

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. JEFFREY T. BERGIN

CASE NO. C20154354

DATE: April 21, 2016

PASADERA BEHAVIORAL HEALTH NETWORK,
Plaintiff,

vs.

CITY OF SOUTH TUCSON, ET AL.,
Defendants.

UNDER ADVISEMENT RULING

IN CHAMBERS - UNDER ADVISEMENT RULING

The Court has under advisement Plaintiff's Special Action Appeal from the City of South Tucson Board of Adjustment. The Court has reviewed Plaintiff's opening brief, Defendants' Answering Brief and Plaintiff's Reply Brief. The Court has considered the Record on Appeal (ROA) filed in support of the motions and has considered the arguments presented at the March 7, 2016 hearing. After significant deliberation, the Court rules as follows.

BACKGROUND

The Record on Appeal (ROA) documents the following background to this case. Plaintiff Pasadera is an Arizona non-profit corporation that provides behavioral health services in Southern Arizona. Pasadera's services include mental health and substance abuse care. Pasadera's substance abuse care includes a residential care program operated under a Level II licensed Behavioral Health Residential Facility from the Arizona Department of Health Services, Office of Behavioral Health.

This matter involves Pasadera's purchase of property (the Property) from Arizona's Children Association (ACA). ACA has operated in Arizona since 1921 and continuously used the Property as its campus. In the 1960s, ACA opened a residential facility on the property to provide residential substance abuse services. ACA's residential program focused on adolescent patients. Pasadera's residential treatment program, in contrast, focuses on adult patients.

In 1978, the City adopted the Zoning Code, which placed the Property in a Single Family Residence Zoning District (SR-1). The Zoning Code allows an existing use that is inconsistent with the Zoning Code to continue operating as a legal nonconforming use. See Zoning Code § 24-18(a); A.R.S. § 9-462.02(A). ACA

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continued to operate its Residential Facility until January 4, 2013, when it made the decision to close its Residential Program and sell the Property. In January 2014, Pasadera became interested in purchasing the Property and to use it for consolidation of its administrative offices, outpatient clinics and residential treatment services.

On February 13, 2014, Pasadera made an offer to purchase the property. On June 2, 2014, during a public special meeting of the City's Mayor and Council, South Tucson's Planning, Zoning and Development Services Director, Joel Gastelum, stated that Pasadera's proposed use of the Property would likely be allowed as a legal nonconforming use. (ROA at 5, pg. 151.) Similarly, on July 16, 2014, Mr. Gastelum stated in a letter to Pasadera's attorney, "The City of South Tucson acknowledges that the proposed use by Pasadera is not changing and therefore it is a legal nonconforming use and Pasadera will have no issue receiving a Zoning Compliance Certificate." Thereafter, on January 2, 2015, Pasadera was informed by interim City Manager Benny Young that no certificate or building permit would be issued if Pasadera served clients over 18 (eighteen) years of age. This decision was confirmed in a January 5, 2015 letter to Pasadera and signed by Mr. Gastelum. Pasadera was approved for a business license for "administrative and family outpatient services." On January 26, 2015, Mr. Gastelum clarified the City's position stating that Pasadera intended to use the property in a manner inconsistent with ACA's prior legal nonconforming use because it intended to change residential services by offering them to adults rather than youth. The City also stated that ACA's nonconforming use had been discontinued for more than six (6) months, thus, abandoning the legal nonconforming use pursuant to Zoning Code § 24-18.

Plaintiff has appropriately appealed this matter to this Court and challenges the City's licensing decision.

ANALYSIS

In reviewing the Board's decision, the Superior Court must determine whether the Board acted arbitrarily, capriciously or in an abuse of its discretion. *Murphy v. Town of Chino Valley*, 163 Ariz. 571, 574, 789 P.2d 1072, 1075 (App.1989). The Court may not substitute its opinion of the facts for that of the Board. *Id.* Rather, if there is credible evidence to support the Board's decision, it must be affirmed. *Id.* When the issues are ones of statutory interpretation, however, the Board's interpretation of the law is subject to *de novo* review. *Id.*

Legal Non-Conforming Use

Plaintiff argues Pasadera's residential treatment facility is an appropriate continuation of ACA's legal nonconforming use permitted under A.R.S. § 9462.02 and Zoning Code § 24-18(a). Plaintiff emphasizes that

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ACA operated under a Level II License and that Pasadera intends to operate under the same license, providing substantially similar services. Plaintiff also emphasizes that the City's administrator expressed an initial opinion that Pasadera's use was consistent with ACA's legal nonconforming use. Defendants argue the ROA supports finding Pasadera's residential treatment plan is substantively different from ACA's residential treatment program such that it is an impermissible departure from the previous legal nonconforming use. Defendants point to examples that the nature and character of the land use would change under Pasadera's residential program. Examples included Pasadera's need to install one or more fences in order to separate the residential portion of its property, Pasadera's plan to increase security on the premises, and that Pasadera's adult patients would be voluntary residents as opposed to ACA's involuntary minor residents

A nonconforming land use is commonly defined as a lawful use maintained after the effective date of a zoning ordinance prohibiting such use in the applicable district. *Rotter v. Coconino County*, 169 Ariz. 269, 271, 818 P.2d 704, 706 (1991). The vested right to continue the nonconforming use runs with the land and is not personal to the owner of the use at the time the right vests. *Id.* at 272. It is not disputed that until January 2013, ACA actively utilized its legal nonconforming use, including the youth focused residential treatment center. What is in dispute is whether Plaintiff's plans for an adult focused rehabilitation center is inconsistent with ACA's legal nonconforming use. The common law on nonconforming uses generally disfavors expansion or enlargement of the use as contrary to the "spirit underlying zoning, [which] is to restrict rather than to increase nonconforming uses." *Rotter*, 169 Ariz. at 277, 818 P.2d at 712 (emphasis omitted), quoting *Mueller v. City of Phoenix*, 102 Ariz. 575, 585, 435 P.2d 472, 482 (1967).

The Board determined that the nonconforming residential treatment use that may have existed at the time Defendants offered to purchase ACA's property involved services offered to minors that were not free to leave the property. The Board also found that the planned adult voluntary residential center would result in a significant change in the clientele that would likely increase security concerns. The Board determined that this was a departure from ACA's previous use.

The ROA does not include evidence showing that Pasadera's residential treatment center will operate in a way that will significantly depart from ACA's residential treatment center. Such evidence is necessary to support the Board's determination that Pasadera's treatment facility is a significant departure from ACA's legal nonconforming use. The Court is also persuaded by the holding in *Blake v. City of Phoenix*, 157 Ariz. 93, 754 P.2d 1368 (App. 1988) when it states "[a] mere increase in volume or intensity of use does not constitute a change in use." Here, Defendants' proposed change in use is not of a different kind of use and there is an

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absence of evidence that it would be accompanied by a drastic enlargement in the use.

THE COURT THEREFORE FINDS the Zoning Administrator's initial decision was correct and that Defendants' planned residential facility would be a continuation of the prior legal nonconforming use.

Abandonment of the Legal Nonconforming Use

Plaintiff argues that the nonconforming use was not intentionally abandoned and remains in existence. Plaintiff argues that due to a change in treatment philosophy, few children were being referred to ACA. This fact combined with budget cuts made it financially difficult to continue causing ACA to close its rehabilitation facility on January 4, 2013.

Defendants argue the legal nonconforming use was abandoned for more than six (6) months and, therefore, is no longer available to Plaintiff. Defendants further argue that Plaintiff did not "identify" the property as potentially fitting with its adult treatment facility model until one (1) year had passed from the voluntary termination of services. Therefore, a voluntary cessation of the nonconforming use existed for well over six (6) months, thus violating the City's zoning code. "No building, structure or premises where a nonconforming use has been discontinued for more than six (6) months . . . shall again be devoted to a nonconforming use." *City of South Tucson Zoning Code* § 24-18(d).

There is no requirement that there be a showing of the intent of the property owner in abandoning a legal nonconforming use. *City of Glendale v. Aldabbagh*, 189 Ariz. 140, 143, 939 P.2d 418, 421 (1997). Nevertheless, "[s]ome conduct within the control of and attributable to the property owner must be a cause of the condition justifying the termination [of the legal nonconforming use]." In the *Aldabbagh* case, the property owner was forced to close his business and to cease a legal nonconforming use because the City obtained an injunction, forcing the business to close for a year. In this case, however, ACA voluntarily closed its residential treatment center in January 2013 due to financial concerns. The ROA confirms that Plaintiff did not identify the ACA property as a potential location for its facility for at least 12 (twelve) months and there is an absence of evidence to show ACA made any attempts to maintain the legal nonconforming use during the twelve months before Pasadera became interested in the property. ACA's financially motivated and understandable decision was not a mere temporary suspension of use. It was a voluntary decision based upon ACA's business model.

THE COURT FINDS ACA's legal nonconforming use was voluntarily discontinued for a period in excess of six (6) months, thus precluding the continued nonconforming use.

Equitable Estoppel

Plaintiff argues that it relied on the initial opinions of the Zoning Administrator to its detriment.

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Equitable estoppels generally applies where (1) “the party to be stopped commits acts inconsistent with a position it later adopts”; (2) the other party relies on those acts; and (3) the latter party is injured by “the former’s repudiation of its prior conduct.” *City of Tucson v. Whiteco Metrocom*, 194 Ariz. 390, ¶22, 983 P.2d 759, 765 (App. 1999). The record reflects, however, that Plaintiff made an offer to purchase the property before the Administrator offered any opinions concerning the nonconforming use issue. For this reason,

THE COURT FINDS Plaintiff’s equitable estoppel argument fails as it did not rely on the Defendant’s acts prior to making an offer on the property.

Procedural Defect

The ROA documents the Defendants appropriately followed procedures in reaching its decision. The Court is not persuaded that the City’s decision was procedurally defective. For the reasons stated above,

IT IS ORDERED AFFIRMING Defendants’ zoning decision.

IT IS FURTHER ORDERED DISMISSING Plaintiff’s Special Action Appeal.


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