

STATE OF MICHIGAN
COURT OF APPEALS

LAKETON TOWNSHIP,

Plaintiff-Appellee,

v

ADVANSE, INC,

Defendant-Appellant.

UNPUBLISHED

March 24, 2009

No. 276986

Muskegon Circuit Court

LC No. 06-044687-CE

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment and final order granting plaintiff injunctive relief and prohibiting defendant's use of the main residence on its property as a short-term rental unit in violation of plaintiff's ordinance. We reverse.

I. Facts and Procedural History

On January 31, 2003, defendant Advanse, Inc. purchased property located at 1403 Scenic Drive in plaintiff Laketon Township. The property is known as Sunset Beach Cottages and contains six structures: four cottages, a guesthouse, and a main house.

From approximately 1948 to January 30, 2003, the previous owners of Sunset Beach Cottages, Kenneth and Jean Orshal, (until Kenneth's death in 2000), rented the four cottages and occasionally the guesthouse on a short-term, seasonal basis. The Orshals used the main house as their permanent residence and never rented it out, although they did run the resort business from their home.

According to the Laketon Township Zoning Map, the subject property was zoned commercial prior to 1979. In July 1979, plaintiff re-zoned the property as a Residential District. Under the zoning ordinance, property in a Residential District could be used for single-family dwellings, churches, schools, libraries, general farming, and accessory buildings. Laketon Township Zoning Ordinance, art II, § 200-1. Article I, Section 102-10, of the ordinance in effect at that time defined a "dwelling or residence," in pertinent part, as: "A building or portion thereof, designed or used exclusively as the residence or sleeping place of one or more persons, including one-family, two-family, and multiple family dwellings, apartment-hotels, boarding and lodging houses." Article III, Section 302.1-1 of the ordinance provided that any non-conforming use of a building may be continued indefinitely, but Section 302.4 prohibited enlargement or

extension of a non-conforming use. The Orshals continued renting all but the main house after the 1979 zoning change.

When defendant purchased the subject property on January 31, 2003, the 1979 ordinance remained in effect. Jean Orshal continued living in the main house for a month or two after closing and paid rent to defendant. Defendant continued to use the cottages and guesthouse as short-term seasonal rental units. Unlike the Orshals, however, defendant also began using the main house as a short-term rental unit after Jean Orshal had vacated. For renting the main house, defendant paid the Muskegon County accommodation tax. The owners of defendant corporation, Douglas and Susan Vanse, do not claim the main house as a homestead exemption or as their residence. Defendant's website, which advertises its cottages, states that the main house will accommodate up to ten people.

In July 2004, plaintiff became aware of some complaints arising out of short-term rentals in residential neighborhoods. On July 14, 2004, Laketon Township Zoning Administrator Richard Grenell participated in a planning commission meeting where those complaints were discussed and the definition of the word "dwelling" in the ordinance was addressed. The minutes from the July 14, 2004, meeting state: "It is the opinion of the Township Attorney that the definition of dwelling in the zoning ordinance is what needs to be improved to specifically address these situations." The minutes from an August 31, 2004, meeting were also introduced as an exhibit in Grenell's deposition, and state, in pertinent part:

Dick Grenell stated that the Township views these as a commercial activity and they are taking place in a residential district, which is against the Zoning Ordinance. However, Dick Grenell also added that there are still some rental cottages that have existed since before the Zoning Ordinance was enacted in 1979 and are legal, non-conforming properties. Laketon Township Attorney Mr. David Bossenbroek added that the Township has historically had short term rental cottages and seasonal properties, but now, more homes are permanent year round residences and there is a clash of uses. The current zoning ordinance classifies the area as a residential area and short term rentals are really a gray area under the current zoning ordinance. The question being is this a commercial use. Mr. Bossenbroek went on to explain that several things could be considered to combat this clash of uses. . . . Changing the definition of a dwelling is just one way of handling the situation and it is possible it could be challenged legally. Mr. Bossenbroek also added that there are still some rental cottages that are "grandfathered in" (as they existed prior to the current zoning ordinance) and could continue to be rented for short terms.

Grenell testified that "it was hard to control [the rentals] unless you changed the definition of a dwelling." Grenell opined, however, that even before the definition of "dwelling" was amended in 2004, renting for less than 30 days was not allowed. Grenell contended that a definitional change was nonetheless necessary because, "[t]hat was not—That was not in the ordinance, but that's the way that I interpreted. As the zoning administrator I can – I interpret the ordinance, and that was the way I interpreted it." Grenell based this opinion on what he was told when he started as zoning administrator and on the ordinance language:

Q. Ok. You said that it was your opinion that one could not rent a residence or dwelling for less than 30 days under the ordinance in effect in January 2003.

A. Yes.

Q. Could you point to me what ordinance section that leads you to that conclusion?

A. Well, normally in here it says in a residential district it's a – single-family dwellings.

Q. Anything else?

A. No. That's what I – And just common sense tells me that.

Q. Anything else?

A. It's a residential district. R-1's are one single-family residential district. That's what tells me that. You can't use it as a commercial enterprise. So—

Q. And that would again be based on Section 200?

A. Uh-huh. The single family? Section 200, Residential District A. Right.

Q. Ok, that's the basis of your belief that you cannot rent a structure for less than 30 days.

A. Sure. That's the way that I interpreted it, and that's the way that I was told when I came on board, is that that's the way it was interpreted prior to me.

On September 20, 2004, following the meetings previously discussed, the definition of “dwelling or residence” in plaintiff's ordinance was amended to provide, in pertinent part:

A building or portion thereof used exclusively for residential purposes, including one family, two family and multiple family dwellings, but not including motels, hotels, tourist homes, cabins, tents campers or travel trailers. A residential purpose shall not include short term rentals, including sub-rentals, for periods of less than 31 days or one calendar month, whichever is less.

The parties do not dispute the fact that the 2004 amendment clearly prohibits short-term rentals, which would only be allowed to continue if considered to be a legal, non-conforming use as permitted in Article III of the zoning ordinance.

Douglas Vanse testified that he received a letter from Grenell, dated June 3, 2005, requesting that he cease renting out the main residence to the public. Grenell took the position that unlike renting out the cottages, which constituted a legal, non-conforming use since the commercial use existed prior to the adoption of the 1979 zoning ordinance, the main house was the prior owner's principal residence and was never rented out to the public; thus, renting it out violated the zoning ordinance. On August 4, 2006, plaintiff filed a complaint requesting

preliminary and permanent injunctions prohibiting defendant from conducting a commercial business enterprise consisting of short-term weekend and weekly seasonal rentals of the guesthouse and main house based on a violation of the zoning ordinance, and to enjoin defendant's use of a motor home placed on the premises for commercial and residential purposes.

By stipulated order, the parties thereafter agreed that defendant would comply with plaintiff's zoning regulations pertaining to the use and storage of motor homes, and plaintiff would dismiss that portion of its complaint. Plaintiff also agreed to dismiss its claim regarding defendant's short-term rental of the guesthouse because the prior owner also used the guesthouse for that purpose. The sole issue remaining for the February 2, 2007 bench trial was whether the short-term rental of the main house violated plaintiff's zoning ordinance, or was a continuation of a legal, non-conforming use. The parties submitted a stipulated statement of facts for trial. The parties also stipulated to the admission of the depositions of Douglas Vanse and Grenell in lieu of their testimony at the bench trial.

Following the bench trial, the trial court issued a February 9, 2007 opinion ruling that although the ordinance that was in effect when defendant purchased the property defined a dwelling "to include this *type* of use [short-term rentals]," the Orshals only used the main house for their residence and renting it out now would expand the non-conforming use. Plaintiff was granted an injunction, and this appeal followed.

II. Analysis

Contrary to the ruling of the trial court, we find that the only relevant question in this case is whether short-term rentals were allowed under the 1979 ordinance, which was in effect at the time defendant began using the property in such fashion in 2003. Defendant contends that the 1979 ordinance permitted short-term rentals, and that after the 2004 amendment, short-term rental of the main house became a legal, non-conforming use. Plaintiff maintains that it did not rezone in 2004; rather, it merely clarified the language regarding the prohibition of short-term rental use. We agree with defendant.

This case involves the interpretation of ordinance language to which the rules of statutory construction apply. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 568 n 15; 737 NW2d 476 (2007). Statutory interpretation is a question of law that is reviewed de novo. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008). "We review a trial court's grant of injunctive relief for an abuse of discretion." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 105; 662 NW2d 387 (2003). Additionally, the trial court's factual findings in a bench trial are reviewed for clear error and its conclusions of law are reviewed de novo. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008). "The clear error standard requires us to give deference to the lower court and find clear error only if we are nevertheless 'left with the definite and firm conviction that a mistake has been made.'" *Id.* (citation omitted).

Both Michigan statutory law and case law provide that the pertinent use of a property is the actual use before the amendment or ordinance enactment. *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993); MCL 125.3208. MCL 125.3208(1) provides, in part: "If the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning

ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment.” If the non-conforming use lawfully existed before the zoning ordinance or amendment was enacted, it is protected as “a vested right in the use of particular property.” *Heath Twp, supra* at 439. The use must be actual, meaning that it “must be apparent and manifested by a tangible change in the land, as opposed to intended or contemplated.” *Id.* at 440. Moreover, Michigan case law and MCL 125.3208 both emphasize that the enactment date of the ordinance “is the critical point in determining when a nonconforming use vests.” *Id.* at 441, citing *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89; 223 NW2d 689 (1974).

At the time defendant purchased and began renting out the main residence in 2003, the 1979 ordinance was in effect. The ordinance defined a “dwelling or residence” as “the residence or sleeping place of one or more persons,” and specifically included “one-family, two-family, and multiple family dwellings, apartment-hotels, boarding and lodging houses.” Laketon Township Zoning Ordinance, art I, § 102-10.¹ *Merriam-Webster’s Collegiate Dictionary* (11th ed) defines an apartment-hotel as “a hotel containing apartments as well as accommodations for transients.” *Id.* at 57. A boarding house is defined as “a lodging house at which meals are provided.” *Id.* at 137. A lodging house is a “rooming house,” *Id.* at 731, and a rooming house is “a house where lodgings are provided for rent,” *Id.* at 1082. While apartment-hotels, boarding houses and lodging houses may traditionally involve rentals of more extended durations, they are nonetheless rentals, and nothing in the 1979 ordinance’s definition of “dwelling or residence” prohibited short-term rentals. As such, we find, as did the trial court, that the 1979 zoning ordinance allowed, or perhaps more accurately stated, did not prohibit, short-term rentals. Because defendant was using the main residence for short-term rentals at the time of the 2004 ordinance amendment, it is entitled to continue to do so as a lawful, non-conforming use as authorized by MCL 125.3208(1) and as permitted under Article III of the zoning ordinance. Given our finding that defendant’s short-term rental of the main house was permitted at the time of the 2004 ordinance amendment, we do not deem it relevant to consider the manner in which the Orshals were using the main house during their tenure of ownership, and the trial court abused its discretion when issuing an injunction on that basis.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering

¹ The 1979 ordinance definition of “dwelling or residence” also included a rather expansive description of a building that is either “designed or used” for such purposes.