

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

322 SOUTH COUNTY ROAD, LLC,

Appellant,

v.

THE TOWN OF PALM BEACH,

Appellee.

CIVIL APPELLATE DIVISION "AY"
CASE NO.: 2011CA002343

Opinion filed: **JAN 13 2012**

Appealed from the County Court of Palm Beach County, Florida

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For Respondent: George P. Ord, Esq.
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PER CURIAM

PETITION GRANTED.

The Petitioner, 322 South County Road, LLC ("Petitioner"), seeks review of a ruling by the Town Council of Palm Beach, Florida ("Respondent") entered on January 12, 2010. The ruling of the Town Council was in connection with a prior ruling entered by the Town's Planning, Zoning, and Building Department, which found that Petitioner had abandoned the grandfathered status of the property located at 322 South County Road, in Palm Beach, Florida. For the reasons set forth below, we find that the Town Council departed from the essential requirements of law, and reverse.

The building at issue is a three-story commercial building constructed in 1938 by Edward U. Roddy, Sr. The building originally contained one street level retail space and 19 residential

apartment units on each of the three floors. Although such use was permissible at the time of the building's construction, the Town of Palm Beach re-zoned the area and assigned a commercial zoning classification to the building in 1974; however, because the use was lawful at the time of its construction, its use as a residential structure continued beyond the zoning reclassification. The Roddy family actively leased the residential units in the building from the time of its construction, after the rezoning in 1974, and up until the death of Mr. Roddy's widow in 2000.

In 2002, the building was conveyed to 332 South County Road, LLC ("the Petitioner"), as a consequence of the administration of the estate of Eleonore Roddy. Shortly thereafter, the extensive restoration of the structure began. During the time of the restoration, the Petitioner maintained occupational licenses and dealt with (and rectified) numerous building code issues.¹ Throughout the period of restoration and construction, there were no residential tenants located on the property at any time. According to the Petitioner, the Town was aware of the Petitioner's ongoing restoration for the purpose of continuing apartment use of the property.

On April 1, 2020, the Petitioner received notice from the Town's Planning, Zoning, and Building Department that their staff was reviewing whether the Petitioner had abandoned the use of residential apartments in the building. On October 7, 2010 the Town Zoning staff issued an administrative ruling, finding that the Petitioner had abandoned the grandfathered residential apartment use of the building under Zoning Code section 134-392, due to discontinuance of said use for a period of two years. The Petitioner appealed the administrative ruling to the Town Council of the Town of Palm Beach ("Town Council"), who denied the appeal on January 12, 2010. The instant Petition for Writ of Certiorari followed, in which the Petitioner argues that the

¹ One such code enforcement issue, involving a written notice dated July 22, 2004, stated that "failure to comply with this request will result in the Town placing this license in history and may result in the loss of the grandfathered status of the property."

Town Council departed from the essential requirements of the law by failing to consider the Petitioner's intention to maintain the grandfathered status of the building.

Where the circuit court reviews local government action, the circuit court's jurisdiction is limited to consideration of whether the municipality afforded the landowner due process, whether the essential requirements of law were observed, and whether the lower tribunal's findings are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *Sarasota County v. Bow Point on Gulf Condominium Developers, LLC*, 974 So. 2d 431, n.3 (Fla. 2d DCA 2007). The Petitioner does not formally raise any issue as to whether the Town Council's ruling is supported by competent substantial evidence. In fact, the Petitioner concedes that the building had not been used for residential purposes for more than two years. Nonetheless, the Petitioner argues that such fact does not amount to an abandonment of the property's grandfathered status because the law requires a showing of intent to let such a classification lapse. The Town Council disagreed, finding that where there has been a two-year discontinuance of the nonconforming use, it is irrelevant whether the owner intended to abandon his grandfathered status. Thus, the crux of the Petitioner's argument attacks the Town's interpretation of the Zoning Code and not the factual findings made by the Town in its application of it. Likewise, neither party raises any issue with regard to due process.

On review, the Town Council strictly construed the terms of the Town's ordinance in its finding that the passage of a two-year period in which the property was not being used for apartment residences, by itself, indicated that the grandfathered status of the property had been abandoned. In making such a determination, the Town interpreted the Zoning Code to be devoid of any requirement that there be consideration of the owner's intent if the nonconforming use had been discontinued for a period of two years or more. In support, the Town cited the

expressed policy of the Zoning Code, the stated intent of which is to provide a mechanism whereby nonconforming uses could slowly be phased out.² The relevant provision of the Zoning Code states:

(a) *Abandonment*. Under this chapter, the discontinuance of a nonconforming use with the intention of the owner thereof to terminate the use for any period of time is an abandonment. Likewise, the discontinuance of a nonconforming use for a period of two years *without the intention of the owner thereof* to discontinue the use and/or the change of a use to a more restricted or conforming use for any period of time shall be considered an abandonment thereof, and such nonconforming use shall not thereafter be revived.

Town of Palm Beach, Fla., Code of Ordinances ch. 134, art. IV, Nonconformities, Div. 2, § 134-392(a) (2011) (emphasis added). Thus, an abandonment occurs whenever an owner intends to terminate a nonconforming use for any period of time or after the nonconforming use has been discontinued/terminated for a period of two years. *Id.* Based on such a construction, and in light of the ordinance's clear language on the issue of abandonment, the Town ruled that the owner had abandoned the nonconformity. *See Peters v. Thompson*, 68 So. 2d 581 (Fla. 1953) (applying a policy of strict construction when reviewing the abandonment of a nonconforming use); *see also Amnesia Holding, Inc. v. City of Miami Beach*, 6 Fla. L. Weekly Supp. 252a (Fla. 11th Cir. Ct. 1999) (applying policy of strict construction in determining that nonconforming use as a nightclub had not been discontinued and/or abandoned).

Conversely, courts have also held that a finding of intent is required before a court may determine that a nonconforming use has been abandoned. In a 1993 holding in this circuit, the court found that, contrary to the Town's position in this case, a literal interpretation of a zoning code should not necessarily be applied when considering whether a use has been abandoned.

²"It is the intent of this chapter to permit these nonconforming uses to continue until they are voluntarily removed, *removed by abandonment*, or otherwise removed as required by this chapter, but not to encourage their survival." Town of Palm Beach, Fla., Code of Ordinances ch. 134, art. IV, Nonconformities, Div. 2, § 134-386(c) (emphasis added). Accordingly, it appears that the Zoning Code contemplates the active use of the abandonment provision to inhibit the persistence of all nonconforming uses.

Cook v. City of Lake Worth, 1 Fla. L. Weekly Supp. 383a (Fla. 15th Cir. Ct. 1993) (“We hold that the Board’s literal construction of the zoning ordinance created an impermissible conclusive presumption of abandonment. Consequently, we grant the writ and quash the board’s decision.”). Additionally, other Florida courts have found exceptions to the rigid application of the abandonment provision. See, e.g. *Sarasota County v. Bow Point on Gulf Condominium Developers, LLC*, 947 So. 2d 431 (Fla. 2d DCA 2007) (holding that the nonconforming use had not been discontinued where the structure had been undergoing necessary and continuous repairs and renovations and the alleged discontinuance predated the applicable zoning regulation); *Lewis v. City of Atlantic Beach*, 467 So. 2d 751 (Fla. 1st DCA 1985) (“Abandonment occurs when the landowner intentionally and voluntarily foregoes further nonconforming use of the property. Neither attrition nor abandonment occurs where a nonconforming use is interrupted or discontinued involuntarily by compulsion or governmental action.”) (citations omitted); *Hobbs v. Dep’t of Transp.*, 831 So. 2d 745, 748 (Fla. 5th DCA 2002) (holding, in the context of a nonconforming street sign, that “[g]enerally, temporary cessation of a nonconforming use does not operate to effect abandonment of the nonconforming use. Instead abandonment occurs when the landowner ‘intentionally and voluntarily foregoes further non-conforming use of the property.’”) (citations omitted).

The Court is aware that the Zoning Code in this case contains specific language expressing that the intent of the landowner is irrelevant after a specific period of time. However, in light of the cases discussed above, this Court finds that such a disregard of the owner’s intent is impermissible. In this case, it is undisputed that Petitioner did not intend to abandon the grandfathered status of the property. To the contrary, Petitioner was making improvements to the property so that such use could continue. Additionally, the record is clear that Petitioner was

in contact with agents acting on behalf of the Town throughout the construction process. The Town issued, and Petitioner maintained, a valid occupational license for the structure's operation as a residential property. Petitioner regularly dealt with building inspectors working for the Town and addressed any issues cited by such individuals as the need arose, with the understanding that compliance was necessary in order to maintain the grandfathered status of the property. Thus, the Court finds that in light of the circumstances, no abandonment for two years of nonuse can be deemed to have occurred some eight years after the alleged nonuse began. Accordingly, the Petition for Writ of Certiorari is **GRANTED**. The order of the Town of Palm Beach is hereby **QUASHED**.

BARKDULL, SASSER, and FRENCH, JJ., concur