

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

5320 POHOPOCO LLC,
C/O LEONID and MARINA
SHERESHEVSKY,

Appellants

vs.

TOWAMENSING TOWNSHIP
ZONING HEARING BOARD,
Appellee

No. 23-CV-2353

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CARBON COUNTY
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Counsel for Appellee

MEMORANDUM OPINION

Matika, J. - December 31, 2024

What began with a simple notice of enforcement sent by the Towamensing Township Zoning Officer, Carl E. Faust, has morphed into a "throw everything against the wall and see what sticks zoning appeal" filed by the owner of the subject property. After an extensive review of the record and the briefs of the parties and after argument held thereon the Appeal is **DENIED** and the notice of enforcement stands.

FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2023, the Towamensing Township Zoning Officer, Carl Faust (hereinafter "Faust") issued an enforcement notice to Marina Shereshevsky (hereinafter "Shereshevsky") claiming that Shereshevsky was operating a short-term rental property located at

[FM-30-24]

5320 Pohopoco Drive, Lehighton, Towamensing Township, Carbon County, Pennsylvania, in violation of the Towamensing Township Zoning Ordinance, specifically table 505 C(26)¹. On July 21, 2023 a notice of appeal was filed by Leonid and Marina Shereshevsky, d/b/a 5320 Pohopoco, LLC (hereinafter "Appellants") to the Towamensing Township Zoning Hearing Board (hereinafter "ZHB"). In that appeal, Appellants sought: 1) an interpretation; 2) a variance from the requirements of 505 C(26); 3) an interpretation of the ordinance; and 4) an appeal of the enforcement notice dated June 22, 2023. A further explanation of what was being sought was spelled out in "Exhibit A" to the notice of appeal which stated:

- "1. Appeal of the Zoning Officer's June 22, 2023, Notice of Violation; my client is not operating a "Short-Term Rental" that is not permitted in the CR-Conservation Recreation Zoning District;
2. Applicant seeks a vested right by and through its/their operation as a permitted use of Bed and Breakfast and/or short-term rental, being operated and used prior to the effective date of No. 2020-4, January 4, 2020;
3. Variance by estoppel and/or vested rights theory given the properties use as a bed and breakfast/short-term rental prior to the effective date of No. 2020-4, January 4, 2020;
4. Variance of Section 505 to allow the use of Bed and Breakfast/short-term rental at the subject property;
5. In addition to the appeal, vested right, variance by estoppel and other vested rights theory, and variance, Applicant seeks any additional relief the board might deem relevant; and
6. Applicant reserves the right to supplement this appeal."

Additionally, the Appellants noted therein that the present use

¹ This portion of the table identifies permitted uses in the CR Conservation Recreation Zoning District in which this property is situated.

was that of a "bed and breakfast."

A hearing was held before the ZHB on September 14, 2023. At that hearing, Shereshevsky testified that she and her husband purchased the property in 2016 and sometime later conveyed ownership to 5320 Pohopoco, LLC, their limited liability company. Prior to purchasing, the property was being used as an Airbnb² with multiple bedrooms being rented. Upon purchasing it, they advertised the property on "VRBO"³, then eventually on Airbnb. Shereshevsky testified that to her knowledge the building was built as a bed and breakfast. From the time the property was purchased until the time of the hearing it was rented out at various times over the years. Shereshevsky also noted that there is an area in the basement apartment in which her and her husband would stay in occasionally as they lived out of state.⁴ While there, they do not provide food for the renters. She also noted that the longest stay for a guest is a week with the shortest being a day or two, the latter time frame according to Shereshevsky being most of the renters.

Also testifying was Faust. He testified that as of the date of the hearing, he had been the Township's zoning officer for thirteen

² An abbreviation of "Air Bed and Breakfast."

³ An abbreviation for "Vacation Rental by Owner."

⁴ Shereshevsky noted that they would some day like to make this their permanent residence.

(13) years and had worked under the 1982 Zoning Ordinance⁵ as it related to this issue and that the ordinance did not address the issue of short-term rentals, however a bed and breakfast establishment was permitted use. Faust further concurred that it was not until January, 2021 that the township began to regulate short-term rentals.⁶ The amendment permitted short-term rentals by special exception but limited those uses to LC-Light Commercial and HC-Heavy Commercial zoning districts only. Thus, in all other zoning districts, short-term rentals are not permitted in Towamensing Township.

After the hearing, the Zoning Hearing Board concluded that the Appellants: 1) "did not satisfactorily prove that they meet the necessary criteria for the issuance of a permit to operate a bed and breakfast; 2) did not satisfactorily prove the establishment of a vested right to operate a bed and breakfast establishment as a prior nonconforming use; 3) are not entitled to use this property as a short-term rental as that use is not a permitted use in a CR-Conservation Recreation District nor is it allowed as a special exception or conditional use; 4) did not satisfactorily prove the establishment of a vested right to operate a short-term rental as a prior nonconforming use; and did not satisfactorily prove entitlement to a variance. As a result, by unanimous vote, the ZHB

⁵ The ordinance attached as part of the certified record references dates of December 14 and February 15, both of which are before the Appellants' ownership.

⁶ Ordinance No. 2020-4 of Towamensing Township.

denied the Appellants' request for a favorable interpretation to recognize their claim of right to operate a bed and breakfast and/or short-term rental as a vested prior nonconforming use and further denied a variance to do the same.

Thereafter, that decision was reduced to writing and signed by all three (3) members of the ZHB with the last signature being placed thereon on October 4, 2023.

On November 3, 2023, the subject appeal was timely filed. In that appeal, Appellants claim a myriad of abuses of discretion and errors of law of the part of the ZHB in that the ZHB:

- A. Failed to " . . . uphold Appellant's vested rights/nonconforming use as a short-term zoning use initiated in prior to the purchase of the subject property by Applicant in 2016 but substantially continued by the Applicant since 2016 and continues/currently is the use of the subject property;"
- B. Failed to " . . . identify and interpret the existing non-conformity/vested right use of the property as a short-term rental having continued the short-term use as of the purchase of the subject property in 2016;"
- C. Improperly interpreted " . . . that the current use of the property was not a vested right/nonconforming use for Short-term Zoning;"
- D. Failed to " . . . understand the vested right/nonconforming

use for short-term rental as outlined by Applicant's testimony and documentation which by way of nonconforming use provides protection for the continued use of the property;"

E. Erred in " . . . finding that Appellant's pre-existing and continuing non-conformity is not permitted in Applicant's Zoning Ordinance of Towamensing Township;"

F. Erred in " . . . finding that the requisite use in question is not a nonconforming use for short-term rental;"

G. Failed to " . . . find that the prior nonconforming use of the property for short-term zoning was not designated as a nonconforming/vested right which additionally allowed Appellant to continue to use the property as a short-term rental based on Appellant's use of his property as a vested right and nonconforming use;"

H. Failed to " . . . find that the prior zoning classification of the property did not provide for short-term rental as permitted use, provided the property was previously zoned as a Limited Commercial district," and

I. Was wrong in concluding in " . . . paragraph 4 of the Conclusions of Law of the ZHB Decision (Exhibit "A") that Applicant had not met his burden of proof in identifying his nonconforming Short-term Rental use."

Briefs were lodged by Appellants and ZHB. In their brief, Appellants limited their arguments to the following:

- 1) Did the Zoning Hearing Board commit an error of law and/or abuse its discretion in finding that the Township established a violation of the zoning ordinance as claimed in the June 22, 2023, enforcement notice? and
- 2) Did the Zoning Hearing Board commit an error of law and/or abuse its discretion in not finding the Appellants had a vested right by and through its operation of a short-term rental, a now nonconforming use?

Since the answer to the first question is controlled by the answer to the second question, this Court will address them in reverse order.

LEGAL DISCUSSION

A trial court, when making a determination of a zoning appeal where no additional evidence is presented before it, is limited to determining whether the zoning hearing board committed an error of law or abused its discretion. *Isaacs v. Wilkes-Barre City Zoning Hearing Board*, 612 A.2d 559 (Pa. Cmwlth. Ct. 1992), *Piecknick v. South Strabane Township Zoning Hearing Board*, 607 A.2d 829 (Pa. Cmwlth. Ct. 1992). "An abuse of discretion will be found only when the zoning hearing board's findings are not supported by substantial evidence." *Hertzberg v. Zoning Hearing Board of Adjustment of City of Pittsburgh*, 721 A.2d 43, 46 (1998). Substantial evidence is that relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Valley*

View Civic Association v. Zoning Board of Adjustment, 462 A.2d 637, 640 (1983). Further, great weight and deference must be given to the Board's determination.

This Court first notes that Appellants' notice of appeal specifically identifies the present use of the subject property as a "bed and breakfast". That use under the zoning ordinance is defined as follows: "An owner-occupied single-family dwelling containing sleeping rooms available for transient guests, subject to the conditions of this ordinance. Food served to bed and breakfast guests on the premises shall be limited to breakfast only."⁷ Further, regulations, not applicable to this appeal are set forth in Article VII, §705(E10).

Shereshevsky testified that she and her husband do not now reside in this property as "owner-occupied property residents" but only stay in the basement apartment on occasion. Thus, this Court questions whether or not, if the present use of this property is a bed and breakfast as claimed, it has not in fact been abandoned, if ever permitted at all. This Court will accept however, that the present "permitted use" is that of a bed and breakfast, one that is permissible by right under the Township's Zoning Ordinance.⁸ This Court will not, however, assume this use

⁷ Towamensing Township Zoning Ordinance, Article II, §202.

⁸ There is no evidence or testimony of record suggesting that this use was ever permitted by the Township through the issuance of a permit to these Appellants or their predecessor nor that it was not.

was ever abandoned despite Shereshevsky's testimony that she and her husband do not reside there and do not provide food (i.e. breakfast) to their renters⁹ simply because this argument was never proffered to potentially make way for any other claimed use, i.e. short-term rental. Nor will this Court assume that Appellants are seeking to change the use from a bed and breakfast to short-term rentals as the appeal to ZHB and the Court is devoid of such an argument. This Court will, therefore, decide this appeal on the basis that the Appellants believe that the decision of the ZHB in upholding the notice of enforcement should be overruled and that the Appellants should be entitled to continue to use this property as a nonconforming, short-term rental use by virtue of a vested right in the same.

As previously noted, the zoning ordinance of Towamensing Township was adopted in the 1980's and, as relevant to this proceeding was amended prior to Appellants' purchase of this property, said amendments however not affecting anything of substance pertaining to the Appellants nor the prior owners. Also as noted, a bed and breakfast is a permitted use in a CR zoning district in which this property is located. Short-term rentals were never and continue not to be, permitted uses anywhere in the Township. They are only allowed by special exception or condition

⁹ The continuous use as a bed and breakfast may be in jeopardy based upon Shereshevsky's testimony that the owners, her and husband do not occupy this property.

in certain other districts.

Shereshevsky and her husband, upon purchasing this property continued to operated it in the same fashion as the prior owners, i.e. rented the six (6) rooms out on a two - seven day rental basis per stay. They occasionally stayed in the basement apartment but did not provide food to the rentals consistent with what a bed and breakfast is designed to provide. Thus, in 2016 and continuing, despite their contention that a bed and breakfast was its "present use", it was not being operated as such, but rather more like a short-term rental, a use which at that time and continuing to this day was not a permitted use. Appellants therefore contend that it was nonconforming and are thus entitled to continue to use the property as a short-term rental as they have a vested right to do so once the amendment was made to the zoning ordinance pertaining to short-term rentals. But, was that use lawful at the time Appellants claim they began to operate the property as a short-term rental?

"A nonconforming use is an activity or structure predating the relevant zoning restrictions. The benefit of legal nonconforming use status is available only for the lawful use which existed on the land when the ordinances took effect and it is the burden of the party proposing the existence of such nonconforming use to establish both its existence and legality before the enactment of the ordinance at issue." *Lantos v. Zoning Hearing Board of*

Haverford Township, 621 A.2d 1208, 1210 (Pa. Cmwlth. Ct. 1993)
(internal citations omitted). (emphasis ours).

"A pre-existing nonconforming use arises when a lawful existing use is subsequently barred by a change in the zoning ordinance. The right to maintain a pre-existing nonconformity is available only for uses that were lawful when they came into existence and which existed when the ordinance took effect. Pre-existing illegal uses cannot become nonconforming uses with a protected right to exist upon enactment of a new ordinance prohibiting them. *Id.* It is the burden of the party proposing the existence of such nonconforming use to establish both its existence and legality before the enactment of the ordinance at issue."

Hager v. West Rockhill Township Zoning Hearing Board, 795 A.2d 1104, 1110 (Pa. Cmwlth. Ct. 2002) (internal citations omitted.)

As recently noted in *Johnson v. Pocono Township Zoning Hearing Board*, 310 A.3d 836, 847-8, the court stated,

"A lawful nonconforming use is a use that predates the enactment of a prohibitory zoning restriction. *DoMiJo, LLC v. McLain*, 41 A.3d 967, 972 (Pa. Cmwlth. 2012). The ability to maintain a nonconforming use is "only available for uses that were lawful when they came into existence and which existed when the ordinance took effect. *Hafner v. Zoning Hearing Board of Allen Township*, 974 A.2d 535, 539 (2003). The fundamental basis for the protection of uses and structures that were lawful when instituted is the "inherent and indefeasible" right of the Commonwealth's citizens to possess and protect property guaranteed by article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, § 1. *Pennsylvania Northwestern Distributors, Inc. v. Zoning Hearing Board of Moon Township*, 526 Pa. 186, 584 A.2d 1372, 1375 (1991). Thus, "[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." *Id.*

Thus, when Shereshevsky and her husband first purchased the property and used it for what they claimed to be short-term rentals, even though they were only carrying on the use of their predecessor in title, it was a use not permitted in the CR zoning district and therefore illegal under the zoning ordinance.¹⁰ The amendment to the zoning ordinance in 2020, limiting short-term rentals to LC and HC zoning districts, could cause certain short-term rentals to be nonconforming but this was not one of them as it was illegal in the CR zoning district the moment the owners began to use it as such.¹¹ A pre-existing illegal use cannot become a nonconforming one. *Hafner*, Supra.

This Court finds that the Appellants never had a legal nonconforming use to use the subject property as a short-term rental.

Appellants next argue that they have a vested right to continue to use this property for short-term rentals because it was used as such prior to the amendment that regulated short-term rentals and since that ordinance otherwise affected this ability to use their property in that fashion they had a vested right to

¹⁰ Again, the Townships ordinance was enacted in 1985 and the structure on the subject property built after that date so no matter who started or when short-term rentals began, that use was not permitted and therefore illegal.

¹¹ In the *Johnson* case, the Supreme Court found that Johnson did in fact have a legal nonconforming use. The distinction between that case and Shereshevsky is the fact that the township "legitimized" Johnson's use by granting him a short-term rental license in 2017, a date that was after the adoption of the original ordinance in 1983, but before the adoption of the 2019 Ordinance that restricted short-term rentals. That is not the case here.

continue that use. Their argument however is misplaced as they pre-supposed that they enjoy a lawful nonconforming use prior to that amendment. Since we previously determined they did not have a lawful nonconforming use at that time of the adoption of 2020 amendment to the Zoning Ordinance, they do not have a vested right in that use. (See *Pappas v. Zoning Board of Adjustment of City of Philadelphia*, 589 A.2d 675, 676 (1991) which found that a property owner does enjoy a vested property right in a nonconforming use but only if that use is lawful.)

CONCLUSION¹²

Since this Court has concluded that any use of the subject property as a short-term rental is not permitted as it was not a lawful use to begin with and further, that use is not entitled to be maintained as a lawful nonconforming use vested in the Appellants by virtue of the enactment of ordinance 2020-4, this Court denies their appeal and allows to stand the decision of the Towamensing Township Zoning Hearing Board in all respects.

BY THE COURT:



Joseph J. Matika, J.

¹² Appellants also raised several other issues in its notice of appeal which this Court has identified herein, however, at not time either at oral argument, or in their brief, did they properly develop or present a case for them, thus this Court considers them waived and thus will deny any relief as it relates to them.