

STATE OF MICHIGAN
IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF ANTRIM

EARL I. SHAFER, JR.,

Plaintiff,

v

Case No. 99-7608-AW
HON. PHILIP E. RODGERS, JR.

STAN BEAN, Supervisor, LOIS GOLTZ,
Clerk, JOHN and JANE DOE, Defendants yet
unnamed in his or her official capacity,

Defendants.

Earl I. Shafer, Jr.
Plaintiff in Pro Per

Kevin A. Elsenheimer (P49293)
Attorney for Defendants

DECISION AND ORDER OF THE COURT ON
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

**INTRODUCTION AND
PROCEDURAL HISTORY**

On June 16, 1999, the Central Lake Township Board (hereinafter "Township") adopted "Central Lake Township Nuisance Ordinance 99-2" (hereinafter "Ordinance"). The Ordinance was published in the Antrim County News, a newspaper of general circulation within the Township, on June 23, 1999. The Ordinance was filed with the Antrim County Clerk on June 30, 1999. On June 16, 1999, the Township adopted a Resolution No. 99-8 entitled "Enforcement Officer." On June 29, 1999, the Plaintiff Shafer presented the Township Clerk, Defendant Lois Goltz, with "a notice of intent to pition [sic] the recently passed Ordinance 99-2." The Township refused to take any action

recognizing the validity of the Petition, acting on the advice of counsel to the effect that the Ordinance and Resolution were not subject to referendum.

On July 7, 1999, the Plaintiff filed this action for mandamus and injunctive relief asking this Court to order the Defendants to “comply with State law, MCL 125.282 sec 12(a)(b)(c)” . . .and “restrain the Defendants from denying the Plaintiff from timely filing a petition to bring the latest Central Lake Township Ordinance to the full vote of the residents of Central Lake Township within the thirty days (30) requirement pursuant to MCL 125.282 sec. 12(a)(b)(c).”

The Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) and for sanctions pursuant to MCR 2.114(E) and (F). The Plaintiff filed a timely response to the motion and the Defendants filed a reply. A hearing on the motion was held on September 20, 1999. The Court, having considered the motion, response, reply, and arguments of counsel and otherwise being fully advised in the premises, for the reasons stated below, grants the Defendants’ motion for summary disposition and dismisses the Complaint with prejudice.

STANDARD OF REVIEW

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

MCR 2.116(C)(10)

A motion for summary disposition brought under MCR 2.116(C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. The party opposing an MCR 2.116(C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. *Fulton v Pontiac General Hospital*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must,

by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court Rule requires the party opposing a motion for summary disposition brought pursuant to MCR 2.116(C)(10) to submit documentary evidence to establish the existence of a genuine issue of material fact. The trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5). If the opposing party fails to make the requisite showing that a genuine issue of material fact exists, summary disposition is appropriate. As the Michigan Supreme Court said in *Lytle v Malady*, 458 Mich 153, 176-177; 579 NW2d 906 (1998):

In determining whether summary disposition is appropriate, courts must consider this evidence in the light most favorable to the nonmoving party, in this case plaintiff, and must give that party the benefit of any reasonable doubt. *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973). Courts may not make factual findings or weigh the credibility of the evidence presented, which at the summary disposition stage would be in the form of admissions, affidavits, pleadings, depositions, and other material submitted to the court in support of or opposition to the motion. Moreover, summary disposition is only appropriate where the claim or defense would be insupportable at trial because of an incurable deficiency. *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 370; 446 NW2d 95 (1989). In other words, courts should be liberal in finding that a genuine issue of material fact does exist. 389 Mich at 372; 207 NW2d 316.

Therefore, this Court must decide whether the party opposing the motion has established with documentary evidence the existence of a genuine issue of material fact. *D'Ambrosio v McCready*, 225 Mich App 90; 570 NW2d 797 (1997) citing *Quinto v Cross & Peters Co*, 451 Mich 358, 547 NW2d 314 (1996).

THE NUISANCE ORDINANCE

The Township enacted the subject Nuisance Ordinance:

“TO PROTECT THE PUBLIC HEALTH, SAFETY AND GENERAL WELFARE BY ESTABLISHING REGULATIONS RELATING TO PUBLIC NUISANCE, ANTRIM COUNTY, MICHIGAN; TO PROVIDE PENALTIES FOR THE VIOLATION OF SAID ORDINANCE; AND TO REPEAL ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT THEREWITH.”

MCLA 41.181; MSA 5.45(1) authorizes a township to enact such an Ordinance:

Sec. 1. (1) The township board of a township may, at a regular or special meeting by a majority of the members elect of the township board, adopt ordinances regulating the public health, safety, and general welfare of persons and property, including, but not limited to fire protection, licensing or use of bicycles, traffic and parking of vehicles, sidewalk maintenance and repairs, the licensing of business establishments, the licensing and regulating of public amusements, and the regulation or prohibition of public nudity and provide penalties for the violation of the ordinances. The township shall enforce the ordinances and may employ and establish a police department with full power to enforce township ordinances and state laws. If state laws are to be enforced, a township shall have a law enforcement unit or may by resolution appropriate funds and call upon the sheriff of the county in which the township is located, the department of state police, or other law enforcement agency to provide special police protection for the township. The sheriff, department of state police, or other local law enforcement agency shall, if called upon, provide special police protection for the township and enforce local township ordinances to the extent that township funds are appropriated for the enforcement. Special township deputies appointed by the sheriff shall be under the jurisdiction of and solely responsible to the sheriff. Ordinances regulating traffic and parking of vehicles and bicycles shall not be in contravention of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Michigan Compiled Laws.

(2) Ordinances enacted may apply to streets, roads, highways, or portions of the township determined by the township board or may be limited to specified platted lands within the township, and with respect to these lands shall be valid and enforceable whether the roads and streets have been dedicated to public use or not. Township boards of townships enacting ordinances under this section may accept contributions from duly constituted representatives of the platted lands benefitted by the ordinances to defray administrative and enforcement costs incident to the enactment of ordinances. (Emphasis supplied.)

Article 7, Section 34 of the Constitution of the State of Michigan states:

“The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.”

Although this constitutional directive does not provide an independent grant of authority to townships to act in a particular area, it does provide a framework for analysis.

The Township contends by its motion for summary disposition that it enacted the Nuisance Ordinance pursuant to constitutional provisions and laws in which the legislature did not provide for a right of referendum, to-wit: the Township Ordinance Act, MCL 41.181; MSA 5.45(1). Therefore, they argue that the Plaintiff has failed to state a claim upon which relief can be granted, MCR 2.116(C)(8), and that there is no genuine issue of material fact, MCR 2.116(C)(10).

The Plaintiff argues in response that the Nuisance Ordinance is merely a disguised zoning ordinance and that he has the power of referendum with respect to a zoning ordinance pursuant to MCL 125.271, et seq; MSA 5.2963(1), et seq, which provides as follows:

Sec. 1. (1) The township board of an organized township 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. The township board of an organized township may use this act to provide by ordinance for the regulation of land development and the establishment of districts which apply only to land areas and activities which are involved in a special program to achieve specific land management objectives and avert or solve specific land use problems, including the regulation of land development and the establishment of districts in areas subject to damage from flooding or beach erosion, and for that purpose may divide the township into districts of a number, shape, and area considered best suited to accomplish those objectives. Ordinances regulating land development may also be adopted designating or limiting the location, the height, number of stories, and size of dwellings, buildings, and structures that may be erected or altered, including tents and trailer coaches, and the specific uses for which dwellings, buildings, and structures, including tents and trailer coaches, may be erected or altered; the area of yards, courts, and other open spaces, and the sanitary, safety, and protective measures that shall be required for the dwellings, buildings, and structures, including tents and trailer coaches; and the maximum number of families which may be housed in buildings, dwellings, and structures, including tents and trailer coaches, erected or altered. The provisions shall be uniform for each class

of land or buildings, dwellings, and structures, including tents and trailer coaches, throughout each district, but the provisions in 1 district may differ from those in other districts. A township board shall not regulate or control the drilling, completion, or operation of oil or gas wells, or other wells drilled for oil or gas exploration purposes and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation, or abandonment of those wells. The jurisdiction relative to wells shall be vested exclusively in the supervisor of wells of this state, as provided in part 615 (supervisor of wells) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.61501 to 324.61527 of the Michigan Compiled Laws.

Section 125.282 provides for the power of referendum with respect to zoning ordinances. It states:

Sec. 12. Within 7 days after publication of a zoning ordinance under section 11a, a registered elector residing in the portion of the township outside the limits of cities and villages may file with the township clerk a notice of intent to file a petition under this section. If a notice of intent is filed, then within 30 days following the publication of the zoning ordinance, a petition signed by a number of registered electors residing in the portion of the township outside the limits of cities and villages equal to not less than 10% of the total vote cast for all candidates for governor, at the last preceding general election at which a governor was elected, in the township may be filed with the township clerk requesting the submission of an ordinance or part of an ordinance to the electors residing in the portion of the township outside the limits of cities and villages for their approval. Upon the filing of a notice of intent, the ordinance or part of the ordinance adopted by the township board shall not take effect until 1 of the following occurs:

- (a) The expiration of 30 days after publication of the ordinance, if a petition is not filed within that time.
- (b) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is inadequate.
- (c) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is adequate and the ordinance or part of the ordinance is approved by a majority of the registered electors residing in the portion of the township outside the limits of cities and villages voting thereon at the next regular election which supplies reasonable time for proper notices and printing of ballots, or at any special election called for that purpose. The township board shall provide the manner of submitting an

ordinance or part of an ordinance to the electors for their approval or rejection, and determining the result of the election.

If, as the Plaintiff contends, the Nuisance Ordinance is merely a disguised zoning ordinance, he would have the power, pursuant to MCL 125.282, MSA 5.2963 (12), to require the Township to submit the ordinance to the electors for their approval or rejection.

This Court finds, however, as a matter of law, that (1) the Nuisance Ordinance is not a zoning ordinance and (2) the power of referendum does not extend to township ordinances passed pursuant to a township's police power under the Township Ordinance Act, MCLA 41.181; MSA 5.45(1) ("TOA").

ZONING ORDINANCE V TOA ORDINANCE

The Township derives its power to enact zoning ordinances from the Township Rural Zoning Act, MCL 125.271, et seq; MSA 5.2963(1) et seq ("TRZA"). Section 12 thereof specifically provides for the right of referendum. A zoning ordinance is one which regulates the use of land and buildings according to districts, areas or locations. Whether a particular ordinance is a zoning ordinance may be determined by considering the substance of its provisions and terms, and its relation to the general plan of zoning. The distinction between zoning and regulatory ordinances cannot be predicated on whether the purpose of the ordinance is to promote the public good, since both may have as their purpose the public good. See, *Natural Aggregates, supra* at 298 and cases cited therein.

The subject Nuisance Ordinance prohibits the creation or maintenance of any nuisance. The Ordinance contains a list of eleven things which represent what is considered to be a public nuisance. Shafer claims that two of items on the list make the Nuisance Ordinance a zoning ordinance. These are:

1. an "accumulation of junk, dismantled, unlicensed (except vehicles with plows), wrecked or inoperative vehicles..." and
2. "[b]uildings, structures or things in such conditions as to cause fire hazards or otherwise be dangerous to public health or safety."

The Plaintiff argues that these definitions of “nuisance” regulate the use of land and not merely activities thereon and therefore the Ordinance is a zoning ordinance. He cites *Square Lake Hills Condominium Assoc v Bloomfield Twp*, 437 Mich 310; 471 NW2d 321 (1991) and *Recreational Vehicle United Citizens Ass’n v City of Sterling Heights*, 165 Mich App 130; 418 NW2d 702 (1987) in support.

In *Square Lake*, the plaintiff condominium association complained that Bloomfield Township’s boat docking and launching ordinance was a zoning ordinance because it limited “the use of lake frontage based on the number of feet of lake frontage owned.” *Id* at 323; 471 NW2d 321. Justice Riley rejected the plaintiff’s contention, saying:

Bloomfield Township ordinance no 397 is *not* a zoning ordinance. The ordinance does not regulate the use of land or lake frontage. Rather, it regulates an “activity” by limiting the number of boats that can be parked or “launched and/or docked adjacent to each separate frontage.

In separate opinions, Justice Levin and Chief Justice Cavanagh found that Bloomfield Township’s ordinance regulated the use of land, and thus constituted a zoning ordinance, because it regulated how lake frontage owners could exercise their riparian rights to dock boats according to the location of their land and the length of their lake frontage. *Id* at 339, n 14, 352; 471 NW2d 321 (Levin, J.), 352, 353; 471 NW2d 321 (Cavanagh, C.J., dissenting).

In *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287; 539 NW2d 761, app den’d 452 Mich 880; 552 NW2d 178 (1995), the Michigan Court of Appeals found Justice Levin’s “use” versus “activity” analysis persuasive and used it in determining whether a Brighton Township ordinance requiring the owner of sand and gravel mining operations to provide a land reclamation plan and surety bond in order to receive a soil removal permit was a zoning ordinance under the TRZA or a regulatory ordinance under the TOA. The Court concluded that it was not a zoning ordinance because the applicability of the permit requirement under the ordinance did not depend upon a zoning or districting scheme, but rather depended upon the amount of soil, sand, gravel, and so forth, to be removed from the site. The ordinance did not regulate the “use” of land, but rather provided that where material is removed from the land, this “activity” must be conducted pursuant to certain regulations.

The Plaintiff's reliance upon *Recreational Vehicle, supra*, is misplaced. *Recreational Vehicle* is distinguishable because, in that case, the challenged ordinance was the City of Sterling Heights' Recreational Vehicle Parking and Storage Ordinance (RVPSO) which regulated "the parking and storage of recreational vehicles, enclosed campers, boats, snowmobiles, and utility trailers upon public and private property **in a single-family residential area.**" (Emphasis supplied.) Application of the ordinance depended upon the zoning or districting scheme.

In the instant case, application of the Nuisance Ordinance does not depend on Township's zoning or districting scheme. The Nuisance Ordinance applies to all the land in the Township regardless of how the land is zoned. What is regulated by the subject Nuisance Ordinance are certain "activities" being conducted on the land, such as accumulating junk and maintaining buildings or structures that pose a fire hazard.

THE POWER OR REFERENDUM

Article II, Section 9 of the Constitution of the State of Michigan provides in pertinent part as follows:

The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

* * * * *

Legislative implementation

The legislature shall implement the provisions of this section.

This Constitutional power of initiative and referendum applies to "laws which the legislature may enact under this constitution." The context clearly indicates that the power of initiative and referendum applies to legislation at the state level and not at the local level.

At the local level, the power of initiative and referendum exists only where implemented by the legislature, such as the power of referendum provided in MCL 125.282; MSA 5.2963(12) in the context of zoning ordinances. No such right or power exists in the context of ordinances enacted pursuant to the Township Ordinance Act, MCL 41.181; MSA 5.45(1).

The subject Nuisance Ordinance is a legitimate exercise by the Township of its police power pursuant to MCL 41.181; MSA 5.45(1). It is not a disguised zoning ordinance. *Natural Aggregates, supra*. There is no power of referendum reserved to the people in this context.

The Plaintiff makes much of the fact that the Township previously enacted a Blight Ordinance under the Township Rural Zoning Ordinance which was defeated in a referendum. This historical note is irrelevant. The Township may attack local concerns through more than one ordinance. *Id* at 301; *Recreational Vehicle, supra* at 139-140.

CONCLUSION

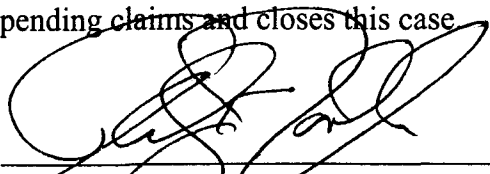
The Township enacted a Nuisance Ordinance to “promote public health, safety, and welfare” pursuant to the Township Ordinance Act, MCL 41.181; MSA 5.45(1). Such an ordinance is not subject to the power of referendum reserved to the people pursuant to the Township Rural Zoning Ordinance, MCL 125.282; MSA 5.2963(12). Therefore, the Plaintiff’s Complaint fails to state a cause of action upon which relief can be granted. MCR 2.116(C)(8).

In addition, the Plaintiff, as the non-moving party, has failed to show that there is any genuine issue of material fact for trial. MCR 2.116(C)(10).

The Defendants’ motion is granted. The Complaint is dismissed with prejudice. Given the public question presented by this case, an award of sanctions is not warranted. MCR 2.114(E). Costs, however, are awarded to the Defendants. The Defendants shall within 14 days of the date signed below present their bill of costs.

IT IS SO ORDERED.

This Decision and Order resolves all pending claims and closes this case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/23/99