

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR GRAND TRAVERSE COUNTY

GREAT NORTHERN BROADCASTING
SYSTEM, INC.,

Plaintiff/Appellant,

v

File No. 02-22228-AZ
HON. PHILIP E. RODGERS, JR.

LONG LAKE TOWNSHIP, LONG LAKE
TOWNSHIP ZONING BOARD OF APPEALS,
LONG LAKE TOWNSHIP BOARD OF
TRUSTEES, and LONG LAKE TOWNSHIP
PLANNING COMMISSION,

Defendants/Appellees.

Richard L. Hillman (P40965)
Attorney for Plaintiff/Appellant

Kevin A. Elsenheimer (P49293)
Attorney for Defendants/Appellees

DECISION AND ORDER

Great Northern Broadcasting System, Inc. ("GNB") owns property on Gray Road in Defendant Long Lake Township ("Township"). There is a 450-foot radio tower located on the property that has been operating since 1991. In February of 2002, GNB filed an application for a conditional land use permit to construct a second tower with a height of 899 feet.¹ The tower was also to provide for co-location of wireless communication antenna.² It is undisputed that towers built

¹The Township requested that GNB submit plans signed and sealed by a structural engineer evidencing the design-collapse features of the tower. No such plans were ever provided, so that the application was incomplete.

²GNB argues that the application only refers to accommodating wireless communication antenna because the Township insisted the tower be built to accommodate same. The Township, on the other hand, denies that it insisted on co-location of wireless antenna. Instead, it claims that its policy is to allow for co-location of cellular equipment. The Township cites the narrative submitted by GNB with the application which states: "Our proposal is to increase the audience reach by

to accommodate AM/FM radio were not subject to Section 4.3 of the Township's Zoning Ordinance, but towers built to accommodate wireless telecommunication antenna were subject to Section 4.3. If Section 4.3 applies to GNB's application, the proposed tower does not satisfy the set-back requirements.

Because GNB's application was for a radio tower that would provide for the co-location of wireless communication antenna, the Township Planning Commission voted at its April 16, 2002 meeting to refer the application to the Township Zoning Board of Appeals ("ZBA"). The ZBA's task was to interpret the Zoning Ordinance and determine whether Section 4.3 applied to GNB's proposal. On May 7, 2002, the ZBA voted unanimously to apply Section 4.3 of the Zoning Ordinance to the application. GNB offered to amend its application to eliminate the provision for co-location of wireless communications equipment, but the Township advised GNB that it had to withdraw its initial application and file a new application.

On May 17, 2002, before GNB could submit a new application, the Township passed a Resolution establishing a temporary moratorium on the acceptance and consideration of conditional land use permits for towers while the Township considered amending the Zoning Ordinance.³ It is undisputed that this Resolution was passed without notice to GNB and without a hearing.

GNB appealed the ZBA's May 7, 2002 interpretation that Section 4.3 of the Zoning Ordinance applied to its application for a conditional use permit. GNB also seeks injunctive and declaratory relief.

On November 25, 2002, the Court heard the oral arguments of counsel and took the matter under advisement. The Court invited the parties to file supplemental briefs regarding the issue of whether that Township could lawfully impose a moratorium on the construction of towers. Supplemental briefs have been filed. The Court, having heard the arguments of counsel and having considered all of the briefs submitted by the parties, now issues this written decision and order and, for the reasons stated herein, upholds the ZBA's interpretation that Section 4.3 applied to GNB's

providing for an 899-foot tower for its use and other broadcasts, cellular, and two-way services for the region."

³The Court believes that the Zoning Ordinance has since been amended, but the substance of any amendments have not been provided to the Court.

application for a conditional land use permit to construct a mixed-use tower, holds that the Township had no authority to impose a moratorium on the construction of radio towers, and finds that GNB's request for injunctive and declaratory relief are moot.

I.

ZBA INTERPRETATION

Pursuant to MCL § 125.290, each township zoning board of appeals is empowered to "act upon all questions as they may arise in the administration of the zoning ordinance." This clearly includes the power to interpret the zoning ordinance which it must administer. Thus, the action of the ZBA was sanctioned by the laws of the state. MCL § 125.293a(1)(a). See, *Szluha v Charter Twp of Avon*, 128 Mich App 402, 406-407; 340 NW2d 105 (1983).

II.

MORATORIUM

Townships have no police power of their own. A township is a municipal corporation and as such is an instrumentality of the state for purposes of local government. *City of Roosevelt Park v Norton Twp*, 330 Mich 270; 47 NW2d 605 (1951); *Hanslovsky v Twp of Leland*, 281 Mich 652; 275 NW 720 (1937). Local governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the State Constitution or statute or which are necessarily implied therefrom. 1963 Mich Const, Art 7 §17; *Hanselman v Killeen*, 419 Mich 168; 351 NW2d 544 (1984) on remand 146 Mich App 616; 381 NW2d 778. They may exercise such power only by virtue of a grant by the state. *Lake Twp v Sysma*, 21 Mich App 210 (1970).

In the case of zoning, power is extended to a township through the zoning enabling acts. *Davis v Imlay Twp Bd*, 7 Mich App 231; 151 NW2d 370 (1967); *Lake Twp v Sytsma*, 21 Mich App 210; 175 NW2d 337 (1970); *Brandon Twp v North-Oakland Residential Services, Inc*, 110 Mich App 300; 312 NW2d 238 (1981). The Township Zoning Act ("TZA"), MCL § 125.271 et seq is the basic enabling act which grants townships the power to pass ordinances concerning zoning. *Lake Twp, supra*; *The Detroit Edison Co v Richmond Twp*, 150 Mich App 40; 388 NW2d 296 (1986).

The TZA is a broad grant of power and authority to townships to zone for the “public health, safety, and welfare.” *Delta Charter Twp v Dinolfo*, 419 Mich 253; 351 NW2d 831 (1984).

In *Sun Communities v Leroy Twp*, 241 Mich App 665, 669-670; 617 NW2d 42 (2000) the Court of Appeals said:

Municipalities derive their authority to zone solely pursuant to state enabling legislation. *Lake Twp v Sytsma*, 21 Mich App 210, 212; 175 NW2d 337 (1970). The Township Zoning Act, MCL§ 125.271 et seq.; MSA 5.2963(1) et seq, (the TZA) is the enabling statute that vests a township with the authority to regulate land use. *Addison Twp v Gout (On Rehearing)*, 435 Mich 809, 813; 460 NW2d 215 (1990). Various actions under the TZA, such as site-plan review and the approval of special use permit requests, are essentially administrative in nature. See, e.g., *Hessee Realty, Inc v Ann Arbor*, 61 Mich App 319; 232 NW2d 695 (1975).

In contrast with the administrative procedures, it is settled law in Michigan that the zoning and rezoning of property are legislative functions. *Schwartz v City of Flint*, 426 Mich 295, 307-308; 395 NW2d 678 (1986). As explained in Crawford, *Michigan Zoning and Planning* (3d ed.), § 1.11, p. 53:

The adoption of a zoning ordinance is a legislative act. . . Logic suggests that since the zoning map is almost inevitably a part of the zoning ordinance, the rezoning of a single parcel of land from one district to another is an amendment of the zoning ordinance and is likewise a legislative act. Because rezoning is a legislative act, its validity and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation. Among other things, the legislature had provided for the amendment of zoning ordinances in essentially the same manner as their original enactment. . . It has been held that the amendment of a zoning ordinance cannot be enjoined, as that would be a judicial invasion of the legislative function. The remedy of the party who conceives himself injured by an amendment is to wait until it has been adopted and then challenge it in court.

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. *Square Lake, supra* at 323, 471 NW2d 321 (Riley, J.) (citing McQuillin, *supra* at § 25.53, p 137), 351, n. 32 (Levin, J.) (citing McQuillin, *supra* at § 25.10, p 31). 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. *People v Strobridge*, 127 Mich App 705, 710; 339 NW2d 531 (1983). A zoning ordinance regulates the use of land and buildings according to districts, areas, or locations. *Square Lake, supra* at 323; 471 NW2d 321 (Riley, J.) (citing 8 McQuillin, *Municipal Corporations*, § 25.53, p 137), 348 (Levin, J., dissenting) (citing McQuillin, *supra* at § 25.01, p 6).

The moratorium in the instant case, amends the Township's Zoning Ordinance by precluding "the acceptance or consideration of applications for conditional land use permits related to the erection of any AM/FM radio tower, television tower and other federally licensed amateur radio facilities" which are "otherwise allowed as conditional land uses pursuant to Long Lake Township Zoning Ordinance." In other words, by resolution, the Township Board prohibited the Township from accepting and considering, let alone issuing, conditional land use permits for towers which are allowed as conditional land uses under the Zoning Ordinance.

Accordingly, the moratorium at issue in this case amends the Zoning Ordinance. Amending the Zoning Ordinance is a legislative act. Therefore, our analysis must begin with the principles of statutory construction. The primary rule of statutory construction is to give effect to the intent of the Legislature that enacted the statute. *Borkus v Michigan National Bank*, 117 Mich App 662; 324 NW2d 123 (1982). The language of the statute is the best source for ascertaining this intent. *Great Lakes Steel Division of National Steel Corp v Public Service Comm*, 143 Mich App 761; 373 NW2d 212 (1985). Words should be given their ordinary meanings. If the language of the statute is clear, it is assumed that the Legislature intended the plainly expressed meaning and the statute must be enforced as written. *Bailey v DAIIE*, 143 Mich App 223; 371 NW2d 917 (1985). If a statute is clear and unambiguous on its face, there is no room for statutory construction or interpretation of that statute. *Detroit v Redford Twp*, 253 Mich 453; 235 NW 217 (1931); *Todd v Textron, Inc*, 140 Mich App 412; 364 NW2d 718 (1985).

The TZA provides for amendment of zoning ordinances in essentially the same manner as their original enactment. MCL 125.271, et seq. Section 14 of the TZA provides:

Amendments or supplements to the zoning ordinance may be made from time to time in the same manner provided in this act for the enactment of the original ordinance.

Enactment of an original ordinance under Sections 7 to 12 of the TZA requires notice, hearings, and submission to the electors. MCL 125.277 to 125.282. The Attorney General has opined that: "A proposed new zoning ordinance or amendment to an existing ordinance must be published at least one time in the form introduced, prior to final adoption by the charter township board, pursuant to this section." Op Atty Gen 1980, No. 5770, p 917.

The Michigan legislature has made a single exception to this rule which is contained in Section 15 of the TZA, MCL 125.285. Section 15 provides:

To protect the public health, safety, and general welfare of the inhabitants of the township, and the lands and resources of the township, **during the period required for the preparation and enactment of an ordinance authorized by this act as provided by sections 7 to 12**, the township board may direct the township zoning board to submit, within a specified period of time, recommendations as to the provisions of an interim zoning ordinance and to submit those recommendations without consideration for sections 7, 8, 9, 11, and 12. Before presenting its recommendations to the township board, the zoning board shall submit the interim zoning plan, or an amendment thereto, to the county zoning commission or the coordinating zoning committee, as provided by section 10, for the purpose of coordinating the zoning plan with the zoning ordinances of a township, city, or village having a common boundary with the township. Approval shall be conclusively presumed unless the commission or committee, within 15 days after receipt of the interim plan or amendment notifies the township clerk of its disapproval. Following approval the township board, by majority vote of its members, may give the interim ordinance or amendments thereto immediate effect. An interim ordinance and subsequent amendments shall be filed and published in accordance with section 11a. The interim ordinance, including any amendments thereto, shall be limited to 1 year from the date the same becomes effective and to only 2 years of renewal thereafter by resolution of the township board.

In *Lake Twp v Sytsma*, 21 Mich App 210; 175 NW2d 337 (1970), a township that had adopted a comprehensive zoning ordinance under which licensed trailer parks were allowed as a nonconforming use enacted an interim zoning ordinance prohibiting the building of trailer parks or mobile home parks as a result of a series of special meetings with no notice thereof to the landowner and park builder. The Court of Appeals held that the ordinance was invalid for failure to follow proper statutory procedure. The Court said:

The intent and the rules established by the state legislature, as expressed in these statutes, are unquestionably plain and unambiguous. Section 14 applies to all amendments or supplements to an existing zoning ordinance. The exception, Section

15, can only be applied before and during the preparation of a permanent zoning ordinance. (See OAG, 1961-1962, No. 3547, p 5 (Jan 9, 1961).

Id at 213.

This Court does not find any valid or compelling reason to depart from the reasoning and holding in *Lake Twp v Sytsma*. Accordingly, the resolution passed by the Township Board placing a moratorium on the acceptance and consideration of conditional land use applications for radio towers fails because it does not conform with the statutory requirements as either an amendment to the Township Zoning Ordinance or as an interim ordinance.

The moratorium is null and void and of no force and effect.

III.

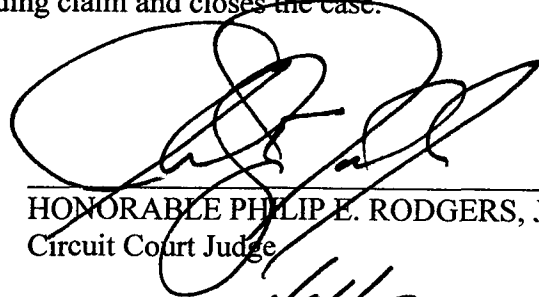
INJUNCTIVE AND DECLARATORY RELIEF

GNB's requests for injunctive and declaratory relief are moot.

Since GNB's original conditional land use permit was never complete and had never been acted upon by the Township, should GNB still desire to construct a tower in Long Lake Township, it must proceed to file its application and process it under the current Zoning Ordinance.

IT IS SO ORDERED.

This Order disposes of the last pending claim and closes the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/06/03