STATE OF MICHIGAN

COURT OF APPEALS

CITY OF FENTON,

Plaintiff/Appellant/
Cross-Appellee,

v

JOHN NYHOF,

Defendant/Appellee/
Cross-Appellant.

UNPUBLISHED
April 15, 1997

No. 186625
Genesee County
LC No. 93-020310

Before: Reilly, P.J., and Wahls and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals the trial court's order denying both a preliminary and permanent injunction to abate defendant's violative land-use. On appeal, plaintiff asserts that, pursuant to statute, defendant's land-use violation constituted a nuisance per se which the trial court was required to abate. Defendant filed a cross-appeal that the trial court was not required to issue an injunction because his use was not within plaintiff's ordinance. We reverse.

Defendant has owned a parcel of land located in the city of Fenton in excess of eighteen years. This land has been zoned for low-density, single family residences. Absent a variance or special use permit, commercial uses on the property are prohibited. At the time defendant purchased the land, he believed that he could pursue his automotive paint and repair business upon his property.

In 1978, a zoning and building inspector for plaintiff inspected defendant's property for zoning violations. The inspector determined that defendant was utilizing residential property for a commercial use in violation of plaintiff's zoning ordinance. However, the inspector informed defendant that if he did not "force an issue and go in bigger business that maybe nothing would ever happen." Consequently, defendant took steps to keep a low profile for his business. Defendant's attorney sent a letter to plaintiff stating that steps had been taken to maintain a low profile and that no further legal action was

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* Circuit judge, sitting on the Court of Appeals by assignment.

warranted. Another letter was sent by defendant's then-wife explaining that defendant was moving his business to a commercial location outside of the city.

Defendant continued his violative use for the next eighteen years. During this period, at least five complaints were filed by residents complaining of defendant's business activity upon his land. In 1985 and 1991, plaintiff sent letters to defendant requiring that he cease his business. Defendant ignored these letters. Pursuant to an inspection in 1993, another letter was sent to defendant informing him of the violation and again defendant ignored the notice, which led to the present action. After a bench trial, the trial court held that defendant's use did not constitute a nuisance per se, and that no injunction would issue due to the equitable defenses of estoppel and laches.

Plaintiff first claims the trial court erred by not determining that, pursuant to statute, defendant's violation of its zoning ordinance constituted a nuisance per se which the trial court was required to abate. We agree.

Statutory interpretation is a question of law that is reviewed for error de novo on appeal. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995).[1] Defendant's land was located in an area zoned as an RDR Rural Residential District. This district allows single-family residences, farms, public and private stables, and other miscellaneous uses of a non-commercial nature. Because the ordinance does not specifically refer to commercial business activities as a permitted use, the activity is prima facie prohibited. *Bangor Twp v Spresny*, 143 Mich App 177, 170; 371 NW2d 517 (1985). Thus, by carrying on a commercial auto paint and repair business on the premises, defendant was in violation of the applicable zoning ordinance.

MCL 125.587; MSA 5.2937 states in relevant part:

> A building erected, altered, razed, or converted, or a use carried on in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the building or land, or both the owner and the agent, are liable for maintaining a nuisance per se.

Therefore, once the contested activity is shown to be in violation of a zoning ordinance, the party bringing the action need not prove a nuisance in fact, as the zoning violation renders the use a nuisance per se. *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990); *High v Cascade Hills Country Club*, 173 Mich App 622, 629; 434 NW2d 199 (1988); *Independence Twp v Eghigian*, 161 Mich App 110, 114; 409 NW2d 743 (1987). Furthermore, a showing of irreparable and immediate harm to the government entity is not required before the complained-of activity may be enjoined. *Independence Twp v Skibowski*, 136 Mich App 178, 184; 355 NW2d 903 (1984). Thus, because the activity violated plaintiff's zoning ordinance, the trial court was required to find the use a nuisance per se pursuant to MCL 125.587; MSA 5.2937. *Towne*, *supra* at 232.

MCL 125.587; MSA 5.2937 requires that once a use is determined to constitute a nuisance per se, the court, "shall order the nuisance abated . . . ." The use of the word "shall" in a statute indicates mandatory rather than discretionary action. *City of Lake Angelus v Oakland Co Rd Comm*,

194 Mich App 220, 224; 486 NW2d 64 (1992). Thus, the Michigan Legislature has mandated enjoinment of land uses prohibited under a municipality's zoning ordinance regardless of their impact upon the health, safety, welfare, and morals of the surrounding community. *Towne, supra* at 231-232; *High, supra* at 630. Accordingly, the trial court erred as a matter of law by failing to enjoin defendant's prohibited activity.

