

Via Hand Delivery

November 7, 2014

Circuit Court Clerk
Kalamazoo County Circuit Court
227 West Michigan Avenue
Kalamazoo, MI 49007

Re: *Township of Richland v. Jim Nieuwenhuis*
Case No. 2014-0507-AV
Transferred from 8th District Court: Case Nos. 14RT3180A and 14RT3181A

To the Clerk of the Court:

Enclosed herewith you will find an original and two (2) copies of the following documents with respect to the above-captioned matter:

1. Appellant's Brief; and
2. Proof of Service

Please file in your usual and customary manner. Should you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

Christopher E. Tracy

Enclosure

c (w/encl): James M. Straub (via email and first class mail)

15974075.1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

TOWNSHIP OF RICHLAND,

Appellee,

vs.

JIM NIEUWENHUIS,

Appellant.

Case No. 2014-0507-AV
Hon. Gary C. Giguere, Jr.

Appeal from 8th District Court:
14RT3180A
14RT3181A

ORAL ARGUMENT REQUESTED

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APPELLANT'S BRIEF

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STATEMENT OF QUESTION PRESENTED

Does Michigan's Right to Farm Act (RTFA), MCL 286.471 et. seq. preempt the Township of Richland's enforcement of its zoning ordinance when appellant's farming operation, including operations involving raising goats and crops, is a commercial production that complies with applicable generally accepted agricultural management practices (GAAMPs)?

Appellant answers: Yes

Appellee answers: No

District court's answer: Yes, that appellant's farming operation met the commercial production requirement.

No, that appellant's farming operation met the GAAMPs requirement because at the time the district court issued its opinion and order the appellant had not then received confirmation from the Michigan Department of Agriculture and Rural Development (MDARD) that the farm complied with the applicable GAAMPs.

STATEMENT OF JURISDICTION

Appellant appeals final order(s) and judgments of the 8th District Court and those orders and judgments are dated August 15, 2014; September 5, 2014; September 10, 2014 and September 23, 2014. This Court has jurisdiction over this appeal pursuant to MCR 7.103(A)(1).

STATEMENT OF FACTS

In May 2014, the Township of Richland (Richland)'s Enforcement Officer issued two citations for alleged zoning ordinance violations to appellant. The first citation was for an alleged violation by appellant Nieuwenhuis for owning and keeping goats on his farm. The second citation was for Nieuwenhuis putting up a hoop house to aid in the farm's vegetable/crop production. Nieuwenhuis' farm/property is more than three (3) acres and is located in one of Richland's agricultural/residential districts. The farm is located south of Richland off of 32nd Street and there are a number of other farms located nearby. Appellant's Ex. 1¹ (Bates-numbered pages JN-000001-3 which are aerial photos showing the farm and surrounding area) part of record before district court. Appellant's Ex. 14 (Bates-numbered pages JN-000232-38 and JN-000243-45) also part of the record are photographs of the hoop house (a temporary structure that acts like a two-sided tent with openings at each end) that protects the farm's crops from wind damage and maximizes the crop yield. The photographs also show the wind damage that occurred to the tomato plants that were not grown inside the hoop house versus the quality tomato plants that Ben Martin, Nieuwenhuis' nephew, was able to raise that were protected by the hoop house. Appellant's Ex. 16 (Bates-numbered pages JN-000255-58) is an article published in the summer 2014 Western Michigan University Magazine about Martin, a WMU alumnus, and his farming operation, including the hoop house, at the Nieuwenhuis farm.

Richland never contacted Nieuwenhuis to confirm whether his farm met the commercial production requirement of the RTFA before the township issued the citations. If Richland would have contacted Nieuwenhuis, the township would have discovered that Nieuwenhuis' farm, in fact, met the commercial production requirement as concluded by the district court in its August

¹ The references to exhibits are to Nieuwenhuis' exhibits admitted into evidence (the record) before the district court.

15, 2014 opinion and order at page 2 (the opinion's pages are not numbered) and supported by appellant's Exhibits 2-10 and 14 (Bates-numbered pages JN-000004-173 and JN-000239-42) that are part of the record. Despite the provisions of MCL 286.474 that allow a governmental unit like Richland to request that MDARD inspect a farming operation to determine, among other things, whether the farm complies with applicable GAAMPs, Richland failed to make such a request to MDARD. If Richland would have timely requested MDARD to perform a GAAMPs inspection/review, then all of the time, effort and expense involved with the court proceedings could have been avoided. Ultimately, Nieuwenhuis had to request on his own that MDARD perform a GAAMPs inspection pertaining to his goats and the hoop house and related crop production. MDARD inspected the farm in late August 2014 and confirmed in a letter dated September 12, 2014 that the farm complied with all applicable GAAMPs. Ex. 17 (Bates-numbered page JN-000259) attached to appellant's renewed motion for reconsideration.²

The district court found in its August 15 opinion and order that Nieuwenhuis could not prove that the farm complied with the applicable GAAMPs because at that time there was no written verification from MDARD regarding such compliance. Nieuwenhuis did provide such written confirmation (Ex. 17) to the district court with his renewed motion for reconsideration, but the district court failed to reconsider its August 15 decision. Be that as it may, the record before the district court, which includes Ex. 17 and MDARD's written confirmation that the Nieuwenhuis farm conforms to all applicable GAAMPs, establishes that the farm is a commercial operation that complies with the GAAMPs and is therefore entitled to protection under the RTFA. Accordingly, this Court should reverse the district court's opinion, order and judgments and should find in appellant's favor.

² The reference to bee colonies in the MDARD letter is not relevant to the issues before this Court. Richland never issued any citations regarding the bee colonies. In addition, the bee colonies have been moved.

ARGUMENT

I. RTFA preempts Richland's enforcement of its zoning ordinance.

A. Standard of Review

Whether a state statute (in this case the RTFA) preempts a local ordinance (Richland's zoning ordinance) is a question of statutory interpretation, which is a question of law that this Court reviews de novo. *Michigan Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401 (2003). The RTFA (state law) preempts a local ordinance (Richland's zoning ordinance) where the ordinance directly conflicts with the state statute or the statute occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257 (1997). In this case, the district court issued its opinion and order after a formal hearing, which is akin to having decided the case in Richland's favor pursuant to MCR 2.116(C)(10). This Court also reviews de novo the district court's findings under these circumstances. *Shelby v. Papesh*, 267 Mich App 92 (2005).

B. Analysis

Richland's zoning ordinance (relevant portion being section 300.404 attached as Ex. A to appellant's trial brief) conflicts with the RTFA. Section 300.404 requires a minimum lot area of five (5) acres for raising livestock. Nieuwenhuis' farm is less than 5 acres and he raises goats. The RTFA does not provide for a minimum lot size. Accordingly, the RTFA preempts and controls as long as Nieuwenhuis' farm is a commercial operation (which it is) that conforms to the applicable GAAMPs (as verified by MDARD the farm does).

The RTFA was enacted to protect farmers from nuisance lawsuits, including lawsuits and citations issued by local municipalities. *Belvidere Twp v Heinze*, 241 Mich App 324, 331

(2000). Under the RTFA, a farm is not a nuisance if the farm involves commercial production and conforms to GAAMPs. *Id.*; MCL 286.472 and MCL 286.473(1).³

The record and evidence before the district court establishes the following:

1. Nieuwenhuis' farm is a commercial operation/involved with commercial production as concluded by the district court in its August 15, 2014 opinion and order and supported by appellant's Exhibits 2-10 and 14 (Bates-numbered pages JN-000004-173 and JN-000239-42). Richland offered no contrary evidence/exhibits during the formal hearing. This Court should find as the district court did that Nieuwenhuis' farm is a commercial operation as he and Ben Martin sell, among other things, crops and goat meat.

2. Nieuwenhuis' farm conforms to the applicable GAAMPs, which is most easily established based on Ex. 17 (MDARD's September 12, 2014 letter following its inspection of the farm). In addition, there also was sufficient evidence in the record before the district court even before appellant submitted Ex. 17. That evidence included Ex. 11 -- a May 29, 2013 MDARD letter to Ben Martin (Bates-numbered pages JN-000176-77). This letter indicated that MDARD visited the farm in May 2013 to verify the farm operated in accordance with MDARD's Michigan Agriculture Environmental Assurance Program (MAEAP). MDARD verified in the letter that the farm met all requirements set forth in the MAEAP cropping system and that the plan called for operating the farm's cropping operation, including the hoop house, in accordance with the GAAMPs. No changes in the farm operation (including where the goats were raised, where the hoop house was located, etc.) occurred from 2013 and/or the spring of 2014

³ For more background information regarding GAAMPs, the Court may want to review MDARD's website at: http://www.michigan.gov/mdard/0,4610,7-125-1599_1605---,00.html.

(prior to Richland issuing its citations to Nieuwenhuis) to the time the MDARD GAAMPs inspection occurred in August/September of 2014. MDARD concluded in its September 2014 letter that the farm conformed with the applicable GAAMPs, and therefore, the farm was conforming to the applicable GAAMPs when Richland improperly issued the two citations in May 2014.

CONCLUSION AND RELIEF REQUESTED

The RTFA preempts Richland's zoning ordinance. Appellant's farm is entitled to RTFA protection as the farm is a commercial operation that conforms to all applicable GAAMPs. For these reasons, appellant respectfully requests that this Court do the following:

1. Reverse the district court's opinion, orders and judgments and rule in favor of appellant.
2. Dismiss or order the district court to dismiss and extinguish the citations issued by Richland.
3. Pursuant to MCL 286.473b require Richland to pay/reimburse Nieuwenhuis for all fees (including attorney fees) and expenses incurred to defend against Richland's improper citations and actions before the district court and this Court.⁴
4. Order any other relief that this Court deems appropriate.

⁴ Appellant can provide to this Court a copy of invoices from his attorney.

Respectfully submitted,

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By:  _____

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Dated: November 7, 2014
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STATE OF MICHIGAN

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PROOF OF SERVICE

Christopher E. Tracy, attorney for Appellant states that on the 7th day of November, 2014, he served a copy of *Appellant's Brief* and this *Proof of Service* via email and U.S. First

Class mail upon:

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I declare that the above information is true to the best of my information, knowledge and belief.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP
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