

STATE OF MICHIGAN
COURT OF APPEALS

SQUARE LAKE HILLS CONDOMINIUM
ASSOCIATION,

UNPUBLISHED
October 21, 1997

Plaintiff-Appellee,

v

No. 196651
Oakland Circuit Court
LC No. 87-336164-CZ

TOWNSHIP OF BLOOMFIELD,

Defendant-Appellant.

AFTER REMAND

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting partial summary disposition for plaintiff. We reverse.

This case comes to us for the second time. The primary issue on appeal is whether defendant may enforce Ordinance 397, which restricts the launching and docking of boats, against plaintiff. The Michigan Supreme Court has already held that Ordinance 397 is authorized under the Township Ordinances Act (TOA), MCL 41.181 *et seq.*; MSA 5.45(1) *et seq.* *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310, 327 (Riley, J.), 334 (Boyle, J.); 471 NW2d 321 (1991). The trial court, while acknowledging the validity of Ordinance 397, held that plaintiff had established a nonconforming use that barred defendant from applying Ordinance 397 retroactively.

First, we address defendant's argument that plaintiff does not have standing to challenge Ordinance 397. It is clear that plaintiff has been launching and docking boats on Square Lake for many years in the belief that it is entitled to such use pursuant to its easement. Defendant has asserted that such use is prohibited by its ordinances. There is no question that plaintiff presents an actual controversy between the parties in which it has a substantial interest and a personal stake in the outcome. Thus, the trial court properly concluded that plaintiff has standing to challenge Ordinance 397. *Rogan v Morton*, 167 Mich App 483, 486; 423 NW2d 237 (1988).

Defendant also argues that Ordinance 397 is not subject to nonconforming uses, and therefore, the trial court erred in granting partial summary disposition for plaintiff. We agree.

In Michigan, the retroactive application of ordinances is addressed in two different contexts. First, our zoning statutes protect a property owner's right to maintain a nonconforming use in existence at the time a *zoning* ordinance is passed. For example, the Township Rural Zoning Act (TRZA), MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq.*, at issue here, provides:

The lawful use of a dwelling, building, or structure and of land or a premise as existing and lawful at the time of enactment of a zoning ordinance, or, in the case of an amendment of an ordinance, then at the time of the amendment, may be continued although the use does not conform with the ordinance or amendment. [MCL 125.286(1); MSA 5.2963(16)(1).]

In contrast, Michigan courts have recognized that *regulatory* ordinances passed pursuant to the police power are not subject to any nonconforming use rights:

The grant of zoning power from the state to townships is made subject to the rights of those having nonconforming uses at the time the zoning ordinance is placed in effect. Not so with the regulatory ordinance in question which is authorized under another grant of power from the state to the townships. MCLA § 41.181 (Stat Ann 1961 Rev § 5.45[1]). Such regulatory ordinances must be reasonable and not confiscatory. Such power is not encumbered by a nonconforming use provision. [*Casco Twp v Brame Trucking Co, Inc*, 34 Mich App 466, 471; 191 NW2d 506 (1971).]

See, also, *Norton Shores v Carr*, 81 Mich App 715, 724; 265 NW2d 802 (1978); *Renne v Waterford Twp*, 73 Mich App 685, 690; 252 NW2d 842 (1977). Thus, the question here becomes whether Ordinance 397 is a zoning ordinance subject to nonconforming use rights, or whether it is a regulatory ordinance not subject to those rights.

Three justices of our Supreme Court have already expressly concluded that Ordinance 397 is not a zoning ordinance:

[W]e cannot agree with plaintiff's conclusion that ordinance no. 397 is a zoning ordinance because it limits the use of lake frontage based on the number of feet of lake frontage owned. **Bloomfield Township ordinance no. 397 is not a zoning ordinance. The ordinance does not regulate the use of land or lake frontage. Rather, it regulates an "activity" by limiting the number of boats that can be parked or "launched and/or docked adjacent to each separate frontage."**

A zoning ordinance is defined as an ordinance which regulates the use of land and buildings according to districts, areas, or locations. 8 McQuillin, *Municipal Corporations*, § 25.53, p 137. The question whether or not a particular ordinance is a zoning ordinance may be determined by a consideration of the substance of its provisions and terms, and its relation to the general plan of zoning in the city. *Id.*

We find plaintiff's argument analogous to the argument made in *Recreational Vehicle United Citizens Ass'n v City of Sterling Heights*, 165 Mich App 130, 418 NW2d 702 (1987). In that case, the plaintiffs challenged a local regulation which restricted the parking and storage of recreational vehicles, enclosed campers, boats, snowmobiles, and utility trailers upon public and private property in a single-family residential area. The plaintiffs claimed the ordinance was not a regulation, but rather a "zoning ordinance" because it limited the use of their property, and invalid because the city did not follow the procedural guidelines in the Township Rural Zoning Act.

The Court of Appeals held that defendant's ordinance was in fact a zoning ordinance because it regulated the storage and parking of plaintiffs' vehicles without reference to a public street or sidewalk. However, relying on an earlier decision, *Belanger v Chesterfield Twp*, 96 Mich App 539, 541; 293 NW2d 622 (1980), rev'd on other grounds 409 Mich 941 (1980), the Court held that where a local ordinance regulates the parking of vehicles on its streets or sidewalks, the ordinance is regulatory. *Recreational Vehicle United Citizens Ass'n v Sterling Heights*, *supra* at 136.

Launching and docking boats on inland lakes are "activities," and the number of boats that can be launched or docked is very much akin to a parking regulation on a residential street. It follows that since township parking regulations on residential streets are within the scope of a township's regulatory police power, *Belanger v Chesterfield Twp*, *supra* at 541, a township regulation of docking and launching boats on its inland lake is within the same scope of regulatory police power. [*Square Lake Hills*, *supra* at 323-325 (Riley, J.) (emphasis added).]

While this rationale did not garner a majority in the Supreme Court, our Court has expressly adopted Justice Riley's opinion as our own. *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 301; 539 NW2d 761 (1995). Both because the ordinance at issue was not specific to any district, area, or location and because it impacted an "activity" upon land rather than the "use" of land, we concluded that it was not a zoning ordinance and, therefore, not subject to nonconforming use rights. *Id.* at 298-302.¹

Consistent with *Natural Aggregates*, we conclude that Ordinance 397 is not a zoning ordinance. It applies to all of the lakes within the Township of Bloomfield, without regard to the districts, areas, or locations in which they are found. Further, its regulation of boat launching and docking affects an "activity" rather than the "use" of land. Because it is a regulatory ordinance, it is not subject to any nonconforming use rights, and summary disposition was improperly granted to plaintiff.

In light of this holding, we need not address the additional issues raised by defendant.

We reverse.

/s/ Richard A. Bandstra

/s/ William B. Murphy

/s/ Robert P. Young, Jr.

¹ Plaintiff argues that *Natural Aggregates* is distinguishable because the ordinance at issue did not completely prohibit the activity at issue (sand and gravel mining) but instead subjected that activity to new permit, surety bond, and land reclamation plan requirements. See *Natural Aggregates, supra* at 290-291. However, nothing in the *Natural Aggregates* analysis suggests that this is a distinction that should make a difference. Further, as a result of the new requirements, the mining operation was completely shut down. *Id.* at 291.