[Cite as *Herres v. Harrison Twp. Bd. of Trustees*, 2010-Ohio-3909.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

MARK HERRES	:	
	:	Appellate Case No. 23668
Plaintiff-Appellant	:	
	:	Trial Court Case No. 08-CV-4162
v.	:	
	:	
BOARD OF TRUSTEES HARRISON TOWNSHIP, et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendant-Appellees	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 20th day of August, 2010.

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VUKOVICH, J.

{¶ 1} Appellant Mark Herres appeals the decision of the Montgomery County Common Pleas Court, which granted summary judgment in favor of appellee Board of Township Trustees of Harrison Township, et al. Appellant argues that there exists a genuine issue of material fact as to whether he changed the nonconforming use of

one lot and whether his use of another lot violated a conditional use permit. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶ 2} Appellant operates Creative Artworks Landscaping and Design, which engages in landscaping, and Herres Custom Builders, which constructs barns, decks, gazebos, and fences and has constructed a commercial building and a carwash. (Herres Depo. at 45, 53). In 1992, appellant purchased the property at numbers 70 and 76 Winnet Drive in Dayton, Ohio, which are adjoining lots in a district zoned Single Family Residential. Number 70 contains a vacant residence, an open garage, and three greenhouses (two of which he roofed with metal and partially sided and are not being used as greenhouses). Number 76 is vacant with a paved area.

{¶ 3} Appellant uses the property for business storage and to organize employees. Some of the items he stores outdoors on the property include: a sixteen-foot box truck labeled “Herres Custom Building” (which is rarely moved and which contains construction equipment), a twenty-six foot flat bed truck, a 1978 pick-up truck, two dump trucks, a front end loader and its attachments, mowing equipment, trailers, construction materials, and landscaping materials such as skids of bagged fertilizer, retaining wall blocks, trees, and burlap.

{¶ 4} In May of 2008, appellant filed a complaint against the Township regarding its continued enforcement of zoning resolutions against him. The Township filed a counterclaim for declaratory and injunctive relief regarding appellant's use of the

properties for outdoor business storage. Appellant ended up voluntarily dismissing his complaint, leaving only the Township's counterclaim pending. The Township filed for summary judgment.

{¶ 5} The Township cited its 1971 Zoning Resolution, which prohibited businesses from operating in this Single Family Residential District, accessory uses that involved the conduct of any business or trade, and any private way giving access to such activity. (See McClintick Aff. at 1, stating the effective date of November 2, 1971). Moreover, this Zoning Resolution also generally prohibited outdoor storage and specifically prohibited outdoor storage of items such as construction equipment, materials, junk vehicles, heavy trucks, and debris. The Township also cited part of its 1990 Exterior Property Maintenance Code, which also prohibits outdoor storage and which mandates that a residential property owner keep his yard free of debris and inoperable vehicles and other materials which may cause a fire, health, or safety hazard or general unsightliness.

{¶ 6} As to number 70, the Township stated that the horticultural use of the greenhouses had been a legal nonconforming use, but this horticultural use had been voluntarily discontinued for more than two years, citing its Zoning Resolution, which states that if a nonconforming use is voluntarily discontinued for two years, a nonconforming use shall not thereafter be re-established and any subsequent use shall conform to zoning regulations. The Township concluded that appellant substituted an illegal nonconforming landscaping and construction business for a legal nonconforming horticultural business and that the change of use constituted a discontinuance of the legal nonconforming use.

{¶ 7} Specifically, prior to the 1971 resolution, a Mr. Kossoudji used the greenhouses on number 70 to grow plants for a business located elsewhere and only one personal vehicle was parked on the property by the caretaker who lived in the residence. In 1978, Kossoudji sold number 70 to a Mr. Kissell, who grew plants in the greenhouses under the name of Tropical Interiors, Inc.

{¶ 8} As to number 76, the Township stated that appellant's use of this lot violates a conditional use permit issued for this property in 1983. That is, Kissell purchased the vacant lot in 1983, and received a conditional use permit to build a parking lot for the nonconforming use occurring on number 70, with the owner to guarantee maintenance of landscaping. The permit stated that it was for a parking lot only, "not more greenhouses or anything else to the rear."

{¶ 9} Appellant responded that his use is substantially the same as his predecessors' use. He urged that Creative Artworks is essentially a horticultural business because he stores plants in one of the greenhouses prior to planting them for customers, just as Kissell nurtured tropical plants prior to selling them. His affidavit stated that Kissell also did landscaping and stored on the property similar equipment, plants, containers, mulch, top soil, and fertilizer. Appellant's deposition clarified that he assumed Kissell stored box trucks and landscaping equipment on the property because he saw such items one time when the property was for sale, noting that Kissell was in the process of moving at the time and that there was another landscaper using the property and storing mowing equipment there. (Herres Depo. at 13, 36-37).

{¶ 10} The Township replied that Kissell's use is irrelevant to determine the legal nonconforming use because it is Kossoudji's use at the time the zoning resolution was

enacted in 1971 that is relevant. Kossoudji's affidavit stated that no material or equipment was stored outside of the greenhouses, that no business vehicles were parked on the property, and that he only used the greenhouses to grow plants which were then transferred to a retail location.

{¶ 11} The commercial operation of a greenhouse to grow plants for use elsewhere was then prohibited in the residential district, but Kossoudji was permitted to carry on as a legal nonconforming use. The Township urged that this situation does not allow successors to store construction or landscaping materials outside just because they might also perform horticulture inside. The Township also argued that both conforming and nonconforming uses are subject to ordinances which protect the public health, safety, and welfare, and that the Exterior Property Maintenance Code's prohibition on outdoor storage serves these purposes.

{¶ 12} On August 31, 2009, the trial court granted the Township's motion for summary judgment. In a lengthy decision, the court found that appellant changed, expanded, and increased the nature and intensity of the nonconforming horticultural use of number 70, which constitutes discontinuance of the nonconforming use as per the Township's Zoning Resolution. The court pointed to photographs showing two enclosed structures, which were formerly greenhouses, an old bathtub, discarded furniture, various vehicles, bobcats, campers, lumber, and plows. The court noted that the equipment is unrelated to plant-growing in a greenhouse but is used for construction.

{¶ 13} The court found that appellant's yard is being used for outdoor storage and contains junk and various waste items, in violation of the Zoning Resolution and the

Exterior Property Maintenance Code. The court further stated that appellant's use of number 76 violates the conditional use permit. Thus, the court ordered appellant to remove all construction equipment, materials, vehicles, junk, and debris from the property and to ensure his future use of the property complies with the requirements for a Single Family Residential District. Appellant filed a timely appeal from that order.

ASSIGNMENT OF ERROR & ANALYSIS

{¶ 14} Appellant's sole assignment of error contends:

{¶ 15} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES, BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER APPELLANT HAS CHANGED, EXPANDED, AND INCREASED THE NATURE AND INTENSITY OF THE NONCONFORMING USE OF THE PROPERTY."

{¶ 16} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶24. Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. When a motion for summary judgment is made and supported by Civ.R. 56, the non-movant may not rest upon the mere allegations or denials of his pleadings but must respond with affidavits or other evidence listed in the rule setting forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E). If the party does not so respond, summary judgment shall be entered against him. Civ.R. 56(E).

{¶ 17} A legal nonconforming use is one that was lawful prior to the enactment of

a zoning resolution and thus can continue after the resolution. *C.D.S., Inc. v. Village of Gates Mills* (1986), 26 Ohio St.3d 166, 168. As the parties acknowledge, once it is established, a legal nonconforming use passes to successive owners. However, if any nonconforming use is voluntarily discontinued for two years or more, any future use shall comply with township resolution. See R.C. 519.19. The township has authority to provide rules regarding extensions or substitutions of nonconforming uses. Id.

{¶ 18} According to Section 3605.08 of the Harrison Township Zoning Resolution, if a nonconforming use is voluntarily discontinued for two years, a nonconforming use shall not thereafter be re-established and any subsequent use shall conform to the zoning regulations. Pursuant to Section 3605.06, a property owner must apply to the Board of Zoning Appeals to substitute a nonconforming use, which shall not be of greater intensity and shall be more compatible with the neighborhood. These are permissible standards. See *Akron v. Chapman* (1953), 160 Ohio St. 382, 386 (stating that the denial of the right to extend or enlarge an existing nonconforming use has been upheld).

{¶ 19} Section 3505.06 also provides that if the nonconforming use is changed to another nonconforming use without Board approval, that change constitutes discontinuance of the legal nonconforming use. Local governments can prohibit expansion or substantial alteration of nonconforming uses in order to eventually eliminate nonconforming uses, which are disfavored in the law. *Beck v. Springfield Twp. Bd. of Zoning App.* (1993), 88 Ohio App.3d 443, 446. See, also, *Carver v. Deerfield Twp. Bd. of Zoning App.* (Aug. 27, 1999), 11th Dist. No. 98-P-0062 (a property owner cannot materially change the character of the prior nonconforming use).

Accordingly, appellant's argument is simply that his use is substantially similar to the legal nonconforming use.

{¶ 20} Kossoudji's act of engaging in commercial horticultural inside greenhouses in a residential district became a legal nonconforming use at the time of the 1971 resolution, which prohibited such use in the future. This resolution also prohibited the outdoor storage of construction materials, inoperative vehicles, heavy trucks, junk, and debris. According to the only Civ.R. 56 material relating to the topic, Kossoudji engaged solely in growing flowers in the greenhouses on number 70, he did not perform construction or landscaping, he did not store any items outside of the greenhouses, and only one regular vehicle belonging to the resident of the house was parked, not stored, on the property. (Kossoudji affidavit). *Appellant did not respond with evidence to dispute these facts as required by Civ.R. 56(E).*

{¶ 21} There may have been a dispute below as to whether Kissell engaged in some outdoor storage on the property. However, as the Township points out, Kissell did not purchase number 70 until 1978, and thus, his use of the property is irrelevant. See R.C. 519.19; *C.D.S.*, 26 Ohio St.3d at 168 (lawful prior to enactment). Rather, the relevant time to evaluate the extent of the legal nonconforming use is at the time of enactment of the 1971 Zoning Resolution. See id.

{¶ 22} Consequently, appellant's storage of items such as a front-end loader and its attachments, construction trailers, box trucks with commercial logos, dump trucks, unlicensed vehicles, lumber, decking, siding, retaining wall block, pavers, pond pumps, skids of landscaping supplies, and garbage is not a continuation of a legal non-conforming use. We note that the photographs submitted to the trial court were

authenticated by affidavit and clearly showed a use greater than growing plants in a greenhouse. Furthermore, *appellant admits* that he used the property in this way and that his use would be violative of the Zoning Resolution were it not for his nonconforming use claim.

{¶ 23} Appellant's use of the property in this manner in connection with a landscaping and construction company is not in any way similar to the legal nonconforming use established by Kossoudji, even if he nurtures plants inside one of the greenhouses prior to planting them in his landscaping business. This latter act would have been a legal nonconforming use on its own. However, his outdoor storage in running a construction and landscaping business are such substantial alterations to the legal nonconforming use established by Kossoudji that appellant has voluntarily discontinued the legal nonconforming use.

{¶ 24} As to number 76, this lot was an undeveloped residential lot when Kissell purchased it in 1983. Thus, the use of it for outdoor storage in violation of the 1971 resolution is not a legal nonconforming use. The conditional use permit issued in 1983 for number 76 provides only for the building of a parking lot to be used for the legal nonconforming use of the horticultural business on number 70. The permit requires proper landscaping and maintenance. The permit did not allow for outdoor storage or the use of the residential lot in connection with a landscaping or construction business. Thus, appellant's outdoor storage violates the conditional use permit for number 76.[1]

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[1]We also note that "[b]oth conforming and nonconforming uses are subject to ordinances and regulations of a police nature predicated upon protection of the public health, safety, welfare, and general good. * * * An owner of property does not acquire immunity against the exercise, by a municipality, of its police power because such owner began his original operation or use of property in full compliance with existing

{¶ 25} For all of these reasons, there is no genuine issue of material fact left for trial. The Township was entitled to judgment as a matter of law. As such, the trial court's grant of summary judgment to the Township is affirmed.

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DONOVAN, P.J., and FAIN, J., concur.

(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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laws." *C.D.S.*, 26 Ohio St.3d at 169. Much of the outdoor storage on appellant's property would fall under this principle as well.