[Cite as *State ex rel. Eberts v. Inland Prods.*, 2010-Ohio-4510.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Paul Eberts,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-796 (M.C. No. 2008 EVH 60057)
Inland Products et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on September 23, 2010

Ron O'Brien, Prosecuting Attorney, and *William J. Stehle*, for appellee.

Denmead Law Office and *Craig Denmead*, for appellants.

APPEAL from the Franklin County Municipal Court, Environmental Division.

McGRATH, J.

{¶1} Defendants-appellants, Inland Products, Inc. and Real Property located at 1840-1842 Brown Road, Columbus, Ohio 43223 (collectively "Inland"), appeal the judgment of the Franklin County Municipal Court, Environmental Division, which rendered judgment against them in favor of plaintiff-appellee, Paul Eberts, zoning enforcement officer for the Franklin County Economic Development and Planning Department ("appellee"). For the following reasons, we reverse.

{¶2} Inland is the owner of the property at issue, located at 1840-1842 Brown Road and situated in Franklin Township, Franklin County, Ohio ("the property"). On March 19, 2008, appellee filed a complaint seeking preliminary and permanent injunctive relief against Inland. The complaint alleged that Inland was using the property for parking commercial vehicles and that such use was not in accordance with sections 531.051 and 300.022 of the Franklin County Zoning Resolution. Inland filed an answer, asserting various defenses, including the defense of a valid, nonconforming use.

{¶3} The case proceeded to a bench trial. On July 15, 2009, the trial court issued its decision, finding that Inland was parking tandem and tractor-trailers on the property in violation of FCZR 531.051 and that such use did not qualify as a non-conforming use. In reaching its decision, the court explained:

> Given the testimony of the witnesses and information submitted to the Court, there was a legal non-conforming use for industrial cartage at the time of the adoption of the FCZR. However, the primary uses on this property have changed over the years since the adoption of the FCZR to include contract carrier shop, non-ferrous foundry, warehousing, bus company operation, boat storage, truck maintenance, paving operations, and custom fabrication shop. Additionally, in 2002, [appellee] proved that the property was used for boat storage in Franklin County municipal court case number 2002 EVH 060305. Although some uses have included the parking and storing of tandem and tractor trailers as an ancillary use, not all primary uses have included the parking and storing of tandem and tractor-trailers.
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> * * * Therefore, since the uses of the property have changed over the years from the original uses in 1947, a non-conforming use has not been maintained. Additionally, the nature of the uses has been substantially different over the history of the property. The uses cannot be said to be industrial in nature and therefore be the same over the years.

> Given the nature of the uses, each use constitutes a different use of the property with a different [Standard Industrial Classification] number, ranging from boat storage to cartage work. Since the uses have not remained the same since the adoption of the FCZR, it is unnecessary to address whether the uses have been continuous.

(Trial court's July 22, 2009 decision at 4-5, 6.) Based on the above, the trial court ordered that Inland be "permanently enjoined from parking and storing commercial vehicles on 1840-1842 Brown Road, Franklin Township, Franklin County, Ohio." (Decision at 6.)

{¶4} It is from this entry that Inland timely filed its notice of appeal, assigning the following errors:

> ASSIGNMENT OF ERROR NO. I
>
> THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF LAW WHEN IT FAILED TO HOLD THAT AN ANCILLARY USE IS AFFORDED THE SAME RIGHT TO A NONCONFORMING USE AS IS AFFORDED TO A PRIMARY USE AND THUS REFUSING TO ALLOW THE CONTINUED STORING AND PARKING OF COMMERCIAL VEHICLES ON 1840-1842 BROWN ROAD.
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> ASSIGNMENT OF ERROR NO. II
>
> THE TRIAL COURT COMMITED PREJUDICIAL AND REVERSIBLE ERROR AS A MATTER OF FACT AND LAW WHEN IT FACTUALLY FAILED TO FIND THAT THE STORING AND PARKING OF COMMERCIAL VEHICLES ON 1840-1842 BROWN ROAD AS THE COMBINATION OF AN ANCILLARY USE AND AS PART OF THE PRIMARY USES CONSTITUTED A NONCONFORMING USE AND THEN LEGALLY FAILED TO ADDRESS WHETHER THAT USE COMPLIED WITH O.R.C. §303.19 BY USING THE CORRECT CONTINUITY STANDARD FOUND THEREIN.

{¶5} Because Inland's assignments of error are interrelated, we shall address them together. In its first assignment of error, Inland argues that the focus of the trial

court's decision was on the primary uses on the property, and, in doing so, it "failed to recognize * * * that ancillary uses are afforded the same protection of a nonconforming use as are primary uses." (Inland's brief at 5.) According to Inland, it was "entitled to a nonconforming use for the parking and storing of commercial vehicles on the property as an ancillary use even though the primary uses may have changed or ceased." (Inland's brief at 5.) Related to the foregoing, Inland asserts in its second assignment of error that the trial court erred when it failed to determine that a combination of the primary and ancillary uses of the property constituted a nonconforming use, and the court further erred when it failed to determine "that [the combined] use legally satisfied O.R.C. §303.19 by using the correct continuity standard found in the language of the statute." (Inland's brief at 7.)

{¶6} A trial court's decision whether to grant or deny an injunction "is a matter solely within the discretion of the trial court and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion." *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 1995-Ohio-301, paragraph three of the syllabus. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The issuance of an injunction is a matter of judicial discretion, and, absent an abuse of discretion by the trial court, an appellate court is not permitted to question the trial court's decision to deny or grant such relief. *Control Data Corp. v. Controlling Bd. of Ohio* (1983), 16 Ohio App.3d 30, 35.

{¶7} "A nonconforming use is a lawful use of property in existence at the time of enactment of a zoning resolution which does not conform to the regulations under the new resolution." *Aluminum Smelting & Ref. Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*, 11th Dist. No. 2001-A-0050, 2002-Ohio-6690, ¶14-15, citing *Kettering v. Lamar Outdoor Advertising, Inc.* (1987), 38 Ohio App.3d 16, 17. Nonconforming uses are not favored by law but are allowed to exist because the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution recognize a right to continue a given use of real property if such use was already in existence at the time of the enactment of the land use regulation forbidding or restricting the land use in question. *Dublin v. Finkes* (1992), 83 Ohio App.3d 687, 689; *Aluminum Smelting & Ref. Co*. at ¶14. That being said, "[u]ses which do not conform to valid zoning legislation may be regulated, and even girded to the point that they wither and die." *Columbus v. Union Cemetery Assn*. (1976), 45 Ohio St.2d 47, 49 (citations omitted).

{¶8} R.C. 303.19, which governs nonconforming uses in counties, provides that "[t]he lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with the provisions of such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of land shall be in conformity with sections 303.01 to 303.25, inclusive, of the Revised Code." See also FCZR 110.043. "The discontinuance of a non-conforming use will be considered to be voluntary only if the property owner intended to abandon the use." *Aluminum Smelting & Ref. Co*. at ¶15 (citations omitted). "Abandonment requires affirmative proof of the intent to abandon coupled with acts or

omissions implementing the intent. Mere non-use is not sufficient to establish the fact of abandonment, absent other evidence tending to prove the intent to abandon." *Davis v. Suggs* (1983), 10 Ohio App.3d 50, 52, citing *Kiser v. Bd. of Commrs. of Logan Cty.* (1911), 85 Ohio St. 129, 131.

{¶9} The gravamen of Inland's argument is that the trial court focused on whether the primary use of the property constituted a legal nonconforming use and did not consider the ancillary use of the property. Conversely, appellee contends that an ancillary use "may not qualify for nonconforming status." (Appellee's brief at 4.)

{¶10} A case with facts similar to the case sub judice is *Bd. of Twp. Trustees of Wash. Twp. v. Grogoza* (Feb. 8, 2001), 5th Dist. No. 00-CA46-2. In that case, Grogoza operated a business that leased commercial real estate. While the lessees, as well as the primary use of the property by the lessees, had changed over the years, the ancillary use of the property, i.e, storage of building materials and vehicles, had not changed. The Fifth District Court of Appeals held that "a nonconforming use which was originally ancillary to the primary nonconforming use of the land, can continue as a nonconforming use even after the primary nonconforming use has ceased to exist." Id. In providing its rationale, the Fifth District Court of Appeals simply explained, "an ancillary nonconforming use is a nonconforming use of the land." Id. Because the court placed primary and ancillary uses on equal footing, it found that Washington Township "failed to meet its burden of demonstrating that the nonconforming use of the subject property for use for small businesses was abandoned for a period of two years." Id.

{¶11} Given the factual parallel between this case and *Grogoza*, we find that, under the specific facts of this case, the trial court should not have considered whether

the use was ancillary or primary, but, whether use of the property constituted a nonconforming use for the requisite time period. Indeed, the plain language of R.C. 303.19 does not distinguish between primary and ancillary uses, but, rather, refers to "any such nonconforming use." We further note that the zoning regulations included in the parties' briefs also do not draw such distinction. Accordingly, we remand this matter to the trial court to determine whether the nonconforming use continued under the requirements of law as an exception to the zoning provisions.

{¶12} For these reasons, both of appellants' assignments of error are sustained, the judgment of the Franklin County Municipal Court, Environmental Division, is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed; cause remanded.

BRYANT and KLATT, JJ., concur.

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