UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2617

September Term, 2013

CITY OF SALISBURY

v.

RIVERSIDE INVESTMENT CORPORATION, INC.

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*Zarnoch,
Graeff,
Kehoe,

JJ.

Opinion by Zarnoch, J.

Filed: February 23, 2016

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

In this appeal from the Circuit Court for Wicomico County, the primary issue is whether a four-unit apartment in a single-family zoning district in Salisbury constitutes a legal, nonconforming use.

FACTS AND PROCEEDINGS

Appellee/cross-appellant, Riverside Investment Corp. Inc. (Riverside) owns a four-unit apartment house at 507 Poplar Hill Avenue in the Newton Historic District in Salisbury. Riverside purchased the property in 1990, when it already had four individual dwelling units on it. Prior to the purchase, Riverside consulted with the realtor of the property, but no one else, to determine if it was approved for such use. The area is currently zoned "R-8", so that under the current zoning code, enacted in 1959, only single-family dwellings are permitted.

On January 4, 2011, appellant/cross-appellee, the City of Salisbury, through its Department of Building, Permits, and Inspections (the Department) notified Riverside that its use of the property as a four-unit apartment violated the City's zoning code. The Department asked Riverside to provide documentation proving that the property was a legal nonconforming use or structure.

Riverside's President, Mark Reeves, met with the William Holland, the Director of the Department. Reeves stated that he provided affidavits and documentation to demonstrate that the property was converted to its current use prior to the adoption of the 1959 zoning code, and that it has been used in this manner ever since. There was no evidence that the City had ever notified owners or occupants of the property prior to 2011

that it was potentially an illegal nonconforming use. After this meeting, Holland wrote Riverside that "upon further review and research that we've concluded that the referenced popery is an illegal nonconforming use." This correspondence also gave Riverside two options: to appeal this determination to the Board of Zoning Appeals (BZA) or to take action to remove three of the units within 30 days. Riverside appealed.

After holding hearings on September 1, 2011, and October 6, 2011, the BZA voted that the property was a legal nonconforming use and reversed the Department's decision.[1] The City filed a petition for judicial review with the Wicomico County Circuit Court, which vacated the BZA's determination on the ground that the Board failed to make findings of fact, and remanded the case for a new hearing.

At the March 7, 2013 remand hearing, there was no dispute that the property was converted from a single-family home into a four-unit structure before 1959. Evidence indicated that the conversion most likely occurred in the 1940s. In response, the City argued that Riverside had to establish that the property was converted to its present use prior to the enactment of the 1936 zoning code. However, because there was no signed zoning map defining the boundaries of the 1936 zoning code, Riverside argued that the code could not be enforced against the property owner.[2] The property owner contended

[1] Vice Chairman Dave Rainey made the motion for reversal: "I move that based on the evidence presented by the Appellant and the information provided by the staff, that they cannot identify when the zoning changes were made on the map prior to 1960, that we overturn the decision of the Department."

[2] Section 33 of the 1936 zoning code provided:
(Continued…)

that it only needed to prove that the conversion took place prior to the 1959 zoning code, for which there was an authentic map. Among other arguments, Riverside claimed that the City could not challenge the legality of the property's use under the doctrine of zoning estoppel.

Riverside presented expert and lay witness testimony to show that the conversion took place in the 1940s. Architect and engineer Keith C. Iott opined that, after reviewing the physical attributes of the property, that it was "converted to a multi-family dwelling in the 1940s or early 1950s, if not earlier." Reeves testified that he had owned the property for twenty-three years, that all four units had been occupied during that period, and that he had received yearly rental licenses from the City, and that he had obtained permits to repair the property.

Riverside also produced an affidavit from Gary L. Hill, the Housing Inspector of the City from 1965 until 1970, and the City's Deputy Building Official from 1970 to 1992. Hill was in charge of the City's building and zoning inspections during that time. He stated that most conversions of single family homes "took place in the 1940s and 1950s and were done so legally, without objection from the City." Furthermore, he explained that "it was always the policy of the City that if the property was safe and met

(…continued)

> Upon passage of this ordinance by the Council, as evidence of the authenticity of the map which is a part hereof, each sheet of the said map shall be signed by the President of the Council and, upon approval of the ordinance by the Mayor, each sheet of said map shall be signed by the Mayor of the City of Salisbury.

basic building standards, the property was considered to be a legal nonconforming use and could remain as such." He also stated that during his employment with the City, he had never seen a copy of the 1936 zoning code. At least three other witnesses submitted affidavits to show that the property had continuously been occupied by four households.

The City did not prove when the property became a four-unit premise, but claimed that Riverside would have had to establish that it was converted prior to 1936 in order to qualify as a legal nonconforming use. City planning employee Gloria Smith testified that under the 1936 zoning code, only a single family residence could have been constructed on the property due to the size of the parcel. The City's other witness, Henry Eure, of the Department, explained that the City concluded that the property was an illegal nonconforming use based on the fact that the City "has no record or any proof the [property] was constructed or remodeled prior to 1936 as a four-family unit."

Both witnesses testified that in order to determine the zoning of the property under the 1936 zoning code, they relied on a map dated April 24, 1931. Riverside's counsel pointed out that this map was unexecuted, to which Smith responded "we have several copies of the [1931] map in our possession in the planning department, none them have signatures on it." Smith also explained that her understanding was that the 1936 zoning code required any authentic zoning maps for the City to be signed by the Mayor and President of the City Council. Both testified that the City's records for special exceptions and variances date back only to 1960. Eure also noted that the City retained records for

building permits, remodeling permits and other related documents only for the last twenty years, with many additional documents having been destroyed in 2005 or 2006.

After the March 7, 2013 hearing, the Board voted 3-2 to make a preliminary determination to uphold the Department's decision that Riverside's use of the property was illegal and nonconforming. On March 21, 2013, when the Board reconvened to approve findings of fact and finalize its written decision, it ordered the property to be converted to a single family dwelling within 365 days of its decision.

The majority opinion rejected Riverside's assertion of zoning estoppel, noting that it had not shown any detrimental reliance. The three-member majority relied on two 1936 City ordinances: Ordinance No. 292, which declared that it incorporated the unexecuted 1931 zoning map, and a later enactment, Ordinance No. 296, which referenced the 1931 map, to support its conclusion that the single-family restriction pre-dated Riverside's conversion of the property to apartments. The two dissenters issued no written opinion, but Vice Chairman Rainey, according to the minutes of the March 7, 2013, hearing, said that "the City is basing this whole case on documents that have to be determined if they are legal. It is the objective of the Board to grant relief to the citizens of Salisbury and this case screams for relief."

Riverside filed a petition for judicial review in the Wicomico County Circuit Court. On January 28, 2014, the court issued an opinion and an order reversing the BZA's decision and finding that the property was a legal nonconforming use. The circuit court agreed with Riverside that the doctrine of zoning estoppel "while not formally

adopted as the law in Maryland, should be applied in this case to preclude the City from challenging the legality" of Riverside's use of the property. The court noted:

> In the present case, Petitioner purchased the property with the understanding that the property had been used as a four unit rental property for at least forty years and relied on this understanding in making substantial renovations in order to market the property to potential tenants. As discussed above, Petitioner provided evidence before the BZA that the City continuously approved the current use of the property by issuing rental licenses and construction permits for each of the units since Petitioner's purchase of the property. Based on the facts contained in the record and otherwise presented to the Court, the Court finds that Petitioner substantially relied on the City's inaction in enforcing its Zoning Code as it pertains to Riverside. . . . After almost 60 years of inaction regarding the property in question, the City cannot now contest the legality of the property under the zoning code.