Defendant claims that the activity at issue does not satisfy the definition of "automobile body repair station" as defined by plaintiff's zoning ordinance. As a result, defendant asserts that plaintiff's ordinance is ambiguous and that the ambiguity must be resolved in his favor. We disagree.

The rules governing construction of statutes also govern construction of ordinances. *Albright v City of Portage*, 188 Mich App 342, 350-351 n 7; 470 NW2d 657 (1991); *Settles v Detroit City Clerk*, 169 Mich App 797, 808; 427 NW2d 188 (1988). A word or phrase in a statute, or in this case an ordinance, is to be given its plain and ordinary meaning. *Nat'l Exposition Co v Detroit*, 169 Mich App 25, 29; 425 NW2d 497 (1988). When the language is clear and unambiguous, judicial construction is neither required nor permitted. *Id*. Such an ordinance must be applied, and not interpreted, because it speaks for itself. *Id*.

The fact that defendant's activity did not fit into one specific definition within the ordinance has no bearing on the specified uses permitted within an RDR residential zone. Aside from the enumerated uses, the RDR residential ordinance states that all non-enumerated uses are forbidden.[2] Regardless of the label attached to defendant's use, it was not specifically permitted in the RDR residential zone, and the ordinance was clear that all non-specified uses were prohibited.

Plaintiff also argues that the trial court erred in applying the equitable defense of estoppel and laches in the present case. We agree. Because the trial court employed equitable defenses, appellate review is de novo. After examining the entire record and the evidence presented, the trial court's findings will be upheld unless this Court is convinced it would have reached a different result had it been sitting as the trial court. *City of Holland v Manish Enterprises*, 174 Mich App 509, 511; 436 NW2d 398 (1988).

In order for a municipality to be estopped from enforcing its ordinances, it must be shown that all the elements required for estoppel are satisfied and that exceptional circumstances exist. *Pittsfield Twp v Malcolm*, 375 Mich 135, 146-147; 134 NW2d 166 (1965). This Court has stated that exceptional circumstances exist "where a building is created in good faith reliance on a permit issued by the city, and the only reasonable use for the property is in fact outside the regulations." *Manish Enterprises, supra* at 514. The central inquiry is whether the entire circumstances, viewed together, present compelling reasons for refusing a party's request for an injunction. *Malcolm, supra* at 148; *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 576; 425 NW2d 180 (1988).

Here, defendant misled plaintiff into believing that the violation had been remedied. Furthermore, plaintiff informed defendant that his use was not in conformity with the pertinent zoning ordinance on six different occasions, yet defendant continued his business. In addition, this case does

not involve the building of a structure in response to affirmative representations made by plaintiff. The garage at issue would not be rendered useless if defendant's violative use is enjoined. After reviewing the entire record, it is apparent that exceptional circumstances are not present here, and that the equities are in favor of plaintiff. *Waldo*, *supra* at 576; *Grand Haven Twp v Brummel*, 87 Mich App 442, 445; 274 NW2d 814 (1978).

We also find that the trial court erred by relying upon the doctrine of laches. In order for the defense of laches to be successfully asserted, the one claiming laches must show some prejudice resulting from the other party's lack of due diligence. *Manish Enterprises*, *supra* at 512. In the present action, defendant has not demonstrated sufficient prejudice to warrant the application of this defense. Because plaintiff's zoning ordinance has not changed in the interim, this decision leaves defendant in the same situation as when he originally bought his property. Accordingly, defendant has not suffered prejudice from plaintiff's actions.

Reversed.

/s/ Maureen Pulte Reilly
/s/ Myron H. Wahls
/s/ Nick O. Holowka

[1] We note that because the remedy in this case is equitable in nature, this Court has applied conflicting standards of review. Compare *City of Holland v Manish Enterprises*, 174 Mich App 509, 511; 436 NW2d 398 (1988); *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 568-569; 425 NW2d 180 (1988); *Charter Twp of Lyon v Lazechko*, 197 Mich App 681; 495 NW2d 839 (1992). However, because the equitable nature of the relief is merely ancillary to the actual application of law, de novo review is warranted.

[2] Section 36-5-2 states land "shall be used **only** for one (1) or more of the following **specified uses** . . . ." (Emphasis added.)