IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF KENNEWICK,	)	**No. 27473-0-III**
	)	
Respondent,	)	
	)	
v.	)	
	)	**Division Three**
COLE MORGAN and JULIE MORGAN, husband and wife, d/b/a ELEGANT GARDENS,	)	
	)	
Appellants.	)	**UNPUBLISHED OPINION**

Korsmo, J. — The City of Kennewick (City) denied the request of Cole and Julie Morgan to recognize a nonconforming use that would have allowed them to continue operating an outdoor wedding business in a residential area. The City subsequently sued to confirm that the business could not continue to operate. The trial court twice granted summary judgment in favor of the City. The Morgans appeal, contending that factual issues exist which entitle them to a jury trial. We agree with the trial court that they have not established the existence of a valid nonconforming use and affirm the judgments.

FACTS

The Morgans purchased property located at 3400 S. Jean Street in Kennewick, Washington, from Treva and Evan Purser. The Morgans operate a home-based wedding and reception business from this property called Elegant Gardens, which hosts outdoor weddings and receptions.

The Pursers started hosting wedding receptions on the property in the early 1980s. Over the years the Pursers owned the property, they also used their residence for outdoor weddings, a nail salon, swimming lessons, a landscape company, permanent make-up/tattoo parlor, wedding reception facility, other party receptions and other businesses as well. Benton County has no record of any permit being obtained from the county.

In February 1999, the City annexed the property into the city. The property continued to be zoned suburban, as it had been designated since the 1950s.

In November 2001, Evan Purser sent an email to the City of Kennewick Planning Manager to clarify whether the wedding business was a conforming business under the code. In a letter dated November 6, 2001, the Pursers were advised by the Kennewick Planning Department that "the key issue above [to determine if a use is conforming or nonconforming] being that the use was lawfully established. You may want to obtain further documentation from the Benton County Planning Department that both of your

businesses and their operations were allowed under the governing Benton County Ordinances." Clerk's Papers (CP) at 197. The letter also stated:

> Please be aware that the city's home business code permits a maximum of four customer/client visits to the home per day, a maximum of one temporary or irregular employee during the first eighteen months of operation, and that then [sic] entrance to the business must be from within the residence. Additionally, the city code requires all activity to occur indoors. As you have described your businesses [sic] operations, they would not conform to these portions of KMC [Kennewick Municipal Code] Section 18.80.100.

CP 197. The Pursers never followed up with the City. Instead, they sold the property to the Morgans in 2002.

In June 2004, the City started receiving complaints about the Elegant Gardens wedding business. In response to complaints, the City sent at least four notices to the Morgans regarding weed control. In late spring 2005, the City received additional complaints about the increased traffic, parking problems, speeding, damage to neighboring property, noise and litter. There had been no complaints under the previous ownership. As a result, the City requested from the Benton County Planning Department, any evidence of a permit, license or application by either the Pursers or the Morgans to conduct their wedding business. The county replied that a search of the records could not find any information such as permits, building, land use, business licenses or any other type of permit or special application for the property.

In July 2005, the City sent a notice to the Morgans to cease and desist their wedding business because it was not a legal nonconforming business. They were requested to apply for a conditional use permit. During the fall of 2005, the City received a number of letters requesting the City deny or not renew the Morgans' business license to operate the wedding and reception business. In February of 2007, the City sent the Morgans a letter which acknowledged receipt of their application for a conditional use permit for a preexisting, nonconforming use; it advised them the application was incomplete and listed seven missing items. In March 2007, the City sent the Morgans another letter acknowledging receipt of the resubmittal of their request for a conditional use permit and advising again that the application was incomplete and missing required documents.

On April 5, 2007 the City filed a complaint for declaration of a nuisance, requesting declaratory and injunctive relief against the Morgans. On October 2, 2007, the City moved for a partial summary judgment to determine whether home-based weddings had been permitted under the Benton County Zoning Ordinance at the time the Pursers commenced business. The Morgans, in opposition to the motion, submitted deposition testimony from litigation between the Pursers and the Morgans. The deposition of Ms. Purser is the only evidence submitted by the Morgans which related to the legal status of

the wedding business. When asked what process they went through to get approval for this use, Ms. Purser stated:

> Q. You went to the county to check out whether or not you could operate a business on your property?
> A. Uh-huh. Oh, yeah.
> . . . .
> Q. But did you go out and talk to somebody at the county?
> A. Oh, yeah.
> Q. And --
> A. Filled out paperwork, went through the whole nine yards.
> Q. What kind of paperwork did you fill out?
> A. I don't know. Whatever they required.
> . . . .
> Q. Correct. If you filled out any paperwork, did you have to go through any process, or was it just fill out the paperwork to let them know you're going to operate this business and then they let you operate the business?
> A. Probably. It was probably more like that then. I don't think it was like it is now, at all.
> . . . .
> Q. Did you tell them you were going to operate a business where you were going to have weddings and receptions where there would be more than 20 people attending on your property?
> A. God, I don't know. I wouldn't know specifics of what I said with the planners ever so many years ago.
> . . . .
> Q. Do you recall anyone from the county telling you that you could not operate a business on your property?
> A. No.

CP 186-188.

> Q. Do you recall ever having to obtain a business license from the county?
> A. You know, I think we did, uh-huh.

CP 192.

On November 16, 2007 the Benton County Superior Court granted the City's motion for partial summary judgment and decreed the Morgans' home-based wedding and reception business was not a permitted outdoor use under the zoning ordinance at the time the Pursers commenced business activities prior to being annexed into the City of Kennewick.

On April 18, 2008, the City filed a motion for full summary judgment to determine (1) if the special use permit section of the former Benton County Zoning Ordinance authorized a home-based wedding business and (2) if the county could have approved the home-based wedding business under the code. The City submitted evidence that prior to 1983 there was no permit or approval process for Benton County, but that in 1983 the County required home occupation permits. Terry Marden, the Benton County Planning Director, testified that he served as director since December 1977. He stated that there were no county records of any nature related to 3400 S. Jean Street and for the last 30 years the property had been zoned suburban. He also testified that an outdoor wedding business such as the Morgans operated had never been permitted under the zoning ordinance because home-based businesses must be operated inside the home and could not exceed 30 percent of the house. Michael Shuttleworth, a Benton County Senior

Planner, testified that he had been a planner for over 15 years and that he was very familiar with the application of the county zoning code. There was no record of the forms Ms. Purser claimed to have filled out and the business as described was not allowed in the suburban zone. Both testified that the only process to obtain approval for a use not listed in the zoning ordinance was through a planning determination where the applicant requested an interpretation that their use was sufficiently similar to one listed in the zoning code.

The Morgans opposed this motion. They resubmitted Ms. Purser's testimony, as well as a declaration from Mr. Morgan stating that the wedding business had been established prior to their purchase of the property and that over the years city officials attended weddings on the property and no official in attendance had ever said the business was not proper.

On August 11, 2008, the court granted the City's motion for full summary judgment. The court found there were no disputed material facts concerning whether a legal nonconforming use had been established and that a legal nonconforming use had not been established.

This appeal followed.

ANALYSIS

This court reviews a summary judgment *de novo*, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id*. If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id*.

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier-of-fact. *Id.* at 225-226. The plaintiff may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

"A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959

P.2d 1024 (1998). The nonconforming use "is defined in terms of the property's lawful use established and maintained at the time the zoning was imposed." *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002) (emphasis omitted). The landowner bears the burden of establishing the legal nonconforming use. *Id.*

Here, there is no question that the wedding business did not conform to the City's zoning code and that it predated the City's zoning ordinance. The question presented is whether the Morgans established that the nonconforming use "lawfully existed" at the time. Answer to that question requires review of the relevant Benton County zoning code provisions.

The Pursers began their wedding business in the early 1980s. The parties agree that the 1981 county zoning code is the relevant ordinance to review. The provision governing suburban districts permitted any use allowed in a residential district and also allowed, by special permit after public hearing, "limited home occupation type activity involving the display and sale of products on the premises." CP 80 (Ordinance No. 116, Section 2). In turn, the residential district zoning provisions allowed a house to be used as an office for a professional (doctor, lawyer, etc.) and also allowed any "home occupations engaged in by individuals within his or her dwelling, providing no professional office or home occupation shall constitute the principal use of the premises

or occupy more than thirty (30) per centum of the usable floor space of a dwelling." CP 64 (Ordinance No. 62., Section IV(1)(E)). The residential district zoning also contained a provision similar to Ordinance No. 116 that allowed limited sales activity in a house. CP 64 (Ordinance No. 62).

None of these provisions authorized an outdoor wedding business at the Jean Street location. All of these provisions required that the activity be conducted inside the house, not outside. In addition, the professional office provision limited the business to no more than 30 percent of the space of the building. Finally, the sales activity provision was only applicable if a special use permit was granted by the county's Board of Adjustment after public notice and hearing. There is no evidence in the record that any such permit was ever sought or granted, or that any public notice and hearing was ever held on the topic.

Thus, review of the zoning provisions and the record establishes that the wedding business was never lawfully authorized by county authorities. It was not a "lawful use" and therefore was not a recognized nonconforming use when the City annexed the area. Appellants have established that there long has been an ongoing wedding business at the location and that county officials apparently tolerated the activity. They have not shown that the business "lawfully existed." Accordingly, they did not establish that they were a

nonconforming use.

The trial court correctly granted both motions for summary judgment.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, A.C.J.

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Sweeney, J.