STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF SANDS,

Plaintiff-Appellant,

and

KENDRICK S. THOMPSON, LEDA THOMPSON, KATHY FOULKS, STEVE FOULKS, EULAINE HARTWIG, JAMES HARTWIG, GAIL HEALY, JUDD HEALY, RAYMOND C. HILLER, MI Y. HILLER, BART KIDDER, JAMES KIDDER, CAROL MYERS, ROBERT MYERS, NANCY OLSON, HELEN PETERS and ROGER PETERS,

Intervening Plaintiffs-Cross Appellants,

v

WALTER RACINE,

Defendant-Appellee-Cross Appellee.

UNPUBLISHED
June 24, 1997

No. 192408
Marquette Circuit Court
LC No. 92-027490-CZ

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff Township of Sands sought an injunction to prevent defendant from continuing the non-conforming use of his property as a racetrack and intervening plaintiffs sought an abatement of the operation of the racetrack on the ground that it was a nuisance. The trial court denied the injunction finding that defendant had not abandoned the valid non-conforming use and that the use did not constitute a nuisance. Plaintiff and intervening plaintiffs (hereinafter collectively referred to as "plaintiffs") now appeal these decisions as of right. We affirm.

The parties agree that defendant's property was used as a racetrack prior to the adoption of the township zoning ordinance and that it, therefore, was a valid non-conforming use at the time the zoning ordinance was adopted. Plaintiffs argue that the prior owner of the land abandoned the non-conforming use when races were not held at the track in 1976 and 1977 and that defendant abandoned the non-conforming use when he conducted activities that were non-commercial from 1986 through 1990. Defendant argues that there was continual racing of some form or another on the track through 1976 and 1977 and that the totality of circumstances, including related non-commercial activities from 1986 through 1990, evidenced his intent not to abandon the non-conforming use.

This Court reviews the trial court's decision de novo giving great weight to its findings. *Rogers v City of Allen Park*, 186 Mich App 33, 36; 463 NW2d 431 (1990). The trial court's findings of fact will not be set aside unless clearly erroneous. *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 29-30; 448 NW2d 727 (1989). With regard to plaintiffs' argument that racing ceased in 1976 and 1977, there is conflicting evidence. The prior owner testified that racing stopped during that time but a race car driver testified that there was continual racing from 1969 through 1987 or 1988. Although the evidence of continued use was hardly overwhelming, we cannot say that the trial court clearly erred in finding that there was racing on the track from 1969 through 1985.

Plaintiffs further argue that defendant lost the non-conforming use status when he did not conduct races for profit on the premises from 1986 through 1990. We disagree. Michigan law requires that, in order to show abandonment of the nonconforming use, the township must show both nonuse *and* an intent to abandon the use. *Dusdal v City of Warren*, 387 Mich 354, 360; 196 NW2d 778 (1972); *Fredal v Forster*, 9 Mich App 215, 231; 156 NW2d 606 (1967). The township was required to demonstrate "an intent to abandon the use and some act or omission on the part of the owner or holder which clearly manifests his or her voluntary decision to abandon it." *Norton Shores v Carr*, 81 Mich App 715, 721; 265 NW2d 802 (1978). During the 1986-1990 period, defendant, apparently suffering from financial circumstances that prevented regular race-track use, nevertheless sought out information on how to maintain the non-conforming use, maintained the property in a manner adequate to keep it usable as a racetrack and conducted occasional race-related activities at the track. In his actions, defendant made a sufficient showing that he had no intention of abandoning the use of the property as a racetrack. The trial court did not clearly err, based on the above case law, in finding that defendant did not abandon the non-conforming use.

Plaintiffs argue that the non-conforming use should have been abated because defendant expanded the use by bringing concrete slabs and a trailer onto the property. The trial court did not err in finding that the concrete slabs were not an expansion of the non-conforming use in light of testimony that such slabs were going to be used to replace already existing earthen pads at the racetrack. Such maintenance of the racetrack is not an expansion of the non-conforming use. *City of Madison Heights v Manto*, 359 Mich 244, 250; 102 NW2d 182 (1960). Further, the trial court's decision to deal separately with the trailer and not abate the entire non-conforming use is not an unreasonable decision and is affirmed. *Norton Shores*, *supra* at 724.

Next, while plaintiffs are correct that public policy favors the gradual elimination of non-conforming uses, *id*. at 720, because there was no abandonment of the use in this case, this policy was not relevant to the trial court's decision and its failure to take cognizance of this policy does not require reversal. The cases cited by plaintiffs exclusively address this policy in the context of the expansion of non-conforming uses rather than in the context of the abandonment of such uses.

Plaintiffs also argue that this Court should find that, if the trial court had ruled on the estoppel issue, it would have affirmed the rule of non-estoppel of the township and eliminated any reliance alleged by defendant on the recommendations of township officials as a basis for finding that he had not abandoned the nonconforming use. The trial court correctly noted in its opinion that it was unnecessary to address the estoppel issue because of its decision with regard to abandonment. Although the trial court noted that defendant spoke with township officials regarding how to maintain his grandfathered status, it referenced this only as an example of how defendant had demonstrated that he did not intend to abandon the non-conforming use. The trial court did not find that the township was estopped from raising the issue on the basis of these conversations.

Intervening plaintiffs argue that the trial court erred in failing to find that the operation of the racetrack constituted a nuisance in fact. We disagree. The trial court's findings that the noise from the track did not cause actual physical discomfort to anyone, and that the time and duration of the noise was reasonably limited, are adequately supported by the record. *Dusdal, supra*; *Smith v Western Wayne Co Ass'n*, 380 Mich 526, 536; 158 NW2d 463 (1968). Further, the trial court's findings that the area is heavily wooded and is neither as residential as plaintiffs claim nor as rural as defendant claims are supported by the exhibits contained in the record. The trial court's handling of this issue by limiting the time, duration and decibel level of the races and by retaining supervision of the case assures plaintiffs of "ready and speedy relief should an actionable nuisance develop because of excessive noise."[1] *Smith, supra* at 545.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman

[1] In view of the potential tensions between the parties' enjoyment of the use of their respective properties, we encourage the trial court to retain its supervision of this matter for a reasonable period of time. Perhaps even more significantly, however, defendant's counsel indicated his client's recognition of the need to take into consideration the interests of the intervening plaintiffs. Whatever legal rights are afforded defendant by this Court's decision, there is nothing that precludes him from undertaking, as a good neighbor in the community, additional accomodations to the intervenors that may be reasonably possible.