

STATE OF MICHIGAN
COURT OF APPEALS

TERESA LYNN OBERLY and MARK OBERLY,

Plaintiffs-Appellants,

UNPUBLISHED
September 20, 2012

v

TOWNSHIP OF DUNDEE, JOANNA UHL, and
ROLLO JUCKETTE,

No. 304122
Monroe Circuit Court
LC No. 09-027497-CE

Defendants-Appellees.

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the grant of summary disposition in favor of defendants in this dispute arising from the enforcement of local zoning ordinances. We affirm.

This litigation involves the propriety of ongoing auctions conducted by plaintiffs on their agriculturally zoned property allegedly in violation of Dundee Township's ordinances. The auctions conducted on the property are primarily through Mark Oberly's business Dundee Auction Services and involve the sale of personal property on a commission basis. Plaintiffs acknowledge that the subject property is zoned for agricultural use and that they have regularly conducted auctions at the property, averaging two auctions occurring every month with approximately 100 to 150 people in attendance at each event.

In 2001, the Township notified plaintiffs of an intent to preclude the ongoing conduct of auctions on their property. Plaintiffs retained counsel to negotiate with the Township on their behalf. The only evidence submitted regarding the outcome of these negotiations is a letter indicating the continued existence of an issue regarding the conduct of auctions on the subject property involving "incidental household furnishing and other related items" that failed to conform to Township ordinances and necessitating such business "be located in a zoning district classified as commercial." No particular enforcement action was undertaken by the Township, and plaintiffs' auctions continued unimpeded until 2007.

On March 6, 2007, the Township Ordinance Officer, Louis Galloro, forwarded correspondence to Mark Oberly indicating the Township's receipt of complaints regarding "the commercial use of property zoned agricultural." Citing Dundee Township Zoning Ordinances Article VII and Article XI, Galloro asserted plaintiffs to be in violation of commercial use provisions and permitted home occupations governed by the ordinances "by conducting a live

auction on your property.” A second letter was forwarded to Mark Oberly by Galloro on March 19, 2007, again indicating violation of zoning ordinances regarding the “commercial use of . . . land that is zoned Agricultural. . .” and the conduct of home occupations. The Township initiated a lawsuit against plaintiffs on August 31, 2007, to preclude the continuation of live auctions on the property, but this action was voluntarily dismissed.

This appeal arose through litigation initiated by plaintiffs against defendants. Plaintiffs’ complaint was comprised of three counts: (1) claims under 42 USC 1983, asserting the deprivation of their procedural and substantive due process rights, (2) challenging the Township zoning ordinances as unconstitutionally vague, and (3) violation of the Michigan Right to Farm Act (RTFA), MCL 286.471 *et seq.* Following defendants’ initial motion for summary disposition, the trial court dismissed all of plaintiffs’ claims with the exception of their assertion of a violation of their rights to equal protection. Six months later, defendants filed a second motion for summary disposition seeking dismissal of the one remaining claim, which the trial court granted.

Plaintiffs first contend the trial court erred in dismissing their claim that defendants violated their right to equal protection. Plaintiffs assert error premised, in part, on the trial court’s reliance on an inadmissible affidavit submitted by Galloro in support of defendants’ motion. Plaintiffs also contest as error the failure of the trial court to treat defendants’ renewed motion for summary disposition as an untimely motion for reconsideration.

“A trial court’s ruling on a motion for summary disposition is a question of law, which this Court reviews *de novo*. Underlying constitutional issues are also reviewed *de novo* by this Court.” *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). In reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court must “consider all the evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact.” *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457-458; 750 NW2d 615 (2008), citing *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A trial court’s decision to admit evidence is reviewed by this Court for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005). This Court considers the proper interpretation and application of a court rule as a question of law, which is reviewed *de novo*. *CAM Constr v Lake Edgewood Condo Ass’n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

As discussed by our Supreme Court in *Shepherd Montessori Ctr Milan*, 486 Mich at 318-319:

The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law. This Court has held that Michigan’s equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution. The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity. The

general rule is that legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes the rational basis standard of review: that is, the classification drawn by the legislation is rationally related to a legitimate state interest. Under this deferential standard, “the burden of showing a statute to be unconstitutional is on the challenging party, not on the party defending the statute[.]” [Footnotes and citations omitted.]

In the circumstances of this case, the ordinances being challenged are “facially neutral” because they “do[] not, on [their] face, treat religious and secular entities differently.” *Id.* at 319. Specifically, Article VII of the zoning ordinances provides a statement of purpose, delineation of “principal permitted uses,” and “permitted uses after special approval” of AG-1 and AG-2 agricultural districts. Similarly, Article II of the zoning ordinances provides a myriad of definitions including, as relevant to this appeal, the definition of the terms “commercial use” and “home occupation.”

Rather, plaintiffs assert that defendants’ application of the ordinance was disparate because they were treated differently from other individuals conducting business or commercial operations on their properties. “The United States Supreme Court allows such ‘class of one’ claims to be brought, but requires a plaintiff to show that [he or she] was actually treated differently from others similarly situated and that no rational basis exists for the dissimilar treatment.” *Id.* at 319-320.

Our Supreme Court has previously determined that when a “township suffered others to use their property in a similar nonconforming manner, that to enforce the zoning ordinance against the defendant alone would be discriminatory and unlawful.” *Blackman Twp v Koller*, 357 Mich 186, 190; 98 NW2d 538 (1959). A “class-of-one” may initiate an equal protection claim where it is alleged: (a) the plaintiffs have “been intentionally treated different[ly] from other[s] similarly situated” and (b) “there is no rational basis for the difference in treatment.” *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). To be construed as “similarly situated, the challenger and his comparators must be *prima facie* identical in all relevant respects or directly comparable . . . in all material respects.” *United States v Green*, 654 F3d 637, 651 (CA 6, 2011) (emphasis in original).

Plaintiffs have not made a sufficient showing of disparate treatment or enforcement by the Township with regard to similarly situated individuals. Weighing against plaintiffs’ contention of disparate treatment is the indication that the Township received complaints about the conduct of plaintiffs’ auctions, but did not receive any such complaints regarding the other businesses cited by plaintiffs and alleged to be similarly situated. In addition, when the other alleged non-complying uses are not identical to the use at issue, the question of equal protection does not arise. *Walker’s Amusements, Inc v City of Lathrup Village*, 100 Mich App 36, 43; 298 NW2d 878 (1980). The record does not suggest that the businesses identified by plaintiffs enjoy anywhere near the frequency or volume of trade that plaintiffs acknowledge transpires on their property. Plaintiffs alleged only one commission-based cattle auction conducted by Juckette and Uhl. Such activity is not legitimately comparable to plaintiffs’ acknowledged conduct of auctions at least twice a month on an ongoing basis and encompassing approximately 100 to 150 attendees at each such event. Of the three additional businesses identified by plaintiffs as receiving preferential treatment, Terri’s Pet Grooming cannot be construed as similarly situated

as it is not located in an agriculturally zoned district. Of the two remaining businesses referenced, Craig Trucking, Inc. and All Occasions Rental, while both are within agriculturally zoned areas, neither purportedly evidenced through the presence of significant signage/outdoor advertisement or traffic, any volume of commercial activity on the properties. As a result, plaintiffs failed to make the requisite showing of identical non-complying usage, rendering their constitutional argument of violation of their right to equal protection without basis in the record.

