STATE OF MICHIGAN
IN THE EIGHTEENTH CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP

Plaintiff

v

File No. 16-3272-CH-HG
Hon. Harry P. Gill

HARVEY HANEY and,
RUTH ANN HANEY

Defendants
_____/

OPINION AND ORDER OF THE COURT DENYING PLAINTIFF'S SECOND MOTION FOR SUMMARY DISPOSITION

Factual Summary

This case involves a zoning and nuisance dispute between the Plaintiff Fraser Township and two of its residents, Defendants Harvey Haney and Ruth Ann Haney. The Defendants own property in Fraser Township that is zoned C-3 Commercial. The property is not zoned for agriculture and has been zoned for commercial use since the 1970s. The Defendants are raising approximately 20 domestic hogs on the property at this time. The Defendants began raising hogs on their property around 2006.

The Plaintiff filed the instant case claiming that the Defendants' act of raising hogs on their property is a nuisance and in violation of the Plaintiff's zoning ordinance. The

Plaintiff seeks a permanent injunction against the Defendants that would order them to remove the hogs and not engage in farming operations on their property.

Procedurally, this is not the first time the Defendants have been involved in a dispute regarding their property. The property in question has been zoned commercial since 1976. The Defendant purchased the initial 10 acres of the property in 1986. In 1990, the Defendants applied for and received a permit from the DNR to hold wild animals in captivity within a fenced area of their property consisting of 7.5 acres. This permit, in the section completed by the DNR, states that the enclosure for holding the animals had township approvals. This appears to have been an error. In 1999, the Defendant purchased the adjoining property, which consisted of 7 additional acres. In 2002, after the enactment of the Privately Owned Cervidae Marketing Act (POC Act), the Defendant submitted an application for his first registration under the act. In this application, the Defendant checked the box that the property was zoned agricultural, but drew a line over the section containing that box.

Subsequently, the DNR learned that the property was in fact zoned commercial and that the Defendant needed a variance to bring his facility into compliance. The Defendant never applied for a variance. In 2008, the DNR concluded that the Defendants' registration could not be renewed without the variance and initiated procedures to revoke the Defendants' registration due to his property being zoned commercial. The DNR did so because the POC Act required a facility holding cervidae species to be located on property that is zoned agricultural.

The matter was heard before an Administrative Law Judge in December 2009. In July 2010, the ALJ held that the POC Act required that the property in question be zoned

agricultural. Since the Defendants' property was not, the ALJ concluded that the Defendants' registration should be revoked by the DNR. In September 2010, the DNR adopted the ALJ's decision and revoked the Defendants' registration.

The Defendant appealed the decision of the ALJ and the DNR to the Circuit Court. On June 22, 2011, the court affirmed the decision of the DNR that revoked the Defendants' registration to hold deer under the POC act.

In 2015, the DNR brought a lawsuit against the Defendants, claiming that the Defendants have continued to operate a cervidae species operation on their property despite the DNR's previous revocation. Further, the DNR claimed that the Defendants' failed to comply with disease testing requirements for their deer. The 2015 case was subsequently settled, which required that the Defendants de-populate their herd.

The instant case has now been filed with Fraser Township as the Plaintiff, not the DNR. In the instant case, the Plaintiff claims that the Defendants' maintenance of hogs on their property constitutes a nuisance and is in violation of its zoning ordinance. The Defendants respond with the claim that the Right to Farm Act prevents the Plaintiff from enforcing its nuisance action and zoning ordinance against them.

Procedural Posture and Position of the Parties

This opinion denies the Plaintiff's second motion for summary disposition. The Plaintiff filed this motion under MCR 2.116 (C)(10), claiming that there is no genuine of material fact that the Right to Farm Act (RTFA) does not protect the Defendants' hog operation because the Defendants' property has been zoned commercial prior to the existence of the hog farm and prior to the Defendants' purchase of the property. The

Plaintiff points to the case of *Jerome Township v. Melchi,* 184 Mich. App. 228 (1990), to support its position.

In response, the Defendant argues that the 1999 amendment to the RTFA, which added MCL 286.474 (6) to the statutory scheme, prevents the Plaintiff from enforcing its ordinance against a farm that complies with Generally Accepted Agricultural and Management Practices (GAAMPS).

