PETITION OF **C.R. GOLF CLUB**	*	
FOR JUDICIAL REVIEW OF THE	*	IN THE CIRCUIT COURT
DECISION OF THE BOARD OF APPEALS	*	FOR
OF BALTIMORE COUNTY	*	BALTIMORE COUNTY
	*	
IN THE CASE OF: **C.R. Golf Club, LLC**	*	
LEGAL OWNERS: PETITION	*	
FOR RECLASSIFICATION	*	
TO RECLASSIFY 11700 FALLS ROAD	*	Case No.: C-15-2702
FROM RC7 to RC5 (229 acres +/-)	*	
	*	
3rd Election District, 2nd Councilmanic District	*	
	*	
Case No.: CRGC-13-0199	*	
Before the Baltimore County Board of Appeals	*	

* * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

This matter comes before the Court for Judicial Review of the February 13, 2015 decision issued by the Baltimore County Board of Appeals ("BCBA"). Following 11 days of hearings before the BCBA, Protestants and People's Counsel for Baltimore County made an oral Motion for Judgment. The parties filed supporting memoranda and public deliberation on the motions was held on October 28, 2014. On February 13, 2015, the BCBA granted the dispositive motions and dismissed the Petitioner's Petition for Reclassification; effectively affirming the Baltimore County Council's decision to reclassify Petitioner's property at 11700 Falls Road from zone RC5 to RC7. Petitioner filed a Petition for Judicial Review on March 13, 2015. This Court conducted a hearing on November 5, 2015 at which time all parties and counsel were present. For the reasons set forth herein, the decision of the Baltimore County Board of Appeals is **AFFIRMED.**

STATEMENT OF THE CASE

The property at issue is the former site of the Chestnut Ridge Country Club located at 11700 Falls Road in Lutherville, Maryland; it consists of approximately 229 acres of land, south

of Broadway on the west side of Falls Road ("the Property"). The Petitioner, C.R. Golf, LLC, ("CR Golf") purchased the Property in November 2011 intending to create a subdivision. At the time of purchase, the Property was zoned as RC5 (rural residential) which permitted a density of 114 residential lots.

On September 1, 2011, as part of Baltimore County's 2012 Comprehensive Zoning Map Process ("CZMP"), Baltimore County's Department of Planning began to create zoning issues generated by the public and planning director. The CZMP takes a year from beginning to end and includes provisions for the filing of applications for rezoning with the Department of Planning, an examination of the requests by the Baltimore County Planning Board and the Baltimore County Council, and ultimately a vote by the County Council to determine zoning classifications. In November 2011, Councilwoman Vicki Almond created an issue (Issue No. 2-031) to determine if the Property, which had been idle for several years, should remain RC5 zoned in light of Chestnut Ridge Country Club's closure.

The Baltimore County Council ultimately reclassified the Property from RC5 to RC7 (resource preservation), which permitted development of 9 single-family homes on the property. In an effort to restore the zoning of the property to RC5, CR Golf submitted a Petition for Reclassification to the BCBA on February 25, 2013. An Amended Petition for Reclassification was submitted on October 30, 2013. The Petitioner presented its case to the BCBA over the course of 11 days between October 30, 2013 and June 18, 2014. Upon the conclusion of the Petitioner's case on June 18, 2014, the Protestants and People's Counsel for Baltimore County moved for judgment on the Petition for Reclassification. The motion was argued and briefed. On February 13, 2015, the BCBA issued its decision granting the Motion and dismissing the

Petition, thereby affirming the County Council's decision to keep the Property in the RC7 (resource preservation) zone. This appeal followed.

STANDARD OF REVIEW

It is well established that judicial review of an administrative agency decision is narrow. *United Parcel Serv., Inc. v. People's Counsel for Baltimore County,* 336 Md. 569, 576-77 (1994). The reviewing court must determine (1) the legality of the decision and (2) whether there was substantial evidence from the record to support the decision. *Id.*

For the purpose of judicial review, this Court gives great deference to all factual conclusions made by the BCBA. This Court may, and should, examine the facts found by the BCBA to determine if there was evidence before it to support each fact found. If there was evidence of the fact in the record before the BCBA, no matter how conflicting or debatable, this Court has no power to substitute its assessment of credibility for that made by the BCBA. *Comm'r Baltimore City Police Dep't v. Cason*, 34 Md. App. 487 (1977), *cert. denied*, 280 Md. 728 (1977). The reviewing court is permitted to examine any inference drawn by BCBA to see if the inference reasonably flows from facts which are shown by direct evidence; however, the court has no power to disagree with the facts so inferred. *Id.* at 508. Ultimately, this Court must examine the conclusions reached by the BCBA to determine if reasonable minds could reach those conclusions from the record or by permissible inference.

Thus, the final decision of the BCBA must be upheld on review if it is not premised upon an error of law and if the Board's conclusions reasonably may be based on the facts proven. *Ad + Soil, Inc. v. County Comm'rs of Queen Anne's County*, 307 Md. 307, 338 (1986). This Court cannot substitute its own judgment for that of the BCBA and must accept the BCBA's factual conclusions, if they are based on substantial evidence and if reasonable minds could reach the

same conclusions on the record. *Columbia Road Citizens' Ass'n v. Montgomery County*, 98 Md. App. 695, 698 (1994).

LEGAL ANALYSIS

The BCBA issued an extensive opinion highlighting the deference it must give to the County Council in zoning reclassification decisions made during the CZMP process. There is a strong presumption that agency decisions, such as zoning reclassifications, are correct and based on all relevant facts and circumstances then existing. *People's Counsel for Baltimore County v. Beechwood I Limited Partnership*, 107 Md. App. 627 (1995). Any revision by the BCBA to the County Council's decision must be based on strong evidence of mistake in the original zoning or comprehensive rezoning. *Id.*

Additionally, the BCBA opinion focuses on the high burden of proof placed on the Petitioners to prove such error. The opinions states

> Unless we find that there is probative evidence produced that: '... there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council would not have taken into account...' the presumption of validity accorded to the comprehensive zoning is not overcome and the question of error is not fairly debatable.

See Exhibit One, Docket Entry No. 1000.

I. The legality of the decision.

Upon review of the record, this Court does not find any error of law made by the BCBA. Its decision is based on well-established case law which is interpreted and applied correctly in the instant case.

II. Whether there was substantial evidence from the record to support the decision.

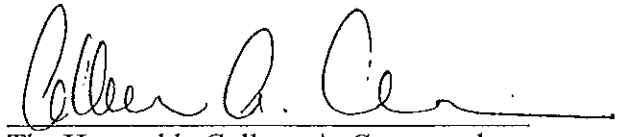
This Court finds that the BCBA's conclusions were reasonably based on all facts then existing. During its 11 day hearing, the BCBA determined that, while the Petitioner presented 'substantial' evidence, it was merely 'to the contrary' of the County Council's decision and did not rise to the level of error. *Id.* Thus, the Petitioner failed to establish error and therefore, the presumption of correctness of the County Council's decision was not overcome during the BCBA hearing. We agree with the BCBA that there is sufficient factual evidence to support the County Council's reclassification of the Property from RC5 to RC7.

CONCLUSION

This Court is persuaded that there is no basis to reverse the BCBA's decision. After an extensive review of the record, this Court finds that the BCBA correctly based its conclusions of law upon the facts presented during 11 days of hearings.

THEREFORE, the decision of the Baltimore County Board of Appeals in Case Number CR-13-0199 is hereby is hereby **AFFIRMED.**

12-10-15
Date



The Honorable Colleen A. Cavanaugh
Circuit Court of Baltimore County

Clerk: Please send copies to all parties.

11700 Falls Road; W/S of Falls Rd; S of Broadway Rd 8th Election District, 2nd Councilmanic District Legal Owner: C.R. Golf Club, L.L.C. Petitioner	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY
RE: Petition for Reclassification to reclassify 11700 Falls Road from RC7 to RC5 (229 acres+/-)	*	Case No. CR-13-0199

* * * * * * * * * * *

OPINION

This matter comes to the Board as a request to reclassify the property located at 11700 Falls Road, Lutherville, MD 21093 consisting of 229 acres (+/-) (the "Property"). The existing zoning is RC7; the requested reclassification is for RC5. Robert A. Hoffman, Esquire and Patricia A. Malone, Esquire of Venable, LLP, represented the property owner, C.R. Golf Club, L.L.C. (the "Petitioner"). Collectively known as Protestants, Richard Burch, Esquire of Mudd, Harrison & Burch, LLP represented Protestants Valleys Planning Council, Tony and Joyce Delauney, Susan Saudek, Dr. Steven and Jill Crawford, Todd Tilson, Courtney and Jayme Wood, and Neil Didriksen. Howard J. Schulman, Esquire of Schulman and Kaufman, LLC appeared pro se and on behalf of A. Thomas Goldbergh, Vicki Foster, and Leslie Schulman. Harold H. Burns, Jr., Esquire appeared pro se and on behalf of Joanne Capizzi. People's Counsel also participated in the hearings.

The Petitioner presented its case during 11 days of hearings before this Board: October 30, 2013; December 11, 2013; December 17, 2013; December 18, 2013; January 6, 2014; March 25, 2014; May 8, 2014; May 13, 2014; June 4, 2014 June 12, 2014; and June 18, 2014. On the last day of hearings, the Petitioner rested. In turn, the Protestants and People's Counsel moved to

dismiss the case. The Petitioner requested to respond to the Motions to Dismiss in writing. The Board permitted the written submission by the Petitioner and allowed the Protestants to submit written Reply Briefs.

Public deliberation on the Motion to Dismiss was held on October 28, 2014.

BACKGROUND

The Property is located on the west side of Falls Road in Lutherville and south of Broadway Road. It is the site of the former Chestnut Ridge Country Club which began operating as a golf course in the 1950s. To the west and south of the Property is Dipping Pond Run, a Class III trout stream. (Pet. Ex. 2). Dipping Pond Run flows in a southerly direction towards the Jones Falls watershed and then into the Chesapeake Bay drainage area. *(Id.)* The Property has five man-made ponds and three wetland/stream systems. *(Id.)* One system is completely forested while the other two are partially forested. *(Id.)* The wetland/stream systems flow in a north-south direction.

Before the 2012 Comprehensive Zoning Map Process (the "2012 CZMP"), the Property had been zoned RC5 (rural residential). (Pet. Ex.6). Prior to that, under the former zoning classifications, the zoning was rural-residential designated as 'R.6' (residence, one and two-family) and RDP ('rural deferred-planning'). In or about Fall of 2011, the Petitioner purchased the Property. At the time of purchase, the zoning was still RC5 which permitted a density of 114 residential lots.

In November of 2011, in preparation for the 2012 CZMP, the Department of Planning created a zoning issue (Issue No. 2-031) to: "evaluate the appropriateness of the RC5 zone in light of the closure of the country club." (Pet. Ex. 10). On August 28, 2012, the County Council voted to downzone the Property from RC5 to RC7. (Pet. Ex. 12). The density permitted under the RC7 zone yields 9 residential lots.

On February 25, 2013, the Petition for Reclassification was filed. On October 30, 2013, an Amended Petition for Reclassification was filed (Pet. Ex. 3) along with a documented site plan (Pet. Ex. 1) and Environmental Impact Statement. (Pet. Ex. 2). Upon review of the Petition for Reclassification and documented site plan, the Department of Planning recommended that the zoning remain at RC5. (Pet. Ex. 16). Likewise, the Planning Board voted to retain the RC5 zoning. *Id.*

LEGAL STANDARDS FOR RECLASSIFICATION PETITION

The Board has original jurisdiction to hear petitions for zoning reclassifications pursuant to Article 32, Title 3 Section 502 of the Baltimore County Code ("BCC"). A petition for reclassification is filed with this Board under §32-3-503. A petitioner may also file a documented site plan.

Under BCC §32-3-510, this Board must make the following specific findings before it can grant a zoning reclassification:

> §32-3-510. FINDINGS NECESSARY FOR ZONING RECLASSIFICATION – IN GENERAL.
>
> (a) *In general.* Before property is reclassified on the official zoning map of the county, the Board of Appeals must find that:
>
> (1) Except as limited by the terms of subsection (b) of this section:
>
> (i) A substantial change has occurred in the character of the neighborhood in which the property is located since the property was last classified; or
> (ii) That the last classification of the property was established in error; and
>
> (2) The requested reclassification is warranted based on a consideration of the purposes of the Baltimore County Zoning Regulations and maps, including:

(i) Population trends;
(ii) Availability and adequacy of present and proposed transportation facilities, water-supply facilities, sewerage, solid-waste-disposal facilities, schools, recreational facilities, and other public facilities;
(iii) Compatibility of uses generally allowable under the requested classification with the present and projected development or character of the surrounding area;
(iv) Any pertinent recommendation of the Planning Board or Department of Planning; and
(v) Consistency of the current and requested classifications with the Master Plan, the county water and sewer plan, and the capital program.

(b) *Limitations on granting reclassification.*

(1) Except as provided in paragraph (2) of this subsection, for a period of one year after an amendment of the zoning map has been adopted for the subject property by the County Council, the Board of Appeals may not grant a zoning reclassification of the property on the grounds that the character of the neighborhood has changed.

(2) In the Chesapeake Bay Critical Area, a change in the character of the neighborhood may not be a basis for granting a reclassification.

(c) *Considerations in making determinations.*

(1) Except as provided in paragraph (2) of this subsection, when hearing a zoning reclassification petition, the Board of Appeals shall consider in evidence without authenticating testimony:
(i) The report of the Planning Board; or
(ii) A duly submitted relevant report or comments from any other county agency.

(2) (i) 1. If a party objects to a report, the party that offers the report as evidence before the Board of Appeals shall be required to

authenticate the report by testimony of a proper witness.

2. This paragraph does not apply to subsection (d)(1) of this section.

(ii) The Board of Appeals shall notify the proper witness.

(d) *Standards for error determination.*

(1) Before a property is reclassified on the basis of error, the Board of Appeals must find, from its review of the reports considered under subsection (c)(1) of this section, that, at the time the last classification of the property was established, the County Council did not consider facts and circumstances then existing that were relevant to the decision.

(2) A classification error may not be established on the basis of:

(i) Economic disadvantage resulting from the classification;
(ii) The incompatibility of the last classification with the zoning classification of surrounding tracts or parcels of land;
(iii) The lack of conformity of the last classification with the recommendations of the Baltimore County Master Plan; or
(iv) The failure of the County Council to consider the property as a specific issue in the comprehensive zoning map process.

ISSUES

I. Does the Board of Appeals have authority to consider a Motion to Dismiss?

The Petitioner first disputes that this Board has the authority to consider a Motion to Dismiss. The Petitioner argues that the MD Rules of Civil Procedure can only be considered by this Board for

issues concerning evidence. They contend that MD Rule 2-519 does not control our decision on a Motion to Dismiss.

We agree with the Petitioner in part. Rule 7 of the Board's Rules of Practice and Procedure (the "Board's Rules") provides that all evidentiary issues which arise during hearings before the Board should follow the Maryland Rules on Evidence. With regard to other issues which arise, or motions which are made, the Board is not required to follow the Maryland Rules.

However, Board Rules 3b.I and 4b provide us with the authority to consider and decide a Motion to Dismiss. Rule 3b.I. reads that: "An appeal may be withdrawn or dismissed at any time prior to the conclusion of the hearing on said appeal." Rule 4b specifies that: "The chairman shall regulate the course of the hearing and shall rule upon procedural matters, applications, modifications and objections made during the course of the hearing, subject to the concurrence of a majority of the board conducting the hearing."

The Board's practice has been that, if a dismissal is warranted based on the evidence presented, this Board will dismiss a case before evidence is presented or after a petitioner rests. By way of example, we have dismissed cases based on: lack of standing to take an appeal; lack of statutory authority for this Board to consider a case (i.e. appeal of building permit by anyone other than owner of property); based on *res judicata* and collateral estoppel; or the failure to timely or properly take an appeal. [1]

If the Board did not have such authority, then resources would be wasted. Hearings would proceed to the end of the case such that, at the close of all of the evidence, the same decision would

[1] We note that Counsel for Petitioners here has previously filed Motions to Dismiss before this Board. By way of example, a Motion to Dismiss was filed by Petitioner's counsel *In the Matter of William Hach and Ann Hach*, Case No.: CBA-09-005. In that case, counsel for the Petitioner represented the Hachs, property owners, and moved to dismiss the appeal filed by a neighbor of a building permit approval. The basis for the Motion to Dismiss was that the neighbor had no standing to file the appeal. This Board agreed with Petitioner's counsel and dismissed the case before hearing the merits.

be made that could have been made earlier. When interpreting statutory language, "a statute must be given a reasonable interpretation, not one that is absurd, illogical or incompatible with common sense." *Lark v. Montgomery Hospice, Inc.*, 414 Md. 215, 228 (2010). "Various statutory provisions covering the same subject matter are to be construed if at all possible, so that together the sections harmonize with one another and no section is rendered nonsensical or nugatory." *Fisher v. Eastern Corr. Inst.*, 425 Md. 699, 710 (2012). We interpret Board Rules 3b.I and 4b as controlling Motions to Dismiss.

