STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA ANN SOECHTIG, Plaintiff-Appellant,	UNPUBLISHED June 12, 2012
v	No. 301757 Alcona Circuit Court
TOWNSHIP OF GREENBUSH and GREENBUSH TOWNSHIP ZONING BOARD OF APPEALS, Defendants-Appellees.	LC No. 10-001545-AA

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff Patricia Ann Soechtig appeals by leave granted from the circuit court's order affirming the decision of defendant Greenbush Township Zoning Board of Appeals (ZBA), denying plaintiff's request for a zoning variance. We reverse and remand to the ZBA for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff's family has owned lakefront property in Greenbush, Michigan, since 1956. Plaintiff maintained that the cottage on the property has either been rented or available for rent every summer since 1957. In 1984, the property was rezoned as "R-1" or single-family residential, which prohibited weekly rentals. In 2010, defendant informed plaintiff that the property could not be rented pursuant to the zoning ordinance. Plaintiff explained that the cottage had been available for rent since 1957.

Defendant requested that plaintiff provide rental receipts "prior to 1984 and each consecutive year, through 2009. This would easily validate your claim of continuous rentals and would settle the issue." By letter, plaintiff responded:

> I cannot provide any rental receipts prior to 1984 since my grandmother was responsible for the cottage prior to her death in 1985. She rented the cottage to friends and neighbors and when my mother took over from 1985 to 2004 she also rented to friends and neighbors and I have no idea if she kept receipts and now that she's dead, I can't ask her.

Plaintiff's letter included a signed affidavit in which plaintiff attested that "[t]he cottage . . . which has been owned by my family since 1956 was either rented or offered continuously for rent since 1957." The township formally denied plaintiff's request for summer rentals, stating the following:

> Greenbush Township has been more than reasonable in requesting some sort of verification that your cottage in Greenbush has been rented continuously during the summer months since prior to 1984 and through 2009.
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> Unfortunately, you provided no proof this occurred other than providing us with a General Affidavit stating your position. We have no alternative than to deny your request for summer rentals in the established R-1 Zoning District.

Plaintiff appealed the township's decision to the ZBA and was told by the township's attorney that "[i]f you have any other proof that the property was used as a rental, . . . gather the same and present it to the Zoning Board of Appeals as part of your appeal." Plaintiff provided three letters from families that rented the cottage from plaintiff's mother "on several occasions" during the 1970s and 1980s. One letter specifically emphasized that the rentals occurred during the summer. Plaintiff also provided four notarized affidavits that stated that the cottage had been owned by plaintiff's family since 1956 and "either rented or offered continuously for rent since 1957" or "to my personal knowledge has been rented since at least 1983." In addition, plaintiff provided a printout of a rental property website, showing that an internet listing for rental of the cottage was "Live since: Mar 29 2006." During the ZBA hearing, the following "ordinance" was read into the record: "Non-conforming uses shall not be re-established after discontinued use and for abatement of use for a period of three hundred and sixty-five (365) consecutive days." The ZBA voted unanimously to deny plaintiff's request for a variance. Relying on the "ordinance," the ZBA found that plaintiff had not established a prior nonconforming use by demonstrating continuous use as rental property "every year" since 1984. It also opined that plaintiff's supporting affidavits were "self-serving" and unpersuasive.

Plaintiff appealed to the circuit court. The circuit court affirmed the ZBA's decision, finding that plaintiff did not "even come close" to establishing a prior nonconforming use.

This Court granted plaintiff's application for leave to appeal and directed the parties to "address the applicability of *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 127-128; 673 NW2d 763 (2003), and the cases cited therein."

II. ANALYSIS

We review de novo a circuit court's decision in an appeal from a city's zoning board, while giving great deference to both the circuit court's and the zoning board's findings. *Edw C Levy Co v Marine City Zoning Bd of Appeals*, 293 Mich App 333, 340; 810 NW2d 621 (2011); see also *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). A circuit court reviews the decision of a zoning board of appeals to ensure that it (1) conforms to the constitution and the laws of this state, (2) is based upon proper procedure, (3) is supported by competent, material, and substantial evidence, and (4) represents the reasonable exercise of discretion granted by law to the zoning board of appeals. *Levy Co*, 293 Mich App at 340; see

also *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002) ("The decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion."). '"Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Levy Co*, 293 Mich App at 340-341; see also *Keller v Farmington Twp*, 358 Mich 106, 111; 99 NW2d 578 (1959) ("[T]he court should not interfere with the judgment of a zoning board if there is a reasonable basis for its ruling.").

"A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000), citing *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). "[I]t is a lawful use that existed before the restriction, and therefore continues after the zoning regulation's enactment." *Sall*, 442 Mich at 439. "Nonconforming use involves the physical characteristics, dimensions, or location of a structure, as well as the use of the premises." *Levy Co*, 293 Mich App at 342. Notably, a nonconforming use may be seasonal. See *Civic Ass'n of Dearborn Twp, Dist No. 3 v Horowitz*, 318 Mich 333, 339-340; 28 NW2d 97 (1947).

"Whether an activity warrants classification as a nonconforming use necessarily involves an imprecise determination." *Grosse Ile Twp v Dunbar & Sullivan Dredging Co*, 15 Mich App 556, 563; 167 NW2d 311 (1969). The burden of establishing a nonconforming use is on the property owner. See *Sall*, 442 Mich at 439. This Court has stated that "[t]o establish a prior nonconforming use, a property owner must engage in work of a substantial character done by way of preparation for an actual use of the premises." *Belvidere Twp*, 241 Mich App at 328 (landowner's purchase of property with the intention to use it for the purpose of operating a large-scale hog farm did not give rise to a vested nonconforming use). "[I]t is essential to show nonconformance in a reasonably substantial manner." *Fruitport Twp v Baxter*, 6 Mich App 283, 285; 148 NW2d 888 (1967); see also *Peacock Twp v Panetta*, 81 Mich App 733, 738; 265 NW2d 810 (1978). "The zoning restriction's enactment date is the critical point in determining when a nonconforming use vests." *Sall*, 442 Mich at 441. "Once a nonconforming use is established, a subsequently enacted zoning restriction, although reasonable, will not divest the property owner of the vested right. Thus, a prior nonconforming use is an exception to zoning's general principle that certain uses should be confined to certain localities." *Id.* at 439. (internal citation omitted). MCL 125.3208(1) provides in part:

> If the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment.

"The policy of the law is against the extension or enlargement of nonconforming uses . . . . The continuation of a nonconforming use must be substantially of the same size and the same essential nature as the use existing at the time of passage of a valid zoning ordinance." *Levy Co*, 293 Mich App at 342.

In granting leave to appeal, this Court directed the parties to address the principles of abandonment of a prior nonconforming use as articulated in this Court's decision in *Livonia Hotel* and the cases cited therein, i.e., *Dusdal v City of Warren*, 387 Mich 354; 196 NW2d 778 (1972), and *Rudnik v Mayers*, 387 Mich 379; 196 NW2d 770 (1972).

The plaintiff in *Livonia Hotel* operated a hotel with an adjoining restaurant that served alcohol pursuant to a class B liquor license, a valid nonconforming use. *Livonia Hotel*, 259 Mich App at 118, 128. The plaintiff purchased the hotel in 1995, continued to operate it, and kept the liquor license in effect although the restaurant owner discontinued operations. *Id.* at 128. In 2000, the plaintiff signed a lease agreement with a new restaurant. *Id*. The city asserted that the plaintiff would be required to obtain a new waiver for a nonconforming use because the prior restaurant use had been abandoned for more than one year and, thus, was considered abandoned under Livonia Zoning Ordinance § 18.18, which stated that discontinuance of a nonconforming use for one year would be considered an abandonment of the use. *Id*. at 127. The plaintiff contended that it never intended to abandon the restaurant use. *Id* at 120. The plaintiff and the new restaurant owner each filed new waiver use petitions. *Id.* The city council approved the petitions, but the mayor vetoed them. *Id*. at 120-121. The plaintiff and the restaurant owner filed a complaint in circuit court, seeking a declaration that the proposed restaurant use had not been abandoned. *Id.* at 121. The circuit court found that the restaurant was abandoned and dismissed the case. *Id*. at 122.

On appeal, the plaintiff argued that the circuit court erred in finding that it had abandoned the restaurant use. This Court stated:

> As plaintiff points out, the Court in *Dusdal v City of Warren*, 387 Mich 354, 196 NW2d 778 (1972), and *Rudnik v Mayers*, 387 Mich 379, 196 NW2d 770 (1972), addressed the definition of "abandonment" in the context of zoning law. As stated in *Dusdal, supra* at 360, 196 NW2d 778:
>
> > The record does not support a finding of legal abandonment. Abandonment in the contemplation of the law is something more than mere nonuser. It is rather a nonuser combined with an intention to abandon the right to the nonconforming use. The burden of proving the abandonment was on the city. It introduced no evidence from which it would be reasonable to conclude that the plaintiff ever intended to relinquish or abandon his vested right to use his property in the manner in which it was being used prior to the residential zoning amendment.
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> In *Rudnik, supra* at 384, 196 NW2d 770, the Court stated, "The necessary elements of 'abandonment' are intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon."
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> As plaintiff correctly notes, "Section 18.18 is in direct contravention of the Supreme Court's holdings in *Rudnik* and *Dusdal*" because it defines abandonment solely on the basis of "actual discontinuance of such valid nonconforming use for a period of one (1) year," LZO 18.18(b), without requiring an intent to abandon the right to the nonconforming use. [*Livonia Hotel*, 259 Mich App at 127-128.]

This Court held that "as a matter of law, plaintiff did not abandon its restaurant use" given the plaintiff's "continued efforts to reopen a restaurant in the hotel." *Id*. at 128-129.

In this case, the nonconforming use at issue is the summer rental of the cottage owned by plaintiff's family. The ordinance that prohibited the rental of the cottage was enacted in 1984. Thus, the 1984 enactment date "is the critical point in determining" whether plaintiff had a vested nonconforming use. See *Sall*, 442 Mich at 441. Importantly, while plaintiff's use of the cottage after the 1984 enactment date would be relevant to determine whether plaintiff abandoned a prior nonconforming use or expanded the scope of such use, it is irrelevant to the initial determination of whether plaintiff established a vested right in the nonconforming use of the cottage for summer rentals. See *id.* ("Construction undertaken after the zoning regulation's enactment is inapposite to determining whether a property owner tangibly changed the land," i.e., whether there is a vested nonconforming use.). When determining whether plaintiff established a prior nonconforming use, the ZBA relied on the "ordinance" and required plaintiff to demonstrate continuous use of the cottage as rental property "every year" since 1984, i.e., that the rental of the cottage had not been discontinued for 365 days since the 1984 enactment date. The "ordinance" relied upon by the ZBA addresses abandonment of a prior nonconforming use—not establishment of a prior nonconforming use. Without addressing the legality of the Greenbush Township "ordinance" under *Livonia Hotel*, we conclude that the ZBA's reliance on the "ordinance" for purposes of determining whether plaintiff established a prior nonconforming use was contrary to law. See *id.*; *Levy Co*, 293 Mich App at 340. In order to establish a prior nonconforming use, plaintiff did not have to prove the continuity required by the "ordinance." The ZBA's requirement that plaintiff do so was contrary to Michigan law. Therefore, the circuit court's decision must be reversed, and the case must be remanded to the ZBA for further proceedings consistent with Michigan law.

On remand, the ZBA shall determine whether plaintiff established the existence of a prior nonconforming use, i.e., whether the cottage was rented during the summer before the 1984 ordinance became effective. To do so, the ZBA shall determine whether plaintiff submitted evidence demonstrating that the cottage was used in a reasonably substantial manner for summer rental before enactment of the 1984 ordinance. See *Belvidere Twp*, 241 Mich App at 328; *Fruitport Twp*, 6 Mich App at 285; *Grosse Ile Twp*, 15 Mich App at 564. As noted above, a nonconforming use may be seasonal. See *Horowitz*, 318 Mich at 338-339 (an outdoor carnival, which was operated during the summer months, was deemed to be a prior nonconforming use); see also *Adams v Kalamazoo Ice & Fuel Co*, 245 Mich 261, 263-264; 222 NW 86 (1928) (removal of an old building, fitting the ground for and placement of an ice station building thereon, to be used only during the ice demand season, was deemed to be a prior nonconforming use). We note that the Michigan Supreme Court has concluded that undisputed testimony from a property owner seeking to establish a prior nonconforming use is sufficient to support the existence of a prior nonconforming use. See *White Lake Twp v Amos*, 371 Mich 693, 696, 699-700; 124 NW2d 803 (1963).

Assuming a prior nonconforming use has been established by plaintiff, the continuation of a vested right to the nonconforming use "may not generally be expanded," and "[t]he continuation of a nonconforming use must be substantially of the same size and the same essential nature as the use existing at the time of passage of" the 1984 ordinance. See *Levy Co*, 293 Mich App at 342. If the evidence submitted by plaintiff establishes a prior nonconforming

use, then the township may attempt to show that plaintiff abandoned the prior nonconforming use. To do so, the township must demonstrate that (1) plaintiff intended to abandon the nonconforming use, i.e., summer rental of the cottage, and (2) an act or omission by plaintiff that clearly manifests her voluntary decision to abandon. See *Livonia Hotel*, 259 Mich App at 127-128.

Reversed and remanded to the ZBA for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly