UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0036

September Term, 2015

WILLIAM LAGNA

v.

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

Woodward,
Arthur,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: January 27, 2016

In an effort to legitimize out-of-water boat storage on his residentially-zoned property, landowner William Lagna petitioned to establish the right to use his property for a nonconforming use as a "private boat club." Both the Baltimore County Office of Administrative Hearings and the Baltimore County Board of Appeals denied his request after hearings. The Circuit Court for Baltimore County affirmed the Board's decision. Concluding that there is no basis for reversal, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Lagna Property

This case concerns a waterfront property, slightly less than one acre in size, along Seneca Creek in the Bowley's Quarters area of eastern Baltimore County. Lot lines originally platted in the 1920s run north and south, dividing the property into four narrow lots. The original owners of the four lots disregarded those divisions and built four structures, each straddling the interior lot lines.

Two bungalow-style dwellings stand near the southern property line along Chestnut Road. A larger house is located closer to the northern property line along Seneca Creek. Another, smaller structure is located to the east of the main house.[1] Over time, the property's owners added a gazebo, a shed, a boat ramp, and two large piers extending from the western edge of the property into Seneca Creek.

[1] The two bungalows are known as 3920 and 3922 Chestnut Road, the larger house is known as 4000 Chestnut Road, and the final structure is known as 4002 Chestnut Road.

In the early twentieth century, the property was used both for residential purposes and for recreational purposes. As was common for waterfront properties in the area during that time period, the property served as the site of a small private club. The Lauraville Boat and Swim Club first operated on the property in 1937, followed by the Blue Diamond Boat Club in or around 1952, and then the Seneca Creek Mariners Club in or around 1963. The popularity of water-oriented clubs in Bowley's Quarters declined significantly in the 1950s, after the opening of the first span of the Chesapeake Bay Bridge allowed direct driving access to the Eastern Shore.

Lagna and his wife purchased the property and its various improvements in January 1994. In the deed, the Lagnas affirmed: "the land conveyed in said Deed is residentially-improved owner-occupied real property and that residence will be occupied by us." Lagna, however, did not follow through on his plans to use the property as his residence. He continued to reside at an inland property.[2]

[2] In reaching the decision under review here, the Board of Appeals took notice of the fact that Lagna's residence at 221 Bowley's Quarters Road had been the subject of a prior appeal before this Court. In 1989, Lagna obtained a variance to keep five recreational boats on his Bowley's Quarters Road property in lieu of the maximum of one such vehicle permitted by zoning regulations. In 2006, a hearing officer fined Lagna for storing as many as 30 vehicles on that property, finding that Lagna had transformed the premises into "a marine storage yard or salvage yard[,] . . . something far different tha[n] the five (5) small boats considered in the [V]ariance." Lagna failed to take an administrative appeal from a zoning commissioner's 2007 decision, which found that Lagna had abandoned the variance. This Court then upheld a 2011 decision of the Baltimore County Board of Appeals, which found that the 2007 decision was final with respect to the issue of Lagna's abandonment of the variance. *William Lagna v. Baltimore Cnty.*, No. 2367, Sept. Term 2011 (filed Apr. 2, 2013) (unreported).

B. Code Enforcement Action Against Lagna

The zoning classification for Lagna's property is R.C.5, "Resource Conservation – Rural Residential." Under the Baltimore County Zoning Regulations ("BCZR"), the owner of R.C.5 property is permitted as a matter of right to use the property for a single-family detached dwelling. BCZR § 1A04.2(A). In the past, zoning regulations permitted owners to obtain a special exception to use R.C.5 property for boatyards or marinas, but those uses are no longer permitted in an R.C.5 zone even by special exception. *See* BCZR § 1A04.2(B).[3]

The BCZR limits the number of boats and other recreational vehicles that may be stored on residential lots. *See* BCZR § 415A.[4] In 2011, a Baltimore County Code Enforcement Officer issued Lagna a citation for storing recreational boats on his property in excess of the maximum number of such boats permitted in an R.C.5 zone. An

[3] BCZR § 101.1 defines a "boatyard" as "[a] commercial or nonprofit boat basin with facilities for one or more of the following: sale, construction, repair, storage, launching, berthing, securing, fueling and general servicing of marine craft of all types." A "marina" is defined as "[a] modern boat basin, restricted to recreational marine craft of all types, with facilities for one or more of the following: berthing, launching and securing such craft, and permitting incidental minimum provision for refueling and emergency servicing, as well as the incidental sale of boats and also land (out-of-water) storage as provided in [BCZR §] 417.7." BCZR § 101.1.

[4] BCZR § 415A.1 limits the number of recreational vehicles that may be stored on land or mounted on a trailer to one recreational vehicle per residential lot. Recreational boats, other than boats less than 16 feet in length that are not mounted on a trailer, are subject to the limitation of one recreational vehicle per residential lot. A residential waterfront lot may have no more than one pier, and an owner may store between four to six boats at a pier, depending on the length of the waterside lot line. BCZR § 415A.2. Out-of-water boat storage is permitted on residential waterfront lots from November 1 through March 31, for up to two or three boats, depending on the length of the waterside lot line. BCZR § 415A.3(A).

administrative law judge ("ALJ") of the Baltimore County Office of Administrative Hearings held a hearing regarding Lagna's "out-of-water boat storage on residential property" and his alleged "failure to cease operation of a Marina in [an R.C.5] zone – not allowed by Right or Special Exception[.]" In his defense, Lagna argued that the property historically served as the site of a "boat club" since before the initial adoption of zoning regulations in 1945. Lagna presented testimony and exhibits in an effort to show that various social and boat-related activities had continued on the property without interruption since 1937 under different club names.

On February 8, 2012, the ALJ issued written findings of fact and conclusions of law. The ALJ found: "Absent a ruling by an appropriate authority that the subject property is, in fact a permitted non-conforming use as a marina or other boat[-]related entity, the Inspector has established that the number of boats clearly stored on the site exceeded that permitted under its existing RC5 zoning." The ALJ imposed a penalty of $1,000 and ordered Lagna to bring his property in compliance with the zoning regulations. The ALJ suspended the penalty, however, and directed Lagna to file a petition for special hearing within 90 days "to determine and resolve the zoning use and status of the so-called 'Seneca Creek Mariners Club' property."

C. Lagna's Petition for Special Hearing

On March 3, 2012, Lagna petitioned for a special hearing to determine "the legal nonconforming status of an existing private boat club with piers & 3 existing single family detached dwelling[s]." In an attachment to his filing, Lagna asserted "that the entire property was, and continues to be, mixed use residential with boat club and that the

piers and boat ramp may be used by the four (4) residences . . . and a private boat club with . . . additional storage of boats on trailers up to the maximum allowed per lot for each of the four (4) residential lots."

As additional relief, Lagna asked for an order adjusting the interior lot lines. He attached a site plan with three alternative sketch plans, each of which would subdivide the property so that each of the four structures would be located on its own separate lot.

After review of Lagna's proposal, the Baltimore County Department of Planning recommended that his requests be denied. Based on aerial photographs from 2002, 2005, and 2008, the Department of Planning found that boat storage on Lagna's property had "intensified significantly from 2002 to the present." According to the Department's report, inspection of the property revealed that the accumulation of boats and trailers on the property gave it "the appearance of a commercial boatyard" which was "not compatible with the rural waterfront character of the surrounding residential community."

After a hearing, an ALJ issued an opinion and order denying Lagna's petition. The ALJ concluded that, even though Lagna had offered some evidence that "at one time a men's club or boat club of some sort was conducted on the premises," he had not demonstrated that "that since 1993 he ha[d] consistently operated a 'boat club' on the premises, without a cessation or abandonment of activities for one year or longer[.]"

The ALJ also rejected Lagna's request for a lot-line adjustment on the grounds that a re-subdivision of the property was not the proper subject of a zoning hearing. The ALJ further wrote, "it would seem . . . that if anything, the four lots owned by Mr. Lagna have merged under the doctrine of zoning merger, so as to create (for zoning purposes at

least) one lot where there had been four."[5] Because the original developers of the property had disregarded the interior lot lines and testimony that Lagna had expressed his intention at the time he acquired the property to build a new home on the premises, the ALJ concluded that "the owners' intent was to treat the property as a single lot." Accordingly, the ALJ determined that Lagna was required to comply with the boat storage restrictions for a single waterfront lot as set forth in BCZR § 415A.

D. Hearing Before the Baltimore County Board of Appeals

Lagna appealed from the ALJ's decision to the Baltimore County Board of Appeals. The Board heard the matter de novo on February 5, 2013, and April 17, 2013.

At the hearing, Lagna withdrew his request for a lot-line adjustment and continued to seek a determination regarding the status of a nonconforming use on the property. He then attempted to establish, through a combination of circumstantial evidence and direct testimony, that the property had been used continuously since 1937 both for residential purposes and as a "boat club" and that he had continued to operate a club on the property after he acquired it in 1994.

Lagna, who was born in 1955, testified that he heard stories about the history of clubs on the property while growing up nearby. As exhibits, he submitted photographs of a plaque with the words "Lauraville 1937 Swim + Boat Club" and a concrete relief with the words "SCMC 1963" on one of the buildings. An unsigned letter from one of the

[5] *See generally Remes v. Montgomery Cnty.*, 387 Md. 52, 63-68 (2005). "Merger, in the context of land use, is the joining of contiguous parcels under common ownership, so that they are viewed as a single parcel for purposes of zoning regulations." *Mueller v. People's Counsel for Baltimore Cnty.*, 177 Md. App. 43, 94 (2007).

former owners stated that the property was "clearly a boat club . . . in 1993 and had a long history prior to that." Lagna offered the "Seneca Creek Maritime Club 1990 Roster," which he had acquired from the former owner. The document listed names and addresses for 26 persons, of which it identified five "Executive Committee Members" and one "Treasurer." Three persons listed on the roster wrote letters stating that they had been active members of the "Seneca Men's Club" or the "Seneca Creek Maritime Club" until Lagna had acquired the property in 1994. One of the members added: "All records on this club were destroyed when the club disbanded in 1993."

Lagna testified that, before he acquired the property, members of the "Seneca Creek Mariners Club" had used the property for swimming and parties. He recalled that some of the members stored boats on the property and launched their boats from the pier. According to Lagna, when he purchased the property in 1994, about seven members accepted his offer to continue their membership. He then "continued to let people that [he] knew, friends, family, other folks, co-workers, use the property" and "people continued the use at a relatively low level."

Although Lagna testified that he did not typically maintain a club membership list, he prepared such a list for the hearing. The roster included: Lagna himself, three of Lagna's family members, Lagna's tenant, six other purported members, and four "Kayak Members." Lagna's brother testified that he had attended cookouts on the property but he did not consider himself a club member and did not know which of Lagna's friends were club members. Lagna's tenant testified that he had paid Lagna $800 monthly since 1995 to reside on the property and that his rent payments included club membership.

Two of Lagna's friends testified that they had paid dues for boat storage or access to the waterfront, but had never participated in formal club meetings or events. Another person named on the membership list stated in a letter that Lagna had provided free boat storage and an "informal membership" in exchange for assistance with projects on the property. Lagna also submitted form letters signed by three members of the community, who were not identified as members, but who stated that, to their knowledge, a "Boat Club" had existed at the property for the last 35 to 50 years.

According to Lagna, Hurricane Isabel in 2003 destroyed much of the documentary proof of the club's existence. He offered an assortment of other documents to support his assertions of the continuous operation of a club, including: copies of a few checks made out to him in the amount of $200 for "Dockage" or "Boat Club Use"; a series of checks made out to him in the amount of $800 from his tenant for "Boat and Slip Rental"; and electricity bills listing 4000 Chestnut Road as "General Service" rather than residential. Lagna also produced redacted copies of his Schedule C federal income tax forms, reporting a profit or loss for a business named the "Seneca Creek Mariners Club" or "Seneca Creek Marine Center" or other variations of those names. He listed the type of business as "Boat Club" from 1994 until 2004, and then he characterized it as "Marina" from 2005 through 2010.

Lagna's final witness was an expert on land use and maritime development. The expert characterized the uses described by Lagna and his other witnesses as "consistent" with the type of "small, private, social, swim, water-oriented clubs" that had emerged in Bowley's Quarters before 1945. The expert opined that Lagna's use did not meet the

definition of a "marina," "boatyard," or "yacht club"[6] under the BCZR. Although the term "boat club" is not defined by the BCZR and although the witness offered no definition, he opined that there were no legal restrictions on the number or type of boats that could be stored at such a "boat club."

People's Counsel for Baltimore County participated in the hearing to oppose Lagna's petition. People's Counsel contended that the Board should reach the same conclusions reached by the ALJ: that Lagna's use of the property was materially different from its prior uses and that the four lots on the property had merged into one lot for zoning purposes.

People's Counsel called five of Lagna's neighbors to describe their observations of the property before and after Lagna's acquisition of the property in 1994. Each of these neighbors largely corroborated the testimony of the others. The neighbors consistently described Lagna's use of the property as different in character from the use of the property by his predecessors. They testified that during the 1970s, 1980s, and early 1990s the club was not known in the neighborhood as a "boat club" but as a men's club or social club. Members of that former club held frequent cookouts, parties, and other social events on the property during summer months, but any boating activity at the club was limited. Former club members stored only a few boats on the northern portion

[6] Zoning regulations applicable within the Chesapeake Bay Critical Area define a "yacht club" as: "A use of waterfront land by a social club which provides recreational facilities, including boat docking, for members and their guests." BCZR § 101A.1. Yacht clubs are permitted in some zones, but not in an R.C.5 zone. *See* BCZR § 1A04.2.

of the property but not near the residences on the southern portion of the property, which were typically occupied by tenants.

Each of the neighbors called by People's Counsel testified that, to the best of their knowledge, the club had closed before Lagna acquired the property in 1994. Although the neighbors sometimes observed Lagna's family or friends using the property for recreation, none of them knew or believed that Lagna had continued to operate a private club. The neighbors observed a sharp decline in any social activity on the premises after Lagna's purchase of the property, followed by a gradual increase in out-of-water boat storage. The neighbors explained that Lagna had accumulated dozens of boats over the past decade, densely covering the entire property, including areas near the unoccupied bungalow houses near Chestnut Road.[7] Many boats appeared to be unused, unlicensed, or in various states of disrepair. The buildings that had formerly supported club activities also appeared dilapidated. Overall, the neighbors described the appearance of the property as that of a "boat junkyard" or an "elephant graveyard" for boats.

People's Counsel's final witness, a member of a marina trade association, testified about the establishment of maritime districts in the early 1990s. A 1991 survey to identify all "bootleg marinas" in Bowley's Quarters area, by finding properties with five or more boats, had not identified the Chestnut Road property as a boat club or marina.

[7] One witness offered an aerial photograph from 1995 showing only two boats stored near the houses at the northern border of the property. More recent photos taken from the air and from the ground revealed approximately 30 boats across the property. On cross-examination, Lagna admitted that he personally owned 23 of 29 boats stored on the property.

E. The Board's Denial of Lagna's Petition

On September 13, 2013, the Board issued an opinion and order denying the relief requested in Lagna's petition.

The Board determined "that Mr. Lagna's storage and collection of his boats on his Property does not qualify as a non-conforming existing boat club." The Board explained that Lagna had provided "only scant information as to the nature or extent" of the clubs that had existed on the property prior to his ownership. The Board reasoned that, even assuming the existence of such a club starting in 1937, letters from former club members showed "that the club was abandoned in 1993 and therefore the use was extinguished even before Mr. Lagna's purchase in 1994."

The Board credited testimony from Lagna's neighbors that the types of club activities that they had observed in earlier decades ceased upon Lagna's purchase. The Board emphasized that Lagna failed to show supporting facts that might indicate the continued existence of a club, such as: common knowledge among neighbors of the club's existence, observed outdoor activity during summer months, maintenance of support facilities, an organizational structure, insurance, a separate bank account, advertisements, a website, or a sign to notify people of the club's existence. The Board also construed Lagna's failure to continue to list a "boat club" on income tax forms after 2005 as "an admission by Mr. Lagna that any 'boat club' use by him terminated in 2005."

The Board further reasoned that, even if Lagna had intended to continue operating a club, the increase in boat storage over his property demonstrated that "his current use is an intensification and change from the original boat, swim, and/or men's club."

In addition, the Board agreed with the ALJ's finding that Lagna's four lots had merged into a single lot for zoning purposes. The Board explained that the original owners had built structures across the lot lines. The Board pointed to Lagna's storage of boats across the interior lot lines as an indication of his intent to continue to use the lots as one single property. The Board added that Lagna had not produced evidence of "any separation of the four lots or residences for other uses" since his purchase of the property. The Board thus declared that Lagna was required to "comply with BCZR § 415 with regard to the number of boats and piers permitted for one single Property."

Lagna petitioned for review of the Board's decision in the Circuit Court for Baltimore County. After a hearing, the circuit court issued an opinion and order on February 10, 2015. The court upheld the Board's determinations that Lagna had failed to meet his burden of proving the existence of a legal nonconforming use and that the lots had merged for zoning purposes. Lagna filed a notice of appeal on March 3, 2015.

