IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Smithbower, Appellant	:	
v.	:	
The Zoning Board of Adjustment of the City of Pittsburgh, City of Pittsburgh and Overbrook Community Council, Inc.	:	No. 1252 C.D. 2012 Submitted: April 15, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE McGINLEY FILED: May 15, 2013

Daniel Smithbower (Smithbower) appeals from the Court of Common Pleas of Allegheny County's (trial court) May 17, 2012 order affirming the City of Pittsburgh's (the City) Zoning Board of Adjustment's (ZBA) November 3, 2011, decision denying him a special exception from the Pittsburgh Zoning Code (Code). Smithbower raises three issues for this Court's review: 1) whether the ZBA erred when it determined that Smithbower failed to demonstrate a legal pre-existing nonconforming use as an adult entertainment establishment; 2) whether the ZBA committed an error of law when it determined that Smithbower was required to show the absence of abandonment; and, 3) whether the ZBA erred when it determined that Smithbower was not entitled to a special exception under the Code when it relied on restrictions in an occupancy permit to dispose of the issue concerning a legal preexisting use. This Court affirms.

Smithbower owns the real property located at 1885 Saw Mill Run Boulevard (the Property) in an HC (Highway Commercial) zoning district in the City's Overbrook neighborhood. There were two occupancy permits (Occupancy Permits) for the Property. The first was issued in 1978 (1978 Occupancy Permit), and permitted a "cocktail lounge on the first floor with combo music (no dancing) and two dwelling units above – nine car parking area." Reproduced Record (R.R.) at 15. The second was issued in 2005 (2005 Occupancy Permit), permitting a business sign for "Butta-Bing." *Id*.

Smithbower filed an application for a special exception under Section 921.03.C.2 of the Code[1] to reconstruct a nonconforming structure.[2] A hearing was held on July 21, 2011 before the ZBA. Smithbower testified that the pre-existing structure was used as an adult entertainment establishment since 1978. He took possession of the Property in January 2005, purchased it in April 2005, and operated an adult entertainment establishment. In September 2005, fire damage to the Property forced Smithbower to close the business. He could not continue to use the Property because his insurance company refused coverage for the fire damage and due to ongoing litigation that involved the insurance claim. However, he intended to reopen the business. On May 4, 2009, Smithbower received a condemnation notice for the Property.

[1] Section 921.03.C.2 of the Code authorizes the ZBA to approve, as a special exception, the reconstruction of a nonconforming structure that was damaged in a natural disaster such as fire, wind, tornado or earthquake, provided that the rebuilding does not increase the intensity of use or expand the floor area or ground coverage.

[2] The prior structure became nonconforming when the Code was amended in 2000, adding the Adult Entertainment classification.

In support of his contention that the Property was used as an adult entertainment facility since 1978, Smithbower submitted a 1979 advertisement (1979 Advertisement) for an establishment named "Sonny Dayes," which promoted "Go-Go Girls." R.R. at 15. The advertisement did not specify an address for "Sonny Dayes," but Smithbower submitted a copy of a 1981 telephone directory listing "Sonny Dayes" at 1885 Saw Mill Run Boulevard. Smithbower also provided an advertisement from 2004 (2004 Advertisement) printed in GOGO! Magazine, which announced December 30, 2004 as the last day of operation of the Bottoms Up Club[3] and thanked customers and employees for "15 Great Years!" R.R. at 73-74. Smithbower also produced numerous documents demonstrating actions he took to obtain a mortgage and to restore the Property following the resolution of the insurance claim litigation.

Lois Pickering (Pickering), the owner of an adjacent commercial property, testified in support of Smithbower that the Property was used as an adult entertainment facility since at least 1973. Carol Anthony (Anthony), representing Overbrook Community Council, Inc. (Overbrook),[4] testified in opposition to the application. Anthony testified that "[a]s a resident for 42 years of the Overbrook Community, I myself observed inactivity in the club sometime between 1999 and 2005." Hearing Transcript (H.T.), July 21, 2011, at 95; R.R. at 142. Anthony acknowledged that "many years ago, when it first opened as Sunny Days [sic], there was a time when I do remember that there was [sic] dancers in there, however, given that ad that there were go-go girls, go-go girls in the '70s did not strip, they were

[3] The Bottoms Up Club was one of the businesses that purportedly operated at the Premises since 1979.

[4] Overbrook and the City intervened in the action below. By letter dated November 5, 2012, the City and the ZBA notified this Court that they would not be filing briefs and that they joined in Overbrook's brief to this Court.

caged and they were fully dressed . . . ." H.T. at 98-99; R.R. at 145-46. When asked whether the Property was used for adult entertainment since 2000, Anthony admitted, "I personally was not in there so I can't tell you what was in there." H.T. at 99; R.R. at 146.

Additional witnesses testified to the longstanding deterioration of the Property. Several Objectors (Objectors) testified that the location was inappropriate for the type of use due to the Property's proximity to an elementary school and little league baseball fields. Concerns were also expressed about traffic congestion and the possibility that the reconstructed facility might draw more patrons resulting in a more intensive use.

On November 3, 2011, the ZBA denied Smithbower's request for a special exception. It rejected the testimony of both Smithbower and Pickering as not credible. Further, the ZBA discounted the relevance of the 1979 Advertisement, and found the objectors' testimony credible that the term "Go-Go Girls" in 1979 merely meant professional dancers. The ZBA noted the Objectors' testimony that the Premises had not been used as an adult entertainment facility was corroborated by the Occupancy Permits which prohibited dancing. The ZBA also accepted as credible an affidavit filed by an Objector who stated that the primary use of the Premises was a jazz club, and that any use of the Property for adult entertainment was recent and short-lived. Thus, the ZBA found that "at no time was the structure used for adult entertainment as that term is currently defined in our zoning code." R.R. at 15. The ZBA decision did not discuss the 2004 Advertisement referencing the 15-year

operation of the "Bottoms Up Club." The ZBA also considered the Objectors' testimony regarding the potential negative effects on the neighborhood.[5]

Acknowledging that there was "conflicting testimonial evidence regarding the historical use of the [P]roperty," the ZBA (contrary to its earlier finding of fact) agreed that "[Smithbower] did show that the subject property had, at certain points, i.e., prior to [the] Code placing restrictions on adult entertainment, been used as an adult entertainment facility." R.R. at 17. However, noting that "even if the structure was legally used as an adult entertainment facility in the past, [Smithbower] did not provide sufficient evidence that this use was not abandoned," the ZBA further stated that Smithbower "needed to rebut the presumption of abandonment in our Code and he failed to do so." R.R. at 17. Smithbower appealed the ZBA's decision to the trial court. On May 17, 2012, the trial court affirmed the ZBA's decision based on the record below. Smithbower appealed[6] to this Court.[7]

Smithbower first argues that the ZBA erred when it determined that he failed to demonstrate a legal pre-existing nonconforming use as an adult entertainment establishment. He contends that he produced substantial evidence that

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[5] Contrary to Anthony's actual statements, the ZBA inaccurately characterized her testimony as establishing that "the subject property was vacant between 1999 and 2005." R.R. at 15.

[6] "When, as here, the trial court accepts no additional evidence in a zoning appeal, our review is limited to considering whether the zoning hearing board erred as a matter of law or abused its discretion." *S. of S. St. Neighborhood Ass'n v. Phila. Zoning Bd. of Adjustment*, 54 A.3d 115, 119 n.1 (Pa. Cmwlth. 2012). "An abuse of discretion occurs when the findings of the [ZBA] are not supported by substantial evidence. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Catholic Soc. Servs. Hous. Corp. v. Zoning Hearing Bd. of Edwardsville Borough*, 18 A.3d 404, 407 n.2 (Pa. Cmwlth. 2011) (citation and quotation marks omitted).

[7] Overbrook filed with this Court an Application to Strike Supplemental Exhibits submitted by Smithbower. Because those exhibits were not material to the Court's determination, the Application is moot.

demonstrated the Property was used as an adult entertainment establishment prior to 2000. He further asserts that the ZBA capriciously disregarded the evidence and ignored the Code's definition of Adult Entertainment when it concluded that the historical evidence of go-go dancers at the Property did not constitute evidence of adult entertainment. This Court disagrees.

Section 921.02 of the Code[8] permits the continuance of a lawful use that becomes nonconforming as long as it remains otherwise lawful. This Court has stated:

> A lawful, nonconforming use of a property is a use predating a subsequent prohibitory zoning restriction. The right 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. It is the burden of the party proposing the existence of such a use to establish both its existence and legality before the enactment of the ordinance at issue. This burden includes the requirement of conclusive proof by way of objective evidence of the precise extent, nature, time of creation and continuation of the alleged nonconforming use.

Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment, 997 A.2d 423, 438 (Pa. Cmwlth. 2010) (emphasis, citations and quotation marks omitted); *see also* Section 921.01.F of the Code. Further, "to qualify as a continuation of an existing nonconforming use, a proposed use must be sufficiently similar to the nonconforming use to a sufficient degree so as to not constitute a new or different use." *Harrisburg Gardens, Inc. v. Susquehanna Twp. Zoning Hearing Bd.*, 981 A.2d 405, 410 (Pa. Cmwlth. 2009). Additionally,

[8] Section 921.02 of the Code states: "[a] nonconforming use which has a valid Certificate of Occupancy and lawfully occupies a structure or vacant site on the date that it becomes nonconforming may be continued as long as it remains otherwise lawful, subject to the standards and limitations of this section."

> [t]his Court may not substitute its interpretation of the evidence for that of the [zoning hearing board (ZHB)]. It is the function of a ZHB to weigh the evidence before it. The ZHB is the sole judge of the credibility of witnesses and the weight afforded their testimony. Assuming the record contains substantial evidence, we are bound by the ZHB's findings that result from resolutions of credibility and conflicting testimony. . . . [R]eview for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in zoning matters. Capricious disregard occurs only when the fact-finder deliberately ignores relevant, competent evidence. Capricious disregard of evidence is a deliberate and baseless disregard of apparently reliable evidence.

Lamar, 997 A.2d at 441 (citations omitted).

Smithbower argues that he met his burden and established a lawful nonconforming use through "uncontested" witness testimony and the 1979 Advertisement for "Sunny Dayes." Smithbower Br. at 14. Contrary to Smithbower's contention, the witness testimony was not uncontested and his evidence did not establish "conclusive proof by way of objective evidence of the precise extent, nature, time of creation and continuation of the alleged nonconforming use." *Lamar*, 997 A.2d at 438 (emphasis omitted). Instead, the witness testimony was contradictory as to whether the Property was previously used as an adult entertainment facility, whether adult entertainment at the premises was an ongoing part of the business or merely an occasional occurrence, whether the business continuously operated, and whether the purported go-go dancing at the bar constituted adult entertainment. The ZBA found Smithbower's testimony not to be credible, as it was authorized to do.

Smithbower points to the 1979 Advertisement as conclusive proof of the lawful nonconforming use prior to 2000. While it is true that the 1979 Advertisement evidences that a business offering go-go dancing was located at the premises in 1979,

it does not conclusively establish that the business continued to offer go-go dancing at any time after the date of the 1979 Advertisement, or that the go-go dancing referenced therein constituted adult entertainment as it is described in the Code. Further, the 1979 Advertisement does not demonstrate conclusively that the nonconforming use was lawful. Based upon a review of the Occupancy Permits, it is not unreasonable for the ZBA to have concluded that a go-go dancing use would not have been lawful at the Premises in light of the restriction on dancing in the 1978 Occupancy Permit.

Finally, Smithbower failed to demonstrate that the go-go dancing referenced in the advertisement was sufficiently similar to the type of adult entertainment Smithbower intended to offer. Importantly, this Court has held that "totally nude entertainment is not sufficiently similar to entertainment offered with 'pasties' and a 'G string' so as to allow totally nude entertainment on the premises as a preexisting nonconforming use." *Jay-Lee, Inc. v. Municipality of Kingston Zoning Hearing Bd.*, 799 A.2d 923, 928 (Pa. Cmwlth. 2002). Although the 2004 Advertisement suggests that the Property had been an ongoing go-go bar since approximately 1979, it does not provide conclusive evidence that Smithbower's proposed adult entertainment is substantially similar to the go-go dancing described therein.[9] Accordingly, as the ZBA was entitled to make credibility determinations and weigh the evidence, and Smithbower failed to provide conclusive proof of a lawful nonconforming use as required, the ZBA did not err when it determined that

[9] Smithbower contends that his proposed use as an adult entertainment facility must be permitted if he successfully established that go-go dancing was a pre-existing use, since go-go dancing is included in the definition of adult entertainment in Section 926 of the Code. Even if Smithbower had conclusively established that go-go dancing was a pre-existing use, the fact that go-go dancing is now included as one of the activities in the Code's definition of adult entertainment does not mean that such a pre-existing nonconforming use may be expanded to encompass all activities described in that definition. *See Jay-Lee*.

Smithbower failed to demonstrate a legal pre-existing nonconforming use as an adult entertainment establishment.

Smithbower next argues the ZBA committed an error of law when it determined that he was required to show the absence of abandonment. Specifically, Smithbower contends that although zoning ordinances may create a presumption of abandonment upon the finding of certain factors, non-use alone will not satisfy a party's burden to prove abandonment of a nonconforming use. Actual abandonment must be demonstrated. Therefore, Smithbower asserts that it is the burden of the party seeking to prove abandonment to establish a period of discontinuance and an intent to abandon. Smithbower further avers that there was insufficient evidence to reach the conclusion that actual abandonment occurred. This Court disagrees.

Section 921.02.B.1 of the Code provides that once a nonconforming use is abandoned, it may not be resumed. "In Pennsylvania, abandonment of a nonconforming use requires both proof of intent to abandon and proof of actual abandonment. A municipal ordinance may create a presumption of intent to abandon through expiration of a designated period set forth in the ordinance, but the municipality must still show actual abandonment." *Bruce L. Rothrock Charitable Found. v. Zoning Hearing Bd.*, 651 A.2d 587, 591 (Pa. Cmwlth. 1994).[10]

This Court has stated:

> [A] party claiming the abandonment . . . bears the burden of proving that [the l]andowner abandoned the nonconforming use. To sustain its burden of proof, the Township must

[10] Section 921.02.B.2 of the Code sets forth the circumstances upon which abandonment may be presumed and includes situations where "use has been discontinued, vacant or inactive for a continuous period of at least one (1) year . . . ." Section 921.02.B.2(d).

> show that (1) [the l]andowner intended to abandon the nonconforming use and (2) [the l]andowner actually abandoned the use consonant with his intention.
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> . . . .
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> With respect to [the l]andowner's intent to abandon the use, we observe that a landowner's failure to use property for a period of time designated by a zoning ordinance is evidence of the intention to abandon.

Money v. Zoning Hearing Bd., 755 A.2d 732, 737 (Pa. Cmwlth. 2000) (citation omitted).

Record evidence supports the conclusion that actual abandonment was established. Objectors testified to a noticeable cessation of activities at the Property since 1999. Even more importantly, there has been no activity at the premises since September 2005. The Property has been boarded up, property taxes are delinquent, the structure was cited multiple times and condemned, and years after the fire, the Property remains vacant and inactive.

Although Smithbower testified that he did not intend to abandon the nonconforming use, that he could not rebuild until after the insurance dispute was resolved, and that plans to rebuild the Property began immediately after resolution of the insurance dispute, the ZBA found his testimony not credible. Because the ZBA was entitled to make credibility determinations and weigh the evidence, and those determinations may not be disturbed on appeal, the ZBA properly determined that Smithbower abandoned any nonconforming use that may have existed.

Finally, Smithbower argues that the ZBA erred in determining that he was not entitled to a special exception under the Code by using restrictions in an occupancy permit as dispositive to the issue of legal preexisting use. Smithbower

specifically contends that the trial court and the ZBA relied too heavily on the 1978 Occupancy Permit, and that although the existence of a certificate may prove existence of a nonconforming use, the absence of such a certificate merely results in a procedural disadvantage. We disagree.

> This Court has stated:
>
> > A certificate [of nonconforming use] proves the existence of a nonconforming use. The mere absence of a certificate does not deprive the landowner of his right to continue a lawful nonconforming use. Rather, in an administrative proceeding such as this, absence of a certificate generally deprives a landowner of the most efficient method of proving the existence of the use, and shifts to the landowner the burdens of proof and persuasion. In short, a certificate represents a procedural advantage, not an independent property right. Conversely, the lack of a certificate results in a procedural disadvantage and not in the loss of a property right.

DoMiJo, LLC v. McLain, 41 A.3d 967, 973 (Pa. Cmwlth. 2012).

Importantly, the instant case does not involve the absence of a certificate being construed against Smithbower. Here, the ZBA did not rely on the *absence* of such a certificate. Instead it considered that the 1978 Occupancy Permit existed and that the permit affirmatively indicated that dancing was prohibited in the premises. The ZBA was entitled to determine the weight to be afforded to the 1978 Occupancy Permit, and it was not error for the ZBA to rely on that permit to conclude that the purported preexisting use was unlawful. Accordingly, the ZBA properly relied on the 1978 Occupancy Permit to dispose of the issue of the legality of the alleged preexisting use.

For all of the above reasons, the trial court's order is affirmed.

BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 15th day of May, 2013, the Allegheny County Common Pleas Court's May 17, 2012 order is affirmed. Overbrook Community Council, Inc.'s application to strike supplemental exhibits submitted by Smithbower is dismissed as moot.

BERNARD L. McGINLEY, Judge