

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TKO Realty, LLC,	:	
Appellant	:	
	:	
v.	:	
	:	
Zoning Hearing Board of the	:	No. 2225 C.D. 2010
City of Scranton	:	Argued: June 6, 2011

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge (P.)
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: July 1, 2011

TKO Realty, LLC (TKO) appeals the September 14, 2010 order of the Court of Common Pleas of Lackawanna County (trial court) affirming the December 9, 2009 decision of the Zoning Hearing Board of the City of Scranton (Board), and denying and dismissing TKO's land use appeal. The issues before this Court are: 1) whether there is substantial evidence to prove that a certain non-conforming use as a 5-unit building was lawfully created; 2) whether the Board is estopped from asserting that TKO and its predecessors in title have failed to register a lawful non-conforming use and/or a rental property; and 3) whether TKO or its predecessors abandoned the non-conforming use.¹ For the reasons that follow, we affirm the trial court's order.

¹ As a fourth issue, the Board discussed the issue of the denial of a use variance for the property in its brief. TKO specifically states in its brief, and the Board acknowledges in its brief, that that issue was not being appealed to this Court, but the Board chose to discuss it anyway. Since the issue is not being raised before this Court, it will not be discussed in this opinion.

TKO bought the property located at 721-723 Columbia Street, Scranton, Pennsylvania (property) in a mortgage foreclosure sale on May 28, 2009. The property had been condemned by the City of Scranton (City) on October 6, 2008, and was vacant from at least that point in time until TKO purchased it. Prior to purchasing the property, TKO contacted the City to determine what steps were necessary to take the property off the condemned property list, and it was given a list of necessary steps and repairs. After purchasing the property, TKO applied for a permit to use the building as a 5-unit apartment complex. The City Zoning Officer denied TKO's application on the grounds that a 5-unit complex did not conform to the City of Scranton Zoning Ordinance (Ordinance),² and that the prior owner's use of the property as a 5-unit apartment complex had been abandoned for six or more months.

TKO appealed the permit application denial to the Board, challenging the Zoning Officer's determination and, alternatively, seeking a variance to turn the property into a 4-unit apartment complex. At the Board hearing, the Zoning Officer testified that, in addition to determining that the property was abandoned pursuant to the Ordinance, none of the prior owners had secured zoning approval to make the property into a 5-unit complex, nor had anyone properly registered the property pursuant to Scranton's Rental Registration Ordinance. In addition to the Zoning Officer, five residents and the principal of the school located across the street from the property testified in opposition to the appeal. The owners of TKO, Jonathan Olivetti and Thomas Kelly, testified on behalf of TKO. The previous owner of the property, Mohammed Abdulla, testified concerning the foreclosure on the property under his ownership, and his intent to use the property as a 5-unit complex. TKO presented evidence that, at the time of the purchase of the property, there were three

² File of Council #74, 1993, effective December 21, 1993, *as amended*.

gas pipes and three sewer lines connected to the building, as well as five electric meters and five telephone lines. In addition, TKO presented evidence that five garbage collection fees had been collected for the property since 2008.

The Board unanimously denied TKO's appeal on the basis that there was "no legal non-conforming use that had not been abandoned." Board Decision at 5. The reasons for the Board's conclusion were that, *inter alia*, (a) the prior expansion to 5 apartment units was done illegally, (b) none of the prior owners lawfully registered the property in compliance with the Rental Registration Ordinance,³ and (c) the building had not been used as a 5-unit building for 6 months or more. TKO's application for a use variance was denied on the basis that it would alter the essential character of the neighborhood, adding to the congestion and traffic problems in the area.

TKO filed a timely appeal with the trial court. The trial court affirmed the Board's decision, determining that there was no evidence that the prior owners of the property ever received permission to use the property as a 5-unit apartment building. In addition, it determined that there was ample, relevant evidence supporting the denial of the use variance. TKO appealed the non-conforming use issue to this Court.⁴

TKO argues on appeal that the evidentiary record did not address prior lawful use, of which evidence exists, because neither party to this appeal disputed that issue before the Board. It further contends that it was an error for the trial court

³ Rental Registration Ordinance adopted December 3, 2001 by Ordinance No. 88-2001, amended in its entirety July 26, 2007 by Ordinance No. 105-2007.

