COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1437 **Cir. Ct. No. 2016FO1021**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

COUNTY OF WALWORTH,

PLAINTIFF-APPELLANT,

V.

BRENDAN J. HEHIR,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] On August 31, 2016, the County of Walworth cited Brendan J. Hehir for illegally operating as a "lodge" a single-family property he owned in a residentially zoned area. Following a court trial, the circuit court determined inter alia[2] that even if Hehir had operated a lodge as alleged, such operation was lawful as the continuation of a nonconforming use. Because we conclude the circuit court's determination was correct, we affirm.

¶2 The parties agree that on December 9, 2014, the County adopted the relevant amendment to the ordinance at issue in this case. The amended ordinance was in effect at the time Hehir rented out his property, in August 2016, to an individual for a period of less than thirty days. As a result of that rental, Hehir received a citation for operating a lodge on R-2 zoned property in violation of WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-181 (2014).

¶3 Hehir asserts that even if he operated a "lodge" as that term has been defined with the December 9, 2014 amendment, the circuit court properly dismissed the citation because his use of the property in this manner "constitute[d] a legal non-conforming use" as he had been renting out the property for periods of less than thirty days prior to the adoption of the amendment. He cites to WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-218 of the zoning code,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2015-16). The issues before the court do not merit consideration by a three-judge panel; therefore, Hehir's motion pursuant to WIS. STAT. RULE 809.41(1) to have the matter reviewed by a three-judge panel is denied. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The parties debate various other issues and arguments on appeal; however, because the ground upon which we decide this case is dispositive, we need not address these other matters. *See* ***Hegwood v. Town of Eagle Zoning Bd. of Appeals***, 2013 WI App 118, ¶1 n.1, 351 Wis. 2d 196, 839 N.W.2d 111 (When the resolution of one issue is dispositive, we need not address other issues raised by the parties.).

which provides in relevant part: "[T]he lawful nonconforming use of a structure … existing at the time of the adoption or amendment of this ordinance may be continued although the use does not conform with the provisions of this ordinance."[3] The County asserts Hehir failed to establish he had a vested interest in continuing to use the property in the manner he had prior to the adoption of the ordinance amendment[4] and thus, it contends the property did not acquire nonconforming status and the citation should stand. The circuit court disagreed with the County's position and dismissed the citation. Based upon the record presented to the court at the time of trial, we agree with the court's decision.

¶4 Hehir represented to the circuit court that the property "has been licensed by the State of Wisconsin as a tourist rooming house since September of 2013," and has been "rented to the general public" since that time. He expressed that the property had been "continuously used as a short-term rental since 2013," and added that he had "a copy of my state license from 2013, 2014, 2015 and 2016. I have an [August 27, 2013] occupancy permit from the Town of Geneva. I've got rental contracts for each year from 2013 up until now that shows [sic] the continuing use of it." He confirmed that he began renting the property "to what arguably could be considered transients" in July 2013, and did so "off and on depending when my family was there or not, but continuously every year." He

[3] The County refers us to a similar provision in the state statutes: "An ordinance enacted under this section may not prohibit the continuance of the lawful use of any building, premises, structure, or fixture for any trade or industry for which such building, premises, structure or fixture is used at the time the ordinances take effect." WIS. STAT. § 59.69(10)(am). Neither party suggests any difference between these two provisions that impacts this case.

[4] On appeal, the County does not contend that Hehir's rentals of the property were in violation of any county ordinance prior to adoption of the ordinance amendment on December 9, 2014.

testified that the length of time for any given rental would be "[f]rom a weekend to two weeks," and the longest amount of time he went between rentals was "I'm guessing two months."

¶5 On cross-examination, Hehir testified that after he purchased the property in 2009, he, his brother, and his father spent six or seven months "rehab[bing]" it. He began letting family and friends stay there in August 2012. Hehir identified for the circuit court the name of the first family to whom he rented the property for money, in July 2013, and indicated that he had that lease, as well as other leases and "payment checks" showing that the same family rented the property in July 2014, 2015, and 2016. Hehir did not recall the name of the second family to whom he rented, but did indicate that the first family was not the only family to whom he had rented the property. He expressed that other than with this first, repeatedly returning family "we weren't keeping the contracts after the people had left," adding, "I didn't know that this was going to come about like this." Hehir testified that this first, repeat family would rent the property for $1500 for one week.

¶6 Following testimony, the County argued that Hehir only testified to "rent[ing] it out once a year to … one family." The court found Hehir's testimony credible and viewed it differently than the County, finding that

> [Hehir] was just giving an outside limit. He has also testified, unimpeached with noncontrary evidence, that the most he's ever gone is two months between rentals. He just merely doesn't remember the names of everybody. That it ranged from weekends to two weeks since the first rental in now July of 2013.

The court concluded that the short-term rentals of the property were "more than just a casual, occasional use," and determined that Hehir's use of the property "was an existing nonconforming use that is grandfathered in under the code."

¶7 On appeal, the County directs us to ***Waukesha County v. Seitz***, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App. 1987), where we explained the law related to nonconforming use:

> A nonconforming use is a use of land for a purpose not permitted in the district in which the land is situated. Land use qualifies as "nonconforming" if there is an active and actual use of the land and buildings which existed prior to the commencement of the zoning ordinance and which has continued in the same or a related use until the present. The property owner bears the burden to prove by a preponderance of the evidence that the nonconforming use was in existence at the time that the ordinance was passed. This burden also requires the property owner to show that the use was "so active and actual that it can be said he [or she] has acquired a 'vested interest' in its continuance." If the use is characterized as merely casual and occasional or accessory or incidental to the principal use, then the use does not acquire a nonconforming status.

Id. at 114-15 (alteration in original; citations omitted). Based upon ***Seitz***, the County correctly asserts that Hehir bears the burden of establishing by the preponderance of the evidence that prior to the December 9, 2014 ordinance amendment, his use of the property for short-term rentals was "so active and actual that it can be said [he had] acquired a vested interest in its continuance." The County, however, incorrectly asserts that Hehir failed to meet his burden.

¶8 While we embrace the circuit court's findings of fact unless they are clearly erroneous, "we view the question of whether a given historical land use qualifies as a valid nonconforming use as involving the application of the trial

court's factual findings to a legal standard," which is a matter of law we review independently. ***Seitz***, 140 Wis. 2d at 116.

¶9 Here, the evidence supports the circuit court's determination that Hehir's use of the property for short-term rentals was a valid, nonconforming use in existence at the time the County enacted the ordinance amendment in December 2014. Hehir's uncontroverted and, as the court found, credible testimony was that he spent about six or seven months "rehab[bing]" the property and then began renting it to families in July 2013. He testified that he thereafter continuously rented the property, for periods of time from a weekend to two weeks, without more than approximately a two-month period in between rentals. The record also establishes that the property was not Hehir's primary residence. While he occasionally stayed there with his family, he did not utilize it as his "home."

¶10 Citing ***Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.***, 2009 WI App 142, 321 Wis. 2d 671, 775 N.W.2d 283, the County asserts that Hehir failed to establish he had a vested interest in continuing to use the property as a short-term rental. The County argues that Hehir failed to establish he made a substantial investment in using the property as a short-term rental or that he will suffer a substantial financial loss if the use is discontinued.

¶11 In ***Kitt's***, we held that

> in order for a use to be protected under WIS. STAT. § 59.69(10)(a) [2007-08],[5] at the time the new ordinance becomes effective, the business owner must have a vested interest in the continuation of that use, meaning that, were the continuance of the use to be prohibited, substantial rights would be adversely affected. In the context of

[5] This paragraph has been renumbered to WIS. STAT. § 59.69(10)(am).

> § 59.69(10)(a) [2007-08]—relating to trade and industry—this will ordinarily mean that there has been a substantial investment in the use or that there will be a substantial financial loss if the use is discontinued.

Kitt's, 321 Wis. 2d 671, ¶31 (footnote omitted). We disagree with the County's assertion that Hehir failed to establish he had a vested interest in continuing to use the property as a short-term rental.

¶12 To begin, we note that the relevant facts of ***Kitt's*** are substantially different from those in this case. In ***Kitt's***, the owner of the tavern at issue was not operating it as an adult entertainment tavern until twelve days before the adoption of a known ordinance amendment prohibiting such establishments. ***Id.***, ¶¶1, 7-8. The owner acknowledged that he deliberately rushed providing adult entertainment in the tavern because he was aware of the pending amendment and wanted to ensure use of the tavern for adult entertainment would be "grandfathered" in following the change. ***Id.***, ¶¶7, 42. Under those facts, we concluded the tavern owner did not act in reasonable reliance upon existing law or, essentially, in "good faith," when he made investments in expanding the tavern's use to include adult entertainment, and thus the owner was not afforded the protection of WIS. STAT. § 59.69(10)(a) (2007-08). ***Kitt's***, 321 Wis. 2d 671, ¶¶43-44, 47. There is no suggestion in this case that Hehir did not act in reasonable reliance upon the law as it existed when he invested time and money to use the property for short-term rentals. Moreover, we conclude Hehir established both a substantial investment in the use of the property as a short-term rental and that he will incur a substantial financial loss if that use is discontinued.

¶13 "[T]he determination whether there is a vested interest in a use is made on a case-by-case basis." ***Id.***, ¶32. The particular circumstances of the property owner guide our "determination whether there has been a substantial

investment in a use or will be a substantial financial loss if the use is discontinued." ***Id.*** Here, though the record does not indicate how much Hehir paid for the property, we can infer that it was, in one form or another, an investment. *See* ***State v. Echols***, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993) ("When a trial court does not expressly make a finding necessary to support its conclusion, an appellate court can assume that the trial court made the finding in the way that supports its decision."). The evidence indicated that Hehir spent money to acquire the property when he purchased it in 2009. He did not use it as his primary residence but "stayed" at the property when he went back and forth from Chicago. He, his father, and his brother spent six or seven months "rehab[bing]" the property before he began allowing friends and family to stay there, which "rehab[bing]" we may reasonably infer took time and money. Further, he necessarily would have put some time, effort, and resources into procuring a license from the State of Wisconsin and an occupancy permit from the town in August 2013. He renewed his license with the State every year since 2013.

¶14 Additionally, while there was no testimony as to the amount of money Hehir would lose if he could no longer use the property as a short-term rental, there is testimony as to the frequency with which he rented the property as well as, at least as to one rental, an amount for which he rented the property. The testimony established that the first family who rented the property did so for $1500 per week and that family has rented the property every year since 2013. In addition, Hehir testified that he rented the property to others as well, such as the individual to whom he rented it in August 2016 and who provided the basis for the citation at issue in this case. Hehir indicated that he would rent out the property for lengths of time from a weekend to two weeks. He also testified that his rental

of the property was continuous since he began renting in July 2013, and there was never a period of time greater than two months when he was not renting it out.

¶15 We conclude based upon the particular circumstances of this case that Hehir made a substantial investment[6] in preparing and using his property for short-term rental and would incur a substantial financial loss if his property was subject to the ordinance amendment. Based on this, we conclude Hehir had a sufficiently vested interest in the property. The circuit court did not err in determining that Hehir's use of the property for short-term rentals was an existing, nonconforming use at the time the County adopted the ordinance amendment, and thus, his continued use of the property in the same manner was lawful. The citation against Hehir was properly dismissed.

¶16 For the foregoing reasons, we affirm the circuit court's dismissal of the citation against Hehir.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(4).

[6] We stated in ***Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.***, 2009 WI App 142, 321 Wis. 2d 671, 775 N.W.2d 283, that "[w]e do not intend to suggest the substantial investment must be financial," adding a parenthetical that "[t]ime as well as money may constitute a substantial investment." ***Id.***, ¶31 n.13.