2006-11

STATE OF MICHIGAN

IN THE SUPREME COURT

GUST PAPADELIS, NIKI PAPADELIS, TELLY'S GREENHOUSE AND GARDEN CENTER, INC., a Michigan Corporation, and TELLY'S NURSERY LLC, a Michigan Limited Liability Company,
Plaintiffs-Appellees,

v

CITY OF TROY, MARK STIMAC, MARLENE STRUCKMAN, and JOHN/JANE DOE(S),
Defendants-Appellants.

Supreme Court Case No. 132366

Court of Appeals
Docket No. 268920

Oakland County Circuit Court
No. 05-067029 CZ

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF TROY'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTIONAL BASIS

The City of Troy's Statement of Jurisdictional Basis is correct and complete.

STATEMENT OF QUESTIONS INVOLVED

I. SHOULD THE MICHIGAN SUPREME COURT GRANT TROY'S APPLICATION FOR LEAVE TO APPEAL?

APPELLANT TROY SAYS	"YES"
APPELLEES PAPADELIS SAY	"NO"
AMICUS MML SAYS	"YES"

II. DOES THE MICHIGAN RIGHT TO FARM ACT, MCL 286.471, *ET SEQ*, PREVENT THE CITY OF TROY FROM ENFORCING ITS ZONING ORDINANCE AGAINST PLAINTIFFS PAPADELIS IN ALL OF THE FACTUAL CIRCUMSTANCES PRESENTED TO THE TRIAL COURT?

Plaintiffs Papadelis say	"YES"
Trial court said	"YES"
Court of Appeals said	"YES"
Defendant City of Troy says	"NO"
Amicus MML says	"NO"

III. DOES THE RIGHT TO FARM ACT ALLOW THE OWNER OF A PARCEL ZONED RESIDENTIAL TO CREATE A FARM ON THAT PARCEL?

Plaintiffs Papadelis say	"YES"
Trial court said	"YES"
Court of Appeals said	"YES"
Defendant City of Troy says	"NO"
Amicus MML says	"NO"

IV. DOES THE EXEMPTION FOR AGRICULTURAL BUILDINGS OF THE STATE CONSTRUCTION CODE ACT, MCL 125.1510 (8), ALLOW PLAINTIFFS PAPADELIS TO CONSTRUCT ANY BUILDING OR STRUCTURE INCIDENTAL TO AGRICULTURAL USES OF THE LAND WITHOUT COMPLYING WITH SIZE, LOCATION AND LOT COVERAGE PROVISIONS OF THE ZONING ORDINANCE, AND THE STATE CONSTRUCTION CODE ACT?

Plaintiffs Papadelis say	"YES"
Trial court said	"YES"
Court of Appeals said	"YES"
Defendant City of Troy says	"NO"
Amicus MML says	"NO"

STATEMENT OF FACTS

The statement of facts in the brief of the City of Troy is accepted as complete and correct.

ARGUMENT

I. THE MICHIGAN SUPREME COURT SHOULD GRANT THE CITY OF TROY'S APPLICATION FOR LEAVE TO APPEAL.

Standard of Review

Statutory interpretation is a question of law that the Supreme Court reviews de novo. *Paige v City of Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (Mich 2006).

Whether a statute preempts a local ordinance is a question of law that is reviewed de novo by appellate courts. *Czymbor's Timber, Inc v City of* Saginaw, 269 Mich App 551, 555; 711 NW2d 442 (2006). The Supreme Court reviews a trial court's ruling on a motion for summary disposition de novo. *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999). Applications for leave to appeal are considered according to the criteria in MCR 7.302.

The Issues in This Case

The issues presented by this case about the effect of the Right to Farm Act, MCL 286.473, *et seq*, on the City of Troy's zoning ordinance and the City of Troy's enforcement of the State Construction Code Act with respect to buildings purportedly incidental to agricultural purposes of the land are of significant public interest to cities and villages throughout Michigan, because the Right to Farm Act as interpreted and applied in this case preempts virtually all building and zoning regulations sought to be enforced by municipalities against agricultural uses within urbanized areas like the City of Troy. MCL 7.302(B)(2). The trial court and Court of Appeals were inexact in the interpretation and application of the Right to Farm Act to Plaintiffs' activities, resulting in an unduly broad exemption from all building and zoning regulations. In particular, the Court of Appeals held that a farm or farm operation could qualify for protection under the RTFA by MCL 286.472 (1) or (2), suggesting that generally accepted agricultural and management practices need not be followed by a farm operation that existed before a change in land use around the farm operation. Opinion, pages 4-5. APPENDIX 1.[1] The Court of Appeals acknowledged that according to its interpretation of the RTFA "a business could 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." FN1, Opinion, page 5. The Court of Appeals asserted that its ruling was "not necessarily inconsistent with *Jerome Twp*, supra, at 233," even though in *Jerome Twp*

[1] The Court of Appeals opinion in this case is cited as "Opinion" and is reproduced in the APPENDIX.

the farm operation was found to be unprotected by the RTFA because it did not exist before the enactment of the zoning ordinances." FN2, Opinion, page 6. Despite the assertion to the contrary, the holding conflicts with the decision in *Jerome Twp v Melchi*, 184 Mich App 228; 457 NW2d 52 (1990). MCR 7.302 (B)(5). In addition, the Court of Appeals interpreted MCL 286.473(2) to apply without a timing requirement in order for the farm operation to be protected by the RTFA in the context of urban development around the farm operation. The effect of this misconstruction of the RTFA is to license all farm operations to open or expand agricultural activities within urbanized developments where otherwise restricted or prohibited by local zoning ordinances. This is clearly erroneous and will cause material injustice to municipalities attempting to enforce zoning ordinances, as well as to residents within municipalities who built or bought their homes in districts where agricultural uses were excluded. MCR 7.302(B)(5).

The Court of Appeals employed superficial analysis of the expansion of a nonconforming use from the south parcel to the north parcel, finding "the fact that Plaintiffs' agricultural activities on the north parcel are otherwise protected under the RTFA blurs this distinction." Opinion, page 7. Rather than stating precisely that the RTFA insulates all farm operations from local zoning ordinances in all circumstances, the Court of Appeals concluded that "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." Opinion, page 7. Therefore, any farm

operation that is a valid nonconforming use situated in a residential zoning district can expand its farm operations with impunity because the RTFA supposedly protects or permits such expansion. This is an unwarranted interpretation of the RTFA, because in the circumstances of this case the RTFA is used as a sword to expand a nonconforming farm operation in a residential district, rather than as a shield against expanding residential or other incompatible uses. Plaintiffs' greenhouse was not a prior nonconforming use, because it was constructed long after the adoption of the Troy zoning ordinance. "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000). Perhaps the Court of Appeals thought the expansion of Plaintiffs' nonconforming use brought it closer to the minimum required parcel size of 5 acres, and therefore made the use more conforming, rather than less conforming. However, that rationale is not reflected in the opinion.

The Court of Appeals engaged in rather cursory interpretation of the Stille-De Rossett-Hale single state construction code act, being MCL 125.1510 (8), which provides that:

> Notwithstanding 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.

The Court of Appeals found that Plaintiffs' greenhouses obviously were "incidental to the use for agricultural purposes" without determining what agricultural purposes actually existed that were "of the land on which the building is located." Opinion, page 7. If the growing of plants in the greenhouses is the agricultural purpose of "the land on which the building is located," then a slaughterhouse, cannery, or fish cleaning and packaging plant could be constructed without a building permit! The Court of Appeals confused the activity within a building or structure with "agricultural purposes of the land on which the building is located" as required by the plain language of the statute. The decision is clearly erroneous and will cause material injustice by allowing a large group of buildings or structures to be exempt from obtaining a building permit and complying with the state construction code.

Urban municipalities throughout Michigan rely heavily on zoning regulations and the building code to obtain and maintain orderly development of real property. The interpretation of the RTFA and the Construction Code Act employed by the Court of Appeals cuts a gaping hole in the regulatory fabric used by municipalities to direct and control development of real property in urban areas.

This case presents issues of significant public interest involving subdivisions of the state in the form of Michigan municipalities, which are responsible for developing and enforcing zoning regulations. MCR 7.302 (B)(2). The decision of the Court of

Appeals is clearly erroneous, and conflicts in part with the decision in *Jerome Twp v Melchi*, 184 Mich App 228; 457 NW2d 52 (1990). MCR 7.302(B)(5).

II. THE RIGHT TO FARM ACT DOES NOT PREVENT TROY FROM ENFORCING ITS ZONING ORDINANCE IN THE FACTUAL CIRCUMSTANCES OF THIS CASE.

Standard of Review

"Resolution of the issues in this case involves the interpretation of [the Right to Farm Act and the State Construction Code Act]. Statutory construction is a question of law that we review de novo. As we stated in *Reed v Yackell*, 473 Mich 520, 528-529; 703 NW2d 1 (2005):

> Our fundamental obligation when interpreting statutes is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). If the statute is unambiguous, judicial construction is neither required nor permitted."

Summary of Argument

Conflict with the RTFA must be determined by examining the GAAMPs developed by the Commission of Agriculture, which comprise the standard specified by the Legislature in MCL 286.473 (1).

The RTFA

In this case the Court of Appeals failed to give effect to all of the language of the statute, which produced erroneous rulings and results. "Courts must give effect to every word, phrase and clause in a statute, and must avoid an interpretation that would render any part of a statute surplusage or nugatory." *Koontz*, supra, page 312.

The RTFA, MCL 286.473, says:

> (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.

There is no statement or declaration in the RTFA that farms or farm operations are exempt from all zoning regulations. Nor is there any statement or declaration that agricultural activities are exempt from all zoning regulations. Nevertheless, that is the effective result of the misinterpretation of the RTFA by the Court of Appeals. The RTFA provides protection from nuisance lawsuits under conditions stated in the act. Some understanding of "a public or private nuisance" is necessary to give effect to the RTFA's protection of a farm or farm operation.

> An ordinance that prohibits conduct which results in a nuisance refers to a public nuisance. In *Township of Garfield v Young*, 348 Mich 337, 341-342; 82 NW2d 876, 878 (1957), the Court quoting Prosser, Torts, s 71, pp. 401, 402 states:
>
> "No better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.' The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community or the confort or convenience of the general public * * *
> "To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several. * * * It is not necessary, however, that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right."

People of Redford Township v McGregor, 65 Mich App 747, 751; 238 NW2d 183 (1975). A nuisance arising from the violation of an ordinance is by its nature a public nuisance. *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). The City of Troy's request to abate some of Plaintiffs' activities states a public nuisance claim, which is described by statute as a nuisance per se; MCL 125.3407.

"A private nuisance is a nontrespessory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). "It evolved as a doctrine to resolve conflicts between neighboring land uses." *Adkins*, page 303. "[T]he gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Adkins*, page 303.

In *Jerome Twp v Melchi*, supra, page 233, the Court of Appeals ruled that defendants could not expand or develop a nonconforming agricultural use after adoption of a zoning ordinance prohibiting that use, relying on MCL 286.471(2):

> 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); M.S.A. § 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); M.S.A. § 12.122(3)(1) and (2). The trial court erred in denying plaintiff injunctive relief as to defendants' apiary.

Following this holding in the present case would compel the conclusion that Plaintiffs' greenhouse is an illegal expansion of a nonconforming agricultural use. If protection of an expanding nonconforming use by the RTFA "is not contemplated by the Right to Farm Act," as described in *Jerome Township v Melchi*, supra, then Plaintiffs' greenhouse should not be protected by the RTFA. The text of MCL 286.473 (2) has not been amended.

Plaintiffs' construction and use of a greenhouse on their north parcel did not predate the residential development within 1 mile of the north parcel. Therefore, it was error for the Court of Appeals to find that Plaintiffs' use of the north parcel was protected by MCL 286.473(2). In *Steffens v Keeler*, 200 Mich App 179; 503 NW2d 675

(1993), the Court of Appeals properly analyzed the record for the farm operation's conformity with GAAMPs and the existence of the farm operation prior to a change in land use or occupancy around the farm operation, according to MCL 286.473(1) and (2). For reasons not explained or justified by the amendment to MCL 286.474, in this case the Court of Appeals found protection for the actions of Plaintiffs Papadelis under MCL 286.473(1) without proof of conformity with applicable GAAMPs, and without proof of the existence of the greenhouse or a farm operation on the north parcel prior to the residential development within 1 mile of the north parcel as required by MCL 286.473(2). Both findings or holdings were erroneous.

The RTFA does not say that a farm or farm operation is immune from all claims of public or private nuisance. Instead, a farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation conforms to generally accepted agricultural and management practices, also known as "GAAMP"s. See APPENDIX. Whether a farm conforms to the GAAMPs is decided according to policies adopted by the Michigan Commission of Agriculture. *Richmond Twp v Erbes*, 195 Mich App 210; 489 NW2d 504 (1992). The GAAMPs provide the actual standard with which a farm or farm operation must comply to gain the protection of the RTFA described in MCL 286.473(1). The GAAMPs are not rules promulgated according to the Administrative Procedures Act, MCL 24.201 *et seq.* The GAAMPs appear to be policy statements of the Commission of Agriculture, which is the administrative board at the helm of the Michigan Department of Agriculture. MCL 285.1. "The head of the

department of Agriculture is the commission of agriculture." MCL 16.276. "All powers, duties and functions now vested by law in the director of agriculture are transferred by a type I transfer to the head of the department of agriculture." MCL 16.278. The Commission of Agriculture does not wield rule promulgating power according to MCL 285.1 or the RTFA, which specifies that "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 management practices according to ***policy*** determined by the Michigan Commission of Agriculture." MCL 286.473(1), emphasis added.

There is legislatively granted authority for the Department of Agriculture, or the Commission of Agriculture, to promulgate rules. See MCL 286.223a, of the Insect and Plant Disease Act, and MCL 290.158 regarding standard grades for table stock potatoes, as examples.

> Rules adopted by an agency in accordance with the APA have the force and effect of law. They must be promulgated in accordance with the procedures set forth in the APA, and are not valid if those procedures are not followed Where, however, the agency has not been empowered to promulgate rules, ***policy statements*** issued by it need not be promulgated in accordance with APA procedures and do not have the force of law. Such statements are so-called "interpretive rules." As expressed by Professor Davis, "An interpretive rule is any rule an agency issues without exercising delegated legislative power to make law through rules."

Clonlara Inc v State Bd of Education, 442 Mich 230, 239; 501 NW2d 88 (1993), emphasis added. Simply calling the agency statement a "policy" is not outcome determinative of whether or not it is a rule, because "'Rule' means an agency regulation, statement, standard, ***policy***, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency ..." MCL 24.207, emphasis added. The GAAMPs look like rules as defined by MCL 24.207.

If generally accepted agricultural management practices determined by "policy" of the Michigan Commission of Agriculture are intended to be legislative rules with the force of law, they must be promulgated according to the Administrative Procedures Act.

> "[I]nterpretive rules are, basically, those that interpret and apply the provisions of the statute under which the agency operates. No sanction *241 attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets .... They state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.

Clonlara, Inc, supra, pages 240-241, quoting Cooper, State Administrative Law, pp 174-175. Perhaps the GAAMPs are interpretive rules by which the preemptive scope of the RTFA is defined, rather than legislative rules by which the RTFA is given effect. These "agency policies may have the force and effect of law because the relevant statute does not provide specific standards for eligibility and administration of the program" by

which protection is granted to a farm operation from nuisance lawsuits. *Faircloth v Family Independence Agency*, 232 Mich App 391, 404; 591 NW2d 314 (1998):

> The policies are not interpretive statements because they do not merely interpret or explain the statute or rules from which the agency derives its authority. Rather, they establish the substantive standards implementing the program.

Whether the GAAMPs published by the Commission of Agriculture through the Department of Agriculture are legislative rules that should have been promulgated according to the APA was not decided by the trial court or the Court of Appeals, and is not squarely presented to the Michigan Supreme Court. But this line of analysis remains important in attempting to interpret the RTFA, because protection from lawsuits alleging a public or private nuisance is premised on the existence of GAAMPs and a farm operation's conformity with the relevant GAAMPs. Recognizing and acknowledging that "[t]he rights of the public may not be determined, nor licenses denied, on the basis of unpromulgated policies," *AFSCME v Dept of Mental Health*, 452 Mich 1, 11; 550 NW2d 190 (1996), the exact nature and function of the GAAMPs in the context of the operation of the RTFA must be reviewed, and should have been examined in more detail by the trial court and the Court of Appeals. It is conformance with GAAMPs that shields a farm or farm operation from a finding of a public or private nuisance. MCL 286.473(1). The absence of a GAAMP on any particular farm activity like operating a greenhouse does not give the operator any protection from a claim of public or private nuisance according to MCL 286.473(1). Certainly the absence

of a GAAMP cannot give more protection to a particular farm operation than the presence of a GAAMP, because the Legislature required conformity with a GAMMP as a condition to receiving protection by the RTFA from conflicting local ordinances.

Subsection (2) of MCL 286.473 acts to protect a farm or farm operation from being found to be a public or private nuisance if the farm or farm operation "existed before a change in the land use or occupancy within 1 mile of the boundaries of the farm land, and if before that change" "the farm or farm operation would not have been a nuisance." This subsection says nothing about a farm or farm operation being exempt from all zoning regulations. Instead, the Legislature made it clear that changes in land use within 1 mile of an existing farm could not render the existing farm a public or private nuisance, if before that change in use the farm would not have been a nuisance. Homeowners in a residential district that develops next to an existing farm cannot label the farm a public or private nuisance just because the nearby land use changed from agricultural to residential.

The RTFA language that prompted the erroneous rulings of the Court of Appeals is found in MCL 286.474(6):

> (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.

The trial court and the Court of Appeals determined that Plaintiffs' activities on the north parcel were "protected" by the RTFA because "George's affidavit states that plaintiffs' operations comply with all GAAMPS, as required under MCL 286.473(1)." Opinion, page 4. However, the trial court and Court of Appeals never determined if any GAAMP applied to Plaintiffs' activities involving the operation of a greenhouse. This was a glaring error, because the existence and applicability of a GAAMP, and Plaintiffs' conformity with it, are required for the Plaintiffs' activities to be "protected" by MCL 286.473(1).

A quick review of the GAAMPs (APPENDIX) reveals there is nothing remotely close to generally accepted agricultural management practices for a greenhouse or nursery operation.[2] The GAAMPs on livestock production facilities include distances between expanding facilities and non-farm residences, and site specifications that include setbacks. Similar standards on greenhouses used in nursery operations would be relevant and helpful to determining if Plaintiffs' activities were protected by the RTFA. The GAAMPs indicate the Department of Agriculture did not view the RTFA as a complete preemption of local zoning.

[2] Judicial speculation about inferences to be drawn from the absence of a GAAMP is not helpful, because the Legislature specified that a farm must conform "to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture" to be protected from being found a public or private nuisance.

> Category 3 Sites: Sites generally not appropriate for new and expanding livestock production facilities.
>
> **New and expanding livestock production should not be constructed in areas where local zoning does not allow for agricultural uses.**
>
> ***
>
> 3. Residential zones – Areas that are zoned primarily for residential use will generally have housing at a density that necessitates setback distances for livestock production facilities to prevent conflicts. New livestock production facilities shall not be constructed within 1500 feet of areas zoned for residential use where agricultural uses are excluded. **Existing livestock production facilities may be expanded within 1500 feet of areas zoned for residential use with approval from the local unit of government.**

Generally Accepted Agricultural and Management Practices for Site Selection and Odor Control for New and Expanding Livestock Production Facilities, June 2006, APPENDIX. Emphasis added. In the introduction is some interesting commentary:

> The decision of where to site a livestock production facility can be based on several objectives including: preserving water quality, minimizing odor, working with existing land ownership constraints, future land development patterns, maximizing convenience for the operator, maintaining aesthetic character, minimizing conflicts with adjacent land uses and **complying with other applicable local ordinances.**

Livestock Production Facilities, GAAMPs, Introduction, page 1, APPENDIX. In the PREFACE it says:

> Agricultural producers who voluntarily follow these practices are provided protection from public or private nuisance litigation under the Right to Farm Act.

Livestock Production Facilities, GAAMPs, PREFACE, page iii, APPENDIX. The exclusion of all agricultural uses by local zoning is not preempted or prohibited by the GAAMPs on livestock facilities, according to the interpretive or legislative rule of the Commission of Agriculture. "[A]s a general rule, deference is given to an administrative agency's decisions, provided that the agency's construction is consistent with the purpose and policies of the statute itself." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 416; 565 NW2d 844 (1997). A reviewing court cannot determine the nature and extent of preemption by the RTFA as applied to a farm operation and a local zoning ordinance unless the purported regulated activity is examined and compared to the applicable GAAMPs. There is no general standard of agricultural use within the RTFA itself by which a conflict with a local ordinance can be analyzed and determined.

Because the GAAMPs provide the actual standards by which agricultural practices are protected or exempted by the RTFA from local ordnance regulation, the GAAMPs must be examined to determine the existence of any conflict with the RTFA. The RTFA does not recite standards of accepted agricultural practices. If there is no conflict between a local zoning ordinance and an applicable GAAMP, then there is no conflict and there is no preemption of the local ordinance by the RTFA.

There are GAAMPs on Pesticide Utilization and Pest Control, Nutrient Utilization and Irrigation Water Use, which might apply to some of Plaintiffs' specific activities of fertilizing, watering, and spraying pesticides on greenhouse plants. See APPENDIX. None of these activities was regulated in any way by Troy's zoning ordinance, so there was no conflict between Troy's zoning ordinance and Plaintiffs' greenhouse operation, even assuming Plaintiffs' conformity with those GAAMPs.

Unlike livestock facilities, the greenhouse operation of the Plaintiffs is not described in GAAMPs that detail specifications for site selection and expansion of an existing site. Compliance with GAAMPs on watering, fertilizing, and spraying pesticides does not exempt Plaintiffs' greenhouse operation from Troy's zoning ordinance. That compliance only garners protection by the RTFA against local ordinances purporting to regulate or prohibit the methods by which Plaintiffs might water, fertilize, or spray pesticides within their greenhouse operation. This fundamental point was missed by the trial court and the Court of Appeals, and should be corrected.

The absence of GAAMPs on Plaintiffs' greenhouse operation does not exempt Plaintiffs' activities from Troy's local zoning ordinance. It would be the presence of GAAMPs on Plaintiffs' greenhouse operation, combined with Plaintiffs' conformity with the GAAMPs and a conflict between the provisions of the GAAMPs and Troy's local zoning ordinance that would preempt the local zoning ordinance regulations

actually in conflict. The plain, unambiguous language of the RTFA gives the protective shield of the act to a farm the "conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture." MCL 286.473(1).

The Court of Appeals decided "[t]he Legislature did not require both subsections [of MCL 286.473] to be met in order for a farm or farming operation to qualify for protection under the RTFA." Opinion, page 5. In and of itself, the independent operation of MCL 286.473(1) and (2) may be a problem for municipalities attempting to enforce local zoning ordinances.[3] The Court of Appeals erroneously found Plaintiffs' greenhouse operation to be "protected" under MCL 286.473(1) of the RTFA without verifying the nature and extent of conformity with applicable GAAMPs. Then the Court of Appeals bootstrapped its erroneous decision under MCL 286.473(1) to reach the strange conclusion that "[b]ecause 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.***" Opinion, page 6, emphasis added. No clear explanation is offered for this dramatic result. The Court of Appeals merely stated that "The RTFA preempts defendants' zoning ordinance to the extent that it conflicts with the RTFA." Opinion, page 6. But

[3] The ultimate outcome could be absurd, with farms that comply with GAAMPs being allowed to commence operations in highly developed residential, commercial, or industrial zoning districts where prohibited by local zoning, and farms that do not conform to GAAMPs but existed prior to a change in use within 1 mile of the farm boundary being allowed to continue to operate in a manner contrary to local zoning regulations and relevant GAAMPs.

there was no careful analysis and determination of how the Troy zoning ordinance actually conflicted with the GAAMPs according to MCL 286.473(1). Then the Court of Appeals mistakenly relied on another case to find a conflict with Troy's zoning ordinance.

> 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 5 acres is pre-empted by the RTFA and is not enforceable.

Opinion, page 6. But in *Shelby Charter Twp v Papesh*, 267 Mich App 92; 704 NW2d 92, (2005), the conflict rendering the zoning ordinance unenforceable was the site standard in GAAMPs for poultry operations, which is the specific type of conflict not argued, analyzed, proved, or found in this case! The discrepancy between the rationale in this case, and in *Shelby Charter Twp v Papesh*, is glaring.

> The language of the statute is unambiguous. It clearly states that a local ordinance is preempted when it purports to extend or revise the RTFA or GAAMPs. It further plainly states that a local unit of government shall not enforce an ordinance that conflicts in any manner with the RTFA or GAAMPs. It is undisputed that plaintiff's Ordinance § 9.10(A), which was in force when defendants bought the property in 1995, prohibited raising poultry on a parcel smaller than three acres. It is also undisputed that the property did not exceed 1.074 acres. The relevant GAAMPs provide for the proper management practices for poultry farming, including, but not limited, to facilities, manure management, and care of chickens and turkeys. Plaintiff has not produced, and we are unable to find, any GAAMP that limits poultry farming to property consisting of more than three acres. As we concluded above, if defendants' farm is commercial in nature and in compliance with the GAAMPs, it is a farm operation protected by the RTFA. The ordinance

> conflicts with the RTFA to the extent that it allows plaintiff to preclude a protected farm operation by limiting the size of a farm.

Shelby Charter Twp v Papesh, page 106. The holding of a conflict was based on an examination of the GAAMPs that applied to the poultry farm, and recognition of relevant GAAMPs that did not limit poultry farms to a minimum size. There was no carte blanche determination that all zoning ordinances requiring a minimum parcel size for agricultural uses necessarily conflict with certain GAAMPs and the RTFA. The analysis in *Shelby Charter Twp v Papesh*, supra, was not followed and applied by the Court of Appeals in reviewing the City of Troy's zoning ordinance and Plaintiffs' greenhouse operation.

The more subtle and difficult issue presented by this case is the preemptive effect of the RTFA when there is a generalized description but no definitive standard in the GAAMPs by which a particular farm operation is described and regulated. The parties, trial court, and Court of Appeals never identified GAAMPs that describe and regulate Plaintiffs' greenhouse operation, so there is no record of any actual conflict between Troy's zoning ordinance and any particular provision of the GAAMPs. Unlike the facts in *Shelby Charter Twp v Papesh*, supra, in which there were GAAMPs for a poultry farm operation without a standard for a minimum amount of land on which to conduct it, here there is no GAAMP describing greenhouse farming operations with which to compare and thereby discern any conflict with Troy's zoning ordinance. The MML

asserts that the absence of a GAAMP is the legal equivalent of the absence of a conflict with MCL 286.473(1) of the RTFA.[4]

With no GAAMP that describes, defines, and regulates Plaintiffs' greenhouse activities, (other than incidental references to irrigation, fertilizer, and pesticides), how could the trial court and the Court of Appeals find a conflict between Troy's zoning ordinance and any of the GAAMPs? More pointedly, how can farm operators gain the benefit of the protection offered by the RTFA in MCL 286.473 (1) if there is no GAAMP with which to conform? In the absence of a GAAMP with which a farm can conform, there is no standard of the RTFA with which a local ordinance can conflict, and no RTFA protection from public or private nuisance suits as described in MCL 286.473(1).

Subsection (3) of MCL 286.473 addresses the change in size of a farm operation, like that of the Plaintiffs:

> A farm or farm operation in conformance with subsection (1) shall not be found to be a public or private nuisance as a result of any of the following:
>
> (a) A change in ownership or size.
>
> (c) A change in the type of farm produce being produced.

The expanded use by Plaintiffs of their north parcel would not be a proper basis for finding that use to be a public or private nuisance, as long as the farm operation was in

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[4] There is an unpublished Court of Appeals opinion to the contrary, which is based on flawed analysis of a purported conflict despite the absence of a pertinent GAAMP. *Milan Twp v Jaworski*, decided December 4, 2003, lv den 470 Mich 895; 683 NW2d 146 (2004). APPENDIX.

conformance with subsection 1, which depends on conformity with the applicable GAAMPs. The trial court and Court of Appeals failed to consider and apply this subsection to the facts of this case. The amendment at MCL 286.474 (6) compels no different outcome.

> 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 provision of this act.

Absent some conflict between Troy's zoning ordinance and a provision of the GAAMPs, there simply is no conflict between Troy's zoning ordinance and the RTFA. If the RTFA preempted all local zoning of agricultural uses, without regard to GAAMPs and the pattern of development described in MCL 286.473 (2), then there would be no need or purpose for MCL 286.473(1) and (2), and the GAAMPs.

In addition, the Court of Appeals found "the zoning ordinances regarding building specifications are preempted by MCL 286.474(6) of the RTFA to the extent the city is attempting to enforce them against a use protected under the RTFA." Opinion, page 8. The exact nature of the conflict between the zoning ordinance regulations and the RTFA was not identified. The Court of Appeals just asserted: "By the same token, the city's zoning ordinances regarding building size and permit requirements conflict with the RTFA." Opinion, page 8. The rationale reflected the error. "This Court is unaware of any such requirements in the RTFA." Opinion, page 8. By this reasoning, all building, and zoning regulations not reflected in the RTFA that are applied to a farm

or farm operation are in conflict with the RTFA and therefore preempted. This interpretation of the RTFA grossly overstates the preemptive purview of the act. The Court of Appeals found conflict between Troy's zoning ordinance and standards that do not exist in the RTFA or the GAAMPs by which conflicts are supposed to be determined. This produced an absurd result by which Troy's zoning ordinance was preempted because of conflict with unspecified GAAMPs, and because of conflict with standards for building specifications that are not within the RTFA or relevant GAAMPs.

Plaintiffs, the trial court, and the Court of Appeals took the potent preemption language of MCL 286.474(6) and erroneously read it as a preemption of all local zoning regulations that attempt to exclude agricultural uses from other zoning (residential, industrial, commercial, and highway interchange) districts. There is no statement in the RTFA of the Legislature's intent to repeal or preempt all local zoning authority for classifying and segregating general land uses. The Troy zoning ordinance does not conflict with any provision of applicable GAAMPs, and does not conflict with any provision of the RTFA. The misinterpretation of the RTFA by the Court of Appeals should be corrected.

III. THE RIGHT TO FARM ACT DOES NOT ALLOW THE OWNER OF A PARCEL ZONED RESIDENTIAL TO CREATE A FARM ON THAT PARCEL.

Standard of Review

Statutory interpretation is a question of law the Supreme Court reviews de novo. *Paige v City of Sterling Heights*, supra.

The RTFA

The Court of Appeals went where no court had gone before:

> We are aware that, under MCL 268.471(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.

FN 1, Opinion, page 5. This is an admission of how the RTFA was misconstrued and extended to a point where farm operations could move into residential zoning districts of cities and villages and bring the "nuisance" to the established residential neighborhoods. There is nothing in the RTFA that mandates the result reached by both the trial court and the Court of Appeals.

"This act prohibits nuisance litigation against a farm or farm operation that conforms to generally accepted agricultural and management practices." *Village of Peck v Hoist*, 153 Mich App 787, 791; 396 NW2d 536 (1986).

> The Legislature undoubtedly realized that, as residential and commercial development expands outward from our state's urban centers and into our agricultural communities, farming operations are often threatened by local zoning ordinances and irate neighbors. It, therefore, enacted the Right to Farm Act to protect farmers from the threat of extinction caused by nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations as well as from the threat of private nuisance suits.

Northville Twp v Coyne, 170 Mich App 446, 448-449; 429 NW2d 185 (1988). Now the Court of Appeals has extended the protection of farms from urban development to a license for farms to locate in fully developed urban areas. This is inconsistent with how the RTFA has been interpreted. *Padgett v Mason County Zoning Comm*, unreported COA opinion #236458 and 236459, December 9, 2003:

> The RTFA prohibits nuisance litigation against farm operations that conform to generally accepted agricultural practices. MCL 286.473; *Steffens v Keeler*, 200 Mich App 179, 181; 503 NW2d 675 (1993). Specifically, the RTFA establishes that a farm operation will not be found to be a public or private nuisance if the farm operation existed before a change in the land use and, if before that change in land use, the farm operation would not have been a nuisance. MCL 286.473. The 1999 amendment to the RTFA simply indicates that local zoning ordinances cannot preempt the RTFA. MCL 286.474(6); *Belvidere Twp v Heinze*, 241 Mich App 324, 327-328; 615 NW2d 250 (2000). Ultimately, as set forth in *Heinze*, **the purpose of the RTFA is to protect farmers from nuisance suits, not to make farms exempt from zoning.** ***Id.*** **at 331.**

APPENDIX. Emphasis added. Prior to the amendment to MCL 286.474 effective in 2000, the RTFA was not a defense to actions enforcing local zoning ordinances. *Travis v*

Preston, 249 Mich App 338, 343; 643 NW2d 235 (2002). The amendment in MCL 286.474(6) made it clear that:

> (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.

However, the Court of Appeals never identified or described exactly what the conflict was between Troy's zoning ordinance and the RTFA, other than the minimum size requirement of 5 acres for an agricultural use. That is not a conflict with any provision of the RTFA or a GAAMP on nurseries or greenhouses, so there is no conflict between Troy's zoning ordinance and the RTFA. The conflict in this case is between the use of the north parcel desired by Plaintiffs Papadelis and Troy's zoning ordinance, not between the RTFA and Troy's zoning ordinance.

Where Troy's zoning ordinance regulates agricultural uses not described in GAAMPs, there is no conflict with the RTFA. And where Troy's zoning ordinance allows an existing nonconforming agricultural use to be continued, there is no conflict with the RTFA. Even where Troy's zoning ordinance prevents the expansion of a nonconforming agricultural use on the north parcel by Plaintiffs Papadelis, there is no conflict with the RTFA according to the plain language of MCL 286.473 (1) and (2).

IV. THE EXEMPTION FOR AGRICULTURAL BUILDINGS IN MCL 125.1510(8) OF THE STATE CONSTRUCTION CODE ACT DOES NOT ALLOW THE CONSTRUCTION OF A GREENHOUSE WITHOUT A BUILDING PERMIT.

Standard of Review

Statutory interpretation is a question of law the Supreme Court reviews de novo. *Paige v City of Sterling Heights*, supra.

The State Construction Code Act

MCL 125.1510 (8) says:

> Notwithstanding 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.

Neither the trial court nor the Court of Appeals determined what constituted the "agricultural purposes of the land on which the building is located." The assumption that the greenhouse constructed on the land is an agricultural purpose of the land is incorrect, because it ignores the statutory prerequisite that the building be ***incidental*** to the agricultural purposes of the land on which the building is located. In this case the trial court and the Court of Appeals incorrectly viewed the activities in the greenhouse, after construction, as the use to which the building was incidental. This was error, because it replaces agricultural purposes of the land" with "agricultural uses of the building," and effectively eliminates the ***"incidental"*** role of the building in relation to

the primary agricultural purposes of the land. Using this circular approach, the agricultural activity in the building makes the building incidental to the agricultural activity within it, and "the agricultural purposes of the land on which the building is located" are defined by the activities in the building!

"Incidental" means: "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose." *State Fire Marshall v Lee*, 101 Mich App 829, 834; 300 NW2d 748 (1980), citing Black's Law Dictionary (4th ed.)

The greenhouse was not incidental to Plaintiffs' use of the north parcel for agricultural purposes of the land on which the greenhouse is located. There is nothing in the statute to suggest the greenhouse can be incidental to Plaintiffs' use of adjoining parcels, and the phrase "land on which the building is located" limits the primary agricultural purposes of the land to the same land on which the building is located. As used in the statute,

> "Agriculture or agricultural purposes" means of, or pertaining to, or connected with, or engaged in agriculture or tillage which is characterized by the act or business of cultivating or using land and soil for the production of crops for the use of animals or humans, and includes, but is not limited to, purposes related to agriculture, farming, dairying, pasturage, horticulture, floriculture, viticulture, and animal and poultry husbandry.

MCL 125.1502a(a). Plaintiffs' greenhouse is the primary use or purpose of the land, rather than an incidental use dependent upon other agricultural purposes of the land. For purposes of this statute,

> "Building means a combination of materials, whether portable or fixed, forming a structure affording a facility or shelter for use or occupancy by persons, animals, or property. Building does not include a building, whether temporary or permanent, 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. Building includes the meaning "or part or parts of the building and all equipment in the building" unless the context clearly requires a different meaning.

MCL 125.1502a(f). Once again, the definition excludes any 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." Plaintiffs' construction and use of the greenhouse is not incidental to any other primary agricultural purposes on the same land where the greenhouse is situated. Therefore, the exemption from a building permit does not apply to Plaintiffs' greenhouse. The trial court and Court of Appeals misconstrued the statute by failing to give meaning to all of the words in the operative subsection.

Also troublesome is the manner in which the trial court and Court of Appeals accepted Plaintiffs' contention that the greenhouse was "not used in the business of retail trade" despite the growing and potting of plants for sale in the adjoining retail business. If anything, this relationship between Plaintiffs' uses of the south and north parcels indicates that the greenhouse would be incidental to the retail business on the

south parcel, rather than incidental to agricultural purposes of the land on which the greenhouse is situated. This type of reasoning, by which the greenhouse is exempt from the building code because it is incidental to the operation of a nearby retail outlet, is violative of the plain language of MCL 125.1510 (8).

Finally, the Construction Code Act is not a local ordinance in conflict with the RTFA, even though, as the Court of Appeals noted at page 7 of its Opinion, the permit requirement "is often enforced through local government." Local enforcement of the statute and building code does not convert the statute into a local ordinance in conflict with the RTFA. The RTFA does not amend, supersede, or repeal the Construction Code Act, and the text of the RTFA does not support disregarding the requirement that a structure must be incidental to the agricultural purposes of the land on which the building is located to be exempt from needing a building permit. The fact that a farm operation described in the RTFA "must be at least partially commercial in nature for the RTFA to apply" (Opinion, page 7) does not militate in favor of exempting all structures from building permit requirements where some type of activity related to agriculture occurs in the building.

At a minimum, the trial court should be directed to determine if the greenhouse constructed by Plaintiffs is "incidental to the use for agricultural purposes of the land on which the building is located" pursuant to MCL 125.1510(8).

CONCLUSION

The trial court and Court of Appeals misinterpreted the RTFA and MCL 125.1510(8) of the State Construction Code Act.

RELIEF

The Supreme Court should grant the City of Troy's Application for Leave to Appeal and reverse the decision of the Court of Appeals, holding that conformity by a farm operation with an applicable GAAMP must be established and analyzed to determine the existence of an actual conflict between a local ordinance and the GAAMP in order for the protective shield of MCL 286.473(1) to be invoked against a nuisance abatement claim. The Supreme Court should reverse the decision of the Court of Appeals as to the exemption of MCL 125.1510(8).

Dated: February 16, 2007

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Order

Michigan Supreme Court
Lansing, Michigan

June 29, 2007

Clifford W. Taylor,
Chief Justice

132366 & (65)(69)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

GUST PAPADELIS, NIKI PAPADELIS, TELLY'S GREENHOUSE AND GARDEN CENTER, INC., and TELLY'S NURSERY LLC,
Plaintiffs-Appellees/
Cross-Appellants,

v

SC: 132366
COA: 268920
Oakland CC: 2005-067029-CZ

CITY OF TROY, MARK STIMAC, and MARLENE STRUCKMAN,
Defendants-Appellants/
Cross-Appellees.

_____/

On order of the Court, the motion for leave to file brief amicus curiae is GRANTED. The application for leave to appeal the September 19, 2006 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants are considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE in part the judgments of the Oakland Circuit Court and the Court of Appeals to the extent that they hold that 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. Assuming that the plaintiffs' acquisition of additional land entitled them under the city's zoning ordinance to make agricultural use of the north parcel (a point on which we express no opinion, in light of the defendant city's failure to exhaust all available avenues of appeal from that ruling after the remand to the Oakland Circuit Court in the prior action, see *City of Troy v Papadelis (On Remand)*, 226 Mich App 90 (1997)), 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 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). As no provisions of the RTFA or any published generally accepted agricultural and

management practice address the permitting, size, height, bulk, floor area, construction, and location of buildings used for greenhouse or related agricultural purposes, no conflict exists between the RTFA and the defendant city's ordinances regulating such matters that would preclude their enforcement under the facts of this case. We REMAND this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. In all other respects, the applications are DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 29, 2007

Clerk

p0626

Order

Michigan Supreme Court
Lansing, Michigan

September 10, 2007

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

132366(73)(74)

GUST PAPADELIS, NIKI PAPADELIS, TELLY'S GREENHOUSE AND GARDEN CENTER, INC., and TELLY'S NURSERY LLC,
Plaintiffs-Appellees/
Cross-Appellants,

v

SC: 132366
COA: 268920
Oakland CC: 2005-067029-CZ

CITY OF TROY, MARK STIMAC, and MARLENE STRUCKMAN,
Defendants-Appellants/
Cross-Appellees.

_____/

On order of the Court, the motion for reconsideration of this Court's June 29, 2007 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously. The motion for immediate consideration is DENIED.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 10, 2007

Corbin R. Davis
Clerk

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