STATE OF MICHIGAN

COURT OF APPEALS

BRIAN VANFAROWE and RAJINI VANFAROWE,

Plaintiffs-Appellants,

v

CASCADE CHARTER TOWNSHIP and GOODWOOD PLAT OWNERS, INC.,

Defendants-Appellees.

UNPUBLISHED
November 8, 2007

No. 264189
Kent Circuit Court
LC No. 05-004313-AV

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from the trial court's order affirming the grant of a special use permit issued by defendant township for the construction of a boat launch. We reverse and remand for proceedings consistent with this opinion.

Plaintiffs live adjacent to "Lot 25" of the Goodwood Plat in Cascade Township, on which the Goodwood Plat Owners, Inc. (GPO) planned to build a boat launch for the use of the owners in the plat. The Goodwood Plat was developed by Grover and Priscilla Good in 1950 when they subdivided their property along the Thornapple River into 52 lots: 25 along the river and the remainder across the street from the river. When the Goods established the plat, they included a dedication that states in part that "the street as shown on said plat is hereby dedicated to the use of the public and 'Lot 25' is dedicated to the use of the property owners." It is undisputed that the plat now consists of 43 lots, 22 lots along the river and 21 across the street.

Sometime after the plat was established, the Goods interest in Lot 25 was conveyed by deed to "Goodwood Plat Owners, Inc." In 1991, the owners of lots in Goodwood Plat discovered that GPO had lapsed as a corporation because it had failed to file annual reports. The owners then formed the current GPO, incorporated in February, 1992, and filed suit to confirm ownership of Lot 25 in the new GPO. GPO claims that the suit was successful, but no judgment was recorded.

The parties agree that Priscilla Good executed a quitclaim deed to the current GPO on January 9, 1996. That deed granted lot 25 to GPO "[s]ubject to flowage rights appearing on record, and also subject to building and use restrictions of the Cascade Township Zoning

Ordinance. Subject also to any rights of common usage which may be vested in owners of other lots in Goodwood Plat."

Lot 25 is only 75 feet wide. However, the township's keyhole ordinance requires all waterfront property to have "at least 100 feet of lake, river or stream frontage as measured along the normal high water mark of the lake, river or stream for each single-family home, dwelling unit . . . utilizing or accessing the lake, river or stream frontage." See §4.33(1)[1] Cascade Charter Township Zoning Ordinance.

In late 2004, GPO applied for and received a Michigan Department of Environmental Quality (MDEQ) permit to build a boat launch. GPO applied for a Type II special use permit on March 6, 2005, under the keyhole development provision of the ordinance, §4.33(7). The application requested permission "[t]o construct and use a boat ramp for use by the Goodwood Plat Owners Assoc member only, on the lot owned by the association, that has been used as an access site for years." The township's planning commission considered the application and held a public hearing on April 4, 2005. The minutes of the meeting show that the planning commission members discussed GPO's application in some detail before opening the public hearing. During the public portion of the meeting, both appellants spoke and expressed concern about the boat launch and noted their opposition to the granting of the special use permit because of the noise and increased traffic, including that generated by nonowners who would use the launch.

After a hearing, it was recommended that the special use permit with the listed conditions to the township board be approved. The resolution was approved on April 27, 2005. The resolution discussed the application and noted that it was required by the township's zoning ordinance and the keyhole development provisions in §§ 4.33(5) and 4.33(7). The township interpreted the ordinance as stating that the 100 foot minimum width did not apply to Lot 25 because it was lawful nonconforming use at the time the ordinance was adopted. Thus, all the owners had lawful nonconforming use rights since dedication in 1950, and §4.33 (5) and (7) would allow the expansion of the use with a special use permit. The township made no findings of fact as to how Lot 25 had been used in the past.

Plaintiff took issue with the approval of the nonconforming use in the circuit court, alleging: (1) that the township engaged in illegal contract zoning by authorizing the building of the boat launch in the utility easement agreement; (2) that the justification for granting the permit, that GPO had an existing nonconforming use and was "grandfathered in" so the 1995 zoning ordinance did not apply, was without basis in law and was not based on competent material evidence; and (3) that GPO obtained the fee interest by deed to Lot 25, thus

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[1] Cascade Charter Township revised its zoning ordinance effective October 20, 2006, to comply with the new state of Michigan zoning enabling act, Public Act 110 of 2006. The township's ordinance is Ordinance 7 of 2006. Michigan's Public Act 110 repealed the City and Village Zoning Act, the County Zoning Act, and the Township Zoning Act, and replaced them with one statute that recodified most of the provisions without substantial change. House Legislative Analysis as Enrolled, HB 4398, 4/11/06.

extinguishing the easement that granted it the right to use the lot to access the river. Therefore, GPO was subject to the 1995 ordinance.

Essentially, the court held that an irrevocable easement in Lot 25 was conveyed when the lots were sold and the easement allowed the construction of launching facilities. The failure to recognize the dedication as a nonconforming use would now deprive the plat owners of a valuable right. Admitting that it had no supporting law upon which it based its conclusion, the court held that that a plat dedication alone can be a nonconforming use. Plaintiffs appeal by leave granted.

Plaintiffs first allege the trial court erred in concluding that there was a nonconforming use established prior to the adoption of the zoning ordinance at issue. On this record, we cannot conclude whether the trial court erred and remand for a determination regarding the actions taken toward establishing a nonconforming use.

This Court reviews a circuit court's decision in an appeal of a zoning board decision de novo "while giving great deference to the trial court and zoning board's findings." *Norman Corp v City of East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). A decision of a township zoning board should be affirmed unless it was contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion. *Century Cellunet of So Mich Cellular Ltd v Summit Twp*, 250 Mich App 543, 546; 655 NW2d 245 (2002).

Plaintiffs allege that because defendant GPO has not made a tangible change in the land or performed work of a substantial character on the land, it had not established a nonconforming use of Lot 25, and thus, the township's grant of nonconforming was in error. Defendants argue, and the trial court held, that construction or tangible change in the land was not required to establish a nonconforming use; rather, the dedication in the deed alone, an easement and a vested right in the property, established that a nonconforming use existed. The concise issue is whether a dedication in a deed, standing alone, is a nonconforming use.

"A prior nonconforming use is a vested right to continue the lawful use of real estate in the manner it was used prior to the adoption of a zoning ordinance." *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 573; 398 NW2d 393 (1986), quoting *Dusdal v City of Warren*, 387 Mich 354, 359; 196 NW2d 778 (1972). The key moment for determining when a nonconforming use vests is the date of the adoption of the zoning ordinance. *Heath Twp v Sall*, 442 Mich 434, 441; 502 NW2d 627 (1993). Although a use existing at the time of the adoption of the ordinance does not meet the current zoning restrictions, the use "is protected because it lawfully existed before the zoning regulation's effective date." *Id*. at 439. Because that existing use is a valuable property right, a municipality may not bar the use without engaging in a confiscatory taking. *Gackler, supra* at 578; *Austin v Older*, 283 Mich 667, 676; 278 NW 727 (1938). However, the underlying policy of nonconforming use law is that uses should be eliminated over time. *High v Cascade Hills Country Club*, 173 Mich App 622, 626-627; 434 NW2d 199 (1989). Thus, enlargement and extensions are discouraged, and "zoning regulations should be strictly construed with respect to expansion." *Norton Shores v Carr*, 81 Mich App 715, 720; 265 NW2d 802 (1978). A municipality may also provide for the "limitation and eventual elimination of a nonconforming use in order to advance the goals of the zoning plan." *Gackler, supra* at 572. When the nonconforming use of the property has been ongoing, this

Court strictly construes the scope of that nonconforming use. *Garb-Ko Inc, v Carrollton Twp*, 86 Mich App 350; 272 NW2d 654 (1978).

The oft-repeated rule is that, in order to establish a nonconforming use, "there must be work of a 'substantial character' done by way of preparation for an actual use of the premises." *Id*. at 574, quoting *Bloomfield Twp v Beardlsee*, 349 Mich 296, 307; 84 NW2d 537 (1957); see also *Heath Twp, supra* at 439; *Bevan v Brandon Twp*, 438 Mich 385, 401; 475 NW2d 37 (1991), amended 439 Mich 1202 (1991). Further, "the *actual* use which is nonconforming must be apparent and manifested by a tangible change in the land, as opposed to intended or contemplated by the property owner." *Heath, supra* at 440. The work must go "beyond mere preparation [and] must materially and objectively change the land itself." *Heath, supra* at 441. Moreover, as defendants and the trial court stated, there is "no comprehensive formula for precisely what *activities* are sufficiently substantial to eclipse the prior nonconforming use threshold. It is not a question susceptible of precise quantitative measurements." *Heath, supra* at 447 (emphasis added). Rather, it is a question of the facts and the particular circumstances of the case. *Id*.

The cases that comprise the bulk of nonconforming use law are those where the property owner is seeking to put the property to a new use or develop vacant land, and the zoning is changed before the project is completed. In the landmark case of *City of Lansing v Dawley*, 247 Mich 394, 396-397; 225 NW 500 (1929), the Michigan Supreme Court held that, although the defendant obtained a building permit, ordered plans, surveyed the property, tore down a barn, and moved a house, he had done "nothing of a substantial character" to establish a prior nonconforming use before the zoning ordinance took effect and his building permit was revoked. Thus, his property was not exempt property from the zoning ordinance. *Id*. at 397. In *Bloomfield Twp v Beardls*ee, 349 Mich 296, 297, 306; 84 NW2d 537 (1957), the Supreme Court also held that the defendant had not established a prior nonconforming use as a gravel-mining operation despite the fact he purchased the property to mine gravel and actually performed some mining before the zoning change to residential in 1952. He performed more extensive mining on the property without complaint from the township after the ordinance was adopted but was enjoined from moving his complete mining operation onto the property. *Id*. at 306-307. The Court held that because his prior use was "meager" he had shown no substantial use of the property. *Id*. at 308. Even though he had contemplated the use and spent money in preliminary preparations, he had not acquired a vested right or nonconforming use. *Id*. at 309.

The Supreme Court revisited the issue of what is required to establish a nonconforming use more recently in *Gackler, supra* at 562. In *Gackler*, the plaintiff claimed that it established a nonconforming use and vested interest in a mobile home park by constructing a road, surveying and subdividing the plat, grading and excavating the sites, and installing eleven mobile homes. *Id.* at 573. The Court held that those activities were not work of a "substantial character which makes apparent an actual use of the [entire] plat as a single-wide mobile home plat. Nor does the fact that approximately one-fourth of the back lots are occupied by single-wide mobile homes establish the nonconforming use." *Id.* at 576. Because the land as developed could be used for mobile homes or conventional dwellings, the plaintiffs had not established a nonconforming use for the whole property as a mobile home park and could be barred from placing single-wide mobile homes that did not qualify as "dwellings" on the remaining lots. *Id*.

In *Heath*, a case in which this Court and the Supreme Court applied the rule from *Gackler*, the defendants claimed they had established a prior nonconforming use as a mobile home park by spending $18,000 in plans and site work before a referendum returned their property to single-family residential zoning. *Heath, supra* at 436-437. This Court held that although the development of a site plan and the clearing of trees would not be sufficient work to establish a vested right to build the mobile home park, the fact that the defendants had installed a commercial well and constructed a well-house, drilled four test wells, and began excavating for the park's road system did establish a nonconforming use. *Id*. at 438. The Supreme Court reversed, holding that such preliminary work was not sufficient to meet the "work of a substantial character" test and thus, could not establish a nonconforming use as a mobile home park. *Id.* at 445-446. Although the construction of the commercial well and the well-house to service a multi-unit facility were work of a substantial character, those activities in aggregate with the other preparatory work were still not "substantial" given the total construction required for a mobile home park. *Id.* at 445. Thus, defendants failed to prove a legal nonconforming use. *Id*. at 446.

Finally, in *Belvidere Twp v Heinze*, 241 Mich App 324, 330; 615 NW2d 250 (2000) this Court, applied the rules from *Gackler* and *Heath* and held that, despite significant investments and preparation, the defendant had not established a vested nonconforming use. The defendant purchased land with the intent to establish a large hog farm, and before the zoning was changed to bar his operation, he obtained financing for the operation, purchased insurance, applied for well and sediment control pit permits, designed the barn and manure pit layouts, obtained quotes for the construction and signed contracts with suppliers, graded the site, and constructed the barn and manure sewage system. *Id*. at 328. The Court discussed each act separately to determine whether it was "work of a substantial nature beyond mere preparation [that] materially and objectively change[d] the land itself." *Id*. citing *Heath Twp, supra* at 441. The Court noted that only the manure pit and sewer system were pertinent activities because only those two were clearly required for the specific use of a large scale hog farm; the road, barns, water and soil permits all could be used for another lawful use of the land, so they did not establish work of a substantial nature. *Belvidere Twp, supra* at 330-331. And, because the manure pit and sewer system were "miniscule in comparison with the entire construction" project, they did not constitute work of substantial nature to prove a vested nonconforming use. *Id*. at 329-330.

The above cited case law demonstrates that there was be some activity of a substantial nature prior to enactment of the zoning ordinance to warrant the grant of the nonconforming use. In the present case, the trial court did not conduct an evidentiary hearing to determine the use of Lot 25 and the nature of the usage prior to the enactment of the keyhole ordinance. Because the trial court proceeded to resolve the case on briefs without entertaining testimony regarding the usage and whether it falls within the applicable case law, we reverse and remand.

We note the defendants submit that the zoning ordinance cannot obviate the language of the dedication in the plat. However, defendants have other avenues of recourse and can seek a variance from the zoning at issue. See *Paragon Properties Co v City of Novi*, 452 Mich 568, 575; 550 NW2d 772 (1996); *George v Harrison Twp*, 44 Mich App 357, 363; 205 NW2d 254 (1973).

Plaintiffs next argue that the township erred in allowing the nonconforming use of the easement because it was extinguished when the Association became the fee owner of Lot 25 in

1996. We disagree. Although the merger of the dominant and servient estates extinguishes a prior easement, *Von Meding v Strahl*, 319 Mich 598, 605; 30 NW2d 363 (1948), under the facts of this case, there was no such merger.

A dedication of land to all the owners of property in a plat gives the owners of the lots an irrevocable right to use the land, or an easement. *Little v Hirschman*, 469 Mich 553, 562; 677 NW2d 319 (2004). Thus, each lot in the Goodwood plat obtained an easement at the time of the plat to use Lot 25 and each lot is a dominant estate. The Association now owns Lot 25 in fee, subject to the easement, and is the servient estate. The Association, a corporation, represents the individual owners, but it is not the same entity as the individual owners; thus, there is no merger or unity of title. Cf. *Bourne v Muskegon Court Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950) (noting that a corporation is a separate legal entity from its shareholders). Although the individuals who may use the lot are the same individuals who "own" the lot, the easement is not extinguished; mere unity of possession does not terminate an easement. *Odoi v White*, 342 Mich 575, 576; 70 NW2d 709 (1955) (noting that the possession and use of property by a land contract vendee who never obtained fee title to the property did not extinguish an easement). In addition, a nonconforming use is not subject to merger and extinguishment by a change in ownership. As long as a valid, nonconforming use is not expanded or extended, the property owner and any successors may continue the nonconforming use. *Kopietz v Zoning Bd of Appeals for City of Clarkston*, 211 Mich App 666, 675; 535 NW2d 910 (1995), citing *Austin v Older*, 283 Mich 667, 676; 278 NW 727 (1938).[2]

Reversed and remanded for a determination of the actual existence of nonconforming uses of the land subject to the easement and to determine the scope of any nonconforming uses. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski

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[2] We note that defendant township alleges, in the alternative, that the issuance of a special use permit was properly granted. However, we limited our review to the issues raised in the application. *VanFarowe v Cascade Charter Twp*, unpublished order of the Court of Appeals, entered November 17, 2005 (Docket No. 264189). Additionally, we reject defendant township's challenge to plaintiffs' standing. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 946 (2006); *Brown v East Lansing ZBA*, 109 Mich App 688, 699-700; 311 NW2d 828 (1981).