STATE OF MICHIGAN

COURT OF APPEALS

GARY L. GILLETTE, D.V.M.,

Plaintiff-Appellant,

v

COMSTOCK TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
February 3, 2004

No. 240198
Kalamazoo Circuit Court
LC No. 00-000135-CZ

GARY L. GILLETTE, D.V.M.,

Plaintiff-Appellant,

v

MARCIA V. STUCKI,

Defendant-Appellee.

No. 240199
Kalamazoo Circuit Court
LC No. 95-003152-AA

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendant Comstock Township (Docket No. 240198) and defendant Marcia Stucki (Docket No. 240199) in this land use zoning action. We affirm.

FACTS

Defendant Marcia Stucki owns an approximately thirty-four acre parcel of land in a rural area of Comstock Township. Stucki acquired the property in 1976 to engage in small-scale farming activities.[1] Under the township's then-existing zoning ordinance, the use of the property

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[1] The land was used as a farm before Stucki acquired the land.

for these purposes was permitted. In 1977, the township adopted a new zoning ordinance, "R1-A," which placed the property into a single-family residential zoning district. Under the new ordinance, small-scale farming activities were only permitted either as a valid prior non-conforming use or through the acquisition of a Special Exception Use Permit (SEUP). There is no dispute that Stucki's farming activities in existence on the date of the adoption of the new zoning ordinance could continue as a valid non-conforming use, but without the right to enlarge or expand the operation.[2]

Plaintiff acquired his six-acre adjacent property in 1985. In 1995, plaintiff complained to the township zoning administrator that Stucki had goats on her property. In response to communications from the township, Stucki removed the goats from her property pending resolution of the zoning issues regarding her right to keep goats and other animals on the property.

After removing the goats, Stucki filed two applications for a SEUP seeking approval from the township planning commission to keep horses, chickens, goats, and other unspecified farm animals on her property. Section 10.03m of the Comstock Township Zoning Ordinance (the ordinance) allows private stables as a special exception use in the R1-A zone. Section 10.03q of the ordinance allows as a special exception use in the R1-A zone the keeping of poultry, swine, goats, sheep, rabbits, and cattle on parcels of at least five acres, subject to certain conditions set forth in § 10.03q. Stucki applied for special exception use permits under § § 10.03m and q of the ordinance. Stucki did not waive her claim of lawful nonconforming use rights with respect to the keeping of animals on her property by virtue of the prior animal keeping activities, but was instead seeking the SEUPs as one way of formally defining the specific extent to which animals may be kept on the property.

On July 27, 1995, the township planning commission held a public hearing on the SEUP requests. Procedural questions arose concerning the extent of Stucki's nonconforming use rights under § 4.11.1 of the ordinance. Plaintiff argued that the animal setback requirements of § 4.11.1 of the ordinance would prevent use of the existing buildings and a substantial portion of Stucki's land for the keeping of farm animals. Stucki maintained that the "grandfather" type exemption under § 4.11.1.B of the ordinance exempted her from the setback provisions of § 4.11.1.A of the ordinance. Plaintiff also raised an issue of interpretation regarding the area to be deemed "developed for residential purposes" under subsection § 4.11.1.D of the ordinance for purposes of measuring the setback requirements of subsection A. The planning commission voted to table the consideration of the SEUP request under § 10.03q and to refer the matter to the Zoning Board of Appeals (ZBA) and to table consideration of the request for a SEUP for a private stable under § 10.03m to the next planning commission meeting.

At a meeting on August 10, 1995, the planning commission resumed consideration of Stucki's request for a SEUP for a private stable. After reviewing the regulations in § 21.20 of the ordinance governing private stables and the standards in § 4.13 of the ordinance for special

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[2] See MCL 125.286(1) and § 5.01 of the Comstock Township Zoning Ordinance.

exception uses, the planning commission voted to grant Stucki's request for a SEUP for a private stable consisting of not more than twelve horses.

On October 3, 1995, the ZBA considered the two issues referred to it by the planning commission. In response to plaintiff's written request, two additional issues were placed before the ZBA with respect to this matter. First, whether the provisions of § 4.11.1.A are applicable to horses, and second, whether the keeping of goats is in violation of § 4.11.1.C.

In holding that § 4.11.1.A was not applicable to horses, the ZBA referred to (1) the fact that § 21.20 specifically addressed the setback requirements for horses, (2) the legislative history of § 4.11.1.A, which was amended in 1997 to delete its prior reference to "horses" so as to eliminate the conflict with § 21.20, and (3) the past history of interpretation of the sections by the zoning administrator in consistently applying the setback provisions of § 21.20, not § 4.11.1.A, to the keeping of horses.

The ZBA also considered Stucki's claim of exemption under § 4.11.1.B from the animal setback requirements of § 4.11.1.A. The claim focused on that portion of § 4.11.1.B exempting from the setback restrictions of § 4.11.1.A:

> . . . any land, the last active use of which, during the preceding 3 years prior to such platting or development of adjacent land, was legitimate farming or agricultural operations or involved any of the foregoing animals or poultry.

Following proofs, the ZBA upheld Stucki's claim that the property was exempt under § 4.11.1.A. Because of this determination, the question regarding the meaning of "developed for residential purposes" in § 4.11.1.D for purposes of applying the animal setback restrictions in § 4.11.1.A was moot as to this property.

Lastly, with regard to plaintiff's request for a determination that the keeping of goats on Stucki's property was in violation of § 4.11.1.C, the ZBA concluded that § 4.11.1.C was not applicable to the situation.

On October 12, 1995, the planning commission resumed consideration of Stucki's request for a SEUP under § 10.03q. The planning commission voted to grant a SEUP, subject to the conditions that (1) no more than twenty-five adult poultry, fifteen adult rabbits, ten adult swine, ten adult goats, ten adult sheep, and ten adult cattle may be kept on the property and (2) no building housing any of the farm animals shall be nearer than sixty feet to any property line or nearer than one hundred feet to any dwelling and that the farm animals shall be confined in a suitable fenced area to preclude their approaching closer than sixty feet to any dwelling on adjacent property.[3]

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[3] This latter condition was imposed in recognition that the setback limitations of § 4.11.1.A had been determined to be inapplicable to the property and that some minimum setback requirements were necessary to protect adjoining properties and satisfy the standards for the granting of a SEUP.

In November 1995 plaintiff filed a petition for review and various motions seeking to appeal the decision of the planning commission and the ZBA. At the hearing on the motion, Stucki stipulated that no additional animals would be brought onto her property while the appeals were pending. The circuit court denied plaintiff's application for leave to file a delayed petition for review of the SEUP granted on August 24, 1995, for a private stable.

In August 1996 plaintiff filed a Petition for Injunctive Relief, Damages, and Attorney Fees contesting Stucki's retaining horses and chickens on her property after the grants of SEUP permits. The claim for damages and injunctive relief was based on a nuisance per se claim premised in part upon Stucki's failure to undergo site plan review for the horses and chickens already on her property. No such claim was brought before the planning commission or the ZBA, and, consequently, neither the planning commission nor the ZBA addressed the need for site plan review for the existing animals. The township filed a motion to dismiss on the ground that the petition was a separate action not properly brought in the context of an appeal of the planning commission and ZBA decisions.

On May 5, 1997, the circuit court issued an opinion from the bench on the appeal of the planning commission and ZBA decisions. In a written judgment dated December 23, 1997, the court upheld the October 12, 1995, decision of the planning commission granting a SEUP for the limited keeping of farm animals on the property. The judgment further provided that before any of the animals permitted to use the property are allowed to be on the property "pursuant to such SEUP," a site plan would have to be submitted by Stucki and approved by the planning commission.[4] The judgment also affirmed the October 3, 1995, decision of the ZBA. The judgment declined to review the August 10, 1995, decision of the planning commission granting Stucki a SEUP for a private stable under § 10.3m of the township zoning ordinance, noting that the court had previously denied plaintiff's application for a delayed appeal of that decision. On January 18, 1998, plaintiff filed an application for leave to appeal in this Court.

The township moved to dismiss plaintiff's Petition for Injunctive Relief, Damages, and Attorney Fees. In an order entered by Judge Foley on April 29, 1998, the court reserved a ruling on the motion to dismiss until this Court ruled on the application for appeal. On July 29, 1998, this Court denied plaintiff's application for leave to appeal "for lack of merit in the grounds presented." On May 25, 1999, the Supreme Court denied plaintiff's application for leave to appeal this Court's denial of plaintiff's application for leave to appeal "because we are not persuaded that the questions presented should be reviewed by this Court." On October 11, 1999, plaintiff and the township stipulated to the dismissal of the township without prejudice.

Following the conclusion of plaintiff's appeal of the two SEUPs, Stucki applied for site plan review for her private stable and livestock keeping special exception uses. On February 10, 2002, the planning commission granted site plan approval to Stucki.

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[4] The circuit court did not address in the judgment Stucki's right to continue to keep the existing horses and chickens on her property pursuant to lawful nonconforming use status.

Plaintiff then filed two new legal actions. The first action (lower court number 00-000138-AA) appealed the February 10, 2000, decision of the planning commission granting site plan approval. The second action (lower court number 00-000135-CZ) sought declaratory judgment, damages, and other equitable relief for various alleged statutory and constitutional violations pertaining to the site plan approval granted to Stucki. The court held that the second action be held in abeyance pending resolution of plaintiff's claim of appeal from the township's site plan approval decision. However, plaintiff voluntarily dismissed this claim of appeal.

The township moved for summary disposition on the ground that plaintiff's abandonment of his appeal and dismissal of the claim of appeal from the township's site plan approval decision amounted to an abandonment of all associated issues in that case. The township argued that plaintiff's voluntary dismissal constituted an abandonment of the issues raised in lower court number 00-000135-CZ because Michigan law does not create separate causes of action in these circumstances but explicitly provides that an appeal must be pursued to the circuit court raising all issues. The court requested additional briefing with regard to plaintiff's contention that he was entitled to pursue a separate claim for inverse condemnation or taking and, if so, whether it survived the appeal argument.

Ultimately, Judge Schaefer[5] granted summary disposition pursuant to MCR 2.116(C)(8) in favor of the township. The court pointed out that, even if dismissal was more appropriate under MCR 2.116(C)(4) for lack of jurisdiction, dismissal was nevertheless appropriate and neither party was misled as to grounds for dismissal. Relying on *Krohn v Saginaw*, 175 Mich App 193; 437 NW2d 260 (1988), the court found that plaintiff's voluntary dismissal of his appeal of the township's decision to approve Stucki's site plan negated this action because an appeal to circuit court is the sole remedy for redress of grievances from decisions such as those complained of by plaintiff. The court distinguished *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195; 550 NW2d 867 (1996) on the basis that a proper appeal was pending before the circuit court in that case, whereas in the present case the appeal was dismissed.

The trial court also rejected plaintiff's motion to amend his complaint on the basis that plaintiff could not show trespass nuisance against the township because the township neither owned nor controlled Stucki's property. The court also found that the action did not rise to the level of a taking since the action was not directly aimed at plaintiff's property and the granting of a license to a private citizen to conduct permitted activities on that person's land cannot be regarded as a taking of private property by the government for public use.

The trial court granted summary disposition pursuant to MCR 2.116(C)(8) in favor of Stucki, finding that the law imposes no requirements for prior or even contemporaneous approval of a site plan where a special land use is contemplated.

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[5] Judge Schaefer took over Judge Foley's docket.

Plaintiff first argues that the trial court improperly granted summary disposition of plaintiff's claim for damages and injunctive relief on the ground that plaintiff's remedy was to pursue an appeal of the planning commission's decision to approve a site plan and grant SEUPs rather than file an action for declaratory relief to challenge the planning commission's decision. Whether plaintiff was required to raise the issues filed in this lawsuit in an appeal of the planning commission's decision involves a question of law that is reviewed de novo on appeal. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Municipalities derive their authority to zone solely pursuant to state enabling legislation. *Lake Twp v Sytsma*, 21 Mich App 210, 212, 175 NW2d 337 (1970). The Township Zoning Act, MCL 125.271 *et seq*. (the TZA), is the enabling statute that vests a township with the authority to regulate land use. *Addison Twp v Gout (On Rehearing)*, 435 Mich 809, 813, 460 NW2d 215 (1990). Various actions under the TZA, such as site-plan review and the approval of special use permit requests, are essentially administrative in nature. See, e.g., *Hessee Realty, Inc v Ann Arbor*, 61 Mich App 319, 232 NW2d 695 (1975).

MCL 125.293a authorizes a direct appeal from decisions made by a zoning board of appeals (ZBA). The ZBA is a municipal administrative body, *Schlega v Detroit Bd of Zoning Appeals*, 147 Mich App. 79, 81, 382 NW2d 737 (1985), charged with interpreting the ordinance, hearing appeals, granting variances, and performing various other functions that may arise in the administration of the zoning ordinance. See MCL 125.288-125.293; *Szluha v Avon Charter Twp*, 128 Mich App. 402, 340 NW2d 105 (1983). By statute, a ZBA's decisions (administrative acts) are final, subject to circuit court review under the standard set forth in MCL125.293a.

An aggrieved party is free to raise substantive issues, including constitutional issues, in the appeal of the administrative decision. *Choe v Charter Twp of Flint*, 240 Mich App 662, 668 n 2; 615 NW2d 739 (2000). Indeed, plaintiff filed a claim of appeal with the circuit court from the planning commission's February 10, 2000, site plan approval for Stucki's property. However, plaintiff abandoned his appeal of the planning commission's decision and filed a separate action challenging the constitutionality of the township's decisions (Count I), raising alleged statutory violations (Count II), and challenging the township's decision on the basis that the decision resulted in a nuisance (Count III). At issue here is the court's finding that plaintiff should have pursued his appeal to raise the issues he attempted to raise in this action.

The circuit court relied on *Krohn v Saginaw*, 175 Mich App 193; 437 NW2d 260 (1989), in dismissing plaintiff's complaint. In *Krohn*, the plaintiffs were the owners of a parcel of property who challenged the administrative decision of the Saginaw Planning Commission to grant a special use permit and a variance that would allow the construction of an auto-parts store and gasoline station on a neighboring parcel. The plaintiffs in *Krohn* conceded that, in granting the special use permit and variance request, the planning commission was exercising the authority of the zoning board of appeals. *Id*. at 195-196. On the basis of this concession, a panel

of this Court held that the statutory provisions governing ZBA appeals would apply and that the plaintiffs' complaint was barred because the plaintiffs failed to file their appeal within twenty-one days of the denial.[6]

In addition to appealing the decision, the plaintiffs also sought declaratory relief, equitable relief, and damages. In addressing the plaintiff's assertion that the claims for declaratory relief, equitable relief, and damages were separate, and should not have been dismissed, this Court held:

> Count III of plaintiffs' complaint alleged that their state and federal due process rights were violated and that their property had been taken without just compensation as protected by the state constitution. Count IV of the complaint alleged that the planning commission action allowed an unpermitted illegal use of the subject site and constituted a nuisance per se. Lastly, count V of the complaint asked for a declaration of the parties' rights with reference to the intended construction. With respect to each of these counts, we believe that they all raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission. Accordingly, those are issues to be raised in an appeal from the decision of the planning commission. Accordingly, since

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[6] In pertinent part, the panel explained:

> The statutes governing zoning board decisions anticipate that final decisions are made by the zoning board of appeals, which decisions may then be appealed to circuit court. MCL 125.585(11); MSA 5.2935(11). In the case at bar, the final decision was made by defendant planning commission. However, at oral argument on plaintiffs' motion for an order to show cause, plaintiffs argued that the Saginaw Zoning Code gives to the planning commission the authority of the board of appeals to hear such matters where special requests or special uses are to be considered. Plaintiffs' argument is consistent with the manner in which Action Auto's request was handled and, therefore, we accept plaintiffs' admission in this regard as true for purposes of this appeal. It therefore follows that, if the planning commission possesses the authority of the zoning board of appeals in the present circumstances, then the provisions of MCL 125.585; MSA 5.2935 apply to the planning commission in the case at bar. Specifically, the provisions of MCL 125.585(11); MSA 5.2935(11), providing for appeals from the zoning board of appeals to circuit court, would govern an appeal of a decision of the planning commission to circuit court. Specifically, that statute allows for an appeal to circuit court from a decision of the zoning board of appeals, or, in this case, the planning commission. [*Krohn, supra* at 195-196; 437 NW2d 260.]

> plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. [*Krohn, supra* at 197-198.]

Thus, a litigant may not choose to bypass the appeal procedure and proceed with separate litigation under other theories. The issues raised by plaintiff address defects in the method employed by the planning commission in reaching its decision, or in the actual result reached by the planning commission, and are not separate causes of action. Thus, the trial court properly granted summary disposition in favor of the township.

Plaintiff also argues that the trial court abused its discretion by denying plaintiff's motion to amend the complaint to allege a claim of inverse condemnation or taking.[7] The grant or denial of a motion to amend the complaint is within the trial court's discretion. *Detroit/Wayne County Stadium Authority v 7631 Lewiston, Inc,* 237 Mich App 43, 46-47; 601 NW2d 879 (1999).

MCR 2.118(A)(2) permits a party to amend a complaint by leave of court or stipulation by the opposing party and "[l]eave shall be freely given when justice so requires." Leave to amend should be denied only for specified reasons such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously permitted, undue prejudice to the adverse party, or futility. *Tierney v University of Michigan Regents,* 257 Mich App 681, 687-688; 669 NW2d 575 (2003).

Here, in the original complaint, plaintiff alleged that the actions and decisions of the township deprived plaintiff of the use and enjoyment of his property, and the economic benefits therefore, including the ability to use and enjoy the property free from undue, unreasonable, and unlawful interference from Stucki and/or the township. Thus, plaintiff alleged that he was deprived of his property rights without due process, equal protection, and just compensation being paid. Plaintiff alleged a claim of inverse condemnation or taking, and therefore leave to amend the complaint would have been moot in light of the trial court's ruling that plaintiff failed to allege that the government's action caused a substantial decline of his property's value and because the township's action in granting the SEUPs was not directly aimed at plaintiff's property.

Nonetheless, inverse condemnation is the taking of private property for public use without commencement of condemnation proceedings. *Hart v Detroit,* 416 Mich 488, 494; 331 NW2d 438 (1992). To establish a taking, a plaintiff must show that the government's actions were a substantial cause of the decline of his property's value, and the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. *Attorney General v Ankersen,* 148 Mich App 524, 561; 385 NW2d 658 (1986). Here, the only governmental action was aimed at Stucki's property, and whatever incidental impact that action had on plaintiff's property will not give rise to a claim for inverse condemnation. See, e.g., *Heinrich v Detroit,* 90 Mich App 692; 282 NW2d 448 (1979). Similarly, the issuance of a permit is not sufficient to impose liability for damage to neighboring property. See, e.g.,

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[7] Plaintiff's sole argument in support of this contention is procedural; he does not address the merits of the proposed amendment.

Kuriakuz v West Bloomfield Twp, 196 Mich App 175, 177; 492 NW2d 757 (1992). The trial court properly granted summary disposition in favor of defendant township.

Docket No. 240199

Plaintiff asserts that he was entitled to summary disposition because the township violated Michigan law by failing to conduct site plan review for a special exception use before making a determination of whether the proposed location was suitable for the use. We disagree.

In MCL 125.286(e), the TZA provides in pertinent part:

> (2) A township may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plan and granting approval.
>
> (3) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan . . . .
>
> (4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments.
>
> (5) A site plan shall be approved if it contains information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.

The use of the word "may" in a statute is construed as permissive rather than mandatory. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). Subsection (2), read in conjunction with subsection (4), provides that, while a township may or may not require activity review, site plan submission, and approval, is required for special land uses and planned unit development review. Subsection (2) addresses not the timing of site plan submission and approval, but rather whether site plan submission and approval is required for a particular use or activity.

Subsection (5) states that a site plan shall be approved if it contains the information required by the zoning ordinance, and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance. Subsection (5) contemplates that a site plan would incorporate the conditions imposed pursuant to special exception use review. Nothing in § 16e requires site plan submission, review, and approval before authorization of the proposed use.

Section 10.03(m) of the Comstock Park Zoning Ordinance permits private and public stables and riding academies only by special exception. Section 10.03(q) permits, "subject to the

provisions of Section 4.11.1" the raising and keeping of animals which either are or whose products are customarily used for human consumption. Both subsections are "subject to Section 22.00 for site plan review requirements." Section 22.00, entitled "Site Plan Review procedures," provides in Section 22.01, entitled, "Scope":

> The intent of this Article is to provide for consultation and cooperation between land developers and the Township in order that the developer may accomplish his or her objectives in the utilization of his or her land within the regulations of this zoning ordinance and with minimum adverse affect on the use of adjacent streets and highways and on existing and future uses in the immediate area and vicinity. Prior to the issuance of a building permit, the creation of a use or the erection of a building in the district and under the conditions cited below, a site plan shall be submitted in accordance with this Article to the Planning commission for approval. Site plans shall be required for the following uses and related development to be created in the following districts:
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> * * *
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> Section 22.01.2: FOR SPECIAL EXCEPTION USES IN:
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> * * *
>
> C. Single-Family Residential Districts.

Section 4.13 of the ordinance provides the procedure for review of applications for uses permitted by special exception. Plaintiff contends that the site plan review under Article 22 must precede the special exception use review under section 4.13, which states, in pertinent part:

> The uses identified as special exception uses in Articles 9.00 through and including 20.0 are recognized as possessing characteristics of such unique and special nature (relative to location design, size, public utility needs, and other similar characteristics) as necessitating individual standards and conditions in order to safeguard the general health, safety, and welfare of the community.
>
> a) Petitions for the grant of special exceptions shall be filed with the Township clerk on forms provided therefore. The petitioner shall submit plans and specifications or other data or exploratory material stating the methods by which he will comply with the conditions specified for each grant of special exception. . . . .
>
> b) The Planning Commission shall review and decide all applications for approval of special exception uses and shall, on its own initiative, hold a public hearing after giving notice as required herein. . . . .
>
> c) In hearing a request for any special exception, the Planning Commission shall be governed by the following principles and conditions:
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> 1) The applicant for a special exception shall have the burden of proof,

> which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Commission.
>
> 2) A special exception may be granted when the Planning Commission finds from the evidence produced at the hearing that:
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> a) The proposed use does not affect adversely the General Plan for physical development of the Township as embodied in this ordinance and in any Master Plan or portion thereof adopted by the Township; and
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> b) The proposed use will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
>
> c) The standards as may be set forth for a particular use for which a special exception may be granted, can and will be met by the applicant; and
>
> d) The proposed use is compatible with the natural environment and the capacities of public services and facilities affected by the proposed use.

The plain language of the zoning ordinance provides that an applicant for a SEUP must obtain two approvals before the use can be established: 1) approval of the proposed use under the standards set forth in § 4.13, and 2) approval of a site plan under Article 22.00. Until the applicant has received both approvals, the special exception use cannot be established. There is no language in the statute or the ordinance that provides that approval of a site plan must always precede approval of the proposed use.

Plaintiff has cited no authority for the proposition that site plan submission, review, and approval shall be required before authorization of a proposed special land use. In *Bruni v City of Farmington Hills*, 96 Mich App 664; 293 NW2d 609 (1980), a zoning case involving the construction of cluster housing, this Court held that before the cluster housing could be constructed, a site plan had to be submitted for review and approval. In that case, the use was determined to be appropriate, and then site plan approval occurred:

> In order for a cluster option to be approved, it must first be determined whether or not the land in question qualifies. In the instant case, plaintiffs' land has already been determined as qualifying for the cluster option. Secondly, a site plan for the proposed cluster housing must be presented. A public hearing regarding the plan is to be held, after which the Planning Commission decides whether or not to approve the site plan. [*Id.* at 667-668.]

Similarly, in the present case a petition for a SEUP was submitted. Once the township determined that the property in question was appropriate for the special exception use, a site plan was presented and the planning commission made a decision to approve the site plan. Final approval of the special exception use was not granted until after the site plan approval occurred, and thereafter final approval of the proposed use was accomplished. The trial court properly granted summary disposition in favor of Stucki.

Plaintiff also argues that the trial court erred by granting summary disposition in favor of Stucki on the ground that Stucki's existing uses in keeping horses and chickens were lawful nonconforming uses and did not constitute a nuisance per se. He asserts that Stucki's keeping of horses and chickens after August 10, 1995, was a nuisance per se. Again, we disagree.

Stucki did not implement the SEUPs she obtained for a private stable or to keep farm animals until her site plan was approved on February 10, 2000. Thus, until this time the keeping of the animals constituted a nonconforming use. A nonconforming use is established when a parcel of property continues to be used for a formerly proper purpose after it has been rezoned so as to make that use improper. Section 5.01 of the zoning ordinance provides:

> Any lawful nonconforming use existing at the time of passage of this Ordinance or any prior ordinance may be continued, provided, however, that except in the case of dwellings or farm buildings, the building or the lot or land involved shall neither be structurally altered, repaired nor enlarged unless such revised structure shall conform to the provision of this Ordinance for the district in which it is located.

Here, Stucki merely maintained the status quo until she obtained final approval of her site plan and was able to implement the SEUPs. The continuation of a nonconforming use need only be of substantially the same size and nature as the use when a valid zoning ordinance was passed. There is no authority for plaintiff's proposition that Stucki's filing of the SEUPs application eliminated her lawful nonconforming use rights or caused her to relinquish her claim of lawful nonconforming use status.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Helene N. White