STATE OF MICHIGAN

COURT OF APPEALS

ALBERT C. PADGETT,

Plaintiff-Appellant,

v

MASON COUNTY ZONING COMMISSION,

Defendant-Appellee,

and

INTERNET LOCAL SERVICES, INC., a/k/a LOCAL INTERNET SERVICES, INC.,

Intervenor-Appellee.

UNPUBLISHED
December 9, 2003

Nos. 236458; 236459
Mason Circuit Court
LC No. 01-000014-AS

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

In this consolidated action, plaintiff appeals by leave granted from the circuit court order affirming the Mason County Zoning Board of Appeals' denial of plaintiff's request for a special use permit and its dismissal of the complaint. We affirm.

I. FACTS

Plaintiff is a farmer who owns a 35-acre parcel in Victory Township. Plaintiff conducted a hog farming operation of this property from 1980 to 1993.

In 1993, a diseased herd led plaintiff to declare bankruptcy and to cease hog farming operations. In 1994, as a result of Victory Township relinquishing its zoning function to the county, plaintiff's land was rezoned from agricultural to residential. In 2000, another businessman assumed plaintiff's mortgage and contracted to dispose of his industrial ice cream waste as feed for hogs. The new business relationship enabled plaintiff to recommence the hog farming operation. The county, however, required plaintiff to file a request for a special use permit for his farming operation because his property was no longer zoned for such uses. Plaintiff filed the request for a special use permit in order to operate his farm.

The Mason County Zoning Commission (the "commission") held a hearing and denied plaintiff's require for a special use permit for a hog farm operation. Plaintiff appealed this decision, and the Mason County Zoning Board of Appeals (the "ZBA") affirmed the commission's decision. In response, plaintiff filed a three-count complaint in circuit court. Count I sought an appeal of the ZBA's decision denying plaintiff's request for a special use permit for the hog farm operation. Count II sought a declaration that the zoning ordinance was invalid as violative of the Michigan Constitution and the Right to Farm Act, MCL 286.471 *et seq*. Count III alleged a taking action for just compensation. The trial court held a hearing on the matter on May 21, 2001, and found that defendant had "prevailed."

The trial court found that plaintiff, despite his desire or hope to restart his farming operation, had ceased the operation in 1993 and, therefore, that it did not constitute a prior nonconforming use. The trial court also found that the ZBA had properly analyzed the special use permit factors when it declined to issue the special use permit, and that sufficient material evidence supported the ZBA's decision. The trial court also ruled that the Right to Farm Act ("RTFA") was inapplicable.

Defendant filed a proposed order with the trial court denying plaintiff's appeal and dismissing his complaint in its entirety. Plaintiff filed objections to the proposed order, arguing that defendant was "bootstrapping" a dismissal of counts II and III to the court's denial of plaintiff's appeal in count I. The trial court heard plaintiff's objection to the proposed order. Conceding that it may not have broken down each particular allegation in plaintiff's complaint, the trial court stated that it was nonetheless comfortable that its decision encompassed all three counts of plaintiff's complaint. The trial court signed defendant's proposed order denying plaintiff's appeal and dismissing his complaint with prejudice.

In Docket No. 236458, plaintiff seeks relief from that portion of the trial court's order denying his appeal of the ZBA's decision. In Docket No. 236459, plaintiff seeks relief from that portion of the lower court's order dismissing his complaint in its entirety. These claims were consolidated in an order of this Court dated January 8, 2002. Local Internet Services, Inc., the intervening party in this action, has property across the street from plaintiff's farm at issue.

II. SPECIAL USE PERMIT AND DECISION OF THE ZBA

In his first issue on appeal, plaintiff claims that the ZBA erred in determining that plaintiff's hog farming facility did not constitute a prior nonconforming use and by denying plaintiff's request for a special use permit.

A. Standard of Review

An appeal from a decision of a zoning board of appeals is an administrative appeal. *Paragon Properties Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996). When there is competent, material and substantial evidence in support of a decision, a reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). When reviewing a lower court's examination of administrative action, this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the factual findings, a standard of review

"indistinguishable from the clearly erroneous standard of review." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *Id.* at 234-235.

B. Analysis

The question before us is whether the trial court misapplied the competent, material, and substantial evidence standard of review to the ZBA's decision that the hog farm operation did not constitute a prior nonconforming use. In applying the competent, material, and substantial evidence standard of review to an administrative decision, the trial court is required to review the entire record, and not just portions that support the agency's findings. *Great Lakes Sales, Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992). Substantial evidence is less than a preponderance of the evidence, but is more than a mere scintilla. *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). Our Supreme Court has cited the dictionary definitions of "competent," "material," and "substantial" with regard to a Worker's Compensation Appellate Commission decision: "Competent, material, and substantial evidence . . . is solid, true, reliable, authoritative, [and] capable . . . ." *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 514 n 5; 563 NW2d 214 (1997).

Plaintiff argues that his construction and use of the property as a hog farming operation predated the zoning ordinance; therefore, the hog farming operation constitutes a prior nonconforming use for which no special use permit was required. Plaintiff also argues that because he never evidenced any abandonment of hog farming operations, the ZBA improperly applied section 301 of the ordinance at issue, which prohibits the reestablishment of a prior nonconforming use that has been discontinued for a period of more than one year.

Specifically, the portion of the Mason County zoning ordinance at issue, section 301, states:

> Whenever a nonconforming use has been discontinued for a period of one year, such use shall not be re-established, and any future use shall be in conformity with the provisions of this ordinance . . . .

The ordinance comports with MCL 125.216, the codification of the common law concept of prior nonconforming uses that existed before the enactment or amendment of an ordinance. Specifically, MCL 125.216(1) states, in pertinent part:

> The lawful use of a building or structure and of land or a premise as existing and lawful at the time of enactment of a zoning ordinance, or in the case of an amendment of an ordinance, then at the time of the amendment, may be continued although that use does not conform with the provisions of the zoning ordinance or amendment.

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 at the time of the zoning regulation's effective date. MCL 125.216; *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). Accordingly, we note that it has been established that a zoning restriction's

enactment date is the critical point in determining when a nonconforming use vests. *Id.* That is, where a party's lawful use existed before and at the time of the enactment of the zoning regulation, the use may continue after the zoning restriction takes effect. *Id.* Consequently, once a property owner establishes a prior nonconforming use, the subsequent enactment of a zoning restriction will not divest the property owner of the vested right. *Id* .

The trial court was correct in concluding that the ZBA's decision, that plaintiff's use of the property as a hog farm did not constitute a prior nonconforming use, was supported by competent, material or substantial evidence. Specifically, the ZBA record reflects that, by his own admission, in 1993, before the zoning was relinquished to the county and changed from agricultural to residential, plaintiff discontinued the use that he presently seeks to recommence. Specifically, plaintiff expressly confirmed that when he went bankrupt in 1993, he went out of the business and ceased hog farming. Further, the record indicates that plaintiff's use of the property for hog farming operations was terminated from that time until 2000, a period of seven years. Additionally, the record reflects that the intervenor had expressly asked plaintiff if he intended to continue to raise hogs in the future, to which plaintiff responded in the negative. Moreover, no evidence indicates that plaintiff intended to reestablish his pig farming operations during that time.

It is not disputed in this case that if the use of land does not constitute a prior nonconforming use, a special use permit would be required in order for a party to use land in a way not conforming to the zoning restrictions. As noted, the record supports the ZBA's conclusion that plaintiff's hog farming operation did not constitute a nonconforming use. Accordingly, the ZBA's requirement of a special use permit in this case was warranted. Furthermore, there was competent, material and sufficient evidence supporting the ZBA's decision to deny the special use permit. Specifically, as evidenced by the transcript of the ZBA, the ZBA considered the evidence and testimony presented and specifically applied the criteria for special use set forth in section 502 of the ordinance at issue. For example, the transcript reflects that each ZBA member expressly reviewed each of the criteria for the issuance of a special use permit, in conjunction with the factual record, and found the proposed use to be in violation of items 1, 2, 4 and 7 of the ordinance. Accordingly, the denial of the special use permit was supported by substantial facts on the record and the terms of the ordinance, and the trial court did not err in upholding the ZBA's denial of such a permit.

III. MICHIGAN RIGHT TO FARM ACT

Next, plaintiff asserts that the Mason County zoning ordinance, and the ZBA's denial of his request for a special use permit, to the extent his farm was being "zoned out" due to odors, constitute violations of Michigan's Right to Farm Act (RTFA).

A. Standard of Review

This issue was set forth in Count II of plaintiff's complaint. The trial court did not indicate upon what theory it dismissed Counts II and III of the complaint. However, because the trial court summarily dismissed Counts II and III, the standard of review for a motion for summary disposition is appropriate. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Further, issues of statutory construction are reviewed de novo on appeal. *Id.*

B. Analysis

The RTFA prohibits nuisance litigation against farm operations that conform to generally accepted agricultural practices. MCL 286.473*; Steffens v Keeler*, 200 Mich App 179, 181; 503 NW2d 675 (1993). Specifically, the RTFA establishes that a farm operation will not be found to be a public or private nuisance if the farm operation existed before a change in the land use and, if before that change in land use, the farm operation would not have been a nuisance. MCL 286.473. The 1999 amendment to the RTFA simply indicates that local zoning ordinances cannot preempt the RTFA. MCL 286.474(6); *Belvidere Twp v Heinze*, 241 Mich App 324, 327-328; 615 NW2d 250 (2000). Ultimately, as set forth in *Heinze*, the purpose of the RTFA is to protect farmers from nuisance suits, not to make farms exempt from zoning. *Id.* at 331.

Based on the foregoing, we conclude that the RTFA is inapplicable in the instant action. Plaintiff's hog farming operation, contrary to his contention, was not being "zoned out" due to odors. There is no indication that the commission or the ZBA based its ordinance or its decisions on grounds that the hog farming operations constitutes a nuisance. Rather, as noted, facts on the record clearly show that plaintiff had ceased use of his property as a hog farm before the ordinance at issue was enacted and had no vested prior nonconforming use when the county zoned the property in 1994. Accordingly, the county has not eliminated plaintiff's farm based on nuisance, but has simply denied plaintiff's special use application. Consequently, the RTFA is inapplicable and offers no support for plaintiff's appeal.

IV. TAKING OF PROPERTY WITHOUT JUST CAUSE

Next, plaintiff argues that the Mason County zoning ordinance, and the denial of his request for a special use permit, amount to an unconstitutional taking of his property entitling him to just compensation.

A. Standard of Review

Zoning ordinances are presumed to be constitutional. For example, in *Northville Area Non-Profit Housing Corp v City of Walled Lake*, 43 Mich App 424, 431; 204 NW2d 274 (1972), this Court stated:

> It is a well-settled principle of law that there is a presumption in favor of the validity of a legislative enactment, to wit: the amendment to the city zoning ordinance, by virtue of its adoption. It is also well-settled that he who claims the ordinance to be invalid has a burden of proving the invalidity by a preponderance of the evidence.

B. Analysis

In this case, plaintiff argues that the application of the ordinance to his property constitutes a taking because it prohibits him from using his property as a hog farm, the only use to which the property is reasonably adapted. However, the prohibition of taking property without just compensation extends only to vested rights in property. 8A Mich Civ Jur (2002), p 228; *Snow v Freeman*, 55 Mich App 84, 87, 222 NW2d 43 (1974), rev'd on other grounds 405 Mich 837 (1979). In this case, as set forth *supra*, the operation of a pig farm on plaintiff's

property did not constitute a prior nonconforming use at the time the property was zoned. Accordingly, at the time he submitted his application for a special use permit, plaintiff had no vested interest in a prior nonconforming use. Because plaintiff did not have a vested right to use his property as a hog farm in violation of the zoning ordinance, there can have been no taking. Rather, the ZBA simply followed its duly enacted zoning ordinance in denying plaintiff's request for a special use permit. Accordingly, there has been no taking of plaintiff's property and the county's enforcement of its zoning ordinance was a valid exercise of its police power.

Finally, plaintiff contends that the trial court erred when dismissing Counts II and III of his complaint.

Again, as noted, plaintiff did not have a valid nonconforming use at the time the ordinance at issue was enacted. Accordingly, the trial court could grant no meaningful relief on any counts because plaintiff had no right to use his property as a hog farm. Consequently, plaintiff could not prevail on any claim contained in his complaint. An issue is moot when it presents "nothing but abstract questions of law which do not rest upon existing facts or rights." *East Grand Rapids School Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 390; 330 NW2d 7 (1982). Therefore, the decision on the merits of plaintiff's appeal rendered Counts II and III of plaintiff's complaint moot. As a general rule, a court will not decide moot issues. *Id.* Therefore, defendant and intervenor were entitled to judgment as a matter of law on these counts. In light of the foregoing, that the fact that there was no express recitation that defendant and intervenor were seeking a dismissal pursuant to MCR 2.116(C)(1)-(10) is of no consequence.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad