IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Aviv & Eden Realty, LLC t/a Reds and Son, Appellants	:	
v.	:	
City of Philadelphia Zoning Board of Adjustment	:	No. 129 C.D. 2011
	:	Submitted: August 26, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: November 17, 2011

Aviv & Eden Realty, LLC (A&E) appeals from the order of the Court of Common Pleas of Philadelphia (common pleas court) which affirmed the decision of the Philadelphia Zoning Board of Adjustment's (ZBA) denial of A&E's application to use 117-19 Richmond Street (Property) for an automobile repair shop, which included body and fender work, and painting.

The Property is located in a "G-2 Industrial Zoning District." Prior to 2001, Section 14-508(b) of the Philadelphia Zoning Code specifically allowed "**[a]uto**, machine or wagon **repair shop**, including auto body and fender work and painting" as a matter of right in a G-2 Industrial Zoning District (emphasis added).

On June 14, 2001, the Philadelphia Zoning Code was amended by Bill No. 010338. Section 14-508(b) was "deleted" from the G-2 Industrial District and

the "auto repair shop" use was transferred to the LR or Least Restricted District. See Section 14-509(1)(a)(.1) of the Philadelphia Zoning Code.

On March 30, 2009, A&E applied to the Philadelphia Department of Licenses and Inspections (L&I) for Zoning Use/Registration Permit to legalize the existing use of the Property for an automobile body repair shop, with body and fender work, painting and finishing. Application for Zoning/Use Registration Permit, March 30, 2009, at 3; Reproduced Record (R.R.) at 47a. L&I denied the application on the ground that such use was no longer permitted in the G-2 Industrial Zoning District.

A&E appealed to the ZBA. It argued that (1) the use pre-existed the 2001 Zoning Code change and, therefore, it was a valid "non-conforming use;" and alternatively, that (2) it met all the requirements for a variance.

A public hearing was conducted on September 9, 2009.

Thomas Hert (Hert), a principal of A&E, testified that he purchased the Property in 2005. Hert stated that when he purchased the Property in 2005, it was being used by then-owner, William Roland, for truck repairs, body and fender repair, painting and finishing. Hearing Transcript, September 9, 2009 (H.T.), at 7-8; R.R. at 57a-58a. From 2005 to 2008, he operated an auto body repair, body and fender, painting and finishing business trading as "Reds & Sons Collision Center." Hert's business was mainly the repair of cars whereas the prior business was the repair of big trucks. After operating his own auto repair business from 2005 to 2008, Hert leased the Property to Liberty Collision Center in December 2008, which continued the same use. H.T. at 8; R.R. at 58a.

An Objector, Timothy Alicea (Alicea), testified that he lived across from the Property for six years and in the neighborhood for 41 years. He testified that there was "never a body shop" at that location, although he did refer to the Property as a "garage." He testified that "Bill [Roland] sold the guy [A&E/Hert] **the garage**." H.T. at 14; R.R. at 62a (emphasis added). Alicea testified that Roland performed all "body and fender" work at his place "on Front and Columbia." Id. He stated that before A&E/Hert bought the Property, it was "always a paint booth, a paint shop, that was it." H.T. at 14; R.R. at 64a. Alicea complained of the recent "hammering of metal" and the "loud" "noisy" and "unsightly" character of the business since A&E/Hert owned the Property. H.T. at 13-17; R.R. at 63a-67a. The Fishtown Neighbors Association and a number of other residential neighbors also objected to A&E/Hert's application because of the tow trucks, overcrowding of cars, "fumes" and "noise pollution." H.T. at 12, 17-20; R.R. at 62a, 67a-70a.

A&E's counsel anticipated that Roland, who had operated a truck repair business at the Property for 37 years, would testify at the zoning hearing. However, Roland, for whatever reason, did not appear. The ZBA agreed to keep the record open to allow A&E's counsel the opportunity to present an affidavit from Roland.

Thereafter, in an attempt to prove the Property was used as an auto repair shop before the 2001 change to the Philadelphia Zoning Code, A&E submitted to the ZBA the notarized Affidavit of Roland, the former owner of "Reliable Wagon & Automotive Body Builders, Inc." Roland stated that he "formerly owned and operated the business at 117 Richmond Street, Philadelphia, PA (now called Reds and Son Collision or Liberty Collision)" which "did auto

repair, body and fender work and painting work, mostly on trucks, at that location." He further stated that he operated that business "continuously from 1968 to 2005, for a total of 37 years." Affidavit of William Rowland at 1; R.R. at 98a.

On November 12, 2009, the ZBA denied A&E's appeal based on its conclusion that prior to the Zoning Code change on June 14, 2001, the Property was used for automobile "painting and finishing" not for "body and fender work." The ZBA credited Alicea's live testimony over the Roland Affidavit. It further found no evidence that the Property suffered from any unique condition which created a hardship, or that it was impracticable to use the Property in conformity with the Zoning Code. The ZHB also found that there was sufficient evidence from which it could find that the variance, if granted, would substantially and permanently interfere with the appropriate use and enjoyment of the adjacent residential properties. A&E appealed.

Finding neither abuse of discretion nor error of law in the findings and conclusions of the ZBA, the common pleas court affirmed.

On appeal[1], A&E contends that the ZBA and trial court erred because they "subdivided a use defined in the zoning code into its constituent parts." A&E argues that the ZBA and common pleas court erroneously "carved up this use in such a manner as to separate "painting" from "body and fender work" in the face

[1] Where the common pleas court did not receive additional evidence beyond that which was heard before the zoning hearing board, the standard of review is whether the board committed an error of law or an abuse of discretion. Patullo v. Zoning Hearing Board of Township of Middleton, 701 A.2d 295 (Pa. Cmwlth. 1997).

of a Zoning Code provision that grouped them into the same use." A&E Brief at 11. A&E argues that the "auto repair shop" use is broad and includes both painting and body/fender work.

An owner asserting the protected status of a non-conforming use has the burden of proving that the use pre-dated the pertinent ordinance. Appeal of Lester M. Prange, Inc., 647 A.2d 279 (Pa. Cmwlth. 1994); Little v. Zoning Hearing Board of Abington Township, 357 A.2d 266 (Pa. Cmwlth. 1976). The non-conforming use which is within the orbit of protection of the law and the Constitution is a nonconforming use which existed at the time of the passage of the zoning ordinance or the change in use district under a zoning ordinance, not a new or different nonconforming use. Hanna v. Board of Adjustment of Borough of Forest Hills, 408 Pa. 306, 183 A.2d 539 (1962).

The key to determining whether a proposed use is a "continuance" of a lawful non-conforming use or a "change" to a different one is a review of how the applicable zoning ordinance categorizes uses within the municipality. If the proposed use is within the ambit of the classification found in that ordinance, then it is a continuance of an existing lawful non-conforming use, not a new one.

In Collis v. Zoning Board of Wilkes-Barre, 465 A.2d 53 (Pa. Cmwlth. 1983), Health Services Management (HSM) sought permission to use property located in Wilkes-Barre for the treatment of individuals with mental health problems. The property was previously used as a general hospital which provided general and surgical services. The Zoning Hearing Board and Luzerne County Court of Common Pleas granted the permit and concluded that HSM's proposal was for a continuation of a non-conforming, pre-existing use. The Iron Triangle

Committee objected on the basis that HSM's proposed use was not a "hospital use" which was the prior non-conforming use, but rather an entirely separate use, i.e., a psychiatric treatment facility. This Court affirmed the action of the common pleas court which held that a "change" from a general services hospital to a psychiatric facility was simply a continuation of the prior "hospital" use.

Similarly, in Lawrence v. Zoning Hearing Board of Gwynedd Township, 338 A.2d 779 (Pa. Cmwlth. 1975), James and Ethel Brannon (the Brannons) purchased a 12-acre tract of land, which included three concrete dog kennels capable of housing 70 dogs. The kennels were constructed by the prior owners for the breeding, raising and occasional boarding and selling of show dogs long before 1941 when Lower Gwynedd Township adopted a zoning ordinance which prohibited the use in a residential district.

After they purchased the property, the Brannons began to board dogs in exchange for a fee. Neighboring landowners objected. The zoning hearing board and Montgomery County Court of Common Pleas Court found that the Brannon's use of the property was a continuation of the non-conforming use as it had existed prior to the adoption of the zoning ordinance because it involved the "same ultimate use." The modification in operations from principally a breeding kennel to boarding kennel was "not of such a material nature to amount to a change of use." Lawrence, 338 A.2d at 781. The Brannon's "boarding kennel" was, therefore, protected as a continuation of the prior nonconforming "breeding kennel" use. See also Naimoli v. Zoning Hearing Board Twp. Of Chester, 425 A.2d 36 (Pa. Cmwlth. 1981), where this Court affirmed a zoning board decision to allow landowners to replace a pre-existing non-conforming radio tower with a fiberglass disc for the reception of cable television signals because it was a

"continuation, or at most, an extension of the non-conforming communication system in use." Naimoli, 425 A.2d at 39-40.

Here, Alicea and the other objectors complained that the Property had never been used for "body and fender work." Therefore, a difference of opinion existed only as to *the nature of the vehicle repair work* that was performed at the Property prior to 2001. Even if the repairs were limited to "painting and finishing," as found by the ZBA and common pleas court, the Property was nonetheless commercially used by both owners for the repair of vehicles in exchange for a fee. Although there was some dispute as to the precise type of repairs that were performed by Roland, there was no question that the Property was used by Roland as a garage for repairs on trucks and other vehicles before the Zoning Code prohibited that use in a G2 Zoning District in 2001.

"Auto repair shop," by definition, in the Zoning Code included "body and fender work, and painting and finishing." When a zoning ordinance groups the uses together in the same clause, it is evidence that they are similar. Robert S. Ryan, Pennsylvania Zoning Law and Practice, §7.6.3A, 2001. The Zoning Code did not distinguish between auto repair shops that only "paint and finish" from those that work on "bodies and fenders." Clearly, Section 14-508(b) permitted "auto repair shops" with possible "painting and finishing" and "body and fender work" as incidental to the overall use. The ZBA and common pleas court, nevertheless, focused on Alicea's testimony who described the dissimilarity between the *types* of auto repair work performed by Roland and Hert and ignored that the overall "use" of the Property, before and after the 2001 Zoning Code change, was as an auto repair shop and/or commercial garage. Failure to recognize the overall use was error.

An "auto repair shop" that performs "painting and finishing" and one that performs "painting and finishing and body and fender work" are engaged in the repair of automobiles, they both involve the same ultimate use, they both involve the utilization of the same facilities, and are of the same commercial nature. The Property was used as an auto repair garage before 2001, and it was used as an auto repair garage after 2001, regardless of the particular procedures performed on the automobiles. Even assuming Roland only "painted and finished" trucks at the Property, the fact that Hert's use of the Property as an auto repair shop which performed "painting and finishing," *and* "body and fender work" did not amount to a "change in use."

Simply stated, the use of the Property by Hert was sufficiently similar to the use of the Property by Roland so as to constitute a continuation of that use.[2] The permit legalizing the auto repair shop/garage at the Property should have been granted.

The order of the common pleas court is reversed.

BERNARD L. McGINLEY, Judge

[2] Although A&E cites cases which involve an "expansion" of a non-conforming use, this case does not involve a change in use so discussion of cases which address changes or additions or expansions of non-conforming uses is not warranted.

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O R D E R

AND NOW, this 17th day of November, 2011, the order of the Court of Common Pleas of Philadelphia County in the above-captioned case is hereby reversed.

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BERNARD L. McGINLEY, Judge