Circuit Court for Baltimore City
Case No. 24-C-16-002738

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1664

September Term, 2016

MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.*

v.

LILLIE DRIVER, *et al.*

Woodward, C.J.,
Nazarian,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: November 22, 2017

Nonconforming uses, that is, uses prohibited in a zoning district but allowed to continue because they predate the law, are disfavored in Maryland:

> [N]onconforming uses pose a formidable threat to the success of zoning. They limit the effectiveness of land use controls, contribute to urban blight, imperil the success of the community plan, and injure property values.

County Council of Prince George's Cnty. v. E.L. Gardner, Inc., 293 Md. 259, 267 (1982). Appellees, Lillie Driver and her daughter, Dale Watkins,[1] formerly operated a tavern as a nonconforming use within a zoning district which now prohibits them. After a fire prevented operation of the property as a tavern, the Baltimore City Board of Municipal and Zoning Appeals ("the BMZA") determined that the nonconforming use had been terminated. The Circuit Court for Baltimore City reversed the BMZA's judgment and remanded to the BMZA for additional factfinding. Because we conclude that the BMZA had sufficient evidence to determine that the nonconforming use was terminated, we reverse the circuit court and affirm the BMZA's judgment.

BACKGROUND

Driver and Watkins operated Lil's Place, a tavern, at 1909 North Pulaski Street. Lil's Place had been in business as a tavern since 1937, and Driver had owned and operated it since the late 1980s. As of the adoption of Baltimore City's first comprehensive zoning ordinance in 1971, 1909 North Pulaski has been located in an R-7 Zoning District, a

[1] For reasons that escape comprehension, this case came to us bearing the caption "Mayor and City Council of Baltimore v. Melvin Kodenski." Kodenski is not a party; he is Appellees' lawyer. On our own motion, we substitute the proper party names.

residential district in which taverns are not permitted. Baltimore City Zoning Code ("ZC") § 4-1001 *et seq.* (2012).[2] Since that time, Lil's Place has operated as a Class III nonconforming use.[3]

On March 8, 2014, the Baltimore City Fire Department entered Lil's Place to put out a fire in an adjacent building. Lil's Place sustained fire damage as well as damage from the firefighters. On March 19, 2014, Driver received a Code Violation Notice and Order ("the Fire Order") from Tim Randolph, a Housing Code Enforcement Official, noting that the property was unfit for human habitation. The Fire Order required Driver to, among other things, secure any openings to the property, clean the property, and either rehabilitate or raze the building within 30 days. The Fire Order noted that prior to rehabilitation or razing, Driver was required to obtain a building permit.

It is unclear from the record before us when Driver began to rehabilitate the property and restore it to use as a tavern. What is clear, however, is that she neither sought nor obtained a building permit before beginning. By December 2015, Driver had completed repairs. She then applied for an occupancy permit to continue the nonconforming use. The application was denied by the Zoning Administrator, and Driver appealed to the BMZA.

[2] Baltimore City rewrote its zoning code in 2017. Because Driver's application for an occupancy permit was filed prior to the revision, the prior edition applies, which we cite throughout.

[3] A Class III nonconforming use includes "any nonconforming use of … a structure that was designed and erected primarily for that use that is no longer allowed in the district in which it is located." ZC § 13-401(1).

At a hearing before the BMZA, Watkins testified about the fire, the damage to the property, and her and Driver's efforts to rehabilitate the property. A friend of Driver's testified that the bar had been open before the fire. Adeline Hutchison, the President of the Robert W. Coleman Community Organization and a local community activist, testified that Lil's Place had been closed "at least since 2013." The BMZA also considered evidence of the liquor board inspections of Lil's Place, which had found the tavern closed on each of at least seven occasions between 2012 and 2013.

Based on that evidence, the BMZA found that the nonconforming use had been extinguished for two reasons. *First*, the BMZA found that the tavern had been closed in 2013, a year prior to the fire, and continued to be closed after the fire; as a result, Lil's Place not been in active or continuous operation since 2013. Because a lack of "active and continuous operation" of a nonconforming use for a 12 month period constitutes abandonment, the BMZA held that the nonconforming use could not continue. *Second*, the BMZA found that because Driver had not obtained a building permit, she had not taken the steps to sustain a nonconforming use after a fire.

Driver petitioned for judicial review in the Circuit Court for Baltimore City. The circuit court reversed the BMZA and remanded, ordering the BMZA to take additional evidence on whether Driver's efforts at rehabilitation after the fire were sufficient to retain the nonconforming use, and whether she began reconstruction soon enough for the nonconforming use to be retained. The Mayor and City Council of Baltimore noted this appeal.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, we "look[] through the circuit court's … decision[] … and evaluate[] the decision of the agency." *People's Counsel for Balt. Cnty. v. Surina*, 400 Md. 662, 681 (2007). This Court does not "substitute its judgment for the administrative agency's in … discretionary decisions … particularly … in … areas within that agency's particular realm of expertise." *Id.* We defer to the agency's discretion "so long as the agency's determination is based on 'substantial evidence,'" asking whether "the zoning body's determination was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

ANALYSIS

Driver objects to both findings of the BMZA. *First*, Driver argues that the BMZA was incorrect to find that the use of Lil's Place as a tavern had been "abandoned;" because the cessation of use had not been voluntary and, because she began repairs within 12 months of the fire, her repairs constituted a continuing active operation of the nonconforming use. *Second*, Driver argues that because the rehabilitation was done pursuant to the Fire Order, it was "required by law," and thus her failure to obtain the building permit did not terminate the nonconforming use. We reject both arguments.

I. Abandonment of a Nonconforming Use

Driver first contests the BMZA's finding that she had discontinued the use of the property as a tavern and thus had abandoned her nonconforming use. Her challenge takes two forms: first, she argues that she never intended to discontinue the nonconforming use,

and thus never abandoned the use; and, second, she argues that the BMZA had insufficient evidence from which to determine that she had, in fact, abandoned the nonconforming use.

Our analysis begins with the governing section of the Baltimore City Zoning Code:

> (1) Except as specified in this section, whenever the active and continuous operation of any Class III nonconforming use … has been discontinued for 12 consecutive months:
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> (i) the discontinuance constitutes an abandonment of the discontinued nonconforming use … *regardless of* any reservation of an *intent* to resume active operations or otherwise not abandon the use; and:
>
> (ii) the discontinued nonconforming use …:
>
> (A) may not be reestablished.

ZC § 13-407(a) (emphasis added). While other zoning codes, in other jurisdictions, allow or even mandate consideration of an owner's intent to determine whether the nonconforming use has been abandoned, *see, e.g.*, *Landay v. Bd. of Zoning Apps.*, 173 Md. 460 (1938), the Baltimore City Zoning Code makes plain that the BMZA's determination of abandonment is made "regardless of … [the] intent" of the owner. ZC § 13-407(a)(1)(i); *Union Square Ass'n v. Marc Lounge, Inc.*, 75 Md. App. 465, 471 (1988). Thus, we reject Driver's argument that her subjective intent to maintain the nonconforming use was enough.[4] We next turn to the sufficiency of the evidence.

[4] Driver contends that a business need not be open to be in active operation. *See, e.g.*, *Trip Assocs. v. Mayor and City Council of Baltimore*, 392 Md. 563 (2006) (holding that a nonconforming use only operating two days a week did not constitute abandonment of that use for the other five days of the week). The BMZA determined that a business

The BMZA concluded that Lil's Place had been closed since at least 2013. As reported above, the BMZA heard testimony from Adeline Hutchison, who was active in the neighborhood and in local community projects. Hutchison testified that while Driver and Watkins had been involved in some community projects in the early 2010s, by 2013 she "had not had any other … contact with her" for a few years, and that Lil's Place had been closed "at least since 2013." The BMZA also considered records that liquor board inspectors had found Lil's Place closed at different hours on different days of the week seven times between 2012 and 2013. By contrast, Watkins testified that Lil's Place had been open.[5]

The BMZA heard the conflicting testimony and chose to believe that Lil's Place was not open. The BMZA found Hutchison's testimony more credible than Driver's:

> [Driver] was unable to show through credible evidence or testimony the continuous operation of this nonconforming use sufficient to meet the requirements set forth in Title 13.

We defer to the finders of fact on the credibility of testimony and the weight of evidence. *Armstrong v. Mayor and City Council of Baltimore*, 410 Md. 426, 443-44 (2009). If there is sufficient evidence to support the BMZA's opinion, it is not our place to review the

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which is closed for repairs, and which has not been open for 12 months, is by definition inactive, and we defer to that interpretation.

[5] At oral argument, Driver contended that a tavern did not need to sell alcoholic beverages to be "actively and continuously" in use, and that "selling bags of pretzels" would be sufficient. Regardless of the merits of this argument, there is no evidence beyond Watkins' assertion that Lil's Place was open to suggest that Lil's Place sold any pretzels, or anything else, during this time period. At the hearing, Watkins mentioned tax receipts as if they might support her claim that Lil's Place was operating in 2013, but if they exist they were never introduced into evidence.

credibility and weight the BMZA afforded testimony. The evidence presented was sufficient to demonstrate that Lil's Place had been closed since 2013 and to support the BMZA's finding. Therefore, we reverse the circuit court and affirm the BMZA's decision.

II. Failure to Obtain a Building Permit

As described above, Driver rebuilt Lil's Place without obtaining a building permit. The BMZA found that this failure was fatal to her efforts to retain the nonconforming use. Driver contends that her failure to obtain a building permit does not eliminate the nonconforming use of Lil's Place as a tavern. She argues that her failure to obtain a building permit before beginning repairs is insufficient to justify terminating her nonconforming use, and, in the alternative, that she did not need to obtain a building permit because the repairs were made pursuant to the Fire Order and were thus "required by law." Again, we disagree with both arguments. We begin with the statute:

> If any part of a structure devoted to a Class III nonconforming use is destroyed or damaged by fire … no repairs or reconstruction may be made unless:
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> (1) A building permit is obtained and work started within 1 year from the date of the destruction or damage and the work is diligently pursued to completion; or
>
> (2) the repairs or reconstruction are:
>
> (i) required by law; or
>
> (ii) made to conform the structure and use to the regulations of the district in which the structure is located.

ZC § 13-404. First, we view section 13-404 as a list of three requirements with which a nonconforming use must comply after a fire to retain the nonconforming use. *Marc Lounge*, 75 Md. App. at 471. Second, we hold that the Fire Order is not the sort of legal requirement contemplated by the statute, and even if it was, the repairs went beyond those required by the Fire Order.

When a structure hosting a nonconforming use is damaged by fire, the Zoning Code sets three requirements: (1) a building permit must be obtained, (2) work must be started within one year of the fire, and (3) work must be pursued diligently to completion. ZC § 13-404(1). In *Marc Lounge*, this Court held that strict compliance with all three requirements is necessary to retain a property's nonconforming use. 75 Md. App. at 467. In *Marc Lounge*, a bar operating as a nonconforming use did not begin construction and rehabilitation until more than a year after it was damaged by a fire. *Id.* The Court held that failure to follow the requirement that work begin within one year terminated the use.[6] *Id.*

[6] Driver attempts to distinguish *Marc Lounge* because it was decided in 1988 based on an application for an occupancy permit in 1983, when the text of the Code was different. We disagree. In 1983 and 1988, the Zoning Code read:

> Where a structure, or portion thereof, **devoted to a Class III non-conforming use is destroyed or damaged by fire** … **no repairs or reconstruction** … shall **be made unless a building permit is obtained and** restoration is **started within one year from the date of the destruction or damage and** such restoration **is diligently pursued to completion.**

BCC, Art. 30 § 8.0-4(c) (1983) (emphasis added). We see no substantive difference between this provision and the one in force today. The bolded language is repeated verbatim in the 2012 edition, which has replaced "shall" with "may" and "restoration" with "work." Thus, we think *Marc Lounge* remains binding precedent and hold that failing to comply with any of the three requirements results in termination of the nonconforming use.

