THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

Sara Realty, LLC

v.

Country Pond Fish and Game Club, Inc.

No. 07-E-0204

ORDER

The petitioner, Sara Realty, LLC, ("Sara Realty"), brings this action against Country Pond Fish and Game Club, Inc. ("CPFGC"), seeking to have the Court declare and rule that CPFGC "has and continues to engage in a private nuisance" by virtue of its "engaging in and allowing . . . outdoor gun shooting activities" without having effectuated "adequate noise control or abatement measures" after its removal of trees and vegetation and its terrain alterations within an area of its property situated close to that of Sara Realty. See particularly Petition for Declaratory Relief and Injunctive Relief, III, B. and C. and IV, 1 and 2. The petitioner seeks, as well, to have the Court issue injunctive relief prohibiting CPFGC "from engaging in and allowing any outdoor shooting activities until and unless . . . . [it] has implemented adequate noise control measures." Id.

Sara Realty owns and operates Whispering Pines Campground in Newton. CPFGC runs a gun club/shooting range operation on property now adjacent to the campground.

CPFGC filed a Motion to Dismiss and Demurrer pursuant to Superior Court Rule 134, asserting that Sara Realty may not obtain the relief it seeks because of the

protections afforded CPFGC by RSA 159-B. Sara Realty strongly opposes CPFGC's Motion, contending, first, that RSA 159-B does not apply to the pertinent circumstances and, second, that even if it does apply, it ought to be deemed unconstitutional, being violative of the strictures of Part I, Article 14 of the New Hampshire Constitution.

The Court held a hearing on CPFGC's Motion on April 3, 2008. Because both parties have submitted materials for consideration that go beyond the pertinent pleadings, the Court treats CPFGC's Motion as one for Summary Judgment. After considering the parties arguments and the pertinent materials of record, and as explained below, the Court **GRANTS** CPFGC's Motion and enters summary judgment in its favor.

I. Standard of Review

When ruling on a motion for summary judgment, the Court "consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006) (citing Sintros v. Hamon, 148 N.H. 478, 480 (2002)). "Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Merchants Mut. Ins. Co. v. Laighton Homes, 153 N.H. 485, 487 (2006) (citing D'Amour v. Amica Mut. Ins. Co., 153 N.H. 170, 171 (2006)); see also RSA 491:8-a, III (1997). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark, 153 N.H. at 756 (citing Sanford v. Town of Wolfeboro, 143 N.H. 481, 484 (1999)). Finally, "[t]he party objecting to a motion for summary judgment 'may not rest upon mere allegations or denials of his pleadings, but

his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial.'" Weeks v. Co-Operative Ins. Cos., 149 N.H. 174, 176 (2003) (quoting RSA 491:8-a, IV (1997)).

II. RSA 159-B

RSA 159-B, as enacted and expanded in 2004 and since then effective, broadly protects shooting ranges from liability related to noise. The statute reads as follows:

> *Purpose of exemption.* 2004, 83:1, eff. May 7, 2004, provided:
>
> The general court recognizes that maintaining safe shooting ranges within the state is essential to provide places for the training of law enforcement, safety programs for youth, competitive shooting, hunter's safety training, self defense training for private citizens, and safe affordable shooting environments. The general court encourages shooting range owners and operators to exhibit reasonableness in applying the provisions of this exemption.
>
> *159-B:1 Exemption.*
>
> Notwithstanding the provisions of RSA 644:2, III(a) or any other law to the contrary, no person who owns, operates, or uses a shooting range in this state shall be subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution, provided that the owners of the range are in compliance with any applicable noise control ordinances in existence at the time the range was established, was constructed, or began operations.
>
> *159-B:2 Injunctions.*
>
> The owners, operators, or users of shooting ranges shall not be subject to any action for nuisance and no court shall enjoin the use or operation of a range on the basis of noise or noise pollution, provided that the owners of the range are in compliance with any noise control ordinance that was in existence at the time the range was established, was constructed, or began operations.
>
> *159-B:3 Expansion.*
>
> Subsequent physical expansion of the shooting range or change in the types of firearms in use at the range shall not establish a new date of commencement of operations for the portion or portions in existence prior to the expansion for the purposes of this chapter.

159-B:4 Retroactivity Prohibited.

No administrative rule, statute, or ordinance adopted, enacted, or proposed by the state of New Hampshire or its political subdivisions shall be applied retroactively to prohibit or limit the scope of the shooting activities previously conducted at a shooting range, which was in operation prior to the adoption, enactment, enforcement, or proposal of the administrative rule, statute, or ordinance.

159-B:5 Nuisance.

Notwithstanding any other law to the contrary, a person may not maintain a nuisance action for noise or noise pollution against a shooting range, or the owners, operators, or users of the range, located in the vicinity of that person's property, if the shooting range was established, constructed, or being used on a regular basis as of the date the person acquired the property.

159-B:6 Exemption From State Standards.

No standard in rules adopted by any state agency for limiting levels of noise in terms of decibel level, which may occur in the outdoor atmosphere, shall apply to the shooting ranges exempted from liability under the provisions of this chapter.

159-B:7 Cause of Action.

The owners of a shooting range shall have a right of action in superior court to enforce the provisions of this chapter.

159-B:8 Definitions.

In this chapter:

I. Noise shall mean the intensity, duration, and character of sounds from shooting.

II. Shooting range shall mean a property or properties designed and operated for persons using rifles, shotguns, pistols, revolvers, or blackpowder weapons; archery; air rifles; silhouettes; skeet ranges; trap ranges; or other similar facilities.

III. Facts

The parties agree on many of the material facts.

CPFGC owns and operates a Club engaged in “shooting range” activities as defined in RSA 159-B: 8 II, and (as to firearms) has done so since approximately 1962 on 10.75 acres in Newton. Def.’s Mot. to Dismiss and Demurrer, Ex. B. No regulations

related to shooting ranges were in effect in Newton in 1962, and the Town did not adopt a zoning ordinance until 1973. In 1999, Sara Realty purchased property ("the campground") located to the west of CPFGC's shooting range operation. In about 2005 or 2006, the Town adopted specific noise ordinance/regulations.

In 2001, CPFGC purchased a lot of about 40 acres ("the Mika lot") located between CPFGC's then shooting range operation and the campground. It then proceeded to undertake an expansion project on this lot, and, in that regard, filed in September 2001 a Notice of Intent to Cut Wood Or Timber. The Town's Board of Selectmen signed or approved the notice on or about October 1, 2001, but, in a letter dated October 29, 2001, informed CPFGC that "[i]t has been brought to our attention that the cutting has begun in an area that the Planning Board might otherwise consider a suitable tree buffer between the uses on the property and neighboring properties." Pl.'s Resp. and Ans. in Opposition to Def.'s Mot. to Dismiss and Demurrer ("Pl.'s Resp.") Ex. 2. At the time CPFGC received the October 29 letter, it was clearing or cutting, or had already cleared and cut, trees and vegetation on the westerly side of the Mika property. Inasmuch as CPFGC was also at that time seeking approval for a plan to do excavation and development on this lot, and because the selectmen considered that Section IV of Newton's Non-Residential Site Plan Regulations required submission and approval of site plans prior to any clearing in conjunction with a non-residential site development, the Board of Selectmen, through the letter, revoked the cutting permit pending site plan review by the Planning Board.

On June 5, 2002, and because of a decision by the Town's Planning Board the previous month that a variance was needed to move its project forward, CPFGC

submitted an application to the Newton Zoning Board of Adjustment ("ZBA"), seeking a variance for, among other things, removal of gravel from an approximate five acre portion of the Mika lot in excess of the 2,500 cubic yard limit on incidental gravel excavation permitted by the Newton Site Plan Regulations. Pl.'s Resp., Ex. 3. In a letter submitted to the ZBA, CPFGC explained that it wished to undertake the excavation and the rest of its project in order to expand its current operations to include an archery range, picnic area and additional parking facilities, but to do so as "a good neighbor" with also "the construction of sound-suppressing berms." Id.

The Planning Board and ZBA held a joint meeting on July 9, 2002, to consider this application, and the ZBA unanimously voted to grant the variance to allow the gravel removal "in this residential area as per the plan and regulated by the Planing Board [sic]." Pl.'s Resp. Exs. 4 and 5. CPFGC's project thereafter required Planning Board excavation/site plan approval before work could actually begin.

CPFGC worked with the Planning Board over the course of the next several months to develop a satisfactory plan. Sara Realty, through its principal Ronald J. Pica ("Pica"), was involved in the review process as an interested abutter, and, with Pica's and CPFGC's acceptance, a sound specialist Frank Kuhn ("Kuhn") of Air and Noise Compliance, Co. ("ANC") was retained by the Planning Board to aid in the development of a noise mitigation plan that CPFGC would institute as part of its project. Pl's Resp. Ex.'s 6,7,8 and 9. Excavation/site plan approval was granted on June 10, 2003, conditioned upon, among other things, CPFGC's agreement to integrate certain noise mitigation elements into the project. Pl.'s Resp. Ex. 10.

Despite Sara Realty's assertions that CPFGC's noise mitigation efforts were ineffective, and that indeed, it is now subjected to noise levels far exceeding anything that may be deemed acceptable, the Planning Board ultimately voted on October 9, 2007 that CPFGC had indeed met the noise mitigation condition. Before voting as it did, the Planning Board had considered further input from Kuhn as well as input from another sound expert, Herbert Singleton of Cross Spectrum Labs. See in this regard, this Court's decision in Sara Realty, LLC v. Town of Newton Planning Board, Rockingham County Sup. Ct., No. 07-E-203 (June 25, 2008) (Order, Lewis, J.), affirming the Planning Board's October 9, 2007 decision.

The parties certainly dispute the degree, if at all, that CPFGC's project on the Mika lot has resulted in a worsening of noise conditions, and whether CPFGC has at all subjected Sara Realty, or its campground occupants, to noise-related nuisance. In connection with CPFGC's Motion to Dismiss, the parties dispute the applicability of RSA 159-B to the case, and whether, if RSA 159-B is applicable, it passes constitutional muster.

IV. Applicability of RSA 159-B

Sara Realty argues that "the exemption" under RSA 159-B:1, and the other protections afforded shooting ranges by RSA 159-B, are not here involved inasmuch as CPFGC caused the nuisance here at issue unrelated to the original shooting range area by its removal of trees, vegetation and its excavation of the Mika lot. Sara Realty concedes that CPFGC's original shooting range operation, in place since the 1960's when there were no zoning or other pertinent land use ordinances or regulations, enjoys the protections conferred by RSA 159-B, that "it would not have a cause of action by

reason of the statute." See Pl.'s Resp. at 9. It asserts, however, that CPFGC's "operations . . . chang[ed] beginning in 2001," and that, by virtue of these changes, "[h]ere although the shooting range itself is not expanded, the excavation activity engaged in by . . . [CPFGC] itself produces the noise nuisance . . . [and] [t]hat activity can be regulated and can be the subject of this nuisance action by reason of the noise elevation result." Id. at 9-10.

The alleged noise nuisance that Sara Realty complains of, however, may not realistically be regarded as stemming from just the excavation activity and vegetation/tree cutting. Rather, it necessarily arises from a combination of these activities on the Mika lot, with the sounds carrying from the original, and admittedly protected, shooting range operation. Sara Realty here challenges CPFGC's original shooting range, or gun-related activities and operations, though as allegedly made worse or intolerable, insofar as noise is concerned, by the Mika lot project; and the relief it seeks is to terminate or curtail the original gun-related shooting range activities. RSA 159-B is thus plainly implicated, and the Court deems CPFGC to be entitled here to its protections.

RSA 159-B:8, II broadly defines "shooting range" to mean "a property or properties designed and operated for persons using rifles, shotguns, pistols, revolvers, or blackpowder weapons; archery; air rifles; silhouettes; skeet ranges; trap ranges; or other similar facilities," and CPFGC's expanded operations, including its archery operation and the parking lot, plainly fall within that definition.[1]

[1] The Court notes that when the expansion project at issue here was approved by the Planning Board in 2003, RSA 159-B did not contain a definition of "shooting range" and it did not expressly refer to "archery." See RSA 159-B (effective July 11, 1987). However, the statute at that time did provide broad protections for gun shooting ranges like those maintained by CPFGC "from any civil or criminal

Significantly, this is not a case where CPFGC has physically expanded its actual firearm shooting operations or shooting ranges. Rather, CPFGC has done no more than purchase and develop certain adjoining property without actually extending its firearm shooting ranges into the newly acquired area. In these circumstances, CPFGC does not lose the pertinent protections that RSA 159-B affords it. See RSA 159-B:3 which specifies that a "physical expansion of the shooting range . . . shall not establish a new date of commencement of operations for the portion or portions in existence prior to the expansion for the purposes of this chapter."

Nor is there merit to Sara Realty"s contention that because CPFGC "in fact acquiesced in the Planning Board condition that the noise be mitigated . . . [it] is estopped from claiming that the excavation activity and its noise elevation result is exempted under the statute." See Pl.s Memo., dated April 3, 20068, at 6. While CPFGC did work with the Planning Board and did accept its sound mitigation condition, these circumstances do not at all call for this Court to find that CPFGC is thereby estopped from here invoking the protections of RSA 159-B.

Sara Realty also asserts that it nonetheless may seek to enforce the Planning Board's 2003 sound mitigation condition through RSA 676:15. Yet in its previously referenced decision in Sara Realty, LLC v. Town of Newton Planning Board, this Court has affirmed the Planning Board's decision that CPFGC satisfied that condition. The issue is thus no longer an open one.

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prosecution in any matter relating to noise or noise pollution resulting from the ranges" or from "any action for nuisance (or injunction) on the basis of noise or noise pollution, provided that the owners [of the ranges] are in compliance with any noise control laws or ordinances in existence at the time construction of the range was approved." See RSA 159-B:1 and 2 (effective July 11, 1987).

In sum, the Court concludes, upon review of the material undisputed facts, that RSA 159-B does apply, and, would, if constitutional, operate to bar Sara Realty's present nuisance action for declaratory and injunctive relief. The Court proceeds to consider Sara Realty's challenge to the constitutionality of RSA 159-B's statutory scheme.

V. Constitutionality of RSA 159-B

Sara Realty argues that RSA 159-B, as here applied, violates its right secured by Part 1, Article 14 of the State Constitution, to seek relief from the noise emanating from CPFGC's shooting range. Relying heavily on the Superior Court's decision in Resident's Defending Their Homes, et al, v. Lone Pine Hunters' Club, Inc. et al Hillsborough County Sup. Ct. Nos. 00-E-0208 and 04-E-0364 (December 6, 2006) (Hampsey, J.), it contends that RSA 159-B creates two classes of similarly situated landowners: those who can seek assistance from local officials or bring private nuisance actions to seek to alleviate harm from noise emanating from a shooting range, and those who cannot. It maintains that this unequal treatment is not substantially related to an important governmental objective.

CPFGC counters that RSA 159-B is not violative of equal protection. It particularly maintains that if the statutory scheme is viewed as creating distinct classes of similarly situated landowners with differing rights and abilities to seek relief as to noise disturbances, it would survive middle tier scrutiny because the statute's classifications are reasonable, and bear a fair and substantial relation to its important governmental objectives: the promotion of public safety and the protection of the right to use firearms.

Part 1, Article 14 of the New Hampshire Constitution provides:

> Every subject of this sate is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.

The "purpose of the provision is to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements upon access to the courts." Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 640 (2002), citing Opinion of the Justices, 126 N.H. 554, 559 (1985). It operates "basically [as] an equal protection clause [because] it implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection and without discrimination." Trovato v. Deveau, 143 N.H. 523, 525 (1999) (citation omitted).

"The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." Opinion of the Justices (Limitation on Civil Actions), 137 N.H. 260, 265 (1993) (quotations and citation omitted). If the legislation in question does treat similarly situated persons differently, the Court then determines if the State is justified in so doing. To that end, the Court applies one of three standards of review, which it determines "by examining the purpose and scope of the State-created classification and the individual rights affected." Cmty. Res. For Justice v. City of Manchester, 154 N.H. 748, 758 (2007) (quotations and citation omitted). Strict scrutiny is applied to classifications "based upon suspect classes or affecting a fundamental right;" intermediate scrutiny is applied to classifications affecting "important substantive rights;" and a standard of rationality is applied to all other classifications. Id.

