

STATE OF MICHIGAN
COURT OF APPEALS

ROMEO PLANK INVESTORS, L.L.C.,

Plaintiff-Appellee,

v

MACOMB TOWNSHIP,

Defendant-Appellant.

UNPUBLISHED

February 20, 2007

No. 266415

Macomb Circuit Court

LC No. 04-004813-AV

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant Macomb Township (the “township”) appeals by delayed leave granted from a circuit court order reversing the decision of the Macomb Township Zoning Board of Appeals (ZBA), which denied a request for a division of property and transfer of one parcel to adjacent property owned by plaintiff Romeo Plank Investors, L.L.C. (“RPI”). Because the ZBA’s decision complied with the law, was based on proper procedure, is supported by competent, material, and substantial evidence on the record, and represents the reasonable exercise of discretion granted by law to the board of appeals, we reverse.

RPI submitted a request to the township seeking to transfer a portion of one parcel of land to a neighboring parcel. The transferring, or parent, parcel is owned by a nursery and located in an area zoned by the township’s zoning ordinances to be residential (single family). The nursery is permitted to continue operation as a vested non-conforming use. The township denied RPI’s request for a transfer and RPI thereafter appealed the decision to the township’s ZBA. The ZBA also denied RPI’s request and RPI claimed an appeal of the ZBA decision in the Macomb County Circuit Court. The court reversed the ZBA decision, opining that the requested transfer is not a division and thus need not comply with the Land Division Act (“LDA”), MCL 560.101 *et seq.*. The court further determined that because the proposed transfer is not an exempt split, a division, or a subdivision as defined in the LDA or the township’s land division ordinance, the township has no authority to regulate or prohibit the transfer. This appeal followed.

This Court reviews *de novo* a trial court’s decision in an appeal from a city’s zoning board, while giving great deference to the trial court and zoning board’s findings.” *Norman Corp v City of East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004), *lv den* 472 Mich 894 (2005). Statutory interpretation is a question of law which this Court also reviews *de novo* on appeal. *People v Stone Transport, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000). The primary rule of statutory construction is to ascertain and give effect to the intent of the

Legislature. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). If the plain and ordinary meaning of the statute is clear, judicial construction is not permitted. *Id.*

On appeal, the township contends that the ZBA decision was supported by competent, material, and substantial evidence on the record and that the township ordinances relied upon in denying RPI's request does not conflict with state law. We agree with the circuit court that the proposed property division is not governed by the LDA, because it does not involve an "exempt transfer," "division," or "subdivision" as those terms are defined in the LDA. MCL 560.102(d)-(f). However, the circuit court erred in determining that because the property division was not governed by the LDA, the township therefore lacked the authority to regulate or prohibit the division and transfer.

It is axiomatic that a township cannot enact an ordinance that directly conflicts with state law, or where a statutory scheme preempts the ordinance by occupying the "field of regulation" which the municipality seeks to enter. *City of Brighton v Hamburg Twp*, 260 Mich App 345, 350; 677 NW2d 349 (2004). Here, because the LDA does not govern the proposed transfer, there is no direct conflict.

Further, as this Court determined in *Conlin v Scio Twp*, 262 Mich App 379, 387; 686 NW2d 16 (2004), the LDA "is not preeminent in the field of land subdivisions." This conclusion is supported by the language of the LDA, which expressly provides that "approval of a division is not a determination that the resulting parcels comply with other ordinances or regulations." MCL 560.109(6). In other words, even where a division is allowed by the LDA, the LDA "expressly allows municipalities to impose stricter requirements." *Conlin, supra*. It therefore follows that where the LDA does not govern a property division, a township remains free to regulate the division. In this case, the township's ordinances apply to a broader range of land transfers than are described in the LDA, and govern *any* division, partition, or split of land. Macomb Ordinances, §§ 17-161(a).

RPI also argues that even if the township is permitted to regulate land divisions, it could not deny the proposed division here on the basis that remainder Parcel A would not be in compliance with the existing zoning ordinance. According to RPI, the division would diminish rather than expand the nonconforming use of the property, and the township cannot properly extinguish the nonconforming use altogether.

Previously existing nonconforming uses may be continued, but the goal is the gradual elimination of such use. MCL 125.286(1)(repealed by PA 2006, No 110, § 702, eff July 1, 2006, but in effect at the time the proceedings that lead to this appeal took place). Pursuant to MCL 125.286, the "township board *shall provide in a zoning ordinance for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon reasonable terms set forth in the zoning ordinance.*" Here, under the township's ordinance, a nonconforming use that "was lawful at the time of the effective date of this Ordinance, may be continued; provided, however, such use shall have continued in operation, does not constitute a nuisance, and *shall not be enlarged, altered, or changed in area, activity or content during its continuance, except as provided otherwise by proper authority.*" Macomb Ordinance, § 10-0309 (emphasis added). Here, the township's ordinance limits RPI's proposed land transfer because it would "alter, or change[] in area" the nonconforming use by Wade Nursery.

As RPI argues, when a proposed use would not expand or extend a nonconforming use, a property owner or his successors can generally continue the nonconforming use. *Kopietz v Zoning Bd of Appeals for the City of the Village of Clarkston*, 211 Mich App 666, 676; 535 NW2d 910 (1995). Where a local ordinance “completely prohibits the extension or expansion of a nonconforming use,” it violates the terms of the Township Zoning Act. *Century Cellunet of Southern Michigan Cellular Ltd Partnership v Summit Twp*, 250 Mich App 543, 551-552; 655 NW2d 245 (2002).

Here, the township’s ordinance, which prohibits alteration of a nonconforming use, likely violates the Township Zoning Act. Moreover, we find no “reasonable terms” provision in the township’s ordinances that would permit the extension of an existing nonconforming use as required by MCL 125.286. Nonetheless, it is apparent that after the township assessor initially indicated that Wade Nursery would need to comply with residential (R-1-S) zoning requirements before the transfer would be permitted, the ZBA later provided “reasonable terms” to alter the property and continue its nonconforming use as a nursery if it complied with ordinances applicable to that use in a C-2 zone. Further, the ZBA considered whether the denial of petitioner’s request would cause any practical difficulties or unnecessary hardships under MCL 125.293. See *Century Cellunet, supra*. Under these circumstances, the ZBA’s decision complied with the law, was based on proper procedure, is supported by competent, material, and substantial evidence on the record, and “represents the reasonable exercise of discretion granted by law to the board of appeals.” MCL 125.585(11)(a) – (d).

For these reasons, we reverse the circuit court’s decision and reinstate the decision of the ZBA.

Reversed.

/s/ Kirsten Frank Kelly

/s/ Alton T. Davis

/s/ Deborah A. Servitto