As a result, we will consider the merits of the Motions.

II. Was BCC §32-3-214(a)(2) violated when Councilperson Almond, rather than the County Council, raised CZMP Issue 2-031?

In its Response to Motion to Dismiss, the Petitioner contends that this Board should find that BCC §32-3-214(a)(2) was violated. That Section requires the County Council as a whole - not an individual councilperson - to apply for a zoning change. In this case, the evidence presented indicated that Councilperson Almond raised CZMP Issue 2-031 relating to the rezoning of the Property and not the Council as a whole.

BCC §32-3-503 states that this Board has jurisdiction to review a petition for rezoning "subject to the provisions of subtitle 5." In reviewing Subtitle 5 which is entitled "Zoning Reclassification Through Cycle Zoning," there are no provisions which authorize this Board to consider issues which may arise under Subtitle 2. Subtitle 2 is entitled "Zoning Process." This Board's authority under Subtitle 5 is limited to determining whether there has been a change in character of the neighborhood or an error made, and whether the zoning change is warranted under BCC §32-3-510. Any issue about the appropriate process for the Council to follow should be addressed by the Circuit Court.

Given our limited statutory authority, we will not consider that issue.

III. Did the Petition for Reclassification fail to satisfy the requirements under BCC §32-3-503?

Protestant Valley's Planning Council urges us to dismiss the case because the Petition for Reclassification filed on February 25, 2013 failed to satisfy the requirement of BCC §32-3-503(b). That Section states that a Petition for Reclassification must articulate in detail the justification for the alleged error.

The February 25, 2013 Petition (the "Original Petition") was filed by way of a letter from Petitioner's counsel and was done so as an 'open plan' (i.e. a Petition which does not specify a particular use for the Property). The Original Petition set forth 4 reasons for the alleged error. On October 30, 2013, the Petitioner filed an Amended and Supplemental Petition in accordance with BCC §32-3-513 (the "Amended Petition"). (Pet. Ex. 3). The Amended Petition included a documented site plan (Pet. Ex. 1) proposing a particular use, as well as an Environmental Impact Statement (Pet. Ex. 2). The Amended Petition not only incorporated the alleged errors contained in the Original Petition, but expanded on the alleged environmental errors.

Reviewing the Original and Amended Petitions, the argument by Valley's Planning Counsel fails to acknowledge that there was an Amended Petition filed. The Environmental Impact Statement was a detailed-12 page document which specified, with particularity, the reasons for the alleged error. As such, we find that the Petitioner satisfied the requirements of BCC §32-3-503(b) in articulating in detail the justification for the alleged error.

IV. Did the Petitioner meet the burden of proof under BCC §32-3-510?

We turn to the merits of the Motions to Dismiss. The Protestants and People's Counsel argue similarly that the case should be dismissed because the Petitioner failed to prove that any error was committed by the County Council in rezoning the Property from RC5 to RC7. At this posture of the case, the Protestants do not contest that the case should be dismissed because the Petitioner failed to prove that the zoning change is warranted under BCC §32-3-510. As a result, we need not address that issue at this time.

As stated in the Amended Petition and as presented at the hearings by Petitioner's experts, as well as the documents admitted into evidence, the Petitioner focused on the environmental information that was provided to Councilperson Almond by both County agencies and interested members of the community as the basis for the alleged error.

In its Response to Motion to Dismiss, the Petitioner contends that this Board, in reviewing the evidence, must find: (1) that the information provided to the Council was "incomplete or inaccurate" and therefore erroneous; and (2) that the misapprehension resulting from the erroneous facts formed at least "one of the primary reasons" for the Council's decision. (Pet. Opp. Mot. Judg., p. 17). Under §32-3-510(c), this Board must weigh the reports provided by the County agencies during the CZMP along with the evidence submitted by the Petitioner and determine whether an error has been made. (*Id.*) In short, if the Board is satisfied that the burden has been met, the Motion to Dismiss should be denied.

The evidence presented by the Petitioner during the 11 days of hearing consisted of the following testimony and written reports which addressed both the alleged error and whether the zoning change was warranted:

(1) Stacy MacArthur of D.S. Thaler & Associates was admitted as an expert in the areas of landscape architecture, land planning and in the Baltimore County zoning and development

regulations for RC zones. Ms. MacArthur provided the zoning history of the Property and emphasized that it had been zoned rural residential for 36 years until it was changed during the 2012 CZMP.

Ms. MacArthur testified that the RC7 zone was more appropriate for areas that have valuable cultural or historic significance. She highlighted that those cultural and historic areas were listed in the 2010 Master Plan. Ms. MacArthur pointed out that the Property is not located within any of those areas. She did concede on cross examination that there was no prohibition in the Master Plan which prevents areas other than those with cultural or historic significance, from being included in a resource preservation area.

Ms. MacArthur discussed the Petitioner's proposed use for the Property under RC5 as described in the documented site plan dated October 30, 2013 (the "Plan") (Pet. Ex. 1). The Plan includes only 62 residential lots where 114 lots are permitted under RC5. Ms. MacArthur acknowledged on cross examination that 9 residential lots under the RC7 zone would have less impact on the environment than 62 lots. At the same time, she stated that a golf course use is permitted by special exception in the RC7 zone and, as result, is still an available use here. Finally, she admitted that there was no "laundry list of reasons" generated by the Council as to why the zoning was changed.

(2) Mark Eisner, P.G. of Advanced Land and Water, Inc. was accepted as an expert in the area of hydrogeology, geology, hydrology, water occurrence and movement, the processing and issuing of MDE water appropriation permits, groundwater discharge, water demand evaluations, groundwater mounding, groundwater flow and transport, groundwater modeling, environmental site assessments, well construction, pumping tests, and hydrogeologic impact evaluations.

Mr. Eisner prepared a report entitled '*Hydrogeologic Support for Environmental Impact Statement; Proposed Redevelopment of Chestnut Ridge Country Club Lutherville, Baltimore County,*

Maryland" dated December 4, 2013. (Pet. Ex. 18). When the report was offered into evidence, the Protestants objected on the basis that the report was support for the Environmental Impact Statement and should have first been submitted to the Planning Board in accordance with BCC §32-3-512(a). At that time, we admitted the report into evidence and permitted Mr. Eisner to testify about his findings and conclusions.

Mr. Eisner explained that the proposed 62 lot subdivision has less impact on wells, septic systems and streams than the golf course use. He identified that there were 3 main tributaries/streams which run through the Property and discharge into Dipping Pond Run. The perk rates on the northern and eastern portion of the Property have higher perk rates than on the western and southern portions of the Property where the forest buffers and streams are located.

He explained that the water usage for the 62 lot subdivision will generate 20,000 gallons per day ("gpd") based on average water use of 330 gpd/household. (Pet. Ex. 18, p.5). In contrast, he highlighted that the golf course use consumed 70,000 gpd. (*Id.* at p. 4). He opined that the 62 lot subdivision will also use 70% less groundwater than the golf course use which in turn, would leave 70% more groundwater available in the aquifer. (*Id.* at 4).

In addition, according to Maryland Department of Environment studies, the golf course irrigation use is 100% consumptive as compared to the water used by homes which is only 25% consumptive. Mr. Eisner discussed Figure 3 of his Report which was entitled "365 Day Model Draw Down Map (Planned Use)." (Pet. Ex. 25). This chart indicates that through the proposed onsite sewage disposal system ("OSDS"), 75% of household water used will be returned to the groundwater and the aquifer. Consequently, with the proposed residential use, approximately 70% more groundwater recharge will be available for resource protection in a drought year. (Pet. Ex. 18, at p.

6). This will improve the water entering Dipping Pond Run and its tributaries and improve downstream aquatic habitat. (*Id.* at p. 4).

Mr. Eisner also opined that the proposed development will have no impact on adjacent wells. (Pet. 18, at p. 6). There was, he found, a high concentration of nitrogen in the wells located on the Property. He attributed this to the past golf course use and pointed out how this negatively impacts groundwater resources. (*Id).* The proposed development will reduce the fertilizer concentration in wells and ultimately in the groundwater which flows into Dipping Pond Run. (*Id).*

Mr. Eisner did admit on cross examination that the same analysis would apply if there were 9 homes on the Property. In addition, he conceded that with fewer homes, the water usage would be less. There would also be fewer septic systems and less impermeable surface. Finally, he acknowledged that Best Available Technology can be applied regardless of the number of lots developed.

3) Mariceleste Miller, P.E., Chief of Water Resource Engineering at D.S. Thaler & Associates, Inc. Ms. Miller was qualified as an expert in storm water management facilities. She designed the storm water management facility for the proposed development (the "SMW facility"). (Pet. Ex. 28). Ms. Miller explained that the purpose of the proposed SWM facility is to conserve and protect the environmental resources and to reduce impervious surfaces. The development would be concentrated on the natural ridge lines of the Property which will enable the water to flow from the highest point to the lowest.

To minimize the impervious surfaces, Ms. Miller explained that the road widths would be reduced, driveways would be shared, and curbs and gutters would be eliminated. Water would be directed into swales alongside the roadways. Water would flow into the resources areas such as the wetlands. She also incorporated the use of rain gardens to filter nitrogen and phosphorus.

The Plan provides for 5 large SWM facilities on the Property. It was clear to her that the golf course did not have any storm water management practices. The lack of such facilities on the golf course caused the upper channels of the ponds to erode. In a large storm, the water level was very high and the stream valleys were degraded. The proposed Environmental Site Design ("ESD") for the 62 lots will improve the water quality on the Property. Removing the existing ponds will restore the waterway by taking the heat out of the water which ultimately kills the fish.

On cross examination, Ms. Miller admitted that while she prepared some parts of the Environmental Impact Statement, each of the Petitioner's experts, as well as the Petitioner's counsel, had input into the contents of the Environmental Impact Statement.

As a result of Ms. Miller's testimony regarding the preparation of the Environmental Impact Statement, the Protestants and People's Counsel immediately made verbal Motions to Dismiss on jurisdictional grounds under BCC §32-3-512(11)(ii). That Section requires that the Environmental Impact Statement be "competently prepared by a "professional planner or engineer."

In the same Motion, they raised for a second time their argument that the case should be dismissed under BCC, §32-3-513 for failure of the Petitioner to submit to the Department of Planning, documents identified by the Petitioner as "amendments." In particular, they emphasized that Mr. Eisner's report entitled '*Hydrogeologic Support for Environmental Impact Statement*' should have been submitted to the Department of Planning. As noted, we had previously admitted this report into evidence.

Specifically, the Protestants and People's Counsel argued again that Subsection (d) of §32-3-513 defines "amendments" as documents that 'relate to the proposed use of the property,' and which are submitted after the Petition is filed. When read in conjunction with Subsection (a)(2), they argue that all "proposed amendments to a petition" must be transmitted to the Director of Planning. This

Board, they point out, is required under Subsection (a)(2) to: "(1) Immediately suspend the hearing proceedings; and (2) Within 2 business days, transmit a copy of the amendment to the Director of Planning."

As to the first issue, the Petitioner argued that each expert who assisted in the preparation of the Environmental Impact Statement has, or would, testify in this hearing. The Petitioner added that it would be *incompetent* for the professional engineer to hold him/herself out as an expert in every area. As to the second issue, the Petitioner added that it should be permitted to submit reports and documents into evidence at this hearing. In other reclassification cases, they argue that they have never previously been required to submit evidentiary information to the Planning Department under §32-3-513. They emphasized that §32-3-512(a)(11) only requires the Environmental Impact Declaration to be submitted along with the Petition which is then forwarded to the Department of Planning.

After a deliberation of this Motion on the record, we held that there was no test for when an Environmental Impact Statement is "competently prepared." In our review of the BCC, we did not find any definition of this phrase, nor was any definition provided by the Protestants or People's Counsel. Absent a specific definition, the Board interpreted the phrase, 'competently prepared' as including the input of various experts who are specialized in specific areas, with the final signature by the professional planner or engineer. As a result, we denied that Motion to Dismiss on the basis that the Environmental Impact Statement was not "competently prepared."

On the second issue, we revisited and reconsidered the issue previously raised under §32-3-513. This time we agreed that reports and documents which were submitted after the filing of the Petition meet the definition of 'amendment.' Accordingly, we held that Mr. Eisner's report should have been submitted to the Department of Planning before being offered into evidence at the hearing.

Anticipating that this argument would be raised each time a "document relating to the proposed use of the property" was offered, and to prevent further delay in the case, we suspended the hearing and ruled that all documents which the Petitioner intended to offer as evidence which "relat[e] to the use of the property" should all be submitted to the Department of Planning prior to the next hearing.

To accommodate the parties and given that additional hearing dates had been scheduled for March 25 and 26, 2014, this Board convened an additional hearing date on January 7, 2014 to open the record, to accept the additional documents that 'relate to the Property' as designated by the Petitioner, and to submit those to the Department of Planning with instructions to submit the documents to the Planning Board.

4) Scott G. McGill, President of Ecotone, Inc., was admitted as an environmental specialist concentrating in the areas of streams, wetlands and watershed restoration. Mr. McGill was hired by the Petitioner to study the existing environmental conditions and resources on the Property and to develop restoration concepts in the context of the proposed Documented Site Plan.

Mr. McGill prepared a report entitled '*An Assessments of Existing and Proposed Condition of Streams, Wetlands and Forests on the Chestnut Ridge Golf Club Property*' dated January of 2014 (the "McGill Report"). (Pet. Ex. 32). Exhibit A of the McGill Report showed 3 existing stream systems identified as "Stream Systems 'A', 'B' and 'C'." (Pet. Ex. 33). He pointed out that there were also 5 existing man-made ponds.

Mr. McGill studied the thermal quality of the water. (Pet. Ex. 32, Appendix A). He looked for the existence of brook trout. He explained that brook trout can only survive in cold waters. Brook trout are an indigenous species in Maryland and are a remnant of the Ice Age. The existence of brook trout in a stream system indicates that the water quality is high. On the other hand, brown trout are native in Europe and can tolerate warmer temperatures.

Mr. McGill conducted testing on the fisheries by using an electro shocker with a net to stun the fish. The results were that the fish population was not diverse and that only some brown trout were found in each of the 3 streams. There were no brook trout found in any of the 3 stream systems. His research confirmed that the last time brook trout was found in Dipping Pond Run was in February of 1996. (Pet. Ex. 32, Appendix D). As a result, Mr. McGill disagreed with the conclusions contained in the Department of Environmental Protection and Sustainability ("DEPS") reports dated January 20, 2012 (Pet. Ex. 36) and February 16, 2012 (Pet. Ex. 37).

Under the proposed subdivision, Mr. McGill's plan was to protect the cold water resources. One such solution is to use bioretention facilities and recharge ground water which will decrease the water temperature in the streams. He would remove the 3 ponds located within Stream System C along with the underground piping associated therewith to prevent fish from becoming trapped in the pipes. He would propose to restore the natural water channel in the footprint of those ponds. He would retain ponds 1 and 2 and bypass the cold water around those ponds.

In sum, Mr. McGill opined that the golf course use caused the environmental problems that exist today. The proposed residential use, he said, would be substantially better for protection of environmental resources than the golf course use. This plan would also help the County in reducing the amount of nitrogen and phosphorus pollutants which will, in turn, assist the County in obtaining a total maximum daily load ("TMDL") credit with Maryland Department of the Environment.

On cross examination, Mr. McGill acknowledged that trout need not exist in order to classify a stream as Use III. He further conceded that the Use III classification does not afford a higher level of protection for brook trout over brown trout. He acknowledged that brown trout are also worthy of protection. He further agreed that Dipping Pond Run is a high quality water resource. Finally, he acknowledged that his plan for protection of environmental resources could work as well with fewer

homes. However, he added that the only development alternatives considered by the Petitioner was for either a golf course or for 62 homes.

5) Charles J. Ilardo, a representative of the Petitioner, authenticated an email dated August 28, 2012 from Councilperson Vicki Almond to constituents of the 2nd County Council District (the "Almond email"). The Almond email was sent the day after the County Council voted on the downzoning. (Pet. Ex, 13). It read as follows:

> *Baltimore County Council Chairperson Vicki Almond, along with the rest of Council* ***APPROVE downzoning of the property formerly owned by Chestnut Ridge Country Club from RC5 to RC7.***
>
> *The RC7 designation allows for much less dense development than would have otherwise been permitted under RC5. After extensive research into the environmental concerns related to this property, along with the vast amount of community input received by my office, the decision became clear. I would like to express my sincerest gratitude for your input and suggestions along the way.*
>
> *Sincerely,*
>
> *Vicki Almond*
>
> *Baltimore County Council*
>
> *2nd District*

6) Kenneth W. Schmid, a traffic planner and traffic engineer with Traffic Concepts, Inc. was accepted as a traffic expert. Mr. Schmid testified in regard to trip generation predictions for the proposed residential use. He generated a report of his trip generation predictions. (Pet. Ex. 42).

Ultimately, he concluded that, the intersection of Falls Rd. and Chestnut Ridge operated at a 'C' level of service and would be adequate during peak hours, with the additional homes proposed. He opined that even with the additional homes, there would be no need for road improvements on the west side of Falls Rd. Comparing the proposed lots with the trip generation from the golf course use, he concluded that the golf course use generated 400 more trips per day than a residential development.

On cross examination, he recognized that the intersection of Seminary Avenue and Falls Rd was a substandard "F" intersection and that it was not capable of handling more development. He further agreed that the trip generation for 9 units would be less than for 62 units.

7) Uri P. Avin, FAICP, research professor and Director of Planning and Design Center at the National Center for Smart Growth at University of Maryland, was admitted as an expert in the area of land planning. Professor Avin prepared a report dated January 7, 2014 entitled '*Planning and Zoning Analysis: Chestnut Ridge Reclassification Petition.*' (Pet. Ex. 44).

Professor Avin opined that the RC7 is an improper zone for this Property and therefore the County Council committed an error. He based his opinion on 3 factors: (1) BCZR RC7 findings reference Master Plan 2010, the relevant map and text of which exclude the Property; (2) the zoning change to RC7 is inconsistent with prior RC7 zoning actions and the pattern of RC7 application; and (3) the placement of the RC7 zone on the Property was in error because it conflicts with the Smart Green and Growing Legislation of 2009. In addition, Professor Avin also discussed why the reclassification was warranted under BCC §32-3-510(a)(2)(i)-(v).

In regard to the first reason why the Council erred, Professor Avin identified BCZR §1A08.1 which references Master Plan 2010 and lists 7 specific resource preservation areas where valuable cultural, historic, recreational and environmental resources are located. (Pet. Ex. 44). The resource preservation areas are zoned RC6, RC7 and RC8. (*Id.* at p.2). The Property is not located within

these resource preservation areas. (*Id.)* Professor Avin also emphasized that the 13 legislative goals contained in BCZR §1A08.1.B do not apply to the Property. (*Id.* at p. 3).

In regard to the second basis for error, Professor Avin stated that the downzoning is inconsistent with prior RC7 zoning actions and the pattern of RC7 application. (*Id).* He highlighted in his report that almost 90% of RC7 zoning is in three critical reservoir watersheds which is consistent with the purpose of the zoning district. (*Id.* at 4). He added that of the 10-11% outside the reservoir watersheds, only 5% (or 1,827 acres) is in private hands. (*Id).* He wrote that: "[the Property] is the only property among these 4 properties that is adjacent to, let alone surrounded by, RC5 and is the only one OUTSIDE the reservoir watersheds." (*Id.* at p. 6).

Finally, he stated that the RC7 zoning was in error because it conflicts with the State of Maryland Smart Green and Growing Legislation of 2009. That Legislation requires that land uses and densities be consistent with a comprehensive plan. (*Id.* at 27). He concluded that since the 2010 and 2020 Master Plans are unequivocal in showing the subject property as Rural Residential, which explicitly includes RC5 and excludes RC7, the downzoning in 2012 conflicts with state law. (*Id).*

Decision

In its Opposition to Motion for Judgment, the Petitioner cites *People's Counsel for Baltimore County v. Beechwood I Limited Partnership*, 107 Md. App. 627 (1995) and *White v. Spring*, 109 Md. App. 692 (1996). The Court of Special Appeals in *Beechwood* overturned this Board's decision to reclassify a property where we held that the County Council did not provide "a logical reason for the downzoning." The *White* case was decided 4 months after *Beechwood* and affirmed the Talbot County Council's decision to return to the prior zoning classification because the Council's decision to downzone the Property was based on erroneous information provided by the Department of Planning.

The holding in *White* explained what a zoning mistake 'is,' while the holding in *Beechwood* describes what a zoning mistake 'is not.' (*White* at 698). From these two cases, the appellate court in *White* wrote, "the law of zoning mistake, as applicable to traditional rezoning, may be completely understood." (*Id.*)

To apply *Beechwood* and *White* to the facts here, it is first necessary to discuss the facts and holdings of those cases. In *Beechwood*, during the Baltimore County 1992 CZMP, the County Council downzoned 148 acres +/- in the North Point area of southeastern Baltimore County along Back River. This Board granted the reclassification petition on the basis of error. Our opinion was grounded in the testimony of both the Petitioner and the Petitioner's expert who indicated that "there was no logical reason for the property to be down-zoned from D.R.5.5 to D.R.1." (*Id.* at 636).

In reversing our decision, the Court of Special Appeals in *Beechwood* held that this Board has a limited function in reviewing rezoning decisions and may not:

> substitute its judgment for that of the County Council, even if it had been so empowered, might have made a diametrically different decision. The circumstances under which it may overturn or countermand a decision of the County Council are narrowly constrained. It may never simply second-guess.

(*Id.* at 638). The Court of Special Appeals also emphasized the legislative power of the County Council:

> When it undertakes, every four years, its comprehensive zoning function, it speaks with the voice of the people. *Hyson v. Montgomery County*, 242 Md. 55, 63 (1966). As with all legislative bodies, it may sometimes make policy decisions that are, in the eyes of some observers, wrong. For the ordinary rightness or wrongness of their decisions, however, legislators are answerable only to their electorates at the next election—not to the courts and not to the County Board of Appeals.

(*Id.* at 638).

The appellate court in *Beechwood* addressed the burden of proof and evidence necessary to meet that burden. The Court noted that there is a:

> strong presumption of the correctness of original zoning and of comprehensive rezoning. To sustain a piecemeal change in circumstances such as those present here, strong evidence of mistake in the original zoning or comprehensive rezoning....must be produced....Since as we have also said, this burden is onerous,....the task confronting appellants, whose application followed the comprehensive rezoning by merely four months, is manifestly a difficult one.

(Id. at 640).

Quoting from cases which preceded *Beechwood*, namely *Boyce v. Sembly,* 25 Md. App. 43, 44 (1975), *Coppolino v. County Board of Appeals*, 23 Md. App. 43 (1975) and *Howard County v. Dorsey*, 292 Md. 351 (1982), the Court in *Beechwood* explained the legal standard for this Board to apply in determining error.

First, in zoning law, the words "mistake" and "error" are interchangeable terms. (*Beechwood* at 641; *Boyce* at 44). Second, mistake or error are established when there is "***probative*** evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive zoning were invalid." (*Id.* at 50-51). Third, the burden is on those seeking a reclassification to show both: 1) the then-existing conditions that allegedly made the comprehensive zoning incorrect; and also 2) the literal failure of the County Council even to have considered those conditions..." (*Beechwood* at 645; *Boyce* at 51-52).

We are further instructed that there is a presumption, that at the time of the rezoning, the Council had before it, and did in fact, consider **all** of the relevant facts and circumstances then existing.

(*Beechwood* at 645-646; *Boyce* at 51-52). The *Beechwood* Court citing *Boyce* explained that this presumption means that, in order to establish error, it is necessary "to show the facts that existed at the time of the comprehensive zoning *but also which, if any of those facts were not actually considered by the Council.*" (*Beechwood* at 646; *Boyce* at 51-52). (Emphasis Added).

Unless we find that there is probative evidence produced that: "...there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council would not have taken into account...", the presumption of validity accorded to the comprehensive zoning is not overcome and the question of error is not "fairly debatable." (*Beechwood* at 646; *Boyce* at 52). "Probative evidence" is evidence which has the effect of proof; tending to prove or actually proving. (Black's Law Dictionary, 6th Edition).

We also learned from the Court of Appeals holding in *Montgomery County v. District Land Corp.*, 274 Md. 691, 705 (1975) that this Board may not inquire into the motives of the County Council regarding legislative decisions:

> As general rule, the motives, wisdom or propriety of a municipal governing body in passing an ordinance are not subject to judicial inquiry...In addition, individual council members and other city officials may not testify as to the motives actuating council action, as recorded in its minutes, nor may they testify as to what was intended or meant by an adopted measure.

Moreover, the County Council does not owe this Board any justification for why a property was rezoned. (*Beechwood* at 644; *Coppolino* at 370).

Additionally, with regard to the burden of proof, the role of experts was also discussed in *Beechwood* citing the Court of Appeals decision in *Dorsey*, *supra*:

> Moreover, in reviewing the evidence before the Board, it must also be noted that the opinion or conclusion of an expert or lay witness is of

> no greater probative value than that warranted by the soundness of his underlying reasons or facts.

(Dorsey at 358-359).

> The Court of Appeals and this Court have stated that an opinion, even that of an expert, is not evidence strong or substantial enough to show error in a comprehensive rezoning unless the reasons given by the witness as the basis for his opinion, or other supporting facts relied upon by him, are themselves substantial and strong enough to do so.

(Id. at 359).

The *Beechwood* Court mentioned specifically that the previous decisions of this Board have been overturned in a number of cases preceding *Beechwood.* (*Pahl v. County Bd. of Appeals*, 237 Md. 294 (1965); *Brenbrook Const. Co. v. Dahne*, 254 Md. 443 (1969); *Creswell v. Baltimore Aviation*, 257 Md. 712 (1970); and *Stratakis v. Beauchamp*, 368 Md. 643 (1973)).

We note in *Dorsey* that the Court of Appeals pointed to the lack of evidence produced in that case that the rezoning was incorrect:

> Thus, there was no evidence to show that the initial premises of the Council with respect to the subject property were incorrect and that consequently the classification assigned at the time of the comprehensive rezoning was improper.
>
> When all is said and done, this record is totally devoid of any evidence to show that at the time of the comprehensive zoning of the subject property the Council failed to take into account any facts or circumstances then existing relevant to the subject property and its environs so that its initial assumptions and premises in determining the appropriate classification for the subject property were erroneous.

(Id. at 365-66).

The Court in *Beechwood* also mentioned that this Board's conclusion in *Trainer v. Lipchin*, 269 Md. 667 (1973) was erroneous when we held that there was an error because the rezoning involved "a questionable choice." (*Beechwood* at 646). The Court of Appeals in *Trainor* said:

> In substituting its judgment for that of the County Council, the Board of Appeals relied on one expert witness who testified "that it would not be 'practical' to build apartments on the subject parcel, and another witness who offered his conclusion that the Comprehensive Zoning was erroneous because 'in our estimation the best suitable use for that is commercial.' The Court of Appeals held that such evidence was insufficient to make the issue of mistake fairly debatable.

(Beechwood at 647; *Trainor* at 674-675).

A few months after the *Beechwood* opinion was decided, the Court of Special Appeals decided the *White* case. In *White*, the 1989 CZMP took place in Talbot County during which critical area districts were established in order to comply with the Chesapeake Bay Critical Area Protection Act ("CBCA") of 1984. The Talbot County Planning Department recommended downzoning a property during that CZMP because it was believed to be located within a Resource Conservation Area ("RCA"). Under the CBCA, the Planning Department informed the Council that a growth allocation would be used for property because it was in an RCA to permit density higher than one unit per five acres. As a result, the Circuit Court downzoned the Property.

After the 1989 CZMP, the Talbot County Planning Department discovered that the property was not, and had never been, in the RCA. (*Id.* at 703). As a result, a Petition for Reclassification was filed. (*Id).* An evidentiary hearing was held before the County Council at which time the County

Council made findings of fact and wrote a report about the evidence presented. (*Id.* at 704). This evidence included:

> (1) Planning Department Staff Report acknowledging the mistake and recommending the return to prior zoning; (*Id.* at 704).
>
> (2) Testimony and a letter from Talbot County Planning Officer admitting that a mistake was made; (*Id.* at 704-705). and
>
> (3) Letter from Chairman of CBCA Commission agreeing that a mistake was made in understanding the CBCA. (*Id.* at 705).

When the Circuit Court for Talbot County reviewed the County Council decision to return the property to the prior zoning, it found *substantial evidence* before the County Council tending to show that the Council had based its previous rezoning upon the mistaken assumption that the zoning was necessitated by reason of critical area growth allocation requirements. The Circuit Court found that the Council based its decision to downzone, in substantial part, upon the mistaken information furnished it by its staff – a mistake later discovered by the same staff. (*Id.* at 706).

The Circuit Court found the Planning Officer's testimony and the Planning Department's report were persuasive in meeting the burden of proof on mistake. The Court of Special Appeals, in reviewing the Circuit Court's decision, said:

> there was *ample evidence* before all entities involved in the current rezoning process *i.e.* the Commission, the Council and [Circuit Court], that one of the primary reasons that the subject property had been previously zoned RR was the misapprehension that it was required to be so zoned because of growth allocation complications. That requirement was later determined not to be applicable. That erroneous belief was the quintessential zoning mistake that permits a mistake-based rezoning. We hold that the [Circuit Court's] affirmance of the County Council's action, in finding a mistake in its previous zoning action, was appropriate in that, as the [Circuit Court] correctly found, it was supported by *substantial evidence.*

(Id. at 707). (Emphasis Added).

Another way to prove 'mistake' is when information relevant to the subject property is not available to the County Council at the time of the zoning decision which prevented the Council from making an informed decision. In *Bonnie View Country Club, Inc. v. Louis J. Glass*, 242 Md. 46 (1966), a mistake was made where previously unknown extensive copper mine shafts, subsurface rock formations and topography could not have been taken into account at the time the zoning was changed. Similarly, in *People's County for Baltimore County v. Prosser*, 119 Md. App. 150 (1998), the Court of Special Appeals upheld this Board's decision that an error occurred where the evidence produced showed that it was impossible for the County Council to have known of, or to have foreseen in 1992, that septic systems were failing. We found there that the parcels could only be used if the septic systems were destroyed.

In this case, there was no argument that the relevant environmental facts were unknown by the County Council at the time of the CZMP and then later discovered. Therefore, the holdings of *Bonnie View Country Club*, *supra* and *Prosser*, *supra*, do not apply here.

This Board has previously found mistake by the County Council and has granted petitions for reclassification. In our review of seven (7) of those cases, we note the type of evidence that was submitted to this Board was as follows:

(1) *In the Matter of the Application of Maud D. & Lee R. Jones – Legal Owners; John F. Owings, Jr., CP (Jones Property), Case No.: CR-02-070 (Out of Cycle, 2001)*: The evidence presented to the Board included a letter from Councilman McIntire to the Planning Board admitting error in failing to vote to reclassify the property to D.R.10.5 as the Councilman had originally intended. Councilman McIntire wrote that "it slipped through the cracks." In that case, Jeff Long, who was with the Planning Office, testified before the Board and explained that the error occurred when the property information on the CZMP application indicated that the zoning should remain D.R. 3.5. This Board found error based on the evidence and said: "...the extraordinary step taken by Councilman McIntyre to send a letter to the Planning Board admitting that an error was made in

failing to rezone the property to D.R. 10.5 is perhaps the only way to show error where an oversight had taken place at the Council level."

(2) *In the Matter of the Application of Sarandos and Eva Macris – Legal Owners; Thomas S. Macris through POA- Petitioner for Zoning Reclassification on Property located on the NW/Cor Joppa Road and Lackawanna Ave (1722 E. Joppa Road); Case No.: CR-02-457-XA; Out of Cycle 2002)*: This Board granted a petition to reclassify property known as Vito's Pizza which was located on East Joppa Road. [2] The Planning Office raised the issue to change the zoning of the subject property along with 24.75 acres of land from B.R. to B.L.R. Prior to the zoning change, the legal owners had contracted with Enterprise Rental Car to operate a rental car business at the property. The new zoning would not permit such a business. The evidence presented to this Board was testimony from Jeff Long of the Office of Planning stating that the community planner from his office was 'new' and recommended the zoning change to the Council. The community planner failed to provide Councilman Skinner with the zoning history of the property which included 2 prior zoning hearings (prior approval was granted for a larger building) or of future plans for the property. Mr. Long explained to this Board during his testimony that the job of the community planner is to meet with the councilperson at the site, to talk with the owners and consider their future plans. In granting the reclass back to the prior zoning, we weighed heavily the testimony of Mr. Long and found that a mistake had been made in failing to provide Councilman Skinner with the relevant information.

3) *In the Matter of The Application of Betty Kreuzburg – Legal Owner for a Zoning Reclassification from D.R. 3.5 to O-3 on Property Located on the NE/S Reisterstown Road, 540' NW of Centerline Mt. Wilson Lane (8919 Reisterstown Road), 3rd Election District, 2nd Councilmanic District:* In this case we granted a reclass for the 'Wright House,' a historic property which sits on Reisterstown Road, from D.R. 3.5 to O3. We heard testimony from Jeff Long of the Office of Planning who explained that the Planning Office would have recommended this zoning change in the 2000 CZMP. However, Mr. Long explained that the Council was not aware at that time that the development of the area surrounding the Wright House was primarily commercial and that the Wright House was one of only two single-family residences remaining on this portion of Reisterstown Road. We found that an error occurred because the County Council was not aware that residential use was no longer viable for this property and that office use was appropriate.

(4) *In the Matter of the Application of Mint Meadows LLC et al. – Legal Owners; Heidi S. Kraus – C.P. for Reclassification from R.C.2 and R.C.7 to R.C.4 and R.C.5 on Property located on the SW/S York Rd., Opposite Sparks Rd. and Lower Glencoe Rd. (Approx. 100 acres); Case No.: R-05-340; Out-of-Cycle, 2005*: We granted a petition to reclassify over 100 acres on south side of Belfast Road from RC2 and RC7 back to RC4 and RC5. The property had been zoned RC4 and RC5 for many years and yielded a maximum of 35 lots. The evidence that was presented to this Board at

[2] Robert Hoffman, Esquire and Venable, LLP, the undersigned counsel for the Petitioner here, represented the Petitioners in the Macris matter advocating for a reclass.

that hearing was that Councilman McIntyre had agreed to remove the subject property as an issue in the 2004 CZMP to allow the existing zoning to remain on the property. The evidence confirmed that an administrative mistake was made when the property remained a zoning issue and that this resulted in the zoning change. We found that all parties (including the community group, Councilman McIntyre, the Petitioners, the contract purchaser and the Community Planner) were in agreement that the zoning should not have been changed. Therefore, we found an error occurred.

(5) *In the Matter of the Application of Shreyas and Nisha Panchigar – Legal owners/Petitioners for a Zoning Reclassification on Property located on the S/S of Hollins Ferry Road, 225' E of Hammonds Ferry Road, 13 the Election District, 1st Councilmanic District; Case No.: CR-07-132-X (out of cycle)*: This Board granted a petition to reclassify a property back to BL, BL-AS and ML from DR for an unimproved lot surrounded by commercial uses on Hammonds Ferry Rd. The evidence before this Board was that the Petitioners had been granted a special exception to operate a service garage. The site plan proposed by the Petitioners was for a retail building and car wash. Accepted into evidence was a letter from Councilman Moxley to the Petitioner stating that a mistake had been made in rezoning the property from commercial to industrial and residential because Councilman Moxley was not aware of community support for the proposed retail store and car wash. Councilman Moxley's letter confirmed that, had he known of the community support, he would not have voted to change the zoning to residential use.

(6) *Petition for Reclassification 1206 Molesworth Rd: NW/S Molesworth Road 1645' NE Armacost Rd., 406' NW Molesworth Rd., 6th Election and 3rd Councilmanic District*: This Board granted a petition to reclassify a property from RC7 zoning back to RC4 located in northern Baltimore County on Middletown Farms. The evidence that this Board accepted was that the Petitioner had been granted a limited exemption from the full development process to create a minor subdivision with 1 lot. As part of that process, the Petitioner spent money on fees for forest conservation easement and bought adjacent property to satisfy access requirements that County imposed in approving the subdivision plan. The Petitioner filed a documented site plan with the petition to reclassify. This plan was the same minor subdivision plan under review with the Planning Office. Jesse Bialek from the Planning Office testified that she was not aware that other planning staff were simultaneously reviewing the Petitioner's minor subdivision plan. The County Council relied upon the Planning staff to inform them of the relevant information when considering an issue. As a result, the evidence was clear that the County Council was not aware of the Petitioner's pending minor subdivision that was proceeding contemporaneously with the CZMP, for which the County had already collected a substantial amount of money from the Petitioner. Thus, we found as error occurred.

(7) *In the Matter of the Application of Howard Lintz – Legal Owner; Petitioner for a Zoning Reclassification on Property located on the E/S Jarrettsville Pike; 244' S of C/L Southside Avenue 914345 Jarrettsville Pike); 10th Election District, 3rd Councilmanic District; Case No.: R-09-270 (Cycle I, 2009)*: This Board granted a petition to reclassify a portion of property along Jarrettsville

Pike from RC5 to both RO-CR (residential office, commercial rural district) and RC5-CR (resource conservation, commercial rural district) based on evidence of error committed in reviewing the original application, the amended application and the recommendations of Office of Planning and Planning Board. When presented during the CZMP, the issue was denied because Councilman McIntire was under the impression that the Petitioner's request for zoning remained B.R. We found, based on the evidence, that the subject property had always been maintained as an office at the location since World War II and had always been a place of commerce. As such, the request to place a commercial rural overlay district was very protective to the R.C. zones and would be a good transition for the area. We agreed that confusion occurred between the Planning Office, Planning Board and Councilman's office as to the request for RO-CR zoning and BR zoning. This, we found, was an error.

Applying the standards for determination of error as set forth in BCC §32-3-510(c)(1), this Board is permitted to consider as evidence, *without an authenticating witness*, reports of the County agencies. These include reports by the Planning Board and other county agencies who provide information to the Council on an issue. In this case, we consider the reports of Baltimore County agencies including not only the Planning Office (Pet. Ex. 14 and 16) but also DEPS (Pet. Ex. 36 and 37) and Advisory Commission on Environmental Quality ("ACEQ") (Pet. Ex. 54). In considering the Motion to Dismiss, we must weigh those reports in light of the evidence submitted by the Petitioner in support of the zoning reclass.

The Petitioner instructs this Board that in considering all the evidence presented, we must determine if the Petitioner provided enough evidence by demonstrating:

> (1) that information provided to the Council was "incomplete or inaccurate" and thus erroneous; and
>
> (2) that the misapprehension resulting from the erroneous facts formed at least "one of the primary reasons" for the Council's decision.

Petitioner argues that they need not prove all facts that existed at the time of the County Council decision or that the County Council was aware of all facts that existed at the time of the

decision but only that County Council did not consider certain relevant information in existence at time of the decision.

Addressing the issue of whether the County environmental information was 'incomplete or inaccurate,' we repeat the holding of *White, supra.* The *White* Court in discussing the 'fairly debatable standard' said:

> The basic reason for the fairly debatable standard is that zoning matters are, first of all, legislative functions and, absent arbitrary and capricious actions, are presumptively correct, if based upon substantial evidence, ***even if substantial evidence to the contrary exists***. The zoning agency, in this case, not the court, is considered to be the expert in the assessment of evidence. *Prince George's County v. Meininger*, 264 Md. 148, 154 (1972); *Brouillett v. Eudowood Shopping Plaza, Inc.*, 249 Md. 606, 608 (1968); *B.P. Oil, Inc. v. County Bd. of Appeals*, 42 Md. App. 576 (1979).

(Id. at 699). (Emphasis Added).

Based on our review of the environmental information provided to the County Council by County agencies, we do not find that this information was "incomplete or inaccurate.' Rather, we find both the County information, and information provided by the Petitioner, were each substantial in their own right. However, given the burden of proof is on the Petitioner and the presumption is that the County Council had all the information necessary to make a decision while the evidence presented by the Petitioner may have been 'substantial,' it was simply 'evidence to the contrary.' The evidence presented was simply debatable.

Environmental experts, whether County employees or hired by a petitioner, will inevitably vary in their findings and opinions as to what they believe is correct or incorrect. We do not agree with the Petitioner that the particular language selected by DEPS in their reports, namely that:

"Both Brook trout and Brown trout have been found in Dipping Pond Run downstream of this site", makes the information provided 'incorrect or inaccurate.' (Pet. Ex. 36 and 37). There may indeed be different ways of phrasing a sentence. Under that theory, another series of experts could dissect the Petitioner's reports and find issue with the wording contained therein.

The only evidence of error produced here was expert testimony. According to the case law, that evidence was "of no greater probative value" than the DEPS or ACEQ reports. (*Dorsey* at 358-359). The holding in *Dorsey* made clear that the opinion of an expert is not evidence strong or substantial enough to show error. (*Id.* at 359).

As to the second factor, even if the Petitioner did prove that the County information was 'incomplete or inaccurate,' we do not find that the Petitioner met its burden of proof as to what information the County Council considered in making its decision. The Petitioner did not prove a 'literal failure' by the Council to consider the type of evidence submitted by the Petitioner. The Petitioner argues that the August 28, 2012 email from County Councilperson Almond to her constituents proves that she considered or weighed heavily the DEPS or ACEQ reports (which they allege was inaccurate) in making her decision. We do not agree.

We find that the Almond email was, at best, a political email from a Councilperson to her constituents, informing them of the County Council's vote on an issue. The Almond email does not list what 'environmental information' the County Council as a governing body, or Councilperson Almond individually, considered in making the decision to downzone. Even if we had such a list, what one of the Councilperson 'considered' does not prove what information the Council as a whole considered. The Petitioner cannot, on the one hand, make the argument that one Councilperson cannot raise a zoning issue and at the same time argue that this email proves that the Council relied on 'incomplete or inaccurate' environmental information.

The presumption of correctness carries with it the presumption that the Council had before it all information then existing which is relevant to the issue. This means that - unless proven otherwise - the Council, in making its decision, had before it, knew, and considered the same or similar information provided by the Petitioner here. It also means that even if the Council considered the DEPS or ACEQ information, the Council may have found that none of it made a difference in their ultimate decision. For all we know, the Council, in making its decision, could have given no weight to any of the information contained in the County reports. The Petitioner has the burden of proof on this issue.

Comparing the evidence presented here with the evidence presented in each of our 7 previous reclassification cases where we granted the request, the evidence in each of those cases was substantial and probative of error. It is clear that our previous decisions were in keeping with the holdings in *White* and *Beechwood.* Here, the Petitioner's evidence leads us only to speculate as to what environmental information the Council actually considered in making their decision. As the Court in *Anderson House, L.L.C. v. Mayor & City Council of Rockville*, 402 Md. 689, 723-724 (2008) indicated, the Council, in making zoning decisions, is considering the overall needs and development of the County as a whole and not considering individual properties on an isolated or piecemeal basis. As applied here, the Council's reason for downzoning this Property may have stemmed from the County's overall needs.

The evidence further revealed that, prior to the August 28, 2012 vote, the Petitioner, through counsel, provided environmental information to Councilperson Almond. (People's Counsel Ex. 4i). The Petitioner, via letter to the Councilperson Almond, addressed the environmental issues raised by the Protestants before the Planning Board and at the County Council hearing. (*Id.*) In its letter, the Petitioner pointed out to Councilperson Almond, the

following facts: (i) that the residential subdivision will not deplete groundwater supplies; (ii) that the residential subdivision will alleviate existing adverse environmental conditions and improve area stream quality; and (iii) that the residential subdivision will have less impact on area roads than the operation of a country club. In that letter, Petitioner was proposing a 90 lot subdivision. (*Id.*) Thus, under the presumption of correctness, the County Council did consider the Petitioner's information but it did not persuade the Council to retain the RC5 zoning.

We also learned from the testimony of David Thaler that, prior to the Council vote, he met with Councilperson Almond on two occasions and provided information to her. Accordingly, under the presumption, we must assume that the County Council considered the information provided by Mr. Thaler to Councilperson Almond prior to their vote. Having considered all of that information, the Council's decision was still to downzone the property. Thus, the burden of proof has not been met on the second factor.

Other than the Petitioner's letter to Councilperson Almond, all of the Petitioner's evidence of error was prepared by their experts after the filing of the Amended Petition on October 30, 2013. While the presumption confirms that the County Council considered this information because it existed at the time of the CZMP, if the Petitioner wanted the County Council to have this information in the form provided to us at the hearings, it was not prevented from submitting the same to the Council prior to the vote.

In this case, as in *Dorsey*, *supra*, we find that: "...this record is totally devoid of any evidence to show that at the time of the comprehensive zoning of the subject property the Council failed to take into account any facts or circumstances then existing relevant to the subject property and its environs so that its initial assumptions and premises in determining the appropriate classification for the subject property were erroneous." (*Id.* at 365-366).

Unlike the obvious error in *White* which was substantiated by the evidence there, the Petitioner here did not prove that there was a "literal failure of the County Council to have considered those conditions...." (*Beechwood* at 645; *Boyce* at 51-52). We find that the Petitioner here did not prove which if any "facts were not actually considered by the Council." (*Beechwood* at 646; *Boyce* at 51-52). We acknowledge that a petitioner in a zoning reclassification has a very onerous burden of proof. The holdings in *White* and *Beechwood*, as well as the cases proceeding those, remind this Board that we cannot substitute our judgment for that of the County Council.

Because the burden of proof has not been met, there is no need to hear the Protestants' case. We will dismiss the case for the reasons set forth herein.

ORDER

THEREFORE IT IS, it is this 13th day of February, 2015, by the Board of Appeals of Baltimore County,

ORDERED, that the Protestants' and People's Counsel Motions to Dismiss the Petition for Reclassification in case number CR-13-0199 is hereby **GRANTED** and the case is hereby **DISMISSED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
FOR BALTIMORE COUNTY

Maureen E. Murphy, Panel Chair

David L. Thurston

11700 Falls Road; W/S of Falls Rd; S of Broadway Rd 8th Election District, 2nd Councilmanic District Legal Owner: C.R. Golf Club, L.L.C. Petitioner	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY
RE: Petition for Reclassification to reclassify 11700 Falls Road from RC7 to RC5 (229 acres+/-)	*	Case No. CR-13-0199

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DISSENTING OPINION

This Board member respectfully disagrees with the Board Majority and believes that Motion to Dismiss should be denied.

The fact-findings necessary for Zoning Reclassification before this Board, are burdensome on the Petitioner. The Petitioner must provide testimony and evidence which, among other things, demonstrates the County Council erred, made mistakes in its consideration of known facts, or did not consider facts and circumstances then existing that were relevant to the decision to "down zone" from RC-5 to RC-7 during the 2012 CZMP process.

During the eleven days of testimony of the above-referenced case, I heard the description of a proposed development that would clean up and improve the environmental and living condition of hundreds of acres; provide needed housing inventory to the County; and assist the County budget constraints through increased property taxes on this "high dollar real estate." It is understandable that the Protestant's and others would prefer the 229-acre property to remain "park like". What neighbor would not desire a park to play or an area to walk your dog? Is there any unjust enrichment benefit that accrues to the Protestants' because of the zoning change? This member, along with other County citizens, will not discover what the Protestants' may gain,

because the Majority Members of this panel of the Board of Appeals have agreed to grant a Motion to Dismiss. This minority member desires the continuance of the case to examine all facts of the Protestant's Case and render a full and final decision upon conclusion of this case.

It might be argued that the County Council apparently erred because they invoked the practice of "*Councilmanic Courtesy*" and voted unanimously in favor of the zoning change from RC-5 to RC-7. This minority member dissenting opinion is not suggesting that the vote or the efforts of any councilperson were unethical, improper or incorrect. My only concern is that the "rubber stamp" approval invoked through a "*Councilmanic courtesy*" vote places a very large burden of proof on the Petitioner who believes they were harmed by the down zoning process.

BCC 32-3-510 and the narrow interpretation of *Beechwood* has benefitted the Protestants' efforts in this zoning reclassification case. The burden, to prove error or mistake of facts, is thrust upon the Petitioner. After reviewing all the testimony and evidence presented to this Board of Appeals, I believe the Petitioners have met and surpassed their burden.

Under BCC 32-3-510(a)(1)(ii) the Board of Appeals must find "that the last classification of the property was established in error" that being RC-7 (Resource Preservation) Zone. The RC-7 Zoning classification was adopted in the County Council Master Plan 2010, in part to identify and protect specific resource preservation areas such as Pretty Boy, Liberty and Loch Raven along with other identified natural resources. As described in extensive testimony by the Petitioner's expert witnesses, no identified significant natural resource was named. Other legislative goals of the RC 7 classification are to protect and preserve identified cultural and historic elements of the community at large. Without continuation of this proceeding, the Protestant's will be denied its responsibility to identify those County natural resources, cultural elements, and historic elements that require RC-7 protection.

After many days of testimony by aquatic habitat experts, having trout in a stream is an indicator that the water environment is clean and healthy, and to a greater degree, if there is evidence that brook trout are present, the waterway is pristine. Brook trout are like the "canary in a coal mine", being present is a superior safety/quality standard to maintain.

DEPS provided a document and comments that brook trout were currently present in down-stream tributaries, thereby projecting the implication that those streams were natural resources worthy of RC-7 protection. However, no field tests were performed by DEPS to substantiate the actual presence of brook trout. In fact, according to State records, no brook trout had been present for decades. Testimony by Petitioner's experts concluded, by an actual field investigation, no brook trout were found. I believe that a reasonable person would conclude an "error of fact" was present at the time of CZMP, and the County Council did not consider facts and circumstances then existing that were relevant to the decision. The Protestants case should be heard to prove contrary facts during the continuation of this case.

The Department of Planning and the Planning Board have both concluded and opined that the CR Golf Club property should be zoned RC-5. It is their job and duty to consider and interpret the laws and codes promulgated by the State and Baltimore County Council. A reasonable person would (or should) grant considerable weight to recommendations of those individuals whose job it is to understand and promote the wishes of the County Council through the interpretation of the County's Master Plan 2010.

In conclusion, it is my opinion that the Motion to Dismiss should have been denied, and the proceedings in this matter should have continued until all parties had fully presented their cases, at which time, a full and final decision could be made.

February 13, 2015
Date

Richard A. Wisner