STATE OF MICHIGAN
COURT OF APPEALS

CITY OF TROY,

Plaintiff-Appellant,

v

GUST PAPADELIS and NIKI PAPADELIS, d/b/a TELLY'S GREENHOUSE AND GARDEN CENTER,

Defendant-Appellees.

UNPUBLISHED
May 10, 1996

No.172026
LC No.91-410854

Before: Doctoroff, C.J., and McDonald and J.B. Sullivan,* J.J.

PER CURIAM.

Plaintiff appeals as of right the order of the Oakland Circuit Court denying its action for an injunction and abatement of a nuisance. We affirm in part and reverse in part.

Defendants are the owners of two adjoining parcels of land located on John R Road. The area, which had been farmed for many years, was zoned for residential use in 1956. Defendants purchased the north parcel (the residential parcel) in 1974, and purchased the south parcel (the greenhouse parcel) in 1977 or 1978. Defendant's residence is located on the residential parcel and a greenhouse nursery is located on the greenhouse parcel. In May of 1991, plaintiff filed a complaint seeking preliminary injunctive relief against certain uses which defendants were making of their property. The trial court denied plaintiff's request and this Court denied leave to appeal. Plaintiff renewed its motion, and the matter proceeded to a full hearing.

Prior to trial, the parties stipulated to certain facts, including that the greenhouse nursery was a legal nonconforming use and that defendants have utilized the southerly portion of the residential parcel for the storage, growing and display of flowers, plants, perennials and shrubs since 1978. At trial, defendant Gust Papadelis testified that, in 1980, he received permission from the Zoning Board of Appeals to build a pole barn, and in 1988 he received permission to build a new greenhouse to replace seven dilapidated greenhouses on the greenhouse parcel. The new greenhouse was approximately

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*Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Rule 1995-6.

4000 square feet larger than the variance granted by plaintiff. Subsequent to a widening of John R in 1988, defendants constructed a parking lot on the residential parcel.

When defendants purchased the residential parcel in 1974, there was an apple orchard on the property. The orchard had "always. . .been" there, and defendants either sold or gave away the apples. There was testimony that the greenhouse parcel was farmed from 1939 to 1976. During that time produce was both sold from the parcel and trucked to market, and greenhouses and cold frames were added to the parcel. Since defendant's acquisition of the greenhouse parcel, the greenhouse business had grown from a few hundred or a thousand dollars a year to close to a million dollars a year.

In denying plaintiff's request for injunction and abatement of a nuisance, the trial court found: that plaintiff was bound by its stipulation, made in the initial action for a preliminary injunction, that defendants' greenhouse and nursery operation was a valid and legal nonconforming use of the greenhouse parcel; that defendants had a right to conduct their greenhouse and nursery operation under the Right to Farm Act, MCL 286.471 *et seq.;* MSA 12.122(1) *et seq.* (RTFA)*;* that the cold frames and shade covers used to protect plants on defendants' property were permitted temporary structures under both the State Construction Code, MCL 125.1502(2); MSA 5.2949(2)(2) and the Right to Farm Act; and that plaintiff was barred by laches from enjoining defendants from storing or growing agricultural items or parking on the residential property.

Plaintiff first claims that the trial court erred in finding that defendants had not illegally expanded their nonconforming use. This Court reviews equity cases *de novo*, and will not reverse unless the trial court's findings were clearly erroneous or we conclude that we would have reached a different result had we occupied the lower court's position. *Schmude Oil v Omar Operating*, 184 Mich App 574; 458 NW2d 659 (1990).

One of the goals of zoning is that uses of property not conforming to municipal zoning ordinances be gradually eliminated. *Jerome Twp v Melchi*, 184 Mich App 228; 457 NW2d 52 (1990). However, a use which is lawful at the time of the enactment of an ordinance may be continued even if the use is nonconforming under the new ordinance, so long as it is substantially the same size and same essential nature as the use existing at the time of the passage of the ordinance. A change in the nature and size of the nonconforming use constitutes a nuisance per se. *Id.*

Plaintiff does not dispute its stipulation that the use of the greenhouse parcel is a legal, nonconforming use of that parcel. Even if it did, we would conclude based on our review of the record that the trial court did not clearly err in finding that the greenhouse parcel was used for agricultural, greenhouse and nursery related purposes prior to the passage of the 1956 zoning ordinance *Jerome Twp, supra.* The record indicates that the prior owners of the parcel had a significant operation as early as the 1940's and that it continued into the 1970's.

As to the residential property, however, plaintiff argues that its stipulation (that defendants have used the portion south of the residence for the storage, growing and display of flowers, plants, perennials and shrubs since 1978) was made by previous, inexperienced counsel, and was contradicted by aerial photographs and plaintiff's witnesses. Plaintiff cites no authority for its apparent position that the trial court erred in denying its motion, which came at the close of proofs, to set aside that stipulation. On that basis alone, plaintiff's claim should be denied. *Hover v Chrysler Corp,* 209 Mich App 314; 530 NW2d 96 (1994).

Moreover, the cases do not support such a position. Indeed, our Supreme Court has stated that any deviation from the rule, that a party must be able to rest secure that an adjudication will be based on stipulated facts, is a denial of due process. *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 277 (1963). See also, *Nuriel v YWCA*, 186 Mich 141; 463 NW2d 206 (1990).

Plaintiff goes on to argue, however, that if it is "stuck" with the stipulation as to the residential parcel, the nonconforming use "could not extend past the house." While plaintiff's argument could be read as a virtual concession that it would be inequitable to obtain relief as to the use of the portion of the residential property south of the house, *City of Hancock v Hueter,* 118 Mich App 811; 325 NW2d 591 (1982), we nonetheless agree that the expansion of the business onto the residential property, including the parking of customer vehicles, was a nonconforming use which is neither the same size nor the same essential nature as the use which existed at the time of the passage of the zoning ordinance.

Stated differently, even if plaintiff were bound by its stipulation as to a portion of the residential property, our analysis would not end there. The defense of laches requires more than the mere passage of time. *Badon v General Motors Corp*, 188 Mich App 430; 470 NW2d 436 (1991). A defendant must show that the passage of time combined with intervening circumstances render it inequitable to grant relief to the plaintiff. *Id.* The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Id.*

In this case, notwithstanding the improvements made by defendants to the properties, there are no exceptional circumstances such that the residential parcel should be excluded from the zoning restrictions. Defendants have not been irreparably harmed by those improvements, and could have avoided any detriment by seeking a variance as to the use of the residential parcel. Their nonconforming use of the residential parcel cannot be shielded by plaintiff's failure to take action more quickly.

Plaintiff also claims that the trial court erred in finding defendants' use of the two parcels protected by the Right to Farm Act. The RTFA prohibits nuisance litigation against a farm or farm operation that conforms to generally accepted agricultural and management practices in furtherance of that purpose. *Steffens v Keeler*, 200 Mich App 179; 503 NW2d 675 (1993); MCL 286.473; MSA 12.122(3). However, the RTFA does not provide protection to a farming operation which is established after a change in zoning requirements. *Jerome Twp, supra.*

Plaintiff first claims that the only "farm product," as defined by the RTFA, that could possibly have been commercially produced on the greenhouse parcel at the time of purchase in 1977 was flowers, and that therefore only the selling of flowers grown on site is protected by the RTFA. Plaintiff further claims that no farm products had been commercially produced on the residential parcel in decades.

The Right to Farm Policy Statement and Procedures adopted by the Michigan Agricultural Commission in 1991 lists greenhouse and nursery production as a farm operation under the RTFA. As to the greenhouse parcel, plaintiff does not provide legal or factual support for its claim that only the selling of flowers grown on site is protected by the RTFA. Moreover, the RTFA looks to the activity in place at the time of the passage of the ordinance. *Jerome Twp, supra.* In any event, plaintiff has stipulated that defendants' use of that parcel is a recognized, legal nonconforming use. Therefore plaintiff's claim is without merit.

As to the residential parcel, however, while the record indicates that it contained an apple orchard for a long time (contrary to plaintiff's claim that "[n]o farm products had been commercially produced on the Residential Parcel in decades if ever"), the expansion of the nursery business onto the residential parcel occurred after the zoning ordinance was enacted and therefore is not protected by the RTFA. *Jerome Twp, supra.* The trial court's finding to the contrary is erroneous.

Plaintiff next claims that much of what is stored and sold on the greenhouse parcel is imported and that therefore defendants are not entitled to protection under the RTFA. Plaintiff relies on *Richmond Twp v Erbes,* 195 Mich App 210; 489 NW2d 504 (1992), in which this Court found that wood pallets which are made from purchased wood and assembled on the property were not farm products under the RTFA. In this case the trial court found that the RTFA does not require plants and flowers to be grown from seed, and that there was evidence that it is standard practice to bring in seedlings and other small plants and shrubs for nursery operations. We distinguish *Richmond Twp,* and are not persuaded that the trial court erred.

Plaintiff further argues that, because there are no generally accepted agricultural and management practices in place for greenhouse operations, defendants cannot derive any benefit from the RTFA. However, MCL 286.473(1); MSA 12.122(3)(1) provides only that, if a farm operation conforms to generally accepted agricultural and management practices, it shall not be found to be a public or private nuisance. The statute does not, as plaintiff suggests, provide that only operations for which there are such practices in place are protected, nor will we read any such requirement into the statute.

Finally, plaintiff claims that defendants' greenhouse is a nuisance per se because, when the surrounding subdivision was developed in the mid 1970's, defendants' property was used only for

selling flowers out of one small greenhouse. This claim is nothing more than a restatement of plaintiff's other claims and has no merit.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Gary R. McDonald
/s/ Joseph B. Sullivan