

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
(O'Connell, Murray and Davis (*dissenting*), JJ)

JOE and SUE HERMAN, JAY and
SARAH JOLLAY, JERRY JOLLAY,
NEAL KREITNER, TONY and LIZ
PETERSON, RANDY and ANNETTE
BJORGE, and TINA BUCK,

Plaintiffs-Appellants,

Supreme Court Docket No. 134097

Court of Appeals Docket No. 273021

Lower Court Case No: 05-3247-CZ-M

v

COUNTY OF BERRIEN, a public body
corporate,

Defendant-Appellee.

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING JURISDICTION

Plaintiffs-Appellants appeal an April 26, 2007 decision by the Michigan Court of Appeals. This Court granted leave by Order dated November 30, 2007. Jurisdiction is proper under MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTION PRESENTED

- I. Must a county comply with a township's ordinances when placing ancillary improvements on a site chosen for a county building?

Plaintiffs-Appellants answer, "yes."

Defendant-Appellee answers "no."

The Circuit Court answered "no".

The Michigan Court of Appeals answered "no."

COUNTER-STATEMENT OF FACTS

Plaintiffs-Appellants' Statement of Facts correctly reviews the basic factual and procedural background for this Appeal, but goes too far, offering descriptions of the questions presented (Plaintiffs-Appellants' Brief, at Page 1); argument ("In plaintiffs-appellants' view...", at Page 2) and statements outside of the record ("those opposed have pointed out...", at Page 6).

Accordingly, Defendant-Appellee, County of Berrien, offers the following Counter-Statement of Facts.

Plaintiffs-Appellants are residents of Coloma Township, in the County of Berrien. (Complaint at Paragraphs 1-14.) They brought suit against the county in an effort to compel the county to subject to township regulation its plans for a new firearms training facility for use by county law enforcement personnel.¹ The township filed no such action, and is not a party to this suit. Plaintiffs-Appellants' original complaint contained two counts. Count I, Declaratory Judgment, sought to compel the county to comply with the Coloma Township Zoning Ordinances. Count II, Nuisance Per Se and Injunctive Relief, alleged that use of the training facility would result in "peak noise levels exceeding those levels prescribed by the Coloma Township Zoning Ordinance". (Complaint at Paragraph 42.)

¹Because of the importance of its firearms training programs, the county decided to proceed with development of the firearms training facility site, notwithstanding the ongoing litigation. At oral argument the Court of Appeals panel expressed some interest in the status of the site. Accordingly, Defendant-Appellee, County of Berrien, offers, at pages 2a and 3a in its Appendix, two aerial photographs depicting the site and building. While technically not part of the record below, these photos are offered for the convenience of the Court and the parties.

After considering cross motions for summary disposition, the trial court issued a May 25, 2006 Amended Alternate Order Granting Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and Denying Plaintiffs' Motion for Summary Disposition pursuant to MCR 2.116(C)(10). The court also granted Plaintiffs-Appellants leave to amend Count II of their complaint, to allege grounds for nuisance (noise) "other than the Township Zoning Act, the court having ruled that the statutory basis for the present nuisance per se allegation is the Township Zoning Act which is barred by the court's ruling as to Count I". (Order at Page 2; Plaintiffs-Appellants' Appendix at page 102a.)

Plaintiffs-Appellants' Amended Complaint retained the original Count I, (Amended Complaint at Paragraph 52) Declaratory Judgment, and added a revised Count II, styled Nuisance and Injunctive Relief, but still based on alleged violations of the township's noise restrictions. However, the amended Count II specifically relied on the Township Ordinances Act, MCL 41.181, *et seq*, rather than the Township Zoning Act, MCL 125.271, *et seq*, ("TZA") as the statutory source of the township's "Anti-Noise Ordinance". (Amended Complaint at Paragraph 58)

The parties again filed cross motions for summary disposition. After a hearing, the trial court entered an August 24, 2006 Order Granting Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and Denying Plaintiffs' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10). Plaintiff-Appellant's Appendix at page 186a. In dismissing Plaintiffs-Appellants' claims under both the Township Zoning Act, and the Township Ordinances Act, the trial court found that *Pittsfield Charter Township v Washtenaw County*, 468 Mich 702; 664 NW2d 193 (2003) controlled,

(August 7, 2006 hearing transcript at Pages 25-26; Plaintiffs-Appellants' Appendix at pages 181a and 182a) and that the County Commissioner's Act, MCL 46.11 ("CCA") *et seq*, gave the county the authority to proceed with its plans to construct the new law enforcement training facility, without having to comply with the TZA.

Plaintiffs-Appellants' timely appealed to the Michigan Court of Appeals, and following oral argument, on April 26, 2007, the Court of Appeals issued its published majority opinion affirming the circuit court rulings, *Herman v County of Berrien*, 275 Mich App 382 (2007).

Plaintiffs-Appellants timely sought leave to appeal to this Court, and leave was granted on November 30, 2007.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

The trial court granted summary disposition to Defendant-Appellee, County of Berrien, pursuant to MCR 2.116(C)(8) and denied Plaintiffs-Appellants' Motion for Summary Disposition pursuant to MCR 2.116(C)(10).

The Court of Appeals, by majority opinion, affirmed the trial court's decision.

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Lash v City of Traverse City*, 479 Mich 180; 735 NW2d 628 (2007), citing *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

This case turns on an analysis of three competing statutes, the County Commissioner's Act, MCL 46.11 *et. seq.* (the CCA), on the one hand, and on the other hand, the Township Zoning Act, MCL 125.271 *et. seq.* (the TZA) and the Township Ordinances Act, MCL 41.181, *et. seq.* (the TOA).

Issues of statutory interpretation are questions of law that this Court reviews de novo. When interpreting a statute, the primary obligation is to ascertain and effectuate the intent of the Legislature. *Lash, supra* at 187, citing *Tryc v Michigan Veteran's Facility*, 451 Mich 129; 545 NW2d 642 (1996).

In determining legislative intent regarding whether a government unit is immune from the provisions of local zoning ordinances, the analysis requires more than merely searching for words of exclusion. It is necessary to look for guidance to the statutes themselves to see if there are any textual indications that would convey the Legislature's intent on the issue of priority. *Pittsfield Charter Township v Washtenaw County*, 468 Mich 702, 710; 664 NW2d 193 (2003).

II. SUMMARY DISPOSITION WAS PROPERLY GRANTED TO DEFENDANT-APPELLEE, COUNTY OF BERRIEN.

a. THE *PITTSFIELD TWP.* DECISION HAS ESTABLISHED THAT PRIORITY IS TO BE GIVEN TO THE COUNTY IN SITING ITS BUILDINGS

In *Pittsfield Charter Township v Washtenaw County*, 468 Mich 702; 664 NW2d 193 (2003), this Court addressed whether Defendant Washtenaw County had to comply with the Township's Zoning Ordinance in the locating of the county's proposed homeless shelter. The Court examined the two acts that are the sources of township and county authority, the TZA and the CCA, noting that they are "potentially in tension with each other in their grants of authority. It is our undertaking to establish the proper priority between them." *Pittsfield Twp.*, 468 Mich at 709.

The *Pittsfield Twp.* court observed that the Court of Appeals had attempted to resolve the conflict by construing the Court's earlier holdings in *Dearden v City of Detroit*, 403 Mich 257; 269 NW2d 139 (1978) and *Burt Township v Department of Natural Resources*, 459 Mich 659; 593 NW2d 534 (1999), "to mean that there must be express indications in the statute granting the county immunity from the township's zoning power before the county could be immune". *Ibid.*

The *Pittsfield Twp.* Court reversed the Court of Appeals, noting that the test articulated in *Dearden*, is that "in resolving a conflict between units of government, the legislative intent 'where it can be discerned' controls the question whether a governmental unit is subject to the provisions of another's zoning ordinances". *Ibid.* The Court also noted that the *Burt Township* decision reiterated this approach and cautioned that there are no 'talismanic words' that must be present to convey the

Legislature's intent to create immunity from local zoning. Rather, the Legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive". *Ibid.*

Applying the proper test, the *Pittsfield Twp.* Court carefully analyzed the competing statutes, and concluded:

"Therefore, when these TZA provisions are viewed alongside the structure of the county power in MCL 46.11, the lack of focus on county buildings in the TZA reinforces our view that the Legislature in this circumstance intended that priority be given to the county in siting its buildings." *Pittsfield Twp.*, 469 Mich at 715.

The current debate, however, is not over whether the CCA has priority over the TZA and the TOA.² Plaintiffs-Appellants admit:

"There is no dispute in this case concerning whether the exercise by a Michigan County of the enumerated powers quoted above takes precedence or priority over...zoning ordinances. The Michigan Supreme Court resolved that controversy in *Pittsfield*...and held that the county's statutory right to site buildings...took priority over the township's zoning regulation which regulated the 'siting' of buildings based upon use." Plaintiffs-Appellants' Brief at page 13.

Instead, as the Court of Appeals observed, "the question is whether the county

²Plaintiffs-Appellants conceded at oral argument in the trial court, and the trial court correctly found that the TOA offers no greater authority to a township than does the TZA. At the August 7, 2006 hearing, the trial court and Plaintiffs' counsel had the following exchange:

"The Court: I mean, the township doesn't have any greater authority under the ordinance act than they do under the zoning act, do they-
Mr. Walton: Well, I don't-
The Court: -viz a viz the county?
Mr. Walton: I wouldn't say they have greater. I think that it's different, your Honor." Plaintiffs-Appellants' Appendix at page 170a. See also, the trial court's oral opinion at page 182a.

must comply with the township's ordinances when placing ancillary improvements on the site chosen for the county building." *Herman*, 275 Mich App at 386.

The Court of Appeals answered the question in favor of the county, first by noting that the *Pittsfield Twp.* Court had concluded that the "power to site county buildings is, except for one inapplicable exception, unlimited." The Court of Appeals then observed that the specific power exercised by the county was to "designate a new site for a county building", as authorized by MCL 46.11(b). Because the term "site" is not defined in the CCA, the Court of Appeals looked to this Court's discussion of "site" in *Charter Township of Northville v Northville Public Schools*, 469 Mich 285; 666 NW2d 213 (2003), and concluded:

"Using these same definitions, it is clear that when designating a new 'site', for county buildings, the 'site' includes the entire area of ground on which the building is to be located. In other words, it is the 'site' or, in real terms, the entire parcel where the buildings will be located, that is not subject to local regulation. Hence, the uses on the site for the building are not subject the township ordinances. *Pittsfield Twp.*, *supra*, at 711; 664 NW2d 193". *Herman*, 275 Mich App at 387.

In another proper reference to *Pittsfield Twp.*, the Court of Appeals also noted:

"Finally, there is nothing within the township zoning statute, MCL 125.271(1), which applies more specifically to the physical improvements on the property than does MCL 46.11(b) and (d). *Pittsfield Twp.*, 486 Mich at 714-715. Thus, contrary to plaintiffs' position, the statutes cannot be read to provide a legislative policy choice for townships to *have* the power to regulate any physical structures located on a site of a county building but to have *no* power to regulate the uses of the county building itself." *Herman*, 275 Mich App at 388.

b. THE POSITION ADVOCATED BY PLAINTIFFS-APPELLANTS DISTORTS THE MEANING OF *PITTSFIELD TWP.*

The Court of Appeals' analysis and conclusions are consistent with the rules of statutory construction, and with this Court's prior decisions in cases of conflicting statutory grants of authority. By contrast, however, the position argued by Plaintiffs-Appellants flies in the face of the clear intent of the statute, this Court's ruling in *Pittsfield Twp.*, and common sense. It simply defies reason to argue that the CCA's grant of authority to the county can only be exercised within the "building" itself. To so conclude ignores the equally important concept of "site" and its place in the statute. As the Court of Appeals aptly observed:

"There is more to the siting and erection of the building than simply putting the building on the property. As can be seen in this case, at a minimum parking lots, sidewalks, lighting and landscaping would be developed within the area adjacent to the county building placed on this new site. Often time there may also be physical improvement to the property outside of the physical structure of the building, but which are related to the building's purpose. All such improvements are on the 'site' chosen by the county for the building, and consequently are immune from the township ordinances." *Herman*, 275 Mich App at 387.

Were Plaintiffs-Appellants' argument to prevail, a county would be permitted to construct a new jail, and yet be prevented from placing an exercise yard on the site. A county could erect a new building as a post for its sheriff's deputies, but not a communications tower.

Here, the county has determined that the proper firearms training of its law enforcement personnel requires both indoor and outdoor activities. The DLZ Feasibility Study states, in the Executive Summary:

“As shown in Figure 2, DLZ also analyzed the costs and benefits of constructing an indoor range. A single indoor range would cost an estimated \$1.3 million to construct and would not eliminate the need for an outdoor firing range(s). At best, it is estimated that the indoor range would reduce outdoor range activity by 50%.” Plaintiffs-Appellants’ Appendix at page 118a.

Defendant-Appellee, County of Berrien, also presented a March 10, 2006 Affidavit of Charles E. Heit, the undersheriff for the County of Berrien, summarizing the various indoor and outdoor training activities to be undertaken at the site by the Berrien County Sheriff’s Department “in its efforts to meet the statutory obligation to annually re-certify or qualify deputies and other department personnel as law enforcement officers within the State of Michigan”. Defendant-Appellee’s Appendix at Page 4a.

Plaintiffs-Appellants’ distortion of *Pittsfield Twp.* would make it impossible to properly conduct the important firearms training activities that the CCA unquestionably authorizes the county to undertake.

c. THE PROPER APPLICATION OF *PITTSFIELD TWP.* DOES NOT LEAD TO UNFETTERED COUNTY POWER.

Plaintiffs-Appellants also attempt to avoid the clear applicability of *Pittsfield Twp.*, and the plain language of the CCA, by predicting that dire consequences will flow from allowing the county “to do as it pleases” with the property surrounding the building itself, hypothesizing a circumstance in the “*Pittsfield Twp.* scenario”, where the county could employ “open burning pits” at the site of the homeless shelter.

Similarly, Court of Appeals Judge Davis’ dissent warns of “unfettered license”, “carte blanche”, and the need for “Kevlar play clothes”.

Such fears are unfounded. *Pittsfield Twp.* did not hold, and Defendant-Appellee

county need not argue that an activity like “outdoor open burning”, unrelated to the authorized purposes for which the site is to be developed, must be exempt from township regulation. Just as the exercise of statutory interpretation makes clear the Legislature’s intent that a county be given immunity from township regulations in siting and erecting county buildings, case law makes equally clear that activities on the site not reasonably related to the county purpose for which the building and site are constructed and developed, will not be exempt.

In *Capital Region Airport Authority v DeWitt Charter Township*, 236 Mich App 576; 601 NW2d 141 (1999), the Court of Appeals properly concluded that non-aeronautical activities were subject to local regulation, as they clearly fell outside the scope of the Airport Authority’s Act, the statutory basis at issue. The Court said:

“In sum, with respect to the CRAA’s proposed development of airport lands for non-aeronautical uses, we find no legislative intent for the CRAA to be exempt from local regulation...we are unable to discern, from the record before us, the extent to which the CRAA’s proposed uses are aeronautical in nature and therefore exempt from the zoning ordinance. At least two of the uses specifically discussed in the briefs—the tortilla processing plant and the small animal kennel—are clearly unrelated to aeronautics...” *Capital Region Airport Authority*, 236 Mich App at 595.

Similarly, in *Charter Township of Bloomfield v Birmingham Public Schools*, 2003 WL 231358 (Mich App 2003), the court said:

“The question before this court is whether the Birmingham Public Schools, as a governmental unit, is exempt from local zoning ordinances when it plans to construct on public school grounds wireless communication towers that are to be predominately used for commercial purposes. We conclude that Defendant is subject to the local zoning ordinances because sole and exclusive jurisdiction vests in the superintendent of public instruction only for those buildings and projects that are designed for ‘school purposes’.” Slip opinion at page 1. See Defendant-Appellee’s Appendix at page 8a.

It must also be recognized that the county is constrained by the political process.

As the majority opinion in the Court of Appeals noted:

“Although the dissent uses colorful language to warn property owners about the potential dangers that could result from the county’s decision to place the training facility at this location, we believe the dissent’s concern in this regard confuses politics with the law. It is not our role to decide whether the decision of the County Board of Commissioners in placing the facility at this location was a wise one; rather, we must decide the narrow legal issue of whether the physical improvements are subject to township ordinances...county commissioners are elected to decide county policy issues within the sphere of county power. MCL 45.555; MCL 45.556(a). If plaintiffs and a sufficient number of area residents are unhappy with the policy choices supporting the decision to place the facility at this location, the political process should provide an adequate remedy. *Northville Twp.*, 469 Mich at 297 n5, 666 NW2d 213 (opinion by Taylor J.)”. *Herman*, 275 Mich App at 388, FN3.

It should also be noted that adopting the position of Plaintiffs-Appellants would hardly eliminate the hypothetical rogue exercise of municipal power; the political process would simply shift from one local municipal entity (the county) to another (the township).

RELIEF REQUESTED

The trial court and the Court of Appeals correctly applied the test as described by this Court in *Dearden* and *Pittsfield Twp.* Summary disposition was correctly granted to Defendant-Appellee, County of Berrien. The decision of the Court of Appeals should be upheld.

Respectfully submitted,

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