NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

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| PERSAUD PROPERTIES FL INVESTMENTS, LLC,<br><br>Appellant,<br><br>v.<br><br>TOWN OF FORT MYERS BEACH,<br><br>Appellee. | ) | Case No. 2D19-1282 |

Opinion filed December 11, 2020.

Appeal from the Circuit Court for Lee County; Alane C. Laboda, Judge.

Jennifer R. Cowan, Kevin S. Hennessy, and Richard P. Green of Lewis, Longman & Walker, P.A., St. Petersburg; and Nicole J. Poot of Lewis, Longman & Walker, P.A., St. Petersburg (substituted as counsel of record), for Appellant.

Hudson C. Gill and Jeffrey L. Hochman of Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., Fort Lauderdale, for Appellee.

BLACK, Judge.

Persaud Properties FL Investments, LLC, owns beachfront property in the Town of Fort Myers Beach. The property includes a restaurant and bar with a license to

sell alcohol on the premises, including permitting alcohol sale on the part of the property which extends into the Environmentally Critical zone—the beach. The property, by virtue of the ability to allow the sale and consumption of alcohol in the Environmentally Critical (EC) zone, had been a nonconforming use under the Town's municipal code of ordinances until a 2019 determination by the Town that Persaud had abandoned the nonconforming use of the property. Upon the abandonment determination, the property lost its status as a grandfathered nonconforming use and was required to comply with current zoning regulations, which prohibit alcohol sales in the EC zone. The trial court ruled in the Town's favor in Persaud's action for declaratory relief, inverse condemnation, deprivation of due process rights, and injunction and entered a judgment finding that the Town had properly determined that Persaud had abandoned the nonconforming use of the property. We reverse.

Persaud's property is located in two zoning districts in the Town: downtown, which permits the sale of alcohol and its consumption on premises, and EC, which prohibits alcohol sales. The Town adopted the ordinance at issue in 1995. At the time of the adoption, the property in question operated with a liquor license and sold and served alcohol in what was later zoned as EC. The prior owner of the property had a valid liquor license and when Persaud purchased the property it obtained the license, transferring it to the company. In October 2014, Persaud closed the bar and restaurant to begin extensive renovations. The Town was well aware of the renovations as various construction permits had to be issued and inspections had to occur; additionally, during the renovation period, multiple stop-work orders were issued by the Town. Upon completion of the renovations in October 2015, Persaud sought the necessary approval

to reopen and begin selling alcohol on the premises, including in the EC zone. During the one-year period of closure and at the request of Persaud, the property's liquor license had been held in escrow or "inactive status" by the Department of Alcoholic Beverages and Tobacco, a fact which had been known to the Town and which was important to a Town planner for purposes of the abandonment issue. Nonetheless, the Town advised Persaud that it could not sell alcohol in the EC zone because the nonconforming use had been abandoned pursuant to a provision of the Town's land development code. Persaud then filed suit against the Town.

The operative complaint included a count for declaratory relief, as well as counts alleging a taking under state law and deprivation of due process under the Florida Constitution and a count seeking a mandatory injunction. Both Persaud and the Town moved for summary judgment. After a hearing, the court entered judgment in favor of the Town on all counts.

The parties agree that there are no factual issues in dispute. Because our conclusion as to the entry of judgment in favor of the Town on the declaratory relief count renders moot the remaining issues on appeal, we address only the issue of whether the trial court incorrectly determined, as a matter of law, that Persaud had abandoned the nonconforming use of its property pursuant to the Town's land development code. "We review de novo the trial court's determination that the [Town] was entitled to—and that [Persaud] was not entitled to—a judgment as a matter of law." See Highlands-In-The-Woods, L.L.C. v. Polk County, 217 So. 3d 1175, 1178 (Fla. 2d DCA 2017); see also Harkless v. Laubhan, 278 So. 3d 728, 732 (Fla. 2d DCA 2019) (stating that review of the legal conclusions in a declaratory judgment is de novo (citing

Reed v. Honoshofsky, 76 So. 3d 948, 951 (Fla. 4th DCA 2011))). "Municipal ordinances are subject to the same rules of construction as are state statutes." Angelo's Aggregate Materials, Ltd. v. Pasco County, 118 So. 3d 971, 975 (Fla. 2d DCA 2013) (quoting Rinker Materials Corp. v. City of North Miami, 286 So. 2d 552, 553-54 (Fla. 1973)). However, "[s]ince zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." Rinker Materials Corp., 286 So. 2d at 553; see also City of Miami Beach v. 100 Lincoln Rd., Inc., 214 So. 2d 39, 39 (Fla. 3d DCA 1968) ("Since zoning laws are in derogation of the common law, as a general rule they are subject to strict construction in favor of the right of a property owner to the unrestricted use of his property." (citing Wright v. De Fatta, 152 So. 2d 10, 14 (La. 1963))). Moreover, zoning ordinances, like statutes that are in derogation of the common law, "will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute [or ordinance] was not intended to make any alteration other than was specified and plainly pronounced." See Essex Ins. Co. v. Zota, 985 So. 2d 1036, 1048 (Fla. 2008) (quoting Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977)), superseded on other grounds by statute as recognized in Essex Ins. Co. v. Integrated Drainage Sols., Inc., 124 So. 3d 947, 951 (Fla. 2d DCA 2013). "[T]he presumption is that no change in the common law is intended unless the statute is explicit in this regard." Id. (emphasis omitted) (quoting Carlile, 354 So. 2d at 364); see also Major League Baseball v. Morsani, 790 So. 2d 1071, 1078 (Fla. 2001) ("The presumption is that no change in the common law is

intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." (quoting State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997))).

At issue is the proper interpretation of section 34-1264(h)(2) of the Town's land development code.[1] Section 34-1264 is specific to the "sale or service for on-premises consumption" of alcoholic beverages, and it provides that "[a]n establishment engaged in the sale or service of alcoholic beverages may thereafter become a nonconforming use due to a change in regulations, as provided in division 3 of article V of this chapter." Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. IV, div. 5, § 34-1264(h)(2) (2019); see Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. V, div. 3, § 34-3241(a) (2019) ("Nonconforming uses generally. . . . For purposes of this division, the term 'nonconforming use' means a use or activity which was lawful prior to the adoption of any ordinance from which this code is derived, or the adoption of any revision or amendment to this code, . . . but which fails, by reason of such adoption, revision, or amendment, to conform to the use requirements where the property is

[1]Although Persaud argues that section 34-1264(h)(2) does not apply to its property because the nonconforming use was not authorized by "special exception, administrative approval, or other approval" as defined in section 34-1264, we do not address that assertion because it was not before the trial court. We therefore resolve this case without deciding whether section 34-1264(h)(2) is applicable to nonconforming uses, like Persaud's property, that were not authorized by "special exception, administrative approval, or other approval" but were preexisting lawful uses that become nonconforming uses through changes in the code and are permitted to continue pursuant to section 34-3241(c). See Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. IV, div. 3, § 34-3241(c) (2019).

located."). Section 34-1264(h)(2) further provides that "[n]onconforming uses may continue until there is an abandonment of the permitted location for a continuous nine-month period" and that abandonment "mean[s] failure to use the location for consumption on the premises purposes as authorized by the special exception, administrative approval, or other approval." Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. IV, div. 5, § 34-1264(h)(2).[2]

Persaud contends that a correct interpretation and application of the abandonment provision of the Town's code requires an intent to have abandoned the nonconforming use. In support of this argument, Persaud cites City of Miami Beach v. State ex rel. Parkway Co., 174 So. 443 (Fla. 1937), Peters v. Thompson, 68 So. 2d 581 (Fla. 1953), Sarasota County v. Bow Point on the Gulf Condominium Developers, LLC, 974 So. 2d 431 (Fla. 2d DCA 2007), Hobbs v. Department of Transportation, 831 So. 2d 745 (Fla. 5th DCA 2002), and Lewis v. City of Atlantic Beach, 467 So. 2d 751 (Fla. 1st DCA 1985). Persaud argues that the trial court erred in refusing to apply the common law as discussed in these cases to the issue of abandonment.

In City of Miami Beach, the supreme court concluded that the word "discontinued," as used in the city's nonconforming use ordinance, did not mean "a temporary cessation for the purpose of making repairs or extensions"; rather, it meant

[2]Section 34-3244, governing nonconforming uses generally, similarly provides that "[w]hen a nonconforming use is discontinued or abandoned for nine consecutive months, the use shall not thereafter be carried out or reestablished except in conformance with all current regulations." Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 34, art. V., div. 3, § 34-3244 (2019). However, section 34-3244 does not define discontinue or abandon.

"a discontinuance of business of that sort at that place." 174 So. at 445. Peters similarly addressed a nonconforming use zoning regulation that included an "abandonment, or discontinuance" provision. 68 So. 2d at 582. In Peters, the court upheld the county's finding that the nonconforming use, the sale of alcoholic beverages within 1500 feet of another establishment selling alcoholic beverages, had been discontinued. Id. In reaching its conclusion, the court "noted that no effort [had been] made to renew the [liquor] license" during the period in which the property was closed. Id. This court, in Bow Point, very clearly held that the trial court had applied the correct law when it determined "that the suspension of Bow Point's motel operation for sixteen months during necessary repairs and renovations did not constitute a discontinuance of the nonconforming use." 974 So. 2d at 433.[3] Lewis expressly states that "[a]bandonment occurs when the landowner intentionally and voluntarily foregoes further nonconforming use of the property" and that "[t]emporary cessation of a

[3]Although City of Miami Beach, Peters, and Bow Point address "discontinuance" as applied to nonconforming uses, discontinue is defined as "to abandon or terminate," see Discontinue, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/discontinue (last visited Oct. 15, 2020), and discontinuance provisions and abandonment provisions have been interpreted without distinction, compare Bow Point, 974 So. 2d at 432 ("[A] discontinuance provision is one of the methods by which nonconforming uses may be gradually eliminated over the course of time. Other methods include attrition, destruction, and obsolescence."), with Crandon v. State ex rel. Uricho, 28 So. 2d 159, 160 (Fla. 1946) ("[W]e are not required to determine whether 'discontinuance' as used in the resolution contemplates an intent to abandon the use of the property."), and Lewis, 467 So. 2d at 754-55 ("The general rule is that nonconforming uses may be eliminated by attrition (amortization), abandonment, and acts of God as speedily as is consistent with proper safeguards and the rights of those persons affected." (first citing Bixler v. Pierson, 188 So. 2d 681, 683 (Fla. 4th DCA 1966); and then citing 82 Am. Jur. 2d Zoning and Planning § 179 (1985))). But cf. Crandon, 28 So. 2d at 160 (noting that the court was not "required to say that discontinuance is synonymous with abandonment"). Moreover, it is clear in each of these cases that the intent of the property owner was considered when determining whether the nonconforming use had been discontinued.

nonconforming use or the temporary vacancy of buildings used for the nonconforming use does not operate to effect abandonment of the nonconforming use." 467 So. 2d at 755 (first citing 82 Am. Jur. 2d Zoning and Planning § 216 (1985); then citing City of Miami Beach, 174 So. at 445); and then citing Quinnelly v. City of Prichard, 291 So. 2d 295, 299 (Ala. 1974)). The final case cited by Persaud, Hobbs, reiterates the state of the law with regard to abandonment provisions in zoning ordinances. Citing both Peters and Lewis, as well as Crandon v. State ex rel. Uricho, 28 So. 2d 159 (Fla. 1946), Hobbs reaffirms that a nonconforming use is abandoned by the property owner only when there is an intent to do so. 831 So. 2d at 748-49; see also Abandon, Black's Law Dictionary (11th ed. 2019) (defining "abandon" as "[t]o relinquish or give up with the intention of never again reclaiming one's rights or interest in"); Abandon, Black's Law Dictionary (5th ed. 1979) ("[Abandon] includes the intention, and also the external act by which it is carried into effect."); Abandonment, Black's Law Dictionary (5th ed. 1979) ("In determining whether one has abandoned his property or rights, the intention is the first and paramount object of the inquiry, for there can be no abandonment without the intention to abandon.").

The zoning regulations in each of the cases cited by Persaud are indistinguishable from the ordinance at issue here in that each provided that a grandfathered nonconforming use would lose its grandfathered status upon the discontinuance or abandonment of the use for a set period of time. And like those ordinances, the abandonment provision of the Town's code does not explicitly and unequivocally announce that the common law does not apply to it; in fact, the Town's code of ordinances provides as a general rule that "[a]ll words and phrases shall be

construed and understood according to the common and approved usage of the language, but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning." Town of Fort Myers Beach, Fla., Code of Ordinances ch. 1, § 1-2.(a) (2019).

Further supporting our conclusion that abandonment as used in the Town's ordinance includes an intent element is the definition of "used for" in section 1-2. of the code: "The term 'used for' includes the term 'arranged for,' 'designed for,' 'maintained for,' and 'occupied for.' " Town of Fort Myers Beach, Fla., Code of Ordinances, Appendix A–Land Development Code ch. 1, § 1-2.(c) (2019). The evidence unequivocally supports the conclusion that Persaud was both maintaining and occupying the property for the sale of alcoholic beverages on the premises, including within the EC zone, as it had done previously and as the Town was fully aware.

Strictly construing the Town's ordinance in favor of the property owner, as we must, abandonment of a nonconforming use requires more than the passage of nine months while the property was closed for renovations; it requires voluntary cessation of the nonconforming use with the intent that the cessation of such use be permanent. The trial court erred in failing to apply the common law and in determining, as a matter of law, that Persaud had abandoned the nonconforming use of its property where there was no evidence that Persaud intended to discontinue selling alcohol in the EC zone.

Persaud did not abandon or discontinue the nonconforming use of the property during the one-year period of closure where renovations and construction were ongoing. Persaud is therefore entitled, under the applicable provisions of the Town's

municipal code, to maintain the property's status as a grandfathered nonconforming use. Our conclusion with regard to the declaratory action requires a reversal of the judgment as to all other counts. Cf. Lewis, 467 So. 2d at 755-56. Accordingly, we reverse the judgment in favor of the Town and remand for entry of a judgment in favor of Persaud on the declaratory relief count.

Reversed and remanded.

SMITH, J., and CASE, JAMES R., ASSOCIATE SENIOR JUDGE, Concur.