QUESTIONS PRESENTED

Lagna raises a number of challenges to the Board's two main determinations, regarding the nonconforming use status of the property and the merger of the lots for zoning purposes.[8] To properly address the merits of his arguments in light of the

[8] The questions in Lagna's brief are:

A. Did the Board of Appeals err in concluding that there was "no evidence" supporting that the boat club at the property is a legal nonconforming use?

(continued…)

governing principles of judicial review of administrative decisions, we have reformulated the questions as follows:

1. Did substantial evidence support the Board's decision to deny Lagna's petition to approve the legal nonconforming status of Lagna's property for use as a "private boat club"?

2. Did the Board err in determining that Lagna's four lots had merged into a single property for zoning purposes?

The answer to both questions is: No. The Board's determinations on the issues of nonconforming use and lot merger were supported by substantial evidence in the record and were not premised on an error of law.

B. Was there substantial evidence to support the conclusion that the boat club was operating in 1945 when the zoning regulations were adopted and, thus, constituted a legal nonconforming use?

C. Was there substantial evidence to support the conclusion that Mr. Lagna has not changed, discontinued or abandoned the legal nonconforming use under 104.1 of the zoning regulations?

D. Was there substantial evidence to support that the boat club was not in existence in 1988 such that it was grandfathered under section 103.5 of the zoning regulations?

E. Did the Board of Appeals err in addressing the issue of lot merger when that issue was not presented in Mr. Lagna's Petition for Special Hearing?

F. Even if the Board of Appeals had authority to address the issue of lot merger, did the Board err in concluding that the four lots had merged?

G. Was the Board's decision that the four lots are merged an unconstitutional confiscation of Mr. Lagna's property?

DISCUSSION

I.

As the primary relief requested in his petition, Lagna asked the local zoning authorities to declare that he had a right to continue to use his property for nonconforming use as a "private boat club." "A request for special hearing," such as Lagna's petition, "is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore Cnty.*, 163 Md. App. 194, 209 (2005).

The BCZR defines a "nonconforming use" as "[a] legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use." BCZR § 101.1. The Court of Appeals recently reiterated the principles of Maryland law regarding nonconforming uses:

> A property owner establishes a non-conforming use if the property owner can demonstrate to the relevant authority (often a local board of appeals) that the property was being used in a then-lawful manner before, and at the time of, the adoption of a new zoning ordinance which purports to prohibit the use on the property. Such a property owner has a vested constitutional right to continue the prohibited use, subject to local ordinances that may prohibit "extension" of the use and seek to reduce the use to conformance with the newer zoning through an "amortization" or "abandonment" scheme. Nevertheless, nonconforming uses are not favored by Maryland law, and local ordinances regulating validly non-conforming uses will be construed to effectuate their purpose.

Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co., 444 Md. 490, 514 n.16 (2015) (citations omitted).

The ultimate purpose of the BCZR and other zoning regulations is "'to reduce nonconformance as speedily as possible with due regard to the legitimate interests of all concerned.'" *Trip Assocs., Inc. v. Mayor & City Council of Baltimore*, 392 Md. 563, 574

(2006) (quoting *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 307 (1957)). The Baltimore County ordinance generally adopts the "abandonment" approach for eliminating nonconforming uses: "A nonconforming use (as defined in Section 101) may continue . . . provided that upon any change from such nonconforming use to any other use whatsoever, or any abandonment or discontinuance of such nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate." BCZR § 104.1. As with other similar provisions governing nonconforming use, this provision "must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses." *Cnty. Council of Prince George's Cnty. v. E. L. Gardner, Inc.*, 293 Md. 259, 268 (1982) (citations omitted).

Consistent with the notion that nonconforming uses are disfavored, Maryland law allocates the burden of proving a property's status as a nonconforming use upon the party seeking to establish that use. *See Trip Assocs.*, 392 Md. at 573; *Calhoun v. Cnty. Bd. of Appeals of Baltimore Cnty.*, 262 Md. 265, 267 (1971); *Vogl v. City of Baltimore*, 228 Md. 283, 288 (1962); *Lapidus v. Mayor & City Council of Baltimore*, 222 Md. 260, 262 (1960). This Court has summarized that principle in the following terms:

> The party asserting the existence of a nonconforming use has the burden of proving it. Whether that party has met its burden is a matter entrusted to the Board. And, since 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. In that capacity, the Board acts as factfinder, assessing the credibility of the witnesses and determining what inferences to draw from the evidence.

Cnty. Comm'rs of Carroll Cnty. v. Uhler, 78 Md. App. 140, 145 (citations omitted), *cert. denied*, 316 Md. 428 (1989).

Much of Lagna's appellate brief argues that the Board's decision should be reversed because the protestants failed to "prove" that prior uses of the property had terminated. To the contrary, it was incumbent upon Lagna, as the petitioner, to persuade the Board, first, that a lawful use existed when the lots were zoned for residential use in 1945 and, second, that whatever uses had been made of the lots at that time continued thereafter without changing to any other use. Lagna provided no definition of "boat club" use. He did not contend that "boat club" use, however defined, was ever authorized on his property at any time after the enactment of the BCZR in 1945. Accordingly, he attempted to establish that the use of the property had remained unchanged over seven decades. Needless to say, his task was exceptionally difficult. The passage of time left him with only vague hearsay descriptions and circumstantial evidence regarding use of the property for most of those years.

As daunting as his task was before the local zoning authorities, Lagna faced perhaps even greater obstacles in his action for judicial review. Consistent with the standard of review for other administrative decisions, court review of a decision of the Baltimore County Board of Appeals is "generally is a 'narrow and highly deferential inquiry.'" *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 733 (2010) (quoting *Maryland Nat'l Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83 (2009)). Such a final decision from a local zoning agency is "prima facie correct and presumed valid" and should be reviewed by the court "in the light most favorable" to the agency. *Marzullo v. Kahl*, 366 Md. 158, 172 (2001) (citations and quotation marks omitted).

"Judicial review of administrative agency action based on factual findings, and the application of law to those factual findings, 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 based on an erroneous conclusion of law.'" *Zimmer Dev. Co.*, 444 Md. at 573 (quoting *United Parcel Serv., Inc. v. People's Counsel for Baltimore Cnty.*, 336 Md. 569, 577 (1994)). The reviewing court may not substitute its judgment for that of the agency if "there is sufficient evidence such that 'a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Zimmer Dev. Co.*, 444 Md. at 573 (quoting *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 160 (2005)); *see People's Counsel for Baltimore Cnty. v. Surina*, 400 Md. 662, 681 (2007) ("we inquire whether the zoning body's determination was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion") (citations and quotation marks omitted). Stated differently, where a zoning board's findings are supported by more than a scintilla of evidence, the decision is at least fairly debatable, which "'pushes the Board's decision into the unassailable realm of a judgment call[.]'" *Eastern Outdoor Adver. v. Mayor & City Council of Baltimore*, 128 Md. App. 494, 515 (1999) (citations and quotation marks omitted).

In his brief, Lagna largely ignores the governing standard of review.[9] His

[9] Maryland Rule 8-504(a)(5) requires that every appellate brief must include a "concise statement of the applicable standard of review for each issue, which may appear in the discussion of the issue or under a separate heading placed before the argument[.]" A single footnote in Lagna's brief includes a quotation describing the substantial evidence test.

argument does invoke the concept of "substantial evidence," but only to misapply that concept to the facts. Lagna asserts in succession that "there was more than sufficient evidence to support that a boat club was operating at the property when the zoning regulations were enacted in 1945," that "there was substantial evidence supporting that Mr. Lagna operated a boat club after 1994," and thus that there was "substantial evidence to support the conclusion that Mr. Lagna has not changed, discontinued[,] or abandoned the legal nonconforming use[.]" In sum, Lagna contends that *he* presented evidence upon which the Board could have granted his petition. That contention, even if correct, would not warrant reversing the Board's denial of the petition. Lagna's arguments fail to address the relevant question for the purpose of judicial review: whether substantial evidence in the record supported the *Board's* determinations on the issue of nonconforming use.

As the Board recognized, one of the main tests for determining the existence of a nonconforming use is whether the property is "known in the neighborhood as being employed for that given purpose." *Trip Assocs.*, 392 Md. at 573 (citing *Chayt v. Bd. of Zoning Appeals of Baltimore City*, 177 Md. 426, 434 (1939)). Evidence on this point was by no means conclusive. Lagna presented testimony and letters from members of the community who stated that they either had been club members or were aware of the club's existence during much of the relevant time period. People's Counsel later offered testimony from other neighbors that called Lagna's assertions into question.

One neighbor testified that he no longer observed "people doing the same type of social activities" as before and that he "did not know the club was still [t]here" after

Lagna acquired the property. Another witness testified that she had observed frequent "club use" before Lagna's acquisition, but that "over the past nineteen years," she had "never witnessed any type of club activity" on the property. The next witness testified that, during the prior six years in which he had lived in the neighborhood, he had not "observed any kind of activity as relating to a boat club, men's club, [or] any kind of club, other than a collection of boats[.]" Another neighbor commented, "the activity you saw back then in the 1970s, and 1980s, and early 1990s, you do not see similar activity nowadays. . . . It's more like a boat junkyard[.]" In the words of yet another member of the community, "it really kind of defied any, any logic as far as it being an active, boat club. It's really an active, storage . . . area for boats."

In its written opinion, the Board summarized: "Credible testimony from neighbors who have lived in the neighborhood for decades was provided – that no club of any kind existed at the Property since Mr. Lagna's purchase." Lagna now argues that the Board "clearly gave undue, indeed unfounded, weight to the testimony of the protestants regarding their personal observations of activity on Mr. Lagna's property." This Court's role, however, is not to render its own judgment regarding the weight of conflicting testimony, as long as there is "room for reasonable debate" on the issue. *See Boehm v. Anne Arundel County*., 54 Md. App. 497, 514, *cert. denied*, 297 Md. 108 (1983).

In *Boehm*, this Court upheld the decision of a local board of appeals to refuse to recognize the legal nonconforming use of a property as a landfill. Several witnesses testified that there had been dumping and landfilling activity on the subject property before the use became prohibited and consistently thereafter, but other witnesses testified

that there had been no dumping or excavation until over a decade after the use became prohibited. *Id.* at 498-99 & n.1. This Court concluded that, "in light of the quantity and quality of the protestants' testimony and evidence," it was reasonable for the board to conclude that that landowner had not met his burden of proving that the nonconforming use existed during the relevant time period. *Id.* at 515. As in *Boehm*, the Board's weighing of the conflicting evidence here passes the test of reasonableness. The testimony of Lagna's neighbors, even though it was in conflict with evidence produced by Lagna, was sufficient to support the conclusion that Lagna did not continue the prior use of the property after he acquired it in 1994.

Even without this testimony from protestants, however, the Board would not have been required to conclude that Lagna had satisfied his burden. Lagna asserts that much of the testimony and documents he presented regarding the existence of a club on the property was "uncontradicted." Yet even when a party presents largely uncontested evidence of a nonconforming use, the local zoning agency must evaluate the credibility of testimony and the weight of evidence before making its decision. *See Cnty. Comm'rs of Carroll Cnty. v. Uhler*, 78 Md. App. 140, 146 (1989).

In *Uhler*, a board of zoning appeals refused to certify the nonconforming use of a property as a junk yard or storage yard, even though the landowners presented testimony from witnesses who had consistently observed junk and heavy equipment on the property during the time period in question. *Id.* at 142-44. The board reasoned that the evidence showed only that the property was "a location where pieces of equipment were infrequently parked." *Id.* at 144 (internal quotation marks omitted). A circuit court

reversed the board's decision, under the mistaken belief "that if there was any evidence in the record supporting the relief requested, which is not controverted, as opposed to contradicted, then the Board must grant the relief sought." *Id.* at 146. Reversing that judgment, this Court concluded that the circuit court had improperly substituted its judgment for that of the board. *Id*. The Court explained: "[T]he mere fact of presentation of testimony does not entitle that testimony to be credited and the Board's determination not to credit it, in and of itself, provides substantial evidence for the Board's conclusion." *Id.* at 147. Adding that there was at least one significant "discrepancy" in the Uhlers' evidence regarding uses of the property, the Court reasoned that "it [wa]s patent . . . that the Board's decision [wa]s fairly debatable." *Id.*

Likewise, the testimony and documents presented by Lagna regarding his operation of a "boat club" by no means compelled the Board to grant the petition. The Board explained several reasons for its refusal to credit Lagna's assertions. As the Board explained, Lagna provided only "scant information as to the nature and extent" of the clubs that existed on the property before 1994, and in particular as to whether those clubs had "existed continuously without interruption[.]" The Board relied on a letter from a former member stating that the former club had been "disbanded" in 1993 as evidence that "the use was extinguished even before Mr. Lagna's purchase." The Board contrasted the few supporting documents that Lagna offered (photographs, checks, utility bills, tax forms, and a self-prepared member list) with the notable absence of other evidence that would tend to verify the club's existence (such as organizational documents, insurance, a bank account, advertisements, a website, or an on-site sign). The Board expressed

skepticism towards Lagna's list of purported club members when it noted that the list consisted entirely of Lagna himself, his relatives, his tenant, and his friends. The Board also inferred from federal income tax forms identifying Lagna's business as a "Marina" rather than a "Boat Club" after 2005 that "any 'boat club' use by him terminated in 2005." Finally, the Board explained that it had considered the evidence "in light of the fact" that Lagna first asserted the existence of a nonconforming use in response to a code enforcement action decades after his purchase. In sum, the Board's reasoned and reasonable decision to discount much of Lagna's evidence, "in and of itself," is a sufficient basis for affirming the Board's decision. *See Uhler*, 78 Md. App. at 147.[10]

The primary basis for the Board's ruling – its determination that Lagna failed to establish that he had operated a boat club on his property continuously since 1994 – was amply supported by the record. As a secondary conclusion, the Board stated that "even if the facts proved Mr. Lagna's intent to operate a boat club, . . . his current use is an intensification and change from the original boat, swim and/or men's club." This alternative finding, although discussed only briefly by the Board, independently supports the Board's decision.

[10] In his brief, Lagna protests that the Board "ignored" testimony from his witnesses, because the Board failed to discuss some of that evidence in its opinion. Lagna also insists that the Board erred when it stated: "[I]n this Board's view of the evidence, Mr. Lagna did not provide evidence that a boat or swim club has existed on the Property since 1937." We agree with Lagna that it would be an overstatement to say that he produced "no evidence" in support of his assertions. Viewing the decision in a light favorable to the agency, however, it is apparent that the Board considered the evidence presented by Lagna and that the Board's decision relied only on the evidence that the Board found to be credible and persuasive.

In general, the owner of a vested right to continue a nonconforming use also has the right to "intensify" that nonconforming use by, for example, using the property more frequently or with a higher volume of business. *See Feldstein v. LaVale Zoning Bd.*, 246 Md. 204, 211 (1967). The "mere intensification of a nonconforming use is permissible so long as the nature of use is not substantially changed[.]" *Phillips v. Zoning Comm'r of Howard Cnty.*, 225 Md. 102, 102 (1961); *see, e.g.*, *id.* at 108-09 (upholding decision to prohibit property owner from expanding nonconforming use as a used car lot and furniture warehouse where record showed that premises over time "by some sort of 'creeping' process, developed into a full-fledged junk yard and shop, where, among other things, large numbers of worn out and wrecked motor vehicles were junked and burned"). The determination of whether an owner's use is an impermissible enlargement or a mere intensification is a question of fact for the local zoning authorities. *See id.* at 109-10.

Under the Baltimore County ordinance, a property owner's right to continue a nonconforming use terminates "upon any change from such nonconforming use to any other use whatsoever[.]" BCZR § 104.1. In *McKemy v. Baltimore Cnty.*, 39 Md. App. 257 (1978), this Court reversed part of a zoning decision and remanded the case to the Baltimore County Board of Appeals for consideration of whether certain uses of a property exceeded the permissible scope of an existing nonconforming use and, if so, whether "by virtue of [BCZR § 104.1], the entire non-conforming use ha[d] been lost." *Id.* at 270. The owner in that case had established a valid nonconforming use of residentially-zoned lots as a general parking facility for nearby businesses (*id.* at 265-67), but the proprietor later extended his use to include truck storage for a freight hauling

business, while expanding his operations in intensity, volume, and area. *Id.* at 269. This Court directed the Board on remand to determine whether those expansions represented an "actual change" from the preexisting uses of the lots, by considering the following factors: "(1) to what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use; (2) is the current use merely a different manner of utilizing the original non-conforming use or does it constitute a use different in character, nature, and kind; (3) does the current use have a substantially different effect upon the neighborhood; (4) is the current use a 'drastic enlargement or extension' of the original non-conforming use." *Id.* at 269-70.

In the present case, even crediting testimony that Lagna continued to operate a "club" of some sort and even accepting that the clubs of both Lagna and his predecessors to some extent involved boat-related activities, the record still supported the Board's conclusion that Lagna's right to continue any such nonconforming use had terminated upon a "change from such nonconforming use to any other use whatsoever[.]" BCZR § 104.1. The right to continue a nonconforming use depends on the continuity of the substantive characteristics of the use, not the mere continuity of a label such as "club," "boat club" or even "Seneca Creek Mariners Club." *See McKemy*, 39 Md. App. at 269 (explaining that, in determining whether owner's use had exceeded scope of preexisting use, "the Board was not required to assume, and should not have assumed, that the lowest common denominator was 'parking,' or even 'parking' in conjunction with a business across the street").

Testimony from Lagna's neighbors, which the Board expressly credited, supported the conclusion that Lagna's use of the property differed in character, nature, and effect from the use of the property by his predecessors. Prior owners had operated primarily a social club and incidentally stored a few boats near the buildings on the northern portion of the property; over time, Lagna transformed the site into what appeared to be predominantly an out-of-water boat storage facility, both as a business and for a personal collection, extending to the southern portions of the property along Chestnut Road. In light of the factors outlined in *McKemy*, 39 Md. App. at 269-70, the Board's determination that Lagna had transformed the prior use of the property into "any other use whatsoever" (BCZR § 104.1) was at least fairly debatable.[11]

II.

After denying Lagna's request to approve the use of the property as a private boat club, the Board of Appeals also declared that the four lots subject to his petition had "merged into one single [p]roperty for zoning purposes," and thus that Lagna must "comply with BCZR § 415 with regard to the number of boats and piers permitted for one

[11] Before the Board, Lagna relied only on BCZR §§ 101.1 and 104.1, general provisions regarding nonconforming use. Before this Court, Lagna attempts to raise the argument that use of the property as a boat club is "grandfathered" by a separate provision applicable to properties within the Chesapeake Bay Critical Area, which states that "[t]he county shall permit the continuation, but not necessarily the intensification or expansion, of any use in existence on June 13, 1988." BCZR § 103.5(C). The Board did not address the applicability of this provision because Lagna failed to raise the issue to the Board. In any event, his new argument fails on appeal because we uphold the Board's determinations that Lagna did not continue the preexisting uses of the property after his acquisition in 1994, or alternatively that he had intensified and changed the use during his ownership.

single [p]roperty." Wishing to treat his property as four separate properties for the purposes of boat storage, Lagna now asks this Court to negate that declaration. He contends: that the Board lacked authority to decide issues of lot merger or boat storage; that the evidence was legally insufficient for the Board to conclude that the lots had merged; and that the zoning merger of the lots amounts to an unconstitutional confiscation of his property. For various reasons, all of these arguments fail.

Lagna first argues that the Board should not have even considered whether his lots should be treated as a single property for the purpose of determining the number of boats permitted on his property, because he says that those issues were not properly before the Board. He relies on BCZR § 500.7, which grants "any interested person" the right to petition for a special hearing "to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations." Lagna argues that his petition "obviously[] sought only the former type of relief" regarding nonconforming use, and therefore that the scope of the hearing did not include his other rights with respect to the property.

The record does not support Lagna's assertions that the Board unilaterally "took it upon itself to address and affirmatively rule upon" the matters of lot merger and boat storage under BCZR § 415A. Lagna first filed his petition at the direction of an ALJ who had suspended a penalty against Lagna for his violations of BCZR § 415A. In an attachment to his petition, Lagna asserted that his property could "be used by the four (4) residences . . . and a private boat club with, as provided by Section 415c [sic], additional

storage of boats on trailers up to the maximum allowed per lot for each of the four (4) residential lots." In his supporting memorandum, Lagna explained that his petition sought "essentially four categories of relief": confirmation of his rights regarding nonconforming use; confirmation of his rights regarding nonconforming structures; a lot-line adjustment re-subdividing his property into four separate lots; and finally "confirmation regarding the maximum number of boats allowed at the property." His memorandum went on to argue that, "[b]ased on the lot lines of the four lots at the subject property," BCZR § 415A permitted Lagna to store "a substantial number of boats" on land and on the piers at his property. The ALJ, recognizing that Lagna had requested "a determination of the number of boats [Lagna] may keep on the premises," concluded that the property should be treated as a single property for zoning purposes, based on the doctrine of lot merger.

Dissatisfied with the ALJ's decision regarding boat storage, Lagna then attempted to narrow the scope of his petition by withdrawing his request for a lot-line adjustment. At the de novo hearing, People's Counsel argued that the Board should affirm the ALJ's finding that the lots had merged into one lot for the purposes of the boat storage limits in BCZR § 415A. At one point, Lagna objected to a question posed by People's Counsel to Lagna's expert witness regarding merger of the lots (on the ground that the question fell outside of the scope of the proceeding). The Board did not rule on the objection, but the Chairman informed Lagna that "[t]he reason we're here is because we have a lot of boats on this property." In his post-hearing memorandum, Lagna did not ask the Board to exclude the lot-merger issue from its decision. Instead, Lagna affirmatively argued that

the ALJ's determination that the lots had merged was incorrect on the merits, asserting that "the doctrine of zoning merger" was "not applicable" because Lagna had "never intended to merge these four lots[.]"

In sum, Lagna himself introduced the issue of "the maximum number of boats allowed at the property," and that issue involved a determination of whether the property should be treated as four separate lots. Lagna's post-hearing brief reflects that he knew and had reason to know that the Board would make a determination on lot merger. Instead of using that opportunity to bring an argument about the proper scope of the hearing to the Board's attention, Lagna waived any such objection when he asked the Board to reverse the ALJ's lot-merger determination on the merits. The issue that Lagna seeks to raise here cannot be resurrected in the subsequent action for judicial review. *See Anne Arundel Cnty. v. Nes*, 163 Md. App. 515, 535 (2005) (holding that landowner waived any claim that board of appeals had erred in failing to grant waiver of certain requirements by expressly abandoning that position before the board); *Capital Commercial Props., Inc. v. Montgomery Cnty. Planning Bd.*, 158 Md. App. 88, 102 (2004) (holding that party failed to preserve issue of whether planning board's decision would violate provision of zoning ordinance by failing to raise that argument to the board); *id.* at 104-05 (where party's argument "involve[d] the construction of the ordinances administered by the Board," holding that the issue "should have been presented for decision by the Board in the first instance" rather than being raised for the first time in an action for judicial review); *Brzowski v. Maryland Home Improvement Comm'n*, 114 Md. App. 615, 637-38 (1997) (holding that party waived argument that

agency's action exceeded its authority where party brought a number of objections to agency's attention without presenting that argument to the agency).[12]

Before the Board, however, Lagna did argue that the doctrine of lot merger should not apply to his property when he asserted that he did not intend to merge the four lots. The Board rejected that assertion, finding that, in addition to actions of the prior owners in building structures that straddled the interior lot lines, "Lagna's storage of boats across the 4 lots is indicative of his intent to integrate and use the lots as one single property." In addition, the Board emphasized that Lagna had not presented evidence of "any separation of the four lots for residences or other uses." On appeal, Lagna concedes that evidence that "structures are sited across lot lines" and evidence of "storage of a boat across a property line" could indicate an owner's intent to merge the lots, but he asserts that this evidence was "insufficient . . ., as a matter of law, to supply the intent necessary to merge the lots." He identifies no legal authority supporting this assertion.

Historically, the doctrine of zoning merger emerged in many jurisdictions to advance the legislative goal of restricting undersized parcels. *See Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 352 Md. 645, 653 (1999).[13] The Court of Appeals first recognized the doctrine of zoning merger in *Friends of the Ridge*, a Baltimore County

[12] If we were to reach this issue, we would see no error in issuing a declaration regarding Lagna's rights to boat storage on the property under the zoning regulations, as that issue was part of the relief that he requested in his initial petition.

[13] In the present case, it is undisputed that the four lots owned by Lagna, each approximately one-quarter acre in size, are all undersized. *See* BCZR § 1A04.3(B)(1) (prohibiting creation of lots with an area less than one-and-a-half acres in an R.C.5 zone).

zoning case, which held "that a landowner who clearly desires to combine or merge several parcels or lots of land into one larger parcel may do so" by "integrat[ing] or utiliz[ing] the contiguous lots in the service of a single structure or project[.]" *Id.* at 658. Generally, a finding that adjacent lots under common ownership have merged for zoning purposes "require[s] that the intent of the owner to merge the parcels be expressed, though little evidence of that intent is required." *Id.* at 653. The Court has emphasized that the owner's "[i]ntent is to be derived from the facts," (*Remes v. Montgomery Cnty.*, 387 Md. 52, 66 (2005)), and "[e]ach case must be examined on its own." *Id.* at 68. For example, in *Remes*, the Court of Appeals held that a vacant lot merged into the adjacent, developed lot by operation of law, even without any formal request for a replatting, where the common owner installed a swimming pool on the vacant lot as an accessory to the house on the other lot and built a semi-circular driveway over both lots. *Id.* at 82.

This Court will not set aside a local zoning board's determination regarding lot merger, as long as the decision is at least fairly debatable and not the product of a clear error. *See Mueller v. People's Counsel for Baltimore Cnty.*, 177 Md. App. 43, 94 (2007). In the instant case, the record included substantial evidence that Lagna intended to use his four contiguous lots in the service of a single project. Like the former owners who had made improvements across the internal lot lines, Lagna himself disregarded the internal lot lines in his use of the property. His stated intent, in the deed through which he acquired the property, was to use the four lots for a single-family residence. In his memorandum to the Board, Lagna raised the confusing argument that he never intended to merge the lots because "he and his predecessors have always used the four lots *in*

combination for the fulfillment of [a] single use." (Emphasis added.) This statement alone serves as an admission of his intent to merge the lots. *See Remes*, 387 Md. at 82 (emphasizing that common owner's "*use*" of two adjacent lots "*in concert* is consistent with zoning merger") (second emphasis added). Indeed, the premise underlying Lagna's petition was never that he had operated four different boat clubs on the four different lots, but that he was using all four lots in service of a single club, without regard to any subdivision. The Board nonetheless found that Lagna's combined use of the four lots for storage and collection of boats was not the same use as the prior combined use of the lots by the former owners as a "boat, swim, and/or men's club."

As a final issue, Lagna contends separately that the Board's merger of the four lots for zoning purposes constituted an unconstitutional "confiscation" of his property. Despite the opportunity to raise any such constitutional concerns when he argued to the Board that lot merger was inapplicable, Lagna failed to raise these arguments to the Board. His request to raise new constitutional issues on appeal is "contrary to the well-established" rule that "constitutional challenges involving a question of fact must be raised before the agency to prevent waiver." *Halici v. City of Gaithersburg*, 180 Md. App. 238, 255 (2008).

In any event, Lagna's unpreserved argument invokes constitutional issues in name only. He contends that "in the absence of sufficient proof" the Board was "not constitutionally authorized to deprive Mr. Lagna of his right to operate the boat club or his right to four lots." In essence, Lagna seeks to recycle his challenge to the Board's factual determination as a "constitutional" issue. We reject this "attempt to conjure a

constitutional violation out of a routine" factual determination committed to the agency's discretion. *McAllister v. McAllister*, 218 Md. App. 386, 406 (2014). As stated above, the record was adequate to support the Board's conclusion that the four lots had merged into one for zoning purposes.

CONCLUSION

We affirm the circuit court's judgment affirming the decision of the Board of Appeals.

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