

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH SMOLARZ,

Plaintiff/Counterdefendant-
Appellant,

v

COLON TOWNSHIP,

Defendant/Counterplaintiff-
Appellee,

and

LARRY MOYER,

Defendant/Counterplaintiff,

and

JERRY ALBRIGHT, LINDA ALBRIGHT,
RAMON CRESPO, DOLLENE CRESPO,
MITCHELL ADDIS, CONNIE ADDIS, ROBERT
ROBBINS, JUDITH ROBBINS, CHARLES
BENTON, JUDY BENTON, RICHARD NOIROT,
CLARA NOIROT, LESTER TEFFT, WILLIAM
SAMPSON, and DORIS SAMPSON,

Intervening Counterplaintiffs-
Appellees.

UNPUBLISHED

April 21, 2005

No. 251155

St. Joseph Circuit Court

LC No. 01-001160-CZ

JOSEPH SMOLARZ,

Plaintiff/Counterdefendant-
Appellee,

v

LARRY MOYER and COLON TOWNSHIP,

No. 255286

St. Joseph Circuit Court

LC No. 01-001160-CZ

Defendants/Counterplaintiffs,

and

JERRY ALBRIGHT, LINDA ALBRIGHT,
RAMON CRESPO, DOLLENE CRESPO,
MITCHELL ADDIS, CONNIE ADDIS, ROBERT
ROBBINS, JUDITH ROBBINS, CHARLES
BENTON, JUDY BENTON, RICHARD NOIROT,
CLARA NOIROT, LESTER TEFFT, WILLIAM
SAMPSON, and DORIS SAMPSON,

Intervening Counterplaintiffs-
Appellants.

Before: Judges Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

This action involves plaintiff's right to engage in various shooting activities on his land, to which his neighbors object, and the township's right to regulate that use. In these consolidated appeals, plaintiff appeals by leave granted in Docket No. 251155 from the trial court's September 8, 2003, order granting defendant Colon Township's motion for summary disposition and permanently enjoining plaintiff from using his property as a hunt club, gun club, or firing range until plaintiff applies for and defendant issues a special use permit allowing these activities. In Docket No. 255286, intervening counterplaintiffs, neighbors of plaintiff, appeal as of right from the trial court's April 12, 2004, order granting plaintiff's motion for summary disposition and dismissing intervening counterplaintiffs' action for nuisance. We affirm the trial court's grant of summary disposition in both Docket No. 251155 and Docket No. 255286.

I. Standard of Review

Both appeals stem from the trial court's decision on motions for summary disposition pursuant to MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and is reviewed de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court must consider the entire record, including any documentary evidence submitted by the parties, in a light most favorable to the non-moving party to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.*

II. Docket No. 251155

A. The Township Rural Zoning Act

Plaintiff argues that defendant Colon Township ("defendant") lacked the general authority under the Township Rural Zoning Act ("TRZA"), MCL 125.271 *et seq.*, to enact the

2000 amendment to its zoning ordinance. We disagree. Issues of statutory construction, including zoning ordinances, are also reviewed de novo. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

Townships only have those powers provided by statute or our state’s constitution. Const 1963, art VII, §§ 22 and 34. MCL 41.181 provides that a township may adopt an ordinance regulating the public health, safety, and welfare of persons and property and provides a *non-inclusive* list of subjects. More specifically, MCL 125.271 pertains to a township’s authority to enact zoning ordinances and states, in part:

(1) The township board of an organized township¹ in this state may provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township outside the limits of cities and villages which regulate the use of land and structures; to meet the needs of the state’s citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that use of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements; and to promote public health, safety, and welfare. For these purposes, the township board may divide the township into districts of such number, shape, and area as it considers best suited to carry out this act. [Footnote added.]

Additionally, “[a] township may provide in a zoning ordinance for special land uses which shall be permitted in a zoning district only after review and approval by either the zoning board, an official charged with administering the ordinance, or the township board, as specified in the ordinance.” MCL 125.286b(1).

Here, the township’s amendment at issue, § 14.3, states, in pertinent part:

SPECIAL LAND USES

The following land uses are allowed in the district if location standards and conditions can be met to assure compatibility of such uses with permitted uses in the district and in compliance with Article XVI. Uses similar to (but not listed) as special land uses may be considered by the Planning Commission as provided in Section 16 of this Zoning Ordinance.

¹ The fact that Colon Township is an unchartered township is of no import to the resolution of this issue because “the [TRZA] applies to charter townships as well as general law townships.” *Huxtable v Bd of Trustees of Charter Twp of Meridian*, 102 Mich App 690, 694; 302 NW2d 282 (1981).

* * *

6. Hunt clubs, gun clubs or firing ranges.

MCL 125.271(1) provides a township with the authority to enact zoning ordinances to “regulate the use of land . . . to insure that use of the land shall be situated in appropriate locations and relationships.” Additionally, MCL 125.286b(1) allows a township to require that a landowner obtain a special land use permit for uses delineated in the zoning ordinance. Thus, we conclude that defendant had the authority to enact the 2000 amendment requiring a special land use permit for firing range use in an agricultural district.

