STATE OF MICHIGAN

COURT OF APPEALS

BERRIEN TOWNSHIP,

Plaintiff/Counterdefendant-Appellee,

v

EARL MAXWELL,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
December 20, 2005

No. 256487
Berrien Circuit Court
LC No. 03-003347-CH

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

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff on its claim that defendant improperly expanded a previously existing non-conforming use on his property and violated certain township ordinances. We affirm in part and vacate in part.

Before 1980, defendant's predecessor in title, Thomas Kimmel, owned and operated property, then zoned industrial, as a salvage business and junkyard pursuant to a 1968 zoning ordinance allowing such operation as an acceptable use in an industrial zone. In April 1980, the property was rezoned from industrial to agricultural/residential; Kimmel continued to operate the junkyard as a preexisting nonconforming use. Defendant leased the property from Kimmel in 1988 and acquired it in 1992. When defendant began operating the property, there were three structures and approximately 390,000 scrap tires present; there were no trucks, heavy machinery, or equipment used in the operations. By the time defendant purchased the property in 1992, there were 800,000 to 900,000 tires on the property; between 1992 and 1994, there were approximately 950,000 tires on the property; and in October 2002, there were an estimated 650,000 tires on the property. In addition, by October 2003, there were six balers, a loader, two forklifts, two shears, a rim buster, and eleven trucks, including a dump truck, a mobile home mover, a couple of yard trucks, and several pick-up trucks in use on the property. Further, defendant added ten structures on the property, increasing the number of such structures from three to thirteen during the time of his operation. Defendant testified that he was operating on sixteen acres, four fewer than permitted under the 1968 ordinance and than Kimmel had operated during his ownership of the property.

Defendant asserts that the trial court erred in determining that his operation constituted an unlawful expansion of the preexisting nonconforming use. We disagree. We review de novo a

trial court's decision to grant a motion for summary disposition. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). In reviewing an order granting summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Id*. at 30-31. Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 31.

Defendant complains that the trial court referenced "aerial photographs" that were not authenticated or admitted. However, any error in this regard was harmless considering defendant's admission that there was a substantial increase in the number of tires on the property and that he had added ten structures, commercial operations, heavy equipment, machinery, and a fleet of eleven trucks to his operation. In *City of Hillsdale v Hillsdale Iron & Metal Co, Inc*, 358 Mich 377, 385-386; 100 NW2d 467 (1960), our Supreme Court determined that the defendant's operation constituted an impermissible expansion of the prior nonconforming use, explaining that:

> [the] [d]efendant admits that through the erection of certain buildings and installation of certain machinery and equipment, as well as a spur railroad track, the operation of the scrap yard has become more mechanized and intensified, since the effective date of the ordinance. Testimony establishes that before the ordinance the business carried on at the location in question was largely storage of scrap metal. Since then a metal crushing or grinding or chopping machine and equipment for processing scrap metal have been operated there. The court found, on competent evidence, that since [the] effective date of the ordinance, the operations changed from gathering and storing and shipping of scrap to processing of scrap metal, to burning of automobile tires and bodies . . . and to smashing and crushing automobile bodies and other large pieces of metal. . . .

Similarly, defendant acknowledged erecting new buildings and adding heavy machinery, equipment, and a fleet of trucks to his operations, and to crushing automobiles (by way of a mobile crusher) and processing items for recycling on the property.

Defendant's testimony that he was operating on four fewer acres than his predecessor does not obviate his substantial expansion of the nature and character of that operation. As this Court explained in *Century Cellunet of Southern Michigan Cellular Ltd Partnership v Summit Twp*, 250 Mich App 543, 546-547; 655 NW2d 245 (2002), a nonconforming use must be substantially the same size and essential nature as the use at the time of the passage of a valid zoning ordinance. "A change in the nature and size of a nonconforming use is an extension of a prior nonconforming use and constitutes a nuisance per se." *Jerome Twp v Melchi*, 184 Mich App 228, 232; 457 NW2d 52 (1990). This is because "'[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.'" *Century Cellunet*, *supra* at 546, quoting *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000). "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*, *supra* at 546.

In *Century Cellunet*, the defendant operated a telecommunications tower supporting six panel antennas designed to facilitate wireless telephone services; the defendant sought to replace

the six existing antennas with smaller, more powerful antennas and to install three additional antennas on the tower to facilitate personal communications services. *Id*. at 544-545. The defendant asserted that this would not constitute an expansion of its nonconforming use because the total size of the nine new antennas would be less than the total size of the six existing antennas. *Id*. at 549. This Court disagreed, explaining:

> Petitioner's proposal includes the addition of three new antennas to its tower. Despite the fact that these antennas would be smaller than the antennas currently attached to the tower, their addition would clearly increase the number of antennas present. Furthermore, their addition would change the positioning of all of the antennas on the tower and would increase the density of the antennas present. [*Id*.]

As in *Century Cellunet*, defendant's claimed reduction in the acreage used is not dispositive; rather, even if defendant was operating on fewer acres, there can be no dispute that his operations had expanded to include a level of commercial operation not present before the zoning change. The trial court did not err in determining that there was no genuine issue of material fact that defendant had impermissibly expanded operations at the property beyond that permitted by the prior nonconforming use.

Defendant next argues that the trial court erred in determining that plaintiff's litter and debris ordinance was not unconstitutionally vague. We disagree.

Plaintiff's litter and debris ordinance, Ord. No. 31, § 142.002, provides in pertinent part:

> (a) No person, firm or corporation shall permit any junk, debris, waste material, combustible material, or other miscellaneous unused, unsanitary or dangerous material or equipment, or other source of filth or cause of sickness to accumulate in unreasonable or abnormal quantities . . . . The determination of whether such accumulation is unreasonable and abnormal shall be made by the Township Board upon the advice and report of the Zoning Enforcement Officer or Supervisor, based upon the following standards:
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> (1) The use district classification in which such property is located . . . with . . . agricultural-residential use district classifications permitting less such accumulations than commercial or industrial use district classifications.
>
> (2) The density of population of building structures in the area adjoining such property with restrictions against such accumulations becoming more strict as population or building structures become more dense.
>
> (3) The existence of disease, rodents, or other evidence of unsanitary conditions or causes of sickness connected therewith.
>
> (4) The likelihood of such accumulation creating a nuisance or cause of sickness or an unsanitary or unsafe condition.

As this Court explained in *Plymouth Charter Twp v Hancock*, 236 Mich App 197, 200; 600 NW2d 380 (1999), "[a]n ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating to those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated." Plaintiff's ordinance employs a reasonable person standard to determine prohibited conduct. As this Court further explained in *Plymouth Charter Twp*,

> [t]he reasonable person standard is a hallmark of the Anglo-American legal system. . . . We believe the reasonable person standard serves to provide fair notice of the type of conduct prohibited, as well as preventing abuses in application of the ordinance. The reasonable person standard assures that "the person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly." It also serves to prevent any ad hoc and subjective application by police officers, judges, juries or others empowered to enforce [the ordinance]. [*Id*. at 201-202 (citations omitted).]

Thus, the reasonable person standard of the ordinance fulfills the "fair notice" requirement; it provides persons of ordinary intelligence with a reasonable opportunity to know what constitutes an offending accumulation of litter and debris. Further, the ordinance's statement of standards to be used in making that determination guards against the abuse of "unfettered discretion" by township officials. The trial court correctly determined that plaintiff's litter and debris ordinance was not unconstitutionally vague.

Defendant next argues that the trial court erred in determining that the litter and debris ordinance is not preempted by the scrap tire provisions of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.16901 *et seq*. We disagree.

State law preempts a municipal ordinance in two situations: (1) where the ordinance directly conflicts with a state statute or (2) where the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977). Defendant does not argue that such a direct conflict exists here.

Whether a state statute occupies the field that an ordinance attempts to regulate is to be determined considering four guidelines:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
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> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
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> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not

> generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
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> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
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> As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.
>
> However, where the Court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held pre-empted. [*Id*. at 323-325 (citations omitted).]

Generally, the NREPA's scrap tire provisions regulate the collection, accumulation, storage, and disposal of scrap tires; they require that owners and operators of scrap tire collection sites register and be bonded; they set forth requirements for storing scrap tires, including providing for mosquito abatement and the removal of vegetation in storage areas; and they require the Department of Environmental Quality ("DEQ") to prepare and implement a statewide response plan for responding to fires at tire collection sites. MCL 324.16901-324.16907. The scrap tire provisions also establish a scrap tire regulatory fund, a portion of which is to be used for the cleanup or collection of scrap tires, and further provide that the DEQ is to assist owners and operators of scrap tire collection sites and scrap tire processors in developing markets for scrap tires. MCL 324.16908-324.16908a. Nowhere in the NREPA is there any express provision that the statute excludes local ordinances, and defendant concedes that the first of the criteria is not satisfied.

Defendant correctly notes that the preamble to NREPA provides:

> [T]o protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, and assessments; to provide certain appropriations; to prescribe penalties and provide remedies; to repeal certain parts of this act on a specific date; and to repeal certain acts and parts of acts. [MCL 324.101 *et seq*.]

Defendant argues that this preamble obviously evidences the purpose of the NREPA to be the consolidation of all environmental regulations into state control. Contrary to defendant's assertion, however, the NREPA does not evidence any intent to prohibit local regulation; rather, the preamble expresses a desire by the Legislature to consolidate state laws relating to the environment and natural resources into a single act. Further, plaintiff's litter and debris ordinance does not in any way direct or impact state allocation of funding for the removal of scrap tires. Whether defendant violated the ordinance and whether, therefore, plaintiff is entitled

to abatement is in no way connected to whether defendant is eligible for or receives grant funding for tire removal. The litter and debris ordinance prohibits the accumulation of unreasonable or abnormal amounts of litter or debris; the NREPA's scrap tire provisions do not regulate or attempt to regulate the quantity of tires a scrap tire collection site can accumulate. And the scrap tire provisions do not provide for permitting particular numbers of tires, which might impact the propriety of a local ordinance governing the same. Instead, the NREPA simply provides certain regulations for certain levels of accumulation.

We also reject defendant's bald assertion that preemption is "implied" by an examination of the legislative history, and that the pervasiveness of the state regulatory scheme is "suggestive" of preemption. Defendant does not discuss these factors, but merely concludes that "[i]t is obvious" that the local ordinance is preempted and that, as the registered owner of a scrap tire collection site, he is entitled to the full benefits of the NREPA. Defendant cannot merely announce his position and leave it to this Court to find support. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

We can discern no basis for concluding that, by virtue of its scrap tire provisions, the NREPA was intended to completely regulate the field of litter and debris. The trial court did not err in finding that state law did not preempt plaintiff's litter and debris ordinance.

Defendant next asserts that plaintiff's litter and debris ordinance does not provide for enforcement by the filing of a civil action, but rather is a penal statute prescribing criminal enforcement. We agree. We apply rules of statutory construction when construing an ordinance; therefore, when the language used in an ordinance is clear and unambiguous, it is to be applied as written. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422; 616 NW2d 243 (2000).

§ 142.005 of plaintiff's litter and debris ordinance, setting forth the penalties for violation, provides:

> Any person, firm or corporation who violates any of the provisions of this ordinance shall be guilty of a misdemeanor and shall be punished by a fine of not more than $100.00, plus the Township's actual costs of enforcement and including attorney fees, or by imprisonment in the county jail, not to exceed 93 days, or by both such fine, cost and imprisonment in the discretion of the court. Each day that a violation continues to exist, shall constitute a separate offense.
>
> In addition to the imposition of the foregoing fines and penalties, if any person, firm, or corporation refuses or neglects to comply with an order of the Township Board, Township Supervisor, or Zoning Enforcement Officer, issued under this ordinance, said Township Board may cause the said nuisance, source of filth, cause of sickness, or unreasonable accumulation to be removed from the premises, impounded, destroyed, and/or sold and the cost thereof assessed against the owner or occupant of the premises on which the same is located. If the owner or occupant of such premises shall refuse, upon demand, to pay such expenses so incurred, such sums shall be assessed against the real estate involved and shall be collected and treated in the same manner as are taxes assessed under the general laws of the State of Michigan.

> In the event of a sale of any such material or equipment by the Township, the proceeds from such sale shall first be used to reimburse the Township for all costs it has incurred and the balance, if any, shall be returned to the owner of the property.

By its plain language, the ordinance first provides that violators shall be guilty of a misdemeanor, punishable by the imposition of fines "plus [plaintiff's] actual costs of enforcement and including attorney fees" or by imprisonment in the county jail, or by both jail time and the imposition of fines and costs. In addition, the second paragraph of the ordinance provides that *if* the owner of property refuses or neglects to comply with an order issued under the ordinance, plaintiff has the authority to clean up any unreasonable accumulation of materials and assess the cost of doing so to the owner of the property. *If* the owner then refuses, upon such demand, to pay those costs—which by the plain language of the ordinance must have been incurred by the township in cleaning up the property after a refusal to comply with an order to do so—the ordinance further provides plaintiff with the authority to assess the costs against the property in the same manner as property taxes are assessed.

Plainly, the ordinance provides no manner of enforcement by civil action in the first instance. Nor does the ordinance provide for the recovery of attorney fees other than as part of the fines and costs imposed as a penalty following criminal conviction. The trial court erred in allowing plaintiff to pursue civil enforcement of the litter and debris ordinance and in awarding plaintiff attorney fees attributable to that action. We vacate the portion of the trial court's judgment in plaintiff's favor relating to the alleged violation of the litter and debris ordinance (Count IV of the complaint) and the trial court's award of attorney fees to plaintiff. However, we note that this does not impact the trial court's order requiring that defendant abate any use of the property inconsistent with its current zoning designation of agricultural/residential.

Finally, defendant argues that the trial court erred in holding a bench trial when he had demanded and timely paid the fee for a jury trial. However, because plaintiff's complaint sought only equitable relief and defendant's counter-complaint had been dismissed, defendant was not entitled to a jury trial. *Wayne Co Sheriff v Wayne Co Bd of Comm'rs*, 196 Mich App 498, 510; 494 NW2d 14 (1992).

We affirm in part and vacate in part.

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