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UNPUBLISHED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.

MURRAY. J., (*concurring*).

I concur in the majority opinion, which reverses the trial court's order and remands for a determination as to the existence of any nonconforming use of the easement. I write separately to expand upon the reasoning employed by the majority.

As the trial court recognized in its thorough and well-written opinion, there appears to be no case law in Michigan, or for that matter anywhere else in the United States, that decides whether an easement such as the one in the instant case qualifies, in and of itself, as a nonconforming use for purposes of a local zoning ordinance. In the absence of such case law, the trial court nevertheless concluded that the easement was sufficient to constitute a nonconforming use because the same policies behind finding nonconforming use as a result of substantial use and improvements to property existed to a situation involving a restrictive easement. After canvassing Michigan law on this subject, however, it is my view that the easement was not sufficient by itself to constitute a nonconforming use.

In *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993), the Supreme Court set forth the definition for a prior nonconforming use:

> A prior nonconforming use is a vested right in the *use* of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date. *Dusdal v City of Warren*, 387 Mich 354, 359-360; 196 NW2d 778 (1972). In other words, it is a lawful *use* that existed before the restriction, and therefore continues after the zoning regulation's enactment. Generally, to establish a prior nonconforming use,

> a property owner must engage in "work of a 'substantial character' done by way of preparation for an *actual use* of the premises." [Citation omitted in part; emphasis supplied.]

Thus, in most all of the cases discussing what constitutes a prior nonconforming use, the courts have required that the party seeking to establish the nonconforming use provide evidence that work of a substantial character had been done in preparation for the use of those premises in a nonconforming way when the zoning ordinance is amended.

The critical difference between the trial court's holding and the case law is the fact that a *right* to use an easement is not the same thing as *using* the easement. In general, an easement is the right to use another's land for a specific purpose that is not inconsistent with the other's ownership interest. *Michigan Dep't of Nat'l Resources v Carmody-Lahti Real Estate Inc*, 472 Mich 359, 379 n 42; 699 NW2d 272 (2005). Thus, an easement gives the holder a *right* to use the property in a particular manner, while under Michigan law, an *actual use* of the property must exist to constitute a nonconforming use. MCL 125.3208(1); *Heath Twp, supra* at 438; *Gackler v Yankee Springs Twp*, 427 Mich 562, 574-575; 398 NW2d 393 (1986); *In re Central Baptist Theological Seminary*, 370 NW2d 642, 647 (Minn App, 1985) ("A nonconforming use is an actual use.")

If an actual use exists at the time the zoning change takes place, that nonconforming use is preserved, but cannot be expanded once the zoning change occurs. *Jerome Twp v Melchi*, 184 Mich App 228, 231; 457 NW2d 52 (1990). But if the actual use is not "up and running" at the time of the zoning change but is instead in the process of becoming so, the court will employ the "work of a substantial character" test to determine whether the property was being used for a nonconforming use. *Heath, supra*. Accordingly, it is not enough to have a right to use the property in a particular way, as there is a distinction between the right to use land and the actual use of the land. See, e.g., *Miller v Thomas*, 201 Wis 2d 675, 691; 550 NW2d 134 (1996) (Brown, J., concurring).

This rationale is also consistent with well-settled law providing that the intent to use property in a certain way, and the preparations to use property in a certain way, are not sufficient to meet the "work of a substantial character" test because the focus is on the actual use of the property. *Gackler, supra*; *Heath, supra* at 440-442; *City of Lansing v Dawley*, 247 Mich 394, 397; 225 NW 500 (1929). It is a property owner's use of the property in a particular manner that is preserved under the nonconforming use doctrine, and that doctrine helps preserve the property owner's constitutional right to utilize their property as they had been prior to the zoning amendment. Here, however, there is no evidence that any of the property owners utilized the easement for the intended purpose, i.e., a boat ramp. Although the record also does not appear to support such a conclusion, an evidentiary hearing will allow the parties to expand upon this evidence. That is why I concur in a remand.

Unlike the trial court, I cannot glean from the case law a rule of law that provides a property owner with protection from a change in zoning in the absence of substantial use of the property in that particular manner. In order to conclude as did the trial court, a case would have to stand for the proposition that a property owner is exempted from the current application of a zoning ordinance simply because the property owner "could have" utilized the property in a particular manner because of an easement, but in fact never did so. However, if the property

owner never utilized the property in any particular way before the zoning amendment, there was no use conforming to the prior zoning, and the property is subject to the zoning amendment.

/s/ Christopher M. Murray