Circuit Court for Baltimore County
Case No. 03C17001849

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1838

September Term, 2017

2627 LLC

v.

THE VALLEY'S PLANNING COUNCIL, INC.

Meredith,
Graeff,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: August 12, 2020

This appeal arises from a decision of the Office of Administrative Hearings for Baltimore County that approved a development plan proposing the construction of four homes upon a ridge in the Caves Valley National Register Historic District (listed on the National Register of Historic Places), adjacent to the Stemmer House (a Baltimore County Landmark in a Baltimore County historic environmental site). 2627 LLC ("the Developer"), appellant, applied for a permit to construct four single-family homes on the property. The Valley's Planning Council, Inc. ("Valley's Planning Council"), appellee, was among the protestants opposing the proposed plan. After a Baltimore County Administrative Law Judge ("ALJ") approved the proposed development plan, and the Board of Appeals for Baltimore County affirmed that approval, Valley's Planning Council filed a petition for judicial review in the Circuit Court for Baltimore County. Because another proposed development plan had previously been disapproved when a different developer had proposed constructing houses in the same location a decade earlier, the circuit court held that, under principles of collateral estoppel, the development plan proposed by 2627 LLC must also be disapproved, and the circuit court reversed the Board of Appeals's decision (that had affirmed the ALJ's approval of the development plan proposed by 2627 LLC). This appeal by the Developer followed.

QUESTIONS PRESENTED

The Developer presents the following questions for our review:

1. Whether the ALJ correctly determined that the proposed development is not barred by collateral estoppel or *res judicata*?

2. Whether the ALJ applied the correct burden of proof?

3. Whether the ALJ correctly determined that any potential impacts of the development on the Caves Valley National Register Historic District do not serve as a basis to deny the proposed development?

4. Whether the ALJ properly determined that Appellant had satisfied its obligation with respect to stormwater management?

5. Whether the ALJ properly approved the "panhandle" lots within the proposed development?

We answer "yes" to question 1, and we will, therefore, vacate the judgment of the circuit court. We also answer "yes" to question 4. But, because we answer "no" to questions 2, 3 and 5, we shall remand the case to the circuit court and direct that the circuit court vacate the decision of the Baltimore County Board of Appeals and remand the case with instructions for the Board of Appeals to vacate the ALJ's approval of the development plan and remand the case to the Baltimore County Office of Administrative Hearings for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL BACKGROUND

The site of the proposed development is near the intersection of Caves Road and Park Heights Avenue in the Owings Mills area of Baltimore County. In 2015, 2627 LLC's proposed development plan sought approval to build four single-family houses on 24.18 acres of unimproved land ("the 2015 plan"), but a previous owner of the property had submitted an application for a different development plan that had been disapproved in 2004 ("the 2004 plan"). A point of contention between the Developer and the protestants objecting to the proposed 2015 plan was whether the 2004 administrative

decision rejecting the 2004 plan precluded approval of the development plan submitted in 2015.

In 2004, the subject property was owned by Barbara Holdridge, who had lived on the property in a historic structure known as the Stemmer House for 40 years. At that time, the parcel owned by Ms. Holdridge consisted of 73 acres, part of which was included within the Caves Valley National Register Historic District when that federal historic district was recognized in 1988. Working with a different developer, Ms. Holdridge submitted the 2004 plan seeking approval to build thirteen new homes on the site.

The 2004 plan proposed that, in addition to the Stemmer House lot, thirteen new lots would be accessed via a new roadway off of Park Heights Avenue. The homes proposed near the Stemmer House were oriented away from that historic structure (*i.e.*, the rear of the new homes would face the Stemmer House). The plan required six storm water management ponds, some of which had outfall on or near erodible slopes. The plan included homes to be built on slopes greater than 25%. The plan proposed clearing a significant amount of "priority-one" forest.

The Deputy Zoning Commissioner was designated to be the hearing officer to conduct the public hearing on the 2004 plan. For simplicity, we shall refer to him as the 2004 Hearing Officer. He declined to approve the 2004 plan, and addressed two key concerns in his written opinion: the potential environmental impact of the proposed stormwater management systems, and the negative impact the development would have

upon the Caves Valley National Register Historic District. The 2004 Hearing Officer's opinion included the following findings and conclusions:

> Storm Water Management
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> I am persuaded by the weight of the evidence before me that the plan does not present a suitable outfall for the storm water management ["SWM"] facilities. Both Mr. O'Leary and Mr. Chadsey eventually agreed that the 1994 Maryland Standards and Specifications for Soil Erosion and Sediment Control apply to this project and that rock aprons are not suitable for land which has a greater than 10% slope. They also agreed that **the land receiving water from SWM facility #3 exceeds this limitation**. They disagree regarding the outfall from three other facilities identified by Mr. O'Leary as having similar flaws. I conclude that they disagree, because they employed different definitions of the word "slope[."] . . . I find Mr. O'Leary's method is more appropriate because the issue here is to avoid eroding the soil at the outfall. Once this erosion starts it will eat its way to the bottom of the hill. Therefore, the place to measure the slope is at the end of the apron and not average it over the distance to a natural break.
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> I further find that the "forebay" portion of the storm water management facilities is a "BMP" [Best Management Practice] and is subject to the 50 ft. separation requirement from septic reserve areas. The controlling concern here is that facilities that hold storm water might allow that water to seep into nearby drain fields degrading their effectiveness. Both Mr. O'Leary and Mr. Chadsey agreed that this separation distance is applicable to this plan. They disagree as to whether the "forebay" is part of the storm water management facility. However, **both agree the "forebay" collects and holds storm water. Therefore, I find that it poses the danger sought to be avoided by the regulation.** Whether or not the forebay cleans the water is not relevant in my view. **I further find from the evidence that the forebay associated with SWM facility #1 violates this separation requirement** as Mr. O'Leary opined. In finding this, I rely on the fact that his calculation took the differences in elevations into account because it would be the three dimensional distance and not the lineal distance which matters for the reasons above.
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> Similarly, I find that swales which conduct water to the SWM facilities are subject to the 25 ft. separation regulation noted by Mr. O'Leary for the same reasons as above. Presumably, these swales carry

water for shorter times than the SWM facilities hold water and so the separation reduces from 50 ft. to 25 ft. in the regulations. **I am satisfied that the six swales which Mr. O'Leary identified as violating the separation distance are not in conformance with the regulations.**

Phase II

Expecting the above finding, Mr. Chadsey requests that these matters be put off until the on site measurements can verify whether or not there is the need for a different design. I recognize that the courts have noted that development in Baltimore County is an ongoing process and more engineering work will follow approval of the development plan. However, in my view suitable outfall must be shown at this stage of the development. To me this is not a design detail which is envisioned in Section 32-4-229(g) of the [Baltimore County Code] to follow the development plan. For example, selecting materials for the storm water management facilities would constitute such a detail. **Here we have no systems level design for outfall from which detailed designs can proceed. Consequently, I cannot approve the development plan as presented.**

Preserving the Historic District

Section 32-4-416 [of the Baltimore County Code in effect in 2004] requires each development plan to preserve historic structures or sites referred to in Section 32-4-223(8). This latter section names sites listed on the National Register of Historic Places and a National Register District covering the proposed development. **Consequently, the plan must preserve both the Stemmer[] House and Caves Valley Historic District as they appear on the development plan.**

The issue of the impact of the development on the Stemmer[] House was considered by the Planning Board who found that the subject plan will not adversely impact the historic building. Apparently, lots for new homes were moved away from the Stemmer[] House and additional plantings are to be made in the open field behind the historic building which should further shield the view from and to the historic building. **I am satisfied that the plan adequately preserves this building.**

However, I am not convinced that the plan adequately preserves the Caves Valley Historic District in which lots 7, 8 and 9 are located. First, the report from the Planning Board on the impact of the development

and the Stemmer[] House barely mentions the historic district. It is fairly obvious to me that the Planning Board either did not discuss this separate issue or gave it short consideration. Had it been considered as the separate preservation issue it clearly is, the title, body and conclusion of the report would have been quite different. **Impact on a district is surely quite different from impact on a single structure.** Everything in the report focused on the Stemmer[] House. Therefore, I conclude that the Planning Board did not effectively consider the matter. **That said, I may add conditions to the plan which go beyond the Planning Board findings.**

As mentioned above, **the new homes on lots 7, 8 and 9 are not only in the historic district but are on the Valley side of the wall**. I am concerned with the impact that these three new homes would have on the historic district which admittedly contains none [sic] contributing buildings as shown by the Protestants[']' photographs. But, as Ms. Pontone noted, **there is a cultural landscape associated with a rural agricultural valley that in my view is incompatible with these three new homes.**

If this were the only consideration, I might decide to approve these homes as they are on the fringe of the district. However, when I consider that the Developer is proposing storm water outfalls onto slopes 10% or greater with highly erodible soils, I am convinced that the Developer is asking too much of the site. In addition**, the Developer proposes to build homes on slopes greater than 25% which poses its own danger of erosion along with the possibility of disposing [sic] sediment into the sensitive trout streams below**. This sort of damage, even of the slightest nature, could take place through mistakes made during construction and beyond. Finally, **the fact that the Developer is proposing six storm water management facilities for only 13 homes tells me that this plan is simply asking too much on this ridge**.

Therefore, I will not approve a plan with homes in the historic district, not only to preserve the district but also to relieve the pressure to build on this ridgeline. As Mr. Chadsey indicated, I believe that he can readily remedy the setback flaws in the plan as it stands. However, in my view, he needs room to pull back the storm water management facilities onto more level ground so that discharges are not attempted at the edge of this cliff. Reducing the number of lots by three will hopefully give him the room to make a more reasonable design from both an environmental and preservation standpoint.

(Emphasis added.)

No appeal from the 2004 Hearing Officer's decision was pursued, and the development plan proposed in 2004 was apparently abandoned.

In 2006, the Baltimore County Landmarks Preservation Commission designated an area surrounding the Stemmer House to be a historic environmental setting. (*See* the definition of a County historic environmental setting in Baltimore County Code ("B.C.C.") § 32-7-101(p).) The designated area of the County's historic environmental setting did not extend to the outer bounds of Ms. Holdridge's land, and did not include the land on which the four houses were proposed in the 2015 plan.

In 2007, the Baltimore County Code was amended via County Bill No. 26-07. This bill's primary purpose was to amend the County's law regarding preservation of historic landmarks, but it also included an amendment that repealed one portion of B.C.C § 32-4-416 which had been cited as one of the justifications for the 2004 Hearing Officer's decision rejecting the 2004 plan. In 2004, § 32-4-416 had provided: "Each Development Plan shall preserve . . . historic structures or sites identified on any of the lists referred to in § 32-4-223(8) of this title," which included sites on the National Register of Historic Places and National Register Districts. As a consequence of the adoption of County Bill No. 26-07 in 2007, § 32-4-416 no longer includes the reference to preserving "historic structures or sites" which had been cited in the 2004 decision as one of the reasons for rejecting the development plan.

Also in 2007, the Maryland General Assembly passed the Stormwater Management Act, which requires the Maryland Department of Environment ("MDE") to

establish regulatory requirements regarding the use of environmental site design ("ESD") in stormwater management practices. As a result of this change in the law, new developments are required to utilize environmental site design to the maximum extent practicable (sometimes referred to as "ESD to the MEP"). *See Maryland Dept. of Environment v. Anacostia Riverkeeper*, 447 Md. 88, 112 (2016) ("Another stormwater management phase began when the General Assembly required MDE to mandate the use of environmental site design ('ESD') in 2007. H.B. 786, Gen. Assemb. Reg. Sess. (Md. 2007). ESD is best understood as those practices, such as 'small-scale stormwater management practices, nonstructural techniques, and better site planning,' that 'mimic natural hydrologic runoff characteristics and minimize the impact of land development on water resources.' [Maryland Code (1982, 2013 Repl. Vol.), Environment Article,] § 4–201.1(b)[.]").

In 2012, Barbara Holdridge sold her property. After purchasing the property from Ms. Holdridge, the current owner recorded a lot line adjustment which segregated 3.57 acres of the property surrounding the Stemmer House to constitute a lot that was no longer in the same parcel as the 24.18 acres at issue in the 2015 plan. Therefore, the parcel of land on which the Stemmer House sits is not part of the 24.18 acre parcel that would be subdivided pursuant to the 2015 plan.

In 2014, the Developer began working on the currently proposed development plan, known as "2609-2615 Caves Road." An ALJ conducted public hearings on the 2015 plan over five days.

On the first day of the hearing, Valley's Planning Council raised a preliminary issue, arguing that the denial of the 2004 plan precluded approval of the 2015 plan because the 2004 Hearing Officer had made a "legal ruling as a matter of law" that "there cannot be houses in this area of the [federal historic] district" where three of the four proposed houses would be located. Valley's Planning Council's attorney recited a three part test in support of his claim that the denial of the 2004 plan must be given preclusive effect:

> [(1)] whether the agency was acting in a judicial capacity, obviously Judge Murphy [the 2004 Hearing Officer] was; [(2)] whether the issue was actually litigated and it was, they had experts testify in fact about the federal district; and [(3)] was the resolution necessary to the decision, it was the decision.

Valley's Planning Council acknowledged that one of the reasons given by the 2004 Hearing Officer for rejecting the 2004 plan was dissatisfaction with the stormwater management facilities, but the protestant emphasized that the Hearing Officer also "said I'm not going to approve these three houses in particular because they are in the historic district . . . ." Furthermore, Valley's Planning Council argued that there had been no substantial change "[o]ther than the fact that [the Developer] brought a new plan, which is a self created -- you can't create, avoid the [preclusive] effect of res judicata by just filing a new plan." Valley's Planning Council emphasized that it was "relying upon the simple fact that this is a legal conclusion."

The Developer acknowledged that the entire proposed 24.18 acre development was within the Caves Valley National Register Historic District, which is on the federal

National Register, but argued that there were differences from the 2004 plan that rendered preclusion inapplicable. The Developer argued:

> . . . [In the 2004 decision,] there were a whole host of environmental issues with the site. And you know, the site called for 13 lots, we're proposing four here . . . . [T]here's two really important facts that have changed, that again, you'll hear from our folks.
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> One is that at the time of the development on the subject property now and on the prior property . . . there were big issues about the lot clearing of priority one forests, which was obviously of concern to the [Hearing Officer] at that point, as was reflected in his order. Since this, that case happened and prior to my client purchasing the property, this property was logged [by Ms. Holtridge]. So when we did a forest stand delineation for purposes of this development plan, there is no priority one forest on this property anymore.
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> * * *
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> And a second important fact is that the storm water management policy has significantly changed since the prior case. The prior case had 13 lots and they proposed six storm water management facilities, and among the statements in the [Hearing Officer]'s order was, he talked about concerns about storm water management ponds and the fact that they were outfalling on or close to steep slopes. And he said, finally, the fact that the developer is proposing six storm water management facilities for only 13 homes tells me that this plan is simply too much on this ridge.
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> And those other facts are also important because the [Hearing Officer], after he was talking about the National Register of Historic Districts, he talks about the importance of that and then he goes on in this paragraph and he says, if this were the only consideration, which [counsel for Valley's Planning Council] says it should be for purposes of res judicata, I might decide to approve these homes, as they are on the fringe of the district. However, when I consider the developer[']s proposing storm water outfalls on slopes greater than ten percent, the highly erodible soil, I'm convinced the developer is asking too much of this site.
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> It's a completely different plan, period, and you're going to hear that from the facts of our witnesses when they present their case. But for him to

> just simply say these four houses are 15 feet from the other four houses, you should deny it, it's wrong.

After having heard arguments from both sides regarding the denial of the 2004 plan, the ALJ stated that, "if res judicata is a consideration," this sounds like a case where a "lot of facts are in play, so I'm going to need to hear from the witnesses on whether or not there is a substantial change."

At the beginning of the hearing on the 2015 plan, representatives from all Baltimore County departments that were required to review the proposed development plan indicated the plan addressed all comments submitted at the Development Plan Conference, and they each recommended approval of the plan.[1] *See generally People's Counsel for Baltimore County v. Elm Street Development, Inc.*, 172 Md. App. 690, 694-96 (2007) (describing the general procedure for "obtaining approval of a development plan" in Baltimore County). Unlike the hearing described in *Elm Street*, however, where the opponents of the plan "chose not to produce any evidence or even question the County representatives as to the basis for their recommendations," *id*. at 705, the opponents of the 2015 Caves Road plan cross-examined witnesses who recommended approval, called witnesses opposing the plan, and introduced exhibits.

[1] The departments present included: the Department of Permits and Development Management (including the Development Plans Review office ("DPR"), the Real Estate Compliance office, and Office of Zoning Review); the Department of Environmental Protection and Sustainability ("DEPS"); and the Department of Planning ("DOP").

In the contested portion of the case, the Developer presented several expert witnesses. Mr. Kennedy, a professional engineer, opined that the Developer satisfied all Baltimore County rules and regulations regarding stormwater management. Henry A. Leskinen, an environmental specialist, testified that the current plan would require removal of only one priority-one tree. Sally Malena, a registered landscape architect accepted as an expert, stated that Lots 3 and 5 would not be visible to motorists traveling on Caves Road. Mitchell Kellman, a land use and zoning planner accepted as an expert, testified that the proposed development was consistent with Baltimore County Master Plan 2020 and satisfied all requirements of the zoning regulations. Kathryn Kuranda, an architectural historian accepted as an expert, said that the National Register of Historic Places is a planning tool that did not impose specific constraints on property owners; she opined that the proposed development would have no adverse effect upon the historic district and would be compatible with other residential properties in the vicinity.

Valley's Planning Council spearheaded the opposition to the proposed development. Among the witnesses it called was Janet Davis, who was accepted as an expert on architectural history and historic places. Prior to her retirement in 2011, she had been the historic preservation planner in Frederick County. She explained that she had prepared the nomination for the Caves Valley Historic District to be included in the National Register of Historic Places. She described the history and the cultural landscape of the land within the boundaries of the Caves Valley Historic District. Asked whether

the Developer's proposed development "would have a negative impact on the Caves Valley Federal Historic District," Ms. Davis explained why she believed it would:

> Well, the plan shows that the lots that are proposed there are right on the ridge line, and throughout our documentation we underscore the fact that the ridge line is the boundary and is important to understanding the whole cultural reference of the district, and that this plan would fragment the tree line, take away many trees. The house lots are very close to the Stemmer House itself.
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> The driveway when paved becomes a road, basically, it's not going to ever go away, and that is a feature that I think erodes away the significance of historic districts. The edges of the district are often subject to this kind of thing because people think well, it's not the main part of it, but it is, every part of the district is important. That's why they . . . make us spend so much time on delineating the boundary and justifying it.
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> It has to be the kind of [boundary] that can sustain the significance of the district, and this breaking up of the district's boundaries, and especially in this case from large parcels into small ones, just does nothing but erode away that boundary and that significance.

She added: "The nature of the human relationship [with the land] . . . affects the land's historical significance, as well as the scenes it produces. Pastoral and actively farmed land conveys a dramatically different message about that relationship than a rural residential landscape of contemporary single-family houses and subdivisions. That's exactly what is happening here."

Several area residents testified regarding concerns about the impact of the development upon the area, and expressed the view that the homes would have a significant and irreversible impact upon the Caves Valley National Register Historic District. Tom Finnerty, president of the Greater Greenspring Association, expressed concern that the proposed homes would negatively impact the historic district. Daniel

O'Leary, a professional engineer accepted as an expert, testified that the proposed storm water management plan was inadequate. Elizabeth Watson, a planner with Heritage Strategies LLC, testified that, whereas the nearby Caves Valley Golf Course development was well-designed, the proposed development would essentially be chipping into a preserved forest area.

Bruce Doak, a property line surveyor accepted as an expert on zoning regulations and development, testified that there is nothing in the record to indicate that the Department of Planning had reviewed and approved the proposed panhandle lots. Mr. Doak testified that panhandle lots are not permitted as of right, but are permitted only upon conditions spelled out in B.C.C. § 32-4-409(a). Mr. Doak expressed the opinion that the proposed panhandle lots were contrary to § 32-4-409(a)(i), (ii), and (iii). Mr. Doak also asserted that the Developer had not satisfied the requirement that the Developer demonstrate compliance with the performance standards set forth in Baltimore County Zoning Regulations ("B.C.Z.R.") § 1A04.4.

In the ALJ's initial ruling dated April 28, 2016, the ALJ agreed with the last point made by Mr. Doak, *i.e.*, that the Developer had not complied with B.C.Z.R. § 1A04.4, which requires a developer to demonstrate that the plan complies with the "performance standards" for RC5 lots.[2] "The regulations expressly require the DOP [Department of Planning] to submit to the ALJ 'findings' on the performance standards, and the Hearing

[2] In Baltimore County, the RC5 zone permits "maximum gross residential density [of] .5 dwelling[s] per acre." B.C.Z.R. § 1A04.3.B.1.a.

Officer is obligated to 'adopt the findings presented by the Department of Planning.' B.C.Z.R. 1A04.4.C." The ALJ found that the law was unambiguous, and required these findings for even a single house to be built in RC5 zones. In this case, the Department of Planning "did not submit 'findings' on the issue, and [the Developer's engineer] testified the review would be deferred 'until better information is known.'" In the absence of these findings, the ALJ concluded the development plan could not be approved, and (initially) denied approval of the 2015 plan based on that issue alone.

With respect to the other concerns that had been raised by the protestants, the ALJ made the following four rulings: (1) The ALJ concluded that "*res judicata* is not applicable here." The ALJ explained that there had been a "significant change in circumstances between the earlier and subsequent" application, noting that the new development is a different size and scope than the 2004 plan, and there had also been a change in the law relative to the Baltimore County Code provision cited in the 2004 ruling, B.C.C. § 32-4-416. (2) The conceptual stormwater management plan presented by the Developer was sufficient at this stage, and satisfied B.C.C. § 32-4-224(a)(10). (3) There was no impediment regarding the County-designated historic environmental setting which surrounds the Stemmer House because the proposed new lots were outside that setting and, therefore, would not be protected by B.C.C. § 32-7-101(p). And the ALJ concluded that, as a result of the amendment to B.C.C. § 32-4-416, there is no longer any "provision in the B.C.C. or B.C.Z.R. which requires the ALJ to 'preserve' historic sites, nor is there any code or regulation which imposes any particular requirements for a

development project proposed in the vicinity of a historic district or structures." "Without such rules," he concluded, "the ALJ cannot deny a plan proposing single family dwellings outside of the HES [historic environmental setting] surrounding a County landmark and adjoining the Caves Valley Historic District." (4) The section of the Baltimore County Code dealing with panhandle lots, § 32-4-409, does not require any agency to make findings or recommendations to the ALJ or Hearing Officer regarding panhandle lots. The ALJ did not believe the development plan could be denied on the basis of the lack of findings from the Department of Planning.

Although the initial decision of the ALJ denied approval of the proposed development plan based upon B.C.Z.R § 1A04.4, consideration of the 2015 plan resumed after the ALJ granted the Developer's Motion for Reconsideration in accordance with Rule 4K of the Zoning Commissioner's Rules. The ALJ found that reconvening to hear more testimony and/or exhibits with respect to the performance standards issue would "allow for this matter to be resolved in a sensible and economical fashion, without the necessity for multiple appeals and a procedural morass."

On August 25, 2016, the ALJ issued his "Amended Development Plan Opinion & Order" approving the "2609-2615 Caves Road" Development Plan (that we have been referring to as the 2015 plan). The ALJ made the following comments that were intended to clarify and modify his previous opinion :

> While Protestants continue to present the issue as one involving the Stemmer House and the Caves Valley Historic District, I do not believe the County Code and zoning regulations provide support for that argument. Throughout the RC-5 performance standards there appear numerous

> references to the "site." Both Developer's and Protestants' witnesses agreed the "site" encompasses only the lot being developed, which in this case would exclude the Stemmer House. Protestants note the standards require a development proposal to "integrate, where possible, significant features of the site, such as . . . landmarks and gardens, into the site design, and retain the existing character of the features and their settings." B.C.Z.R. § 1A04.4.D.1.c. Assuming the Stemmer House constitutes a "landmark" as that term is used in the standards, the section in question regulates "site design" and "site planning," which would exclude the Stemmer House which is not on the development "site." As for the "setting" of the landmark, the LPC [Landmarks Preservation Commission] has determined the HES [historic environmental setting] designated for the Stemmer House will sufficiently protect and buffer that resource, and the ALJ and parties are bound by that determination.
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> Finally, and as noted in the original Order, **I continue to believe the preservation or protection of the Caves Valley Historic District is not an issue or factor involved in the review and approval of this development. Baltimore County law previously required any development project to "preserve historic sites and structures." If that was still the law it is at least arguable Protestants presented sufficient evidence to prove that requirement would not be satisfied in this case. But** the County Council repealed that law (former B.C.C. § 32-4-416) and **the plan cannot be denied on this basis**.

(Emphasis added.)

Valley's Planning Council appealed the ALJ's decision to the Board of Appeals of Baltimore County. In a 2-1 decision, the Board affirmed the ALJ's decision, noting "the majority of the Board concurs with the finding of the ALJ that there is no provision in the B.C.C. or B.C.Z.R. which requires the ALJ to 'preserve' historic sites, nor is there any code or regulation which imposes any particular requirements for a development project proposed 'in the vicinity' of a historic district or structures[;] consequently, it was not required for the ALJ to make specific findings regarding the issue."

One Board member dissented, and wrote: "I see no reason in the record presented to the ALJ to conclude that there has been a material change in the law such that issue preclusion should not apply." The dissenting member of the Board argued that the ALJ's discussion of "issue preclusion runs afoul of § 32-4-281(e)[(1)(iii)](3) and (5) because it is an error of law and it is arbitrary and capricious."

Furthermore, the dissenting member of the Board was of the view that the ALJ committed an error of law by finding that he lacked the authority to consider the impact of the 2015 plan on the Caves Valley National Register Historic District. The dissenting member of the Board stated the following:

> The ALJ concluded that there was no authority which required him to "preserve" historic sites, or to account for development in the "vicinity of a historic district or structures." He based this conclusion on the deletion of the language discussed above from § 32-4-416 and the absence of formal guidance from Baltimore County as to how to best "preserve historic districts and viewsheds." According to the ALJ opinion, the County's failure to codify just how to implement preservation policies results in the inability to even consider the issue in the course of a development. The authority of the ALJ to review a development plan includes the requirement that approval of the plan ". . . shall be subject to all appropriate standards, rules, regulations, conditions, and safeguards set forth [in Title 7]". The ALJ viewed his authority in this matter far too narrowly.
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> . . . [T]he deletion of the language in former 32-4-416 cannot rationally be viewed as divesting the ALJ of such authority. . . . [I]t is not clear that the County has ever codified rules to implement historic preservation, either before or after the modification of § 32-4-416. Yet development plans routinely receive historic impact scrutiny. . . .
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> . . . [The ALJ] declined to make any findings or conclusions about the historic impact issue in any of its possible forms. He could have found that the present plan satisfied any such concerns; he could have found that the present plan represented a far too serious compromise of those issues; or he could have found anywhere in between those two poles. **But the**

> **point is he explicitly chose to set the issue aside under the theory that he lacked the authority to address it. I view that as an error of law that requires reversal of his decision by reason of § 32-4-281(e)[(1)(iii)](3) and (5).**

(Emphasis added; record references omitted.) B.C.C. § 32-4-281(e)(1)(iii)(3) and (5) permit the Board of Appeals to reverse or modify the decision of the ALJ if it is "affected by any other error of law" or is "arbitrary or capricious."

Valley's Planning Council filed a petition for judicial review in the Circuit Court for Baltimore County. The court ruled on only the issue of whether the plan was barred by *res judicata* or collateral estoppel, and did not reach the merits of the other four questions for review because, according to the court, "[t]he conclusion to this single question is dispositive." The circuit court ruled that *res judicata* is not applicable, but collateral estoppel is applicable, and precludes the proposed development from being approved. The court concluded "that the founding principles of collateral estoppel have not been served by allowing Developer to move forward with the Plan." "The issues and testimony presented to the ALJ and Board during the Plan's approval process are almost identical to the issues discussed in the 2004 Decision. Permitting relitigation in such a context does not promote judicial economy." The circuit court reversed the decision of the Baltimore County Board of Appeals.

The Developer filed this appeal.

STANDARD OF REVIEW

Both parties agree that the ALJ was the final decision maker, and it is the ALJ's decision that we are reviewing. The Court of Appeals described the standard of review of

an administrative agency's decision in *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 576-77 (2004):

> Judicial review of administrative agency action is narrow. The court's task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency. A reviewing [c]ourt may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency. 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.

(Citations and internal quotation marks omitted.)

While we may "give weight to an agency's experience in interpretation of a statute that it administers, . . . it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Schwartz v. Md. Dep't of Natural Res*., 385 Md. 534, 554, 870 A.2d 168 (2005). With respect to questions of legal interpretation, the Court of Appeals said in *HNS Development, LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 449-50 (2012):

> When an agency resolves a question of law, however, our review is less deferential. We will not uphold an "administrative decision which is premised solely upon an erroneous conclusion of law." *People's Counsel for Balt. Cnty. v. Md. Marine Mfg. Co.*, 316 Md. 491, 497, 560 A.2d 32, 34–35 (1989). A "degree of deference should often be accorded the position of the administrative agency" charged with interpreting and enforcing a particular set of statutes or regulations. [*People's Counsel for Balt. Cnty. v.*] *Surina*, 400 Md. [662] at 682, 929 A.2d at 911 [(2007)] (quoting *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169, 177 (2001)). Our task is to "ascertain and effectuate" the intent of the legislative body and to avoid "construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense." *Mayor & City Council of Rockville v. Rylyns Enters., Inc*., 372 Md. 514, 550, 814 A.2d 469, 490 (2002). To accomplish this task, "we begin our inquiry with the words of the statute

> and, ordinarily, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry." *Id*. We keep in mind that particular provisions of a statute are interpreted in the context of the entire statutory scheme, and "read together and harmonized to the extent possible, reading them so as to avoid rendering either of them, or any portion, meaningless, surplusage, superfluous or nugatory." *Id*. (citing *Whiting–Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 302–03, 783 A.2d 667, 671 (2001)).

DISCUSSION

I. Preclusive effect of denial of the 2004 plan

The Developer asserts that the circuit court erred in reversing the ALJ's approval based upon the court's conclusion that the 2004 decision was preclusive and binding on the issue of whether houses could be built upon the ridge. The Developer points out that the term "collateral estoppel" was never mentioned during the hearings on the 2015 plan before the ALJ, although there were arguments regarding *res judicata*. And the Developer further asserts that the plan proposed in 2015 was sufficiently different from the plan that was turned down in 2004 that the earlier decision is not entitled to any preclusive effect.

Valley's Planning Council responds that, although the words "collateral estoppel" were not spoken during the hearings before the ALJ, the requirements for application of collateral estoppel were argued. And, Valley's Planning Council contends, the changes in the proposed plan, as well as the intervening changes in the law, are not sufficiently material to avoid giving preclusive effect to the 2004 decision disapproving the houses on the ridge.

We conclude that, even if we assume (without deciding) that an argument for application of collateral estoppel was adequately preserved, because the plan proposed in 2015 was sufficiently different, and the law was sufficiently different from what was before the Hearing Officer in 2004, the 2004 decision did not compel the ALJ to deny approval of the four lots proposed in the 2015 plan based upon collateral estoppel. And, for the same reasons, the 2004 decision did not compel the ALJ to deny approval of the 2015 plan based upon the doctrine of *res judicata*.

In *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 735-36 (2010), discussing the concept of *res judicata*, we observed:

> The more recent Maryland cases have held that, when an administrative agency is performing a quasi-judicial function, the principles of *res judicata* are applicable. *See, e.g., Stavely v. State Farm Mut. Auto. Ins. Co*., 376 Md. 108, 116, 829 A.2d 265 (2003); *Sugarloaf v. Waste Disposal*, 323 Md. 641, 658–59, 594 A.2d 1115 (1991); *Cicala v. Disability Review Bd*., 288 Md. 254, 263–64, 418 A.2d 205 (1980).
>
> The Court of Appeals has confirmed that an administrative agency's decision will be entitled to preclusive effect if the test first enunciated in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845–46 (9th Cir.1987), is met. *See Batson v. Shiflett*, 325 Md. 684, 705, 602 A.2d 1191 (1992). In *Batson, id*. at 701, 602 A.2d 1191, the Court of Appeals quoted with approval the following test for determining whether an administrative agency's ruling "is entitled to preclusive effect":
>
> > Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the [agency] was acting in a judicial capacity; (2) whether the issue presented to the [reviewing] court was actually litigated before the [agency]; and (3) whether its resolution was necessary to the [agency's] decision.
>
> (Internal quotation marks omitted.) *Accord Neifert v. Dept. of Environment*, 395 Md. 486, 507, 910 A.2d 1100 (2006).

But we have also declined to give preclusive effect to a prior judgment that is not predicated upon the same evidentiary facts. *Naylor v. Prince George's County Planning Bd.*, 200 Md. App. 309, 327-29 (2011) (preclusive effect denied where the preliminary plans differed "in the location, size, configuration, and timing of the two subdivisions").

The Developer argues that the following changes in facts are substantial, and therefore, neither *res judicata* nor collateral estoppel can apply:

> (1) **Lots and Acreage:** the 2004 plan proposed fourteen lots on seventy-three acres, whereas the current development plan proposes four lots on twenty-four acres.
>
> (2) **Historic Structure:** the 2004 plan included a lot for the Stemmer House, which is not even part of the land being subdivided in the 2015 plan.
>
> (3) **Historic Setting:** the historic environmental setting associated with the Stemmer House was established after the 2004 case, and the four houses proposed on the current development plan are located entirely outside the boundaries of that setting.
>
> (4) **Access:** access to thirteen of the fourteen lots on the 2004 plan would have been from Park Heights Avenue, whereas access proposed for the four lots on the 2015 development plan is via an existing driveway from Caves Road.
>
> (5) **Orientation:** three homes proposed on the 2004 plan are within the boundaries of the current property. But the proposed orientation of the houses is different. The proposed homes on the 2004 plan had the rear of the homes facing the Stemmer House. The homes proposed in the 2015 plan have the fronts facing toward the Stemmer House.
>
> (6) **Impervious area and Stormwater Management:** the 2004 plan required six stormwater management ponds, some of which had outfalls on or near steep slopes, and the plan contained more impervious area. The current plan proposes "small micro-

bioretention-based" storm water management devices, no ponds, and no outfalls on or near steep slopes, in accordance with 2007 changes in Maryland law.

(7) **Steep Slopes**: the 2004 plan proposed homes to be built along steep slopes, whereas no homes on the current plan are proposed on a steep slope.

(8) **Forest Clearing:** the 2004 plan proposed substantial priority-one forest clearing. Due to a change in the location of the driveway, and subsequent forest clearing by the previous owner after 2004, the current plan requires the removal of only one specimen tree.

Valley's Planning Council argues that these changes in the plan are immaterial because the critical part of the 2004 decision was based on the "physical location" of the three proposed lots which are in virtually the same location on the 2015 plan. Valley's Planning Council argues that the 2004 development plan was denied because the lots on the ridge did not "adequately preserve" and would "impact" the Historic District. Valley's Planning Council dismisses the distinctions proffered by the Developer, noting that "they are plainly irrelevant to the application" of preclusion because they have no connection to the basis of the 2004 decision.

We agree with the Developer that too much has changed since 2004 to conclude that consideration of the 2015 plan is barred by either collateral estoppel or *res judicata*. First, the lots, the acreage and the scope of the 2015 plan are all dramatically different from those components of the 2004 plan. The 2004 plan covered 73 acres and created thirteen new home sites and an "HOA Common Area" in the center of the development. The 2015 plan proposes four new homes on 24 acres.

Next, the 2004 plan included the Stemmer House on a lot in the subdivision, whereas the current plan does not. The lot line adjustments recorded in 2012 have legally severed the Stemmer House's designated "historic environmental setting" from the acreage included in the 2015 plan. Although Valley's Planning Council may not be happy with the manner in which the Landmarks Preservation Commission has treated the Stemmer House, this is nonetheless a change since the 2004 plan was rejected.

Next, the access to the proposed dwellings is different. The 2004 plan proposed a new road from Park Heights Avenue, a scenic route, whereas the current development requires only the improvement of an existing entry off Caves Road, not a scenic route.

Although Valley's Planning Council plays down the significance of the differences in the stormwater management systems proposed in the 2015 plan, the changes since 2004 are major, and they address one of the critical concerns that led the Hearing Officer to reject the 2004 plan. The 2015 plan utilizes environmental site design that includes a modest impervious area on the plan with no outfalls on or near erodible slopes. This alone is a significant change in facts since it was one of the prime reasons the 2004 Hearing Officer gave for his conclusion to reject the plan: "I am persuaded by the weight of the evidence before me that the plan does not present a suitable outfall for the storm water management facilities. . . . [T]he fact that the Developer is proposing six storm water management facilities for only 13 homes tells me that this plan is simply asking too much on this ridge."

The fact that none of the current proposed homes are to be built on slopes "greater than 25%" is also a significant difference in the environmental impacts of the plans. In 2004, the Hearing Officer expressed concern that building "homes on slopes greater than 25% . . . poses its own danger of erosion along with the possibility of disposing [sic] sediment into the sensitive trout streams below. This sort of damage, even of the slightest nature, could take place through mistakes made during construction and beyond." Eliminating this major concern is a substantial change from facts that led to the rejection of the 2004 plan.

Finally, only one specimen tree would be removed under the 2015 plan, which is a material change from the "significant amount" of priority-one forest that would have been removed under the 2004 plan. Although this change is largely due to the prior owner's harvesting many of the trees that were present in 2004, the change in the location of the access road also allows for a smaller number of trees to be removed.

The Developer also points to two significant changes in the law since the 2004 plan was denied. First, a section of the Baltimore County Code cited in the 2004 decision, B.C.C. § 32-4-416—which *required* preservation of National Register Historic District sites—was amended in 2007 to delete the reference to historic sites. *See* Baltimore County Council Bill No. 26-07.

Second, the Maryland General Assembly passed a comprehensive bill dealing with storm water management in 2007. Stormwater Management Act of 2007, Maryland Code (1982, 2013 Repl. Vol.), Environment Article, §§ 4-201 thru 4-215. The County has

adopted changes required by the State. B.C.C. §§ 33-4-101 thru 33-4-116. These changes in the law governing stormwater management compelled the Developer to utilize a materially different stormwater management design in the 2015 plan.

In view of the multiple factual differences and the changes in law cited by the Developer, we conclude that there have been sufficient changes in the proposed development plan and the law that neither *res judicata* nor collateral estoppel is applicable to bar the 2015 proposal. *See Gertz v. Anne Arundel County*, 339 Md. 261, 269-70 (1995) ("the claim raised in the second action . . . was not the same as the claim decided in the prior adjudication"); *Esslinger v. Baltimore City*, 95 Md. App. 607, 627-28 (1993) ("[C]ollateral estoppel is inapplicable . . . when there is an intervening change in the applicable legal context.").

II. Impact upon historical site

The Developer argues that, because of the amendment to § 32-4-416 in 2007, the ALJ correctly concluded that he had no authority to consider the impact of the proposed development upon the Caves Valley National Register Historic District. Although we agree that the code no longer contains the provision that expressly *required* the development plan to preserve the Caves Valley National Register Historic District, we conclude that the ALJ erred in asserting that he could not even *consider* the impact the development would have upon the National Register District in which the proposed houses were to be constructed. Even after the 2007 amendment to § 32-4-416, it was still the expressly stated policy and intent of Baltimore County to ensure that proposed

development projects provide for the protection of natural features and historical sites or areas.

Title 4 of the Baltimore County Code addresses "Development." Section 32-4-102 sets forth development policies for the County, and lists in subsection (b)(2) the intended goals of the development law. Section 32-4-102(b)(2) currently provides (as it did in 2015):

> (2) **This title is intended to ensure that proposed development projects** are safe, adequate, convenient and, **where applicable, provide for the following:**
>
> > (i) Conservation of existing communities and the promotion of the quality of development, site and building design, and compatibility;
> >
> > (ii) Promotion of economic development to expand the tax base, provide employment, facilitate commercial activity, and house the citizens of the county;
> >
> > (iii) Improved linkage between developments to enhance circulation of motor vehicles, bicycles, and pedestrians, including appropriate location and design of streets, foot paths, and transit facilities relative to their anticipated functions and to existing facilities;
> >
> > (iv) Water supply, sewerage, stormwater drainage, street lighting, fire protection, and emergency services, including adequacy of water volume, water pressure, and emergency access to all parts of the property;
> >
> > (v) Community services, including schools, parks and other open spaces, recreation areas and facilities, and other amenities for users or occupants of the property;
> >
> > (vi) **Prevention of environmental degradation and promotion of environmental enhancement, including adequacy of** landscaping and energy conservation measures, and of **protection of** floodplains, steep slopes, watersheds, nontidal wetlands, tidal wetlands,

vegetation, other **natural features and historical sites or areas**; and

(vii) Preservation of agricultural lands, including adequacy of protection of prime and productive soils from inappropriate development.

(Emphasis added.)

In furtherance of the intent to protect "historical sites or areas," Section 32-4-223(8) still requires a development plan to identify any historical site—including any National Register District—that is either within or contiguous to the proposed development. Section 32-4-223(8) states:

The Development Plan shall identify the following information concerning existing site conditions:

* * *

(8) Identification of **any building, property, or site within or contiguous to the proposed development that is included in**:

(i) The Maryland Historical Trust Inventory of Historic Properties or the county inventory;

(ii) The county preliminary or final landmarks list;

(iii) **The National Register of Historic Places**;

(iv) The Maryland Archeological Survey;

(v) Any county historic district; or

(vi) A National Register District covering the proposed development[.]

(Emphasis added.)

As a consequence of the amendment made by Bill 26-07, § 32-4-416 no longer *mandates*, as it did prior to passage of Bill 26-07, that a development plan "preserve [h]istoric structures or sites identified on any of the lists referred to in § 32-4-223(8)." Instead, § 32-4-418 now provides that those historic structures or sites referred to in "§ 32-4-223(8)(i), (ii), and (v) . . . are subject to the provisions of Title 7 of this article." Title 7, in turn, focuses on preservation of county historic districts and "landmark" structures, and does not mention National Register sites.[3]

We are not persuaded that the repeal of the provision in § 32-4-416 that expressly required that all development plans preserve any National Register District supports the position, adopted by the ALJ, that the Baltimore County Code now *precludes* giving any consideration to the impact the proposed development would have upon a historic district that is on a National Register. The dissenting member of the Board of Appeals called the ALJ's leap in logic to arrive at his position "a spectacularly grand inference":

> The parties agree that County Bill 26-07 removed the specific language quoted above [*i.e.*, "[h]istoric structures or sites identified on any

[3] Valley's Planning Council points out that the focus of Bill 26-07 was not to reduce the protection of National Register Districts, but was to improve the manner in which the County identified and preserved landmarks in Baltimore County. Valley's Planning Council asserts in its brief: "Section 32-4-418 simply subjects certain structures to Title 7, but Title 7 has nothing to do with the development plan review process, which is set forth in Title 4 (not Title 7) of Article 32, and has nothing to do with ***federal*** historic districts." Valley's Planning Council also reproduced Bill 26-07 in its appendix, and it is clear that the purpose clause of that bill makes no reference to either federal historic districts or the development plan review process, but instead expresses the intent to create a county inventory of county landmarks and make other changes "generally relating to landmarks preservation." All but 3 pages of the 29-page bill address county landmarks and the Baltimore County Landmarks Preservation Commission.

> of the lists referred to in § 32-4-223(8),"] from § 32-4-[4]16. From this silent deletion, the Developer has argued that it is no longer necessary, or even proper, for development plan approval to account for historic sites. In effect, the Developer is suggesting that the Baltimore County Council intended to eliminate considerations of impact on historic areas out of the development process. Even if there was no larger context to look to, this is a spectacularly grand inference from a silent record. Fortunately, however, there is a larger context, and that context is the other portions of [Bill] 26-07 as well as the remaining portions of the [B.C.C.] which obviously continued to place a high regard on historic landmarks and sites. . . .
>
> . . . [E]ven without the old § 32-4-416, there were then, and continue to be, other code provisions which support the conclusion that impact on a historic site is well within the spectrum of issues to be considered in the review of a development plan. This is important, first, because the continued existence of these provisions provides further support for the conclusion that the deletion of the language from § 32-4-416 was not intended to remove such concerns from the development plan process. Secondly, these provisions provide an independent basis for the consideration of historic impact in the development process separate and apart from the old § 32-4-416. Section 32-4-401(b) requires "all development" to "[c]onform to the policy and intent of this Title." The intent of the Title is contained in § 32-4-102. Specifically, § 32-4-102(b)(2) states that development plans provide for a number of identified issues. One of those issues is recited in § 32-4-102(b)(2)(vi), which specifically mandates ". . . protection of floodplains, steep slopes, watersheds, nontidal wetlands, tidal wetlands, vegetation, **other natural features and historical sites or areas**[.]" (Emphasis supplied [in dissenting opinion]). Finally, § 32-4-223(8) requires that a development plan identify "any building, property, or site within or contiguous to the proposed development that is included in" a list of historic places and sites. If consideration of historic places and sites has been eliminated from the development plan process, as the Developer here suggests, there would seem to be little reason for bothering to identify them in the context of pre-existing site conditions.

As the dissenting member of the Board of Appeals pointed out, it remains an expressly codified intent of the County, as stated in § 32-4-102(b)(2)(vi), "to ensure" that proposed development projects prevent environmental degradation by promoting adequate "protection of . . . natural features and historic sites or areas." And § 32-4-

401(b) requires that "all development shall" "[c]onform to the policy and intent of this title." Consequently, we conclude that the ALJ applied an incorrect standard of review when he treated these provisions of the code as mere surplusage and stated: "While the concerns expressed by the community are valid and appropriate, I do not believe they can serve as a basis to deny the Development Plan."

Section 32-4-229(b)(1) provides: "The Hearing Officer shall grant approval of a Development Plan that complies with these development regulations **and applicable policies**, rules and regulations adopted in accordance with Article 3, Title 7 of the Code, provided that the final approval of a plan shall be subject to all appropriate standards, rules, regulations, conditions, and safeguards set forth therein." (Emphasis added.) The converse of this requirement is that the hearing officer should not grant approval of a development plan that does not comply with applicable policies. And we note that the hearing officer is expressly authorized to "impose any conditions" that protect "surrounding and neighboring properties," and are "necessary to alleviate any adverse impact upon the welfare of the community," pursuant to Section 32-4-229(d)(2), which provides:

> (2) In approving a Development Plan, the Hearing Officer may impose any conditions if a condition:
>
> > (i) Protects the surrounding and neighboring properties;
> >
> > (ii) Is based upon a comment that was raised or a condition that was proposed or requested by a participant;

> (iii) Is necessary to alleviate an adverse impact on the health, safety, or welfare of the community that would be present without the condition; and
>
> (iv) Does not reduce by more than 20%:
>
> 1. The number of dwelling units proposed by a residential Development Plan in a DR 5.5., DR 10.5, or DR 16 zone; or
>
> 2. The square footage proposed by a non-residential Development Plan.

Because the Baltimore County Code still requires a development plan to identify whether the proposed development is in or contiguous to a National Register District, and because it remains a policy of the County to ensure that development projects adequately provide for the protection of historical sites, we conclude that any of the six categories listed in § 32-4-223(8) *may be considered* when an ALJ is determining whether the development adequately protects a historic site, including National Register Districts such as the Caves Valley National Register Historic District. *See* §§ 32-4-102(b)(2)(vi); 32-4-401(b).

Therefore, we agree with the dissenting member of the Board of Appeals who expressed the view that the ALJ committed legal error when he refused to consider the impact of the proposed development upon the Caves Valley National Register Historic District:

> The ALJ had the authority to account for historical impact, yet the ALJ declined to make any findings or conclusions about the historic impact issue in any of its possible forms. He could have found that the present plan satisfied any such concerns; he could have found that the present plan represented a far too serious compromise of those issues; or he could have found anywhere in between those two poles. But the point is he explicitly chose to set the issue aside under the theory that he lacked the authority to address it.

The ALJ acknowledged in his written opinion that it was arguable that Valley's Planning Council "had presented sufficient evidence to prove" that preservation of the Caves Valley National Register Historic District would not be well served by this development plan. At the end of his final opinion approving the development plan, the ALJ made the following statement:

> Finally, and as noted in the original Order, I continue to believe the preservation or protection of the Caves Valley Historic District is not an issue or factor involved in the review and approval of this development. Baltimore County law previously required any development project to "preserve historic sites and structures." **If that was still the law it is at least arguable [Valley's Planning Council] presented sufficient evidence to prove that requirement would not be satisfied in this case. But the County Council repealed that law (former B.C.C. § 32-4-416) and the plan cannot be denied on this basis.**

(Emphasis added.)

Valley's Planning Council offered testimony from experts and lay witnesses who were concerned that the character of the Caves Valley National Register Historic District would be damaged by allowing the Developer to proceed with building homes in the locations proposed in the 2015 development plan. Because the ALJ held that he could not consider, and therefore did not consider, potential damage as a possible basis for denying approval of the plan (or approving with conditions), the ALJ made an error of law with respect to the standard for approval of a development plan, and the case must be remanded to the Office of Administrative Hearings for further proceedings consistent with this opinion.

III. Stormwater management

The Developer argues that the ALJ's decision with respect to the proposed stormwater management plans was correct. Valley's Planning Council, based on testimony from its own expert, Mr. O'Leary, asserts that the development plan does not comply with Baltimore County Code § 32-4-224(a)(10), and that the stormwater management plan is deficient.

The ALJ found that the trenches and pervious pavement shown on the plan are deemed acceptable by the Maryland Department of the Environment and the County Department of Environmental Protection and Sustainability. The ALJ further found that, at this stage of the process, the County Department of Environmental Protection and Sustainability has approved a "concept" stormwater management plan, and the plan will evolve throughout the "dynamic" development process, as recognized by experts for both parties. *See Monkton Preservation Assoc. v. Gaylord Brooks*, 107 Md. App. 573, 584-85 (1996) (describing development process as an "ongoing process"). B.C.C. § 33-4-101(h) merely requires that this first plan (of three required stormwater management plans) contain "information necessary to allow an initial evaluation of a proposed project."

The ALJ found that the concept plan met the requirements of B.C.C. § 33-4-107(b)(2), showing the "type, size and location of proposed ESD practices, supporting computations, and all points of discharge from the site," based on an exhibit from the Developer's expert and the review by DEPS. Notwithstanding concerns expressed by a witness for the protestants, there was substantial evidence to support the ALJ's conclusion.

The Board of Appeals explained: "In reviewing the basis for the ALJ finding on this issue, it is clear that his finding was the result of choosing between the expert testimony of Mr. Kennedy and Mr. O'Leary." We agree with the Board of Appeals on this point. The expert testimony of Mr. Kennedy was adequate substantial evidence to support the ALJ's decision approving the concept plan for stormwater management.

IV. Panhandle lots

A "panhandle lot" is "a lot shaped and situated so that the only frontage or access to a local street or collector street is a narrow strip of land." B.C.C. § 32-4-101(p). Section 32-4-409 of the Code lists conditions for creating panhandle lots. The ALJ recognized that "panhandle lots are not considered matters of right but rather a project design solution that may be approved under the proper circumstances." But it is not clear that there was substantial evidence in the record as a whole to support an affirmative finding by the ALJ that the proposed panhandle lots met all requirements imposed by § 32-4-409.

After Mr. Doak—an expert on development and zoning, called by the protestants—opined that the proposed panhandle lots did not meet the requirements of B.C.C. § 32-4-409(a), the County's representative from the Department of Planning testified summarily that the Department of Planning had recommended and approved the development plan. The Developer contends that the County Department of Planning's recommendation of the plan implicitly established that the panhandle lots shown thereon complied with § 32-4-409, and that nothing further is required. But neither the Developer

nor the County offered testimony or other evidence explaining why the protestants' expert's testimony regarding the panhandle lots was in error, or affirmatively explaining that the 2015 plan meets the requirements of § 32-4-409.

The ALJ found that nothing more was needed for him to approve the proposed development plan. The ALJ held that administrative "officers are presumed to have properly performed their duties," and that it was Valley's Planning Council's burden to elicit testimony from witnesses to establish that the panhandle lots were overlooked by Department of Planning. The ALJ held that, "without such evidence [from the protestants], [he did] not believe the Development Plan could be denied on this basis." *Cf. Elm Street*, 172 Md. App. at 704 ("We dispose of appellants' argument that the Board erroneously deferred to the 'expert opinions' of the Office of Planning and DEPRM, without scrutiny, by simply noting that the recommendations of the County agencies were rendered, without explanation, as the law permits.").

We agree with the ALJ's assertion that *Elm Street* stands for the proposition that reports from all of the County's reviewing departments can satisfy a *prima facie* case for approval, *id*. at 696, and the departments are not required to articulate the facts and reasons underlying their decisions unless the B.C.C. or B.C.Z.R. plainly imposes such a requirement with respect to particular decisions. *Id*. at 701-02. Therefore, ***if*** the protestants had presented no evidence of non-compliance of the panhandle lots, the Developer and the County could have chosen not to present any evidence on that point to the ALJ, and the development plan could have been "deemed Code-compliant **in the**

absence of evidence to the contrary." *Id*. at 703 (emphasis added). Under such circumstances in *Elm Street*, we concluded: "[S]ince [the protestants] chose not to produce any evidence or even question the County representatives as to the basis for their recommendations, we must conclude that the agencies carried out their duties properly." *Id*. at 705.

In *Elm Street*, the protestants called no witnesses and offered no evidence of non-compliance with code requirements. *Id.* at 705. Here, however, the protestant *did* present evidence that the 2015 plan does not comply with the requirements of B.C.C. § 32-4-409. Valley's Planning Council produced expert testimony that the proposed panhandle lots shown on the 2015 plan are not permitted of right by County law. And the panhandle lots are not a trivial feature of this subdivision's design; if the proposed panhandle lots are prohibited by County law, as the uncontradicted testimony of Mr. Doak indicated is a possibility, the 2015 plan would need to undergo major revisions.

Under these circumstances, we conclude that, even though § 32-4-409 does not, on its face, require any County department to submit findings to the ALJ regarding panhandle lots, after the ALJ heard expert testimony that the proposed lots were not permitted by code, it was error for the ALJ to approve the 2015 plan in the absence of evidence affirmatively demonstrating compliance with the applicable code requirements. Upon remand, the ALJ shall conduct further proceedings to ascertain whether the proposed panhandle lots would be in compliance with the applicable code requirements, and may hear additional evidence regarding this feature of the development plan.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY WITH DIRECTIONS TO VACATE THE DECISION OF THE BALTIMORE COUNTY BOARD OF APPEALS AND REMAND THE CASE TO THE BALTIMORE COUNTY BOARD OF APPEALS WITH INSTRUCTIONS TO REMAND THE CASE TO THE BALTIMORE COUNTY OFFICE OF ADMINISTRATIVE HEARINGS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
COSTS TO BE EQUALLY DIVIDED BETWEEN APPELLANT AND APPELLEE.