With respect to classifications, owners of property situated near shooting ranges enjoy differing rights or abilities to obtain relief against noise emanating from such ranges under RSA 159-B depending upon whether the range was legally begun and/or upon its compliance with "any noise control ordinance that was in existence at the time the range was established, was constructed, or began operations," and/or upon "if the shooting range was established, constructed, or being used on a regular basis as of the date the . . . [owner] acquired . . . [pertinently affected property]." See RSA 159-B: 1, 2 and 5; see also RSA 159-B:4 as to prohibition of retroactivity. Moreover, RSA 159-B deprives or limits property owners like Sara Realty in regard to noise-related remedies that are generally available to other property owners against neighbors who are not shooting range operations.

"[T]he right to use and enjoy property is an important substantive right," and accordingly, the "intermediate scrutiny test [is utilized] to review equal protection challenges to zoning ordinances that infringe upon this right," id.; and it is also the case that the right to recover for one's personal injuries is an "important substantive right" under New Hampshire's Constitution, see Carson v. Maurer, 120 N.H. 925, 931-932 (1980), Opinion of the Justices, 137 N.H. at 266, with the right "to maintain actions in tort to redress injuries. . . accorded solicitous protection." Gould v. Concord Hospital, 126 N.H. 405, 409 (1985). The Court thus here applies the intermediate scrutiny test. This test

> requires that the challenged legislation be substantially related to an important governmental objective. The burden to demonstrate that the challenged legislation meets this test rests with the government . . . . To meet this burden, the government may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation nor upon overbroad generalizations.

Cmty. Res. For Justice, 154 N.H. at 762 (2007) (quotations and citations omitted). In applying this test, the Court does not pass "any judgment on the merits of the social policies in dispute." Opinion of the Justices, 137 N.H. at 259.

RSA 159-B functions as a "grandfathering" statute for shooting ranges. It "primarily protects existing shooting ranges from liability related to noise." Residents Defending Their Homes v. Lone Pine Hunters' Club, Inc., 155 N.H. 486, 487 (2007). Its objective is to assure that the state's shooting ranges, which to a large degree came into existence in rural settings with rather little, or non-existent, noise regulations then in place, would not be eliminated or unduly endangered in their operations, because of encroaching development, accompanying noise-related private nuisance litigation, or increased regulatory oversight concerned with noise.

The statute, particularly as put in place in 2004, reflects the legislature's strong view that the preservation of the State's existing network of shooting ranges serves important public safety and training functions and furthers other important, vital public interests such as allowing for the availability of appropriate shooting environments. As set forth in RSA 159-B's statement of purpose:

> [t]he general court recognizes that maintaining safe shooting ranges within the state is essential to provide places for training of law enforcement, safety programs for youth, competitive shooting, hunter's safety training, self defense training for private citizens, and safe affordable shooting environments.

Laws 2004, 83:1.

Moreover, the pertinent legislative history of the 2004 enactment of the present statutory scheme affirms that its purpose is to effectively keep shooting ranges that were legal when they began operations from being "shut down with new laws and

ordinances," see Residents Defending Their Homes, 155 N.H. at 489 (quoting from a statement of Executive Councilor David Wheeler, as contained in a summary of testimony in support of HB 1309 received by the Senate Committee on Wildlife and Recreation in March, 2004). As also strongly stated in the House Judiciary Committee's majority report justifying the protections the statute affords such shooting ranges:

> Safe shooting ranges within the state are essential to providing places for the training of law enforcement personnel, firearms safety programs for youths, competitive shooting, hunter safety training, self defense, training for citizens – all in a safe affordable shooting environment. Further, whereas Part I, Article 2-a of our New Hampshire Constitution states that "all persons have the right to keep and bear arms in defense of themselves, their families, their property and the state" does it not make common sense that suitable training facilities should be available in guaranteeing the furtherance of that constitutional right? The minority will argue that this is a local control issue but because the state has a compelling interest in serving ALL citizens and since the legislature has repeatedly rejected the home rule concept, the argument of "local control" is really null and void. There is no doubt that shooting ranges serve a vital public interest. The committee heard testimony that several shooting ranges in the state have been taken to court, costing them tens of thousands of dollars, almost forcing them out of existence. This bill, as amended, will strengthen and clarify our state's existing range protection law. The amendment makes clear that rules cannot be retroactively changed on the shooting range after they have begun operation of when the shooting range preexisted the regulation. The bill as amended does nothing to interfere with a localities [sic] ability to regulate a new shooting range. This bill will protect public safety by ensuring that all citizens still have a safe place to train.

N.H.H.R. Jour. 410-11 (March 11, 2004) (Rep. James E. Wheeler).

The statute "was modeled after legislation in 38 other states," and, as further described by Senator Sapareto, one of its supporters, "seeks to protect property rights of these legally operating shooting ranges and ensure gun owners have continued access to safe and permissible places to practice shooting." N.H.S. Jour. 729 (April 15, 2004).

It is thus clear that RSA 159-B is oriented to serve important governmental objectives, those of promoting public safety, and protecting the right of New Hampshire citizens to responsibly bear and use firearms; and it has been convincingly shown that the challenged legislation, with its classifications and protections, substantially serves, and is substantially related to, those important governmental objectives. The statute effectively works, through its various provisions, to foster those governmental objectives by promoting the continued existence of shooting ranges, though they create noise.

"The statute need not be perfectly tailored to satisfy . . . [the middle tier] standard of review," Trovato, 143 N.H. at 526, and the Court is not presented with justifications for the statute's classifications (and protections) which may be characterized as "hypothesized or 'invented *post hoc* in response to litigation' . . . [or based] upon 'overbroad generalizations'" Cmt. Res. For Justice, Inc. 154 N.H. at 762. Rather, the classifications (and protections) enjoy direct support from a legislative record of fact-finding and policy conclusions.

To be sure, RSA 159-B provides gun shooting ranges like those of CPFGC quite broad protection in regard to noise related challenges, and Sara Reality contends that it allows CPFGC to "make as much noise as possible without penalty," and deprives the town of authority to "limit . . . [CPFGC's] shooting activities relative to noise even if its members were firing an infinite number of rounds at all times of the day and night." Pl.'s Resp. at 14-15.

Yet there are limits to the protections RSA 159-B accords shooting ranges. For one thing, RSA 159-B does not protect shooting ranges that, when originally begun, were not legally in operation, see Residents Defining Their Homes, 155 N.H. at 489

(though here there is no dispute that CPFGC's firearm shooting range operation was lawfully commenced), or protect shooting ranges not in compliance with pertinent regulations in existence when the range was established, constructed, or began operations. For another, RSA 159-B:3 appears to allow more noise-related regulation of, and related litigation concerning, physical expansions of shooting ranges like CPFGC's, or in regard to changes in firearms used at such shooting ranges, in connection with newly created "portions" of any such shooting range. [2] Third, the statute does not broadly exempt such shooting ranges from being generally required to comply with laws and ordinances not related to noise. Id. at 489; but see RSA 159-B:4. Finally, the statute expressly "encourages" the owners and operators of shooting ranges "to exhibit reasonableness in applying the provisions of the exemption" (see 2004, 83:1), and, while this does not impose a mandatory obligation, it puts in context the statute's application.

As earlier stated, this is not a case where CPFGC has at all expanded or changed its actual gun shooting range operations from what previously existed. Rather, it is one where the pertinent alleged noise problems strongly implicate CPFGC's 2001 purchase of the Mika lot and its later tree/vegetation cutting and terrain alteration on this property. As also earlier discussed, however, RSA 159-B protects CPFGC's gun shooting range activities in this context, and, indeed, the Court notes that if CPFGC had not purchased the Mika property but someone else had and then had effected similar

[2] There is some suggestion in the legislative history that this is not the case, that even "physical expansions" enjoy the protections provided by the statute as stem from a shooting range's original commencement. See N.H.S. Jour. 729,732 (2004). As written, however, the statute does not do this in regard to new shooting ranges or new portions of physically expanded ones.

tree/vegetation cutting and terrain alteration, Sara Reality would have found itself in the same position, but without CPFGC to blame.

The previously referred to case of Sara Realty, LLC v. Town of Newton Planning Board reflects that noise mitigation work has been here effectuated; the Town of Newton Planning Board has concluded that the noise mitigation condition it established had been satisfied by CPFGC; and this Court has affirmed the Planning Board's decision, deeming it lawful and reasonably entered. CPFGC's Mika lot project thus did not take place without any regard for the noise impact it may have on neighbors like Sara Realty.

In the Residents Defending Their Homes case, the Superior Court concluded, in declaring RSA 159-B unconstitutional, that the statute's "differing treatment of shooting ranges based upon when the range began operation is not necessary to the government's interest in preserving the viability of private shooting clubs," and further that "there is no nexus between the goal of maintaining safe shooting ranges and complete denial of a landowners right to seek a remedy for injuries to their land that may emanate from a shooting range." Resident's Defending Their Homes, et al, v. Lone Pine Hunters' Club, Inc. et al Hillsborough County Sup. Ct. Nos. 00-E-0208 and 04-E-0364 (December 6, 2006) (Hampsey, J.), at 9-10. Yet, and as previously already discussed, the pertinent legislative history shows that the differing treatment the legislature adopted in RSA 159-B stemmed from its consideration of the history of shooting ranges within our State, the serious threat these ranges face, absent protection, due to encroaching development, and the essential role they play in the furthering important public objectives. It also reflects the legislature's conclusion that

the most effective way to ensure the continued viability of these shooting ranges was to strongly limit noise-related remedies against them. Moreover, and as also discussed previously, RSA 159-B does not result in a "complete denial" of remedy with regard to shooting ranges.

Sara Realty cites City of Dover v. Imp. Cas. & Indemn. Co., 133 N.H. 109 (1990), in support of its position. There, in a 3-2 decision, the Supreme Court declared RSA 507-B:2, I, unconstitutional on equal protection grounds. The statute at issue in that case afforded "municipalities with complete immunity from tort liability resulting from negligence incident to ownership or maintenance of highways, streets and sidewalks." Id. at 119.

The Court's majority in the City of Dover case recognized that the challenged statute had a legitimate purpose or objective -- to protect municipalities from being subjected to "unworkable" and "unreasonable" burdens in regard to their responsibilities to maintain public highways and sidewalks. Id. at 118-119. The majority concluded, however, that the statute lacked sufficient tailoring to this legitimate legislative objective. The Court read the statute as working to unjustifiably deprive any remedy to "a category of plaintiffs . . . simply because the defendant is a municipality." Id. at 120. It stated that a "workable" standard of care for municipalities in connection with highways, streets and sidewalks may well not be one of "ordinary care", but it should also not be one that deprived a remedy to those who sustain injury "when a community has [had] actual notice of a hazardous condition on its highways or sidewalks and has had adequate opportunity to correct the condition, protect travelers from injury, or warn public users of the hazard[.]" Id. at 121. The Court determined it could not sustain, or condone, a

statute creating classifications which rewarded "intransigence on the part of municipalities or their employees, to the injury of others[.]" Id. at 119-120.

Here, however, the statutory scheme at issue is oriented and tailored, with its classifications and protections, to assure the continued existence of the State's lawfully begun network of shooting ranges. To be sure, and insofar as noise is concerned, the statutory scheme strikes a balance strongly in favor of shooting range operations like those of CPFGC, and against adjacent landowners and others subject to the noise they create. Yet, the classifications and protections fit the permitted legislative policy; the policy has been deemed by the legislature to be of high importance; and the remedy deprivations it prescribes to property owners like Sara Realty with regard to shooting ranges operate to realize the legislature's legitimate, highly important objectives, while leaving available certain noise-related remedies such as those pertaining to "physical expansions" of ranges, and, as well, though limited by RSA 159-B:4, remedies that are not related to noise. Given the important policy objectives the statute substantially works to further, "[t]he restriction of private rights . . . imposed [by RSA 159-B] is not so serious that it outweighs the benefits" it confers. See Opinion of the Justices, 137 N.H. at 266 (quotations and citation omitted).

In conclusion, while it is true that RSA 159-B burdens landowners like Sara Realty by abridging their ability to seek relief, RSA 159-B, as applied here, nonetheless passes constitutional muster.

The Court enters summary judgment in favor of CPFGC.

So **ORDERED**.

June 25, 2008___ _____

DATE JOHN M. LEWIS
Presiding Justice