Following a hearing on the motion on April 26, 2017, the court requested additional briefing from each side. From the Plaintiff, the court asked that it analyze the issues presented in *Shelby Township v. Papesh,* 267 Mich. App. 92, as applied to the instant matter. From the Defendants, the court asked that they brief how the provisions laid out in MCL 286.473 (1) and (2) compare to MCL 286.474 (6) in light of the 1999 amendment (effective 2000) to the RTFA.

After reading the briefs, the attached exhibits, and the applicable law, the court is of the opinion that the 1999 amendment to the RTFA, which added MCL 286.474 (6), prevents the Plaintiff from enforcing its zoning ordinance against the Defendants' farm, provided the Defendants' farm is GAAMP compliant. Accordingly, the Plaintiff's second motion for summary disposition is denied. The court will provide its detailed analysis below.

Analysis

The court is of the opinion that the Defendant is correct in arguing that the 1999 amendment to the RTFA, which added MCL 286.474 (6), prevents the Plaintiff from enforcing its zoning ordinance against the Defendants' farm, provided the Defendants' farm is GAAMP compliant. The court believes that this position finds support in the RTFA's

statutory language, the Michigan Court of Appeals case of *Charter Twp. of Shelby v. Papesh*, 267 Mich. App. 92 (2005), and the 1999 amendment's legislative history.

The 1999 amendment to the RTFA, which added MCL 286.474 (6), states as follows:

> **Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act pre-empt 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.**

This statutory language is clear in stating that 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."*

This interpretation of the RTFA finds support in *Charter Twp. of Shelby v. Papesh*. This case interprets the post 1999 amendment to the RTFA. In this case, the Defendants purchased property in Shelby Township that had a farmhouse and two chicken coops on it at the time of purchase. Farming was a permitted land use at the time of purchase, but a Shelby Township ordinance prevented property owners from raising farm animals on lots that were less than three acres.

A year after the Defendants' purchase, they began raising a flock of chickens using the pre-existing chicken coops on their property. Two years later, the area surrounding the Defendants' property became more developed, and neighbors began to complain about the farming operations. The township brought suit, won a summary disposition motion, and the Defendants' appealed.

The court of appeals reversed the trial court's grant of summary disposition and directed the trial court to grant the Defendants' counter motion for summary disposition. In reaching its conclusion, the court stated that:

> **"The language of the statute [RTFA] is unambiguous. It clearly states that a local ordinance is preempted when it purports to extend or revise the RTFA or GAAMPs. It further plainly states that a local unit of government shall not enforce an ordinance that conflicts in any manner with the RTFA or GAAMPS."**

The court further stated the following language:

> **"Further, as we previously noted, MCL 286.474(6) expressly provides that "a local unit of government *shall not* ... *enforce* an ordinance that conflicts in any manner with this act...." (Emphasis added). We cannot imagine any clearer expression of legislative intent. The plain language of the RTFA precludes enforcement of an ordinance that conflicts with the RTFA.**
>
> **Although plaintiff argues that application of the RTFA under these circumstances will prevent local municipalities from "get[ting] their arms around" farms operating in existing or developing residential areas, the fact that the statute appears to be unwise or unfair to plaintiff is insufficient to permit judicial construction. The wisdom of a statute is for the determination of the Legislature, and the law must be enforced as written. *Smith v. Cliffs on the Bay Condo. Ass'n,* 463 Mich. 420, 430, 617 N.W.2d 536 (2000). "A court may not inquire into the knowledge, motives, or methods of the Legislature," *Fowler v. Doan,* 261 Mich. App. 595, 599, 683 N.W.2d 682 (2004), and may not impose a construction on a statute on the basis of a policy decision different from that chosen by the Legislature, *Robertson v. DaimlerChrysler Corp.,* 465 Mich. 732, 752, 641 N.W.2d 567 (2002). Accordingly, the RTFA no longer allows township zoning ordinances to preclude farming activity that would otherwise be protected by the RTFA. Rather, any township ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by the RTFA."**

In its supplemental brief, the Plaintiff attempts to distinguish *Charter Twp. of Shelby* by arguing that Shelby Township allowed farming on the property at the time the Papesh family purchased it. In the instant matter, farming has never been allowed on the Defendants' property, as it was zoned commercial prior to the Defendant even purchasing

the property. The Plaintiff argues that the issue in the *Charter Twp. of Shelby* case was how many acres are needed in order for farming to be allowed on a plot of land, whereas the issue here is whether the RTFA protects a land owners right to farm on property that has never been zoned for farming.

However, the court is of the opinion that the 1999 amendment to the RTFA, which added MCL 286.474 (6) and was interpreted in *Charter Twp. of Shelby,* changed how the RTFA applies. The court in *Charter Twp. of Shelby* is clear in stating that,

> **"The language of the statute [RTFA] is unambiguous. It clearly states that a local ordinance is preempted when it purports to extend or revise the RTFA or GAAMPs. It further plainly states that a local unit of government shall not enforce an ordinance that conflicts in any manner with the RTFA or GAAMPS."**

Despite the factual differences put forth by the Plaintiff between *Charter Twp. of Shelby* and the instant matter, the plain language of MCL 286.474 (6) as described by the court in *Charter Twp. of Shelby* leads to the conclusion that the RTFA now trumps all conflicting zoning ordinances. The court believes that *Charter Twp. of Shelby* is controlling to the instant matter.

In *Charter Twp. of Shelby,* the township attempted to enforce an ordinance that included a minimum acreage requirement for landowners to operate a farm on property that is zoned for agriculture. The point of *Charter Twp. of Shelby* is that the 1999 amendment to the RTFA prohibits a local unit of government from enforcing in any way an ordinance that restricts a farm or farm operation as defined in the RTFA. The ordinance in this case concerns a farm operation on a plot of land that is zoned commercial. In *Charter Twp. of Shelby,* the plot of land was zoned for agriculture, but the ordinance required that there be a minimum acreage of land to operate a farm. The holding in *Charter Twp. of*

Shelby was clear and unequivocal in stating that the 1999 amendment to the RTFA prohibits the enforcement of any ordinance that prohibits a farming operation. The fact that the property in this case is zoned commercial, while in *Charter Twp. of Shelby* the property was zoned agricultural but with a minimum acreage requirement, is a distinction without meaning under the holding of *Charter Twp. of Shelby.*

Prior to this amendment, the RTFA only served as a defense to nuisance actions, but not zoning enforcement actions. Accordingly, the addition of MCL 286.474 (6) in 1999 now protects farms against all conflict zoning ordinances, provided the farm is GAAMP complaint.

This position initially caused the court concern when it was argued by the Defendant. The court's concern was how the new provision at MCL 286.474 (6) relates to MCL 286.473 (1) and (2). In other words, the court's concern was whether the interpretation of MCL 286.474 (6) put forth by the Defendant would render meaningless the already existing provision of the RTFA found at MCL 286.473 (2). MCL 286.473 (1) and (2) state as follows:

> **(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.**
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> **(2) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.**

MCL 286.473 (2) was the provision that was interpreted in the case of *Jerome Township v. Melchi*, 184 Mich. App. 228 (1990), which was primary case used by the Plaintiff to support its position. *Jerome Twp.* pre-dates the 1999 amendment to the RTFA.

In short, *Jerome Twp.* involved a situation where the Plaintiff Township was attempting to enforce its zoning ordinance against the Defendant landowner who maintained an apiary on his property. The Defendant sought RTFA protection. However, the court of appeals declined to extend the RTFA protection to the Defendants' apiary. In reaching its conclusion, the court stated that:

> **"[D]efendant's apiary did not exist prior to the 1965 enactment of the plaintiff's zoning ordinances (i.e, prior to the change in the land use). Therefore, defendants seek protection of a farm operation established after a change in plaintiff's zoning requirements. Such protection is not contemplated by the Right to Farm Act, MCL 286.474 (1) and (2); M.S.A. 12.122(3)(1) and (2)."**

Jerome Twp. stood for the proposition that a farm that comes into existence *after* the existence of a zoning ordinance that prohibits farming does not receive RTFA protection as indicated in MCL 286.473(2). There has been no express indication that *Jerome Twp.* is no longer good law following the 1999 amendment to the RTFA, whether it be in the legislative history of the 1999 amendment or the subsequent cases dated after this amendment. For this reason, the court's concern was that, if the 1999 amendment changed how the RTFA applies by having it trump ALL zoning ordinances – even for farms that did not exist prior to the enactment of the particular zoning law - then why would the legislature keep MCL 286.473 (2) in the RTFA following the 1999 amendment?

