IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: The Appeal of SIIKA, LLC From a Decision of the Jackson Township Zoning Hearing Board	:	No. 2394 C.D. 2010
Appeal of: Jackson Township	:	
In Re: The Appeal of SIIKA, LLC From A Decision of The Jackson Township Zoning Hearing Board	:	No. 2396 C.D. 2010
v.	:	
Jackson Township	:	Submitted: June 6, 2011
v.	:	
Rocco A. Venditto, Jr., et ux, Timothy S. Knupp, et ux, Appellants	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge (P.)
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: September 19, 2011

Jackson Township (the Township) and Rocco Venditto and Timothy Knupp (Intervenors) appeal from the October 7, 2010, order of the Court of Common Pleas of York County (trial court), which reversed an order of the Jackson Township Zoning Hearing Board (ZHB) finding that SIIKA, LLC (SIIKA) had abandoned a pre-existing nonconforming use to operate a junkyard. We affirm.

This case involves a seventeen-acre property (the property), originally owned by Richard and Deborah Christine, which is located along Pine Road in the Township. The Christines used the property as a junkyard, and they had a license from the Township authorizing them to operate that business. Although junkyards are not a permitted use under the property's current zoning, the Christines' junkyard operated as a preexisting nonconforming use.

In November 2006, the Christines sold the property to SIIKA. The junkyard license was transferred to Christine Auto Salvage, LLC (CAS), an affiliate of SIIKA, and SIIKA permitted the junkyard to continue to operate on the property. CAS renewed the junkyard license in June 2007, for a period of one year. Normal operation of the junkyard was temporarily halted in November 2007; CAS intended to resume operations in the spring of 2008.

The Christines apparently failed to pay real estate taxes on the property prior to the sale to SIIKA. As a result, on November 7, 2007, the county tax claim bureau sold the property at a tax upset sale to an entity known as KDR Investments, LLP (KDR). Following the sale, the Township's zoning officer, Sandra Sterner, contacted KDR regarding the status of the junkyard license. KDR informed Sterner that it was not using the property as a salvage yard and wished to void the junkyard license.

On June 6, 2008, SIIKA filed an action challenging the upset sale. The parties ultimately resolved the litigation by entering a stipulation to set aside the tax sale. KDR executed a quitclaim deed in favor of SIIKA on April 20, 2009.

During the tax sale period, CAS' junkyard license expired and was not renewed. CAS continued to operate during this time; however, it was engaged in removing the salvage yard from the property.

On July 28, 2009, a representative of SIIKA, Simon Shimnovtic, wrote the following letter to zoning officer Sterner:

> I am writing to you, asking for your assistance with the above-mentioned business…. As you are aware, the land had been inadvertently sold at Tax Sale. As you are also aware, I was in litigation due to the sale for over a year. Finally, in April 2009, the title to the property was returned to me….
>
> ….
>
> It is my understanding that KDR contacted you while the property had been in their [sic] name during the litigation, and informed you that the property was no longer to be used as a salvage yard. This is not an issue that I feel you should penalize me for.
>
> I would appreciate your assistance in approaching the board to revert the zoning back to the Salvage classification as it was previously; as I do not feel that it should have been taking [sic] out of this classification to begin with.

(Reproduced Record (R.R.) at 49a.) Sterner responded by letter dated August 14, 2009:

> …[P]lease be advised that KDR (former owner of this property) requested the Township, in writing, to void the junkyard license on May 23, 2008. The Township honored their [sic] request and since no application for a Junkyard License was applied for in June 2008, the nonconforming

> use of a Junkyard in a Rural Conservation Zone for this property is now considered abandoned.
>
> It is not the intent of the Township to penalize you…. *The nonconforming use was discontinued 'officially' May 23, 2008*…. If your desire is to use this property as a Junkyard, you would need to apply for a Variance to the Zoning Ordinance (attached Variance Zoning regulations, application and instructions attached).

(R.R. at 50a.) (Emphasis added.)

SIIKA followed the zoning officer's advice and applied to the ZHB for a variance; however, SIIKA subsequently withdrew the variance request and challenged the zoning officer's conclusion that the nonconforming junkyard use was abandoned. The ZHB denied SIIKA's challenge and concluded that the junkyard use was abandoned for, among others, the following reasons: (1) the zoning officer's August 14th letter was an adverse determination pursuant to the Pennsylvania Municipalities Planning Code (MPC)[1] from which SIIKA failed to take a timely appeal; and (2) SIIKA failed to show continued use of the junkyard beyond the spring of 2008, and thus abandoned the use.

SIIKA appealed the ZHB's determination to the trial court. The Township and Intervenors participated in the appeal. After review, the trial court reversed the ZHB's decision, finding that the zoning officer's August 19, 2009 letter was not a determination adverse to the landowner as defined by the MPC and did not activate the 30-day appeal period and that SIIKA did not abandon the nonconforming use of the property as a junkyard.

[1] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§10101-11202.

On appeal to this Court, the Township contends[2] that trial court erred in holding that the August 14, 2009, letter issued by the zoning officer did not constitute a "determination" as defined by section 107(b) of the MPC. The Township argues that the August 14th letter falls squarely within the definition of determination in section 107(b) of the MPC because the zoning officer refused to register a nonconforming use and thus fixed the rights of SIIKA by denying it the ability to continue a nonconforming use. The letter, the Township asserts, unequivocally stated that the junkyard use was deemed abandoned. We do not agree.

Section 107(b) of the MPC provides as follows:

> (b) The following words and phrases when used in Articles IX and X-A shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:
>
> ….
>
> ***"DETERMINATION," final action by an officer, body or agency charged with the administration of any land use ordinance or applications*** thereunder, except the following:
>
> (1) the governing body;
>
> (2) the zoning hearing board; or
>
> (3) the planning agency, only if and to the extent the planning agency is charged with final decision on preliminary or final plans under the subdivision and land development ordinance or planned residential development provisions. Determinations shall be appealable only to the boards designated as having jurisdiction for such appeal.

53 P.S. § 10107(b) (emphasis added).

[2] The Intervenors have adopted the brief and arguments of the Township.

In the instant case, the process started when SIIKA contacted the zoning officer to request assistance with restoring its junkyard salvage operation. No application of any kind was before the zoning officer, and SIIKA had not been issued a citation or violation notice charging it with operating an illegal use.

Moreover, the zoning officer's August 14, 2009, letter did not state that, *effective August 14, 2009*, the nonconforming use was deemed abandoned and that SIIKA had thirty days to appeal that decision to the ZHB. Instead, the August 14th letter was retrospective in nature, explaining the zoning consequences of events that took place more than one year before the letter was issued. The zoning officer informed SIIKA that KDR had voluntarily discontinued the nonconforming use on May 23, 2008, and May 23, 2008, was the official date of the discontinuance. SIIKA's only remedy, the zoning office advised, was to seek a variance. Therefore, we conclude that the August 14, 2009, letter was not a determination as defined by section 107(b) of the MPC.

The Township relies on North Codorus Township v. North Codorus Zoning Hearing Board, 873 A.2d 845 (Pa. Cmwlth. 2005), in which the Court held that an oral statement made during a telephone call constituted a determination for purposes of section 107(b) of the MPC. However, North Codorus is distinguishable from the instant case because the landowner in North Codorus had filed a subdivision and development plan, which was pending, and asked the zoning officer whether an amendment to the local zoning ordinance was applicable to the pending plan. The zoning officer in North Codorus had reviewed the developer's plans, and the right to develop the property turned on the question of whether the amendment was applicable.

Next, the Township argues that SIIKA had thirty days to appeal the August 14, 2009, letter to the ZHB and, because SIIKA did not do so, its appeal was untimely filed pursuant to section 914.1 of the MPC.[3] However, section 914.1 provides that appeals from "determinations" adverse to the landowners must be filed within thirty days. Therefore, because that the August 14, 2009 letter was not an appealable determination, we conclude that this argument is without merit.

The Township contends that the trial court erred by finding that SIIKA did not abandon its nonconforming junkyard use. The Township points out that section 133-32(E) of the Jackson Code, (R.R. at 200a), provides that a

[3] Section 914.1 of the MPC, added by the act of December 21, 1988, P.L. 1329, provides as follows:

> (a) No person shall be allowed to file any proceeding with the board later than 30 days after an application for development, preliminary or final, has been approved by an appropriate municipal officer, agency or body if such proceeding is designed to secure reversal or to limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given. If such person has succeeded to his interest after such approval, he shall be bound by the knowledge of his predecessor in interest. The failure of anyone other than the landowner to appeal from an adverse decision on a tentative plan pursuant to section 709 or from an adverse decision by a zoning officer on a challenge to the validity of an ordinance or map pursuant to section 916.2 shall preclude an appeal from a final approval except in the case where the final submission substantially deviates from the approved tentative approval.
>
> (b) ***All appeals from determinations adverse to the landowners shall be filed by the landowner within 30 days after notice of the determination is issued***.

53 P.S. § 10914.1 (emphasis added).

nonconforming use is deemed discontinued or abandoned when the use ceases and is not reinstated within a period of one year. The Township asserts that actual abandonment was established here because the junkyard license was not renewed after the termination of the license on May 23, 2008, and that there were no junkyard or salvage operations on the property from May 23, 2008, through May 23, 2009.

In Heichel v. Springfield Township Zoning Hearing Board, 830 A.2d 1081, 1086-87 (Pa. Cmwlth. 2003), we stated the following:

> A lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed unless it is a nuisance, *it is abandoned* or it is extinguished by eminent domain. Keystone Outdoor Advertising v. Department of Transportation, 687 A.2d 47, 51 (Pa. Cmwlth. 1996).

(Emphasis added.) Abandonment of a nonconforming use is proven in accordance with the following:

> Abandonment is proved only when both essential elements are established: (1) intent to abandon and (2) implementation of the intent, i.e., actual abandonment. This Court stated in Rayel v. Bridgeton Township Zoning Hearing Board, 98 Pa. Commw. 455, 511 A.2d 933, 935 (Pa. Cmwlth. 1986), that *discontinuance of a nonconforming use for a period in excess of that called for in a zoning ordinance creates a presumption of an intent to abandon*, and the presumption "can carry the burden of proving intent to abandon if no contrary evidence is presented." However, in addition to proving intent, those opposing "must prove that the use was actually abandoned." Id.
>
> The Supreme Court stated in Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township, 553 Pa. 583, 720 A.2d 127 (1998), that failure to use for the specified time under a discontinuance provision is evidence of intent to

> abandon, which shifts the burden to the party contesting the claim of abandonment, but *the introduction of evidence of a contrary intent rebuts the presumption and shifts the burden of persuasion back to the party claiming abandonment*. Further: 'What is critical is that the intention to abandon is only one element of the burden of proof on the party asserting abandonment. The second element of the burden of proof is actual abandonment of the use for the prescribed period. This is separate from the element of intent.' Id. at 592, 720 A.2d at 132. This Court has stated that *non-use alone will not satisfy a party's burden to prove abandonment,* i.e., 'actual abandonment must be demonstrated by other evidence, such as overt acts, a failure to act, or statements.' Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township, 686 A.2d 888, 890 (Pa. Cmwlth. 1996), aff'd, 553 Pa. 583, 720 A.2d 127 (1998).

Finn v. Zoning Hearing Board of Beaver Borough, 869 A.2d 1124, 1127 (Pa. Cmwlth. 2005) (emphasis added).

Moreover, a finding of abandonment requires proof that a landowner intended to relinquish the use voluntarily. Metzger v. Bensalem Township Zoning Hearing Board, 645 A.2d 369 (Pa. Cmwlth. 1994) (holding that where a use was involuntarily discontinued due to insolvency, the nonconforming use was not abandoned). Where the discontinuance of the use occurs due to events beyond the owner's control, such as the financial inability to carry on a business, there is no actual abandonment. Id. In addition, a lapse in proper licensing under the zoning ordinance is not dispositive of the use's status so long as the use of the premises does not run afoul of a zoning restriction. McGeehan v. Zoning Hearing Board, 407 A.2d 56 (Pa. Cmwlth. 1979) (holding that the lapse of a junkyard license was not dispositive of the junkyard's status as a nonconforming use).

Here, although the ZHB and the trial court found that SIIKA did not operate the junkyard more than one year after the license expired, the trial court

correctly concluded that any presumption of abandonment arising from those facts was rebutted by SIIKA. The record reflects that SIIKA involuntarily lost title to its property when the tax claim bureau sold it to KDR. SIIKA commenced legal action to set aside the tax sale and recover title to the property. After litigating the dispute for several months, SIIKA finally regained title to the property on April 20, 2009. In this unusual circumstance, it is not reasonable to conclude that SIIKA was required to operate the junkyard or maintain the junkyard license while KDR owned the property and litigation was ongoing. We also observe that the lapse of the junkyard license, without more, is not a basis for concluding that SIIKA abandoned its nonconforming use. Although the record shows that SIIKA cleared junk from the property following the tax sale, SIIKA did so to comply with the wishes of KDR, the Township, and the Pennsylvania Department of Environmental Protection. (R.R. at 79a-80a.) Therefore, we conclude that SIIKA did not abandon its nonconforming use to operate a junkyard.

Accordingly, we affirm.[4]

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PATRICIA A. McCULLOUGH, Judge

[4] The Township contends that the trial court erred by finding, *sua sponte*, that SIIKA had established a vested right in the use of the property. However, in light of our disposition of this matter, we need not reach this issue.

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ORDER

AND NOW, this 19th day of September, 2011, the order of the Court of Common Pleas of York County, dated October 7, 2010, is affirmed.

PATRICIA A. McCULLOUGH, Judge