Circuit Court for Anne Arundel County
Case No. C-02-CV-19-00081

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 363

September Term, 2020

CEDAR HILL DEVELOPMENT, INC., *et al.*

v.

BLACKJACK TRUCKING, LLC.

Arthur,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 22, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

**This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The Anne Arundel County Board of Appeals ("Board") granted the application of Blackjack Trucking, LLC ("Blackjack") to register a nonconforming use, specifically, a contractor's shop and yard, on residentially-zoned property. Cedar Hill Development, Inc. ("Cedar Hill"), an adjacent landowner, sought judicial review of the Board's decision in the Circuit Court for Anne Arundel County. The circuit court affirmed.

Cedar Hill noted this timely appeal from the judgment of the circuit court, presenting two questions for our review:

1. Did the Board commit reversible legal error by finding that a contractor's yard and shop with haulage service was a valid nonconforming use under Anne Arundel County Code § 18-15-101?

2. Even assuming the Board correctly found that the appellee's requested use was legal when established, pursuant to Anne Arundel County Code § 18-1-101(89), did the Board commit reversible error in determining that the use had not terminated via cessation of use, pursuant to Anne Arundel County Code § 18-15-104?

We perceive no error in the Board's interpretation and application of law, and no error in the Board's factual findings. Accordingly, we shall affirm.

INTRODUCTION

"One of the basic tenets of zoning is that some uses of land are incompatible with others, and that more efficient employment of land resources is achieved if such incompatible uses are separated." *Cnty. Council of Prince George's Cnty. v. E. L. Gardner, Inc.*, 293 Md. 259, 266 (1982). Zoning laws and regulations are designed to avoid an "admixture" of incompatible land uses "by dividing the community into use districts, each restricted to industrial, commercial or residential occupation." *Id.* Although use districts are "designed to be homogeneous," they often include land that was developed prior to the

enactment of a zoning ordinance, and thus may be "devoted to uses proscribed by the zoning regulations." *Id.* at 267.

'"The principle of a nonconforming use protects the vested rights of [a] property owner against changes in the zoning ordinance which may impair or prohibit the owner's existing use of his property.'" *Mayor & Council of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 537 (2002) (quoting Stanley D. Abrams, *Guide to Maryland Zoning Decisions*, § 11.1 (3d ed., 1992)). "A valid and lawful nonconforming use is established if a property owner can demonstrate that before, and at the time of, the adoption of a new zoning ordinance, the property was being used in a then-lawful manner for a use that, by later legislation, became non-permitted." *Trip Assocs., Inc. v. Mayor & City Council of Baltimore*, 392 Md. 563, 573 (2006).

The protection of vested rights in an existing use of property is in direct opposition to the notion that nonconforming uses "pose a formidable threat to the success of zoning" in that "[t]hey limit the effectiveness of land use controls, contribute to urban blight, imperil the success of the community plan, and injure property values." *E.L. Gardner*, 293 Md. at 267 (quoting 1 R.M. Anderson, *American Law of Zoning* § 602 (2d ed. 1976)). Local ordinances often resolve "the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community . . . by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment." *Id.* at 268. "[T]he purpose of such restrictions is to achieve the

ultimate elimination of nonconforming uses through economic attrition and physical obsolescence." *Id.*

Anne Arundel County Code § 18-1-101(88),[1] defines "nonconforming" use as "a use that was allowed when it came into existence but that is no longer allowed under the law in effect in the zoning district in which the use is located." Section 18-15-104(a) of the Code places a limit on nonconforming uses by providing that "[a] nonconforming use terminates when the use ceases operation for 12 consecutive months or when the scope of the use is so significantly reduced during the 12-month period as to change its nature or character."

In Anne Arundel County, to register a nonconforming use, an application is made to the Anne Arundel County Office of Planning and Zoning ("OPZ"), which then determines if there is a valid nonconforming use, i.e., whether the use was allowed when it came into existence and whether it continued without an interruption of more than a year. *See* § 18-15-101(a). A person aggrieved by OPZ's decision may seek review by the Board. § 3-1-104(c). A party to the proceeding before the Board may seek judicial review in the circuit court. Md. Code (1974, 2013 Repl. Vol.), Local Government Article § 10-305(d)(1).

[1] Unless otherwise specified, all statutory references that follow are to the Anne Arundel County Code.

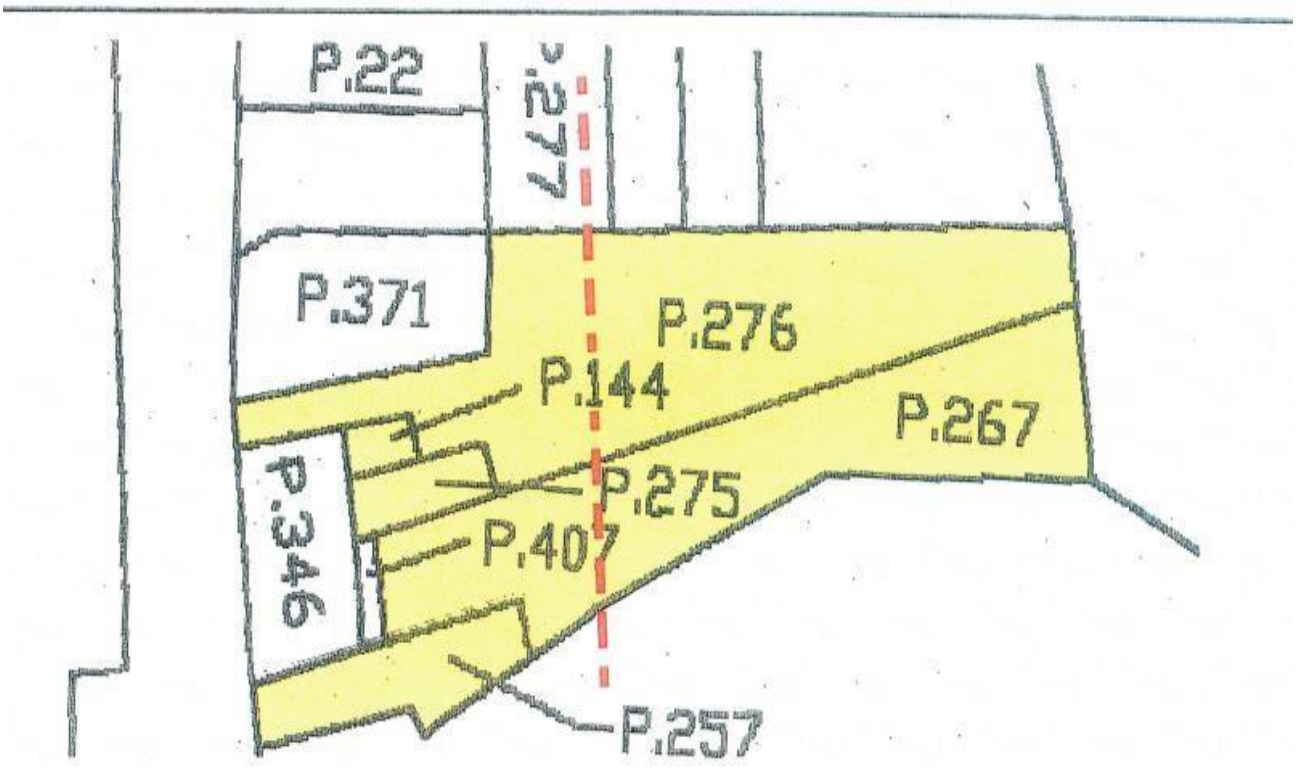
FACTUAL AND PROCEDURAL HISTORY

A. The Property

Blackjack is the owner of five contiguous parcels of land, totaling approximately 3.5 acres (collectively, "the Property"), just north of the I-695 interchange at Maryland Route 2 (Ritchie Highway) in Brooklyn Park. Blackjack operates a business on the Property which includes excavation; hauling of excavated and raw materials (such as asphalt, stone, and sand); and snow removal. The Property is used by Blackjack to park trucks and other equipment when not in use. There is an accessory office and maintenance garage on the Property.

Cedar Hill owns land adjacent to the Property, which it intends to develop into a mixed residential community consisting of single family homes, townhouses, and apartments.

The Property is identified as Parcels 144, 257, 267, 275, and 276 on Map 20 of the Tax Map of Anne Arundel County. Parcels 257 and 276 have frontage on Ritchie Highway. One of the exhibits before the Board was a parcel map, which is reproduced below, that shows the configuration of the Property (in shade).



Blackjack purchased the Property in 2016 from the James H. Fraley and Bridgette R. Fraley Trust ("Fraley Trust"). The Fraley Trust acquired the Property from the estate of James H. Fraley, after his death in 2005.

Mr. Fraley acquired the Property parcel-by-parcel, beginning in 1963, when he purchased Parcel 144. Parcels 267, 275, 257, and 276, were purchased in 1965, 1966, 1969, and 1980, respectively.

Mr. Fraley used the Property for the operation of a business known as Fraley Corporation. The nature of that business was one of the issues before the Board, as we shall discuss later in this opinion. Portions of the Property were also leased to third parties for the operation of auto sales and auto repair businesses, including Whay's Auto Service.

Zoning History

Under a zoning ordinance enacted by Anne Arundel County in 1952, the Property was split-zoned, as indicated by the dotted line on the parcel map. The western-most 300 feet of the Property (to the left of the dotted line) was zoned "Heavy Commercial" ("HC"). The remainder of the Property was residentially-zoned for "Detached Dwellings." These zoning classifications remained unchanged from 1952 to 1976.

In 1976, the western-most 400 feet of the Property was rezoned C3-General Commercial, and the remainder of the Property was rezoned R5-Residential. The question before the Board was whether, prior to 1976, a nonconforming use for a "contractor's shop and yard" existed on the portion of the Property that was originally zoned HC.

Under the 1952 Zoning Code, permitted uses of land in the HC district included "Construction – warehouse or shop" and "Excavating – warehouse or shop." In 1957, zoning regulations applicable to the HC district were amended to delete "Construction – warehouse or shop" as a permitted use and, at the same time, to allow shops for various construction-related trades, including carpentry, electrical, plumbing, heating, and sheet metal.[2] An excavating warehouse or shop remained a permitted use.

In 1964, the zoning regulations applicable to the HC district were amended to add a special exception use for "outdoor storage . . ., including, but not limited to vehicle sales, including new and used cars, trucks, trailers, and contractors and farm equipment, lumber,

[2] Under the 1957 amendments, permitted uses in the HC zoning district also included shops for printing, publishing, lithography, electroplating, furniture upholstery, and sign painting.

materials and coal yards and similar or appurtenant uses[.]" The definition of "outdoor storage" specifically excluded "overnight parking of business vehicles[.]"

Between 1976 and 1992, the Property underwent several different zoning reclassifications, none of which are important to the issues on appeal. In 1992, the entire Property was rezoned R-15 Residential, and has retained the same zoning to date.

B. Nonconforming Use Application and Administrative Decision

In March 2016, the Fraley Trust filed an application with OPZ to register a contractor's shop and yard and an automobile service facility (Whay's Auto Service) as nonconforming uses of the Property. In June 2016, Blackjack purchased the Property and was substituted as the applicant.

On March 1, 2017, OPZ issued a two-part administrative decision. First, OPZ determined that the automobile service facility was a valid nonconforming use on Parcels 275 and 267. Second, OPZ determined that a contractor's shop for haulage was not a valid nonconforming use on the Property.

In its decision, OPZ noted that Blackjack had not provided documentary or photographic evidence that demonstrated that a contractor's yard and shop had existed on the Property for 10 years, which would have established a rebuttable presumption of a valid nonconforming use.[3] OPZ explained the grounds for its decision as follows:

> An examination of the historical aerial photos does not substantiate any claim to a nonconforming right for a contractor shop or yard on these lands but rather serve[s] to rebut the presumption that there is a nonconforming right. In particular, the building that houses the offices

[3] *See* § 18-15-101(c) ("There is a rebuttable presumption that a use in existence continuously for a period of 10 years is a nonconforming use.").

> of Blackjack Trucking only appears on the aerial photographs for the first time in 1995. That structure was constructed during the period when this portion of the subject property was zoned either C3 or R15. Both of these zoning categories did not allow a contractor's establishment at that time.
>
> Historical aerial photographs show an illegal solid waste facility/junkyard operating on this property since the 1970s until approximately 2014. County records (i.e. citation records) also support this. This illegal use of lands which ceased in 2014 serves to rebut any assertion there is a nonconforming right for a contractor shop and yard as the area denoted on the site plan for truck parking was in fact being used to store solid waste/junk.

Blackjack appealed OPZ's decision to the Board.

C. Board of Appeals Hearing

The Board held nine hearings over the course of a year, the first on August 8, 2017, and the last on August 15, 2018. At the first hearing, Blackjack clarified that its application to register a contractor's shop and yard was limited to the portion of the Property that was located in the HC district from 1952 to 1976, i.e., the western-most 300 feet.

Blackjack's Case

Blackjack did not produce any witnesses who had personal knowledge of the use of the Property prior to 1976, nor did Blackjack introduce any business records of the Fraley Corporation in support of its application. Instead, Blackjack's case focused on challenging OPZ's interpretation of the aerial photographs taken in 1952, 1962, 1970, and 1977.

Richard Josephson testified for Blackjack as an expert in land use and nonconforming uses. Mr. Josephson was employed by OPZ from 1986 to 2004 and had served as the Zoning Administrator for Anne Arundel County from 1990 to 1993. During

his employment with OPZ, Mr. Josephson reviewed land use applications, including nonconforming use applications.

Mr. Josephson testified at length regarding his analysis of the aerial photographs. He stated that the 1952 photograph showed buildings and "some development" on the portion of the Property in the HC zoning district. An aerial photograph taken in 1962 showed the west side of the Property was "somewhat developed," but he could not say whether it was commercial or residential activity.

According to Mr. Josephson, the 1970 aerial photograph of the Property showed "more building activity" as well as "some vehicle equipment and storage" on the part of the Property zoned Heavy Commercial. He stated that there appeared to be an area cleared of vegetation that may have been used for storage of equipment. The 1977 aerial photograph, which was taken the year after the Property was rezoned, again showed vehicle and equipment storage in the part of the Property that had previously been zoned Heavy Commercial.

Mr. Josephson had also reviewed aerial photographs from 1980 to 2015. He stated that the 1980 aerial photograph showed that the Property was "fairly intensely developed with buildings" and "fairly intensely characterized by vehicles and equipment." The 1984 photograph showed "extensive development of the site with buildings and with the vehicle and equipment storage[.]" The 1988 photograph showed "development of the site with buildings and with vehicles, storage, and equipment[.]" The 1990 photo showed buildings and vehicle and equipment storage, including cars, "[r]oll-off containers," trailers, and trucks, which Mr. Josephson characterized as "intense commercial activity[.]" The 1995

photo similarly showed "intense commercial uses" including storage of vehicles and equipment such as trucks and roll-off containers. According to Mr. Josephson, Google Earth images 1995, 2002, 2004, 2005, 2007, 2008, 2009, 2010, 2011, and 2014, and 2015 showed the same characteristics.

Based on his review of the photographs, Mr. Josephson concluded that, between 1962 and 1970, the site was developed for storage of vehicles and equipment "used in excavation uses [and] various other contractors' types of uses[.]" Mr. Josephson opined that the historical use of the Property from the 1960s through 2014 is most similar to an excavator shop or warehouse, which, he explained, was a permitted use under the 1952 zoning code and remained a permitted use until the Property was rezoned in 1976.

A 2017 printout of Fraley Corporation's website page was admitted into evidence. According to the website, the business was established in 1963, the same year that Mr. Fraley acquired the first parcel that comprises the Property. The website described the business as "scrap metal recycling and waste disposal services for industrial, commercial[,] and residential customers[.]" The list of services offered by Fraley Corporation in 2017 include: ferrous and non-ferrous scrap metal recycling, roll-off container and dumpster rentals for metals, debris, waste, concrete, and soils; and debris removal services. Mr. Josephson testified that the historic use of the Property as shown on the aerial photographs was consistent with the services listed on the company's website.

On cross-examination, Mr. Josephson explained that, even though the 1952 Code did not expressly permit outside storage of vehicles, use of the Property for that purpose would be incidental to an excavating shop or warehouse and would therefore have been

permitted under the 1952 Code. Mr. Josephson also explained that, although "recycling" was not specifically mentioned as a permitted use, it was "similar to" or "could be involved" in use as an excavation warehouse or shop and would be permitted.

Blackjack called three witnesses who had personal knowledge of Mr. Fraley's business and use of the Property from the late 1980's to 2016. Danny Boyd, Blackjack's civil engineering expert, had "been on the [P]roperty many, many times over the years." He had lived in the Brooklyn Park area for a "good portion" of his life and had worked in the area throughout his professional career, which began in 1970. He was involved in a rezoning of the Property in the 1990's, had been hired to do work on an adjacent parcel at some point, and had been on the Property "for other reasons" after the year 2000. In addition to going onto the Property, Mr. Boyd drove by the Property on a "routine basis" on his way to visit relatives and attend meetings of an organization with which he was involved.

Mr. Boyd testified that, from the late 1980's to the date of the hearing, he observed many different types of heavy commercial vehicles on the Property, including backhoes, dumptrucks, and bulldozers. To Mr. Boyd's knowledge, the Property was never used for residential purposes.

David Whay owns and operates Whay's Auto Service on the Property. Mr. Whay began working on the Property part-time in 1989 or 1990, and full-time in 1995. According to Mr. Whay, the Fraley Corporation hauled millings to work sites and hauled scrap from work sites to take to the dump. The scrap was sorted for recycling. Fraley Corporation also had snow removal contracts. Mr. Whay testified that Fraley Corporation had "a lot of

equipment" on site, including dumpsters, dumptrucks, roll-off containers, excavators, and snowplows. The company employed a mechanic who worked on the vehicles in the garage on the Property.

Marvin Blume purchased neighboring parcels 346 and 407 in 2001. He owns and operates Marvin's Muffler Works, an automotive exhaust repair service, on his property.[4] According to Mr. Blume, Fraley Corporation's principal business was excavating, but it also "did a lot of construction work[.]" He said that Fraley Corporation "did a lot of . . . service stations when they had to pull up tanks [and] things like that." In addition, Fraley hauled stone and "millings", such as crushed asphalt, to and from construction sites. Mr. Blume testified that Fraley Corporation "always had big trucks, excavating type equipment" on the Property, including backhoes, loaders, trailers, and roll-off containers. He said that Fraley Corporation's trucks were maintained and repaired in the garage on the Property, and that the company had an office on the Property.

Both Mr. Blume and Mr. Whay testified that, after Mr. Fraley died in 2005, his son and his nephew continued to run the business of Fraley Corporation on the Property. According to both witnesses, Fraley Corporation vehicles were present on the Property until Blackjack arrived.

Jennifer Brienza, the owner of Blackjack, testified that, in early 2014, Bridgette Fraley, one of the trustees of the Fraley Trust, gave Blackjack permission to park trucks on

[4] Mr. Blume's property was registered as a nonconforming use at the time he purchased it.

the Property. Blackjack began using the Property at that time to park its trucks and equipment. Blackjack later purchased the Property from the Fraley Trust in June 2016.

Cedar Hill's case

Cedar Hill's expert in land use and land planning, Shepherd Tullier, had previously worked at OPZ as a zoning analyst, which involved nonconforming use issues. Mr. Tullier opined that from 1952 to 1976, there were no permitted uses of the Property on site. Mr. Tullier stated that, based on his review of the aerial photographs, the only uses shown were salvage and automobile uses, which were not permitted; and outdoor storage, which was not permitted except by special exception. Mr. Tullier saw no evidence of an excavating use on the Property.

Mr. Tullier testified that the 1970 photograph showed vehicles, trailers, and a few "out buildings" on the Property, but it was "unclear what kind of business or enterprise was going on[.]" According to Mr. Tullier, the 1970 photograph did not depict "large" equipment or an excavation business on the Property.

Mr. Tullier described the 1977 aerial photograph as showing "a continuation of this kind of helter skelter placing of vehicles and containers and material on the site[.]" He characterized the use shown in the 1977 photograph as "outside storage." Mr. Tullier reviewed the aerial photographs for the time period 1977 through 1988, but he was unable to determine what the Property was being used for, other than for outside storage, which he defined as "junk yards and storage of unlicensed vehicles[.]"

Mr. Tullier testified that, in 1988, Mr. Fraley filed a petition in opposition to a proposed rezoning of part of the Property from commercial to residential. Mr. Tullier quoted from Mr. Fraley's application:

> Currently that portion of the [P]roperty lying on Maryland Route 2 is . . . used for commercial . . . purposes. The [P]roperty has in the past been used as a dump site. And while the long-term effects of that use can be mitigated in a commercial use context, it's less likely that such mitigation could be accomplished if the site is put to a residential use where more exposed ground area would be required.

In 2004 or 2005, according to Mr. Tullier, Mr. Fraley filed an unsuccessful application to rezone the Property from R15 to C4. In that application, Mr. Fraley listed the uses of the Property as "commercial, auto repair sales[,] and salvage."

Robert Konowal, a staff member of OPZ, stated that Blackjack's application was denied because the aerial photographs do not substantiate that a contractor's yard and shop was established on the Property prior to 1976. According to Mr. Konowal, the Property was being used as an illegal solid waste facility/junkyard from the 1970's until 2014.

Keith Kernan, an Anne Arundel County zoning inspector, testified that, in June 2012, he inspected the Property in response to a complaint. He observed "cargo containers, junk, scrap piles," and "untagged[,] wrecked, [and] dismantled vehicles." He observed "small excavating equipment" that was used, he said, to "move material from one area to [an]other," but he saw no evidence that the Property was being used as a contractor's yard or hauling business. Mr. Kernan stated that, based on his observations, the business being operated on the Property was a "scrap recycling" business.

Mr. Kernan sent a notice of violation to the trustees of the Fraley Trust in July 2012. Mr. Kernan reinspected the Property on "numerous occasions" between June 2012 and June 2014. During those site inspections, he did not observe any other business such as a contracting, hauling, or snowplow business being operated on the Property. The zoning violations were abated as of June 2014.

Cedar Hill also called Sam Stevenson, an environmental consultant. In 2003, Mr. Stevenson had been hired by Cedar Hill's predecessor in interest to perform an environmental assessment of the proposed development site and the surrounding land, including the Property. The evaluation involved inspection of the land for "indicators of environmental problems," such as use of storage of chemicals or other environmental contaminants.

Mr. Stevenson visited the Property on two occasions: in January and February 2003. He observed automobiles, trucks, and equipment, both operable and inoperable. Mr. Stevenson characterized the use as a "[j]unkyard, salvage yard, [or] scrap yard."

As a routine part of Mr. Stevenson's assessment, he spoke with Mr. Fraley to establish how the land had been used. Mr. Fraley told Mr. Stevenson that the Property had been used for a junkyard and recycling facility for many years.

Ground-level photos taken by Mr. Stevenson during his site inspection in 2003 were admitted into evidence. One of the photographs depicts large trucks, one with the name "Fraley" on the door, with a roll-off container on the back of it. Mr. Stevenson agreed that the trucks in the photograph could be used for hauling materials. A front-end loader was

present on the Property, which Mr. Stevenson agreed could be used for a "soil loading" or "construction-type" business.

D. The Decision of the Board

In a five-to-one decision, the Board found that Blackjack had met its burden of proving that the contractor's shop and yard was a valid nonconforming use.[5] The Board found, first, that use of the Property as a contractor's shop and yard was a lawful use under the original 1952 Heavy Commercial zoning classification. The Board reasoned that the 1952 Code permitted a "construction warehouse or shop," and an "excavating warehouse or shop" and that "[t]hese definitions certainly encompass the expected activities of the more recent formulation, 'contractor's yard and shop.'"

The Board next determined that there was ample evidence that the Property was used as a contractor's shop and yard since the 1960's. In so finding, the Board expressly credited Mr. Josephson's analysis of the aerial photographs.

Finally, the Board determined that the use was continuous since 1976. The Board noted that Mr. Boyd, who had "extensive personal knowledge" of the Property, had "described the long history of construction, excavation, and contracting through his observation of heavy equipment and trucks" on the Property. The Board found that Mr. Boyd's testimony was corroborated by the aerial photographs of the Property. The Board

[5] One member of the Board dissented from the Board's decision to approve a contractor's yard and shop.

The Board also found that the automobile service facility was a valid nonconforming use. That decision is not at issue in this appeal.

also found that the testimony of Mr. Whay and Mr. Blume "confirmed the uses on the [P]roperty in the more recent period."

The Board rejected Cedar Hill's argument that the contracting business ceased when the zoning violations were abated in 2014, stating:

> We agree that the Fraleys operated unlawfully on the [P]roperty with a junkyard and recycling center; however, they also operated uses now embodied within a lawful "contractor's yard and shop." They trucked millings to and from the site and trucked recycled materials, also. The current neighbors testified that the trucks were on-site, repaired on-site and operated on and off-site. Understandably, Mr. Fraley was cited for the unlawful portion of his use on this property, but his admissions in that case do not erase the fact that he also lawfully operated a contractor's yard and shop on site.

The Board noted that, although the "level of activity may have varied from time to time (and co-existed with an unlawful junkyard/recycling use)," the evidence confirmed "that the Fraley contracting operation continued on the [Property] until [Blackjack] acquired the [P]roperty and began to operate its contracting business on the site in a similar manner."

Cedar Hill filed a petition for judicial review of the Board's decision in the Circuit Court for Anne Arundel County. The circuit court affirmed the Board's decision. Cedar Hill filed this timely appeal from the Board's decision to approve Blackjack's application to register a contractor's yard and shop as a nonconforming use.

Additional facts will be introduced in the discussion of the issues.

STANDARD OF REVIEW

In reviewing a circuit court decision on appeal from a decision of an administrative agency, "this Court's 'role is to repeat the task of the circuit court, i.e., to determine whether the circuit court's review was correct.'" *City of Hyattsville v. Prince George's Cnty.*

Council, 254 Md. App. 1, 23 (2022) (citations omitted). "Accordingly, this Court evaluates the agency's decision using the same standards used by the circuit court." *Id.* In reviewing challenges to a zoning decision, a court's role "is limited [usually] to determining if there is substantial evidence in the record as a whole to support the [Board's] findings and conclusions, and to determin[ing] if the [Board's] decision is premised upon an erroneous conclusion of law." *Id.* (citations and quotation marks omitted).

"The party asserting the existence of a nonconforming use has the burden of proving it." *Cnty. Comm'rs of Carroll Cnty. v. Uhler*, 78 Md. App. 140, 145 (1989). "Whether that party has met its burden is a matter entrusted to the Board." *Id.* "[S]ince that decision, as is the decision whether to certify a nonconforming use, can be made only after hearing and determining facts, the Board acts in a quasi-judicial capacity in making it." *Id.* "In that capacity, the Board acts as factfinder, assessing the credibility of the witnesses and determining what inferences to draw from the evidence." *Id.*

"The scope of judicial review of administrative fact-finding is a narrow and highly deferential one." *City of Hyattsville*, 254 Md. at 23 (citations and quotation marks omitted). "A conclusion by a local zoning board satisfies the substantial evidence test . . . if reasoning minds could reasonably reach the conclusion from facts in the record." *Id.* at 24 (citations and quotation marks omitted). "If substantial evidence supports the conclusion of the zoning agency, the courts may not disturb that conclusion, even if substantial evidence to the contrary exists." *Id.* (citations and quotation marks omitted). Stated differently, "[t]he court may not substitute its judgment on the question [of] whether [an] inference drawn is the right one or whether a different inference would be better supported.

The test is reasonableness, not rightness." *Uhler*, 78 Md. App. at 146 (citation and quotation marks omitted).

"Appellate courts 'review legal questions or the agency's conclusions of law de novo.'" *City of Hyattsville*, 254 Md. App. at 23 (citation omitted). "We frequently give weight to an agency's experience in interpretation of a statute that it administers, but it is always within our prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong." *Schwartz v. Md. Dep't of Nat. Res.*, 385 Md. 534, 554 (2005). "An appellate court may reverse the decision of a local zoning body where the legal conclusions reached by that body are based on an erroneous interpretation or application of the zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute." *City of Hyattsville*, 254 Md. App. at 23 (citations and internal quotation marks omitted).

DISCUSSION

Cedar Hill contends that the Board erred in determining that a contractor's yard and shop was a valid nonconforming use of the Property. Cedar Hill maintains that the "historic use on the Property was an illegal junk/salvage yard and/or outdoor storage[,]" and that neither use was lawful when established. Alternatively, Cedar Hill asserts that any valid nonconforming use of the Property was terminated as a matter of law when the illegal junkyard operations were ceased and abated in response to a zoning enforcement action.

Blackjack maintains that the Board's decision is supported by substantial evidence in the record and is not based on legal error. Blackjack submits that Cedar Hill's arguments

amount to "disappointment" that the Board gave more credit to Blackjack's evidence and legal theories.

I. Use of the Property

Cedar Hill contends that there was no evidence of a legal use of the Property prior to the zoning change in 1976. Cedar Hill claims that the only conclusion supported by substantial evidence was that the Property was used for a junk or salvage yard and/or outdoor storage of vehicles. Cedar Hill argues that, because both uses required a special exception, pursuant to amendments to the zoning code in 1963 and 1964, and, because an approved special exception was never obtained, the use was not lawful when established. We are not persuaded.

The evidence of the use of the Property prior to the critical zoning change in 1976 was limited to four aerial photographs of the Property, which were taken in 1952, 1962, 1970, and 1977. The Board's attention was focused on the aerial photographs throughout the protracted hearing.

The parties' respective expert witnesses interpreted the photographs differently. Blackjack's expert, Mr. Josephson, testified that, according to his review, the Property was developed for heavy commercial use, including parking for vehicles and equipment used in excavating, sometime between 1962 and 1970. Mr. Josephson characterized the use as being most similar to an excavation warehouse or shop, which was a permitted use in the HC zoning district until 1976. According to Mr. Josephson, the historical use of the Property would translate to a contractor's yard or shop under current use classifications. The Board expressly found Mr. Josephson's analysis to be "probative."

Mr. Josephson's opinion was bolstered by evidence that the Fraley Corporation had been in existence since 1963, the same year that Mr. Fraley acquired the first parcel, and by evidence that the business of the Fraley Corporation involved excavation and hauling services. From this evidence, and the reasonable inferences to be drawn from the evidence, the Board could have reasonably concluded that use of the Property as an excavation warehouse or shop began in 1963.

Cedar Hill claims that the Board erred as a matter of law by failing to apply the 1964 amendment to the zoning code, which added a special exception for outdoor storage.[6] Again, we disagree. Although Cedar Hill's expert characterized the use of the Property as outdoor storage, which was not permitted without a special exception, Mr. Josephson explained that parking vehicles and equipment on the Property would have been considered incidental to the use as an excavation warehouse or shop; therefore, no special exception would have been necessary.

Mr. Josephson's testimony appears to be consistent with § 18-5-102, which provides that, "[e]xcept as provided otherwise in this article, uses and structures customarily accessory to permitted, conditional, and special exception uses also are allowed." "Accessory" is defined as "a use or structure that customarily is incidental and subordinate to another use or structure." § 18-1-101(1). We discern no error in the Board's conclusion that the use of the Property was not subject to the 1964 amendment.

[6] Cedar Hill also argues that the Board failed to apply the 1963 amendment, which added a special exception for junk or salvage yards. That amendment is not relevant as Blackjack was not seeking to establish a junk or salvage yard as a valid nonconforming use.

Ultimately, the Board found that Blackjack had met its burden of proving that the use was lawful when established. We shall not disturb the Board's finding. As the Supreme Court[7] has explained, "when there are differing opinions of two well-qualified experts and a zoning issue is fairly debatable, then the County Board could quite properly accept the opinion of one expert and not the other." *Md. Reclamation Assocs., Inc. v. Harford Cnty.*, 414 Md. 1, 29 (2010) (citation and internal quotation marks omitted). Under such circumstances, courts "should not substitute their judgment on a fairly debatable issue for that of the administrative body." *Id.* (citation and quotation marks omitted).

Cedar Hill maintains that, because it was undisputed that, at some point, parts of the Property were used to store junk and debris, in violation of the zoning code, the Board's finding that a contractor's yard and shop was established on the Property was erroneous because the two uses are mutually exclusive. In support of this argument, Cedar Hill relies on dicta in a footnote in *Uhler, supra*, in which this Court commented that the storage of unusable equipment on property "is a junkyard or something else, but certainly not an equipment storage yard." *Uhler*, 78 Md. App. at 147 n.4. The language cited by Cedar Hill is not controlling in this case because the issue in *Uhler* was not whether the two nonconforming uses could coexist on property, but whether the circuit court had applied an incorrect standard of review. *See Bowers v. State*, 227 Md. App. 310, 321 (2016)

[7] In the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

(explaining that dictum "is typically a judicial comment 'that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)'" (quoting *Obiter dictum,* BLACK'S LAW DICTIONARY 1240 (10th ed. 2014))).

Nor do we find *Uhler* to be persuasive. Read in context, we do not interpret this Court's comment as a statement that there are no circumstances under which the two nonconforming uses can coexist. Unlike Blackjack, the landowners in *Uhler* had petitioned to certify their property as a junkyard *and/or* a contractor's equipment storage yard. 78 Md. App. at 142. Some of the witnesses who testified in the landowner's case described the property as a junkyard, while the testimony of other witnesses tended to establish that the property was used as a contractor's equipment storage yard. *Id.* at 147. This Court in *Uhler* commented that the administrative agency could have determined that the uses were "mutually exclusive" because of the "major discrepancy" in the evidence offered by the landowners in support of their petition. *Id.* at 147. That is not the case here.

Another argument advanced by Cedar Hill is that any nonconforming use that began in 1963, when Mr. Fraley acquired Parcel 144, cannot be expanded onto the other parcels that Mr. Fraley subsequently acquired. Cedar Hill claims that the Board "erred in reviewing the history of ownership" of the individual parcels that comprise the Property and "blithely decided that use of Parcel 144 established a use that could be extended" to the other parcels that comprise the Property. We disagree.

"[Z]oning ordinance[s] [are] concerned with the use of property and not with ownership[.]" *People's Couns. for Baltimore Cnty. v. Surina*, 400 Md. 662, 701 (2007) (quotation marks omitted). Mr. Josephson's opinion that the Property was developed for

heavy commercial use as of 1970 applied to everything west of the 1952 HC zoning line and was not confined to a specific parcel or parcels, as he explained during cross-examination:

> [COUNSEL FOR CEDAR HILL]: . . . There are a number of parcels that are the subject of this application, and they are Parcels 257, 275, 267, 144, and 276. Where on those properties is the - - is the excavation-warehouse or shop?
>
> [MR. JOSEPHSON]: Well, I think everything that existed west of that initial Heavy Commercial Zone line is where - - is what we're talking about, so everything that is west of that line is - - whether it is in a building or whether it's outside of a building is what - - is what I'm talking about.

That Mr. Fraley did not acquire the last of the five parcels that comprise the Property until after the critical zoning change in 1976 was irrelevant to the Board's decision. A "mere change of ownership does not destroy a nonconforming use; a use transferred to a successor in interest will continue to be legal so long as the nature and character of that use is unchanged and substantially the same facilities are used[.]" *Purich v. Draper Props., Inc.*, 395 Md. 694, 724-25 (2006) (Harrell, J., dissenting) (citation omitted). *See also* 4 Rathkopf, *The Law of Zoning and Planning* § 72:20 (4th ed. 2022) ("It is not a question of who was then using the land for the particular purpose, but rather a question of what the land, at that time, was being used for. A mere change in ownership does not destroy the right to continue a nonconforming use.").

We hold that the facts in the record before the Board would allow a reasoning mind to conclude the portion of the Property in the original HC zoning district was used as an excavation warehouse or shop, and that such use was in existence prior to the relevant zoning change in 1976.

II. Uninterrupted Use

Cedar Hill contends that, even if the Board correctly found that the requested use was legal when established, the Board's finding that the use had been continuous since 1976 was erroneous. In support of this argument, Cedar Hill first maintains that the use was terminated as a matter of law by a written "admission" that the use was prohibited. Cedar Hill points to a letter dated August 14, 2012, from Bridgette Fraley, a trustee of the Fraley Trust, to Jay Fraley of Fraley Corporation, in which she advised that the County had issued a notice of violation on the Property. Ms. Fraley stated in her letter that the Property was zoned R15 Residential, where a "scrap salvage operation" "has at all times been prohibited." Ms. Fraley directed that all debris be removed "without delay", and that there be "no further transport of any junk and debris to" the Property.

We do not agree that, on these facts in the record, the Board was constrained to find that a nonconforming use as an excavating warehouse or shop had terminated. The Anne Arundel County Code provides that a nonconforming use terminates only "when the uses ceases operation for 12 consecutive months or when the scope of the use is so significantly reduced during the 12-month period as to change its nature or character." § 18-15-104(a). There is nothing in the Code providing that a nonconforming use terminates as a matter of law upon a statement of the owner of the property acknowledging that an existing use does not conform to current zoning law. Cedar Hill provides no other authority in support of its contention.

Cedar Hill next claims that, "[f]rom the moment [Ms.] Fraley gave notice to the Fraley Corporation to terminate its business, any further use was a violation of the lease

and a trespass upon the Property." Cedar Hill argues that the Board should not have considered any continued use because it "runs counter to the principle that the zoning ordinances should be strictly construed in order to bring nonconformance into conformance as quickly as possible." We do not accept the premise of this argument. Fraley Corporation was directed only to clear the Property of all accumulated junk and debris and to cease bringing any more salvage material onto the Property. There is nothing in the letter prohibiting Fraley Corporation from using the Property for its debris removal and waste disposal business or from parking vehicles and equipment used for those business purposes on the Property.

Finally, Cedar Hill asserts that any use by Blackjack prior to its purchase of the Property could not be considered by the Board because Blackjack "had no legal right to park commercial vehicles on residentially zoned property." This argument lacks merit. Although Blackjack did not acquire legal title to the Property until 2016, it used the Property to park vehicles and equipment with the permission of the Fraley Trust. As we explained earlier in this opinion, it is use, not ownership, that is significant.

CONCLUSION

Based on our review of the record before the Board, there is no basis upon which to reverse the judgment of the circuit court. The Board's determination that use of the Property as a contractor's shop and yard was legal when established and had continued

without interruption of more than a year was supported by substantial evidence and was not based on legal error.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.