STATE OF MICHIGAN

COURT OF APPEALS

ARTHUR SULLENS and MICHELLE SULLENS,

Plaintiffs-Appellants,

v

TOWNSHIP OF SUMPTER,

Defendant/Third-Party Plaintiff-Appellee,

and

COUNTY OF WAYNE,

Third-Party Defendant.

UNPUBLISHED
September 26, 2000

No. 214224
Wayne Circuit Court
LC No. 97-733243-CZ

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order entered by the trial court dismissing with prejudice plaintiffs' cause of action. We reverse and remand.

Plaintiffs own several parcels of land in Sumpter Township, including an eight-acre lot that they put up for sale in 1997.[1] This lot is the subject of this cause of action. The lot includes two structures used as housing. Plaintiffs live in the smaller of the two dwellings and, until shortly before this lawsuit was initiated, rented the other. The dwellings are serviced by one septic tank system and one water connection to the township water main. Plaintiffs contend that the use of the two structures as dwellings

[1] At the time the lot was first put on the market, it was approximately ten acres. Subsequently, plaintiffs split off a one-acre parcel, and as of the filing of their brief on appeal, intended to split off another one-acre parcel.

and the set up of the water and septic systems has existed since at least 1977, when plaintiff Arthur Sullens purchased the property.

Plaintiffs alleged in their complaint that their attempts to sell the disputed property were undermined by defendant Sumpter Township (hereinafter Sumpter). Specifically, plaintiffs alleged that Sumpter had been telling prospective buyers that the property could not be sold until it was split so that the two dwelling houses would be located on separate lots. Further, plaintiffs alleged that Sumpter was telling the prospective buyers that a second septic system would have to be installed. In its first motion for summary disposition, Sumpter asserted that plaintiffs were also challenging Sumpter's requirement that a separate water service lead be installed so that the two dwellings would each be serviced by a different lead. Plaintiffs sought declaratory and injunctive relief as well as damages, claiming that Sumpter's behavior was improper given that the set up of the two dwellings constituted a vested nonconforming use of the property.

Sumpter appears to concede that the use of the two structures as dwellings and the existence of the single septic system and single water connection predated the enactment of the relevant township ordinances. However, Sumpter does dispute whether the use of the smaller structure as a dwelling was lawful. Sumpter asserts that this structure has always been assessed as a garage, and that no permit to change it to a dwelling was ever issued.

In its first motion for summary disposition, Sumpter argued that even assuming that the use of the two dwelling houses both was lawful and predated the enactment of the applicable zoning ordinances, plaintiffs' suit must fail because plaintiffs could not establish that the regulations were unreasonable in that they deprived plaintiffs of any substantial rights. In response, plaintiffs filed a counter-motion for summary disposition, arguing that not only did Sumpter lack jurisdiction over the septic tank issue because regulation of this activity was under Wayne County's jurisdiction, but that application of the ordinance would impose a substantial burden on a valid nonconforming use of the property. The record contains an order denying defendant's motion for summary disposition. However, the order does not set forth the reasons for the denial, and the record does not include a transcript of the motion hearing. Accordingly, we have no indication whether the trial court considered and dismissed, or put off any decision on plaintiffs' counter-motion for summary disposition.

Thereafter, Sumpter was allowed to implead Wayne County as a third-party defendant. In its third-party complaint, Sumpter alleged that it "has merely insisted that Plaintiffs comply with its ordinance which requires that Plaintiffs' property be split for purposes of taxation, and that there be separate water lines, thereby bringing it into compliance with Sumpter's zoning ordinance . . . ." Sumpter characterized the cost of these requirements as "insubstantial." Further, Sumpter alleged that the real financial burden facing plaintiffs was due to Wayne County's insistence that a second septic system be installed. Sumpter's third-party complaint was summarily dismissed by the trial court "for the

reason the County of Wayne is immune pursuant to MCL 691.1401 *et seq.*[; MSA 3.996(101) *et seq.*] and for other reasons stated on the record."[2]

Next, Sumpter filed a second motion for summary disposition, arguing that because it is a government agency, law of the case doctrine compels the dismissal of plaintiffs' lawsuit on the same grounds cited for the dismissal of its third-party complaint, i.e., governmental immunity. In their response, plaintiffs argued that Sumpter's actions were ultra vires, and thus not covered under governmental immunity. In support of this assertion, plaintiffs again argued that application of the zoning ordinances would impose a substantial burden on a valid nonconforming use of the property, and that Sumpter had no jurisdiction regarding the septic system.

