



TO: The Mayor and Members of City Council
FROM: Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
DATE: September 27, 2006
SUBJECT: Papadelis v Troy

In a previous case between Troy and the Papadelis Family (Telly's Nursery), the Michigan Court of Appeals ruled the southern parcel (3305 John R Road) could be used as a nursery business, since it was allegedly used as a nursery prior to the adoption of the zoning classification in 1955. The Court of Appeals limited the commercial use to the southern parcel, and explicitly prohibited expansion to the northern parcel, 3301 John R. Road, which was also owned by the Papadelis family. The northern parcel was required to remain consistent with the residential zoning classification of the property. However, since the time of the first Court of Appeals opinion, the Papadelis family has continued to use the north parcel for their nursery business, on the basis such use was a permitted agricultural use. This use has continuously expanded, resulting in litigation.

In the most recent case before the Michigan Court of Appeals, the Papadelis family argued that the expansion of the nursery to the north parcel was permitted under the current version of the Michigan Right to Farm Act, which was amended in 1999. This intervening amendment to the state statute was not controlling in the earlier Papadelis v. City of Troy lawsuit, but it was dispositive to this opinion. In footnote 1, the Michigan Court of Appeals opines:

We are aware that, under MCL 269.473 (1) (the Right to Farm Act), a business could conceivably move into an established residential neighborhood and start a farm or farm operation in contravention of local zoning ordinances as long as the farm or farm operation conforms to generally accepted agricultural and management practices. Although we might personally disagree with the wisdom of the policy choice codified under MCL 286.473 (1), we are without the authority to override the clearly expressed intent of the Legislature. MCL 286.473 (1) is simply not ambiguous and, therefore, must be enforced as written.

In the attached unpublished opinion, the Michigan Court of Appeals found that Telly's Nursery and Greenhouse is a "farm," as defined under current state law, and therefore the entire operation is entitled to the protections of the Right to Farm Act (MCL 269.473). This is true, even though the expansion to the north parcel has only recently occurred.

Although the City was not successful in its efforts to limit the expansion of the business in a residential district, the City was victorious in obtaining a dismissal of the claims brought against the City and individual employees. The Court of Appeals dismissed the Papadelis' claims that Troy allegedly violated their constitutional rights, which was brought under 42 U.S.C. Section 1983 as a claim for damages. Under this section, a Plaintiff who succeeds in recovering even one dollar in damages would also be awarded all attorney fees and costs incurred in the pursuit of the lawsuit. Since the Court has dismissed these allegations against the City, this effectively precludes the Papadelis family from recovering damages or attorney fees against the City.

Please let us know if you have any questions regarding this matter.

STATE OF MICHIGAN
COURT OF APPEALS

GUST PAPADELIS, NIKI PAPADELIS,
TELLY'S GREENHOUSE AND GARDEN
CENTER, INC., and TELLY'S NURSERY,
L.L.C.,

UNPUBLISHED
September 19, 2006

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

v

CITY OF TROY, MARK STIMAC, and
MARLENE STRUCKMAN,

No. 268920
Oakland Circuit Court
LC No. 2005-067029-CZ

Defendants/Counter-Plaintiffs-
Appellants/Cross-Appellees.

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendants City of Troy (“the city”), Mark Stimac, and Marlene Struckman (collectively “defendants”) appeal as of right from a circuit court order granting partial summary disposition for plaintiffs Gust Papadelis, Niki Papadelis, Telly’s Greenhouse and Garden Center, Inc., and Telly’s Nursery, L.L.C. (collectively “plaintiffs”), and dismissing defendants’ counterclaim against plaintiffs. Plaintiffs cross appeal the same order to the extent that it granted summary disposition to defendants on plaintiffs’ claim under 42 USC 1983. We affirm.

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court denied defendants’ motion for summary disposition under MCR 2.116(C)(10) and granted summary disposition in plaintiffs’ favor under that subrule. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass’n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id.* at 31. In addition, this Court reviews de novo issues of statutory interpretation. *Ford Motor Credit Co v Detroit*, 254 Mich App 626, 628; 658 NW2d 180 (2003).

The Michigan Right to Farm Act (RTFA), MCL 286.471 *et seq.*, “was implemented to protect farmers from nuisance lawsuits.” *Travis v Preston (On Rehearing)*, 249 Mich App 338, 342; 643 NW2d 235 (2002). The RTFA defines “farm,” “farm operation,” and “farm product” as follows:

(a) “Farm” means the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.

(b) “Farm operation” means 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

(c) “Farm product” means those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products, cervidae, livestock, including breeding and grazing, equine, fish, and other aquacultural products, bees and bee products, berries, herbs, fruits, vegetables, flowers, seeds, grasses, nursery stock, trees and tree products, mushrooms, and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture. [MCL 286.472.]

In *Shelby Charter Twp v Papesh*, 267 Mich App 92, 100-101; 704 NW2d 92 (2005), this Court further interpreted the term “commercial production” as used in MCL 286.472(a) and (b) as “the act of producing or manufacturing an item intended to be marketed and sold at a profit.”

It is undisputed that plaintiffs’ property is zoned “R-1D,” or “single family residential.” The city’s zoning ordinance provides as follows regarding single family residential parcels:

10.20.00 PRINCIPAL USES PERMITTED:

In a One Family Residential District (R-1A through R-1E) 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.

10.20.02 Agriculture on those parcels of land separately owned outside the boundaries of either a proprietary or 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.

Defendants argue that plaintiffs are engaging in commercial activity on their northern parcel in violation of the city’s residential zoning ordinance. Plaintiffs contend that their activity on the northern parcel is protected under the RTFA.

Plaintiffs raised this same argument in the previous action between these parties. See *City of Troy v Papadelis*, 226 Mich App 90, 95- 96; 572 NW2d 246 (1997). At that time,

however, MCL 286.474 of the RTFA did not exempt farming operations from local zoning ordinances as this Court recognized. *Id.* at 96. Thus, this Court concluded that “[b]ecause this cause of action was filed to enforce a zoning ordinance, the RTFA is not a defense to this action.” *Id.*

In 1999, the Legislature amended MCL 286.474 to provide as follows:

(6) 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. [Emphasis added.]

In *Shelby Charter Twp, supra* at 107, this Court interpreted this provision and concluded:

Accordingly, the RTFA no longer allows township zoning ordinances to preclude farming activity that would otherwise be protected by the RTFA. Rather, any township ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by the RTFA.

Thus, to determine whether the RTFA preempts the zoning ordinance in this case, we must first determine whether plaintiffs’ use of the north parcel is protected under the RTFA.

The activity on the north parcel satisfies the definition of “farm operation,” and the nursery products involved in plaintiffs’ business constitute “farm products,” under MCL 286.472. The affidavit of George Papadelis, the son of Gust and Niki Papadelis and the president of Telly’s Greenhouse and Garden Center, Inc., reveals that the parcel is used for “agricultural operations includ[ing] without limitation, the storage, growing, sustaining, nurturing and wholesale sale of floriculture and horticulture products.” The affidavit further avers that the greenhouses and cold frames on the parcel are used only for cultivating plants and other agricultural products. In contrast, Mark Stimac, the city’s director of building and zoning, averred in his affidavit that he was not aware of what occurs inside the two greenhouses. George’s affidavit also states that when plants inside the greenhouses and cold frames are ready for sale, they are moved to the south parcel for retail sale. Accordingly, plaintiffs’ use of the north parcel satisfies the definition of “commercial production” as used in MCL 286.472(a) and (b). *Shelby Charter Twp, supra* at 100-101.

Plaintiffs’ use of the north parcel is protected under MCL 286.473(1), which provides:

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 a 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 [GAAMPs] shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.

Thus, “[a]ccording to the plain language of the RTFA, a farm or farming operation cannot be found to be a nuisance if it is commercial in nature and conforms to the GAAMPs.” *Shelby Charter Twp, supra* at 101. George’s affidavit states that plaintiffs’ operations comply with all GAAMPs, as required under MCL 286.473(1). Defendants failed to produce any evidence to the contrary, thereby failing to create a genuine issue of material fact regarding plaintiffs’ compliance with all GAAMPs. Therefore, plaintiffs’ use of the parcel is protected under MCL 286.473(1).

