

STATE OF MICHIGAN
COURT OF APPEALS

SOO TOWNSHIP,

Plaintiff-Appellant,

v

LORENZO PEZZOLESI,

Defendant-Appellee.

UNPUBLISHED

October 25, 2011

No. 299359

Chippewa Circuit Court

LC No. 09-010577-CE

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff Soo Township appeals as of right from the trial court's order dismissing its suit against defendant Lorenzo Pezzolesi. We vacate the trial court's order and remand for further proceedings.

I. BASIC FACTS

Pezzolesi purchased a parcel of property in Soo Township in 1987. At that time, the property was zoned commercial. Defendant began operating a junk/salvage yard on the property shortly after he purchased the property.

In 2001, defendant's property was zoned residential. Also, in 2001, plaintiff enacted a nuisance ordinance and a junkyard ordinance, which addressed junk and waste located within Soo Township.

On August 3, 2009, plaintiff filed a "complaint for abatement of nuisance," arguing that defendant's property constituted a common law nuisance and was in violation of the nuisance and junkyard ordinances. The complaint also stated that defendant's property was not zoned to be a junkyard and that defendant was not licensed to operate a junkyard. Defendant responded that he operated a salvage yard, not a junkyard, and that the property had been grandfathered in prior to 2001.

At trial, Soo Township Supervisor James Perron testified that defendant's property was zoned residential and defendant never requested a junkyard variance. Perron testified that he did not see any commercial activity taking place on the property, the entryway to the property was blocked on a regular basis, and there was no "signage" on the property. Pictures of the property

were introduced, which showed heavy-duty equipment, tires, and other items being stored on the property.

Defendant testified that he used the property as an “equipment yard” or “salvage yard” since 1987, adding that he salvaged “engines, transmissions, differentials, axles and tires” from equipment. In fact, in the two weeks before trial defendant sold some scrap that was stored on the property on two separate occasions for \$213.00 and \$140.32. When asked if he had employees, defendant said that when he needed help he called “Peter, Joe, [and] Bob” on Saturday and Sunday when they were free. He said that he did not know their last names, and that his company in Canada that sold scrap paid them.

Prior to the end of the hearing, the trial court ruled from the bench, dismissing all claims. In a subsequent written opinion, the trial court found that: (1) defendant continually operated his salvage business in its current form since 1987; (2) the property was zoned commercial when defendant purchased it; and, (3) plaintiff rezoned defendant’s commercial property to residential property after defendant purchased it. For these reasons, the trial court found that defendant’s use of the property was a legal nonconforming use, and was not subject to the licensing requirements in the zoning ordinance. Although the trial court did not address the nuisance ordinance in its written opinion, it appears that during the hearing the trial court determined that defendant was not subject to it. Plaintiff now appeals.

II. STANDARD OF REVIEW

Whether an ordinance is zoning or regulatory in nature is a question of law subject to review de novo by this Court. See *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 298-299; 539 NW2d 761 (1995) (reviewing de novo whether a regulatory ordinance constituted “disguised zoning”). We review a trial court’s findings of fact for clear error. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995). A trial court’s finding is “clearly erroneous only if there is no evidence to support it or if the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made.” *Id.*

III. ANALYSIS

A. ABANDONMENT

Plaintiff first argues that the trial court clearly erred in finding that defendant did not abandon his right to the nonconforming use of his property.

“The necessary elements of ‘abandonment’ are intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon.” *Rudnik v Mayers*, 387 Mich 379, 384; 169 NW2d 770 (1972).

Here, there is no indication that there was an act or omission by defendant that clearly manifested his voluntary decision to abandon his right to the nonconforming use of his property. The only witness to testify in plaintiff’s favor said that he did not know if defendant was using the property differently than when it was purchased, or if defendant had substantially the same business in 1987 as he had at the time of trial. Although plaintiff’s witness testified that he did not personally see any commercial activity taking place on the property, defendant explained that

he had used the property as an “equipment yard” or “salvage yard” since 1987, and sold some scrap that was stored on the property in the two weeks before trial.

Based on the evidence presented at trial, we are not left with a definite and firm conviction that the trial court made a mistake in concluding that defendant has continually operated his salvage business in its current form since the year 1987, and by extension, that defendant had not abandoned his right to the nonconforming use of his property.

B. ORDINANCES

Plaintiff next argues that the trial court erred in concluding that defendant’s property was not subject to the junkyard and nuisance ordinances. We agree. These regulatory ordinances apply to defendant’s prior nonconforming use.

A township may adopt an ordinance regulating the public health, safety, and general welfare of persons and property. *Natural Aggregates Corp*, 213 Mich App at 293-294. This includes licensing of businesses. *Id.* Township regulations are only subject to judicial intervention when there is an abuse of discretion, excessive use of power, or an error of law. *Id.* at 294. However, a court may determine whether an ordinance is within the range of conferred powers and whether it is reasonable. *Id.* An ordinance is reasonable if there is a rational relationship between the exercise of the regulatory power and the public health, safety, morals, or general welfare in a particular manner in a given case. *Id.*

Zoning ordinances regulate land uses, while regulatory ordinances regulate activities. *Natural Aggregates Corp*, 213 Mich App at 299-302.

A zoning ordinance regulates the use of land and buildings according to districts, areas, or locations. Whether a particular ordinance is a zoning ordinance may be determined by considering the substance of its provisions and terms, and its relation to the general plan of zoning in the city. The 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. [*Id.* at 298-299 (citations omitted).]

Thus, for example, where the ordinance in *Natural Aggregates Corp* did not provide whether soil, sand and gravel may be removed from township land, but instead required one who wished to do so to obtain a permit, file a land reclamation plan, and obtain a surety bond, this Court held the ordinance to be regulatory. *Id.* at 300-301. A regulatory ordinance can be imposed on a prior nonconforming user, but a zoning ordinance cannot. *Id.* at 298, 301-302.

The junkyard ordinance at issue here requires any person engaged in the operation of a junkyard¹ within Soo Township to obtain a permit. A person or entity interested in operating a

¹ The ordinance defines “junkyard” as a “business . . . operated by a person who buys, stores, sells, processes, receives or recycles used rags, paper, used bags, used metal, used tires, used car parts, used appliances or any other type of machinery or automobile, when such appliance,

junkyard is required to apply for a permit by submitting an application to the Township Clerk. The application is then referred to the Township Board, who may grant the permit, deny the permit, grant the permit with conditions, or request more information. The ordinance lists 11 factors that the Township Board is to consider in deciding how to act on the application. The ordinance contains 16 paragraphs of “regulations and conditions [that] are required for the granting of a new or renewed junkyard permit and the continued operation of a junkyard.” The ordinance provides for a fine of not more than \$500.00 for a violation of any provision, and indicates that each day the ordinance is violated is a separate violation. The junkyard ordinance addresses the activity and requirements for operating a junkyard in the township. It applies to any property used for that purpose, regardless of its location. The applicability of the permit requirement under the ordinance does not depend upon a zoning or districting scheme, but on the activity taking place on the land.

The nuisance ordinance contains 10 paragraphs of activities or conditions that are “hereby declared to be nuisances.” It also provides for a fine of not more than \$500.00 for a violation of any provision, and indicates that each day the ordinance is violated is a separate violation. Much the same as the junkyard ordinance, the nuisance ordinance addresses activity or conditions that could apply to any property, regardless of its location. It also does not depend on a zoning or districting scheme, but on the condition of or activity taking place on the land. For these reasons, both the nuisance and junkyard ordinances are regulatory ordinances that apply to defendant’s prior nonconforming use. See *Natural Aggregates Corp*, 213 Mich App at 300-301. As such, the trial court erred in concluding otherwise.

We vacate the trial court’s order dismissing the suit and remand to the trial court for further proceedings consistent with this Court’s determination that the nuisance and junkyard ordinances are regulatory in nature and apply to defendant’s prior nonconforming use. Defendant should have an opportunity to argue below that he either did not violate these regulatory ordinances, that they are not within the range of conferred powers, that they are unreasonable, or that the ordinances were adopted in bad faith and resulted in a regulatory taking of defendant’s property.

Vacated and remanded. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

machinery or automobile is acquired for the purpose of dismantling or stripping for the sale or recycling of used metals or parts.”