STATE OF MICHIGAN

COURT OF APPEALS

LONG ISLAND COURT HOMEOWNERS,

Plaintiff-Appellee,

v

VICTOR VERNIER, ELIZABETH VERNIER, ELEANOR M. BOURLIER and MAE LOUISE VERNIER,

Defendants,

and

IRA TOWNSHIP,

Third-Party Defendant,

and

GREAT LAKES LAND, LTD., INC., and MARIO OLGIATI,

Defendants-Appellants.

UNPUBLISHED
June 4, 2009

No. 283292
St. Clair Circuit Court
LC No. 67-603182-CZ

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendants-Appellants Great Lakes Land, Ltd., and Mario Olgiati (hereafter referred to as "defendants") appeal by leave granted an order making a temporary injunction permanent and an order granting a permanent injunction pursuant to MCR 3.310(C). They argue that the trial court abused its discretion by disallowing them from using a roadway for residential construction purposes. We agree and reverse.

We review a trial court's decision to grant injunctive relief for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). "The trial court abuses its discretion when its decision falls outside [the] range of principled outcomes." *Id*. This Court reviews de novo the findings of fact supporting the decision in an equitable action for clear error. *Maatta v Dead River Campers, Inc*, 263 Mich App 604, 607;

689 NW2d 491 (2004). "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Kernen v Homestead Develop Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). "The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters*, *supra* at 9. We consider several factors in determining the propriety of issuing an injunction, including, as is relevant to the case at bar, (1) the nature of the interest to be protected, (2) the relative adequacy to the plaintiff of injunction and of other remedies, and (3) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied. *Higgins Lake Property Owners Association v Gerrish Township*, 255 Mich App 83, 106; 662 NW2d 387 (2003).

Previously, in 1970, a permanent injunction had been entered to enforce restrictive covenants in Cicotte and Vernier's Long Island Subdivision, Ira Township, St. Clair County, Michigan. Defendants' predecessors in interest, the Verniers, were using subdivision lots (as well an adjacent parcel called "U-255"), for the operation of a public marina, in violation of deed restrictions, which stated: "no building shall be erected on said premises except a private dwelling house and out buildings and no building erected on said premises shall at any time be used for the purpose of any trade, manufacture or business of any description or as a hotel, saloon, or place of public resort . . . ."

With respect to use of the roadway at issue here, the 1970 injunction provided that:

> [the Verniers], their agents, representatives, customers, and assigns, are permanently enjoined and prohibited from using the 15-foot roadway . . . *for any commercial purpose or activity. Marina patrons and those persons engaged in any commercial activity not connected with residential use,* are thus barred from using said roadway to get to or from the U-255 property. *The use of said roadway as it bisects said lots is limited to single-family residential use only.* [Emphasis added.]

In issuing the injunction at issue here, the trial court judge seems to have had two concerns. First, he was apparently trying to follow the letter of the 1970 injunction.[1] For example, he stated, "I'm going to take . . . a look at trying to interpret what's been done in the past in the context of what can or can't be done," and "I think that the commercial activities of [development] . . . would be in violation of the . . . [injunction] as it presently exists." The 1970 injunction, however, specifically prohibits "persons engaged in any commercial activity not connected with residential use," from using the road, which, as defendants point out, clearly

[1] In light of our conclusion that the trial court improperly interpreted the 1970 injunction in support of the injunction entered here, we need not consider whether it was appropriate to consider the 1970 injunction for that purpose. However, we note that a permanent injunction may properly be dissolved when there has been a material change in circumstances, *Gruber v Dodge*, 45 Mich 33, 39; 205 NW2d 869 (1973), and the proposed use of the property for residential purposes is significantly different than its use in 1970 as a marina.

anticipates and allows for commercial activity that *is* connected with residential use. We conclude that the 1970 injunction does not provide any basis for the injunction at issue here.

