

STATE OF MICHIGAN
COURT OF APPEALS

TALLMADGE CHARTER TOWNSHIP,

Plaintiff- Appellant/Cross- Appellee,

v

HIGH GRADE MATERIAL COMPANY,

Defendant- Appellee/Cross- Appellant.

UNPUBLISHED

December 28, 1999

No. 213935

Ottawa Circuit Court

LC No. 97-029582 CE

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's denial of an injunction on the ground that the doctrine of laches barred plaintiff from imposing restrictions on defendant's business, which operates pursuant to a special use permit. Defendant cross appeals as of right. We affirm.

Plaintiff Tallmadge Charter Township is a municipality in Ottawa County. Defendant High Grade Materials Company operates a redi-mix business within the township. The property on which defendant operates its business was established by defendant's predecessor as a redi-mix facility in 1970. On May 15, 1986, plaintiff rezoned the area from "industrial" to "light industrial." Section 16.3 of the amended zoning ordinance required uses of land within the light industrial district to secure a special use permit as a condition to operating a manufacturing business. The predecessor, however, was never required to obtain a special use permit. Before leasing the property from its predecessor, defendant was incorrectly informed by plaintiff's agent that the redi-mix business was a permitted use.¹ Defendant acquired the property in March 1996. In September 1996, defendant presented to the township a site plan for the construction of a new \$200,000 building to encase the redi-mix facility. The site plan was approved by the planning commission, which issued a building permit. The planning commission never informed defendant that a special use permit was required because the business constituted a nonconforming use. After defendant invested \$200,000 in the construction of a new building on the property, plaintiff informed defendant that it was required to obtain a special use permit to continue its operation. Defendant was granted the special use permit, but the permit restricted defendant's hours of operation from 6:00 a.m. to 7:00 p.m.²

Plaintiff subsequently filed a complaint seeking an injunction, alleging that defendant had violated, and continued to violate, the terms and conditions of the special use permit. Defendant conceded that it operated outside the terms of the special use permit, but argued that defendant's action was barred by the doctrine of laches and that defendant had a legal nonconforming use of the property. The trial court concluded that plaintiff was barred by the doctrine of laches from requiring defendant to obtain a special use permit and from enforcing any restrictions in the permit.³

Plaintiff argues that because defendant extended, enlarged, altered, remodeled or modernized its nonconforming use when it built a new \$200,000 building, defendant must comply with the ordinance requirements for securing a special use permit and must comply with all other ordinances. We need not address the merits of this issue, however, because plaintiff's claim is barred by the doctrine of laches.

The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against defendant. *Sedger v Kinnco, Inc.*, 177 Mich App 69, 73; 441 NW2d 5 (1988). In determining whether a party is guilty of laches, each case must be determined on its own particular facts. *Troy v Papadelis (On Remand)*, 226 Mich App 90, 97; 572 NW2d 246 (1997). The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Badon v General Motors Corp.*, 188 Mich App 430, 436; 470 NW2d 436 (1991).

Here, the property at issue has been used as a concrete ready-mix facility since 1970. In 1986, under terms of an amended ordinance, this property was rezoned "light industrial" and, at that time, the property became a non-conforming use. However, the previous owners of the property were never required to apply for or obtain a special use permit. Therefore, there is no dispute that plaintiffs waited more than ten years after the amended ordinance was adopted and the property became a nonconforming use before requiring that a special use permit be obtained to continue the ready-mix operation. Additionally, plaintiff reviewed defendant's site plan and issued a building permit to defendant more than three months before requiring defendant to obtain a special use permit. Further, because defendant expended over \$200,000 to support the continued operation of the ready-mix facility in reliance on the building permit and because defendant relies on the ability to operate at night in order to meet customer demands, it would unduly prejudice defendant and it would be an injustice to allow plaintiff to enforce the restrictions in the special use permit. Under these circumstances, we conclude that the trial court properly held that plaintiff's claim is barred by the doctrine of laches.

Plaintiff also argues that defendant has waived any remedy from this Court because it elected to stand on its permit rather than petition for an amendment or change in the permit and because it did not appeal to the circuit court as provided in the ordinance. However, because this issue was not properly raised at trial, it is waived on appeal. *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987).

On cross-appeal defendant argues that the trial court abused its discretion in granting the township's motion for reconsideration to address whether defendant's use of property was a nonconforming use because the motion failed to demonstrate palpable error as required by MCR 2.119(F)(3). We disagree. The issue of whether defendant's operation was a nonconforming use was argued during the May 27, 1998, hearing, but the court failed to rule on the issue in its original opinion.

Because the motion for reconsideration did not present an issue already ruled on by the trial court, the trial court had discretion to grant reconsideration and to issue an addendum to its opinion and order. MCR 2.119(F)(3).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

¹ Use of the property as a redi-mix business was actually a nonconforming use.

² Defendant's predecessor's operating hours were from 5:00 a.m. until 11:00 p.m.

³ Specifically, the court reasoned that plaintiff waited more than ten years after the amended zoning ordinance was adopted and defendant's property was rezoned before requiring a special use permit, that plaintiff reviewed and approved defendant's site plan at least three months before requiring that defendant obtain a special use permit, that defendant expended over \$200,000 toward the continued operation of the facility, that nighttime operations have been conducted since 1970, that nighttime operations are essential to meet customer demands, and that taking away nighttime privileges would prejudice defendant as a result of plaintiff's lack of due diligence in requiring a special use permit. In an addendum, the court also held that defendant's erection of the building did not expand the use or operation of the redi-mix business but rather only enclosed the machinery used in operation of the business. The court also found that plaintiff could have issued the building permit with conditions, but did not. Rather, plaintiff issued the permit without conditions, and after the building was erected sought to impose restrictions. Last, the court held that plaintiff has the right to restrict the hours of operation pursuant to the prior use made by the predecessor's operation of the redi-mix business, which was 5:00 a.m. until 11:00 p.m.