoning map amendments for a "recommendation." Although unclear on its face as to the standard of review, LU § 25–210 authorizes, in Prince George's County, the District Council to "review" the "final decision" of the Planning Board, and issue a "final decision."
>
> CDP and SDP approvals were not among the local functions that the Legislature excepted from the planning boards' exclusive jurisdiction. Because no alternative provision was made, the RDA indicates to us that, like other unspecified local planning functions, the Planning Board is invested with exclusive original jurisdiction over the determination of CDPs and SDPs, subject to appellate review by the District Council.

444 Md. at 567–70 (footnotes omitted).

There are no provisions in the Regional District Act that lead us to conclude that the General Assembly intended to vest the Planning Board with exclusive jurisdiction in special exception cases. In fact, LU § 22-301 explicitly authorizes the district councils to either decide special exception cases or to delegate that authority to an administrative agency.[15] Moreover, the same statute provides that appeals from those agencies "shall

[15] *See* LU § 22-301:

> (a)(1) A district council may adopt zoning laws that authorize the board of appeals, the district council, or an administrative office or agency designated

follow the procedure determined by the district council." Thus, there is no conflict between PGCC § 27-132(f)—which authorizes the District Council to exercise "original jurisdiction" in appeals from decisions by the zoning hearing examiner in special exception cases—and any provision of the Regional District Act. The policy concerns at the heart of the Court's analysis in *Zimmer* are simply not present when the District Council reviews a decision of a zoning hearing examiner in a special exception case.[16]

For these reasons, we will apply the long-standing principle that it is the final decision by an administrative agency that is entitled to deference. *See, e.g., Anderson v. Dep't of Pub. Safety & Corr. Servs*., 330 Md. 187, 212 (1993); *Board of Physicians v. Elliot*, 176 Md. App. 369, 402 (2006); *Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 296 (1994) ("[T]he substantial evidence standard is not modified in any way when the

> by the district council to grant special exceptions and variances to the zoning laws on conditions that are necessary to carry out the purposes of this division.
>
> * * *
>
> (b) Subject to § 22-309 of this subtitle, an appeal from a decision of an administrative office or agency designated under this subtitle shall follow the procedure determined by the district council.

[16] In *County Council of Prince George's County v. Billings*, the Court of Appeals noted that PGCC § 27-132(f) states that the District Council exercises original jurisdiction when it reviews a zoning hearing examiner's decision in a special exception case. 420 Md. 84, 105–06 (2011). However, *Billings* did not address the nature of original jurisdiction nor whether application of § 27-132(f) to special exception cases is consistent with the Regional District Act.

[agency] and its examiner disagree.") (quoting *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 496 (1951)).

Our cases have emphasized that when an administrative body issues recommended findings of fact, and that recommendation conflicts with the findings of fact in the "final decision" reached by the agency, our focus must remain on deciding whether the final decision is supported by substantial evidence:

> Because the substantial evidence test remains the ultimate and absolutely controlling consideration on judicial review, it does not matter that the agency may have ignored the findings and the proposed decision of the [administrative law judge], even without having had any rational basis for doing so, *just so long as there still exists some other basis for the agency's decision that would be enough, in and of itself, to satisfy the substantial evidence test.*

Maryland Bd. Of Physicians v. Elliot, 170 Md. App. 369, 386 (2006) (emphasis added). Thus, for our analysis, it is immaterial how thoughtful, detailed, or well-reasoned the zoning hearing examiner's decision was in issuing its approval of the application. Our task is to focus on whether the District Council's decision was supported by substantial evidence. "Substantial evidence has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Becker v. Anne Arundel County*, 174 Md. App. 114, 138 (2007) (quoting *Snowden v. City of Baltimore*, 224 Md. 443, 448 (1961)). Under the substantial evidence test, we will only overturn the District Council's findings if those findings are "unsupported by competent, material, and

substantial evidence in light of the entire record as submitted." *Elliot*, 170 Md. App. at 405–07.

8. The Maryland Law of Special Exceptions

A special exception use is one which "the local legislature . . . identifies [as] 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 & Council of Rockville v. Rylyns Enterprises*, 372 Md. 514, 541 (2002). In Prince George's County, a special exception use will be approved if the administrative decision-maker, *i.e.*, a zoning hearing examiner of the District Council, is satisfied that the proposed use satisfies the statutory criteria set out in the County Zoning Ordinance.[17]

[17] The standards for granting a special exception application are set out in PGCC § 27-317, which states in relevant part:

> (a) A Special Exception may be approved if:
>
> (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
>
> (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
>
> (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
>
> (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;

There are two Maryland appellate decisions regarding special exceptions that are particularly relevant in this appeal. The first is *Schultz v. Pritts*, 291 Md. 1 (1981), which synthesized the holdings of a number of previous decisions in order to establish a conceptual basis by which judges and lawyers could properly assess the degree to which evidence of adverse impact on surrounding properties should affect the outcome of a special exception application. The second is *People's Counsel of Baltimore County v. Loyola College*, 406 Md. 54 (2008), which revisited and clarified the Court's analysis in *Schultz*.

The applicant in *Schultz* proposed to build and operate a funeral home in a neighborhood of single family houses. At the administrative hearing, an expert witness opined that traffic generated by the funeral home site might "under certain circumstances" create traffic problems as funeral processions exited the site. In addition, "[the expert] testified that funeral processions would have an adverse effect on emergency vehicles and other traffic attempting to enter or leave a medical center located opposite the site." *Id.* at 8. The board of appeals denied the application based on this evidence. *Id.* at 9. The relevant

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> (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood. . . .
>
> * * *

Additionally, as we discussed previously, PGCC § 27-343.03 sets out specific performance and review standards for concrete recycling facilities. *See* footnote 9, *supra*. There appears to be no dispute that Barnabas's application satisfied the requirements of § 27-343.03.

issue before the Court of Appeals was whether this evidence formed a sufficient basis to deny the application. The Court of Appeals' analysis focused on a decision of this Court, *Gowl v. Atlantic Richfield Co.*, 27 Md. App. 410, 417-18 (1975). In *Gowl,* we held that if "the potential volume of traffic under the requested [special exception] use would appear to be no greater than that which would arise from permitted uses," then it would be "arbitrary, capricious, and illegal to deny the application for special exception on vehicular traffic grounds." *Gowl*, 27 Md. App. at 417-18). The Court of Appeals rejected this standard. In explaining why, the Court stated (emphasis added):

> 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.
>
> * * *
>
> *If [the applicant] shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.* The extent of any harm or disturbance to the neighboring area and uses is, of course, material. *If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide.* But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

291 Md. at 11.

The Court of Appeals then considered what would constitute "probative evidence" of harm to the neighborhood or disturbance to the plan. To answer this question, the Court looked to *Deen v. Baltimore Gas & Electric Co*., 240 Md. 317, 330-31 (1965), and *Anderson v. Sawyer*, 23 Md. App. 612, 617-18 (1974), and stated (emphasis added):

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

Id. at 15.

Schultz was, and continues to be, in the forefront of Maryland's land use appellate caselaw.[18] However, as the Court noted in *Loyola College*, "some of the language of Judge Davidson's opinion for the Court in *Schultz* occasionally has been mis-perceived by subsequent appellate courts and frequently misunderstood by some attorneys, planners, governmental authorities, and other citizens." 406 Md. at 57. In *Loyola College*, the Court undertook to clarify these matters. *Id.*

The Court began its analysis by meticulously analyzing *Schultz* and then reviewing the reported Maryland appellate opinions applying *Schultz's* teachings in special exception

[18] *See, e.g., Eastern Outdoor Advertising v. Mayor & Council of Baltimor*e., 146 Md. App. 283, 307–08 (2002); (*Schultz* "is the seminal case in Maryland concerning conditional uses or special exception uses"); *Lawton T. Sharp Farm, Inc. v. Somerlock*, 52 Md. App. 207, 210 (1982) (*Schultz* "is a landmark interpretation" of the law of special exceptions).

cases. *Id.* at 87–101. The Court then restated the applicable legal standards for special exception cases (emphasis added):

> Evaluation of a special exception application is not an equation to be balanced with formulaic precision. That lack of a precise rubric is reflected in the standard of judicial review applied to zoning decisions. Courts are to defer to the conclusions of the zoning body where the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable.
>
> It is clear in examining the plain language of *Schultz*, and the cases upon which *Schultz* relies, that the *Schultz* analytical overlay for applications for individual special exceptions *is focused entirely on the neighborhood involved in each case. . . . .*
>
> * * *
>
> *Schultz* speaks pointedly to an individual case analysis focused on the particular locality involved around the proposed site.
>
> * * *
>
> *But what sense is to be made of Schultz's language referring to consideration of whether "the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone"?* Is it to be declared surplusage? Is it to be stricken or disapproved because the 2008 composition of this Court simply has had a change of mind twenty-seven years later? The answer is "no." The language retains vitality and sense as long as the *raison d'etre* for its inclusion in *Schultz* is understood.
>
> * * *
>
> The local legislature, when it determines to adopt or amend the text of a zoning ordinance with regard to designating various uses as allowed only by special exception in various zones, considers in a generic sense that certain adverse effects, at least in type, potentially associated with (inherent to, if you will) these uses are likely to occur wherever in the particular zone they may be located. In that sense, the local legislature . . . separates permitted uses, special exceptions, and all other uses. That is why the uses are designated special exception uses, not permitted uses. The inherent effects notwithstanding, the legislative determination necessarily is that the uses

> conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, *provided that, at a given location, adduced evidence does not convince the body to whom the power to grant or deny individual applications is given that actual incompatibility would occur.* With this understanding of the legislative process (the "presumptive finding") in mind, the otherwise problematic language in *Schultz* makes perfect sense. The language is a backwards-looking reference to the legislative "presumptive finding" in the first instance made when the particular use was made a special exception use in the zoning ordinance. *It is not a part of the required analysis to be made in the review process for each special exception application*. It is a point of reference explication only.

Id. at 101–07 (quotation marks, citations, and footnotes omitted). *See also Montgomery County. v. Butler*, 417 Md. 271, 304–05 (2010) (A local ordinance that allows a board of appeals "'to consider any adverse effects created by the unusual characteristics of the site' is entirely consistent with *Schultz* and its progeny.").

9. The District Council's Decision

As we previously indicated, the District Council denied the special exception application for two reasons. First, it concluded that approval of the special exception application would "substantially impair the integrity of The Heights and Vicinity Master Plan of 2000 and the Branch Avenue Corridor Sector Plan of 2008." Second, it found that Barnabas failed to demonstrate that operation of the proposed concrete recycling plant could be conducted without real detriment to the surrounding neighborhood. To this Court, the Council argues that there is substantial evidence in the record to support both of these conclusions. Barnabas disagrees. Both parties are correct—but only in part. We agree with

Barnabas that the Council erred when it concluded that granting the special exception application would impair the 2000 Master Plan and the 2008 Sector Plan. However, the Council's conclusion that Barnabas failed to prove that the recycling plant could be operated without real detriment to the neighborhood is supported by substantial evidence.

