

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

FILED

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CARBON COUNTY  
PROTHONOTARY

BRIAN SARGENT, :  
Appellant :  
vs. : No. 23-CV-0905  
ZONING HEARING BOARD OF THE :  
BOROUGH OF JIM THORPE, :  
Appellee :  
and :  
BOROUGH OF JIM THORPE and :  
GLEN ONOKO ESTATES, INC. :  
HOMEOWNERS' ASSOCIATION, :  
Intervenors :

Neil Ettinger, Esquire	Counsel for Appellant
Matthew Schnell, Esquire	Counsel for Appellee
James Nanovic, Esquire	Counsel for Intervenor, Borough of Jim Thorpe
Julie Wagner Burkart, Esquire	Counsel for Intervenor, Glen Onoko Estates, Inc. Homeowners' Association

MEMORANDUM OPINION

Matika, J. - June 25, 2024

Short-term rentals of homes or parts thereof have become a more prevalent way for property owners to earn income while at the same time they have become headaches and nuisances to the municipalities in which they are located. As a result, municipalities are becoming more and more cognizant of these uses and are enacting ordinances or amending existing ordinances to regulate them. Such is the case before the Court here. The

applicant claims that the municipality has improperly affected his ability to operate a short-term rental at his property located at 1112 Broadview Drive, Jim Thorpe. This appeal is his attempt to convince this Court of those improprieties, however, for the reasons stated herein, this Court denies his appeal.

**FACTUAL AND PROCEDURAL BACKGROUND**

On or about March 1, 2022, Jim Thorpe Zoning Officer, Matthew Helbers, (hereinafter "Helbers") issued a Notice of Violation to Appellant, Brian Sargent (hereinafter "Sargent") alleging that Sargent was operating a short-term rental property located at 1112 Broadview Drive, Jim Thorpe, in violation of the Jim Thorpe Zoning Ordinance. In support of this, Helbers described this violation as one in which Sargent was operating a short-term rental in an R1 Zoning District when "short-term rental uses shall [only] be allowed in the following districts by special exception: C1, C2, C3, R4 and S-Special." Also in this Violation Notice, Helbers advised Sargent of his right to appeal this notice to the Jim Thorpe Borough Zoning Hearing Board, Appellee herein (hereinafter "ZHB" of "Zoning Hearing Board") within thirty (30) days of the date of the notice. According to the certified record of the Zoning Hearing Board proceedings, no appeal was taken.

Thereafter on September 28, 2022, an "Application to the Zoning Hearing Board" was received from Sargent, although signed by a Mandy Kane. In this application Sargent requested a "Section

500-50.2c Variance to allow Short-Term Rental in R1 Zoning District." Additionally, on that same date Sargent filed a "Certificate of Use and Occupancy Application for Change of Use" along with a short-term rental application. These applications were denied by Helbers by letter dated October 17, 2022.<sup>1</sup>

On October 20, 2022, an amended application was submitted to the ZHB. In that amended application, Sargent sought the following: 1) a variance from §500-50.2(C) to allow a short-term rental in an R1 zoning district (this was the same request made in the original application); 2) a vested right in a permitted use of a short-term rental being operated and used prior to the effective date of the amendment to the Zoning Ordinance (specifically, §500-50.2(C)); and 3) a variance by estoppel claiming he used the property in question as a short-term rental prior to the effective date of the amendment to the Zoning

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<sup>1</sup> Specifically, Helbers cites the following for the reasons he was denying the applications:

"1) Section 500-50.2C. of the Code of the Borough of Jim Thorpe states: "Short-term rental uses shall be allowed in the following districts by special exception: C-1, C-2, C-3, R-4 and S-Special." This property is located in the R-2 Zoning District and is therefore not an allowed use.

2) Section 351-9A. of the Code of the Borough of Jim Thorpe states in relevant part: "An application for a permit shall be filed with the designated Borough official before use of the property as a short-term rental. The application shall contained the following information . . . (9)The location, approximate age and capacity (if known) of the sewage disposal system." No such information has been provided with your STR application."

This latter issue was never raised anywhere in any of Sargent's appeals to the ZHB or this Court. Even had we sustained his appeal on the grounds he raised, the right to use this property for a short-term rental would still be prohibited for this reason alone, although possibly curable upon further applications.

Ordinance. In addition, Sargent included in that amended application (sent via a letter from his counsel, Neil D. Ettinger, Esquire) an Appeal from the decision of Helbers on the use and occupancy application for change of use and short-term rental application.

A duly advertised and noticed Zoning Hearing Board hearing occurred on March 8, 2023. At that hearing, Sargent withdrew his request for a variance. After said hearing, the ZHB denied Sargent's requests to find that the use of 1112 Broadview Drive as a short-term rental was a nonconforming use by virtue of Sargent's claimed vested right or by virtue of a variance by estoppel. Additionally, the ZHB unanimously denied the appeal of Sargent from the October 17, 2022 denial of Helbers regarding the change of use and short-term rental applications. A written decision was issued by the ZHB on April 18, 2023.

On May 12, 2023, Sargent filed a Notice of Appeal. In that appeal, Sargent claimed that the ZHB committed various errors of law or abuses of its discretion. These perceived errors and/or abuses can be categorized as follows: 1) failure to find that Sargent had a vested right to a non-conforming use; 2) failure to find that Sargent was entitled to a variance by estoppel to permit this short-term rental use; and 3) failure to designate and identify Sargent's property as a short-term rental pursuant to his short-term rental application for use made in accordance with

53 P.S. §10613 and Borough Ordinance 2021-01.

On June 8, 2023, Jim Thorpe Borough intervened as of right and on July 17, 2023, Glen Onoko Estates, Inc. was granted permission to intervene. All parties lodged briefs and argument ensued thereafter on October 24, 2023. This matter is now ripe for disposition.

### **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.

## I. A LEGAL NONCONFORMING USE

Before addressing any of the issues raised in this appeal by Sargent, a threshold determination as to whether this use, i.e. a short-term rental, is a legal, nonconforming use under the Jim Thorpe Borough Zoning Ordinance.

The Zoning Ordinance of the Borough of Jim Thorpe was adopted on April 10, 1997.<sup>2</sup> §500-14 identifies the permitted uses, uses by special exception and conditional uses, in an R1 Zoning District where the subject property is located. Short-term rental use is not included as a permitted or conditional use nor as a special exception use. It was not until March 11, 2021 when the Ordinance was amended was there any reference to or inclusion of short-term rental uses in the Borough. As a result, short-term rental uses were now permitted by special exception in C1, C2, C3, R4 and S-Special Zoning Districts.<sup>3</sup>

Sargent purchased this property in August, 2020 at a time when short-term rental uses were not permitted in any located under any circumstances in the R1 Zoning District. Sargent's intent was to have his parents reside in the property, however, he claimed that as a "plan B" should that not work out, he was intent on using it for short-term renters based upon his research of the Zoning

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<sup>2</sup> Exhibit "I" attached to the certified record filed in this matter.

<sup>3</sup> The Zoning Ordinance was amended via Ordinance No. 2021-01.

Ordinance, which he claimed did not prohibit<sup>4</sup> short-term rentals in an R1 Zoning District. Thereafter, beginning in October 2020, Sargent began utilizing this property for short-term rental purposes and continued to do so through the date he received the notice of violation from the Jim Thorpe Zoning Office in and around March 1, 2022. It was not until March 11, 2021, that the 1987 Zoning Ordinance was amended to permit short-term rental uses by special exception in C1, C2, C3, R4, and S-Special Zoning Districts.

This record reflects that at the time Sargent began using this property in October, 2020 as a short-term rental unit, it was not a permitted use under the Jim Thorpe Zoning Ordinance. Sargent argues that it became a nonconforming use once the March 11, 2021 amendments pertaining to short-term rentals were adopted and enacted as that Ordinance amendment restricted short-term rentals to other zoning districts, not the R1 zoning district.

"A non-conforming use is an activity or structure predating the relevant zoning restrictions. The benefit of legal non-conforming 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 non-conforming use to establish both its existence and legality before the

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<sup>4</sup> Notwithstanding Sargent's argument, property uses which are not expressly permitted by a zoning ordinance are excluded by implication. *Slice of Life, LLC v. Hamilton Zoning Hearing Board*, 270 A.3d 886 (Pa. 2019).

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).

"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, in the case *sub judice*, when Sargent first purchased the property and then used it for short-term rentals, a use not permitted in an R1 Zoning District, that use was illegal. The addition of the 2021 amendment to the zoning ordinance restricting short-term rentals did cause certain short-term rentals to become nonconforming, however, Sargent's cannot be said to be one of them as it was an illegal use in an R1 zoning district the moment he began to use it as such.<sup>5</sup> As previously noted, a pre-existing illegal use cannot become a nonconforming use. *Hafner*, *Supra*.

As a result, this Court concludes that Sargent never had a legal nonconforming use to use the subject property as a short-term rental.

## II. VESTED RIGHT

Sargent next argues that he has a vested right to continue to use the subject property for short-term rentals. He bases this argument on the fact that because he established a short-term rental use on the property before the March 1, 2021 amendment to the Zoning Ordinance and that amendment otherwise affected his ability to continue to use his property in that fashion, he has a

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<sup>5</sup> In the *Johnson* case, the Supreme Court found that Johnson did in fact have a legal nonconforming use. The distinction between that case and Sargent 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.

vested right to continue that use. Sargent's argument however is misplaced, as he pre-supposes he enjoyed a lawful nonconforming use. Since we previously determined he did not have a lawful nonconforming use at the time of the adoption of the March 11, 2021 amendment to the Zoning Ordinance, he does 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).

### **III. VARIANCE BY ESTOPPEL**

Sargent also argues that he should be entitled to a variance by estoppel.<sup>6</sup>

"There are four factors relevant to whether a ZHB should grant a variance by estoppel. Such variances are appropriate when a use does not conform to the zoning ordinance and the property owner establishes all of the following: (1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use; (2) the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceeding; (3) the landowner has made substantial expenditures in reliance upon his belief that his use was permitted; and (4) denial of the variance would impose an unnecessary hardship on the applicant."

*Hafner, Supra* at 1212 citing *Borough of Dormont v. Zoning Hearing Bd. of Borough of Dormont*, 850 A.2d 826, 828 (Pa. Cmwlth. 2004) (citations omitted).

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<sup>6</sup> While Sargent raises this as an issue on appeal, he does not expand upon it in his brief, however, we will still address the shortcomings of this claim.

Thus, the burden is on Sargent to establish a variance by estoppel. Here, Sargent failed to establish this right in that he cannot claim he meets all of these factors.

**A. Municipalities Failure to Enforce the Law**

The evidence shown suggests that if Sargent utilized the property as a short-term rental in October/November of 2020, the Borough was not aware of it, according to the Zoning Officer, until a complaint was filed approximately one month before the notice of violation was issued by him on March 1, 2022. Sargent himself said he could not say for certain if the Borough knew he was operating a short-term rental on this property. Once Helber learned of this, he investigated it and sent the enforcement notice.

**B. Sargent Acting in Good Faith**

Sargent testified that he never spoke to a Zoning Officer about the use of the property before utilizing it as a short-term rental. He further testified that he reviewed the Zoning Ordinance and did not find anything "prohibiting" such a use in an R-1 zone. When questioned as to whether he found anything that permitted it, he said he did not "see the difference." Likewise, he testified that he spoke to an attorney who advised him that the Borough "did not have any short-term vacation rental ordinances in place."

This Court cannot say that Sargent acted in good faith and relied innocently upon the validity of the use. He never spoke to the Zoning Officer about short-term rentals before or upon

purchasing the property nor prior to using the property as a short-term rental. His explanation that his research into prohibitions of such a use suggested his ability to operate such a use is negated by the fact that there are specific permitted uses<sup>7</sup> listed which explicitly prohibited other uses such as a short-term rental. His testimony regarding conversations with an attorney are as equally incredulous. This Court does not find any credible evidence that Sargent satisfied this factor.

**C. Expenditures in Reliance**

Other than the purchase of the property, which was actually to allow his parents to move into it, Sargent did not testify as to any expenditures made in reliance upon his belief that his use was permitted.

**D. Unnecessary Hardship**

Other than the possibility of lost income, Sargent provided no testimony as to unnecessary hardship. Even lost income is insufficient to establish this factor. "To establish unnecessary hardship, an applicant must show more than a mere economic or personal hardship. To accomplish this, "[t]he applicant must prove that the hardship is unique to the property, and that the zoning restriction sought to be overcome renders the property practically

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<sup>7</sup> "One who commences a use without inquiry into whether it is permitted by the municipality's zoning ordinance does so at his own peril." *Appeal of Crawford*, 531 A.2d 865, 869 (1987). See also, *Hasage v. Philadelphia Zoning Hearing Board of Adjustment*, 202 A.2d 61 (1964), which requires a landowner to check the zoning status of his property.

valueless." *Hafner, Supra* at 1213. This Sargent has also failed to do. In the end this Court finds that Sargent is not entitled to a variance by estoppel.

#### **IV. Registration Requirements**

Lastly, Sargent argues that the ZHB erred by failing to register his short-term rental as required by the Zoning Ordinance.

"Zoning ordinances may contain provisions requiring the zoning officer to identify and register nonconforming uses, structures, and lots together with the reasons why the zoning officer identified them as nonconformities." 53 P.S. §10613. In adopting ordinance 2021-01, which amended the 1997 Zoning Ordinance, the Borough in §3 established the following:

"Registration of Nonconformities. Pursuant to Section 613 of the MPC, the Zoning Officer is directed to identify and register Existing Nonconforming Short Term Rentals together with the reasons why the Zoning Officer identified such nonconformity. To that end, within ninety (90) days following the effective date of this Ordinance, the owner of any Short-Term Rental shall come forward and register such nonconforming use as a change of use application with the Zoning Officer of the Borough of Jim Thorpe, who shall maintain records of all such nonconformity by name and address for the use and the administration and enforcement of this Ordinance, and as a matter of public information. The owner of such Short Term rental shall comply with the Zoning Ordinance (other than the zoning location which shall be considered grandfathered for purposes of this Ordinance) The Zoning Officer shall issue a Certificate of Nonconformity to the owner of the premises or proprietor of the Short Term Rental in question. Such registration shall have the effect of permitting the Short Term Rental to continue in the zone in which it is located subject to the requirements set forth in Section 500-50.2 and subject to the independent Short Term Rental Ordinance

adopted by the Borough Council as may be amended from time to time." §308 2021.01 Ordinance of the Borough of Jim Thorpe.

The onus is on the property owner to come forward and proffer to the Borough that they believed they had and wished to register a nonconforming use. Sargent, during the requisite time period (90 days from the effective date of the ordinance) did not come forward and attempt to register his perceived nonconforming use.

Sargent first argues that the Zoning Hearing Board erred "in failing to find that per the testimony of its Zoning Officer, Mr. Helbers, when Helbers admitted that a permit would have been granted, for STR use for the non-conforming property, had the applicant submitted the proper application and supporting documentation within the ninety-day window following the STR Ordinance adoption on March 11, 2021." This Court does not quite understand Sargent's argument here as to how the ZHB erred. While Helbers did state that had Sargent applied for a permit during the ninety (90) days, it would have been granted<sup>8</sup>, the fact remains Sargent did not apply. This Court perceives no assignment of error on a moot point such as this.

Notwithstanding, Sargent argues that it was incumbent upon the Zoning Officer to actively seek out and identify these nonconforming uses. This Court disagrees. In the Ordinance the

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<sup>8</sup> This Court is also unsure if this would have been accurate based upon our previous ruling that Sargent's nonconforming use lacked legality.

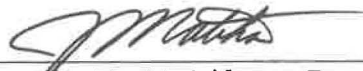
Zoning Officer is responsible to "identify and register" existing nonconforming short-term rentals, but only after the owner comes forward and registers them.

Finally, Sargent relies upon *Appeal of Suburban General Hospital*, 410 A.2d 85 (PA. Cmwlth. Ct. 1980) to suggest that the Zoning Officer and/or the Borough violated §613 of the Municipalities Planning Code in adopting ordinance 2021-01. This Court fails to see how that case's authority has been violated here or even how that case is applicable to the case *sub judice*.

**CONCLUSION**

For all the reasons stated herein, the appeal of Brian Sargent from the decisions of the Jim Thorpe Zoning Hearing Board is **DENIED.**

**BY THE COURT:**



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**Joseph J. Matika, J.**