

Pending before the Court is the appeal of York Beach Mall, Inc. ("YBM") from a decision of the Board of Adjustment ("the Board") of the Town of South Bethany ("South Bethany" or "the Town") upholding the building inspector's decisions citing YBM for two zoning violations. The first decision was that YBM's six foot fence violated a residential area regulation prohibiting fences greater than four feet in height. The second was that YBM was making commercial use of a residential area. This is the Court's decision on the appeal.

FACTS

History of Property in Question

The dispute at hand centers on a piece of property known as Paradise Canal ("the canal") located in South Bethany, Delaware.

In 1959, Vance and Pearl McCabe owned the canal. The canal is located west of, and adjacent to, a 1.86 acre piece of property on which the McCabes built York Beach Mall (this 1.86 acre piece of property also will be referred to as "YBM"). In 1959, the canal was a body of water approximately 40 feet by 365 feet.

The property originally was located in what was known as York Beach, Inc. In 1961, restrictions on York Beach, Inc., specified that only Section A was to be used for business or commercial purposes. Section A was YBM; the canal was outside of Section A.

The storm of 1962 caused the canal to be partially filled in, leaving only approximately 80 feet of the canal under water.

Originally, the canal and YBM were in the county, and consequently, were subject only to Sussex County's zoning regulations. However, in 1972, South Bethany annexed the canal and

YBM. Although the Town adopted its first zoning ordinance in October, 1973, as appellee concedes in pages 4, 5, 6 and 18 of its answering brief, the canal was not zoned until 1997. That is because the official zoning maps from 1973 to 1994 designated the canal as water. For the first time, in April, 1997, the canal was included in the residential zoning district, and the amended zoning map, which showed the canal as residential, was recorded on June 20, 1997. This is an important fact and I will rephrase it. The canal never was zoned until 1997. I note that the Board's concession in its brief regarding the timing of the canal's zoning is in accordance with the law that an area not included in a zoning map is unzoned. *Auditorium, Inc. v. Board of Adjustment of Mayor & Council of Wilmington, Del. Supr.*, 91 A.2d 528 (1952); *Rye v. Boardman, N.Y. Supr.*, 171 N.Y.S.2d 885 (1958).

Beginning in the 1960s and through the 1970s, the Town stored its municipal property on the canal.

In 1978, Vance McCabe asked the Town and the county if he could be relieved from taxation on the land described in the letter as being under water. Exemption from taxation was granted.

A dispute regarding the title to the canal came to a head in the mid-1970s. Claiming title were Vance and Pearl McCabe, South Bethany, and the State of Delaware ("the State"). The Superior Court resolved the title dispute in its decision in *McCabe v. Wilson, Del. Super.*, C.A. No. 39, 1977, Chandler, J. (December 10, 1986), wherein it held that Vance and Pearl McCabe retained title to the canal.

Ultimately, title to the canal, as well as YBM, passed to Sandra Robertson and her two daughters by operation of wills.

Sandra Robertson desired to fill in the canal. The record shows that there were complaints from residents about the view behind YBM. The Town requested that YBM install a fence to hide this rear area. YBM agreed to do so once it filled in the rest of the canal.

YBM requested a permit from the Department of Natural Resources and Environmental Control ("DNREC") to fill in the canal, and it indicated on the application that the purpose of filling in the canal was "To close a hazzerdest [sic] dead end lagoon and make parking area behind York Beach Mall." DNREC granted the permit.

The canal ultimately was filled in and a six foot fence, which was authorized by the commercial zoning ordinances, was installed sometime in July or August, 1989. The fence was installed on the western boundary of the canal, not on the western boundary of the 1.86 acre known as YBM. No permit was given to YBM regarding the fence.

An aerial photograph in 1994 does not show that there are dumpsters or propane tanks located on the canal.

In January 1997, Ms. Robertson and her daughters deeded the canal to YBM, which had been incorporated since 1984.

On May 9, 1997, the Town approved a revision to the official zoning map, thereby zoning the canal as residential.

On July 11, 1997, the building inspector, upon instruction from the Mayor, cited YBM for violating § 145-11 of the Town's Code

by having a six foot fence in a residential area. That section, which addresses residential fences and walls, provides:

Subject to limitations imposed by § 145-9, no person shall erect a fence or wall or portion thereof, except as a retaining wall of a building or fence enclosing a swimming pool, that shall exceed four (4) feet in height.¹

On August 6, 1997, the Town cited YBM for another violation, charging YBM was making a commercial use of residential property in violation of Article VII, R-1 Single Family Dwelling District of the Code.

YBM appealed both violations and the appeals were consolidated. The Board held a public hearing. Testimony was given over two nights, and on December 12, 1997, the Board members voted on the matter and stated their rationale for their votes. The Board issued its written decision on February 13, 1998.

Summary of Testimony

1) Richard Mais

Richard Mais ("Mais"), General Manager of YBM, testified to the following.

He was involved with the placement of the fence in the rear of YBM. Copies of the fence proposal indicating the fence's location

¹The section of the Code pertaining to commercial fences, § 145-12, provides:

All commercial property shall provide a privacy fence at least six (6) feet but not more than eight (8) feet in height. A fence shall be erected to conceal various storage equipment/materials, dumpsters and any other materials normally found in commercial establishments. This fence shall be anchored in such a manner that it cannot become airborne during high winds and/or stormy conditions.

were sent to Bill Campbell ("Campbell"), the building inspector at that time.

Mais' testimony is the only evidence regarding the knowledge of the location of the fence:

Q. Mr. Mais, turning back to what we have identified as BIII, does that show the location of the proposed fence being located on the westerly side of the last portion of the lagoon that was still open?

A. Yes.

Q. And did you have discussions with the then building inspector regarding the location of that fence?

A. Yes.

Q. Was it required to be placed there as opposed to along the eastern portion of the building?

A. Yes.

Q. Was there a specific ordinance that required that?

Q. Was there a specific ordinance of the Town requiring commercial fences to be margined at the extremities of the commercial properties?

A. Yes.

Q. And that's why the fence was placed?

A. Yes.

Q. Was a building permit required by the then building inspector?

A. No.

Transcript of November 25, 1997 Hearing at 18-19.

The Board did not note this testimony or make any ruling regarding Mais' credibility in its decision.

Mais further testified as follows.

Since May, 1986, YBM and its tenants have used the canal for

employee parking, deliveries, as well as the placement of dumpsters, propane tanks, and a well.

The canal never was taxed until it was deeded to YBM in January, 1997.

2) Sandra Robertson

Sandra Robertson testified as follows. Prior to 1986, the canal was used for parking as well as the placement of dumpsters and propane tanks. The Town used the canal for the storage of lifeguard stands and other property. When she applied for the application to fill in the canal, she wrote that she intended to use the canal for parking. She assumed the Town had notice of this application; however, she had no proof that it did.

3) Carol Goodhand

Carol Goodhand, the Town's building inspector, testified as follows. A violation comes to her attention either by someone in town alerting her to a situation or the Mayor or Town Council directing her to issue a violation. She then investigates and if there is a problem, she issues a violation notice. In this case, she issued the two violations to YBM at the direction of the Town Council. She had reviewed the Town records and had not found anything, including a permit, relating to the exact location of the fence nor any correspondence between Campbell and YBM regarding the location of the fence. The minutes of the council meetings addressing the fence never state exactly where the fence was to be placed. The only record pertaining to the property is a copy of the permit from DNREC to fill in the canal. YBM never has requested a

change of zoning.

She has seen delivery trucks deliver to the rear of YBM. Uses of the canal before 1997, which she noted, were for parking and the placement of dumpsters. After May 1997, she noticed that dumpsters, gas tanks, and a well were added. These items did not require the issuance of building permits in order to be placed there. Each of the items, except for the well, are moveable.

4) Herbert Schaffer

Herbert Schaffer, current mayor of the Town, testified as follows.

He has been involved in the Town's government in various positions since 1984. He is familiar with the history of this case.

In the 1980s, the area behind YBM was unsightly, and the Council made overtures to YBM about the construction of a fence in order to hide the unsightliness. He was on the Council at the time of the fence's construction; however, he was not present during specific discussions about the fence. Campbell played a large role in the construction of the fence.

Mayor Schaffer does not remember any specific discussions regarding the fence's location. He does remember that the Council wanted the fence to be six (6) feet high to hide the items sitting behind YBM. He assumed the fence was placed on the border of YBM's property. No one focused on the fence's location; instead, the focus was on its installation because the Town had wanted it installed for such a long period of time to hide the eyesores.

When questioned about the Town's delay in citing YBM, Mayor

Schaffer responded as follows. The Town rides Sussex County's tax records; the tax records did not assess the canal; and until Hugh J. Dolan, a resident, called the fence's location to their attention in 1996, the Town had no idea the fence was located on the outside border of the canal property rather than the outside border of the YBM property. He affirmed his testimony was that he had no knowledge or awareness that the filled-in portion of the canal was fast land and used for commercial purposes until 1996.

5) Lawrence Lank

Lawrence Lank ("Lank"), Director of Planning and Zoning for Sussex County since 1985, testified as follows.

In 1971, YBM and the canal, which were in the county, were zoned as medium density residential. This zoning included bodies of water such as the canal. The 1973 official zoning map of South Bethany showed the canal was unzoned and there was no change until the amendment to the map in 1997, zoning the canal residential. By showing the canal as a body of water, it was unzoned and unrestricted unless the Town had restrictions in its ordinance. Once the lagoon map was abandoned the property owner should have applied for rezoning of that parcel or portion of land.

Lank agreed that in order to acquire a legitimate status of nonconformity, a property owner must have a legal and legitimate use prior to the adoption of the zoning ordinance. A use on an adjacent parcel which is accessory to a primary structure on the adjacent parcel could be considered a nonconforming use only if that use was prior to the creation of the zoning ordinance. If the

canal had a commercial use before the Town zoned it, then such a use would be nonconforming. The conveyance of the canal to YBM in 1997 would not have affected the canal's zoning.

6) Bonnie Lambertson

Bonnie Lambertson ("Lambertson"), vice-president and spokesperson for the Concerned Citizens of South Bethany, testified on behalf of that group.² Lambertson testified to the following. She reviewed a picture taken on August 29, 1996, which showed dumpsters and a car in the canal area. Since Grotto's has moved in, there has been an increased commercial use of the property; noises, smells, traffic and light pollution have increased.

7) Hugh Dolan

Hugh Dolan testified. He recited a statement of facts to the Board and lodged complaints about the activities of Grotto's, Ms. Goodhand's actions, and Mr. Mais.

8) Joel Hamilton

YBM called Joel Hamilton as a rebuttal witness. He is the owner of B&R Tackle, which is located in YBM. He testified as follows. He has been a tenant since 1976, and has placed dumpsters on the canal since that time. The canal also was where trucks have made, and continue to make, deliveries to his business. If the fence was moved inward from its present location, he would not have a place for his dumpsters and trucks would be unable to make

²Although the Board allowed them to participate in the hearing below, this Court refused to allow such participation on appeal. York Beach Mall, Inc. v. Board of Adjustment of Town of South Bethany, Del. Super., C.A. No. 98A-03-001, Graves, J. (February 2, 1999).

deliveries to his business.

Summary of Board's Decision

Before I summarize the Board's decision, I must address a problem with the transcript of the Board's decision rendered on December 12, 1997. The Board members discussed their decisions on the violations at the December 12, 1997, meeting and thereat, set forth their rationale for their votes on the violations. The written decision, rather than setting forth the rationale, references these statements. Unfortunately, virtually the entire transcript is noted as being "unintelligible". The Court obtained the tape of the December 12, 1997, meeting and listened to it. The Court was able to decipher what was said and will summarize the contents of the tape below. However, this problem with the transcript has caused the decision on this matter to be delayed for an inordinate amount of time.

Because significant problems can occur when a record is not intelligible, all boards of adjustment should take all precautions necessary to insure that all participants in the hearings speak directly into a microphone so that a record is made which a court reporter can transcribe.

With that said, I turn to the tape of the December 12, 1997 meeting.

The first person to set forth his vote and the rationale therefor regarding both violations was Joseph DeMul. He reviewed the chronology of the canal. He then stated as follows. The

"kernel" of the case is the rule of law that "intent alone, without implementation, is not sufficient to bind any land." YBM, although intending to use the canal strip as an addition to their existing commercially zoned 1.86 acre, never took any action to implement this desire until January, 1997, when Ms. Robertson transferred title to YBM. Specifically, YBM did not make any request for zoning changes; YBM did not take steps to place the property back on the tax roll; YBM did not request building permits when needed. Thus, officially, zoningwise and taxwise, the canal was underwater; unused; and useless, and this official status remained unchanged until 1997. Thus, to everyone but YBM, the canal was not commercial. The implementation, not YBM's intent, is what counts.

At the time the zoning ordinance was adopted on November 1, 1973, the only use of the canal strip was for the storage of town property. This is a public use; thus, the nonconforming use was a public use. A nonconforming use must be continued, and if unused, it is lost after a period of one year. The public use ended once the title was ruled to be with the McCabes in 1986. The nonconforming status was lost. Consequently, the strip reverted from public to residential zoning on the basis of the allowed uses in the zoning maps.

Since property owners must abide by the zoning restrictions, the violations must be upheld.

John Hough stated as follows. He agreed with Mr. DeMul that if there is a break in a nonconforming use, then that use is lost and he did not think there was enough continuity of the commercial use

or enough of any commercial use to justify a nonconforming use. He voted to uphold the violations.

Mike Sheehy voted to uphold the violations on the ground that the canal never has been zoned commercial; instead, it has been zoned residential.

Doug Malsbury also voted to uphold the violations. He stated as follows. In his opinion, the question is whether the canal is to be considered all one property or to be considered nonconforming commercial. He reviewed the history of the canal, also. He then stated:

Up until this dispute started in '96 and '97, evidence suggests that the canal areas was used for the following: Moveable dumpsters were on or partially on it; two moveable propane tanks were probably slightly in or on the banks of what used to be an old unbulkheaded canal. The area was driveable and used for some deliveries as well as some minimal parking and maybe minimal occasional overnight parking, and minimal storage.

During the last year, the following commercial supportive activities had developed: Two large propane tanks with concrete filled pipe type barricades installed in the last filled area of the canal. There is at all -- there is at times vehicle parking which has completely saturated all available spaces, spilling over into the streets.

There has been what is believed to be first time construction and land development as described in the code. ***

There has been testimony that this parcel of land has been used commercially for years. There may have been some migrating supportive commercial use made of this area and should not have been ignored if it was realized. But it has been minimal with almost no, if any, construction or land development.

Since ownership of this parcel has transferred to York Beach Mall, there has been accelerated land development, construction, wells, large propane tanks, platforms, excavations, grading, filling, and saturated parking, all to support commercial activities.

After reviewing the evidence, laws, testimony, old aerial photo maps, zoning codes and purposes, past and

present, covenants, charters and related items, it is clear to me the old canal bed was never intended by the county, state, local government, and people, past or present, for expansion of commercialism.

Finally, John Manion, who voted to uphold the violations set forth his rationale as follows. There was no compelling evidence of substantial commercial support use of the canal before the adoption of the zoning ordinance in December, 1973. Nonconforming uses prior to 1973 could continue but not be expanded. Even though the Town was not vigilant in dealing with the placement of the fence and filling of the property, the property still could never be used for commercial support purposes since that was prohibited by the zoning code.

The Board issued its written decision on February 13, 1998. Therein, it found as follows:

The Board found that during the time of the ownership and occupancy of the property at Paradise Canal, by the McCabe Family, the property had been used for a multitude of purposes including but not necessarily limited to, storage of beach patrol and beach related materials by the Town, commercial uses accessory to the operation of York Beach Mall, parking, the placement of dumpsters and propane tanks, and for loading and unloading of goods and materials for past and present enterprises located in the Mall. ***

After having considered the credible testimony of the witnesses, the exhibits, and the argument of counsel, the Board of Adjustment finds that the ultimate issue is a determination of whether or not Paradise Canal is or was a commercial use or a non-conforming commercial use. Based upon the facts before it and for the reasons stated on the record by the individual members of the Board of Adjustment, the Board finds that the property known as Paradise Canal is neither zoned commercially nor has a non-conforming commercial use been established.

The Board issued its decision beyond the sixty day period

required by the zoning ordinance.³ The Board contends this delay was because of unexpected surgery the Chairman of the Board had to undergo and because the Town was recovering from two major storms.

DISCUSSION

Summary of Arguments

Appellant advances a number of arguments on appeal as summarized below.

The Board's decision is invalid because the Board did not comply with the Town ordinance requiring it to file its decision within 60 days of the hearing.

The Town's building inspector instructed YBM where to place the fence, and the fence was properly located. Prior to 1997, the canal was not designated as zoned, and consequently, any use was permissible until the land was specifically designated as R-1. Since the prior use was a legal non-conforming use, this non-conforming use can continue.

The limitations for taking an appeal from a decision of the building inspector passed in 1989 after the fence was built. Thus, the Town is barred from pursuing the matter.

The doctrines of laches and estoppel prevent enforcement of the alleged zoning violations.

³The pertinent zoning provision, § 145-62 of the South Bethany Code, provides:

A. Report of decisions. On all appeals, applications and other matters brought before the Board of Adjustment, the Board shall inform, in writing, all the parties of its decisions and the reasons therefor within sixty (60) days after the date of the conclusion of the hearings.

Standard of Review

Courts have limited appellate review of the factual findings of an administrative agency. The functions of a court reviewing a decision of a Board of Adjustment are to determine whether substantial evidence exists on the record to support the Board's findings of fact and to correct errors of law. *Hellings v. City of Lewes Board of Adjustment*, Del. Supr., 734 A.2d 641 (1999). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994). If substantial evidence exists, the Court may not reweigh the evidence and substitute its own judgment for that of the Board. *Hellings v. City of Lewes Board of Adjustment*, supra. If there is an error of law or a lack of substantial evidence, the Court may not remand the matter for further proceedings. Id.

Timeliness

The first issue I address concerns the timeliness of the Board's decision. Although it was untimely, it was rendered. Appellant has not cited to any harm caused by the delay. I will allow the appeal to proceed in the interests of justice. *Cheswold Aggregates, L.L.C. v. The Board of Adjustment of the Town of Cheswold*, Del. Super., C.A. No. 99A-12-001, Ridgely, J. (March 17, 2000).

Non-conforming Use

Before I examine the facts of this case, I set forth the general law regarding nonconforming uses.

As explained in *Breasure v. Swartzentruber*, Del. Ch., C.A. No. 1007-K, *Berger*, V.C. (November 1, 1993) at 4:

"[T]he basic notion of a nonconforming use precludes a change to a use which is not a continuation of the one which existed on the effective date of the ordinance. A new or substituted use, differing in quality or character, is prohibited unless the ordinance otherwise provides." [Citations omitted.] However, "a nonconforming use may be intensified where normal growth and expansion reasonably require such intensification." [Citation omitted.]

In order to be deemed a nonconforming use, that use must have existed at the time of the enactment of the zoning code. *New Castle County v. Harvey*, Del. Ch., 315 A.2d 616 (1974); *Minquadale Civic Association v. Kline*, Del. Ch., 212 A.2d 811 (1965). Furthermore, the use must not be only casual or occasional. *Mellow v. Board of Adjustment of New Castle County*, Del. Super., 565 A.2d 947, 954 (1988); *Minquadale Civic Association v. Kline*, 212 A.2d at 816. Finally, a nonconforming use, once it exists and continues, runs with the land. *Kirkwood Motors, Inc. v. Board of Adjustment of New Castle County*, Del. Super., C.A. No. 99A-12-009, *Quillen, J.* (May 16, 2000) at 5.

Central to an examination of whether a nonconforming use existed is the determination of when the canal was zoned. As noted earlier in the facts, the canal was not zoned until 1997, and for the first time, it was zoned as residential. Unfortunately, the Board members, in rendering their decisions, considered the canal to have been zoned in 1973. That was an error of law.

Because the Board incorrectly determined the date of zoning to be 1973 rather than 1997, its review of whether a nonconforming use

of the property existed at the time of the zoning also was wrong as a matter of law.⁴ Thus, the next step the Court must take is to determine whether it may rule, as a matter of law, that nonconforming uses of the property existed at the time the canal was zoned residential in 1997. The Court is well aware that it should not view the evidence and make findings of fact. *Hellings v. City of Lewes Board of Adjustment*, 734 A.2d. However, in this case, it is undisputed that before and as of 1997, the canal was used in connection with the commercial activities of YBM; dumpsters and propane tanks were placed there and vehicles were parked there.⁵ The witnesses for both YBM and the Town so testified.

The next question is whether such use was more than casual or occasional so as to constitute a valid nonconforming use. In its briefing, the Board argues that the canal was not continuously used in a commercial fashion for any extended period of time. There have been periods of vacancy, then periods of temporary uses "which have been minor in degree and intensity." Answering Brief at 6. It further argues on that same page:

The testimonial and photographic evidence shows that prior to 1997 only a few moveable propane tanks and dumpsters, a recycling bin, and the occasional parked vehicle were located on, or partially on, the canal parcel.

The Court rules that as a matter of law, the evidence

⁴However, in its briefing, the Board addresses the nonconforming use as of 1997 without noting any discrepancy with the decision ruling 1973 was the significant point in time.

⁵For a period of time, the Town used the canal as a storage yard. Whether a municipal use or not, its character was akin to a commercial use.

established the use of the property as an accessory to YBM's commercial activities was not casual or occasional; the evidence clearly showed such accessory commercial use took place on a regular basis before the zoning of the property to residential. If the Board had concluded that the evidence did not establish a nonconforming use as of 1997, then this Court would have reversed that decision as having been contrary to the substantial evidence of record. Thus, in this situation, the Court considers it appropriate to rule that the use of the canal for uses accessory to YBM's commercial activity was a valid nonconforming use.

As if conceding that the Court will, as a matter of law, rule that the use of the canal for such accessory commercial uses was continuous and not casual as of 1997, the Board argues that merely commercial accessory uses do not constitute a nonconforming commercial use; instead, there must be actual commercial activities which take place on that piece of property. That is not the law in Delaware as the decisions in *Kirkwood Motors, Inc. v. Board of Adjustment of New Castle County*, *supra* and *Atlantic Properties Group v. Deibler*, Del. Super., C.A. No. 93M-11-001, Graves, J. (January 6, 1994) at 15 evidence. Thus, a use may be deemed a nonconforming use even if it constitutes an accessory commercial use.

The real question here, which the Board never reached because its reasoning was in error, is whether the uses which took place were different from the valid nonconforming use or whether they were merely an intensification of such. Since the evidence showed

that all uses at the time of the hearing either were parking or the placement of items accessory to the commercial activity to YBM, then the increase in parking and the placements of more dumpsters, a well, and propane tanks, were merely an intensification of the valid use existing at the time of the enactment of the zoning code.

In light of my conclusions above, no need exists to consider appellant's other arguments.

For the foregoing reasons, I reverse the decision of the Board.

IT IS SO ORDERED.