

STATE OF MICHIGAN
COURT OF APPEALS

IDA TOWNSHIP,

Plaintiff/Counter-Defendant-
Appellee,

v

SOUTHEAST MICHIGAN MOTORSPORTS,
LLC, DARRIN FELKEY and CHARLES
MUDGE,

Defendants/Counter-Plaintiffs-
Appellants,

and

IDA TOWNSHIP PLANNING COMMISSION,

Counter-Defendant-Appellee.

UNPUBLISHED
October 3, 2013

No. 303595
Monroe Circuit Court
LC No. 09-027194-CZ

Before: METER, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendants/counter-plaintiffs-appellants (defendants) appeal as of right an April 8, 2011, order wherein the trial court modified a preliminary injunction and restricted defendants' use of their property for riding motocross vehicles. In related orders, the trial court held that defendants' use of their property for riding motocross vehicles and the construction of tracks for that purpose constituted a public nuisance and a nuisance per se, held that the Ida Township Zoning Ordinance was constitutional on its face, and granted plaintiff/counter-defendant-appellee Ida Township's and counter-defendant-appellee Ida Township Planning Commission's (the Township's), motion for summary disposition with respect to all of defendants' constitutional counterclaims. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This zoning dispute arises from defendants' 2008 application for a special land-use permit for the construction of a motocross park on a 95-acre parcel of property zoned AG-2 (agricultural) in Ida Township (the property). Sometime in 2007 and early 2008,

defendant/counter-plaintiff Charles Mudge and a group of friends got together to purchase the property. The group planned to build a motocross complex that contained three motocross tracks that could accommodate 50 dirt bikes. The group also planned to have a pond, rustic camp sites, and other activities at the complex. The group included Mudge, Darrin Felkey, and 18 other individuals who eventually incorporated defendant/counter-plaintiff Southeast Michigan Motorsports, L.L.C. (“SEMM” or “the LLC”). Felkey was named president of SEMM and Mudge was a principal member.

The Ida Township Zoning Ordinance (ITZO) is a permissive ordinance in that it lists “principal permitted uses” in each zoning district. The principal permitted uses in the AG-2 district are single-family dwellings, farm buildings and equipment, truck gardening and nurseries and other similar structures/uses. In addition, to the principal permitted uses, the ordinance permits “[a]ccessory buildings and uses customarily incidental to the above Principal Permitted Uses.” ITZO § 7.02.

For uses that are not principal permitted uses or accessory uses, § 7.03 contains a list of uses that are permitted with a special use permit. Specifically, § 7.03 allows “private parks,” in the AG-2 district “after special approval.” The ITZO vests the Planning Commission with the authority to recommend to the Township Board that a request for special use be granted or denied. *Id.* at § 16.07(4). The ITZO provides 10 specific criteria that govern the Planning Commission’s recommendations with respect to special land use applications. *Id.* at § 16.07(7)).

On April 24, 2008, Mudge filed an application for a special land use review, requesting a permit to construct the motocross park. The Planning Commission held public meetings to address the application, where several residents objected to the proposed park. The matter was eventually tabled to allow defendants time to submit necessary documentation.

In the meantime, although the initial purchase agreement was contingent on the Township’s approval of the special-use application, SEMM waived the contingency and purchased the property on May 1, 2008, without any guarantee that the Township would grant the application. The transaction was structured to split the parcel into a 95-acre parcel of vacant land and a five-acre parcel with an existing residential home on it.

After defendants submitted a proposed site plan that contained a noise study, the Planning Commission hired Mannik & Smith (M & S), an engineering firm, and Carlisle Wortman (Carlisle), a private firm that advises municipalities on community planning, to review the plan. M & S submitted two reports. In its first report completed on July 25, 2008, M & S identified 28 deficiencies, including issues related to dust and noise control. On November 3, 2008, M & S submitted another report that identified eight concerns including concerns with the plan’s unpaved driveway and grassy parking area and indicated that SEMM failed to address the “noise consideration” in more detail.

Carlisle submitted a report on September 10, 2008, and identified 29 “concerns.” These concerns ranged from lack of detail on farming operations to failure to adequately address environmental impacts such as air quality, lighting, soil erosion, use of portable restrooms, and the potential need for MDEQ permits. On November 7, 2008, Carlisle submitted another review

of SEMM's revised site plan and identified 12 items of concern including concerns with portable restrooms, parking areas, driveways and noise.

In total, the Planning Commission held six public meetings while the special use application was pending. Finally, on November 11, 2008, the Planning Commission recommended that the Board deny defendants' application at a public hearing "based on the findings, determinations, conclusions, requirements and standards as stated" in the Carlisle and M & S reports. The Planning Commission articulated reasons for recommending denial, indicating that the proposed use was not compatible with the area or natural environment, did not protect the public health, and would produce dust and noise to the detriment of residents and otherwise be objectionable to nearby dwellings.

After the Planning Commission sent its recommendation to the Township Board (the Board), Carlisle sent a memorandum to the Board summarizing its review of the application and site plan. Carlisle indicated that the plan was not harmonious to the surrounding area and recommended that the Board deny the plan. On January 6, 2009, the Board denied the special use request "based on the findings, determinations, conclusions, observations and recommendations by: [the Planning Commission]" and based on the three reports from Carlisle and the two reports from M & S.

After the Board denied the special use request, in the spring of 2009, a neighbor flew over the property in an airplane and took aerial photographs and forwarded them to the Township. At trial, Mudge agreed that the photographs depicted a motocross track. In addition to the photographs, according to Ron Iott, the Township Supervisor, several residents submitted verbal and written complaints about riding activity on the property. However, Iott agreed that the Township did not have any record of the complaints.

