Circuit Court for Montgomery County
Case No. 485741V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1705

September Term, 2021

IN THE MATTER OF WILLIAM CHERNICOFF

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

JJ.

Opinion by Arthur, J.

Filed: November 28, 2022

Two homeowners obtained a building permit from the Montgomery County Department of Permitting Services ("DPS") to convert their detached garage into a living space for their elderly family members. Their neighbors appealed the issuance of the permit. The Montgomery County Board of Appeals affirmed the grant of the permit, and the Circuit Court for Montgomery County affirmed the Board's decision. The neighbors appealed.

For the reasons set forth below, we hold that the Board did not err in approving the permit. We affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2011, Richard and Pavitra Bacon purchased a residential property in Silver Spring. The property is located in an R-60 (residential) zone.

When the Bacons purchased the property, it included a detached garage, consisting of approximately 808 square feet, which was set back five feet from the closest lot line. Because of its size and its distance from the lot line, the garage did not conform to the current requirements of the Montgomery County Zoning Ordinance. Because the garage had been built before the Zoning Ordinance imposed those requirements, it was a lawful, nonconforming use.

In February of 2020, the Bacons applied for a building permit to convert the garage into an accessory dwelling unit ("ADU"). They proposed modifications to the garage, including the replacement of the roof, an increase in the height of the structure to accommodate an HVAC system, the addition of a second-floor "storage attic" above the

first-floor living space, and a second-floor window. The changes in the roof structure (to add an HVAC system) were required for the proposed ADU to comply with the County building code.

DPS denied the permit because the proposed ADU did not comply with the R-60 zoning requirements pertaining to the required setback from the lot line, the proposed second-floor window, and the limits on the size of the structure.

In response to the denial of the permit, the Bacons applied to the Board for three variances:

(1) a setback variance of 12 feet to account for the setback requirement of 17 feet (the "setback variance");

(2) a variance of 142.5 square feet in the size of the ADU (the "size variance"); and

(3) a variance to add a second-floor window to the ADU (the "window variance").

Appellants William and Bruna Chernicoff own the property abutting the Bacons' property to the south. Appellants Ozan and Serpil Koknar own the property abutting the Bacons' property along the rear lot line. The Chernicoffs and the Koknars opposed the Bacons' variance requests.[1]

After a hearing in which the Chernicoffs and the Koknars participated, the Board granted the setback and size variances, but denied the window variance. In a written decision dated July 15, 2020, the Board evaluated each of the statutory criteria for the

[1] The Chernicoffs and Koknars were joined by another neighbor, who is no longer a party to these proceedings.

grant of a variance and concluded that the application for the setback and size variances met the criteria. Among other things, the Board found that the variances "were required to make the ADU code compliant." In addition, it remarked that "two-story accessory structures are allowed in the R-60 zone, and that the height of the proposed structure will not exceed the maximum allowable height for accessory structures in the R-60 zone." As a condition of the variances, the Board required that the Bacons submit as-built plans upon completion of the construction of the ADU.

The neighbors sought judicial review in circuit court. Although they had told the Board that the proposed ADU would "be adverse to the use and enjoyment" of their properties (a ground for denying a variance under § 59.7.3.2 of the Montgomery County Zoning Ordinance), the neighbors told the circuit court that the Board lacked "jurisdiction" or "authority" to grant the variances.

In an order dated January 21, 2021, the circuit court ruled that the neighbors had not preserved their arguments. In a footnote, the court added:

> On appeal, the [neighbors] did not challenge the Board's factual findings on the only issue raised before the Board. Notwithstanding this failure, the Court has reviewed the issues properly raised before the Board and record herein. The Board's factual findings and conclusions were supported by substantial evidence and its decision was not based upon an erroneous conclusion of law.

The neighbors did not appeal the circuit court's decision to this Court.

Meanwhile, on August 18, 2020, the Bacons had applied to DPS for a building permit for the ADU. On November 20, 2020, DPS granted the permit under § 8-25 of the

Montgomery County Code. The permit authorized the Bacons to convert the garage to an ADU.

The neighbors appealed the issuance of the permit to the Board. In their written argument, they began with the premise that the Bacons' garage was a lawful nonconforming structure. They cited § 59.7.7.1.A.1 of the Montgomery County Zoning Ordinance, which prohibits any increase in the height or footprint of a lawful, nonconforming structure that existed as of October 31, 2014. Because the building permit allowed the Bacons to increase the height and gross floor area of the garage, the neighbors argued that it conflicted with the Zoning Ordinance.

At the outset of the hearing on the building permit, several Board members expressed their concern that the neighbors intended to relitigate the grant of the variances, which approved the structure that the building permit allowed the Bacons to build. The neighbors responded that they would limit their case to a single issue: "whether the permit was unlawfully issued because it authorize[d] an increase in the height and/or floor area of a lawful, nonconforming structure." They argued that "a building permit cannot be granted that authorizes an increase in the height or floor area of a lawful, nonconforming use." "That issue," they asserted, "was not before the Board when the variances were granted because there was no permit before the Board."

The Board issued an opinion denying the appeal. It observed the DPS had found a need for the variances, that the Board had granted the variances, and that the circuit court had approved the Board's decision. It concluded that because of "the grant of the variances, the nonconforming structure was made conforming, and thus DPS properly

issued the permit for the Bacon's garage, based on the variances that the Board had previously granted."

The neighbors petitioned for judicial review.

At the hearing on the petition in the circuit court, the neighbors framed the question before the court as follows: "Can the Board of Appeals use its authority to grant variances to turn a lawful nonconforming structure into a conforming one?"

The court denied the petition, which it characterized as an attempt "to get a second bite at the apple" by challenging the variances. Those challenges, the court said, "should have been raised," and "could have been raised," but "were not raised" at the variance hearing.

This appeal followed.

QUESTION PRESENTED

The neighbors present the following question, which we have rephrased: Did the Board err in approving the building permit, which allowed for an increase in the height and floor area of an ADU, based upon the zoning variances approved by the Board?[2]

[2] The neighbors phrased their question as follows:

> IN APPROVING THE PERMIT TO CONVERT A LAWFUL NONCONFORMING STRUCTURE FROM A GARAGE INTO AN ACCESSORY DWELLING UNIT, DID THE BOARD COMMIT LEGAL ERROR WHEN IT CONCLUDED THAT, DUE TO ITS PROPER APPROVAL OF VARIANCES REQUESTED BY THE PROPERTY OWNER, THE NONCONFORMING STRUCTURE WAS MADE CONFORMING?

STANDARD OF REVIEW

In reviewing an appeal from a circuit court's exercise of judicial review over an agency's ruling, "we look through the decision of the circuit court and review the agency's decision directly." *West Montgomery Cty. Citizens Ass'n v. Montgomery Cty. Plan. Bd. of Md.-Nat'l Capital Park & Planning Comm'n*, 248 Md. App. 314, 332-33 (2021). Our task is limited to deciding whether the agency's findings and conclusions are supported by substantial evidence in the record and whether the agency's decision is premised upon an error of law. *I.B. v. Frederick Cty. Dep't of Soc. Servs*., 239 Md. App. 556, 562 (2018) (citation omitted).

In this case, the neighbors contest the Board's conclusions of law, which we review *de novo*. *See Mayor & Council of Rockville v. Pumphrey*, 218 Md. App. 160, 194 (2014). Generally, an agency's decision, including that of a local zoning board, is not entitled to deference if the decision is based on erroneous conclusions of law. *Montgomery Cty. v. Longo*, 187 Md. App. 25, 49-50 (2009) (citations omitted).

DISCUSSION

The neighbors contend that the Board erred in affirming the issuance of the building permit, which, they claim, violated the height and floor area restrictions pertaining to nonconforming structures. They rely on § 59.7.7.1.A.1 of the Montgomery County Zoning Ordinance, which provides:

> A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential,

> Employment, or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones.

In the neighbors' view, the Board erroneously concluded that the variances transformed the Bacons' garage from a lawful nonconforming structure to a conforming structure. They contend that the garage remained a nonconforming structure subject to the restrictions of § 59.7.7.1.A.1. Thus, they conclude that the issuance of the permit was unlawful.

The Board and the Bacons respond that the challenge to the building permit is an attempt to relitigate the grant of the variances and the Board's authority to grant the variances. They point out that the neighbors identify no legal defect in the building permit unrelated to the variances. They contend that because the challenges to the validity of the variances either were raised or could have been raised at the variance hearing, the challenge to the building permit is barred by issue preclusion or claim preclusion.

"[I]f a proceeding between parties involves the same cause of action as a previous proceeding between the same parties, the principle of res judicata applies and all matters actually litigated or that could have been litigated are conclusive in the subsequent proceeding." *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 388 (2000). On the other hand, "[i]f a proceeding between parties does not involve the same cause of action as a previous proceeding between the same parties, the principle of collateral estoppel applies, and only those facts or issues actually litigated in the previous action are conclusive in the subsequent proceeding." *Id.* at 388-89.

The neighbors acknowledge that they previously challenged the validity of the variances and the Board's authority to approve the variances. They also acknowledge that the Board approved the variances. And they acknowledge that the circuit court upheld the Board's decision. They differentiate their challenge to the building permit from their challenge to the variances by arguing that they do not contest the validity of the variances. Instead, they say, they challenge the impact of the variances on other zoning prohibitions, specifically the prohibitions on increasing the height and footprint of nonconforming uses in § 59.7.7.1.A.1.

We agree with the Bacons and the Board that any challenge to the validity of the variances is barred by collateral estoppel. The parties are the same as the parties to the variance case; the validity of the variances was previously litigated in the variance case; and the circuit court affirmed the Board's approval of the variances, in part because the Board's decision was supported by substantial evidence and untainted by legal error.[3] At this juncture, therefore, the validity of the variances has been conclusively established. The neighbors cannot attack the variances in the guise of an attack on a building permit that authorized the Bacons to do what the variances allowed them to do.[4]

[3] The neighbors characterize that ruling as "dicta." They argue that the ruling was unnecessary, because the circuit court had determined that they failed to preserve their argument that the Board lacked the authority to grant the variance. We interpret the ruling as an alternative ground for the decision – one that a careful jurist took pains to insert in order to ensure the decision did not turn solely on procedural grounds.

[4] The neighbors argue that we cannot affirm the Board's decision on the basis of collateral estoppel. They observe that we review the decision of the Board, and not the decision of the circuit court. And although the circuit court relied on something

(continued)

Even if collateral estoppel were not in play, the neighbors' arguments would fail on the merits. As the Board argues in its brief, "[t]he variances allowed the construction of the very thing that the building permit allowed." "By dint of the variances," the Board correctly observes, "the garage structure became lawful." Thus, the Board concludes, "[t]he variances brought the garage into compliance with zoning standards." *Accord* 3 Gail Gudder, *Rathkopf's The Law of Zoning and Planning* § 58.23 (4th ed. rev. 1994) (stating that, "[w]hen a variance is granted, the use permitted becomes a conforming use"). The Board did not err in issuing a building permit that authorized the Bacons to build the structure that the Board had previously approved when it issued the variances.

The neighbors argue that this case is "not materially distinguishable" from *Kenyon v. Board of Zoning Appeals of Harford Cty.*, 235 Md. 388 (1964). There, the Court of Appeals held that a local board of zoning appeals had exceeded its powers when it granted a variance to permit an owner to expand a lawful, nonconforming use to a greater extent than the zoning ordinance allowed. The *Kenyon* case is distinguishable on at least two grounds. First, *Kenyon* concerns the grant of a variance, not the grant of a building permit that allows the property owners to construct a structure for which they have obtained a variance. Second, unlike the Harford County ordinance at issue in *Kenyon*, § 59.7.3.2 of the Montgomery County Zoning Ordinance imposes no similar limits on the

resembling collateral estoppel when it affirmed the award of the building permit, the Board, the neighbors say, did not. We are unpersuaded. In our judgment, the question of issue preclusion was adequately raised and decided in the Board. The Board members raised the question on their own motion at the outset of the hearing. Moreover, the Board based its decision on its prior approval of the variances and the circuit court's decision affirming that approval.

Montgomery County Board's power to grant variances. Under § 59.7.3.2, the Board may grant variances from "any requirement of" the Zoning Ordinance.

Section 59.7.3.2.G.3 of the Montgomery County Zoning Ordinance states that the "[a]pproval of a variance entitles the applicant or successor to obtain a building permit or file a site plan or conditional use application to the standard granted by the variance." The Bacons obtained a variance. The approval of the variance entitled the Bacons to a building permit "to the standard granted by the variance." *Id.* That is exactly what the requested building permit did. The Board, therefore, did not err in approving the grant of the permit.[5]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[5] In delivering his oral ruling in this case, the circuit court judge "question[ed]" whether the neighbors had proceeded in "good faith" and wondered whether "costs" should be allowed. Neither the Bacons nor the Board responded by moving for an award of costs and expenses. In their brief, however, the Bacons, who are representing themselves, argue that they should receive an award of the costs and expenses that they have incurred on appeal. The short answer to their argument is that this Court can review a trial court's decision about whether a party proceeded in bad faith or substantial justification, but typically does not make factual findings of its own on that subject (or about the reasonableness of the costs, expenses, and attorneys' fees that a party claims to have incurred). For a case concerning an award of Rule 1-341 sanctions after an appeal, see *Litty v. Becker*, 104 Md. App. 370, 376 (1995).