STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF WEBBER,

Plaintiff/Counter Defendant-Appellant,

v

BRUCE AUSTIN,

Defendant/Counter Plaintiff-Appellee,

and

BARBARA FORBES,

Defendant-Appellee,

and

DALE FORBES,

Defendant,

and

MARC DANEMAN,

Intervening Appellee.

UNPUBLISHED
April 22, 2014

No. 313479
Lake Circuit Court
LC No. 11-007995-CH

TOWNSHIP OF WEBBER,

Plaintiff/Counter Defendant-Appellant,

v

BRUCE AUSTIN,

Defendant/Counter Plaintiff-

No. 315050
Lake Circuit Court
LC No. 11-007995-CH

Appellee,

and

DALE FORBES and BARBARA FORBES,

Defendants,

and

MARC DANEMAN,

Intervening Appellee.

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Following a bench trial, appellant Webber Township challenges the trial court's judgment in favor of appellee Bruce Austin under the Right to Farm Act (RTFA), MCL 286.471 *et seq*. In the consolidated appeal, the Township challenges the trial court's award of costs and attorney fees under the attorney fee provision of the RTFA, MCL 286.473b. While these appeals were pending, this Court issued *Lima Twp v Bateson*, 302 Mich App 483; 838 NW2d 989 (2013). Because the trial court's judgment directly contradicts the *Bateson* decision, we reverse the judgment and remand for further proceedings. Correspondingly, we vacate the award of costs and attorney fees.

I. FACTS AND PROCEDURAL HISTORY

In approximately 2011, Austin took possession of a commercially zoned property in Webber Township and began preparing the property to conduct his horse rescue project. Shortly thereafter, the Township filed a complaint against Austin to enjoin him from using the property for the horse rescue project.[1] The Township alleged that the project violated the commercial zoning ordinance. The trial court entered a preliminary injunction which required Austin to cease the horse rescue project.

Prior to trial, Austin asserted the RTFA as an affirmative defense. At trial, the evidence centered primarily on whether Austin's project was a commercial production within the meaning of the RTFA, MCL 286.472. Austin testified that although he had never made a profit from the

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[1] The complaint also sought to enjoin Austin from using the property for his dumpster business, but the Township later dropped that aspect of its complaint. The Township also sued the title owner of the property, Barbara Forbes. Forbes did not actively participate at trial and is not participating in this appeal.

project, he intended to make a profit in the future. The trial court entered judgment in favor of Austin, including the following:

> 2. Defendant's use of the Property known as 3665 South M-37, Webber Township, Michigan as an animal rescue operation is hereby deemed a valid non-conforming use of the property under the Webber Township Zoning Ordinance.
>
> 3. Defendant's use of the Property as an animal rescue operation is not a nuisance and is protected by the Michigan Right to Farm Act, being MCL 286.471, *et seq*.
>
> 4. This Court declines to render an opinion regarding Defendant's compliance under the Michigan Right to Farm Act's generally accepted agricultural management practices for the reason Plaintiff has not exhausted its administrative remedies available through the Michigan Department of Agriculture.
>
> 5. Defendant may forthwith resume his animal rescue operation on the Property, including care for horses on said property.

Following the entry of judgment, Austin filed a motion for costs and attorney fees pursuant to the attorney fee provision of the RTFA, MCL 286.473b. In a supplemental motion, Austin sought costs for the transport, care, and feeding of the rescue horses during the pendency of the proceedings. The trial court awarded attorney fees and costs to Austin in the amount of $36,679.78. The court denied Austin's request for reimbursement of animal care costs. The Township appealed the judgment and the attorney fee award, and this Court consolidated the appeals.

II. NONCONFORMING USE

The Township first argues that the trial court erred by determining that Austin's horse rescue project was a valid nonconforming use of the property. We review de novo the trial court's conclusions of law; we review the court's factual findings for clear error. *Scholma v Ottawa Co Rd Comm*, 303 Mich App 12, 16; 840 NW2d 186 (2013).

A nonconforming use is "a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because [the use] lawfully existed before the zoning regulation's effective date." *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000) (citation omitted). When a property is transferred to a new owner, the nonconforming use may continue but cannot be expanded. *Kopietz v Village of Clarkston Zoning Bd of Appeals*, 211 Mich App 666, 676; 535 NW2d 910 (1995) (nonconforming use can survive transfer of property); *Century Cellunet of Southern Mich Cellular Ltd Partnership v Summit Twp*, 250 Mich App 543, 546; 655 NW2d 245 (2002) (generally, nonconforming use cannot be expanded). To be a valid continuation of a nonconforming use, the new owner's use must be "substantially of the same size and the same essential nature as the use existing at the time of passage of a valid zoning ordinance." See *Edward C Levy v Marine City Zoning Bd of Appeals*, 293 Mich App 333, 342; 810 NW2d 621 (2011).

In this case, the trial court erred in determining that Austin's horse rescue project was a valid nonconforming use. The undisputed trial evidence demonstrates that the horse rescue

project was significantly different than Austin's predecessors' use of the property. The predecessors did not raise livestock on the property, nor did they offer livestock for sale. Because Austin's use differed substantially from that of his predecessors, his horse rescue project was not a nonconforming use. See *Levy*, 293 Mich App at 342 (2011).

The nonconforming use issue is not dispositive of this appeal, however. The validity of Austin's use of the property turns on whether the horse rescue project constitutes a farm operation within the meaning of the RTFA.

III. *BATESON* AND THE GAAMPS

The Township next argues that the trial court erred by declining to receive evidence concerning compliance with the generally accepted agricultural management practices (GAAMPs). In *Bateson*, this Court held that a person asserting a defense under the RTFA has the burden of proving by a preponderance of the evidence that (1) the activity at issue is a statutorily protected farm or farming operation; and (2) the activity at issue complies with the GAAMPs. *Bateson*, 302 Mich App at 494, 496, 500-501. Specifically, the Court stated, "[a]ppellants [the landowners] bear the burden to prove compliance with the GAAMPs by a preponderance of the evidence." *Id*. at 501.

The *Bateson* decision did not establish a new principle of law, nor did it overrule settled precedent. The decision interpreted and applied the RTFA to explain the relevant burden and standard of proof. When the Court issued *Bateson*, these appeals were open on direct review. The trial court's refusal to consider the GAAMPs in this case is directly contrary to the *Bateson* holding. Accordingly, *Bateson* requires reversal of the trial court's judgment and a remand for further proceedings. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 220; 732 NW2d 41 (2007) (retroactivity of decisions generally); *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 94; 795 NW2d 205 (2010) (judicial decisions apply to cases open on direct review).[2]

IV. COMMERCIAL PRODUCTION UNDER THE RTFA

The Township contends the trial court erred by determining that Austin's horse rescue project was a commercial production within the meaning of the RTFA, MCL 286.472. The Township further contends that the commercial production issue is solely a matter of law, which this Court should review de novo. We disagree with both contentions.

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[2] We acknowledge that the materials Austin filed on appeal contain information about whether Austin complied with certain GAAMPs after trial. These materials are not part of the trial court record and cannot be considered on appeal. MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). On remand, Austin has the burden of proving GAAMPs compliance by a preponderance of the evidence. Austin is not limited to evidence offered at the original evidentiary hearing, but may also offer additional evidence in an attempt to meet this burden.

The RTFA definitions applicable to the issue of commercial production are as follows:

> (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:
>
> * * *
>
> (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, . . . *livestock, including breeding and grazing, equine,* . . . . [MCL 286.472.]

The RTFA does not define the term "commercial production." In *Shelby Charter Twp v Papesh*, 267 Mich App 92, 100-101; 704 NW2d 92 (2005), the Court defined commercial production under the RTFA as "the act of producing or manufacturing an item intended to be marketed and sold at a profit." The *Papesh* Court noted "there is no minimum level of sales that must be reached before the RTFA is applicable." *Id*. at 101 n 4. Similarly, the *Bateson* Court determined that a farmer has the burden of proving by a preponderance of the evidence that he or she intended to produce farm products and to sell them at a profit. 302 Mich App at 498.

In this case the trial court assessed the evidence of Austin's intent and determined that Austin intended to operate the horse rescue project as a commercial production. Absent clear error, we cannot overturn the court's assessment of Austin's intent. As the trial court noted, nothing in the RTFA requires that a farmer demonstrate that the farming operation is actually profitable. The record is sufficient to support the trial court's finding on intent if the evidence indicates that the operator produced farm products with the intent to market and sell them at a profit. MCL 286.472(a); *Papesh*, 267 Mich App at 101 Here, Austin testified that he intended to produce farm products—including horses and manure—and to sell those products at a profit. This evidence supports the trial court's determination that Austin's horse rescue project is a commercial production within the meaning of the RTFA. Accordingly, there was no clear error in the trial court's determination that the horse rescue operation is a commercial production under the RTFA.

V. COSTS AND ATTORNEY FEES

The Township argues that because the case must be reversed under *Bateson*, this Court must also reverse the attorney fee award. However, our Supreme Court has explained that when a remand is required to determine which party will prevail in the underlying action, the appellate court should vacate the accompanying statutory attorney fee award, to be reinstated by the trial court if the same party prevails on remand. *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 133; 560 NW2d 43 (1997).

In accordance with *Vugterveen*, we must vacate the award of costs and attorney fees and remand with instructions to reinstate the award if Austin prevails on remand. The trial court retains discretion to award additional costs and fees as appropriate. MCL 286.473b.

In his pro se materials, Austin appears to be attempting to challenge the trial court's denial of his request for reimbursement of the costs of caring for the animals during the pendency of the proceedings. Austin did not file a cross appeal, so a challenge to the trial court's ruling on costs is not properly before this Court. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 220; 625 NW2d 93 (2000).

VI. CONCLUSION

Judgment reversed, case remanded for further proceedings consistent with this opinion and with *Bateson*, 302 Mich App 483. Award of costs and attorney fees vacated, to be reinstated if Austin prevails on remand. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro