Circuit Court for Garrett County
Case No. 11-C-15-014324

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 721

September Term, 2016

DEBORAH WELLS

v.

JOSEPH MORAN, ET AL.

Arthur,
Leahy,
Reed,

JJ.

Opinion by Reed, J.

Filed: August 6, 2018

*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.

This case involves the decision of the Deep Creek Watershed Zoning Board of Appeals (the "Board") to grant a setback variance to Joseph P. Moran and Barbara A. Moran to build a garage on a vacant lot across the street from their house on Deep Creek Lake. The appellant, Deborah Wells, owns the lot adjoining the vacant lot on which the garage is to be built. She opposes the variance on the grounds that the garage does not meet the requirements for an accessory structure and use to the Morans' principal, a.k.a. "primary," use, their house. This is because the vacant lot is separated from the lakeside lot by a road.

Ms. Wells presents three questions for our review on appeal, which we have reduced to two and rephrased:[1]

I. Was the Board's decision consistent with the applicable zoning ordinance and supported by substantial evidence?

II. Was the variance request barred by collateral estoppel?

For the following reasons, we answer both questions in the negative. Therefore, we shall vacate the judgment below and remand this case to the Board for further proceedings consistent with this opinion.

[1] The questions, as presented by the appellant, are as follows:

I. Whether the agency decision is based on an error or [sic] law?

II. Whether the applicant did not met [sic] his burden of proof for variance?

III. Whether the zoning decision should have been dismissed based on collateral estopped?

FACTUAL AND PROCEDURAL BACKGROUND

On October 6, 2015, Joseph and Barbara Moran filed a variance application seeking to build a garage within fifteen (15) feet of the front of their property line at 661 Hazelhurst Road, Swanton, Maryland 21561. The application specified that the garage would be built on the vacant lot ("Lot 81" or the "vacant lot") located directly across the street from the Morans' lakefront house. As indicated above, the appellant owns the lot adjoining the vacant lot. She opposes the variance, clearly believing that the Morans should only be permitted to build a garage on the same lot occupied by their house ("Lot 31" or the "lakefront lot"). When their application was denied, the Morans noted an appeal to the Board.

On November 19, 2015, the Board held a hearing on the Morans' application. Mr. Aaron Teets, a professional engineer and land surveyor, testified on behalf of the Morans that if the setbacks were applied to the vacant lot in accordance with the Deep Creek Watershed Zoning Ordinance (the "Zoning Ordinance"), the dimensions of the garage would be five (5) feet by one hundred and five (105) feet. Mr. Teets testified that "there's quite a few properties on Hazelhurst Road that have garages or accessory buildings that are . . . much closer to the roadway than the one that we're proposing." He also testified that "there are quite a few properties, lakefront properties, that . . . own properties across the road that have accessory uses." In fact, according to Mr. Teets, "there's only one lot on . . . Hazelhurst Road on the non-lakefront side that isn't owned by a lakefront owner [who is]

using it as an accessory use for accessory buildings." Therefore, Mr. Teets concluded that the Morans' application is "a pretty consistent use within the Hazelhurst neighborhood."

Following the hearing, the Board voted unanimously to grant the Morans a variance to build a garage within twenty-one (21) feet of the front property line of the vacant lot. The Board memorialized its decision in a written Opinion and Order dated December 1, 2015, imposing upon the variance the following conditions:

> a. This approval established the front setback for this proposed construction only. This approval does not establish any future setbacks for the affected front property line.
> b. The application must secure a building permit through the Planning Office, before commencing construction.
> c. A second survey must be submitted to the Planning Office after installation of the footers, during construction of the garage.
> d. An as-built drawing must be submitted to the Planning Office upon completion of the construction of the addition to the garage.
> e. The size of the garage is limited to 24 feet by 40 feet.

Feeling aggrieved by the Board's decision, the appellant filed a petition for judicial review in the Circuit Court for Garrett County on December 21, 2015. The circuit court held a hearing on the petition on May 13, 2016. At the conclusion of the hearing, the court found: (1) that the variance application was not barred by collateral estoppel; and (2) that the Board's decision was in accordance with the law and supported by substantial evidence. Based on these findings, the court dismissed the appellant's petition for judicial review.

On June 8, 2016, the appellant noted a timely appeal to this Court.

STANDARD OF REVIEW

It is well-settled that, on appeal from a circuit court's denial of a petition for judicial review of a zoning board's decision,

> the role of this court is essentially to repeat the task of the circuit court; that is, to be certain that the circuit court did not err in its review." *Mortimer v. Howard Research & Dev. Corp.*, 83 Md. App. 432, 442, 575 A.2d 750 (1990). Thus, we review the decision of the administrative agency, not the decision of the circuit court. *Abbey v. Univ. of Maryland*, 126 Md. App. 46, 53, 727 A.2d 406 (1999). We "recognize two standards of review of a decision of a zoning board: one for the board's conclusions of law and another for the board's findings of fact or conclusions of mixed questions of law and fact." *Eastern Outdoor Advert. Co. v. Mayor and City Council of Baltimore*, 128 Md. App. 494, 514, 739 A.2d 854 (1999). As to the Board's factual findings, we must determine "'whether the issue before the administrative body is "fairly debatable," that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions.'" *Stansbury v. Jones*, 372 Md. 172, 183, 812 A.2d 312 (2002) (quoting *White v. North*, 356 Md. 31, 44, 736 A.2d 1072 (1999); quoting in turn *Sembly v. County Bd. of Appeals*, 269 Md. 177, 182, 304 A.2d 814 (1973)).
>
> In reviewing the board's legal conclusions, however, "our review is expansive, and we owe no deference." *Bennett v. Zelinsky*, 163 Md. App. 292, 299, 878 A.2d 670 (2005). "'Generally, a decision of an administrative agency, including a local zoning board, is owed no deference when its conclusions are based upon an error of law.'" *Stansbury*, 372 Md. at 184, 812 A.2d 312 (quoting *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569, 709 A.2d 749 (1998)). In reviewing for legal error, we "'must determine whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law.'" *Eastern Outdoor Adver. Co.*, 128 Md. App. at 514, 739 A.2d 854 (quoting *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 652, 701 A.2d 879 (1997)).

Cinque v. Montgomery Cty. Planning Bd., 173 Md. App. 349, 360 (2007).

Moreover, "[a] reviewing Court may not uphold the agency order unless it is sustainable *on the agency's findings and for the reasons stated by the agency.*" *Eastern Outdoor Advert. Co. v. Mayor & City Council of Baltimore*, 128 Md. App. 494, 516 (1999) (quoting *Colao v. Cty. Council of Prince George's Cty.*, 109 Md. App. 431, 463 (1996), *aff'd*, 346 Md. 342 (1997)) (emphasis in original).

DISCUSSION

I. WHETHER THE BOARD'S DECISION WAS CONSISTENT WITH THE ZONING ORDINANCE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

a. Parties' Contentions

The appellant argues that the Board misapplied the law where it approved the Morans' application for a variance based on the doctrine of merger. According to the appellant, the legal doctrine of merger requires not only common ownership for a period of time, but also that the lots be contiguous to each other. The appellant asserts that the latter requirement cannot be met in this case because Lots 31 and 81 are separated by a road. The fact that the two lots are taxed as a single parcel, the appellant contends, is irrelevant.

Moreover, the appellant argues that "[t]here is absolutely no foundation in the record supporting the [Board's] required findings of fact." The appellant asserts that, under the Zoning Ordinance, a garage on the vacant lot cannot satisfy the definition of an "accessory structure" because it would not be located on the same lot as the Morans' principal use, their house. The appellant also draws our attention to the definition of "variance,"

contending that the Morans are not helped by the fact that they "could have had a garage on Lot 31, but chose not to build [it there] because it would detract from [their] view."

Both the Morans and the Board of County Commissioners of Garrett County, Maryland (collectively referred to as the "appellees") argue that the Board's decision should be affirmed.[2] Together, they assert that, pursuant to Md. Code Ann., Real Prop. ("R.P.") § 2-114, and *Callahan v. Clemens*, 184 Md. 520 (1945), "where the Morans[s] . . . own property on both sides of the street, the Deed to them is required to be construed as passing title in the street to its center line[.]" *Bd. of Cnty. Comm'rs Brief* at 6. Therefore, the appellees contend that "[the] lots are, in fact, contiguous for purposes of an accessory use." *Id.*

In addition, the appellees argue that the present case is one in which the burden of proof for variance was met. They assert that the appellant "actively chose to ignore," *id.* at 7, part of the definition of "accessory structure," namely, the part that states that an accessory structure is "**customarily** incidental to and located on the same lot occupied by the principal use." (Emphasis added). The appellees contend that, by including in its definition the word "customarily," the legislative body clearly intended that there not be a requirement that every accessory structure be located on the same lot as the principal use. Therefore, and in light of the various factual findings made by the Board (*e.g.*, that the application of the setback requirements to the vacant lot would result in a garage with dimensions of five (5) feet by one hundred and five (105) feet; that Lots 31 and 81 are

[2] The appellees' arguments are substantially the same. Therefore, though we may quote one appellee or the other, we shall address their arguments as being made by both.

assessed as a single parcel for tax purposes; that other owners of lakefront lots on Hazelhurst Road also have lots on the other side of the street that they use for accessory uses; and that a forty (40) foot by thirty (30) foot garage would not fit on the lakefront lot without a variance), the appellees argue that the "decision of the Board . . . is supported by substantial evidence, is reasonable, and is in compliance with the Deep Creek Watershed Zoning Ordinance." *Brief of Joseph Moran and Barbara Moran* at 9.

b. Analysis

i. Merger

First, we shall address the appellant's argument that the Board misapplied the law where, in its Opinion and Order dated December 1, 2015, it found that Lots 31 and 81 have merged for zoning purposes. The doctrine of zoning merger was first recognized in Maryland in the case of *Friends of The Ridge v. Baltimore Gas & Elec. Co.* ("*Ridge*"), 352 Md. 645, 653, 724 A.2d 34, 38 (1999).[3] In *Ridge*, a utility company that owned three contiguous parcels of land was planning to enlarge its substation. *Id.* at 649. Though the existing substation was located on a single parcel, "[t]he new, enlarged substation was planned to extend onto a contiguous parcel." *Id.* The issue before the Court of Appeals was whether, under the applicable zoning ordinance, the utility company was "required . . . to obtain a variance to use the three parcels as one parcel." *Id.*

Ultimately, the *Ridge* Court held that "no variance is required for respondent to utilize the entire parcel for its proposal, so long as setback requirements are met from the

[3] *See Ridge*, 352 Md. at 653 n.8 (explaining that the Court of Appeals was "unaware of any [previous] Maryland cases adopting the zoning doctrine of merger").

exterior property lines of respondent's combined parcel." *Id.* at 650. In so holding, the Court, for the first time, announced that the doctrine of zoning merger applies in Maryland. In order for two or more parcels to merge for zoning purposes, the following elements must be satisfied, according to *Ridge*: (1) the parcels must be under common ownership; (2) the parcels must be contiguous; and (3) there must be some evidence of intent by the owner to merge.[4] *Id.*at 653-62. However, even if all three of the aforementioned elements are satisfied, merger does not occur if "the ordinance's language specifically and clearly prohibits it." *Id.* at 648. *Accord Remes v. Montgomery Cty.*, 387 Md. 52, 65 (2005).

In the instant case, the Zoning Ordinance specifically and clearly prohibits merger, at least at it applies to lots like Lots 31 and 81 that are separated by a roadway. Section 157.007.B(36) of the Zoning Ordinance defines "lot" as:

> A parcel or plot of land used or set aside and available for use as the site for 1 or more buildings and buildings accessory thereto or for any other purpose, in one ownership **and not divided by a road nor including any land within the limits of a public or private road right-of-way.**

(Emphasis added). We explained in *Cremins v. Cty. Comm'rs of Washington Cty.*, 164 Md. App. 426, 448 (2005), that,

> [w]hen we review the interpretation of a local zoning regulation, we do so "under the same canons of construction that apply to the interpretation of statutes." *O'Connor v. Baltimore County*, 382 Md. 102, 113, 854 A.2d 1191 (2004). "'The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.'" *Motor Vehicle Admin. v. Jones*, 380 Md. 164, 175, 844 A.2d 388

[4] In her brief, Ms. Wells lists the elements of zoning merger as "(1) common ownership for a period of time and (2) the lots or parcels must be contiguous to each other." She omits the intent element, which is equally crucial to the zoning merger analysis.

> (2004) (quoting *Holbrook v. State*, 364 Md. 354, 364, 772 A.2d 1240 (2001)). We assign words in a statute or, as here, an ordinance, their ordinary and natural meaning. *O'Connor*, 382 Md. at 113, 854 A.2d 1191. When the plain language of the provision "is clear and unambiguous, our inquiry ordinarily ends[.]" *Christopher v. Montgomery County Dep't of Health & Human Servs.*, 381 Md. 188, 209, 849 A.2d 46 (2004) (quotation marks and citation omitted). Only when the language is ambiguous do we look beyond the provision's plain language to discern the legislative intent. *Jones*, 380 Md. at 176, 844 A.2d 388.

Therefore, we need not look beyond the definition of "lot" in the Zoning Ordinance to determine whether Lots 31 and 81 can be merged. The definition clearly states, in part, that a lot is a "parcel or plot of land . . . not divided by a road." Lots 31 and 81 are divided by Hazelhurst Road. Thus, the two lots cannot be merged for zoning purposes.

In support of their position that Lots 31 and 81 can be merged, the appellees cleverly point to R.P. § 2-114 ("Title to streets or highways"). That section provides, in relevant part:

> (a) **In general.** Except as otherwise provided, any deed, will, or other instrument that grants land binding on any street or highway, or that includes any street or highway as 1 or more of the lines thereof, shall be construed to pass to the devisee, donee, or grantee all the right, title, and interest of the devisor, donor, or grantor (hereinafter referred to as the transferor) in the street or highway for that portion on which it binds.
>
> (b) **Boundary between tracts.** If the transferor owns other land on the opposite side of the street or highway, the deed, will, or other instrument shall be construed to pass the right, title, and interest of the transferor only to the center of that portion of the street or highway upon which the 2 or more tracts coextensively bind.

In drawing these provisions of the Real Property Article to our attention, the appellees have overlooked the critical fact that "[z]oning is concerned with dimensions and uses of land or structures, not with any particular description [of] 'lot,' 'parcel,' or 'tract' applicable to or necessary for conveyancing." *Ridge*, 352 Md. at 655. In other words, "[c]onveyancing is a separate area of law involving the transfer of property between buyers and sellers that generally is not directly connected with government regulations and restrictions on the use of property through the zoning power." Accordingly, R.P. § 2-114(b)'s reference to the "center of that portion of the street or highway upon which the 2 or more tracts coextensively bind" does not alter our analysis.

For the foregoing reasons, we hold that the Board misapplied the law of zoning merger where it found that Lots 31 and 81 are "one lot, not two separate lots."

ii. The Vacant Lot Garage as an Accessory Structure to the Lakefront House

We now turn our attention to whether the Zoning Ordinance would allow a garage to be built on the vacant lot despite the nonapplication of the doctrine of merger. To resolve this issue, we must determine whether a garage, as an accessory structure, is required to be built on the same lot as its principal use. We hold that there is no such requirement and shall explain.

Section 157.007.B of the Zoning Ordinance defines "accessory structure" and "accessory use" as follows:

> (1) ***ACCESSORY STRUCTURE.*** A subordinate structure customarily incidental to and located on the same lot occupied by the principal use. The term includes, but it not limited to, a private garage, barn, playhouse, greenhouse, swimming pool, satellite dish antenna, dock or boathouse.

> (2) ***ACCESSORY USE.*** A use conducted on the same lot as the primary use to which it is related; a use that is clearly incidental to, and customarily found in connection with, such primary use.

The appellant argues that these definitions require garages to be built on the same lot as their principal uses. In doing so, however, she ignores the term "customarily" in the first definition and the semicolon in the second definition. By including the term "customarily," the legislative body chose not to restrict the definition of "accessory structure" to include only those structures located on the same lot as their principal uses. Likewise, by including a semicolon in the definition of "accessory use," the legislative body provided us with two definitions that are similar to one another, but not entirely synonymous.[5] Thus, because a garage on the vacant lot could satisfy what comes after the semicolon ("a use that is clearly incidental to, and customarily found in connection with, such primary use"), it could also satisfy the definition of an "accessory use" as a whole.

For the foregoing reasons, we hold that an accessory structure and use garage need not, in every case, be located on the same lot as the principal use under the Zoning Ordinance.

[5] *See Preserving "Catalyst" Attorney's Fees Under the Freedom of Information Act in the Wake of Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 37 Harv. C.R.-C.L. L. Rev. 131, 152–53 (2002) (explaining that "the semicolon appears to connote the existence of two similar, but non-synonymous definitions. When the [7th Edition of the Black's Law D]ictionary introduces a wholly distinct definitional trail, it employs a new numbered entry in the definition of the term, and when it provides synonyms, it generally makes that intent clear with the use of phrases such as 'also termed,' 'also written,' and 'often shortened to.' Thus, it seems likely that the semicolon signals something in between: a related, but non-synonymous definition.").

II. WHETHER THE VARIANCE REQUEST WAS BARRED BY COLLATERAL ESTOPPEL

a. Parties' Contentions

The appellant argues that the Board's decision should be reversed based on the application of the doctrine of collateral estoppel. The Morans had previously filed a variance application to build a garage on the vacant lot, but they withdrew that application following a hearing before the Board on November 20, 2014. The Board never entered a final ruling on the previously-filed application ("VR-728"). Nevertheless, the appellant asserts that it serves to bar the instant application ("VR-742") under the doctrine of collateral estoppel.

The appellees argues, quite simply, that, because there was no final judgment with respect to VR-728, the doctrine of collateral estoppel does not apply.

b. Analysis

The elements of collateral estoppel are as follows:

> (1) there was a final judgment on the merits in the prior litigation;
>
> (2) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior litigation;
>
> (3) the issue decided in the prior litigation is identical with the issue presented in the subsequent litigation;
>
> (4) the issue actually litigated was essential to the judgment in the prior action.

Berrett v. Standard Fire Ins. Co., 166 Md. App. 321, 339–40 (2005), *aff'd*, 395 Md. 439 (2006) (quoting *Deitz v. Palaigos*, 120 Md. App. 380, 395 (1998)). In the case at bar, there was no final judgment first respect to VR-728. The Morans withdrew with application, and

that withdrawal was accepted by the Board. Therefore, the first element of collateral estoppel is not satisfied and the doctrine does not apply.

CONCLUSION

The Board's decision was based, in large part, on Lots 31 and 81 combining to form a single lot for zoning purposes. However, as we explained above, the doctrine of merger does not apply in the case at bar. Because we can only affirm the Board's decision for the reasons stated by the Board, we must vacate the judgment below. We instruct the circuit court to vacate the decision of the Board and remand the case to the Board for further proceedings consistent with this opinion. Specifically, the Board shall decide whether to grant the Morans a variance to build a garage on the vacant lot notwithstanding the fact that the vacant lot and the lakefront lot are not considered to be merged for zoning purposes.

JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY VACATED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE THE DECISION OF THE BOARD AND REMAND FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY AMONG THE PARTIES.