STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN ANIMAL FARMERS ASSOCIATION, and DOUGLAS L. MILLER, Plaintiffs-Appellants, v DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT, Defendant-Appellee.	UNPUBLISHED March 1, 2012 No. 305302 Ingham Circuit Court LC No. 11-000395-CZ

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order denying their motion for summary disposition and request for preliminary injunction and granting summary disposition in favor of defendant pursuant to MCR 2.116(I)(2). For the reasons stated in this opinion, we affirm.

I. FACTS & PROCEEDINGS

Plaintiff Michigan Animal Farmers Association ("MAFA") is a non-profit corporation whose members own and operate farms that raise or keep various breeds of swine, including Old World Swine, Razorback, Eurasian Boar, and Russian Boar. Plaintiff Douglas Miller is a MAFA member who owns a game ranch where he raises Russian and Eurasian Boar and organizes boar hunts for paying customers.

On December 9, 2010, the director of the Department of Natural Resources and Environment (DNRE) issued Invasive Species Order Amendment No. 1 of 2010 ("the ISO amendment"). Pursuant to the ISO amendment, "wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, [E]urasian wild boar and Russian wild boar (*Sua scrofa Linnaeus*)" were added to the list of species prohibited under the invasive species act, MCL 324.41301 *et. seq*.[1] Under the invasive species act, parties in unlawful possession of

[1] MCL 324.41301 *et seq*. is actually part of the Natural Resources and Environmental Protection Act (NREPA), but it is referred to throughout this litigation by both parties by its popular name, the "invasive species act."

prohibited species are subject to civil and criminal penalties. MCL 324.41309. The ISO amendment provided that the additions to the list of prohibited species would become effective on July 8, 2011, and directed that defendant consult with the Michigan Department of Agriculture on "the development of a phased compliance protocol" for the implementation of the ISO amendment. It was decided that enforcement of the ISO amendment will be deferred until March 31, 2012, to allow "owners of shooting and breeding facilities," such as plaintiffs, an opportunity "to cease possession of all such swine before determinations of noncompliance will be rendered."

On May 17, 2011, plaintiffs filed their first amended complaint for declarative and injunctive relief, which alleged that the ISO amendment was an unconstitutional taking of plaintiffs' property, that defendant's director lacked the authority to issue the ISO amendment, that the swine listed on the ISO amendment were not invasive species as defined by the invasive species act, and that plaintiffs would be irreparably harmed if the ISO amendment were allowed to take effect. Defendant answered plaintiffs' complaint and disputed all plaintiffs' allegations.

On June 1, 2011, plaintiffs moved the trial court for summary disposition pursuant to MCR 2.116(C)(10), or for a preliminary injunction in the alternative. Defendant filed a response requesting summary disposition in its favor pursuant to MCR 2.116(I)(2). On June 22, 2011, a hearing was held regarding plaintiffs' motion for summary disposition. After hearing arguments from both parties, the trial court rejected each of plaintiffs' arguments, denied plaintiffs' request for a preliminary injunction, and granted summary disposition in favor of defendant pursuant to MCR 2.116(I)(2). A conforming order was entered on July 14, 2011.

Plaintiffs now appeal the trial court's order denying their motion for summary disposition and granting summary disposition in favor of defendant. On appeal, plaintiffs maintain that the ISO amendment is invalid for several reasons.

II. STANDARDS OF REVIEW

We review a trial court's decision to grant or deny summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is properly granted to the opposing party pursuant to MCR 2.116(I)(2) "if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996), citing MCR 2.116(I)(2).

Issues of statutory interpretation are questions of law that we review de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). We also review issues of constitutional law de novo. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010).

III. THE AUTHORITY OF THE DNRE DIRECTOR

Plaintiffs argue that the ISO amendment is invalid because the DNRE director lacked authority to issue the order. Specifically, plaintiffs argue that Executive Order 2009-45 failed to specifically transfer the authority to add to, or delete from, the list of prohibited species in the invasive species act to defendant, and that accordingly, defendant lacked the authority to issue the ISO amendment because only the Commission of Natural Resources possessed that authority.

MCL 324.41302 delegates the authority to add to or delete from the list of prohibited or restricted species to the Commission of Natural Resources. Pursuant to Executive Order 2009-45,[2] the Commission of Natural Resources was transferred, by type II transfer, to the director of the DNRE.[3]

The governor has extensive authority to reorganize the executive branch of government pursuant to Const 1963, art 5, § 2, which provides in pertinent part:

> [T]he governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor.

