UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2495

September Term, 2013

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BACK RIVER, LLC, ET AL.

v.

BALTIMORE COUNTY,
MARYLAND, ET AL.

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Zarnoch,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: December 30, 2014

This appeal is the second appeal before this Court concerning the retention of a wireless telecommunications tower in Baltimore County.

In 2002, landowner Back River LLC and its tenant Sprint PCS (hereinafter collectively referred to as "Sprint")[1] constructed a cell tower on a commercially-zoned property. In an administrative proceeding before the County Board of Appeals, Sprint requested variances to permit noncompliance with a local zoning ordinance that required the tower to be "set back at least 200 feet from any other owner's residential property line." Baltimore County Zoning Regulations § 426.6.A.1. The Board rejected that request, a circuit court affirmed the decision, and this Court ultimately affirmed the judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

In 2012, Sprint filed a petition for special hearing, asserting a new legal theory under which the existing tower was actually in compliance with the setback regulations. An administrative law judge ruled otherwise and also held that the new petition was barred under the doctrine of res judicata. Sprint appealed to the Board of Appeals, which dismissed the appeal on res judicata grounds. The circuit court affirmed that decision. Because the Board's determination was legally correct, we also affirm.

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[1] During the course of this series of zoning cases, Sprint merged with Nextel Communications in 2005 to form Sprint Nextel Corporation. *See, e.g.*, *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1256 (D. Kan. 2006).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The 1998 Zoning Regulations

In 1998, the County Council of Baltimore County enacted Bill 30-1998 ("An Act concerning Zoning – Wireless Telecommunications Towers and Antennas"). The act amended the Baltimore County Zoning Regulations ("BCZR") by establishing guidelines for the regulation of certain towers and antennas. Part of the express intent of the County Council was to ensure that any new wireless telecommunications towers would be located in commercial zones and would be "[l]ocated and designed to minimize [] visibility from residential and transitional zones." BCZR § 426.2.B.

To accomplish that purpose, the regulations imposed certain "setback" requirements[2] that restricted the placement of wireless telecommunications towers:

> **§ 426.6 Requirements for wireless communications towers.**
>
> A. Setbacks
>
> > 1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner's residential property line.
> >
> > 2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
> >
> > 3. If a tower is located in a medium or high intensity commercial zone the tower shall be set back from an adjoining

[2] As used in the BCZR, the term "setback" is defined as the "required minimum horizontal distance between the building line . . . and the related front, side or rear property line." BCZR § 101.1.

> property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line.
>
> 4. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

The Act also authorized the Zoning Commissioner or the County Board of Appeals to "grant a variance to a height or area requirement, including any setback, for a tower or structure housing equipment for a tower[,]" in accordance with the overall standards for the granting of variances. BCZR § 426.11. The Commissioner and the Board are empowered to grant variances "only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship." BCZR § 307.1.

**B. Sprint's Petition for Variances**

As of 2001, the property known as 810 Back River Neck Road in eastern Baltimore County was owned by Back River LLC. The surrounding area is heavily wooded. The property is located in close proximity to tributaries of the Chesapeake Bay. Most of the neighborhood falls within the Chesapeake Bay Critical Area and, accordingly is subject to significant restrictions from environmental regulations. *See generally* Md. Code (2000, 2012 Repl. Vol.), Natural Resources Art., §§ 8-1801 *et seq.*; Code of Maryland Regulations ("COMAR") 27.01; Baltimore County Code §§ 33-2-101 *et seq*.

In 2001, the parcel covered roughly 4.3 acres, in the shape of a rectangle about 223 feet in width and about 768 feet in length. A one-story commercial building stood at the east end of the property, with a retail storefront facing Back River Neck Road. The area behind that building was used for storage and other commercial purposes. The property was zoned as "Manufacturing, Light" or "M.L.," a medium-intensity, commercial classification that permits certain industrial, retail, transportation, storage, and other related uses. *See* BCZR § 253.1. Operating a wireless telecommunications tower on M.L. property is permitted by right, subject to the setback requirements. *See* BCZR §§ 253.1.B.23, 426.5.D.

Back River LLC leased part of the property to Sprint PCS, a telecommunications provider. Sprint PCS had selected the property as a potential location for a cell tower to fill a gap in its cellular coverage network. The two companies planned to construct a 115-foot tower near the west end of the property. The three adjoining properties to the north, west, and south, were each zoned under a residential zoning classification "R.C. 20," meaning "Resource Conservation – Critical Area." *See* BCZR § 1A05.[3]

In October 2001, Back River LLC and Sprint PCS (collectively "Sprint") filed a petition seeking a number of variances to accommodate construction of the proposed tower. Specifically, Sprint sought relief from BCZR § 426.6.A.3, to permit setbacks for the

[3] In general, permitted uses of R.C. 20 property include residential uses as well as natural resources, agricultural, recreational, institutional, and other public or quasi-public uses. *See* BCZR § 1A05.2. A special exception is required to use R.C. 20 property for a wireless telecommunications tower. *See* BCZR §§ 1A05.2.C.8, 426.5.D.

proposed tower of 148 feet from the northern property line, 75 feet from the western property line, and 75 feet from the southern property line, each in lieu of the required 200 feet "from the residential zone line." In addition, Sprint requested variances to permit setbacks for equipment cabinets supporting the proposed tower, of 40 feet each from the west and south property lines, in lieu of the 125 feet for those structures required by BCZR § 426.6.A.4.

After a hearing, the Zoning Commissioner for Baltimore County granted the requested variances. The Commissioner reasoned that compliance with the zoning regulations would not be possible on the site. In his January 4, 2002, order granting the variances, he wrote: "Although the property contains in excess of 4.0 acres in area, it is but 223 feet wide. Section 426.6 of the B.C.Z.R. requires a 200-foot setback from the nearest property line to the tower. In view of the width of the property, this setback cannot be maintained." Nonetheless, the Commissioner reasoned that the narrowness of the property made compliance uniquely difficult, and thus he concluded that variances from the setback requirements were appropriate.

The Office of People's Counsel filed a timely appeal from that decision.

### C. The 2002 Amendment to the Zoning Regulations

In March 2002, while the appeal of the variance decision was pending, the County Council enacted Bill 17-2002 ("An Act concerning Wireless Telecommunications Towers – Setbacks"). The stated purpose of the act was to "revis[e] the setback requirements for wireless telecommunications towers" by repealing and reenacting § 426.6.A of the BCZR.

As amended, the regulation provided:

> **§ 426.6 Setback requirements for wireless telecommunications towers.**
>
> A. Setbacks
>
> 1. A tower shall be set back at least 200 feet from any other owner's residential property line.
>
> 2. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

The amendment took effect on May 5, 2002. In effect, the amendment simplified the setback requirements by combining subsections (1) through (3) into a single subsection. Those previous subsections had drawn distinctions between towers that were located in residential zones, towers that were located in transitional zones, and towers that were located in medium or high-intensity commercial zones. In each instance, however, the previous subsections permitted the tower if it were set back at least 200 feet from either a "residential property line" (in the case of a tower in a residential zone) or a "residential zone line" (in the case of a tower outside of a residential zone). Perhaps because the laborious distinctions were largely immaterial, the 2002 amendment replaced the three subsections with a single, new subsection that required towers, wherever they were located, to be set back at least 200 feet from a "residential property line."

On May 7, 2002, two days after the adoption of the amended setback requirements, the Baltimore County Department of Environmental Protection and Resource Management requested that Sprint change its site plan to minimize its environmental impact on nearby

bodies of water. Subsequently, Sprint revised its site plan, by relocating the proposed tower 60 feet to the east. Sprint submitted a revised variance request to the Board of Appeals, referring to the new setback regulations as they had been amended and renumbered by Bill 17-2002. With the administrative appeal still pending, Sprint then constructed the tower at its own risk.

### D. Reversal of Order Granting Variances ("*Back River I*")

The Baltimore County Board of Appeals conducted a de novo hearing on Sprint's variance petition on September 25, 2002, and January 21, 2003. The Board issued an opinion on May 14, 2003, denying the requested variances. The Board rejected Sprint's arguments that "special circumstances or conditions exist[ed] that [were] peculiar to the land" (BCZR § 307.1) and that the property's shape made it "unique" under the meaning established by *Cromwell v. Ward*, 102 Md. App. 691 (1995). The Board specified that it was "not denying Sprint the right to erect a telecommunications tower in the . . . area," but "only saying that there may be a more appropriate piece of property where the tower could be erected and not require the variances that would be necessary on the instant property."

Subsequently, Sprint petitioned for judicial review of the Board's decision in the Circuit Court for Baltimore County. The circuit court affirmed the decision on February 5, 2004. Sprint appealed to the Court of Special Appeals, and this Court affirmed that judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

Both the circuit court and this Court held that the Board's conclusion – namely, that the property possessed no "unique" characteristics that would justify variance relief – was supported by substantial evidence. Judge Adkins explained: "[I]f we were to hold that a variance must be granted, simply because a property cannot accommodate one otherwise permitted use without an area variance, we would be permitting 'the exception to swallow the rule.'" *Sprint PCS*, slip op. at 30-31.

**D. Subsequent Developments**

Despite the denial of Sprint's request for a variance, the tower remained on the property over the years that followed while the owners attempted to cure the setback deficiencies by acquiring land from the adjacent properties. In February 2008, Back River LLC purchased portions of the properties to the north and to west of the tower. With the additional acreage (approximately 0.6 additional acres), the tower is now located more than 200 feet from the northern property line and more than 200 feet from the western property line. However, Back River LLC was unable to purchase any of the land to the south of the tower. The tower continues to stand approximately 75 feet from the southern property line.

In May 2008, Sprint filed a petition for special hearing to permit a transfer of the portions of the property zoned R.C. 20 (*i.e.*, the property that had been purchased from the two adjacent parcels) into the property zoned M.L.; the transfer, if approved, would have had the effect of incorporating the newly-acquired property into the commercially-zoned property, thereby moving the "residential property line" farther away from the tower. Sprint

also filed a petition for special exception to increase the height of the existing tower from 115 feet to 125 feet. At the parties' request, consideration of those petitions was postponed, and a hearing was never rescheduled.

In November 2008, the Baltimore County Department of Permits and Development Management issued a citation to Back River LLC "for violations under [BCZR] § 426.6.A.1, failure to provide and maintain [a] 200 ft. set back from another's residential property line[.]" In January 2009, the County's Code Enforcement Hearing Officer issued a civil penalty of $9,200.00 for the zoning violation, which Sprint paid.[4]

**E. Sprint's Amended Petition for Special Hearing ("*Back River II*")**

In May 2012, Sprint filed an amended petition for special hearing, in which Sprint requested additional relief: "To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations[.]"[5] Both the Office of People's Counsel and Baltimore County opposed the petition.

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[4] Findings of fact from the Code Enforcement Hearing Officer indicate that Back River LLC had reached an "agreement with family members [who owned the property to the south] to purchase [the] final piece of real estate needed to meet [the] set back requirement," but that the sale had not been finalized. The record here includes no indication that the sale and transfer were ever completed.

[5] Beginning with the 2012 amended petition and continuing through this appeal, Sprint has been represented by Lawrence E. Schmidt. Mr. Schmidt was the Zoning Commissioner whose ruling was reversed by the Board of Appeals in the 2002 decision that both the circuit court and this Court later upheld.

The hearing was conducted before the Office of Administrative Hearings for Baltimore County.[6] Sprint advanced the new theory that the location of the tower complied with BCZR § 426.6, as it had been amended in 2002 to require that a tower be "set back at least 200 feet from any other owner's residential property line." Sprint presented testimony that no residence was currently located on the residentially-zoned property 75 feet south of the tower. A witness for Sprint purported to opine that the zoning regulations require a 200-foot setback from an adjacent property line only if that property has actually been improved with a dwelling and is currently used as a residence.

In an opinion issued on August 2, 2012, the Administrative Law Judge denied Sprint's petition. The ALJ determined that the placement of the tower did not comply with the zoning regulations and also that the doctrine of res judicata barred Sprint from obtaining special hearing relief after the prior denial of its variance petition.

Sprint appealed the denial of its petition to the Board of Appeals. Baltimore County and the Office of People's Counsel jointly moved to dismiss the appeal on the grounds of res judicata. The Board of Appeals did not hear testimony, but instead accepted memoranda and considered oral arguments from the parties at a hearing on December 4, 2012. The Board

[6] In 2010, the County Council established the Office of Administrative Hearings, and authorized the administrative law judges of that Office to conduct zoning hearings and to exercise the powers formerly vested in the Zoning Commissioner. *See* Baltimore County Code §§ 3-12-101 *et seq*.

considered exhibits, including copies of the 2002 legislation and this Court's opinion in the prior variance case.

Sprint argued that it was not precluded from raising its claim, because (Sprint contended) it was advancing a legal theory (regarding the 2002 amendments) that had somehow not been available at the time of the administrative and judicial appeals from its variance petition from 2002 through 2005. Sprint's primary contention was that, in the prior proceedings, "neither the Board of Appeals, the Circuit Court, nor the Court of Special Appeals considered the impact of [the] change in law" that occurred while the prior administrative appeal was pending in 2002.

In an opinion and order dated April 19, 2013, the Board of Appeals concluded that res judicata barred Sprint's petition from bringing its petition for special hearing after the denial of the variance petition, because "the end result being [] sought as well as the underlying facts which are contained in both avenues of relief are the same[.]"[7] The Board further rejected Sprint's argument that a change of circumstances after the initial litigation justified an exception to the rule of res judicata.

After examining the 2002 amendment, the Board expressly rejected Sprint's argument that the current version of the law "bears little resemblance" to the law in effect at the time of the initial variance proceeding before the Zoning Commissioner. Although the 2002

[7] Although the Board's opinion noted that Back River LLC had received a code enforcement citation for violating the setback requirements of BCZR § 426.6.A.1, the Board's analysis focused only on the preclusive effect of the variance decisions.

amendment changed the setback requirement from 200 feet from the "residential zone line" in former § 426.6.A(3) to 200 feet from the "residential property line" in amended § 426.6.A(1), the Board reasoned that the change made no substantive difference:

> The terms 'property line' and 'zoning line' do refer to different things, but here the distinction is not relevant because the tower is not set back 200' from either the RC 20 "zone line" or the "property line" of the adjacent parcel. . . . [E]ven if the new version of the law were deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief no matter what label that request for relief has taken on.

Accordingly, the Board granted the County's motion to dismiss Sprint's appeal.

Sprint petitioned for judicial review of the Board's decision in the Circuit Court for Baltimore County. After another hearing, the circuit court issued an order on January 10, 2014, denying the petition for judicial review and affirming the decision of the Board of Appeals. Finally, Sprint filed a timely appeal of that judgment to this Court.

## SCOPE OF REVIEW

Sprint has submitted four questions for our review, which we now quote verbatim:

I. Did the Board properly apply the current setback requirements to the property at issue?

II. Did the Board err in dismissing Sprint's petition for special hearing as barred by res judicata, considering that the Board refused to hear evidence necessary to analyze whether Back River I and Back River II present different causes of action?

III. Does the Board's failure to conduct a de novo hearing and fully explain its reasons for its decision constitute reversible error?

IV. Is the circuit court's failure to issue a written decision reversible error pursuant to the Land Use Article of the Annotated Code Section 4-405?

The fourth question concerns an isolated procedural issue; the first three questions are closely interconnected.

The scope of our review of an agency's decision is defined by the record. "[I]n examining the record made below, we do not engage in an independent analysis of the evidence, . . . and we proceed from the premise that an agency's decision is prima facie correct and presumed valid[.]" *Montgomery Cnty. v. Butler*, 417 Md. 271, 284 (2010) (citations and quotation marks omitted). Ordinarily, "[o]ur role in reviewing the final decision of an administrative agency, such as the Board of Appeals, is 'limited to determining if 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.'" *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 122-23 (2011) (quoting *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)). "When reviewing the decision of a local zoning body, such as the Board, we evaluate directly the agency decision, and, in doing so, we apply the same standards of review as the circuit court[.]" *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore Cnty.*, 407 Md. 53, 77 (2008).

Judicial review of an agency action typically concerns the narrow question of whether or not the agency order can be sustained on the agency's findings and for the reasons stated by the agency. *See Armstrong v. Mayor & City Council of Baltimore*, 410 Md. 426, 443,

461-62 (2009) (quoting *Trinity Assembly*, 407 Md. at 77-78). In general, it is improper for the reviewing court to search the record for alternative grounds to sustain the agency's decision other than those reasons relied upon by the agency. *See Anselmo v. Mayor & City Council of Rockville*, 196 Md. App. 115, 128 (2010).

The Board summarized its conclusion as follows: "As this Board is not swayed by the Petitioners' argument that this case involves an exception to the doctrine of res judicata, and somehow involves the application of new law that would change the outcome of prior decisions in this matter, the Motion to Dismiss filed by Baltimore County and joined by People's Counsel is GRANTED." By its own terms, the decision currently under review is not a denial of special hearing relief, but a dismissal of Sprint's appeal on the grounds of res judicata.[8] When the Board interpreted BCZR § 426.6, it did so within the narrow context of rejecting Sprint's argument that a significant "change in law" had occurred after the original litigation. Accordingly, it would be inappropriate for this Court to conduct an unbridled examination of the zoning regulations outside of the res judicata issue.

In *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719 (2010), this Court considered the question of "[w]hether an administrative agency's determination of the applicability of the doctrine of *res judicata* should be assessed pursuant

[8] Sprint's brief evidently concedes as much, by correctly stating: "Although the Board analyzed the amendment of BCZR § 426.6 in its written opinion, its[] decision granting Baltimore County's Motion to Dismiss was based upon the application of the doctrine of *res judicata*." Appellants' Br. at 17.

to the substantial evidence standard of review[.]" *Id.* at 722. The *Seminary* case concerned the preclusive effect of the denial of a petition for special hearing (and alternatively for variances) on a subsequent petition to legitimize the same use on the same property. The appellant contended that an administrative ruling on res judicata was "a mixed question of law and fact" that required review for reasonableness under the substantial evidence test. *Id.* at 734.

Our opinion recognized that the default standard of review of an administrative agency's decision is narrow and highly deferential. *Id.* at 733. Nevertheless, we held that the issue of whether res judicata barred the second special hearing petition was a question of law and that it was appropriate to conduct a plenary, de novo review of the Board's legal conclusion on that issue. *Id.* at 734. In doing so, we also "reject[ed] the appellant's implied assertion that the agency was required to resolve any disputed factual issue in th[e] case in order to determine whether the doctrine of *res judicata* was applicable." *Id.* at 722-23.

Accordingly, we will consider de novo the following questions, which we consolidate and restate in this form:

I. Did the Board err in dismissing Sprint's appeal from the denial of Sprint's petition for special hearing as barred by res judicata?

II. Is the circuit court's failure to issue a written decision reversible error pursuant to Md. Code (2012), § 4-405 of the Land Use Article?

As explained below, the answer to both questions is, no. Because we determine that the Board's legal conclusion was correct and also that the circuit court was not required to

issue a written opinion, it is unnecessary to remand to either body to receive additional evidence or to provide more detailed reasoning.

## DISCUSSION

### I.

### A. The Doctrine of Res Judicata

"[I]t is crystal clear that a final judgment of a circuit court affirming a decision of an administrative agency . . . is entitled to full preclusive effect." *Esslinger v. Baltimore City*, 95 Md. App. 607, 621 (1993); *see also Stavely v. State Farm Mut. Auto. Ins. Co.*, 376 Md. 108, 116 (2003) (holding that, under principles of res judicata, earlier agency determination that is affirmed by Court of Special Appeals binds agency in later controversy between same parties).

A long and uninterrupted line of Maryland cases has established that a circuit court judgment affirming a decision by a local zoning body will bar a subsequent attempt to relitigate the matter, where there is only a slight distinction in the form of the second action. *See Fertitta v. Brown*, 252 Md. 594, 599 (1969) (prior determination that particular use of property violated zoning ordinance barred later action seeking declaratory relief to legitimize same use even if prior determination is unsound); *Alvey v. Hedin*, 243 Md. 334, 340 (1966) (appellants barred from second attempt to allege mistake in original zoning of land even though appellants were "attempting to get a different type of commercial classification than in the first case"); *Whittle v. Bd. of Zoning Appeals of Baltimore Cnty.*, 211 Md. 36, 48-49

(1956) (prior adverse ruling on permit application barred later permit application that attached additional conditions); *Bensel v. Mayor & City Council of Baltimore*, 203 Md. 506, 508-17 (1954) (denial of permit for nonconforming use barred subsequent action seeking to enjoin City from interfering with nonconforming use); *Mayor & City Council of Baltimore v. Linthicum*, 170 Md. 245, 249-50 (1936) (denial of prior application to allow proposed use of lot disposed of questions in subsequent application based on different theory); *see also Century I Condo. Ass'n, Inc. v. Plaza Condo. Joint Venture*, 64 Md. App. 107, 113-14 (1985) (earlier decision governing use exceptions acted as res judicata in later case involving building permit for same structure).

Generally, the doctrine of res judicata precludes a party from raising a claim in a second litigation "'if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.'" *Cochran v. Griffith Energy Servs., Inc.*, 426 Md. 134, 140 (2012) (quoting *R & D 2001, LLC v. Rice*, 402 Md. 648, 663 (2008)). Res judicata, or claim preclusion, "ensures that courts do not waste time adjudicating matters which have been decided or *could have been* decided fully and fairly." *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005) (emphasis in original). For this reason, the final judgment in a prior litigation will bind the parties even if a ruling in the original litigation is found later to be in error. *Powell v. Breslin*, 430 Md. 52, 64-65 (2013).

As the Court of Appeals has summarized, the doctrine of res judicata embodies three elements:

> (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

*Rice*, 402 Md. at 663.

In this case, Sprint concedes that the first and third elements are present: the parties to its special hearing petition are substantially identical to the parties to the original action, which concluded in a final judgment on the merits. Sprint argues only that the claim presented in its current action could not have been raised and determined in the prior litigation.

**B. Identity of Claims**

To determine whether a case involves the same claims that were or could have been decided in earlier litigation, Maryland has adopted the "transaction test," set forth in § 24 of the Restatement (Second) of Judgments. *See Kent Cnty. Bd. of Educ. v. Bilbrough*, 309 Md. 487, 499-500 (1987). "Under the transaction test, what factual grouping constitutes a 'transaction' and what groupings constitute a series of connected 'transactions' are to be determined 'pragmatically, giving weight to such considerations as whether facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or

usage.'" *Boyd v. Bowen*, 145 Md. App. 635, 656 (2002) (quoting *Bilbrough*, 309 Md. at 498). Under this approach, "if the two claims or theories are based upon the same set of facts and one would expect them to be tried together ordinarily, then a party must bring them simultaneously." *Norville*, 390 Md. at 109. The modern view is that the dimensions of a claim are measured in factual terms, "'regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the [litigant]; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.'" *Bilbrough*, 309 Md. at 497-98 (quoting Restatement (Second) of Judgments § 24, cmt. a).

Under that approach, we must conclude that the claim raised in Sprint's 2012 petition for special hearing ("[t]o confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations") is substantially identical to a claim that could have been raised and determined in the earlier litigation. When Sprint came before the Board in 2002, Sprint sought variances from the same setback regulations to permit retention of the same cell tower in the same location. The two petitions involve a single transaction: Sprint's attempt to secure permission from the local zoning bodies to retain a wireless telecommunications tower on the property.

Appellees in this case have pointed to no Maryland authority specifically holding that a property owner's petition seeking to confirm compliance with zoning regulations involves the "same claim," for res judicata purposes, as an earlier petition seeking variances from the

same zoning regulations. Nonetheless, that holding is compelled by the reasoning under comparable circumstances in three cases: *Jack v. Foster Branch Homeowners Ass'n No. 1, Inc.*, 53 Md. App. 325, 334 (1982), which reasoned that, under the transaction approach, a request for modification, reduction, or waiver of zoning regulations presents the same cause of action as an earlier petition for variance from the same zoning regulations; *Esslinger*, 95 Md. App. at 618, which adopted the transaction approach and held that claims for declaratory relief to allow a nonconforming use on a property presented the same claim as earlier zoning action seeking a permit for the same use; and *Seminary Galleria*, 192 Md. App. at 741-42, which held that even though a property owner's second special hearing petition involved a different zoning regulation from the regulation involved in the first, both petitions involved the same claim for approval of the same use.

In *Jack*, this Court considered the preclusive effect of a prior denial of a variance petition. The property owner in that case, Dr. Joseph Jack, operated a professional office at his residence, but did not furnish the off-street parking spaces required by a local zoning ordinance. *Jack*, 53 Md. App. at 327. Jack's application for variances was ultimately denied in a judgment of a circuit court. *Id.* at 330. A year later, Jack attempted to legitimize the use of his property through a different provision of the local zoning ordinance, by applying for a modification, reduction, or waiver of the parking requirements. *Id.*

On review of a circuit court's denial of the second application on grounds of res judicata, this Court reasoned:

> [I]f the transactional analysis espoused by the American Law Institute is applied, *Restatements (Second) of Judgments*, § 24 (1982), the appellees would prevail. Here, the "transactions" would be attempts to secure permission to operate with less than eight off-street parking spaces, and would be the same in each proceeding.

*Jack*, 53 Md. App. at 334. Nevertheless, we noted that the rule for determining the identity of claims was, at that time, the "same evidence" test. *Id.* (citing *MPC, Inc. v. Kenny*, 279 Md. 29 (1977)). Because this Court reasoned that the evidence necessary to sustain the variance action was not identical to the evidence necessary to support the second action, we held that res judicata did not bar Jack's claims. *Id.* at 334-36.

A few years later, however, the Court of Appeals endorsed the transactional approach when it decided *Bilbrough*. In adopting § 24 of the Restatement (Second) of Judgments, the Court expressed concern that "sole reliance on the same evidence or required evidence analysis to determine if the same claim is involved in two actions may improperly narrow the scope of a 'claim' in the preclusion context." *Id.* at 494.

Accordingly, the analysis evolved when this Court decided *Esslinger*. The property owner in that case, Donald Esslinger installed a free-standing satellite dish on his property. *Esslinger*, 95 Md. App. at 610. The City's Zoning Board denied three separate applications for a special exception to permit him to erect or retain the satellite dish. The denial of the first application was ultimately affirmed by a circuit court, and the denial of the last application was ultimately affirmed by this Court. *Id.* at 610-12. Later, Esslinger instituted an action pursuant to 42 U.S.C. § 1983, in which he alleged that the City's refusal to allow

him to erect and maintain a satellite receiving dish violated various constitutional rights. *Id.* at 613-14.

Much like the property owner in *Jack*, Esslinger argued that res judicata did not apply to the second action under the "same evidence" test. On review, however, we rejected that position, because the Court of Appeals had since approved of the transactional approach. *See Esslinger*, 95 Md. App. at 617 (citing *Bilbrough*, 309 Md. at 494, 498). We explained:

> Under the "transaction" approach, it is clear that the claim in the 1987 zoning case is identical to the present claim. Indeed, it is undisputed that both arise from precisely the same transaction, *i.e.*, Esslinger's attempt to place a free-standing satellite dish on his property. The facts of the two actions are thus related in "space, origin and motivation." Both involve Esslinger's request for and the Zoning Board's denial of a conditional use permit to allow the same satellite dish on the same property. The only difference between the 1987 zoning action and the 1992 civil rights action is that the latter protests a 1989 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *erect* the dish and the former involved a 1986 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *retain* the same dish. Maryland courts have long recognized that such small differences in the posture of the zoning request do not prevent application of *res judicata*.

*Esslinger*, 95 Md. App. at 618-19 (footnote omitted).

Accordingly, we held that res judicata barred Esslinger's claims for declaratory and injunctive relief, because he could have asserted those claims as the basis for overturning the original zoning decision. *Id.* at 620-24.

This Court further explained that "[b]oth § 24 of the Restatement and the Court of Appeals in approving the transactional test . . . make it clear that '[e]quating claim with

transaction' is 'justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined.'" *Id.* at 619 (quoting *Bilbrough*, 309 Md. at 499). We reasoned that Esslinger could have obtained declaratory and injunctive relief from the circuit court in the earlier litigation, but that he could not have joined a claim for monetary damages to a petition for judicial review of the original zoning actions. *Esslinger*, 95 Md. App. at 623-24. "Accordingly, although Esslinger's claims for injunctive and declaratory relief [were] barred by *res judicata*, his claims for damages [were] not barred by *res judicata* since the latter could not have been asserted in the circuit court action reviewing the initial zoning case." *Id.* at 624.

In the instant case, the claim raised in Sprint's petition is not a claim for monetary relief, but one for relief of a declaratory nature. *See Antwerpen v. Baltimore Cnty.*, 163 Md. App. 194, 200 (2005) ("[a] request for special hearing is, in legal effect, a request for a declaratory judgment"). Under the reasoning of *Esslinger*, Sprint possessed sufficient procedural means to pursue a declaratory remedy when the circuit court reviewed the earlier zoning decision. Thus, res judicata bars the attempt to seek declaratory relief upon the same legal theory that a party could have asserted during a circuit court's review of a prior zoning case. *See Esslinger*, 95 Md. App. at 624.

This Court's more recent opinion in *Seminary Galleria* fortifies the conclusion that the claims raised in Sprint's two petitions are identical for the purposes of res judicata. In

that case, the property owner, Seminary, created 14 new parking spaces in a residentially-zoned portion of its property, without obtaining a permit. *Seminary Galleria*, 192 Md. App. at 723. Seminary then sought retroactive approval of the construction of the parking spaces, by filing a petition for special hearing and alternatively for a variance. *Id.* at 724. The Board of Appeals entered a final order denying the first request, and then Seminary filed a slightly different petition. *Id.* at 726-27. Seminary attempted to differentiate the new petition by introducing a new legal theory: that another section of the BCZR actually required Seminary to furnish the additional parking and that Seminary should be allowed to meet those minimum parking requirements to the extent possible. *Id.* at 727. The Board of Appeals held that Seminary was not precluded from bringing the second petition, and then it approved the parking plan. *Id.* at 729-30.

On review, this Court disagreed with that decision and held that Seminary was precluded from raising the claim in its second petition. We first concluded that the Board's final order in the first petition was entitled to preclusive effect, noting that "[t]he issue of whether the 14 parking spaces could remain was actually litigated" in the first litigation, and "[t]he ruling was necessary to – indeed, the essence of – the Board's decision" in the first case. *Id.* at 736. Despite the slight distinctions in Seminary's two requests, we reasoned that, "[i]n both cases, Seminary's request for relief was the retroactive approval of the same 14 spaces it had constructed in the [residential] zone." *Id.* at 741. The dispositive issue was that, "[w]ith reasonable diligence, Seminary could have discovered and asserted in support

of the original [] filing" the same evidence and legal theory that it raised in its later filing. *Id.* at 741-42. In other words, "Seminary's failure to accurately and contemporaneously survey the Galleria in connection with its first application to approve the additional spaces [was] not a reason to consider a second application seeking the same relief." *Id.* at 742.[9]

Sprint nonetheless contends that res judicata is inapplicable here. In support of that position, Sprint advances a number of overlapping arguments that fall into two general categories: (1) that, as a factual matter, the 2002 amendment to the applicable zoning regulations *was not* considered at the time of the earlier variance proceedings; and (2) that, as a legal matter, Sprint *could not* have asserted its current theory to obtain relief at the earlier proceedings. Sprint's first argument involves an erroneous characterization of the record; the second argument involves an erroneous interpretation of the law.

### C. Prior Consideration of the Amended Regulation

During Sprint's original variance action, the Zoning Commissioner, the Baltimore County Board of Appeals, the Circuit Court for Baltimore County, and the Court of Special Appeals (in addition to each of the parties, including Sprint) all independently agreed that

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[9] The *Seminary* Court did not expressly apply either the "same evidence" test or the transactional approach. *See Seminary Galleria*, 192 Md. App. at 741. Instead, the Court focused on the availability of the evidence and legal theory during the earlier litigation. The Court reasoned that the result was controlled by prior case law that precludes successive zoning applications as a general matter in the absence of any substantial change in circumstances. *See id.* at 740 (citing *Alvey v. Hedin*, 243 Md. 334 (1966); *Chatham Corp. v. Beltram*, 243 Md. 138 (1966); *Woodlawn Area Citizens Ass'n v. Bd. of Cnty. Comm'rs for Prince George's Cnty.*, 241 Md. 187 (1966)).

the placement of the tower violated the existing zoning regulations. Each of these prior decisions "hinged on the presumption" (Appellants' Br. at 5) that the BCZR required that the tower be set back 200 feet from each of the three property lines to the north, west, and south. Sprint now posits that, under its new interpretation of the 2002 amendment, this presumption must have been mistaken.

The foundation of Sprint's position is Sprint's contention that "it is apparent that the Board of Appeals, the Circuit Court, and the Court of Special Appeals each failed to consider the impact of th[e] change in the law" that allegedly resulted from the 2002 amendment. Appellants' Br. at 9-10. Sprint suggests that those prior administrative and judicial determinations were reviewed under the language of the earlier, 1998 regulation that predated the 2002 amendment: "Given the absence of any specific language stating, 'the law has been amended since this case was instituted' or 'Bill 17-02 has been enacted'; it is apparent that this amendment to the law (and most importantly, its impact on this case) was never considered by any of the administrative and judicial bodies that considered Sprint's variance petition in *Back River I*." Appellants' Br. at 10.

This theory of the record is fundamental to Sprint's appeal. It is also incorrect.

To illustrate how and why Sprint's theory is incorrect, some facts bear repeating. At the 2001 hearing before the Zoning Commissioner, Sprint originally requested variances under the zoning regulations that had been enacted by the 1998 bill. In particular, Sprint requested variances from § 426.6.A.3, which had required that, "if the [commercially-zoned]

property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line"; and a variance from § 426.6.A.4, which had required "a structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line."

While an appeal was pending before the Board of Appeals, Baltimore County amended § 426.6.A.4. The amendment, which took effect on May 5, 2002, re-codified former subsections A.1, A.2., and A.3 into a single standard in a new subsection A.1: "A tower shall be set back at least 200 feet from any other owner's residential property line." The amendment also renumbered former subsection A.4 (concerning setbacks from the equipment structures supporting a tower) as current subsection A.2.

After the effective date of the 2002 amendment, Sprint relocated the proposed tower site an additional 60 feet from the western property line. Subsequently, Sprint submitted a memorandum to the Board of Appeals that included its revised variance requests. The very first page of Sprint's 2002 memorandum explained: "the Baltimore County Council adopted Bill 17-2002 which revised BCZR § 426 such that the references within BCZR § 426.6.A for setbacks, which are the subject of Sprint's Petition for Variance, have been re-numbered." In the same memorandum, Sprint notified the Board of its requested variances from sub-sections A.1 and A.2, for reduced setbacks to the neighboring property lines, "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002[.]" In other words, in Sprint's

memorandum to the Board of Appeals, Sprint presumed that the 2002 amendments governed the appeal.

On September 25, 2002, more than four months after the effective date of the 2002 amendment, the Board of Appeals conducted a hearing to consider Sprint's revised variance requests. During the administrative appeal, the Board was required to apply the updated regulations. *See Scrimgeour v. Fox Harbor, LLC*, 410 Md. 230, 240-41 (2009); *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 38 (2007) (re-affirming that, under the rule established by *Yorktown Corp. v. Powell*, 237 Md. 121 (1964), a "legislated change of pertinent law, which occurr[ed] during the ongoing litigation of a land use or zoning case, generally, shall be retrospectively applied").[10]

The text of the Board's 2003 opinion, in which the Board rejected Sprint's variance request, confirms that the Board considered the setback regulation as it had been amended and renumbered in 2002. The Board specifically noted that Sprint had originally requested variances under subsections A.3 and A.4, but that Sprint itself later revised its plan and requested variances under the renumbered subsections A.1 and A.2. The Board's opinion includes no references to the term "residential zone line," from the 1998 version of the regulation. Instead, employing the language of the 2002 amendment, the Board referred only

[10] The *Yorkdale* rule, which "provides for the retrospective application of changes to statutes that impact land use issues made during the course of litigation in land use and zoning cases" (*see Layton*, 399 Md. at 51), affects not only the Board of Appeals, but also the circuit court and the appellate courts. *See id.* at 69.

to the required 200-foot setbacks from each "property line" to the north, west, and south. In short, the Board did exactly what it was required to do in 2002: it evaluated Sprint's revised variance requests with reference to the setback requirements of the zoning regulation in effect at the time – the 2002 amendments.[11]

In Sprint's 2003 petition for judicial review, Sprint also informed the circuit court of the 2002 amendment, and Sprint quoted in full the updated sub-sections 426.6.A.1 and A.2, under the heading "Applicable Zoning Regulations." Similarly, in Sprint's 2004 appellate brief in its unsuccessful appeal to the Court of Special Appeals, Sprint again stated its requests for variances from subsections A.1 and A.2 "in light of the revisions of BCZR § 426 pursuant to Bill 17-2002[.]" The appendix to Sprint's brief even included the full text of the regulation, expressly as amended by "Bill No. 17-2002."

This Court's unreported opinion, authored by Judge Adkins, accurately cited the number of the subsection at issue. *Sprint PCS*, slip op. at 8 (citing "BCZR 426.6.A.1," and explaining that, in contrast to the factors considered for standard setbacks under the BCZR, "a wireless telecommunications tower on such a site must satisfy a greater setback – at least

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[11] In an unconvincing exercise in sophistry, Sprint now contends that the Board's use of the phrase "property line" reveals that the Board actually must have been considering the location of the "residential zone line" under the pre-2002 legislation. Sprint theorizes that Zoning Commissioner had (imprecisely) referred to a "property line" in describing the setback required from the "residential zoning line" under the pre-2002 requirements. Sprint then theorizes that, in referring to the "property line," the Board of Appeals was not employing the language of the 2002 amendment (which refers to the "residential property line"), but was replicating the Zoning Commissioner's erroneous formulation of the pre-2002 legislation. We reject Sprint's convoluted argument.

200 feet from any residential boundary"). Later, the opinion even quoted the amended language: "The ML zone permits cellular towers by right, subject to a 200 foot setback requirement 'from any other owner's residential property line.' BCZR § 426.6(A)(1)." *Sprint PCS*, slip op. at 31.[12]

Contrary to Sprint's contentions, the reality is that, during the *Back River I* proceedings from 2002 through 2005, the Board and the reviewing courts considered *only* the setback requirements of the amended regulation. The term "residential zoning line" from the repealed version of BCZR § 426.6.A.3 was absolutely inconsequential in the variance review proceedings from 2002 to 2005. The obvious reason why the Board and the courts found it unnecessary to extensively discuss "the impact of this change in law" (Appellants' Br. at 9-10) was that the law did not change during the course of those proceedings. There was no mistake or oversight here (at least none by the reviewing bodies).

Sprint unsuccessfully attempts to draw an analogy between this case and *Gertz v. Anne Arundel County*, 339 Md. 261 (1995). In that case, the Court of Appeals held that an adverse

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[12] In its memorandum to the Board of Appeals in *Back River II*, Sprint incorrectly asserted that this Court failed to cite the language of the 2002 regulation. In the same memorandum, Sprint argued that this Court "mistakenly described the setback requirements as they existed under the law then in effect." Sprint now admits that this Court's opinion quoted the correct regulation. Nonetheless, Sprint goes on to misquote this Court's earlier opinion, altering and re-ordering the Court's words in a thoroughly unpersuasive effort to establish that this Court was actually applying the pre-2002 requirements. Appellants' Br. at 10 n.6. Anyone with an elementary ability to read the English language could determine that this Court's earlier opinion proceeded on the supposition that the 2002 amendments, and not the earlier the legislation, governed the outcome of the case.

judgment against Anne Arundel County in an earlier contempt action involving the County and a property owner did not bar the County from proceeding in a later injunctive action against the property owner, where the second action was based on an emergency ordinance passed after the first case. *Id.* at 270. The Court explained that the rule of res judicata did not apply: "When the contempt action was litigated, the County had no right to proceed against Gertz under the Ordinance because it had not yet been enacted." *Id.* In the instant case, by contrast, Sprint had every right to raise claims based on the regulation that took effect several months before the de novo hearing. More precisely, from 2002 through 2005, Sprint did in fact bring a claim based on the amended regulation.

In sum, Sprint alleges that each of the administrative and judicial bodies that denied its variance petition in 2003, 2004, and 2005 erroneously "applied the old law when analyzing the variance issue." Appellants' Br. at 11. Sprint stakes out that position even though Sprint had revised its variance request to reflect the current law, even though Sprint informed each reviewing body of the 2002 amendment while contending that variances were needed, even though none of the written opinions applied the repealed subsection 426.6.A.3, even though none of those opinions used the term "residential zone line" or other language from that repealed sub-section, even though the Board and this Court both cited the amended subsection 426.6.A.1, and even though the Board and this Court employed the language of the 2002 amendment in referring to the required 200-foot setbacks from the three adjacent "property lines." Sprint's argument is, unarguably, incorrect.

In the midst of making its res judicata determination in this case, the Board of Appeals accepted at face value Sprint's suggestion that the applicable regulation had changed after the 2002 proceedings. Nonetheless, the Board expressly rejected Sprint's argument that the 2002 amendment significantly changed the setback requirements as applied to the property. The Board concluded that the distinction between the two versions of the regulation was "not relevant because the tower is not set back 200' from either the RC 20 'zone line' or the 'property line' of the adjacent parcel." The Board added: "even if the new version of the law were to be deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief[.]"

Ordinarily, a degree of deference should be accorded to an administrative agency's interpretation and application of the statute that it is tasked with administering. *See Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69 (1999). Specifically, the Court of Appeals has recognized that the Baltimore County Board of Appeals has considerable expertise in interpreting the BCZR. *Marzullo v. Kahl*, 366 Md. 158, 173 & n.11 (2001); *see id.* at 173-74 (holding that Court of Special Appeals erred by failing to give proper deference to Board's presumed expertise in construing the BCZR). For this reason, the Office of People's Counsel argues that this Court should uphold the Board's decision by deferring to the Board's interpretation of the BCZR amendment. On the other hand, Sprint asserts that the Board's interpretation of the regulations deserves no deference and, in any event, that a

remand is needed to allow the Board to re-analyze "the question of whether the phrase 'residential property line' amounts to a material change" in law. Appellants' Br. at 31.

The answer to both parties is that there was no change in the applicable law between the 2002 review proceedings and the current action. It was unnecessary for the Board to analyze the difference between the 1998 language and the 2002 language, because the 1998 language was never an issue in the prior administrative and judicial appeals. Accordingly, there is no reason to defer to the Board's answer to a legal question that should not have been considered, nor any reason to remand to allow the Board to provide a more detailed explanation on this inconsequential issue.

**D. Availability of Sprint's New Legal Theory at Earlier Proceedings**

The applicable law has not changed since the Board of Appeals reviewed Sprint's revised variance requests in 2002. Some time in the past decade, however, Sprint retained a new attorney and developed a new theory of that regulation. Sprint now contends that it could not have presented this argument to the Board in *Back River I*. Before analyzing whether Sprint could have asserted this claim in the earlier proceeding, it is necessary to describe, briefly, Sprint's current theory.

In 2002, the proposed site of the tower was within 200 feet of each of the property lines to the north, west, and south. These three property lines coincided with the zoning lines, which divided the commercially-zoned (M.L.) land from the adjoining residentially-zoned (R.C. 20) land. The 2002 amendment revised the language of the applicable setback

requirements from "the tower shall be set back at least 200 feet from the residential zone line" (former BCZR § 426.6.A.3), to "[a] tower shall be set back at least 200 feet from any other owner's residential property line." BCZR § 426.6.A.1.

Sprint contends that BCZR § 426.6.A.1, under its plain meaning, incorporates a "residential use requirement." Sprint argues: "The clear purpose of the amended regulation was to keep cell towers away from dwellings. A 200 foot setback is required only when property within 200 feet of a tower is owned by another *and has a dwelling thereon*." Appellants' Br. at 14. Under this interpretation, the regulation does not require that a tower be set back any distance from an adjoining residentially-zoned property, as long as no one currently resides in a dwelling on that property.[13]

Sprint further asserts that, at the time of the review of its variance petition, the neighboring R.C. 20 properties to the north and west were vacant, but the property to the south was improved with a dwelling. In addition, Sprint proffered to the Board of Appeals in *Back River II* that, if it had been permitted to adduce evidence, its witnesses would have testified that the dwelling no longer stands on the property to the south. The Board took no testimony and made no factual findings on this disputed fact. Because the Board purported

[13] Sprint has drawn our attention to a pair of administrative decisions issued by the Deputy Zoning Commissioner for Baltimore County, which Sprint argues support its interpretation of BCZR § 426.6.A.1. One decision was expressly limited to the facts of the subject property, while the other decision involved split-zoned property. Even if these decisions were indistinguishable, we would see no reason why the Board of Appeals, let alone this Court, would be bound to follow them.

to dismiss an appeal after considering only legal issues, we shall assume, *arguendo*, that Sprint made accurate representations to the Board about the existence of the house on the southern property. *See Antwerpen*, 163 Md. App. at 203 (explaining that, where Board of Appeals ruled only on motion to dismiss and did not take evidence, this Court would assume that appellant's proffer to Board was correct).

Moreover, we shall take no position here on the correctness or incorrectness of Sprint's interpretation of BCZR § 426.6.A.1. The only relevant issue for our analysis is whether Sprint could have made the legal argument during the earlier proceeding. Under Sprint's theory, there was only one adjacent "residential property line" in 2002, the property line south of the tower. No setbacks would have been required from the property lines of the unimproved, residentially-zoned properties to the north and west of the tower. Thus, through only an ordinary degree of diligence (indeed, simply by examining the regulation and the site plan), Sprint could have realized that, under what Sprint now calls the "plain meaning" of the regulation, two of the requested variances would no longer be needed. Because the property itself was approximately 223 feet wide, Sprint could have revised its proposal by relocating the tower more than 200 feet north of the southern residential property line. Finally, Sprint could have argued before the Board that, as an alternative to variance relief, the Board should determine that no setbacks were required from the adjacent, vacant, residentially-zoned properties.

These two procedural means (revising the variance requests in light of the amended regulations and asking the Board to determine that variances were not legally necessary under the regulations) were not only available to Sprint. Sprint actually employed both mechanisms after the effective date of the amendment. When Sprint submitted its 2002 memorandum to the Board, Sprint revised its variance requests "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002." At the same time, Sprint also argued that "setback variances for the equipment cabinets [were] not legally necessary since they [did] not qualify as 'structures' . . . as that term is defined by the BCZR." There is no merit to Sprint's contention that "treating the facts as separate trial units would not [sic] conform to the party's expectations because [Sprint's] rights under the new law could not have been litigated in the initial action." Appellants' Br. at 24.

Sprint argues here that it did not possess the procedural means to change its theory in the context of a de novo review of the variance petition. Sprint submits: "Although the Board's hearing was a *de novo* proceeding, the new theory (special hearing) could not have been considered because of the relief sought (variance) in the case then at issue." Appellants' Br. at 22. Sprint further argues that the transaction approach cannot be applied to this case, because (Sprint claims) it lacked the means to obtain relief during review of the variance petition. Appellants' Br. at 18-19.

In making these arguments, Sprint conflates the relief requested with a particular process to obtain that relief. The specific remedy requested in Sprint's 2012 petition was not

the hearing itself, but official confirmation that certain setbacks were not required from adjacent, unimproved properties. If Sprint believed that the language of the 2002 amendment somehow eliminated some of the setback requirements from adjacent properties, Sprint could have and should have presented those arguments in the earlier proceeding so that the Board could have resolved all issues in a single piece of litigation.[14]

Sprint attempts to place the issue under a technical lens rather than a pragmatic one, by contending: "Petitioners could not have been permitted to introduce a new petition for special hearing when only a petition for variance was under consideration during the appellate proceedings at the Board." Appellants' Br. at 22-23. Sprint attempts to distinguish *Cassidy v. Cnty. Bd. of Appeals of Baltimore Cnty.*, 218 Md. 418 (1958). In *Cassidy*, the Court of Appeals rejected an appellant's argument that the County Board of Appeals lacked jurisdiction to grant a special exception to a property owner because the public notice had mentioned only reclassification of the property. *Id.* at 421-25. The Court reasoned that, despite different standards of proof in the two petitions, the actual notice to the public substantially complied with the requirements, because the method of notice for both types

[14] There are many possible reasons why Sprint did not make such an argument. Perhaps the interpretation did not occur to Sprint's attorneys at the time, or perhaps the attorneys considered that interpretation to be untenable. Perhaps they saw no benefit in moving back the boundaries of the unoccupied residential properties on the north and the west, because Sprint had already constructed the tower, at its own risk, 75 feet from the (then-occupied) residential property to the south. Whatever Sprint's reasons for declining to present this theory at the time, those restrictions were self-created, and not imposed by the agencies or the courts.

of petition was identical, and because the notice clearly apprised the public of the character of the proposed action. *Id.* at 424-25.[15]

Sprint argues that *Cassidy* should be distinguished. Sprint contends that the only way to confirm whether or not the BCZR required setbacks from unimproved properties was through a petition for special hearing, but that additional public notice would have been required before granting that relief. But even assuming that additional notice would have been required for Sprint to introduce its theory, such an obstacle was purely temporary. Given the four months that elapsed between the effective date of the amendment in May 2002 and the Board's de novo hearing, Sprint had ample time to cure any defective notice. At most, the Board would have been required to post additional notice on the property and to publish notice in two newspapers of general circulation for 15 days before hearing the matter. *See* BCZR § 500.7.

Neither the Baltimore County Zoning Regulations nor the Rules of Practice and Procedure issued by the Baltimore County Board of Appeals outline a specific procedure for amending a petition at the Board level. If Sprint had argued that the 2002 zoning amendment drastically changed the nature of the setback requirements at issue in the case, then the Board

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[15] Although Sprint mentioned the issue of public notice in a single page of its appellate brief, almost all of the substance of Sprint's argument on this issue was first presented in a 12-page section of a reply brief. This Court has no obligation to address the additional arguments that were not presented in the original brief. *See, e.g.*, *Chang v. Brethren Mut. Ins. Co.*, 168 Md. App. 534, 550 n.7 (2006); *see also May v. Air & Liquid Systems Corp.*, 219 Md. App. 424, 440 & n.12 (2014).

could have selected an appropriate course of action: dismissing the case without prejudice to allow a new petition to be filed, remanding the case back to the Zoning Commissioner, staying the appeal to allow the Zoning Commissioner to conduct a special hearing before consolidating the appeal, or simply issuing notice and resolving the matter at the de novo hearing. We do not speculate as to which procedure would have been most appropriate. At most, a few additional steps would have been required before the exact remedy could be granted.[16]

In sum, the time to present Sprint's theory that the BCZR required no setbacks from the vacant, adjacent properties was during the 2002 litigation, not in the separate, multi-year litigation that Sprint commenced in 2012. It cannot be disputed that both of Sprint's claims seeking approval for the cell tower were so closely related in space, origin, and motivation that the claims formed a convenient trial unit. *See Esslinger*, 95 Md. App. at 618. Therefore, Sprint is precluded from bringing substantially the same claim that the Board and the reviewing courts could have resolved in the earlier litigation, if only Sprint had presented its argument at that time. *See Seminary Galleria*, 192 Md. App. at 741-42 (holding that res judicata barred special hearing petition, because "[w]ith reasonable diligence, [petitioner]

[16] As explained previously, in *Esslinger*, 95 Md. App. at 623-24, this Court held that res judicata bars a litigant from raising claims for declaratory relief based upon legal theories that he or she could have asserted in a prior judicial review of an administrative decision. *Esslinger* focused on the circuit court's power to grant that particular remedy, rather than the Board's power. Thus, even if the Board in 2002 could not have granted special hearing relief, the circuit court could have granted equivalent declaratory relief in 2003.

could have discovered and asserted in support of the original [] filing its current argument"); *see also Alvey*, 243 Md. at 340 (res judicata barred second rezoning application "because any of the testimony relied upon in the [second] case as to this question could and should have been presented in the first case"); *Whittle*, 211 Md. at 49 (res judicata barred second rezoning application because "all the information which could have been produced should have been produced [in the first case] and the second case cannot be decided on testimony whi[c]h might have been introduced in the first case"); *Linthicum*, 170 Md. at 249 (holding that prior judgment regarding proposed use of property "dispose[d] of all questions [] presented [in second case], for they were all involved in the general question of exclusion of use, whether they were actually raised or not").

## II.

### A. Issuance of Written Opinion by Circuit Court

Sprint's final contention is that the circuit court erred when it affirmed the decision of the Board of Appeals without issuing a written opinion. Sprint directs our attention to § 4-405(a) of the Land Use Article, which mandates that a circuit court must "file a written order and opinion embodying the reasons for its decision" after conducting judicial review of certain zoning decisions by a board of appeals. Sprint further argues that the circuit court's order failed to include its reasons, and thus that the case should be remanded with instructions that the circuit court issue a separate opinion.

These contentions are misguided. As the Office of People's Counsel correctly points out, the provision cited by Sprint is inapplicable to this case. Baltimore County is a charter county that has adopted home rule under Article XI-A of the Maryland Constitution. *See, e.g.*, *Hope v. Baltimore Cnty.*, 288 Md. 656, 659-60 (1980); *see also Falls Rd. Cmty. Ass'n, Inc. v. Baltimore Cnty.*, 437 Md. 115, 136, 141 n.28 (2014). Section 4-405(a) of the Land Use Article is codified within a division that expressly does not apply to zoning matters in charter counties. *See* Md. Code (2012), § 1-401(a) of the Land Use Article.[17]

Judicial review over zoning cases in a charter county is governed by the Express Powers Act, currently codified in Title 10 of the Local Government Article. Under that Act, each charter county is authorized to establish a board of appeals with jurisdiction over zoning exception cases and other matters. *See* Md. Code (2013 Repl. Vol.), Local Government Art., § 10-305(a)-(b). In such cases, the county board of appeals is required to file an opinion that must include factual findings and the grounds for the decision. *Id.* § 10-305(c). There is no corresponding requirement that the circuit court issue its own separate opinion when reviewing a decision by a board of appeals. *See id.* § 10-305(d).

In addition, § 10-324(a) of the Local Government Article empowers a charter county to enact local laws providing for the right to seek review in the circuit court of any other

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[17] Section 1-401 of the Land Use Article is titled "Charter counties; limited application of division." Subsection (a) reads: "General limited application. Except as provided in this section, this division does not apply to charter counties." Subsection (b) lists a number of exceptions (*i.e.* certain provisions that do apply to charter counties), but that list does not include § 4-405.

matter arising under local zoning laws. Section 604 of the Baltimore County Charter grants parties a right to obtain judicial review of decisions of the board of appeals by appealing to the circuit court. These provisions include no requirement that the circuit court file a separate opinion when reviewing zoning cases.

Sprint commenced the instant case by filing a petition for special exception and special hearing in 2008. The administrative law judge ultimately considered only the petition for special hearing, and then Sprint appealed to the county board of appeals and to the circuit court. Neither § 10-305 nor § 10-324 of the Local Government Article requires that the circuit court must embody its reasons in a written opinion. Thus, the circuit court's order affirming the decision of the board of appeals was not deficient. Sprint's request for a remand to the circuit court has no statutory basis.

## CONCLUSION

For the reasons stated in this opinion, we affirm the judgment of the circuit court, which affirmed the decision of the Board of Appeals. Our ruling is based upon a de novo legal conclusion that, even if Sprint's factual proffers to the Board were accurate and even if Sprint's interpretation of the zoning regulations were correct, res judicata would still bar Sprint's present claim. Accordingly, there is no reason to remand for further proceedings to resolve any remaining factual or legal dispute. *See Seminary Galleria*, 192 Md. App. at 723, 742 (affirming circuit court's judgment reversing Board's zoning decision on grounds of res

judicata, without remand); *Antwerpen*, 163 Md. App. at 203-04, 210 (affirming circuit court's judgment affirming Board's decision on purely legal grounds, without remand).

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**