J-07

TO: Mayor and Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
DATE: February 22, 2006
SUBJECT: Papadelis v. City of Troy

Enclosed please find a copy of the Opinion and Order issued by Oakland County Circuit Court Judge Colleen A. O'Brien in the most recent Papadelis v. Troy lawsuit. The initial litigation between the City of Troy and the Papadelis family was commenced in May 1991, in an effort to stop the tremendous expansion of Telly's Nursery in a residentially zoned district. The litigation between the parties has continued since that time, since Telly's Nursery continues to expand.

In the most recent case, the Papadelis family filed a complaint against the City and Troy Building and Zoning Director Mark Stimac and Housing and Zoning Inspector Supervisor Marlene Struckman. In this complaint, they asserted three separate counts. First, they argued that the City and its officials had allegedly violated their constitutional rights, and asserted that the City was required to pay damages and reimburse costs and attorney fees under 42 U.S.C. Section 1983. Second, they requested declaratory relief that would allow them to retain their business as is, since it was allegedly protected by the Right to Farm Act (RTFA) and/or the City's ordinance allowing agricultural uses on residential parcels over 5 acres. Third, they requested an injunctive order that would "permanently enjoin the Defendants (City) from interfering with the Plaintiff's agricultural use of the Property by issuing or enforcing previously issued misdemeanor citations, stop work orders or other tickets related to the Plaintiff's use of the Property, or pursuing any action against the Plaintiffs contrary to the RTFA, the State Construction Code Act, any ruling in the Prior Action, and the July 23 Order."

As to Count III, Judge O'Brien held that there was no authority or basis "for issuing such a blanket order" for injunctive relief. In addition, Judge O'Brien held that "there is no question of fact that the actions of Defendants do not implicate any constitutional violations," and dismissed the request for damages and reimbursable costs and attorney fees.

The City's victory in this case was not absolute, however. Judge O'Brien, in her opinion, found that the Papadelis family was conducting agricultural activities, rather than retail sales, on the northern parcel. As a result, the current use of the property is protected by the RTFA. In addition, Judge O'Brien also determined that the Papadelis family was not required to obtain permits from the City to construct the greenhouses on the northern parcel. Under the State Construction Code Act, permits are not required for buildings or structures that are "incidental to agricultural uses of land." Since she found that agricultural uses were occurring, rather than retail sales, Plaintiffs were exempt from the permitting process for their greenhouses. Judge O'Brien also dismissed the City's counter-claim, since she found that they were using the property for agricultural purposes.

If you have any questions concerning the above, please let us know.

05-067029-CZ
OAKLAND COUNTY JUDGE COLLEEN A. O'BRIEN
PAPADELIS,GUS V TROY CITY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GUST PAPADELIS, NIKI PAPADELIS, TELLY'S GREENHOUSE AND GARDEN CENTER, INC., a Michigan Corporation, AND TELLY'S NURSERY, L.L.C., a Michigan Limited Liability Company,

Plaintiffs/Counter-Defendants,

v

Case No. 05-067029-CZ
Hon. Colleen A. O'Brien

CITY OF TROY, A MICHIGAN MUNICIPAL CORPORATION, MARK STIMAC, MARLENE STRUCKMAN, AND JOHN/JANE DOE(S).

Defendants/Counter-Plaintiffs.

_____/

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OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on Plaintiffs/Counter-Defendants' ("Plaintiffs") motion for partial summary disposition and Defendants/Counter-Plaintiffs' ("Defendants") motion for summary disposition pursuant to MCR 2.116(C)(10). The Court, having heard oral argument and having reviewed the parties' respective motions, responses and supporting documentation in light of applicable law, enters the following opinion and order.

Plaintiffs claim this case is about the arbitrary, capricious and unlawful actions of Defendant City of Troy and its officials who have refused to comply with the City's

ordinances, Michigan law and this Court and are attempting to shut down Plaintiffs' lawfully operating greenhouse and plant nursery. In contrast, Defendants claim this case is about Plaintiffs' efforts to expand a retail business in violation of the City of Troy's zoning ordinances.