Driver disputes this interpretation of the requirements of section 13-404(1), arguing that, under *Mayor and City Council of Baltimore v. Dembo, Inc.*, failing to obtain a building permit can never result in the termination of a nonconforming use. 123 Md. App. 527 (1998). *Dembo* concerned a strip club operating as a nonconforming use that had neglected to obtain a permit to operate as a strip club. *Id.* at 542. We held there that the failure of the club to obtain the required permit did not terminate the nonconforming use. *Id.* Driver interprets this holding to mean that a failure to obtain *any* permit is insufficient to terminate *any* nonconforming use. We do not read *Dembo* that broadly. *Dembo* dealt with the City's power of licensure, not zoning, and the provision of the City Code that required the strip club to obtain a permit (which the club had, then violated) was entirely unrelated to nonconforming uses. *Id.* at 540-42. *Dembo* held that requirements unrelated to the use's nonconforming nature, such as licensure, could not terminate a nonconforming use. *Id.* It does not, however, govern a situation where the Zoning Code imposes specific requirements on property owners concerning the operation and retention of nonconforming uses. As demonstrated in *Marc Lounge*, section 13-404 creates specific requirements on property owners of nonconforming uses, and failure to comply with all of these requirements results in termination of that nonconforming use. 75 Md. App. at 471. Driver did not comply with these requirements.

Driver next argues that, even if she had failed to meet the requirements of section 13-404(1), her work on the property fell under one of the two exceptions provided by section 13-404(2). Section 13-404(2) provides exceptions to the requirements of section 13-404(1) if, either: (i) the repairs are "required by law;" or (ii) the repairs are conducted

to conform the structure to a permitted use, that is, the owner is making the changes so as to abandon the nonconforming use and establish a permitted use.[7] Driver argues that the Fire Order, which declared the building unfit for human habitation and ordered Driver to remediate the danger, made the ordered repairs "required by law."

Contrary to Driver's assertion, the Fire Order did not make the rehabilitation of the property absent a building permit a repair required by law. On its face, the Fire Order did no such thing. Driver was ordered to:

> A. Secure all accessible openings within five (5) days of [March 19, 2014] and notify inspector when this is completed. Keep all openings secured until the building is razed or rehabilitated.
>
> B. Remove all trash, debris, … .
>
> C. Rehabilitate or raze building, within 30 days, *after securing approval from the building official*.[8] The Housing Code Official for your area may extend the time within which to comply with any item on this notice.
>
> D. Obtain an occupancy permit before using or occupying the property.

(emphasis added). Driver was ordered to secure the openings and clean the property. She was ordered to rehabilitate the building, potentially, but *only after securing a building permit*. The plain text of the Fire Order contradicts Driver's argument.

[7] We need not delay long on this exception. Driver did not seek to bring the property into residential use; rather, she sought a permit to continue the nonconforming use.

[8] "[T]he building official" refers to the Commissioner of Housing and Community Development, who has the power to issue building permits. Baltimore City Building Code ch. 2 §§ 103.1(2); 105.1 (2015).

Further, we do not think that this is the type of situation, generally, where a repair is "required by law." A routine notice issued to recently damaged buildings, declaring that the space is "unfit for human habitation," is not a safe harbor for nonconforming uses. Instead, we think that this exception exists for a situation where the *specific use*, though nonconforming, carries specific building requirements. For example, a halfway house might be located in a zoning district that restricts multi-family residences, and thus became a nonconforming use. If part of the structure was damaged by a fire such that it was still habitable but was left with, for example, fewer emergency exits than required by law, *see* Fire Code ch. 8 § 1004, that repair might fit into the section 13-404(2)(i) exception. A repair "required by law" is a repair that is mandated by law when that law does not itself require the owner to obtain a building permit. This Fire Order, as a generic, routine notice, does not. In sum, we conclude that the repairs made by Driver were not required by law, and thus Driver failed to comply with the Zoning Code by failing to obtain a building permit.

CONCLUSION

Municipalities have a wide range of possibilities of how to implement and enforce their zoning laws. The Baltimore City Zoning Code affirmatively seeks to terminate nonconforming uses by adopting a strict and largely mechanical test for determining the abandonment of nonconforming uses, and the procedures required to retain that use. Simply put, the Baltimore City Zoning Code is allowed to make retention of nonconforming uses difficult and may make owners walk a tightrope to retain them. Lil's Place did not comply, and the nonconforming use has been abandoned.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND REMANDED WITH INSTRUCTIONS TO AFFIRM THE DECISION OF THE BALTIMORE CITY BOARD OF MUNICIPAL AND ZONING APPEALS. COSTS TO BE PAID BY APPELLEES.