

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From the Michigan Court of Appeals

ASSOCIATED BUILDERS AND
CONTRACTORS,

Plaintiff-Appellant,

V

CITY OF LANSING,

Defendant-Appellee.

Supreme Court: 149622
Court of Appeals: 313684
Circuit Court: 12-000406-CZ

**AMICUS CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION IN
SUPPORT OF APPELLEE CITY OF LANSING**

Dated: March 31, 2015

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STATEMENT OF QUESTION PRESENTED

WHETHER A LOCAL MUNICIPALITY HAS THE AUTHORITY TO ENACT A PREVAILING WAGE ORDINANCE WITH REGARD TO CONTRACTORS PERFORMING PUBLIC PROJECTS FOR THE LOCAL MUNICIPALITY AND THUS WHETHER *ATTORNEY GENERAL EX REL. LENNANE V CITY OF DETROIT*, 225 MICH 631 (1923) SHOULD BE OVERRULED.

Amicus Curiae Michigan Townships Association answers: "Yes".

Appellee answered: "Yes".

Appellant answered: "No".

Michigan Court of Appeals answered "Yes".

Circuit Court answered: "No".

STATEMENT OF FACTS

Amicus Curiae, Michigan Townships Association concurs with and hereby adopts the Appellee's Counter-Statement of Facts contained in Appellee's Brief on Appeal.

ARGUMENT

A LOCAL MUNICIPALITY HAS THE AUTHORITY TO ENACT A PREVAILING WAGE ORDINANCE WITH REGARD TO CONTRACTORS PERFORMING PUBLIC PROJECTS FOR THE LOCAL MUNICIPALITY AND THUS *ATTORNEY GENERAL EX REL. LENNANE V CITY OF DETROIT*, 225 MICH 631 (1923) SHOULD BE OVERRULED.

A. STANDARDS OF REVIEW

The issues addressed herein involve questions of constitutional and statutory interpretation, which are reviewed *de novo*. *In Re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). See also *Midland Cogeneration Venture Limited Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011). A trial court's summary disposition decision is reviewed *de novo*. *Spiek v Department of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The theory of preemption is also reviewed *de novo* as an issue of statutory interpretation. *Thomas v United Parcel Service*, 241 Mich App 171, 174, 614 NW2d 707 (2000).

B. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in a large number of state and federal cases presenting issues of statewide significance to Michigan townships. Pursuant to Michigan Court Rule 7.306(D)(2), the MTA consists of "an association

representing a political subdivision” and accordingly is authorized to file this amicus curiae brief in support of the City of Lansing.

The MTA submits this brief in support of the City of Lansing’s authority to enact its prevailing wage ordinance and in response to this Honorable Court’s December 10, 2014 Order granting leave¹. By said December 10, 2014 Order, the parties were required to brief the jurisprudentially significant questions of:

“(1) whether *Attorney General ex rel Lennane v City of Detroit*, 225 Mich 631; 196 NW 391 (1923), should be overruled; and (2) what authority, if any, enabled defendant to enact its prevailing wage ordinance.”

The MTA strongly believes that these questions present issues of major statewide significance to Michigan municipalities by addressing the current scope of their self-governance and police power ordinance authority for the protection of the public health, safety and general welfare. Since 1923 when *Lennane* was decided, there have been significant changes to the Michigan Constitution, statutes, and case law greatly expanding a local municipality’s self-governance and police power authority. The Court of Appeals Opinion properly ruled that these intervening changes in law have rendered *Lennane* no longer applicable.² *Lennane* is basically a dead-end, an outlier, which no longer fits within the current framework for analysis of local municipal authority.

¹ *Associated Builders and Contractors v City of Lansing*, 497 Mich 920; 856 NW2d 386 (2014). Said leave to appeal was granted regarding the Michigan Court of Appeals published opinion in *Associated Builders and Contractors v City of Lansing*, 305 Mich App 395; 853 NW2d 433 (2014) (Court of Appeals Opinion).

² See also the unpublished case of *Rudolph v Guardian Protective Services, Inc.*, 2009 WL 3013587 (Mich App 2009) leave to appeal denied 486 Mich 868, 780 NW2d 571 (2010) (Appellant’s Exhibits pages 17A-19A). In *Rudolph*, the Court of Appeals indicated that stare decisis forced it to follow *Lennane*, although it believed the case to be obsolete. The Court of Appeals in *Rudolph* urged this Honorable Court to reconsider *Lennane*. This makes two separate Court of Appeals panels since 2009 that have analyzed *Lennane* and determined it obsolete.

In general, Article VII, Section 34 of the Michigan Constitution of 1963³ provided a new framework for analyzing the powers of cities, villages, counties and townships. With this new Constitutional provision, the electors of this State mandated a seismic shift reflecting current views on self-governance by broadening the powers of local municipalities, especially those of counties and townships. Such powers are no longer limited to those expressly provided for (i.e., *Lennane*) but now extend to those fairly implied and not prohibited by the Michigan Constitution. In addition, local municipalities now enjoy liberal construction of the Constitution and law in their favor. This was not the case when *Lennane* was decided in 1923. As will be addressed herein, local municipalities now enjoy broad self-governance and police powers which are rightfully confined by a reasonableness standard and limited where such authority is preempted by state statutory scheme (i.e. field preemption) or specifically prohibited by law. *Lennane* stands opposite of the present Constitution and should be specifically overruled by this Honorable Court.

There is a clear disconnect between *Lennane* and current law allowing a municipality to adopt a prevailing wage ordinance. Sufficient authority exists to allow local municipalities to enact prevailing wage ordinances pursuant to their legislative discretion.⁴ While there are in fact a few townships in the state which do have prevailing wage ordinances similar to the City of Lansing, clearly, this option is not for every municipality.⁵ It is, however, still rightfully a valid public policy consideration of the legislative body of a local municipality to determine whether

³ Also referred to as Article VII, Section 34. This Section is analyzed later herein.

⁴ Township authority in MCL 41.181, (general police power ordinance authority) and MCL 41.2(1)(b) (contract authority); City and Village home rule authority stemming from Article VII, Section 22 of Michigan Constitution of 1963.

⁵ It is quite apparent that the Appellant truly takes issue with the concept of a prevailing wage requirement as a matter of public policy. But such decision really is a political issue for legislative bodies, not the courts.

to exercise its police powers and adopt a prevailing wage ordinance regarding local municipal projects.

A local prevailing wage ordinance is complimentary to the Federal and State prevailing wage laws⁶ and is not in conflict. When a local municipality chooses to require that those who construct public projects for the municipality must pay prevailing wages similar to the federal and state requirements, it is clearly a reasonable exercise of local public health, safety and general welfare police powers for the same reasons.⁷ It reasonably protects local contractors from being undercut by low cost outside contracted for labor on public works projects and further supports a higher quality of workmanship on local municipal projects. Ultimately, it becomes a local fiscal issue as the municipal construction project will most likely cost the local municipality more if it requires its contractors to pay a prevailing wage (costs are merely passed through in making the bid). But again this is a reasonable policy decision of the local legislative body. It should also be noted that a local municipality could just contractually require a prevailing wage on a public project without an ordinance pursuant to its reasonable right to enter into contracts.⁸ A construction RFP could just include the requirement as an exercise of local self-governance regarding its contracts.

A judicial ruling in support of *Lennane* and against the City of Lansing's authority to enact its prevailing wage ordinance would set jurisprudence in the state back over 50 years and overturn the broad scope of powers that local municipalities currently enjoy for the betterment of

⁶ Davis-Bacon Act, 40 U.S.C. §3141, et seq. and MCL 408.551, et seq. respectively. Note that *Lennane* was decided even before these statutes were enacted and therefore, did not have any insight with regard to the rationale and validity of this police power public policy.

⁷ See *Western Michigan University Board of Control v State of Michigan*, 455 Mich 531, 535, 536; 565 NW2d 828 (1997) regarding policy reasons for prevailing wage regulation.

⁸ See MCL 41.2(1)(b) which generally empowers a township "[t]o make contracts necessary and convenient for the exercise of their corporate powers."

their citizens and property owners. The MTA is confident that when this Honorable Court reviews the relevant constitutional provisions, statutory language and case law, current jurisprudence with regard to municipal powers will be upheld and the outdated *Lennane* case overruled. *Lennane* has no place in modern municipal jurisprudence.

Additionally, the MTA wholeheartedly concurs with the Appellee City of Lansing's arguments and to the extent possible, will attempt to refrain from being overly repetitious by restating the same arguments. This brief will instead analyze the questions framed by this Honorable Court from a Township prospective based upon the relevant statutory law, case law and Article VII Section 34. A ruling on this case will impact municipal jurisprudence including that of townships.

C. GENERAL RULES OF CONSTITUTIONAL AND STATUTORY INTERPRETATION

When reviewing a constitutional provision, the primary objective is to realize the intent of the people and in doing so, apply the plain meaning of the language used unless they are technical legal terms.⁹ Generally, the rules of statutory construction will also apply to the constitution.¹⁰

The issues before this Honorable Court also turn in part on statutory interpretation. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature."¹¹ "The first step in that determination is to review the language of the statute itself."¹² "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning

⁹ *Toll Northville Ltd v Township of Northville*, 480 Mich 6, 15 fn2; 743 NW 2d 902 (2008).

¹⁰ *Counsel 23 Am. Federation of State, County and Municipal Emp., AFL-CIO v Civil Service Commission for Wayne County*, 32 Mich App 243, 247-248; 188 NW2d 206 (1971).

¹¹ *In re: MCI Telecommunications*, 460 Mich 396, 411; 596 NW2d 164 (1999).

¹² *In re: MCI Telecommunications, supra*, 411.

expressed and judicial construction is neither required nor permissible.”¹³ Courts “must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.”¹⁴ Courts “interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole.”¹⁵

“All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”¹⁶

In addressing the threshold question of ambiguity, this Honorable Court has held that:

“A term is ambiguous ‘when it is *equally* susceptible to more than a single meaning,’ *Lansing Mayor v Pub. Service Comm.*, 470 Mich 154, 166, 680 NW2d 840 (2004), not when reasonable minds can disagree regarding its meaning.”¹⁷

Further, “ambiguity is a finding of last resort”.¹⁸

Armed with the above rules of interpretation, the following textual analysis of the relevant constitutional and statutory language will show that the language is not ambiguous. Article VII, Section 34 was plainly intended by the electorate to constitutionally mandate broad interpretation of township authority, thereby clearly signaling a departure from the days of *Lennane*. This Constitutional mandate coupled with unambiguous police power ordinance

¹³ *In re: MCI Telecommunications*, *supra*, 411.

¹⁴ *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) citing *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich 142, 146; 644 NW2d 715 (2002).

¹⁵ *Johnson*, *supra*, 177 citing *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

¹⁶ *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69, 77, 780 NW2d 753 (2010), citing MCL 8.3a;

¹⁷ *Toll Northville Ltd., v Township of Northville*, 480 Mich 6, 15 fn 2; 743 NW2d 902 (2008).

¹⁸ *Lansing Mayor*, *supra* at 165, citing *Klapp v Limited Insurance*, 468 Mich 459, 474; 663 NW2d 447 (2003).

authority (MCL 41.181) allows townships to enact a local prevailing wage ordinance for the public health, safety and general welfare of persons or property.

D. CONSTITUTIONAL FRAMEWORK FOR ANALYSIS OF MUNICIPAL AUTHORITY

Analysis of local municipal authority must begin with review of the Michigan Constitution. Townships possess authority conferred by the Michigan Constitution of 1963 and the Legislature.¹⁹ With regard to this authority, Article VII, Section 17 of the Michigan Constitution of 1963 provides that:

“Each organized township shall be a body corporate with powers and immunities provided by law.”

In this regard, Article VII, Section 34 of the Michigan Constitution of 1963 provides that:

"The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

In addressing Article VII, Section 34 the Michigan Attorney General stated that:

“The Address to the People accompanying this constitutional provision states: This is a new section intended to direct courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes.”²⁰

Article VII, Section 34 cannot just be given judicial gloss, rather it is the framework of any analysis regarding municipal authority. This framework did not exist when *Lennane* was decided in 1923. Article VII, Section 34 provided a seismic shift with regard to expansion of the powers granted to counties and townships by the constitution and law to include those fairly

¹⁹ *Hess v Cannon Township*, 265 Mich App 582, 590; 696 NW2d 742 (2005).

²⁰ Michigan Attorney General Opinion No. 6712 (1992).

implied and not prohibited by the constitution.²¹ The constitution and laws concerning local municipalities are also now to be liberally construed in their favor. Even Article VII, Section 34 must be liberally construed in their favor. The court's decision in *Lennane* stands in stark contrast to the broad ideals of self-governance mandated by the electorate in 1963 pursuant to Article VII, Section 34 and Article VII, Section 22. The court decision in *Lennane* was based upon the Michigan Constitution of 1908 when the current lexicon for analysis of municipal powers did not even exist. Although the Court in *Rudolph* believed it was bound by stare decisis regarding *Lennane*, it aptly stated:

“The *Lennane* court observed that the state was the sovereign, and although municipalities presumably had the power ‘to legislate upon matters of municipal concern,’ they were merely agents of the state; and the wage ordinance at issue would exercise police power over a state concern in the absence of an explicit delegation of the power to do so. *Lennane, supra*, at 638-641, 196 NW 391.

But the foundations for the *Lennane* court's holding have not remained static. Forty years later, the Constitution of 1963 was adopted. At that time, Const 1908, art 8, §21 became Const. 1963, art. 7, §22, mostly with minor changes but in significant part adding the requirement that ‘[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.’ More significantly, the Constitution of 1963 added an entirely new provision to the local government provisions, at Section 34 of Article 7.. .”²²

Based upon these constitutional amendments in 1963, the court in *Rudolph* then address the enlarged authority of local municipalities regarding self-governance powers stating that:

²¹ Additionally, as pointed out in the Court of Appeals Opinion, Article VII Section 22 of the Michigan Constitution of 1963 was amended with regard to cities and villages to provide that “[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section,” The Court of Appeals Opinion goes on to cite the convention comment to this section which states that “[t]he new language is a more positive statement of municipal powers giving home rule cities and villages full power over their own property and government . . .”. 2 official record, Constitutional Convention, 1961, P.3393. *Associated Builders and Contractors, supra*, 406.

²² *Rudolph, supra**2.

“Our Supreme Court has recognized as much. In the context of township ordinances, the Court observed that ‘[a]t common law, we narrowly construed township ordinances enacted pursuant to the delegated police power in the township ordinance act,’ but Const.1963, art. 7, §34 ‘replaced the common-law rule of strict construction by constitutionally requiring courts to liberally construe all legislative and constitutional powers conferred upon townships.’ *Square Lake Hills Condominium Ass’n v Bloomfield Township*, 437 Mich. 310, 319, 417 N.W. 2d 321 (1991). Our Supreme Court subsequently observed that home rule cities now enjoy powers not expressly denied, rather than only those specifically granted, and that the relationship between state and local governments ‘has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified.’ *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994). The approach taken by the *Lennane* court appears to have been forsaken.’²³ (Emphasis added).

The published Court of Appeals Opinion in this case carries forward this analysis highlighting the constitutional tidal shift toward greater self-governance and broad police power authority and away from the narrowly construed municipal authority espoused in 1923 in *Lennane*.

The decision in *Lennane* as previously indicated is outdated and no longer has a place in today’s jurisprudence. As will be discussed further, this constitutional framework sets the stage for fairly implied and liberally construed police powers rather than having to specifically enumerate each power. MCL 41.181 provides ample township support for the position that prevailing wage ordinances are valid and enforceable general police power ordinances.

E. MCL 41.181 PROVIDES TOWNSHIPS WITH BROAD AUTHORITY TO ADOPT A PREVAILING WAGE ORDINANCE

MCL 41.181 is the primary source of broad police power regulatory authority allowing townships to enact ordinances for the public health, safety and general welfare of persons and property. This statute is the life blood of a township's general police power regulatory authority allowing townships to address public policy issues as they arise (i.e., township construction, noise, smell, dust, vibration, rental registration, hazardous waste, buildings, fire prevention,

²³ *Rudolph, supra*, *2.

anti-funneling, docking and boat launching, gravel mines, business activity impacts and licensing, traffic, parking, signs, etc.).

With regard to a township's general police power regulatory authority, MCL 41.181 provides in relevant part that:

"(1) The township board of a township, . . . may adopt ordinances regulating the public health, safety, and general welfare of persons and property, including, but not limited to, ordinances concerning fire protection, licensing or use of bicycles, traffic, parking of vehicles, sidewalk maintenance and repairs, the licensing of business establishments, the licensing and regulation of public amusements, and the regulation or prohibition of public nudity, and may provide sanctions for the violation of the ordinances. . . (Emphasis added.)

There can be no dispute that under MCL 41.181 the legislature has broadly empowered a township to adopt police power ordinances regulating the public health, safety and general welfare of both persons and property in the township as determined by the township board. The language itself provides for broad regulatory authority beyond just the enumerated ordinances therein (i.e., "including, but not limited to"). In addition to this express language in MCL 41.181, the mandates from Article VII, Section 34 of the Michigan Constitution of 1963 provide for liberal construction in favor of the township and powers fairly implied. With this in mind, it is hard to imagine that such regulatory authority does not include ameliorating the negative impact of bringing in low cost labor from outside the township to work on the township's own public projects.

Analogous to the Plaintiff-Appellant's attempt to impermissibly restrict the local legislative authority the following quote is apropos with regard to this position.

"In essence, plaintiffs argue that the powers of a township are sparse, able to fit in a snack-size Ziploc bag. Plaintiffs are incorrect. 'Townships generally have power to buy, hold and sell property; to levy and collect taxes; to borrow money; to make contracts; to exercise police power; to condemn private property for public purposes; to receive gifts of real and personal property for public purpose; to use funds from government grants to promote local business; and to sue and be

sued.” 24 Mich Civil Jurisprudence, Townships, §84, pp. 355-356. Townships are granted the power to adopt ordinances and regulations under MCL 41.181 regarding the public health, safety, and general welfare of its citizens and property. . . .”²⁴ * * * (Emphasis added)

This Honorable Court explained the status of township ordinances adopted under MCL 41.181 as follows:

“When an ordinance purports to be, and is obviously enacted, in the interest of the public health, safety, and welfare, it is presumed valid. *Kirk v Tyrone Twp*, 398 Mich 429, 439; 247 NW2d 848 (1976). It may be declared invalid only when it plainly appears that it does not tend, in any applicable degree, to promote those ends and the power to legislate has been exercised arbitrarily. *Square Lake, supra*, at 318 n 14. (Emphasis added).

The validity of a prevailing wage ordinance is presumed and in no way has it been shown to be arbitrary.

In *Square Lake*, the Michigan Supreme Court addressed the standard that would be applied in determining whether a prevailing wage ordinance falls within the broad regulatory authority provided under MCL 41.181 and in doing so, indicated that:

"[O]ur function is to determine whether a township ordinance is within the range of conferred discretionary powers and then determine if it is reasonable."²⁵

It is axiomatic that it is within the range of conferred discretionary power under MCL 41.181 for a township to address public health, safety and general welfare concerns. There is nothing in the broad language of MCL 41.181 which would lend to the strained interpretation that it does not include within its discretionary ordinance authority the ability to enact a prevailing wage ordinance to address the conditions of workers on a township’s own public projects. This exercise of a township’s police powers is very limited in scope to purely a local

²⁴ *Hess v Cannon Township*, 265 Mich App 582, at 592-593, 696 NW2d 742 (2005). Arguably the township’s power to contract in the exercise of its corporate powers pursuant to MCL 41.2(1)(b) would allow the township even without an ordinance to exercise the requirement that the contractor performing services for the township conform to the prevailing wage.

²⁵ *Square Lake, supra* at 317.

concern regarding a township's own projects and does not even attempt to extend out to all construction occurring within the township boundaries.

The Court in *Square Lake* continued with regard to reasonableness and stated that:

"The test for determining whether an ordinance is reasonable requires us to assess the existence of a rational relationship between the exercise of police power and the public health, safety, morals or general welfare in a particular manner in a given case."²⁶

There is no support for finding in review of MCL 41.181 or from case law analysis that a township's prevailing wage ordinance does not carry forward this rational relationship on a local level but for the same purpose as the similar state and federal legislation.

In *Western Michigan University Board of Control v State of Michigan*, 455 Mich 531, 535, 565 NW2d 828 (1997) this Honorable Court had the opportunity to address the Michigan Prevailing Wage Act as follows:

"Michigan's prevailing wage act is generally patterned after the federal prevailing wage act, also known as the Davis-Bacon Act. 40 U.S.C. §276a *et seq.* Both the federal and Michigan acts serve to protect employees of government contractors from substandard wages. Federal courts have explained the public policy underlying the federal act as

'protect[ing] local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area' . . . [and] "giv[ing] local labor and the local contractor a fair opportunity to participate in this building program.' [*Universities Research Ass'n, Inc. v Coutu*, 450 US 754, 773-774, 101 S. Ct. 1451, 1463, 67 L.Ed2d 662 (1981).]

The purposes of the Davis-Bacon Act are to protect the employees of Government contractors from substandard wages and to promote the hiring of local labor rather than cheap labor from distant sources. [*North Georgia Building & construction Trades Council v Goldschmidt*, 621 F2d 697, 702 (C.A.5, 1980).]

*536 The Michigan prevailing wage act reflects these same public policy concerns. Through its exercise of the sovereign police power to regulate the terms and conditions of employment for the welfare of Michigan workers, FN2

²⁶ *Square Lake, supra*, at 318. See also *Natural Aggregates Corporation v Brighton Township*, 213 Mich App 287, 294; 539 NW2d 761 (1995).

THE MICHIGAN LEGISLATURE has Required that certain contracts for state projects must contain a provision requiring the contractor to pay the prevailing wages and fringe benefits to workers on qualifying projects.

“FN2 See Const. 1963, art. 4, §49; *West Ottawa Public Schools v Director, Dept of Labor*, 107 Mich App 237, 244, 309 NW2d 220 (1981).”

These police power purposes also apply to the local prevailing wage ordinance. Further, it is rational that higher paid workers will perform their jobs better and thereby create safer and superior public projects. Nothing arbitrary about that.

It is a township board’s public policy choice whether to enact a prevailing wage ordinance. In this regard, the court in *Hess* stated that:

“The courts are especially deferential toward legislative determinations of public purpose; [f]or determination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government. Such determinations should be made by the elected representatives of the people.” (Citations omitted)²⁷

The township citizens have elected their representatives to make such determinations. It is the elected township board’s right to make such a determination to adopt a prevailing wage ordinance even though it will most likely cost the township more for its public project based upon higher bids to cover the prevailing wage requirement. The judiciary should not interfere with this policy decision.

F. A TOWNSHIP PREVAILING WAGE ORDINANCE IS NOT PREEMPTED

The only remaining question is whether a township’s reasonable prevailing wage police power ordinance is preempted by state law. “State law preempts a municipal ordinance in two situations: (1) where the ordinance directly conflicts with a state statute or (2) where the statute completely occupies the field that the ordinance attempts to regulate.” *Czybor’s Timber, Inc. v*

²⁷ *Hess, supra*, at 595.

City of Saginaw, 269 Mich App 551, 555; 711 NW2d 442 (2006), Aff'd 478 Mich 348 (2007).

The Michigan Prevailing Wage Act (MCL 408.551, et seq.) does not occupy the entire field of government contracts (it only covers state projects) and a township's prevailing wage ordinance would not conflict with this statute. With a township prevailing wage ordinance governing only township projects and the state prevailing wage law only covering state projects, the following quote is a proper expression of why no conflict exists.

"It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test *is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits*. Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorized what the legislature has expressly forbidden.

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creating no conflict therewith unless the statute limits the requirement for all cases to its own prescription*. Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and a municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot co-exist and be effective. Unless legislative provisions are contradictory in the sense that they cannot co-exist, they are not deemed inconsistent because of a mere lack of uniformity in detail." *Rental Property Owners Association of Kent County v Grand Rapids*, 455 Mich 246, 262, 566 NW2d 514 (1997), quoting 56 Am. Jur. 2d, Municipal Corporations, §374, pp. 408-409 (emphasis in Rental Property Ass'n.)

The local prevailing wage ordinance and state law may co-exist and are, therefore, not inconsistent.

This Honorable Court in *People v Llewellyn*, 401 Mich 314, 323-325; 257 NW2d 902 (1977), has articulated the following guidelines to determine whether a statute preempts an ordinance by occupying the field:

“First where the state law expressly provides that the state’s authority to regulate in a specified area of law is to be exclusive, there is no doubt that municipal regulations preempted.

Second, preemption of a field of regulation may be implied upon an examination of legislative history.

Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of preemption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state’s purpose of interest.” (citations omitted)

In application of these guidelines, it is first apparent that nothing in the Michigan Constitution or state statute expressly prohibits a local municipality from adopting a prevailing wage ordinance. Second, there is no basis that legislative history suggests field preemption. Third, such ordinance in fact compliments the state law as the state law only covers state projects, clearly leaving the door open for local municipalities to legislate locally as they choose. The state has refrained from trying to dictate what policy must be adopted locally. By leaving this decision up to the local municipalities, some municipalities have chosen to have prevailing wage ordinances and most have not. But that is a legislative policy decision of the local municipality. Finally, the regulated subject matter does not demand state uniformity. The terms of an individual local municipality’s construction contract is purely a local matter left up to the municipality’s public policies. This issue is at the heart of local self-governance.

CONCLUSION

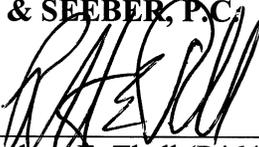
The Court of Appeals Opinion was correct in determining that *Lennane* was inapplicable to the case at bar as the reasoning employed in *Lennane* has subsequently been rejected by amendments to the Michigan Constitution and by changes in Michigan statute and case law. The framework for analyzing local police power authority is far different today. *Lennane* was decided in 1923, and derived from the Constitution in 1908. Since the Supreme Court's decision in *Lennane*, the Michigan Constitution and the Courts have interpreted the authority granted to local municipalities in a more expansive manner. The *Lennane* Court would not arrive at the same result if the issue was one of first impression today.

From the preceding analysis, Amicus Curiae respectfully request that this Honorable Court uphold the Court of Appeals Opinion and overturn the outdated and no longer applicable case of *Lennane*.

Dated: March 31, 2015

Respectfully submitted,

**BAUCKHAM, SPARKS, LOHRSTORFER,
THALL & SEEBER, P.C.**

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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From the Michigan Court of Appeals

ASSOCIATED BUILDERS AND
CONTRACTORS,

Plaintiff-Appellant,

V

Supreme Court: 149622
Court of Appeals: 313684
Circuit Court: 12-000406-CZ

CITY OF LANSING,

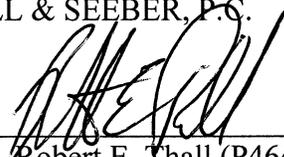
Defendant-Appellee.

CERTIFICATE OF SERVICE

Robert E. Thall, Attorney in the firm of Bauckham, Sparks, Lohrstorfer, Thall and Seeber, P.C., being first duly sworn deposes and says that on the 31st day of March, 2015, he caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the Michigan Supreme Court filing, and via U.S. Mail to any counsel not registered to receive electronic copies from the Court, by enclosing same in a sealed envelope with first class postage prepaid.

Dated: March 31, 2015

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THALL & SEEBER, P.C.

By: 
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March 31, 2015

Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa Avenue
Lansing, Michigan 48909

Re: Associated Builders and Contractors v City of Lansing
MSC Docket No. 149622
Amicus Brief of the Michigan Township Association in Support of
the City of Lansing

Dear Clerk:

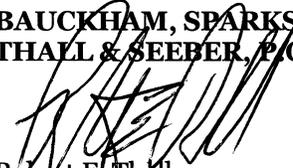
Enclosed please find the Amicus Brief of the Michigan Townships Association in Support of the City of Lansing.

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in a large number of state and federal cases presenting issues of statewide significance to Michigan townships.

Pursuant to Michigan Court Rules 7.306(D)(2), the Michigan Townships Association consists of "an association representing a political subdivision" and accordingly authorized to file the aforementioned amicus curiae brief in support of the City of Lansing. If you have any questions, please do not hesitate to contact me.

Sincerely,

**BAUCKHAM, SPARKS, LOHRSTORFER,
THALL & SEEGER, P.C.**


Robert E. Thall

RET/ser
Enclosure
cc w/enc.:

G. Lawrence Merrill, Executive Director MTA
John Canzano
Michael Bogren
Samantha Heraud
Thomas C. Ludden
Kraig Schutter
Paul Hudson
Andrew Nickelhoff