Circuit Court for Anne Arundel County
Case No. C-02-CV-17-000715

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1795

September Term, 2017

ATTMAN PROPERTIES COMPANY ET AL.

v.

ANNE ARUNDEL COUNTY ET AL.

Fader, C.J.,
Kehoe,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: August 12, 2019

This appeal arises from a zoning decision of the Anne Arundel County Board of Appeals to grant a special exception to Spectec, LLC, to develop a 156-townhouse community on a 16.72-acre parcel located in Millersville. Two neighbors, Attman Properties Company and Cloverleaf Warehouse LLLP (collectively, "Attman"), filed a petition for judicial review in the Circuit Court for Anne Arundel County. The circuit court, the Honorable Stacy McCormack presiding, affirmed the Board's decision. Attman has appealed the court's judgment. The appellees are Spectec, Clement LLC, the owner of one of the parcels involved in the application, and Anne Arundel County (collectively "appellees"). Attman presents two issues, which we have reworded slightly:

> 1. Did the Board commit reversible legal error by failing to make a finding under *Schultz v. Pritts*, 291 Md. 1 (1981) as to whether the Nolberry planned unit development would have substantially greater adverse impacts at the proposed location than it would elsewhere in the zoning district?
>
> 2. Was the Board's decision arbitrary, capricious, and unsupported by substantial evidence?

We will affirm the judgment of the circuit court.

Background

In 2015, Spectec filed an application for a special exception to construct a residential planned unit development on portions of three contiguous parcels located east of Veterans' Highway in Millersville. On its northerly and easterly sides, the subject property is bounded by existing residential communities. The Rol-Park mobile home community and the Clover Leaf Business Park are located to the west, with other commercial development to the south. Access to the subject property is problematic. An existing stream blocks access from

the south. As we will discuss in part 2 of this opinion, there are two feasible ways that the subject property can be accessed by roads. Nolberry Drive provides the only direct access but using that street to access the property raises significant safety concerns. The other feasible access is through a portion of the mobile home park to Clover Leaf Drive, which is located to the west of the mobile home park and the business park before terminating at an unsignalized intersection with the Veterans' Highway.

Although the zoning ordinance permitted as many as 300 townhomes on the site, Spectec sought to construct only 156 units. In a hearing that stretched out into seventeen separate evening sessions, the Anne Arundel County Board of Appeals ("the Board") heard testimony and legal argument on the application from Spectec, Attman, and other neighbors, both residential and commercial.

In February 2017, the Board conditionally approved the Nolberry planned unit development, concluding that the application met the nine criteria enumerated in Anne Arundel County Code ("AACC") § 18-16-304(a).[1] We will discuss the specifics of the Board's decision later in this opinion. Following the Board's approval of the application, Attman filed a petition for judicial review. On October 13, 2017, the circuit court affirmed the Board's decision, and Attman filed a timely appeal.

[1] Two Board members dissented.

Special Exceptions and Planned Unit Developments in Anne Arundel County

The Nolberry planned unit development lies in an area primarily zoned R-22, with small portions classified as R-5 and OS-Open Space. The R-5 and R-22 zoning district regulations allow planned unit developments only by special exception. *See* AACC § 18-4-106.

Planned unit developments are a method of land use control that are intended to provide a greater degree of flexibility to both developers and regulators in the design of medium and large residential, commercial, and mixed-use developments. The planned unit development concept "has freed the developer from the inherent limitations of the lot-by-lot approach and thereby promoted the creation of well-planned communities." *Rouse–Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments*, 138 Md. App. 589, 623-24 (2001) (quoting *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 226 (1980)).

In Anne Arundel County, planned unit developments are implemented through Article 17 of the County Code through what is essentially a site plan approval process. *See* AACC § 17-7-1001—1004. Not all zoning districts in Anne Arundel County allow planned unit developments as a matter of right. In the R-5 and R-22 districts, a developer must obtain a special exception as part of the planned unit development review and approval process.

A special exception, sometimes referred to as a "conditional use," is a grant of a specific use that:

(1) would not be appropriate generally or without restriction; and

> (2) shall be based on a finding that:
>
> (i) the requirements of the zoning law governing the special exception on the subject property are satisfied; and
>
> (ii) the use on the subject property is consistent with the plan and is compatible with the existing neighborhood

Md. Code (2012) Land Use Article ("LU") § 1-101. *See also Mayor & Council of Rockville v. Rylyns Enterprises,* 372 Md. 514, 541 (2002) (A special exception use is one which "the local legislature . . . identifies [as] conditionally compatible in each zone, but which should not be allowed unless specific statutory standards assuring compatibility are met by the applicant at the time separate approval of the use is sought."). A special exception adds "flexibility to a comprehensive legislative zoning scheme by serving as a 'middle ground' between permitted uses and prohibited uses in a particular zone." *People's Counsel for Baltimore County v. Loyola College in Maryland,* 406 Md. 54, 71 (2008).

Before an application for a planned unit development special exception can be filed, a developer must file an administrative site plan, *see* AACC § 17-7-1003, and hold a pre-filing meeting with the Office of Planning and Zoning. *See* AACC § 18-16-201. The Office of Planning and Zoning reviews the proposed plan, obtains comments from other reviewing agencies, and may request additional information from the applicant. AACC § 17-7-1003(c). When its review is complete, the Office of Planning and Zoning issues a written recommendation to the County administrative hearing officer as to whether the application should be approved, denied, or granted subject to conditions. AACC § 17-7-1003(d).

The administrative hearing officer conducts a public hearing on the application where the applicant, the County, and other interested persons may testify and present evidence. AACC § 18-16-301(b). If the administrative hearing officer is satisfied that the proposed use meets the statutory criteria set out in AACC § 18-16-304, the special exception will be approved.[2] The applicant bears the burden of proof in meeting all of the statutory criteria.

[2] At the time this action was filed, AACC § 18-16-304 provided:

> (a) Requirements. A special exception use may be granted only if the Administrative Hearing Officer makes each of the following affirmative findings:
>
> (1) The use will not be detrimental to the public health, safety, or welfare;
>
> (2) The location, nature, and height of each building, wall, and fence, the nature and extent of landscaping on the site, and the location, size, nature, and intensity of each phase of the use and its access roads will be compatible with the appropriate and orderly development of the district in which it is located;
>
> (3) Operations related to the use will be no more objectionable with regard to noise, fumes, vibration, or light to nearby properties than operations in other uses allowed under this article;
>
> (4) The proposed use will not conflict with an existing or programmed public facility, public service, school, or road;
>
> (5) The proposed use has the written recommendations and comments of the Health Department and the Office of Planning and Zoning;
>
> (6) The applicant has presented sufficient evidence of public need for the use;

(Footnote continued. . . .)

AACC § 18-16-301(c). Whether the administrative hearing officer grants or denies the special exception application, the decision must be based "solely on the evidence presented at the hearing and observations made during any site visit." AACC § 18-16-306(a).

A party aggrieved by the Administrative Hearing Officer's decision may appeal the decision to the Board of Appeals, which reviews the application *de novo* using the same nine criteria provided in AACC § 18-16-304(a). *See* AACC § 3-1-207; § 18-16-402.

The Standard of Review

In a judicial review proceeding, the issue before an appellate court "is not whether the circuit . . . court erred, but rather whether the administrative agency erred." *Bayly Crossing, LLC v. Consumer Protection Division,* 417 Md. 128, 136 (2010) (cleaned up). For that reason, we "look through" the circuit court's decision in order to "evaluate the decision of the agency" itself. *People's Counsel for Baltimore County v. Loyola Colleg*e, 406 Md. 54, 66 (2008). A court accepts an agency's factual findings if they are supported by substantial

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(7) The applicant has presented sufficient evidence that the use will meet and be able to maintain adherence to the criteria for the specific use;

(8) The application will conform to the critical area criteria for sites located in the critical area; and

(9) The administrative site plan demonstrates the applicant's ability to comply with the requirements of the Landscape Manual.

(b) Phasing of development. If phasing of development is proposed for a use allowed by special exception and the Planning and Zoning Officer has approved a plan for phasing of development, the Administrative Hearing Officer may allow phasing pursuant to the approved plan as a condition of special exception approval.

evidence, that is, if there is relevant evidence in the record that logically supports the agency's factual conclusions. *Bayly Crossing*, 417 Md. at 138-39. In contrast, a court reviews the agency's legal conclusions *de novo. Id.* at 137. "An agency's decision is to be reviewed in the light most favorable to it and is presumed to be valid." *Assateague Coastal Trust v. Schwalbach*, 448 Md. 112, 124 (2016) (citing *Chesapeake Bay Foundation v. DCW Dutchship, LLC*, 439 Md. 588, 611 (2014)).

Analysis

Attman argues that the Board's decision must be reversed for two reasons. First, Attman asserts that the Court of Appeals' decision in *Schultz v. Pritts*, 291 Md. 1 (1981), required the Board to determine if there were "any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone" before granting a special exception application. Second, Attman argues that there was a lack of substantial evidence even to satisfy the statutory criteria for special exceptions that are set out in the Anne Arundel County Code.

1.

As to its first contention, Attman claims that the Board was to undertake a "*Schultz* analysis" (a concept that we will discuss shortly), in addition to making findings as to the special exception criteria contained in AACC § 18-16-304. In support, Attman interprets language in *People's Counsel of Baltimore County v. Loyola College*, 406 Md. 54 (2008), as requiring two separate and distinct standards for special exception applications—one

derived from *Schultz*, and the other from the local zoning ordinance. For additional support, Attman points to County Bill 18-18, which added criteria to AACC § 18-16-304, for the proposition that the original language of § 18-16-304 did not encompass the *Schultz* test.[3]

Appellees present several counterarguments. According to them, a *Schultz* analysis is only necessary if the Board concludes that the proposed use will have adverse effects on the neighborhood. Here, because the Board concluded that the special exception application satisfied all the requirements in AACC § 18-16-304 and that the proposed use would have no adverse effects, a *Schultz* analysis was not necessary. Further, such an analysis was incapable of being conducted because there were no adverse effects to apply to a *Schultz* analysis. Appellees characterize *Schultz* as requiring a secondary analysis necessary only if the Board finds the proposed use will have adverse effects. As an additional argument, appellees maintain that *Schultz* only applies if a county does not have statutory criteria in place to review a special exception application, and, in any event, that

[3] Enacted since the time the parties filed their briefs (enacted April 20, 2018), County Bill No. 18-18, adds two more criteria to the existing nine of § 18-16-304:

> The use at the location proposed will not have any adverse effects above and beyond those inherently associated with the use irrespective of its location within the zoning district[; and]
>
> The proposed use is consistent with the County General Development Plan[.]

The Board did not address County Bill 18-18 in its decision. For this reason, we will not consider Bill 18-18 in our analysis. *See, e.g.*, *Swoboda v. Wilder*, 173 Md. App. 615, 635 (2007) (Holding that we may "uphold the decision of the Board only on the basis of the agency's reasons and findings.") (cleaned up).

the *Schultz* standard is incorporated within AACC § 18-16-304, the nine criteria of which go above and beyond the requirement articulated in *Schultz*.

We don't need to address all of these contentions and counter-contentions in order to decide whether the Board committed legal error in the way that it framed its analysis of the evidence in this case. Explaining why the Board did not err requires us to review carefully the Court of Appeals' reasoning in *Schultz* and *Loyola College.*

A special exception is a land use regulatory device that:

> adds flexibility to a comprehensive legislative zoning scheme by serving as a "middle ground" between permitted uses and prohibited uses in a particular zone. . . . A permitted use in a given zone is permitted as of right within the zone, without regard to any potential or actual adverse effect that the use will have on neighboring properties. A special exception, by contrast, is merely deemed *prima facie* compatible in a given zone. The special exception requires a case-by-case evaluation by an administrative zoning body or officer according to legislatively-defined standards. That case-by-case evaluation is what enables special exception uses to achieve some flexibility in an otherwise semi-rigid comprehensive legislative zoning scheme.

Loyola College, 406 Md. at 71–72 (footnote omitted).

The concept that zoning ordinances should authorize administrative agencies to grant "special exceptions" to zoning regulations goes back to the earliest days of land use

regulation in the United States.[4] However, as Judge Harrell explained in *Loyola College,* the current understanding of the term (which is reflected in the previous quotation) developed in a series of Maryland appellate decisions beginning with *Montgomery County v. Merlands Club*, 202 Md. 279, 290 (1953). *See Loyola College*, 406 Md. at 74–77. *Merlands* is significant because in it, the Court of Appeals clearly articulated the core inquiries in every special exception case: whether the applicant demonstrated that the proposed use "would be in general harmony with the zoning plan and would not adversely affect the neighboring properties and the general neighborhood." 202 Md. at 290.

In *Schultz v. Pritts*, 291 Md. 1 (1981), the Court synthesized the holdings of a number of post-*Merlands* decisions in order to identify a conceptual basis by which courts and zoning agencies could properly assess the degree to which evidence of adverse impact on surrounding properties should affect the outcome of a special exception application. In that case, the applicant proposed to build and operate a funeral home in a neighborhood of single-family houses. At the administrative hearing, an expert witness opined that traffic generated by the funeral home site might "under certain circumstances" create traffic problems as funeral processions exited the site. 291 Md. at 8. In addition, "[the expert]

[4] *See, e.g.*, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 9–10. Advisory Committee on Zoning, Department of Commerce (1926) (recommending the establishment of "boards of adjustment" to make "special exceptions" to the terms of a zoning ordinance "in accordance with general or specific rules therein contained.").

testified that funeral processions would have an adverse effect on emergency vehicles and other traffic attempting to enter or leave a medical center located opposite the site." *Id.* The board of appeals denied the application based on this evidence. *Id.* at 9. The relevant issue before the Court of Appeals was whether this evidence formed a sufficient basis to deny the application.

The first part of the Court's analysis focused on a decision of this Court, *Gowl v. Atlantic Richfield Co*., 27 Md. App. 410, 417-18 (1975). In *Gowl*, we held that if "the potential volume of traffic under the requested [special exception] use would appear to be no greater than that which would arise from permitted uses," then it would be "arbitrary, capricious, and illegal to deny the application for special exception on vehicular traffic grounds." *Gowl*, 27 Md. App. at 417-18. The Court of Appeals rejected this standard. In explaining why, the Court stated (emphasis in original):

> [In special exception cases, the] duties given to the Board are to judge whether *the neighboring properties in the general neighborhood would be adversely affected* and whether the use in the particular case is in harmony with the general purpose and intent of the plan.
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> * * *
>
> If [the applicant] shows to the satisfaction of the Board that the *proposed use would be conducted without real detriment to the neighborhood* and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide.

291 Md. at 11.

The Court of Appeals then considered what would constitute "[t]he specific nature of the requisite adverse effect" to neighboring properties. *Id.* at 12. To answer this question, the Court looked particularly to *Deen v. Baltimore Gas & Electric Co*., 240 Md. 317, 330-31 (1965), and *Anderson v. Sawyer*, 23 Md. App. 612, 617-18 (1974), and stated (emphasis added):

> [T]hese cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is *whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.*

Id. at 15.

The above-quoted passage, and particularly the italicized language, is what the parties mean by a "*Schultz* analysis," which is also termed "a comparative geographic analysis." *Loyola College*, 406 Md. at 94; *Mills v. Godlove*, 200 Md. App. 213, 232 (2011).

Schultz was, and continues to be, in the forefront of Maryland's land use appellate caselaw. However, as the Court noted in *Loyola College*, "some of the language of Judge Davidson's opinion for the Court in *Schultz* occasionally has been mis-perceived by subsequent appellate courts and frequently misunderstood by some attorneys, planners, governmental authorities, and other citizens." 406 Md. at 57. One point of confusion pertained to how parties, zoning agencies, and courts should address the requirement that the proposed special exception use would not have "adverse effects above and beyond

those inherently associated with such a special exception use irrespective of its location within the zone."[5] In *Loyola College*, the Court examined this problem.

That case arose out of a proposal by what is now known as Loyola University Maryland to build a retreat center in a rural portion of northern Baltimore County. Pertinent to the issues on appeal, opponents to the application unsuccessfully argued to the zoning board that *Schultz* "required Loyola to show that there are no other locations within the R.C.2 zone in Baltimore County where the proposed use would have less of an adverse effect than on the local neighborhood of the Property." *Id.* at 62–63. For the purposes of its review, the Court of Appeals articulated the issue before it as:

> Does *Schultz v. Pritts* require that, before a special exception may be granted, an applicant must adduce evidence of, and the zoning body must consider, a comparison of the potential adverse effects of the proposed use at the proposed location to the potential adverse effects of the proposed use at other, similarly-zoned locations throughout the jurisdiction?

Id. at 66 (citation omitted).

In the process of answering "no" to this question, the court began by meticulously analyzing *Schultz* and then reviewing the reported Maryland appellate opinions applying

[5] Another issue, namely, what precisely constitutes the universe of relevant "adverse effects" that might be considered by a zoning board in a special exception case, appears to have been resolved in *Clarksville Residents Against Mortuary Defense Fund v. Donaldson Properties*, 453 Md. 516 (2017). We will discuss *Clarksville* later in this opinion.

Schultz's teachings in special exception cases. 406 Md. at 87–101. The Court restated the applicable legal standards for special exception cases (emphasis added):

> It is clear in examining the plain language of *Schultz*, and the cases upon which *Schultz* relies, that the *Schultz* analytical overlay for applications for individual special exceptions *is focused entirely on the neighborhood involved in each case*. . . .
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> * * *
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> *Schultz* speaks pointedly to an individual case analysis focused on the particular locality involved around the proposed site.
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> * * *
>
> The use of the descriptive term "inherent" in *Schultz* comes directly from Judge Davidson's opinion for the Court of Special Appeals in *Anderson* [*v. Sawyer*, 23 Md. App. 612 (1974)]. Thus, *Anderson* is particularly important to a proper understanding of what Judge Davidson and the Court meant in *Schultz* in defining what adverse effects are "inherent" in a proposed use. . . . [T]he Court of Special Appeals discussed the effect of traffic, also inherent to operation of a funeral home. The intermediate appellate court's discussion of the increase in traffic that may be caused by the funeral home *focused only on the potential for an adverse effect at the particular location*. No comparative, multiple site impact analysis was performed or called for to determine what adverse effects were in excess of those "inherent" in a funeral home establishment. Thus, the *Schultz* standard, as presaged in *Anderson*, requires that the adverse effect "inherent" in a proposed use be determined *without recourse to a comparative geographic analysis.* Any language to the contrary in *Holbrook*, *Lucas*, *Futoryan*, *Hayfields*, and *Mossburg* is disapproved.[6]

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[6] *Board of County Commissioners for Cecil County v. Holbrook*, 314 Md. 210, 220 (1988) *Futoryan v. Mayor and City Council of Baltimore*, 150 Md. App. 157 (2003); *Lucas v. People's Counsel for Baltimore County*, 147 Md. App. 209, 223–24 (2002) *Hayfields v. Valley Planning Council*, 122 Md. App. 616, 654–55 (1998); *Mossburg v. Montgomery County*, 107 Md. App. 1, 8–9 (1995). In *Holbrook*, the Court upheld a decision of the local

(Footnote continued. . . .)

> *But what sense is to be made of Schultz's language referring to consideration of whether "the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone"?* Is it to be declared surplusage? Is it to be stricken or disapproved because the 2008 composition of this Court simply has had a change of mind twenty-seven years later? The answer is "no." The language retains vitality and sense as long as the *raison d'etre* for its inclusion in *Schultz* is understood.
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> * * *
>
> [The existence of adverse effects] is why the uses are designated special exception uses, not permitted uses. The inherent effects notwithstanding, the *legislative* determination necessarily is that the uses conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at a given location, adduced evidence does not convince the body to whom the power to grant or deny individual applications is given that actual incompatibility would occur. With this understanding of the legislative process (the "presumptive finding") in mind, the otherwise problematic language in *Schultz* makes perfect sense. The language is *a backwards-looking reference* to the legislative "presumptive finding" in the first instance made when the particular use was made a special exception use in the zoning ordinance. *It is not a part of the required analysis to be made in the review process for each special exception application*. It is a point of reference explication only.

Id. at 101–07 (quotation marks, citations, and footnotes omitted).

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zoning board to deny a special exception to install a mobile home: in light of the mobile home's high degree of visibility in this particular location, . . . we hold that the Board reasonably concluded that the permanent presence of the Holbrook mobile home would create significantly greater adverse effects in this location than were it located elsewhere in the zone." The other cited decisions contained similar analyses.

Most recently in *Clarksville Residents Against Mortuary Defense Fund v. Donaldson Properties*, 453 Md. 516 (2017), the Court again revisited the *Schultz* analysis. In that case, the applicant filed for a special exception to construct a funeral home and mortuary in a residential district. 453 Md. at 523. Although a few neighbors took issue with the potential environmental impacts of the use, many residents in the neighborhood objected to the funeral home on grounds of cultural sensitivity. *Id* at 528-29.

The Board ultimately granted approval of the application with conditions. *Id*. The Board concluded that the application met all of the legal criteria for the use, and as a result, it was presumed to promote the general welfare of the community; that it was consistent and in harmony with the County's General Plan; and that "the adverse effects of noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions would not be greater at the Property than they would generally be elsewhere in the RR–DEO zone or applicable other zones." *Id*. at 526-30.

In affirming the decision of the Board, the Court of Appeals noted that the *Schultz* line of cases stood for the proposition that if the applicant satisfies the statutory standards and requirements "then there is a presumption that the use is in the interest of the general welfare, a presumption that may only be overcome by probative evidence of unique adverse effects." 453 Md. at 543. In holding that the Board did not err, the Court reiterated that the Board was required to consider only the enumerated criteria in the County's special exception ordinance. *Id*. at 551.

Collectively, *Schultz, Loyola,* and *Clarksville* tell us the primary question to ask when reviewing a special exception application is whether the special exception is compatible with the neighborhood. *See Schultz,* 291 Md. at 11; *Loyola*, 406 Md. at 106-07; *Clarksville*, 453 Md. at 543. If the reviewing agency determines the proposed use has satisfied the statutory requirements of the local zoning ordinance, there is a presumption that the use is compatible with surrounding uses, a presumption that "may only be overcome by probative evidence of unique adverse effects." *Clarksville,* 453 Md. at 543.

There is nothing in *Schultz, Loyola College,* or *Clarksville* that suggests that a zoning board is required to perform a *Schultz* analysis in the absence of proof of "actual incompatibility" between the proposed special exception use and the surrounding neighborhood.[7] Indeed, as the Court in *Loyola College* made clear, the opposite is the case. 406 Md. at 69 ("[T]he *Schultz* analytical paradigm is not a second, separate test (in addition to the statutory requirements.")); and at 106–07 (The *Schultz* analysis "is not part of the required analysis to be made in the review process for each special exception application.").

[7] In support of its argument that a *Schultz* analysis was required in this case, Attman points to the following passage in *Loyola College*: "[w]ithin each [statutory] factor . . . lurks another test, the *Schultz v. Pritts* standard." 406 Md. at 68–69. However, context is important, because the Court then stated:

> In this respect, the *Schultz* analytical paradigm is not a second, separate test (in addition to the statutory requirements) that an applicant must meet in order to qualify for the grant of a special exception.

Id. at 69.

To hammer the point home, the Court expressly disapproved of language in earlier Maryland appellate opinions that suggested to the contrary. *Id.* at 105.

In conclusion, we hold that there was no legal error in the Board's analysis of the evidence in the present case.

2.

As its second argument, Attman asserts that the Board failed to consider probative evidence as to the Nolberry planned unit development's adverse impacts on the neighborhood. These adverse impacts include that the Nolberry planned unit development conflicts with the existing truck and commercial traffic along Four Leaf Clover Drive, which is the sole access point between the development and Veterans Highway. According to Attman, this poses a danger because the Four Leaf Clover Drive-Veterans Highway intersection is unsignalized and heavily-trafficked, and so the addition of 156 townhomes would only increase that danger. Additionally, Attman claims that the Nolberry project would have adverse impacts on the adjacent Rol-Park mobile home park by converting the park's existing open space into retaining walls and stormwater devices, and causing the relocation of three mobile home units, as well as creating greater noise and nuisance for residents.

Based on these propositions, Attman argues that the Board's findings as to compliance with the criteria set out in AACC § 18-16-304 were not supported by substantial evidence. Attman points to evidence it provided that the Nolberry development would have an

adverse impact on the surrounding neighborhood. Specifically, Attman contends that criterion one (that the use will not be detrimental to public health, safety, and welfare) was not met because the Nolberry planned unit development poses safety threats because it is accessed through a heavy commercial development to an unsignalized intersection on a busy thoroughfare; that criterion seven (that the use meets and maintains adherence to the criteria for the specific use) was not met because a portion of the proposed development site is zoned R-5 and the proposed use does not meet the bulk requirements for a planned unit development in an R-5 zoning district; and that criterion nine (compliance with the Landscape Manual) was not met because the Nolberry Landscape Plan failed to provide "sections, elevations, and perspectives coordinated with the landscape plan, that demonstrate the quality and intensity of the design and materials required."

Initially, we note that some of Attman's arguments are misdirected. At this point, the issue isn't whether there was substantial evidence before the Board to support Attman's contentions—there indisputably was such evidence, although it was controverted by Spectec—but whether there was substantial evidence to support the Board's decision. As to that issue, we hold that there was substantial evidence in the record to support the Board's decision.

Because Attman disputes the evidentiary findings only as to criteria (1), (7), and (9) of AACC § 18-16-304, our analysis is limited to a review of the Board's findings for those three criteria. "We [will] affirm an agency's decision if there is substantial evidence in the

record as a whole to support the agency's findings and conclusions." *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 124 (2016) (citing *Chesapeake Bay Foundation, Inc. v. DCW Dutchship, LLC*, 439 Md. 588, 611 (2014)).

A.

AACC § 18-16-304(a)(1) requires that the Board find that the proposed use "will not be detrimental to the public health, safety, or welfare[.]" Attman's argument is primarily focused on alleged traffic issues in the area, and secondly, on the health and safety of the residents of the adjacent mobile home park. The most frequently-voiced concern at the public hearing regarding the proposed use was traffic, and more specifically, access into the Nolberry planned unit development, which the Board found "not as easy to resolve" as other issues. The Board concluded that access into the Nolberry development from Nolberry Drive, a dead-end, residential street north of the site, was not feasible, and likewise found access from Old Mill Road was not viable because of topographic and ownership concerns.

However, the Board concluded that access to the Nolberry planned unit development via Four Leaf Clover Drive, which connects to Veterans Highway, was appropriate and not detrimental to the public health, safety, and welfare. Concerns were raised as Four Leaf Clover Drive because the road runs past the business park owned by Attman to the south of the Nolberry planned unit development, and Four Leaf Clover Drive's intersection with Veterans Highway is unsignalized.

On these issues, the Board found the testimony of Wayne Newton, an expert in civil engineering, particularly helpful. Mr. Newton presented a traffic study created by Traffic Concepts, Inc., a company in the business of analyzing traffic patterns for new developments. He testified that Four Leaf Clover Drive and the connecting road network "would continue to operate at an acceptable level of service post-development," and that the traffic study demonstrated that a signal at the Veterans Highway intersection was not needed. Additionally, the Board found Mr. Newton's testimony "convincing that one access point from the site is sufficient to serve the proposed development[.]" Thus, the Board concluded that the access would not have any adverse effects on the surrounding neighborhood.[8]

In its brief, Attman also alleges that the Nolberry planned unit development will be detrimental to the public health, safety, and welfare of the Rol-Park mobile home park adjacent to the site, and that the Board failed to make any findings with respect to this issue. The Board's silence in its decision regarding this concern is a result, no doubt, from the lack of testimony on this issue at the hearing. The Rol-Park mobile home park is owned

[8] Attman raised another concern that vehicles would use the business park as a "cut through" and that minors would trespass on the business park. The Board responded that it does not have jurisdiction over the use of a private parking lot by trespassers, and that, in any event, "the possibility that trespassing could occur did not dissuade us from the conclusion that the special exception will not be detrimental to the public health, safety, and welfare."

and operated by Clement, a co-applicant to the special exception application and an appellee here. Unsurprisingly, Clement did not present evidence that the Nolberry planned unit development presented problems to its property or its residents. Only one resident of Rol-Park testified before the Board at the hearing, and his testimony was concerned possible damage to a stream buffer. (As we will explain below, the stream buffer issue was addressed by the Board in its decision.) Thus, with no opposition from the owner of the Rol-Park home, and almost no testimony by Rol-Park's residents, the effects of the Nolberry planned unit development on Rol-Park were essentially a non-issue that the Board did not need to discuss.[9]

The Board found that there would be only one adverse effect if the Nolberry project were approved, namely that there would be construction in the stream buffer. The Board remedied the problem in its decision. Based on the testimony of David Blaha, Attman's expert in environmental assessment, and Lynne Rockenbauch, Master Watershed Steward and President of a local watershed advocacy group, the Board found that the project, as proposed, would cause the construction of townhouses over a stream buffer that ran along

[9] Clement asserts that Attman lacks standing to raise arguments on behalf of the residents in the Rol-Park mobile home park because Clement, and not Attman, owns the land on which Rol-Park sits. This argument was not raised before the Board, and so we decline to entertain it at the appellate level. *See, e.g., Swoboda v. Wilder*, 173 Md. App. at 635 (A court may "uphold the decision of the Board only on the basis of the agency's reasons and findings.") (cleaned up).

the access road. The Board concluded that the buffer was necessary to prevent erosion and flooding. Ultimately, the Board conditioned approval of the special exception on Spectec's forgoing building townhomes over the stream buffer, thus making it a non-issue at this point. (Spectec agreed, as part of the conditional approval, to forgo construction over the stream buffer.)[10]

B.

AACC § 18-16-304(a)(7) requires that Board find that the proposed use "will meet and be able to maintain adherence to the criteria for the specific use[.]" The specific requirements for granting a special exception for a planned unit development are found in AACC § 18-12-201 *et seq.*[11] Attman argues that the Nolberry project fails to satisfy the requirement encapsulated in AACC § 18-12-203(f), which sets out the bulk regulations for R-5 and R-22 zones. Attman points out that the proposed location for the development lies in both an R-5 and R-22 zone, but that the proposed planned unit development does not

[10] This condition prevented Spectec from constructing any townhomes along the access road, reducing the number of townhomes to be developed by twenty-five.

[11] Section § 18-12-202(a) permits townhomes in a PUD of less than 500 dwelling units. Section § 18-12-203(a) permits the applicant to propose its own bulk regulations relating to lot size, setbacks, spacing, and height, that will govern the development of the PUD, and subsection (b) requires a fifty (50) foot setback between any structure in the PUD and the boundary line of an adjacent residential district. Section § 18-12-203(c) requires that the density of the PUD not exceed the density allowed in the zoning district. Lastly, the minimum site area for a PUD is 20 acres in an R-5 district, and 10 acres in an R-22 district. AACC § 18-12-203(f). It is not disputed that Spectec's application met all of these requirements.

meet the bulk requirements for an R-5 zone. The Board was not convinced by this argument, and its analysis is supported by substantial evidence.

The Nolberry site is primarily zoned R-22, but a narrow strip of land on the eastern portion of the property is zoned R-5, and an even smaller area is zoned OS-Open Space. At the hearing, testimony was presented that this was the result of a "geospatial mismatch" between the boundary lines of the various zoning districts as depicted on the County's zoning maps and actual property boundaries. Many local jurisdictions in Maryland correct geospatial mismatches through an administrative adjustment process. Anne Arundel County is one of them. *See* AACC § 18-2-108.[12] [13]At the hearing, Joan Jenkins, a zoning

[12] The Code provision states in pertinent part:

> (b) Administrative changes to zoning district lines. The Planning and Zoning Officer may certify adjustments to a zoning district line in the following circumstances:
>
> (1) When more accurate parcel information such as a sealed survey plat or a recorded plat becomes available and evidence clearly indicates that the property boundary was intended to match the zoning district line, the Office of Planning and Zoning may adjust the zoning district line to match the more accurate property boundary;
>
> * * *

[13] The other generally-used approach in Maryland to the problem of geospatial mismatches is to adopt rules of interpretation for zoning boundaries that typically provide that zoning boundaries are coterminous with property lines. *See, e.g.,* Prince George's County Code § 27-111; Talbot County Code § 190-6.2.

analysist with Anne Arundel County, testified that the zoning discrepancy on the subject property was the result of a geospatial mismatch could be corrected administratively.

In its decision, the Board acknowledged the presence of the geospatial mismatch. The Board further noted that an administrative zoning line adjustment could be conducted to remedy the issue. Operating under the assumption that the line adjustment would be conducted, the Board found that the Nolberry planned unit development would be constructed in "an R-22 district," and so the Board concluded that Spectec "presented compelling evidence" that the Nolberry project met the criteria for a planned unit development use in an R-22 district.

C.

AACC § 18-16-304(a)(9) requires the Board to find that the proposed use "demonstrates the ability to comply with the requirements of the Landscape Manual." The Board concluded that the Nolberry planned unit development had the ability to comply with the Landscape Manual through the testimony of Timothy Brenza, an expert in landscape architecture and planning. On behalf of Spectec, Mr. Brenza submitted a detailed, color-coded landscape plan for the planned unit development, which included vegetated buffers along the borders of the project. Additionally, Mr. Newton testified as to the sufficiency of the proposed Landscape Plan.

Neither Brenza's nor Newton's testimony was rebutted by Attman. Rather, Attman interprets subsection (a)(9) to read that the proposed use *must* comply with the Landscape

manual. However, such a high threshold is not required of an applicant. All that is required of the applicant is that the proposed use *has the ability* to comply with the Landscape Manual.[14] Thus, the Board did not err when it concluded that the designs in the Nolberry Landscape Plan sufficiently had the ability to meet the requirements of the County's Landscape Manual.

Because we conclude that the Board's analysis of the evidence presented to it was not flawed by any error of law, and that its findings were supported by substantial evidence, we affirm the administrative decision.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.

[14] This is because the design details are addressed as part of the County's review and approval process of the planned unit development site plan pursuant to Title 17 of the County Code.