After receiving the photographs and the complaints, on April 17, 2009, the Township filed a complaint against SEMM, Felkey and Mudge (defendants) for declaratory and injunctive relief. The Township alleged that defendants had proceeded with their plans to construct "motorcycle/ATV facilities" on the property in violation of the ITZO. The Township alleged that defendants' conduct amounted to a public nuisance and a nuisance per se. The Township requested that the trial court enjoin defendants from "constructing and/or operating a Motor Sports Park." In conjunction with its complaint, the Township filed a motion for an ex-parte temporary restraining order (TRO) and a preliminary injunction requesting that the court enjoin defendants "construction and/or operation of the motocross tracks and trails."

On May 11, 2009, defendants responded to the Township's motion for a TRO, and argued that they were using the property for farming along with "uses that are customary and incidental to agricultural property by creating dirt pathways for recreational and farming off-road vehicles." Defendants argued that recreational use of off-road vehicles was customary and accepted in the AG-2 district. Defendants argued that there was no evidence that they were constructing a motocross park.

Defendants also filed a counterclaim against the Township and the Planning Commission ("the Township"). Defendants alleged that the Township violated their procedural and substantive due process rights and violated their right to equal protection enforceable under 42

USC 1983. Defendants also alleged that the ITZO was void for vagueness and that the Township's conduct amounted to a regulatory taking.

Meanwhile, the trial court held a hearing to address plaintiffs' motion for a preliminary injunction. At the hearing, Mudge agreed that he and other members of SEMM had driven dirt bikes and ATVs on the property, but he explained that the use was only for recreational purposes and did not constitute commercial activity. Neighbors also testified about defendants' use of the property for motocross riding. Jill Loughney testified that she lived less than a quarter-mile from the property and that she heard dirt bikes on the property during the spring of 2009. Regina Feldpausch testified that she lived by the property and could see a track from her window. Feldpausch testified that people rode dirt bikes on the track and that she could hear the noise from the bikes inside her home. The noise interfered with her use and enjoyment of her property. According to Feldpausch, on one occasion, three dirt bike riders awakened her at midnight and did not leave until 1:15 to 1:30 a.m. Sally Shaffer testified that she lived less than a quarter-mile away from the property. In the fall of 2008, she heard dirt bikes and ATVs.

Following testimony, the trial court granted the Township's motion for a preliminary injunction and enjoined defendants from using motocross vehicles on the property until further order of the court.

On October 1, 2009, the Township moved for summary disposition on all of the claims and counterclaims. The trial court granted the motion as to defendants' void for vagueness challenge, but denied the motion as to all of defendants' other constitutional counterclaims and the Township's nuisance claims. The court then scheduled a bench trial for the nuisance claims and a jury trial for the counterclaims.

Ultimately, the court did not hold a jury trial, but the bench trial commenced on April 26, 2010, and lasted eight days. At the trial, Mudge testified about SEMM's original plan to build a motocross park, how he and Felkey were involved in the special-use application process, and how he constructed and used tracks on the property after the application was denied. Mudge explained that he and other members of SEMM wanted to use the property for recreational use like other residents in the township. Mudge testified that the property was used 13 times for motocross riding after the special use application was denied. Mudge testified that a farmer farmed about 20 acres on the parcel and another portion was reserved for pheasants.

The Township introduced testimony from Loughney and Feldpausch, neighbors who lived next to defendants' property. Their testimony was similar to the testimony they offered at the preliminary injunction hearing. Several Township officials testified about the procedure employed to decide whether to grant the special-use application. And, although it involved a question of law, the officials offered extensive testimony regarding their personal interpretations of the zoning ordinance. In addition, Iott testified that he received complaints about the activity on defendants' property and other Township officials agreed that residents rode dirt bikes and ATVs in the township.

Following the close of proofs, the Township argued that defendants were constructing and using a motocross complex on their property that mirrored the site plan and constituted the primary use of the land in contravention of the zoning ordinance. Defendants argued that their

riding activity was customarily incidental to other principal uses and was permitted as recreational use under the ITZO.

On June 28, 2010, the trial court entered an order and attached “memorandum of law” denying defendants’ motion for dismissal. The court held that defendants primary use of the land was for motocross riding and therefore was not permitted under the zoning ordinance as an “accessory use” that was “customarily incidental” to a permitted use. The court found that the Township established a cause of action for public nuisance and nuisance per se. At a subsequent hearing, the trial court stated that “implicit” within the order and memorandum of law, was a finding in favor of the Township on its nuisance claims.

On November 4, 2010, the trial court granted the Township’s second motion for summary disposition as to defendants’ due process and regulatory taking claims. However, the court reserved its ruling on the equal protection claim until the parties could conduct further discovery on landowners who maintained similar tracks in the township. The parties then conducted 11 depositions of township residents who maintained some form of motocross track on their property.¹ The depositions essentially showed that 10 township residents maintained motocross tracks on properties that contained a single-family residence. Most of the tracks were constructed for use by a family and a few friends. Mudge was an exception in that he previously held large-scale events at his residential property on a weekly basis where on one occasion he had over 70 riders present. Mudge stopped holding the weekly events in 2009. There was no evidence of complaints pending against any of the track owners at the time the Township filed suit against defendants.

Randy Delker was the only property owner who owned a track on a parcel of land that did not contain a single-family residence. Instead, his track was located on a 50-acre parcel that abutted a 21-acre parcel of land that he owned. Delker leased 50 out of the 71 acres for farming. In 2010, however, Delker testified that three to five people used the track per week, primarily his sons. Delker also hosted year-end parties where up to 30 people would use the track at the same time. Delker did not know of anyone who formally complained to the Township about the track.

After reviewing the depositions, the trial court granted the Township’s motion for summary disposition with respect to defendants’ equal protection claim. The trial court found that the other landowners were dissimilar to defendants. The court reasoned that the other residents maintained tracks for “accessory uses,” while defendants’ principal use of the property was for motocross riding.

At a March 23, 2011, hearing, the trial court rejected defendants’ argument that they had two distinct equal protection claims and that the court had failed to address their business-related claim. Then, the trial court entered four written orders to clarify all of its prior rulings. In Order #1, the trial court held that the ITZO was constitutional on its face, that defendants’ use of the

¹ The depositions are not in the lower court record, however, the trial court referenced the depositions and the Township attached excerpts of the depositions to its brief on appeal and defendants do not dispute the authenticity of those excerpts.

property amounted to a public nuisance and a nuisance per se, and that the preliminary injunction would remain in place until further order of the court. In Order #2, the trial court granted the Township's motion for summary disposition as to defendants' due process, "selective enforcement," and regulatory taking claims. In Order #3, the trial court granted the Township's motion for summary disposition as to defendants' equal protection claim. In Order #4, the trial court denied defendants' motion for reconsideration.

On April 8, 2011, the trial court granted defendants' motion to amend the preliminary injunction and allowed defendants to construct one track on the property that did not exceed the specifications of Delker's track and permitted defendants to ride up to six machines on the track on the second and fourth weekend of each month. The court ordered defendants to allow Township officials to inspect the property. This appeal ensued.

II. ANALYSIS

A. NUISANCE²

Defendants contend that the trial court erred in holding that their riding off-road vehicles on tracks constructed for that purpose amounted to a public nuisance and a nuisance per se.

Proceedings for abatement of a nuisance are equitable in nature and reviewed de novo on appeal while the trial court's findings of fact in support of its decisions are reviewed for clear error. *Ypsilanti Twp v Kircher*, 281 Mich App 251, 270; 761 NW2d 761 (2008). Whether conduct violates a local zoning ordinance requires interpretation and application of the zoning ordinance, which involves a question of law that we review de novo. *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 458-459; 773 NW2d 730 (2009).

The trial court concluded that defendants' "use and proposed use of its property" for the riding of motocross vehicles and construction of tracks for that purpose constituted a public nuisance and a nuisance per se. The court reasoned that such conduct was not permitted under the zoning ordinance as an "accessory use" that was customarily incidental to a principal permitted use of the property.

A public nuisance includes conduct that "(1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting significant effect on these rights." *State v McQueen*, 293 Mich App 644, 674; 811 NW2d 513 (2011) (quotation omitted). Use of land in violation of a local zoning ordinance constitutes a nuisance per se. MCL 125.3407.

"We apply the rules of statutory construction when construing a zoning ordinance." *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995). "[W]hen the language used in an ordinance is clear and unambiguous, [this Court] may not engage in judicial

² For purposes of clarity, we will address defendants' questions presented out of order.

interpretation, and the ordinance must be enforced as written.” *Id.* “[U]nless explicitly defined in a statute, every word or phrase . . . should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.” *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (quotation omitted).

In relevant part, the ITZO lists the following “principal permitted uses” in the AG-2 district:

- (1) Single-family dwellings. . .
- (2) Farm buildings, machinery and operations used in the production of farm products. . . .

* * *

(9) *Accessory buildings and uses customarily incidental to the above Principal Permitted Uses.* [ITZO § 7.02 (emphasis added).]

Here, defendants argue that riding motocross vehicles is a permissible “accessory use” that is “customarily incidental” to a principal permitted use under the ordinance. The zoning ordinance defines “accessory use” in relevant part as:

A use of land . . . *customarily incidental and subordinate* to the actual principal use of the land . . . and located on the same parcel of property with such principal use. [ITZO § 3.01(2) (emphasis added).]

Thus, an “accessory use” is one that is: (1) customarily incidental and (2) subordinate to the actual principal use on the same parcel of property. This Court has previously interpreted similar language in a zoning ordinance.

In *Lerner v Bloomfield Twp*, 106 Mich App 809, 811; 308 NW2d 701 (1981), this Court interpreted a zoning ordinance that allowed “accessory uses” that were “customarily incidental” to single-family residences. This Court explained that the term “customarily” modified the term “incidental,” and did not stand alone such that the challenged activity “must be ‘*customarily incidental*’ to the [primary] use, not merely customary *and* incidental.” *Id.* at 812 (emphasis in original). Similarly, in the ITZO, the term “customarily” modifies “incidental” and the two terms do not stand alone. Thus, defendants’ cannot show that motocross riding is permissible under the ordinance simply because it is “customary” to ride motocross in the township and that riding is “incidental” to the primary use of the property. Instead, an accessory use will be found in cases where “the use in question enhance[s] the principal use of the property.” *Id.* at 813. Furthermore, an “incidental use” “depends upon” and “furthers” the principal use of the property. *Id.* It is “something . . . appertaining or subordinate to, or accompanying something else of greater or principal importance. . . .” *Twp of Groveland v Jennings*, 106 Mich App 504, 512; 308 NW2d 259 (1981) (quotations omitted). At all times, an accessory use must remain “something less” than the principal use of the property, which “must be and must continue to be dominant to an accessory use.” *Id.* at 513 (quotations omitted).

Combining these definitions into a workable whole indicates that, in order to qualify as an accessory use that is customarily incidental to a primary use under the ordinance, defendants' riding of motocross vehicles on tracks constructed for that purpose must be subordinate to the primary use, it must be dependent on or pertain to the primary use, and it must enhance or further the primary use of the property.

Here, there was no evidence to support that defendants' motocross riding and the construction of tracks for that purpose was "subordinate to" any other primary use of their property. There was no single-family dwelling on defendants' 95-acre parcel of property.³ There was evidence that defendants allowed a farmer to farm corn and soybeans on approximately 20 acres and conducted hay rides, maintained a corn maze, and at least one individual hunted on the property. In addition, there was evidence that defendants planned to farm pheasants on the property. The Township does not dispute that these activities were permitted farming activities under the zoning ordinance. However, these uses encompassed a small portion of the 95-acre parcel. In contrast, before the preliminary injunction, evidence showed that defendants used the land for motocross riding on multiple occasions and one neighbor testified that the use exceeded 20 times. Additionally, Mudge testified that he planned to construct tracks so that all 20 corporate members of SEMM and their families could ride motocross vehicles for recreational purposes. Further, there was no limit on the number of future members of SEMM. This planned use would have overwhelmed the minimal farming activities that occurred on the property such that it could not have been considered "subordinate to" farming. Thus, the trial court's factual finding that motocross riding was defendants' primary use of the property was not clearly erroneous. *Ypsilanti Twp*, 281 Mich App at 270.

More importantly, defendants' did not show, nor can they show that motocross riding and construction of tracks for that purpose is in any way dependent upon or pertains to farming. None of defendants or the corporate members of SEMM farmed the property. Instead, an independent farmer farmed the property. Defendants' motocross riding did not depend on or pertain to that farmer's cultivation of corn and soybeans. Nor did such conduct further or enhance the farming activity. Rather, Mudge testified that he and other members of SEMM wanted to ride motocross and construct tracks for recreational purposes and to allow kids to practice for competitive motocross races. While use of an ATV for transportation or for moving

³ To the extent defendants argue motocross was an accessory to the single-family residence on their neighboring five-acre parcel, defendants' argument fails. The plain terms of the ordinance state that an accessory use must be a use that is customarily incidental and subordinate to a primary use that occurs on the *same* parcel. ITZO § 3.01(2). See *Kalinoff*, 214 Mich App at 10 ("where the language used in an ordinance is clear and unambiguous . . . it must be enforced as written"). Moreover, defendants cannot show how riding motocross vehicles and construction of tracks for that purpose was somehow dependent upon or pertained to the presence of the single-family residence. Nor can defendants show that such activity furthered or enhanced the presence of the single family residence.

farm equipment may enhance the practice of farming, riding motocross vehicles for recreational purposes and to prepare for competitive races and construction of tracks for that purpose does not further or enhance the practice of farming.

In sum, the trial court did not err in holding that defendants' use of motocross vehicles and construction of tracks for that purpose was not permitted under the ITZO and that the use amounted to a public nuisance and a nuisance per se. *McQueen*, 293 Mich App at 674 (conduct that is proscribed by law constitutes a public nuisance); MCL 125.3407 (conduct that violates a zoning ordinance constitutes a nuisance per se).

B. INJUNCTION

Defendants contend that the trial court erred when it modified the preliminary injunction and placed restrictions on defendants' use of motocross vehicles on the land. Defendants contend that they should have been allowed unrestricted use of the land for that purpose.

MCL 125.3407, provides in relevant part that the use of land in violation of a zoning ordinance constitutes a nuisance per se and that "[t]he court *shall* order the nuisance abated" (emphasis added). Here, the trial court did not err in restricting defendants' use of the land. Although the issue is not before this Court as appellees did not raise it on cross-appeal, the trial court was required to abate defendants' use of the land for motocross activity after it properly determined that such activity constituted a nuisance per se. MCL 125.3407. Accordingly, restricting defendants' use of the land cannot constitute error.

C. CONSTITUTIONAL ISSUES

Defendants contend that the trial court erred in granting the Township's motion for summary disposition with respect to its equal protection, void for vagueness, due process, and regulatory taking counterclaims. Defendants alleged their equal protection and due process claims were enforceable under 42 USC 1983. "Section 1983 creates a cause of action against any person who, acting under color of state law, abridges 'rights, privileges, or immunities secured by the Constitution. . . .'" *Bosscher v Twp of Algoma*, 246 F Supp 2d 791, 796 (WD Mich, 2003), quoting 42 USC 1983.

"This Court reviews the grant or denial of summary disposition de novo 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). The Township moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), and the trial court did not specify the subrule under which it granted the motion; however, because the trial court considered evidence outside the pleadings, this Court reviews the order pursuant to the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). In reviewing a court's order on a motion under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Summary disposition is proper under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* at 552. We review constitutional issues de novo. *Risko*, 284 Mich App at 459.

i. Equal Protection

“The Equal Protection Clause requires that all persons similarly situated be treated alike under the law.” *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

While there was some confusion in the lower court regarding the nature of defendants’ counterclaim, defendants argued that the Township treated them differently from similarly situated landowners by seeking to enjoin their use of the property to ride motocross vehicles. Defendants do not contend that they are a member of a protected class or that the Township’s action infringed on a fundamental right. The United States Supreme Court recognizes such “class of one” claims⁴ “where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v Olech*, 528 US 562, 564-565; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). However, “a plaintiff must overcome a ‘heavy burden’ to prevail based on the class-of-one theory.” *Loesel v City of Frankenmuth*, 692 F 3d 452, 462 (CA 6, 2012).

The initial threshold of any class-of-one claim requires the claimant to prove that he or she was treated differently than similarly situated individuals. *Shepherd Montessori*, 486 Mich at 318-319. “There is no precise formula to determine whether an individual is similarly situated to comparators.” *McDonald v Village of Winnetka*, 371 F 3d 992, 1002 (CA 7, 2004). Federal appellate courts have held that to be considered similarly situated, the plaintiff and his comparators “must be *prima facie* identical in all relevant respects or directly comparable . . . in all material respects.” *United States v Moore*, 543 F 3d 891, 896 (CA 7, 2008) (quotation omitted); see also *United States v Green*, 654 F3d 637, 651 (CA 6, 2011). What is clear is that “[c]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and [their comparators]. . . .” *Rustin v Town Bd for the Town of Skaneateles*, 610 F 3d 55, 59 (CA 2, 2010) (quotation omitted).

In this case, defendants failed to create a question of fact regarding whether they were similarly situated to their comparators. Here, evidence showed that defendants’ property was subject to potentially much higher intensity of use. At any given time, there were at minimum 20 individuals who could legally access defendants’ property and ride motocross vehicles on it whereas none of the comparators’ tracks were similarly situated. Defendants failed to identify any other parcel of property with a motocross track on it where 20 individuals had legal access to the property for motocross riding. Thus, unlike the other properties, defendants’ property was far more likely to create future nuisance issues for the Township including noise and dust that interfered with the neighboring landowners’ quiet enjoyment of their properties.

In addition, motocross riding on the other properties was secondary to other uses. With respect to Delker’s track, evidence showed that he rode motocross, hunted, and farmed a

⁴ Defense counsel referred to “selective enforcement” and “equal protection” claims at different times throughout the proceeding. However, a “class of one” equal protection claim is “a form of selective enforcement claim[.]” 2 Am Law Zoning § 15:5. (5th ed).

significant part of the property. Moreover, as noted above, unlike defendants, Delker did not share ownership interest in the property such that he and 19 other individuals had unfettered access to the property for motocross riding. In contrast, the evidence clearly showed that the primary reason behind defendants' purchase of the property was so that, at minimum, 20 individuals would have a place to ride motocross. None of the members lived on the property. Their primary reason for owning the property was so that they could use it for motocross riding. Although there was evidence that farming and other activities took place on the property, it was clear that these uses were ancillary to defendants' intended principal use of the property—that being, motocross riding.

Finally, the comparators and defendants were dissimilar in that there was record evidence to show that use of defendants' property for motocross interfered with neighboring residents' quiet enjoyment of their property. See e.g. *Sowers v Powhatan Cty*, 347 Fed Appx 898, 901-902 (CA 4, 2009) (complaints directed at one zoning applicant and not another can differentiate applicants in inquiry into whether applicants were similarly situated). In contrast, defendants failed to offer any evidence to show that the comparators' motocross activity interfered with the quiet enjoyment of neighboring properties. The only similar evidence involved a complaint that a neighbor levied against Greg Steinert's track several years ago. Contrary to defendants' contention, the Township took action in that instance by facilitating a compromise between the two individuals. After the compromise, the neighbor did not have any further complaints.

In sum, there was insufficient evidence to create a genuine issue of fact to support that defendants were “prima facie identical in all relevant respects or directly comparable . . . in all material respects” to their comparators. *Moore*, 543 F 3d at 896. Moreover, even if we were to conclude that defendants were similarly situated to their comparators, defendants failed to create a genuine issue of fact regarding whether the Township's differential treatment was rationally related to a legitimate governmental purpose. *Shephard Montessori*, 486 Mich at 319-320.

Under the rational basis standard, governmental conduct will pass constitutional muster if “any reasonably conceivable state of facts could provide a rational basis” for the differential treatment. *FCC v Beach Comm, Inc*, 508 US 307, 313; 113 S Ct 2096; 124 L Ed 2d 211 (1993). “[I]n other words, the challenger must negative every conceivable basis which might support” the challenged conduct. *TIG Ins Co, Inc v Treasury Dep't*, 464 Mich 548, 558; 629 NW2d 402 (2001) (quotation omitted) (emphasis added).

In this case, the Township sought to enjoin defendants' from operating motocross vehicles and constructing tracks for that purpose on grounds that it was not permitted under the zoning ordinance. The Township's action was rationally related to the legitimate governmental purpose of protecting the public health, safety and welfare of the residents that were affected by defendants' conduct. It was rational for the Township to infer that allowing 20 individuals and their friends and family unfettered access to the property for motocross riding would generate disturbing noise and dust so as to interfere with the neighboring residents' quiet enjoyment of their land. See e.g. *Village of Belle Terre v Boraas*, 416 US 1, 9; 94 S Ct 1536; 39 L Ed 2d 797 (1974) (holding that reduction of traffic and noise is a legitimate governmental interest).

Next, defendants argue that the trial court failed to address their argument that the Township treated them differently than similarly-situated businesses in the district that were not

required to obtain a special use permit. Contrary to defendants' assertions, defendants' did not plead two distinct equal protection claims. Furthermore, defendants could not prove their class-of-one claim by comparing SEMM to businesses that are totally dissimilar in nature as they alleged. *Moore*, 543 F 3d at 896. Instead, to survive summary disposition, defendants needed to produce evidence showing that there was another business in the township that was "*prima facie* identical in all relevant respects or directly comparable . . . in all material respects" to SEMM. *Id.* Defendants did not even allege that there was such a business in the district; therefore, the trial court properly dismissed defendants' equal protection claim in its entirety. *Id.*

Next, defendants argue that the trial court erred in failing to set aside the grant of summary disposition as to the equal protection claim based on MCR 2.612(C) and MCR 2.313(D). After the court granted summary disposition but before it entered a written order, defendants moved to set aside the order on grounds that the Township perpetrated fraud on the court by arguing that there were complaints against defendants, yet failing to produce any evidence of written complaints. The trial court declined to hear the motion until after it entered a written order, but defense counsel failed to refile the motion. Hence, this issue is not preserved for our review because the trial court did not address and decide the issue. *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005). Nevertheless, even if we were to address the issue, defendants are not entitled to relief.

Defendants' argument that the Township committed fraud or misled the tribunal because Iott could not locate the written complaints that he recalled receiving is baseless. Defendants do not dispute having received a copy of a letter written by a resident during her deposition. Moreover, that Iott could not recall where the written complaint was located or who made the complaint does not necessarily mean that Iott was lying as defendants imply. Given the vast amount of documents involved in this case, it is plausible to assume that Iott honestly misplaced the written complaint. The trial court was free to consider the absence of a written complaint in weighing Iott's credibility. Further, the record supports that Iott did receive a complaint where residents testified that the motocross activity interfered with the use of their land, where Loughney testified that she wrote letters to the Township, and where residents sent aerial photographs to the Township. In addition, even without a written complaint, Iott testified that he received verbal complaints and there was nothing to refute that testimony. Finally, as discussed above, irrespective of written complaints, there were other differentiating factors that showed defendants were not similarly situated to their comparators.

ii. Void for Vagueness

Defendants contend that the trial court erred in holding that the ITZO was not unconstitutionally vague.

"An act is void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated." *Kenefick v City of Battle Creek*, 284 Mich App 653, 655; 774 NW2d 925 (2009) (quotation omitted). "The party challenging the facial constitutionality of an act must establish that no set of circumstances exists under which the [a]ct would be valid." *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999) (quotation omitted). "All statutes and ordinances are presumed

to be constitutional and are construed so unless their unconstitutionality is clearly apparent.” *Houdek v Centerville Twp*, 276 Mich App 568, 573; 741 NW2d 587 (2007).

Defendants contend that the zoning ordinance does not provide fair notice that riding off road vehicles is not permitted in the agricultural district. “To provide fair notice, an ordinance must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required.” *Kenefick*, 284 Mich App at 655 (quotation omitted). The constitution does not require that an ordinance define every term or be drafted with mathematical precision. See *Dep’t of State Compliance & Rules Div v Mich Ed Assoc*, 251 Mich App 110, 120; 650 NW2d 120 (2002); *Mich Wolfdog Ass’n, Inc, v St Clair Co*, 122 F Supp 2d 794, 802 (ED Mich, 2000). Rather, an act “is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.” *Kenefick*, 284 Mich App at 655 (quotation omitted).

In this case, the ITZO is a “permissive ordinance” in that it articulates which uses are permitted in each of the zoning districts. With respect to the agricultural district, the ordinance contains a provision stating that the purpose of the agricultural zoning district is to “preserve and protect” the township’s supply of prime agricultural land and that the principal use of land is “farming, dairying and livestock enterprises, and forestry or other bona fide agricultural pursuits.” ITZO § 7.01. The ordinance then lists 11 “principal permitted uses,” in the agricultural district. The only permitted use that could possibly encompass motocross riding and tracks constructed for that purposes is an “accessory use” that is “customarily incidental” to a permitted primary use. The ordinance defines “accessory use” as one that is customarily incidental and subordinate to a primary use. ITZO § 3.01(2). In addition, as discussed above, resort to case law, judicial interpretations and a treatise would put an ordinary person on notice that riding motocross vehicles and the construction of tracks on the property for that purpose is not customarily incidental to any of the listed permitted uses. *Kenefick*, 284 Mich App at 655.

Defendants also contend that the ordinance is vague in that it does not contain an adequate definition of the phrase “private park,” which is listed as a use that is permitted in the agricultural district with a special use permit. ITZO § 7.03(3). The ordinance provides that a private park must comply with 10 standards set forth in § 16.07 of the ordinance.

A review of the common dictionary definition of the terms “private” and “park,” when considered in conjunction with the standards set forth in § 16.07 and the stated purpose of the agricultural district leads to the conclusion that the phrase “private park” is not unduly vague. The word “private” is defined in relevant part as, “belonging to some particular person or persons . . . not open or accessible to the general public.” *Random House Webster’s College Dictionary* (1997). “Park” is defined as “a public area of land, usually in a natural state, having facilities for recreation” *Id.* Thus, a “private park” is an area of land, that belongs to a particular person or persons that is usually natural in state and contains facilities for recreation that conforms with the above-referenced standards. When these definitions are read in conjunction with the stated purpose of the agricultural district, which is to preserve agricultural land, and the standards set forth in § 16.07, it is apparent that a person of ordinary intelligence would be placed on fair notice of the requirements for a special-use permit to operate a private park. *STC, Inc*, 257 Mich App at 539.

Finally, defendants argue that the Township had unfettered discretion to deny a special use application. “In determining if an act inappropriately allows for arbitrary enforcement, we examine the act to determine if it provides standards for enforcing and administering the laws in order to ensure that the enforcement is not arbitrary or discriminatory” *Kenefick*, 284 Mich App at 657 (quotation omitted).

Here, the Township was not given unfettered discretion to decide whether to deny a special use application. Instead, the ordinance contained specific procedures and standards that governed the decision-making process. Specifically, the ordinance provides general standards for special uses as follows:

Each use . . . shall be of such location, size and character that, in general, it will be in harmony with the appropriate and orderly development of the district in which it is suggested and will not be detrimental to the orderly development of adjacent districts and uses. [ITZO § 16.07(1).]

In addition to these general standards, the ordinance specifies 10 additional standards that “shall serve the Commission as the basis for decisions involving special land uses. . . .” ITZO § 16.07(7) (emphasis added). Further, after the Planning Commission submits its recommendation, the Township Board can approve, deny, or approve the application with conditions and the Board must articulate the basis for its decision. ITZO § 16.07(4). We conclude that these standards and procedures are sufficient to ensure that the Township’s decision whether to grant or deny a special-use application is not “arbitrary or discriminatory.” *Kenefick*, 284 Mich App at 657.

In sum, the trial court did not err in holding that the ITZO was constitutional on its face.

iii. Due Process

Next, defendants contend that the trial court erred in granting summary disposition as to their substantive and procedural due process claims.

“In order to claim entitlement to the protections of the due process clause—either substantive or procedural—a plaintiff must first show that he has a constitutionally protected liberty or property interest . . . and that he has been deprived of that protected interest by some form of state action” *Stone v Univ of Maryland Med Sys Corp*, 855 F 2d 167, 172 (CA 4, 1988). “A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law.” *Wedges/Ledges of California, Inc. v City of Phoenix*, 24 F 3d 56, 62 (CA 9, 1994) (quotation omitted).

In this case, even assuming defendants had a protected property interest in obtaining the special use permit because the ITZO § 7.03 provides that special uses “shall” be permitted subject to conditions, there was no issue of fact to support that defendants were denied procedural or substantive due process during the special use application process.

Generally, procedural due process requires “notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decision maker.”

Hinky Dinky Supermarket, Inc. v Dep't of Community Health, 261 Mich App 604, 606; 683 NW2d 759 (2004) (quotation omitted).

In this case, defendants were afforded notice of the nature of the proceedings and were given an opportunity to be heard in a meaningful time and manner by an impartial decision maker. Defendants submitted an application on April 24, 2008. The Planning Commission held multiple meetings between that time and the time it denied the application in November 2008. Defendants do not deny that they were provided notice of those meetings and were given an opportunity to attend and be heard at the meetings. Defendants were also given an opportunity to submit anything to the Planning Commission in support of their application. In addition, defendants received the first reports from the engineer and the planner in a timely manner that provided them with weeks to respond to the concerns in the reports. Thus, to the extent that defendants contend that they were not given a chance to respond to the later-issued reports, defendants' argument lacks merit where those reports contained the same or similar concerns as the earlier reports. Moreover, there is no evidence that either the Planning Commission or the Township Board acted in an impartial manner. Instead, the Planning Commission held multiple meetings, giving defendants every opportunity to submit materials in support of their application. The Commission gave defendants an opportunity to be heard at the meetings. Both the Planning Commission and the Board considered the reports of its professionals and applied the requisite criteria in the zoning ordinance before articulating objective reasons in support of their decisions. There is no evidence that the members of the Commission were biased against defendants or had improper motive to deny the application. Instead, the Commission and the Board reached a reasonable conclusion.

Defendants contend that the Commission failed to follow the procedures in the zoning ordinance when it reopened public comment at subsequent meetings. Defendants fail to cite a provision in the ordinance that requires the Commission to close all public comment on an issue after a single public hearing and they do not cite any law to support that reopening public comment constitutes the deprivation of procedural due process.

Defendants also argue that the Planning Commission failed to follow the appropriate procedures and apply the proper criteria for approving their site plan. Defendants' argument lacks merit because, while defendants' correctly assert that the Commission has final authority to approve a site plan for a special use in the agricultural district, ITZO § 16.06(2), the ordinance provides that "Planning Commission approval of [a] Special Use site plan *is contingent upon Township Board Special Use Approval. . .*" *Id.* (emphasis added).

Essentially, under the plain language of the zoning ordinance, the Commission is required to make a recommendation on a *request* for a special use approval by applying the criteria set forth in § 16.07(7). In making that recommendation, nothing precludes the Commission from considering an applicant's proposed site plan. However, the Commission is not required to take any formal action on the site plan until *after* the Township Board approves a special use request. See § 16.06(2). One the Board approves a special use request, the Commission must formally review the applicant's final site plan for the proposed special use by applying the criteria set forth in § 16.06(4). In the event the Commission denies the site plan, the applicant may appeal that decision to the Board of Appeals pursuant to § 16.06(11). Here, given that the Township

Board did not approve defendants special use request, the Commission was not required to formally review and approve defendants' site plan.

In sum, the trial court properly granted summary disposition with respect to defendants' procedural due process claim where defendants were given notice and an opportunity to be heard before an impartial decision maker. *Hinky Dinky*, 261 Mich App at 606.

With respect to defendants' substantive due process claim, substantive due process "[bars] certain government actions regardless of the fairness of the procedures used to implement them." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293(2008) (quotation omitted). Substantive due process "is not a guarantee against incorrect or ill-advised [governmental] decisions." *Id.* at 206 (quotation omitted). Rather, in disputes over municipal conduct, the proper inquiry concerns whether the governmental conduct "was egregious or arbitrary." *Id.* at 197 (citations omitted). Indeed, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* "[T]he governmental conduct must be so arbitrary and capricious so as to shock the conscience." *Id.* at 200 (citations omitted).

In this case, defendants fall far short of identifying any evidence to show that the Township's denial of a special use application to allow a motocross complex in an agricultural district was so arbitrary that it "shocks the conscience." Here, the Township articulated legitimate reasons to deny the special use application; the Township was concerned with the adverse affects that the motocross park would have on residential properties in the surrounding area. The Township's concerns were well-founded where the Township's engineer and professional planner submitted reports that indicated defendants' proposed use raised significant potential problems. Part of the Township's responsibility under the ordinance was to determine whether the proposed use was harmonious with the surrounding area. ITZO § 16.07(1). It is well-settled law that a local government "has authority to regulate land use pursuant to the police power reserved to the states and delegated to local governments." *Risko*, 284 Mich App at 462. Part of that authority requires making discretionary decisions in an effort to promote the well-being of the locality as a whole. See e.g. *id.* at 465-466. Where, as in this case, there were legitimate and valid concerns with a proposed land use, and where the local governing body held hearings, reviewed evidence, listened to both sides of the issue and attempted in good-faith to base its decision on criteria set forth in the governing ordinance, defendants cannot possibly show that the government's conduct was so egregious that it "shocked the conscience." Similarly, where a government responds to complaints by its citizens and interprets its ordinances in good faith to conclude that a use is not permitted within a district, the government's attempt to enforce its ordinances is not egregious conduct that "shocks" our conscience. *Mettler Walloon*, 281 Mich App at 197.

iv. Regulatory Taking

Lastly, defendants contend that the trial court erred in granting summary disposition as to their regulatory taking/inverse condemnation claim.

"The federal and state constitutions both proscribe the taking of private property for public use without just compensation." *Ypsilanti Charter Twp*, 281 Mich App at 272. "An inverse condemnation claim may be based upon the government's 'regulatory taking' of private

property.” *Dorman v Twp of Clinton*, 269 Mich App 638, 646; 714 NW2d 350 (2006). “A regulatory taking occurs when the state effectively condemns, or takes, private property for public use by overburdening that property with regulations.” *Id.* (quotation and citation omitted). There are two situations that constitute a categorical taking: “(1) [] the owner is deprived of *all* economically beneficial or productive use of [his or her] land . . . or (2) [] the government physically and permanently invades any portion of the property.” *Id.* (quotation omitted). In contrast, “[w]here the government’s actions merely diminish the owner’s ability to freely use his or her land, the court must apply the balancing test set forth [in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)].” *Id.*

Defendants contend that the Township restrained their ability to freely use their property when the Township: (1) filed suit and enjoined them from using the property for riding motocross bikes and constructing tracks for that purpose and (2) denied their special-use request.

Here, we note that there was no evidence that the Township’s conduct constituted a “categorical taking” where defendants were not deprived of “all” beneficial or productive use of their property and where the Township did not physically invade the property. *Id.*

Similarly, there was no issue of fact to support that the Township otherwise committed a regulatory taking when it moved to enjoin defendants from using their property to ride motocross bikes and construct tracks for that purpose. As discussed above, this conduct was not a permitted use under the zoning ordinance and therefore constituted a nuisance per se. This Court has previously explained that, “the nuisance exception to the prohibition on unconstitutional takings provides that because no individual has the right to use his or her property so as to create a nuisance, the [s]tate has not ‘taken’ anything when it asserts its power to enjoin [a] nuisance-like activity.” *Ypsilanti Charter Twp*, 281 Mich App at 272 (quotation omitted). Therefore, when the Township filed suit to abate the nuisance on defendants’ property, it was exercising its legitimate police power and no regulatory taking occurred.

Finally, applying the *Penn Central* balancing test shows that there was no issue of fact to support that the Township’s denial of defendants’ special-use application constituted a regulatory taking. *Dorman*, 269 Mich App at 646. In determining whether governmental actions amount to a taking under *Penn Central*, “the court must consider: (1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.” *Id.*

The first *Penn Central* factor concerns the nature of the governmental action. *Id.* Here, there was no evidence to support that the character of the Township’s action, i.e. denying the special-use application for a motocross park, unfairly singled defendants out for a unique regulation. See *K & K Const, Inc, v Dep’t of Environmental Quality*, 267 Mich App 523, 529; 705 NW2d 365 (2005). Here, the zoning ordinance applied equally throughout the township. There were no other commercial motocross parks in the township that were permitted to operate without a special use application and there is no evidence that the Township would have granted a permit for such use to another entity. The benefits of requiring individuals to obtain a special-use permit for such activity applied equally to all township residents in that the requirement promoted consistent land use development in each of the zoning districts.

The second factor concerns the economic effect of the Township's denial of the special-use application. *Dorman*, 269 Mich App at 646. Here, even after the denial, defendants were left with valuable land use rights. *K & K Const*, 267 Mich App at 529. Evidence showed that a large portion of the property was farmable and that defendants leased some of the land to a farmer for cultivation of corn and soybeans. Defendants also maintained or planned to maintain a pheasant habitat on the property and one individual hunted on the property. In addition, the zoning ordinance permitted a number of other uses including single-family residences, farm operations and production of "farm products," and a number of uses with a special-use permit.

The third factor concerns the regulation's interference with distinct investment-backed expectations and takes into account whether defendants knew or reasonably should have known of the land-use regulation at the time of purchase. *Dorman*, 269 Mich App at 646; *K & K Const*, 267 Mich App at 529. Here, before SEMM purchased the property, Mudge spoke with Iott about his plans for a motocross park and then filed a request for a special use permit. Thus, defendants knew the complained-of regulation was in place before they purchased the property. *K & K Const*, 267 Mich App at 529. Indeed, SEMM's original purchase agreement for the property was contingent on the Township's approval of the special-use request, yet SEMM waived that contingency and purchased the property in May 2008 during the application process without any guarantee that the Township would approve the request. The fact that SEMM conditioned the purchase agreement on approval of the special use permit shows that defendants were aware the proposed motocross park was not generally permitted in the township without special approval. As such, at the time of purchase, defendants' did not have investment-backed expectations that the land could be used for the operation of a motocross park. Rather, defendants got what they bargained for: a parcel of property zoned agricultural on which operation of a motocross park required special permission from the Township.

In sum, there was no question of fact to support that denial of defendants' special use request amounted to a regulatory taking. *Dorman*, 269 Mich App at 646; *K & K Const*, 267 Mich App at 529.

III. CONCLUSION

The trial court did not err in holding that defendants' use of the property amounted to a public nuisance and a nuisance per se, the court did not err in placing restrictions on defendants' use of the property, and the court did not err in granting summary disposition as to all of defendants' constitutional counterclaims.

Affirmed. Appellees having prevailed in full, may tax costs. MCR 7.219.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens