



TO: Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
DATE: June 11, 2008
SUBJECT: Papadelis v. City of Troy

Enclosed please find the May 22, 2008 order issued by Oakland County Circuit Court Judge Colleen A. O'Brien in the "on remand" proceedings in the *Papadelis v. Troy* lawsuit. The City immediately filed a Motion asking the Court to reconsider her adverse opinion, which was denied on June 10, 2008. Any appeal of these orders must be filed on or before July 1, 2008, prior to the next regularly scheduled City Council meeting. As a result, we have prepared a proposed resolution authorizing an appeal for the June 16, 2008 City Council agenda.

In June 2007, the Michigan Supreme Court issued its favorable opinion, ruling that the structures on the Papadelis property (which is being operated as Telly's Nursery), must comply with the City of Troy zoning ordinances, even if the property is being used as a "farm." The Supreme Court remanded the case to the Oakland County Circuit Court for entry of an order consistent with its ruling. Since the Papadelis family constructed two large greenhouses, eight smaller greenhouses, and a large pole barn on the property which are not compliant with Troy's ordinances, and since the Supreme Court sent the case back we asked the Oakland County Circuit Court for an order that required compliance with the City of Troy ordinances. Instead of granting immediate relief, the Court scheduled an evidentiary hearing, which occurred over several days in the late fall/early winter of 2007/2008. The Court then requested written briefs, and took the matter under advisement until her May 22, 2008 order.

Although the City presented evidence to establish that the general residential zoning ordinances were applicable to the structures on the property, Judge O'Brien's order holds that there are no explicit regulations for structures that are used for "agricultural" purposes, and as such, there are no applicable Troy ordinances governing the structures. She also ruled that the structures are principal (which means that the residence on the property is the accessory structure). She also "waived" the requirement for site plan approval, on the basis that it would be an exercise in futility.

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. Judge O'Brien's opinion, if unchallenged, could conceivably lead to additional expansion onto other properties owned by the Papadelis family and the construction of additional buildings. According to Judge O'Brien, the City of Troy has no current authority to regulate any construction by the Papadelis family, which gives them unlimited discretion to build whatever they choose to build. As you are all aware, the Papadelis property is surrounded by residential homes.

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

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.

_____ /

OPINION AND ORDER

INTRODUCTION

This matter is before this Court upon remand from the Michigan Supreme Court pursuant to its June 29, 2007 Order for "further proceedings not inconsistent with this order." In lieu of granting leave to appeal, the Supreme Court reversed in part the judgments of this Court and the Court of Appeal:

... to the extent they hold the Right to Farm Act, MCL 286.471 et seq. (RTFA), and the State Construction Code, MCL 125.1502a(f), exempt the plaintiffs from the defendant city's ordinances governing the permitting, size, height, bulk, floor area, construction, and location of structures used in the plaintiffs' greenhouse operations.

The Michigan Supreme Court determined that “the plaintiffs’ structures remain subject to applicable building permit, size, height, bulk, floor area, construction, and location requirements under the defendant city’s ordinances.” The Michigan Supreme Court found that the “plaintiffs’ greenhouses and pole barn are not “incidental to the use for agricultural purposes of the land” on which they are located within the meaning of MCL 125.1502a(f).” The Supreme Court further found that “no conflict exists between the RTFA and the defendant city’s ordinance regulations, such matters that would preclude their enforcement under the facts of this case.” This was because “no provisions of the RTFA or any published generally accepted agricultural and management practice address the permitting, size, height, bulk, floor area, construction, and located of buildings used for greenhouse or related agricultural purposes...”

Pursuant to the aforesaid order, on July 11, 2007, Defendant City of Troy (City) filed a Motion for Order Directing Plaintiffs to Remove Buildings and other Structures Constructed without Permits or other Approvals as Required by Ordinance. In the motion, the City asked this Court for an order directing Plaintiffs to remove two greenhouses, a pole barn, cold frames and “every other structure erected upon Plaintiffs property without permit and/or violation of the Troy Zoning Ordinance.” The City claimed that the greenhouses, pole barn and cold frame structures located on Plaintiffs’ property violated City ordinances and constituted a nuisance per se. In response, Plaintiffs maintained that the ordinances cited by City in their motion were not applicable to their greenhouses and agricultural structures.

On July 25, 2007, this Court set an evidentiary hearing concerning the City’s motion and directed the parties’ to submit briefs. The evidentiary hearing was held on

the following dates: October 17, 2007, October 23, 2007 and January 30, 2008. After hearing the testimony of witnesses and reviewing the exhibits admitted into evidence, the Court makes the following findings of fact and conclusions of law as more fully discussed below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The City takes the position that the greenhouses and “cold frames” were constructed in violation of former Ordinance 40.57.04. This Ordinance limits the size of an accessory building on residential property to 600 square feet or one half of the ground floor area of the main building on the property. Further, they allege that the greenhouses and cold frames were constructed in violation of former Ordinance 40.57.10 which required the approval of all greenhouses by the City’s Zoning Board of Appeals. Further, the City argues that the greenhouses and cold frames violate the current Ordinance 40.56.03, which limits the size of the supplemental accessory buildings to 200 square feet. As to the pole barn, which is located on the north parcel, the City argues that it violates height, location, and size requirements for accessory structures and therefore violates 40.56.02(e), 40.56.00(b), 40.56.02(c) and 40.56.02(d).

In contrast, the Plaintiffs take the position that the City is unable to sustain its burden of proof to show that there is an applicable building permit, size, height, bulk, floor area, and construction and location requirement under the City’s Zoning Ordinance that pertains to the greenhouses, “cold frames” and pole barn on Plaintiffs’ property. Plaintiffs argue that the City’s ordinances only apply to accessory structures that are used for “recreation or pleasure” and are supplemental to a residential use. Plaintiffs further take the position that the City’s attempts to enforce the setback, height, bulk and

requirements for residential dwellings on the permitted lawful, non-residential use which Plaintiff's are making of the property would work an injustice on Plaintiffs. Plaintiffs argue that the City's Zoning Ordinance clearly and unequivocally allows agricultural use of Plaintiff's property, which would be nullified by the City requiring Plaintiff to meet the requirements of residential dwellings.

The Court finds that the City Zoning Ordinance does allow Plaintiff's to use their property for agricultural purposes. The property, which can be divided into two parcels, contains a retail business known as "Telly's Greenhouse and Garden Center" which is located on the south parcel. It is upon the north parcel that Plaintiffs conduct their agricultural operations associated with floriculture. Plaintiffs have constructed two greenhouses and a number of cold frames and a pole barn on the north parcel. The greenhouses, cold frames, and pole barns are all used in Plaintiff's agricultural operations. The cold frames, greenhouses and pole barns located on the north parcel of the property were built without building permits or application to the City of Troy's Zoning Board of Appeals. Also located on the north parcel is the single family residence belonging to Plaintiffs Gust and Niki Papadelis.

The majority of the north parcel, over 75 percent, is used for agriculture. Specifically, the activity is that of floriculture, which meets the definition of agriculture as a principal use. The home located on the north parcel is only a minimal part of the activities that take place on the property. The structures located on the north parcel are dedicated to floriculture and are not an accessory to the residential use. The agricultural buildings on the north parcel are the primary use and the residence is an accessory use. There are two greenhouses and a pole barn located on the north parcel. At times cold

frames have been observed on the property. Cold frames are temporary shelters comprised of hoops and coverings that are used to protect plants against adverse conditions, primarily in the spring and the fall. They are generally dismantled in the summertime. The evidence at the evidentiary hearing indicates that at times as many as eight cold frames have been constructed on the property.

Greenhouses, cold frames and pole barns are typically used in farming operations in Michigan. It is impossible to have a floriculture operation in southeast Michigan without a greenhouse and a place to pot plants and make them grow. Clearly, greenhouses are necessary due to Michigan's climate. People begin buying flowers and plants for their gardens around Memorial Day. In order for these plants and flowers to be available, their growing needs to begin in February. Flowers and plants cannot be grown in Michigan in February without the use of a greenhouse.

Farming, horticulture and floriculture also require equipment (which is often expensive) and buildings to house the equipment. Farming operations also require materials, such as soils, containers, seed, fertilizer and cuttings. All of these materials need to be stored in a building. Farming, horticulture and floriculture operations require large buildings in the thousands and tens of thousands of square feet. The activities required for a farming/floriculture operation cannot be contained in a building or buildings with a total combined size of 1,271 square feet. A 640 square foot greenhouse is too small to support a farming operation taking place on five acres. Requiring the removal of the greenhouses, cold frames and pole barn would make it impossible for the floriculture operations on the north parcel to continue and destroy the prospect of agricultural use of the property.

Although at times over the years, Plaintiffs have requested permits from the City, the City has not issued permits for the subject buildings because they consider them to be in violation of the Zoning Ordinances. Around July 5, 2006, Plaintiffs did submit plans to the City for the pole barn that was later constructed on the north parcel. However, Mark Stimac, who is the chief official charged with interpreting City's Zoning Ordinance, never reviewed the plans in detail because he believed the building violated the Zoning Ordinance provisions regarding the size of accessory buildings.

The property is zoned R-1D which, as relevant to this dispute, provides for agriculture as a principal permitted use: "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 acres; all subject to the health and sanitation provisions of the Code of the City of Troy." Troy Zoning Ordinances at § 10.20.02.

Section 04.20.05 of City's Zoning Ordinance defines agriculture as:

Farms and general farming, including horticulture, floriculture, dairying, livestock, and poultry raising, farm forestry, and other similar enterprises, or uses, but no farms shall be operated as piggeries, or for the disposal of garbage, sewage, rubbish, offal or rendering plants, or for the slaughtering of animals except such animals as have been raised on the premises or have been maintained on the premises for at least a period of one year immediately prior thereto and for the use and consumption of the persons residing on the premises.

(emphasis added).

It is undisputed that Plaintiffs meet the qualifications for agricultural use, and that agriculture is occurring on the north parcel. Likewise, the City has no provision under the zoning ordinance that governs an agricultural building when agriculture is the primary use (and the agricultural building is the primary building) on a parcel of property.

The Zoning Ordinance has no criteria for agricultural uses other than size (more than five acres), the requirement that the property be outside of a supervisor's plat, and that the uses are subject to the health and sanitation provisions of the Code of the City of Troy. The proviso that agricultural uses are "subject to the health and sanitation provisions of the Code of the City of Troy" does not establish building area or criteria for agricultural uses. This proviso does not appear in any other section of Section 10 of the Zoning Ordinance. There are other principal uses permitted in residential zoning districts, such as schools and churches. These specific uses have specific language pertaining to the construction of buildings for that use. There are no such restrictions or specifications for agricultural uses.

Section 10.20.02 allows commercial agricultural activities in residential zoning districts.

Section 04.20.05 of the Zoning Ordinance contains the definition of "agriculture." This definition includes activities, such as "horticulture, floriculture, dairying, livestock, and poultry raising" that require buildings for their operations. When viewing a property such as the Plaintiffs', Mr. Stimac admits that he would expect to see activities and things incidental to farming. Further, he is not aware of any City regulation regarding the buildings necessary to run a farm.

The Schedule of Regulations for residential buildings in residential districts pertains to single family residences and buildings accessory thereto. The Schedule of Regulations for residential buildings in residential districts allows for 30% of the lot to be covered by buildings. The Schedule of Regulations for residential zoning districts does not contain any specifications for agricultural buildings.

The Schedule of Regulations for residential zoning districts lists the applicable side, rear and front setbacks for residential structures. The greenhouses, cold frames and pole barn meet the setbacks set forth in the Schedule of Regulations for residential zoning districts.

The City claims that the pole barn falls within the definition of an accessory building and the greenhouses and cold frames falls within the definitions of accessory supplemental building.

Section 40.20.00 of the Zoning Ordinance contains the definitions of terms used in the Zoning Ordinance.

Section 40.20.01 defines and “accessory building” as:

A building, or portion thereof, which is supplemental or subordinate to the main building or to the use of the land and is devoted exclusively to an accessory use....

Section 40.20.01 of the Zoning Ordinance further defines ‘accessory buildings’ as: (a) barn; (b) garage; and (c) storage building or (c) shed.

A “barn” is a “building specifically or partially used for the storage of farm animals such as, but not limited to: horses, cattle, sheep, goats and fowl, other than a dog house.”

A “garage” is a “building, or portion of the main building, of not less than one hundred eight (sic) (180) square feet designed and intended to be used for the periodic parking or storage of one or more private motor vehicles, yard maintenance equipment or recreational vehicle such as, but not limited to, boats, trailers, all terrain vehicles and snowmobiles.

A “storage building/ shed” is a “building designed and intended to be used for the storage of tools, garden tractors, lawn mowers, motorcycles, small recreation vehicles such as, but not limited to, snowmobiles, ATV’s, and motor scooters.”

Section 04.20.03 of the Zoning Ordinance defines an “Accessory Supplemental Building” as:

An accessory building used by the occupants of the principal building for recreation or pleasure, such as a gazebo, a swimming pool cabana, a building housing a spa or greenhouse. The various types of accessory supplemental buildings shall be further defined as follows:

- A. Cabana: A building used in conjunction with a swimming pool and used for no other purpose than the housing of pool filter equipment, pool accessories such as, but not limited to, vacuum cleaning equipment, brooms and safety equipment, and safety equipment, and/or changing of clothes.
- B. Dog House: A building designed and used for housing not more than three dogs, cats or other similar animals owned by the occupant of the parcel on which it is located.
- C. Gazebo: A detached, roofed or sheltered structure, which is generally of open, screened, or lattice – work construction, and may be used for outdoor seating.
- D. Greenhouse: A detached building that is used for non-commercial purposes, constructed of permanent or temporary framing that is set directly on the ground and covered with glass panels or plastic or other transparent material, and is used to grow plants.
- E. Play House: A detached building designed and used for children’s play.

The Zoning Ordinance does not contain a definition for “cold frames.”

The Zoning Ordinance is typically not enforced against a home owner who covers a flower bed with a plastic covering even if it exceeds 36 square feet.

Section 40.20.04 of the Zoning Ordinance defines an “Accessory Use” as a “use which is supplemental and subordinate to the main use and used for purposes clearly incidental to those of the main use.”

It is the constitutional duty of the Court to look beyond the substance of an ordinance or statute when faced the question of whether the legislature has overstepped its authority. *See Daugherty v Thomas*, 174 Mich 371, 385 (1913); *Marbury v Madison*, 1 Cranch (US), 137. Constitutional limitations are designed to protect private rights against the arbitrary exercise of governmental power and therefore operate to limit and restrain the exercise of police power. *Id.*

The rules of statutory interpretation apply to the interpretation of ordinances. *Gora v Ferndale*, 456 Mich 704, 711 (1998); *Brandon Twp v Tippett*, 241 Mich App 417, 422 (2000). The Court’s primary task in construing a statute is to discern and give effect to the intent of the Legislature; this task begins by examining the language of the statute itself; the words of a statute provide the most reliable evidence of its intent; if the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. *Sun Valley Foods Co v Ward*, 460 Mich 230 (1999). The statutory language must be read and understood in its grammatical context, unless it’s clear that something different was intended. *Aetna Finance Co v Gutierrez*, 96 N M 538; 632 P2d 1176 (1981). Courts may not speculate regarding the probable intent of the Legislature when the statutory language is clear and unambiguous. *Lorencz v Ford Motor Co*, 439 Mich 370, 376 (1992). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Id.*; *Nat’l Exposition Co v Detroit*, 169 Mich App 25, 29 (1988).

An ordinance must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. *People v Barton*, 253 Mich App 601, 605 (2002); *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 469 (2004). An ordinance cannot use terms that require persons of ordinary intelligence to guess its meaning and differ about its application. See *People v Capriccioso*, 207 Mich App 100, 102 (1994); *People v Noble*, 238 Mich App 647, 651-652 (1999). To provide adequate guidelines, a statute or ordinance must provide reasonably precise standards for enforcing and administering the law sufficient to ensure that the enforcement is not arbitrary or discriminatory. *National Aggregates Corp v Brighton Twp*, 213 Mich App 287 (1995). Therefore, the Michigan Supreme Court has noted that:

Where a zoning ordinance permits officials to grant or refuse permits without the guidance of any standard, but according to their own ideas, it does not afford equal protection. It does not attempt to treat all persons or property alike as required by the zoning act. While the exercise of discretion and judgment is to a certain extent necessary for the proper administration of zoning ordinances, this is so only where some standard or basis is fixed by which such discretion and judgment may be exercised by the board. Where a zoning ordinance is vague and indefinite, it cannot be sustained as valid under the authorizing act.

Osisu, supra, citing *Taylor v Moore*, 303 Pa 469, 479 (154 A 799).

The City's Zoning Ordinance does not contain a section specifically addressing agricultural uses. Additionally, the ordinance provisions City relies upon in its motion do not provide any guidelines as to how to build a greenhouse, pole barn or other agricultural structure in the City of Troy. However, as Mr. Stimac agrees, it is reasonable that owners of land that is zoned for agricultural use should be able to conduct normal agricultural activities on that land.

In determining what can be built on the property, a zoning administrator would first determine the primary and secondary use of the property. Since agricultural uses are principal permitted uses in R-1D zoning districts, a zoning administrator should apply the building setbacks for residential structures set forth in the Schedule of Regulations. As the principal use, the agricultural structures would be subject to greater setbacks than if they were treated as accessory structures. This provides greater protection to surrounding residential uses than if agricultural buildings were considered accessory structures.

Applying the rules of statutory construction to the City's Zoning Ordinance, it is apparent that agricultural uses are a permitted use of right within residential zoning districts. The Court is satisfied that the City contemplated that the agricultural uses of property would have at least some sort of commercial component. This conclusion is supported by the testimony of the City's representative, Mr. Stimac, who testified that commercial agricultural uses are allowed. The use of terms "floriculture," dairy farming" and "poultry farming" indicates that the City contemplated that the allowable agricultural uses would occur in buildings. However, the City failed to provide any guidelines by way of setbacks, lot coverage and building criteria for agricultural buildings within its Zoning Ordinance.

The Court is satisfied, based upon the testimony of Plaintiffs' experts, that agricultural buildings are necessary thereto, are typically not regulated by local units of government for the reason that it is generally understood that such structures are subject to the RTFA and are regulated by the Department of Agriculture, generally accepted agricultural practices and general agricultural standards within the industry.

Applying the rules of statutory construction to the ordinances City cites in its Motion and at the evidentiary hearing/bench trial, it is apparent from their plain language that the ordinances are intended to apply to uses and structures that are supplemental and subordinate to residential uses. As such, the definitions of “accessory use,” “accessory structure,” and “greenhouse” are not applicable to Plaintiffs’ commercial agricultural use of the Property. Plaintiffs’ structures are for commercial agricultural uses and are necessary to the greenhouse/floriculture industry.

Additionally, the City failed to establish that the cold frames, which are undefined in the ordinance, and appear to be little more than temporary coverings used to protect plants from the elements, are “structures” within the mean in of the zoning ordinance. As Mr. Stimac testified, City would not ticket homeowners who cover their flower beds with plastic sheeting to protect them from the elements. “Cold frames” perform the same function and, likewise, should not be the subject of ticketing or adverse action by the City against the Plaintiffs.

Insofar as the plain language of Section 40.20.01, 40.20.03 and 40.20.04 does not apply to Plaintiffs’ agricultural uses of the property and the greenhouses, cold frames and pole barn, City has failed to meet its burden of establishing that any “building permit, size, height, bulk, floor area, construction, and location requirements under Troy’s ordinances” are applicable to Plaintiffs’ commercial agricultural uses. As a result, Plaintiffs are not in violation of any applicable ordinances, and greenhouses, cold frames and pole barn are not a nuisance *per se*.

Applying the residential standards set forth in the Schedule of Regulations to the property, the Court finds that the greenhouses, cold frames, and pole barn are within the

proscribed setbacks for principal structures. Additionally, all of the structures located on the property are less than 30 percent of the lot coverage provided under the Schedule of Regulations for residential property set forth in ordinance. Therefore, to the extent that the Schedule of Regulations applies to the property, Plaintiffs are in compliance with the Zoning Ordinance.

Finally, Plaintiffs' failure to obtain site plan approval in 2003 prior to constructing the greenhouses is not relevant for the reason that due to their use in agriculture, Plaintiffs' greenhouses, cold frames and pole barn are subject to waiver of the site plan requirements under Exception 9 to the site plan approval requirements of Section 3.40.03 of the City's Zoning Ordinance. Additionally, the testimony in this case establishes that Plaintiffs attempted to obtain clarification, permits and site plan approval from City for the greenhouses and pole barn, but that Mr. Stimac refused to review the Plaintiff's proposed site plan. Due to the history of enmity between the parties, and Mr. Stimac's testimony that City believed that Plaintiffs' proposed buildings violated the Zoning Ordinance and that any permit request or site plan would be rejected by City, the Court is satisfied that Plaintiffs' attempts to obtain a building permit or site plan approval were futile. The law does not require the doing of a futile or useless act. *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674, 681 (1994).

The City is requesting that the Court provide equitable relief by ordering Plaintiff to remove the greenhouse, cold frames, and pole barn from its premises. The City's position is premised entirely upon its claim that Plaintiff's greenhouse, cold frames and pole barn violate the Zoning Ordinance. Insofar as this Court has determined Plaintiff has not violated any applicable provision of the City Zoning Ordinance, the City is not

entitled to relief under the Michigan Zoning Enabling Act MCL 125.3407, or the former provision of the City and Village Zoning Act.

Additionally, the City failed to present any evidence that the greenhouses, cold frames and pole barn constitute a nuisance, or that City is entitled to the equitable relief it seeks in its Counterclaim and Motion. An injunction will not be granted if it works an injustice. See, e.g., Township of Pittsfield v Malcolm, 375 Mich 135 (1965); *Grand Haven Township v Brummel*, 87 Mich App 442, 446 (1978). The Court is satisfied that requiring the Plaintiffs to remove the greenhouses, cold frames and pole barn will effectively prevent them from utilizing the property for agricultural purposes, which is a use of right under the Zoning Ordinance. Even if Plaintiffs were in violation of an applicable provision of City's Zoning Ordinance, which they are not, the remedy City seeks is unduly harsh and inequitable. Allowing Plaintiffs to continue their agricultural uses, as they currently exist, with the use of necessary greenhouses and other typical agricultural structures, is consistent with the City's Zoning Ordinance and the Michigan Supreme Court's June 29, 2007 Order.

In conclusion, the Court finds that the greenhouses, cold frames and pole barn located on the north parcel of the property do not violate any applicable Zoning Ordinance of the City of Troy.

Accordingly, the City's Motion for Order Directing Plaintiffs to Remove Building and Structures Constructed without Permits or Other Permits Required by Ordinance is denied, the City's Counterclaim is dismissed and judgment is rendered in favor of Plaintiffs.

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

IT IS SO ORDERED.

Date: MAY 22 2008

COLLEEN A. O'BRIEN

COLLEEN A. O'BRIEN, Circuit Judge

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register of Deeds
By *Ruth Johnson*
Deputy