STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY TURNER, ANN TURNER, RUDY HOWARD, a/k/a RUBY HOWARD and OKEY HOWARD,

Plaintiffs/Counterdefendants-Appellees,

and

WILLIAM R. BERRY, JR., MELISSA WEGNER, RONALD D. VANZANDT and LAURIE A. DAVIS,

Joined Party Plaintiffs-Appellees,

v

SOUTH TWIN LAKE RESORT, INC.,

Defendant/Counterplaintiff-Appellant.

and

ERIC V. SLUSHER, DIANA LYNN SLUSHER, ROBERT E. SLUSHER, KATHRYN K. SLUSHER, MATTHEW C. SLUSHER and KATHY J. SLUSHER,

Defendants-Appellants.

UNPUBLISHED
March 17, 2000

No. 211381
Lenawee Circuit Court
LC No. 96-007082-CH

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

In this easement and zoning case, defendants appeal as of right the order (1) enjoining defendants from improving or maintaining the easement, (2) establishing a governing body to oversee maintenance and improvements of the easement, (3) apportioning maintenance cost of the easement to defendants, and (4) determining that defendants' use of their conference center is a local zoning ordinance violation. We affirm in part and reverse in part.

The Lutheran Outdoor & Retreat Ministry of Michigan owned the Tecumseh Woods Lutheran Camp in Tipton, Michigan. The camp contained a private dirt road that joined with the county road. The property was divided into seven different parcels and offered for sale at auction. Parcels one, five, six and seven contained a private road that was recorded as an easement for a common driveway. All parcels were zoned commercial-recreational (CR) at the time of their sale. At the time of trial, however, only two parcels were zoned CR, including defendants' parcel, and the other two parcels were rezoned for agriculture and residential use. Defendants purchased parcel seven, which is a sixty-nine acre parcel at the end of the easement, and plaintiffs own the other parcels adjacent to the private road.

Defendants formed a family-owned corporation known as South Twin Lake Resort, Inc. Defendants' parcel contains five cabins that are two-bedroom duplexes, a thirty-two by seventy foot lodge (conference center), and an outdoor worship area (amphitheater). The resort offers swimming, boat rental, hiking, volleyball, horseshoes, canoes, bonfires, and a playground. The resort has seven rental units, each unit accommodating up to eight people. The conference center has a capacity of 260 persons, and is rented for different occasions.

Plaintiffs filed suit complaining about defendants' maintenance of the private road and their operation of the conference center. Following a two-day bench trial, the trial court found that defendants' operation of the conference center was in violation of the Franklin Township zoning ordinance and enjoined defendants from unilaterally maintaining or improving the private road. The court also awarded the Turners $1,200 for damage done to their property as a result of defendants' grading of the private road.

Defendants first argue that the trial court erred when it enjoined them from maintaining and improving the easement. We agree. In cases involving equity, this Court's review is de novo. *Walker v Bennett*, 111 Mich App 40, 45; 315 NW2d 142 (1981). However, this Court reviews for clear error the findings of fact supporting the trial court's decision. *Webb v Smith*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

An easement is the right to use the land of another for a specified purpose. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). "An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement." *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). The land served or benefited by an appurtenant easement is the dominant tenement, and the land burdened by an appurtenant easement is the servient tenement. *Id.* In the present case, all five parcels are both dominant and

servient. Each of the parties uses the private road over the easement as their means of ingress and egress to their property.

This Court, in *Lakeside Associates v Toski Sands*, 131 Mich App 292; 346 NW2d 92 (1983), explained the relative rights of a dominant and servient tenement:

> 1. That the conveyance of a right of way gives to the grantee not only a right to an unobstructed passage at all times over defendant's land, but also such rights as are incident or necessary to the enjoyment of such right of passage.
>
> 2. The owner of the way, where its limits are defined, has not only the right of a free passage over the traveled part, but also to a free passage on such portions of the way as he thinks proper or necessary.
>
> 3. The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement.
>
> 4. The rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil.
>
> 5. The owner of the soil is under no obligation to repair the way, as that duty belongs to the party for whose benefit it is constructed.
>
> 6. What may be considered a proper and reasonable use by the owner of the fee, as distinguished from an unreasonable and improper use, as well as what may be necessary to plaintiff's beneficial use and enjoyment, are questions of fact to be determined by the trial court or jury. [*Lakeside Associates*, *supra* at 299-300.]

See also *Harr v Coolbaugh*, 337 Mich 158; 59 NW2d 132 (1953) (an owner of a servient estate may make any use of the premises that is not inconsistent with the easement).

The owner of the easement, not the servient estate, has a duty to maintain the easement in a safe condition to prevent injuries to third parties. *Kesslering v Chesapeake & Ohio Railway*, 437 F Supp 267 (ED Mich, 1977); *Morrow v Boldt*, 203 Mich App 324; 512 NW2d 83 (1994). "The party who enjoys the easement is entitled to maintain it so that it is capable of the use for which it was given. That party, however, is not entitled to make such drastic changes so as to increase the burden of the easement over the property involved." *Carlton v Warner*, 46 Mich App 60, 62; 207 NW2d 465 (1973). In this case, the trial court incorrectly enjoined defendants from exercising their right to maintain their easement over plaintiffs' property. The trial court may determine what reasonable improvement and repairs are required, but denying defendants the right to make even reasonable maintenance and improvements is inequitable. See *id*.

Defendants also argue that the trial court erred by creating a governing body, comprised of the easement's adjacent landowners, to determine the maintenance and improvements to be made to the easement. We agree. As stated above, a dominant owner has the right to make reasonable

improvements and maintenance to their easement. Although the establishment of a governing body to determine issues of maintenance and improvements of the easement may provide the court with a long-term solution, it does not ensure equity. Here, four of the five voting members of the governing body are plaintiffs, and two of those members own property that is zoned differently than defendants' property. The trial court's solution, although creative, cannot ensure that the governing body will approve reasonable maintenance and improvements proposed by defendants. Therefore, we reverse that part of the order enjoining defendants from maintaining and improving the easement, as well as that part of the order establishing a governing body, and remand to the lower court for a determination of what reasonable maintenance and improvements defendants may make.

Defendants next assert that the trial court erred by apportioning sixty percent of the cost of maintenance of the easement to defendants. We disagree. "Maintenance costs of an easement used jointly by both the dominant and servient owners are to be paid in proportion to each party's use." *Bowen, supra* at 194. Here, evidence was presented that defendants own the property furthest from the county road and operate a resort on their property. Based on this evidence, we cannot conclude that the trial court clearly erred in finding that defendants' proportionate use of the road is sixty percent.[1] Furthermore, we find that the trial court's damage award of $1,200 to the Turners was not clearly erroneous.. In rendering its decision to award damages to the Turners, the court, in essence, determined that defendants' maintenance of the private road was too burdensome on the servient tenement. *Henkle v Goldenson*, 263 Mich 140, 143; 248 NW 574 (1933).

Defendants also claim that the trial court incorrectly determined that defendants' operation of their conference center violated the local zoning ordinance.[2] Review of zoning cases is de novo, but we accord great weight to the findings of the trial court because of its opportunity to see and hear the witnesses. We will not upset the trial court's determination unless our review of the record convinces us that we would have reached a different result. *Talcott v City of Midland*, 150 Mich App 143, 146; 387 NW2d 845 (1985). See also *Macenas v Michiana*, 433 Mich 380; 446 NW2d 102 (1989).

The rules of statutory construction apply also to ordinances. *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). In construing a statute, provisions of the statute must be read in the context of the entire statute so as to produce a harmonious whole. *Weems v Chrysler Corp*, 448 Mich 679, 699-700; 533 NW2d 287 (1995); *Fremont Twp v McGarvie*, 164 Mich App 611, 615; 417 NW2d 560 (1987). This Court, in *Fremont Twp, supra,* explained the method of interpreting a zoning ordinance.

> The underlying principle of the proper construction of a zoning ordinance is to discover and give effect to the intent of the lawmaker. *Bangor Twp v Spresny*, 143 Mich App 177, 179; 371 NW2d 517 (1985). When interpreting the language of an ordinance to determine the extent of a restriction upon the use of the property, the language must be interpreted, where doubt exists, in favor of the property owner. *Id*. at 614.]

The Franklin Township zoning ordinance divides property into several different uses. Of particular importance in this case is the CR district. CR-zoned property "is intended for those areas oriented towards outdoor recreation uses and at the same time interested in the preservation of the

natural features of the land."[3] Franklin Township zoning ordinance §§ 12.02, 13.01. The permitted principle uses allowed in the CR district are:

> 1. Boat launching facilities, marinas, including the sale of gasoline, oils and accessory parts, service of boats and motors, docking and berthing space and supporting facilities to dry dock and store boats and motors when not in use.
>
> 2. Public and private parks, playgrounds, picnic areas and beaches.
>
> 3. Establishments containing indoor tennis courts, handball courts, swimming pools, gymnasiums, and health clubs.
>
> 4. Indoor ice skating and roller skating rinks.
>
> 5. Ski lodges and resorts.
>
> 6. Restaurants, only in conjunction with the principle recreational use.
>
> 7. Accessory buildings and uses customarily incidental to the above Permitted Principle Uses. [Franklin Township zoning ordinance § 13.02.]

The ordinance specifically states that "[a]ny uses not expressly permitted are prohibited." Franklin Township zoning ordinance § 13.02.

The trial court found that the conference center was the principle or core business of the property "under the guise of a resort." Defendants advertised the property as a separate banquet hall and not as a resort, and offered catering service in the center. The hall accommodated approximately two hundred sixty people, whereas the cabins accommodated only fifty-six people. Defendants acknowledged that the conference center is used only sparingly by cabin occupants. Although defendants claimed that the cabin rentals generate more income than the conference center, defendants failed to produce actual records to support their claim. Under these circumstances, we cannot conclude that we would have reached a different result than did the trial court. Accordingly, we agree with the trial court's conclusion that the conference center is in violation of the zoning ordinance.[4]

Defendants argue in the alternative that their use of the conference center is an accessory use of the permitted principle use of "a resort." However, in light of our conclusion that the principle use of the property was a conference center, this argument is without merit. We note, however, that even if we were to conclude that a resort is the principle use of the property, we would reject defendants' argument. An accessory use must be "customarily incident" to the principle use as a resort. The intent of commercial-recreational property is for "those areas that are oriented towards recreational uses" and "the preservation of natural features of the land." See Franklin Township zoning ordinance § 13.01. The conference center is used for weddings, proms, company picnics, anniversary parties, golf outings, seminars, and retreats. The uses for which defendants are using the conference center are not "customarily incident" to outdoor activities and natural preservation.

Affirmed in part and reversed in part.

/s/ William B. Murphy
/s/ Harold Hood
/s/ E. Thomas Fitzgerald

[1] The trial court noted that, if circumstances changed, defendants could seek changes to the apportionment of costs.

[2] We note that at oral argument on this matter the parties represented that the ordinance was recently amended. Any amendment, however, is not relevant to our resolution of this issue.

[3] In contrast, the permitted principal uses of property zoned C-1 include "theaters, dance halls, assembly halls or other similar places of assembly."

[4] The trial court ordered that the conference center "shall be used only by persons who stay at the resort and their legitimate guests. There shall be no advertisements for Defendants' property as a banquet hall. . . ."