II. BACKGROUND

The instant case arises out of Plaintiffs' construction of greenhouses on their property, specifically the northern portion of their property. The parties are not new to the Court and have a long and tortured history of litigation. Thus, a detailed background is helpful here.

Plaintiffs Gust Papadelis and Niki Papadelis, husband and wife, are the record titleholders of two contiguous parcels of property located at 3301 John R. Road (the "North Parcel") and 3305 John R. Road (the "South Parcel"). The area, which has been farmed for many years, was zoned for residential use in 1956. Plaintiff Telly's Greenhouse and Garden Center is a Michigan corporation. Plaintiff Telly's Nursery is a limited liability company. The Papadelises, Telly's Greenhouse and Garden Center and Telly's Nursery shall be collectively referred to as Plaintiffs.

Defendant City of Troy ("City") is a municipal corporation. Defendant Mark Stimac is the Director of Building and Zoning for the City. Defendant Marlene Struckman is employed by the City as an inspector. Defendants John/Jane Does(s) are municipal agencies or boards and/or those persons within the City whose decisions constitute the official policy of the City.

Mr. and Mrs. Papadelis purchased the North Parcel in 1974 and purchased the South Parcel in 1977 or 1978. The Papadelis residence is located on the North Parcel.

On the South Parcel is a greenhouse/nursery operation. Both parcels are zoned for residential use. The retail nursery operation on the South Parcel, as discussed below, has been found to be a legal nonconforming use of that parcel.

Plaintiffs have utilized the South Parcel for the storage, growing and display of flowers, plants, perennials and shrubs since 1978. In 1980, Mr. Papadelis received permission from the Zoning Board of Appeals to build a pole barn. In 1988, he received permission to build a new greenhouse to replace seven dilapidated greenhouses on the South Parcel. The new greenhouse was approximately 4000 square feet larger than the variance granted by the City. Subsequent to the widening of John R in 1988, Plaintiffs constructed a parking lot on the North Parcel, the residential parcel.

In May of 1991, the City initiated a lawsuit in the Oakland County Circuit Court entitled City of Troy v Gust and Niki Papadelis d/b/a Telly's Greenhouse and Garden Center, Case No. 91-410854-CZ (the "Prior Action"). The City sought injunctive relief against certain uses, which Plaintiffs were making of their property. The City claimed that Plaintiffs' use of their property for a nursery constituted a nuisance per se because it did not conform with the City's zoning regulations.

Circuit Court Judge Jessica Cooper ruled and the Court of Appeals affirmed that the Defendants' operation of a nursery on the South Parcel could continue as a valid nonconforming use. City of Troy v Papadelis, unpublished opinion per curiam of the Court of Appeals, decided May 10, 1996 (Docket No. 172026), affirmed in part and reversed in part. However, with regard to the North Parcel, the Court of Appeals found that Plaintiffs had no right to violate the zoning ordinance because "the expansion of the nursery business onto the residential parcel occurred after the zoning ordinance was

enacted and was not protected by the Right to Farm Act (RTFA)." The Court of Appeals found that the trial court's finding to the contrary was erroneous. Id. at *3.

After the Court of Appeals issued its opinion, the defendants in the appeal, Plaintiffs herein, appealed to the Michigan Supreme Court, arguing that the circuit court erred in finding that they could not continue to use the residential parcel for parking and other nursery-related uses. Troy v Papadelis (On Remand), 226 Mich App 90, 94 (1997). Plaintiffs claimed that since the time they had filed the appeal in the Court of Appeals, the RTFA had been amended to provide greater protection to farming operations. Id. Thereafter, the Michigan Supreme Court vacated the Court of Appeals' earlier decision and remanded the case back to the Court of Appeals for reconsideration in light of the amendment of the RTFA. Id.

On remand, the Court of Appeals reaffirmed that the trial court was correct that Plaintiffs' operation of a nursery on the South Parcel could continue as a valid nonconforming use because it had been used for farming, greenhouse, and nursery purposes since the area was zoned for residential use in 1956. Id. at 95-96. However, as stated by the Court of Appeals, the "closer question" was defendants', Plaintiffs herein, use of the North residential parcel for the operation of the nursery, including the storage and display of farm products and the parking of customer and employee automobiles. Id. at 96. The Court of Appeals found that because there had been no commercial use of the property on the North residential parcel before 1974, when defendants, Plaintiffs herein, purchased it, it was not a valid nonconforming use. The Court of Appeals found that the RTFA did not preclude the application of the Township Rural Zoning Act. Accordingly, because the prior action was filed to enforce a zoning ordinance, the RTFA did not apply.

Id. The Court of Appeals then remanded the case for entry of an order enjoining the commercial use of the North Parcel. Id. at 98. This ruling was in October of 1997. However, the order was not entered until March of 2002, as more fully discussed below.

After the Court of Appeals decision on remand, the Plaintiffs continued to use the North Parcel for parking, selling, receiving, and growing. On February 18, 2002, an item agenda for the City Council meeting was entitled, "Telly's Proposed Consent Judgment." However, Plaintiffs' proposed Consent Judgment was not entered and the City Council was directed to obtain an order regarding the remand from the Court of Appeals.

Finally, on March 27, 2002, an order, approved as to form by both sides, was entered in the Oakland County Circuit Court, which provided:

1. Defendants Gust Papadelis and Niki Papadelis, d/b/a Telly's Greenhouse and Garden Center, are hereby enjoined from commercial use of the northern parcel, more commonly known as 3301 John R. Road, in the City of Troy.

2. Defendant's use of the northern parcel (3301) John R. Road in the City of Troy shall be consistent with the R-1-D residential zoning district of the City of Troy.

3. The Circuit Court shall retain jurisdiction over this mater to enforce the provisions of this order.

4. Defendants shall remove all commercial materials within 30 days of entry of this order on the northern parcel. (3301 John R. Rd.).

5. Defendants shall immediately cease all commercial parking on the northern parcel.

At the time of the Prior Action, the North Parcel consisted of the property with the residential home on it. However, Plaintiffs acquired some additional property north of the home on the North Parcel. Plaintiffs believed that because they owned in excess of

five acres, they could now conduct agricultural/farming operations on the North Parcel under City ordinance.

On April 25, 2002, Plaintiffs wrote a letter to the City Attorney indicating that they believed the purchase of the additional property met the requirements of the ordinance definition for agricultural use. Plaintiffs further indicated that in order to conform with the March 22, 2002 Order, they were moving non-agricultural products from the North Property. Plaintiffs then continued to remove commercial activity from the North Parcel.

On May 13, 2002, the City filed an ex parte motion for order to show cause in the Prior Action case alleging that the Papadelises failed to comply with the terms of the March 27, 2002 Order. On June 26, 2002, this Court conducted an evidentiary hearing. At the evidentiary hearing, Plaintiffs indicated they used the North Parcel for storage, production of annuals, perennials, trees and shrubs. Plaintiffs indicated that what they were doing on the North parcel was consistent with the ordinance. They asserted they did not allow customers on the North Parcel. Annuals were grown in pots on the North Parcel and taken to the South Parcel to be sold.

On July 23, 2002, this Court issued an Opinion and Order, which contained the following findings:

> Although the Papadelises were in contempt of court for their failure to comply with the order entered on March 27, 2002, the actions of the City contributed to the Papadelises' inability to comply with the court's order.
>
> Papadelises are currently in compliance with the Court's order based upon changes they made to the property.
>
> Papadelises' purchase of five acres allows them to use the North Parcel for agricultural use under the City's zoning ordinance.

The City's motion for reconsideration was denied and its claim of appeal to the Michigan Court of Appeals was rejected.

It appears things were somewhat peaceful between the parties until Plaintiffs built two large greenhouses on the North Parcel, behind the house. The business entity, Telly's Greenhouse and Garden Center, owns the greenhouses.

Apparently, Defendant Struckman received a complaint after the greenhouses were constructed. She then inspected the property on April 2, 2003. After Struckman's inspection, she issued two citations to Plaintiff Gust Papadelis for constructing a greenhouse without Board of Zoning Appeals approval as required by Section 57.10 of the zoning ordinance and for constructing a building over 660 square feet in size and more than one-half the ground floor area of the main building contrary to Section 40.57.04 of the zoning ordinance. The tickets were filed in the 52/4 District Court.

On April 10, 2003, Plaintiffs' attorney made a written request to the City to dismiss the tickets premised on the allegation that this Court's July 23, 2002 Order and that the Michigan Right to Farm Act, MCL 286.471, et seq., allowed the structures to be built. Plaintiffs counsel also asserted that the issuance of the tickets constituted contempt of the circuit court's July 23, 2002 order. The tickets were not dismissed.

Thereafter, on April 15, 2003, Plaintiffs filed a lawsuit in federal court. Shortly after filing the federal lawsuit, upon stipulation of the parties, a stay of proceedings was entered in the 52/4 District Court pending final outcome of the federal litigation. The stay in that court has been modified so that it will continue until a final outcome of the instant case now before this Court.

In response to the federal court complaint, the City of Troy filed a counterclaim. Plaintiffs then filed a motion to dismiss the City's counterclaim for procedural reasons. That motion was granted and the City's counterclaim was dismissed without prejudice. The City of Troy then filed its own motion to dismiss Plaintiffs' complaints for both procedural grounds and on the merits. The federal count granted the motion based on procedural reasons but declined to reach the merits on the case. The federal court order directed Plaintiffs to re-file its complaint in this Court. In accordance with that order, Plaintiffs have filed the present cause of action and the Defendants have filed a counterclaim.

III. DISCUSSION

In Plaintiffs' motion for partial summary disposition, Plaintiffs assert that Defendants' Counterclaim should be dismissed, a judgment entered in favor of Plaintiffs on Counts II and III of their Complaint, that Defendants should be adjudged liable to the Plaintiffs on Count I of their Complaint, and that trial should be limited to the issue of damages and attorney fees on the Plaintiffs' claims under 42 USC 1983 and 1988.

In response, Defendants request summary disposition in their favor and request an order dismissing Plaintiffs' Complaint in its entirety with prejudice and an order granting judgment in favor of Defendant City of Troy on its Counterclaim.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. Spiek v Dep't of Transportation, 456 Mich 331, 337 (1998). When deciding the motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. Ritchie-Gamester v Berkley, 461 Mich 73, 76 (1999). The moving

party has the initial burden of supporting its position with documentary evidence, and the party opposing the motion then has the burden of showing that a genuine issue of fact exists. Smith v Globe Life Ins Co, 460 Mich 446, 455 (1999). The nonmoving party may not rest on mere allegations or denials but must set forth specific facts--through documentary evidence--showing that a genuine issue of fact exists. Karbel v Comerica Bank, 247 Mich App 90, 97 (2001).

Count I of Plaintiffs' Complaint asserts a violation of 42 USC 1983. Count II of Plaintiffs' Complaint seeks declaratory relief. Count III of Plaintiffs' Complaint seeks injunctive relief. What can be gleaned from the Counterclaim is that Defendants seek an abatement of nuisance and injunctive relief.

Count I – Violation of 42 USC 1983

Both sides seek summary disposition in their favor as to this count. Plaintiffs have brought their claim under 42 USC 1983, which provides a federal remedy against any person who, under color of state law or custom having the force of law, deprives another of rights protected by the constitution or laws of the United States. See Payton v City of Detroit, 211 Mich App 375, 398 (1995). The state and federal constitutions guarantee that no person will be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, section 2; In re Hawley, 238 Mich App 509, 511 (1999). The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power. Id.

Plaintiffs allege that Defendants violated their substantive due process rights by entering into a course of action designed to impermissibly interfere with their ability to

conduct business. Plaintiffs argue the right that is impacted is their right to put the Property to a use that is not only lawful, but is designated as a principal permitted use under the City's zoning ordinance. Defendants respond that Plaintiffs failed to produce evidence establishing an issue of fact with respect to the Section 1983 claims.

A property owner's right to use its property for lawful purposes is a protected right under the law. A property owner possesses the right to build or improve his or her property, although this right can be subject to legitimate permitting requirements or application of a land-use regulations. Nollan v California Costal Comm'n, 483 US 825, 834 (1987). Malicious, irrational and arbitrary governmental actions, which place restraints on an individual's property rights violate substantive due process. Sinaloa Lake Owners Ass'n v City of Simi Valley, 882 F2d 1398 (CA 9,1989). A substantive due process claim does not require proof that all use of property has been denied, but rather that the interference with property rights was irrational or arbitrary. Id.

Plaintiffs' arguments regarding the constitutional violations are based primarily on their indignation and frustration with Defendants over the events leading up to the instant case. Certainly, the same is fueled by the past dealings and litigation between the parties. However, Plaintiffs fail to provide facts or law that would actually implicate any constitutional violations.

This Court addresses individually Plaintiffs' claims that Defendants engaged in certain arbitrary actions regarding the property and Plaintiffs:

A. The City encourages Plaintiffs to negotiate and spend thousands of dollars on a site plan, then refused to enter into a consent judgment

Plaintiffs claim that in 2001, they approached the City about the possibility of resolving the prior action. Plaintiffs contend they spent a lot of money on site plans but that a consent judgment was never entered. Recall that the issue of Plaintiffs' proposed consent judgment was discussed at the February 18, 2002 City Council meeting. During such meeting, various people opposed the same. The City Council rejected the entry of the consent judgment.

However, Plaintiffs fail to demonstrate how the City's failure to enter into a consent judgment rises to the level of a constitutional violation. Plaintiffs provide no authority for their argument that the City's decision not to enter into a consent judgment constitutes an arbitrary or unreasonable action in violation of the United States or Michigan Constitutions.

Moreover, the evidence shows that Plaintiffs freely took it upon themselves to try and secure a consent judgment. Here, George Papadelis, the son of Plaintiffs Gust and Niki Papadelis, stated in his affidavit that he "believed it would be better for both the City and my family if a consent agreement was in place that governed the use of the Property and allowed us to redevelop the Property to accommodate the business and its potential impact on the neighbors." According to Mr. Papadelis, his family spent thousands of dollars with a professional planner and surveyor in order to develop a plan that would "fairly meet the needs and concerns of our businesses, the City of Troy and our neighbors."

Therefore, the Court concludes that the City's actions in regard to Plaintiffs expenditures and its eventual rejection of the Plaintiffs' proposed does not implicate any constitutional violations.

Plaintiffs further argue that rather than enter into a consent judgment, the City Council voted at the meeting on February 18, 2002 to take Plaintiffs to court. Plaintiffs characterize this as some kind arbitrary action taken against them. However, the evidence indicates that the City Council was not directed to institute any new action. The order sought was based upon the Court of Appeals' ruling on remand from the Supreme Court that commercial activity was prohibited on the North Parcel.

Therefore, the Court concludes that the City Council's seeking of an order corresponding to the Court of Appeals decision on remand does not constitutes an arbitrary or unreasonable action that violated Plaintiffs' constitutional rights.

B. The City ignores this Court's finding that the Papadelises own more than five acres of property.

Recall that on July 23, 2002, this Court issued an Opinion and Order, which found that Defendants were in compliance with the Court's order of March 27, 2002 based on the changes they made and the purchase of the five additional acres which allowed Defendants to use the northern parcel for agricultural use under the Zoning ordinance. Plaintiffs claim that after this Court so ruled they attended a meeting with representatives of the City of Troy, including the City Assessor, Mark Stimac and others, at which time the City's representatives told Plaintiffs that they could not use the Property for agricultural uses because the Property was divided into more than one parcel. At the same meeting, Plaintiffs were told that the City would not combine the parcels into one tax identification. However, the Court concludes that merely being told the same at some meeting, which has no legal effect, does not rise to the level of a constitutional violation of Plaintiffs' property rights.

C. The City initiates a program of placing the Property under surveillance.

The accusation of some kind of "surveillance" is not substantiated. Plaintiffs claim that in February of 2002, the City began to regularly "inspect" the Property looking for violations of the Zoning Ordinance. Plaintiffs claim that the city conducted twenty-one inspections. Plaintiffs have attached at Exhibit J, certain print outs, which are unreadable. Plaintiffs claim that a significant portion of these "inspections" were conducted without any City employees coming on the Property. All that can be gleaned from the evidence is that the City responded to some complaints concerning Plaintiffs' property. Plaintiffs fail to demonstrate how any of the alleged activity violates their constitutional rights.

D. The City's failure to uniformly apply its zoning ordinance.

In their Complaint, Plaintiffs have made no specific claim of a constitutional violation other than substantive due process. However, under Count I, Plaintiffs contend that the City has attempted to preserve the residential character of their Property while at the same time allowing commercial development of nearby property where the Troy Sports Center is located. This appears to invoke an equal protection argument. In their brief, Plaintiffs raise further equal protection violations concerning Defendants' treatment of a poultry farm and another resident with a large garage.

In broad terms, the equal protection doctrine mandates that persons in similar circumstances be treated similarly. See Dowerk v Oxford Charter Twp, 233 Mich App 62, 72-73 (1998). However, notwithstanding the fact that the equal protection claim has not been pled, Plaintiffs fail to provide any specific factual support for their broad assertions. Therefore, the equal protection claim is without merit.

Accordingly, summary disposition as to Count I is granted in favor of Defendants. There is no question of fact that the actions of Defendants do not implicate any constitutional violations.

Count II – Declaratory Relief

Plaintiffs ask this Court to issue a declaratory judgment in their favor that Plaintiffs' agricultural uses of the Papadelises property is a protected activity under the Michigan Right to Farm Act ("RTFA"), MCL 286.471, et seq., and is exempt from the City's zoning ordinance, that, the exemption notwithstanding, the Plaintiffs' use of the property complies with the City's zoning ordinance, and that the Plaintiffs' agricultural uses are exempt from the State Construction Code.

MCL 286.473(1) of the RTFA provides:

> (1) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture. Generally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.

The purpose of the RTFA is to protect farmers from nuisance suits. See Travis v Preston (On Rehearing), 249 Mich App 338, 342 (2002). A "farm" is defined as "the land, plants, animals, buildings, structures, . . . used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products." MCL 486.472. "Farm operation" is defined as "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, ..." MCL 486.472(b). "Farm products" are "those plants and animals useful to human beings produced by agricultural and includes . . . herbs, fruits,

vegetables, flowers, seeds, grasses, nursery stock, trees and tree products." MCL 286.4719(c).

MCL 286.474(6) provides:

> Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

According to the City, Plaintiffs are not farmers facing the possibility of losing the farm. Rather, Plaintiffs are business people trying to justify the unlawful expansion of their retail business under the pretense of operating a farm. The City contends it is not seeking an order to preclude Plaintiffs from engaging in farming activities. The City contends it is seeking an order to prevent the continued unlawful expansion of Plaintiffs' retail business. More specifically, according to the City, the greenhouses on the North Parcel constitute an unlawful expansion of Plaintiffs' retail business, in violation of Section 40.50.03(A) of Troy's Zoning Ordinance. This section provides:

> Non-Conforming Uses of Land
> Where, at the effective date of adoption or amendment of this chapter, lawful use of land exists that is made no longer permissible under the terms of this chapter as enacted or amended such use may be continued, so long as it remains otherwise lawful, subject to the following provisions:
>
> A. No such non-conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this chapter.

In contrast, it is Plaintiffs' position that the operations on the North Parcel are restricted to agricultural uses, including the growing, sustaining and nurturing and

wholesale of various floriculture and horticulture products including flowers, shrubs, trees and bushes. Plaintiffs contend that all of these are farming activities, which are protected under the RTFA.

Accordingly, the issue becomes whether retail sales are taking place on the North Parcel. The Court's focus is directed to the greenhouses that were built on the northern parcel after Plaintiffs' acquired additional property. The City claims there is no dispute that the greenhouses are used for retail. The Plaintiffs claim that Defendants have no evidence that retail sales take place in the greenhouses.

First, the City relies on the fact that Telly's Greenhouse and Garden Center, which operates a retail business on the southern parcel, also owns the greenhouses. Thus, according to the City, the greenhouses must be part of the retail operations. However, this conclusion, without more, does establish that retail operations are taking place out of the greenhouses.

Additionally, the City relies upon the depositions of certain persons residing on neighboring properties. However, such depositions do not establish that retail sales are taking place on the North Parcel.

Here, Rosalie Allie, whose property is adjacent to the northern parcel, was deposed on December 14, 2004. In reference to the North Parcel, Ms. Alie contends that she "has seen customers on the property." Ms. Alie reaches this conclusion because such people were "not dressed in the green that designate Telly's Greenhouse." Ms. Alie also asserts that such people, supposedly not in green, are choosing plants and "someone comes and takes them after they choose them." Ms. Alie cannot state the time when she has seen such activity other than those times when she is in her kitchen because her

"dining nook faces that property so you see everything." Ms. Alie also testified that she had not seen the exchange of any money. In addition, she doesn't know why the people she allegedly saw were on the northern parcel. Thus, all that such testimony shows is that certain unidentified persons, not wearing green, were observed on the northern parcel from a window of a neighbor. The Court finds such evidence does not show that retail operations are taking place on the North Parcel.

The City also relies on the deposition testimony of Donna Dodoro. Ms. Dodoro claims she knows that the people on the northern property are customers because she can see them from her backyard. She states such people are "mothers and fathers, sometimes they have their children with them; other times they have an actual Telly's employees with them pointing out different merchandise and directing them to various plants and materials." She contends she has observed the aforesaid mothers, fathers, and children and employees "over the past several years." She never saw money changing hands but that "they would take it to the cash register, which is on the southern property."

Again, the Court finds such testimony to be speculative and not supportive of Defendants' position that retail sales are taking place on the North Parcel. If anything, what the testimony shows is that a cash register is on the southern parcel, which would actually support Plaintiff's position that sales on not taking place on the northern parcel.

Finally, the City points to the admission of Mr. Papadelis that the northern parcel is used by employees and for the purposes of storing overflow product from the retail business. The Court fails to see how this supports the City's argument that retail sales are taking place on the northern parcel. This admission actually supports Plaintiffs position that retail sales are only taking place on the southern parcel.

In contrast, the evidence presented by Plaintiffs shows that customers are not allowed on the North Parcel. George Papadelis, the president of Plaintiff Telly's Greenhouse and Garden Center, Inc. and the son of Plaintiffs Gust and Niki Papadelis in his affidavit states that the greenhouses and cold frames on the North Parcel are used for cultivation, only. Customers are not allowed inside of them. When the plants inside are ready for retail sale, they are moved from the North Parcel to the South Parcel. Any customers who wander into the area are immediately escorted back to the South Parcel. There is no evidence that cash registers are located on the North Parcel or that any exchange of money is taking place on the North Parcel.

Defendants offer no contrary evidence that would create a question of fact as to whether retail sales are occurring on the North Parcel. Accordingly, because the evidence demonstrates that only agricultural activities are taking place, such use of the property is protected activity under the RTFA.

Plaintiffs further seek a declaration from this Court that the State Construction Code Act, MCL 125.1501, et seq allows the Plaintiffs to construct greenhouses without the need to apply for building permits from the City. The State Construction Code act does not require building permits for buildings or structures that are incidental for agricultural uses of land, so long as they are not used in the business of retail trade. MCL 125.1510(8); MCL 125.1502a(1)(f); MCL 125.1502a(1)(z).

Defendants argue that the State Construction Code Act is not applicable here for the reason that the activities taking place on the North Parcel are retail. However, as set forth above, the Court has found there is no issue of fact that retail sales are not taking

place on the North Parcel. Accordingly, the Court finds the exemption under the State Construction Code Act to be applicable to Plaintiffs.

At this point, the Court wishes to addresses Defendants' Counterclaim. Defendants give scant attention, let alone any analysis, to this particular claim in their brief. In any event, Defendants claim they are entitled to summary disposition for the reason that Plaintiffs' continued use of the northern parcel for activity related to the retail business on the southern parcel is a nuisance per se which must be abated by order of this Court. Pursuant to Section 7 of the City and Village Zoning Act, MCL 125.587, any building erected or use carried on in violation of the zoning ordinance is a nuisance per se entitling the City to a court order abating such nuisance.

As can be gleaned from Defendants' Counterclaim, Defendants are specifically claiming that Plaintiffs' "present use of their property is not in accordance with Section 10.20.02 of Troy's Zoning Ordinance. Section 10.20.01 lists the principal uses permitted in One Family Residential District (R-1A through R-1E). This section provides that "no building or land shall be used and no building shall be erected except for one or more of the following specified uses, unless otherwise provided in this Chapter.

Section 10.20.02 provides:

> Agriculture on those parcels of land separately owned outside the boundaries of either a proprietary on supervisor's plat, having an area of not less than five (5) acres; all subject to the health and sanitation provisions of the Code of the City of Troy.

However, buried in another portion of their briefs, the City contends that Section 10.20.02 is "not applicable to the present case because Plaintiffs are not using the northern parcel located at 3301 John R. for agricultural purposes." The City contends that Plaintiffs "instead, have used that parcel as an expansion of their retail business on

the south parcel in violation of the zoning ordinance." See "Brief in Support of Defendants' Answer to Plaintiffs' Motion for Partial Summary Disposition."

Recall that this Court has previously found that the activities on the North Parcel are agricultural and not retail. Moreover, as correctly noted by Plaintiffs, this Court previously found after the evidentiary hearing on June 26, 2002 that the "Papadelises' purchase of five acres allows them to use the North Parcel for agricultural use under the City's zoning ordinance." Thus, Section 10.20.02 provides no basis for the relief requested by Defendants in their Counter Claim for abatement of a nuisance.

The Court finds the real issue in the Counterclaim to be the expansion of a nonconforming use by Plaintiffs. This would implicate a violation of Section 40.50.03(A) of Troy's Zoning Ordinance. However, as set forth above, this Court has found that retail sales are not taking place on the North Parcel. Thus, there is no expansion of a nonconforming use. Accordingly, there is no violation of Section 40.50.03(A).

Therefore, the Court grants summary disposition in favor of Plaintiffs as to the Counterclaim.

Count III – Injunctive Relief

Plaintiffs ask this Court to permanently enjoin the Defendants from interfering with the Plaintiffs' agricultural uses of the Property by issuing or enforcing previously issued misdemeanor citations, stop work orders or other tickets related to the Plaintiffs' use of the Property, or pursuing any action against the Plaintiffs' contrary to the RTFA, the State Construction Code Act, any ruling in the Prior Action, and the July 23 Order.

Plaintiffs fail to cite to any authority or provide a basis for issuing such a blanket order. The Court finds the language in the order, as requested by Plaintiffs, to be over broad, overreaching and ambiguous.

THEREFORE, IT IS HEREBY ORDERED that summary disposition is granted in favor of Defendants' as to Count I of Plaintiffs' Complaint.

IT IS FURTHER ORDERED that as to Count II, the Court finds that Plaintiffs' use of the North Parcel constitutes an agricultural use, which is a protected activity under Michigan Right to Farm Act ("RFTA"), MCL 286.471, et seq; that Plaintiffs are exempt from Section 40.50.03(A) of the City of Troy's Zoning Ordinance; and that Plaintiffs are exempt under the State State Construction Code Act, MCL 125.1501, et seq,

IT IS FURTHER ORDERED that the relief as requested in Count III is DENIED.

IT IS FURTHER ORDERED that summary disposition in favor of Plaintiffs as to Defendants' Counterclaim is GRANTED.

IT IS FURTHER ORDERED that this Opinion and Order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated: 2-17-06

Colleen A. O'Brien

Hon. Colleen A. O'Brien

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register of Deeds
By: S. Wagner
S. Wagner Deputy