

Circuit Court for Baltimore County
Case No. 03-C-18-008512

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 116

September Term, 2020

FALLS ROAD COMMUNITY
ASSOCIATION, ET AL.

v.

CR GOLF CLUB, LLC

Graeff,
Wells,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned),
JJ.

Opinion by Harrell, J.

Filed: June 9, 2021

*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 arises from an administrative proceeding involving a residential development plan¹ proposed by CR Golf Club, LLC (“the Developer”), appellee, to be built on a parcel of land on the west side of Falls Road in Baltimore County, a site occupied formerly by the Chestnut Ridge Country Club. The development plan was opposed by the Falls Road Community Association, Inc., Harold Burns, Joanne Capizzi, and Dan Coulhoun, Jr., appellants, whom we shall refer to collectively as “the Protestants.” After a public hearing before the Office of Administrative Hearings for Baltimore County, the Administrative Law Judge (“ALJ”) approved the development plan with conditions.

An administrative appeal was taken and, in a written opinion issued on 25 July 2018, the Baltimore County Board of Appeals (“the Board”) affirmed the ALJ’s decision to approve the development plan with conditions. Thereafter, the Protestants filed a petition for judicial review in the Circuit Court for Baltimore County. The circuit court found that the Board’s decision was not erroneous as a matter of law and affirmed the ALJ’s decision. The Protestants filed a motion to reconsider the circuit court’s decision, which was denied. This timely appeal followed. The County did not participate in the appeal.

QUESTIONS PRESENTED

The Protestants present four questions for our consideration:

- I. Did the County Board of Appeals err in ruling that the ALJ had broad discretion to determine the relevance of the testimony of two expert witnesses and that the ALJ’s determination in this regard was entitled to deference?

¹ A development plan is defined as “a written and graphic representation of a proposed development prepared in compliance with” article 32, title 4, subtitle 2 of the Baltimore County Code (“BCC”). *See* BCC § 32-4-101(q).

II. Did the County Board of Appeals err in ruling that the ALJ properly excluded testimonial and documentary evidence from the Protestants’ stream expert?

III. Did the County Board of Appeals err in ruling that the ALJ properly excluded testimonial and documentary evidence from the Protestants’ traffic expert?

IV. Did the circuit court err in denying the Protestants’ motion for reconsideration and refusing to consider a recent decision of the County Board of Appeals?

For the reasons set forth below, we shall reverse and 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 with conditions and remand the case to the Baltimore County Office of Administrative Hearings for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The basic facts of this case are not in dispute. The development of the subject property took place in phases. In the first phase, the Developer obtained approval of a development plan for an eight-lot subdivision on a portion of the subject property. As part of the initial phase, the Developer granted to Baltimore County environmental easements for a forest buffer and forest conservation area that covered 87 acres of the total 230-acre overall tract. In 2017, a development plan for an additional lot was approved (neither it nor the previous development plan for the 8 lots are the subjects of this appeal). The development plan at issue here was for the third phase of the proposed development which included the development of an additional 31 residential lots.

A. Review and Approval of Development Plans in Baltimore County

It is helpful to set forth a brief summary of the review and approval process of development plans in Baltimore County. *See also People’s Counsel for Baltimore County v. Elm Street Dev’t, Inc.*, 172 Md. App. 690, 694-95 (2007). The requirements for review and approval of a development plan are found in § 32-4-201 *et seq.* of the Baltimore County Code (“BCC”). An applicant may not file a development plan for review without first participating in a community input meeting. BCC § 32-4-221(a). The purpose of a community input meeting is to provide a forum for discussion and resolution of “community concerns and developer constraints within the context of [Title 4 of the Baltimore County Code] and county regulations and policies.” BCC 32-4-217(a)(2). Once a development plan is filed, representatives of county government visit the site. BCC § 32-4-226(a). The Department of Permits, Approvals and Inspections forwards copies of the development plan to the appropriate county agencies, which review the plan for compliance with county regulations and provide comment.² BCC §32-4-226(b). The Director of the Department of Permits, Approvals and Inspections schedules a development plan conference to be attended by representatives of the various agencies and participants from the community input meeting. BCC § 32-4-226(c). The development plan conference

² The following county agencies are required to review the development plan: Department of Planning; Department of Environmental Protection and Sustainability; Department of Education; Department of Recreation and Parks; Fire Department; Police Department; Department of Economic and Workforce Development; Department of Permits, Approvals, and Inspections; Landmarks Preservation Commission, if applicable; State Highway Administration; and, “[a]ny other county agency requested to be represented.” BCC § 32-4-226(b).

provides an opportunity “to resolve any conflict between agency comments” and “to resolve any comments raised or conditions proposed at the community input meeting.” BCC § 32-4-226(c)(2). If an agency does not attend the conference, “it is presumed to have no comment on the plan.” BCC § 32-4-226(c)(3).

After the development plan conference, the plan goes before a hearing officer, specifically, a county ALJ, for a public quasi-judicial hearing. The agencies’ written comments on the development plan are submitted to the ALJ. BCC § 32-4-226(d). “If no comments or conditions are received by the Hearing Officer, the Development Plan shall be considered to be in compliance with county regulations.” BCC § 32-4-227(e)(2). The ALJ is required to consider any comments and conditions submitted by a county agency and to take testimony and receive evidence on any unresolved comment or condition that is relevant to the proposed development plan. BCC § 32-4-227(e) and -228(a). The hearing requirements are set forth in BCC § 32-4-228, which provides, in part:

(a) *Hearing conducted on unresolved comment or condition.*

(1) The Hearing Officer shall take testimony and receive evidence regarding any unresolved comment or condition that is relevant to the proposed Development Plan, including testimony or evidence regarding any potential impact of any approved development upon the proposed plan.

(2) The Hearing Officer shall make findings for the record and shall render a decision in accordance with the requirements of this part.

(b) *Hearing conduct and operation.* The Hearing Officer:

(i) Shall conduct the hearing in conformance with Rule IV of the Zoning Commissioner’s rules;

(ii) Shall regulate the course of the hearing as the Hearing Officer considers proper, including the scope and nature of the testimony and evidence presented; and

(iii) May conduct the hearing in an informal manner.

BCC § 32-4-228.

The approval of a development plan is addressed in BCC § 32-4-229(b), which provides:

- (1) 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.
- (2) A final decision of the Hearing Officer on a Development Plan may be appealed to the Board of Appeals in accordance with Part VIII of this subtitle.

B. Hearing Before the ALJ

In the instant case, after proper notice was given, the ALJ conducted a public quasi-judicial hearing over four days between 15 December 2017 and 6 February 2018. Numerous witnesses testified in support of the development plan, including representatives of various Baltimore County agencies, all of whom reviewed the plan and testified that it had been approved by their respective agencies.

1. Testimony of Matthew Sichel

In addition to the agency representatives, the Developer called as a witness Matthew Sichel³, a licensed professional engineer at KCI Technologies, who was accepted as an expert in the field of professional engineering, with particular knowledge of the application of Baltimore County land development regulations and storm water management regulations. Sichel was familiar with the subject property, had visited it on several occasions, and prepared the development plan. Among other things, Sichel testified about the stormwater management plan he and his staff had developed for the property. Sichel

³ In the transcript, Mr. Sichel’s name is also spelled “Sickle” but, for consistency, we shall use Sichel throughout this opinion.

testified that the development would result in a reduction of total impervious surface from 13 acres to 12 acres. In addition, new stormwater management would be provided where none had existed when the site was used as a golf and country club.

Several tributaries of Dipping Pond Run, designated as a “Use III trout stream,” traversed the subject property. According to Sichel, the property was in “an interjurisdictional watershed” that required “quantum management for flood control” and “environmental site design, to the maximum extent practical.” To address flood control in the interjurisdictional watershed, Sichel proposed two stormwater retention ponds and making use of another pond that had been part of the first phase of the development. Sichel stated that the ponds “provided adequate stormwater management from a quantity perspective for control of the entire site.” In addition, because “trout like cold water,” the stormwater retention ponds were designed to reduce the time water was held in them so as to reduce the thermal impact of the discharged water on the fish population (such as it may be) in Dipping Pond Run.

On cross-examination by Protestants, Sichel was unable to say that there would not be an increase in the temperature of the water in the tributaries of Dipping Pond Run as a result of the proposed development. He asserted that he “relied on guidance given by [the Maryland Department of the Environment] for design of stormwater management in a Use III trout watershed.” He stated, “I’m not looking at [actual] temperatures. I’m looking at what MDE has given us for the systems that we used to design these types of stormwater management facilities.” Sichel conceded that he was “not qualified to talk about

temperature of water.” He also could not say that there would be no additional sediment in Dipping Pond Run or its tributaries from the implementation of the development plan.

2. Testimony of Daniel O’Leary

The Protestants called several witnesses, including Daniel O’Leary, a water resource engineer with ESD Associates, who was accepted by the ALJ as an expert in water resource engineering and stormwater management. O’Leary testified that he had concerns about the proposed stormwater management plans. He stated that the areas where one of the stormwater management ponds was to discharge were eroding actively now and unstable. The plan did not provide for a suitable “outfall” to a stable area.

O’Leary took issue also with Sichel’s testimony that there would be no increase in runoff. He maintained that the runoff from three study points was analyzed in the aggregate in the development plan, but should have been examined at each discrete point because the three discharge points affected three different tributaries. He agreed with Sichel that the stormwater ponds could be designed to manage the rate of runoff, but there would be an increase in the volume of discharge because a meadow area would be converted to grass, which would increase the volume of runoff. O’Leary testified that the stormwater management plan did not address specifically an increase in the temperature of the runoff from the site. In addition, the plan did not address existing ponds on the site which, if displaced, could result in warmer water flowing into a receiving stream and the volume of water impacting a stream.

Ultimately, O’Leary opined that the Developer’s stormwater management plan did not achieve several of the purposes of the stormwater management regulations set forth in

the Baltimore County Code. He opined that the development plan failed to minimize damage to public and private property (BCC § 33-4-102(d)(1)), reduce stream channel erosion (BCC § 33-4-102(3)), reduce local flooding (BCC § 33-4-102(d)(5)), and to maintain after development, as nearly as possible, the predevelopment stormwater runoff characteristics (BCC § 33-4-102(d)(6)). He also opined that the development plan did not comply with BCC § 33-4-104, which prohibited development without providing for appropriate stormwater management measures that control or manage runoff from the site, or with BCC § 32-4-415(a), which required protective measures to prevent erosion or sloughing of steep or unstable slopes and to preserve their natural topographical features.

3. Testimony of Paul Kazyak

The Protestants called as a witness Paul Kazyak, an instructor at Johns Hopkins University’s Advanced Academic Program, who taught a variety of courses including freshwater ecology, coastal ecology and management, sustainability, water quality scheme, and water quality assessment. Kazyak retired from the Maryland Department of Natural Resources (“DNR”) in 2016. His work there included investigating the impact of development on stream systems in Maryland, particularly as affecting fish. Part of Kazyak’s job at the DNR involved running the Maryland Biological Stream Survey (“MBSS”). Thus, he was familiar with Dipping Pond Run, which was identified as one of 30 sentinel sites included in the MBSS. After some testimony about his professional experience, he was accepted by the ALJ as an expert in stream ecology and stream surveys.

Kazyak testified that data collected from the MBSS’s sentinel site Dipping Pond Run showed “a decline in trout.” When asked if he had “an opinion regarding whether or

not the stream systems in the Dipping Pond watershed are sensitive . . . to development,” counsel for the Developer objected. Counsel argued that the hearing related only to whether the development plan satisfied Baltimore County development regulations and that a development plan cannot be denied simply because it has a negative impact on a Use III stream. Counsel for the Protestants countered that the county’s development regulations “do not just include the stormwater management regulations,” but also protection of streams. As examples, he pointed to Title 3, Article 33 of the Baltimore County Code which addressed the protection of the water quality of streams, wetlands, and flood plains, and BCC §§ 32-4-102 and 32-4-416, which set out the intention of the development regulations. The following colloquy between the ALJ and counsel for the Protestants occurred:

[ALJ]: I agree with you if the zoning is a certain amount and the site is full of problems or wetlands. Of course that’s going to impact density in development, but you’re not talking about that here. You’re going to want to talk about something, a project that complies with everything the county tells a developer to do on stormwater management and it’s still going to hurt Dipping Pond Run. And if that’s the case, I don’t think it’s relevant.

* * *

[ALJ]: - providing beginning prefatory language in a statute about preserving streams. That’s just a feel good thing that the [county] council passes. How does that – where does the rubber meet the road on that?

[COUNSEL]: Well, there’s plenty of law that supports that. My opinion, you cannot approve a development that’s inconsistent with the policy’s intents, and not just of the development regulations but other laws that apply in Article 3 and –

[ALJ]: If that were the case you’d never have development, because any time you build 30 houses, you’re going to have an impact on environmental things. You just are. And we try to ameliorate that with stormwater or

whatever else [we] do, and that's the rules that a developer needs to follow. In an ideal world maybe that's not the case, but I think it's the world that we're operating in right here. Are you aware of, in your career, of any other case in Maryland where stormwater management has been complied with and the plan is denied? Based on environmental impact.

[COUNSEL]: Under Baltimore County practice, are you talking about appellate decisions? Well, Baltimore County never denies a plan when the stormwater management's complied with. But that's not the question. That's not the law. What you're asking is –

[ALJ]: Hearing officer, or Circuit Court, or anybody else in the county you're aware of?

[COUNSEL]: There are cases where either the hearing officer imposes conditions because stormwater management isn't sufficient. Absolutely. And again, the issue is not necessarily residential versus no use. It's the extent of use in part. That's part of our argument, certainly.

[ALJ]: Extent of use is governed by zoning.

[COUNSEL]: I'm talking about one house versus 40. Obviously residential.

[ALJ]: It's governed by the zoning.

[COUNSEL]: Okay, then why are we here, Your Honor?

[ALJ]: Because there's a lot of other issues here. You had a stormwater management expert talk for an hour and a half on flaws in the plan. I might agree with him. Might not. I have agreed with some of the things you've had experts say, but am I going to agree about a stream being hurt by development, and how am I going to relate that to denying or not denying a plan if it complies with the stormwater management regulations, and yet still hurts the stream?

At that point, counsel for the Protestants was permitted to proffer the opinions Kazyak would have expressed and the documents that would have been offered in support of his opinions. The proffer can be summarized as follows:

1. Based on his personal observations and data that development has specific impacts on streams and stream systems. Those impacts have occurred and continue to occur in the Dipping Pond Run stream and watershed despite the enactment of stormwater management regulations.
2. Kazyak would testify about the results of a specific study he did that concluded (i) impervious surfaces are a predictor of stream degradation, (ii) that a large majority of sensitive macroinvertebrates declined even when the amount of impervious surface was as low as .5 to 2 percent, (iii) the effects of impervious surfaces worsen for smaller streams with higher gradients, (iv) increase in the temperature of the water of streams including Dipping Pond Run affects trout populations, and (v) the impact of the ponds and the reduction in base flow is a critical limiting factor for trout populations.
3. Kazyak would testify that the proposed development would increase water temperatures, cause a reduction in base flow, and negatively impact the tributaries of Dipping Pond Run and the health of aquatic species. Kazyak would opine that the Developer’s stormwater management plan did not address water temperature, the reduction in base flow, or the impact of the ponds. In addition, like O’Leary, Kazyak would testify that impervious surfaces, which include lawns and other aspects of development, can create sheet flow and negatively affect streams.
4. Kazyak would opine that the proposed development plan was not consistent with the purposes of Baltimore Counties “Small Watershed Action Plan (“SWAP”) or the standards set forth in the Baltimore County Code, including provisions relating to the protection of water quality, streams, wetlands, and flood plains, and the design standards and requirements set forth in BCC Article 32, Title 4.

Counsel for the Developer objected to Kazyak’s testimony on the ground that it “would just go to whether or not the regs themselves are adequate,” and the ALJ was required to apply the applicable regulations. The following exchange then occurred:

[ALJ]: I tend to agree with that as well, that there’s a lot more the county should be doing, and really further evidence of that I (inaudible) but I’m sitting here and we’ve been talking about this, I’ve never heard a county representative talk about this in seven years of cases I’ve had. Have you ever heard of a county representative talk about this?

[COUNSEL FOR PROTESTANTS]: Talk about what?

[ALJ]: Stream health, temperatures of streams. They don't look at that. Maybe they should. Maybe it ought to be part of their law, but it must not be if they've never come in and talked about that in any development case I've had.

[COUNSEL]: You mean County Council members? I wouldn't –

[ALJ]: County employees. DEPS. I've never heard DEPS say a word about the temperature of a stream or the volume. They talk about buffers, stormwater management, that's the lexicon they use. They just don't get into the science. The mechanisms the county has are the ones that they have on a checklist for development plans.

[COUNSEL]: I think that's reflective of a presumption. I'm not saying that's unfair. It's just a presumption. If you're doing stormwater management, you do forest buffers, you some forest con [sic], then you're okay. But that doesn't answer the question in my mind of whether from a legal perspective – these guys aren't attorneys, they're well intentioned people in DEPS but they're not attorneys. And they don't look at – they should be looking at it, absolutely. In particular cases. This is just one of the cases. This is the exception where not every case is going to have a stream like this right near it. It's just not.

[COUNSEL FOR DEVELOPER]: Your Honor, you also hit on this before. The regulations and laws don't begin and end in this room. Now there's stage 2 here. We have sediment erosion control plans that go through a whole different set of regulations that would deal with ensuring the sediment doesn't make its way into streams. You mentioned you can fine someone for dumping. I mean those are other ways that laws exist to protect, but in the context of the development plan case, we think we've complied.

[ALJ]: Okay, I agree. All right, so I think we've gotten (inaudible) on the record.

4. Testimony of Ed Myers

The Protestants sought to introduce the testimony of Ed Myers, a traffic engineer and transportation planner with Kittelson and Associates, for the purpose of opining that the development should be considered as falling within a deficient traffic shed area,

notwithstanding the undisputed fact that it was not included within a deficient area on the applicable 2017 Transportation Basic Services Map (“Transportation Map”), reviewed and approved annually by the Baltimore County Council.⁴ After some testimony about Myers’s experience, there was a discussion between counsel and the ALJ about Myers’s anticipated testimony. Protestants’ counsel argued that the traffic sheds indicated on the transportation services maps “don’t tell us what the traffic shed is[,]” and “shouldn’t be a precursor to me putting on evidence on this issue[.]” Rather, standards set forth in the Baltimore County Zoning Regulations (“BCZR”), § 4A00.1 *et seq.*, should apply. The following exchange occurred:

[COUNSEL FOR PROTESTANTS]: What this witness will tell you is he took these failing intersections, and applying what is indisputably the county’s own policy – two page written policy which we will put in evidence – for determining –

[ALJ]: He’s going to develop the traffic shed based on those standards?

[COUNSEL FOR PROTESTANTS]: He’s going to determine whether or not the subject property is within the traffic shed for these failing intersections, correct.

[ALJ]: I don’t see how he can do that.

