

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Heather Jennings and :  
Kenneth Jennings, :  
Appellants :  
v. : No. 1638 C.D. 2010  
Zoning Board of Adjustment : Argued: April 5, 2011  
of the City of Pittsburgh and :  
City of Pittsburgh and Point :  
Breeze Development Corporation, :  
Blyden Terry, Scott Peterson and :  
Robert Hanna :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: July 28, 2011

Heather and Keith Jennings (collectively, Jennings) appeal from an order of the Court of Common Pleas of Allegheny County (Trial Court) that denied Jennings’ appeal from a decision of the Zoning Board of Adjustment of the City of Pittsburgh (Board), and affirmed the Board’s decision. The Board denied Jennings’ request for a special exception for the use of their property for religious assembly, under the Pittsburgh Zoning Code (Zoning Code).

Jennings is the owner of real property, with a three-story dwelling and attached three-car garage thereon, located at 6955 Thomas Boulevard within the

City of Pittsburgh (the Property). The dwelling on the Property has ten bedrooms, with an additional separate apartment above the detached garage. The garage provides the only three parking spaces. Pursuant to the Zoning Code, the Property is zoned Single Unit Detached Residential, Low Density (R1D-L). The Property was previously owned by Ebenezer Baptist Church, and utilized as a personal care residence for up to fifteen clients and a resident manager. The most current Certificate of Occupancy, dated December 1, 2006, is for a small personal care residence for up to fifteen clients and a resident manager.

Jennings proposes to lease the Property to a non-profit corporation known as An Ordered Life, which seeks approval under Section 903.02.A.1 of the Zoning Code as Religious Assembly by special exception. An Ordered Life's proposed use is as a contemplative community in a communal group living arrangement, wherein a maximum of ten unrelated adults will live in the ten bedrooms and will share common living, eating, and recreation areas. One additional adult, employed by An Ordered Life, will reside in the garage unit and serve as a Prior/Director/Manager (Manager), and be responsible for screening applicants, direction of the program, and the management of the daily affairs. Residents within the program would be at least twenty-three years of age, must be employed, will pay an initial \$2000.00 to enter the program, and will pool their income to cover food and lodging costs. Communal prayer sessions of fifteen to twenty minutes in length will occur twice daily for all residents, and the Manager will provide weekly spiritual training to the residents. No chapel or designated worship area will be established upon the Property, and the combination of the ten

residents and the Manager will be restricted to three vehicles, with any visitors parking on the street.

Upon initial application for the proposed use, the Zoning Administrator classified it as Religious Assembly pursuant to the Zoning Code. Hearings before the Board ensued, at which Appellees Point Breeze Development Corporation, and neighboring landowners Blyden Terry, Scott Peterson, and Robert Hanna intervened as objectors and opposed the proposed use. The objectors presented testimony regarding the parking and late night noise/activity problems currently being produced from the Property, in contrast to the former personal care use and activity. Following the receipt of testimony and evidence from all parties, the Board concluded that the proposed use was not for Religious Assembly, defined in the Zoning Code as “an establishment operated by a religious organization for religious worship, religious training and related religious services.” See Certified Record (C.R.), Section 911.02 of the Zoning Code.

The Board concluded that, contrary to the definition of Religious Assembly, the proposed use will be to create high-density housing for multiple unrelated adult individuals to reside in a communal manner. The Board emphasized that the use will not set aside any areas on the Property for religious worship, training or services, and that there will be no public worship or congregation thereon. The Board concluded that the brief, twice-daily prayer sessions do not establish a primary use of Religious Assembly under the Zoning Code, and noted that the use does not meet the standards for Religious Assembly

under the Zoning Code in relation to, *inter alia*, parking demand, residential compatibility standards, and the various impacts upon the surrounding areas.

Additionally, the Board concluded that Jennings had not met the burden to establish that the dwelling unit above the garage exists as a legal nonconforming use, in that it had been vacant for between three and eight years. Thus, the Board concluded that Jennings had failed to rebut the presumption of abandonment of the use in light of the objectors' evidence. Accordingly, the Board denied Jennings' request for a special exception for a Religious Assembly use under the Zoning Code.

Jennings thereafter timely appealed to the Trial Court, which received no additional evidence in the matter. The Trial Court affirmed the Board, in regards to the Zoning Code's Religious Assembly use requirements, and in regards to the abandonment of the garage unit as a legal nonconforming use. Jennings now appeals to this Court from the Trial Court's order.<sup>1</sup>

Where the trial court has taken no additional evidence, this Court's scope of review is limited to determining whether the Board committed an abuse of discretion or an error of law. Upper Saucon Township v. Zoning Hearing Board of Upper Saucon Township, 583 A.2d 45 (Pa. Cmwlth. 1990). The Board will be found to have abused its discretion only if its findings are not supported by substantial evidence, which is such relevant evidence as a reasonable mind might

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<sup>1</sup> Filing a combined brief to this Court as Appellees in this matter are the Point Breeze Development Corporation, Blyden Terry, Scott Peterson and Robert Hanna (collectively, Appellees). The Board and the City of Pittsburgh have joined in Appellees' brief.

accept as adequate to support a conclusion. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983).

Jennings presents three issues on appeal: 1.) whether the Trial Court abused its discretion and erred as a matter of law in affirming the Board's conclusion that the use at issue is not Religious Assembly pursuant to the Zoning Code; 2.) whether the Trial Court abused its discretion and erred as a matter of law in affirming the Board's holding that the use at issue fails to meet the special exception criteria of Zoning Code Section 922.07.D.1, and; 3.) whether the Trial Court abused its discretion and erred as a matter of law in affirming the Board's holding that the nonconforming use of the dwelling unit above the garage in the property at issue was abandoned.

In support of the first issue, Jennings argues that the Board erred and abused its discretion in holding that the proposed use was Multi-Suite Residential,<sup>2</sup> and not Religious Assembly, under the plain and ordinary definitions within the Zoning Code. The Zoning Code defines the terms relevant to the matter *sub judice* thusly:

**Multi-Suite Residential** means a building or portion thereof, containing rooms rented as sleeping or living quarters, without private kitchens and with or without private bathrooms. Lodging or meals or both are provided for compensation on a weekly or monthly basis.

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<sup>2</sup> A Multi-Suite Residential use is not allowed within a R1D-L district under Section 911-4 of the Zoning Code.

**Religious Assembly** means an establishment operated by a religious organization for religious worship, religious training and related religious services.

**Religious Assembly (Limited)** means a Religious Assembly use for which fewer than 20 parking spaces are required.

C.R., Section 911.02 of the Zoning Code, Use Table. Jennings argues that the proposed Christian monastic program does not fall within the Multi-Suite Dwelling definition, in that: the program operates on one-year cycles with most members remaining therein for only one cycle; members must be employed and member income is pooled to cover program costs; members are responsible for running the household, including the preparation of meals, and; members are not renting on a weekly or monthly basis, nor being provided meals for compensation on a weekly or monthly basis. Jennings argues that the record in its entirety reveals that the Board's conclusion that the program is a Multi-Suite Residential use was made in error, and that relevant and uncontradicted evidence establishes that the use is most consistent with the Religious Assembly definition within the Zoning Code. We disagree.

We note that Jennings has failed to directly challenge the evidence supporting any of the Board's specific findings, and therefore those findings of fact are binding upon this Court for purposes of appellate review.<sup>3</sup> Eichlin v. Zoning

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<sup>3</sup> Notwithstanding Jennings' failure to challenge any specific Board Findings in the Statement of Questions Involved presented to this Court, our review of the record reveals substantial evidence supporting each of the Board's Findings in this matter.

Hearing Board of New Hope Borough, 671 A.2d 1173 (Pa. Cmwlth. 1996). We further note that it is irrelevant whether substantial evidence of record supports the alternative findings impliedly advanced by Jennings herein; the relevant inquiry, for purposes of our appellate review, is whether substantial evidence supports the findings that were actually made by the Board in this matter. Accord Valley View Civic Association. It is axiomatic that determinations as to witness credibility and the weight to be given to the evidence are left solely to the Board in its role as fact finder. Shamah v. Hellam Township Zoning Hearing Board, 648 A.2d 1299 (Pa. Cmwlth. 1994).

The foundation of the Board's determination that the proposed primary use is not for Religious Assembly, under the Zoning Code, can be found in Conclusion 9:

The brief twice-daily prayer sessions do not establish a primary use of the Property for "Religious Assembly" as defined in the Use Table at [Zoning Code Section] 911-20, otherwise any household use that engaged in daily prayer would fall within the ambit of the "Religious Assembly (Limited)" for a Special Exception use. See, e.g., Russian Orthodox Church Appeal, [397 Pa. 126, 129,] 152 A.2d 489[, 491] ([1959]) ("the fact that the land will be owned by a religious institution [does not] alter the basic secular use to be made thereof, and we would be most reluctant to construe the ordinance so as to make a distinction not found therein based upon the nature of the owner of the land rather than the nature of the use to be made of the land.). Cf., Diocese of Altoona-Johnstown v. Zoning Hearing Board of Borough of State College, 899 A.2d 399 (Pa. Cmwlth.)[, petition for allowance of appeal denied, 590 Pa. 662, 911 A.2d 937 (2006)] (construction of building to house student center, seventy-seat chapel, Catholic library, and ancillary housing for three Benedictine monks who

would conduct daily mass and provide the sacraments, was a permitted special exception as a place of worship); Berlant v. Lower Merion Township Zoning Hearing Board, 279 A.2d 400 [(Pa. Cmwlth. 1970)] (synagogue falls within special exception for permitted religious use of property as a place of worship). If this [B]oard were to find that the proposed use of the [P]roperty fell within the ambit of “Religious Assembly,” our decision would essentially render the Zoning Code meaningless, as any applicant could side-step the requirements of the [C]ode by claiming to perform minimal religious services within a building. Such a holding would create a slippery slope this Board is not willing to go down.

Board Opinion (hereinafter, Op.), Conclusion of Law 9. We agree with the Board’s reasoning.

The Board found that the only scheduled religious activity within the proposed use upon the Property would be communal prayer sessions for the residents held within the house for approximately 15-20 minutes, twice each day. Op., Findings 20, 22. The program’s Manager will, additionally, purportedly provide weekly spiritual training to the residents in the house, although Jennings failed to present any testimony or evidence regarding specifically what such “weekly training” would entail. Id., Finding 21. The program would provide no additional spiritually-related or spiritually-specific requirements or programming, the Property would have no designated area for religious prayer, worship, or training, and there would be no public worship or congregation upon the Property. Id., Findings 22-25.

In contrast, the Board’s Findings that determine that the proposed use is more consistent with the category of Multi-Suite Residential far outweigh the



minimal Religious Assembly components. Jennings does not contest that the proposed use has the following characteristics:

- A communal group living arrangement;
- Residence of ten unrelated adults within ten bedrooms;
- An additional unrelated adult managing the daily affairs, including chore scheduling and the handling of all financial aspects;
- The manager living in the dwelling above the garage;
- Residents are required to have employment and to pool income to cover the costs of food and lodging;<sup>4</sup>
- Residents are required to provide a \$2,000 deposit before beginning the program, and;
- Participants agree to reside for a minimum period of one year;

Under the uncontested facts as found above, which facts are all supported by substantial evidence of record, the Board did not err in concluding that the proposed use was “a building or portion thereof, containing rooms rented as sleeping or living quarters, without private kitchens and with or without private bathrooms” as is provided for under the Multi-Suite Residential categorization under the Zoning Code. C.R., Section 911.02 of the Zoning Code, Use Table. Additionally, the Board did not err in concluding that the proposed use was not one

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<sup>4</sup> We agree with the Trial Court that the pooling of residents’ income, which is derived from their respective regular employment outside of the proposed Property use, to support the costs of communal meals to be prepared in one central kitchen, as well as for the costs of all utilities, taxes, and maintenance, is consistent with the Zoning Code’s Multi-Suite Residential characteristic of lodging and/or meals provided for compensation on a weekly or monthly basis.

primarily centered on the operation “by a religious organization for religious worship, religious training and related religious service.”<sup>5</sup> Id. Notwithstanding Jennings’ generalized assertions, the Board properly concluded that the facts as found do not analogize the proposed use to that of a religious community such as a priory, convent, abbey, cloister, monastery, rectory, friary, or seminary, as those terms are commonly understood.

Next Jennings argues that the Trial Court abused its discretion and erred as a matter of law in affirming the Board’s holding that the use at issue fails to meet the special exception criteria of Zoning Code Section 922.07.D.1 (setting forth the conditions for compliance in approving a special exception for a proposed use). However, Jennings founds his argument on this issue on the assertion that Zoning Code Section 903.02.A.1<sup>6</sup> permits a Religious Assembly use in the R1D-L

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<sup>5</sup> Additionally, the facts as found are sufficiently consonant with the majority of the Zoning Code’s characteristics of a Multi-Suite Residential definition, and do not constitute a use that is not encompassed by the Use Table of Section 911.02 of the Zoning Code. As such, the “savings clause” of the Zoning Code contained at Section 911.03 is inapplicable hereto. Section 911.03 of the Zoning Code reads:

In the event that an application is submitted for a use that is not listed in the Use Table of Section 911.02, the Zoning Administrator shall be authorized to:

- A. Determine the classification of the new or unlisted use type into an existing land use category that most closely fits the new or unlisted use based upon the definitions of this Code and upon the similarity of the new/unlisted use with an existing, defined land use category.

<sup>6</sup> Section 903.02.A.1 reads:

Use Regulations

*(Continued....)*

District subject to compliance with the special exception criteria in Zoning Code Section 922.07.D.1. Inasmuch as the proposed use *sub judice* does not constitute a Religious Assembly use pursuant to the Use Table of Section 911.02 of the Zoning Code, as set forth in our foregoing analysis, the Board did not err in holding that the use at issue fails to meet the special exception criteria of Zoning Code Section 922.07.D.1. Section 922.07.D.1 under its own terms requires a foundational conclusion that the use at issue is a Religious Assembly use under the facts before us.

Finally, Jennings argues that the Trial Court erred as a matter of law in applying the law pertaining to the abandonment of nonconforming uses. Section 921.02.B.2(d) of the Zoning Code addresses an abandonment of a nonconforming use, and the evidence required to establish abandonment, and states in relevant part:

A nonconforming use shall be presumed abandoned when any one (1) of the following occurred:

\* \* \*

(d) The use has been discontinued, vacant or inactive for a continuous period of at least one (1) year, provided this

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(a) Primary Uses

Primary uses shall be allowed in the R1D Subdistrict **in accordance with the Use Table of Sec. 911.02.**

(b) Accessory Uses

Accessory uses shall be allowed in the R1D Subdistrict in accordance with the Accessory Use regulations of Chapter 912.

(Emphasis added.)

presumption may be rebutted upon showing, to the satisfaction of the Zoning Board of Adjustment, that the owner had no intention to abandon. Where appropriate, the Zoning Board of Adjustment may require contemporaneous documentation of previous use or intended use, such as leases or real estate advertisement, to rebut the presumption.

C.R., Section 921.02.B.2(d) of the Zoning Code. Jennings cites to Pappas v. Zoning Board of Adjustment of City of Philadelphia, 527 Pa. 149, 589 A.2d 675 (1991), in which our Supreme Court stated that the abandonment of a nonconforming use cannot be established by mere proof of a failure to use the property, or of a temporary use not inconsistent with an intention to use it for the original purpose; there must be evidence of intention to abandon.

Our Supreme Court has held that a failure to use a nonconforming property for a designated period of time as provided for under a municipal zoning code discontinuance provision constitutes evidence of an intention to abandon. Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township, 553 Pa. 583, 720 A.2d 127 (1998). When such a zoning ordinance provision addressing an abandonment period exists, the burden of persuasion rests with the party challenging the claim of abandonment, and if evidence of a contrary intent is introduced, the presumption is rebutted and the burden of persuasion shifts back to the party claiming abandonment. Id. “Where ... a discontinuation provision is provided in the ordinance, such provision “creates a presumption of the intent to abandon the use by the expiration of the designated time.” ... “Absent any evidence to the contrary, the lapse of the designated time will be sufficient to

establish an intent to abandon the use.” Latrobe Speedway, 553 Pa. at 592, 720 A.2d at 132 (quoting Pappas, 527 Pa. at 156, 589 A.2d at 678).

Jennings argues that the objectors’ evidence in this matter is not sufficient in itself to establish actual abandonment, and as the objectors never met their burden of proving abandonment, the burden never shifted to Jennings. We disagree.

Jennings does not dispute that the Property was rezoned to its current R1D-L designation in 2003, allowing only single-unit detached dwelling units so that the second unit over the garage on the Property became nonconforming. Jennings also does not dispute that the current Certificate of Occupancy references the three-car garage, but does not include the dwelling unit above that garage. Reproduced Record (R.R.) at 2a. The objectors presented credible evidence that the garage dwelling space had been abandoned for three to eight years, in accordance with Section 921.02.B.2(d) of the Zoning Code. Robert Hanna has lived next to the Property since 2004, and testified that he has never seen the garage dwelling unit used. R.R. at 191a-192a. The prior nursing home use has not utilized or occupied the Property for at least three years. R.R. at 190a. Under Section 921.02.B.2(d), these facts create a presumption that the use of the garage dwelling unit has been abandoned, shifting the burden to Jennings to rebut the presumption of intent to abandon the use.

As noted, Latrobe Speedway, Inc. establishes that absent evidence to the contrary, the lapse of an ordinance-designated time will be sufficient to establish intent to abandon. Herein, Jennings presented no evidence showing that

the prior owner intended to maintain the nonconforming use as a personal care residence, no evidence that the Property was still assessed as a personal care residence, no evidence that taxes were paid on the Property as a personal care residence, and no evidence that the previous owner tried to sell the Property as a personal care home.<sup>7</sup> Therefore, Jennings did not overcome the presumption of Section 921.02.B.2(d) of the Zoning Code.

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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<sup>7</sup> While Jennings did assert before the Board that the prior owner attempted to procure a purchaser for the Property during the three years that the Property was not used, Jennings presented no evidence whatsoever that the prior owner sought a tenant to continue or resume the prior personal care home use. This fact distinguishes the instant matter from Appeal of Langol, 104 A.2d 343 (Pa. Super. 1954), in which the Superior Court held that after a vacant period in excess of a zoning ordinance discontinuance period, a landlord's attempts during that period to procure tenants to specifically continue the same prior nonconforming use negated a borough's assertion of an intent to abandon. Jennings reliance upon Langol, therefore, is misplaced under the instant facts.

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Breeze Development Corporation,	:	
Blyden Terry, Scott Peterson and	:	
Robert Hanna	:	

**ORDER**

AND NOW, this 28th day of July, 2011, the order of the Court of Common Pleas of Allegheny County, dated July 14, 2010, at No. SA 09-001333, is affirmed.

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JAMES R. KELLEY, Senior Judge