On its own motion, the court dismissed plaintiffs' cause of action at the hearing held on Sumpter's motion for summary disposition, reasoning as follows:

> I'm ordering them to issue a certificate of occupancy and that solves the matter for me. Issue a certificate of occupancy. The township can take additionally whatever action they feel is proper in order to conform to their ordinances including putting in the line themselves and assessing the property.
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> ***
>
> Okay, let me get it straight so I don't see you again on this one. The township is hereby ordered to issue a certificate of occupancy and prevented from . . . prohibiting the sale of the property based on non-conforming use. The township is further permitted by my order to install the separate sewer line to make the use conforming and to assess the property . . . , and fold that cost into the property taxes . . . .

The court also indicated that Sumpter was permitted to install the second water service lead. When asked by plaintiffs' attorney whether the court was concluding that the nonconforming use doctrine was inapplicable, the court responded, "Of course. They're going to make it conforming." Finally, when pressed by Sumpter's counsel on whether it was grating Sumpter's motion for summary disposition, the court responded, "No, summary disposition is denied because I don't think you're immune." The court did not elaborate further.

In its order for dismissal, the trial court ordered the township to issue a certificate of occupancy allowing plaintiffs to sell the property in its present condition. Further, the court ruled that the township was allowed to "take steps to bring the subject property into conformity with its ordinances, including the installation of a separate sewer line and a separate water service lead, and to file a lien and/or assess the property to recover its cost therefor."

Plaintiffs first argue that the trial court erred in dismissing their suit. We agree, but not for the reasons set forth by plaintiffs on appeal. Both plaintiffs' lawsuit and their appeal are based on the

[2] The transcript of this hearing is not included in the record before us.

nonconforming use doctrine. Plaintiffs argue that any attempt to force them to split the disputed property into two parcels and to require them to alter the water and septic systems violates their constitutionally protected right to continue the nonconforming use of the property. What plaintiffs' argument fails to consider is whether under the circumstances of this case, Sumpter's regulations of plaintiffs' property stem from different and distinct exercises of police power, and if so, whether this impacts the applicability of the nonconforming use doctrine.

"A prior nonconforming use is a vested right in the use of a 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). Accord *Dusdal v City of Warren*, 387 Mich 354; 359-360; 196 NW2d 778 (1972). Although considered to be detrimental to the public interest as expressed in the zoning scheme, nonconforming uses are allowed to continue in order to protect the constitutional rights of the property owner in the use of the property. This does not mean, however, that local governments have no authority to regulate the nonconforming property. For example, the property owner cannot change or expand that use. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 95; 572 NW2d 246 (1997). This is in keeping with the public policy goal of gradually eliminating the nonconforming use.

Further, nonconforming uses are subject to reasonable regulations enacted pursuant to the exercise of a local government's police power to protect the public health, safety, and general welfare. *Goldblatt v Town of Hempstead*, 369 US 590, 592; 82 S Ct 987; 8 L Ed 2d 130 (1962); *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310, 322, n 18; 471 NW2d 321 (1991); *Orion Twp v Weber*, 83 Mich App 712, 720; 269 NW2d 275 (1978); *Renne v Waterford Twp*, 73 Mich App 685, 690; 252 NW2d 842 (1977); *Casco Twp v Brame Trucking Co, Inc*, 34 Mich App 466, 471; 191 NW2d 506 (1971). Nonconforming property owners cannot escape compliance with local health and safety regulations simply because their nonconforming use of the property is protected. 4 Anderson on Zoning, § 6.73, pp 529-530. "A non-conforming use is amenable to municipal ordinances which regulate similar uses, conforming or non-conforming." *Id.* Accord 4 Rathkopf's The Law of Zoning and Planning, § 51A.02(2) (1997). The nonconforming use doctrine is meant to protect property owners from the unfair and perhaps unconstitutional deprivation of their property rights. It is not meant, and cannot be used as a shield to insulate nonconforming property owners from the health and safety regulations applicable to all.

Often, the failure to recognize the difference between a local government's authority to zone and to regulate is based on the fact that these concepts stem from the same general grant of police power. See *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 298-299; 539 NW2d 761 (1995) (observing that "[t]he distinction between zoning and regulatory ordinances cannot be predicated on whether the purpose of the ordinance is to promote the public good, since both may have as their purpose the public good). Nonetheless, as recognized by the Court of Special Appeals of Maryland in *Mayor & City Council of Baltimore v Dembo, Inc*, 123 Md App 527; 719 A2d 1007 (1998), a critical distinction exists between these exercises of municipal authority. In *Dembo*, the appellate court concluded that a nonconforming adult entertainment business was subject to reasonable licensing provisions regulating the use of the property. *Id.* at 534. The *Dembo* court reasoned that the licensing provisions at issue "are not in the nature of a zoning law, which is primarily concerned with

uniformity of land use and stability of location. . . . Rather, the provisions are more broadly aimed to protect the health and welfare of the citizens by licensing operators of adult entertainment establishments." *Id.* at 536-537.

Courts consistently recognize the ability of a local government to regulate the manner in which a nonconforming use operates under the government's police power. For example, in *Wantanabe v City of Phoenix*, 140 Ariz 575; 683 P2d 1177 (1984), nonconforming property owners challenged the imposition of a city ordinance requiring them to pave their gravel parking lots. Five of the appellants operated roadside stands that sold items raised on their farms. Adjacent to each stand was a graveled parking area. The other appellant operated a yard where it manufactured precast concrete products. The yard was graveled. It was conceded that these uses were nonconforming. *Id.* at 576. The *Watanabe* court rejected appellants' argument "that the city may not enforce any zoning ordinance which affects their existing nonconforming property." *Id.* at 577. The court concluded that the ordinance, which was intended to control for dust, was a reasonable exercise of the city's police power authority to regulate to protect the public health, safety, and welfare. *Id.* at 578.

Another illustrative case is *Miller & Son Paving, Inc v Wrightstown Twp*, 42 Pa Commw 458; 401 A2d 392 (1979). In that case, the defendant operated a nonconforming quarry. The defendant had been cited for several zoning violations, including the failure to fence the property. *Id.* at 460-461. The defendant argued that because "it has a nonconforming use it has a right to conduct its operations exactly as it did prior to the enactment of the Zoning Ordinance, including the right to continue to quarry without providing a fence." *Id.* at 461. The *Miller* court held that the trial court had correctly concluded "that no nonconforming rights to quarry its land were interfered with by requiring [the defendant] to fence its operations for the safety of the public." *Id.*

Similarly, in *Keener v Serr*, 53 Ohio App 2d 143, 145; 372 NE2d 360 (1976), the Court of Appeals of Ohio, Sixth District, held that a municipality can require the owners of nonconforming junkyards to maintain a list of vehicles in the yards and to present said list to an authorized subdivision of the municipality upon request. The court explained that such requirements were legitimate exercises of the municipalities power to regulate "for the protection of the public health, safety, morals and general welfare." *Id.*

Of course, if the regulations effectively and immediately terminate the nonconforming use, then such regulations may be invalid as applied. See *Orion, supra* at 720-724. This is in keeping with the notion that such nonconforming use is a vested right that should be free from the threat of immediate termination.

Although Michigan appellate courts often frame the issue through a reference to the enabling legislation on which the ordinance at issue is authorized, see, e.g., *Casco*, *supra* at 471, determining whether a given provision should be characterized as zoning or regulatory does not depend on a mechanical application of some sort of statutory spread sheet, i.e., it is not simply a matter of scrutinizing case law and statutory language to determine if the ordinance at issue stems from a statutory framework identified as zoning or regulatory in nature. In fact, much of the current statutory landscape does not neatly subdivide local police power authority into such discreet categories, and often a general area of

concern is addressed in more than one enabling statute. A nonconforming property owner cannot be immune from reasonable regulations adopted in the interest of promoting the public health, welfare, and safety simply because the activity at issue is mentioned in a statute or act that addresses a local government's zoning authority. See *Keener, supra*.

Instead, the operative question is whether the ordinance restricts the application or employment of the property in the use designated as nonconforming, or whether, in furtherance of protecting the health, welfare, and safety of the community, the ordinance regulates the manner in which the use functions. If the answer is the later, then the vested rights theory of nonconforming uses is inapplicable. See, e.g., *Renne, supra* at 689-690 (observing that "no right of compensation inures to property owners who are constrained by ordinance for reasons of public health and welfare to abandon a functional septic tank in favor of a public sewer system").

Although not directly on point, we find this Court's reasoning in *Natural Aggregates, supra*, to be instructive. The plaintiff in *Natural Aggregates* operated a sand and gravel processing business on property zoned for such activity. *Id.* at 289-290.[3] In 1989, the defendant township had adopted an ordinance that required a yearly permit for such mining operations, as well as requiring that property owners obtain "a separate permit and surety bond for bringing off-site fill material onto township property." *Id.* at 290-291. Relying on Justice Riley's opinion in *Square Lake, supra*, the *Natural Aggregates* Court noted that there is a difference between an ordinance that restricts the "use" of land and an ordinance that regulates an "activity" taking place on the land. *Id.* at 300-301. The Court concluded that because the ordinance at issue regulated the activity of removal of material from the property and not the use of the plaintiff's land as a sand and gravel mine, the ordinance was a reasonable exercise of the defendant's police power under the township ordinance act (TOA), MCL 41.181; MSA 5.45(1). *Id.* at 301-302.[4]

Based on the record before us, we conclude that it is unclear whether under the circumstances of the case at hand the attempts to regulate plaintiffs' water and sewage systems are reasonable expressions of Sumpter's authority to regulate for the public's health, welfare, and safety. The parties are instructed to address this issue on remand.

Conversely, we believe it is clear that Sumpter's ordinance restricting to one the number of dwellings that can be placed on a parcel is not a regulatory ordinance and is therefore encumbered by the nonconforming use doctrine. However, after reviewing the record we conclude that a question of fact exists concerning the lawfulness of the use of the smaller structure as a dwelling. While plaintiffs contend that the structure has been used as a dwelling since at least 1977, Sumpter countered that the

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[3] The plaintiff had been operating the business since 1968. The zoning of the property for this purpose occurred "[s]ometime around 1971." *Brighton Twp, supra* at 290.

[4] The TOA provides in pertinent part: "The township board of a township may, at regular or special meeting by a majority of the members elect of the township board, adopt ordinances regulating the public health, safety, and general welfare of persons and property . . . ." MCL 41.181; MSA 5.45(1).

structure is a garage that has never been certified as a dwelling. See 83 Am Jur § 628, p 525. This issue must also be addressed on remand.

Finally, plaintiffs argue the trial court erred in ruling that the township had the authority to install a second septic system on the property. We agree. Both parties agree that Wayne County is responsible for the supervision of plaintiffs' septic system. Both the township building code and zoning ordinances defer to the Wayne County Health Department in matters involving septic tanks.[5] Further, it appears that this is not the type of situation where a township is requiring a property owner to attach to a public sewer. See *Renne, supra* at 689-690.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey G. Collins

I concur in result only.

/s/ Michael J. Kelly

[5] For example, the Sumpter Township Code states that "[t]he type, capacities, location and layout of a Private Sewage Works shall comply with all recommendations of the Wayne County Health Department." Sumpter Township Ordinance, § 25-54.