Defendants argue that the RTFA nevertheless does not protect plaintiffs’ operations on the north parcel because they did not exist before the change in land use, i.e., before the parcel was zoned for residential use in 1956. MCL 286.473(2) of the RTFA protects farms or farming operations only if they “existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.”

This provision was at issue in *Jerome Twp v Melchi*, 184 Mich App 228; 457 NW2d 52 (1990). In that case, the property was zoned residential in 1965, and was used for farming strawberries, tomatoes, raspberries, beets, corn, and pickles at that time. *Id.* at 229, 232. In 1979, one of the defendants “captured a wild swarm of bees and established a commercial apiary on the property,” including the sale of bee by-products and bait. *Id.* at 229. The plaintiff township filed a nuisance action against the defendants and sought to enforce the zoning ordinance. *Id.* at 230. The defendants argued that the RTFA protected the apiary from being enjoined as a nuisance. *Id.* at 232. This Court held:

Defendants’ maintenance of an apiary on the property constituted a farm or farm operation for purposes of the Right to Farm Act. See MCL 286.472(a), (b) and (c); MSA 12.122(2)(a), (b) and (c). However, defendants’ apiary did not exist prior to the 1965 enactment of plaintiff’s zoning ordinances (i.e., prior to the change in the land use). Therefore, defendants seek protection of a farm operation established *after* a change in plaintiff’s zoning requirements. Such protection is not contemplated by the Right to Farm Act, MCL 286.473(1) and (2); MSA 12.122(3)(1) and (2). The trial court erred in denying plaintiff injunctive relief as to defendants’ apiary. [*Id.* at 233 (emphasis in original).]

In the present case, the operations on the north parcel did not begin until after the city enacted its zoning ordinance in 1956. Thus, defendants argue that, similar to *Jerome Twp, supra*, the operations are not protected under the RTFA. Defendants thus present the issue of whether both MCL 286.473(1) *and* (2) must be met before a farm or farming operation is protected under the RTFA. We conclude that MCL 286.473(1) and (2) are to be read separately and that protection under one subsection does not depend on a party’s satisfaction of the requirements stated in the other subsection.

When interpreting statutory language, courts must ascertain the legislative intent that may reasonably be inferred from the words in a statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). When the Legislature has unambiguously conveyed its intent, the statute speaks for itself and judicial construction is not permitted. *Id.* Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute. *Id.*

MCL 286.473(1) and (2) provide:

(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 a 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.

(2) A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.

The Legislature did not require both subsections to be met in order for a farm or farming operation to qualify for protection under the RTFA. Each subsection specifically states that “[a] farm or farm operation *shall not* be found to be a public or private nuisance if” the specified conditions are met. *Id.* (emphasis added). This language indicates an intent to extend the protections of the RTFA to farms or farm operations that meet the requirements of either subsection. Thus, according to the plain language of MCL 286.473(1), a farm or farm operation that conforms to generally accepted agricultural and management practices is entitled to the protection provided by the RTFA without regard to the historic use of the property in question.¹

This interpretation of MCL 286.473 is consistent with *Shelby Charter Twp, supra*, in which the plaintiff raised the same argument that defendants raise in this case. In *Shelby Charter Twp*, the plaintiff argued that the RTFA was inapplicable because the defendants did not commence their poultry operations until after the enactment of an ordinance limiting farming operations to property consisting of three or more acres. *Id.* at 105. Relying on the 1999 amendment, MCL 286.474(6), this Court rejected the plaintiff’s argument and determined that “if defendants’ farm is commercial in nature and in compliance with the GAAMPs, it is a farm operation protected by the RTFA.” *Id.* at 106. Although the ordinance was in effect at the time that the defendants purchased their property in 1995, and the defendants did not commence their poultry operation until 1996, this Court did not determine that the defendants’ failure to comply

¹ We are aware that, under MCL 268.473(1), a business could conceivably move into an established residential neighborhood and start a farm or farm operation in contravention of local zoning ordinances as long as the farm or farm operation conforms to generally accepted agricultural and management practices. Although we might personally disagree with the wisdom of the policy choice codified under MCL 286.473(1), we are without the authority to override the clearly expressed intent of the Legislature. MCL 286.473(1) is simply not ambiguous and, therefore, must be enforced as written. *Koontz, supra* at 312.

with subsection (2) of MCL 286.473 affected their protection under subsection (1). Thus, this Court determined, albeit implicitly, that the two subsections operate independently.²

As stated in *Shelby Charter Twp, supra* at 107, “the RTFA no longer allows township zoning ordinances to preclude farming activity that would otherwise be protected by the RTFA.” Because the activity at issue here is otherwise protected under the RTFA, specifically under subsection (1) of MCL 286.473, defendants’ zoning ordinance cannot preclude plaintiffs’ activity on the north parcel. The RTFA preempts defendants’ zoning ordinance to the extent that it conflicts with the RTFA. As this Court determined in *Shelby Charter Twp*, a zoning ordinance restricting agricultural activity to parcels containing a minimum number of acres conflicts with the RTFA. *Id.* at 106. Thus, defendants’ ordinance limiting such activity to parcels with an area not less than five acres is preempted by the RTFA and is not enforceable. MCL 286.474(6); *Shelby Charter Twp, supra* at 106.

Defendants argue that the trial court erroneously determined that the RTFA permits plaintiffs to use the north parcel for storage of products sold on the south parcel. The RTFA specifically provides, however, that a “farm operation” includes activity associated with the “commercial production, harvesting, and storage of farm products” MCL 286.472(b). Plaintiffs’ nursery products constitute “farm products” under MCL 286.472(c). Thus, plaintiffs’ use of the north parcel, and in particular the greenhouses and cold frames on the north parcel, for commercial production and storage of nursery products is a protected use under the RTFA.

Defendants also rely on the deposition testimony of neighboring landowners stating that commercial activity occurs on the north parcel. Two neighbors testified that they have observed customers on the north parcel selecting merchandise. The individuals were not dressed in the green clothing worn by employees of the business and were sometimes accompanied by employees. Neither neighbor observed the exchange of money on the parcel and one neighbor opined that that would occur at the cash register on the south parcel. Defendants argue that this commercial activity is not protected under the RTFA.

As recognized in *Shelby Charter Twp, supra* at 100-102, a farming operation must be at least partially commercial in nature for the RTFA to apply. For example, in *Jerome Twp, supra* at 229, 233, this Court determined that the defendants’ commercial apiary, including the retail sale of bee by-products, was a farm or farm operation under the RTFA. Accordingly, the fact that customers may have been on the north parcel selecting merchandise is not inconsistent with the RTFA. There is a fine line between an expansion of the valid nonconforming use on the south parcel and the activity purportedly occurring on the north parcel. Nonetheless, because the activity on the north parcel is related to commercial production of farm products as required under MCL 286.472(a) and (b), such activity is protected under the RTFA notwithstanding that it

² This conclusion is not necessarily inconsistent with *Jerome Twp, supra* at 233. While the Court in *Jerome Twp* determined that the defendants’ apiary was not protected under the RTFA because it did not exist before the enactment of the zoning ordinances, the Court did not specifically address whether the apiary conformed to GAAMPs as required for protection under MCL 286.473(1). Accordingly, it appears that MCL 286.473(1) was not at issue in that case.

may also be an expansion of the nonconforming use on the south parcel. The nature of plaintiffs' nursery business makes it difficult to distinguish between activity protected under the RTFA and activity constituting an expansion of the nonconforming use on the south parcel. If the nonconforming use on the south parcel was, for instance, a nightclub that expanded its operations to the north parcel, there would be no dispute that such expansion would constitute an unlawful expansion of a nonconforming use. In this case, however, the fact that plaintiffs' agricultural activities on the north parcel are otherwise protected under the RTFA blurs this distinction. In any event, notwithstanding that the use of the north parcel may give the outward appearance of the expansion of a nonconforming use, the RTFA protects plaintiffs' activities on that parcel.

Defendants also argue that the trial court erroneously determined that the agricultural building exemption under MCL 125.1510(8) of the Stille-DeRossett-Hale single state construction code act, MCL 125.1501 *et seq.*, ("the Construction Act") applies to plaintiffs' greenhouses. MCL 125.1510(1) requires that an application for a building permit be submitted before the construction of a building or structure. MCL 125.1510(8), however, provides that, "[n]otwithstanding this section, a building permit is not required for a building incidental to the use for agricultural purposes of the land on which the building is located *if it is not used in the business of retail trade.*" (emphasis added). The trial court determined that, because no retail sales occurred on the north parcel, this provision was applicable to plaintiffs.

Plaintiffs' greenhouses are obviously "incidental to the use for agricultural purposes." Thus, the question becomes whether they are "used in the business of retail trade." See *id.* Undefined words in a statute should be accorded their plain and ordinary meanings, and dictionary definitions may be consulted in such situations. *Koontz, supra* at 312. Plaintiffs are clearly operating a business on the parcels at issue. However, the exception only applies if the building "is not used in the business of retail trade." MCL 125.1510(8) (emphasis added). According to *Random House Webster's College Dictionary* (1997), "retail" is defined to be "the sale of goods to ultimate consumers" and "trade" is defined as "a purchase or sale; business deal or transaction." Accordingly, if the greenhouses are incidental to the use of the land for agricultural purposes and are not used "in the business of retail trade," (i.e. are not used in the sale of the agricultural goods to the ultimate consumer), then they do not require a building permit under the Construction Act. MCL 125.1510(8).

George's affidavit states that the greenhouses are used for cultivating plants and other agricultural products before they are ready for sale, at which time they are moved to the south parcel. Therefore, the greenhouses are essentially storage rooms for nursery products. Further, the deposition testimony of the neighboring landowners confirmed that the exchange of money does not occur on the north parcel. Because the purchase and sale of goods occurs only on the south parcel and not inside the greenhouses, the greenhouses are exempt from building permit requirements under the Construction Act. MCL 125.1510(8).

This interpretation is consistent with the RTFA. Statutes that appear to conflict should be read together and reconciled, if possible. *People v Budnick*, 197 Mich App 21, 24; 494 NW2d 778 (1992). When two statutes lend themselves to an interpretation that avoids conflict, that interpretation should control. *Jackson Community College v Dep't of Treasury*, 241 Mich App 673, 681; 621 NW2d 707 (2000). As previously recognized, a farming operation must be at least partially commercial in nature for the RTFA to apply. *Shelby Charter Twp, supra* at 100-102. "Commercial production" as used in the RTFA is "the act of producing or manufacturing an item

intended to be marketed and sold at a profit.” *Id.* at 100-101. Thus, it is possible for the greenhouses to be used in the commercial production of farm products without the greenhouses being used in the “business of retail trade” as long as the retail operations do not occur in them. This interpretation avoids any conflict between the building permit requirement of the Construction Act, which is often enforced through local government, and the RTFA which protects farms, including the buildings and structures on the farms, from local ordinances conflicting with the RTFA through the preemption provision. MCL 125.1508b; MCL 286.472(a); MCL 286.474(6).

Defendants argue that even if plaintiffs are exempt from the building permit requirement under the Construction Act, they are not exempt from complying with the city’s zoning requirements. The city issued Gust Papadelis two misdemeanor tickets, one for constructing a greenhouse without approval from the board of zoning appeals as required under § 40.57.10 of the city’s zoning ordinance, and one for constructing a building over 600 square feet, or more than one-half of the ground floor area of the main building on the premises, contrary to § 40.57.04 of the city’s zoning ordinance. Like the city’s zoning ordinance pertaining to a minimum five-acre property size in order to conduct agricultural activities, the zoning ordinances regarding building specifications are preempted by MCL 286.474(6) of the RTFA to the extent that the city is attempting to enforce them against a use protected under the RTFA. The RTFA preempts any local ordinance or regulation that purports to revise in any manner or conflicts with the provisions of the RTFA or the GAAMPs. MCL 286.474(6). As previously stated, in *Shelby Charter Twp, supra* at 106, this Court determined that a zoning ordinance specifying a minimum parcel size for agricultural use conflicted with the RTFA to the extent that it allowed a township to preclude a protected farm operation by limiting its size. By the same token, the city’s zoning ordinances regarding building size and permit requirements conflict with the RTFA. This Court is unaware of any such requirements contained in the RTFA. In addition, “buildings” and “structures” are included under the definition of “farm” under MCL 286.472(a) of the RTFA. Accordingly, the city may not rely on its ordinances to restrict activity otherwise protected under the RTFA, and the city may not enforce its zoning ordinances against plaintiffs. MCL 286.474(6); *Shelby Charter Twp, supra* at 107.

Therefore, trial court properly granted summary disposition for plaintiffs on count II of their complaint seeking declaratory relief that their activity on the north parcel is protected under the RTFA, that they are exempt from the city’s zoning ordinance, and that the agricultural building exemption under the Construction Act applies to their greenhouses on the north parcel. Further, the trial court properly granted summary disposition for plaintiffs on defendants’ counterclaim seeking an order enjoining plaintiffs from using the north parcel for purposes connected with the commercial activity on the south parcel and requiring that plaintiffs remove the greenhouses on the north parcel and all other structures found to be an unlawful expansion of the nonconforming use on the south parcel.

On cross appeal, plaintiffs challenge the trial court’s dismissal of their claim under 42 USC 1983 pursuant to MCR 2.116(C)(10). Plaintiffs contend that they presented sufficient evidence to create a genuine issue of material fact for trial. We disagree.

Persons deprived of constitutional rights by individuals acting under color of state law have a civil remedy under 42 USC 1983. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 74; 592 NW2d 724 (1998). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . [42 USC 1983.]

The statute provides no substantive rights in and of itself, but rather supplies a remedy for violations of rights under other laws. *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576; 507 NW2d 751 (1993). To establish a claim under § 1983, a plaintiff must show that he or she was deprived of rights, privileges, or immunities secured by the Constitution and laws. *Dean v Childs*, 262 Mich App 48, 53-54; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich 914 (2005); *Kallstrom v City of Columbus*, 136 F3d 1055, 1060 (CA 6, 1998).

The substantive due process component of the Fourteenth Amendment protects against the deprivation of certain fundamental rights of individual freedom and liberty at the hands of arbitrary and capricious government action. See *Electronic Data Systems Corp v Flint Twp*, 253 Mich App 538, 549; 656 NW2d 215 (2002); *Sutton v Cleveland Bd of Ed*, 958 F2d 1339, 1350-1351 (CA 6, 1992). “[A] substantive due process violation occurs when arbitrary and capricious government action deprives an individual of a constitutionally protected property interest.” *Warren v City of Athens, Ohio*, 411 F3d 697, 707 (CA 6, 2005).

On appeal, plaintiffs contend that they presented sufficient evidence to support their § 1983 claim. In support of their assertion that defendants demanded that plaintiffs cease conducting agricultural activities on the north parcel, plaintiffs rely on the “nearly two dozen” inspections of the property, some of which were conducted from a neighboring landowner’s residence. Many of the inspection records on which plaintiffs rely, however, are unreadable, as the trial court recognized. Other records merely note that inspections of the property were made pursuant to complaints of neighboring landowners. Thus, the inspections do not appear to have resulted from arbitrary and capricious government conduct.

To the extent that plaintiffs rely on the two misdemeanor citations issued to Gust Papadelis, the evidence does not demonstrate that these citations were issued as a result of arbitrary and capricious government conduct. The citations were issued for constructing a greenhouse without approval from the zoning board of appeals pursuant to § 40.57.10 of the zoning ordinance, and constructing a building that did not comply with the size requirements of § 40.57.04 of the zoning ordinance. Further, defendant Struckman, a housing and zoning inspector employed by the city, was notified of the greenhouse pursuant to a complaint received from a resident. Thus, the citations were issued in accordance with the city’s zoning ordinance and applicable codes, and did not result from arbitrary and capricious government action.

Plaintiffs primarily argue that defendants ignored the July 2002, circuit court order in the earlier action, as well as the RTFA and the city’s zoning ordinance. Whether plaintiffs’ activities were protected under the RTFA, however, was disputed between the parties, as this appeal demonstrates. It does not appear that defendants merely ignored the dictates of the RTFA. In addition, a question raised in this appeal is whether MCL 286.474(6) of the RTFA preempts the city’s zoning ordinance. Defendants argued that the RTFA does not preempt the city’s ordinance

because plaintiffs are not protected under the RTFA. Thus, defendants' attempts to enforce the city's ordinance against plaintiffs were consistent with their view that the ordinance applied to plaintiffs' activity. Further, the July 2002, order was issued before plaintiffs constructed two greenhouses on the north parcel. Although the order established that plaintiffs' use of the property at that time did not render them in contempt of the trial court's earlier order, the July 2002, order did not necessarily permit plaintiffs to build greenhouses or other structures on the north parcel, especially if those structures violated the city's zoning ordinance. This was an issue of dispute between the parties. Thus, defendants did not merely disregard the previous order, the RTFA, or the city's zoning ordinance. Accordingly, plaintiffs were not deprived of a protected property interest by arbitrary or capricious government action. *Warren, supra* at 707.³

Plaintiffs also argue that the city did not evenly apply its zoning ordinance and did not treat plaintiffs the same as it treated other property owners with conforming and nonconforming uses. This appears to be an equal protection argument. "The basis of any equal protection claim is that the state has treated similarly-situated individuals differently." *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031, 1036 (CA 6, 1992). Because plaintiffs do not contend that they were deprived of a fundamental right and do not purport to be a member of a suspect class, defendants' actions are reviewed under the rational basis test. *Id.*

Plaintiffs apparently rely on the fact that the corner of Big Beaver Road and John R Road was rezoned for commercial use. This area is not similarly situated to plaintiffs' property, however, because it is designated for nonresidential use on the city's master land use plan while plaintiffs' property is designated for residential use on the master land use plan.

Plaintiffs also apparently rely on the fact that the city approved a consent judgment regarding Peacock Poultry but did not approve plaintiffs' proposed consent judgment. Even if similarly situated, defendants had a rational basis for their actions. As evidenced by the February 2002, memorandum to the mayor and members of city council, the Peacock Poultry operation was a legal nonconforming use and there were no allegations of the use spreading to adjoining parcels. Plaintiffs' dealings with the city, however, concerned the north parcel, which did not involve a legal nonconforming use. Further, as part of the consent agreement, Peacock Poultry agreed to remove a refrigeration semi-trailer from the property as well as a storage building that houses a freezer. Peacock Poultry also agreed to construct a six-foot-high privacy fence on the property. Thus, Peacock Poultry agreed to limit its operations and remove structures that had generated complaints. Plaintiffs, on the other hand, constructed two greenhouses and cold frames on the parcel adjoining their legal nonconforming use, which evidenced an intent to expand their operation. Accordingly, a rational basis existed for the city's

³ Defendants argue that Stimac and Struckman are also entitled to qualified immunity. In analyzing whether a state actor enjoys qualified immunity from suit, a court must first determine whether a constitutional violation occurred. *Ewolski v City of Brunswick*, 287 F3d 492, 501 (CA 6, 2002). If no constitutional violation occurred, then there is no need for further inquiry. *Torisky v Schweiker*, 446 F3d 438, 443 (CA 3, 2006). Because no constitutional violation occurred in this case, there is need to proceed to the second step.

decision to enter into a consent agreement with Peacock Poultry but not to enter into a consent agreement with plaintiffs. As such, no equal protection violation occurred.

Plaintiffs also rely on the comments of the city's mayor made at the February 2002, city council meeting. Plaintiffs specifically note the mayor's comments that the city would "play dirty" in order to win. Plaintiffs have taken the mayor's remarks out of context. The record shows that the remarks related to the city's decision not to seek entry of an order in the circuit court for over four years after this Court remanded the previous action for entry of an order precluding commercial activity on the north parcel. The remarks were not directed toward plaintiffs and do not support their equal protection claim.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto