

## ***Sixth Circuit Upholds Township Odor Control Ordinance Limiting Number of Hogs***

The Sixth Circuit Court of Appeals has held that a township zoning ordinance that controls odors by limiting the number of animals on agricultural land based on the relative odors of different animals does not violate any constitutional rights.

In 1987, the Township of Brady, Michigan adopted a zoning ordinance amendment to control odors from farms in the township. The ordinance limits the number of farm animals on property zoned for agricultural use based on “relative differences in the odor-producing characteristics of animal wastes” of various farm animals.

According to the ordinance, odors from cattle, horses, and swine are twice as offensive as odors from sheep and goats, and ten times as offensive as odors from poultry. Thus, under the ordinance, a farm would be allowed to raise twice as many sheep as pigs.

The ordinance assigns “animal unit” values to different farm animals. For example, swine, horses, and cattle have an “animal unit equivalence” of 1.00, while sheep and goats have an equivalency of 0.50. Farms are limited by the ordinance to no more than 300 “animal units.” However, landowners may apply to the township for a “special exception use permit” to permit up to 1,999 animal units provided that the livestock operation is at least one-half mile from neighboring properties.

Robert Richardson owned 194 acres in the Township of Brady. Because Richardson believed that he must be able to raise at least 4200 pigs for an economical pig farm operation, Richardson proposed an amendment to the zoning ordinance that would create a new animal unit definition for “nursery swine.” Under Richardson’s proposed animal category pigs weighing less than 55 pounds would be defined as “nursery swine.” Richardson proposed that the “animal unit equivalence” for nursery swine be 0.50.

But the Brady Township Planning Commission was equally divided on the amendment, so the amendment failed. Members of the Township Board and the Township Planning Commission expressed confidence that the zoning ordinance would be amended at some point in the future. Relying on these assurances, Richardson applied for a special exception use permit to operate a nursery-swine operation involving no more than 1,999 animal units, and received the permit in February 1997.

In January 1998 the Township Planning Commission again considered a proposed amendment to the ordinance defining nursery swine as 0.50 animal units. The Planning Commission recommended approval of the ordinance change to the Township Board, but the Board sought further study.

In February 1998, Richardson asked the Zoning Board of Appeals for an interpretation of the definition of animal unit with respect to nursery swine, and to change the definition accordingly. The Township Board Attorney found, however, that the Zoning Board of Appeals did not have the legal authority to make such changes.

In March, 1998, the township cited Richardson for a civil infraction for violating his special exception use permit by housing more than 1,999 pigs on his property. Richardson then sued the township in state court complaining that the zoning ordinance violated his rights under the United States and Michigan constitutions.

The township removed the case to federal district court, which rejected Richardson's lawsuit. The district court found that the ordinance did not violate Richardson's 14<sup>th</sup> Amendment "substantive" and "procedural" due process rights. Richardson appealed to the United States Circuit Court of Appeals for the Sixth Circuit, which affirmed the district court's decision.

### **Substantive Due Process**

The Court of Appeals first analyzed whether the ordinance violated Richardson's "due process right not to be subjected to arbitrary or irrational zoning decisions." The court cited the general rule that a zoning ordinance satisfies *substantive* due process requirements if the ordinance is rationally related to a legitimate governmental purpose.

A zoning ordinance may violate substantive due process rights either as written ("on its face") or as applied to a particular parcel of land. A zoning ordinance violates substantive due process on its face when *any* application of the ordinance would violate due process. When zoning ordinance violates substantive due process rights as applied, only the decision made with respect to a *particular parcel* violates the constitution.

The Court of Appeals found that the objective of the ordinance, "to reduce odor so that neighboring property owners will not be offended by the smell," was "undoubtedly" a legitimate governmental purpose. But Richardson objected to the township's irrational means to achieving this objective.

The court found that, in fact, the Township Planning Commission had considered several approaches to categorizing animal odors, including evaluating relative waste produced by different animals, but ultimately concluded that different animals should be distinguished based on the "differences in the odor producing characteristics of animal waste." Richardson failed to show that by basing animal units on the type of animal and not on the amount of waste, the township has acted irrationally. The Court of Appeals concluded, therefore, that the ordinance did not violate due process on its face.

Richardson also contended that the ordinance was arbitrarily and irrationally applied to his farm because animal equivalency should be based upon the size of the animals. Thus, the township should have allowed Richardson to use a different equivalency unit for pigs limited to 55 pounds in weight.

The Court invoked the rule from past precedents that "a legislative body need not even select the best or the least restrictive method of attaining its goals so long as the means selected are rationally related to those goals." The court acknowledged that the township could have taken the weight of pigs into account, but that it did not have to.

In fact, the township had considered varying animal equivalencies based on animal weight, but rejected that approach, noting the administrative difficulty of deciding “who was going to go out and weigh the pigs. The court added that a municipality’s consideration of administrative concerns is “entirely rational,” and does not violate the constitution.

### **Procedural Due Process**

The court considered Richardson’s procedural due process claim that he had a right to an expeditious processing by the township of his request for a new animal category. But the court noted that the Planning Commission had considered Richardson’s request twice and approved it the second time.

The fact that the Township Board sent the ordinance change back to the Planning Commission for further study, and that the Zoning Board of Appeals failed to “reinterpret” animal-unit provisions did not violate any “legitimate claim of entitlement.” Richardson could not show that he had a “property interest” in or “legitimate claim of entitlement to a discretionary decision” by a government body.

The Court of Appeals concluded that the township had not acted arbitrarily or irrationally in denying Richardson’s request to change a local zoning ordinance in a way that would benefit his farm operation. Thus, the Court of Appeals affirmed the district court’s decision to dismiss Richardson’s complaint.

***Richardson v. Township of Brady***, 2000 WL 875402 (6<sup>th</sup> Cir. Jul. 5, 2000)

This article was prepared by Stuart J. Weiss, an associate in our Environmental Department, and previously appeared in the September, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.