# STATE OF MICHIGAN

# COURT OF APPEALS

AMELIA HASENOHRL,

Plaintiff-Appellee,

v

IMMACULATE CONCEPTION OF TRAVERSE CITY,

Defendant-Appellant.

UNPUBLISHED
April 25, 2024

No. 364578
Grand Traverse Circuit Court
LC No. 2021-035937-AW

Before: GADOLA, C.J., and BORRELLO and PATEL, JJ.

PER CURIAM.

This nuisance-abatement action arises out of defendant's alleged violation of the night sky provisions of Traverse City's outdoor lighting ordinance. Plaintiff alleges that defendant's unshielded outdoor light fixtures emit light from dusk to dawn daily that trespasses into her home and substantially interferes with her peaceful use and enjoyment of her property. Following a one-day bench trial, the trial court held that plaintiff had standing to pursue a nuisance per se claim, that the subject light fixtures violated the lighting ordinance and thus constituted a nuisance per se, and that plaintiff was entitled to equitable relief.

Defendant appeals as of right the trial court's order directing defendant to add "cut-off shielding"[1] to the subject light fixtures within 60 days and, until the installation of the shielding, to "maintain the current lumen output of 350."[2] On appeal, defendant argues that plaintiff does not have standing to enforce the lighting ordinance and, even if she did have standing, the subject light fixtures do not violate the ordinance. We affirm.

[1] As defined by Traverse City Ordinances, § 1375.02.

[2] The trial court stayed its order for equitable relief pending resolution of defendant's appeal.

## I. BACKGROUND

In 2016, defendant submitted a formal site plan and sought the necessary permits for the construction of the Immaculate Conception Elementary School. It is undisputed that the city informed defendant when the project started that "[e]xterior light sources shall be deflected downward and away from adjacent properties and rights-of-way and shall not violate night sky provisions of the Traverse City Code of Ordinances." Defendant indicated to the city that its exterior and parking lot lighting would be "dark sky compliant" and "shielded from neighboring properties and streets." Members of the city's staff recommended that the planning commission approve defendant's site plan with the condition that the exterior lighting "be deflected downward and away from adjacent properties and rights-of-way" and comply with the "night sky provisions of the Traverse City Code of Ordinances."

The city's planning and zoning department issued a land use permit to defendant on July 17, 2017. The permit stated that "[w]ork shall be in compliance with ALL CITY CODES AND ORDINANCES and in accordance with approved plans, specifications, maps[,] and statements filed with the City of Traverse City as part of this application, and shall meet all requirements of the City of Traverse City's Standard Specifications and Detail." The permit specified that "ALL LIGHT FIXTURES SHALL BE 100% CUT-OFF" and that "LIGHT LEVELS AT THE PROPERTY LINE SHALL NOT EXCEED 0.2 FOOTCANDLES."

The city's lighting ordinance dictates that "[a]ll outdoor lighting fixtures shall provide a 100 percent cut off above the horizontal plane at the lowest point of the light source." Traverse City Ordinances, § 1375.05(4). A "full-cutoff fixture" is defined as "zero intensity at or above a horizontal plane (90° above nadir) and limited to a value not exceeding 10 percent of the lamp lumens at or above 80°." Traverse City Ordinances, § 1375.02. The ordinance further requires all outdoor lighting "be hooded, louvered or a combination thereof in order to assure the areas beyond the development site boundary . . . are protected from direct glare." Traverse City Ordinances, § 1375.05(3). And building façade lights "shall be from the top and directed downward with full cut-off shielding." Traverse City Ordinances, § 1375.05(2).

Defendant began construction of the school facility in 2017. Approximately 11 antique lamp exterior light fixtures were installed along the south-facing façade of the school facility. The lamps have prismatic glass around the bulbs that allows light to pass through. The lamps come on at dusk and turn off at daylight daily. The lamps are not 100% cutoff, nor are they hooded or louvered.

In a letter dated July 11, 2019, David Weston, the city's planning and zoning administrator, informed Eric Mulvany, the director of school operations for Grand Traverse Area Catholic schools,[3] that residents adjacent to the school property had complained about the school's light levels. Weston stated, "Based on the complaints there is light trespass onto nearby properties which is a violation of the City's Lighting Ordinance." Weston instructed that "something will

[3] Mulvany served as the school liaison between the construction manager, the architects, the city and the civil engineers during the elementary school project.

need to be done immediately to shield, dim, or turn off the lights that are shining onto residential properties near the school."

TowerPinkster was the architectural firm hired by defendant for the school project. Defendant authorized TowerPinkster to communicate on defendant's behalf with regard to the lighting issue. In response to Weston's July 2019 letter to Mulvany, Lentz Becraft, an electrical engineer at the architectural firm, authored a memo to Weston admitting that the subject fixtures "were designed to provide 3,600 lumens and are not full cut-off so therefore do not meet the city's ordinance requirements" and stated that "[t]he fixtures will be programmed to a maximum output of 62.5% or 2,250 lumens to stay within the city's requirements."

On October 5, 2020, Russ Soyring, Traverse City's former city planner, sent an email to Mulvany reporting that Rhoades Engineering conducted a lighting test and defendant's exterior lighting violated the outdoor lighting ordinances in several areas:

> 1. Light spillage that is too bright passed the school's property lines. The maximum footcandle at the property line is 0.2 fc.
>
> 2. The parking lot lighting uniformity levels exceed the 1:15 min/mac ratio.
>
> 3. Uplifting a number of the light fixtures. Lights must be designed [so that] light does not project above the horizontal plane.

Mulvany maintained that he addressed the city's concerns with the school project team, but admitted that he never asked anyone for clarification on the requirement that all exterior lighting fixtures be 100% cut-off and not project above the horizontal plane. Mulvany admitted that the subject light fixtures do not have a barrier from the top of the bulb to the bottom of the bulb that blocks the light completely. He also admitted plaintiff has a direct line of sight to the school and its lights on the south-facing façade and thus she is impacted much differently than persons who reside miles away from the school. He further admitted that the subject light fixtures create a direct glare into plaintiff's windows at night.

Mulvany testified that, at the time that the subject light fixtures were installed, he believed that the fixtures complied with the city's lighting ordinance. But defendant was later instructed that the lights would have to be dimmed "below the 3,000 threshold." In January 2021, a dimming controller was installed to allow the subject light fixtures to be dimmed from their original state of 3600 to 5400 lumens. Initially, the lights were dimmed to 2250 lumens. Later, they were dimmed to 1125 lumens. Ultimately, the fixtures were set to a schedule where they are at 1125 lumens from dusk until 10:00 p.m. and then they are dimmed to 375 lumens from 10:00 p.m. to dawn daily. Mulvany testified that it was his belief that defendant was currently in full compliance with the lighting ordinance. Although Mulvany stated that directing the lighting away from neighboring properties was not an option given the design of the subject fixtures, he conceded that the fixtures could be replaced to prevent the light from trespassing into plaintiff's home.

Mulvany maintained that the subject light fixtures are necessary for the school's security cameras. But he admitted that the fixtures were selected by the architect for their aesthetic value. Mulvany also acknowledged that there are no antique lamps on the north-facing side of the

building and the fixtures on that side of the building provide sufficient lighting for defendant's surveillance cameras.

Weston testified that the subject light fixtures are not 100% cutoff, they are not shielded, and they allow direct glare to emanate from them. As the city's zoning administrator, Weston enforces the city's light ordinance. But he generally tries to resolve the issue before issuing a violation. Weston testified that although the subject fixtures did not comply with § 1375.05(2), (3), or (4) of the city's lighting ordinance, the city determined that the unshielded lights fell within § 1375.04(2), which limits unshielded lights to 2,250 lumens or less. At the time, the city decided to allow unshielded lights at 2,250 or less as long as the footcandles were met at the neighboring property lines. Weston conceded that based on the plain language of § 1375.04(2), it only applied to outdoor lights that required a permit but a permit had not been issued. And, in this case, since a permit was required and had been issued, he acknowledged that § 1375.04(2) did not apply "[b]y its plain language." Nevertheless, he testified that, at the time, "[t]hat's not how we interpreted it . . . ." Weston further acknowledged that there was nothing in the ordinance language that would preclude the application of § 1375.05(2), (3), and (4) to the subject light fixtures. In fact, Weston testified that it was always the city's expectation that defendant's exterior lighting would be 100% cutoff, which is what Weston specifically noted on the land use permit when he issued it. Defendant has never been cited for violating the city's lighting ordinance, nor has the city taken an enforcement action against defendant with regard to the lighting ordinance.

Plaintiff has lived in her home for 24 years. She has line of sight to the school from her home. Before the school was constructed, there was a lot of "night sky darkness" in plaintiff's neighborhood and in her yard. But now the subject fixtures shine directly into her upstairs window and disrupt her sleep. As a result, plaintiff had to add room-darkening shades over her existing darkening blinds. But, even with the additional shades, it is too bright for plaintiff to sleep in her bedroom. Plaintiff testified that she did not notice any change to the brightness after defendant dimmed the subject light fixtures. As a result of light intrusion, plaintiff is unable to keep her bedroom windows open at night, which causes her bedroom to become hot in the warmer months and makes it difficult for her to sleep. The light also intrudes into her downstairs windows and lights up the interior of her home. Plaintiff testified, "I feel like I'm in a spotlight in my living room and even in my bathroom, because the lights shine all the way through into the bathroom." She feels as if she has lost her privacy. Because her sleep is impacted daily, plaintiff is tired, she exercises less with less intensity, and she consumes caffeine to stay attentive. Plaintiff testified that the subject light fixtures have significantly impacted her.

Plaintiff's neighbor, Debrah Malmgren, testified that she also has line of sight to the school. Malmgren described a "profound" glow from the subject light fixtures each night that reflects off the clouds and the ground "all night long," which disrupts the nighttime darkness. Malmgren testified that she complained to Soyring about the bright glow from the subject fixtures, and the fixtures have "been a topic of conversation amongst other neighbors." After the fixtures were installed, Malmgren's master bedroom was "lit up" at night and she was unable to "get complete darkness." The brightness disrupted Malmgren's enjoyment of her home and she ultimately installed shades on a bank of architectural windows that were previously bare. Malmgren maintained that she did not notice any difference in the brightness after defendant dimmed the lights.

Plaintiff commenced this action in September 2021 claiming that defendant was in violation of the city's lighting ordinance. Plaintiff asserted that defendant's lights were trespassing on her property, creating a nuisance, and interfering with her peaceful use and enjoyment of her property. Following a one-day bench trial, the trial court found that plaintiff suffered distinct and different effects from defendant's exterior lighting compared to the public in general "[d]ue to the location of Plaintiff's real property and its proximity to the School[.]" Accordingly, the court held that plaintiff had standing to pursue her nuisance action. The court further held that defendant's exterior light fixtures violated §1375.05(2), (3), and (4) and thus constituted a nuisance per se under MCL 125.3407, which entitled plaintiff to equitable relief. But the court found that "the utility of exterior light outweighs the gravity of the alleged harm to Plaintiff" and thus concluded that plaintiff failed to demonstrate a private nuisance. On December 29, 2022, the trial court entered an order for equitable relief directing defendant to add "cut-off shielding" to its outdoor antique lights within 60 days and, until the installation of the shielding, to "maintain the current lumen output of 350." This appeal followed.

## II. STANDARDS OF REVIEW

"This Court reviews for clear error the trial court's factual findings following a bench trial and reviews de novo the trial court's conclusions of law." *Patel v Patel*, 324 Mich App 631, 650; 922 NW2d 647 (2018). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Id*. at 650-651 (cleaned up).

This Court reviews de novo whether the trial court properly interpreted a municipal ordinance or statute. *Youmans v Charter Twp of Bloomfield*, 336 Mich App 161, 211; 969 NW2d 570 (2021).

## III. STANDING

Defendant argues that the trial court erred by finding that plaintiff has standing to bring this nuisance-abatement action. We disagree.

The use of land or a dwelling, building, or structure in violation of a zoning ordinance is a nuisance per se. MCL 125.3407; *Fraser v Haney*, 509 Mich 18, 26; 983 NW2d 309 (2022). Generally, a violation of a zoning ordinance "gives no right of action to an individual and must be abated by the appropriate public officer." *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990); see also *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 461; 957 NW2d 47 (2020). But a private citizen may bring an action to abate a nuisance "arising from the violation of zoning ordinances or otherwise[ ] when the individuals can show damages of a special character distinct and different from the injury suffered by the public generally." *Towne*, 185 Mich App at 232; see also *Ansell*, 332 Mich App at 461. This "may be proven by showing that the defendant's activities directly affected the plaintiff['s] recreational, aesthetic, or economic interests." *Sakorafos v Charter Twp of Lyon*, __ Mich App __, __; __ NW2d __ (2023) (Docket No. 362192); slip op at 6 (cleaned up). "Under the test for standing, an adjoining landowner is likely to be determined to be affected by the nuisance created by a zoning violation in a manner distinct from the general public." *Id*. at __; slip op at 7.

In this case, the city's zoning administrator testified that the subject light fixtures do not comply with Traverse City Ordinances, § 1375.05(2), (3), or (4) because they are not 100% cutoff, they are not shielded, and they allow direct glare to emanate from them. And Mulvany admitted that plaintiff has a direct line of sight to the school and its lights on the south-facing façade and thus she is impacted much differently than persons who reside miles away from the school. He further admitted that the subject light fixtures create a direct glare into plaintiff's windows at night. Plaintiff testified that the lights intrude into her home and bedroom all night long every single day, which has detrimentally impacted her daily life. Because plaintiff has suffered "distinct" and "different" injuries from the general public who do not have a direct line of sight to the school, the trial court did not err by finding that plaintiff has standing to pursue her claim. See *Towne*, 185 Mich App at 232; see also *Ansell*, 332 Mich App at 461.

## IV. ORDINANCE VIOLATION

Defendant further argues that the trial court erred by finding that defendant's exterior light fixtures violated Traverse City Ordinances, §1375.05(2), (3), and (4) and thus constituted a nuisance per se under MCL 125.3407. We disagree.

The rules of statutory interpretation apply to the interpretation of a zoning ordinance. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422; 616 NW2d 243 (2000). An ordinance's provisions must be read in context, giving each word its plain and ordinary meaning. *Barrow v Detroit Election Comm*, 301 Mich App 404, 413-414; 836 NW2d 498 (2013). If the language of an ordinance is clear and unambiguous, courts are required to apply the ordinance as written. *Brandon Charter Twp*, 241 Mich App at 422. Courts "follow these rules of construction in order to give effect to the legislative body's intent." *Id*.

In June 2017, the city passed an outdoor lighting ordinance, Traverse City Ordinances, §1375, et seq., with the stated intent to:

- Minimize light trespass and light straying from artificial light sources;
- Eliminate intrusive artificial lighting that contributes to the "sky glow" phenomenon and disrupts the natural quality of nighttime;
- Minimize harshly lighted surfaces and direct glare in order to enhance nighttime vision;
- Encourage lighting practices and lighting systems that are designed to conserve energy; and
- Provide for adequate nighttime safety, utility, security, and productivity.

Relevant to this action, Traverse City Ordinances, § 1375.05 provides:

**1375.05 - Design and construction standards for all outdoor lighting except for public street lighting.**

> All outdoor lighting shall be designed and constructed to meet or exceed the following minimum requirements; all measures to be taken at the ground surface level.
>
> * * *
>
> (2) Lighting of building facades shall be from the top and directed downward with full cut-off shielding.[4]
>
> (3) All lamps and luminaries shall be hooded, louvered or a combination thereof in order to assure the areas beyond the development site boundary including public rights-of-way are protected from direct glare.[5]
>
> (4) All outdoor lighting fixtures shall provide a 100 percent cut off above the horizontal plane at the lowest point of the light source. . . .[6]

Defendant does not address the above ordinance provisions. Instead, it contends that its unshielded light fixtures comply with Traverse City Ordinances, § 1375.04(2):

> **1375.04 - Prohibited lighting.**
>
> No person shall install, maintain or use outdoor lighting for which an electrical permit is required and has not been issued for the following types of lighting:
>
> * * *
>
> (2) Unshielded lights that are more intense than 2,250 lumens or a 150 watt incandescent bulb . . . .

Weston, the city's zoning administrator, testified that the subject light fixtures do not comply with Traverse City Ordinances, § 1375.05(2), (3), or (4) because they are not 100% cutoff, they are not shielded, and they allow direct glare to emanate from them. Weston further testified that it was always the city's expectation that defendant's exterior lighting would be 100% cutoff, which is what Weston specifically noted on the land use permit when he issued it. Mulvaney admitted that the subject fixtures are not fully cutoff, as required by the land use permit, or shielded from neighboring properties and streets, as defendant indicated to the city that all of its exterior

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[4] "Cut-off shielding" is defined as "a technique or method of construction which causes light emitted from an outdoor light fixture to be projected only below and [sic] imaginary horizontal plane passing through the fixture below the light source." Traverse City Ordinances, §1375.02.

[5] "Direct glare" is defined as "the visual discomfort resulting from insufficiently shielded light sources in the field of view." Traverse City Ordinances, §1375.02.

[6] "Light source" is defined as "the bulb which creates the light onto adjacent areas that may affect residential properties." Traverse City Ordinances, §1375.02.

and parking lot lighting would be. And he admitted that the subject light fixtures create a direct glare at night.

Although the city determined, at the time, that the unshielded lights fell within § 1375.04(2), Weston testified that the plain language of § 1375.04(2) only applied to outdoor lights that required a permit but a permit had not been issued. And, in this case, since a permit was required and had been issued, he acknowledged that § 1375.04(2) did not apply "[b]y its plain language."

Traverse City Ordinances, § 1375.05 is clear and unambiguous. All outdoor lighting must "be hooded, louvered or a combination thereof" and "provide a 100 percent cut off above the horizontal plane at the lowest point of the light source," regardless of the lumens produced by the lighting. Although outdoor lighting produces less than 2,250 lumens, it still requires shielding. Viewing the record as a whole, we are not left with a definite and firm conviction that the trial court made a mistake by finding that the subject light fixtures violate the ordinance.

Defendant argues that the city has not ever cited or taken enforcement action against defendant for violating the ordinance.[7] The record shows that defendant maintains light fixtures on its property that violate the ordinance. Under MCL 125.3407, the use of land or a dwelling, building, or structure in violation of a zoning ordinance is a nuisance per se. *Haney*, 509 Mich at 26, and "[t]he court shall order the nuisance abated." Further, Traverse City Ordinances, § 1322.07 states:

> **1322.07 - Declaration of nuisances.**
>
> Buildings and structures built, altered, razed or converted, or uses carried on, in violation of this Zoning Code, are hereby declared to be a nuisance per se. Any court of competent jurisdiction may order such nuisance abated, and the owner or agent in charge of the building or land may be adjudged guilty of maintaining a nuisance per se. . . .

[7] Defendant also argues for the first time on appeal that, under Traverse City Ordinances, § 1375.01(b), "the zoning administrator is specifically permitted to consider deviation from the ordinance." Because this issue was not raised in the trial court, it is unpreserved and we decline to consider it. *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 359090); slip op at 3.

The trial court did not clearly err by finding that defendant's violation of the city's lighting ordinance constitutes a nuisance per se and properly exercised its equitable authority to abate the nuisance.

Affirmed.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Sima G. Patel