Accordingly, "'art 5, § 2 enables the Governor to enact laws affecting the executive branch, just as the Legislature can' by issuing executive orders and submitting them to the Legislature." *Mich Mut Ins Co v Dir, Dep't of Consumer and Indus Servs*, 246 Mich App 227, 236; 632 NW2d 500 (2001), quoting *House Speaker v Governor*, 443 Mich 560, 578; 506 NW2d 190 (1993).

Because art 5, § 2 is not self-executing, the Executive Organization Act (EOA), MCL 16.101 *et seq.*, was enacted to serve as the enabling legislation for that provision. *Soap and Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 748; 330 NW2d 346 (1982). "The EOA empowers the Governor to transfer an existing department, board, commission, or agency to another principal department." *Mich Mut Ins Co*, 246 Mich App at 237. MCL 16.103 provides that the transfer of an agency to another principal department may be a type I, type II, or type III transfer depending on the intended effect of the transfer. MCL 16.103 provides in pertinent part:

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[2] Issued on October 8, 2009.

[3] Executive Order 2011-1 abolished the DNRE and transferred its authority and responsibilities to the newly created Department of Natural Resources and Department of Environmental Quality. It is not disputed that Executive Order 2011-1 does not affect the ISO amendment or any lawsuit filed against the DNRE.

> (a) Under this act, a type I transfer means the transferring intact of an existing department, board, commission or agency to a principal department established by this act. When any board, commission, or other agency is transferred to a principal department under a type I transfer, that board, commission or agency shall be administered under the supervision of that principal department. Any board, commission or other agency granted a type I transfer shall exercise its prescribed statutory powers, duties and functions of rule-making, licensing and registration including the prescription of rules, rates, regulations and standards, and adjudication independently of the head of the department. Under a type I transfer all budgeting, procurement and related management functions of any transferred board, agency or commission shall be performed under the direction and supervision of the head of the principal department.
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> (b) Under this act, a type II transfer means transferring of an existing department, board, commission or agency to a principal department established by this act. Any department, board, commission or agency assigned to a type II transfer under this act shall have all its statutory authority, powers, duties and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and procurement, transferred to that principal department.
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> (c) Under this act, a type III transfer means the abolishing of an existing department, board, commission, or agency and all its statutory authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, are transferred to that principal department as specified under this act.

In this case, it is not disputed that the transfer of the Commission of Natural Resources to defendant was a type II transfer. This Court has explained that a commission "reassigned to a principal department by a type II transfer loses its autonomous control over its functions." *Mich Mut Ins Co*, 246 Mich App at 238. In contrast, commissions transferred by a type I transfer retain independent authority separate from the principal department, and the principal department is barred from removing substantive functions vested by law in the transferred commission. *Id.* Type III transfers abolish the existing board, office, commission or agency and reassign their functions to the principal department. *Id.* at 238-239.

Because the commission in this case was transferred to defendant by a type II transfer, the commission no longer has autonomous control over its functions, and pursuant to the transfer, defendant is vested with authority to carry out the functions previously delegated to the commission. As explained by the Court in *Soap and Detergent Ass'n*, 415 Mich at 749, a commission transferred by a type II transfer loses control of "all its statutory authority, powers, duties and functions," because control is transferred to the principal department. In this case, defendant is the principal department, and accordingly, it is defendant that had the authority to issue the ISO amendment. Therefore, contrary to plaintiffs' argument, it was not necessary for the governor to specifically provide that defendant would have the authority to add species to the list of prohibited species because Executive Order 2009-45 transferred, by type II transfer, the entire Commission of Natural Resources to defendant.

Plaintiffs also argue that MCL 16.107(a), which prohibits the head of a principal department from removing any substantive function vested by law in an agency, prohibited defendant from "reassigning" the power to issue the ISO amendment to its director. Plaintiffs' argument lacks merit. MCL 16.107 "delineates the relationship between the transferred agency and the principal department which acquires the agency." *Soap and Detergent Ass'n*, 415 Mich at 749. Pursuant to subsection (a), the department head has the power to allocate functions among the agencies subsumed in the department with the approval of the governor, but the department head is not permitted to remove substantive functions vested by law in an agency or officer. *Id.*; MCL 16.107(a). However, pursuant to subsection (b), if a type II or III transfer is involved, the department head has greater authority. *Id.*; MCL 16.107(b). Subsection (b) provides that "all prescribed statutory functions of rule making, licensing and registration including the prescription of rules, regulations, standards and adjudications shall be transferred to the head of the principal department into which the department, commission, board or agency has been incorporated." MCL 16.107(b).

Because Executive Order 2009-45 transferred the Commission of Natural Resources to defendant by a type II transfer, it was the governor that "reassigned" the power to add species to the list of prohibited species, not the head of defendant. Accordingly, MCL 16.107(a) is not implicated. Further because it was a type II transfer, the commission lost control of "all its statutory authority, powers, duties and functions." Therefore, because we conclude that Executive Order 2009-45 was a proper exercise of the governor's power, and that pursuant to the order all statutory authority, powers, duties and functions of the Commission of Natural Resources were transferred to defendant, defendant had the authority to issue the ISO amendment, and defendant's action did not violate MCL 16.107(a).

IV. REQUIREMENTS FOR LISTING SPECIES

Plaintiffs argue that the statutory requirements for listing species as prohibited pursuant to MCL 324.41302(3) are not satisfied in regard to the species listed by the ISO amendment.

MCL 324.41302(3) provides in pertinent part:

> (3) The commission of natural resources or the commission of agriculture, as applicable, shall list a species as a prohibited species or restricted species if the commission of natural resources or commission of agriculture, respectively, determines the following:
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> (a) For a prohibited species, all of the following requirements are met:
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> (*i*) The organism is not native to this state.
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> (*ii*) The organism is not naturalized in this state or, if naturalized, is not widely distributed in this state.
>
> (*iii*) One or more of the following apply:
>
> (A) The organism has the potential to harm human health or to severely harm natural, agricultural, or silvicultural resources.

(B) Effective management or control techniques for the organism are not available.

The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Naini*, 490 Mich at 246-247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247. An undefined statutory term must be accorded its plain and ordinary meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). A dictionary may be used to determine the ordinary meaning of a word or a phrase. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515-516; 773 NW2d 758 (2009).

Plaintiffs first argue that because the term "native" is not defined in the invasive species act, this Court should adopt the definition of "native" that is set forth in the animal industry act, MCL 287.701 *et seq*. Plaintiffs argue that the species listed as prohibited by the ISO amendment are "native" pursuant to the definition of the term set forth in the animal industry act, and accordingly, the requirements set forth in MCL 324.41302(3)(a)(*i*) for listing a species as prohibited are not satisfied. MCL 324.41302(3)(a)(*i*) requires that "the organism is not native to this state."

Michigan law recognizes that "all statutes relating to the same subject, or having the same general purpose, should be read . . . as together constituting one law, although enacted at different times, and containing no reference one to the other." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 427; 565 N.W.2d 844 (1997) (quotation and citation omitted).

We reject plaintiffs' argument that the invasive species act and animal industry act are statutes *in pari materia*. While both statutes deal with animals generally, they do not relate to the same subject matter, nor do they have the same general purpose. The animal industry act pertains to the transmission of disease among animals and from animals to humans, and applies its definition of "native" to individual animals, rather than species. In contrast, the invasive species act deals with the introduction of entire species of animals into the state's ecosystem, and the regulation of any potentially harmful species. Further, the animal industry act specifically limits the application of its defined terms, stating that "[f]or the purposes of this act, the words and phrases defined in sections 3 to 6 have the meanings ascribed to them in those sections." MCL 287.702. Accordingly, the two acts should not be read together, and we employ traditional rules of statutory interpretation to determine the meaning of "native" under MCL 324.41302(3)(a)(*i*).

Webster's College Dictionary defines "native" in the context of plants and animals as "originating naturally in a particular country or region, as animals or plants." *Random House Webster's College Dictionary* (1992). Under this definition, the swine listed pursuant to the ISO amendment are clearly not native, as they do not naturally originate in the state of Michigan, but rather are imported into the state for breeding and hunting purposes. As such, the first requirement for mandatory listing on the prohibited species list is met in this case.

Next, plaintiffs argue that the swine prohibited by the ISO amendment are "naturalized," and accordingly, do not meet the requirements for mandatory listing. MCL 324.41302(3)(a)(*ii*) requires that "[t]he organism is not naturalized in this state or, if naturalized, is not widely

distributed in this state." Like the term "native," there is no statutory definition of the term "naturalized" in the invasive species act. Plaintiffs argue on appeal that the term should be defined as "to cause (as a plant) to become established as if native." Plaintiffs further argue that the term "native" in the definition of "naturalized" should be defined as in the animal industry act.

Plaintiffs' approach to defining the term "naturalized" fails to consider the common and ordinary definition of the term, and instead imports the technical definition of "native" found in the animal industry act. Webster's College Dictionary defines "naturalize" in the context of plants and animals as "to introduce (plants, birds, etc.) into a region and cause them to flourish as if native." *Random House Webster's College Dictionary* (1992). Under the facts of this case, it is clear that the swine covered by the ISO amendment have been introduced into the state of Michigan; however, it is also clear that those swine have not been caused to flourish as if native. Plaintiffs admit that their swine are bred and kept in captivity, and are not intentionally permitted to run at large. Such swine, though capable of causing damage in the event they escape captivity, cannot properly be said to be flourishing as if native to the state. Moreover, even if we were to consider these species to be "naturalized" for sake of argument, the swine are not "widely distributed in this state." As such, the second requirement for mandatory listing on the prohibited species list is satisfied.

Finally, plaintiffs argue that there are effective management or control techniques available for the swine listed as prohibited by the ISO amendment. MCL 324.41302(3)(a)(*iii*) requires either that "[t]he organism has the potential to harm human health or to severely harm natural, agricultural, or silvicultural resources" or that "[e]ffective management or control techniques for the organism are not available." Even assuming plaintiffs' assertion that effective management or control techniques are available is accurate, the record supports the trial court's conclusion that the swine listed as prohibited by the ISO amendment have "the potential to harm human health or to severely harm natural, agricultural, or silvicultural resources." Accordingly, all the requirements set forth in MCL 324.41302(3) are satisfied in regard to the species listed by the ISO amendment.

Plaintiffs also argue, for the first time on appeal, that MCL 324.41302(1) cannot provide a basis for the ISO amendment because that subsection fails to provide a constitutionally permissible basis for delegation of authority because it does not provide sufficient standards to govern the exercise of the delegated authority. In light of our conclusion that the ISO amendment was properly issued pursuant to subsection 41302(3), we need not address plaintiffs' argument in regard to subsection 41302(1).[4]

V. REGULATORY TAKING WITHOUT JUST COMPENSATION

[4] The invasive species act provides that a species *may* be added to the list of prohibited species if the requirements of subsection 41302(1) are satisfied, and that a species *shall* be added to the list of prohibited species if the requirements of 41302(3) are satisfied.

Lastly, plaintiffs argue that enforcement of the ISO amendment will constitute a regulatory taking of their property without just compensation in violation of Const 1963, art 10, § 2, and accordingly, request an injunction to prevent the ISO amendment from taking effect.[5]

A trial court's determination regarding a motion for injunctive relief is reviewed for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). A trial court abuses its discretion when its determination falls outside of the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4). In determining whether to issue a preliminary injunction, a court must consider four factors: (1) harm to the public if the injunction issues; (2) whether harm to the applicant absent temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).

Even assuming plaintiffs could demonstrate that the first three factors weigh in favor of granting an injunction, plaintiffs cannot demonstrate that they would suffer irreparable injury if an injunction does not issue. Enforcement of the ISO amendment is deferred until March 31, 2012, to allow "owners of shooting and breeding facilities" an opportunity "to cease possession of all such swine before determinations of noncompliance will be rendered." Accordingly, the failure to enjoin the ISO amendment will not cause plaintiffs irreparable harm because owners of prohibited swine will not immediately lose their property, and any property that is lost will be subject to a potential claim for governmental compensation in the Court of Claims. Therefore, we conclude that the trial court did not abuse its discretion by denying plaintiffs' motion for an injunction.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

[5] We note that the Court of Claims is the proper venue for a regulatory taking claim such as the one plaintiffs assert; however, this Court has recognized a trial court's jurisdiction to grant equitable relief in order to prevent an unconstitutional taking before it occurs. *Bales v Mich State Highway Comm*, 72 Mich App 50; 249 NW2d 158 (1977).