

2017 IL App (2d) 161105-U  
No. 2-16-1105  
Order filed October 25, 2017

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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TERRA CREEK, LLC,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-CH-638
	)	
THE CITY OF ROCKFORD,	)	Honorable
	)	Eugene G. Doherty,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices McLaren and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly granted defendant summary judgment on plaintiff's claim that a special-use permit had lapsed: although there had been no construction on the property, the residential "use" of the property had continued and thus, per the pertinent ordinance, the permit had not lapsed.

¶ 2 Plaintiff, Terra Creek, LLC, wanted defendant, the City of Rockford, to approve its plan to build townhouses on land that it had recently purchased. Defendant's zoning board recommended rejecting the plan, claiming that the development was inconsistent with a special-use permit the city had granted to a previous developer of the site. Plaintiff filed suit, alleging that the special-use permit had lapsed due to inactivity. The court agreed with defendant, finding

that the permit remained valid. Plaintiff appeals, contending that the prior developer's failure to build anything on the site after 2009 invalidated the permit. We affirm.

¶ 3 Plaintiff's complaint alleged the following. The property in question had formerly been zoned R-3, a classification that permitted multiple-unit housing. The property was included in a planned mixed-use development known as Bello Reserve. The development was to include single and multi-family homes, restaurants, stores, and offices. In 2001, the city approved a special-use permit for the development. The plat for phase 1 was recorded in 2003. The special-use permit was modified several times, most recently in 2006. On April 9, 2008, the final plat for the second phase of the development was recorded and, on April 16, 2008, the declarations, covenants, and restrictions for the second phase were recorded. The last building permit for the second phase of the development was issued in 2009 for a single-family home.

¶ 4 Plaintiff acquired the property in 2014. The purchase contract included a warranty that the property was zoned R-3 and that plaintiff could obtain a building permit for fewer than 50 units. Plaintiff presented to the city its plan to build 46 two-story, condo-ready townhouses. The city advised plaintiff that it could not proceed unless the special-use permit were modified. Plaintiff applied twice to modify the permit, but the city's zoning and planning staff recommended denying the applications.

¶ 5 Plaintiff alleged that, pursuant to a city ordinance, the more than two years of inactivity had caused the special-use permit to lapse. Accordingly, the site was subject to the previous R-3 zoning, and plaintiff's development plan was consistent with that zoning classification. Therefore, it could proceed without the city's approval.

¶ 6 Plaintiff moved for summary judgment, asserting that, because there had been no construction at the site since 2009, the special-use permit had lapsed by operation of law. The

city responded that the property had been continuously used for residential purposes since 2009, which was consistent with the special-use permit. The city alternatively argued that plaintiff did not present proper evidence of a lack of construction activity at the site.

¶ 7 The court agreed with the city that the special use did not lapse (and therefore the court did not reach the city's second issue). The court noted that plaintiff's argument equated "use" with "construction." However, the ordinance in question specifically referred to the "use" of the property. The court wrote that "use" seems to refer to the particular function that occurs on the property, such as worship services. See *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill. 2d 1 (2001). As plaintiff did not dispute that the property had continuously been used for a purpose allowed by the special-use permit, *i.e.*, residential, the court denied plaintiff's motion. The city then filed its own motion for summary judgment, which the court granted. The court found no just reason to delay enforcement or appeal of the order. Plaintiff timely appeals.

¶ 8 Plaintiff contends, as it did in the trial court, that the fact that no new construction occurred at the site for approximately five years means that the special-use permit lapsed by operation of law. Plaintiff posits that, after the special-use permit lapsed, the zoning reverted to what it was before the special-use permit was issued and that its plan to build townhouses on the site was consistent with the prior R-3 zoning classification. Therefore, plaintiff asserts, the trial court erred by granting the city summary judgment.

¶ 9 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c)

(West 2014); *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 333 (1996). Our review of an order granting summary judgment is *de novo*. *Id.*

¶ 10 A “special use” is one that is expressly permitted within a zoning district by the controlling ordinance so long as the use meets certain criteria or conditions. *Living Word Outreach*, 196 Ill. 2d at 16. “ ‘The purpose of special uses is to provide for those uses that are either necessary or generally appropriate for a community but may require special regulation because of unique or unusual impacts associated with them.’ ” *Id.* (quoting S. Connor, *Zoning*, in *Municipal Law & Practice* § 13.17 (Ill. Inst. for Cont. Legal Educ. 2000)).

¶ 11 Because of the nature of a special use and the special findings and conditions typically required, it may be desirable to provide a time limit within which the use must be commenced. This allows the local authorities to maintain a certain degree of control over the special use. See *Rockford Blacktop Construction Co. v. County of Boone*, 263 Ill. App. 3d 274, 282 (1994). Accordingly, the city’s zoning ordinance provides:

“If the use of the property as authorized by the special use permit, or modification or renewal, is commenced and, at a later date, is discontinued for a period of 24 consecutive months or there is evidence of a clear intent on the part of the owner to abandon the special use on the property prior to the 24-month discontinuance, then the special use permit shall lapse.” Rockford Zoning Code, § 63-012-C (adopted Apr. 4, 2006).

¶ 12 Plaintiff contends that this is what happened here: the original developer obtained a building permit in 2009 and did nothing further until it sold the property in 2014. The city responds that, because at least one home has been continuously used for residential purposes, which was one of the uses contemplated by the special-use permit, the special use was never discontinued.

¶ 13 The parties have not cited, and our research has not uncovered, any case discussing what constitutes the discontinuance of a special use. We therefore turn to the language of the ordinance itself. Municipal ordinances are construed using the rules of statutory construction. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 850 (2007). The primary rule of statutory construction is to ascertain and effectuate the legislative body's intent. *Id.* The best indicator of that intent is the statute's plain language. *Id.*

¶ 14 As the trial court observed, plaintiff's argument equates "use" with "construction," noting that no construction occurred on the property after 2009. This argument is problematic for several reasons, not the least of which is that the word "construction" does not appear in the ordinance. The ordinance contains the word "use," which in this context appears to refer to the type of activity conducted on the property. See, e.g., *Living Word Outreach*, 196 Ill. 2d at 16-23. The reason for the additional safeguards typically required in approving a special-use permit is the nature of the activity conducted on the property, not the construction necessary to accommodate that activity. Indeed, it is possible to conduct an activity on property without any construction whatsoever, as by occupying an existing structure. Reading the ordinance as requiring construction to prevent a lapse of the special-use permit would thus mean that a cessation of construction activity for 24 months would result in the loss of the special-use permit, even if the property continued to be used in a way contemplated by the permit. Thus, the court did not err in holding that the continuous use of the property for residential purposes, as contemplated by the special-use permit, kept the permit in force.

¶ 15 Plaintiff additionally contends that the warranty provided in the sale contract evinces the original developer's intention to abandon the special use. However, the warranty is inconsistent with the admitted fact that the property continued to be used for its intended purpose.

¶ 16 The judgment of the circuit court of Winnebago County is affirmed.

¶ 17 Affirmed.