[COUNSEL FOR DEVELOPER]: Your Honor, it’s legislatively adopted. Much like your comments on the zoning of the property being legislatively determined –

[ALJ]: I’m fairly familiar with the process and never had a witness speak to what’s in a traffic shed. Again, I rely on my experience, I guess. Anecdotal to some extent, but it is 7 years. I pay attention during the cases, and I’m familiar with these cases. It comes up a fair amount of times as you can

⁴ There is no dispute that if a property is within the traffic shed of a failing intersection, the Baltimore County Zoning Regulations impose a moratorium on the issuance of building permits with regard to that property.

imagine. It's come up in Greenspring Station. It's had special variance hearings on failing intersections. The developers there. This site either is or isn't in a failing intersection, and I don't think a witness can say I'm sure, or I believe, that intersections are rated D or F or whatever they're rated, and then there's a question of where the shed is drawn. And I think that's done by Baltimore County as shown on the maps.

* * *

[COUNSEL FOR PROTESTANTS]: I understand you may have experience with the basic services maps, Your Honor, but this is a very unique situation in that – there's only a couple – several most recently 9 or 10 failed intersections in all of Baltimore County, failing intersections.

[ALJ]: Right.

[COUNSEL FOR PROTESTANTS]: And this one is unique because we have three intersections very close to the outskirts of the URDL [Urban-Rural Demarcation Line]. I think what [counsel for the Developer] is trying to tell you, and I don't this [sic] case has ever been before you, Your Honor, is just because an intersection isn't on the basic services map, a piece of paper that I understand is adopted every year, that does mean that a particular failed intersection is not within the traffic shed. I absolutely disagree with that. That's a legal point, and I can make the legal argument if you want me to. It's pretty straightforward, and in fact I don't think it's complicated at all.

The ALJ questioned whether, if the county did not include an intersection within a mapped area, there could be testimony that it should be within the mapped area. Counsel for the Protestants responded, “[y]es, there is no other forum for us to do that.” The ALJ disagreed and concluded:

Whether or not [the subject development is] subject to Article 4 in this zoning regs, development roadmap, and the basic services map, has been determined by resorting to the maps themselves adopted yearly by the council. I don't believe testimony, expert or otherwise, can alter what's done legislatively yearly as to those maps.

Counsel for the Protestants proffered that if permitted to testify, Myers would have opined that three intersections just south of the subject development were determined by

Baltimore County to be failing, that based on the methodology and standards employed by Baltimore County for determining traffic sheds, the subject development was within the traffic shed of the failing intersections, and that, based on data from a manual adopted by the Institute of Traffic Engineers (the “ITE Manual”), the requisite percentage of vehicles from the development would contribute to the failing intersections.

5. The ALJ’s Decision

On 20 February 2018, the ALJ issued a written opinion and order approving the development plan with two conditions not relevant to the questions posed in this appeal. The ALJ held that Kazyak’s proffered testimony was “irrelevant as a matter of law.” He explained:

Both the circuit court and the Baltimore County Board of Appeals have held that stormwater management and forest buffer/forest conservation plans are the means chosen by the State of Maryland and Baltimore County to address and prevent adverse impacts upon streams and other environmental features. See, e.g. In Re: Burns Property, Case No. CBA-03-03--13020; In Re: Smyth Property, Case No. CBA-03-152. Mr. Sichel testified the stormwater management features on the site would comply with State and Baltimore County regulations that require a maximum 12-hour retention period. I believe this is all the Developer is obligated to prove at this juncture.

With respect to the issue of the Transportation Basic Services Map and whether the development fell within the traffic shed of failing intersections just south of it, the ALJ concluded that:

As discussed in greater detail at the hearing, whether or not a site is within a deficient or failing traffic shed (and therefore subject to a development moratorium) can only be determined, as an objective matter, by consulting the official transportation maps adopted each year by the Council. In my opinion it would be untenable to make such a determination on an *ad hoc* basis in response to expert testimony, whether presented by a developer or protestant.

The ALJ noted that because all of the agency witnesses recommended approval of the development plan, it was presumed to be compliant with the Baltimore County Code. That presumption was supported by Sichel’s testimony who opined that the development plan satisfied all county requirements. The ALJ credited Sichel’s testimony and found that the lay and expert witnesses who testified on behalf of the Protestants failed to rebut successfully the presumption that the development plan was in compliance with the Baltimore County Code.

C. The Board of Appeals

The Protestants appealed to the Baltimore County Board of Appeals, raising twenty allegations of error,⁵ including, *inter alia*:

1. The ALJ erred in excluding the expert testimony of Paul Kazyak and his exhibits.
2. The ALJ erred in ruling that the testimony of Mr. Kazyak is “irrelevant as a matter of law.”
3. The ALJ erred in ruling that the Developer was only obligated to prove that its stormwater management plan comply with State and County regulations requiring a 12-hour retention period.
4. The ALJ erred in crediting the opinion of the Developer’s stormwater management expert, Mr. Sichel, and concluding based on his testimony that a suitable outfall exists, that channel protect volume (CPV) ponds are not required because the Developer is providing environmental site design to the maximum extent practicable, that stormwater management controls are evaluated on a site-wide basis rather than by individual drainage areas, and that the existing ponds are water resources which are not integral to or evaluated as a part of the stormwater management program.

⁵ The Board rejected eleven claims of error on the ground that they had been waived because the Protestants failed to raise them before the ALJ. That ruling by the Board is not at issue in the instant appeal.

5. The ALJ erred in ruling that the testimony of [Protestants] expert, Dan O’Leary (regarding, *inter alia*, the amount of impervious surface on site, the Developer’s consideration of the existing ponds, the suitability of outfalls, the Developer’s channel protection volume calculations, the Developer’s study points and hydrology calculations, and the Developer’s use of level spreaders and bioswales) did not undermine the validity of Mr. Sichel’s testimony and the Developer’s stormwater management plan.

6. The ALJ otherwise erred in approving the Developer’s stormwater management plan because it fails to meet applicable laws, regulations, and standards.

7. The ALJ erred in excluding the expert testimony of Edward Myers and his exhibits.

8. The ALJ erred in ruling that application of the moratorium on building permits under BCZR § 4A02 *et seq.*, can only be determined by consulting the official transportation maps adopted by the County Council.

With respect to issues three through six above, the Board found that they dealt with “areas of disagreement” between Sichel and O’Leary, and that the ALJ was “within his discretion as fact finder to decide whose testimony he chose to give more weight.” In addition, the Board found that the error asserted in issue six had not been articulated with reasonable particularity as required by BCC § 32-4-281(b)(2) and, as a result, would not be addressed.

As for issues one and two, which dealt with Kazyak’s testimony, the Board stated, “[a]s this is a record appeal, this Board affords the ALJ broad discretion in deciding the relevance of such proposed expert testimony.” The Board held:

While this Board may have preferred to allow Mr. Kazyak to complete his testimony, we again, are not permitted to supplant our judgment for that of the ALJ during such a hearing when the ALJ possesses broad discretion in determining which experts are germane as to the issues before him and which ones would be helpful in assisting him in making his final decision. It

is worth noting that in this instance, the ALJ did not choose to preclude the testimony of Mr. Kazyak, until after he was qualified as an expert, and after a proffer from Counsel allowed him to ascertain that the proffered testimony would have no bearing on the task that he was required to undertake as a fact-finder pursuant to BCC § 32-4-229(d). Consequently, this Board will defer to the discretion of the ALJ in this matter, and finds no error in the exclusion of testimony of Mr. Kazyak.

With respect to issues seven and eight, which involved the ALJ's decision to exclude the testimony of Myers, the Board ruled as follows:

In short, Protestants/Appellants pretend that the actual Basic Service Maps are not the end of such an analysis, rather the same standards used for the development of such maps should be applied to development plans and applications themselves. Conversely, the Developer argues that in reading [BCZR] § 4A02.4 in conjunction with other relevant statutes, the Developer is only required to ensure that the location of its proposed development does not appear in an area delineated as a deficient traffic shed on the maps provided by the County and adopted by the County Council.

In reading these related statutes, as a whole, this Board agrees with the Developer. This Board finds that the purpose of such basic services maps is to put developers on notices as traffic areas which have been delineated as deficient. In this case, the Developer has made such investigation and it is clear that the proposed development is not located in such an area. The Board agrees that there is no statutory support for the argument that would have been opined by Mr. Myers that the Developer must take into account that traffic from its proposed development might ultimately find its way into a deficient traffic shed. Consequently, the Board agrees, and defers to the discretion of the ALJ who found that on this basis the proffered testimony of Mr. Myers would have been irrelevant to his consideration on whether the Developer had met its burden for an approval of a development plan. The Board finds no error in the ALJ decision on this matter.

After the Board rendered its decision affirming the ALJ's approval of the development plan, the Protestants filed a timely petition for judicial review in the Circuit Court for Baltimore County.

D. The Circuit Court

The Protestants presented five issues for consideration on judicial review:

A. Did the ALJ improperly shift the burden of proof to the [Protestants] following the recommended approval of the plan by the County agencies?

B. Did the Board of Appeals erroneously conclude that the ALJ had discretion to exclude expert testimony and, as such, was entitled to deference?

C. Did the ALJ err in excluding the expert testimony of Paul Kazyak?

D. Did the ALJ err in excluding the expert testimony of Edward Myers?

E. Did the Board of Appeals erroneously conclude that the [Protestants] waived certain arguments by failing to preserve them for appeal?

In a written memorandum opinion entered on 27 February 2020, the circuit court found that the ALJ did not shift the burden of proof; there was no error in the ALJ's decision to exclude Kazyak's testimony and the Board did not err in affirming that decision; there was no error in the ALJ's decision to exclude the proffered testimony of Myers and the Board did not err in affirming that decision; the Board acted within its authority in determining that the Protestants waived certain arguments; and, that the Protestants failed to preserve certain issues that were not set forth with reasonable particularity.

Following entry of the circuit court's order, the Protestants filed a motion for reconsideration based on a recently decided (3 January 2020) case, *In the Matter of CPC Falls Road, LLC*, in which the Board of Appeals determined that the sewer basic services maps were not determinative and that expert testimony regarding sewer deficiencies was admissible. The Protestants argued that although the *CPC Falls Road, LLC* case involved allegations of a deficient sewer rather than traffic, the analysis should be the same in the case at hand. As a result, because the Board determined that the basic services maps were

not determinative for purposes of determining whether adequate infrastructure exists to support a particular development, expert testimony on that issue is not irrelevant as a matter of law. The circuit court denied the motion for reconsideration.

STANDARD OF REVIEW

In a judicial review proceeding, the issue before us is not whether the circuit court erred, but whether the administrative agency erred. *Bayly Crossing, LLC v. Consumer Protection Division*, 417 Md. 128, 136 (2010). For this reason, we will “look through” the circuit court’s decision in order to evaluate the decision of the agency. *In re J.C.N.*, 460 Md. 371, 386 (2018); *Kor-Ko Ltd. v. Maryland Dep’t. of the Env’t*, 451 Md. 401, 409 (2017); *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 368 (2016); *People’s Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 66 (2008). Our review of an administrative agency’s determination is limited narrowly to determining if there is (1) “substantial evidence in the record as a whole to support the agency’s findings and conclusions[,]” and (2) “to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Cosby v. Dep’t of Human Res.*, 425 Md. 629, 638 (2012)(quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67 (1999)). To determine whether there is substantial evidence to support the agency’s findings and conclusions, we look to see “whether the ALJ’s determination was ‘supported by evidence which a reasonable person could accept as adequately supporting [the] conclusion.’” *In re J.C.N.*, 460 Md. at 386 (quoting *Kenwood Gardens Condos, Inc. v. Whalen Props., LLC*, 449 Md. 313, 325 (2016)). This does not mean we resolve conflicting evidence – doing so is squarely within the province of the administrative agency. *Banks*, 354 Md. at 68. Our

review of the administrative agency’s legal conclusions is *de novo*, and “we may reverse an administrative decision premised on erroneous legal conclusions.” *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998). *See also Bd. of Liquor License Comm’rs v. Kougl*, 451 Md. 507, 514 (2017)(if an agency’s conclusion is based on an error of law, it will not be upheld); *Bayly Crossing, LLC*, 417 Md. at 137 (we review an agency’s legal conclusions *de novo*).

DISCUSSION

I.

The Protestants contend that the Board of Appeals erred in affirming the ALJ’s exclusion of Kazyak’s and Myers’s proffered testimony on the ground that the ALJ had “broad discretion” to determine the relevance of the proffered testimony. Although often times it is written that evidentiary rulings are entrusted to the sound discretion of the ALJ, the Protestants maintain that application of that standard of review depends, first, on whether the ALJ engaged in a discretionary weighing of relevance in relation to other factors. They argue that did not occur in this case. Instead, the ALJ’s ruling was a legal determination that the proffered testimony was not legally relevant and, thus, *de novo* review is engaged. We agree.

Proceedings before an ALJ must be conducted in conformance with Zoning Commissioner’s Rule IV.⁶ BCC § 32-4-228(b)(i). The ALJ “[s]hall regulate the course of

⁶ The rules of practice and procedure before the Zoning Commissioner and Hearing Officers of Baltimore County are found in Appendix G of the Code of Baltimore County Regulations.

the hearing” as he or she “considers proper, including the scope and nature of the testimony and evidence presented,” and “[m]ay conduct the hearing in an informal manner.” BCC 32-4-228(b). Zoning Commissioner’s Rule IV provides, in part, that that the proceeding is quasi-judicial in nature, that the ALJ is not bound by the technical rules of evidence, and that the proceeding “will be guided, although not bound, by the Administrative Procedure Act, § 10-213 *et seq.* of the State Government Article of the Maryland Code (“SG”). *See* Zoning Commissioner’s Rule IV (L). Evidence is addressed in SG § 10-213 which provides, in part:

(b) The presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence.

* * *

(d) The presiding officer may exclude evidence that is:

- (1) incompetent;
- (2) irrelevant;
- (3) immaterial; or
- (4) unduly repetitious.

Certainly, because the rules of evidence are relaxed in proceedings before the ALJ, evidence that is inadmissible in a judicial proceeding is not inadmissible necessarily in an administrative proceeding. *Powell v. Maryland Aviation Admin.*, 336 Md. 210, 220 (1994). The Court of Appeals has mandated, however, that administrative agencies observe the basic rules of fairness as to parties appearing before them, and that they admit evidence that has sufficient reliability and probative value to satisfy procedural due process. *Dal Maso v. Bd. of County Comm’rs*, 238 Md. 333, 337 (1965); *Powell*, 336 Md. at 220.

In Maryland, relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Maryland Rule 5-401. With regard to the proper standard of review of a ruling on the admissibility of evidence, the Court of Appeals has explained:

Appellate review of a trial court ruling on the admissibility of evidence often is said to be based on the standard that such a ruling is “left to the sound discretion of the trial court,” so that “absent a showing of abuse of that discretion, its ruling[] will not be disturbed on appeal.” Application of that standard, however, depends on whether the trial judge’s ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law. When the trial judge’s ruling involves a weighing, we apply the more deferential abuse of discretion standard. On the other hand, when the trial judge’s ruling involves a legal question, we review the trial court’s ruling *de novo*.

J.L. Matthews, Inc. v. Md.-Nat’l Capital Park & Planning Comm’n 368 Md. 71, 91-92 (2002)(citations and footnote omitted).

More recently, this court described the appropriate analysis to be as follows:

In evaluating the correctness of the trial court’s ruling, we engage in a two-pronged analysis. First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*. *Simms* [v. *State*], 420 Md. [705] at 725, 25 A.3d 144 [(2011)]. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Md. Rule 5-401. If we conclude that the challenged evidence meets this definition, we then determine whether the court nonetheless abused its discretion by admitting relevant evidence which should have been excluded because its “probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403.” *Simms*, 420 Md. at 725, 25 A.3d 144.

Washington Metropolitan Area Transit Authority v. Washington, 210 Md. App. 439, 451 (2013).

The ALJ excluded the testimony of Kazyak based on his understanding that there was no regulation that would deny approval of a development plan in Baltimore County solely because it had a negative effect on a Use III stream. The ALJ stated:

You're going to want to talk about something, a project that complies with everything the county tells a developer to do on stormwater management and it's still going to hurt Dipping Pond Run. And if that's the case, I don't think it's relevant.

The ALJ excluded the testimony of Myers based on his understanding that the traffic shed was an area to be determined solely by reference to the Public Services Map adopted annually by the County Council. The ALJ stated:

The site either is or isn't in a failing intersection, and I don't think a witness can say I'm sure, or I believe, that intersections are rated D or F or whatever they're rated, and then there's a question of where the shed is drawn. And I think that's done by Baltimore County as shown on the maps.

Later, the ALJ explained:

Whether or not [the subject property is] subject to Article 4 in this zoning regs, development roadmap, and the basic services map, has been determined by resorting to the maps themselves adopted yearly by the council. I don't believe testimony, expert or otherwise, can alter what's done legislatively yearly as to those maps. So that's the basis of it.

In affirming the ALJ's ruling, the Board stated that "the Developer is only required to ensure that the location of its proposed development does not appear in an area delineated as a deficient traffic shed on the maps provided by the County and adopted by the County Council. . . . In this case, the Developer has made such investigation and it is clear that the proposed development is not located in such an area."

The ALJ's decision to exclude the proffered testimony of both Kazyak and Myers was based on his determination that the evidence was not legally relevant. Such decisions,

however, are conclusions of law which we review *de novo*. *Parker v. State*, 408 Md. 428, 437 (2009); *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n* 368 Md. 71, 92 (2002); *Asphalt & Concrete Servs., Inc. v. Perry*, 221 Md. App. 235, 254 (2015) (“we conduct an independent analysis of whether evidence is relevant”), *aff'd*, 447 Md. 31 (2016). For the reasons set forth below, we shall hold that the proffered evidence of both witnesses was legally relevant and the ALJ erred in excluding it.

II.

According to the Protestants, the Board erred in concluding that the ALJ did not abuse his discretion in determining that Kazyak’s testimony was irrelevant as a matter of law because the stormwater management and forest buffer/forest conservation plans were the sole means chosen by the State of Maryland and Baltimore County to address and prevent adverse impacts upon streams and other environmental features. In addition to their argument that the determination of legal relevance is an issue to be reviewed *de novo*, the Protestants maintain that various stormwater management regulations, other than those referenced by the ALJ, and various other provisions of the Baltimore County Code, required protection of stream systems and provided an independent basis for the ALJ to consider Kazyak’s testimony regarding impacts of the development on the tributaries of Dipping Pond Run. We agree.

We utilize the same principles to interpret local enactments as we do for state statutes. *F.D.R. Srouer P'ship v. Montgomery Cty.*, 179 Md. App. 109, 122-23 (2008) (citations omitted). All legislation is “created with a particular objective or purpose.” *Bowers v. State*, 227 Md. App. 310, 322 (2016) (citations omitted). The cardinal rule of

statutory interpretation is to ascertain and carry out the legislature’s purpose and intent when it enacted the statute or regulation. *75-80 Properties, LLC v. RALE, Inc.*, 470 Md. 598, 623 (2020). Our primary goal “in interpreting statutory language is to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny.” *Lockshin v. Semsker*, 412 Md. 257, 274 (2010) (citations omitted). Our analysis begins with the normal, plain meaning of the language of the statute. *Id.* at 275. We presume that the legislature “meant what it said and said what it meant[,]” so when statutory language is clear, we need not look past the statute. *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 294 (2017). We read the plain meaning of the language “as a whole, so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.” *Koste v. Town of Oxford*, 431 Md. 14, 25-26 (2013)(internal quotations omitted). Statutory language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the legislative body in enacting the statute. *Matter of Collins*, 468 Md. 672, 690 (2020).

Numerous provisions of the Baltimore County Code make clear the county’s intent to protect the environment, including, without limitation, water quality, streams, and species composition.⁷ Article 32, Title 4 of the Baltimore County Code sets forth

⁷ The Developer takes issue with the Protestants’ reliance on certain sections of the Baltimore County Code that were not referred to specifically by counsel for the Protestants at the hearing before the ALJ, and asserts that post hoc arguments based on those sections, specifically BCC § 33-4-102(d) and § 33-4-108(d), were not preserved properly for our consideration. That argument is without merit. Counsel for the Protestants clearly raised

regulations governing development which apply “to the process of review for approval of all development” in the county. BCC § 32-4-104(a). “Subject to the limitations in the Charter and [the Baltimore County] Code, all development of land shall conform to: (i) The Master Plan; (ii) Adopted community plans; and (iii) [Title 4].” BCC § 32-4-102(a). “A permit may not be issued without compliance with” Title 4. BCC § 32-4-115(a).

The purpose of Title 4 is, among other things, to “protect the viability of the county’s existing communities by ensuring that new development and redevelopment is compatible with the neighborhood and minimizes adverse environmental . . . impacts on the surrounding community[.]” BCC § 32-4-104(a). The development plan must identify various site conditions including streams, springs, seeps, bodies of water, forest buffers, soil types, and wooded areas. BCC § 32-4-223. All development must meet the standards and requirements set forth in subtitle 4. BCC § 32-4-401(b)(1).

Section 32-4-413 provides that a “plat may not be approved unless provision is made for grading or for erosion and sediment control that will minimize soil erosion, loss of topsoil, sedimentation of streams, and degradation of water quality in the area.” There is linkage that neither a development plan nor a plat may not be approved unless it “includes protective measures adequate to prevent erosion or sloughing of any steep slope or unstable slope” and “preserve[s] natural features, including watercourses” BCC §§ 32-415(a) and 416(a). The Developer argues that provisions referring explicitly to a plat should not

the issue that there were multiple provisions of the Code that authorized the ALJ to consider the impact of the development plan on streams and noted on the record that the specific references provided at the hearing were not an exhaustive list.

have been considered at the development plan hearing. We are not persuaded. Plats are derived from, and based on, the approved development plan. BCC § 32-4-101(kk)(defining “plat” as “the graphic representation of a development prepared in accordance with the approved Development Plan[.]”). They are filed and recorded in the land records after the development plan is approved and are not subject to appeal. BCC § 32-4-271(c). As a result, the only opportunity to ensure that a proposed development minimizes soil erosion, sedimentation of streams, and degradation of water quality is at a development plan hearing. Moreover, as we already noted, all development was required to meet the standards and requirements of subtitle 4. Thus, the ALJ was authorized to consider whether the proposed development complied with BCC §§ 32-4-213, 415(a), and 416(a), notwithstanding the references in those provisions to a plat.

Article 33 of the Baltimore County Code addresses environmental protection and sustainability. Title 3 of that article deals with the protection of water quality, streams, wetlands, and floodplains and “applies to all proposed development.” BCC § 33-3-104(a)(1). The purpose of Title 3 is, among other things, to “[p]rotect the county’s streams, wetlands, and riverine floodplains[.]” BCC § 33-3-103(a)(1). Title 3 contains provisions for forest buffers that may be employed when development may adversely affect water quality or streams. BCC §§ 33-3-111 and 112.

Stormwater management is addressed in Title 4. The parties do not dispute that in Baltimore County “a person may not develop or redevelop any site without providing for appropriate stormwater management measures that control or manage stormwater runoff from the site.” BCC § 33-4-104(a)(1). Section 33-4-102(d) provides that proper

management of stormwater will, among other things, “[m]inimize damage to public and private property[,]” [r]educe the effects of development on land[,]” [r]educe stream channel erosion[,]” and “[a]ssist in the attainment and maintenance of water quality standards[.]” BCC §33-4-102(d). The stormwater management “measures must be consistent with, and meet “minimum control requirements” set forth in the State of Maryland’s Stormwater Management Design Manual, which contains design and construction criteria for various types of stormwater management facilities. BCC § 33-4-104(a)(2). The purpose of the stormwater management regulations is to “protect, maintain, and enhance the public health, safety, and general welfare by establishing minimum requirements and procedures to control the adverse impacts associated with increased stormwater runoff.” BCC § 33-4-102(a). “Adverse impacts” are defined in BCC § 33-4-101(c) as:

any deleterious effect on waters, nontidal wetlands, or tidal wetlands, including their quality, quantity, surface area, species composition, aesthetics, or usefulness for human or natural uses which are or may potentially be harmful or injurious to human health, welfare, safety, or property, biological productivity, diversity, or stability or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation.

The County clearly anticipated consideration of the impact of a development plan on streams, water quality, erosion, sedimentation, and riparian and aquatic ecosystems in determining whether a development plan should be approved. Importantly, there is no provision that suggests that mere facial or minimal compliance with stormwater management or other regulations automatically satisfies or fulfills the intentions or purposes set forth in the provisions referred to here. Mere compliance with stormwater management regulations (an issue that was disputed at the hearing) did not render

automatically testimony about the impact of the development plan on the stream system or trout irrelevant as a matter of law.

In this case, Kazyak’s testimony, it appears, would have addressed, *inter alia*, two issues that Sichel did not consider, specifically the increased temperature of stream water resulting from runoff from the development and the introduction of additional sediment in the waters of Dipping Pond Run and its tributaries. Contrary to the Developer’s argument, Kazyak did not have to be an expert in steep slopes in order for him to testify about the importance of protecting steep slopes or the impact of erosion on stream systems. He was qualified and admitted to testify as an expert in stream ecology and stream surveys.⁸ Kazyak’s expert testimony that compliance with stormwater management regulations in this particular instance would not satisfy the intent and purpose of the Code with respect to the stream, sedimentation, and aquatic life, including trout, was legally relevant and should have been admitted.

III.

The Protestants allege that the Board erred in affirming the ALJ’s exclusion of Myers’s testimony and his exhibits on the ground that it was irrelevant as a matter of law. They assert that the Board should have reviewed the ALJ’s relevance conclusion *de novo* and determined that it was erroneous. We begin our analysis by examining the pertinent regulations. The Baltimore County Growth Management Act (the “Act”) is codified in

⁸ Kazyak was offered also as an expert on the impacts of development on streams and stream ecology, but the ALJ reserved its ruling on that subject. Because the ALJ excluded Kazyak’s testimony, he never ruled on the reserved question.

Article 4A of the Baltimore County Zoning Regulations (“BCZR”). The purpose of the Act is set forth in BCZR § 4A00.1:

The purpose and intent of this article is to implement the objectives of the county-wide Master Plan and to adopt standards and guidelines relative to new development in all areas of the county which would result in land use patterns, location of new growth and timing of growth and development that is consistent with preservation of the quality of life in existing neighborhoods, with the ability of the county to provide necessary public facilities and services to support new development, with the ability of the county to correct existing service and facility deficiencies, with the preservation of natural, agricultural and environmental resources and with the promotion of new growth and development in appropriate areas.

The Act sets forth provisions for the annual adoption by the County Council of three “Basic Services Maps,” one for sewerage, one for water supply, and one for transportation. BCZR § 4A02.3. The Act contains specific standards that “are intended to form the basis for the delineation of areas on the Basic Services Maps as well as for the evaluation of development applications in accordance with the requirements of this article.” BCZR §4A02.4.A. The intent of the transportation map is set forth in BCZR §4A02.4.D, which provides:

Intent. The transportation standards and maps are intended to regulate nonindustrial development where it has been determined that the capacity of arterial and arterial collector intersections is less than the capacity necessary to accommodate traffic both from established uses and from uses likely to be built pursuant to this article. Such development is not intended to be restricted unless there is a substantial probability that an arterial and arterial collector intersection situated within the mapped area will, on the date the map becomes effective, be rated at level-of-service E or F under standards established by the Highway Capacity Manual, 1965, published by the Highway Research Board of the Division of Engineering and Industrial Research, National Academy of Sciences National Research Council.

BCZR § 4A02.4.D.

BCZR § 4A02.3.G.1 prohibits the issuance of a building permit in any area that has deficient sewer, water, or transportation services. A building permit may not be issued unless an applicant meets the requirements set forth in the Act. *See* BCC § 32-6-106. No mention is made that a development plan, an earlier step in the development process than permitting, falls within the ambit of this prohibition.

It is undisputed that the subject property was not identified on the Basic Services Map for transportation (“Transportation Map”) that was in effect at the time of the hearing before the ALJ. Nevertheless, the Protestants argued below, as they do here, that the substantive standards set forth in the Act that are used to determine when an intersection is failing, and not the Transportation Map itself, govern the ALJ’s review of development applications.⁹ A plain reading of the regulations supports that position.

Myers would have testified that application of the substantive standards set forth in the Act would establish that the subject property was within a failing traffic shed. Using traffic counts and relying on counts taken by Baltimore County and the State Highway Administration, Myers would have testified about the percentage of vehicles that were heading toward the failing intersections located south of the subject property near Greenspring Station. Applying the county’s own methodology, he would have opined that

⁹ We reject the Developer’s argument that the “only reasonable interpretation” of the phrase “development applications” used in BCZR § 4A02.4.A is to treat it as referring to a reserve capacity certificate under BCZR § 4A02.3.G. Reserve capacity use certificates are issued “upon appropriate application on forms prepared by the Director” after an applicant has applied for a building permit . . . or final subdivision approval.” BCZR § 4A02.3.G. The language used in BCZR § 4A02.4A is not restrictive. It refers to “evaluation of development applications in accordance with the requirements of this article.”

the subject property was within the traffic shed of the failing intersections because a requisite percentage of vehicles from the development would contribute to those intersections.

Contrary to the ALJ's determination that the transportation issue could only be resolved by reference to the Transportation Map itself, and that no testimony, expert or otherwise, could alter the Transportation Map, the plain language of the relevant provisions makes clear that the map is not dispositive of the question whether a development plan complies with the development regulations and applicable policies, rules, and regulations with regard to transportation. The Transportation Map simply does not control the outcome of this case. Even when county agencies have no comments about a development plan, protestants may rebut the presumption afforded to the Developer. *Elm Street*, 172 Md. App. 690 (2007). Clearly, if the Transportation Map was dispositive, a public hearing on the issue would serve no purpose. Myers's testimony was of consequence to the determination of whether the capacity of arterial and arterial collector intersections was less than the capacity necessary to accommodate traffic both from established uses and from uses likely to be built pursuant to BCZR Article 4A. Myers's testimony was legally relevant.

IV.

The final argument presented by the Protestants is that the circuit court erred in denying its motion for reconsideration which was filed within ten days of the entry of judgment pursuant to Maryland Rule 2-534. In their motion for reconsideration, the Protestants asked the court to consider a recent decision by the Baltimore County Board of

Appeals, *In the Matter of CPC Falls Road, LLC*, Case No.: CBA-20-006, in which the Board determined, arguably, that the Basic Services Maps are not determinative and that expert testimony with regard to sewer deficiencies was admissible. The Protestants’ argument is without merit.

The circuit court has broad discretion to grant a motion to alter or amend a judgment that is filed within ten days of the entry of judgment. As a general rule, we will not disturb the denial of a motion for reconsideration absent an abuse of discretion. *Miller v. Mathias*, 428 Md. 419, 438 (2012); *NRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 673 (2010); *Johnson v. Francis*, 239 Md. App. 530, 542 (2018). A ruling reviewed under an abuse of discretion standard will not be reversed unless “[t]he decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *North v. North*, 102 Md. App. 1, 14 (1994).

It is well established that a motion to alter or amend under Rule 2-534 is not an occasion for a party to make arguments that it neglected to make before the court ruled and, in such circumstances, the court has almost limitless discretion not to consider the argument. *Schlotzhauer v. Morton*, 224 Md. App. 72, 85 (2015), *aff’d* 449 Md. 217 (2016); *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002). In *Morton*, the Court of Appeals explained that:

[a] circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived.

Morton, 449 Md. at 233 n.10. In *Steinhoff*, we noted that a “trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been raised earlier but were not.” *Steinhoff*, 144 Md. App. at 484.

In the instant case, the Board issued its decision in *In the Matter of CPC Falls Road, LLC* on or about 3 January 2020. The circuit court’s opinion was entered on 27 February 2020, and the Protestants’ motion for reconsideration was not filed until 9 March 2020. Because the Protestants could have, and should have, raised the issue earlier, the circuit court was well within its discretion to deny the motion for reconsideration.

**JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE COUNTY REVERSED; 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
OFFICE OF ADMINISTRATIVE HEARINGS
FOR FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION; COSTS TO BE PAID BY
APPELLEE.**

The correction notice(s) for this opinion(s) can be found here:

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0116s20cn.pdf>