The trial court was also concerned with the impact the residential construction traffic might have on the roadway. There is case law that addresses the issue of road use by property owners who own lots both in and adjacent to a subdivision subject to restrictive covenants. In *R R Improvement Ass'n v Thomas*, 374 Mich 175; 131 NW2d 920 (1965), our Supreme Court reasoned that:

> the trial court should be informed by due testimony whether and how, if at all, the present residential advantages enjoyed by [subdivision] lot owners will or might be adversely affected by appellant's proposal; whether a new traffic burden or maintenance problem will thereby be cast on [the] road, or for that matter, upon any other part of the subdivision's roadways; . . . and, in general, whether there are fair distinguished from carping or trifling reasons for denial to appellant of that which is sought by her. [*R R Improvement Ass'n*, *supra* at 183-184]

Further, the Court noted that "[a]n injunction that bears heavily on the defendant, without benefiting the plaintiff, will always be withheld as oppressive." *Id.* at 184, quoting *McClure v Leaycraft*, 183 NY 36, 44; 75 NE 961 (1905). In a later case where traffic concerns were at issue, as they are in the case at bar, this Court followed *R R Improvement Ass'n* and remanded, "for testimony and determination as to what actual detriment construction of the proposed roadway will cause plaintiff . . . it must be shown that any added traffic will harm plaintiff." *Billiet v Aulgur*, 18 Mich App 391, 398; 171 NW2d 463 (1969).

Consistent with these roadway precedents, our Court has more recently employed a balancing approach in determining the propriety of injunctive relief. *Higgins*, *supra*. Applying that approach here, we note that there was evidence that construction traffic could harm the road and inconvenience other lot owners. However, the record does not show that any damage will be irreparable, and, when construction is completed, the additional traffic resulting from the 16 new homes will have no adverse consequences.[2] Carlo Santia, a traffic expert who conducted an impact analysis regarding the proposed project, testified that, once the subdivision is built, the additional use by residents of the 16 new homes would have "negligible impact" on traffic volumes and no detrimental impact on the road surface. James Warner, director of engineering for the St. Clair County Road Commission, agreed that additional traffic volume from the new subdivision would have a negligible impact and that the road would be suitable for providing access to the additional homes. Finally, regarding concerns about the ability of emergency vehicles to access the new subdivision, the Ira Township Fire Department sent a letter to the Planning Commission on December 12, 2004, stating that "all fire concerns have been met fore [sic] site plan."

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[2] In contrast, with respect to the 1970 injunction, the trial court found that heavy commercial traffic to the marina would cause extensive and continuing problems for the roadway and its neighboring residences.

In sum, while construction traffic may harm the road and inconvenience plaintiff's members, any damage will be reparable, and when construction is completed, the additional traffic resulting from the 16 new homes will be negligible. Yet the trial judge has enjoined defendants from using the road to build the development, suggesting that they instead bring in their workers and materials over the water, by boat, or over a bridge, which defendants would have to build. Either of these alternatives would be extremely costly for defendants and would likely make the proposed subdivision financially infeasible. The hardship imposed on defendants by granting the injunction is much harsher than that which the plaintiff would endure if the injunction had been denied. Thus, the trial judge abused his discretion by depriving defendants of the right to develop their property in a practicable manner, based on temporary inconvenience to plaintiff and impermanent damage to the subdivision road.[3]

We reverse. Defendants, as the prevailing parties, may impose costs. MCR 7.219.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio

[3] We further note that the injunction against defendants denies them the same use of their property that other residential owners adjoining the roadway, such as plaintiff's members, are allowed. The injunction does not prevent other residential neighbors from using the roadway for remodeling, additions, and other construction projects. Thus, the injunction entered here for plaintiff's benefit seems to be the result of "unfairness or overreaching," which is inconsistent with "[t]he maxim that a party who comes into equity must come with clean hands." *Richards v Tibaldi*, 272 Mich App 522, 537; 726 NW2d 770 (2006).