Circuit Court for Baltimore County
Case No. C-03-CV-22-003313

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2121

September Term, 2023

VALLEYS PLANNING COUNCIL, INC., *et al.*

v.

2627, LLC

Berger,
Albright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: December 13, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case involves a development plan by 2627, LLC ("Developer") to build four single-family homes within the Caves Valley National Register Historic District ("CVNRHD") in Baltimore County. Appellants include Valleys Planning Council ("VPC"), Kathleen Pontone, David Wilmerding, and Betsy Wilmerding.[1] VPC opposes Developer's plan and brings this appeal, which builds upon an extensive procedural history spanning almost a decade: Developer's plan has twice been approved by a Baltimore County Administrative Law Judge ("ALJ"), twice reviewed by the Board of Appeals, twice reviewed by the circuit court on petition for judicial review, and this is the second time the plan has been before this Court. The first time, we remanded for further proceedings before an ALJ. *2627 LLC v. Valley's Planning Council, Inc.*, No. 1838, Sept. Term, 2017, 2020 WL 4673887 (Md. App. Aug. 12, 2020). After that remand, ALJ Paul Mayhew approved the plan again (and added a condition prohibiting further subdivision or development of the property), the Board of Appeals affirmed (but removed the condition), and the circuit court affirmed the Board of Appeals. Here, VPC challenges the plan and the removal of the condition.

On appeal, VPC presents six questions for our review.[2] For clarity, we consolidate

[1] We collectively refer to Appellants as "VPC" in this opinion. We mean no disrespect to the other individual appellants in doing so.

[2] VPC phrased its six questions as follows:

i) Did the ALJ err in applying a presumption in favor of development approval?

ii) Did the ALJ correctly review the development plan under the

and rephrase these questions as:

1. Did ALJ Mayhew[3] err in approving the development plan?

2. Did ALJ Mayhew correctly deny Developer's request to strike a condition that prohibited further subdivision or development of the property?

For the reasons below, we answer Question One in the negative. We do not reach Question Two. Developer contends that the issue of the condition is moot because Developer has since recorded a conservation easement on the property. While we would otherwise be inclined to remand for further proceedings before an ALJ to resolve this fact-intensive question, Developer requested during oral argument in November 2024 that we reinstate the condition imposed by ALJ Mayhew rather than remand. Accordingly, we affirm the plan's approval and reimpose the condition, affirming in part and reversing in part the judgment of the circuit court.

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applicable legal standard - whether the proposed development "protects" the Historic District?

iii) Did the ALJ err in limiting the scope of the remand to exclude consideration of whether the development plan protects the Stemmer House and the Historic Environmental Setting?

iv) Did the ALJ correctly weigh the evidence in light of his mistaken allocation of a presumption in favor of development approval ([(i)] above)?

v) Did the ALJ correctly deny the Developer's request to remove the condition that no further subdivision or development be permitted beyond the four proposed lots in the development plan?

vi) Did the Board of Appeals err in removing the condition imposed by the ALJ that no further subdivision or development be permitted?

[3] The parties agree that ALJ Mayhew's decision is the decision that we review.

BACKGROUND

In the 2016 decision first approving Developer's plan, ALJ John Beverungen opined that "it can be said, without fear of contradiction, that no other residential project in Baltimore County has received such extensive scrutiny for design and site planning elements prior to the approval of a development plan." In the eight years since ALJ Beverungen made this statement, Developer's plan has been reviewed twice by the Board of Appeals, twice by the Circuit Court for Baltimore County, and now, twice by this Court.

This Court's previous opinion dealing with Developer's plan detailed the underlying facts. *See 2627 LLC*, 2020 WL 4673887. We again briefly summarize the relevant details of Developer's "2609-2615 Caves Road" plan and explain the numerous procedural developments that have followed.

I. The Development Plan

Developer sought and has obtained, subject to our review, approval to build four single-family homes on 24.18 acres of land it owns near the intersection of Caves Road and Park Heights Avenue in Owing Mills. Pursuant to Baltimore County Code ("BCC")[4]

[4] The official publication of the BCC is available online at https://www.baltimorecountymd.gov/departments/law/county-code (last visited December 10, 2024).

