Circuit Court for Somerset County
Case No. C-19-CV-23-000008

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1427

September Term, 2023

IN THE MATTER OF

ROUTE 30 AUTO & TRUCK SALES, LLC.

Friedman,
Zic,
Storm, Harry C.
(Specially Assigned),

JJ.

Opinion by Storm, J.
Dissenting Opinion by Friedman, J.

Filed: November 22, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. Rule 1-104(a)(2)(B).

Introduction

The "Pines Motel" operated for many years in the City of Crisfield as a "nonconforming use" under the City's Zoning Ordinance.[1] On May 26, 2021, Route 30 Auto & Truck Sales, LLC ("Appellant" or "Route 30") purchased the motel and property.[2] Shortly thereafter, by letter dated June 15, 2021, the Crisfield City Inspector, Dean Bozman, notified Appellant that the Pines Motel property was in the R2 zone[3] and that while "the City had allowed the operations as a hotel/motel business at the Property as a nonconforming use, according to the City's records, "the hotel/motel business at the Property ceased for [sic] than twelve (12) months, rendering the nonconforming use of the Property discontinued under Section 112-123(C)."[4] The notice explained that based on water meter readings the "hotel/motel business at the Property ceased no later than May

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1 The Zoning Ordinance defines a "Nonconforming Use" as "[a]use, whether of land, or of a structure, which does not comply with the applicable use provisions of this chapter [112] or amendment thereto where such use was lawfully in existence prior to the enactment of this chapter or amendment thereto." Zoning Ordinance, §112-20.

2 Appellant purchased two adjacent parcels on Summit Avenue. The Pines Motel building is located on one of the parcels.

3 The R2 zone is a residential zone under the Zoning Ordinance.

4 Section 112-123.C. of the Zoning Ordinance provides:

> If any such nonconforming use of land ceases for any reason for a period of more than 12 months, any subsequent use of such land shall conform to the regulations specified by this chapter for the zone in which such land is located.

22, 2020."[5] Moreover, according to Mr. Bozman, records showed that no hotel rental tax had been paid by the hotel/motel operator for any of 2020 or for any month in 2021, all of which "evidence[d] that the operations of the hotel/motel business closed more than a year prior to [Appellant's] purchase of the Property." The result, according to Mr. Bozman, was that "the nonconforming use of the Property for a hotel/motel [was] deemed discontinued and terminated" and all future use of the Property had to "conform to the City's regulations governing use of property zoned R2."

Appellant appealed the Inspector's decision to the City Board of Zoning Appeals (the "Board" or "BZA"). Following a public hearing held on November 29, 2022, the Board met on December 12, 2022 and voted to deny Appellant's appeal.[6] The Board determined that Appellant had failed to carry its burden of proof, and that as a result of "Appellant's failure to prove continuous usage of the property as a motel, the property must conform to its R2 residential zoning going forward."

The Circuit Court for Somerset County affirmed the Board's decision, finding that the Board had "properly upheld the City Inspector's decision in this matter." This appeal followed. Additional facts will be discussed as needed below.

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[5] No explanation was provided by the City as to why or how the May 22, 2020 date was selected.

[6] Of the four Board members voting, one Board member, Lamont Potter, voted to uphold the appeal. Board Chair Margo Green-Gale voted to deny the appeal, as did Board member David Tawes (who while not present at the December 12th meeting provided correspondence indicating his vote). According to the Minutes, Board member Artie Tawes indicated that if the Board Chair voted to uphold the appeal he would back her vote; however, when the Board Chair voted to deny the appeal, Artie Tawes also voted to deny.

Standard of Review

When reviewing a decision of an administrative agency, [this court] will 'look through' the circuit court's decision and 'evaluate[] the decision of the agency.'" *Hayden v. Maryland Dep't of Nat. Res.*, 242 Md. App. 505, 520, 215 A.3d 827 (2019), *citing Kor-Ko, Ltd. v. Maryland Dep't of the Env't*, 451 Md. 401, 409, 152 A.3d 841 (2017). As related to a zoning decision challenge, a court's role "is limited [usually] to determining if there is substantial evidence in the record as a whole to support the [Board's] findings and conclusions, and to determin[ing] if the [Board's] decision is premised upon an erroneous conclusion of law." *City of Hyattsville v. Prince George's Cnty Council*, 254 Md. App. 1, 23 (2022) (citations and quotation marks omitted). As related to factual determinations, "[a] conclusion by a local zoning board satisfies the substantial evidence test . . . if reasoning minds could reasonably reach the conclusion from facts in the record." *Id*. at 24. (citations and quotation marks omitted). And, "[i]f substantial evidence supports the conclusion of the zoning agency, the courts may not disturb that conclusion, even if substantial evidence to the contrary exists." *Id*. (citations and quotation marks omitted).[7]

On the other hand, notwithstanding the deference due the agency, "it is always within our prerogative to determine whether an agency's conclusions of law are correct."

[7] Stated another way, 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).

Kushell v. Dept. of Nat. Resources, 385 Md. 563, 576 (2005).[8] "An appellate court may reverse the decision of a local zoning body where the legal conclusions reached by that body are based on an erroneous interpretation or application of the zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute." *City of Hyattsville*, 254 Md. App. at 23 (citations and internal quotation marks omitted). In other words, "[a]ppellate courts 'review legal questions or the agency's conclusions of law de novo.'" *Id*. (citation omitted).

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." *Eastern Outdoor Adver. V. Mayor & City Council of Baltimore*, 128 Md. App. at 573. Under the City of Crisfield Zoning Ordinance, the definition of a "nonconforming use" is consistent with this generally understood definition. *See* n. 1, *supra*.

In this case, while Appellant has raised as one of its issues on appeal the question of whether the City showed that the property was in fact zoned R2, this issue was waived.[9]

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[8] Where the issue is one of statutory construction and a question of law, "the court's review is expansive, that is, the appellate court may substitute its judgment for that of the administrative agency." *Harford County, Maryland v. McDonough*, 74 Md. App. 119, 122 (1988) (citations and quotation marks omitted).

[9] Counsel for Appellant was expressly asked at the Board hearing if he was challenging the zoning classification of the property and he indicated that he was not.

Moreover, there was no serious question about the non-conforming use status of the Pines Motel property. The parties and the Board proceeded on that basis and the Board's decision was predicated thereon. The issue was not whether the property was a non-conforming use; rather, the question was and is whether, under the City's Zoning Ordinance, the non-conforming use status was lost. And the answer to that question necessarily depends upon the language of the particular ordinance. *Landay v. MacWilliams,*173 Md. 460, 467 (1938) ("Decisions in cases dealing with the effect of the cessation or discontinuance of a nonconforming use naturally turn on the language of the particular ordinance or statute under consideration."). *See also McLay v. Maryland Assemblies*, Inc., 269 Md. 465, 469 (1973).[10]

The provision of the Zoning Ordinance upon which the City relied in this case provides that "[i]f any such nonconforming use of land ceases for any reason for a period of more than 12 months, any subsequent use of such land shall conform to the regulations . . . " Zoning Ordinance, §112-123.C.[11] In its consideration of Route 30's appeal from the

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[10] This is necessarily so because the language of zoning ordinances, while similar, varies from one to the other. Compare, for example, the Zoning Ordinance language at issue here: "If any such nonconforming use of land ceases . . ." with the language of the Baltimore City ordinance language (Section 13-407) at issue in *Trip Assoc., Inc. v. Mayor and City Council of Balto.,* 392 Md. 563, 576 (2006):"Whenever the active and continuous operation . . . regardless of an intent to resume active operations or otherwise not abandon the use."

[11] Section 112-123 is titled "Continuation of nonconforming uses." In its entirety, that section provides:

City Inspector's decision, the Board determined, and the case proceeded on the basis that, "the issue would be *whether the motel had in fact ceased operation* as such for at least twelve consecutive months, and [that] the Appellant would have the burden of proof upon that issue."[12] (emphasis added).

> Where, at the effective date of adoption or amendment of this chapter, lawful uses of land exists that is made no longer permissible under the terms of this chapter as enacted or amended, such use may be continued, subject to the provisions of §112-125 [dealing with structures and premises], so long as it remains otherwise lawful, subject to the following provisions:
>
> A. No such nonconforming use shall be enlarged or increased or extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this chapter.
>
> B. No such conforming use shall be moved, in whole or in part, to any other portion of the lot or parcel occupied by such use at the effective date of adoption or amendment of this chapter.
>
> C. If any such nonconforming use of land cases for any reason for a period of more than 12 months, any subsequent use of such land shall conform to the regulations specified by this chapter for the zone in which such land is located.

[12] Whether the burden of proof was properly allocated was not raised as an issue. *See generally*, 2 *American Law of Zoning* (5th ed.) §12:22 and cases cited ("In cases involving the termination of nonconforming uses dues to abandonment or discontinuance, the burden varies among different jurisdictions and depending upon the procedural posture of the case. In some circumstances the burden of proof will be on the party asserting termination, while in other situations the party asserting termination merely has to make a prima facie case and the burden then shifts to the property owner to prove that the use was not abandoned. Substantial evidence of abatement, of course, is required."). Maryland appellate precedent makes clear that one who claims the *existence* of a nonconforming use has the burden of proving it, *see e.g.*, *Calhoun v. County Board of Appeals*, 262 Md. 265, 267 (1971);

Appellant presented evidence to the Board showing that when Route 30 purchased the property on May 26, 2021, the Pines Motel facility existed there. And, it was undisputed that the motel use had not changed to any other use. Nelson Shepherd, who was the City's Code Compliance Officer in May 2021,[13] testified that in late April or early May of 2021 he was told by Appellant's principal, Mr. Dyson, that he had worked out a deal to buy the Pines Motel and that he was going to reopen it as a motel. Mr. Shepherd advised both City Inspector Bozeman and Joyce Morgan, the City Treasurer of that fact. Mr. Shepherd testified that no one at the City told him that it could not be reopened.

Mr. Shepherd also testified that he met with Mr. Dyson after Appellant's purchase of property in the latter part of May. At that time, they went through the motel rooms and the "whole motel complex." He testified to there being water and electricity,[14] and to observing that in one of the rooms there were fishing poles and food in the refrigerator.[15] In other rooms, the beds were all made and were orderly. He offered his opinion that the

Lapidus v. Mayor & City Council of Baltimore, 222 Md. 260, 262 (1960); *County Com'rs of Carroll County v. Uhler*, 78 Md. App. 140, 145 (1989). Whether that same rule should apply where the nonconforming use is sought to be eliminated does not seem to have been raised or addressed specifically in any reported appellate decision of which the panel is aware. Here, the Board declared, and parties proceeded without objection, on the basis that Route 30 shouldered the burden of proof.

[13] By the time of the Board hearing in November 2022, Mr. Shepherd was no longer employed by the City.

[14] Mr. Dyson also testified to these facts.

[15] Mr. Sweet, one of Mr. Dyson's lawyers, testified that in May 2021 he observed one of the motel rooms to have fresh food in a refrigerator and fishing poles in the corner.

motel had not been closed for 12 months. He further testified that during the period of the Governor's Covid restriction Orders, "most of the motels weren't doing any business because of that." Mr. Shepherd also wrote a letter, which was part of the record, in which he indicated among other things that "[t]he previous owners operated the business through June 2020" and that the "utilities (water/sewer and electricity) had never been terminated."

Some of the other evidence presented by Appellant included Governor Hogan's Proclamations of March 20, 2020 and June 12, 2021 declaring the existence of and continued existence of a catastrophic health emergency in the State of Maryland related to the Covid-19 pandemic;[16] a letter from counsel for Appellant to the City dated June 10, 2021, indicating that "the previous owners operated the business *through June 2020*, after the 1st Emergency Declaration by the Governor, dated March 5, 2020 . . ." (emphasis in original); water bills from the prior owner's operation showing some minimal level of "business water" and "business sewer" usage beyond May 2020; and, personal property tax records for the prior owner showing that personal property taxes for 2019, 2020 and 2021 were all paid on May 13, 2021.

The City presented evidence in support of its position that the motel use had ceased. City Treasurer Joyce Morgan testified that no hotel tax payments had been made by the prior owner of the Pines Motel since November 2019, that October 2019 was the last tax payment received, and that no taxes were received in 2020 or 2021. Ms. Morgan

[16] While the various Covid Orders were introduced, there was no testimony about the alleged impact that the Covid-19 pandemic had on the Pines Motel.

also testified to authoring an email dated June 11, 2021 to Mr. Bozman indicating that the''[t]he Mayor wants to be sure that no one, including Nelson [Shepherd], issues any permits of any kind to Pines Motel." The city also called Jason Loar, the City Engineer. Mr. Loar reviewed the water meter readings from January 2018 through May 2021. He estimated 25 beds for the motel, and determined that water usage should have been roughly 1,000 gallons per day. He concluded that "for a multiple bed hotel it does not appear to be in operation [between January 2018 through May 2021] based on the water usage." Mr. Loar acknowledged, however, that his average usage figures would most likely not have applied during the period of the Governor's Proclamation, but concluded that it was "quite possible" the motel was not operational from May 2020 to May 2021 based on water meter readings. At the same time, he also acknowledged that there was some limited water usage during various months of the relevant 12-month period.

The record before the Board also included testimony from an adjacent/contiguous property owner, Samuel Davis. Mr. Davis testified to the lack of activity which he observed at the motel in 2019 and 2020 and to his unsuccessful attempt to contact the prior owner in 2019 after someone damaged his fence.

Based on the evidence, the Board rendered its Decision and Findings of Fact as follows:

> In determining Appellant had failed to carry its burden of proof, the Board noted that, although Mr. Thornton [counsel for Appellant] had done the settlement at which Appellant purchased the motel, and therefore presumably was in communication with the seller, no witness was called on behalf of the Appellant to testify about the use and operation of the

> property, as a motel or otherwise, prior to settlement. The Board also noted that, while it would have been an easy matter to introduce ledgers or other documentary evidence showing motel rooms being leased, no such evidence was presented. Thus, although evidence of motel operation, if it existed, could readily have been presented by Appellant, the Appellant produced no evidence of motel usage apart from uncorroborated assertions by Mr. Dyson and his counsel. On the other hand, the City produced evidence incompatible with usage of the property as a motel, and a neighbor testified he had observed no activities at the motel property consistent with its use as a motel since at least 2019.
>
> In deciding that Appellant has failed to carry its burden of proof, the Board has been mindful of the State's overarching policy discouraging continuation of nonconforming uses, and the burden born[sic] by any property owner trying to qualify as a legal, nonconforming use.[17]
>
> Given the Appellant's failure to provide continuous usage of the property as a motel, the appeal is denied, and the property must conform to its R2 residential zoning going forward.

Analysis and Decision

Appellant claims that the Board gave too much weight to certain evidence and failed to consider what Appellant contends is other credible evidence. But under the deferential

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[17] *See* Zoning Ordinance §112-121.B. ("It is the intent of this chapter not to encourage the survival of non-conformities. Such uses are declared incompatible with permitted uses in the zones involved."). Although a "nonconforming use is a vested right entitled to constitutional protection" once established, *Amereihn v. Kotras*, 194 Md. 591, 601 (1950), nonconforming uses are not favored. *County Council v. Gardner, Inc.*, 293 Md. 259, 268 (1982). And, "the right . . . to 'continue' a con-conforming use is not a perpetual easement to make a use of one's property detrimental to his neighbors and forbidden to them." *Grant v. City of Baltimore*, 212 Md. 301, 307 91957). Rather, it has been recognized that "the earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned . . ." *Id.*

standard of review applicable to this issue, we simply "consider whether the issues were fairly debatable and the decision of the Board [ ] supported by sufficient facts of record so that a reasonable mind could have reached the same conclusion." *Boehm v. Anne Arundel Cnty*, 54 Md. App. 497, 513 (1983). This court "defer[s] to the [the Board's] assessment of credibility. *Id*. *See also Cnty Comm'rs of Carroll Cnty v. Uhler*, 78 Md. App. 140, 145 (citations omitted), *cert. denied*, 316 Md. 428 (1989) (In its "quasi-judicial" capacity, "the Board acts as factfinder, assessing the credibility of witnesses and determining what inferences to draw from the evidence.").

Our role, however, does not stop there. We also examine the Board's action to determine if its decision is premised upon an erroneous conclusion of law. *City of Hyattsville,* 254 Md. App. at 23. "A reviewing court … always has the right to determine if the administrative body made an error of law, *Baltimore Lutheran High Sch. Ass'n, Inc. v. Employment Security Admin.*, 302 Md.649, 662 (1985). *See also Kushell*, 385 Md. at 576 (It is "always within our prerogative to determine whether an agency's conclusions of law are correct.")

Here, the Board framed the issue and decided the case based upon its determination of "whether the motel had in fact ceased operation for at least twelve consecutive months…." If that was the correct question under the Zoning Ordinance, the issue was fairly debatable. There was under the applicable standard "substantial evidence" suggesting that the motel had not been operating as a going business during the 12-month period. But this misconceived the nature of the issue. The real question under the Zoning Ordinance

section pursuant to which the City was acting was whether "any such *nonconforming use of land cease[d]* for any reason for a period of more than 12 months . . . ." Zoning Ordinance, § 112-123.C. This question, as we see it, is one of law – the meaning of the phrase "use of land" and whether the use of the land (as opposed to the operation of the business) "ceased."[18]

Here, there is little if any doubt that what was on the land was a motel.[19] There was no suggestion that the land was being put to any other use. The motel building was still there; the motel sign was still there; the motel rooms were still intact; the beds were made; no fixtures were removed; the utilities were still connected and working.[20] And while the

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[18] Our colleague in dissent focuses (at footnote 6) on the word "ceases" and suggests that it means "discontinue." We believe that the focus should be on the entire phrase "use of land ceases." Moreover, if "ceases" means the same as "discontinue," we fail to understand why the City of Crisfield, in the next subpart of its Zoning Ordinance dealing with "structures," uses the phrase "discontinued or abandoned." *See* Zoning Ordinance, §112-125.D. *See also* note 20, *infra*.

[19] It worth noting that subsections A. and B. respectively of Section 112-123 preclude the nonconforming use being "increased or extended to occupy a greater area of land than was occupied" and the nonconforming use not being "moved, in whole or in part, to any other portion of the lot or parcel…." The focus is on the amount of land being occupied and where on the land the use is located. Neither subsection A. nor B. focus on or even mention the operation of any business to which the land use relates.

[20] *See McLay v. Maryland Assemblies, Inc.*, 269 Md. 465, 471 (1973). In that case, the Court commented that "had Assemblies removed its equipment or had used the buildings for purposes permitted in an A-R zone, the use would have been lost after the passage of the time fixed by the Ordinance…"

business being conducted there may have been minimal (or even non-existent), the land continued to be used for that same motel use.[21]

In *Southern Equipment Co., Inc. v. Winstead*, 80 N.C. App. 526, 342 S.E.2d 524 (1986), the court was confronted with a similar issue. There, Southern Equipment operated a concrete mixing facility as a nonconforming use. The Town's zoning ordinance provided for the forfeiture of the nonconforming use if one of several conditions occurred. One of those conditions, like the Zoning Ordinance here, specified that "[i]f a nonconforming use of land and/or structures cease[d] for any reason for a period of six (6) months" the nonconforming use would be forfeited. A slump in business resulted in the facility not being operated for more than six months; however, during that time the plant, equipment, inventories and utilities continued to be maintained. The operations could have been quickly resumed and meanwhile, orders were being filled at a facility in a nearby town.

The Town Zoning Officer advised Southern Equipment that its failure to operate the plant resulted in the loss of the nonconforming use and decision that was upheld by the Town's Board of Adjustment. The Superior Court reversed that decision. Focusing on the word "ceases" as used in the ordinance, the court observed that "the nature and use of the land and structure did not change during the period in question, even though, for economic

[21] The fact that hotel occupancy taxes were not being paid is analogous to the failure by the business operator in *Mayor & City Council of Baltimore v. Dembo, Inc*. to obtain an adult entertainment license. This Court found that "a property owner will not lose its nonconforming use status under the zoning laws simply by its failure to comply with a licensing law." 123 Md. App. 527, 534 (1998).

reasons, the Petitioner did not load concrete mixing trucks at this plant for a period of six (6) months." *Id.*, at 526; 342 S.E.2d at 527.

The North Carolina Court of Appeals affirmed that decision. Also focusing on the meaning of the word "ceases," the Court explained:

> Thus, if the word cease was used in the sense of just stopping the forfeiture lies; otherwise it does not. There is nothing in the provision quoted or in the zoning ordinance as a whole to indicate that in enacting the ordinance the Town legislative body equated the mere failure to operate a non-conforming business with its cessation. On the other hand, there is a strong indication in a companion subsection of the same ordinance that the word cease was used in a more stringent sense.[22] We therefore hold that petitioner's valuable property right was not forfeited by mere inactivity for six months and affirm the judgment of the Superior Court.

342 S.E. 2d at 528.

The Board's analysis in this case, like the Board in *Southern Equipment*, was flawed by its application of an erroneous interpretation of the Zoning Ordinance. Rather than focusing on whether there was a cessation of the use to which the land was being put, the Board interpreted the Zoning Ordinance in a way that focused improperly and exclusively

[22] The other section to which the Court was referring provided for the forfeiture upon a 'discontinuance" or "abandonment." The dissent (at footnote 6) fails to recognize that the Crisfield Zoning Ordinance has a similar distinct provision in section 112-125.D. dealing with the "nonconforming use of a structure or a structure and premises in combination" being "discontinued or abandoned." That section was not relied upon by the City in this case. *See also McLay v. Maryland Assemblies, Inc.*, 269 Md. 465, 471-74 (1973) discussing the differences between cessation, discontinuance and abandonment as used in zoning ordinances.

on the business operation. The correct focus under the express terms of the Crisfield Zoning Ordinance is on the use of the land, and whether the nonconforming use ceased.

Conclusion

In conclusion, because the Board and the circuit court in its affirmance of the Board, erred in the interpretation of the law as set forth in the Zoning Ordinance, the judgment of the circuit court will be reversed. The case will be remanded to the circuit court with direction to vacate the decision of the Board of Appeals and to remand the case to the Board for further proceedings consistent with this Opinion.

THE JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY IS REVERSED AND THE CASE IS REMANDED TO THAT COURT WITH DIRECTION TO VACATE THE DECISION OF THE CITY OF CRISFIELD BOARD OF ZONING APPEALS AND REMAND THE CASE TO THE CITY OF CRISFIELD BOARD OF ZONING APPEALS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

Circuit Court for Somerset County
Case No. C-19-CV-23-000008

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> "I know the sound of two hands clapping. What is the sound of one hand clapping?"[23]
>
> "If a tree were to fall on an island where there were no human beings would there be any sound?" "No. Sound is the sensation excited in the ear when the air or other medium is set in motion."[24]

To this list of metaphysical questions, we might now add: "What are the characteristics of a continuing use of a property as a motel during the time of COVID?"

As my friends in the majority recite, the property at issue is within the R2 (Residential) zoning in the City of Crisfield, but had been operating as a motel since before the advent of zoning. Slip Op. at 1. As a result, that use is "grandfathered in" as a legal nonconforming use under the zoning code. *Id.*; CRISFIELD, MD., CODE § 112-123. The law in Crisfield, as it is everywhere in Maryland (and beyond), is that a nonconforming use is allowed to continue in perpetuity unless it ceases to be used for that use for a period of time—in this case, 1 year—after which any future use must conform to the zoning code. *Id.* Thus, if the owner of the property ceased to use it as a motel for one year, the nonconforming use would end and thereafter the property could only be used for uses permitted in the R2 district. *Id.* § 112-123.C.

The City of Crisfield's Code Enforcement Officer, Dean Bozman, notified the owner of the property, Route 30 Auto & Truck Sales, LLC, (which, consistent with

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[23] This is a paraphrase of the kōan of Hakuin Ekaku (1686-1769), which he used to challenge conventional thinking and push his students to embrace doubt. Norman Waddel, *Translator's Introduction* to HAKUIN EKAKU, WILD IVY: THE SPIRITUAL AUTOBIOGRAPHY OF ZEN MASTER HAKUIN, xxxv-vi (Norman Waddell trans., 1999). Kōans are paradoxical riddles used in Zen Buddhism to challenge conventional thinking.

[24] *Editor's Table*, THE CHAUTAUQUA, June 1883, at 543-44.

Maryland Rule 8-111(b), I will call "Route 30") that its nonconforming use had lapsed because the motel had ceased operations by "no later than May 22, 2020."[25] Slip Op. at 1-2. In support of that finding, Bozman provided water meter readings for the motel demonstrating "negligible water usage" from March 2020 through May of 2021. *Id.*

Route 30 appealed the Code Enforcement Officer's decision to the Board of Zoning Appeals of the City of Crisfield. A hearing was held and on December 21, 2022, the Board rendered its written decision, finding that the nonconforming use had been abandoned for a period of more than one year. The Board recited several facts that supported its determination, including that:

- There had been negligible water usage by the property. Moreover, there was expert testimony that the amount of water usage was incompatible with the operation of a motel.
- The City of Crisfield charges a hotel rental tax for every night's stay. CRISFIELD, MD., CODE § 100-3. No hotel rental tax had been paid by Route 30 or its predecessor from January 2020 through and including June 15, 2021.
- Testimony from a neighbor, Sam Davis, that he had seen no activity in the motel since 2019 and that, when he had looked for someone to speak to about the motel, the motel and the motel office area had been vacant.[26]

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[25] Route 30 complains that Bozman and the Board selected that date arbitrarily. I am not impressed by this argument. Whether the date was chosen arbitrarily is a factual question to which we defer to the Board. Further, it would be an unreasonable burden to put on the City and its Code Enforcement Officer to be required to identify the date on which the last visitor vacated the motel. Such a burden would be incompatible with the statutory policy of noncontinuation of nonconforming uses. *See* Slip Op. at 10 n.17. Moreover, such a burden is not required by the Ordinance, which requires merely a cessation of the nonconforming use for any period of one year. CRISFIELD, MD., CODE § 112-123.C.

[26] Route 30 tried below and in this Court to impeach Mr. Davis's testimony based on a lack of opportunity to observe and his alleged bias. Board Meeting Transcript, November 29. 2022, p. 151-156. Of course, the Board of Zoning Appeals was free to accept or reject,

- The Board also noted evidence that could have been but was not offered. It observed that Route 30 could have but did not call the previous owner to testify about the use and operation of the motel during the previous owner's ownership. It also noted that Route 30 could have but did not produce ledgers or other documentary evidence showing that it had leased out motel rooms.[27]

As I noted at the beginning of this dissenting opinion, the question of what the use of property as a motel looked like during the COVID emergency is a close and difficult question. It may have been that Route 30 wanted to rent out its rooms but there were no customers during the health emergency. It may have been that Route 30 simply gave up because there were no customers available. Fortunately, however, I don't need to resolve these questions. That is because these are factual questions. They were the Board of Zoning Appeals' decisions to make and, so long as it had substantial evidence to back up that decision, I must, necessarily, affirm. *See, e.g.*, *City of Hyattsville v. Prince George's Cnty. Council*, 254 Md. App. 1, 24 (2022).

Because I would stop here, I must respectfully dissent.[28]

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believe or disbelieve, Mr. Davis's testimony, in whole or in part. *Brown v. State*, 368 Md. 320, 327 (2002) (holding that issues of the credibility of a witness at a hearing are for the trier of fact to decide). That the Board chose to believe Mr. Davis is not an error that we review or a basis on which to challenge the Board's decision.

[27] The Board of Zoning Appeals also pointed out contrary facts, including Route 30's insistence that it had continued to operate without interruption and that a witness, Mr. Sweet, testified that he had found food in a refrigerator in the motel in May of 2021. That the Board chose not to believe these facts or discounted them, is not an error. In the same vein, my friends in the majority point to the existence of a motel sign as evidence of the continued use. Slip Op. at 12. I note that the parties did not agree whether there is or is not a sign. Oral Argument at 31:25, 38:35. But even if there was, it was for the Board to decide of what significance a sign would be—not for this Court.

[28] My friends in the majority appear to accept the deference that they must give to the Board's factual determinations. Slip Op. at 3-4 (citing *City of Hyattsville*, 254 Md. App. at

24). But rather than affirm, they conclude that this is a legal determination to which no deference is owed. Slip Op. at 4 (citing *City of Hyattsville*, 254 Md. App. at 23). With this, I cannot agree. *First*, no party argued at trial or in this Court that the Board of Zoning Appeals made an error of law. In fact, both parties agree that this is a factual dispute and that the standard of review is the substantial evidence test. I think we ought to take their word for it. *Second*, if there is a legal error, it was certainly waived. MD. RULE 8-131, 8-504(a)(5). *Third*, it is not legal error at all. To me, "cease" means discontinue. A motel "ceases" being a motel when it is no longer accepting guests. If the motel is not operating, the nonconforming use is lost. In the end, this is not a legal question and only a factual question, about which, as I say above, I think we are compelled to defer.