

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UNPUBLISHED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

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

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

SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority's opinion and would reverse and remand the trial court's decision because there exist genuine issues of material fact whether plaintiff abandoned his farming operation and whether plaintiff's use of his land was non-conforming and protected by the Michigan Right to Farm Act (RTFA) from nuisance lawsuits.

This case concerns whether a long-time family farmer who filed for bankruptcy when a disease wiped out his herd will have the opportunity to maintain his livelihood and recommence his hog farming operation.

Plaintiff, it would appear from the record of this case, has been in the farming business in Victory Township in Mason County since the 1940's. Plaintiff owns 35 acres of land and raises hogs. Plaintiff's hogs became infected with a disease which eliminated his entire herd and as a result, plaintiff filed for bankruptcy protection in 1993.

However, plaintiff maintained ownership of his land, retained barns on the property as well as farm equipment and other farm machinery. In particular, plaintiff retained a sizeable underground storage "pit" or "pond" for hog manure.

It would appear from the record that while plaintiff experienced financial difficulty he did not divest himself of farm assets nor did he subdivide and sell any real property which he owned. Indeed his “Padgett Farms” sign remained on the property with a picture of pigs on the sign.

On January 1, 1994, a new Mason County Zoning ordinance came into effect which rezoned plaintiff’s property in Victory Township from agricultural to residential-recreational. In 2000, plaintiff chose to recommence his farming operation, gained a new business partner and placed 1,000 hogs in his barns. He was informed of the zoning change and told he needed a special use permit. He removed the hogs and applied for a special use permit. The Mason County Zoning Board of Appeals denied plaintiff’s request for a special use permit. The circuit court issued an order which upheld the Mason County ZBA’s decision.

This is a consolidated appeal which joins an appeal from the ZBA decision. Count I of plaintiff’s complaint is an appeal of the ZBA decision. Count II of plaintiff’s complaint alleged that plaintiff’s use of the property was a non-conforming use and protected by the RTFA, MCL 286.471 *et seq.*, and in count III, plaintiff alleged an unjust taking without compensation.

While the issues merge and overlap, a review of the record of this case and the analysis of pertinent case law and application of relevant Michigan statutes require a reversal of this matter.

First, it is well established under Michigan law that a prior, non-conforming 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); *Belvidere Twp v Heinze*, 241 Mich App 324, 327-328; 615 NW2d 250 (2000). A hearing was conducted by the trial court on May 21, 2001. The trial court declared that defendant had “prevailed” and affirmed the ZBA’s denial of a special use permit and dismissed the remaining counts of plaintiff’s complaint. The trial court erred. There exist genuine issues of material fact concerning whether plaintiff’s use of the land was a prior non-conforming use and as such superceded the Mason Township ordinance which required a special use permit. On the issue of nonconforming use, no proofs were taken and no witnesses were called to testify or to be cross examined, only the presentations of the party’s attorneys were considered.

Secondly, as a corollary to the issue of nonconforming use, there exist genuine issues of material fact as to whether plaintiff abandoned his use of the land for farming purposes. It is well established case law in Michigan that mere nonuse or temporary discontinuance of use in and of itself does not constitute abandonment. *Dusdal v City of Warren*, 387 Mich 354; 196 NW2d 778 (1972). Rather, to establish abandonment, which would further substantiate defendants’ claim of a special use permit, an act or omission of abandonment plus intent to abandon the property or use of the property must be established. *Id.* at 359. Here, the trial court did not conduct an evidentiary hearing to assess the intent of plaintiff to abandon the property and to ascertain the veracity of the purported comments made by plaintiff to defendant intervenor that he would not start farming again.

Thirdly, given the existence of genuine issues of material fact on the issues of nonconforming use and abandonment, the trial court should have applied the legal principles of the RTFA. Of great importance is § (4)(6) of the RTFA which became effective June 1, 2000 which preempts local ordinances that conflict with RTFA. The real significance of the RTFA is

to protect farmers from nuisance lawsuits including odors stemming from farm operations and the like, as long as a farmer adheres to generally accepted agricultural management practices. While defendants disclaim this matter is a nuisance suit, the air of the Mason County Zoning Commission proceedings reflected high anxiety concerning the odors associated with hog farming.

In this case, because an evidentiary hearing was not conducted by the trial court, there exist genuine issues of material fact concerning plaintiff's use of the land and his intent to resume farming operations. If this case were remanded, the trial court might determine that plaintiff conclusively abandoned his land with the requisite intent and therefore a special use permit would be required in order for a proper resumption of farming operations. On the other hand, the trial court might determine that abandonment did not occur and therefore plaintiff's intended use was nonconforming. If so, plaintiff's protections and responsibilities under the RTFA would be triggered. Of particular significance would be plaintiff's adherence to generally accepted agricultural management practices concerning the storage of hog manure and the odors associated with hog farming. Farmers have the right to farm in Michigan. Farmers also have responsibilities as stewards of the land in Michigan. In this case, there was an insufficient determination of plaintiff's rights and responsibilities.

I would reverse.

/s/ Bill Schuette