Circuit Court for Baltimore City
Case No. 24-C-17-004307

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2346

September Term, 2019

KATHY HUDSON, *ET AL.*

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, *ET AL.*

Berger,
Nazarian,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: September 16, 2021

A group of residents in the Roland Park neighborhood of Baltimore objects to the prospect of an eighty-foot tall apartment building on a parcel of undeveloped, wooded land located near the intersection of Falls Road and Northern Parkway. In practical terms, they complain the building would block the view from some of the residents' homes and would create an unacceptable level of additional traffic and safety problems in the area.

The dispute itself, though, involves more complicated legal questions. The eighty-foot building would have been permitted under the applicable height restrictions of Baltimore's former zoning scheme. But that scheme was replaced on June 5, 2017 by a new zoning scheme known as TransForm Baltimore, and TransForm Baltimore would forbid it—its height limitation for a multi-family dwelling such as this is thirty-five feet. And the zoning application and decision at issue here straddle TransForm Baltimore's effective date.

TransForm Baltimore includes transition rules for resolving whether the old or the new zoning code applies to "applications" pending at the time of the new code's adoption. Section 2-203(k)(1) provides that an application filed before June 5, 2017 is governed by the provisions of the *old* zoning code. So on April 3, 2017, in an attempt to "vest" its "right" under the old code to build an eighty-foot building, a Developer—the appellant[1]—filed an

[1] We refer to the appellants in this matter, Overlook Sub 1, LLC and Overlook Sub 2, LLC, collectively as the "Developer."

application for a planned unit development ("PUD")[2] for the proposed apartment building.[3] The Developer understood—and the City's Planning Department agreed—that filing the PUD application before June 5, 2017 was sufficient under TransForm Baltimore's transition rules to ensure that the new zoning code's thirty-five foot height limitation would not apply. The PUD application made its way through the City's administrative process and culminated in the City Council's enactment of City Ordinance 17-037 (the "PUD Ordinance"), the effect of which was to allow the proposed eighty-foot structure to be built.

Several groups of residents sought judicial review of the PUD Ordinance in the Circuit Court for Baltimore City. After briefing and a hearing, the circuit court, in a 117-page opinion, vacated the PUD Ordinance and remanded the case for further consideration. As an initial matter, the court found that the "Findings of Fact" adopted by the Council—a two-page form that tracks the statutory language but lacks any actual factual findings—were insufficient to provide a basis for judicial review. The circuit court further held that, contrary to the Developer and City's view, the Developer's PUD application did *not* "vest" its "right" to build an eighty-foot building. Instead, the filing had the following consequences: (1) under the applicable transition provision (the new code's section 2-

[2] A PUD is a zoning planning tool used to allow more flexibility than would be otherwise allowed under lot-by-lot zoning. The main purpose of PUDs is to "promote[] the creation of well-planned communities." *Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's Cty.*, 138 Md. App. 589, 624 (2001) (*quoting Woodhouse v. Board of Comm'rs*, 261 S.E.2d 882, 891 (N.C. 1980)).

[3] The application was in the form of a proposed ordinance filed in the City Council (Council Bill No. 17-0049). *See* Old Zoning Code § 9-106.

203(k)(1)), the City Council must evaluate the PUD application according to the PUD evaluation criteria set forth in the *old* code (§§ 9-112, 14-204, 14-205); and (2) those criteria required the City Council to engage in an analysis that included comparing the proposed building to what TransForm Baltimore allowed, *i.e.*, a thirty-five foot building. Two groups of residents appealed the circuit court's ruling and the Developer and the City cross-appealed.

We affirm. We agree with the circuit court that even though it filed its PUD application before June 5, 2017, the Developer does not currently have the "right" to build an eighty-foot building. As the circuit court observed, the outcome might have been different had the Developer filed a *building permit* application before that date. But it didn't. The administrative process and standards associated with PUD applications applied to this application, and they required the City Council to compare what the PUD application proposes (an eighty-foot building) to what the new code allows (a thirty-five foot building or buildings). The practical result is that the City Council may yet approve the eighty-foot building the PUD application proposes, but it must apply the old code's criteria and make the necessary findings of fact first.

I. BACKGROUND

The circuit court detailed the course of events well and comprehensively over almost fifty pages of its memorandum opinion, and we will not attempt to replicate its excellent work. Instead, we include the background necessary for the limited questions of law before us, and what follows is undisputed unless we indicate otherwise. What follows,

though, should not be construed as findings—the role of finding facts lies with the City Council in the first instance. And as we explain below, we agree with the circuit court that the Findings of Fact on which the Council relied when it adopted the PUD Ordinance were insufficient for that purpose, and the case ultimately must be remanded so that the Council can fulfill that role.

A. TransForm Baltimore

At the center of this case is Baltimore's comprehensive new zoning ordinance, "TransForm Baltimore," which the City Council adopted on December 5, 2016 and which became effective on June 5, 2017. Before then, Baltimore followed a separate zoning code; we will follow the circuit court and refer to it as the "old" or "former" zoning law. TransForm Baltimore is now codified as Article 32 of the Baltimore City Code, with the short title "Zoning Code of Baltimore City." Again, like the circuit court, we will call it the "new" or "current" zoning code or "TransForm Baltimore."

TransForm Baltimore contains a section—§ 2-203, titled "Transition Rules"—that in subsections (b) through (j) sets forth the rules for resolving questions about whether the old or the new zoning code applies to things such as preexisting structures, previously issued building permits, and previously established PUDs. The last subsection, (k), contains the transition rules for pending *applications*, and it is the interpretation of that provision on which the outcome of this appeal depends:

> (k) *Pending Applications*.
>
> (1) An application that has been submitted and considered complete before June 5, 2017, or before the effective date of any relevant amendment of this Code is governed by the Code

> provisions in effect when the application was submitted.
>
> (2) A new application submitted after June 5, 2017, or after the effective date of any relevant amendment to this Code is governed by the Code provisions in effect when the application was submitted.
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> (3) If a pending application is modified after its submittal, the Zoning Administrator must review the application to determine if the proposed modifications constitute a new application. If the Zoning Administrator determines that the modifications constitute a new application, the application must be resubmitted under the Code provisions then in effect at the time of resubmittal.

But although subsections (b) through (j) each deal with a separate category of structure, use, or permit, subsection (k) refers only to "application[s]," with no limitation to particular application(s). As we explain below, the circuit court found, and we agree, that at least subsections (k)(1) and (k)(2) apply to PUD applications.[4]

B. The Proposed Development: The Overlook

The site at issue is an approximately twelve-acre parcel of land (the "Property") in north Baltimore near the northeast corner of the intersection of Northern Parkway and Falls Road. In 1962, a large apartment building then known as Belvedere Towers, and now known as the Falls at Roland Park (the "Falls") was built on an adjacent six-acre property. That property is now owned by another entity associated with the Developer entities in this case, and all of those entities are affiliated with Blue Ocean Realty LLC ("Blue Ocean,"

[4] The circuit court held specifically that subsections (k)(1) and (k)(2) apply to pending and complete PUD applications, but that subsection (k)(3) did not because of its reference to the role of the Zoning Administrator, who does not play a role in the PUD application process.

the entity that submitted the PUD application) and Jonathan Ehrenfeld (the owner of Blue Ocean). Neither Blue Ocean nor Mr. Ehrenfeld is a party to this case.[5]

Under the old zoning code, the Property was split-zoned as two zones of approximately six acres each. The western portion of the Property, which abuts the Falls property, was designated R-6 and the eastern portion was designated R-1. The proposed apartment building, which would be called The Overlook at Roland Park (the "Overlook"), would stand entirely on the R-6 portion, approximately 150 feet from the Falls building. The PUD application as originally filed included the R-1 portion of the Property, but was later revised to include only the R-6 portion, apparently at the request of some of the opposing residents. The R-1 portion was to remain undeveloped, although there is some dispute over whether and how the prohibition against development was to be guaranteed.

The parties do not dispute that the proposed eighty-foot height of the Overlook would be permitted under the old code.[6] And the Overlook would be located uphill from the Falls, which would significantly affect the Overlook's perceived height: although the Falls would be the taller building, the Overlook's roof would stand about twenty-seven feet

[5] Without making a finding, the circuit court observed that there is some question as to whether Blue Ocean or any associated entity owned the Property as of the date the PUD Bill was submitted to the City Council (April 3, 2017), and that, based on its review of numerous agreements and assignments, "[o]ne may assume that the purchase of the property had not been closed as of sometime in June 2017 . . . ." None of the parties raised ownership of the property as an issue on appeal, and we make these observations for context and without deciding the issue.

[6] Everyone agrees that under the former code, the permissible height of a building in zone R-6 is calculated using a floor area ratio calculation and that the proposed eighty-foot height of the Overlook would be permitted under that calculation.

higher than the Falls's roof. And, as observed by the circuit court, that would be "a significant detraction to [the Residents], some of whom live on St. George's Road at the top of the hill above the [P]roperty." For example, the Overlook's roof would be about twenty-five to thirty feet higher than the property of appellants Hunter and Margaret Cochrane. Under the new zoning code, the Property is designated R-6 and R-1-A. The parties don't dispute that under the new zoning code, the building would be subject to a thirty-five foot height limitation and that views from the surrounding neighborhood would not be obstructed by a building of that height.

In addition to objecting to the proposed height of the building, the residents also object to the project on the ground that the additional dwelling units, and the additional cars they would bring, would create an unacceptable level of additional traffic and safety problems in the area.

C. Proceedings Leading Up To the City Council's And Mayor's Approval Of The PUD Application

1. PUDs Generally

PUDs are a mechanism designed to allow development that is more beneficial to the community than the development restricted by standard Euclidean zoning. *Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's Cty.*, 138 Md. App. 589, 624 (2001) (*citing* 5 Ziegler, *Rathkopf's The Law of Zoning and Planning* (4th ed. Rev. 1994), § 63.01 at 63–7). Euclidean zoning is a legislature's division of an area into separate districts dedicated to different purposes such as, for example, residential, commercial, or industrial. *Id.* at 623 (*citing* 1 Rathkopf, § 1.01(c), at 1-20). The PUD

concept potentially allows a variety of residential, commercial, and/or industrial uses within the same area. *Id.* Conventionally speaking, a PUD "free[s] the developer from the inherent limitations of the lot-by-lot approach and thereby promote[s] the creation of well-planned communities.'" *Id.* at 624 (*quoting Woodhouse v. Board of Comm'rs*, 261 S.E.2d 882, 891 (N.C. 1980)).

Title 9 of Baltimore City's former zoning code governed PUD applications. Consistent with the conventional purpose of PUDs, Title 9 states up front that PUDs allow flexibility from lot-by-lot zoning: "Planned Unit Developments are intended to encourage the best possible design of building forms and site planning under a unitary development plan . . ." and that "[u]nitary control over an entire development, rather than lot-by-lot regulation, will produce a well-designed development that will have a beneficial effect on the health, security, general welfare, and morals of the City and the neighboring areas." § 9-101. Title 13 of TransForm Baltimore, which now governs PUDs, states a similar purpose: to "encourage a creative approach to the use of land that results in better development and design than might otherwise be accomplished under the strict application of this Code on a lot-by-lot basis."[7] § 13-101(2).

Title 9 of the former code also defined the process for applying for and approving PUDs, which we'll describe in broad strokes to provide context for what happened in this case. Generally speaking, the process requires coordination between the developer and

[7] The proposed PUD here—a single structure on one lot—does not appear to fit squarely into the general definition of a PUD, although the parties do not suggest that PUDs are prohibited for single structures on single lots.

various City agencies to create a development plan, and culminates in the City Council passing an ordinance designating the parcel of land at issue as subject to the PUD. *See Maryland Overpak Corp. v. Mayor & City Council of Balt.*, 395 Md. 16, 27–29 (2006) (describing the PUD application process and standards under the old zoning code). The process starts with a conference between the developer and the City's Planning Commission, and then continues with the developer's creation of a detailed development plan that must include particular details about the project, such as a map with accurate boundary lines; the use, size, and location of both existing and proposed buildings; and statistical data on size, density, and proposed number of residential units. Old Zoning Code § 9-105, § 9-107.

The developer then submits the PUD application to the Council in the form of a proposed ordinance or bill. *Id.* § 9-106. The bill is reviewed by various city agencies, including the Department of Planning, which prepare reports and recommendations and submit them to the City Council. *Id.* § 9-111. The agencies evaluate the bill against a lengthy list of standards set forth in various sections of the code. The circuit court outlined the comparative analysis mandated by § 9-112(b) at length and divided the standards into three general categories:

> (1) a pair of mandatory requirements for any PUD (§ 9-112(b)) (*i.e.*, that the uses that would otherwise not be allowed "under the basic regulations governing the underlying district" are necessary to the PUD's primary purpose and do not adversely affect the surrounding neighborhood);
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> (2) one hortatory feature (§ 9-112(c)) (*i.e.*, the application of the PUD's "bulk regulations . . . , which are expressed in terms of the overall density for the entire [PUD] rather than on a lot-

> by-lot basis, *should result* in overall development that is no less beneficial to the residents than would be obtained by application of the basic regulations for the underlying district" (emphasis added)); and
>
> (3) a series of required considerations (§ 9-111(a)(2) and § 14-205(a)) (*i.e.*, two respective include laundry lists of factors, *e.g.*, the PUD's conformance with the Master Plan; the PUD's effect on availability of light, air, open space, and street access; and the PUD's effect on traffic patterns and adequacy of off-street parking and loading).

In a series of footnotes, the circuit court also compared the PUD standards in the former code to those in the new code and observed that there were both similarities as well as differences. Stated generally, though, the City Council's task in evaluating a PUD application, under either the old or the new code, is to "ensure that the proposed PUD will conform with the surrounding area in terms of contemplated development; topography; value of surrounding areas; availability of light, air, open space, and street access; and risk of public and health hazards." *Maryland Overpak*, 395 Md at 28.

Once "the Council is satisfied with the development plan and reports from the reviewing agencies," the final step in the PUD application process is for the Council to "approve the PUD in the form of an ordinance." *Id.* at 28 (*citing* Old Zoning Code § 9-113).

2. The PUD Application Process For The Overlook

The PUD application process for the Overlook appears to have followed the steps set forth in the old code. Blue Ocean Realty submitted the original PUD development plan on March 27, 2017. On April 3, 2017, Bill 17-0049 (the "PUD Bill" or "PUD Application") was introduced to the Council and assigned to the Council's Land Use and Transportation

Committee, which referred it to various city agencies.[8] As part of the agency review, the Planning Department prepared a Staff Report and held a hearing on May 4, 2017. The Developer eventually also submitted a revised development plan on June 2, 2017. On June 7, 2017, the City Council's Land Use and Planning Committee held a hearing and voted at the end to approve the PUD Bill. On June 19, 2017, the full City Council approved the PUD Bill, and on July 21, 2017, the Mayor signed it into law as Ordinance 17-037.

As noted above, we need not restate the evidence contained in the administrative record—the circuit court did so ably and in great detail—but to provide context for our analysis, we summarize it briefly:

> May 4, 2017 Planning Commission Staff Report and Hearing
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> - The Planning Commission was transparent in its Report about the reason why the Developer had decided to request a PUD—it was to avoid TransForm Baltimore's thirty-five feet height limitation, and to "vest" his current "property rights" to build a taller building.
> - Planning Department representative Tamara Woods testified at the hearing and confirmed the Developer's desire to avoid the thirty-five foot height limitation by "vesting" its right to build an eighty-foot building.
> - Both the Staff Report and Ms. Woods represented that the Planning Department had agreed with the PUD approach because the Developer's plan would protect the R-1 portion of the site from development. That was advantageous, the Report maintained, because the R-1 portion had "more tenuous environmental features" and it was therefore better to encourage development on the

[8] The agencies were listed on the bill: City Solicitor, Board of Municipal and Zoning Appeals, Planning Commission, Department of Housing and Community Development, Department of Public Works, Fire Department, Baltimore Development Corporation, Baltimore City Parking Authority Board, and Department of Transportation.

R-6 portion of the site only. To that end, the Report observed that the proposed landscape plan included "three large Forest Conservation Easements [that] encompass a good portion of the R-1 zoned portion of the site."

- The Commission also heard from the Developer's representatives (Al Barry and Jonathan Ehrenfeld) and from neighborhood residents and representatives of community associations (Sue Joslow (president of the Poplar Hill Association), Rosemary Mountain (representative of the North Roland Park Improvement Association), and Shelly Sehnert (president of the North Roland Park Improvement Association)), who spoke, among other things, about their negotiations and ultimate cooperation and agreement concerning the Overlook project. The agreement itself was eventually reduced to writing and was included in the final PUD development plan. The agreement's terms included the Developer's agreement to restrict access to the Overlook through existing rights of way through the Falls, and not through local roads (specifically, Poplar Hill Road, Cliffhurst Road, and St. George's Road) and its agreement to make the R-1 section of the property "permanent green space" and maintain that space at its expense.[9]
- The Commission also heard from those who opposed the Overlook project, including residents (Curt Houston, Fife Hubbard, Jamie Riordan, and Hunter Cochrane) and representatives of a third neighborhood association (Robert Williams and Scott Wheeler, both of the Lehr Stream Neighborhood Association).[10] Mr. Williams testified that he and those residents objected to the height of the building and the potential negative

[9] As we observe below in footnote 13, the Developer characterized the agreement's terms as concessions, but the circuit court was skeptical of that characterization.

[10] Mr. Cochrane, Mr. Williams, and the Lehr Stream Neighborhood Association are appellants/cross-appellees in this appeal. Mr. Houston and Ms. Hubbard testified that they are residents of the Sabina-Mattfeldt neighborhood; they are not named parties, although the Sabina-Mattfeldt Community Improvement Association is an appellant/cross-appellee. Mr. Riordan is a resident of Poplar Hill Road.

impacts on traffic in the neighborhood.

- At the end of the hearing, the Commission voted unanimously to adopt the Planning Staff Report.

Developer's June 2, 2017 Updated PUD Development Plan

- The updated PUD development plan map no longer included the R-1 portion of the Property, and further stated that the Developer agreed to place the R-1 portion under a permanent forest conservation easement. It also included the written agreement between the Developer and the North Roland Park Improvement and Poplar Hill Associations and covenants known as the "Albert" and "Brown" covenants relating to restrictions on access to the Property from St. George's Road and Cliffhurst Road.

June 7, 2017 the City Council Land Use and Transportation Committee Hearing

- The hearing lasted about three hours. Many of the same individuals who spoke at the Planning Commission hearing on May 4 also spoke at the June 7 hearing before the Committee. The individuals and organizations who spoke can be divided into three groups: (1) City agencies that had reviewed the plan; (2) those who supported the PUD, including the Developer's representatives and the neighborhood associations who made the agreement with the Developer; and (3) neighborhood residents opposing the PUD.

- As she had before the Planning Commission, Ms. Woods explained that the PUD allows the Developer to "vest" its "right[]" to build an eighty-feet tall building and that the Planning Department approved of that plan in order protect the R-1 portion of the site from development due to its "more tenuous environmental features." She went on to explain how the Planning Commission had made the required considerations and findings under § 9-112 and §§ 14-204 and 14-205 of the old zoning code. She also asserted that the Developer had worked with the

Department of Planning to have the forest conservation easements made into a deed restriction.

- The City Law Department was represented by Rick Turnwell, who opined—consistent with a June 2, 2017 letter to the City Council from Chief Solicitor Victor K. Tervala—that as long as there was a complete application on file before June 5, 2017, which he asserted there was, "the development can be governed under the old code."

- Ms. Valerie LaCour testified on behalf of the City's Department of Transportation about a Traffic Impact Study and she spoke about its conclusions.[11] The circuit court described aspects of the Traffic Impact Study in great detail, observing that there were eight study intersections and that the study indicates that four of them have levels of service of D or lower. The court also observed that some of the Study's findings appeared to contradict the DOT's conclusion that only the Falls Road and Smith Avenue intersection would experience a three-second increase in average delay during the afternoon peak hour.[12]

- Supporters of the project presented their views, including the Developer, again represented by Mr. Barry and Mr. Ehrenfeld, and the neighborhood associations that had made an agreement with the Developer, again represented by Ms. Sehnert and

[11] The circuit court observed on pages 12 to 13 of its opinion that the Traffic Impact Study was dated June 6, 2017, one day before the hearing. It also observed that the DOT's cover letter to the report was dated May 2, 2017. The Hudson Appellants assert that the study was withheld from them. The City responds that the May 2 date was a mistake.

[12] For example, on page 17 the court observed that construction of the building would produce (a) additional delays of three or four seconds at the intersection of Falls Road and Northern Parkway and (b) additional delays of three to thirteen seconds at the intersection of Falls Road and Mattfeldt Avenue (eastbound). It observed that the westbound direction of the latter intersection is already at more than twice its capacity in the morning peak period, and that the traffic study does not express how much farther over twice capacity it would become with the project.

> Ms. Joslow. Mr. Barry and Mr. Ehrenfeld asserted that the Developer had agreed to the following in the course of those negotiations, which they characterized as concessions: (1) preserving the green space in the R-1 section; (2) restricting the location of vehicular ingress and egress; and (3) agreeing to develop 148 units in four levels instead of the 197 that the old code would have permitted. Mr. Barry and Mr. Ehrenfeld also addressed the reasons why they had decided to proceed with a PUD instead of with a building permit, asserting that the decision stemmed from their desire to work with the community and incorporate the community's input into their project.[13]

[13] The circuit court explained the Developer's asserted concessions and the building permit issue as follows:

> Even without a clear statement of the Committee's reasoning for approving the PUD application, this record shows that the Committee members were impressed with the notion that the Developer was actually making concessions–agreeing to be "locked into" a plan with fewer units and a lower building height than the Developer could have built "by right." In its memorandum to this Court, the City emphasized this idea that the Developer was requesting less than it had a right to build. City's Memo. at 20 n.10. But the testimony supported a conclusion that it is very unlikely that the Developer had enough time from when it gained legal control of the property to complete the design and engineering work that would have been necessary to achieve a complete building permit application by June 5, 2017. **Although Mr. Ehrenfeld presented his decision to forgo that approach in favor of a PUD application as a choice to enhance community involvement in the development process, the determinative factor may have been time.** The PUD application required far less extensive engineering work and would permit a much longer timeline for construction. Because the Planning Department did not attach any legal significance to the difference between meeting the June 5, 2017 deadline with a completed building permit application as opposed to a PUD application, the Planning Department–and apparently the Committee–did not see any need to grapple with the factual

- Opponents of the project presented their views; they included several of the same individuals who spoke before the Planning Commission and several additional individuals. Shale Stiller (an attorney who represented several of the petitioners before the circuit court, and who still represents them in this appeal) discussed, among other things, some of the materials contained in a large binder that the opposing residents had submitted to members of the Committee shortly before the hearing.[14] Among those materials was a report by Mr. Rick Chellman, a licensed engineer and fellow of the Institute of Traffic Engineers, that criticized aspects of the Traffic Impact Study and the opinion of a real estate agent who had visited neighboring properties and who opined that, if the Overlook were built, "the average property will go down in value by 10 to 20 percent" and certain properties could go down as much as 40 percent."

- Among the opponents was also Bob Williams (president of the Lehr Stream Neighborhood Association). He addressed the question of the Developer's use of a PUD as opposed to a building permit and challenged the Planning Department's perspective that the PUD application had the effect of vesting the Developer's

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questions whether the Developer could have completed a building permit application and why it chose to use a PUD application instead. This Court also need not resolve whether the record would support specific findings on this issue because the undisputed fact is that the Developer never applied for a building permit. **In this Court's view, that fact, for whatever reason, extinguished the Developer's *right* to build an eighty-foot structure with either 148 or 197 dwelling units.**

(Italics in original; bold emphasis supplied).

[14] The circuit court also observed that "there was no specific opportunity for the Committee members to review th[e] volume of evidence" contained in the binder. That observation contributed to the court's conclusion that a remand would be necessary, *i.e.*, to allow the City Council an opportunity to consider and weigh the evidence contained in the binder.

asserted right to build a building under the old code.[15]

- Appellant Hunter Cochrane also testified and challenged the characterization of the Developer's

[15] Mr. Williams testified as follows:

> [W]hat I'm drawing out here is that there were a number of months when Mr. Ehrenfeld had not decided whether he was going to buy, option the property, or whether he was going to build a building.
>
> By the time he decided to build a building, it was March. And there was a lot of talk about if you don't satisfy me, I'll build 197, but if you do, I'll build 157. And he was a gentleman about it, I have no complaints with him.
>
> But the bottom line point is this. Without the PUD, which was submitted without a building that had been fully designed, and which has changed significantly since the first submission, Mr. Ehrenfeld could not build this building under current zoning rules, he would have to build it under the [] Transform Baltimore rules.
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> Notwithstanding that, we came very close to an agreement with Mr. Ehrenfeld. We had two items that were our key items; one was that we did not want the roof of the new building to be higher than the roof of the Belvedere, not taller versus shorter, but that the roofs line up or that the new building be less. After submitting the PUD, two days later, we received a document from Mr. Ehrenfeld that said, "Regrettably, the building was going to be higher. It's now two and a half stories higher, which is a major impact on the people that live around the rim," and he said that this was a mistake made by his [] engineer.
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> ***
>
> We do not understand why vesting property rights for an undesigned building that does not have time to submit a new permit is appropriate.
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> The idea that the PUD is limiting, I said, is wrong.
>
> The planning staff making the trade between the buffer and the building is really, in effect, trading us something we already had for something that we don't want.

> agreement about limiting ingress and egress as a concession—he explained that there are two existing covenants that permanently restrict access to the Property from two local neighborhood streets, "[s]o this notion that the developer has given anything away or that the neighborhood associations have received anything that was necessary is a moot argument." He also raised questions concerning the Developer's choice to pursue a PUD as opposed to file for a building permit.

At the end of the presentations, Chairman Reisinger said, "So I want to thank everyone for coming out for testimony for and against. What I need to move forward is a finding of facts. Do I have a motion to move the findings of fact?" Councilman Costello made a motion, and Councilman Pinkett seconded it. The Committee voted in favor of adopting them, with one abstention. But as the circuit court observed, the only thing in the administrative record before this Court that might qualify as a "finding of facts" was a boilerplate document tracking the language of § 9-112 and § 14-204 of the old code. Other than the reference to the bill number and the name of the Overlook project, there are no references to the specific elements of the PUD application. The document also stated, incorrectly, that what was being granted was an amendment to a PUD rather than an original PUD designation. As noted, the parties agree that the Findings of Fact are insufficient to provide a basis for judicial review, and the City and the Developer maintain that the case should be remanded to the City Council to correct this error.

Additional facts will be supplied as necessary below.

II. DISCUSSION

Two sets of residents appealed the circuit court's ruling, and the Developer and City cross-appealed. The questions the parties raise boil down to the following: (1) Is remand

to the City Council the proper remedy? and (2) Did the City Council err in interpreting TransForm Baltimore's § 2-203 to mean that the Developer had "vested" its "right" to build an eighty-foot structure, as permitted by the old zoning code, by its filing of a PUD application before the June 5, 2017 effective date for TransForm Baltimore? We agree with the circuit court, and we hold that remand is the proper remedy and that the City Council erred in interpreting the TransForm Baltimore transition provision (§ 2-203(k)) to mean that the Developer's filing of a PUD application "vested" its "right" to build an eighty-foot tall building.

The parties' basic contentions fall into three groups. *First*, the Hudson Appellants argue that the circuit court erred in remanding the case to the City Council for further consideration.[16] They maintain that the appropriate remedy is simply to vacate the PUD Ordinance without remand due to the pervasive procedural and substantive errors in the proceedings before the City Council. *Second*, the Cochranes agree that the case should not

[16] The Hudson Appellants state the Questions Presented in their brief as follows:

> 1. Where the Circuit Court has already vacated the PUD and reversed the City Council for numerous pervasive errors at all levels of the process, both procedural and substantive, is a remand appropriate when an entire new review process and hearing would be necessary for the purpose of comparing density, bulk, and height regulations under two different ordinances?
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> 2. Is a remand appropriate where, after the Circuit Court's decision, the Developer has filed a separate action in another forum, based on the same drawings but for the same building?
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> 3. Is a remand appropriate if the councilmanic courtesy practice is unconstitutional in "quasi-judicial" proceedings?

be remanded, and they argue that the City Council's asserted errors of law cannot be corrected on remand anyway. But if the case is remanded, they agree that the City Council should evaluate the PUD application as directed by the circuit court.

Third, in their cross-appeals, the City and the Developer do not contest that the City Council's findings of fact were deficient, and agree that the case should be remanded to the City Council for consideration of all of the evidence and the making of findings of fact. They argue, though, that the Council should apply the old code only and that the Developer may therefore move forward with building the eighty-foot tall building.[17]

[17] The City states the Questions Presented in its brief as follows:

> I. Which zoning code governs the PUD application?
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> A. Does current zoning code § 2-203(k) apply to a PUD application?
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> B. Was the Developer's PUD application complete before June 5, 2017?
>
> C. Did the City Council properly conclude that the former zoning code governs the height of the proposed apartment building?
>
> II. Did the circuit court commit error by remanding the case to the City Council?
>
> A. Have Appellants identified such procedural and substantive errors that would preclude remand?
>
> B. Would remand give the City and the Developer "two bites at the apple"?
>
> C. Is remand precluded by the Developer's subsequent and alternative request for a variance?
>
> D. Is remand futile because the process is corrupted by "councilmanic courtesy"?
>
> E. Is remand futile in light of Appellants' submission of evidence of adverse impacts?

A. Remand Is The Appropriate Remedy.

We first address whether the circuit court erred in remanding this matter to the City Council. We hold that it did not.

As a general rule, a court must remand for an administrative agency to perform remaining administrative functions unless remand would be futile. *County Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 581 (2015). So where the zoning authority fails to make adequate findings or explain its reasoning sufficiently, the appropriate remedy generally is to vacate the decision and remand for further proceedings designed to correct the error. *Maryland Bd. of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 425 Md. 482, 522 (2012); *e.g.*, *Pistorio v. Zoning Bd. of Howard Cnty.*, 268 Md. 558, 569–70 (1973) (holding that remand was the appropriate

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The Developer states the Questions Presented in its brief as follows:

> 1. Whether the Circuit Court erred in requiring a building permit under the former Baltimore City Zoning Code in order to utilize the zoning requested in a completed PUD application grandfathered under the former Baltimore City Zoning Code?
>
> 2. Whether the Circuit Court erred by requiring a comparative analysis with the new Baltimore City Zoning Code in determining whether to grant a PUD application grandfathered under the former Baltimore City Zoning Code?
>
> 3. Whether the Land Use Committee of the City Council, as affirmed by the Circuit Court, correctly applied the zoning transition rules provided in Section 2-203 of the new Baltimore City Zoning Code to the PUD application pending during the transition to the new Baltimore City Zoning Code?
>
> 4. Whether the Circuit Court correctly rejected Appellants' arguments that remand would be futile?

remedy where the zoning board's findings of fact and conclusions of law were insufficient in decision denying application for zoning reclassification); *Board of Cnty. Comm'rs for Prince George's Cnty. v. Ziegler*, 244 Md. 224, 228–29 (1966) (case remanded without affirmance or reversal for zoning authority to state the reason for its actions and include them in the record); *Colao v. Cnty. Council of Prince George's Ctny.*, 109 Md. App. 431, 458 (1996) (holding that remand was required where the County Council had adopted the recommendations of the local zoning authority, which had not sufficiently articulated its findings of fact and conclusions of law).

The key, then, to determining whether remand is appropriate is futility. For example, in *County Council of Prince George's Cnty. v. Convenience and Dollar Market/Eagle Mgt. Co.*, this Court held that remand would be futile, and therefore not appropriate, because the only decision the Prince George's County District Council could have made on remand would have been to affirm the decision of the Planning Board. 238 Md. App. 613, 639–40 (2018). In that case, the District Council, as the reviewing body, had erroneously exercised original jurisdiction and evaluated the evidence itself, and had come to a conclusion different than that reached by the Planning Board. Because there was no dispute that the Planning Board's decision had been supported by substantial evidence and was not otherwise arbitrary or capricious, the only outcome upon remand would have been for the Council to affirm the Board's decision.

Similarly, in *Ocean Hideaway Condo. Ass'n v. Boardwalk Plaza Venture*, the Court of Appeals held that remand was unnecessary even where the local zoning board had failed

to make sufficient findings of fact. 68 Md. 650, 662–63 (1986). The Court observed that the board failed to make detailed findings of fact and that it would have remanded the case but for its conclusion concerning one of the factual disputes. *Id.* The zoning board had concluded that the proposed building would not cast excessive shadows on adjacent public or private properties, and the Court found that that conclusion was in error and not supported by any evidence because both parties' experts agreed that the proposed building *would* cast such shadows. *Id.* at 665. Remand would have been futile because the only possible outcome on remand would have been for the board to deny the special exception. *Id.* at 664.

Unlike in the *Convenience and Dollar* and *Ocean Hideaway* cases, the City Council isn't left here with only one possible conclusion on reconsideration. After it undertakes the correct comparative analysis (as outlined by the circuit court), the Council could approve the PUD as proposed or not. Neither the Cochranes nor the Hudson Appellants have demonstrated that remand would be futile.

As we explain further below, the Cochranes argue that the City Council erred in applying the old code to the PUD Application, and assert that it should have applied the new code because the PUD Application was not approved before TransForm Baltimore came into effect. They interpret TransForm Baltimore to provide transition rules only for *approved* PUDs, and assert that any PUD application still pending as of June 5, 2017 must be considered under the new code. But they don't explain why the Council's alleged error in considering the application under the old code could not be corrected when the matter

comes back before the Council. Indeed, they also maintain in their Reply brief that if the case is remanded, the City Council should apply the law as directed by the circuit court. Either way, we are not convinced that the circuit court erred in ordering a remand.

The Hudson Appellants similarly fail to convince. They make a scattershot set of arguments about the City Council's "procedural and substantive errors," but fail ultimately to identify any reason why such errors could not be corrected on remand. *First*, they assert that remand "would require a totally new review process for multiple city agencies," but there is no reason the Council couldn't consider the application against the existing record, as it did before, and the Hudson Appellants offer neither explanation nor support for why. *Second*, they argue that remand would duplicate a parallel proceeding for a variance that the Developer purportedly has filed before the Board of Municipal and Zoning Appeals. But this record contains nothing about the variance proceedings and they cite no legal authority supporting this argument. *Third*, they argue that remand would allow the Developer "two bites at the apple" to meet the standards for PUD approval, citing *Department of Labor v. Woodie*, 128 Md. App. 398, 410 (1999). But in *Woodie*, we held that a remand was improper where the claimant requested it for the purpose of submitting additional testimony to buttress his case. *Id.* at 407–08. This case is different. Here, remand will allow the City Council to consider evidence that has already been submitted, including the large binder of materials prepared by the residents, and to apply the correct legal standard in evaluating the PUD application.

Fourth, and finally, the Hudson Appellants assert that the practice of "councilmanic

courtesy" tainted the proceedings and inevitably would taint the proceedings on remand. They argue that zoning decisions in Baltimore City "are controlled by only one individual," *i.e.*, the Councilmember for a particular district. The evidence they cite in support of their contention that councilmanic courtesy happened in this case are comments by two Councilmembers during the roll call vote and the 2004 Final Report of the City Council Transmission Commission. The only legal authority they cite is a 1774 speech by Edmund Burke; a 1975 law review article by Judge Henry Friendly (*Some Aspects of a Fair Hearing*, 123 U. Pa. L. Rev. 1267, 1278 (1975)); Federalist Paper No. 10; and a handful of Maryland cases.

As we understand the argument, the Hudson Appellants ask us to create a common law rule to the effect that the practice of councilmanic courtesy is improper in quasi-judicial zoning proceedings before the City Council and to find not only that it occurred in this case, but also that it would inevitably occur again on remand. We decline to do so. As an initial matter, we agree with the circuit court that "councilmanic courtesy in its purest form" likely is inconsistent with a Councilmember's obligation in a quasi-judicial proceeding to weigh evidence and decide the questions presented impartially.[18] And we agree with the

[18] From among the authorities that the Hudson Appellants cite, *Regan v. State Bd. of Chiropractic Examiners*, comes closest to supporting the principle that "councilmanic courtesy" is improper in quasi-judicial proceedings, although it does not stand for such a rule. 355 Md. 397, 408–09 (1999). Instead, *Regan* involved the question of whether members of an administrative agency who perform quasi-judicial functions should recuse themselves. *Id.* at 410. The *Regan* court stated that "[w]e shall assume, for purposes of this case, that the 'appearance of impropriety' standard set forth in our cases involving judges and some others is applicable generally to the participation of

circuit court as well that councilmanic courtesy may have been a contributing factor in the decision of one or more Councilmembers to vote in favor of the PUD Ordinance. But in the end, the circuit court declined to decide the merits of this issue, explaining that "[b]ecause the Court is reversing the decision on other grounds, the Court declines to decide in isolation whether this record requires reversal on the ground that the Committee's decision was improperly affected by councilmanic courtesy."

We likewise decline to decide the merits of the issue. The only question the Hudson Appellants raise before us is a narrow one: whether the circuit court erred in remanding the case to the City Council due to the purported role that councilmanic courtesy will inevitably play upon remand. Even if we assume that some measure of councilmanic courtesy played some role in the initial decision-making regarding the PUD Bill, and that the practice of pure councilmanic courtesy in a quasi-judicial decision-making process is improper, we find that the Hudson Appellants have not established that remand would be futile because we cannot assume councilmanic courtesy would taint the proceedings on remand. The Councilmembers were elected to make decisions, and in this quasi-judicial context to evaluate the PUD Application against an appropriate record and the correct standard. The Councilmembers are entitled to take the full range of issues into account when making their decisions, but each needs to reach their own decision based on the record and the law; if they don't, that failure can be addressed on judicial review.

members of Maryland administrative agencies performing quasi-judicial or adjudicatory functions . . . ." *Id.*

B. The City Council's Errors Of Law.

Next, we turn to the question of whether the City Council erred in its application of the law. In reviewing the final decision of an administrative agency, the capacity in which the Council acted here,[19] we look through the circuit court's decision and evaluate the decision of the agency directly. *WV DIA Westminster, LLC v. Mayor & Common Council of Westminster*, 462 Md. 369, 395 (2019) (*citing Kenwood Gardens Condos., Inc. v. Whalen Props., LLC*, 449 Md. 313, 324 (2016)). In reviewing the agency's decision, our role is the same as that of the circuit court, and we apply the same standard of review, which "'is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Id.* (*quoting Kenwood Gardens*, 449 Md. at 324–25). "[W]e afford deference to an agency's interpretation of a statute it administers, but 'we owe no deference to an agency's erroneous conclusions of law.'" *Shaari Tfiloh Congregation v. Mayor & City Council of Balt.*, 237 Md. App. 102, 107 (2018) (*quoting Manekin Constr., Inc. v. Md. Dep't of Gen. Servs.*, 233 Md. App. 156, 172 (2017)).

We conclude that the City Council made two errors of law in enacting the PUD

[19] Section 10-501(a)(2) of the Land Use Article ("LU") provides for judicial review of "zoning action[s]" taken by the City Council of Baltimore. Md. Code (2012). A request for judicial review of the City Council's "zoning action" may be made in the circuit court, *id.*, and is to be conducted in accordance with Title 7, Chapter 200 of the Maryland Rules, which govern judicial review of administrative agency decisions. LU § 10-501(b).

Ordinance. *First*, the Council erred in accepting the Planning and Law Departments' interpretation of § 2-203(k) to mean that the filing of a PUD application before June 5, 2017 "vested" the Developer's right to build an eighty-foot building, as permitted by the old code. *Second*, the Council erred in failing to make the comparison required by the criteria for evaluating PUD applications as set forth in the old zoning code at § 9-112 and § 14-204. Put another way, the Council failed to compare what the PUD was proposing to do with what otherwise would be allowed by the applicable lot-by-lot zoning regulations, *i.e.*, those set forth in *new* zoning code, TransForm Baltimore, which included the thirty-five foot height limitation.

Just as the City Council failed to make specific findings of fact, it also failed to make explicit conclusions of law. And so just as the circuit court, we can only review the City Council's actions based on the assumption that the Council, through the Land Use and Planning Committee, "adopt[ed] wholesale the conclusions contained in the Planning Department's report." Among those conclusions was the assumption that under § 2-203(k)(1) of the new zoning code, the Developer's filing a PUD application before June 5, 2017 "vested" in the Developer a right to build a structure with the more generous height restrictions of the old zoning code. The City Law Department reached the same conclusion according to the letter to the City Council and the testimony of a Law Department representative at the June 7 Committee hearing. The parties do not dispute that the City Council's enactment of the PUD Ordinance was consistent with that legal premise. We conclude, then, that the City Council made these two legal errors—misinterpreting § 2-203

and failing to engage in the comparative PUD analysis required by law—because its passage of the PUD Ordinance depended upon its implicit acceptance of the erroneous premise that the PUD application "vested" the Developer's right to build an eighty-foot building.

1. The Circuit Court's Legal Analysis

As we note above, we agree with the circuit court that on remand, the City Council must evaluate the PUD application under the standard that is set forth in the *old* code in § 9-112 and § 14-204, which, as applied, reference the zoning requirements now in effect, *i.e.*, those contained in the *new* code. Although the standard of review requires us to look through the circuit court's decision, the parties have framed their arguments here around it. And we agree with the circuit court's conclusions about how the different laws apply to this application.

In interpreting a statute, including a local zoning ordinance, we attempt to ascertain the intent of the legislative body, in this case the City Council. *Marzullo v. Kahl*, 366 Md. 158, 175 (2001); *Eastern Outdoor Advertising Co. v. Mayor and City Council of Baltimore*, 128 Md. App. 494, 519 (1999). "We assume that the legislature's intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the [legislative body]." *Blackstone v. Sharma*, 461 Md. 87, 113 (2018) (*quoting Phillips v. State*, 451 Md. 180, 196 (2017)). But we do not "confine strictly our interpretation of a statute's plain language to the isolated section alone," *Johnson v. State*, 467 Md. 362, 372 (2020) (*quoting Wash. Gas Light Co.*

v. Md. Pub. Serv. Comm'n, 460 Md. 667, 685 (2018))—we read the statute as a coherent whole and in context:

> We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope.

Id. (*quoting State v. Johnson*, 415 Md. 413, 421–22 (2010)). In addition, we avoid interpretations that lead to illogical or absurd results, even where the legislation at issue is not necessarily identified as ambiguous. *See Goshen Run Homeowners Assoc., Inc. v. Cisneros*, 467 Md. 74, 109 (2020).

We begin by reproducing § 2-203 of the new code in substantial part because subsection (k) must be interpreted in the context of how the new zoning code addresses the transition of zoning mechanisms other than PUD applications:

> (a) *In general.*
>
> In determining the applicability of this Code to structures or uses previously governed under other zoning regulations, the following rules apply.
>
> ***
>
> (h) *Previously established planned unit development*.
>
> For planned unit developments established before June 5, 2017, transition rules are set forth in § 13-102 {"Transition rules"} of this Code.
>
> (i) *Previously issued building permits*.
>
> If a building permit for a structure was issued before June 5, 2017, or before the effective date of any relevant amendment to this Code and if substantial construction has occurred within 180 days of the issuance of that permit, the structure may be completed in accordance with the plans on the basis of which the building permit was issued.

> (j) *Previously granted variances and conditional uses*.
>
> (1) All variances and conditional uses granted before June 5, 2017, or before the effective date of any relevant amendment to this Code remain effective, and the recipient of the variance and conditional use may proceed to develop the property in accordance with the approved plans.
>
> (2) However, if the recipient fails to act timely on the variance or conditional use, as required by § 5-309 {"Expiration of approval"} of this Code, the provisions of this Code govern and the approval is invalid.
>
> (3) Any subsequent change to a conditional use, including any addition, expansion, relocation, or structural alteration, is subject to the procedures and requirements imposed by this Code on conditional uses.
>
> (k) *Pending Applications*.
>
> (1) An application that has been submitted and considered complete before June 5, 2017, or before the effective date of any relevant amendment to this Code is governed by the Code provisions in effect when the application was submitted.
>
> (2) A new application submitted after June 5, 2017, or after the effective date of any relevant amendment to this Code is governed by the Code provisions in effect when the application was submitted.
>
> (3) If a pending application is modified after its submittal, the Zoning Administrator must review the application to determine if the proposed modifications constitute a new application. If the Zoning Administrator determines that the modifications constitute a new application, the application must be resubmitted under the Code provisions then in effect at the time of resubmittal.

TransForm Baltimore § 2-203.

Just as it wasn't necessary for us to duplicate the circuit court's detailed evidentiary discussion, we similarly can outline how the court construed and applied § 2-203:

- *First*, on pages 56 through 61 of its memorandum opinion, the circuit court determined that § 2-203(k)—

which refers to "applications" without specifying any particular type of application—does apply to PUD applications. The court reasoned that the logical structure of § 2-203 supports that interpretation, and that interpreting it otherwise would lead to the absurd result of the new code leaving a gap for determining the law applicable to filed-but-still-pending PUD applications as of June 5, 2017.

- *Second*, on pages 61 through 71, the circuit court applied § 2-203(k)(1) to this case. As an initial matter, it concluded that the record supported that the PUD application was "complete" before June 5, 2017, as required by subsection (k)(1). While acknowledging that the initial PUD submission in March was not complete, the court concluded that the record supported that the application was complete as of June 2, 2017, when the Developer submitted its revised plan and materials.

  The court went on to hold that evaluation of the PUD application "is governed by the Code provisions in effect when the application was submitted," *i.e.*, by the standards for evaluating PUD applications as set forth in § 9-112 and § 14-204 of the old code. The court framed the issue around the undisputed fact that the Developer had not filed a building permit application before June 5, 2017. It concluded, on page 65, that consequently "the Developer's *right* to erect a structure based on the former Zoning Code parameters expired on June 5, 2017 . . . ."

- *Third*, having concluded that evaluation of the PUD application is governed by § 9-112 and § 14-204 of the old code, the circuit court turned to examining those sections on pages 66 to 71, and further on pages 106 through 117. The court concluded that they require the City Council to compare the features of the proposed PUD to what would be permitted on the Property "by right." And what is permitted on the Property by right is restricted by the density and bulk regulations—including building height—that apply to the Property under TransForm Baltimore.

- *Fourth*, the circuit court went on to explain, on page

> 116, the correct legal analysis that the City Council should undertake on remand: "The Committee's comparison should have been between the proposed eighty-foot building with 148 units and the available 'by right' configuration under TransForm Baltimore – up to 197 units in one or more structures not exceeding a height of thirty-five feet."

The City and the Developer raise various arguments challenging the circuit court's analysis and conclusions and argue that the City Council got it right. But, as we explain below, we see no error in the circuit court's analysis and agree with its conclusion that the City Council erred as a matter of law.

We address *first* the arguments raised by the City and the Developer, and *second*, those raised by the Cochranes, who also challenge the City Council's application of the law.

2. The City's and the Developer's Arguments

First, the City and the Developer argue that on remand, the City Council should apply the old code only. Their primary argument is that the plain language of new code § 2-203(k)(1) directs that an application filed before June 5, 2017 is to be governed by the "Code provisions in effect" when it was submitted and not by code provisions scheduled to come into effect into the future. The City and the Developer argue that accordingly, the bulk regulations—including height restrictions—of the *old* zoning code govern the project.

At first glance, the City and Developer's argument sounds persuasive—it is plausible that the City Council intended to draft the transition rules with a "clean break" between projects governed by the old code only versus those governed by the new code

only. But we agree with the circuit court that when § 2-203(k) is read in context, it becomes apparent that that is not the case. This is a PUD application, and the PUD criteria in effect at the time the application was filed—§ 9-112 and § 14-204 of the old code—apply. Sections 9-112 and 14-204, in turn, require a comparative analysis between what the PUD proposes and what the applicable zoning allows. And after June 5, 2017, the applicable zoning restrictions and regulations of TransForm Baltimore applied to the project.

The City and the Developer resist that interpretation. They argue that once approved, the PUD Ordinance superseded whatever the applicable zoning might have been—that is, the applicable zoning is not that of TransForm Baltimore but is instead that of the PUD Ordinance, citing provisions in both the old and the new zoning codes. The City cites § 13-305(e) of the new code, which provides that "the use of the land and the construction, modification, or alteration of any structures within the planned unit development are governed by the approved final development plan rather than by the provisions of this Code." Therefore, the City concludes, "[h]aving already been approved under the provisions of the former zoning code, as §2-203(k) of the current zoning code directs, the PUD itself would thereafter constitute the applicable zoning for the property and govern what the owner could build." In addition to citing the same section upon which the City relies, the Developer also cites § 9-116 of the old code, which provides that "the Zoning Administrator must delineate and designate approved Planned Unit Developments on the official zoning maps," and § 9-123, which provides that "the basic building height limitations for the underlying district may be increased to the extent specifically provided

in the approved Development Plan." The Developer argues under those sections, a PUD "supersedes the standard zoning."

But that theory puts the cart before the horse. A PUD, once approved, creates an alternative to the default zoning, but only after it's approved. The approval depends on a comparison between what the PUD application proposes and what would otherwise be allowed under the applicable zoning regulations. The City and the Developer did not identify, and we did not find, anywhere in the record where the City Council made such a comparison. And, as explained above, we agree with the circuit court that the proper comparison was *not* between what the PUD proposed and what would have been allowed under the *old* code, but instead was what the PUD proposed and what is now allowed under the *new* code.

The City and the Developer also argue that the circuit court's interpretation of the phrase "basic regulations for the underlying district" in § 9-112(b) was erroneous. The Developer asserts that that phrase is "self-referential to the basic regulations under the Old Zoning Code." The City similarly argues that the circuit court erroneously read in the word "existing" before the term "underlying district." We disagree. It makes more sense to read the PUD criteria provisions (§ 9-112 of the old code) as referring to regulations in effect at the time the building permit application would be filed, *i.e.*, the regulations under the new zoning code.

Finally, the City and the Developer take issue with the circuit court's references to *Board of Cty. Comm'rs of Calvert Cty. v. Pritchard*, 312 Md. 522, 524 (1988) and the

common law vested rights doctrine. In *Pritchard*, as part of a comprehensive rezoning, Calvert County reclassified "commercial" property as "rural commercial," a new zoning classification. *Id.* The county's transition rule provided that undeveloped properties with an *approved* site plan within two years of the adoption of the ordinance could retain the old "commercial" zoning classification. *Id.* at 525. There would then be an additional two years to complete substantial construction of the buildings. *Id.* The owners of the property at issue submitted for review plans for development of their property right before the expiration of the initial two-year period, and consequently failed to obtain approval of their site plan by the two-year deadline. *Id.* at 525–26. The Court of Appeals held that, under the plain language of the transition rule, the owners' failure to timely file the plans triggered reclassification of the zone. *Id.* at 530–31. The owners argued that their procedural due process rights were violated. *Id.* In rejecting that argument, the Court observed that the owners were on notice that their property would be downzoned absent an *approved* site plan, and that the required review by numerous agencies would take time. *Id.* Therefore, the Court observed, "prudence dictates that one who owned undeveloped rural commercial land as of [the date the ordinance was passed] would inquire of the appropriate Calvert County officials as to how far in advance of the automatic downzoning a site plan for a specific type of project should be submitted in order to obtain approval within the two-year period." *Id.* at 532. On page 64 of its memorandum opinion, the circuit court quoted that statement in support of its analysis concerning the Developer's failure to file a building permit application before June 5, 2017.

In the context of the same discussion, the circuit court also referenced "ordinary vested right principles" in observing that, had the Developer filed a complete building permit application before June 5, 2017, then under such principles, the project would preserve the status of being governed by the former zoning code "as long as the project continued at a reasonable pace toward completion" (*citing Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 641 (2015)). Under the vested rights doctrine, "rights to continue construction after a change in the zoning law vest when (1) the work done is recognizable by a 'reasonable member of the public,' and (2) construction commenced pursuant to a building permit for a use then permitted under the zoning law." *Sizemore*, 225 Md. App. at 648 (*quoting Prince George's Cty., Md. v. Sunrise Development Ltd. P'ship*, 330 Md. 297, 314 (1993)).

We agree with the City and the Developer that neither *Pritchard* nor the common law vested rights doctrine is on point. But that doesn't matter: neither *Pritchard* nor the vested rights doctrine was the basis for the circuit court's decision anyway. The circuit court cited *Pritchard* to provide perspective for TransForm Baltimore's six-month grace period and to support its inference that "the Developer knew that fundamental zoning changes were coming to Baltimore even before TransForm Baltimore was finally adopted." And the circuit court referenced the common law vested rights doctrine to illustrate the significance of the filing of a building permit application in another context—in cases involving the question of whether an owner has vested her right to build under former zoning rules *when a building permit has been filed*. Here, no building permit was filed, so

the question is whether the transition provision allowed the Developer to "vest" its right to build an eighty-foot building through the filing of a PUD application. And that question can be answered only by re-framing it: the PUD application did not trigger the Developer's right to build an eighty-foot building, but instead triggered a process by which the City Council was required to compare what was proposed to what would have been allowed by the applicable zoning regulations—again, in this instance, against TransForm Baltimore. The City Council, based on the erroneous recommendations of the Planning and Law Departments, failed to engage in that comparison. Those failures are where the City Council misconstrued the law, and they form the basis for both the circuit court's view and ours that the PUD Ordinance must be vacated and the case remanded.

3. The Cochranes' Arguments

We turn, *second*, to the Cochranes' arguments. As we observed above in connection with the remand question, the Cochranes argue that the City Council erred in failing to apply the new code only. But they also maintain (in their reply brief) that, if the case is remanded, the City Council should apply the law as directed by the circuit court. To the extent the Cochranes take the position that the new code only applies, on the ground that New Code § 2-203(k) does not apply to PUD applications at all, we disagree. Under the structure of § 2-203, subsection (k) applies to PUD applications, and reading that section to exclude PUD applications would result in the absurdity of leaving a gap in the statute for the transition of PUD applications that were pending as of June 5, 2017.

To the extent the Cochranes argue in the alternative that § 2-203(k) applies to PUD

applications but does not apply here because the Developer's PUD application did not meet the "completeness" requirement of § 2-203(k)(1), we agree with the circuit court's conclusion that the application was complete before June 5, 2017. Put another way, to the extent that the City Council made an implicit finding that the application was complete for the purpose of meeting that requirement under New Code § 2-203(k)(1), substantial evidence supports that finding.

The Cochranes argue that there were certain covenants missing from the Developer's initial submission, specifically (1) the existing restrictive covenants preventing access to St. George's Road and Cliffhurst Road, each of which they assert has been in existence since 1963 (the "Albert" and "Brown" covenants), and (2) the proposed covenants concerning forest conservation easements on the R-1 portion of the Property. But they do not dispute that the covenants concerning St. George's Road and Cliffhurst Road were submitted to the City Council as part of the June 2, 2017 submission. Instead, they argue that (a) all covenants were required to have been submitted with the original application (*i.e.*, before the proposed PUD was filed in April) and (b) in any event, no satisfactory document concerning the forest conservation easements was ever produced, and that the June 2 submission is therefore also incomplete. But there is no dispute as to what was included in the PUD application as of June 2, 2017, or that the application as of that date included the restrictive covenants concerning ingress and egress referred to as the "Albert" and "Brown" covenants and the indications on the proposed landscape plan that the R-1 portion of the Property would be subject to a forest conservation easement.

The Cochranes also identify no legal requirement that the PUD submission be complete at the time of the Planning Department's review. They take issue with the *form* of the forest conservation easement and, in their Reply, raise certain authorities that they assert govern the establishment of forest conservation easements. But as the City points out in its reply, the Cochranes failed to preserve that argument because they did not raise it before the administrative agency, and they raise it for the first time on appeal in their reply. *See Halici v. City of Gaithersburg*, 180 Md. App. 238, 254 (2008); *McIntyre v. State*, 168 Md. App. 504, 532 (2006). And even if the Cochranes are right that the PUD Application improperly omitted the proposed forest conservations easements, they do not explain why that would have been necessary given that the R-1 portion of the Property was taken out of the PUD submission.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANTS/CROSS-APPELLEES AND APPELLEES/CROSS-APPELLANTS TO SPLIT COSTS.