A. Plan Compliance

In its decision, the District Council stated (bracketed paragraph numbers added):

> Community planning south made these significant points, which we adopt:
>
> [1] The General Plan "vision" for Developed Tier properties like the 54-acre tract is for creation of neighborhoods that are "sustainable" and "transit-supporting" and "mixed-use" and "pedestrian-oriented" and "medium- to high-density." The proposed concrete recycling plant will not help to create a neighborhood with any of these features.
>
> [2] The existing landfill on the tract "is an enormous mound of dirt that towers over the community and can be seen from a great distance on St. Barnabas Road." That is, prior landfill uses by Barnabas and its predecessors have left a large, unsightly dirt mound on the 54-acre tract, one that is "highly visible in the community." Also, concrete is being stockpiled on the proposed recycling facility site at a height that is visible from the street.
>
> [3] The staff's point here is that prior Class 3 fill operations have made the property unsightly and current concrete stockpiling is adding to the problem.
>
> [4] As The Heights and Vicinity Master Plan indicates, the industrial area - primarily the 54-acre tract and the residential community, Gordon's Corner and Victoria Manor, are in "close proximity." the Master Plan recommends "light industrial" uses on and around the 54-acre tract, because of the nearby residences.
>
> [5] The Master Plan states that special exception uses in the industrial areas, including the 54-acre tract, "should be carefully considered," because of the proximity of the residential community, and special consideration should be given to "the impact on the nearby residential area and roads." The Master Plan emphasizes the important of "the appearance of the site," a feature the staff had noted was deficient.

[6] Staff stated that the proposed concrete recycling "is not in keeping with the existing lighter industrial." That is, the concrete recycling will be more intensive - and more intrusive to the residential community - than the landfill operations then (in 2008) existing on the site.

[7] Staff stated that "industrial and residential uses" adjacent to the 54-acre tract, or "in close proximity" to the tract, "may adversely be affected by dust and noise" generated by the concrete recycling plant. Thus staff noted direct compatibility problems, as between the site of the concrete recycling and the nearby residential and light industrial properties.

[8] Staff questioned how "safe circulation" would ensured, as between vehicles and pedestrians on and near the subject property. Here again, Barnabas's application suffered from inadequate and incomplete planning. In particular, Barnabas's traffic circulation plan did not show "how the trucks will be stacked if several are waiting to be serviced." Barnabas did not meet staff's "burden of proof," to show that truck traffic would not create unforeseen problems.

[9] Also as to truck traffic and Barnabas's traffic circulation plan, staff noted that Barnabas offered a mere "estimate" as to the time trucks would be on site, not a plan to ensure that several trucks were not on the property at the same time. Again, Barnabas did not satisfy staff that truck traffic would not create on-site stacking or parking problems, problems that would then adversely affect neighboring residents.

[10] Staff also noted that Barnabas in its plan had not considered "the impact of noise and air quality on surrounding properties" from the trucks going to and from the subject site. Staff distinguished between on-site and off-site impacts, pointing out that the truck traffic entering and leaving the property and the neighborhood would likely cause significant adverse noise and dust impacts that Barnabas had not addressed.

[11] Staff also noted that the increase in dump truck traffic to be anticipated from the concrete recycling would (or "could") "discourage reinvestment in the area" of St. Barnabas Road. That corridor is proposed for upgraded development, in the 2000 Master Plan and 2008 Sector Plan. Again, because concrete recycling is not a "light industrial" type of land use, and because the intensity of the use and particularly the increase in truck traffic will not have favorable effects in surrounding land development, the proposed special exception use will be inconsistent with the Master Plan and Sector Plan recommendations.

