

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

FORSYTH TOWNSHIP,

Plaintiff,

v

FILE NO. 12-50325-CZ
HON. THOMAS L. SOLKA

RANDY and LIBBY BUCHLER,

Defendants.

_____ /

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a zoning ordinance enforcement case. The Buchlers keep about 150 chickens and 8 sheep along with a family garden at their home on 6.5 acres of land on Johnson Lake in Forsyth Township. They sell eggs and handmade woolen products to supplement Randy Buchler's Social Security Disability income. Forsyth Township's zoning ordinance does not permit commercial agriculture in the Lake Residential (LR) zone where the Buchler property is located. The township brings this action to stop Buchlers' egg and sheep farming operation. Buchlers claim Michigan's Right to Farm Act (RTFA)¹ preempts the local zoning ordinance giving them protection from the township's nuisance claim.

Under the facts and circumstances shown at trial the court finds and concludes that Buchlers' egg and wool farm, as operating at time of trial, is protected against Forsyth Township's nuisance claim brought under its zoning ordinance.

Forsyth Township is a rural township consisting of about 188 square miles. One hundred seventeen square miles of township land are state or publically owned. Forsyth

Township adopted its current zoning ordinance in 1990 before the Buchlers acquired the property and started farming in 2003. The zoning ordinance was adopted in accordance with provisions of the Township's Rural Zoning Act number 184 of Public Acts of 1944. Its Lake Residential Zone (LR), in which the Buchler parcel is located, covers 7.75 sq. miles. Permitted and conditional uses in the LR zone include single family dwellings, temporary use of campers, essential services, outdoor heating units, seasonal dwellings (except mobile homes), governmental recreational facilities, and churches. Commercial farming and livestock production is not a permitted or conditional use. Agriculture is permitted in other zones (Rural Residential and Resource Production.)

Minimum lot size in the LR zone is one acre. The Buchler parcel is 6.5 acres. The structures on the Buchler parcel, including their home, sauna, woodshed, hen houses, and other structures related to the egg and wool production meet all lot line and lakefront setback requirements under the ordinance.

Buchlers moved to their property in 2001.² In addition to their home and a family garden, they operate a small chicken and sheep farm on the property for commercial production of eggs and wool. Their farm is known as "Shady Grove Farm, U.P., LLC".

According to the Buchlers' testimony they started raising chickens on the property in 2003. They started with about 25 chickens in 2003 and by time of trial had upwards of 150 laying chickens. Since 2003 they have also maintained seven or eight

¹ MCL 286.471

² The property was formerly owned by Libby Buchler's grandparents first as a

sheep on the property.³ The eggs are sold to a licensed egg processor who wholesales the eggs to the Marquette Food Coop. The sheep's wool is harvested and in addition to family clothing, Libby Buchler sells woolen items at local retail outlets in Marquette County. Income from egg and woolen good sales supplement the family income.⁴

Johnson Lake has approximately 61 developed lots or parcels fronting on the lake, including the Buchlers'. Many are "high end", lake front residential homes. In 2009, township officials received upwards of six complaints or objections to the Buchler's farming operation, some anonymous, some not. Complaints included violation of the zoning ordinance, the farm growing "too big" for the area, pollutants or nutrients running off into Johnson Lake, and commercial operations on going in a residential zone.

As a result of these complaints, township zoning officials sent Buchlers a letter informing them that their operation was in violation of the township zoning ordinance. The complaints, notice from the zoning officials, and Buchlers' response touched off a series of meetings of the Township Planning Commission, Township Board, and an *ad hoc* committee.

The Buchlers requested a "special exception"⁵ for the limited and light nature of their farming activity. When their application was before the Planning Commission, neighbors and residents spoke for and against the request for a "special exception." The matter went back and forth between the Township Board and the Planning Commission for a number of meetings and hearings. A member of the Forsyth

"camp" and later, 1978 as her grandparents' home.

³ The Buchler children also have raised a 4H Club turkey and lamb from spring until sold at the county fair in August.

⁴ Randy Buchler is partially disabled from an industrial injury.

⁵ Sometimes referred to as "use variances" in zoning ordinances enacted under

Township Planning Commission (who resides in the township but also happens to be a professional planning/zoning employee for the City of Marquette) informed the Planning Commission that the "special exception" provision of the zoning ordinance is likely not authorized by current state enabling statutes and could be considered as illegal "spot zoning".

Another Planning Commission member raised the question of whether Buchlers would have the right to continue commercial farming under the state Right To Farm Act (RTFA).⁶ That question led to informal discussions among township officials, Buchlers, and Michigan Department of Agriculture and Rural Development (MDARD) staff responsible for administering the Michigan Right to Farm Act. One commission member was told by an MDARD staff member in Lansing that the RTFA would not apply to the Buchler's farm because the zoning ordinance and LR District pre-dated the Buchler farm. Randy Buchler requested that his farm be inspected by MDARD to determine if it complied with "Generally Accepted Agricultural Management Practices".⁷ He was told MDARD was too understaffed to respond to RTFA inspections in the Upper Peninsula. He was asked to produce a letter to that effect, but did not.

By the March 10, 2011 meeting, the Planning Commission was still uncertain about how, and if, the zoning ordinance should be enforced against Buchlers in light of the Right to Farm Act and related considerations. The Planning Commission tabled the Buchler case for six months "to carry out a study regarding small scale farming in the township. . .". This motion passed 7 - 0.

earlier enabling legislation.

⁶ MCL 286.471

Finally, at the Planning Commission meeting of September 08, 2011, after lengthy discussion and many motions, the Planning Commission denied Buchlers' request for a "special exception" for light agriculture activity in the Lake Residential District. The motion passed 4 - 1. The Planning Commission also appointed a small *ad hoc* committee with volunteer members, including Randy Buchler to explore possible amendments to the zoning ordinance to permit and light, sustainable agriculture within terms of the ordinance. Although that *ad hoc* Committee met, it did not lead to changes in the zoning ordinance.

The Planning Commission motion and recommendation went to the Township Board which accepted the Planning Commission recommendation at its September 22, 2011 meeting. As a result of that Township Board action, the zoning administrator sent a letter to Buchlers in September 2011 asking that they cease and desist chicken and sheep farming within 45 days. Additional correspondence was exchanged between zoning officials, the Buchlers, the Township Attorney, and ultimately Buchlers' attorney without resolution of the issue.

The township filed this complaint to enforce the ordinance, requesting a court order stopping Buchlers from commercial farming on their property. During a two day bench trial township officials, neighbors on Johnson Lake, the Buchlers and others testified. Two experts testified by deposition. Buchlers' immediate neighbors from both sides of the Buchler property testified they could not see, smell, or hear any aspect of the chicken or sheep farming from their homes. They found the Buchler activities neither a nuisance nor annoying. The chickens and sheep are located on the back of

⁷ Also known as GAAMPS, more anon.

the Buchler lot, not visible from the lake. One of the neighbors is a middle school science teacher. She conducted lake water testing off the Buchler property as a class project. They tested for signs of agriculture runoff – water temperature, ph levels, dissolved solids, dissolved oxygen, and nitrates. All were within “excellent” ranges.

During the pendency of this case although Randy Buchler could not get an MDARD GAAMPs inspection, he did apply for certification under MDARD’s Michigan Agriculture Environmental Assurance Program (MAEAP). This program is authorized by statute, MCL 324.8710 “to reduce (farm) producer’s legal and environmental risks ... by taking a voluntary, proactive approach to reducing agriculture pollution while keeping business operations sustainable.”⁸ Following site visits and inspections by the Marquette County Soil and Water Conservation District and MDARD Buchlers’ farm was certified as being MDARD MAEAP compliant.

In deposition testimony Wayne Whitman, environmental manager for MDARD described the relationship to MAEAP certification and GAAMPs:

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Q Okay. Okay. Do you know what the Michigan Agriculture Environmental Assurance Program’s Water Stewardship Program is?

A I am familiar with that program.

Q Can you tell me how it relates to the Michigan Department of Agriculture, if at all?

A That program is administered in our division, in the same section where Right to Farm is administered. The environmental Stewardship Division.

⁸ MDARD MAEAP website

Q Okay, thank you.

A And another acronym, MAEAP, Michigan Agricultural Environmental Assurance Program, provides a voluntary proactive way that farms can have their farm management practices evaluated to determine their environmental performance and identify any deficiencies, try to prioritize and schedule changes necessary at their farm.

Q Okay. Would you say it is -- Is it a first step or a step toward coming into compliance with the GAAMPs, is it -- What's the relationship there?

A It is consistent in that in order for a farm to achieve verification under the MAEAP program, they need to meet the Right to Farm GAAMPs that apply to their farm operation.

Q Okay. So if a farm is MAEAP certified, then they are in compliance with the applicable GAAMPs, is that what you are saying?

A It is a difference determination. At the time of a MAEAP verification, the verifier will review records, will conduct an on-site inspection of that farm, and determine if they are meeting all of the criteria to be MAEAP verified. It is consistent but it is not the same as a complaint response or a site selection verification or even a proactive verification, which is done under the Right to Farm Act.

Q Okay. It is not the same, but I thought I heard you say that for a person -- a farm to gain MAEAP verification, they had to be meeting the requirements of applicable GAAMPs?

A Yes.

Q Okay.

A That's true, yes.

Gary Taylor, an associate professor in the Department of Community and Regional Planning at Iowa State University was at Michigan State University when the

RTFA was amended in 1999 providing for state preemption and requiring site selection GAAMPs. He worked on the MSU Extension educational programs on the 1999 Amendments. He also holds a law degree.

Taylor testified in his deposition:

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So that in the case that we're talking about, in the Buchler case, if it is, in fact, the case that Mr. Buchler's farm receives MAEAP certification and MAEAP certification indicates compliance with GAAMPs, then compliance with GAAMPs would afford Mr. Buchler nuisance protection under the Right to Farm Act and so he would, in other words, be allowed to continuing his farming operation as is under the Right to Farm Act.

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By Ms. Halley:

Q Okay. So far in our discussion, Mr. Taylor, what is your opinion about whether or not the Michigan Right to Farm Act supersedes the Forsyth Township zoning ordinance as it relates to the regulation of agriculture and specifically as it relates to the Buchlers' farming activities?

A Yea. Well, I think as I -- as I explained earlier, my rationale for thinking that as it applies to the Buchlers' property the township ordinance is unenforceable because -- If it is -- if it is the case that they -- that they get this MAEAP verification, then the township ordinance is unenforceable against them.

The Michigan Right to Farm Act, MCL 286.471 was enacted in 1981. The RTFA protects farm operations from nuisance complaints provided the farm operation conforms to Generally Accepted Agriculture and Management Practices (GAAMPs) according to policies developed by MDARD, MCL 286.473.

The court finds and concludes the Buchler's meet the threshold test of a "farm

operation” which requires “activity that occurs at any time as necessary on a farm in connection with the *commercial production*, harvesting, and storage of farm products...” MCL 286.472. Both the exhibits and testimony relating to wholesale egg sales and woolen goods sales and the amount of income produced leads the court to find the Buchler egg and wool operation meets the test of “commercial production” under the Act. “There is no minimum level of sales that must be reached before the RTFA is applicable.” *Shelby Township v Papesh*, 267 Mich App 2 (2005).

The RTFA has been amended three times since to enhance protections afforded commercial farmers.⁹ The 1999 amendment, effective June 01, 2000, specifically expressed the legislature’s intent in protecting farm operations:

MCL 286.474, environmental complaints involving farms or farm operations.

(6) Beginning June 01, 2000, except as provided in this section, it is the express legislative intent that this act preempt any local ordinance. . .that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not. . .enforce an ordinance. . .that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

The 1999 amendment also required a GAAMP for site selection and odor control for new and expanding livestock production facilities. Pursuant to this amendment MDARD developed a site selection, odor control and livestock GAAMP (the 2012 GAAMP is Exhibit 9 in the record). The 2012 GAAMP has three primary objectives: (1) environmental protection; (2) social considerations (neighbor relations); and (3)

⁹ 1987 Michigan Public Acts 240; 1995 Michigan Public Acts 94; 1999 Michigan Public Acts 261.

economic viability.

This GAAMP goes on to specifically provide:

The decision of where to site a livestock production facility can be based on several objectives including: preserving water quality, minimizing odor, working with existing land ownership constraints, future land development patterns, maximizing convenience for the operator, maintaining aesthetic character, minimizing conflicts with adjacent land uses, and complying with other applicable local ordinances. (page 1)

This GAAMP defines a “livestock production facility” as a farming facility “where farm animals ... are confined with a capacity of 50 animal units or greater...” In an accompanying table, 50 “animal units” of sheep are 500 sheep and lambs and 50 “animal units” of chickens are 5000 chickens. The record indicates the Buchlers have approximately eight sheep, about 150 chickens.

With those definitions and minimum animal units considered, the GAAMP goes on to describe three “acceptable locations” for livestock production facilities. Those categories are:

Category 1. These sites are normally acceptable for livestock production facilities and generally defined as areas that are highly agriculture with few non-farm residences.

Category 2. These sites where special technologies and/or management practices could be needed to make new and expanding livestock facilities acceptable. These areas are predominantly agricultural but also have an increased number of non-farm residences.

Category 3. These are sites that are generally not acceptable for new and expanding livestock production facilities due to environmental concerns or areas that may be predominantly residential.

The location of Buchlers farm on Johnson Lake in an area zoned Lake Residential is not a category 1 or category 2 site. The Buchler land is better

characterized as a category 3 site under this GAAMP: "sites generally not appropriate for new and expanding livestock production facilities." However, this GAAMP recognizes the *possibility* of livestock production facilities on a category 3 site under certain circumstances:

New and expanding livestock production facilities should not be constructed in areas where local zoning does not allow for agricultural uses. Any proposed site with more than the maximum number of non-farm residences specified in Table 4 for a new operation, and Table 5 for an expanding operation, is a category 3 site. New livestock production facilities are inappropriate for that site. *However, expanding livestock production facilities may be acceptable if the farm submits an Odor Management Plan and site verification approval is determined by MDARD.*

Both Tables 4 and 5 are based on a livestock production facility with minimum of 50 "animal units" (500 sheep and lambs and 5000 laying hens or broilers.) Buchlers' sheep and chickens are about 1.6% to 3% of the minimum "animal units " that trigger application of the standards. This GAAMP also notes in footnote 2 to the Tables that a commercial farmer can be afforded the nuisance protection under the GAAMP if their operation conforms to applicable GAAMPS "but are not required to complete the site review and verification process if less than 250 animal units." Randy Buchler testified he requested a MDARD review and verification but was told the agency had insufficient staff to come to the U.P. for a verification.

A number of Michigan appellate decisions, published and unpublished, have considered the Right to Farm Act in relationship to local zoning ordinances.

In *Charter Township of Northville v Coyne*, 170 Mich App 446 (1988), the Court of Appeals concluded:

(The legislature) therefore, enacted the Right to Farm Act to protect

farmers from the threat of extinction caused by nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations as well as from the threat of private nuisance suits.

In the instant case, Coyne erected a barn on Pierson's property. The barn serves as a storage site for farm machinery and implements, seeds, supplies, and some produce. Its construction and use appears to conform to generally accepted agricultural and management practices. Accordingly, we conclude that Michigan's Right to Farm Act is a valid defense to plaintiff's nuisance suit that arises out of an alleged violation of its zoning ordinance. The trial court erred in concluding otherwise.

In an unpublished decision, *Almont Township v Dome*, COA #179297, 1997 Mich App LEXIS 1285 (January 17, 1997), the plaintiff township challenged a decision from the Lapeer Circuit Court which found the defendant did not violate two of the town's zoning ordinances. The defendant operated a tree farm. He placed a mobile home on the property without first obtaining a permit. The town maintained the mobile home violated three zoning ordinances and constituted a nuisance *per se*. The Court of Appeals affirmed the trial court's decision:

Plaintiff (township) argues that because the Commission of Agriculture did not adopt any written guidelines pertaining to generally accepted agricultural and management practices for tree farmers, the trial court could not have concluded that defendant's use of the mobile home was a generally accepted practice. We disagree. The Commission of Agriculture's written policy statement provides in relevant part:

The Commission shall establish Practices encompassing the broadest possible sector of the state's agricultural industry. The Commission recognizes the diversity in Michigan farm products with over 125 commodities being produced in the state. This commercial production process involves the use of a multiplicity of acceptable management techniques. Therefore, the practices defined using the enclosed referenced procedures should not be construed as an exclusive list of acceptable practices.

The 1999 amendment to the RTFA added "preemption" and an expression of

legislative intent to the law in Section 4 (6) of the RTFA. In *Shelby Township v Papesh*, supra, the Court of Appeals reversed the trial court's order granting summary disposition in the township's favor. The defendant landowners began raising chickens. Neighbors complained. The trial court found the poultry operation was a nuisance under a zoning ordinance prohibiting raising farm animals on property that was less than three acres. The trial court concluded the RTFA did not apply.

The Court of Appeals concluded the RTFA preempts the township zoning ordinance.

State law preempts a municipal ordinance where the ordinance directly conflicts with a state statute or the statute completely occupies the field that the ordinance attempts to regulate...A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits... The language of the statute (the RTFA) is unambiguous. It clearly states that a local ordinance is preempted when it purports to extend or revise the RTFA or GAAMPS. *It further plainly states that a local unit of government shall not enforce an ordinance that conflicts in any manner with the RTFA or GAAMPS.*

Further, as we previously noted, MCL 286.474 (6) expressly provides that, 'a local unit of government *shall not enforce* an ordinance that conflicts in any manner with this Act.' We cannot imagine any clearer expression of legislative intent. The plain language of the RTFA precludes enforcement of an ordinance that conflicts with the RTFA. Although plaintiff argues that application of the RTFA under these circumstances will prevent local municipalities from 'getting their arms around' farms operating in existing or developing residential areas, the fact that the statute appears to be unwise or unfair to plaintiff is insufficient to permit judicial construction. The wisdom of the statute is for the determination of the legislature, and the law must be enforced as written any township ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by the RTFA.

The Right to Farm Act at MCL 286.474(6) clearly and unambiguously expresses a legislative intent that the state law preempts "any local ordinance" and bars

enforcement of local ordinances against any farm that complies with the Right to Farm Act. The GAAMPS, themselves, are not administrative rules adopted pursuant to the Administrative Procedures Act with force of law. The GAAMPS are described in the statute as “policy”. MCL 286.473(1). The MDARD official responsible for administering the RTFA, Wayne Whitman Environmental Manager with MDARD testified the GAAMPS are not promulgated rules:

To clarify, GAAMPS are not promulgated rules. They are adopted by the commission with the purpose of defining acceptable farm management practices to prevent pollution and minimize nuisance conditions for farm operations to either natural resources or neighboring properties or to neighbors. . . (Whitman deposition page 31, line 14.)

The GAAMPS do not carry the rule and force of law. The January 2012 GAAMP for “site selection and order control for new and expanding livestock production facilities” in describing Category 3 sites as sites generally not appropriate for new or expanding livestock production facilities is, at best, a policy. And even as a policy, it includes subjective phrases such as “livestock production facilities *should not* be constructed in areas where local zoning does not allow for agriculture uses.” Note the policy does not say “livestock production facilities shall not be constructed in areas where local zoning does not allow.” The policy further goes on to allow for “expanding livestock production facilities” in a Category 3 site if the farm submits a plan for site verification approval to MDARD but also goes on to provide at footnote 2 to Table 5 that the site review and verification process is not required for less than 250 animal units. The Buchlers are well below that minimum threshold.

Zoning ordinances are “legislative acts representing a legislative judgment as to

how land should be utilized and where the lines of demarcation between the several use zones should be drawn”, *City of Greeley v Ells*, 527 P2d 538 (Colo. 1974). Zoning is government control of private property. Private property rights are fundamental rights. A degree of government control of private property rights is consistent with the United States Constitution if enabling statutes and ordinances include processes for zoning decisions on individual parcels to be based on unique facts of that parcel of land including provisions for variances and appellate review, *Village of Euclid v Ambler Realty Company*, 272 US 365, 47 SC 114 (1926), *Nectov v City of Cambridge*, 277 US 183, 48 SC 447 (1928).

If the legislature intended to preclude new farms from seeking RTFA protection from zoning enforcement of ordinances pre-dating the farm it could have carved out that exception in the 1999 preemption amendment, but it did not. The 2012 GAAMP policy discussing the relationship between local zoning ordinances and the RTFA is not law or an administrative rule that can be enforced. This court is left with weighing a policy that suggests consideration of local zoning ordinances against a clear, unambiguous statutory right afforded the Buchlers. Weighing both in the balance the court concludes the statute controls.

The township and objecting neighbors are not left without remedy. The Right to Farm Act provides that individuals and local units of government can submit complaints to MDARD involving a farm or farm operation, MCL 286.474(1). The statute then requires MDARD to investigate the complaint and make a determination of whether the farm operation complies with Generally Accepted Agricultural Management Practices. If

a complaint leads to an MDARD investigation and a farm found out of compliance with GAAMPs we may have a different result to a nuisance complaint.

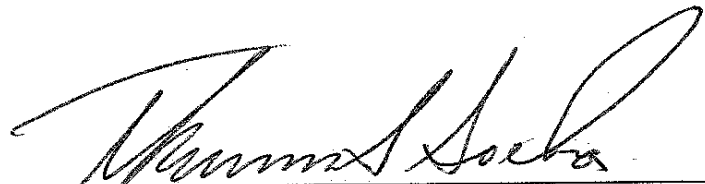
A local unit of government is also authorized to submit proposed amendments to its zoning ordinance prescribing standards different from those contained in published GAAMPs if adverse effects on the environment or public health will exist within the local unit of government, MCL 286.474(7).

In summary, because defendants' farm, as it exists at the time of trial, is protected from nuisance suits under the Right to Farm Act plaintiff's request for an injunction closing the farm is denied. This decision does not bar future enforcement if circumstances and conditions change from those established during trial of this case.

SO ORDERED.

Date:

12/18/2012



Hon. Thomas L. Solka, Circuit Judge

c: Kevin Wm. Koch
Freda Michelle Halley
Stephen Bermis

Date of Mailing: _____