Circuit Court for Baltimore City
Case No.: 03-C-16-010551

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 638

September Term, 2017

IN THE MATTER OF BOONE KONDYLAS, LLC

Meredith,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 9, 2018

Boone Kondylas, LLC ("Boone"), appellee, filed a zoning petition for special hearing in the Baltimore County Office of Administrative Hearings ("OAH"), seeking an amendment to, or rescission of, restrictions previously placed on Boone's waterfront property ("the property"), to permit the use of the property as a restaurant with limited accessory music and entertainment. Following the special hearing, an OAH administrative law judge ("ALJ") denied Boone's zoning petition on the ground that it was barred by *res judicata*, as a result of this Court's 2010 unreported opinion in *Fifth Street, LLC, et al. v. Matthew Ciarpella, et al.*, No. 810, September Term, 2009 (filed July 9, 2010) ("*DOB I*"), wherein we held that the operation by the previous owner comprised a use as both a restaurant and a nightclub, and that use as a nightclub was prohibited by the applicable zoning regulations.

Boone appealed the ALJ's decision to the Board of Appeals of Baltimore County ("Board"), which also denied Boone's petition as barred by *res judicata*. Boone petitioned for judicial review, and the Circuit Court for Baltimore County remanded the matter to the Board for a determination of whether the subject property, under Boone's ownership, currently meets the definition of a nightclub, in light of the factors cited in our opinion in *DOB I*.

Appellants, Charles Wolinski, *et al*. ("Wolinski")—residential neighbors of the property—and People's Counsel of Baltimore County ("People's Counsel"), appealed the decision of the circuit court.

The questions presented, as set forth in Wolinski's brief, are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition?

2. As a matter of law, should the Opinion of the County Board of Appeals in this matter dated September 15, 2016 have been affirmed by the Circuit Court for Baltimore County?

3. Does an administrative agency or on appeal a reviewing Court have the authority to amend the zoning restriction previously granted by the Court of Special Appeals?

The questions as presented by People's Counsel are:

1. As a matter of law, with a successor owner in privity, does *res judicata* bar this repeat petition, which alleges essentially a cosmetic change in management style or operation?

2. Is the County Board of Appeals' opinion correct and at least legally sufficient based on the deferential, contextual and interpretive scope of judicial review?

3. Does the Circuit Court remand misapply *res judicata*; exceed the prudential scope of judicial review, fail to exercise judicial self-restraint, and both disrespect and undermine the administrative function[?]

For the reasons that follow, we shall dismiss appellants' appeal as premature.

FACTS AND LEGAL PROCEEDINGS

The waterfront property at the center of the controversy in this matter is located on Cuckold Point Road on Miller's Island in Baltimore County. The 1.27 acre property is improved by a restaurant/bar called Dock of the Bay ("DOB").[1]

In October 2003, shortly after it suffered extensive damage from Hurricane Isabel, Fifth Street, LLC ("FSLLC"), purchased DOB.[2] After a lengthy rebuilding period, FSLLC

[1] A restaurant, under various names and owners, has operated on the property since the 1950s.

[2] For the background of DOB before Boone purchased it, we rely primarily on the factual recitation set forth in *DOB I*.

reopened DOB in March 2004. It was licensed as a restaurant with a capacity of approximately 150-160 patrons and held a Class D liquor license. On an outdoor patio, there was more seating and a bar, along with a children's play area. DOB had an in-house music system to play satellite radio inside and outside, and it offered live entertainment by disc jockeys, bands and karaoke performers.

In 2006, residential neighbors of DOB complained to the Baltimore County Department of Permits and Development Management that the live music was too loud and disruptive and that DOB was operating as a nightclub, which was not permitted in the applicable business zone.[3] DOB was cited three times for: operating a nightclub in a B.L.

[3] DOB is located in a B.L. (Business Local) business zone. Baltimore County Zoning Regulation ("BCZR") §230.1, permits the operation of a "standard restaurant" and a "tavern" in a B.L. zone but does not permit a "nightclub," even by special exception. BCZR §230.3.

BCZR §101.1 defines "standard restaurant" as:

> A facility or part of a facility used primarily for serving meals and beverages to persons seated at tables on the premises of the establishment. The term includes cafes, cafeterias, tearooms and outdoor cafes. The term does not include a catering hall. A standard restaurant may offer a carry-out service, provided that such service is accessory to the principal restaurant operations. A standard restaurant may include a Class 6 brewery as an accessory use.

The same code section defines a "tavern" as: "An establishment which has a Baltimore County Class D liquor license. A tavern which meets the criteria of nightclub, as defined in these regulations, shall be considered a nightclub." Finally, "nightclub" is defined by the Code section as: "A tavern or other commercial establishment which provides live or recorded entertainment, with or without a dance floor, and which is categorized as a nightclub by the Building Code of Baltimore County."

(continued . . .)

zone; erecting a tent without a permit and; failing to cease nightclub operations and to remove the tent.

In August 2006, FSLLC filed a petition for special hearing, seeking a determination of whether DOB was a nightclub in violation of BCZR.[4] The zoning commissioner determined that DOB was a nightclub under BCZR and the International Building Code and ordered DOB to discontinue the playing of music by way of speaker system. On appeal, a majority of the members of the Board affirmed that determination.[5] Upon judicial review, the Circuit Court for Baltimore County also affirmed the determination. In an unreported opinion by a panel of this Court in *DOB I*, we affirmed the circuit court's judgment, concluding that the transcript and record provided substantial evidence to support the Board's finding that DOB was operating as a nightclub. In reaching that

(. . . continued)

The International Building Code, which was adopted as the Building Code of Baltimore County, sets forth advisory characteristics in determining whether an establishment may be characterized as, *e.g.*, a nightclub, dance hall, banquet hall, or cabaret, to include some or all of the following: low lighting levels; entertainment by a live band or recorded music generating above-normal sound levels; no theatrical stage accessories; later than average operating hours; tables and seating arranged or positioned so as to create ill-defined aisles; a specific area designed for dancing; services facilities for alcoholic beverages and food; and high occupant load density.

[4] A "request for special hearing is, in legal effect, a request for a declaratory judgment." *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005).

[5] One board member dissented, finding that DOB was a restaurant offering some musical entertainment on the side.

conclusion, we analyzed DOB's operation, using the criteria (for determining whether premises are being used as a nightclub) set forth in the International Building Code.

In 2010, Baltimore County filed a petition for contempt alleging that FSLLC continued to operate DOB in violation of the Board's order. At a hearing on the matter, FSLLC argued that DOB was no longer operating as a nightclub because it was not playing music outside the restaurant.

The circuit court, citing the Board's ruling that "the music, whether played inside or outside, is a factor in finding that the facility is a nightclub under the definition set forth in the BCZR," found FSLLC in violation of the Board's order for "continuing to play live and/or recorded entertainment on the premises." The court found FSLLC to be in contempt of court and ordered that FSLLC permanently dismantle any outdoor speaker system at DOB and refrain from allowing "any live band, Disc Jockey, karaoke or any other form of live or recorded entertainment to perform at the Site" for a period of one year beginning November 10, 2010.

DOB closed in 2012. In 2014, Boone purchased the property from FSLLC and reopened DOB. In 2015, Boone filed a petition for special hearing to "amend previous restrictions imposed . . . so as to permit future use of the property as a restaurant with limited accessory music." Before the ALJ, Boone argued that, unlike FSLLC's use of DOB as a nightclub, its business was first and foremost a restaurant, with music to be offered only as a complement to the dining experience.

In his October 22, 2015 written opinion and order, the ALJ concluded that FSLLC's zoning violation and special hearing case had been appealed to the Board, the circuit court, and this Court, all of which had affirmed the agency's finding that DOB was a nightclub, subject to the conditions and restrictions contained in the agency's order. Therefore, the ALJ concluded, "*res judicata* will bar a subsequent zoning case involving the same property unless there have been significant changes since the earlier case was heard." In the absence of any evidence of such significant changes by Boone, the ALJ continued, the ruling that DOB was both a restaurant and a nightclub must stand. Boone's petition was therefore denied.

Boone appealed the ALJ's decision to the Board on November 13, 2015. The Board heard argument on the matter on February 17 and April 28, 2016.

At the start of the hearing, People's Counsel argued that the doctrine of *res judicata* permitted the Board to dispose of the matter on a motion to dismiss. Counsel for DOB's residential neighbors agreed and added that amending the zoning restrictions would require a reversal of this Court's 2010 unreported decision, which the Board was not permitted to do. Boone claimed that there had been some significant changes since 2010 that should cause this Board to come to a different conclusion.

Boone's attorney, although acknowledging that FSLLC had operated a nightclub with loud rock music, which was not permitted in the pertinent B.L. zone, argued that Boone was not operating a nightclub, but a restaurant with the occasional "single acoustic guitar player" providing music. With regard to the *res judicata* argument, counsel averred

that *res judicata* did not apply because there had been a significant change in the facts of the case since *DOB I* was decided.

The Board reserved ruling on the *res judicata* issue and heard testimony.

Kenneth Boone ("Mr. Boone") the sole managing member of Boone Kondylas, LLC,[6] testified that DOB is licensed to operate as a restaurant and maintains a Class D liquor license, which Boone purchased from FSLLC. The restaurant averages 80% food / 20% alcohol sales.

Since Mr. Boone's purchase of DOB, his corporation has expanded the restaurant's kitchen to permit the outdoor steaming of crabs and removed the outdoor stage and tent that FSLLC had erected. Indoors, he said, DOB has seating for approximately 125 patrons at dining room tables and the bar, and there is outdoor seating for approximately 100 additional patrons. DOB has no dance floor or stage, and Mr. Boone has no plans to create either one.

DOB is presently open seven days a week, with posted hours of 11:00 a.m. to midnight, but the restaurant generally closes between 9:00 and 10:00 p.m. during winter months when business is slow. The average patron is between 40 and 70 years of age.

Other than a DJ on New Year's Eve 2014, Mr. Boone testified that he had hesitated to book live performers, as he was initially unfamiliar with what the applicable zoning code permitted. His hesitation appears to have been well founded because in 2015, when Mr.

[6] Mike and Donna Kondylas, the "Kondylas" of "Boone Kondylas, LLC" were no longer in partnership with Mr. Boone by the time of the hearing.

Boone scheduled an acoustic guitarist to play on a Saturday night, the neighbors complained about the potential for noise and disruption, and a zoning official threatened to pull DOB's liquor license if the musician played. Mr. Boone cancelled the guitarist, as well as scheduled performances by a Frank Sinatra cover singer and an "oompah" band for Oktoberfest, and he had not scheduled any live music since then.

Boone's petition centered on his desire to "cater to the demographic" and book soloists to play at DOB. Mr. Boone said he was willing to "live within sound restrictions on outside music [and] time restrictions of both indoor and outdoor music" in anticipation of offering live music outdoors on Friday and Saturday nights from 6:00 until 10:00 p.m. (with last call for alcohol at midnight) and on Sunday afternoons from 5:00 until 8:30 p.m.

Several neighborhood residents testified on Boone's behalf, stating that when FSLLC owned DOB, it hired "[v]ery loud, heavy metal" full-sized bands, which played until midnight or 1:00 a.m. on weekends. In contrast, DOB under Boone's ownership has a family atmosphere with an older demographic. The supporters advocated giving Boone a chance to have live music at DOB.

Charles Wolinski, whose house is approximately 200 feet from DOB, testified that he had fought with FSLLC for seven years over the loud music and the disorderly patrons in the parking lot. In his opinion, everything at DOB now that Boone owns it is "exactly the same" as when FSLLC owned it (other than the playing of live music), and the addition of live music would return the establishment to the level of disruption it had created during FSLLC's ownership.

In the opinion of Matthew Ciarpella, who was also a neighborhood protestant in the FSLLC litigation, the playing of any outdoor music at DOB would re-introduce the same noise problems that had been previously litigated. Other neighbors who had heard the loud music played when FSLLC owned DOB also protested the reinstatement of live music outside the restaurant.

The Board issued its written opinion on September 15, 2016. Therein, the Board noted that as the parties, or their privy, and the property had been involved in the previous litigation regarding the same zoning issue of whether live music should be permitted at the DOB, which led to the Board's 2008 opinion, the only manner in which the Board could act upon the new application for special permit previously denied would be if there had been a substantial change in the facts from those previously litigated. The Board found that the restaurant operations and layout and Boone's proposal for live music were substantially the same as when FSLLC owned the premises and litigated the matter. In the Board's view, a change in the restaurant's ownership or management style did not amount to a substantial change. Having previously determined that DOB comprised a nightclub not permitted in a B.L. zone, and having currently determined that no substantial change to the property existed that would support re-litigation of the issue, the Board denied Boone's petition to amend the previous restrictions imposed upon DOB.

Boone filed a petition for judicial review in the circuit court on October 17, 2016. The court heard argument on the petition on June 1, 2017.

Boone initially argued that the Board, in denying his petition on *res judicata* grounds, never decided the merits of the matter, that is, whether DOB can play live music and, if so, under what circumstances. Counsel for Boone said "whether the zoning is the same, the building is the same, the neighbors are the same, that doesn't matter. The Board of Appeals focused on the wrong inquiry" and "got this wrong" in failing to make a determination of the "ultimate issue." Counsel for Boone requested that the court reverse on the *res judicata* issue and remand to the Board for a determination of whether music should be allowed at DOB as an accessory use to the restaurant service and under what circumstances.[7] In the alternative, Boone argued that the court should find that the operative facts had changed since the time of FSLLC's ownership such that *res judicata* should not apply as a bar to the present litigation.

The circuit court observed that the Board had determined that the prior owner played music that was "loud and [performed by] rock bands and the neighbors didn't like it, therefore nobody can do anything different, because it might [move us] back into what the Dock of the Bay was under" the prior owner. The judge went on to say that the panel of this Court, in its *DOB I* decision was "very factually oriented" when it upheld the Board's determination that DOB was a nightclub while owned by FSLLC. In the circuit court's

[7] As the court pointed out, the applicable zoning regulations prohibit a nightclub from operating in a B.L. zone but does not prohibit music from being played. The Board appeared to use "live music" and "nightclub" interchangeably in its ruling.

view, for *res judicata* to apply, "the same analysis has to be done to see and determine whether the proposed use with the current owner would constitute a nightclub." In the court's words, "[i]f the facts were the same, then maybe *res judicata* would apply at this time . . ., but the analysis just was not done in this case."

Although the Board had found no substantial change in the facts as previously litigated, the circuit court observed that the Board did not perform an adequate analysis of the relevant criteria to determine whether DOB is currently a nightclub. Determining that that analysis should be done, the circuit court remanded the matter to the Board for a determination under the facts of this case as to "whether the proposed use would constitute a nightclub under the analysis used by the Court of Special Appeals in that prior case."

The circuit court issued its written order on June 2, 2017. The order remanded the matter to the Board "for a determination of whether the proposed use of the subject property (the Dock of the Bay) by Petitioner would constitute a 'nightclub' as defined by the Baltimore County Zoning Code under the analysis approved by the Court of Special Appeals in its decision in the matter of *Fifth Street, LLC v. Ciarpella*, No. 810, September Term, 2009, which includes consideration of the criteria in the International Building Code (IBC)."[8]

[8] *See* footnote 3, *supra*, for the International Business Code criteria.

DISCUSSION

Although not raised by any party, before we may consider appellants' arguments, we must ensure that the appeal has been taken either from a final judgment or from an appealable interlocutory ruling. We shall hold that this appeal is premature.

Pursuant to Maryland Code (2013 Repl. Vol., 2017 Supp.) §12-301 of the Courts and Judicial Proceedings Article ("CJP"), a party may appeal from a final judgment in a civil case. The Court of Appeals has consistently stated that "a judgment or order of a court is final when it determines or concludes the rights of parties or when it denies the parties means of further prosecuting or defending their rights and interests in the subject matter of the proceeding." *Schultz v. Pritts*, 291 Md. 1, 5–6 (1981). We will dismiss an appeal if it is not taken from a final judgment entered in a civil case by a circuit court, or if a non-final judgment does not fit within the statutory exceptions or the collateral order doctrine. *Foy v. Baltimore City Det. Ctr*., 235 Md. App. 37, 47 (2017), *cert. granted*, 457 Md. 660 (2018).

In general, where, as here, a circuit court orders a remand of the proceeding to an administrative agency, that is an appealable final order because when "a court remands a proceeding to an administrative agency, the matter reverts to the processes of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding." *Schultz*, 291 Md. at. 6 (citing *Fred W. Allnutt, Inc. v. Commissioner of Labor and Industry*, 289 Md. 35, 40

(1980)). Nevertheless, a circuit court's remand order in a judicial review action is not always an appealable final judgment. Although a remand after the circuit court has conducted a judicial review of the sole question raised in the administrative action, thereby precluding the parties from further contesting the validity of the agency's decision on the merits of the case, is an appealable final judgment, "a remand that precedes any judicial review is not a final judgment[.]" *Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 305, 310 (2015). As we suggested in *Foy*, *supra*, the "lack [of] any discernable conclusions of law or findings of fact" and the circuit court's apparent inability to assess the merits of the Board's decision may render the remand order a non-final judgment. 235 Md. App. at 52-53.

The sole issue before the circuit court in this matter was whether the Board was correct in denying Boone's petition on the ground of *res judicata*, based on the Board's determination that DOB was a nightclub when owned by FSLLC. The circuit court declared itself unable to make a finding on that sole claim because the Board had not determined whether DOB is currently a nightclub, pursuant to the International Business Code factors that were discussed in detail in *DOB I.*

The circuit court did not find any error of law on the part of the Board, nor did it affirm or reverse the Board's decision or decide or conclude the matter in dispute. In other words, the circuit court did not conduct judicial review. As in *Milburn*, the remand was to precede the circuit court's determination of whether there was substantial evidence in the record to support the Board's ruling and whether or not to affirm. 442 Md. at 308. In other

words, although the court did not specifically so state in its order, it deferred its ruling pending the remand, and the matter "contemplates that judicial review awaits the return of the case following the remand." *Id*. at 309. Specifically, once the Board has an opportunity to apply the International Business Code factors to the facts of this case, the circuit court will then determine whether *res judicata* would apply to support the denial of DOB's petition on that basis.

As noted in *Milburn*, 442 Md. at 309, although the parties "have, in a sense, been 'put out of court'. . . there is a strong potential, bordering on certainty, that the issue at hand—the viability of . . . an administrative decision—will be back for determination by the circuit court." The remand order in the subject case does not prevent the parties from continuing to defend or challenge the Board's decision following the remand; once the Board reconsiders its decision, the parties may continue to challenge or defend the Board's decision. All this was made clear in *Milburn*, where the Court said:

> It is true that, on remand, the Board of Appeals retains discretion to reconsider its decision. Finality, however, is not determined by considering what additional proceedings may occur before the agency, but what further proceedings, if any, will occur in the circuit court. *See Brewster* [*v. Woodhaven Bldg. & Dev., Inc.*, 360 Md. 602 (2000)] (proceedings before another forum are irrelevant to finality). Thus, the breadth of the additional proceedings at the agency level do not convert the remand order here into a final, appealable judgment.
>
> After the remand, the parties will have the opportunity to litigate their positions in the circuit court and pursue appellate review of those issues, including any contention that the remand was unlawful or an abuse of discretion. It may be, of course, that the lawfulness of the remand will no longer be at issue and that other issues concerning the validity of the Board's decisions will have become moot as a result of any modifications that the Board makes. In that respect, our holding that a remand that precedes any

> judicial review is not a final judgment is consistent with the purpose of the final judgment rule—to promote judicial efficiency by limiting piecemeal appeals.

Id. at 310-11 (footnotes omitted).

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANTS.