STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: November 14, 2017)

TOWN OF SOUTH KINGSTOWN	**:**	
	:	
v.	**:**	**C.A. No. WC-2016-0026**
	:	
M & S PROPERTY	**:**	
MANAGEMENT	**:**	
ASSOCIATES, LLC	**:**	

DECISION

LANPHEAR, J. The matter before the Court is an action for declaratory and injunctive relief. Plaintiff, Town of South Kingstown (South Kingstown), is requesting that this Court enforce the South Kingstown Zoning Ordinance (Ordinance) and order Defendant, M & S Property Management Associates, LLC (M & S), to abate and correct its violations of §§ 804, 809 and 503.5 of the Ordinance. Jurisdiction is pursuant to G.L. 1956 §§ 45-24-62 and 9-30-1 et seq.

I

Facts and Travel

M & S is the owner of the property located at 4087 Tower Hill Road, South Kingstown, Rhode Island (Subject Property), designated as Lot 26 on South Kingstown Assessor's Map 42-2. The Subject Property is located in the R-80 Rural Residential Low Density Zoning District.

The previous owner, Power Test Realty, LP, used the Subject Property primarily as a gasoline filling station, a nonconforming use. On September 28, 2011, the South Kingstown Zoning Board of Review (Board or Zoning Board) issued a decision wherein "the Board granted

the request for a Special Use Permit to expand an existing nonconforming use, gasoline filling station, Use Code 45, to include sale of liquefied gas, Use Code 53.2 and truck and trailer rental service in an R-80 Zone for property which is the subject of this petition. . . ." (Sept. 28, 2011 Board Decision.)

M & S purchased the Subject Property on June 11, 2015. Soon thereafter, the underground fuel tanks and dispensers permitted by the Special Use Permit were removed. On or about June 26, 2015, Jeffrey T. O'Hara, South Kingstown Building Official, advised M & S, through Stephen D. Smith, that M & S should confer with the Town's Planning Department regarding its intended use of the Subject Property. Mr. Smith is the President of Smithco Oil Service, Inc. (hereinafter Smithco), which is headquartered in Wakefield and operates a heating equipment and oil business.

Mr. O'Hara's June 26, 2015 letter informed Mr. Smith that M & S relinquished its rights pursuant to the Special Use Permit issued in 2011 to operate the Subject Property as a gasoline station upon the removal of the fuel tanks and dispensers. Mr. O'Hara noted that the non-conforming gasoline filling station and truck rental accessory uses were subsequently abandoned in accordance with §§ 202(I) & (J) of the Ordinance.

On July 9, 2015, Mr. O'Hara issued a notice of violation to M & S stating that M & S had erected or installed signage on the Subject Property located in a residential zoning district in violation of the Ordinance. Section 804 of the Ordinance establishes extensive requirements for signs in residential zoning districts. M & S did not file an appeal of that notice of violation with the Zoning Board.

On October 21, 2015, Mr. O'Hara issued a second violation notice to M & S, indicating that commercial vehicles stored on the Subject Property in an R-80 Zoning District were in

violation of § 503.5 of the Ordinance. Sec. 503.5 of the Ordinance provides that if more than one commercial vehicle up to one and one-half tons is stored on the Subject Property, it must be "parked or stored in a completely enclosed building or in an area screened and/or landscaped by means of a full landscape screen . . ." That notice reiterated that the signage on the Subject Property was also in violation of the Ordinance. M & S again did not file an appeal of the notice of violation with the Zoning Board.

On or about December 8, 2015, Michael Ursillo, Town Solicitor, sent a letter to M & S indicating that South Kingstown intended to pursue legal action against it if the violations were not corrected within seven days. On January 19, 2016, South Kingstown filed the present action to enforce these violations. M & S filed a timely answer to South Kingstown's Complaint. The Subject Property remains in violation of the Ordinance.

II

Standard of Review

Section 45-24-62 of the Zoning Enabling Act grants this Court jurisdiction to review a municipality's Complaint of a zoning ordinance violation. This Court's review is governed by § 45-24-62, which provides:

> "The supreme court and the superior court, within their respective jurisdictions, or any justice of either of those courts in vacation, shall, upon due proceedings in the name of the city or town, instituted by its city or town solicitor, have power to issue any extraordinary writ or to proceed according to the course of law or equity or both:
> "(1) To restrain the erection, alteration, or use of any building, structure, sign, or land erected, altered, or used in violation of the provisions of any zoning ordinance enacted under the authority of this chapter, and to order its removal or abatement as a nuisance;
> "(2) To compel compliance with the provisions of any zoning ordinance enacted under the authority of this chapter;
> "(3) To order the removal by the property owner of any building, structure, sign, or improvement existing in violation of any zoning

> ordinance enacted under the provisions of this chapter and to authorize some official of the city or town, in the default of the removal by the owner, to remove it at the expense of the owner;
> "(4) To order the reimbursement for any work or materials done or furnished by or at the cost of the city or town;
> "(5) To order restoration by the owner, where practicable; and/or
> "(6) To issue fines and other penalties."

The Rhode Island Supreme Court has confirmed that a municipality may request and receive injunctive relief from a landowner's violation of a zoning ordinance. See Town of Richmond v. Wawaloam Reservation. Inc., 850 A.2d 924, 936 (R.I. 2004) (affirming trial justice's issuance of an injunction requiring landowner either to obtain zoning relief to enlarge their nonconforming use or to remove recent improvements).

III

Analysis

A

Abandonment

M & S does not dispute South Kingstown's determination that upon the removal of the fuel tanks and dispensers from the Subject Property, the nonconforming use as a gasoline filling station was simultaneously abandoned. However, M & S argues that the storage and/or renting of trucks and trailers and the sale of liquefied propane gas—the two functions which M & S maintains weren't abandoned upon the removal of the fuel tanks and dispensers from the Subject Property—were at all times conforming and permitted by the Special Use Permit.

The Ordinance Ch. 21 Art. II, § 202(J)(3) provides that the intent to abandon a lawful nonconforming use shall be conclusively presumed upon "[r]emoval from the site, building or structure of fixtures, equipment, machinery or inventory necessary for the continuation of the use." Section 202(I) states "[i]f the lawful nonconforming use of any land, building, structure

or sign is abandoned, it shall not be allowed to resume except in conformity with all applicable provisions of this Ordinance, unless the owner can demonstrate an intent not to abandon the use."

It is well settled that in order to constitute abandonment of a nonconforming use, "there must be an intention to relinquish and permanently cease to exercise a known right to devote the property to a permitted nonconforming use, evidenced by an overt act or a failure to act sufficient to support an implication of such intent." A. T. & G., Inc. v. Zoning Bd. of Review of North Smithfield, 113 R.I. 458, 463, 322 A.2d 294, 297 (1974); see also Richards v. Zoning Bd. of Review of Providence, 100 R.I. 212, 219, 213 A.2d 814, 817 (1965) (noting intent to abandon with respect to the abandonment of a nonconforming use is to be ascertained from acts as well as statements). However, mere discontinuance of a nonconforming use for a period of time does not constitute abandonment of that use. Town of Coventry v. Glickman, 429 A.2d 440 (R.I. 1981); Town of East Greenwich v. Day, 119 R.I. 1, 6, 375 A.2d 953, 956 (1977); A. T. & G., Inc., 113 R.I. at 463, 322 A.2d at 297; Richards, 100 R.I. at 218, 213 A.2d at 817; 2 Rathkopf, The Law of Zoning and Planning, 61-3 (3d ed. 1972).

Here, the Zoning Board found that M & S voluntarily abandoned the Subject Property's primary, legal, nonconforming use as a gasoline filling station upon the removal of the fuel tanks and dispensers from the Subject Property. The record reflects that M & S, by its own admission, voluntarily abandoned the nonconforming use as a gasoline fueling station.[1] (Def.'s Mem. 2, Feb. 8, 2017.) See Richards, 100 R.I. 212, 213 A.2d 814; A. T. & G., Inc., 113 R.I. 458, 322

[1] According to M & S's Memorandum, "M & S does not dispute that the non-conforming use as a gasoline filling station was abandoned when the gasoline tanks were removed from the property."

A.2d 294 (noting that the circumstances surrounding the cessation must indicate an intent to abandon the nonconforming use and the vested rights therein).

B

Accessory Uses

M & S argues that the storage and renting of trucks and trailers and the sale of liquefied propane gas were in conformance with the Ordinance because such uses were permitted by the Special Use Permit. However, South Kingstown argues that "Board Member Toth clearly intended to tie *both* the U-Haul rentals and the sale of propane tanks to M&S's continued operation of its gas station as a special condition . . ." and as such, are accessory uses. (Pl.'s Mem. 2, Mar. 8, 2017) (emphasis in original).

According to § 45-24-31(3), an accessory use is

> "[a] use of land or of a building, or portion thereof, customarily incidental and subordinate to the principal use of the land or building. An accessory use may be restricted to the same lot as the principal use. An accessory use shall not be permitted without the principal use to which it is related."

South Kingstown argues that the storage and/or renting of trucks and/or trailers is an accessory use. (Section 503.5 of the Ordinance) (discussing accessory use requirements as they specifically relate to the storage of commercial equipment parked in a residential district). According to § 503.5 of the Ordinance,

> "Commercial vehicles or accessory machinery and equipment for such, when parked or stored in any residential district or a CN Zoning District, only as allowed in Article 3, shall be parked or stored in a completely enclosed building or in an area screened and/or landscaped by means of a full landscape screen as specified in the Subdivision and Land Development Regulations, whether or not said parking or storage area is adjacent to a residential district. However, the area used to store one commercial vehicle of up to one and one-half tons capacity shall not be required to be so screened or landscaped."

South Kingstown also argues that the sale of liquefied propane gas is an accessory use as clearly expressed in the Board's September 28, 2011 decision. In pertinent part, the Board's decision stated:

> "With respect to the liquefied natural gas, the Board finds the manner in which he's going to sell it is going to be accessory or incidental to the use, the principal use of the property, which is a gas station. . . With respect to the truck and trailer rental, based on the scale he proposes, which is going to be a maximum of 15 vehicles/trailers, the Board finds that it would be accessory and incidental to the principal use of a gas station.
>
> . . . .
>
> "Mr. Toth further amended his motion to include . . . [i]f the gasoline station was abandoned, then rental of the U-Hauls must halt.
>
> "Mr. Toth further amended his motion to include the rack storage of 20 LPG tanks." (Sept. 28, 2011 Board Decision.)

Pursuant to §§ 503.5 and 907(B) of the Ordinance and the Special Use Permit issued on September 28, 2011, this Court finds that the storage and renting of trucks and trailers and the sale of liquefied propane gas are accessory uses. This Court relies on §§ 503.5 and 907(B) of the Ordinance as well as the Board's decision in making such a finding. See Ecro Corp. v. Sanford, 104 R.I. 337, 337, 244 A.2d 265, 265 (R.I. 1968) (noting facilities for the storage of petroleum products would be "clearly accessory and incidental to operation of such station under zoning ordinance provision permitting structure or use accessory and incidental to the permitted use"); see also Hardy v. Zoning Bd. of Review of Coventry, 119 R.I. 533, 542, 382 A.2d 520, 525 (1977) (holding "[t]oilets are certainly as accessory to a camping area as the storage of petroleum products is to the operation of a gasoline filling station").

C

Revocation of Accessory Uses

South Kingstown asserts that the abandonment of the use of the Subject Property as a gasoline fueling station subsequently revoked the accessory uses of the storage and renting of trucks and trailers and the sale of liquefied propane gas. M & S argues that the storage and renting of trucks and trailers and the sale of liquefied propane gas did not acquire non-conforming rights pursuant to the Special Use Permit, and therefore, the abandonment of the gasoline fueling station had no effect on the storage and renting of trucks and trailers and the sale of liquefied propane gas. M & S contends that the grant of a Special Use Permit runs with the land and continues even if the original use is abandoned. M & S further argues that while the Board's decision granting permission to store and rent trucks and trailers on the Subject Property was tied to the nonconforming gas fueling station use, the sale of liquefied propane gas was not. M & S contends that it retained the right to sell liquefied propane gas and that it also maintained the right to install signage and store commercial vehicles on the Subject Property in furtherance of that use.

In accord with the Ordinance, § 200(E), uses permitted by grant of a Special Exception or a Special Use Permit from the Zoning Board do not acquire nonconforming rights unless that nonconforming right is an accessory use. More specifically, § 200(E) provides:

> "A nonconforming building, structure, sign, or parcel of land or the use thereof, which exists by virtue of having received a variance or a special use permit (or a special exception) granted by the Zoning Board, shall not be considered a nonconformance for the purposes of this article, and shall not acquire any rights under this article. Rather, such building, structure, sign, parcel of land or use thereof, shall be considered a use by variance or a use by special use permit. Any moving, relocation, addition, enlargement, expansion, intensification or change of such building, structure, sign, parcel of land or use thereof, to any use

> other than a use by variance or special use permit or which is in complete conformance with this Ordinance, shall require a further variance or special use permit from the Zoning Board." Section 200(E).

Moreover, South Kingstown contends that special conditions were placed on the Special Use Permit conditioning the storage or renting of trucks and trailers and the sale of liquefied propane gas on the continued operation of the gasoline fueling station. (Sept. 28, 2011 Board Decision.) Section 907(B) of the Ordinance states as follows:

> "Special conditions. In granting a variance or special use permit, or in making any determination upon which it is required to pass after public hearing under this Ordinance, the Board may apply such special conditions that may, in the opinion of the Board, be required to promote the intent and purposes of the Comprehensive Plan of the Town and this Ordinance. Failure to abide by any special conditions attached to a grant shall constitute a zoning violation. Such special conditions shall be based on competent credible evidence on the record, be incorporated into the decision, and may include, but are not limited to, provisions for:
>
> "1. Minimizing adverse impact of the development upon other land, including the type, intensity, design, and performance of activities;
> "2. Minimizing adverse impact upon Town services and facilities[.]"

Accordingly, this Court finds that all accessory uses, including the storage and renting of trucks and trailers and the sale of liquefied propane gas, were each abandoned upon removal of the fuel tanks and dispensers from the Subject Property. Sec. 200(E) of the Ordinance; see Richards, 100 R.I. 212, 213 A.2d 814; A. T. & G., Inc., 113 R.I. 458, 322 A.2d 294; M.B.T. Constr. Corp. v. Edwards, 528 A.2d 336 (R.I. 1987) (holding that an intentional overt act must be performed by the property owner in order to relinquish or abandon the nonconforming use).

IV

Conclusion

After a review of the entire record, this Court declares that the storing and renting of trucks and trailers and the sale of liquefied propane gas each constituted an accessory use as described in the Special Use Permit issued on September 28, 2011. As such, M & S's use of the Subject Property was in violation of §§ 804, 809 and 503.5 of the Ordinance. Therefore, M & S is enjoined from storing and renting trucks and trailers and from selling liquefied propane gas on the Subject Property. Additionally, M & S is ordered to comply with South Kingstown's Ordinance. If South Kingstown seeks the imposition of a penalty, it shall set a date for hearing before this Court on the Formal and Special Cause Calendar. The parties may submit an appropriate order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Town of South Kingstown v. M & S Property Management Associates, LLC**
CASE NO:	**WC-2016-0026**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**November 14, 2017**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
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