# STATE OF MICHIGAN

# COURT OF APPEALS

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GERRISH TOWNSHIP,

Plaintiff-Appellee,

v

JOHN F. DOERING,

Defendant-Appellant.

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UNPUBLISHED
May 26, 2000

No. 216584
Roscommon Circuit Court
LC No. 98-720253-CH

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

In this action to abate a public nuisance, plaintiff Gerrish Township asked the trial court to order defendant John F. Doering to remove the replacement deck he had constructed without a building permit in violation of the Gerrish Township Zoning Ordinance. The parties submitted the case on stipulated facts, exhibits, and briefs. The trial court found that Doering's replacement deck did not comply with the Township Zoning Ordinance and that it constituted a nuisance per se. Granting the Township's requested relief, the trial court ordered Doering to remove the deck. Doering appeals as of right and we affirm.

## I. Basic Facts And Procedural History

Doering owns real estate in the Woodlawn Subdivision of Gerrish Township, Roscommon County. His property faces Sheridan Drive, which runs along the shore of Higgins Lake. As originally platted, Sheridan Drive was sixty-six feet wide, extending from its current inland edge to the water's edge. However, Sheridan Drive has never been developed or maintained at a greater width than its current width of twelve feet, leaving a strip of land between the water's edge and the traveled portion of the Sheridan Drive right-of-way.

Doering's parents first constructed a deck on the untraveled water side of Sheridan Drive in or about 1952. The old deck remained in place until Doering removed it in 1997 to construct a replacement deck. When the Township learned about Doering's construction, it requested that he apply for a building permit or remove his deck. The Township contended that constructing the replacement deck without a permit violated the Township Zoning Ordinance. The record does not

clearly indicate that Doering applied for a permit after this notice, but it is clear that the Township never issued a permit to him. When Doering did not remove the replacement deck, the Township commenced this action.

The trial court found that the replacement deck was a "structure" under the building code and ordered Doering to remove it because he failed to obtain a building permit to construct it. The trial court rejected Doering's contention that his nonconforming use could continue because it predated the Township Zoning Ordinance, and found instead that he discontinued the nonconforming use for more than 180 days. Specifically, the trial court stated:

> Defendant claims that he had the right to replace the old deck because the old deck was a nonconforming use that predated the ordinance. This situation is addressed at Article V, Section 5.4 of the Ordinance which reads as follows:
>
> > "If the nonconforming use of any building, structure, land or premises or part thereof is discontinued through vacancy, lack of operation, destruction of fire, wind collapse, explosion, Acts of God, acts of the public enemy, or otherwise, to an extent of more than 50% of its assessed valuation, or is discontinued or abandoned for a continuous period of one hundred and eight (180) days, then any future use of said building, structure, land or premises shall conform, in its entirety, to the provisions of This Ordinance; provided, however, the Board of Appeals may, upon application within thirty (30) days of the termination of said period, permit the resumption of such nonconforming use."
>
> Defendant has not complied with this provision. *The old deck has been gone more than one hundred eighty (180) days*. Defendant probably could not utilize this provision because he doesn't own the land, but he has not complied with it anyway. (Stipulated Facts 9, 10, 11 and 12). [Emphasis supplied.[1]]

The trial court also opined that Doering probably could not claim a continuing nonconforming use because he did not own the property. Nevertheless, the trial court determined that, even though Doering did not hold title to the land, the Township Zoning Ordinance resolved this conflict because the Ordinance applies without respect to the legal or equitable status of the title.

We note that the land in this area has been the subject of a number of other court decisions. Early on, the same portion of Sheridan Drive in the Woodlawn Subdivision was part of a longer trail. Referred to as the "trail road," individuals created it as the main route along the west shore of Higgins Lake. In 1934, at the request of landowners along the trail road, the Roscommon Circuit Court enjoined the Roscommon County Road Commission "from cutting trees along and improving and widening the trail." The Michigan Supreme Court affirmed the order, and declared that "if the said trail road ever constituted a public highway, it was a highway by user limited to the width of the trail and the extent of use by the public . . . [and] even if it did constitute a public highway of any width, it ha[d] been abandoned." *Hoyt v Roscommon Co Rd Comm*, unreported order of the Supreme Court, Docket

No. 38508, entered May 5, 1937, recorded by Roscommon County Clerk, August 27, 1946. The road commission met and abandoned sections of the trail, but excluded certain sections, such as the portion along the shore that travels through Woodlawn Subdivision. This roadway along the front of lakeside lots on Higgins Lake has generated other appellate decisions as well.[2]

## II. Property Interest

### A. Standard Of Review

Doering contends that the trial court erred when it determined that he did not have a property interest in the land under the deck. He argues that he has a property interest in the disputed and unimproved portion of Sheridan Drive sufficient to entitle him to build a deck on the land. He notes that the trial court did *not* conclude that he completely lacks a property interest in the land. Rather, the trial court's decision rested expressly on (1) its finding that he constructed the deck without a building permit, a finding the parties do not contest, and (2) its conclusion that, pursuant to the Township Zoning Ordinance, any structure constructed without a building permit constitutes a violation of the Township Zoning Ordinance. We review de novo a trial court's conclusion on an issue of law. *Bracco v Michigan Tech University*, 231 Mich App 578, 585; 588 NW2d 467 (1998).

### B. Zoning Ordinance § 13.6(a)

The Township Zoning Ordinance defines a "structure" as "[t]hat which is built or constructed, or an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner." Clearly, Doering's deck is a structure under this very broad definition because it was "artificially built up" and "composed of parts joined together . . . in [a] definite manner." As a result, the Township Zoning Ordinance required Doering to apply for "a building permit from the Building Administrator." Otherwise, "[w]ork on such project shall not be started until such permit, signed by the Building Administrator has been obtained."

Even if Doering is not an "owner" of the land, he appears to have been authorized to construct the deck by the land owners, and therefore was an "agent" under the Township Zoning Ordinance. We hold that in concluding that the Ordinance applied to Doering regardless of his interest in the land, the trial court committed no error.

### C. Nonconforming Use

In a related argument, Doering contends that the trial court erroneously rejected his claim that he was entitled to this nonconforming use because it found he was not an owner of the land. The trial court did note that "[d]efendant probably could not utilize the [nonconforming use] provision because he doesn't own the land." However, the trial court actually rejected Doering's claim because it found that, even if he had a valid nonconforming use, his right to claim it lapsed under the ordinance 180 days after he removed the old deck because, without a building permit, his new construction violated the Township Zoning Ordinance. As noted above, we cannot find a basis in the record for the trial court's statement that the old deck had been gone more than 180 days and this statement is not in accordance with our

reading of the stipulated facts. We do not, however, regard this element of the trial court's decision to be critical to the issues before us. Below, we deal with the legal issue of the lapse of the nonconforming use as distinguished from whether the trial court had a basis in the record for its statement that the old deck had been gone for more than 180 days, which is a factual matter.

We note that even if the trial court erroneously concluded that Doering had insufficient interest in the land to entitle him to build his deck, "an error in a ruling or order . . . is not ground for granting a new trial . . . or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also *In re Alton,* 203 Mich App 405, 408; 513 NW2d 162 (1994). Because the trial court's conclusion was not necessary to its holding, we will not reverse the trial court's ruling.

## III. Discontinuing Nonconforming Uses

### A. Standard Of Review

Doering contends that the trial court erred in its analysis of the section of the Township Zoning Ordinance giving rise to the lapse of nonconforming uses. Doering appears to argue that his nonconforming use did not lapse. We review de novo a trial court's statutory interpretation as a question of law. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

### B. The Rules Of Statutory Construction

The rules of statutory construction also apply to ordinances. *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the lawmaker. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Statutory language should be construed reasonably, keeping in mind the purpose of the act, *Barr v Mount Brighton, Inc*, 215 Mich App 512, 516; 546 NW2d 273 (1996), and giving the terms their fair and natural meanings in light of the subject matter, *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). The expressed purposes for the Township Zoning Ordinance include the promotion of health, safety, morale, securing safety from fire, and other dangers, lessening congestion in roads, and preventing the overcrowding of lands.

### C. Zoning Ordinance § 5.4

We find it helpful to break the provisions of § 5.4 into its two components. The first component of the section can be reformulated to state, "If the non-conforming use of any building, [or] structure . . . or any part thereof is discontinued . . . to an extent of more than 50% of its assessed valuation, . . . then any future use of said building, [or] structure . . . shall conform, in its entirety, to the provisions of This Ordinance . . . ." When read in this fashion, the first component of the section clearly relates to the *extent* of the discontinuation of the non-conforming use; if more than half the non-conforming use is discontinued, then any future use of the building or structure must fully conform to the zoning ordinance.

The second component of the section can be reformulated to state, "If the non-conforming use of any building, [or] structure . . . or any part thereof is discontinued or abandoned for a continuous period of one hundred (180) days, then any future use of said building, [or] structure shall conform, in its entirety, to the provisions of This Ordinance . . . ." When read in this fashion, the second component of the section clearly relates to the *time* the non-conforming use is discontinued; if the non-conforming use is discontinued for more than 180 days, then any future use of the building or structure must fully conform to the Zoning Ordinance.

Equally clearly, these two components are in the disjunctive. If a non-conforming use under one component has been discontinued, it does not matter whether the non-conforming use has been discontinued under the other component. With this in mind, it therefore made no difference whether Doering discontinued the nonconforming use for more than 180 days when he removed the deck. The parties stipulated that Doering "removed the sun deck built by his parents and constructed a new one in the same location." It is beyond dispute, then, that the non-conforming use the old deck represented was discontinued to an extent of more than 50% of its assessed valuation. Under the first component of § 5.4 of the Township Zoning Ordinance, any future use had to conform entirely to the Ordinance. The replacement deck did not so conform. No further construction of the statute is necessary and we therefore uphold the trial court's decision on this issue.

## IV. Nuisance

### A. Standard Of Review

Doering contends that his deck is not a nuisance per se under the Township Zoning Ordinance. This Court reviews de novo a trial court's conclusion on an issue of law. *Bracco, supra* at 585.

### B. Statutory Provisions

MCL 125.294; MSA 5.2963(24) provides clearly that "[u]ses of land, and dwellings . . . or structures . . . erected, altered, razed, or converted in violation of local ordinances . . . under [the Township Zoning] act are a nuisance per se." The trial court concluded that the zoning ordinance violation was also a nuisance per se pursuant to Article XIII, § 13.8 of the Township Zoning Ordinance, which requires the Township to issue a building permit before a landowner can construct any structure. Because Doering's deck, to whatever extent it was completed, was built without a permit, and therefore violated the Ordinance, it is a nuisance per se under MCL 125.294; MSA 5.2963(24). See *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990) ("[T]he existence of the nuisance may be established merely by showing the violation of the ordinance.")

## V. Laches

Doering contends that laches should prevent the Township from enforcing the Township Zoning Ordinance. Laches is an affirmative defense. *Rowry v University of Michigan*, 441 Mich 1, 12; 490 NW2d 305 (1992). However, Doering forfeited this issue for review because he failed to plead laches

either in his responsive pleading or in an amended pleading. MCR 2.111(F); *Kelly-Nevils v Detroit Receiving Hospital*, 207 Mich App 410, 420; 526 NW2d 15 (1994).

Further, Doering could not prevail on this defense even if he pleaded it as required by the court rule. Laches is an equitable defense, and only applies if granting requested relief would be unfair. *City of Holland v Manish Enterprises*, 174 Mich App 509, 512; 436 NW2d 398 (1988). The defense operates if there has been an "unexcused or unexplained delay" in bringing legal action and a "corresponding change in material condition that results in prejudice to a party." *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). Laches is concerned with "the effect of or prejudice caused by the delay." *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992). Without prejudice, the defense of laches does not apply merely because time passes. *Cantor v Cantor*, 87 Mich App 485, 493-494; 274 NW2d 825 (1978).

We conclude that Doering was not prejudiced by the Township's failure to enforce the Township Zoning Ordinance against him. The passage of time actually accrued to Doering's benefit. He had years to use the old deck, which was not located in a lawful place. Whatever detriment Doering suffered in this case "accrued to [him] through [his] own acts in violation of the ordinance." *White Lake Twp v Lustig*, 10 Mich App 665, 675; 160 NW2d 353 (1968).

VII. Discriminatory Enforcement

Doering contends that the Township has forfeited enforced the Township Zoning Ordinance in a discriminatory manner. We conclude that Doering forfeited this argument by failing to raise it as an affirmative defense. MCR 2.111(F). As discussed above, any defense that seeks to avoid a civil suit by a means other than argument directed to plaintiff's prima facie case is an affirmative defense. *Kelly-Nevils*, *supra* at 420. In any event, we see no evidence of discrimination.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[1] Our review of the record does not reveal any support for the trial court's conclusion that the old deck had been gone more than 180 days. As noted, the case was tried based on stipulated facts, exhibits, and briefs. Stipulated fact number 9 states that "in June of 1997" Doering removed the deck his parents built and constructed a new one in the same location. Under this stipulation, the earliest date which Doering could have removed the old deck was June 1, 1997 and the latest date by which Doering could have constructed the replacement deck was June 30, 1997. Rather clearly, the elapsed time under this scenario was less than 180 days.

Further, Exhibit H to the stipulated facts, a letter dated June 30, 1997 from the Township building and zoning administrator to Doering, refers to a "recent inspection," which disclosed that a "deck was

installed without a building permit." Thus, some time earlier than June 30, 1997, Doering had installed the replacement deck. Again, assuming that the stipulated facts are correct and that Doering remove the old deck no earlier than June 1, 1997, 180 days had not elapsed from when he removed the old deck and installed the new one. Thus, the trial court's statement that the old deck had been gone more than 180 days does not accord with the stipulated facts. The trial court may have meant that the old deck had been gone for more than 180 days from when the Township filed the lawsuit or from the date of the trial court's opinion. Alternatively, the trial court may have interpreted the Township Zoning Ordinance simply to mean that a right to a continuing non-conforming use lapses 180 days from the date such non-conforming use is discontinued if the Township issues no building permit within that 180 day period.

[2] Some of these decisions include *McCardel v Smolen,* 71 Mich App 560; 250 NW2d 496 (1976), aff'd in part and vacated in part 404 Mich 89 (1978), *Kempf v Ellixson,* 69 Mich App 339; 244 NW2d 476 (1976), *Sheridan Drive Ass'n v Woodlawn Backproperty Owners Ass'n,* 29 Mich App 64; 185 NW2d 107 (1970), *Michigan Central Park Ass'n of Higgins Lake v Roscommon Co Rd Comm,* 2 Mich App 192; 139 NW2d 333 (1966).