STATE OF MICHIGAN

COURT OF APPEALS

JEFFERSON TOWNSHIP, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED December 6, 2005
v	No. 256426 Cass Circuit Court
ZOLTAN TISER, JR. and ROBERT TISER, Defendants/Counterplaintiffs-Appellants.	LC No. 03-000390-CZ

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Following a bench trial, the trial court ruled that defendants used their property and stored items on it in violation of the Jefferson Township zoning ordinance and constituted a nuisance per se, and that plaintiff did not violate the Open Meetings Act (OMA), MCL 15.261 et seq., at its June 11, 2003, township board of trustees meeting. Defendants appeal as of right.

I

The property at issue in the present case is a twenty-seven acre parcel located in Jefferson Township. Zoltan Tiser, Sr. and Ilona Tiser purchased the property on August 2, 1973. The Tisers deeded the property to their son, Zoltan Tiser, Jr. (Zoltan Jr.) on March 27, 1997. Zoltan Jr.'s son Robert Tiser (Robert) lives at the residence on the property. Plaintiff's and defendants' dispute is related to defendants' use of the property, which is zoned agricultural. Jefferson Township, the plaintiff in this case, first enacted a zoning ordinance on August 21, 1974. It was subsequently amended in 1987 and on June 20, 2002.

Plaintiff's complaint for injunctive relief alleged that defendants' operation of an auto repair and body shop on the property violated the township zoning ordinance because it was not a permitted use in an agricultural district, that defendants had numerous unlicensed vehicles on the property that violated the blight provision of the ordinance, and that these violations constituted a nuisance per se that is subject to abatement under MCL 125.294. Plaintiff amended its complaint and alleged that defendants' storage of various construction materials and vehicles violated the 30-foot side yard setback requirement of the ordinance.

Defendants denied plaintiffs' allegations, and asserted that their uses of the property were nonconforming uses. Defendants filed a counter-complaint alleging that plaintiff violated the OMA at its June 11, 2003, township board meeting when the board entered into a closed session to discuss this litigation, which was at that time pending. The trial court granted summary disposition to plaintiff on the blight count[1] of its complaint, and the three remaining issues proceeded to trial.

II

Defendants first argue that the trial court erred in finding that plaintiff did not violate the OMA at its June 11, 2003, township board meeting. We agree. We review de novo questions of statutory construction, *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

The OMA provides that all meetings of a public body shall be open to the public and held in a place available to the general public. MCL 15.263(1). All deliberations constituting a quorum of its members and all decisions of a public body shall be made at a meeting open to the public. MCL 15.263(2)-(3). To enter into a closed session, a 2/3 roll call vote of members elected or appointed and serving is required, except for closed sessions permitted under MCL 15.268(a), (b), (c), (g), (i), and (j). MCL 15.267(1). The roll call vote and the purpose for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken. *Id*. In the present case, the minutes of the June 11, 2003, township board meeting reflect a unanimous roll call vote to "adjourn to a closed Executive meeting to discuss Pending Litigation."

Defendant argues that plaintiff had no valid reason to enter into a closed session at the board meeting. Township supervisor Jeffrey Carmen testified that the purpose behind the closed session was "to tell them [the board] that the papers were being served, and that the action that we had contemplated was proceeding, and it was to avoid signaling an opportunity to evade further service. I was concerned about that. It was also pretty embarrassing. We were sitting here with people that we're bringing an action against." When asked if any motion or decision was made during the closed session, he stated, "[a]bsolutely not. It was a session that lasted less than five minutes."

The trial court ruled that while the closed session "In hindsight . . . wasn't really necessary.", it was done out of consideration for defendants and was not a willful violation of the OMA. He further found that the public embarrassment of an opposing litigant "could certainly have a detrimental financial effect . . . ."

We find that plaintiff's closed session was not permissible under any exception to the OMA provided in MCL 15.268. Defendants' counter-complaint alleged that plaintiff's closed session at the June 11, 2003, meeting violated MCL 15.268(e), which provides that a closed session is permissible "[t]o consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a

[1] This decision of the trial court is not appealed by defendants.

detrimental financial effect on the litigating or settlement position of the public body." However, the evidence showed that plaintiff's attorney was not present at the closed session and we can discern no potential "detrimental financial effect" of publicly disclosing the commencement of a lawsuit that was by the time of the meeting a matter of public record.

The available remedy for violation of the OMA in this case is limited because the record establishes that no decision was made at the meeting and no deliberations took place. MCL 15.270(5); MCL 15.263(3); In addition, while no minutes of the closed session were kept as required by MCL 15.267(2), there was testimony as to the purpose and substance of the meeting and, "deficiencies in the keeping of minutes of meetings are, in any event, not grounds for invalidating the actions taken." *Manning v City of East Tawas*, 234 Mich App 244, 252-253; 593 NW2d 649 (1999).

A determination that there has been a violation of the OMA constitutes declaratory relief entitling defendants to actual costs and attorney fees. *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 535; 609 NW2d 574 (2000); *Manning, supra*. Accordingly, we vacate that part of the trial court's decision indicating that plaintiff did not violate the OMA, and remand to the trial court for entry of a declaratory judgment that plaintiff violated the OMA, and for calculation of an award of costs and fees under MCL 15.271(4) for that part of the present suit relating to the OMA.

III

Defendant next argues that the trial court abused its discretion when it denied defendants' motion to adjourn trial pending exhaustion of its administrative remedies. We disagree. A trial court's decision on a motion to adjourn trial is reviewed for an abuse of discretion. MCR 2.503(D)(1); *In re NEGP*, 245 Mich App 126, 134; 626 NW2d 921 (2001).

Defendants argue that the present case should be remanded to the Zoning Board of Appeals (ZBA) for review because the zoning ordinance provides for the review of a zoning administrator's decision to the ZBA, and the circuit court can only hear appeals after the ZBA has made a final determination. Defendants mischaracterize the complaint in the present case as an appeal. This case was an original action started by the township that sought the abatement of three different property uses defined as nuisances per se in the township zoning ordinance. Under § 7.05(B) of the zoning ordinance, plaintiff was only required to seek and obtain the approval of the township board before commencing the present case, and the record shows that it did so. The record shows that defendants had the opportunity to pursue rezoning with the township planning commission, and did not actively do so. It appears that defendants became most interested in pursuing their administrative remedies only after the commencement of the present case.

Defendants admitted upon filing their motion to adjourn that they chose not to correct any ordinance violations and submit a site plan so that their rezoning request would be considered, stating in part, "Jefferson Township has required numerous site plans and other documents from Defendants before they would even recommend zoning. . . . rather than going through all of the above, Defendants chose to continue their nonconforming use. . . . Defendants are willing to again seek commercial zoning." The record shows that defendants' delay tactics forced plaintiff to take action, and only when plaintiff filed suit did defendants express a desire to again actively

pursue their requests for rezoning and for their use of the property to be recognized as a nonconforming use. The trial court did not abuse its discretion in denying defendants' motion to adjourn pending exhaustion of administrative remedies.

IV

Defendants next argue that the trial court erred when it did not find a nonconforming use on defendants' property, based upon its refusal to hear testimony from zoning administrator Hart about the township's 1987 ordinance. We disagree. We review a decision whether to admit evidence for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003).

Defendants argue that the testimony regarding the 1987 ordinance was relevant because the nature of a nonconforming use requires the determination of a property's prior use. Defendants contend that their use of the property was a nonconforming use that complied with the 1987 ordinance, which required a twenty-foot setback from an adjoining property line. Defendants contend that their storage of items should be considered a nonconforming use, and they should be allowed to comply with the 20-foot setback requirement contained in the 1987 zoning ordinance, rather than the 30-foot contained in the 2002 zoning ordinance.

The Jefferson Township zoning ordinance, effective June 22, 2002, addresses nonconforming uses in § 4.15,

> 1. Continuances of Nonconforming Use or Structure.
>
> The lawful use of any land or structure, exactly as such existed at the time of the enactment of this Ordinance, may be continued even though such use of [sic] structure does not conform with the provisions of this Ordinance. Structures nonconforming by reason of height, yards and area or parking provisions may be extended, altered or modernized provided that no additional encroachment or the height, area or parking requirements of this Ordinance are occasioned thereby. A nonconforming use of land may not be expanded, including by means of example and not limitation, increasing the area used to store junk beyond the area so used at the time the junk yard became nonconforming.
>
> 2. Unlawful Use Not Authorized.
>
> Nothing in this ordinance shall be interpreted as authorization for or approval of the continuance of the use of a structure or premises in violation of the regulations in effect immediately prior to the date of this Ordinance.

"A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). "The zoning restriction's enactment date is the critical point in determining when a nonconforming use vests." *Id*. at 441. Generally speaking, nonconforming uses may not be expanded, and one of the goals of local zoning is the gradual elimination of nonconforming uses. *Century Cellunet of*

Southern Michigan Cellular Ltd Partnership v Summit Twp, 250 Mich App 543, 546; 655 NW2d 245 (2002).

Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. MRE 401. Irrelevant evidence is not admissible. MRE 402.

The trial court correctly determined that Hart's testimony about the 1987 zoning ordinance was irrelevant. The evidence shows that defendants stored items on their property in an unlawful manner. Defendants admitted to storing numerous unlicensed vehicles and junk on the property. The storage of blight is prohibited by the township zoning ordinance, and constitutes a nuisance per se under MCL 125.294. Regardless of whether it is stored in compliance with the 20-foot setback requirement or the 30-foot setback requirement, the storage of blight is unlawful. In addition, even if the items stored were not blight, testimony and photographic evidence show that they were stored in violation of both the 20-foot and 30-foot setback requirements. Because a nonconforming use must be lawful, defendants' argument fails. *Heath Twp, supra* at 439.[2] The trial court did not abuse its discretion when it declined to hear Hart's testimony about the 1987 ordinance.

Affirmed in part, and vacated in part. We remand to the trial court for entry of a declaratory judgment that plaintiff violated the OMA, and for calculation of an award of costs and fees under MCL 15.271(4) for that part of the suit relating to the OMA. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey

[2] In any event, the record indicates that a copy of the 1987 zoning ordinance was admitted into evidence. The trial court had the opportunity to consider the 1987 ordinance, and its opinion indicates that it did so.