⁴ "In zoning appeals . . . where the trial court takes no additional evidence, this court's scope of review is limited to determining whether the zoning hearing board committed an abuse of discretion or an error of law." *Money v. Zoning Hearing Bd. of Haverford Twp.*, 755 A.2d 732, 735 n.3 (Pa. Cmwlth. 2000).

to look beyond the evidentiary record before the Board to dismiss the appeal on other grounds. We disagree.

The Ordinance provides: “It shall be the responsibility of a party asserting a nonconformity to provide evidence that the nonconformity was lawfully created and was and continues to be in compliance with all city laws, regulations and codes in effect at the time it was created and thereafter.” Section 806.B.1 of the Ordinance.

First, the issue of whether the legality of the non-conforming use is properly before this Court must be addressed. As justification for its application for appeal to the Board, TKO stated: “Applicant was informed by the City’s Zoning Officer that building has lost it’s [sic] non-conforming status. Applicant appeals and contends that because it was never the intention to abandon the non-conforming use, the use is still valid.” Reproduced Record (R.R.) at 8. Michael Wallace (Wallace), the Zoning Officer, testified that:

Additionally, the building had never, what I can find registered under the Renter’s Ordinance as a five-unit property, and when I checked with the garbage department, 2003, which is as far back as their records went, 2003 and 2004 and 2005, the building has been paying three garbage fees. It was sold to Mr. Firestone in 2006, and the garbage fees jumped to five. There was no record of any work, no permits issued for the building. So, whether it was a legal conversion or not at that time, I don’t have any idea because we don’t have any records, so I’m thinking it was an illegal conversion of the property. At that point, just the six months is enough to say it’s a non-conforming use that has been discontinued and that’s why we are here now, part of the reason why we are here now.

R.R. at 40-41. Further, the Board stated in its decision:

20. Under §806.B.1 of the Ordinance, "It shall be the responsibility of a party asserting a nonconformity *to provide evidence that the nonconformity was lawfully*

created and was and continues to be in compliance with all city laws, regulations and codes in effect at the time it was created and thereafter. With respect to nonconforming dwelling units, in addition to the above requirements, evidence must be provided to show the use is in compliance with the Rental Registration Ordinance...

.....

22. *As to the issue of the five (5) unit use being a legal nonconforming use and on the issue of abandonment, the Board found, by a vote of 4-0, to deny the appeal of Mr. Wallace's finding there was no legal nonconforming use which had not been abandoned. Their findings are based on the following:*

(a) Failure of the evidence to show there were ever more than three (3) legal nonconforming units in the building, i.e. three (3) gas lines, three (3) sewer lines and three (3) garbage fees through 2005.

(b) *That any expansion from three (3) units to five (5) units was done illegally.*

(c) That the building had not been used as a five (5) unit building for in excess of six (6) months.

(d) Failure to register under the Rental Registration Ordinance.

Board Decision at 5-6 (emphasis added). Clearly, the Zoning Officer researched the history of the property before he issued the denial and, based on his findings, he concluded that the non-conforming use was illegal. When he issued the permit denial, however, he focused on the abandonment of the non-conforming use. As a result, TKO failed to address the legality of the non-conforming use during the hearing. That notwithstanding, the Ordinance is clear in that the party asserting the non-conforming use has to provide evidence that the non-conforming use is legal and continues to be compliant. Thus, regardless of the Zoning Officer's reason for

denying the application, under the Ordinance, TKO had the responsibility of proving that the non-conforming use was legal *and* was not abandoned.

Since the legality of the non-conforming use is properly before this Court, the party asserting the continuance of the non-conforming use, i.e., TKO, must show that:

[the] lawful, nonconforming use of [the] property is a use predating the subsequent prohibitory zoning restriction. The right to maintain this nonconforming use is only available for uses that were lawful when they came into existence and which existed when the ordinance took effect. Preexisting illegal uses cannot become nonconforming uses, and it is the burden of the party proposing the existence of such a use to establish both its existence and legality before the enactment of the ordinance at issue.

Hafner v. Zoning Hearing Bd. of Allen Twp., 974 A.2d 1204, 1210-11 (Pa. Cmwlth. 2009) (citations omitted).

TKO presented evidence that it believed proved that the City knew or should have known that there were five units being used at the property: i.e, the City was taxing the property as a multi-unit complex for years; the City collected residential refuse disposal fees on five units for several years; the City failed to inventory all non-conforming uses in effect at the time of the adoption of the 1983 Zoning Ordinance; and several neighbors testified that they believed the building had five units for many years. However, TKO did not present evidence, either before the Board or the trial court, that established the use of the property as a 5-unit complex prior to the prohibitory zoning restriction. Therefore, substantial evidence was not presented to prove that the non-conforming use as a 5-unit building was lawfully created.

TKO next argues on appeal that the City should be estopped from asserting that the non-conforming use had never been registered because it has been

collecting refuse collection fees on five units, a fact that implies that the occupation had been reported, and because it failed to inventory the non-conforming use as required by the 1983 Ordinance. However, the issue of estoppel was not raised by TKO until its brief to this Court. TKO's Concise Statement of Errors Complained Of listed the following errors as the basis for its appeal:

- 1) The findings of fact made by the Board do not support the conclusions of law reached by either the Board or by the Court; and
- 2) The Court's conclusion that the evidentiary record does not contain facts sufficient to sustain the appeal is erroneous; and
- 3) The Court's conclusion that the Applicant failed to sustain its burden of proof is erroneous; and
- 4) The Court's conclusion that the Applicant was not entitled to a building permit for at least three (3) units is erroneous; and
- 5) The Court's assumption that the non-conforming use registration requirement was in effect on the date that the non-conforming use of this parcel vested is not supported by evidence of record; and
- 6) The Court's assumption that the use of this structure was non-conforming prior to December 15, 1993 is not supported by evidence of record; and
- 7) The Zoning Hearing Board abused its discretion when it allowed the City to raise the issue of non-registration of a non-conforming use *for the first time* at the hearing before the Board. The only administrative and statutory basis given for the denial of the building permit by the Code Enforcement Officer was *presumptive abandonment* of the pre-existing non-conforming use six (6) months after condemnation, see 53 P.S. § 10616.1(c)(3).⁵ This ground for denial was the sole

⁵ Section 616.1(c)(3) of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, added by Section 60 of the Act of December 21, 1988, P.L. 1329.

basis for the Applicant's appeal to the Board. The Decision issued by the Board erroneously shifted the burden of proof on non-conformity to the Applicant because the City had not challenged the prior lawful status of the non-conforming use when the Applicant had applied for a building permit to refurbish the structure following foreclosure, or at any previous time. The Court affirmed the Board on that issue.^[6]

Because the issue of estoppel was not timely raised, it is waived pursuant to Pa.R.A.P. 1925(b)(4)(vii).

Finally, TKO argues on appeal that the Board abused its discretion by finding that the non-conforming use had been abandoned, because the prior owner had been put out of possession by foreclosure proceedings, and any cessation of the non-conforming use was involuntary. In addition, TKO argues that the Board abused its discretion when it concluded that the non-conforming use had become illegal or actually abandoned through the owners' and previous owners' failure to register the property under the Rental Registration Ordinance effective after the non-conforming use began. It contends that such secondary ordinance is not a zoning ordinance, and the alleged violation of it was never proved or adjudicated because the City had never commenced any enforcement action under that ordinance. We disagree.

Section 806.B.1 of the Ordinance, in relevant part, provides:

Failure to properly register the property in accordance with the said Rental Registration Ordinance or any successor ordinances, the failure to maintain said registration, or the failure to maintain the premises in compliance with all building codes *shall be considered both an intent to abandon the nonconforming use and an actual*

⁶ The issues raised by TKO in its brief in support of the Notice of Appeal of the Board's order to the trial court listed only two issues: 1) whether the TKO or its predecessors in title voluntarily abandoned the non-conforming use, and 2) whether TKO met its burden of proving undue hardship regarding its request for a use variance for a 5-unit residential structure. *See* Pa.R.A.P. 302.

abandonment of such nonconforming use and shall make any subsequent nonconforming use illegal.

