UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0656

September Term, 2014

FREELAND COMMUNITY ASSOCIATION *ET AL.*

v.

HZ PROPERTIES, LLC

Kehoe,
Leahy,
Zarnoch, Robert A.,*

JJ.

Opinion by Kehoe, J.

Filed: September 16, 2016

*Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court, and in the adoption of this opinion as a specially assigned Senior Judge.

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

This appeal is from a judgment of the Circuit Court for Baltimore County entered in a judicial review of a decision by the Baltimore County Board of Appeals. The appellants are the Freeland Community Association, individual members of that organization, and the People's Counsel of Baltimore County. The appellee is HZ Properties, LLC. HZ owns property in the Freeland area of Baltimore County and desires to subdivide it. The substance of the parties' dispute is whether HZ's land should be considered as one or two parcels for the purposes of the County's zoning ordinance and subdivision regulations. The Board concluded that HZ's land was two parcels. The circuit court affirmed the Board's decision. Between them, the parties present us with ten issues, which we have re-worded and consolidated for our analysis:

1. Did the appellants file a timely appeal to the Board?

2. Does the doctrine of administrative *res judicata* bar HZ's petition for its minor subdivision plan?

3. Does HZ's subdivision plan exceed the maximum allowable density for the zoning district in which the property is located?

We will reverse the circuit court.

Background

As land use cases go, the facts underlying this appeal are relatively simple. Our story begins in 1968. At that time, William J. Walters and Estelle M. Walters owned a small farm, consisting of approximately 45 acres, located in the northern part of Baltimore county. In that year, the Walters conveyed a 200' wide strip of land (the "BGE

Strip"), 5.71 acres total, to the Baltimore Gas and Electric Company ("BGE"), so that BGE could construct and maintain an electric transmission line along its center line.[1] The remaining land north of the BGE Strip totaled approximately 11 acres; the land south of the BGE Strip totaled approximately 28 acres, for a total of 39 acres. The portion of the farm north of the BGE Strip is bisected by "Mikules Manner Road"[2] which continues across the BGE Strip and terminates in the southern portion of farm. We will refer to the

[1]We recognize that one of the main points of contention in this case is whether the 1968 deed conveyed a right-of-way over the BGE Strip or conveyed the parcel to BGE in fee simple, subject to a reservation by the grantors to use the parcel for agricultural purposes that do not interfere with BGE's transmission line. HZ contends that the deed conveyed a fee simple interest. We agree. The deed states in pertinent part:

> That in consideration of the premises and the sum of Five ($5.00) Dollars, and other good and valuable consideration . . . the [Walters] do *hereby grant and convey* onto [BGE], its successors and assigns, *in fee simple*, all the parcel of land . . . described as follows:
>
> > Beginning for the same at a point of intersection of the center line of a proposed electrical transmission line right-of-way, 200 feet wide, with [one of the boundary lines of the Walters farm] . . . .
>
> . . .
>
> TO HAVE AND TO HOLD said parcel of land . . . *in fee simple*.

When the language of a deed is clear and unambiguous, plain meaning controls. *Conrad/Dommel, LLC v. West Development Co.*, 149 Md. App. 239, 265 (2003). In this case, there is no conflict because both the granting ("hereby grant and convey") and the *habendum* ("to have and to hold") clauses unambiguously state that the Walters conveyed a fee simple interest. The reservation of rights by the grantors is further evidence of the parties' intent.

[2]Sometimes referred to as "Mikules Manor Road" in the record.

subject property, which includes the Northern and Southern portions—but does not include the BGE Strip—as the "Property." The Walterses subsequently conveyed the Property to Foy and Dorothy Allen. Mr. Allen submitted an application to subdivide the Property in 1986, which was denied. The Allens passed away and, in 2006, their estates conveyed the Property to HZ. This brings us to the zoning application which has given rise to this appeal.

In 2009, HZ filed an application to subdivide the Northern portion of the Property into two lots, which would result in a total of three lots on the Property. The County's Department of Permits, Approvals and Inspections (the "PAI") approved the application on December 1, 2011. Freeland Community Association ("Freeland") appealed the PAI's decision to the Board of Appeals and People's Counsel subsequently intervened.

As a preliminary matter, HZ filed a motion to dismiss the appeal to the Board on the grounds that the appeal was not timely filed. The Board denied this motion.

At the hearing, both appellants contended that HZ's application should have been denied, either under the doctrine of *res judicata*—due to the 1986 denial of Mr. Allen's application—or on the basis that the Property cannot be subdivided into three lots under its RC 2 zoning classification. The Board concluded that the doctrine of *res judicata* did not preclude the Commissioner from considering HZ's application. It further concluded that the Northern portion of the Property could be subdivided.

Analysis

I. Standard of Review

In appeals of judgments rendered in judicial review proceedings, we "review directly the action of the agency, rather than the decision of the intervening reviewing courts." *Md. Ins. Comm'r v. Central Acceptance Corp.*, 424 Md. 1, 14 (2011). The issues before us are legal questions, which re review *de novo*. *Schwartz v. Md. Dep't of Natural Resources*, 385 Md. 534, 554 (2005).

II. Timeliness of the Appeal

HZ contends that the appellants' Board appeal should have been dismissed for lack of timeliness. Both parties agree that an appeal must be filed with the Board within 30 days of a final agency decision. Baltimore County Code ("BCC") § 3-5-104(c).[3] What the parties disagree on is what the "operative event" was that constituted final agency action on HZ's subdivision application. *See Meadows of Greenspring Homewoners Ass'n*, *Inc. v. Foxleigh Enterprises, Inc.*, 133 Md. App. 510, 516 (2000).

In approving HZ's application, the County applied the following process:

1. HZ submitted a plan to the Zoning Office.

[3]BCC § 3-5-104(c) states:

> Time for filing. Except as provided by law, all appeals shall be filed in writing with the Board within 30 days after the day of the final action appealed

2. The Minor Subdivision Review Office issued comments and a list of requirements that must be fulfilled prior to approval.

3. A revised minor subdivision plan was circulated among the employees of the Zoning Review Office, and received its final signature of approval on December 1, 2011.

4. On December 12, 2011, the Department sent a letter to HZ, stating that the "minor subdivision plan has been approved."

Freeland appealed the Department's decision on January 5, 2012.

The appellants contend that the "operative event" that triggered the 30-day period for their appeal was the letter sent to HZ, dated December 12, 2011. HZ contends that the "operative event" was the final signature of approval on December 1, 2011. The Board agreed with the appellants and denied HZ's motion.

In reaching this decision, the Board noted that the BCC does not contain an express provision as to what constitutes the operative event for minor subdivision applications. The Board next examined two sections of the PAI's Policy Manual, Policy Nos. IIa and IIb. Policy No. IIa is a section that explains the procedure for approving minor subdivision plans. After initial approval, the Manual explains (emphasis added):

> [The plan] will be forwarded to the Zoning Review Office and the Department of Environmental Protection and Resource Management ("DEPRM") for signature. *Final approval is in about a week*. The surveyor will be responsible for providing PDM with eight copies of the signed plan for distribution to the agencies for inclusion into their files.

The Board interpreted the language "final approval is in about a week" to mean that final approval occurs about a week *after* the final signature is placed on the plan; thus concluding that the December 12 letter was the final approval date of the plan.

The second portion of the Policy Manual the Board examined was Policy No. IIb, which provides procedures for recording minor subdivisions. It states (emphasis added):

> Deeds, plats or plans referencing subdivision of land, merging or dividing lots or parcels, shall not be recorded among the land records of Baltimore County *without accompanying documentation showing approval by PDM* of any such subdivision of land.

The Board interpreted this section of the Manual as requiring letters from the Department, such as the December 12 letter, to be attached to any deed, plat, or plan referencing the subdivision before the deed can be recorded. Taken together, the Board concluded that Policy No. IIa and IIb meant that the Department letter is the final agency action constituting approval. It further concluded that: "This interpretation is also consistent with the issue raised by Appellants—that interested persons would not be privy to the date that DEPRM/DEPS signs the plan without daily monitoring of the project file with the county agencies."

HZ disputes the Board's interpretation of the Policy Manual. It argues that the Board mischaracterized the language used in Policy No. IIa and IIb. It contends that Policy No. IIa does not mean that approval is a week *after* the final signature, but that the language means final approval occurs *within* a week of submission.

Normally, courts give at least some deference to an administrative agency's interpretation of the regulations that it administers. *Adventist Health Care Inc. v. Maryland Health Care Com'n*, 392 Md. 103, 119–20 (2006). The degree of deference afforded to an agency's interpretation depends on the level of ambiguity of the language of the regulations in question. *Id.* at 126. When a regulation is ambiguous, it is appropriate to give deference to the agency's interpretation, so long as there is a substantial basis for that agency's interpretation. *Id.*[4] In this instance, it is appropriate for a court to defer to the Board's interpretation of the Policy Manual.

Policy No. IIa states that final approval "is in about a week." It does not expressly limit the time period to somewhere before a week has passed—as HZ's interpretation suggests—or to some point after a week—as the Board's interpretation concludes. The language is otherwise ambiguous on what event constitutes final approval.

As for Policy No. IIb, HZ notes that the policy does not require an attached Department letter of approval in order to record a subdivision in the Land Records. Policy No. IIb requires "documentation" in order to record a subdivision, but it does not specify what documentation is required. Neither Policy No. IIa nor Policy No. IIb make it clear what agency action constitutes "final approval" of a minor subdivision plan.

[4]Similarly, courts will not defer to an agency's interpretation if that interpretation is not consistent with the plain meaning of the statute. *Macke Co. v. Comptroller*, 302 Md. 18, 22–23 (1984).

The Board acknowledged the ambiguities in the Manual; however it also concluded that its interpretation is consistent with the policy goal of affording interested persons an opportunity to appeal a decision by a county agency. We conclude that this policy provides a substantial basis for the agency's interpretation, in light of the absence of a specific provision in the BCC as well as the ambiguities in the Policy Manual.

HZ secondly argues that the Court of Appeals has already rejected the proposition that letters, like the December 12 letter, constitute final agency action in *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569 (1994) . We disagree. As the Board noted, the facts in *UPS* significantly differ from the case *sub judice*. In *UPS*, the letter in question was in response to an inquiry from a citizen regarding the construction of a warehouse—wherein the agency informed the citizen that the warehouse had been approved for construction. The letter in the case before us was not in response to an inquiry from a concerned citizen, but was directed to the developer itself, to inform it of its application approval. *UPS* does not state that a letter can *never* be final approval of an agency decision.

The Board did not err in denying HZ's motion to dismiss.

II. The Merits

The appellants' remaining arguments present two possible paths—each leading to the conclusion that the Board erred when it approved of HZ's subdivision application. First, they contend that the doctrine of administrative *res judicata* barred the

Commissioner's ability to consider HZ's application. Secondly, they contend that the northern portion of the Property cannot be subdivided because the Property is a single lot of record and, under its RC 2 zoning classification, it cannot be subdivided into more than two lots. Regardless of which path we take, we arrive at the same conclusion as the appellants.

The parties present many arguments in support of their contentions, but we will first provide further detail about the dispositive events and our analysis of the legal significance of each event before turning to the parties specific contentions.

A. History of the Property and Applicable Zoning Law

– The 1968 Conveyance –

The Walterses sold the 5.71 acre strip of land to BGE in 1968. The conveyance was in fee simple. Since the 1968 bisection, the Property has been conveyed as a single parcel, saving and excepting the BGE Strip; the Department of Assessments and Taxation records also display the 39 acres as a single parcel.

When the Walterses conveyed the strip to BGE, the BCC included provisions that detailed the process by which an individual could subdivide her or his land. BCC (1968) Article IV, § 22-32 *et seq.* Neither party contends that the Walterses followed these requirements, nor does the record contain any documents that indicate that the Walterses attempted to obtain subdivision approval before conveying the parcel to BGE. At that time, the relevant provision of the BCC defined "subdivision" as:

> The division of any tract or parcel of land, including frontage along an existing street or highway, into two or more lots, plots or other divisions of land *for the purpose, whether immediate or future, of building development* for rental or sale[.]

BCC § 22-48 (1968) (emphasis added).

The Walterses' sale of the 5 acre parcel to BGE was not for the purpose of building development. Thus, we conclude that the conveyance to BGE did not effect a subdivision of their farm and the Property remains a single lot of record.

– Bill 178-79 –

In 1979, the Baltimore County Council enacted Bill 178-79, which added § 1A01.3(B)(1) to the Baltimore County Zoning Regulations ("BCZR"), which provides for the permissible subdivision density in RC 2 zoned properties. It stated (emphasis added):

> Subdivision lot density. No lot of record lying within an R.C.2 Zone and having a gross area of less than two acres may be subdivided. No such lot having a gross area between two and 100 acres may be subdivided into more than two lots (total), and such a lot having a gross area of more than 100 acres may be subdivided only at the rate of one lot for each 50 acres of gross area.

In 1979, the Property was a single lot of record consisting of 39 acres. BCZR § 1A01.3(B)(1) limits the subdivision capacity of the Property to a total of two lots.

– The 1986 Subdivision Application –

In 1986, Mr. Allen submitted an application to the Zoning Commissioner seeking approval for a subdivision. Mr. Allen's application sought to subdivide the Property into

six separate lots. He proposed to: a) subdivide the land to the east of Mikules Manner Road into two lots, b) subdivide the land to the west of the road into two lots, and c) subdivide the land to the south of the BGE Strip into two lots. The Commissioner stated that the relevant questions were: "does the road which divides the northern portion of the property create two distinct parcels of record, and does the BGE Strip create a third parcel to the south of that strip?"

In resolving these questions, the Commissioner analyzed Mr. Allen's proposal based on the public road's and the BGE Strip's bisection of the land under two separate theories. As to the public road, the Commissioner stated:

> It was a long-standing policy of the Zoning Commissioner that if R.C. zoned land under the same ownership were divided by a public road, parcels on both sides of the road would be computed separately for density as if they were separate recorded lots . . . . [T]he Baltimore County Board of Appeals 'rejected' this interpretation . . . .

The Commissioner went on to conclude that, based on the Board's rejection of this interpretation, "the request here to permit two lots on each side of this road shall be denied."

The Commissioner's analysis of Mr. Allen's petition to subdivide the land on either side of the BGE Strip did not consider whether the conveyance of the BGE Strip effected a subdivision of the Property for density purposes. Instead, the Commissioner concluded that the property owners were "certainly compensated" for the strip of land conveyed to BGE, and that the compensation "would have included the development

potential." He concluded that, "to now permit the division of this single tract into two would indeed violate the spirit and intent of the BCZR."

Although not discussed in so many words, we believe the Commissioner's conclusions regarding the BGE Strip's bisection are consistent with our own conclusions. The Commissioner concluded, as have we, that the Property is a single lot of record and thus cannot be subdivided into more than a total of two lots.

– Bill 199-90 –

In 1990, The County Council enacted Bill 199-90, which amended BCZR § 1A01.3(B)(1) by adding the following language:

> In cases where land in single ownership is crossed by existing or proposed roads, rights-of-way or easements, the portions of land on either side of the road, right-of-way or easement shall not be considered separate parcels for the purpose of calculating the number of lots of record.

The 1990 amendment resolved the differing interpretations of the RC District regulations by the Zoning Commissioner and the County Board of Appeals by clarifying that land bisected by roads, rights-of-ways and easements are not separate parcels for subdivision purposes.

HZ places special significance on Bill 199-90, asserting that both the issues of *res judicata* and the merits of this case are dependent on this Bill's "change in the law" since the 1986 decision. It contends that Bill 199-90 establishes those circumstances *and only those circumstances* in which a land bisection does not create separate parcels for

subdivision purposes. Pursuant to this interpretation of Bill 199-90, HZ asserts that a) the doctrine of *res judicata* does not apply because the Commissioner did not have the benefit of Bill 199-90's modification of BCZR § 1A01.3(B)(1) when he considered this matter in 1986, and b) since the BGE Strip is not a road, right-of-way, or easement, the strip *does* bisect the Property for subdivision purposes. On the issue of *res judicata*, HZ also supports the Board's basis for denying the appellant's motion to dismiss—that the 1986 Decision was legally erroneous, and a legally erroneous administrative decision does not have a preclusive effect. We do not agree with these contentions.

B. *Res Judicata*

Res judicata, or claim preclusion, bars a lawsuit that involves claims that have been litigated or should have been litigated in a prior proceeding between the same parties or their privies. *Kim v. Council of Unit Owners for Collington Center III Condominium*, 180 Md. App. 606, 615 (2008). *Res judicata* has three elements: the parties in the present litigation should be the same or in privity with the parties of the earlier case;[5] the second suit must present the same cause of action or claim as the first; and, in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *Anne Arundel County Code Bd. of Educ. v. Norville*, 390 Md.

[5]Though not relevant to the resolution of the issues before us, we recognize this element need not be met under some circumstances. *See Shader v. Hampton Imp. Ass'n, Inc.*, 217 Md. App. 581 (2014), *aff'd* 443 Md. 148 (2015) (examining nonmutual collateral estoppel).

93, 108 (2005). With regard to the second element, a significant change in the law may result in a second cause of action not representing the same "claim" as the first when the second claim is based on a legal theory that did not exist at the time of the first cause of action. *Gertz v. Anne Arundel County*, 339 Md. 261, 270 (1995).

The Board did not deny the appellants' motion to dismiss based on *res judicata* based on HZ's asserted "change in law" theory, nor did it conclude that any of the three elements were unsatisfied. Instead, it concluded that the 1986 decision by the Commissioner was legally erroneous, and that legally erroneous administrative decisions are not entitled to a preclusive effect.

A. The Preclusive Effect of Mistaken Administrative Decisions

The appellants dispute the Board's conclusion that legally mistaken administrative decisions are deprived of their preclusive effect. They rely by analogy upon *Powell v. Breslin*, 430 Md. 52 (2013), wherein the Court of Appeals concluded that: "the mere fact that [a] prior [judicial] ruling is wrong does not deprive it of *res judicata* effect." *Id.* at 64. HZ agrees that this is the general rule, but contends that this rule is inapplicable to decisions made by administrative agencies.

In support of their contention, HZ cites several cases: *Department of Health and Mental Hygiene v. Reeders*, 86 Md. App. 447 (1991), *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324 (1983), and *Board of County Com'rs of Cecil County v. Racine*, 24 Md. App. 435 (1975). We do recognize that all three of these cases state that administrative

orders based on erroneous interpretations of law do not have a preclusive effect under the doctrine of *res judicata*. *Reeders*, 86 Md. App. at 455; *Klein*, 55 Md. App. at 340; *Racine*, 24 Md. App. at 443. However, these decisions are no longer representative of the current law on this issue.

After *Reeders*—the most recent of HZ's cited cases—was decided, the Court of Appeals issued several decisions that indicate that administrative decisions *should* have the same preclusive effect as decisions by courts under the doctrine of *res judicata*. The first of these is *Baston v. Shiflett*, 325 Md. 684 (1992). In *Baston*, the Court discussed three elements which must be present in an administrative decision in order for the decision to have a preclusive effect under *res judicata*.[6] The Court concluded that when an administrative decision embodies all three of these elements, the administrative decision should be: "given the same preclusive effect as findings made by a court;" *Id.* at 702; *see also Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 735 (2010) ("[A] valid and final adjudicative determination by an

[6]These three elements are "[1] Whether the agency was acting in a judicial capacity; [2] whether the issue presented to the court was actually litigated before the agency; and [3] whether the issue's resolution was necessary to the agency's decision." *Baston*, 325 Md. at 701. None of the parties assert that the 1986 Board decision failed to meet these criteria.

administrative tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.").[7]

Moreover, we believe the purposes of the doctrine of *res judicata* are not furthered by the conclusions in *Reeder* and similar cases. The principles behind the doctrine of *res judicata* are: "avoiding the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibilities of inconsistent decisions." *Norville*, 390 Md. 106–07. These principles are poorly served if an administrative decision is denied its preclusive effect under an allegation that the administrative decision was legally incorrect. The expense, both to the parties and to the administrative agency, would often be as great in determining whether the prior administrative decision committed an error of law as it would be if the agency simply issued a judgment on the merits of the case. Furthermore, the goal of minimizing the possibility of inconsistent decisions is not furthered by denying erroneous final agency orders a preclusive effect. The proper procedure for disputing an erroneous decision, administrative or judicial, is to file a petition for judicial review, or an appeal, as the case may be.

[7]As the appellants note, the Court of Appeals has recently stated that legally erroneous court decisions do not lose their preclusive effect. *Powell*, 430 Md. at 64–65.

B. Significant Change in the Law?

HZ contends that the Board's denial of the appellants' motion to dismiss can also be upheld because the law that impacts this case has significantly changed since the 1986 decision. As stated *supra*, HZ asserts that Baltimore County's adoption of Bill 199-90 constitutes a significant change in the law. We disagree.

Bill 199-90 was enacted to end the *de facto* policy of the Zoning Commissioners that treated property bisected by roads as separate parcels for subdivision purposes. In the Commissioner's 1986 decision concerning the Property, he discussed this *de facto* policy, but noted that the Board of Appeals had rejected this policy as a valid interpretation of the BCZR. Bill 199-90 was thus merely the County's way of codifying what the Board had already concluded; that a land bisected by a road, easement, right-of-way, easement, or otherwise, does not create separate parcels for subdivision purposes. As such, Bill 199-90 did nothing to change the state of the law as it existed when the Commissioner considered these issues in 1986.

While we do not find HZ's arguments persuasive, we recognize that the 1986 decision does not discuss in detail the Commissioner's reasons for denying Mr. Allen's petition to subdivide the land based on the BGE Strip bisection. We believe the Commissioner's result is consistent with our conclusions, but for the sake of clarity we will articulate why we do not believe conveyance of the BGE Strip did not have the effect of subdividing the farm for development purposes.

C. Effect of the BGE Strip Bisection

As discussed in greater detail, *supra*, the 1968 conveyance of the 5 acre strip to BGE, which resulted in a bisection of the property, did not have the legal effect of subdividing the Property into separate lots of record. Nevertheless, HZ argues, and the Board agreed, that the northern and southern portions of the Property are separate lots of record for subdivision purposes. In light of the 1968 provisions of the BCC relating to subdivisions, there is no authority to support this conclusion. It makes no difference whether the BGE Strip is considered to be a "road, right-of-way, or easement," as described in Bill 199-90. Bill 199-90 was enacted to *end* a policy applied by the Commissioner that treated portions of a bisected parcel as separate parcels for subdivision. Bill 199-90 did not state that other bisections *create* separate parcels for subdivision purposes. We conclude that the Walterses' grant to BGE a strip of land in fee simple did not create two parcels of land in the remaining portions of the parcel north and south of the BGE Strip. Thus, the Property remains a single parcel, and, absent a variance or other form of administrative relief, cannot now be subdivided into more than a total of two lots. *See* BCZR § 1A01.3(B)(1). The Board erred in granting HZ's application.

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