§ 32-4-409**,** three of the four lots are configured as panhandle lots.[5] A shared driveway provides vehicular access to all four lots. Under Baltimore County Zoning Regulations ("BCZR")[6] § 1A04, the property is zoned R.C.5 (Resource Conservation), which is described as "Rural-Residential."[7] The property is "currently unimproved and is primarily wooded with ponds and a stream on the western and southern portions of the property." The property is located on the southeastern edge of the CVNRHD, which was listed on the National Register of Historic Places in 1988 and encompasses approximately 2,100 acres of land in the Owing Mills area. Since the designation of the CVNRHD, a radio tower and the Caves Valley Golf Club (including thirty-eight associated single-

[5] A "panhandle lot" is "a lot shaped and situated so that the only frontage or access to a local street or collector street is a narrow strip of land." BCC § 32-4-101(ee). BCC Section 32-4-409 lists conditions for creating panhandle lots.

[6] The official publication of the BCZR is available online at https://www.baltimorecountymd.gov/departments/law/county-code (last visited December 10, 2024).

[7] One-family detached dwellings are a permitted use as of right in R.C.5 zone. BCZR § 1A04.2.A. The purpose of the R.C.5 classification is to:

1. Provide for rural-residential development in suitable areas in which basic services are not anticipated.
2. Eliminate scattered and generally disorderly patterns of future rural-residential development.
3. Assure that encroachments onto productive or critical natural resource areas will be minimized.
4. Provide a minimum lot size which is sufficient to provide adequate area for the proper functioning of on-lot sewer and water systems.

BCZR § 1A04.1.B.

family homes) have been constructed within the historic district.

The proposed development site is located adjacent to, but does not include, the Stemmer House.[8] The Stemmer House is on the Final Landmarks List for Baltimore County pursuant to BCC § 32-7-101(j). In 2006, the Baltimore County Landmarks Preservation Commission designated an area surrounding the Stemmer House to be a Historic Environmental Setting ("HES") under BCC § 32-7-101(p).[9] The proposed homes would not be constructed within the boundaries of the HES. However, the shared driveway to the homes and associated stormwater management facilities would be located within the HES.

II. Baltimore County Agency Review and Prior Judicial Review

The review and approval process for development plans in Baltimore County is detailed in *People's Counsel for Baltimore County v. Elm Street Development, Inc.*, 172 Md. App. 690, 694–96 (2007). We briefly summarize here the requirements for review and approval of a development plan, which are found in BCC §§ 32-4-201 to 32-4-232. Before a development plan goes before a hearing officer—in this case, an ALJ—the developer must file a concept plan for review at a conference with the developer and appropriate County agencies. BCC §§ 32-4-211 to 32-4-216. The submission and review

[8] A lot line adjustment was performed in 2004. Previously, the property where the 2609-2615 Caves Road development would be located and the Stemmer House lot were part of the same parcel.

[9] HES means "the property or lot or portion thereof, as delineated by the Commission, which is historically, architecturally, archeologically, or culturally connected to the historic significance of a landmark structure." BCC § 32-7-101(p).

of the concept plan is followed by a community input meeting. BCC § 32-4-217. After this meeting, the developer files the development plan for review by County agencies for compliance with County regulations, and the developer and the County agencies attend a development plan conference. BCC § 32-4-226. After this conference, the plan goes before the ALJ. BCC § 32-4-227. The ALJ

> 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.

BCC § 32-4-229(b)(1). The ALJ's decision is appealable to the Baltimore County Board of Appeals. BCC § 32-4-229(b)(2).

ALJ Beverungen conducted a five-day hearing over the course of several months in late 2015 and early 2016. Representatives from Baltimore County agencies including the Development Plans Review Bureau, the Real Estate Compliance section, the Zoning Review office, the Department of Recreation and Parks, the Department of Planning, and the Department of Environmental Protection and Sustainability testified and recommended that the development plan be approved.

Developer presented several expert witnesses at the hearing before ALJ Beverungen. An engineer testified about the plan's environmental easements and stormwater management system. This engineer also concluded that the plan satisfied Baltimore County rules and regulations. An environmental specialist testified about the request to remove one specimen tree for the shared driveway in order to avoid clearing a

larger area of forest. A registered landscape architect testified that it was her opinion that the proposed homes would not be visible from Caves Road. A land use and zoning planner testified that the plan would be consistent with the R.C.5 zoning classification and the Baltimore County Master Plan. An architectural historian testified that the plan would not adversely affect the CVNRHD. The architectural historian added that listing a property on the National Register is "a planning tool" and that the listing does not limit what a property owner "can do on . . . or with their property." The architectural historian also addressed the HES surrounding the Stemmer House and concluded that the plan would not significantly adversely affect the HES. An area resident and the president of the Velvet Valley Ridge Community Association also testified in support of the development plan.

VPC also presented several witnesses during the hearing before ALJ Beverungen. The former owner of the Stemmer House testified that the plan would negatively impact the Stemmer House and environment surrounding it. Local residents expressed concerns about stormwater management as well as the impact of the development plan on the Stemmer House, the CVNRHD, and the rural character of the area. The president of the Greater Greenspring Association expressed concerns about the impact on the Stemmer House and the CVNRHD. A historic preservation specialist testified about the Stemmer House and the CVNRHD. A filmmaker testified about his preparation of aerial photography and video of the property using a drone, and an architect testified about a three-dimensional model created based on the development plan and the filmmaker's

drone footage. An engineer expressed concerns about Developer's stormwater management concept plan. A planner testified that, in her opinion, the development plan would impact the cultural landscape. A historic preservation advocate testified that her organization, Preservation Maryland, had concerns about the plan's impact on the Stemmer House and the HES. A licensed property line surveyor testified that the proposed panhandle lots did not comply with the BCC and that Developer had not satisfied the requirements under BCZR § 1A04.4 to demonstrate compliance with the performance standards for R.C.5 lots.

The plan was initially denied in April 2016 by ALJ Beverungen because the Developer had not submitted findings on the performance standards under BCZR § 1A04.4.[10] In the original order denying approval, ALJ Beverungen opined that "there is no provision in the [BCC] or the [BCZR] which requires the ALJ to 'preserve' historic sites, nor is there any code or regulation which imposes any particular requirements for a development project proposed in the vicinity of a historic district or structure."

Following Developer's motion for reconsideration and submission of materials

[10] BCZR § 1A04.4 provides standards that development plans must meet with respect to site planning, open space, landscape design, and buildings. These performance standards "apply to all residential development in the R.C.5 Zone" and "are intended to ensure that rural residential development conforms with a quality of design that maintains and reflects the rural character of the County." BCZR § 1A04.4(A), (B). The Department of Planning may require that certain information be submitted "from which a finding can be made on compliance of the project with the standards." BCZR § 1A04.4(B)(3), (C). The Department must submit these findings to the hearing officer, who must adopt the findings before approving the plan unless the findings are an abuse of discretion or unsupported by the evidence. BCZR § 1A04.4(C).

regarding the performance standards, ALJ Beverungen reconvened the hearing. At the reconvened hearing, a representative from the Baltimore County Department of Planning testified that the plan met the performance standards under BCZR § 1A04.4 and recommended approval. The Department of Planning representative testified that the development plan "exhibits a quality of design that maintains and reflects the rural character of the county." He also testified that he was aware that the property is in the CVNRHD. A document containing the written conclusions and determinations in support of the Department of Planning's finding was introduced as an exhibit.

In August 2016, following the reconvened hearing, ALJ Beverungen approved the development plan. In the opinion, ALJ Beverungen wrote that he "continue[s] to believe the preservation or protection of the [CVNRHD] is not an issue or factor involved in the review and approval of this development."

The Board of Appeals affirmed ALJ Beverungen's decision in February 2017. In October 2017, the circuit court reversed, finding that the proposed development plan was barred under principles of collateral estoppel[11] because a prior development plan for the property from 2004 had not been approved.[12] In an unreported opinion published in 2020,

[11] We note that throughout the record, reference is made to this issue sometimes in terms of collateral estoppel, sometimes in terms of *res judicata*, and sometimes in terms of both. The circuit court held that collateral estoppel was applicable but that *res judicata* was not.

[12] The 2004 plan was made by a previous owner of the property and involved a larger parcel of land. The owner had sought approval to build thirteen houses, three of which would have been located within the CVNRHD in a similar location to the four

this Court vacated the judgment of the circuit court. *2627 LLC*, 2020 WL 4673887, at *19. We held that the disapproval of the 2004 plan did not compel ALJ Beverungen to deny Developer's plan because Developer's plan differed from the 2004 plan and the law had since changed.[13] *Id.* at *11. While we agreed with aspects of ALJ Beverungen's 2016 decision, we remanded for further proceedings to consider the impact of the proposed development on the CVNRHD consistent with BCC §§ 32-4-102(b)(2)(vi) and 32-4-223(8) and "to ascertain whether the proposed panhandle lots would be in compliance with the applicable code requirements[.]" *Id.* at *14–18.

After proceedings before ALJ Mayhew upon remand, the plan was again approved in November 2021. ALJ Mayhew did not convene a new evidentiary hearing, instead relying on the transcripts from the hearings before ALJ Beverungen. ALJ Mayhew

houses proposed by Developer in this case. The hearing officer disapproved this plan due to concerns about the proposed stormwater management systems and the impact on the CVNRHD.

[13] We discussed several factual differences between the two plans. First, we noted the plans' differences in acreage and scope: the 2004 plan was for thirteen homes over 73 acres and the site included the Stemmer House. *2627 LLC*, 2020 WL 4673887 at *12. The 2004 plan also would have required that a new road be built and proposed significantly more tree removal. *Id.* at *13. Further, we concluded that "major" differences between the plans' proposed stormwater management systems "address[ed] one of the critical concerns that led the Hearing Officer to reject the 2004 plan." *Id.*

We also addressed two "significant changes" in the law that occurred since the denial of the 2004 plan. *Id.* First, we explained that a provision of the BCC cited by the hearing officer in denying the 2004 plan which required preservation of National Register Historic District sites was amended in 2007 to delete the reference to historic sites. *Id.* Second, we noted that the Maryland General Assembly passed the Stormwater Management Act of 2007. *Id.*

concluded based on his review of the transcripts that the development plan protected the integrity of the CVNRHD and that the proposed panhandle lots met the requirements of BCC § 32-4-409. ALJ Mayhew made his findings about the plan's impacts on the CVNRHD based on the testimony of the County agency representatives. ALJ Mayhew explained that the County agencies "extensively reviewed" this issue and recommended approval. ALJ Mayhew also considered that Developer had "adduced substantial expert testimony in support of the development plan." Noting that neither the BCC nor the BCZR provide specific standards by which to review the protection of historic sites, ALJ Mayhew relied on "overarching land use principles and common sense" to determine whether the development plan protected the CVNRHD. ALJ Mayhew considered "the fact that there has been other substantial recent development within the [CVNRHD]" as another "compelling reason" to approve the development. Finally, ALJ Mayhew included a condition as part of his approval:

> Apart from the four dwellings depicted on the site plan no further subdivision or development shall be permitted on this 24.18 acre site, and provisions restricting future development of the subject lots shall be incorporated in the deeds for these four lots.

In December 2021, Developer filed a motion requesting that ALJ Mayhew reconsider the condition precluding further subdivision or development. ALJ Mayhew denied Developer's motion for reconsideration in April 2022.

In July 2022, the Board of Appeals affirmed ALJ Mayhew's approval of the development plan for the most part. As to ALJ Mayhew's finding that the development plan protects the CVNRHD, the Board found it supported by competent, material, and

substantial evidence in the record. The Board again highlighted that County representatives had recommended approval and that Developer had supplemented these recommendations with expert testimony. The Board did not find error in ALJ Mayhew's consideration of past development in the CVNRHD when deciding what was an acceptable impact on the historic district. The Board also affirmed ALJ Mayhew's decision that the proposed panhandle lots met the requirements of BCC § 32-4-409. However, the Board struck the condition restricting future subdivision and development, finding that "such a prohibition exceeds the statutory authority or jurisdiction of the ALJ and would deprive the Developer of due process in regards to the future use of its property."

While the administrative appeals process was ongoing, Developer recorded a conservation easement on a portion of the property in January 2023. Developer attached documentation of the conservation easement in an appendix to its brief before us. Because this conservation easement was not recorded until after ALJ Mayhew and the Board issued their opinions, the conservation easement was not part of the administrative record.

The circuit court affirmed the Board of Appeals' decision in December 2023. VPC timely appealed.

STANDARD OF REVIEW

Judicial review of an administrative agency's final decision is narrow. *People's Counsel for Baltimore Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 66 (2008) (citations

omitted). We look through the circuit court's decision and evaluate the decision of the agency; however, our task is not to substitute our judgment for the expertise of the agency. *Id.* at 66–67. We have described our role as being limited to determining "(1) whether the record as a whole contains *substantial evidence* that supports the agency's findings and conclusions, and (2) whether the agency premised its decision on an erroneous conclusion of law." *King v. Helfrich*, 263 Md. App. 174, 206 (2024) (citations omitted) (emphasis added). If the agency's decision was supported by "such evidence as a reasonable mind might accept as adequate to support a conclusion" and was not premised upon an error of law, then the decision must be upheld on review. *Loyola Coll. in Md.*, 406 Md. at 67 (citations omitted). While we "occasionally apply agency deference" by considering the expertise of an administrative agency in interpreting and applying the statute that it administers, we do not afford deference to an agency's other legal conclusions. *Comptroller of Md. v. FC-GEN Operations Invs. LLC*, 482 Md. 343, 360 (2022); *King*, 263 Md. App. at 206 (quoting *FC-GEN Operations Invs. LLC*, 482 Md. at 360).

DISCUSSION

I. ALJ Mayhew did not err in approving the development plan.

A. VPC's Contentions

VPC contends that ALJ Mayhew erred in four respects when approving the development plan. First, VPC contends that ALJ Mayhew erroneously applied a presumption in favor of development approval based on the testimony of County agency

representatives. Second, VPC takes issue with ALJ Mayhew's consideration of past development permitted in the CVNRHD. Third, VPC argues that ALJ Mayhew erred in concluding that this Court's remand did not call for consideration of the development plan's impacts on the Stemmer House or the HES. Finally, VPC argues that the evidence it presented with regard to the impact on the historic site should have outweighed the evidence introduced in favor of the plan's approval. We address, and reject, each of these contentions below.

B. ALJ Mayhew did not improperly apply the Elm Street *presumption.*

We held in *Elm Street* that once county agencies recommend approval of a development plan, it is not necessary for the developer or the county agencies to produce further evidence supporting those decisions. *Elm Street*, 172 Md. App. at 702–03. We reached this conclusion because "neither the BCZR nor the [BCC] require[d] that 'findings' be made or reasons be given by the [county agencies] in [their] review of Elm Street's development plan." *Id.* at 702 (declining to read such requirements into the BCZR or BCC because "it is clear that, when either the BCZR or the [BCC] requires that the basis of an agency's opinion be set forth, it plainly imposes such a requirement"). Instead, we explained that it is "up to appellants to produce evidence rebutting the [agencies'] recommendations." *Id.* at 703 (citation omitted). We presume that county agency officials "have properly performed their duties and . . . have acted regularly and in a lawful manner." *Id.* at 705 (citations omitted).

In his opinion approving Developer's plan, ALJ Mayhew began his discussion of

the issue of impacts on the CVNRHD by "acknowledging that the representatives of all the County agencies testified that the plan in this case conforms to all County laws, and all recommended approval of the plan." Citing to *Elm Street*, he explained that "unless there is clear evidence to the contrary [he is] bound by [BCC] Sec. 32-4-229 to approve the plan." ALJ Mayhew's decision was largely made based on this "presumption in favor of these agency recommendations."

The BCC provides that an ALJ "*shall* grant approval of a Development Plan that complies with these development regulations and applicable policies, rules and regulations[.]" BCC § 32-4-229(b)(1) (emphasis added). The BCC also provides that if no comments or conditions are submitted by a County agency, then the Development Plan shall be considered in compliance with County regulations. BCC § 32-4-227(e)(2).

Here, we see no error in ALJ Mayhew's application of the *Elm Street* presumption. Representatives from several Baltimore County agencies including the Development Plans Review Bureau, the Real Estate Compliance section, the Zoning Review office, the Department of Recreation and Parks, the Department of Planning, and the Department of Environmental Protection and Sustainability testified during the hearings before ALJ Beverungen and recommended that the development plan be approved. Specifically, the agency representative testifying on behalf of the Department of Planning was familiar with the plan's details and was aware that the property is in the CVNRHD. Accordingly, per *Elm Street*, because Baltimore County determined that the plan complied with all County laws, ALJ Mayhew was correct to presume that the plan

would be approved. *See Elm Street*, 172 Md. App. at 703 (explaining that when county agencies determine that a developer's plan complies with county regulations, a presumption is created in favor of plan approval).

In an attempt to challenge the presumption's applicability here, VPC argues that because County agency representatives did not specifically review or testify regarding whether the development plan protected the CVNRHD, there should have been no *Elm Street* presumption in favor of the plan's approval. But *Elm Street* specifically provides that agencies are not required to make such findings in the absence of a specific regulation or code provision requiring otherwise. *Elm Street*, 172 Md. App. at 702–03. Here, VPC identifies no provision or regulation that requires Baltimore County agencies to have made findings about the plan's impact (or not) on adjacent (or any) historic districts. Essentially, VPC attempts to insert a requirement that the County agencies make explicit findings that the proposed project will protect historic districts. There is no such requirement in the BCC or the BCZR. Thus, the absence of such findings from Baltimore County agencies is not a basis to conclude that ALJ Mayhew's application of the *Elm Street* presumption was inappropriate or that the ALJ erred in concluding that the development plan appropriately protected the CVNRHD.

C. ALJ Mayhew did not err by considering past development in the CVNRHD.

Citing to BCC § 32-4-102(b)(2)(vi), VPC contends that ALJ Mayhew's comparison of Developer's plan to prior development in the CVNRHD was "not supported by County law[.]" Again, we disagree.

In pertinent part, BCC § 32-4-102 provides:

> (b) *Intent of laws.*
>
> . . .
>
> (2) This title is intended to ensure that proposed development projects are safe, adequate, convenient and, where applicable, provide for the following:
>
> . . .
>
> (vi) Prevention of environmental degradation and promotion of environmental enhancement, including adequacy of landscaping and energy conservation measures, and of *protection of* floodplains, steep slopes, watersheds, nontidal wetlands, tidal wetlands, vegetation, other natural features and *historical sites or areas*; . . .

BCC § 32-4-102(b)(2)(vi) (emphasis added).

Plainly read, BCC § 32-4-102(b)(2)(vi) does not prevent consideration of previous development within the National Register site. VPC fails to explain how this code section, which only provides that it is the intent of the County's development policies to protect historic sites and does not set specific standards by which to assess whether that intent was met, somehow supports a conclusion that that intent was not met here.

ALJ Mayhew reviewed the County code and County zoning regulations, which do not provide specific standards by which to review the protection of historic sites. Relying on "overarching land use principles and common sense," ALJ Mayhew considered "other substantial recent development" in the historic district including the Caves Valley Golf Club, the homes associated with the golf club, and a radio tower. We agree with ALJ Mayhew that nothing in BCC § 32-4-102(b)(2)(vi) prevents consideration of past development.

Nor do we find—and VPC does not claim—a lack of substantial evidence to support ALJ Mayhew's decision. ALJ Mayhew explained that since the CVNRHD was listed on the National Register of Historic Places in 1988, "the Caves Valley Golf Club and 38 associated luxury homes were built squarely within the District, as was the WCAO radio tower." ALJ Mayhew noted that "experts on both sides in this case agree that the golf club community does *not* substantially impact the integrity of the Historic District." ALJ Mayhew opined that the four houses proposed by Developer "will have far less impact on the District than the golf course community." Substantial evidence in the record supports this finding. The golf club and the associated thirty-eight homes were approved by the County and were considered compatible with the protection of the CVNRHD, even by several of VPC's witnesses. ALJ Mayhew did not err in concluding in part based on this evidence that the CVNRHD would be protected under Developer's plan.

D. ALJ Mayhew did not err in concluding that the scope of the remand did not allow him to consider the impacts on the Stemmer House and the HES.

VPC contends that ALJ Mayhew erred in determining that the scope of this Court's remand did not permit consideration of the development plan's impacts on the Stemmer House or the HES.[14] Again, we disagree.

[14] Developer argues that, as an initial matter, VPC waived its ability to raise this argument. Developer contends that the issue of the plan's impacts on the Stemmer House and the HES was not raised by VPC during the administrative appeals process following ALJ Beverungen's decision. Not so. Several witnesses testified on behalf of VPC as to

Because this Court's previous opinion and Mandate did not require further consideration of the plan's impacts on the Stemmer House or the HES, we see no error in ALJ Mayhew's conclusion that he was not directed to consider those impacts. Under Maryland Rule 8-604(d), an appellate court "shall state the purpose for the remand." Md. Rule 8-604(d)(1).[15] Moreover, an appellate court's opinion is an integral part of the mandate. *See Harrison v. Harrison*, 109 Md. App. 652, 665–66 (1996) (explaining that,

impacts of the plan on the Stemmer House and the HES. VPC also raised the issue in front of the agency before this Court's remand in a post-hearing memorandum filed with ALJ Beverungen and in a post-hearing memorandum filed with the Board. Finally, VPC again argued on remand before ALJ Mayhew that it would be "perfectly appropriate and within the scope of the remand for the ALJ to consider impacts to the Historic District, the Stemmer House and its HES." If VPC had raised this issue for the first time only after this Court's remand, then we would agree with Developer that such an argument was waived, and we would not consider it under the law of the case doctrine. *See Kearney v. Berger*, 416 Md. 628, 641 (2010) (citations omitted) (explaining the law of the case doctrine); *see also Reier v. State Dep't of Assessments & Tax'n*, 397 Md. 2, 21 (2007) (noting that litigants "cannot, on the subsequent appeal of the same case raise any question that could have been presented in the previous appeal . . . " (citations omitted)). But that is not how the arguments went here.

[15] Maryland Rule 8-604(d)(1) provides in its entirety:

(d) Remand.

(1) *Generally*. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

generally, "any direction in an order or mandate that proceedings on remand are to be consistent with the opinion would necessarily require the opinion to be considered as an integral part of the judgment"). Upon remand, under Rule 8-604(d)(1), "the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court." Md. Rule 8-604(d)(1).

Our findings of error in the previous opinion (and our Mandate calling for further proceedings "consistent with" our opinion) pertained to how ALJ Beverungen treated evidence of the development plan's impacts on the CVNRHD. Our opinion did not find error with respect to, and our remand did not call for further proceedings about, consideration of the plan's impact on the Stemmer House and the HES. We held that ALJ Beverungen "erred in asserting that he could not even *consider* the impact the development would have upon the National Register District in which the proposed houses were to be constructed." *2627 LLC*, 2020 WL 4673887, at *14 (emphasis in original). In concluding that ALJ Beverungen had erred in declining to consider whether the plan adequately protected the CVNRHD, we did not refer to the Stemmer House or the HES. *See id.*, at *14–17, 19. VPC even acknowledges in its brief that "the Court did not mention the HES or Stemmer House specifically" and "did not state specifically that the ALJ erred in refusing to consider impacts to them[.]" As such, ALJ Mayhew did not err in restricting his "review of the historic issue to the impact, if any, the proposed

development will have on the [CVNRHD]."[16] ALJ Mayhew's decision was consistent with our previous opinion and Mandate.

E. ALJ Mayhew did not err in weighing the evidence regarding impacts on the CVNRHD.

VPC argues that ALJ Mayhew erred in weighing the evidence introduced by the parties on the issue of impacts to the CVNRHD. [17] Because we do not reweigh evidence, we disagree. *See Belfiore v. Merch. Link, LLC*, 236 Md. App. 32, 54 (2018) (explaining that it is not the role of this Court to "reweigh the evidence and draw different inferences" than the agency did).

The applicable standard of review guides our consideration of the evidence in the record. With respect to issues of fact, our review of agency decisions is limited to determining whether there is sufficient evidence to support the agency's findings. *See Loyola Coll. in Md.*, 406 Md. at 67 (explaining that the court is to consider whether there is "such evidence as a reasonable mind might accept as adequate to support a conclusion"); *see also King*, 263 Md. App. at 206 (describing the court's role as determining whether there is "substantial evidence" from the record to support the decision).

[16] We also would highlight, as Developer does in its brief, that ALJ Mayhew added that "even if [he] were to reconsider the impacts on the Stemmer House and the HES, [he] would agree with ALJ Beverungen's analysis and would therefore not deny the development plan based on those impacts."

[17] Because we disagree with VPC about the proper scope of the remand, we reject its argument that the evidence previously presented regarding impacts to the Stemmer House or the HES should have weighed against approval.

There was substantial evidence in the record to support ALJ Mayhew's finding that the development plan protected the CVNRHD. As discussed above, the testimony of representatives from County agencies that the development plan complied with the applicable laws and regulations created a presumption of plan approval under *Elm Street*. Further, even without the *Elm Street* presumption of plan approval, the expert testimony presented in favor of the development plan supports ALJ Mayhew's finding regarding the plan's impact on the CVNRHD. In addition to reviewing the expert testimony from the hearings before ALJ Beverungen, ALJ Mayhew reviewed Developer's Performance Standards Narrative and the notes of the Department of Planning representative who testified about the plan's compliance with the standards. ALJ Mayhew found that these documents demonstrated how the CVNRHD would be protected through plan features such as forest conservation easements, panhandle lots, landscape screening, and compatible materials and designs. This is not, as VPC claims, "one of those cases" in which "the evidence is so tipped in the favor of one party that to conclude otherwise would be in error." ALJ Mayhew's review of the record demonstrates that there was sufficient evidence that the CVNRHD would be protected and that the development plan should be approved.

II. We reverse the Board of Appeals' striking of the condition precluding further subdivision or development. We do so because Developer has consented to the condition rather than have its development plan (specifically, the impact of Developer's conservation easement on the need for the condition) be the subject of another remand to the ALJ for the purpose of further factfinding.

VPC contends that the condition imposed by ALJ Mayhew precluding further

subdivision or development of the property should not have been struck by the Board of Appeals. Developer, in its brief, argues that ALJ Mayhew erred in imposing the condition because it exceeded his authority to impose conditions under BCC § 32-4-229(d). Further, Developer asserts that because the property has since been placed in a conservation easement, the condition is no longer necessary as required under BCC § 32-4-229(d) "as the issue the ALJ attempted to address by the condition (the potential for future subdivision and development on the property) is moot." However, during oral argument in November 2024, Developer requested that we reinstate the condition imposed by ALJ Mayhew rather than remand for further proceedings on this issue.

The BCC authorizes the ALJ to impose conditions when approving a development plan, provided that certain requirements are met:

> (d) *Conditions imposed by Hearing Officer.*
>
> (1) This subsection does not apply to a Development Plan for a Planned Unit Development.
>
> (2) In approving a Development Plan, the Hearing Officer may impose any conditions if a condition:
>
> (i) Protects the surrounding and neighboring properties;
>
> (ii) Is based upon a comment that was raised or a condition that was proposed or requested by a participant;
>
> (iii) Is necessary to alleviate an adverse impact on the health, safety, or welfare of the community that would be present without the condition; and
>
> (iv) Does not reduce by more than 20%:
>
> 1. The number of dwelling units proposed by a residential Development Plan in a DR 5.5., DR 10.5, or DR 16 zone; or
>
> 2. The square footage proposed by a non-residential Development Plan.

> (3) The Hearing Officer shall base the decision to impose a condition on factual findings that are supported by evidence.

BCC § 32-4-229(d).

Developer argues that because, in its view, the conservation easement operates in the same way as ALJ Mayhew's condition to prohibit further subdivision and development, the condition is no longer "necessary to alleviate an adverse impact on the health, safety, or welfare of the community that would be present without the condition" as required under BCC § 32-4-229(d)(2)(iii). Whether the conservation easement in fact is, as Developer argues in its brief, "permanent and accomplishes what the condition originally set out to do" is a fact-intensive question for the agency to resolve.[18] *See United Parcel Serv., Inc. v. People's Counsel for Baltimore Cnty.*, 336 Md. 569, 576–77, 585 (1994) (explaining that "judicial review of an agency's decision is normally limited

[18] Additionally, we note that the conservation easement itself is not part of the appellate record. Recorded by Developer in January 2023, the conservation easement was not before ALJ Mayhew when he approved the plan with the condition in November 2021, or the Board of Appeals, when it affirmed the plan but struck the condition in July 2022. *See* Md. Rule 8-413(a) (limiting the appellate record to what was before the circuit court). Although Developer referenced the recording of the conservation easement during oral argument before the circuit court in May 2023 and argued that it mooted the issue of the condition, the circuit court declined to consider the conservation easement as it was "not part of the record." *See* Md. Rules 7-206(b) (limiting the circuit court's record to testimony, exhibits, other papers before the agency, as well as papers the parties agree, or the court orders, be included in the record), 7-208(c) (prohibiting the admission of additional evidence to support agency's decision before the circuit court "unless permitted by law"); *cf. Matter of AutoFlex Fleet, Inc.*, 261 Md. App. 627, 675 (2024) (summarizing Maryland Rules 7-206(b) and 7-208(c) and explaining that although a court may, in some cases, exercise its discretion to consider adjudicative facts outside the administrative record, "there are important caveats and limitations to considering evidence that was not considered by the agency").

to the findings of fact and conclusions of law actually made by the agency"). Accordingly, we would ordinarily remand this case back to the agency in adherence to the "general rule prohibiting a reviewing court from considering new evidence in an action for judicial review of an administrative decision." *See Montgomery Cnty. v. Stevens*, 337 Md. 471, 482 (1995); *see also Matter of Homick*, 256 Md. App. 297, 312 (2022) (citing to *Stevens* for the proposition that "it would be inappropriate for an appellate court to consider new evidence when determining if an administrative agency's findings were based on sufficient facts and correct law, when instead the appellate court can remand the matter to the agency for such further development of the record"). However, because Developer expressed during oral argument that it would prefer that we reinstate the condition rather than remand, we reverse the judgment of the circuit court and reimpose the condition imposed by ALJ Mayhew.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE IS REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY WITH DIRECTIONS TO AFFIRM THE DECISION OF THE BALTIMORE COUNTY BOARD OF APPEALS AFFIRMING THE DEVELOPMENT PLAN; AND TO REVERSE THE DECISION OF THE BALTIMORE COUNTY BOARD OF APPEALS STRIKING THE CONDITION. COSTS TO BE EQUALLY DIVIDED BETWEEN APPELLANT AND APPELLEE.