STATE OF MICHIGAN

COURT OF APPEALS

CITY OF ALBION,

Plaintiff-Appellee,

v

CLK PROPERTIES, L.L.C.,

Defendant-Appellant,

and

BANK ONE MICHIGAN,

Defendant.

UNPUBLISHED
July 14, 2011

No. 298069
Calhoun Circuit Court
LC No. 2009-002156-CZ

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant CLK Properties, LLC ("defendant")[1] appeals as of right the trial court's order denying its motion for summary disposition and granting plaintiff City of Albion's motion for summary disposition in this dispute over application of a sign ordinance to require removal of an empty sign frame from defendant's property. Because plaintiff's sign ordinance is a valid and enforceable exercise of plaintiff's police power under the home rule city act to which prior nonconforming use analysis is inapposite, there is no dispute that defendant's sign violates the ordinance, and, because defendant did not establish the necessary elements of the affirmative defense of laches, we affirm.

The facts underlying this appeal are not in dispute. On June 20, 2000, defendant purchased commercial property located in the City of Albion. At the time of purchase, and at all times since the purchase, the property has been vacant. Defendant's efforts to sell or lease the

[1] Bank One Michigan is the mortgagee of the property at issue and was originally named in plaintiff's complaint as a codefendant. However, Bank One was dismissed without prejudice prior to service of the complaint and never appeared in this action. Therefore, the term "defendant" refers solely to CLK Properties, LLC.

property have been unsuccessful. Plaintiff takes issue with a large sign from which the front and back advertising panels have been removed that remains on the property. To be specific, the record indicates that there actually are two sign frames on the property. The smaller of the two appears customary in size and design for signs typically found along city streets. The second sign frame is substantially larger. Defendant describes it as a "giant lighted edifice designed to be seen from the nearby expressway." The front and back panels have been removed from each of the signs, leaving only the sign frames with attendant lighting fixtures and supporting polls in place. But, plaintiff takes issue, apparently, with only the continued presence of the larger sign frame.

In May 2002, plaintiff enacted a sign ordinance, section 64-21 which provides in pertinent part:

> (a) *Abandoned signs*. Any business sign or sign structure now or hereafter existing which no longer advertises a bona fide business conducted or product sold, or an abandoned sign, shall be removed at the expense of the property owner within 120 days after the cessation of business. However, this requirement shall not apply where under the provisions of this chapter an existing conforming sign may be altered to advertise a new business or product sold and the property owner has made a written request within said 120 days to the planning department for a 90-day extension to finalize arrangements for the establishment of a new business at said location. Prior to requesting said extension, the property owner shall have removed or covered in an appropriate manner the previously existing advertising sign copy. For the purpose of this section, the word "removed" shall mean:
>
> > (1) All parts of a sign including columns and supports of any pole sign or wall sign.

On or about September 8, 2008, plaintiff sent defendant a Notice of Sign Violation. Defendant did not take any action, and on July 6, 2009, plaintiff filed the instant action seeking removal of the sign.

The parties filed cross-motions for summary disposition. Plaintiff, relying on *Adams Outdoor Advertising v City of East Lansing*, 439 Mich 209; 483 NW2d 38 (1992) ("*Adams I*"), asserted that its sign ordinance constituted a valid and enforceable exercise of its police power and that defendant's sign was in plain violation of that ordinance. Defendant characterized the sign ordinance as a zoning ordinance and asserted that the sign constituted a vested and valuable prior nonconforming use. Defendant argued that *Adams I* is distinguishable from the instant case because *Adams I* was premised on a provision in the home rule city act that permits cities to regulate "billboards," and the instant sign is not a "billboard" as that term is defined by any Michigan statute. Defendant argued further that plaintiff had notice of the existence of the empty sign frame on the property since before enactment of the sign ordinance and accordingly, plaintiff was estopped, and/or barred by the doctrine of laches, from now seeking to enforce the ordinance.

The trial court granted plaintiff's motion for summary disposition ruling pursuant to *Adams I*, that a city has the authority to enact a sign ordinance that includes a provision eliminating nonconforming signs over a period of time. It further determined that the doctrine of laches did not prohibit enforcement of the ordinance. The trial court ordered that defendant remove the sign or otherwise bring the sign into conformance with the ordinance.

This Court reviews a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Statutory interpretation also presents a question of law that this Court reviews de novo, *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008), as does the interpretation and application of a municipal ordinance, *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). Likewise, a trial court's decision regarding the equitable defense of laches is reviewed de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). However, any findings of fact supporting that decision are reviewed for clear error. *Id*. "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

Defendant first argues that the trial court erred by failing to recognize that defendant's sign constitutes a valid prior nonconforming use, which may be continued pursuant to MCL 125.3208(1), despite plaintiff's enactment of the sign ordinance. At the outset, defendant does not assert that the enactment of the sign ordinance was beyond plaintiff's authority, or that it was invalid or irregular in any way. Instead, the issue raised is whether the sign ordinance is a zoning ordinance, subject to well-established limitations on plaintiff's zoning authority and permitting the continuation of prior nonconforming uses, or whether the sign ordinance was enacted under the authority afforded to plaintiff under the home rule city act such that nonconforming use analysis is inapposite.

In *Adams I*, 439 Mich 211-212, 218-219, our Supreme Court specifically held that Michigan cities have the authority under the home rule city act, MCL 117.1, *et seq*., to regulate signage within their city limits. The Court also held that this authority permits a city to eliminate nonconforming signs over a designated period of time. *Id*. at 219. The plaintiffs in *Adams I* owned varying types of billboards and signs, located both on-premises and off-premises.[2] After their attempts to seek variances from the sign code were unsuccessful, the plaintiffs filed suit, arguing that the amortization provision of the sign code was enacted without statutory authority. Our Supreme Court held that enactment of the sign code, including the provision requiring removal of nonconforming signs over a period of time, was a legitimate exercise of the city's

[2] *Adams I* identified off-premises signs as those signs advertising "a use, business, commodity, service or activity not conducted, sold, or offered upon the premises where the signs were located." *Adams I*, 439 Mich at 213-214.

police power under the home rule city act, and specifically MCL 117.4i(f), [3] *id*. at 218-219, which the Court noted "enables cities the authority to regulate signs and billboards in the interest of the health, safety, and welfare of the community and to promote the aesthetic value of the city," *id*. at 218 n 14. Further, the Court explicitly stated that a city's authority under the home rule city act to regulate signs, including the authority to amortize nonconforming signs, is "without limitation by the statutory protection of nonconforming uses under the zoning enabling act . . . ." *Id*. at 219.

In a subsequent decision, *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 22; 614 NW2d 634 (2000) ("*Adams II*"), the Supreme Court acknowledged that *Adams I* established that enactment of a sign code was a legitimate exercise of the city's police power. The Court then further observed that,

> there is no issue regarding nonconforming use because nonconforming use analysis only applies in the context of zoning regulations. *Adams I* held that the sign code is not a zoning regulation, but a police power regulation in the interest of public health and safety. Accordingly, nonconforming use analysis is inapposite here. To understand this distinction (that nonconforming use analysis applies only to zoning regulations and not to public health and safety regulations), one need only consider the unprecedented handcuffing of the government that would ensue if public health and safety regulations were subject to nonconforming use analysis. This would leave governments powerless to immediately terminate existing hazardous or dangerous activities because any preexisting facility engaged in these activities would be able to claim nonconforming use status and continue indefinitely in spite of the regulation. [*Id*. at 22 n 2.]

Our Supreme Court's decisions plainly establish that a sign code or ordinance is "a police power regulation," the enactment of which is within the authority afforded to a city by the home rule city act, and that nonconforming use analysis is inapposite to the enforcement of such codes or ordinances. *Adams II*, 463 Mich 22 n 2; *Adams I*, 439 Mich at 218-219. Accordingly, plaintiff's sign ordinance constitutes a valid and enforceable exercise of its police power, and defendant's assertion that it is entitled to maintain its sign as a prior nonconforming use lacks merit.

Defendant argues that *Adams I* does not control the instant case because the home rule city act only provides for the regulation of "billboards," and thus, *Adams I* only addressed a city's authority to regulate off-premises signs. Defendant also points out that the home rule city act does not define "billboard," but that the term is defined under the Highway Advertising Act

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[3] At the time *Adams I* was decided, the relevant subsection of the home rule city act was MCL § 117.4i(5). Subsequent legislative amendments relabeled, without altering, the pertinent subsection as 4i(f). See *Adams II*, 463 Mich at 682. MCL 117.4i(f) allows a city to provide for the "[l]icensing, regulating, restricting and limiting [of] the number and location of billboards within the city."

of 1972, MCL 252.302(r), as "a sign separate from a premises erected for the purpose of advertising a product, event, person or subject not related to the premises on which the sign is located." Defendant specifically asserts that its sign does not meet the definition of a "billboard," and thus, it cannot be regulated under the city's authority pursuant to the home rule city act. Contrary to defendant's argument, however, *Adams I* does not provide for any difference in the existence or extent of a city's authority to regulate on-premises and off-premises signs. As we acknowledged previously, the plaintiffs in *Adams I* owned varying types of billboards and signs, located both on-premises and off-premises. The Court did not limit its ruling in any manner to suggest that the sign code was authorized only insofar as it applied to off-premises signs. Indeed, the Court specifically stated that the home rule city act, and specifically MCL 117.4i(f), "enables cities the authority to regulate *signs and billboards* in the interest of the health, safety, and welfare of the community and to promote the aesthetic value of the city." *Adams I*, 439 Mich at 218 n 14 (emphasis added).

Defendant next contends that the trial court erred by failing to apply the doctrine of laches to bar plaintiff's enforcement of the sign ordinance in this case. As this Court recently explained in *Attorney General v PowerPick Players' Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010):

> Laches is an affirmative defense primarily based on circumstances that render it inequitable to grant relief to a dilatory plaintiff *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990). "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Angeloff v Smith*, 254 Mich 99, 101; 235 NW 823 (1931). But "[i]t has long been held that the mere lapse of time will not, in itself, constitute laches." *Dep't of Treasury v Campbell*, 107 Mich App 561, 570; 309 NW2d 668 (1981). "The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created." *Id.* The defendant bears the burden of proving this resultant prejudice. *Yankee Springs Twp*, 264 Mich App at 612.

Laches applies only when there has been *both* an unexcused or unexplained delay in commencing an action *and* a corresponding change of material condition that results in prejudice to a party. *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996); *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005).

Defendant argues that it will be prejudiced by the enforcement of plaintiff's ordinance to require removal of the sign. However, to support a defense of laches, defendant is required to show harm arising from plaintiff's *delay* in pursuing removal of the sign, and not merely harm arising from the removal itself. Defendant has made no such showing. If anything, it could be argued, based on defendant's representations regarding the sign's impact on the value and marketability of the property, that the delay in enforcement actually aided defendant, by

affording it with substantial additional time in which to find a lessee or purchaser of the property with the sign as an available feature. Defendant has not identified any action it has taken, or not taken, in reliance on plaintiff's lack of enforcement, nor any material change in its condition resulting from plaintiff having not enforced its ordinance sooner. Consequently, there being no prejudice arising to defendant from plaintiff's delay in enforcement of the ordinance, laches does not bar plaintiff's claim. *Attorney General*, 287 Mich App at 51.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio