

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BARAGA

ROGER TURUNEN, d/b/a HOGAN LAND
IMPROVEMENT CO.,

Plaintiff,

v

File No. 12-6259-CZ
Hon. Charles R. Goodman

RODNEY A. STOCKES, DIRECTOR, MICHIGAN
DEPARTMENT OF NATURAL RESOURCES, and the
MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Defendants.

OPINION AFTER REMAND

At a special session of the Baraga County Circuit Court, held in the Courthouse in the City of Houghton, Houghton County, Michigan on this 12th Day of September, 2019.

Present: HONORABLE CHARLES R. GOODMAN, 12th Circuit Judge

* * * * *

STATEMENT OF CASE

As noted by the Court of Appeals, this cause of action began in 2012. The case arises as a result of the Michigan Department of Natural Resources (DNR) declaring that Mr. Turunen was raising and marketing illegal swine.

In 2010, the DNR issued Invasive Species Order Amendment 1 (ISO). The amendment added to Michigan's list of invasive species Russian boar and hybrids thereof. The amendment read in pertinent part:

“Possession of the following live species, including a hybrid or genetic variant of the species, an egg or offspring of the species or of a hybrid or genetically engineered variant, is prohibited.

* * *

“(b) Wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, eurasian wild boar, Russian wild boar (*Sus scrofa* Linnaeus).

This subsection does not and is not intended to affect sus domestica involved in domestic hog production [§ 40.4(1)(b).]

In the case of *Johnson v Department of Natural Resources*, 310 Mich App 635 (2015), the Court of Appeals determined the ISO to be constitutional. In *Johnson*, however, the Appellate Court was not called upon to review the constitutionality of the ISO as it applied to specific animals, since the plaintiffs in that case admitted that they, at that time, owned prohibited pigs.

Unlike the situation reviewed by the Court of Appeals in *Johnson*, Mr. Turunen does not concede that the eight (8) pigs presently at issue are *Sus scrofa*. Instead, it was necessary for the DNR to inspect Mr. Turunen's animals and thereby decide upon each animal's legality. To do so, the DNR relied upon phenotypes exhibited by each of Mr. Turunen's fifteen (15) pigs. The Court of Appeals identified the phenotypes utilized by the DNR as a guide for their identification of *Sus scrofa*.

"The sum of those characteristics were: 1) an arched dorsal profile or arched back; 2) front shoulders that were larger than the hind quarters; 3) darker colored fur toward the hooves; 4) 'dark brown to blackish in color, sometimes gray' fur with 'light-tipped bristles;' 5) erect ears and a straight tail that were both darker at the tips; 6) a facial mask that appeared as a light-colored beard; 7) more slender from a frontal profile with eyes that appeared more on the side of their head, and 8) an elongated rostrum or nose." Mich App unpub # 336075 (2018).

This case is again before this Court having been remanded by the Court of Appeals. Because Mr. Turunen disputes the DNR's classification of eight (8) of his pigs as ISO prohibited, a question arises as to the constitutionality of the ISO as it was applied to Mr. Turunen's animals. The Court of Appeals has directed this Court to address that issue. The Court of Appeals has further directed the Court to analyze each disputed animal and thereby make a factual determination regarding the legal status of each.

In furtherance of the Court of Appeals' directives, this Court has reviewed the legal briefs submitted by counsel on behalf of their clients; and, on August 14, 2019, the Court heard oral argument on the issues which are the subject matter of the remand. At oral argument, the Court was advised that all eight (8) disputed pigs are now deceased. The death of the pigs at issue raises a question of mootness. As stated by the Court of Appeals in the case of *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359 (1998).

"A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights."

Courts do not decide moot issues or questions; however, Defendant avers that the issues presented in this case are not moot. Defendant asserts that should it be determined that Mr. Turunen possessed illegal animals, he would then be subject to sanctions. The Court disagrees.

Prior to the DNR categorizing eight (8) of Mr. Turunen's pigs as illegal, this Court granted a preliminary injunction to Plaintiff that permitted and authorized Plaintiff to continue to raise and market his pigs during the pendency of this litigation. The DNR cannot, in any way, sanction Mr. Turunen for conducting his business in compliance with a valid and effective court order.

In any event, the Court will comply with the remand order of the Court of Appeals and address the issues which were raised by that Court in its July 5, 2018, opinion. This Court incorporates by reference the findings and conclusions which were set forth in this Court's Opinion and Order dated November 22, 2016.

ISSUE ONE Constitutionality of the ISO as applied

The *Johnson* court set forth on pages 657-658 the standard regarding the application of a law.

“‘Due process requires that a State provide meaningful standards to guide the application of its laws.’ *Pacific Mut. Life Ins., Co. V Haslip*, 499 U.S. 1, 44, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991) (O’Connor, J., dissenting). Void-for-vagueness tenets embrace the principle that a law is unconstitutional ‘if its prohibitions are not clearly defined.’ *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The Supreme Court explained:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [*Id.* At 108-109, 92 S.Ct. 2294 (citations omitted).]

Because we are ‘[c]ondemned to the use of words, we can never expect mathematical certainty from our language.’ *Id.* At 110, 92 S.Ct. 2294.

To give fair notice, a statute ‘must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required.’ *Kenefick v. Battle Creek*, 284 Mich. App. 653, 774 N.W.2d 925 (2009) (quotation marks and citation omitted). It may not use terms that require persons of common intelligence to guess at their meaning and differ as to their application. *People v. Hrlic*, 277 Mich. App. 260, 263, 744 N.W.2d 221 (2007). On the other hand, a statute is sufficiently definite if its meaning can be ‘fairly ascertain[ed] by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.’ *People v. Sands*, 261 Mich. App. 158, 161, 680 N.W.2d 500 (2004).”

The *Johnson* court acknowledged that the ISO bred confusion. To minimize the confusion, the DNR issued a declaratory ruling setting forth physical characteristics which it would utilize to identify prohibited animals. (*Sus scrofa*)

The declaratory ruling did little or nothing to minimize the confusion instigated by the ISO; and, in fact, the declaratory ruling may have exacerbated it. The DNR eventually decided to rescind its declaratory ruling. Nonetheless, as the Court of Appeals pointed out in its July 5, 2018, opinion, the DNR continues to refer to the phenotypes set forth in its declaratory ruling as its guide for the identification of prohibited animals.

At oral argument, counsel for the DNR asserted that the depiction of the pig exhibited on the DNR website provided the public, including Mr. Turunen, with fair notice of what would constitute a prohibited animal. It does not.

As admitted by the DNR on page six (6) of its March 28, 2019, brief, the photograph posted on its website is that a pure Russian boar; however, to be deemed illegal by the DNR, an animal need not be a pure Russian boar. In fact, pure unhybridized populations of Eurasian/Russian wild boar probably no longer exist in this country. (Plaintiff Exhibit 90, page 226; T-181)

Concerning Mr. Turunen's eight (8) pigs, the evidence offered by the Defendant at trial would support only a finding that each pig was, at best, a Russian boar hybrid, meaning that each animal would be a cross breed between Russian boar stock and domestic pig stock. (T 685-686). As such, Mr. Turunen's animals would exhibit less than all of the traits which the DNR associates with *Sus scrofa*, (T-47). Mr. Turunen's pigs, therefore, would not mirror the pure Russian boar shown on Defendant's website, and thus, the website's depiction did not provide Mr. Turunen with fair notice as to what would necessarily constitute a prohibited pig in the eyes of the DNR.

The Court finds that the lack of notice provided to Mr. Turunen becomes even more obvious in light of the testimony of Mr. Dwayne Etter who, along with Mr. Brian Roell, was one of the DNR employees who inspected and evaluated Mr. Turunen's animals. Mr. Etter advised that a pig could be categorized as *Sus scrofa*, even if a pig exhibited only one trait which the DNR associates with Russian boar (T-47); and thus, a pig could be ruled prohibited even if it had minimal resemblance to the animal depicted on the DNR's website. ¹ Mr. Turunen was never provided by the DNR with any indication as to the number of traits exceeding one that might distinguish a legal pig from an illegal one.

Because Mr. Turunen was never provided by the DNR with any indication as to the number of traits exceeding one that might distinguish a legal pig from an illegal one, Mr. Turunen could only guess what a DNR examiner might conclude when examining his pigs.

¹ It is important to note that although Mr. Etter testified that he has not personally concluded a pig to be *Sus scrofa* which only exhibited one phenotype of a Russian boar, his testimony did not preclude the possibility that he, or some other DNR examiner, may not do so in the future.

Mr. Turunen was not provided with the required fair notice as to what specifically could cause a pig to be classified as illegal. The ISO, as applied to Mr. Turunen and his animals, was unconstitutionally vague.

In addition to its failure to provide Mr. Turunen with fair notice that his eight (8) pigs could be held to be violative of the ISO, the ISO and its lack of a clear standard regarding enforcement encouraged the subjective application of its provisions. Again, Mr. Turunen would be required to guess as to the number of traits a specific examiner might deem relevant to justify a determination of illegality. The ISO, as applied in this case, impermissibly encouraged arbitrary and discriminatory enforcement, and again, is unconstitutionally vague. See *Van Buren Charter Township v Garter Belt, Inc.*, 258 Mich App 594 (2003); see also *City of Owosso v Pouillon* 254 Mich App 210 (2002).

FACTUAL REVIEW OF MR. TURUNEN'S EIGHT(8) PIGS

The Court was not provided with opportunity to actually view the eight (8) pigs in question. Instead, photographs of the eight disputed pigs were admitted into evidence, and Defendant's experts offered their interpretation of those photographs.

The Court, of course, is not bound by the interpretation of the photographs as rendered by any of the witnesses who testified in this case. Rather, the Court will review the photographs and make its own determination as to what they disclose.

The DNR utilizes phenotypes to decide whether an animal is prohibited under the ISO or not. As noted by the Court of Appeals in its July, 2018, opinion, a phenotype is a specific physical characteristic, not a generalized one. Certain characteristics, however, which the DNR uses to classify a pig as illegal are not specific to *Sus scrofa*, but instead are shared by domestic swine. A straight tail and erect ears are examples. (T 45-46). A shared characteristic is no more descriptive of *Sus scrofa* than it is of *Sus domestica*, and thus, the Court will not lend much weight to such shared characteristics as being evidence of one type of pig or the other. It is the Defendant's burden to demonstrate that each of Plaintiff's eight (8) pigs is illegal. The burden of proof is that of a preponderance.

The Court finds:

EXHIBIT FOUR PIG

There are four photographs entered into evidence depicting this animal.

1. The dorsal profile is best demonstrated in Exhibits 4a and 4d, and neither depicts a profile similar to the pig set forth on Defendant's website. Instead, the pig's back is straight and there is actually an indent before the animal's back reaches the hind quarter.

2. It is difficult to determine whether the pig's front shoulders are larger than its hind quarters. The photos are inconsistent in that regard. In photograph 4a, the shoulders do look larger; but, a different opinion can be reached when looking at photo 4b.
3. Exhibit 4a and 4d depict a consistent fur color throughout the entire side of the animal, including the fur as it covers the animal's hooves.
4. The animal appears to be a mix of brown and black; but, the Court does not find it to exhibit light-tipped bristles² of the type shown by the pig depicted on the Defendant's website.
5. The erect ears do not appear to be darker at their tips than at their base. In photograph 4a, the pig's tail seems curled, while in photo 4d, it is straight.
6. There appears to be some degree of a facial mask, but certainly less pronounced than that of the pig depicted on Defendant's website.
7. The animal does not appear to be slender, and its eyes seem to be located in the same general area as the eyes of the other pigs which are shown in photograph 4a.
8. The animal's nose is elongated.

EXHIBIT FIVE PIG

Six photographs of this pig are in evidence.

1. Exhibit 5e is the best depiction of the dorsal profile. It is straight, not arched.
2. No photo sufficiently depicts the animal's front shoulders in relation to its hind quarters to allow the Court to make a reasonable comparison between the two.
3. The animal is standing in mud. In some of the photos, the animal's fur seems to be lighter as it nears the hooves.
4. The lighting affects the Court's ability to clearly discern the animal's fur color. In some exhibits the animal's coat appears to be a mix of dark gray and light brown. Yet, in another photograph, the animal appears to be almost completely black. No photograph depicts light-tipped bristles as depicted by the pig shown in the DNR's website.
5. The animal has erect ears which have lighter colored fur at their tips. The animal's tail is curled.

² Light-tipped bristles are often confused with split tips which exist on domestic swine.

6. There is minimal facial masking.
7. No photograph adequately depicts the pig's frontal profile so as to permit a determination that it is "more slender". The pig's eyes seem to be somewhat close together.
8. The pig has a long nose.

EXHIBIT SIX PIG

Three photographs were entered into evidence depicting this animal.

1. The photographs are inconsistent regarding the animal's dorsal profile. It appears arched in Exhibit 6a, but straight in Exhibit 6c.
2. The photographs do not permit the Court to make a distinction between the relationship of the animal's front shoulders and its hind quarters.
3. The photographs do not adequately depict the animal's fur as it nears its hooves, as the animal is standing in mud. Exhibit 6d does indicate, however, that the animal's fur near its hooves could actually be lighter than the rest of the animal's coat.
4. The animal is dark in color. The Court cannot discern for sure if the animal displays light-tipped bristles or split tips.
5. The pig has erect ears which appear uniform in color. The pig's tail is curled.
6. The only photograph which might depict a facial mask is obscured by another pig. And on the basis of the photographs entered into evidence, the Court cannot find that this pig possesses a facial mask.
7. No photograph adequately depicts the pig's frontal profile. The pig's eyes appear to be somewhat centered.
8. The pig has a long nose.

EXHIBIT SEVEN PIG

There are three photographs of this animal in evidence.

1. The pig's back is not arched; it is indented.
2. The Court cannot determine the size of its front shoulders in relation to the animal's hind quarters.

3. The color of the fur covering the hooves is difficult to discern, because the animal is walking in mud; but, the fur does not appear to become darker as it approaches the animal's hooves.
4. The animal's coat is dark, and no light-tipped bristles or split tips are recognizable.
5. The pig has erect consistently colored ears, and a uniformly colored straight tail.
6. No facial mask can be discerned from the photographs.
7. The angle of the photographs prevent the Court from assessing the pig's slenderness, and the darkness of the photographs obscure the animal's eyes, preventing the Court from adequately assessing them, also.
8. The pig has a long nose.

EXHIBIT EIGHT PIG

Three photographs were entered into evidence regarding this animal.

1. The pig's back appears to be arched; however, the Court would note that in each photograph, the placement of the pig's head is either at or near the ground, which certainly could affect the pig's posture. There is no photograph of this animal which shows the animal's dorsal profile from the side with its head in a straight position.
2. The animal's hind quarters actually appear to be larger than the animal's front shoulders.
3. This pig is standing in mud so the Court cannot discern that the animal's fur is darker as it approaches its hooves.
4. This animal actually appears to be lighter in color than many of the other of Plaintiff's pigs. The Court cannot discern the presence of either light-tipped bristles or split tips.
5. The animal has erect ears which appear consistent in color, and no photograph depicts the animal's tail.
6. The animal has a facial mask.
7. The animal does not appear to be slender, but instead, seems to have a somewhat "tub like" physique. The animal's eyes appear to be centered.
8. The nose of this pig is not as elongated as other pigs which were owned and possessed by Plaintiff.

EXHIBIT NINE PIG

There are three photographs of the Exhibit 9 pig.

1. The pig has an arched back.
2. The front shoulders are smaller than the pig's hind quarters.
3. The photographs do not demonstrate darker fur near the animal's hooves.
4. The pig is relatively light in color, but it does exhibit either light-tipped bristles or split tips.
5. The pig's ears are erect, but they are consistent in color, and the pig's tail is curly. The pig has a facial mask, but less so than the pig depicted on Defendant's website.
6. The pig is not slender, and the eyes are well centered.
8. The pig's face is "dish like".

EXHIBIT TEN PIG

There are three photographs of Exhibit 10 pig.

1. The animal's back is elongated and flattened.
2. The hind quarters of the animal appear more developed than the front shoulders.
3. The fur on the hooves is consistent; although again, it is difficult to discern, as the animal is standing in mud.
4. The animal's fur color is dark, and it appears to exhibit either light-tipped bristles or split tips.
5. The animal has erect ears, and a straight tail; but, the photographs do not provide the Court with any indication if either the ear tips or tail tip are darker in color.
6. The photographs may demonstrate a minimal facial mask, but nowhere near the facial mask depicted on Defendant's website.
7. This is not a slender pig.
8. The pig exhibits, especially in photograph 10b, a dish like face, and its rostrum is much shorter than that depicted by the pig shown on Defendant's website.

EXHIBIT ELEVEN PIG

There are three photographs of Exhibit 11 pig.

1. The pig's back does appear to be somewhat arched.
2. The hind quarters seem to be well developed in comparison to the front shoulders.
3. The photographs do not adequately depict the animal's hooves in order for the Court to make a determination as regards the color of the fur situated on the hooves.
4. This pig appears to be light brown in color, and the Court does not discern the presence of light-tipped bristles or split tips.
5. The animal's ears sag to the side, are uniform in color, and the animal has a curly tail which appears to be darker at its tip.
6. The animal does not have an obvious facial mask.
7. No photograph adequately depicts the animal's frontal profile, or the location of its eyes.
8. The animal has a partially extended rostrum.


Based upon the Court's review of the photographs admitted into evidence, the Court does not find that Defendant met its burden of proof on any of the eight (8) pigs in dispute.

CONCLUSION

The Court concludes:

1. That the ISO is unconstitutionally vague as applied to Plaintiff and his animals.
2. That the Defendant did not meet its burden of proof as regards the eight (8) animals in dispute.

IT IS SO ORDERED



Charles R. Goodman
12th Circuit Court Judge