On the issue of the unexecuted map, the court said:

> The City admitted before the BZA that a signed 1936 zoning map does not exist, but that the City's determination was based on an unexecuted map dated April 24, 1931. The BZA credited the City's witnesses that the unexecuted map date April 24, 1931 was the correct map to rely on in applying the 1936 Zoning Code. A reading of Ordinance No. 292 (1936 Zoning Code) shows that the City intended for the April 24, 1931 map to be incorporated into the 1936 Zoning code. Therefore, the BZA, did not incorrectly interpret or apply the law in this matter. This issue amounts to a factual dispute as to whether the unexecuted map dated April 25, 1931 is the correct map incorporated into the 1936 Zoning Code. The BZA found that the 1936 Zoning Code and accompanying map were properly executed and adopted into law. The City Council and Mayor adopted the 1936 Zoning Code, incorporating a presumably valid 1931 Zoning Map.
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> There is no evidence that the zoning map provided by the parties, dated April 24, 1931, has been altered in any way or is not a copy of the original April 24, 1931 zoning map. Petitioner merely argues that there is no way of knowing that the map provided is the original, executed 1931 zoning map. While the Petitioner's argument has merit, this Court's job is to determine whether reasoning minds could reach the same conclusion as the administrative agency from the facts as set forth in the record. The Court finds that reasoning minds could reach the conclusion that the 1931

> Zoning Map and 1936 Zoning Code were properly adopted and executed, and were properly applied in the matter presently before this Court.

The court also rejected Riverside's contentions that it was denied due process because the same law firm represented both the City and the BZA; that the Board based its decision on newly discovered evidence not presented during the hearing; and that the BZA improperly allocated the burden of proof to Riverside.

The City appealed and Riverside cross-appealed on the issues rejected by the circuit court.

QUESTIONS PRESENTED

We have consolidated the parties' questions presented on appeal and cross-appeal as follows:

1. Whether the circuit court and BZA erred in applying the 1936 Zoning Code without an executed zoning map?
2. Whether the circuit court erred in adopting the zoning estoppel doctrine, thereby overturning the BZA's decision that Riverside's use of its property constituted an illegal nonconforming use under the applicable City of Salisbury Zoning Code?[3]
3. Whether the circuit court and the BZA erroneously rejected Riverside's additional arguments as to why the Property is a legal nonconforming use.

For reasons set forth below, we need not rely on the circuit court's finding of zoning estoppel to uphold its decision.[4] It is quite apparent that the key question before

[3] Riverside framed the second question in these terms:

> Whether the Circuit Court properly concluded that the doctrine of zoning estoppel precludes the City from declaring the [p]roperty to be an illegal nonconforming use?

the BZA was the alleged legal inadequacy of the 1931 zoning map. This is an issue we find dispositive and in favor of Riverside.[5]

STANDARD OF REVIEW

In *Maryland Reclamation Associates, Inc. v. Harford County*, (*MRA*) 414 Md. 1 (2010), the Court of Appeals "articulated the narrow standard of review we apply in zoning cases:

> When we review the final decision of an administrative agency, such as the Board of Appeals, we look through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluate[ ] the decision of the agency. Judicial review of administrative agency action is narrow. The court's task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency[.] In our review, 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[.] As we have frequently indicated, the order of an administrative agency, such as a county zoning board, must be upheld on review if it is not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven.

Id. at 24-25 (Citation omitted) (alteration in *MRA*).

In reviewing challenges to zoning decisions, "[a] court's role 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

(…continued)

[4] In *Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 58 (2010), the Court of Appeals said: "We think that zoning estoppel must be applied, if at all, sparingly and with utmost caution."

[5] Thus, we do not reach the other issues advanced by Riverside in its cross-appeal.

premised upon an erroneous conclusion of law." *Id.* at 25 (quoting *Lanzaron v. Anne Arundel County,* 402 Md. 140, 147 (2007) (Citation and quotations omitted)).

Although we review for substantial evidence the decision of the BZA majority, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In addition, one appellate decision has noted that in the case of a divided vote by an administrative agency, the court should "leave nothing to chance" in reviewing the record. *Lien v. Metro. Gov't of Nashville*, 117 S.W.3d 753, 755 (Tenn. Ct. App. 2003).[6] With regard to purely legal questions, our review is *de novo*. *Bern-Shaw Ltd. P'ship v. Mayor of Baltimore*, 377 Md. 277, 291 (2003).

DISCUSSION

"A valid and lawful nonconforming use is established if a property owner can demonstrate that before, and at the time of, the adoption of a new zoning ordinance, the property was being used in a then-lawful manner for a use that, by later legislation, became non-permitted." *Trip Associates, Inc. v. Mayor & City Council of Baltimore*, 392 Md. 563, 573 (2006) (Citation omitted).

The BZA found, and Riverside does not challenge, that the property was converted to multi-family use at some time between 1936 and 1959. Therefore, if the 1936 zoning code clearly established that the district in which the property lies could not be a multi-

[6] "Exhaustive review" seems particularly appropriate here, where the BZA initially ruled in favor of Riverside.

family dwelling, the property was a nonconforming use *after* the enactment of the code, and therefore, could not be a legal use. If, however, as Riverside claims, the 1936 code and its accompanying map do not establish the illegality of multi-family use in that district, then the property was a nonconforming use prior to 1959 and could be considered a legal nonconforming use. Thus, we must consider if the 1936 zoning code can be validly enforced against Riverside.

Riverside claims that "the fact that the BZA relied upon an unexecuted and unauthenticated zoning map denotes that its decision was unsupported by substantial evidence in the record and premised upon an erroneous conclusion of law." Riverside claims that the BZA erred by determining "whether an unexecuted zoning map dated April 24, 1931 was, in fact, a reproduction of the original map accompanying the 1936 zoning code." The City responds that the BZA clearly found that "no exhibit and no witness establishes the conversion of the Property to multi-family use prior to 1940." The BZA was convinced that on July 13, 1936, a valid zoning ordinance (and map) was properly adopted and approved by the City. The BZA considered the fact that the Salisbury City Clerk's office did not have possession of the original signed zoning ordinance and accompanying 1931 dated zoning map referenced in the ordinance, but was nonetheless convinced that the 1936 zoning code was validly adopted.

After the hearing, BZA's legal counsel discovered Ordinance No. 296, which was passed 19 days after Ordinance No. 292 (the 1936 zoning code) was adopted, and which referenced an amendment to the same 1931 zoning map that was adopted in Ordinance

No. 292 (the 1936 zoning code). The City claims that this "information, coupled with Ms. Smith's testimony that several copies of the unsigned 1931 dated zoning map were consistently utilized and kept by the Planning Department, established that the 1931 dated zoning map was a valid copy of the authentic map that could not be located." Furthermore, the City claims that "[t]he zoning map relied upon and kept in the Planning Department's records showed subsequent revisions on the 1931 dated zoning map, which would not have been shown on that map had it not been treated as the official zoning map version connected to the 1936 Zoning Ordinance."

Although the circuit judge admitted that Riverside's argument "has merit," he felt obliged under the substantial evidence rule to defer to the City's evidentiary account that the 1931 zoning map must have been duly executed. In our view, however, the validity of the map and the sufficiency of the circumstantial evidence that the map was duly executed are more appropriately characterized as primarily legal questions.

There are two glaring legal problems with the City's reliance on the 1931 zoning map. First, even though the map was declared part of the 1936 ordinance, Section 33 of the very same ordinance mandated the signing of the map by City officials upon passage of the measure. *See* n.2, *supra*. Thus, mere incorporation of the map in the ordinance is not enough to prove its authenticity. *See* 83 Am. Jur. 2d Zoning and Planning § 466 (2013) ("For a map to be official, it must be adopted by ordinance or resolution and executed . . ."). Second, the City cannot produce an executed 1931 map or even a copy

of an executed map.[7] And its secondary proof cannot fill that void.[8] Particularly, the cases generally disapprove of proof of district boundaries and zoning classifications by "working" maps, 83 Am. Jur. 2d, *supra*, § 99, "photostatic cop[ies]," *Moon v. Smith*, 189 So. 835, 838 (1939), or other maps that are after-the-fact or otherwise "unofficial," *Hull v. Town of Ithaca*, 139 A.D.2d 887, 889 (N.Y. App. Div. 1988). If a court is unable to determine which zoning map is "official," it is a defect that could vitiate a zoning ordinance. *Keeney v. Village of LeRoy*, 22 A.D.2d 159, 162 (N.Y. App. Div. 1964); *Board of County Commissioners v. Rohrbach*, 226 P.3d 1184, 1187-88 (Colo. App. 2009).

The City argues that Ordinance 296, adopted nineteen days later, provides support for its proposition that the 1931 map was duly executed. That measure states in Section I:

> BE IT ENACTED AND ORDAINED by the Mayor and Council of Salisbury, that the Zoning Ordinance of the City of Salisbury, Maryland, being No. 292, is hereby supplemented and amended and the Zoning Map, City of Salisbury, Maryland, presented April 24, 1931 by the Zoning Commission of the City of Salisbury, Maryland, and made a part of said Zoning Ordinance is hereby supplemented and amended as hereinafter set

[7] The City argues that Section 33 "only requires that the zoning map adopted with the ordinance be signed. That section did not require every copy used by the City or anybody else to be signed." This misses the point. Although the City certainly could have unsigned copies of the original 1931 map, this does not establish one way or another that the 1931 map itself was signed. The fact is, there is no signed map as required by Section 33.

[8] In *Board of County Commissioners v. Rohrbach*, 226 P.3d 1184 (Colo. App. 2009), a Colorado appellate court said that it could find no legal authorities supporting the use of secondary proof to show the content of a zoning regulation. *Id.* at 1187.

> out and said Zoning Ordinance, No. 292 and said Zoning Map shall in no other manner be changed than as hereinafter set out.

The rest of the Ordinance related to a separate street not in question in these proceedings. Without actually quoting this Ordinance, the City argues that Section I suggests that "the 1931 dated zoning map was a valid copy of the authentic map that could not be located." The City contends that we must consider this oblique reference to the 1931 map along with Ms. Smith's attempt to trace "all subsequent changes to the zoning district where Riverside's property was located up to the adoption of the next zoning ordinance in 1959" to conclude that "at no time was Riverside's property ever zoned to allow a use other than as a single family residence."

We disagree. The City presented testimony that there was at least one unsigned copy of the 1931 zoning map in the Planning Department, and that this copy showed subsequent revisions of the 1931 zoning map on it. The City argues that this proves that these "would not have been shown on that map had it not been treated as the official zoning map version connected to the 1936 Zoning Ordinance." There is nothing in the record to indicate the BZA made such an inference, but even if it did, it is difficult to automatically accept that revisions made on an unsigned copy establish it as the "official map," particularly when the express language of the 1936 zoning ordinance required that the zoning map be signed by the Mayor and City Council President. Furthermore, the reference to the 1931 zoning map in Ordinance No. 296 does not supplant the

requirement that the map be signed. In sum, there is no evidence that the City relied on an official or authentic map to find that the property was an illegal nonconforming use.[9]

Because the City has not shown the authenticity of the 1931 map, it may not enforce the 1936 zoning code against Riverside.[10] Because Riverside's use of the property as a multi-family dwelling existed prior to the 1959 code, it is a legal nonconforming use.[11] For this reason, we affirm the decision of the circuit court.

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

[9] The parties spar over the relevance of *Soron Realty Co. v. Town of Geddes*, 23 A.D.2d 165 (N.Y. App. Div. 1965), a case distinguished by the Court of Appeals in *Foley v. K. Hovnanian at Kent Island, LLC*, 410 Md. 128 (2009). In *Soron Realty*, a New York court invalidated municipal zoning amendments because a map was not entered in the town minutes or posted as required by law. *Foley* turned on the fact that the citizens had a sufficient description of the affected property, which in *Soron Realty*, they did not. Here, the express requirement of a signed map makes this case look more like the New York decision. However, for the reasons stated above, we need not rely on *Soron Realty* to resolve this appeal.

[10] We have no reason to declare invalid the 1936 zoning code. We merely conclude that absent a validly executed map, the City cannot enforce the 1936 code against this particular property owner.

[11] We are mindful that the burden of proving the validity of a nonconforming use is on the party asserting its existence. *County Com'rs of Carroll County v. Uhler*, 78 Md. App. 140, 145 (1989). In our view, Riverside met that burden by proving a nonconforming use before the enactment of the 1959 zoning code. It was the City that raised the additional bar of the 1936 code, despite its incomplete record practices. *See* pp. 4-5, *supra*. However, as a matter of law, the City has failed in its effort to validly apply the earlier code to Riverside's use of the property.