(Emphasis added).⁷ Section 806.E.1 of the Ordinance states:

If a nonconforming use of a building or land is discontinued for a period of 6 months or more, or is discontinued for a period of 12 or more months in any 2 year period the use is considered abandoned

Regarding residential properties, failure to properly register the property in accordance with the Rental Registration Ordinance (File of Council #88, 2001, as Amended) or any successor ordinance, maintain said registration and maintain the premises in conformance with City building codes shall be considered intent to abandon the nonconforming use.

Further:

The burden of proving the fact of abandonment is on the party so asserting [O]ne seeking to establish that the use has been abandoned must prove that the owner or occupier of the land intended to abandon the use and that the use was, consonant with this intention, actually abandoned. While non-use or discontinuance of the use might be probative with respect to the second issue - actual abandonment - the intent to abandon could not be inferred from or established by a period of non-use alone. Rather, the intent to abandon must be shown by the owner or occupier's overt acts or the failure to act, such as written or oral statements evincing an intent to abandon the use, structural alterations to the building inconsistent with continuance of the nonconforming use, or the failure to take some step such as license renewal necessary to the continuance of the use.

⁷ Appellant cites *Appeal of Suburban General Hospital*, 410 A.2d 85 (Pa. Cmwlth. 1980) for the proposition that “[f]ailure to register a nonconforming use does not constitute an abandonment of that use.” Appellant’s Br. at 12. In the present case, the Ordinance clearly states that failure to register demonstrates intent to abandon a non-conforming use. Therefore, the present case is distinguishable from *Suburban General*.

Smith v. Bd. of Zoning Appeals of City of Scranton, 459 A.2d 1350, 1352 (Pa. Cmwlth. 1983) (citations omitted). “[W]here . . . the applicable zoning ordinance places a reasonable time limitation on the right to resume a nonconforming use, the intention to surrender the right to that use may be presumed from the expiration of the designated time period.” *Appeal of Lester M. Prange, Inc.*, 647 A.2d 279, 282 (Pa. Cmwlth. 1994). However:

Actual abandonment for the period prescribed by the ordinance must always be shown. Moreover, a showing of actual abandonment by the landowner is not proved by a mere temporary discontinuance of the business which is the result of forces or events beyond his control including war, shortage of materials or supplies necessary for the continued operation of the use, destruction of the property by natural disaster, the financial inability of the owner to carry on due to general economic depression, and cessation of business during repair of the property.

Smith, 459 A.2d at 1353. Finally, “[w]here discontinuance of a use occurs due to events beyond the owner’s control, such as financial inability of the owner to carry on due to general economic depression, there is no actual abandonment.” *Metzger v. Bensalem Twp. Zoning Hearing Bd.*, 645 A.2d 369, 371 (Pa. Cmwlth. 1994) (quotation marks omitted).

Regardless of the fact that the previous owner, Mohammed Abdulla, lost the property in foreclosure and may not have voluntarily abandoned the property, the Ordinance clearly states that failure to register the property under the Rental Registration Ordinance evidences intent to abandon and constitutes actual abandonment. While it may not be TKO’s fault that the property was never properly registered under the Rental Registration Ordinance, we note that as TKO testified that it owns at least one other rental property within the city limits, TKO should have known to inquire about the registration issue, prior to purchasing the subject property.

Furthermore, as a realty company, TKO is reasonably expected to become familiar with zoning and other statutory requirements prior to purchasing any property. As a matter of due diligence, TKO should have been aware of the registration deficiency, and the resulting loss of the non-conforming use, prior to purchasing the property.

For the reasons above, we affirm the order of the trial court.

JOHNNY J. BUTLER, Judge

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Appellant	:	
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v.	:	
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Zoning Hearing Board of the	:	No. 2225 C.D. 2010
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ORDER

AND NOW, this 1st day of July, 2011, the September 14, 2010 order of the Court of Common Pleas of Lackawanna County is affirmed.

JOHNNY J. BUTLER, Judge