STATE OF MICHIGAN

COURT OF APPEALS

CANTON INVESTMENT & DEVELOPMENT, INC.,

Plaintiff/Counterdefendant/Appellant,

v

CHARTER TOWNSHIP OF CANTON,

Defendant/Counterplaintiff/Appellee.

UNPUBLISHED
August 20, 2020

No. 350117
Wayne Circuit Court
LC No. 18-009474-CH

Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

PER CURIAM.

Plaintiff-Counterdefendant Canton Investment & Development, Inc., appeals the trial court's order granting Defendant-Counterplaintiff Charter Township of Canton's motion for summary disposition and denying Canton Investment's motion for summary disposition. We affirm.

I. BACKGROUND

In 1950, the Township adopted the Township of Canton Zoning Ordinance ("1950 Ordinance"). The 1950 Ordinance created several zoning districts, including the "C Districts—General Business Districts." 1950 Ordinance, § 2.01. Permitted uses in the "C Districts" included "[b]oarding, rooming and lodging houses or tourist homes." 1950 Ordinance, §§ 5.01(f) and 8.01(a).

Property located at 43415 Michigan Avenue was included in the "C Districts." In 1953, a residential building was constructed on the property. In 1960, another building, which would later be operated as "Canton Party Store," was constructed near the residential building. The property as a whole was identified in the Township's Building and Inspection Services Division files as "Canton Party Store Motel." Thereafter, in 1967, the Township adopted the Zoning Ordinance of the Charter Township of Canton ("1967 Ordinance"). The 1967 Ordinance placed the property in the "C-1, Local Business District," and it prohibited "dwelling structures" from being erected in that district. 1967 Ordinance, § 4.14.

Sometime in the 1970s, Dib Odetalla purchased the property. In 1993, Abraham Nunu, who was a certified public accountant at the time, began preparing tax returns and performing bookkeeping for Odetalla. According to Nunu, he learned that Odetalla had been using the residential building as an apartment building.

In 1997, the portion of the property that contained the party store was conveyed to Khalad Al-Quad.[1] In December 2012, the portion of the property that contained the residential building was conveyed to Canton Investment, and it was operated as an apartment building. Nunu was the shareholder and manager of Canton Investment.

In 2014, the Township adopted an ordinance that required owners of residential rental units to register with the Township; the ordinance also required periodic inspections to ensure compliance with building safety codes. Canton Charter Township Ordinances, §§ 78-278 through 78-292. However, because Nunu failed to timely complete the registration paperwork and was thereafter largely unresponsive to requests to schedule an inspection, the residential inspection was not conducted until September 2017. When the building was inspected by Joseph Urbanek, building code violations were discovered in all five of the apartment units. Notices were mailed to Canton Investment, listing the repairs that would need to be made and instructing it to remedy the violations within 60 days. It was noted that some of the repairs would require permits.

As a result of the number of building code violations, Urbanek consulted Robert Creamer, the Township's Building Official. Creamer researched the property's history. According to Urbanek, Creamer found "paperwork" that suggested that the property was only approved to be used as a motel—not an apartment building. Creamer was also unable to locate certificates of compliance and occupancy for the property. As a result of the zoning issue and the violations, the Township refused to issue permits or a certificate of occupancy to Canton Investment. Creamer later deemed the property to be uninhabitable, and the residents were informed that they had to vacate the premises.

Canton Investment filed a complaint, requesting a temporary restraining order and preliminary and permanent injunctions. Although the trial court initially entered an order granting Canton Investment's motion for a temporary restraining order, the court later "dismissed" the order after hearing oral argument during a show cause hearing. The trial court denied Canton Investment's motion for a preliminary injunction and instead ordered the tenants to vacate the premises within 30 days. In the event that Canton Investment wanted to "seek a variance or other relief from the current zoning restrictions on [the] property," it was instructed to do so "as soon as possible." The parties later stipulated to dismiss the action.

Thereafter, Nunu was served with a notice of a dangerous building hearing under MCL 125.540. The notice reflected that Creamer had determined that the property contained "a dangerous building" and was recommending that it be demolished. During an April 12, 2018 hearing before a hearing officer, the parties discussed the zoning issue at length and agreed that Nunu should be given additional time to explore his options. Nunu's options were (1) to apply for permits to renovate the property or (2) to take the necessary steps with the Township Planning

[1] It is unclear if the property was split.

Commission "to meet the requirements of the zoning ordinance in order to obtain a certificate of occupancy" for the property by October 8, 2018. Nunu was warned that, if he did not pursue either option, the Township would have the right to demolish the building.

On August 2, 2018, Canton Investment filed another complaint, this time seeking a declaration that its use of the building as an apartment building was a legal, nonconforming use. Canton Investment alleged that the building had "been operated as an apartment building for in excess of 40 years." The Township answered the complaint and generally denied the allegations contained therein.

The Township filed a counterclaim, requesting a declaratory judgment that Canton Investment's use of the building on the property constituted an illegal, nonconforming use. In the alternative, the Township requested that the trial court declare that Canton Investment had violated ordinances by failing to obtain a certificate of occupancy and by violating the International Property Maintenance Code. Canton Investment filed an answer and mainly denied the allegations contained in the counterclaim. Canton Investment also requested that the trial court deny the Township's request for relief and instead "rule in favor of the requested relief set forth in the principal Complaint[.]"

At the next dangerous building hearing, it was noted that Canton Investment had not taken any steps to resolve the zoning issue and that Canton Investment had initiated a second circuit court action to determine whether the use of the building as an apartment building was a legal, nonconforming use. According to Canton Investment's counsel, if the trial court determined that it was a legal, nonconforming use, a certificate of occupancy and permits could be issued, and the matter would be resolved. The hearing officer granted Canton Investment additional time.

After the hearing, Nunu submitted an application to the Township Zoning Board of Appeals ("ZBA"). On November 8, 2018, the parties appeared before the ZBA. Counsel for Canton Investment explained the history of the property and the proceedings that had taken place in relation to the property. After a lengthy discussion, the ZBA decided to adjourn the matter so that the trial court could make a determination as to whether operating an apartment building on the property constituted a legal, nonconforming use.

Discovery commenced in the circuit court action. Urbanek and Creamer were both deposed, and neither of them could point to documentation to establish that the residential building had ever been used as a motel or that it was only approved to be used as a motel.[2] It was repeatedly acknowledged that the Township had limited documentation relating to the residential building in its files. Jeffrey Goulet, the head of the Township Planning Department, testified that, because "construction of the site occurred before [the Township] had any zoning or site plan requirements," his office did not have a file on the property. Thus, Goulet did not have any information as to whether the property was used as an apartment or a motel. He agreed that he did not have

[2] A 1993 letter from the Township's Fire Marshal concerning the "Fire Requirements for 43415 Michigan [Avenue]" was referenced. The letter was addressed to Odetalla at the "Canton Party Store Motel." In relevant part, the letter indicated that Odetalla was required to "[p]rovide 110 volt smoke detectors in each apartment."

information as to whether the property was approved "for any particular use." However, based on the building department records, Goulet believed the last legal use of the building was a motel.

On April 11, 2019, the parties appeared before the ZBA for a second time. Counsel for Canton Investment summarized the discovery that had taken place in the trial court proceedings and noted that the trial court had not yet ruled on whether Canton Investment was entitled to relief. Counsel argued that "there is no evidence that [the building] has ever been a motel." However, after reviewing the records, the ZBA decided to "affirm Mr. Creamer's position that the building is a nonconforming use."

Thereafter, the Township filed a motion for summary disposition. In relevant part, the Township argued that the only evidence to support that the building had continuously been operated as an apartment building was the testimony of Nunu, who testified that Odetalla had informed him that he had operated the building as an apartment building. The Township argued that, even if Odetalla had operated the building as an apartment building during the time he owned the property, such use of the building would have been an illegal, nonconforming use because the 1967 Ordinance prohibited "dwelling structures" in the district where the property was located.

Canton Investment opposed the Township's motion for summary disposition and filed a competing motion for summary disposition. Canton Investment argued that, because the building was constructed in 1953, the 1950 Ordinance was applicable. Canton Investment further argued that, because the 1950 Ordinance permitted the use of "[b]oarding, rooming and lodging houses or tourist homes" in the zoning district, operation of apartment buildings was permissible under that ordinance. According to Canton Investment, because "the use as an apartment has been consistent and never broken over the years," it constituted a legal, non-conforming use. The Township opposed the motion, arguing that an apartment building such as the one operated by Canton Investment did not fall under the definition of boarding or rooming houses under the 1950 Ordinance. The Township also pointed out that Canton Investment had not "offer[ed] any other facts or evidence to establish that the Property ha[d] been used as an apartment since it was constructed in the 1950s."

On July 24, 2019, the trial court held oral argument on the parties' motions for summary disposition. The parties made arguments that were consistent with their pleadings. However, when questioned by the trial court, counsel for Canton Investment conceded that it had not presented any evidence as to how the residential building was used in 1953. After hearing oral argument, the trial court denied Canton Investment's motion for summary disposition and granted the Township's motion for summary disposition under MCR 2.116(C)(10). This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision whether to grant a motion for summary disposition. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). In reviewing a grant or denial of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012) (quotation marks and citation omitted). This Court is "limited to considering the evidence submitted to the trial court before its decision on the motions."

Calhoun Co v Blue Cross Blue Shield of Mich, 297 Mich App 1, 12; 824 NW2d 202 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

The interpretation and application of ordinances are questions of law that are reviewed de novo. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407; 761 NW2d 371 (2008).

III. ANALYSIS

Canton Investment argues that the trial court erred by denying its motion for summary disposition and by granting the Township's motion for summary disposition.

A. CANTON INVESTMENT'S MOTION FOR SUMMARY DISPOSITION

Canton Investment argues that the trial court erred by denying its motion for summary disposition because the undisputed facts establish that the property was continually being used in compliance with the 1950 Ordinance. We disagree.

When the residential building was constructed, the 1950 Ordinance was in effect. It is undisputed on appeal that the zoning ordinances that were enacted thereafter did not permit residential use of the property. However, 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 relevant 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." Thus, if the nonconforming 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*, 442 Mich 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 by the property owner." *Id.* at 440 (quotation marks and citation omitted). As explained in *Norton Shores v Carr*, 81 Mich App 715, 719; 265 NW2d 802 (1978):

> A nonconforming use comprehends the physical characteristics, dimensions, or location of a structure as well as the functional use thereof or of the premises on which it is located, and is used as a generic term that includes nonconforming use of conforming structures and plots, nonconforming use of nonconforming structures and plots, and conforming use of nonconforming structures and plots. [Internal quotation marks and citations omitted.]

With respect to whether the use of the residential building complied with the 1950 Ordinance, "[t]he rules governing statutory interpretation apply to ordinances. Thus, this Court's goal in the interpretation of an ordinance is to discern and give effect to the intent of the legislative

body. If the language used is clear and unambiguous, the ordinance must be enforced as written." *Morse v Colitti*, 317 Mich App 526, 548; 896 NW2d 15 (2016) (citations omitted).

At the time the 1950 Ordinance was in effect, the property was included in the "C Districts," and the 1950 Ordinance permitted buildings in the C Districts to be used to provide "[b]oarding, rooming and lodging houses[.]" 1950 Ordinance, §§ 5.01(f) and 8.01(a). Canton Investment argues on appeal that because "boarding, rooming and lodging houses were permitted in the C-District, use of the property as an apartment was a legal, nonconforming use." However, there is no evidence as to how the building was used immediately after it was constructed in 1953. Indeed, the record does not even contain evidence as to who owned the property before Odetalla purchased it sometime in the 1970s. On appeal, Canton Investment places blame on the Township for failing to keep proper records and argues that "[t]he Township cannot fail to produce any records regarding use of the property, and then claim that lack of any records regarding use of the property shows that its current use is illegal."

However, even if Canton Investment is correct that the residential building was used as an apartment building since it was erected in 1953, Canton Investment's use of the building would not fall under the definition of a "boarding or rooming house" as Canton Investment claims on appeal. Section 1.03 of the 1950 Zoning Ordinance defines "boarding or rooming house" as follows:

> BOARDING OR ROOMING HOUSE. A boarding or rooming house shall be construed to mean any dwelling occupied in any such manner that certain rooms in excess of those used by members of the immediate family and occupied as a home or family unit, are leased or rented to persons outside of the family, without any attempt to provide therein or therewith cooking or kitchen accommodations.

Thus, in order to constitute a "boarding or rooming house," there could not have been "any attempt[s]" on the part of the family who dwelled in the home to provide the lessee or rentee with either "cooking or kitchen accommodations."[3] Because the 1950 Ordinance does not define "cooking," "kitchen," or "accommodations," it is necessary to consult a dictionary to ascertain the words' common meanings. *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). "Kitchen" is defined as "a room or place for the preparation and cooking of food," "cook" is defined as "to undergo cooking," and "accommodation" is defined as "lodgings," which is defined as "a room or rooms rented in a private home." *Webster's New World Dictionary* (1996).

In this case, Nunu acknowledged during his deposition that each of the five units in the residential building have "[f]ull kitchens," and that refrigerators and stoves were provided to the tenants. Thus, Canton Investment not only made attempts to provide its tenants with "cooking" and "kitchen accommodations," i.e., an area to prepare and cook food, it actually provided them.

[3] Generally, "or" is a disjunctive term, *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010), which indicates a choice between alternatives, *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 92-93; 811 NW2d 4 (2011).

Consequently, the building cannot be considered a "boarding or rooming house" during the time that the kitchens and/or amenities to cook and prepare meals were present in the units.

There is no evidence in the record as to whether the kitchens were present when the building was erected in 1953 and when Odetalla owned and operated the building. However, this is immaterial because "a continuation of a nonconforming use must be substantially of the same size and essential nature as the use at the time of the passage of the zoning ordinance." *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 29; 448 NW2d 727 (1989). "[N]onconforming uses may not expand." *Norton Shores*, 81 Mich App at 720. This is the case because "[o]ne of the goals of zoning is the eventual elimination of nonconforming uses, so that growth and development sought by ordinances can be achieved." *Id*. See also MCL 125.3208(4). Even if the residential building could have been considered a "boarding or rooming house" when it was operated in the years between 1953 and when Canton Investment obtained the property in 2012, Canton Investment changed the essential nature and enlarged the nonconforming use when it provided "cooking" and "kitchen accommodations" to its tenants. Therefore, the addition of these accommodations—whenever they occurred—created in an illegal, nonconforming use on the property.

Canton Investment also argues in a cursory manner that its use of the apartment building was permitted under the 1950 Ordinance because that ordinance permitted "lodging houses." In so arguing, however, Canton Investment does not explain or rationalize how its use of the building fits within the meaning of a "lodging house" and does not even attempt to define "lodging house." Consequently, Canton Investment has abandoned its argument on appeal that the building was being used as a "lodging house," and the argument need not be addressed by this Court. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008) (holding that an appellant's failure to properly address the merits of its assertion of error constitutes abandonment of the issue). Nonetheless, we have briefly considered the argument and have concluded that the apartment building could not be considered a "lodging house" given the plain meaning of the word "lodging"[4] and Nunu's testimony that Canton Investment rented most of the units in the building—which were divided into private living accommodations—on a long-term basis.

In sum, because the undisputed evidence establishes that Canton Investment's use of the building was not permitted under the 1950 Ordinance, Canton Investment's use of the property could not be considered a legal, nonconforming use and a genuine issue of material fact did not exist for trial. The trial court did not err by denying Canton Investment's motion for summary dispostion.

B. THE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION

Canton Investment argues that the trial court erred by granting summary disposition in favor of the Township on its claim that Canton Investment's use of the property constituted an illegal, nonconforming use. We disagree.

[4] "Lodging" is defined as "a place to live in, esp. temporarily[;] a room or rooms rented in a private home." *Webster's New World Dictionary* (1996).

The Township argued that summary disposition in its favor was proper because the undisputed record evidence established that Canton Investment's use of the building as an apartment building violated the applicable zoning ordinances, past and present. In response, Canton Investment argued that its use of the building was permitted under the 1950 Ordinance and therefore constituted a legal, nonconforming use. As already discussed, however, the record evidence does not support this argument and a genuine issue of material fact did not exist for trial as to whether Canton Investment's use of the building was a legal, nonconforming use. Consequently, the trial court did not err by granting summary disposition in favor of the Township on its claim that Canton Investment's use of the property as an apartment building was an illegal, nonconforming use.[5]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens
/s/ Thomas C. Cameron

[5] Based on this holding, the remainder of Canton Investment's arguments on appeal are rendered moot and need not be considered. See *Attorney Gen v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005).