

## ***Court Examines Michigan Right to Farm Act; Misconduct By “Nosy” Trial Judge Necessitates New Trial***

The Michigan Court of Appeals has held that an amended version of the Right To Farm Act (RTFA) cannot be applied retroactively to bar a suit to enforce a local zoning ordinance against an allegedly malodorous hog farm, and the previous version of the RTFA does not bar the suit. The Court of Appeals, however, found that the trial court had erred in making personal visits to the area in controversy without first informing the parties, and by relying on personal observations from the visits in rendering judgment. Because these errors had irreparably tainted the trial and judgment, the Court of Appeals reversed and remanded for a new trial.

Keith and Glenn Preston (the Prestons) began Preston Farms, a hog farming operation, in Alganssee Township, Michigan in 1986. Soon afterward, residents Pete and Edna Travis and Richard and Patricia Johnson (the Residents), who live near the hog farm, filed a nuisance action against the Prestons. The suit alleged that the hog farming operation generated obnoxious and offensive odors that made their homes uninhabitable, reduced the value of their homes, and deprived them of the peaceful use and enjoyment of their homes. The Residents also alleged that the hog farm violated Michigan law, constituted a nuisance entitling the Residents to damages and injunctive relief, and violated Section 11.06 of the local Alganssee Township Zoning Ordinance (the Zoning Ordinance). The Zoning Ordinance reads as follows:

Control of Heat, Glare, Fumes, Dust, Noise, Vibrations and Odors.

Every use shall be so conducted and operated that it is not obnoxious or dangerous by reason of heat, glare, fumes, odors, dust, noise or vibration beyond the lot on which the use is located.

After the suit was filed, the Residents and Prestons agreed that the Residents would not pursue injunctive relief. The Prestons then moved for a judgment before trial, arguing that the Michigan Right to Farm Act (RTFA) barred any nuisance action against them. The trial court, after initially denying the Prestons' motion, subsequently dismissed all theories of the Residents' complaints, except the assertion that the hog farm violated the Zoning Ordinance. The trial court concluded that enforcement of local zoning laws was allowed under the RTFA.

After a bench trial, the trial court reaffirmed its ruling that the RTFA did not override the authority of local zoning ordinances, and found that the Prestons had violated the Zoning Ordinance. The

trial court further concluded that the Residents had standing to bring a private action to enforce the Ordinance. While presenting its opinion, the trial court revealed that it had visited the area of the hog farm and the Residents' homes on five separate occasions to personally investigate the odor and; the judge explicitly relied on these observations in rendering judgment in favor of the Residents. The Traveses and Johnsons were awarded \$29,000 each. The Prestons appealed.

On appeal, the Court of Appeals examined five issues: (1) whether a recent amendment to the RTFA barring nuisance suits based on local laws would apply retroactively to bar the Residents' suit; (2) whether the previous version of the RTFA would allow the Residents' suit; (3) whether the Zoning Ordinance exceeded the types of restrictions authorized by Michigan's Township Rural Zoning Act; (4) whether the trial judge's visits to the scene in controversy, without notifying the parties, required reversal of the judgment; and (5) whether damages would be a proper remedy under the zoning ordinance.

#### Retroactivity of the RTFA Amendments

The RTFA provisions in effect at the time the Residents filed suit generally protected farming operations from nuisance lawsuits, but allowed actions filed to enforce local zoning laws. However, the amended version of the RTFA, which became effective after the trial court's judgment, provides that:

Beginning June 1, 2000...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...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.

If the amended version applied retroactively, it would bar the Residents' suit to enforce the zoning ordinance.

The Court of Appeals held that the provision does not apply retroactively. The court observed that a statute will not be applied retroactively "in the absence of a clear expression by the Legislature that the act be so applied." Because the RTFA provision did not expressly address the issue of retroactivity, and the language of the provision indicated that it would operate "[b]eginning June 1, 2000," the court could not find a clear expression of intent for the provision to apply retroactively.

#### The Residents' Suit Under the Prior RTFA Provision

Having decided that the pre-amendment version of the RTFA applied to the Residents' suit, the Court of Appeals next determined whether the Residents could bring their suit under the pre-amendment RTFA.

The court held that the Residents could bring their suit under the pre-amendment RTFA because the suit sought to enforce the Zoning Ordinance, and enforcement of local zoning laws was specifically allowed under the prior RTFA. Furthermore, the Residents had standing to bring the suit because their injury was of a "special character distinct and different from the injury suffered by the public generally."

#### The Scope of the Zoning Ordinance

The Court of Appeals next examined whether the odor restriction in the Zoning Ordinance was authorized under Michigan's Township Rural Zoning Act, which sets forth the types of permissible township zoning ordinances. The court held that, under the Act, which allows restrictions "which regulate the use of land and structures...to promote public health, safety, and welfare," odor restrictions are "clearly" authorized.

#### The Judge's Personal Visits to the Alleged Nuisance Site

In rendering its opinion, the trial court revealed that it had visited the site of the alleged nuisance "on five separate occasions before and after the trial," without notifying the parties, to personally observe the extent of the odor emanating from the Prestons' hog farm. The trial court also explicitly relied on these observations in its opinion. Although the Prestons failed to move for a new trial, the Court of Appeals chose to address the issue "in the interest of justice."

The Court of Appeals held that the judge's actions "irreparably tainted the trial and judgment" and required reversal of the judgment and a new trial before a different judge. Although personal observations of the scene in controversy by a trial judge are allowed by Michigan Court Rule 2.513(B), the Court of Appeals noted that earlier decisions held that making such visits without first notifying the parties is "misconduct" requiring a new trial, primarily because of concerns that "the trial judge may have viewed an incorrect location and that the parties' lack of presence at the judge's viewing may have hindered the parties' decisions whether to offer additional proofs at trial."

The Court of Appeals further stated that, while a personal visit is proper to clarify the judge's understanding of undisputed facts, the trial judge here was impermissibly "making an independent

investigation and observation regarding the strength of the odors coming from [the Prestons'] farm.”

Additionally, because the trial court relied on its own observations in rendering judgment, the Court of Appeals remanded the case to a different judge in order to “preserve the appearance of justice”.

Proper Remedies Under the Zoning Ordinance

In closing, the Court of Appeals observed that the trial court would not be able to award damages in the new trial. Because the Residents’ action would be to enforce the Zoning Ordinance, the available remedies would be dictated by Michigan’s Township Rural Zoning Act, which only authorizes a court to abate a nuisance. Although the Residents had agreed with the Prestons not to pursue an abatement action, the Court of Appeals ordered the trial court to mandate abatement of the nuisance if a violation of the Zoning Ordinance was found.

*Travis v. Preston*, 2001 WL 946602, Mich. Ct. App. 8/21/01

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