The Defendant did address this issue by discussing the effect of the 1999 amendment, which added MCL 286.474 (6), upon the existing provisions found at MCL 286.473 (1) and (2). The Defendant argued that MCL 286.473 (2) was kept in the statute to

protect "grand-fathered" farms that are NOT GAAMP compliant. In other words, the post-1999 amendment to the RTFA protects two kinds of farms from zoning enforcement. The first kind includes any GAAMP compliant farm, even if the farm came into existence after the particular zoning ordinance went into effect. These kinds of farms are protected under MCL 286.473 (1). The second kind of farm includes "grandfathered" farms, which are farms that are not GAAMP compliant, but existed prior to the enactment of the particular zoning ordinance at issue. These "grandfathered" farms are protected by MCL 286.473 (2).

The Defendants' argument above alleviates the court's concern. Following the 1999 amendment, the RTFA now trumps all zoning ordinances pursuant to MCL 286.474 (6). Therefore, the provisions found MCL 286.473 (1) and (2) were kept in the statute to protect two kinds of farms – those farms that are GAAMP compliant no matter when they came into existence (protected by MCL 286.473 (1)), and those farms that are NOT GAAMP compliant, but were in existence prior to the effective date of a zoning ordinance that prohibited farming. A farm needs to meet either MCL 286.473 (1) or (2) to receive RTFA protection. It does not need to meet both. As a result, it would appear that the 1999 amendment to the RTFA has implicitly overruled any part of *Jerome Twp.* that holds that a GAAMP compliant farm does not receive RTFA protection if it came into existence after the effective date of the zoning ordinance that prohibited farming.

A case that is persuasive to this analysis is the unpublished case of *Papadelis v. Troy,* 2006 WL 2683385. The court recognizes that this case has no precedential value, but considers it worth discussing as it interprets the *Charter Township of Shelby* case. In *Papadelis,* the court of appeals had nearly the same issue before it that is before this court - Whether the requirements of MCL 286.473 (1) and (2) must both be satisfied for a farm to

obtain RTFA protection from a zoning ordinance post-1999 amendment, or whether only one of those sub-sections need be satisfied.

In short, the Plaintiff owned two parcels of land, a south parcel and a north parcel. On the south parcel, the Plaintiff maintained a green house. The Plaintiff expanded the greenhouse operations onto the north parcel, which was zoned residential. The city sued to enforce its zoning ordinance.

The court of appeals ultimately ruled in favor of the Plaintiff, finding that the expansion onto the north parcel was protected by the RTFA. In reaching its conclusion, the court looked at both MCL 286.473 (1) and (2) and concluded that:

> **The legislature did not require both subsections to be met in order for a farm or farming operation to qualify for protection under the RTFA. Each subsection specifically states that "[a] farm or farm operation shall not be found to be a public or private nuisance if" the specified conditions are met. This language indicates an intent to extend the protections of the RTFA to farms or farm operations that meet the requirements of either subsection. Thus, according to the plain language of MCL 286.473(1), a farm or farm operation that conforms to generally accepted agricultural and management practices in entitled to the protection provided by the RTFA without regard to the historic use of the property in question.**

Further, the court stated that *"this interpretation of MCL 286.473 is consistent with Shelby Charter Twp, supra, in which the plaintiff raised the same argument that defendants raise in this case."* Last, footnotes 1 and 2 of the opinion state the following analysis:

> **We are aware that, under MCL 286.473 (1), a business could conceivably move into an established residential neighborhood and start a farm or farm operation in contravention of local zoning ordinances as long as the farm or farm operation conforms to generally accepted agricultural and management practices. Although we might personally disagree with the wisdom of the policy choice codified under MCL 286.473 (1), we are without authority to override the clearly expressed intent of the Legislature. MCL 286.473(1) is simply not ambiguous and, therefore, must be enforced as written. *Kontz, supra* at 312.**

This conclusion is not necessarily inconsistent with *Jerome Twp, supra* at 233. While the Court in *Jerome Twp* determined that the defendants' apiary was not protected under the RTFA because it did not exist before the enactment of the zoning ordinances, the Court did not specifically address whether the apiary conformed to GAAMPS as required for protection under MCL 286.473(1). Accordingly, it appears that MCL 286.473 (1) was not at issue in that case.

Accordingly, the *Papadelis* case, although unpublished, provides additional guidance on the appropriate application of the RTFA to the instant matter before the court.

This court's position finds support in the legislative history to the RTFA's 1999 amendment as well. Page 1 of the Senate's bill analysis states as follows:

The application of local zoning ordinances apparently has been problematic and costly for some farmers, particularly when they wanted to expand operations. A township ordinance, for example, might limit the number of animals allowed per acre, prohibit noxious odors, or restrict noise levels. Since the Right to Farm Act did not supersede local land use laws, a farmer could be denied a permit necessary to expand, or, after expanding, could find himself or herself subject to a lawsuit brought by displeased residents. To remedy this situation, it was suggested that the Right to Farm Act should preempt local ordinances.

. . .

The bill amended the Michigan Right to Farm Act to do the following:

- **Prohibit local units from enacting or enforcing ordinances that conflict with the Act or GAAMPS.**
- **Allow a local unit, with the approval of the Agriculture Commission, to enact an ordinance differing from GAAMPS if adverse effects on the environment or public health will exist within the local unit.**
- **Require the Commission to adopt GAAMPS for site selection and odor controls at new and expanding animal livestock facilities**
- **Require the Michigan Department of Agriculture (MDA) to report annually to the Legislature on the Act's implementation.**

Finally, the court's application of the RTFA is consistent with the interpretation of the RTFA that was discussed in the law review article titled *"When Urban Agriculture Meets Michigan's Right to Farm Act: The Pig's in the Parlor."* 2011 Mich. St. L. Rev. 365.

Accordingly, the court believes that the Defendants' position has support in the plain language of the amendment as well as the legislative history. The Right to Farm Act prevents a local municipality from enforcing a zoning ordinance against a farm that is GAAMP compliant. This is regardless of when the farm came into existence. For this reason, if the Defendants' hog operations are GAAMP compliant, then the Plaintiff cannot enforce its zoning ordinance against the Defendants pursuant to the Right to Farm Act. Accordingly, the Plaintiff's motion for summary disposition is denied.

The court recognizes the obscure result that the post-1999 application of the RTFA creates. The amendment to the RTFA effectively gave landowners the right to set up a farm in areas that have long been zoned for other purposes, provided that the farm is GAAMP compliant. Although some people would consider this unwise policy, the court recognizes that it must interpret the law as written and *"may not inquire into the knowledge, motives, or methods of the Legislature." Fowler v. Doan,* 261 Mich. App. 595, 599 (2004). The court may not impose a construction of a statute on the basis of a policy decision different from that chosen by the Legislature. *See Robertson v. DaimlerChrysler Corp.*, 465 Mich. 732, 752 (2002). *Stokes v. Millen Roofing Co.*, 466 Mich. 660, 671-672 (2002), recognized this concept, concluding that *"[c]ourts must be careful not to asurp the legislative role under the guise of equity because a statutory penalty is excessively punitive."* (*Recognizing that the Stokes* case is factually different). The *Papadelis* court recognized the same in footnote 1 of that opinion, stating that:

> **We are aware that, under MCL 286.473 (1), a business could conceivably move into an established residential neighborhood and start a farm or farm operation in contravention of local zoning ordinances as long as the farm or farm operation conforms to generally accepted agricultural and management practices. Although we might personally disagree with the wisdom of the policy choice codified under MCL 286.473 (1), we are without authority to override the clearly expressed intent of the Legislature. MCL 286.473(1) is simply not ambiguous and, therefore, must be enforced as written. *Kontz, supra* at 312.**

As such, the court recognizes that this application of the RTFA might be considered by some to create a less than ideal result because the Defendants get to maintain a farm that came into existence well after the enactment of the Plaintiff's ordinance that zoned the Defendants' property commercial. The property was zoned commercial even before the Defendants purchased the property. Despite this result, the court's decision fits within the plain language of MCL 286.474 (6) and appropriately discerns the RTFA's legislative intent. Therefore, the Plaintiff's motion for summary disposition must be denied.

Conclusion

The Plaintiff's motion for summary disposition is DENIED. This decision does NOT resolve the last pending matter in this case.

THERFORE, IT IS ORDERED AS FOLLOWS:

1. The Plaintiff's Second Motion for Summary Disposition is DENIED.

2. The Defendants have pled as an affirmative defense that their farm complies with Generally Accepted Agricultural and Management Practices. Therefore, this decision does not resolve the last pending claim and close this case, as a question of fact remains as to whether the Defendants' farm complies with Generally Accepted Agricultural and Management Practices.

3. Pursuant to the scheduling order, this matter has been set for trial.

It is so ordered.

Dated: June 19, 2017

HARRY P. GILL (P26321)
CIRCUIT COURT JUDGE

cc:
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