Order

Entered: July 16, 2004

JUL 19 2004

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

125434 & (41)(44)

MILAN TOWNSHIP,
Plaintiff-Appellant
and Cross-Appellee,

v

SC: 125434
COA: 240444
Monroe CC: 01-013596-CZ

LYLE JAWORSKI and SEXY PHEASANT FARM GAME BIRD & DOG TRAINING PRESERVE, L.L.C.,
Defendants-Appellees
and Cross-Appellants.

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On order of the Court, the application for leave to appeal the December 4, 2003 judgment of the Court of Appeals and the motion to file brief amicus curiae are considered. The motion to file brief amicus curiae is GRANTED. The application for leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The application for leave to appeal as cross-appellants is therefore moot and is DENIED.

t0713

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 16, 2004

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

MILAN TOWNSHIP,

Plaintiff-Appellee,

v

LYLE JAWORSKI and SEXY PHEASANT FARM GAME BIRD & DOG TRAINING PRESERVE, L.L.C.,

Defendant-Appellant.

UNPUBLISHED
December 4, 2003

No. 240444
Monroe Circuit Court
LC No. 01-013596-CZ

Before: Kelly, P.J. and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendants[1] appeal as of right an order enjoining them from operating a game bird hunting preserve on their agriculturally zoned property in violation of plaintiff's zoning ordinance. We reverse.

I. Facts

Defendant breeds, raises and sells pheasants and quail at the hunting preserve. Customers who purchase game birds from defendant have the option to either buy and take home live birds, or hunt the live birds at the preserve. The hunting preserve is licensed by the Department of Natural Resources (DNR). Pursuant to the requirements of the Milan Township Zoning Ordinance ("the ordinance"), defendant was required to seek a special use permit to operate the hunting preserve on its property which is zoned agricultural. Despite plaintiff's rejection of defendant's application, defendant continued to operate the hunting preserve.

Plaintiff subsequently filed a complaint for declaratory judgment and seeking injunctive relief against defendant. Plaintiff conceded that although neither hunting nor the raising or

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[1] Because defendant Lyle Jaworski and his wife are the sole owners of defendant Sexy Pheasant Farm Game Bird and Dog Training Preserve, L.L.C, from this point forward, the opinion will refer to defendants by the singular term "defendant."

selling of game birds violates the ordinance, defendant's act of charging a fee to allow people to hunt rendered the preserve a "commercial recreation area" as defined in the ordinance Article II, Section 2.01. Under Article IV, Section 4.01 of the ordinance special approval is required to operate a commercial recreation area in an agricultural district. Plaintiff alleged that because defendant's operation of the hunting preserve violated the ordinance, it was a nuisance per se.

The trial court granted plaintiff's motion for a preliminary injunction specifically enjoining defendant from "operating a hunting, shooting, game bird hunting or dog training preserve." Defendant filed a motion for reconsideration which the trial court denied. In response to plaintiff's complaint, defendant alleged that the ordinance was preempted by the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.* and the Right to Farm Act, MCL 286.471 *et seq.* (RTFA).

After a bench trial and oral argument, the trial court found that defendant was raising game birds and selling the right to hunt them. The trial court also found that selling the right to hunt violated the ordinance. It further determined that neither the NREPA nor the RTFA preempted the ordinance. Accordingly, the trial court entered an order enjoining defendant from selling the right to hunt game birds on its property.

On appeal, defendant argues that the trial court erred in finding that the ordinance was not preempted by the NREPA and the RTFA. We conclude that the ordinance is not preempted by the NREPA, but is preempted by the RTFA.

II. Preemption

A. Standard of Review and Generally Applicable Law

Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that this Court reviews de novo. *Michigan Coalition for Responsible Gun Owners v Ferndale,* 256 Mich App 401, 405; 662 NW2d 864 (2003). 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. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids,* 455 Mich 246, 257; 566 NW2d 514 (1997).

B. NREPA

Defendant argues that because a DNR license is mandated by Part 417 of the NREPA entitled "Private Shooting Preserves," the NREPA provisions directly conflict with the ordinance which purports to preclude operation of a hunting preserve even if it is licensed by the DNR. We disagree.

A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *People v Llewellyn,* 401 Mich 314, 322 n 4; 257 NW2d 902 (1977). When interpreting statutes, our obligation is to discern and give effect to the Legislature's intent as expressed in the statutory language. *Gladych v New Family Homes, Inc,* 468 Mich 594, 597; 664 NW2d 705 (2003). If the language is unambiguous, "we presume that the Legislature intended the meaning it clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Di Benedetto v West Shore*

Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000). "Further, we give undefined statutory terms their plain and ordinary meanings. In those situations, we may consult dictionary definitions." *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002) (citations omitted).

The NREPA and the ordinance are not in direct conflict. Defendant specifically relies on the MCL 324.41704 which provides that a game bird preserve license holder "may propagate and sell the prescribed birds, carcasses, or products, in addition to releasing the birds for hunting purposes, by adhering to all requirements . . . ." MCL 324.41704 does not permit a holder of a game bird license to release birds for hunting purposes in violation of local zoning ordinances. Nor is there is any indication in the unambiguous language of MCL 324.41704 that the Legislature intended to regulate the *location* of commercial hunting preserves through its regulation of hunting. As such, the NREPA does not directly conflict with the ordinance requirement of special approval for "commercial recreation areas" on agriculturally zoned property.

Defendant also contends that the NREPA completely occupies the field the ordinance attempts to regulate because section 40113a of the NREPA provides that the DNR has exclusive authority to regulate the taking of game and part 417 of the NREPA expressly indicates the Legislature's determination that game bird hunting preserves are a legitimate means of "taking" game Michigan. We disagree.

Our Supreme Court has set forth four guidelines to aid courts in determining whether a statute occupies the field of regulation:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
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> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
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> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
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> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [*Llewellyn, supra* at 323-325 (citations omitted).]

Through the NREPA, the state has not completely occupied the field regulated by the ordinance. The field regulated by the ordinance is zoning. Neither regulation of the taking of game nor licensing of hunting preserves are included in the eighteen enumerated purposes in section 1.02 of the ordinance. The provisions of the ordinance applied in this case allow plaintiff to approve or disapprove a petition to operate a commercial recreation area in an agriculturally zoned district. If plaintiff allows the operation of commercial recreation area such as a hunting preserve in an agricultural district, the ordinance does not license or in any way regulate the taking of game on the preserve. Likewise, if plaintiff disallows a hunting preserve, the ordinance

does not preclude a license or in any way regulate the taking of game on the preserve; it simply determines that the hunting preserve cannot operate on the proposed property.

Defendant also relies erroneously on part 417 of the NREPA which explicitly defers to local zoning ordinances. MCL 324.41702 provides: "The [DNR] may issue licenses authorizing the establishment and operation of private hunting preserves." MCL 324.41709 further provides:

> A person applying for a license under this part shall submit an application to the [DNR] on forms furnished by the department, stating . . . information required by the [DNR]. The [DNR] shall prepare and distribute suitable forms necessary to implement this part.

The game bird hunting preserve application and license distributed by the DNR and completed by defendant clearly defers to local zoning ordinances by notifying applicants as follows:

> I understand that this license does NOT provide any authorization to circumvent any federal, state, local zoning, or any other local laws and ordinances. I understand it is my responsibility to know and comply with federal, state, and local laws.

Thus, by its unambiguous terms, the NREPA does not completely occupy the field of zoning that the ordinance regulates. The NREPA and the ordinance only happen to intersect in circumstances like the one presented here. Therefore, the trial court did not err in concluding that the ordinance was not preempted by the NREPA.

C. RTFA

Defendant also contends that RTFA preempts plaintiff's zoning ordinance because they are in direct conflict. We agree.

The RTFA was implemented to protect farmers from nuisance lawsuits.[2] *Belvidere Twp v Heinze,* 241 Mich App 324, 331; 615 NW2d 250 (2000). Under the RTFA, a farm or farming operation cannot be found to be a nuisance if it meets certain criteria, such as conforming to "generally accepted agricultural management practices [GAAMPs]." *Id.*; MCL 286.473(1). Whether a farm conforms to the GAAMPs is decided according to policies adopted by the Michigan Commission of Agriculture ("the commission"). *Richmond Twp v Erbes,* 195 Mich App 210, 220-221; 489 NW2d 504 (1992); MCL 286.473(1).

The RTFA, provides:

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[2] Plaintiff alleged that defendant's hunting preserve constituted a nuisance per se because it violated the ordinance. Use of land in violation of an ordinance is a nuisance per se. MCL 125.587; *High Cascade Hills Country Club,* 173 Mich App 622, 629; 434 NW2d 1999 (1988).

> (1) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture. Generally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary. [MCL 286.473.]

The breeding, raising, selling and hunting of game birds clearly come within the purview of the RTFA. The RTFA defines "farm," "farm operations," and "farm products" in MCL 286.472 as follows:

> (a) "Farm" means the land, plants, animals, buildings, structure, including ponds used for agricultural and aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.
>
> (b) "Farm operation" means the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products . . . .
>
> (c) "Farm product" means those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products . . . or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.

According to these definitions, defendant's property is a "farm" because it is used for breeding, raising and selling game birds for commercial purposes. The game birds raised on defendant's property are "farm products" because the are useful to human beings and produced by agriculture. The hunting of game birds on defendant's property constitutes a "farm operation" because it involves the "harvesting of farm products." Deferring to the dictionary definition, *Koontz, supra* at 312, the verb "harvest" is generally defined as "to gather; reap; to gather the crop from; to catch or take for use; to harvest salmon from a river." *Random House Webster's College Dictionary* (1997). Accordingly, the harvesting of the game birds on defendant's property is protected under the RTFA.

Defendant contends that the lack of GAAMPs specifically addressing hunting as a method of harvesting game birds precludes application of the RTFA to the harvesting of game birds on defendant's property. We disagree. GAAMPs are described as "those practices as defined by the Michigan Commission of Agriculture." MCL 286.472(d). According to the commission itself:

> [GAAMPS are] intended to be used by the livestock industry and other groups concerned with animal welfare as an educational tool in the promotion of animal husbandry and care practices. *The recommendations do not claim to be comprehensive for all circumstances* but attempt to define high standards for livestock production and well-being in commercials and farms operations. . . . It should be understood that new scientific discoveries and changing economic conditions may make necessary revision of the Practices.

> Proper animal management is essential to the well being of animals and the financial success of livestock operations. . . . *Specific operating procedures depend on many objective and subjective factors unique to individual farm operations.* [GAAMPS, June 2001, p 1 (emphasis added).]

Further, the commission'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.

In light of the nonexclusive nature of these guidelines, we decline to accept plaintiff's argument that the lack of a GAAMP on game bird hunting means that the commission has determined that the practice is unacceptable. To the extent that the GAAMPs do not address the harvesting of game birds, the commission's express policy statement that the list is not exclusive indicates that the absence of a GAAMP on this subject does not preclude application of the RTFA.

Further, while the commission does not address methods of harvesting game birds in the GAAMPs, it does specifically address game birds:

> These Generally Accepted Agricultural and Management Practices . . . are intended to assist the broiler, turkey, and game bird producer in attaining and maintaining a high quality of bird comfort and well-being . . . . [GAAMPS, p 54.]

Although "game bird" is not specifically defined in the GAAMPs, it is defined generally as "any bird hunted chiefly for sport, as a quail or pheasant, esp. such a bird that is protected by game laws." *Random House Webster's Unabridged Dictionary* (1998). Because "game birds" are a farm product addressed in the GAAMPs and "hunted chiefly for sport," it naturally follows that the commission contemplated hunting as a form of harvesting this farm product. In support of this conclusion, is the commission's recently adopted a resolution recognizing "Gamebird [sic] Hunting Preserves as an agricultural activity and a value-added farm opportunity." In reaching this resolution, the commission relied on the fact that "Gamebirds [sic] are included in the Michigan Right to Farm Generally Accepted Agricultural and Management Practices for the Care of Farm Animals." For these reasons, we conclude the hunting of game birds that takes place on defendant's property is a protected farm operation under the RTFA.[3]

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[3] This conclusion does not leave local government without recourse if it has public safety concerns that it seeks to address by ordinance. MCL 286.4774(7) provides:

(continued...)

We next address whether the ordinance is in direct conflict with the RTFA. The RTFA provides in relevant part:

> Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution 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 enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act. [MCL 286.474(6).]

Under the ordinance, a commercial recreation area operated in an agricultural zone can be proscribed by the township board. As we have concluded above, the hunting of game birds raised for human use constitutes a farm operation protected by the RTFA. The ordinance conflicts with the RTFA to the extent that it allows the township board to preclude this protected farm operation. The ordinance is therefore preempted by the RTFA. The trial court erred by enjoining defendant from selling the right to hunt game birds on their agriculturally zoned property.

Reversed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

(...continued)

> A local unit of government may submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government. . . .