The legal authorities cited by plaintiff in support of his position that defendant lacked the authority to enact an ordinance pertaining to the use or discharge of firearms are inapplicable. The statutes and case law on which plaintiff relies involve a township’s or city’s attempt to totally prohibit the discharge of firearms within its jurisdiction. Here, defendant’s 2000 amendment to its zoning ordinance, and defendant’s corresponding authority to enact the amendment, implicate defendant’s power to regulate land use, i.e., the location of firing ranges in the township. The amendment does not attempt to prohibit all discharge of firearms anywhere in the township and the trial court’s injunctive order specifically provided that plaintiff was entitled to continue using his firing range for personal use. The trial court properly found that defendant had the authority to enact the 2000 amendment.

B. The Sport Shooting Range Act

Plaintiff asserts that the Sport Shooting Range Act (“SSRA”), MCL 691.1541 *et seq.*, bars defendant’s claim of nuisance. First, plaintiff argues that the SSRA protects him from defendant’s nuisance action under MCL 691.1542, which generally protects a landowner from civil liability due to noise emanating from a range if the range was in compliance with noise control laws or ordinances that applied to the range and its operation at the time of construction or initial operation of the range. However, MCL 691.1542 is inapplicable because defendant’s claim of nuisance per se is based on plaintiff’s alleged violation of its zoning ordinance, not a noise ordinance. Violations of a local zoning ordinance constitute a nuisance per se that a court must abate. MCL 125.294.

Second, plaintiff argues that MCL 691.1542a(1) bars defendant’s claim of nuisance per se because plaintiff was not in violation of any zoning ordinance before the 2000 amendment. MCL 691.1542a(1) states:

A sport shooting range that is operated and is not in violation of existing law at the time of the enactment of an ordinance shall be permitted to continue in operation even if the operation of the sport shooting range at a later date does not conform to the new ordinance or an amendment to an existing ordinance.

Plaintiff contends that because a special permit was not required for the operation of a firing range and such a use was not expressly prohibited before the 2000 amendment took effect, the use was permissible. Defendant responds that plaintiff’s argument is flawed because zoning ordinances by their nature prohibit all uses except those that are provided for.

The critical question is whether plaintiff's use of his land as a shooting range without a special land use permit was lawful before 2000. Under defendant's 1980 zoning ordinance, rural residential and agricultural lands were combined in one district. Hunt clubs, gun clubs, and similar land uses were not permitted uses, although hunt and gun clubs were allowed to be operated in the agricultural and rural residential district after the landowner obtained a special land use permit. In March 1998, a new zoning ordinance was passed which reflected the separation of the rural residential and agricultural districts. Section 7.3 of the 1998 zoning ordinance, which pertained to the rural residential district, specifically stated that "[u]ses not listed as permitted or special land uses may only be allowed following a zoning ordinance text amendment as provided in Section 29.1." The sections pertaining to the agricultural district had similar provisions and provided that land in the agricultural district could only be used as a hunt or gun club after obtaining a special use permit. Such a special use was not allowed in the rural residential district.

When interpreting a zoning ordinance, the rules of statutory construction apply. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). Clear, unambiguous language must be enforced as written, *id.*, and provisions within an ordinance must be read as a whole, *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). The language in the 1998 zoning ordinance is clear. If a use is not permitted or allowed by a special land use permit, then it is prohibited. Although the 1980 zoning ordinance has no such language, plaintiff's interpretation contravenes the ordinance's overall purpose, which was to ensure that land uses were consistent with the township's comprehensive plan. Moreover, plaintiff's interpretation renders a nonconforming use irrelevant. Reading the 1980 zoning ordinance as a whole, we conclude that if a use was not delineated as permitted or allowed after obtaining a special land use permit, then that use was not allowed and was in violation of the zoning ordinance.

Plaintiff cites *Village of Mackinaw City v Union Terminal Piers, Inc*, 103 Mich App 60; 302 NW2d 326 (1981), and *Peacock Twp v Panetta*, 81 Mich App 733; 265 NW2d 810 (1978), in support of his interpretation. Those cases are distinguishable, however, because they stand for the proposition that where a use is expressly prohibited in one district, an inference arises that the use is permitted in another district. *Union Terminal Piers, supra* at 64; *Peacock Twp, supra* at 737. This case does not involve the construction of provisions applicable to different districts. At all times, the issue has been the interpretation of the provisions applicable to a specified district.

Shooting ranges were never allowed even with a special permit under the 1980 zoning ordinance. And even if plaintiff's land use was categorized as a hunt or gun club, such a use was only allowed after obtaining a special use permit, which plaintiff never obtained. Thus, plaintiff's usage did not conform to the 1980 zoning ordinance and could not be considered a nonconforming use under the 1998 zoning ordinance. Because plaintiff's land usage as a range was never valid, MCL 691.1542a(1) provides plaintiff no protection.

Third, plaintiff argues that, regardless of any failure to comply with the zoning ordinance, he is permitted to continue to operate his sport shooting range pursuant to MCL 691.1542a(2). We agree.

MCL 691.1542a(2) provides that “[a] sport shooting range that is in existence as of [July 5, 1994,] and operates in compliance with generally accepted operation practices, even if not in compliance with an ordinance of a local unit of government,” shall be permitted to continue, subject to certain limitations. MCL 691.1541(d) defines a “sport shooting range” as “an area designed or operated for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar *sport shooting*.” (Emphasis added.) “Generally accepted operation practices” are defined as:

“those practices adopted by the commission of natural resources that are established by a nationally recognized nonprofit membership organization that provides voluntary firearm safety programs that include training individuals in the safe handling and use of firearms, which practices are developed in consideration of all information reasonably available regarding the operation of shooting ranges.” [MCL 691.1541(a).]

In his affidavit submitted to the trial court, plaintiff avers that “an area on the property that he owns at 33377 Wattles Road, Colon, Michigan[,] has been used continuously from before July 5, 1994[,] to present, as a ‘sport shooting range’ as defined in MCL § 691.1541 . . . in compliance with ‘generally accepted operation practices.’”

Defendant, in its brief supporting its motion for summary disposition, argued that plaintiff’s “range use was not in compliance with the Township’s Zoning Ordinance when commenced since a special use permit was required even in 1994.” Thus, it appears that defendant conceded that plaintiff was, in fact, using his property as a shooting range in 1994. Additionally, defendant never challenged plaintiff’s assertion that he operated his shooting range in compliance with “generally accepted operation practices.” Rather, defendant “question[ed] whether the use qualifies as a sport shooting range at all,” arguing that “the use was not in existence until 1998.” The 1998 use defendant refers to, however, was the “firearms training activities” of local law enforcement personnel.

Defendant’s argument that plaintiff did not operate a sport shooting range until 1998, when law enforcement personnel began using the property for firearms training activities, ignores the statutory definition of a “sport shooting range.” Under the statute, a sport shooting range merely needs to be “designed or operated for the use of . . . *sport shooting*.” MCL 691.1541(d) (emphasis added). Thus, defendant never challenged plaintiff’s affidavit that he operated a sport shooting range as defined in MCL 691.1541 in compliance with generally accepted operation practices as of July 5, 1994. Furthermore, the trial court’s order granting defendant’s motion for summary disposition stated that plaintiff had used his property as a firing range since prior to July 5, 1994, and defendant has not challenged this finding on appeal. Viewing the entire record in a light most favorable to plaintiff, defendant has not created a genuine issue of material fact regarding whether plaintiff operated a sport shooting range in compliance with generally accepted operation practices as of July 5, 1994. Plaintiff is, therefore, permitted to continue to operate his sport shooting range, provided that he does so in compliance with generally accepted operation practices pursuant to MCL 691.1542a(2).

MCL 691.1542a(2), however, contains no language that would permit plaintiff to continue to use his property for the firearms training activities of law enforcement personnel in the face of local zoning ordinances to the contrary. A sport shooting range is defined by statute

as an area designed or operated for *sport shooting*, MCL 691.1541(d), not law enforcement firearms training. MCL 691.1542a(2) permits a sport shooting range in existence as of July 5, 1994, to continue to operate as a sport shooting range and to maintain its facilities and activities consistent with its use as a sport shooting range, but it does not permit such a sport shooting range to be used for law enforcement training purposes. Law enforcement firearms training is not a protected use under the SSRA and, therefore, may be regulated through local zoning ordinances without affecting the property's use as a sport shooting range.

III. Docket No. 255286

Intervening counterplaintiffs (“ICPs”) argue that the trial court erred in granting summary disposition in favor of plaintiff and dismissing their complaint. However, ICPs, in their intervening counter-complaint, requested only that the trial court declare plaintiff’s “use as a law enforcement training facility” a nuisance and to enjoin plaintiff from using the property in the “manner that maintains such a nuisance or creates a new one.” ICPs argued at the hearing on plaintiff’s motion for summary disposition that they never sought to enjoin plaintiff from using his property for recreational or sport shooting. In light of this Court’s resolution of Docket No. 251155, ICPs’ claim is moot,² and we affirm the trial court’s dismissal of ICPs’ complaint.³

IV. Conclusion

In Docket No. 251155, we affirm the trial court’s grant of summary disposition in favor of defendant, but we remand to the trial court for the modification and entry of an injunctive order not inconsistent with this opinion. In Docket No. 255286, we affirm the trial court’s dismissal of ICPs’ complaint.

Affirmed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot

² *Eller v Metro Industrial Contracting, Inc.*, 261 Mich App 569, 571; 683 NW2d 242 (2004) (“An issue is moot and should not be reached if a court can no longer fashion a remedy.”)

³ Additionally, because we found that the SSRA applies to protect plaintiff’s shooting activities as long as they are limited to sport shooting and done in compliance with generally accepted operation practices, any claim ICPs could bring against plaintiff for nuisance based on his sport shooting activities would be barred by MCL 691.1542. We, therefore, need not address ICPs claim that the trial court erred in finding that ICPs failed to claim actual, physical discomfort.