[Cite as *State ex rel. Fischer v. Middleton Twp. Bd. of Trustees*, 2004-Ohio-4150.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State, ex rel., Raymond C. Fischer,
Board of Trustees, Middleton Twp.

Appellee

v.

Jeffrey A. Hall, et al.

Appellants

Court of Appeals No. WD-03-004

Trial Court No. 01-CV-453

DECISION AND JUDGMENT ENTRY

Decided: August 6, 2004

* * * * *

Raymond C. Fischer, Wood County Prosecuting Attorney, and
Linda F. Holmes, Assistant Prosecuting Attorney, for appellee.

David M. Busick, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶1} This is an appeal from a judgment of the Wood County Court of Common Pleas in an action seeking an injunction for the violation of a zoning ordinance and to abate a public nuisance. From that judgment, defendants-appellants, Jeffrey and Kathy Hall, raise the following assignments of error:

{¶2} "Assignment 1: The trial court erred by depriving the Defendant's [sic] of substantial property rights without consideration of their Fifth Amendment protections.

{¶3} "Assignment 2: The trial court erred by not requiring the State to comply with the procedural requirements of the O.R.C. and the O.A.C. in determining a nuisance existed.

{¶4} "Assignment 3: The trial court erred by not requiring the State to show harm suffered by any person due to noise generated by the operation of the Defendant's [sic] firing range.

{¶5} "Assignment 4: The trial court erred by depriving the Defendant's [sic] of their 14th Amendment promise of Equal Protection.

{¶6} "Assignment 5: The trial court erred by infringing on the Defendant's [sic] Second Amendment protections.

{¶7} "Assignment 6: The trial court by [sic] issuing an ambiguous, ill-defined order."

{¶8} Appellants are the owners of approximately six acres of land in Wood County, Ohio. The property is surrounded by family residences and farmland. While their residence sits on the property, appellants are gun enthusiasts who constructed a shooting range on a portion of the lot. On August 29, 2001, appellee Alan R. Mayberry, the Wood County Prosecuting Attorney[1], filed, on behalf of the Board of Trustees of Middleton Township, a complaint for preliminary injunction against appellants. Count I of the complaint was filed pursuant to R.C. 519.24 and alleged that appellants' use of their property was in violation of Article XVII, Section 1 of the Middleton Township

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[1]The Wood County Prosecuting Attorney is now Raymond C. Fischer, who is named as the appellee in the briefs before this court.

Zoning Resolution. Count II of the complaint was filed pursuant to R.C. 3767.03 to abate a public nuisance.

{¶9} The complaint alleged that on or about July 8, 2001, appellants used or permitted others to use high-powered weapons at the firing range on their property, that bullets from that firing range crossed two public roads before becoming lodged in or landing on the property of Fred Greive, and that July 8, 2001, was not the only instance in which persons living in the vicinity of appellants' property have heard bullets from the firing range cross their property. The complaint then alleged that appellants' use of their property as a firing range for automatic and/or high-powered weapons was in violation of Article XVII, Section 1 of the Middleton Township Zoning Resolution in that it created a dangerous, injurious hazard which adversely affected the surrounding area and adjoining properties. The complaint further alleged that appellants' use of their property as a firing range had obstructed the reasonable use or enjoyment of properties on Ovitt and Reitz Roads, had unreasonably interfered with the public's right of safe travel on public roads, and that appellants' continued use of their property as a firing range for automatic and/or high-powered weapons would endanger the public health and safety of the surrounding areas and adjacent properties and would endanger persons traveling on Ovitt and Reitz Roads north of the firing range. As such, the complaint alleged that appellants' use of their property for the discharge of automatic and/or high-powered weapons constituted a public nuisance. The complaint then sought a preliminary and permanent injunction ordering that appellants cease from using their firing range or permitting others from

using it until modifications were made to ensure that bullets and bullet fragments did not ricochet or otherwise escape from the property.

{¶10} Appellants filed an answer to the complaint in which they raised in pertinent part the defenses that the action prayed for by appellee violated appellants' rights under the Second and Fifth Amendments to the United States Constitution.

{¶11} Subsequently, the parties entered into a consent judgment entry in which they agreed to all of the terms necessary to resolve the case with the exception of the hours during which appellants could operate their shooting range. Accordingly, the court held a hearing on that issue during which it heard the testimony of three of appellants' neighbors who testified as to instances of prolonged shooting with high powered and automatic weapons on appellants' property.

{¶12} Gunther Kramer testified as to the events of one particular day in July 2001. Kramer stated that he heard continuous shooting with high powered weapons all day, starting in the early morning. He further stated that when appellants are firing weapons on their property he cannot go outside because of the noise. Finally, he testified that if appellants were permitted to fire their weapons from 7:00 a.m. to 7:00 p.m., he would not be able to live on his property because of the disturbance.

{¶13} Mark Garrett, another neighbor of appellants, testified that he recalled several instances of continuous shooting on appellants' property. Garrett testified that on March 26, 2000, shooting began on appellants' property at around noon and continued intermittently until 5:00 or 6:00 in the evening. He stated that he and his daughters were in the backyard and that the noise made it difficult for him to hear himself talk at times.

Later that year, in June, Garrett again heard continuous shooting on appellants' property. That time, the shooting started at around 6:00 in the evening and continued until 9:30 p.m., with it getting heavier around 9:30. Garrett testified that it was a warm evening so he had the windows open, but the noise made it difficult to put his children to bed. Garrett further testified that there had been between six and ten evenings when he heard shooting on appellants' property, that the occasions lasted for at least one hour, and that if shooting were permitted on appellants' property from 7:00 a.m. until 10:00 p.m., he would not be able to live a normal life and enjoy his backyard because of the noise. Regarding that noise, Garrett testified that on one occasions he left his house for 12 hours because of the noise and on other occasions he and his family have had to go inside to the front of their house to escape the noise.

{¶14} Finally, Dr. Steven Dood, a neighbor of appellants who is also a gun owner and is experienced with guns, testified that he too has heard several occasions of extended shooting on appellants' property. He then testified that the longest shooting session occurred in July 2001, when he estimated that the shooting continued for approximately six hours. Dood stated that although he was trying to do chores outside, he heard what sounded like bullets leaving appellants' property and restricted his and his three year old son's activities to the east side of his house. On a scale from one to ten, with ten being the loudest, Dood testified that in his opinion the noise was an eight. Given his knowledge of guns, Dood stated that it sounded like semi-automatic and automatic weapons were being discharged on appellants' property and that in his estimation, hundreds to thousands of rounds were discharged that day. Although there

were breaks in the shooting, Dood defined them as lulls as opposed to extensive breaks. He testified that when appellants are shooting on their property, his family's policy is that his wife and son do not go into the yard and his yard work is limited. Dood further stated that the long periods of shooting and noise disrupt his ability to enjoy his property and to have a conversation. Finally, Dood testified that there were other occasions during which shooting on appellants' property lasted for approximately one hour.

{¶15} On December 16, 2002, the trial court issued a judgment entry in which it adopted the consent judgment entry of the parties and established the hours of operation of the shooting range. Initially, the court determined that prolonged and frequent shooting on appellants' property posed a safety and noise nuisance to the neighboring properties and that the nuisance could be abated by implementing safety measures and limitations upon the use of the shooting range. The court further found that the parties had entered into a consent agreement as to all terms and conditions relating to the abatement of the nuisance with the exception of the time periods for operating the shooting range. On that issue, the court held "that the shooting should be restricted to the time period between 10:00 a.m. and 5:00 p.m. The Court also finds that the length of any particular shooting ought to be restricted to no more than one continuous shooting period of 3 hours on any particular day. The Court also finds that the frequency of shooting ought to be restricted to no more than 10 hours per week, total."

{¶16} Appellants now challenge the trial court's application of the Middleton Township Zoning Resolution to their use of their property

{¶17} Because appellants' second and third assignments of error are dispositive of this appeal, they will be addressed together. These assignments of error raise the issue of whether the trial court properly enforced the township's zoning ordinance and whether that ordinance has been preempted by the Ohio General Assembly in its enactment of R.C. 1533.83 to .85.

{¶18} In 1997, the General Assembly enacted R.C. 1533.83, .84 and .85, to govern certain aspects of shooting ranges in Ohio. Under R.C. 1533.83(B), a "shooting range" is defined as: "a facility operated for the purpose of shooting with firearms or archery equipment, whether publicly or privately owned and whether or not operated for profit, including, but not limited to, commercial bird shooting preserves and wild animal hunting preserves established pursuant to this chapter. 'Shooting range' does not include a facility owned or operated by a municipal corporation, county, or township police district." R.C. 1533.85 then sets forth immunities concerning shooting range noise. Paragraph (C) of that statute reads: "notwithstanding any contrary provision of law, the courts of common pleas *** shall not grant injunctive relief under Chapter 3767. or any other section of the Revised Code, under an ordinance, resolution, or regulation of a political subdivision, or under the common law of this state against the owner or operator of a shooting range in a nuisance action if the court determines that the owner's or operator's actions or omissions that are the subject of a complaint substantially complied with the chief's noise rules or the chief's public safety rules, whichever apply to the nuisance action."

{¶19} The "chief's noise rules" are defined as "the rules of the chief of the division of wildlife that are adopted pursuant to section 1533.84 of the Revised Code and that pertain to the limitation or suppression of noise at a shooting range or to the hours of operation of shooting ranges." R.C. 1533.83(D). Regarding the adoption of those rules, R.C. 1533.84 reads in relevant part: "The chief of the division of wildlife *** shall adopt rules establishing generally accepted standards for shooting ranges. These rules shall be no more stringent than national rifle association standards, and include standards for the limitation and suppression of noise, standards for the hours of operation of shooting ranges of the various types and at the various locations of ranges, and standards for public safety."

{¶20} Effective September 1, 1998, the chief of the division of wildlife adopted rules regarding shooting ranges which are set forth at Ohio Adm.Code 1501:31-29-03. Those rules provide in pertinent part: "(A) *** Private or public shooting ranges in Ohio should substantially comply with these standards to receive the civil and criminal immunities granted under Ohio Revised Code 1533.85. *** (C) The hours of operation for shooting ranges shall be from seven a.m. to ten p.m. daily, except for indoor or archery ranges."

{¶21} In the present case, Count I of the complaint alleged violations of Article XVII, Section 1 of the Middleton Township Zoning Resolution. That resolution reads:

{¶22} "No land or building in any district shall be used or occupied in any manner so as to create any dangerous, injurious, noxious, or otherwise objectionable fire, explosive or other hazard; noise or vibration; smoke, dust, odor or other form of air

pollution; heat, cold [,] dampness; electrical or other disturbance; glare [,] liquid or solid refuse or wastes; or other substance, condition or element in such a manner or in such amount as to adversely affect the surrounding area or adjoining premises."

{¶23} Accordingly, we must determine whether enforcement of the resolution under the facts of this case has been preempted by R.C. 1533.85.

{¶24} Appellee asserts that there is no preemption in this case because

{¶25} Count I of its complaint was not filed as a nuisance action pursuant to R.C. 3767.03, but rather as an action to enforce a specific provision of the zoning resolution pursuant to R.C. 519.24.

{¶26} R.C. 519.24 reads in relevant part: "In case *** any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, such board, the prosecuting attorney of the county *** or any adjacent or neighboring property owner who would be especially damaged by such violation *** may institute injunction, *** abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful *** use."

{¶27} Relevant to the case now before us, R.C. 519.02 grants township trustees the authority to regulate building and land use within the township "for the purpose of promoting the public health, safety, and morals." Consistent with this statutory authority, the Middleton Township Trustees enacted Article XVII, Section 1, which is a township anti-nuisance zoning resolution. See *Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill* (1993), 67 Ohio St.3d 293, 294, fn 1. Accordingly, under Count I of its

complaint, appellee attempted to enforce the township anti-nuisance zoning resolution by seeking an injunction pursuant to R.C. 519.24. R.C. 1533.85, however, prohibits common pleas courts from granting injunctive relief under Chapter 3767, the nuisance statutes, "or any other section of the Revised Code" in a nuisance action. R.C. 1533.85, therefore, does apply to nuisance actions brought under R.C. 519.24 and we must determine whether it preempts local attempts to govern shooting ranges.

{¶28} It is well-established that "[i]n general, a validly enacted local law is not preempted by a state statute unless it conflicts with that statute." *Atwater*, supra at 296. In *Atwater* the Supreme Court of Ohio addressed the issue of "whether enforcement of a township's anti-nuisance zoning resolution is preempted by R.C. Chapter 3734." Chapter 3734 of the Revised Code broadly regulates the disposal of solid and hazardous waste in Ohio. In *Atwater*, the Atwater Township Board of Trustees and the Atwater Township Zoning Inspector filed suit in common pleas court seeking an injunction against B.F.I. Willowcreek Landfill under the local anti-nuisance zoning resolution. B.F.I. filed a motion for summary judgment alleging that Atwater's right to pursue relief under its nuisance resolution had been preempted by R.C. 3734.02. The trial court agreed, holding that "'State law [specifically R.C. 3734.02] preempts local zoning regulation of landfills in regard to whether a landfill creates a nuisance.'" Id. at 294. The court of appeals reversed, and the Ohio Supreme Court granted a motion to certify. Upon consideration, the court determined that the state statute did not preempt enforcement of the local anti-nuisance zoning resolution because the state statute expressly reserved "the rights of the 'state or any municipal corporation or person' to bring an action to suppress nuisances

against the operator of a solid waste disposal site." Id. at 296. Continuing, the court stated that "R.C. 3734.10 makes clear that in the narrow areas of nuisance and pollution prevention and abatement, political subdivisions of the state retain authority with regard to solid and hazardous waste disposal facilities. If the General Assembly had intended R.C. Chapter 3734 to exclusively occupy the field of solid waste disposal site regulation, it would not have amended R.C. 3734.10 as it did." Id.

{¶29} Contrary to the statutes at issue in *Atwater*, the Revised Code provisions at issue in the present case only allow common pleas courts to grant injunctive relief in a nuisance action against an owner or operator of a shooting range if the court determines that the owner or operator's actions or omissions that are the subject of a complaint failed to substantially comply with the chief's noise rules or the chief's public safety rules. R.C. 1533.85(C). Although the court below determined that prolonged and frequent shooting on the range posed a safety and noise nuisance to the neighboring properties, the court never determined, and the parties never submitted evidence on the issue of, whether appellants' actions on their shooting range violated the chief's noise rules or public safety rules. Those rules provide that the hours of operation for shooting ranges shall be from 7:00 a.m. to 10:00 p.m. daily. Ohio Adm.Code 1501:31-29-03(C). Those rules, however, further provide that:

{¶30} "Private and public shooting ranges in Ohio should substantially comply with the listed noise or sound levels that are set to prevent hearing damage and eliminate nuisance noise complaints. Noise or sound level guidelines are described or explained in great detail in 'The NRA Range Source Book, Section I, Chapter six, (1999 Edition).'

For the purpose of the chief of the division of wildlife's standards for shooting ranges, the following noise or sound levels apply:

{¶31} "(1) Unacceptable: If the sound level exceeds ninety decibels dB(A) for one hour out of twenty-four hours or eighty-five decibels dB(A) for eight hours out of twenty-four hours and sound measuring receiver is located at the boundaries of the range property." Ohio Adm.Code 1501:31-29-03(B).

{¶32} Accordingly, although the chief's noise rules provide that the hours of operation for shooting ranges shall be between 7:00 a.m. and 10:00 p.m., a shooting range must substantially comply with the noise levels set forth in the rules. Where a shooting range owner or operator fails to comply with the chief's noise rules, the owner or operator of a shooting range is no longer protected by the immunities provided by R.C. 1533.85, see Ohio Adm.Code 1501:31-29-03, and a common pleas court can grant injunctive relief in a nuisance action brought pursuant to a local anti-nuisance zoning ordinance. In the current case, the trial court never determined if appellants had substantially complied with the noise levels set forth in the chief's noise rules. As such, the court erred in setting the hours of operation as it did, and the second and third assignments of error are well-taken.

{¶33} Given our ruling under the second and third assignments of error, this case must be remanded to the trial court for further proceedings. Accordingly, because the first, fourth, fifth and sixth assignments of error challenge the trial court's order limiting the hours of operation on several fronts, they need not be addressed and are not well-taken.

{¶34} On consideration whereof, the court finds that substantial justice has not been done the party complaining and the judgment of the Wood County Court of Common Pleas is reversed. This case is remanded to that court for further proceedings consistent with this decision. Costs, in accordance with App.R. 24, are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J.
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JUDGE

Judith Ann Lanzinger, J.
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JUDGE

Arlene Singer, J.
CONCUR.
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JUDGE