Addressing plaintiffs' contention regarding Galloro's affidavit, they argue the document was inadmissible because it failed to conform to the requirements of MCR 2.114(B) and/or MCR 2.119(B), primarily because it was not based on personal knowledge. The Galloro affidavit indicates his ability to testify to the statements contained in the affidavit in accordance with the requirements of MCR 2.119(B)(1)(c) and MCR 2.114(B). Galloro also stated that he was "asked to investigate" the three properties referenced and indicated his inspection of two of the properties, impliedly complying in significant part with the requirements of MCR 2.119(B)(1)(a). Further, during oral argument, the trial court indicated that any deficiencies in the affidavit had been corrected. The allegations contained within the affidavit are also consistent with the requirement that the affiant "state with particularity facts admissible as evidence" in accordance with MCR 2.119(B)(1)(b).

Even assuming Galloro's affidavit suffered from technical flaws and failed to meet all of the requirements of MCR 2.119, our Supreme Court in *Maiden*, 461 Mich at 124 n 6 (citations omitted), has indicated that evidence submitted in support of summary disposition under MCR 2.116(C)(10) "need not be in admissible form . . . [b]ut must be admissible in content." As such, plaintiffs' challenge regarding the admissibility of the affidavit is unavailing.

Plaintiffs also challenge the trial court's failure to treat defendants' renewed motion for summary disposition as an untimely motion for reconsideration. The renewed motion for summary disposition was filed approximately six months after defendants filed their initial request for summary disposition, which was only partially granted by the trial court. During this interim period, the trial court permitted the parties to engage in additional discovery. A final order or judgment had not been entered in the case. MCR 2.604(A). In addition, MCR 2.116(E)(3) permits a litigant to "file more than one motion" for summary disposition, subject to specific limitations that are not applicable to this case, MCR 2.116(F). The denial of a motion for summary disposition does not prohibit a party from raising or filing a subsequent motion for summary disposition, even if the second motion is filed on identical grounds. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997); *Goodrich v Moore*, 8 Mich App 725, 728; 155 NW2d 247 (1967). Consequently, the trial court did not err in allowing the motion to proceed as a subsequent motion for summary disposition rather than a motion for reconsideration.

Plaintiffs next challenge the trial court's dismissal of their substantive and procedural due process claims based on the trial court's determination regarding the insufficiency of the evidence. "Whether proceedings complied with a party's right to due process presents a question of constitutional law that [this Court] review[s] de novo." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). This Court also reviews the grant or denial of summary disposition de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). Because a review of the record indicates that the trial court granted summary disposition based on evidence

and documents submitted beyond the pleadings, we treat summary disposition as having been granted pursuant to the standard set forth in MCR 2.116(C)(10). See *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

“The touchstone of due process is protection of the individual against arbitrary action of government . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental activity. . . .” *Co of Sacramento v Lewis*, 523 US 833, 845-846; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). “Generally, [procedural] due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker.” *By Lo Oil Co v Dep’t of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) (quotation marks and citations omitted). Specifically, in *In re VanDalen*, 293 Mich App 120, 132; 809 NW2d 412 (2011), this Court explained:

Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property. A procedural due process analysis requires a court to consider (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient. Generally, three factors will be considered to determine what is required by due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Internal quotation marks and citations omitted.]

Plaintiffs’ procedural due process claim is premised on the inadequacy of notice received from the Township regarding their alleged violation of the zoning ordinances and the absence of an opportunity to be heard by an impartial decision-maker. With regard to the adequacy of notice, plaintiffs acknowledged receiving correspondence from the Township indicating the alleged ordinance violations. In response, plaintiffs retained legal counsel and participated in negotiations with the Township. When the Township sought to enjoin plaintiffs’ auction activities on their property, they were ultimately served with a complaint and the matter was litigated until voluntarily dismissed. Contrary to plaintiffs’ assertions, the mere fact that the Township did not issue them a ticket or citation for violation of the ordinance does not obviate their receipt of notice of the Township’s allegations or the existence of an opportunity to be heard by an impartial decision-maker. After the dismissal of the Township’s complaint, plaintiffs acknowledge there were no further efforts by the Township to enforce its ordinances.

“Procedure in a particular case is constitutionally sufficient where there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker.” *Reed*, 265 Mich App at 159. The lower court record demonstrates that plaintiffs were

afforded an opportunity to present their arguments in detail both in negotiations with the Township and in two separate legal proceedings. The testimony and documentary evidence provided by plaintiffs was deemed insufficient by the trial court to sustain their allegations. The record supports the conclusion that plaintiffs were afforded procedural due process.

With regard to plaintiffs' substantive due process claims, this Court has indicated:

The Due Process Clause provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]” But despite the clause’s reference to process, the United States Supreme Court has interpreted this clause to “guarantee[] more than fair process,” and to cover a substantive sphere as well, “barring certain government actions regardless of the fairness of the procedures used to implement them.” [*Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008) (internal citations omitted).]

“In disputes over municipal actions, the focus is on whether there was egregious or arbitrary governmental conduct.” *Id.* “[E]ven when evaluating municipal conduct vis-à-vis a substantive due process claim, only the most egregious official conduct can be said to be arbitrary in the constitutional sense.” *Id.* “To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience.” *Id.* at 198.

Plaintiffs do not directly challenge, as part of their substantive due process claim, that the subject ordinances are arbitrary and unreasonable, yet by implication raise the issue. See *Conlin v Scio Twp*, 262 Mich App 379, 390; 686 NW2d 16 (2004). “A zoning ordinance may be unreasonable either because it does not advance a reasonable government interest or because it does so unreasonably.” *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173-174; 667 NW2d 93 (2003). This Court has identified three rules applicable to judicial review of such claims:

(1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner’s use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Conlin*, 262 Mich App at 390 (citation omitted).]

In addition, this Court has previously determined that for a claim to survive the rational basis test applicable to a substantive due process claim, the “means selected must have a real and substantial relationship to the object sought to be attained.” *Id.* (citation omitted). This was further explicated by our Supreme Court in *Muskegon Area Rental Ass’n v City of Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001), quoting *TIG Ins Co, Inc v Dep’t of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001):

Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with mathematical nicety, or even whether it results in some inequity when put into practice. Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. Thus, to have the legislation stricken, the challenger would have to show that the legislation is based solely on reasons totally unrelated to the pursuit of the State's goals, or, in other words, the challenger must negative every conceivable basis which might support the legislation. [Internal quotation marks and citations omitted.]

With regard to the agricultural zoning ordinance, Article VII, Section 7.1 of the ordinance delineates its purpose, for areas designated as AG-1, "is to preserve and protect the Township's supply of a prime agricultural land." The ordinance also indicates that it was enacted to "control the indiscriminate infiltration of urban development into agricultural areas which will adversely affect the agricultural use of land." Similarly, the ordinance delineates the purpose of AG-2 zoned districts "is to maintain agricultural uses in the rural reserve areas of the Township, while allowing limited amount of rural residential development." This Court has previously recognized that the preservation of the identity or character of an area comprised a legitimate governmental interest, which could be advanced through zoning. *Dorman v Clinton Twp*, 269 Mich App 638, 651-652; 714 NW2d 350 (2006). It has also been recognized that the preservation of the agricultural or the rural nature of an area serves to further a legitimate governmental interest. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 533; 537 NW2d 610 (1995). Similarly, legitimate governmental interests have been acknowledged to include maintenance of the compatibility of an area with its surroundings, the protection of natural resources and the insurance of adequate infrastructure to support proposed development, as well as the protection and improvement of the aesthetics of an area. *Norman Corp v City of East Tawas*, 263 Mich App 194, 200-201; 687 NW2d 861 (2004); *Frericks v Highland Twp*, 228 Mich App 575, 608-609; 579 NW2d 441 (1998). As such, plaintiffs have failed to sustain the requisite burden of proof and the trial court's grant of summary disposition on this aspect of their substantive due process claim was proper.

Plaintiffs also allege a violation of the right to substantive due process premised on defendants' prosecution under the ordinances. At the outset, it must be recognized that "[a] challenge to the validity of a zoning ordinance 'as applied,' whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality." *Paragon Props Co v City of Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996). "An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution." *Id.* Further, "the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. . . ." *Id.* at 577 (citation omitted). "In other words, where the possibility exists that a municipality may have granted a variance—or some other form of relief—from the challenged provisions of the ordinance, the extent of the

alleged injury is unascertainable unless these alternative forms of potential relief are pursued to a final conclusion.” *Conlin*, 262 Mich App at 382.

While plaintiffs have not asserted a takings claim, this Court has determined that the rule of “finality” is still applicable to an “as applied” challenge of substantive due process, rendering such issues not ripe for judicial review because of the failure to pursue and exhaust available administrative remedies. *Id.* at 383. Because the lower court record indicates the absence of any effort by plaintiffs to seek or be denied a variance or re-zoning, their “as applied” challenge should be deemed “not ripe for judicial review.” *Id.* Consequently, we affirm the trial court’s dismissal of plaintiffs’ claim even though the court reached the right result for the wrong reason. See *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011).

Even if evaluated as a legitimate “as applied” challenge to substantive due process, plaintiffs’ claim must fail. To establish that a zoning ordinance or land use regulation is unconstitutional “as applied,” a plaintiff must demonstrate “(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that the ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.” *Dorman*, 269 Mich App at 650-651 (citation omitted). A reasonable governmental interest exists regarding the zoning and use restrictions for this property. What plaintiffs are actually challenging is the alleged arbitrary and capricious nature of defendants’ enforcement of the ordinance. Yet, the very fact that defendants received complaints only regarding plaintiffs belies that the enforcement efforts were arbitrary and capricious. The frequency and volume of commercial activity generated by plaintiffs through the conduct of auctions renders their non-compliance with the relevant zoning ordinances distinguishable from the activities they allege being conducted by their neighbors without interference from the Township.

To the extent that plaintiffs allege an ulterior motive by defendants, they failed to substantiate such a claim. In identifying their auction competitors, plaintiffs acknowledged that none were located within the Township. Although plaintiffs also asserted that the individual defendants, Juckette and Uhl, were in competition with them and would benefit from the Township’s limitation of plaintiffs’ auctions, plaintiffs acknowledged the conduct of only one cattle auction involving those defendants. Further, following the dismissal of its lawsuit, the Township took no further steps at enforcement of the ordinances, thus serving to further negate plaintiffs’ assertion of any form of ongoing harassment or arbitrary and capricious action by the Township. Because plaintiffs failed to demonstrate either the lack of a legitimate basis for the ordinance or that defendants were arbitrary and capricious in enforcement of the ordinance, their “as applied” substantive due process claim cannot be sustained.

Plaintiffs also challenge the grant of summary disposition in favor of defendants premised on the trial court’s failure to apply the Michigan Right to Farm Act (RTFA), MCL 286.471 *et seq.*, and the Michigan Department of Agriculture’s Generally Accepted Agricultural Management Principles (GAAMPs). This Court reviews a trial court’s decision on a motion of summary disposition de novo. *Spiek v Mich Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This case also presents an issue of statutory interpretation and applicability, which this Court also reviews de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

The RTFA was developed to prevent nuisance litigation against farms and farm operations that conform to generally accepted agricultural practices. MCL 286.473; *Steffens v Keeler*, 200 Mich App 179, 181; 503 NW2d 675 (1993). The RTFA provides, “[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.” MCL 286.473(1). The statute defines relevant terms, including:

(a) “Farm” means the land, plants, animals, buildings, structures, including ponds used for agricultural or 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, and includes, but is not limited to:

(i) Marketing produce at roadside stands or farm markets.

(ii) The generation of noise, odors, dust, fumes, and other associated conditions.

(iii) The operation of machinery and equipment necessary for a farm including, but not limited to, irrigation and drainage systems and pumps and on-farm grain dryers, and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway as authorized by the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.

(iv) Field preparation and ground and aerial seeding and spraying.

