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STATE OF MICHIGAN

IN THE SUPREME COURT

FRASER TOWNSHIP,

Plaintiff/Appellant,

v

Supreme Court Case No.: 160991
Court of Appeals Case No.: 337842
Lower Court Case No.: 16-3272-CH

HARVEY HANEY and,
RUTH ANN HANEY,

Defendants/Appellees.
_____/

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PLAINTIFF/APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION

Appellant appeals from an Opinion of the Michigan Court of Appeals. Leave to Appeal was granted.

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STANDARD OF REVIEW

Appellant's appeal concerns statutory application of MCL 600.5813. As such the review is de novo. *People v Hartwick* 498 Mich 192 (2015).

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STATEMENT OF QUESTION PRESENTED

Does MCL 600.5813 apply to municipalities trying to enforce zoning laws?

Appellees say:	Yes
Trial Court says:	No
Appellants say:	No
Court of Appeals says:	Yes

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STATEMENT OF FACTS

Appellant is a general township organized under the laws of the State of Michigan. This case involves land use within Fraser Township. Appellees own a commercially zoned parcel in the township. The parcel has been zoned as commercial since Fraser Township enacted its zoning ordinance in the 1970s.

In the early 2000s Appellees applied for a Cervidae permit from the State. Appellees wanted to raise and manage a deer and elk herd. Appellees indicated to the State that the site would be on agriculturally zoned land in Garfield Township in Bay County. They received the permit which apparently did not have a geographical restriction on it. They put the deer and elk (Cervidae) on commercially zoned property in Fraser Township. Such use violated the Township Zoning Ordinance because such animals were not allowed on a commercially zoned parcel. An agriculturally zoned parcel was necessary. Incidentally, one of the State's requirements was that the Cervidae permit be used on agriculturally zoned land.

When Appellees renewed their permit, they told the State they were on agriculturally zoned land even though they knew better.

Eventually, Appellees brought on Russian boar and after years of Fraser Township complaining to the State about Appellees, the State had hearings on the permit. The result of the hearings was that the permit was not renewed. The Appellees appealed to Circuit Court and lost. However, the State had to sue Appellees to have the animals removed by Court Order. After the deer, elk, and wild boars were removed, the Township noticed Appellees brought domestic pigs on the property which are prohibited by the Ordinance on commercial property.

The Township sued to abate the nuisance on the property. It had not sued earlier because the animals that had been on the property were within the State's jurisdiction.

Appellees defended the action but did not list any Affirmative Defenses. Appellees brought a Motion for Summary Disposition based on the State of Limitations citing the general Statute of Limitations of six years for personal actions. The Trial Court ruled the Statute of Limitation did not apply. Appellees appealed and the Court of

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Appeals has ruled the Appellees could amend their pleadings to assert an Affirmative Defense of the Statute of Limitations and that it could apply.

The issue of whether MCL 600.5813 regarding personal actions applies to municipalities enforcing zoning ordinances is before this Court.

ARGUMENT

The first questions is whether a township has authority to enact zoning ordinances and enforce them. The answer to both is yes.

The Michigan Constitution of 1963, Article VIII, §34 provides: The provisions of this constitution and law concerning counties, townships, cities, and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

The Michigan Zoning Enabling Act authorizes a municipality to regulate the development and use of land and to provide for the adoption of zoning ordinances to promote the public health, safety, and welfare of its inhabitants. MCL 125.3101 et seq.

So, the Township has constitutional authority and statutory authority.

The next question is whether a zoning enforcement action is a personal action or in rem. The zoning does not get oriented toward people in the first place. It is orientated toward land and use of it. An enforcement action is not a lawsuit to collect money on a debt owed. It is not for injury or damage to property. It is not for breach of contract or tort. It is for enforcement of regulated land use. Appellant argues that MCL 600.5813 does not apply because it is not a personal action. A quick analogy would be whether zoning could be enforced on land use if the owner were an out of state resident. The land would be local and subject to zoning, but the owner would not be local. The owner might not be reachable if the action were personal from a jurisdictional stand point but the land is what matters. It is local and subject to regulation. Thus, the action is in rem.

Two cases discuss in rem proceedings. One is published and one is not. The published case is *City of Detroit v Hasse* 258 Mich App 438 (2003). It was ruled a tax foreclosure is in rem in nature. It was a suit about the land. Who owns it does not matter

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of the nature of the suit? The Court also ruled that periods of limitations do not operate against the State and its agencies in the absence of a Statute expressly providing otherwise.

The unpublished case is *Clay Township v Hotchkiss* wherein it was ruled that zoning enforcement is an in rem proceeding. Court of Appeals No. 236688. See Exhibit A.

There are two published cases which could have easily used the Statute of Limitations, MCL 600.5813, and applied it if those courts thought it appropriate. One is *Jerome Township v Melchi* 184 Mich App 228 (1990) wherein the Township sought to enforce its ordinance considerably more than six years after the onset of the offending activity. "It is the policy of this State and goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated." *Madison Heights v Manto* 359 Mich 244, 248-249 (1960) (Melchi at p 231).

The other is *Township of Lyon v Petty and Haskins* 317 Mich App 482 (2016) wherein the Township sought to terminate the construction companies' use of residentially zoned property at least twenty years after the onset of the offending use. The Court stated on page 488-89,

> To achieve these goals, "[i]t is the policy of this state and a goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated." *Jerome Twp v Melchi, 184 Mich App 228, 231; 457 NW2d 52 (1990)*. Whether and when to enforce its zoning ordinance to effectuate this gradual elimination is a matter within a township's discretion. 83Am Jur 2d 893, § 936; *Randall v Delta Charter Twp, 121 Mich App 26, 32; 328 NW2d 562 (1982)* ("[D]ecisions of a planning commission, or other similar local agency, concerning whether to enforce zoning ordinances are decisions which are so basic to the operation of a municipality that any attempt to create liability with respect thereto would constitute an unacceptable interference with [the municipality's] ability to govern.")(quotation marks and citation omitted; second alteration in original). "[A}bsent extraordinary circumstances," courts will not interfere with such decisions. 2 Cameron, Michigan Real Property Law, § 23.30, p 1367.

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What are the practical implications of the application of MCL 600.5813 to a municipality trying to enforce a zoning ordinance? If the Statute is applied, it means an offending activity or use, if undiscovered or hidden for six years, becomes unassailable. This would be contradictory to the language that is in all or nearly all ordinances that each new offending day is a new violation. That only makes sense. That language has been approved in *Joy Management Company v City of Detroit* 183 Mich App 334 (1990).

In the instant case despite the Affidavit of Harvey Haney that the had domestic pigs on the property since 2006, there were no domestic pigs noted in a state survey of animals on the property in 2009. See Exhibit B. The Township did not note any domestic pigs (Old McDonald variety) until the year it filed suit. To deprive a municipality the ability to enforce its zoning laws when it sees fit would be in opposition to existing statutes and cases, especially *Township of Lyon*, supra.

There is no hint the legislature intended for MCL 600.5813 to apply to municipalities. If any existing Statute of Limitations would apply to real estate, it would be MCL 600.5801, however, Appellant argues that hypothetically. Appellant argues certainly MCL 600.5813 does not apply to municipalities.

What if Harvey Haney or anyone else began burying human remains on property in year 1 and that activity was discovered in year 7? Holding that MCL 600.5813 would bar the municipality from seeking injunctive relief would crush municipalities from using their statutory powers to regulate land use. The holding in this case is crucial to every municipality in the State. MCL 600.5813 should not be applied to zoning enforcement. The examples of what could happen if MCL 600.5813 is applied to municipalities is endless.

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RELIEF REQUESTED

Appellant requests that the Supreme Court reverse the Court of Appeals and rule that MCL 600.5813 does not apply to municipalities trying to enforce zoning laws.

Dated: January 8, 2021

Respectfully submitted,

/s/ MARK J. BRISSETTE
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Supreme Court Case

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EXHIBIT A

(Case *Clay Township v Hotckiss* Court of Appeals No. 236688)

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2003 WL 21519795
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

CLAY TOWNSHIP, Plaintiff/
Counter-Defendant-Appellee,
v.
Edward HOTCHKISS and Judy Hotchkiss,
Defendants/Counter-Plaintiffs/
Third-party Plaintiffs-Appellants,
and
Sidney BROWN and Michael J. Kras,
Third-Party Defendants-Appellees.

No. 236688.
|
July 3, 2003.

Before: CAVANAGH, P.J., and GAGE and ZAHRA, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Defendants appeal as of right an order granting plaintiff township's petition for injunctive relief to enforce its zoning ordinance and awarding costs. We affirm.

Defendants reside on Harsens Island. After defendants failed to properly apply for a building permit for construction on their house, the township filed suit to force defendants' compliance with the township's zoning ordinance. Defendants filed a counterclaim for a writ of mandamus to compel the township to issue the building permit. Defendants also moved to dismiss the case for lack of jurisdiction, claiming that Harsens Island is not part of the township or the state of Michigan, but instead is in international waters. The trial court denied the motion, and after a bench trial, granted the township's petition to force compliance with the ordinance.

Defendants first argue on appeal that the United States has no jurisdiction over Harsens Island. [1] We disagree. We review de novo questions of jurisdiction. *Jackson Comm College v. Dep't of Treasury,* 241 Mich.App 673, 678; 621 NW2d 707 (2000).

Pursuant to U.S. Const, art VI, the United States has jurisdiction over all subjects within the country. Harsens Island is part of the United States pursuant to the Definitive Treaty of Peace, September 3, 1783, US-GB, art 2, 8 Stat 80-83, the Treaty of Peace and Amity, December 24, 1814, US-GB, 126 TS 3-4 (Treaty of Ghent), and the Declaration of the Commissioners under Article 6 of the Treaty of Ghent, June 18, 1822, US-GB, 8 Stat 274-277.

Defendants next argue that because the Chippewa First Nations of Upper Canada did not convey Harsens Island to the state of Michigan, the state has no basis to exercise authority over the island. We disagree.

The state of Michigan need not own title to property to enforce regulations if the property is located within its geographical borders. An owner's right to unrestricted use of his property is subject to reasonable state regulations pursuant to the legitimate exercise of police power. *People v. McKendrick,* 188 Mich.App 128, 137; 468 NW2d 903 (1991).

Defendants next claim that the township has no authority to enforce its ordinance and Michigan courts have no jurisdiction over them because they are not part of the state. We disagree.

Subject matter jurisdiction is defined as the court's ability to exercise power over a certain type of case. *Campbell v. St John Hosp,* 434 Mich. 608, 613; 455 NW2d 695 (1990). Subject matter jurisdiction over all civil claims rests in the circuit court unless our Constitution or statutes provide otherwise. MCL 600.605. Because the Township Zoning Act (TZA), M.C.L. § 125.271 *et seq.*, does not preclude subject matter jurisdiction, the trial court had subject matter jurisdiction in the case at hand.

The court must also have personal jurisdiction before it may exercise power over a defendant or an item of property. MCR 2.116(C)(1). In personam jurisdiction is the court's power to hear an action against a particular defendant. A state has general in personam jurisdiction over defendants domiciled within the state. *Milliken v. Meyer,* 311 U.S. 457, 463-464; 61 S Ct 339; 85 L Ed 278 (1940). MCL 600.701 gives courts personal jurisdiction

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over a defendant if the defendant was in the state or was domiciled in the state when served with process. While there is no proof of service of the complaint in this case, MCR 2.116(D)(1) provides that a claim of insufficient process must be raised in the first responsive pleading or it is deemed waived. Because defendants did not raise insufficient service of process in their first responsive pleading, they waived this claim.

*2 We also conclude that the trial court had in rem jurisdiction. In rem jurisdiction is the court's power to hear a case regarding an item of property located within the geographic borders of the state. MCL 600.755. Harsens Island is within Michigan's boundaries and is part of the state of Michigan pursuant to 5 Stat 49 (1836). The state may regulate the use of private property for the health, safety, morals, and welfare of the public. *Bowermand v. Sheehan,* 242 Mich. 95, 99-100; 219 NW 69 (1928). Michigan has delegated this authority to its sub-units of government. The TZA, gives a township the authority to regulate land uses within the township through a zoning ordinance.

Pursuant to 1820 Ter Laws, Vol II, p 800, which established St. Clair County, Harsens Island is part of the county. In addition, Clay Township was established pursuant to 1828 Ter Laws, Vol II, p 651, and the township territory included Harsens Island. Thus, the township had valid authority to enforce its ordinance because a zoning ordinance is presumed reasonable and valid, *Korby v. Redford Twp,* 348 Mich. 193, 196; 82 NW2d 441 (1957), and defendants provided no evidence indicating otherwise.

Defendants next argue that the trial court had no subject matter jurisdiction over this case because maritime jurisdiction applies. Again, we disagree.

While the federal courts have authority to adjudicate cases regarding maritime jurisdiction pursuant to U.S. Const, art III, § 2, and exclusive jurisdiction over civil cases involving maritime jurisdiction pursuant to 28 USC 1333, there must be a nexus between the activity and maritime jurisdiction. Under maritime jurisdiction, the federal government retains authority regarding matters and issues relevant to navigation. See *People v. Massey,* 137 Mich.App 480, 485; 358 NW2d 615 (1984). The nature of the wrong must be so directly related to commerce or navigation that it excludes local law in making compensation for injury. *Allisot v Fed Shipbuilding & Drydock Co,* 4 NJ 445, 453; 73 A.2d 153 (1950). The instant case involves enforcement of a zoning ordinance, which is not a traditional maritime activity, and does not involve commerce or navigation. Because the federal government defers to the states in matters involving the states' police power where state laws are not preempted, *Massey, supra* at 486, maritime law does not apply.

Defendants also raise several collateral arguments. Because these issues were not properly raised in the trial court, and defendants fail to provide any evidence to support them, we decline to address them now. *Booth Newspapers, Inc v University of Michigan Bd of Regents,* 444 Mich. 211, 234; 507 NW2d 422 (1993).

Affirmed.

All Citations

Not Reported in N.W.2d, 2003 WL 21519795

Footnotes

1 We note that defendants' brief is extremely confusing and at times incomprehensible, which has made it difficult for this Court to properly ascertain each of defendants' issues and arguments.

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EXHIBIT B

(State survey of animals on property - 2009)

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JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF AGRICULTURE
LANSING

May 15, 2009

Thomas Fouchea, Fraser Township
1474 North Mackinaw Road
Linwood, MI 48634

Dear Mr. Fouchea:

On August 13, 2008, the Michigan Department of Agriculture (MDA) received a formal complaint for investigation regarding the captive cervidae facility owned and operated by Mr. Harvey Haney located at 515 North Huron Road in Fraser Township of Bay County, Michigan. This environmental complaint concerned excessive odors and flies from feces and urine buildup on the surface of the soil inside an eight acre enclosure and noise from elk bugling.

On August 21, 2008, staff from the MDA Right to Farm program conducted an on-site inspection at the Haney captive cervidae facility in response to this complaint. At the time of the inspection, MDA staff observed approximately 300 whitetail deer, approximately 50 elk, and approximately 50 wild boars being kept at this facility. Our August 26, 2008 letter to Mr. Haney requested that he submit a Manure Management System Plan (MMSP) to MDA for review and approval and install measures to minimize odors along the fence line where this facility is in close proximity to neighboring homes.
As outlined in the April 21, 2009 MDA letter to Mr. Haney, which you have referenced, MDA made considerable efforts to gain Mr. Haney's cooperation to develop and implement an MMSP for his captive cervidae facility. Mr. Haney submitted an MMSP for his facility to MDA on March 9, 2009, however, upon review MDA determined that this MMSP had significant deficiencies, and as such, was not acceptable.

Therefore, pursuant to the interagency Memorandum of Understanding (MOU) between the MDA and Michigan Department of Environmental Quality (MDEQ), the complaint file was transferred to the MDEQ Air Quality Division for investigation under their standard pollution investigation process, and our file has been closed. You may wish to contact Mr. Chris Hare in the MDEQ Air Quality Division regarding the application of Michigan's Natural Resources and Environmental Protection Act to this facility.

Administration of Public Act 190, including the registration requirements for a privately-owned cervidae facility is handled by the Michigan Department of Natural Resources (MDNR). You may wish to contact Ms. Shannon Hanna in the MDNR Wildlife Division regarding captive wildlife permits and registration requirements that apply to this facility.

Sincerely,

Don Koivisto
Director

cc: Chris Hare, MDEQ, Air Quality Division
Shannon Hanna, MDNR, Wildlife Division
Kristin Linderman, MDA, Environmental Stewardship Division
Angela Butler, D.V.M., MDA, Animal Industry Division