STATE OF MICHIGA

IN THE MICHIGAN SUPREME COURT

TOWNSHIP OF ADDISON,

Plaintiff/Appellee,

v

JERRY CLINE BARNHART,

Defendant/Appellant.

Supreme Court Case No. 145144
Court of Appeals Docket No. 301294

Oakland County Circuit Court
Case No. 2009-DA8918-AV
Hon. Leo Bowman

52-3 Judicial District Court
Case No. 05-010900-OM
Hon. Julie A. Nicholson

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BRIEF OF AMICUS CURIAE MICHIGAN TOWNSHIPS ASSOCIATION

AND MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF PLAINTIFF/APPELLEE

LAW OFFICES OF BAUCKHAM, SPARKS, LOHRSTORFER, THALL & SEEBER, P.C. - 458 WEST SOUTH STREET, KALAMAZOO, MICHIGAN 49007-4621

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STATEMENT OF QUESTIONS INVOLVED

1. Where evidence was submitted that Defendant/Appellant's "sport shooting range" was utilized for business or commercial purposes, for testing firearms for various companies, and training of deputy sheriffs, does the shooting range fail to qualify as a "sport shooting range" under PA 250 of 1994 (MCL 691.1541 et seq.)?

   Plaintiff-Appellee answers this question "Yes".

   Defendant-Appellant answers this question "No"

   Amicus Curiae Michigan Townships Association answers this question "Yes"

   Michigan Municipal League answers this question "Yes"

   Court of Appeals answers this question "Yes"

   The Circuit Court Barnhart II answers this question "Yes"

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BRIEF OF AMICUS CURIAE MICHIGAN TOWNSHIPS ASSOCIATION AND MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF PLAINTIFF/APPELLEE

NOW COMES the Michigan Townships Association and the Michigan Municipal League at the invitation of this Honorable Court and hereby submits their amicus curiae brief for the consideration of the Michigan Supreme Court in its decision of whether or not to grant leave to appeal to the Defendant-Appellant or take other action under MCR 7.302(H)(1).

BACKGROUND

The owner and operator of a shooting range in Addison Township has petitioned this Honorable Court for leave to appeal two successive decisions of the Michigan Court of Appeals; the first of which, in 2008, involved the Court of Appeals reversing the circuit court's affirmance of the lower district court's dismissal of a citation against Defendant/Appellant Barnhart and remanding the case to said District Court for further consideration of the Defendant/Appellant's compliance with "generally accepted operation practices"; and consideration of the provisions of the *Sport Shooting Range Act,* as a whole; and the second of which in 2012, the Court of Appeals affirmed the circuit court's decision which reversed the lower district court's decision that again found the Defendant/Appellant in compliance with the *Sport Shooting Range Act*. Because of the unappealed "law of the case" of the 2008 decision, that Defendant's shooting range was for business purposes and not for sport purposes, Defendant/Appellant Barnhart seeks reversal of both Court of Appeals decisions on the premise that it erred when it relied for its decision upon Defendant/Appellant's admission that he was "operating the range for both recreational and business purposes" as of July 5, 1994, the date of the

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amendment of the Sport's Shooting Range Act and therefore was not operating a Sport Shooting Range.

The Supreme Court in scheduling a hearing on whether or not to grant leave to appeal "or take other action", specifically requested all parties to address the issue of the Defendant/Appellant's admission he was operating the range for both recreational and business purposes and if such admission removed his range from the category of a "sport shooting range".

It is the within amicus curiaes' position that to the extent the admission "business purposes" solely relates to the charging of a fee for the use of the shooting range or for shooting lessons, such admissions do not by themselves necessarily remove the range from the category of a "sport shooting range". Such admissions could constitute the range a violation of the township's agricultural zoning classification if the charges were for securing a profit as distinguished from a personal privilege. A purpose to secure a profit would also constitute a violation of the SSRA, since the operation would be contrary to the township's agricultural zoning ordinance, illegal at the time of its shooting range initiation and prohibited under Section 2a(1) of the SSRA. Furthermore, the Defendant/Appellant's expressed intent to use the range "to test firearms for various companies" and evidence the range was used for training sheriff's deputies do remove the range from the category of "sport shooting" under MCL 691.1541(d) and the protection of the *Sport Shooting Range Act.*

In addition to the shooting range being in violation of the township's agricultural district zoning laws, and contrary to it being considered a "sport shooting range", it was not operated pursuant to the "generally accepted operation practices" adopted by the Commission of Natural Resources as required by Section 1 of the SSRA and as

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evidenced by the testimony of the Defendant/Appellant recited on pages 34 through 40 of the township's brief filed in opposition to Defendant/Appellant's application in the Supreme Court for leave to appeal.

As a result of the zoning ordinance violation and the foregoing usage admission, the range would not be a "sport shooting range" under the SSRA.

LEGAL ARGUMENT

WHERE EVIDENCE WAS SUBMITTED THAT DEFENDANT/APPELLANT "SPORT SHOOTING RANGE" WAS UTILIZED FOR BUSINESS OR COMMERCIAL PURPOSES, FOR TESTING FIREARMS FOR VARIOUS COMPANIES, AND TRAINING OF DEPUTY SHERIFFS, THE SHOOTING RANGE DID NOT QUALIFY AS A "SPORT SHOOTING RANGE" UNDER PA 250 OF 1994 (MCL 691.1541 ET SEQ.

When the state legislature employed the word "sport" to describe the shooting ranges the legislature intended to provide certain protection from civil liability, criminal prosecution or nuisance actions on the basis of noise or noise pollution, it obviously was limiting the effect of its legislation to a described category of shooting ranges.

Had it not intended such limitation, it would have merely used the words "shooting ranges". Such generic term would have included shooting ranges for the training of the militia, training of police, operation of assault rifles, machine guns, commercial testing of newly manufactured weapons, testing of repaired weapons, and operation of weapons designed for mass destruction. This obviously was not the legislature's intent. It was addressing the popular sport of hunting, personal athletic competition and the National Rifle Association's memberships' desire for safe practice areas, free from unreasonable noise litigation.

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As stated in Wikipedia under "sport", Roget's II: The New Thesaurus, 3d Ed, Houghton Mifflin Harcourt, 1995, the word "sport" is defined as "An activity engaged in for relaxation and amusement".

Webster's New College Dictionary (1995) defines "sport" as follows: "1. An active pastime: recreation...game."

As further stated by the court in *Robinson v City of Detroit*, 462 Mich 439 (2000),

> "Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. The court may not assume that the legislature inadvertently made use of one word or phrase instead of another. Where the language of the statute is clear and unambiguous, the court must follow it." (Supporting citations omitted.)

Similarly as this Court stated in *Western Michigan University Board of Control v State*, 455 Mich 531 (1997) at 538:

> "In construing the terms of a statute, this court has often stated that we must give effect to the legislature's intent. When statutory language is clear and unambiguous, we must honor the legislative intent as clearly indicated in that language. No further construction is required or permitted. Further, where a statute does not define a term, we will ascribe its plain and ordinary meaning." (Supporting citations omitted).

Additionally, the Michigan Court of Appeals in *People v Wolfe*, 251 Mich App 239 (2002) at 242, in discussing the rules of statutory construction stated:

> "The issue before us is one of statutory construction, a question of law that we review *de novo*.
>
> In considering a question of statutory construction, this court begins by examining the language of the statute, we read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this court seeks to effectuate the legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished.
>
> Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context

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in which the words are used. Further, the language must be applied as written, and nothing should be read into a statute that is not within the manifest intent of the legislature as indicated by the act itself." (Supporting citations omitted).

A review of the language of the Sport Shooting Ranges Act supplies the irrefutable conclusion that the intent of the legislature was to supply some protection to the recreational activity of shooting ranges against nuisance actions by neighbors or municipalities based upon noise or danger from errant missiles. This is evident from both the title to the act and the following statutory sections:

"(a) Subsections (1) and (2) of Section (2) of the Act protect an owner or operator of a "sport" shooting range that conforms to 'generally accepted operation practices' from civil liability or criminal prosecution relating to noise where the range complied with "noise control laws or ordinances" at the time of its initial operation.

(b) Subsection (2) of Section (2) of the Act, further protects the owner or operator of a "sport shooting range" from injunctive actions on the basis of noise where the operation was in compliance with noise regulations at the time of its initiation.

(c) Subsection (3) of Section (2) of the Act, extends such protection against regulations of any state department or agency based on noise provided 'generally accepted operation practices' are complied with.

(d) Generally accepted operation practices' are defined in Section 1 of the Act to mean practices adopted by the Commission of Natural Resources established by a nationally recognized nonprofit membership organization. This was followed by the NRC adopting standards of the National Rifle Association relating to such recreational ranges.

(e) Section (d) of the Act, defines 'sport shooting range' as an area designed and operated "for the use of archery, rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar 'sport shooting'."

As stated by the Court of Appeals in its April 10, 2012 decision in the within cause, at its third paragraph on page 1:

"The circuit court noted the parties' stipulation that prior to the effective date of the pertinent portion of the SSRA, defendants' range was used for recreational

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> and business purposes. On the basis of the stipulation 'and other evidence', the circuit court concluded that defendants' range was not a sport shooting range within the meaning of the pertinent portion of the SSRA.
>
> "The circuit court decided that because the range was not a sport shooting range, (based on other evidence) the SSRA did not protect the range from enforcement of local zoning controls."

The within amicus curiae submit this quoted decision was correct and the underlined language 'and other evidence' supports the conclusion of the circuit court recited in full paragraph 3 on page 2 of the April 10, 2012 decision:

> "On the basis of the undisputed facts, the circuit court correctly concluded that defendants' range was not a sport shooting range within the meaning of the SSRA. Moreover, the record before us establishes that even before defendant constructed the range, he indicated his intent to use it to test firearms for various companies."

Given that defendant acknowledged these non-recreational purposes for the range, the law of the case required the conclusion that defendant's range was not a sport shooting range within the meaning of the SSRA.

Since it was determined that the defendants' range was not a sport shooting range because of its contrary purpose "to test firearms for various companies and to educate individuals "in combat arms", it could not be afforded the shelter of the "Sport" Shooting Range Act as a standalone exception to zoning control or nuisance abatement.

It was further undisputed that, as stated in the 12th line of the 1st full paragraph on the second page of the 2008 Court of Appeals decision, that the site of the range in "the zoning category of agricultural did not permit a shooting range", and also, as stated in the second paragraph of said 2008 decision, that Defendant was "operating a shooting range without a zoning compliance permit".

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This evidence was proof that the shooting range did not legally exist on or before July 5, 1994 (the effective date of the SSRA) which the language of Section 2a(1) of the SSRA required for its protection from noise control laws or ordinances.

To receive the protection of the Sport Shooting Range Act, it would have to be legally in existence on July 5, 1994 as a "sport shooting range", as distinguished from a range for non-sporting activities, and be in compliance with existing zoning regulations, as well as with "generally accepted operation practices". According to the testimony as shown in Appellee Township's brief in opposition to Plaintiff/Appellants application for leave to appeal on pages 35 through 39, none of these conditions precedent criteria were complied with.

As stated in MCR 7.302(H)(1), pertaining to authority of the Michigan Supreme Court on applications for leave to appeal:

> "The court may grant or deny the application, enter a final decision, or issue a preemptory order."

In the case at bar, a final decision denying leave to appeal is appropriate and called for in that undisputed sufficient facts exists on the record clearly supporting the circuit court of appeals' decision and "issues of statutory construction present questions of law that are reviewed de novo" (*Cruz v State Farm Mut. Auto. Ins. Co.*, 466 Mich 588 (2002). The case has already previously been once remanded by the circuit court and by the Court of Appeals order for additional proceedings before the district court and should appropriately be brought to a final conclusion in the spirit of judicial closure.

The unpublished decision of the Michigan Court of Appeals entitled *Smolarz v Colon Township*, 2005 WL 927144, attached to this brief for the convenience of the court, supports amicus curiaes' position that the Sport Shooting Range's Act does not

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provide immunity from a township zoning ordinance for a sport shooting range which is not limited to "sport" shooting or which was not located in compliance with the township zoning ordinance at the time of its initiation. In the *Colon Township, supra*, case, the evidence showed that the site of the range was located in an agricultural-residential zone which only permitted a firing range as a special use, requiring the prior approval of the township zoning board or township board. These approvals had not been obtained. Even though the range predated the effective date of the SSRA, it acquired no vested non-conforming use authority since its location had never been permissible under the township's zoning ordinance. Such "location" regulation was specifically permitted to be determined by township ordinance under the Michigan Zoning Enabling Act (MCL 125.3201) and Section 3 of the SSRA.

The Court of Appeals further held on page 4 under bullet 5 that since Defendant operator and owner had been using the range for "law enforcement personnel...for fire arms training activities" it was not a "sport shooting range" under the terms of the SSRA and therefore was not subject to the ordinance immunity provided for in the SSRA. The foregoing facts and decision are similar to the facts and requested decision in the case at bar.

CONCLUSION

Because the Plaintiff/Appellant's shooting range does not comply with "generally accepted operation practices", is in violation of the Townships Agricultural Zoning Regulations, is operated for other than a "sport shooting range" and a case involving statutory construction is reviewed de novo, this Honorable Court should deny the Application for Leave to Appeal.

Respectfully submitted.

Dated: October 25, 2012

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Not Reported in N.W.2d, 2005 WL 927144 (Mich.App.)

Judges and Attorneys
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
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.
Joseph SMOLARZ, Plaintiff/Counterdefendant-Appellee,
v.
Larry MOYER and Colon Township, 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.

No. 251155, 255286.
April 21, 2005.

Before: Judges NEFF, P.J., and WHITE and TALBOT, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** 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 township [FN1] 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.]

FN1. 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).

***2** 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.

* * *

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.

***3** 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.

***4** 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.

***5** 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,[FN2] and we affirm the trial court's dismissal of ICPs' complaint.[FN3]

FN2. *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.")

FN3. 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.

IV. Conclusion

***6** 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.

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Judges and Attorneys (Back to top)

Judges

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United States District Court, Western Michigan

Grand Rapids, Michigan 49503
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- **Talbot, Hon. Michael J.**
State of Michigan Court of Appeals, District I
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- **White, Hon. Helene N.**
United States Court of Appeals, Sixth Circuit
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