

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joan and Norman Mitchell, :  
Appellants :  
v. :  
Zoning Hearing Board of the : No. 649 C.D. 2008  
Township of Abington : Submitted: August 22, 2008

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: September 30, 2008

Joan and Norman Mitchell (collectively, “Property Owners”) appeal from the order of the Court of Common Pleas of Montgomery County (trial court) affirming the denial by the Abington Township Zoning Hearing Board (Board) of Property Owners’ application to classify their property as a legal non-conforming duplex use because this use had been abandoned.

Property Owners own 2455 Radcliffe Avenue, Roslyn, Abington Township, Pennsylvania (Property), which was built as a duplex in 1955. It later became a legal non-conforming use when the property was rezoned as a Residential District (R-4), which does not permit duplexes. Property Owners submitted a request to the Abington Township’s zoning officer to affirm the use of

the property as a duplex, which was denied, because, among other things, Section 1110.G of the Abington Township Zoning Ordinance provides that if a use is discontinued for one year, the use is considered abandoned.<sup>1</sup> Property Owners appealed the denial of the application to the Board.

Before the Board, Joan Mitchell testified that her son, Norman Mitchell, rented the upper floor of the duplex in 1985. In 1991, one of his high school friends, Tracy Blundi (Blundi), rented the downstairs unit. Both Norman Mitchell and Blundi were disabled.<sup>2</sup> In 1993, Norman Mitchell and Blundi formed

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<sup>1</sup> Section 1110.G of the Abington Township Zoning Ordinance provides:

If an owner of a structure or land which is occupied by a nonconforming use desires to discontinue such use for an extended period of time, but intends to resume such use at a later date, he shall apply to the Board of Commissioners in writing for a Certificate of Continuance stating the reasons for and duration of the discontinuance, and the date upon which such use will be resumed. Certificates shall be granted for periods of up to one (1) year and may be renewed for additional six-month (6) periods upon reapplication. If a nonconforming use of land or of a structure ceases or is discontinued for an uninterrupted period of one (1) year or more and no certificate has been applied for or granted, *the owner shall be presumed to have abandoned his nonconforming use*, and any subsequent use of such structure or land shall be in conformity with the provisions of this Ordinance. If a certificate and renewal are granted, but the nonconforming use is not resumed by the end of the certificate or renewed certificate period, the subsequent use shall be in conformity with this Ordinance.

(Section 1110.G of the Abington Township Zoning Ordinance No. 1753 (1996)).  
(Emphasis added.)

<sup>2</sup> Tracey Blundi has multiple sclerosis; the record does not indicate the nature of Norman Mitchell's disability.

a partnership to purchase the Property with each living in their own unit and sharing expenses. Eventually, Blundi's condition caused her to move. When that occurred, Joan Mitchell stated that she and her husband purchased the property to assist her son, hoping that "things would improve for him and he would be able to take ownership back." (Reproduced Record at 18a.) Joan Mitchell testified that when an assessment was occurring in 1997, her son read that the Property was no longer listed as a duplex but as a single-family home. She testified that he thought nothing of this, but in 2007, her son again noticed that the court records indicated that the home was a single-family residence.

With respect to the Property itself, Joan Mitchell testified that the Property had been built as a duplex with each floor of the Property having its own separate entrance, locking doors, electric and gas meters, heater, washer and dryer, and telephone wires. However, Joan Mitchell also testified that the gas stove in the kitchen on the second floor was tapped off and that in 2001, the refrigerator, washer and dryer were all removed from the second floor and placed in the basement. Joan Mitchell added that when this was done, her son had hopes of Blundi coming back. She further testified that her husband sometimes stayed in the upstairs unit because "there are times when he [Norman Mitchell] can't get out of bed. And if he does get out of bed it takes about an hour and a half of him laying downstairs taking all the pill he takes." (Reproduced Record at 38a.)

Joan Mitchell further testified that after she consulted the local tax collector about saving money on the Property, she decided to cut the refuse bill in half so that she would instead be paying only one bill for the Property per year. In

response to a question as to why the kitchen appliances on the second floor were removed, Joan Mitchell testified that most of the time her son lived downstairs, frequently slept on a sofa downstairs, and did not use the second floor anymore.

Finally, Joan Mitchell testified that she was sure that in the future, either she and her husband or her son would have to sell the Property because they could not continue as they were, and both her and her husband were retired senior citizens. Joan Mitchell testified in response to a question as to whether there was a decision to rent the upstairs floor again, that her son could not do this due to his medical concerns.

The Board denied the appeal finding that the second unit had been abandoned. Property Owners appealed to the trial court, which affirmed the Board's decision, relying on both the lack of use of the second unit for more than a year and the removal of the appliances. Property Owners then filed this appeal contending that there was neither substantial evidence to support a finding that they had the intention to abandon nor did they abandon the second unit of the duplex.<sup>3</sup>

A use of a property will be considered abandoned only when those advancing the abandonment prove two essential elements: (1) intent to abandon and (2) implementation of the intent, i.e., actual abandonment. Whether either

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<sup>3</sup> In a land use appeal where the trial court takes no additional evidence, our review is limited to a determination of whether the Board abused its discretion or erred as a matter of law. *A.R.E. Lehigh Valley Partners v. Zoning Hearing Board*, 590 A.2d 842 (Pa. Cmwlth. 1991).

standard is met is “a question of fact which depends upon all the factors present in a case[.]” *Kuhl v. Zoning Hearing Board of Greene Township*, 415 A.2d 954, 955 (Pa. Cmwlth. 1980).

To make out the first prong of an intent to abandon – when there is a zoning ordinance that provides that where there is a discontinuance of a non-conforming use for a period in excess of that called for in a zoning ordinance – in this case, one year, the failure to use the property for the specified time under a discontinuance provision is evidence of intent to abandon. When discontinuance for the requisite period is made out, that shifts the burden from those proposing that the property has been abandoned to the property owners to introduce evidence of a contrary intent which, if proven, rebuts the presumption and shifts the burden of persuasion back to the party claiming abandonment. *Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township*, 553 Pa. 583, 720 A.2d 127 (1998). What is critical is that the intention to abandon is only one element of the burden of proof on the party asserting abandonment. To make out the second element, actual abandonment, which is separate from the element of intent and which cannot be established by mere proof of failure to use the property for a certain period of time, but “is to be ascertained from overt acts, or failure to act, as well a statement.” *Marchese v. Norristown Borough Zoning Board of Adjustment*, 277 A.2d 176, 183 (Pa. Cmwlth. 1971).

Property Owners assert that it was not made out that they intended to abandon the use or there were sufficient facts that established actual abandonment. They contend that they rebutted the Abington Township Zoning Ordinance’s

presumption that they intended to abandon the use with the evidence that they always intended to rent out the second unit once their son regained his health or, in the alternative, that they intended to sell the Property as a duplex. By doing so, they placed the burden back on the township to show actual intent. The Board contends that actual intent was shown through Joan Mitchell's testimony that despite her son learning on two separate occasions that the Property was no longer listed as a duplex in tax records but as a single-family residence, no action was taken by him or Property Owners to effectively correct or change this status. It contends that Property Owners' failure to act to correct those notices as well as Joan Mitchell's testimony demonstrated their intention to abandon the use of the property as a duplex.

Regarding Property Owners' intent to abandon, the Board made the following findings:

8. The applicant testified in 2004, she spoke with the Abington Township Tax Collector to save some money be [sic] having the refuse bill cut in half, since her son lived there by himself.

9. The applicant stated that Tracey Blundi was no longer living in the property and that her son had abandoned the duplex use and was using the property as a single-family property.

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12. The applicant testified that on August 11, 2004, she had called the Board of Assessment and spoke to Bill Smyth and stated that the house she owns at 245 Radcliffe Avenue is not a duplex but a single-family dwelling.

13. The applicant testified that on August 25, 2004, she had spoken with Mr. Hotchkiss of the Assessors office and stated that her son had converted the single-family dwelling three years prior.

(Opinion and Order of the Board, May 9, 2007, at p. 2.)

As to Finding of Fact No. 9, there is no substantial evidence to support that finding. Joan Mitchell testified regarding her conversation with Bill Smyth as follows:

And it's a very difficult thing, when you have to help your older son survive, but for his sake we did it.

In 2004 – and I paid my tax bills faithfully as they were due. I came down and I spoke to a Mr. Solomon. At that time I didn't know who he was. I explained the situation, just in casual talking, and he said to me, well, since my son's only living there alone – I asked him, would I be able to save more money by having something cut?

He says, oh sure. Have the refuse bill cut in half. There's only one person living there.

I did make the call to the phone number he suggested. And even though it wasn't a large amount, \$200 is to us. The refuse bill was \$400 and in 2004, and every year thereafter, they cut that down by half.

(Reproduced Record at 21a.) All that testimony supports is that Joan Mitchell was a person that was supporting her son and trying to save money on her refuse bill, not that she intended to abandon one of the dwelling units in the duplex.

As to Finding of Fact No. 13 that Joan Mitchell told Mr. Hotchkiss of the Assessors' office that her son had converted the single-family dwelling three years earlier, the Board in its brief "restated" that finding as "Mr. Hotchkiss, the county tax assessor told Joan Mitchell that her son had converted the property into a single-family home 2 years earlier." (Board's Brief at 5.) Ignoring that what the county tax assessor told Joan Mitchell as to the status of her property is irrelevant as to her intention, neither version is supported by that testimony. The cited page of the testimony was when Joan Mitchell was being questioned by Larry Matteo, the township secretary:

Q: Let me ask you one other question, ma'am. On August 25<sup>th</sup>, 2004, did you receive a call from Jim Hotchkiss and you informed him that your son converted the home into a single family home two years prior?

A. I don't recall telling him that.

Q: Okay.

A.: I will –

Q: And that your son was ill?

A.: Oh yes. Because his wife has the same thing my son has. And we discussed a lot of things, I gave him some information and he gave me some information, and he was very sympathetic about it.

I think that's when he said to me all he needs that will change it back, you know, is to send written approval. Actually these are your notes. Aren't they? You gave that to me at the meeting.

Q: I gave that to you, that is correct.



(Reproduced Record at 32a.) All that testimony indicates is that she was trying to change back incorrect tax roll information and does not indicate any intent to abandon the second dwelling unit.

Moreover, merely because Joan Mitchell failed to correct items on the tax rolls does not indicate any intent to abandon. Joan Mitchell testified that when she learned that the Property was listed on the tax roll as a single unit dwelling, she “thought nothing of it,” indicating that it was an error of no moment. Moreover, she testified that she and her husband intended to rent the second unit when their son’s health condition improved “if he decided that he could tolerate someone living upstairs.” Coupled with her other testimony of the continued physical maintenance and arrangement of the duplex and her testimony concerning the intent to rent the other unit and the reason that it had not been rented, her testimony showed no intent to abandon.

Even if there was a showing of intent to abandon, it was not established that Property Owners intended to abandon the duplex’s second unit. The only evidence of abandonment was the removal of some of the appliances on the second floor where Property Owners’ son lived before moving to the first floor unit. Without more, actual abandonment was not established. Why this occurred is not clear from the testimony of record, but it appears more to do with Norman Mitchell’s disability than with an abandonment of the second floor use. Given that the Property was occupied by one person, that there was not internal structural changes to change it to a single-family dwelling indicating any intention to make the Property function as a single unit, separate utilities and such, the removal of the

appliances alone does not show actual abandonment. All that was shown was that the second unit could not be occupied because of the medical condition of Norman Mitchell and that Joan Mitchell's only intent in taking the action that she did was to alleviate having financial difficulties caring for a adult son with a chronic medical condition.

Accordingly, we reverse the Board's Order denying Property Owners' application for a certificate of continuance.

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DAN PELLEGRINI, Judge

Senior Judge McCloskey dissents.