> [12] Staff stated that the "vision" of the proposed Branch Avenue Corridor Sector Plan in 2008 was "to create a safe, vibrant, and attractive community that encourages residents to walk, shop and socialize at the upgraded commercial areas." (The Sector Plan was adopted by the District Council in September 2008.) Concrete recycling certainly does not promote this vision, at this location; the use does not at all encourage walking or shopping or socializing by residents, anywhere near it.
>
> [13] Staff stated also that the new Sector Plan "acknowledges that the industrial area potentially could have a negative effect on the growth and stability of the adjoining commercial and residential communities." The preliminary plan proposed a study, to develop a plan to mitigate the effect of operational uses such as dump trucks ingress and egress, noisy equipment, etc." No such study has been done, and no mitigation plan has been proposed. Indeed, Barnabas's application does not even acknowledge the Master Plan or Sector Plan recommendations or the inconsistency of concrete recycling with upgraded commercial and residential uses in the St. Barnabas Road corridor.
>
> [14] As to the potential adverse effects of dump truck traffic, staff pointed out that the subject property is at the end of Clifton Road and that "St. Barnabas Road is the only access point which would allow travel in any direction from the proposed recycling site." Thus Barnabas's claims that Stamp Road offers alternative access are answered here by staff, who explained that most trucks will use St. Barnabas Road, which allows travel "in any direction" from the subject property.
>
> [15] Community planning south staff concluded that "[t]ruck traffic and other heavy equipment that would support a concrete recycling facility would negatively impact the residential, office and retail uses that are proposed for St. Barnabas Road." Staff stated the concrete recycling use would "impact . . . the St. Barnabas Road commercial area" and would place "additional traffic on St. Barnabas Road."[19]

There are problems with this part of the Council's analysis. By way of example:

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[19] In other portions of its decision, the District Council stated that the Planning Board "the Planning Board adopted and reemphasized many negative findings made by the technical staff." The Planning Board resolution does not suggest to us that the Board intended to adopt any of the comments in the Planning South Report as its own.

(1) The Council's conclusion that the recycling facility would not be consistent with the Branch Avenue Corridor Sector Plan (¶ ¶ [13] and [14]) is irrelevant because—as the Planning South Report states—the Subject Property is not located within the boundaries of the Branch Avenue Corridor. The Zoning Ordinance requires an applicant to demonstrate that the proposed special exception use "not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan." *See* PGCC § PGCC § 27-317(a)(3).

(2) The Council's reliance on the Planning South Report's concern about "the *increase* in dump truck traffic to be anticipated from the concrete recycling" (¶ [11] (emphasis added)) is misplaced. The Planning South staff was referring to the increase in traffic that would result from the simultaneous operations of the rubble fill and the recycling facility. The concern raised by the staff was a valid one but it was addressed by the Planning Board and the zoning hearing examiner before the case reached the District Council. The Planning Board and the zoning hearing examiner limited the tonnage to be processed by the facility so that there would be no increase in dump truck traffic. (The zoning hearing examiner also required the landfill operations to cease in 2010 as a condition of the special exception.)

(3) The Planning South Report's statement as to the existing uses and eyesores located on the Subject Property (¶ ¶ [2] and[3]) do not form a logical or legally sufficient basis for the Council to conclude that the recycling facility, *a new use*, did not comply with the Heights Master Plan.

(4) The Planning South staff's—and therefore the District Council's—conclusion that "Barnabas's application suffered from inadequate and incomplete planning," (¶¶ [8] and [11]) was based upon the record as it existed when the Planning South Report was submitted. As we have explained, Barnabas provided extensive additional information to the Planning Board staff. To be sure, the Council could have decided that this evidence was not persuasive. The Council could not, however, pretend that it didn't exist.

(5) The Planning South staff's conclusion (again adopted by the District Council) that "St. Barnabas Road is the only access point which would allow travel in any direction from the proposed recycling site." [¶ 14] is incorrect because Stamp Road and Beech Drive offer direct access from the Subject Property to Branch Avenue, thus by-passing St. Barnabas Road.

(6) Finally, the District Council's conclusion that Barnabas "did not meet staff's 'burden of proof,' to show that truck traffic would not create unforeseen problems" (¶ [8]) is irrelevant. The question before the Council was not whether Barnabas's evidence satisfied the Planning South staff but whether that evidence satisfied the Council.

These defects cast a serious question as to the adequacy of the District Council's conclusion as to whether the proposed special exception would "substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan." PGCC § 27317(a)(3). If the Council's negative findings as to master plan compliance had been the sole basis for the

Council's decision, the outcome of this appeal might be different. But there was an alternate basis for the Council's decision.

B. Impact on the Surrounding Neighborhood

In its decision, the District Council found that:

> The technical staff, commercial property owners on Clifton Road, and residents of the Gordon's Corner single-family subdivision and the Victoria Manor retirement community also presented substantial evidence in opposition to Barnabas's special exception application. These parties, lay and professional, fully answered Barnabas's claims that the dump trucks and heavy equipment uses on the subject property, Clifton Road, and St. Barnabas Road would not create adverse effects for area residents and workers and for the use and development of adjacent properties and the general neighborhood.

As we have explained, we do not believe that the Council's reliance on the comments contained in the Planning South Report was entirely justified. This leaves us with the evidence presented by nearby residents, business owners, and other members of the community who testified against the application. Barnabas asserts that this testimony was insufficient to overcome the expert testimony it presented as to traffic impact, noise, and air quality. Barnabas states:

> The amalgam of evidence . . . clearly demonstrates that the neighboring community would not suffer any adverse effects beyond those that are inherent to the proposed concrete recycling facility.

We do not agree with Barnabas. To be sure, some of the evidence generated by neighboring property owners and residents consisted of complaints about the appearance of the former landfill site, or noise and dust generated by the landfill operations. This

testimony came largely from residents at the Manor at Victoria Park and did not address the relevant legal issues which are, at this point in the analysis, whether the recycling facility—as opposed to the prior uses—would "adversely affect the health, safety, or welfare of residents or workers in the area"; or "be detrimental to the use or development of adjacent properties or the general neighborhood." PGCC § 27-317(a)(4) and (5).

There were a number of witnesses whose testimony suffered from none of these shortcomings. These witnesses included adjacent business owners and nearby residents.

Jennifer Boniface has operated a retail store located on Clifton Road, a few hundred feet from the entrance to the proposed location of the recycling facility, for six years. Boniface's testimony focused on dump truck traffic to and from the Property. Boniface, testified that the truck traffic raised two main concerns. First, Boniface alleged that dump trucks traveling to and from the current facility emanate dirt and dust and also stir up dirt and dust lying in Clifton Road. This dust accumulates on the windows, doors, and landscaping of her business; and, because of the dust, the air filters for equipment utilized in her building must be replaced every week, as opposed to the typical three months. Boniface also testified that cars parked around her business are consistently covered in dust, so much so that Boniface has stopped driving her car to work. Additionally, Boniface testified that the truck traffic not only causes dangerous traffic patterns and accidents, but that the trucks often leave debris behind, such as large rocks, nails, and motor oil, that damage vehicles traveling on Clifton Road. Third, Boniface testified about noise issues.

She indicated that the constant flow of trucks on Clifton Road has created noisy conditions, earthquake-like shaking and vibrations, interruptions with speakers and phone lines, and the inability of her customers to maintain normal conversations within her establishment.

Andy New owns a self-storage business on Beech Place, adjacent to the landfill. New testified that the addition of a recycling plant to the area "would pollute the surrounding community with truck traffic and dust and debris from these trucks" which would have an adverse impact on the community.

Victoria Nwaobasi has owned a car wash on St. Barnabas Road since 2001. She testified that the truck traffic "affects most of my customers coming into the car wash or existing the car wash." She noted that the situation has become "a nightmare" because a gridlock often forms at the entrance and exit of her business on St. Barnabas Road.

Calvin Starcher owns Capital Air Filter on Clifton Road. It was Starcher's belief that the trucks "have no respect" for the members of the community, and that pedestrians on Clifton Road must be careful because the trucks "try to run us over every day."

Then the last of the business owners testified. Louis Choporis operates an automotive paint shop on Clifton Road. He testified as to a series of photographs, taken by himself, depicting the area around his business. Choporis indicated the primary problem to his business was "the trucks are kicking up the dust," and showed a photograph showing as such.

Then, there was the testimony of the residents of Gordon's Corner, a residential community of 270 homes situated between St. Barnabas Road, Beech Road, and Branch Avenue.

Leon White, as president-elect of the Gordon's Corner Citizen Association and a resident of five years, spoke on behalf of the Association. Similar to testimony of the business owners, White's testimony focused on the dust, noise, and traffic issues caused by the dump trucks. According to White, the trucks created more hazards for the senior citizens of the community. As to noise, White testified that "the rumbling of just the trucks themselves . . . make noise as they jostle around with their load." Finally, White noted that trucks traveling along Beech Road leave debris behind, which would only increase with a recycling plant, and that the debris has caused damage to other vehicles traveling on that road.

Annie Ruthie Slade, a resident of Gordon's Corner since 1992, also testified about the high volume of traffic from the dump trucks. She complained that she could not walk into her backyard without sneezing due to the dust and "flying debris" from trucks.

Collectively, the testimony of these witnesses illuminates a factor that is a constant with both the current use and the proposed use—heavily laden dump trucks will enter and leave the Site whenever the recycling plant is in operation just as they current do for landfill operations. Moreover, these effects are not merely occasional. Barnabas voluntarily agreed to limit truck traffic during morning and afternoon peak hours to 92 total trips (46 trips

in/46 trips out) during the AM peak hour, and 72 total trips (36 trips in/36 trips out) during the PM peak hour. The limitation is intended to improve traffic flow at intersections surrounding the Site, but it also illustrates the amount of truck traffic that the recycling plant will generate. Nor is the traffic burden limited to a few hours each day—Barnabas proposes to operate the plant from 5:30 AM to 5:30 PM Monday through Saturday.

The only question remaining is whether the evidence of noise, dust, dirt, and disruption caused by dump truck traffic was legally sufficient to support the Council's decision to deny Barnabas's special exception application. We conclude that it was. As the Court of Appeals has observed, "[e]valuation of a special exception application is not an equation to be balanced with formulaic precision." *Loyola College*, 406 Md. at 101. For this reason, "[c]ourts are to defer to the conclusions of the zoning body where the "evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning *fairly debatable*." *Id.* (emphasis in original). An administrative finding is fairly debatable when there is "relevant evidence as a reasonable mind might accept as adequate to support [the agency's] conclusion." *Becker*, 174 Md. App. at 138. In our view, the evidence that we have summarized in the preceding pages satisfies that requirement.[20]

[20] Barnabas makes two additional arguments which merit some attention.

First, it cites *Anderson v. Sawyer*, 23 Md. App. at 621 for the proposition that The Court's holding in Anderson standing for the proposition that "an expert opinion supported

For these reasons, we conclude that the circuit court erred when it reversed the Council's decision. We will reverse the judgment and remand this case for the court to enter a judgment affirming the District Council's decision.

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS REVERSED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.

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by probative evidence will definitively prevail over opinions of opposing experts whose opinions are based upon conjecture, with the latter's opinion being entitled to 'no weight.'" *Id*. at 621. It argues that the testimony of the neighbors was also conjectural and therefore of no probate weight. Barnabas's point may be valid as to some of the opposition testimony, but such a criticism cannot fairly be leveled at the testimony that we have previously summarized—and which forms the basis of our conclusion as to substantial evidence.

Second, citing *County Council of Prince George's County v. Brandywine Enterprises, Inc*., 350 Md. 339, 349-50 (1998), and *Schultz*, 291 Md. at 11, 22-23, Barnabas argues that as a special exception use, a concrete recycling plant enjoys a presumption of validity. The legal proposition is a correct one but the presumption of validity comes into effect only after the proposed special exception is shown to be compatible with the neighborhood:

> The inherent effects [of the special exception uses] notwithstanding, the legislative determination necessarily is that the uses conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, *provided that, at a given location, adduced evidence does not convince the body to whom the power to grant or deny individual applications is given that actual incompatibility would occur*.

Loyola College, 406 Md. at 106 (emphasis added).