

STATE OF MICHIGAN
COURT OF APPEALS

JAMES SOUPAL, GERI SOUPAL, ALAN HAY,
and SANDRA HAY,

UNPUBLISHED
February 28, 2003

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 231443
Roscommon Circuit Court
LC No. 96-007522-CH

SHADY VIEW, INC.,

Defendant-Appellant/Cross-
Appellee.

Before: O’Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant appeals by right an order granting plaintiffs’ request for a permanent injunction that enjoined defendant from having a dock longer than seventy-five feet or mooring more than five boats on its lakefront property zoned R-1, single-family residence. We reverse.

First, defendant claims that the trial court erred when it declared defendant’s 160-foot-long dock with 20 boat slips a violation of the township’s zoning ordinance. This Court reviews matters of statutory construction, including the interpretation of ordinances, de novo. *Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000); *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).

Plaintiffs argue that a marina is a commercial enterprise and is thus prohibited in an R-1 area. Both of the judges and three DEQ decisions also determined that the dock was a marina. But even if the dock is a marina under the zoning ordinance, the ordinance does not prohibit the operation of a marina in areas zoned R-1, single-family residence. The ordinance, however, does prohibit the operation of a commercial enterprise in the R-1 zone. We must ask then whether this marina constitutes the operation of a commercial enterprise. When construing words in a statute or ordinance, the “ordinary and generally accepted meaning” must be applied. *Tryc v Michigan Veterans’ Facility*, 451 Mich 129, 135, 136; 545 NW2d 642 (1996). Webster’s Dictionary defines “commercial” as:

1. of, pertaining to, or characteristic of commerce.
2. produced, marketed, etc., with emphasis on salability, profit, or the like[.]. . .
3. able or likely to yield a profit.
4. suitable for the wide popular market[.]. . .
5. engaged in, used for, or

suitable to commerce or business, esp. of a public or nonprivate nature[.]
[*Random House Webster's College Dictionary* (1992).]

The facts of this case are such that we can determine that defendant's dock is not commercial in nature because it is not open to the public or being operated for profit. Thus, the trial court's ruling that the dock violated the zoning ordinance is error requiring reversal.

Defendant next argues that the trial court erred by declaring the dock a nuisance *per se*. “[A] nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.” *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152; 422 NW2d 205 (1988), overruled on other grounds, *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Besides the alleged zoning violation, plaintiffs presented no proof regarding how defendant's dock was a nuisance *per se*. In fact, the evidence showed that other docks that are longer and have significantly more boats exist in the neighborhood. Indeed, two plaintiffs own docks as long as defendant's. Because plaintiff failed to prove that the dock was a nuisance *per se*, the court's determination was error.

Defendant next argues that the trial court erred by declaring the dock a nuisance in fact. To establish nuisance in fact, plaintiffs must show *significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of their property. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999); see, also, *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992); *Hadfield, supra* at 152-153 (a nuisance in fact occurs where the natural tendency of the act is to create danger and inflict injury on person or property); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995);

Again, plaintiffs failed to establish that they suffered significant harm or that defendant's dock was an unreasonable interference with their use or enjoyment of their property. Plaintiffs showed only that they did not like the fact that defendant was using the property to access the lake and that they had less privacy. Plaintiffs also argued that their property value had diminished. However, property devaluation is insufficient to constitute a nuisance. *Adkins, supra* at 311; *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 586, n 6; 609 NW2d 593 (2000), *aff'd sub num Byrne v State*, 463 Mich 652; 624 NW2d 906 (2001). The fact that plaintiffs dislike the use defendant is making of the property or feel their privacy has been diminished does not constitute a significant harm or amount to unreasonable interference. Therefore, the court erred by declaring the dock a nuisance in fact.

Last, defendant argues that the trial court's injunction was an abuse of discretion. While the granting of injunctive relief is within the trial court's sound discretion, the decision must not be arbitrary and must be based on the facts of the particular case. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999).

The trial court's injunction is error requiring reversal because it was based on an erroneous finding that the dock was a nuisance. Moreover, even if the dock were a nuisance, the injunction was an abuse of discretion because it was internally inconsistent, and it did not necessarily eliminate the claimed interferences.

Before enjoining an activity, a court must consider harm to the defendant if an injunction is issued, harm to the plaintiff if an injunction is not issued, and whether the plaintiff has successfully demonstrated that the plaintiff will suffer irreparable harm if an injunction is refused. *University of Texas v Camenisch*, 451 US 390, 392; 101 S Ct 1830; 68 L Ed 2d 175 (1981); *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984); *Comm'r of Ins v Albino*, 221 Mich App 54, 77-78; 561 NW2d 412 (1997).

If defendant's dock were a commercial enterprise marina as plaintiffs claimed, then the trial court was obligated to completely enjoin it. MCL 125.587; *Indian Village Ass'n v Shreve*, 52 Mich App 35, 37-38; 216 NW2d 447 (1974). The court, however, only reduced the length of the dock and the number of boats allowed. Thus, the court's ruling was internally inconsistent.

Furthermore, the limitations placed on defendant's dock would not necessarily cure the alleged unreasonable interference with plaintiffs' property rights. The property would still be worth less. Fewer boats would not automatically cure ingress or egress issues. And allowing five boats rather than ten or twenty did not necessarily ensure that plaintiffs were restored to their previous level of privacy.

Finally, the court's order that defendant could only allow two families at a time to use the premises was arbitrary. The trial court provided no justification for that limitation and did not describe how it would resolve plaintiffs' concerns.

We reverse and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Jane E. Markey