(v) The application of chemical fertilizers or organic materials, conditioners, liming materials, or pesticides.

(vi) Use of alternative pest management techniques.

(vii) The fencing, feeding, watering, sheltering, transportation, treatment, use, handling and care of farm animals.

(viii) The management, storage, transport, utilization, and application of farm by-products, including manure or agricultural wastes.

(ix) The conversion from a farm operation activity to other farm operation activities.

(x) The employment and use of labor.

(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, cervidae, livestock, including breeding and grazing, equine, fish, and other aquacultural products, bees and bee products, berries, herbs, fruits, vegetables, flowers, seeds, grasses, nursery stock, trees and tree products, mushrooms, and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.

(d) “Generally accepted agricultural and management practices” means those practices as defined by the Michigan commission of agriculture. . . . [MCL 286.472]

This Court has discussed the underlying purpose of the Act in *Northville Twp v Coyne*, 170 Mich App 446, 448; 429 NW2d 185 (1988), stating:

The Michigan Right to Farm Act was enacted by our Legislature in 1981 to provide for circumstances under which a farm and its operation shall not be found to be a public or private nuisance. In furtherance of this purpose, this act prohibits nuisance litigation against a farm or farm operation that conforms to generally accepted agricultural and management practices [GAAMPs].

The implication of this language is that the RTFA is a defense to be raised and not inherently an affirmative cause of action.

The parties do not dispute that plaintiffs are engaged in agricultural activities on the property, which are protected by the RTFA, or that the activities pertaining to cultivation of crops, the raising of livestock, and the related efforts to sustain those activities would conform to GAAMPs. Further, there appears to be no dispute that such activities have continued unimpeded by defendants. Rather, the conflict centers on whether plaintiffs’ conduct of auctions on their agriculturally zoned property falls under the protections proffered by the RTFA. Specifically, MCL 286.474(6) 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.

Plaintiffs’ routine conduct of commission-based auctions is not the type of activity that the RTFA was intended or designed to protect. Clearly, the statutory intent is to protect farms and farmers from facing nuisance litigation premised on activities inherent in a farming operation, which are statutorily defined as including “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.” MCL 286.473(1)(b). As discussed by this Court in *Coyne*, 170 Mich App at 448-449:

The primary rule of statutory interpretation is to ascertain and give effect to the legislative intent. The language of the statute is the best source for ascertaining this intent. From the language chosen by the act’s drafters, we ascertain that the Legislature was concerned with the regulation of land use and its impact upon farming operations. This concern was directed towards regulations imposed upon farms by local government sources as well as private sources. The Legislature undoubtedly realized that, as residential and commercial development expands outward from our state’s urban centers and into our agricultural communities, farming operations are often threatened by local zoning ordinances and irate neighbors. It, therefore, enacted the Right to Farm Act to protect farmers from the threat of extinction caused by nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations as well as from the threat of private nuisance suits. [Internal citations omitted.]

Action by the Township did not threaten plaintiffs’ right to farm their land. Rather, plaintiffs seek to extend the protections of the RTFA to any activity, including auctions, conducted on agricultural property as long as some portion or percentage of the items sold at the auction constitute a good or service produced by the farm. Citing to GAAMPs, plaintiffs contend that their auctions fall within the definition of a farm market as “a place or an area where transactions between a farm market operator and customers take place” as long as “[a]t least 50 percent of the products marketed and offered for sale at a farm market . . . [are] produced on and by the affiliated farm.” While plaintiffs correctly point out that there was no demonstration or evidence regarding the percentage of items sold by plaintiffs that constituted non-farm produced goods, it was acknowledged that the auctions held by plaintiffs were commission-based, implying that the goods being sold were imported for the purpose of auction and not being self-produced. In addition, plaintiffs ignore additional language within GAAMPs’ definition of a farm market recognizing that such markets “may include marketing activities and services to attract and entertain customers and facilitate retail trade business transactions” but only “when allowed by applicable local, state and federal regulations.” Such language is contrary to plaintiffs’ assertion that the Township ordinances serving to restrict the conduct of auctions on their farm property are preempted by the RTFA.

Next, plaintiffs contend error in the trial court’s grant of immunity to the individual defendants, Juckette and Uhl. “The applicability of governmental immunity comprises a question of law that is reviewed de novo on appeal.” *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). A motion for summary disposition brought pursuant to MCR 2.116(C)(7) should be granted when a claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). “To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity.” *Id.*

Plaintiffs only contest error by the trial court in its determination that Juckette and Uhl were immune from litigation. Plaintiffs asserted that the individual defendants had intentionally interfered, through prosecution of litigation, with the conduct of auctions on plaintiffs' property. It is routinely recognized that governmental employees are immune from tort liability if they are acting or reasonably believe they are acting within the scope of their authority in pursuit of a governmental function, unless their activities constitute gross negligence. MCL 691.1407(2). A "governmental function" is defined as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). Acts construed as ultra vires do not fall within the protection of the immunity statutory scheme. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 591; 363 NW2d 641 (1984), superseded by statute on other grds as stated in *Peters v Bay Fresh Start, Inc*, 161 Mich App 491, 498; 411 NW2d 463 (1987).

Plaintiffs' pleadings are deficient and fail to overcome defendants' assertion of governmental immunity. There are no factual allegations within the pleadings identifying any overt act on the part of the individual defendants pertaining to the enforcement of the Township ordinances against plaintiffs. A failure to act on the part of Juckette and Uhl cannot be construed to comprise an ultra vires act, exempting them from immunity. See *Epperson v Crawford Co Rd Comm*, 196 Mich App 164, 167; 492 NW2d 455 (1992). "Where the act complained of is one of omission rather than commission, it is not [construed to be] an intentional tort." *Hobrla v Glass*, 143 Mich App 616, 629; 372 NW2d 630 (1985).

Any assertion by plaintiffs regarding overt acts by these defendants to enforce the zoning ordinances must also fail. This Court has determined that "decisions 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." *Randall v Delta Charter Twp*, 121 Mich App 26, 32; 328 NW2d 562 (1982). This Court has also determined it "insufficient to state a claim allegations that the defendant willfully failed to enforce a township ordinance despite having knowledge of a violation. The Court held that a governmental agency may not be held liable for even an intentional failure to enforce a statute in the absence of a statute authorizing the imposition of liability." *Hobrla*, 143 Mich App at 629, quoting *Randall*, 121 Mich App at 34. Plaintiffs have completely failed to allege how or why liability should be imposed against the two defendants based on their "individual" rather than "official" capacities. As such, the trial court properly dismissed plaintiffs' claims against Juckette and Uhl based on governmental immunity.

Finally, plaintiffs challenge the grant of summary disposition in favor of defendants premised on their assertion that the Township's ordinances are unconstitutionally void for vagueness. "The 'void for vagueness' doctrine is a derivative of the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law." *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 539; 669 NW2d 594 (2003); see, also, US Const, Am XIV; Const 1963, art 1, § 17. This Court reviews a claim that a statute is void for vagueness de novo. *STC, Inc*, 257 Mich App at 538-539.

In reviewing a vagueness claim, this Court has explained:

A statute may be declared void for vagueness if (1) it is overbroad and infringes First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in concluding whether the statute has been violated. Vagueness challenges that do not involve a challenge to First Amendment freedoms are examined in light of the facts of the particular case. There is a presumption that the statute is constitutional, and the party asserting the constitutional challenge has the burden of proof. In determining whether a statute is void for vagueness, the entire text of the statute is examined and the words of the statute are given their ordinary meanings. When a statute is challenged on the basis that it fails to provide fair notice, the statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. [*STC, Inc*, 257 Mich App at 539 (internal citations omitted).]

“Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.” *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004), quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). The party challenging the constitutional validity of an ordinance has the burden to establish that the ordinance is clearly unconstitutional. *Gora v City of Ferndale*, 456 Mich 704, 712; 576 NW2d 141 (1998).

Plaintiffs’ contention that the zoning ordinances are void for vagueness is disingenuous. Section 7.2 of Article VII of the zoning ordinances identifies “principal permitted uses” within “the Agricultural District,” indicating that “no uses shall be permitted unless otherwise provided in this Ordinance,” except the following:

1. Single-family farm dwellings
2. Homestead residential dwellings
3. Farms, which shall include: 1) tree fruit production, 2) small fruit production, 3) field crop production, 4) forage and sod production, 5) livestock and poultry production, 6) fiber crop production, 7) apiary production, 8) maple syrup production, (9) mushroom production and 10) greenhouse production, subject to c below; and all structures, machinery, vehicles, uses, activities and storage incidental to and a necessary part of the commercial production of farm products.

* * *

4. General farming including livestock and poultry raising, dairying, horticulture, farm forestry and similar bonafide agricultural enterprises or use of land and structure, except that no farm operated wholly or in part for the disposal of garbage, sewage, rubbish, offal or wastes from rendering plants or slaughter houses shall be permitted.

5. Truck gardening and nurseries[.]
6. Roadside stands for the display and sale of produce raised on the same premises. . . .
7. Farmponds. . . .
8. Accessory buildings and uses customarily incidental to the above Principal Permitted Uses. . . .

While recognizing roadside stands, the ordinance does not in any manner suggest the routine conduct of auctions as a permitted use. Contrary to plaintiffs' assertion of vagueness, the ordinance is quite specific in defining permitted uses.

Article VII, Section 7.3 specifically delineates "permitted uses after special approval" indicating that all uses delineated within this section "shall be permitted subject to the conditions hereinafter imposed and subject further to the approval of the Township Board, after recommendation from the Planning Commission." The only subsection of Article VII, Section 7.3 applicable references "home occupations" which is defined in Article II of the ordinances as:

Any occupation conducted within a dwelling unit and carried on by the inhabitants thereof, which use is clearly incidental and secondary to the use of the dwelling for dwelling purposes, does not change the character thereof, and which does not endanger the health, safety and welfare of any other persons residing in that area by reason of noise, noxious odors, unsanitary or unsightly conditions, fire hazards and the like, involved in or resulting from such occupation, profession or hobby. . . .

Contained within the restrictions of a home occupation is the requirement that "[n]o home occupation shall generate other than normal residential traffic either in amount or type." Even if it were to be conceded, as argued by plaintiffs, that this portion of the ordinance is inapplicable because the auctions could not be construed as home occupations because they were not "conducted within a dwelling unit," it cannot be suggested that the ordinance, itself, is vague or unclear regarding what activities are permissible and prohibited.

The same result occurs with regard to violation of the portion of the ordinance included within Article II, regarding "commercial use," which is defined as:

A commercial use related to the use of property in connection with the sale, purchase, barter, display or exchange of goods, ware, merchandise or personal services or the maintenance of offices or recreational or amusement enterprises, or garage, basement sales or flea markets conducted on residential premises for more than six (6) calendar days during a given (1) year period.

While plaintiffs focus on the terms "garage . . . or flea markets," the definition includes the conduct of any type of commercial sales exceeding six events within a one-year period. Again, the language of the ordinance is quite explicit regarding the types of behavior or activity encompassed and the frequency of occurrence that is permissible.

“The proper inquiry is not whether the [ordinance] may be susceptible to impermissible interpretations, but whether the [ordinance] is vague as applied to the conduct allegedly proscribed in this case.” *Yankee Springs Twp v Fox*, 264 Mich App 604, 607; 692 NW2d 728 (2004) (citations omitted). Using this standard, plaintiffs’ claim of vagueness must fail as the ordinance is sufficiently explicit with regard to identifying and delineating the conduct that is proscribed.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio