

STATE OF MICHIGAN
IN THE SUPREME COURT



Appeal from the Michigan Court of Appeals
Hon. Peter D. O'Connell, Presiding

CLAM LAKE TOWNSHIP,
a Michigan general law township; and
HARING CHARTER TOWNSHIP,
a Michigan charter township,

Plaintiffs/Appellants,

v

DEPARTMENT OF LICENSING
AND REGULATORY AFFAIRS
(THE STATE BOUNDARY
COMMISSION), a state administrative
agency; TERIDEE LLC, a Michigan
limited liability company; and
THE CITY OF CADILLAC,
a Michigan home rule city,

Defendants/Appellees.

Supreme Court Case No. 151800

Court of Appeals Case No. 325350

Wexford County Circuit Court
Case No. 14-25391-AA
Honorable William M. Fagerman

State Boundary Commission Docket
No. 13-AP-2

**APPEAL BRIEF
ON BEHALF OF AMICUS CURIAE
MICHIGAN REALTORS®
IN SUPPORT OF THE POSITION OF
DEFENDANTS/APPELLANTS
CLAM LAKE TOWNSHIP AND
HARING CHARTER TOWNSHIP**

Appeal from the Michigan Court of Appeals
Owens, P.J., Murphy, and Hoekstra, J.J.

TERIDEE LLC, a Michigan limited
liability company; THE JOHN F.
KOETJE TRUST, u/a/d 5/14/1987,
as amended; and
THE DELIA KOETJE TRUST,
u/a/d 5/13/1987, as amended,

Plaintiffs/Appellees,

v

CLAM LAKE TOWNSHIP,
a Michigan municipal corporation; and
HARING CHARTER TOWNSHIP,
a Michigan municipal corporation,

Defendants/Appellants.

Supreme Court Docket No. 153008

Court of Appeals Docket No. 324022

Wexford County Circuit Court
Case No. 13-24803-CH
Honorable William M. Fagerman

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TABLE OF CONTENTS

INDEX OF AUTHORITIES	<u>iii</u>
STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT	
STATEMENT OF JURISDICTION	<u>vi</u>
STATEMENT OF QUESTIONS PRESENTED	<u>vii</u>
I. INTRODUCTION/STATEMENT OF INTEREST	<u>1</u>
II. STATEMENT OF FACTS	<u>3</u>
III. ARGUMENT	<u>6</u>
A. Standard of Review	<u>6</u>
B. Public Policy Considerations Weigh in Favor of Reversing the Court of Appeals Opinion	<u>7</u>
C. Fundamental Rules of Statutory Construction Mandate Reversal of the Lower Courts	<u>11</u>
1. The Plain Language of Section 6 of Act 425 Requires Reversal of the Lower Courts	<u>12</u>
2. Act 425, as a Whole, Requires Reversal of the Lower Courts	<u>14</u>
3. The Legislative History of Act 425 and the Zoning Enabling Act Demonstrate the Error of the Lower Courts	<u>15</u>
D. The Lower Courts Reversibly Erred by Finding that Zoning Provisions of 425 Agreements are Not Severable	<u>16</u>
IV. CONCLUSION/RELIEF SOUGHT	<u>20</u>

INDEX OF AUTHORITIES

Cases

<i>Bio-Magnetic Resonance, Inc v Dep't of Public Health</i> , 234 Mich App 225; 593 NW2d 641 (1999)	<u>11</u>
<i>Detroit v Redford Twp</i> , 253 Mich 453; 235 NW 217 (1931)	<u>11</u>
<i>Dressel v Ameribank</i> , 468 Mich 557; 664 NW2d 151 (2003)	<u>6</u>
<i>Epps v 4 Quarters Restoration, LLC</i> , 498 Mich 518; 872 NW2d 412 (2015)	<u>9, 10, 15</u>
<i>Grand Rapids v Consumers Power Co</i> , 216 Mich 409; 185 NW 852 (1921)	<u>3</u>
<i>In re Certified Question</i> , 433 Mich 710; 449 NW2d 660 (1989)	<u>11</u>
<i>In re Receivership of 11910 South Francis Rd</i> , 492 Mich 208; 821 NW2d 503 (2012). ..	<u>11</u>
<i>Inverness Mobile Home Community Ltd v Bedford Twp</i> , 263 Mich App 241; 687 NW2d 869 (2004)	<u>2</u>
<i>Johnson v Recca</i> , 492 Mich 169; 821 NW2d 520 (2012)	<u>11</u>
<i>Kalady v Rim</i> , 478 Mich 581; 734 NW2d 201 (2007)	<u>12</u>
<i>Lash v Traverse City</i> , 479 Mich 180; 735 NW2d 628 (2007)	<u>12</u>
<i>Macomb Co Prosecuting Atty v Murphy</i> , 464 Mich 149; 627 NW2d 247 (2001)	<u>12</u>
<i>McJunkin v Cellasto Plastic Corp</i> , 461 Mich 590; 608 NW2d 57 (2000)	<u>6</u>
<i>People v Reddin</i> , 290 Mich App 65; 799 NW2d 184 (2010)	<u>12</u>
<i>Prof Rehab Assoc v State Farm Mut Auto Ins Co</i> , 228 Mich App 167; 577 NW2d 909 (1998)	<u>17</u>
<i>Roberts v Mecosta Co Gen Hosp</i> , 466 Mich 57; 642 NW2d 663 (2002)	<u>11</u>
<i>Rory v Continental Ins Co</i> , 473 Mich 457; 703 NW2d 23 (2005)	<u>18, 19</u>
<i>SMK, LLC v Dep't of Treasury</i> , 298 Mich App 302; 826 NW2d 186 (2012)	<u>12</u>
<i>Walén v Dep't of Corrections</i> , 443 Mich 240; 505 NW2d 519 (1993)	<u>12, 15</u>
<i>Walters v Leech</i> , 279 Mich App 707; 761 NW2d 143 (2008)	<u>12</u>
<i>Whitman v City of Burton</i> , 493 Mich 303; 831 NW2d 223 (2013)	<u>11</u>

Statutes

MCL 123.141 8

MCL 124.21, *et seq.* *passim*

MCL 124.22 6

MCL 124.23 5

MCL 124.24 6, 14

MCL 124.25 6, 14

MCL 124.26 5, 12, 13, 17

MCL 124.27 5, 17

MCL 125.3306 14

MCL 125.3402 14

MCL 339.601 9

MCL 600.215 vi

Court Rules

MCR 7.303(B)(1) vi

Other Authority

1963 Michigan Constitution vi

**STATEMENT IDENTIFYING
ORDER APPEALED FROM AND RELIEF SOUGHT**

Appellants, Clam Lake Township (“Clam Lake”) and the Charter Township of Haring (“Haring”) (collectively, “Townships”), are appealing the September 19, 2014 “Opinion and Order on Motion for Summary Disposition” of Judge William M. Fagerman of the Wexford County Circuit Court in Case No. 13-24803-CH, which was entered by the circuit court on September 22, 2014, and which was affirmed by the Court of Appeals in an unpublished opinion entered on December 8, 2015. The effect of the lower courts’ opinions was to declare invalid an Agreement for the Conditional Transfer of Property¹, which the Townships had entered pursuant to Act 425 of 1984 (“Act 425”), MCL 124.21, *et seq.* (the “425 Agreement”). The principal substantive basis of the lower courts’ decisions was that the zoning provisions of the 425 Agreement unlawfully restrict Haring Township’s legislative zoning authority by contract.

The Townships are seeking reversal of the lower court decisions, and a concurrent declaration that: (1) the Act 425 Agreement is valid and enforceable, and thus prohibits any annexation of the Transferred Area; (2) the attempted annexation of the Transferred Area by TeriDee, LLC is void; and (3) the Transferred Area has been continuously within Haring Township’s jurisdiction since June 10, 2013, when the Townships’ 425 Agreement became effective.

¹ The property transferred by Clam Lake Township (sometimes, “Grantor”) to Haring Township (sometimes “Grantee”) is referred to as the “Transferred Area.”

STATEMENT OF JURISDICTION

Amicus Curiae, Michigan REALTORS[®], states that this Court has jurisdiction pursuant to 1963 Mich Const, art. VI, §4; MCL 600.215; and MCR 7.303(B)(1). Leave to Appeal was granted by this Court on April 6, 2016.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER PUBLIC POLICY CONSIDERATIONS FAVOR REVERSING THE DECISION OF THE COURT OF APPEALS WHICH DECLARED VOID THE 425 AGREEMENT OF THE TOWNSHIPS?

The Court of Appeals would Answer: "No."

The Circuit Court would Answer: "No."

Plaintiffs/Appellees Answer: "No."

Defendants/Appellants Answer: "Yes."

Amicus Curiae Answers: "Yes."

II. WHETHER CONTRACT ZONING IS PERMITTED UNDER ACT 425?

The Court of Appeals Answered: "No."

The Circuit Court Answered: "No."

Plaintiffs/Appellees Answer: "No."

Defendants/Appellants Answer: "Yes."

Amicus Curiae Answers: "Yes."

III. WHETHER PROVISIONS OF THE 425 AGREEMENT OF THE TOWNSHIPS ARE SEVERABLE?

The Court of Appeals Answered: "No."

The Circuit Court Answered: "No."

Plaintiffs/Appellees Answer: "No."

Defendants/Appellants Answer: "Yes."

Amicus Curiae Answers: "Yes."

I. INTRODUCTION/STATEMENT OF INTEREST

The Michigan REALTORS[®] (the "Association") is Michigan's largest non-profit trade association, comprised of 47 local boards and a membership of more than 24,000 brokers and sales persons licensed under Michigan law. Each day, the Association's members are involved in hundreds of real estate transactions involving the sale of residential properties. One of the primary goals of the Association is to provide the opportunity for all Michigan residents to own or rent affordable housing. To promote this goal and others, the Association seeks to oppose laws and court decisions which delay, restrict, or otherwise impede the ability of the Association's members to sell affordable housing.

The present case involves issues of major significance to the Association, its members and consumers. At issue in this appeal is the validity of agreements entered into between local units of government for the conditional transfer of real property for the express purpose of economic development ("425 Agreements") and, more specifically, the impact of the presence of zoning provisions on their validity. Economic development projects create opportunities for affordable housing for Michigan residents in the form of new housing stock and the revitalization of older housing as a byproduct of new commercial development. Invalidating 425 Agreements, as the lower courts did in this case, deprives Michigan communities of economic development opportunities and, in turn, deprives Michigan citizens of affordable housing. For these reasons, the Association and its members have a significant interest in the outcome of any court decision which might address or otherwise impact the validity of 425 Agreements.

The Court of Appeals found, among other things, that Act 425 does not permit the legislature of two local units of government to enter into a 425 Agreement which contains provisions relating to the zoning of the real property being transferred. Court of Appeals Opinion, December 8, 2015 (“COA Op”), p 6, Exh 1. The Court of Appeals concluded that absent legislative authority to do so, 425 Agreements which provide for zoning are void as against public policy based on the principle of law that a township board may not contract away its legislative powers, including the power to zone and rezone. COA Op, p 3, citing *Inverness Mobile Home Community Ltd v Bedford Twp*, 263 Mich App 241, 247-248; 687 NW2d 869 (2004).² In addition, the Court of Appeals found that the offending zoning provisions of a 425 Agreement, contrary to the express language of the 425 Agreement, are not severable, thereby rendering the 425 Agreement void in its entirety.

The Court of Appeals Opinion constitutes an incorrect interpretation of Act 425 and fails to apply correctly fundamental rules of statutory construction. The Court of Appeals Opinion ignored express language in the 425 Agreement here at issue contrary to fundamental rules of contract interpretation. And, last, but not least, the Court of

² In *Inverness*, the Court of Appeals stated:

However, while a township board may, by contract, bind future boards in matters of a business or proprietary nature, a township board may not contract away its legislative powers. “The true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.” *Harbor Land Co v Twp of Grosse Ile*, 22 Mich App 192, 205; 177 NW2d 176 (1970), quoting *Plant Food Co v City of Charlotte*, 214 NC 518, 520; 199 SE 712 (1938).

Inverness, 263 Mich App at 248.

Appeals Opinion omits any analysis of the public policy considerations and potential detrimental economic and other ramifications of its overbroad proclamations, on the thousands of 425 Agreements currently in operation throughout Michigan.

The Association believes that this is a case of important public interest, and that the outcome of this case is of continued and vital concern to the Association, its members and consumers. The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae"

The Circuit Court and the Court of Appeals erred by invalidating hundreds, if not thousands, of 425 Agreements in place throughout Michigan. The Association, therefore, seeks leave to file this brief amicus curiae in support of the position of the Townships.

II. STATEMENT OF FACTS

The Association accepts the Statement of Facts contained in the Townships' Brief on Appeal, as highlighted by the following:

1. 425 Agreements are usually entered into by two (2) local units of government because utilities and infrastructure necessary for economic development are not available from the Grantor municipality but are available from the Grantee municipality.

2. Prior to entering into a 425 Agreement, the contracting partner must consider certain factors, including:

- a. composition of the population;
- b. population density;
- c. land area and land uses;
- d. assessed valuation;
- e. topography, natural boundaries, and drainage basins;
- f. the past and probable future growth, including population increase and business, commercial, and industrial development in the area to be transferred;
- g. comparative data for the transferring local unit and the portion of the local unit remaining after transfer of the property;
- h. the need for organized community services;
- i. the present cost and adequacy of governmental services in the area to be transferred;
- j. the probable future needs for services;
- k. the practicability of supplying such services in the area to be transferred;
- l. the probable effect of the proposed transfer and of alternative courses of action on the cost and adequacy of services in the area to be transferred and on the remaining portion of the local unit from which the area will be transferred;
- m. the probable change in taxes and tax rates in the area to be transferred in relation to the benefits expected to accrue from the transfer;
- n. the financial ability of the local unit responsible for services in the area to provide and maintain those services;
- o. the general effect upon the local units of the proposed action; and
- p. the relationship of the proposed action to any established city, village, township, county, or regional land use plan.

MCL 124.23.

3. In addition, in many instances, other factors are considered, such as:
 - a. the need for economic development to alleviate and prevent unemployment;
 - b. the need for additional housing opportunities;
 - c. the need to assert new commercial enterprises with locating within the Transferred Area;
 - d. the need to revitalize the economy and tax base of the contracting parties; and
 - e. the need to protect sensitive environmental elements within the Transferred Area, such as wetlands.

4. No two 425 Agreements are alike. While Act 425 requires that all 425 Agreements contain certain "mandatory provisions," MCL 124.27, and further allows 425 Agreements to contain other "permissible provisions," MCL 124.26, each 425 Agreement is the result of true negotiations between the parties on issues such as which party has jurisdiction over and will provide to the Transferred Area:
 - a. police and fire protection;
 - b. zoning;
 - c. water;
 - d. sanitary sewer;
 - e. electric service;
 - f. library services;
 - g. building services, including land use approvals;
 - h. soil erosion and sedimentation control; and
 - i. refuse collection and recycling services.

5. 425 Agreements also provide for which party collects property taxes within the Transferred Area and any revenue sharing arrangements, which party has jurisdiction for purposes of special assessments, whose connection fee rates for water and sewer will apply to the Transferred Area, where residents of the Transferred Area shall vote, which party controls liquor licenses within the Transferred Area and which party's sign ordinance applies.

6. Transfers of property under 425 Agreements are conditional and for periods of no more than 50 years. MCL 124.22.

7. The decision to enter into a 425 Agreement is by a majority vote of the members of the legislative body of each of the two contracting parties after holding at least one public hearing, notice of which is made in accordance with the Open Meetings Act. MCL 124.24.

8. After public hearing, twenty percent (20%) of the voters or fifty percent (50%) of the owners of property within the Transferred Area may file a petition with the clerk of the local unit in which the Transferred Area is located, thereby requiring the local unit to hold a referendum. The local unit may, by resolution, call for a referendum on its own. MCL 124.25.

III. ARGUMENT

A. Standard of Review

This Court's review of this matter is de novo. A decision to deny or grant summary disposition as well as issues of statutory interpretation and application are all reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000).

B. Public Policy Considerations Weigh in Favor of Reversing the Court of Appeals Opinion

The Court of Appeals ruled that Act 425 does not permit the parties to a 425 Agreement to include provisions relating to the zoning of the Transferred Area and, that Agreements that do, are void. COA Op, pp 5-6, Exh 1. The legal principle upon which the Court of Appeals built its opinion was that public policy demands that local units of government not contract away their legislative functions. COA Op, p 2. Ironically, however, it is public policy that requires that the Court of Appeals Opinion be reversed.

Thousands of developments have occurred in Michigan under 425 Agreements, going back many years. In the vast majority of cases, the 425 Agreements were entered into at the request of developers because the utilities and/or infrastructure necessary for development was not available in the Grantor municipality. In the vast majority of these cases, there were no objections to the 425 Agreements and the developments that resulted have provided positive economic conditions. Developers, as well as the municipalities, have spent millions of dollars in reliance upon these 425 Agreements. Municipalities have collected and spent tax dollars and home and business owners have paid taxes in reliance upon these 425 Agreements. Voters have voted in their new districts in reliance upon these 425 Agreements.

The Court of Appeals Opinion purports to render all 425 Agreements made throughout Michigan since Act 425's effective date of March 23, 1999, with provisions relating to zoning void ab initio, regardless of how many years ago they were entered into and regardless of how effective they have been. In fact, the broad, sweeping language of the Court of Appeals Opinion brings into issue the validity of a substantial

amount of 425 Agreements currently in effect throughout the State in which zoning in some aspect or another was contractually agreed to by the contracting parties. Under the Opinion of the Court of Appeals, these 425 Agreements, although having been performed for years and relied upon by the contracting and third parties for years, may be collaterally attacked and negated by anyone, literally anyone, who is annoyed or dissatisfied with some facet of the 425 Agreement. As a result, the development that has occurred, sometimes at a cost of millions of dollars spent by both the contracting parties and innocent third parties in reliance upon the 425 Agreement, will be thrown into limbo. The property transferred pursuant to a 425 Agreement will, perhaps after many years, be transferred back to the contracting Grantee local unit of government. Municipalities losing their 425 Agreement property will lose substantial portions of their tax base. The ownership and operation of municipal water and sewer systems, that were built or extended to serve the Transferred area, are subject to territorial limits under Michigan law (MCL 123.141) and could not continue without the authorization of the 425 Agreement; that is, the provision of utilities to the Transferred Area would cease. Likewise, the provision of fire and police services, etc, to the Transferred Area will be interrupted, if not altogether discontinued. Litigation will involve everything from requesting property tax refunds from the unit of local government losing the transferred property to questioning whether elections were legal because residents voted in the wrong district. This is not a desired outcome beneficial to the economic development of this State.

Under similar circumstances, in which this Court reviewed a contract purportedly entered into contrary to statutory law, this Court found the contract voidable as opposed to void ab initio, in part, to alleviate the adverse affect upon

voidance of the contract on third parties. Specifically, in *Epps v 4 Quarters Restoration, LLC*, 498 Mich 518; 872 NW2d 412 (2015), this Court held that a contract between a home owner and an unlicensed builder, entered into in violation of MCL 339.601³, is voidable rather than void. *Id.* at 546. Justice Markman, writing for a unanimous Court, presented the following partial analysis:

[I]t is relevant that MCL 339.2412(1) says nothing regarding the rights or obligations of third parties. In many situations that can be contemplated, particularly with regard to agreements to build, a contract may serve to transfer rights to one of the parties upon which a third party might reasonably rely.

* * *

A contract may also directly give rights to third parties as intended beneficiaries. MCL 600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427-428; 670 NW2d 651 (2003). These and other third parties could potentially be harmed if contracts with an unlicensed builder were treated as void; they would be unable to rely on or enforce any transfers of rights or obligations under a void contract. It is therefore clear that by affecting the status of contracts between the homeowner and the unlicensed builder, MCL 339.2412(1) has the potential to inflict a considerable hardship on third parties. However, the statute is again conspicuously silent in this regard; if the Legislature had intended to impose such a hardship or risk on third parties to all contracts involving an unlicensed builder, it is reasonable to think that the Legislature would have offered some express indication to that effect. We believe the statute's silence in this respect further suggests that the contract at issue is voidable and not void.

Id. at 548-549 (attached). The same logic applies here. By affecting the status of 425 Agreements, considerable hardship will be encountered by innocent third parties.

³ MCL 339.601 provides: "A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act [including residential building services] or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation."

Like the statute at issue in *Epps*, Section 6 of Act 425 is “conspicuously silent” on the risk allocated to third parties for relying on 425 Agreements which contain zoning provisions. As in *Epps*, it is reasonable here to think that had the Legislature intended that innocent third parties bear the brunt of 425 Agreements rendered void by judicial decree, it would have said so. It did not and its silence is indicative of its intent to the contrary.

Finally, the outcome of the Court of Appeals Opinion is further exacerbated by its refusal to sever zoning provisions from 425 Agreements such that the heart of the 425 Agreement could remain intact as a valid contract. COA Op, p 5. If zoning provisions in 425 Agreements were severable, third parties attacking the 425 Agreements on the basis of “contract zoning” could not invalidate the entire 425 Agreement. Instead, the only remedy available to these third parties would be to sever and invalidate the zoning provisions. Therefore, severability would at least prevent those attacks against 425 Agreements by persons seeking to void provisions of the 425 Agreements other than zoning or the 425 Agreements as a whole. Stated otherwise, as a practical matter, lawsuits would be limited to challenges against the zoning provisions since these are the only provisions in the 425 Agreements which could be invalidated and, the 425 Agreements would substantially remain intact. Public policy favors such an outcome.

C. Fundamental Rules of Statutory Construction Mandate Reversal of the Lower Courts

“The overriding goal guiding judicial interpretation of statutes is to discover and give effect to legislative intent.” *Bio-Magnetic Resonance, Inc v Dep’t of Public Health*, 234 Mich App 225, 229; 593 NW2d 641 (1999) (citations omitted). Once the intent of

the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989). “If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted.” *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

First, the court examines the most reliable evidence of the Legislature’s intent – the language of the statute itself. *Whitman*, 493 Mich at 311. “When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined.” *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931); *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). “A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002); see also *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007) (The judiciary may not speculate regarding the Legislature’s intent beyond those words expressed in the statute.) Courts are not free to add language to a statute. *Kalady v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007).

In addition, when interpreting statutes, courts must assume that the Legislature was aware of existing law, both statutory and common, at the time it enacted the statute in question. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993); *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008). Courts may also consider the placement of words in a statutory scheme, *People v Reddin*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010), as well as the remainder of the statutory scheme. *SMK, LLC v Dep't of Treasury*, 298 Mich App 302, 309; 826 NW2d 186 (2012). Provisions must be read in the context of the entire statute to produce a harmonious whole. *Macomb Co Prosecuting Atty v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).

1. The Plain Language of Section 6 of Act 425 Requires Reversal of the Lower Courts

The Court of Appeals held that Section 6 of Act 425 does not permit 425 Agreements to contain provisions relating to the zoning of the Transferred Area.

COA Op, pp 5-6. Section 6 provides:

If applicable to the transfer, a contract under this act may provide for any of the following:

(a) Any method by which the contract may be rescinded or terminated by any participating local unit before the stated date of termination.

(b) The manner of employing, engaging, compensating, transferring, or discharging personnel required for the economic development project to be carried out under the contract.

(c) The fixing and collecting of charges, rates, rents, or fees, where appropriate, and the adoption of ordinances and their enforcement by or with the assistance of the participating local units.

(d) The manner in which purchases shall be made and contracts entered into.

(e) The acceptance of gifts, grants, assistance funds, or bequests.

(f) The manner of responding for any liabilities that might be incurred through performance of the contract and insuring against any such liability.

(g) Any other necessary and proper matters agreed upon by the participating local units.

MCL 124.26 (emphasis supplied). The Townships argued correctly that the term “ordinances” in subsection (c) encompasses all types of ordinances, including zoning ordinances and, that the statute therefore allows for contract zoning in 425 Agreements. By contrast, the Court of Appeals incorrectly held that this interpretation “reads more words into the statute than are present.” According to the Court of Appeals, this section only allows a 425 Agreement to state the “who” and not the “what;” that is, the statute states only that a 425 Agreement “may state which local unit will . . . adopt and enforce ordinances;” not “the manner in which” the local units will adopt ordinances. The fact of the matter is that the statute is not limited to either. The statute is not limited to the “who” or the “what.” The statute broadly states that: [i]f applicable to the transfer, a contract under this act may provide for . . . the adoption of ordinances and their enforcement by or with the assistance of the participating local units.” The statute encompasses both the “who” and the “what.” The local units may provide for: (1) the adoption of a zoning ordinance – by whom, in what manner and specify the terms; and (2) the enforcement of a zoning ordinance – by whom, in what manner and under what terms. The Court of Appeals incorrectly added language and a limitation to the statute itself by placing limitations on the “what” of

zoning matters which may be placed in a 425 Agreement where the Legislature had placed none.⁴

2. Act 425, as a Whole, Requires Reversal of the Lower Courts

Other provisions of Act 425 support the allowance of contract zoning in a 425 Agreement. For example, Act 425 contains many of the same protections for the public as does the basic legislation providing local units with the authority to zone. Before a 425 Agreement is entered into, the legislative bodies of both local units must hold at least one public hearing after providing notice. MCL 124.24. The same is true when a local unit adopts a zoning ordinance. MCL 125.3306. Similarly, following public hearing, the voters and/or land owners within the Transferred Area may file a petition with the clerk and bring the matter of entering into the 425 Agreement to a vote. MCL 124.25. Again, the same is true when a local unit adopts a zoning ordinance. MCL 125.3402.

Accordingly, the 425 Act, as a whole, contains safeguards for the public which mirror the safeguards in place in the general Zoning Enabling Act. Arguably, such safeguards would not be necessary had the Legislature intended to exclude zoning from the list of subject matters that could be included in 425 Agreements. The presence of these safeguards buttresses the interpretation of

⁴ Moreover, it appears that the Court of Appeals was concerned that contract zoning in 425 Agreements could lead to one local unit "dictating" to another "how a local unit must zone or rezone the property." COA Op, p 6. This is untrue. 425 Agreements are negotiated as to numerous matters at arms length by the local units – including zoning. Should the local units disagree on how the Transferred Area will be zoned, they will simply not enter into the 425 Agreement.

Section 6 of Act 425 discussed above in which contract zoning in 425 Agreements is permitted under Act 425.⁵

3. The Legislative History of Act 425 and the Zoning Enabling Act Demonstrate the Error of the Lower Courts

The Legislature is presumed to know existing law when enacting a statute. *Walen*, 443 Mich at 248. This principle is particularly relevant here as follows.

Michigan has had some version of legislation enabling local units to regulate land use through zoning ordinances since 1921. With knowledge of that legislation, the Legislature adopted Act 425 in 1984, making it effective March 29, 1985. Act 425 was then amended in 1990.

Michigan's current legislation enabling local units to regulate land use through zoning ordinances is the Zoning Enabling Act ("ZEA"), which was adopted in 2006, effective July 1, 2006. At that time, there were many 425 Agreements in existence which contained provisions regarding the zoning of the Transferred Area. Yet, the ZEA contains nothing prohibiting this manner of zoning. Nor has Act 425 ever been amended to prohibit contract zoning in 425 Agreements. The Legislature's silence on this issue, after years of practice, is relevant to its intent to permit contract zoning in 425 Agreements.

⁵ In addition, and perhaps most obvious, is the case of which the Legislature could have excluded zoning from the permissible subject matters in 425 Agreements by stating: neither party to the contract may, within the contract, contract away its legislative zoning authority. It is therefore "telling" as to the Legislature's intent that Act 425 does not contain any such provision. *See, Epps, supra* at 428 ("it is relevant to examine not only the words and phrases present in MCL 339.2412(1), but also the words and phrases that are conspicuously *absent*.")

D. The Lower Courts Reversibly Erred by Finding that Zoning Provisions of 425 Agreements are Not Severable

The Court of Appeals held that notwithstanding the parties' express contractual language to the contrary, the provisions of the 425 Agreement relating to zoning were not severable. COA Op, p 5. The Court of Appeals explained:

"The primary consideration in determining whether a contractual provision is severable is the intent of the parties." *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). In looking at the intent of the parties, our Supreme Court has explained that two principal factors should be considered:

first, "whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other"; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties. 3 Williston, Contracts (3d ed), §532, p 764. However, "[e]ven though the consideration for each agreement is distinct, if the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded . . . as entire and not divisible." *Id.*, p 765, 577 NW2d 909. [*Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 616 n 87; 473 NW2d 652 (1991).]

COA Op, p 4. The Court of Appeals concluded that "the [zoning] provisions were 'so interdependent or interwoven that the parties must be deemed to have contracted only with a view toward the performance' of those provisions." COA Op, p 5 (emphasis supplied). This ruling is incorrect.

First, the Court of Appeals' analysis focuses solely on the first factor of this Court's two-prong analysis and wholly fails to consider that many of the various promises contained in 425 Agreements, particularly zoning, can be apportioned

without making a wholly new agreement. At Section 7 of Act 425, the Legislature has determined which provisions of a 425 Agreement are mandatory; that is, must be present to constitute a valid 425 Agreement. Section 7 reads:

A contract under this act shall provide for the following:

(a) The length of the contract.

(b) Specific authorization for the sharing of taxes and any other revenues designated by the local units. The manner and extent to which the taxes and other revenues are shared shall be specifically provided for in the contract.

(c) Methods by which a participating local unit may enforce the contract including, but not limited to, return of the transferred area to the local unit from which the area was transferred before the expiration date of the contract.

(d) Which local unit has jurisdiction over the transferred area upon the expiration, termination, or nonrenewal of the contract.

MCL 124.27. Zoning is not among these mandatory provisions. Zoning is merely among the “permissible” provisions. MCL 124.26. Therefore, the zoning provisions of a 425 Agreement may be severed without impairing the validity of the remaining provisions or the contract as a whole – as determined by the Legislature.

Second, as noted by the Court of Appeals, the primary consideration in determining whether a contractual provision is severable is the intent of the parties. COA Op, p 4, citing *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). Similar to statutory interpretation, intent is best discerned by the language actually used in the contract. *Rory v Continental Ins Co*, 473 Mich 457, 469; 703 NW2d 23 (2005). In relevant part, in *Rory*, Justice Young stated:

When a court abrogates unambiguous contractual provisions based on its own independent assessment of

“reasonableness,” the court undermines the parties’ freedom of contract. As this Court previously observed:

This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 62 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, §10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, *Corbin on Contracts*, as follows:

“One does not have ‘liberty of contract’ unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made. [15 Corbin, *Contracts* (Interim ed), ch 79, §1376, p 17.]” [*Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).]

Rory, 473 Mich at 468-470.

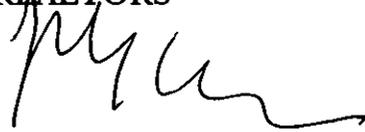
Here, and in other 425 Agreements, the parties expressly contracted that in the event any provision of the 425 Agreement is found to be unenforceable, or any portion of the Transferred Area is held to be invalidly transferred, the unenforceability or

invalidity thereof shall not affect the remainder of the 425 Agreement, which shall remain in full force and effect and enforceable in accordance with its terms. This language clearly indicates the parties' intent that any unenforceable or invalid provisions be severed, including zoning. The parties' unambiguous intent should have been honored by the lower courts. This Court should reverse the decisions of the lower courts.

IV. CONCLUSION/RELIEF SOUGHT

For all the foregoing reasons, the Association respectfully requests that this Court grant the Association leave to file this Amicus Curiae Brief in support of the Townships, reverse the decisions of the lower courts and remand this matter to the circuit court with instructions to enter judgment in favor of the Townships.

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 KeyCite Yellow Flag - Negative Treatment
Appeal Granted by Teridee LLC v. Haring Charter Tp., Mich.,
April 6, 2016

2015 WL 8286094

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

TERIDEE LLC, John F. Koetje Trust, and
Delia Koetje Trust, Plaintiffs–Appellees,

v.

CHARTER TOWNSHIP OF HARING and
Township of Clam Lake, Defendants–Appellants.

Docket No. 324022.

|

Dec. 8, 2015.

Synopsis

Background: Landowners brought two-count action against two townships, seeking declaration that agreement between townships that conditionally transferred land was invalid or void. The Circuit Court, Wexford County, granted townships' motion for summary disposition as to one count, but, after discovery, granted landowners' motion for summary disposition as to other count. Townships appealed.

Holdings: The Court of Appeals held that:

[1] agreement unlawfully contracted away township's zoning authority;

[2] agreement's zoning requirements were not severable; and

[3] act allowing agreement does not allow for contract zoning.

Affirmed.

West Headnotes (3)

[1] **Municipal Corporations**

↔ **Unauthorized or Illegal Contracts**

Agreement between two townships, purportedly made under statute allowing conditional transfer of property between townships for purpose of economic development projects, unlawfully contracted away township's legislative zoning authority, and therefore agreement was void: even though township may have later been able to amend its zoning ordinance over transferred area, agreement specifically required township to rezone residential portion of transferred area to one of its comparable zoning districts, and required township to adopt into its zoning ordinance minimum zoning requirements provided in agreement before considering a property owner's application for development. M.C.L.A. § 124.21 et seq.

Cases that cite this headnote

[2] **Municipal Corporations**

↔ **Unauthorized or Illegal Contracts**

Minimum zoning requirements in townships' agreement, which unlawfully contracted away one township's legislative zoning authority, were not severable from rest of agreement that was purportedly made under statute allowing conditional transfer of property between townships for purpose of economic development projects; even though agreement was amended to include severability clause, clause was only added to agreement because township had "independently" adopted minimum requirements of agreement into its zoning ordinance, and agreement plainly stated that parties wanted township to regulate development of transferred area in manner provided by agreement. M.C.L.A. § 124.21 et seq.

Cases that cite this headnote

[3] **Zoning and Planning**

↔ Contracts for Amendments; Conditions

Act that enables two local units of government to conditionally transfer property by written agreement for the purpose of economic development projects does not allow for contract zoning. M.C.L.A. § 124.26.

Cases that cite this headnote

Wexford Circuit Court; LC No.2013-024803-CH.

Before: OWENS, P.J., and MURPHY and HOEKSTRA, JJ.

Opinion

PER CURIAM.

*1 Defendants, Clam Lake Township and Haring Charter Township, appeal as of right an order entered by the trial court, which granted plaintiffs summary disposition pursuant to MCR 2.116(C)(10) and (D)(2), and declared void defendants' agreement to conditionally transfer property, known as the "transferred area." We affirm.

This case involves 1984 PA 425, MCL 124.21 et seq. (Act 425), which enables two local units of government, such as defendants, to conditionally transfer property by written agreement for the purpose of economic development projects. Collectively, plaintiffs own approximately 140 acres of vacant land in Clam Lake Township, which they intend to develop into a mixed-use development that would include retail stores, a hotel, a restaurant, and other commercial entities. At the time the complaint was filed, the property was zoned by Wexford County. In June 2011, plaintiffs sought to annex their property to the city of Cadillac to gain access to the city's water and sewer services, which are located within one-quarter mile from the property. According to plaintiffs, defendants did not have the infrastructure or were unable to provide the property with public water and sewer services in a timely manner. Defendants opposed the annexation.

In October 2011, defendants entered into an Act 425 agreement to conditionally transfer property, which most

significantly included all of plaintiffs' property. This is of significance to plaintiffs because while an Act 425 agreement is in effect, annexation cannot occur. MCL 124.29. Plaintiffs brought an action against defendants in circuit court challenging the agreement, which was dismissed on summary disposition because the circuit court determined that the State Boundary Commission (SBC) had primary jurisdiction. The SBC ultimately determined that the agreement was not executed for the purpose of promoting economic development, as defined by Act 425, but rather to bar plaintiffs' annexation petition. Accordingly, the SBC determined that the agreement was invalid. For other reasons, the SBC also did not approve plaintiffs' annexation petition.

Plaintiffs filed a second annexation petition on June 5, 2013. Meanwhile, defendants entered into a new Act 425 agreement regarding the same property involved in the first agreement, which was approved on May 8, 2013, and became effective June 10, 2013. Plaintiffs alleged that although the agreement proposed a mixed-use development, the development restrictions and regulations in the agreement were so strict that they effectively restricted any reasonable commercial development. Plaintiffs alleged that the agreement was a second attempt to prevent plaintiffs' property from being annexed to Cadillac.

Consequently, plaintiffs filed the present action seeking two counts of declaratory relief. In Count I, plaintiffs requested that the trial court declare the agreement invalid because it was executed for an improper purpose and therefore did not comply with the requirements of Act 425. In Count 2, plaintiffs requested that the trial court declare the agreement void against public policy because it binds the current and future zoning boards of Haring Charter Township to rezone the transferred area to the rezoning requirements set forth in the agreement, which plaintiffs argued divests the township, by contract, of its legislative zoning authority.

*2 Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that both counts should be dismissed because the SBC had primary jurisdiction to rule on the validity of the agreement under Act 425. Defendants also argued that Count II should be dismissed because the agreement did not divest Haring Charter Township of its legislative zoning authority.

The trial court dismissed Count I, finding that the SBC had primary jurisdiction to determine the validity of the agreement, specifically whether it complied with the requirements of Act 425. As to Count II, the trial court denied summary disposition, finding that discovery was necessary to evaluate recent amendments to the agreement and to determine whether (1) defendants were carrying out the agreement in a way that did not divest the township of its legislative zoning authority, and (2) whether defendants could sever the allegedly invalid rezoning provisions of the agreement to make the balance of the agreement enforceable.

Following discovery, the parties filed cross-motions for summary disposition. The trial court determined that the agreement divested Haring of its legislative zoning authority, which made the contract void. It also determined that the unlawful provisions were central to the agreement and could not be severed. Consequently, defendants claimed this appeal.

¶ Defendants first argue on appeal that the trial court erred in determining that the Act 425 agreement contracted away Haring's legislative zoning authority and was therefore void. We disagree. The parties do not contest the principle of law that a township board may not contract away its legislative powers, which includes its power to zone and rezone property. *Inverness Mobile Home Community, Ltd. v. Bedford Twp.*, 263 Mich.App. 241, 247–248, 687 N.W.2d 869 (2004). Rather, they argue whether the plain language of the agreement actually contracts away Haring's zoning power.

We review de novo a trial court's ruling on a motion for summary disposition, "viewing the evidence in the light most favorable to the nonmoving party." *Joliet v. Pitoniak*, 475 Mich. 30, 35, 715 N.W.2d 60 (2006). Issues of contract interpretation are questions of law that we also review de novo. *In re Smith Trust*, 480 Mich. 19, 24, 745 N.W.2d 754 (2008).

Contrary to defendants' argument, the parties' intent is not controlled by how they applied the agreement, by their testimony, or by extrinsic evidence, such as the concurring resolutions the townships passed. Rather, the parties' intent is determined "by examining the language of the contract according to its plain and ordinary meaning." *Miller-Davis Co. v. Ahrens Constr., Inc.*, 495 Mich. 161, 174, 848 N.W.2d 95 (2014). "In doing so, we

avoid an interpretation that would render any portion of the contract nugatory." *Id.* A court's "primary task" in interpreting a contract is to "give effect to the parties' intention at the time they entered into the contract." *Id.* Further, a contract is to be construed as a whole, and all its parts are to be harmonized so far as reasonably possible. *Comerica Bank v. Cohen*, 291 Mich.App. 40, 46, 805 N.W.2d 544 (2010) (citation omitted). "[C]ontractual terms must be construed in context and in accordance with their commonly used meanings." *Hastings Mut. Ins. Co. v. Safety King, Inc.*, 286 Mich.App. 287, 294, 778 N.W.2d 275 (2009). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *Id.* at 292, 778 N.W.2d 275.

*3 Keeping in mind the principles discussed above, we conclude that the plain language of the agreement contracts away Haring's zoning authority over the undeveloped property by providing how Haring must zone the property. The parties specifically provided how Haring was to rezone the transferred area once the agreement became effective. First, the agreement specifically requires that the "portions of the Transferred Area that are already developed for residential housing shall be zoned in a Haring zoning district that is comparable to the existing County zoning and existing land use." This clearly contracts away Haring's zoning power. It requires Haring to rezone the residential portion of the transferred area to one of its comparable zoning districts and does not give Haring any discretion to leave the area zoned by the county or rezone it to a district it prefers.

Second, the agreement specifically requires that the undeveloped portion of the transferred area

shall be rezoned, upon application of the property owner(s), to a planned unit development ("PUD") district that permits mixed commercial/residential use; provided, however, that Haring shall not consider a PUD rezoning application for this portion of the Transferred Area until (i) it has adopted provisions in its zoning ordinance that allow mixed-use commercial/residential PUDs, and which require that such PUDs

comply with the following minimum requirements, and (ii) the property owner(s) have submitted an application that complies with the following minimum requirements.

This also clearly contracts away Haring's zoning power. It requires Haring to adopt into its zoning ordinance the minimum zoning requirements provided in the agreement before it can even consider a property owner's application for development.

Further, section V of the minimum zoning requirements, which Haring is directed to adopt into its ordinance, provides that a "PUD plan shall be reviewed in accordance with, and shall otherwise comply with, the PUD regulations of the Haring Township Zoning Ordinance, to the extent that those regulations are not inconsistent with the above minimum requirements. Where the above regulations are more stringent, the more stringent regulations shall apply." Defendants argue on appeal that this provision merely provides that any development plan submitted must comply with Haring's general PUD regulations, but if the minimum requirements of the agreement that Haring initially adopted into its zoning ordinance for the transferred area were more stringent than the general PUD regulations, the more stringent regulations shall apply. This, however, does not help defendants. This provision is simply reiterating that Haring is to apply the minimum requirements in the agreement if they are more stringent than its general PUD regulations. Again, this is a restriction on Haring's zoning power.

Defendants further argue that subsection (c) of section 6 allows Haring to unilaterally amend its zoning ordinances over the transferred area, and therefore, the agreement, as a whole, does not restrict Haring's zoning authority. This argument is without merit. Subsection (c) provides that after Haring makes "such amendments" to its zoning ordinance, which undoubtedly refers to the adoption of the minimum requirements in the agreement, the transferred area "shall be subject to Haring's Zoning Ordinance and building codes as then in effect or as subsequently amended." This merely provides that the transferred area will be under the jurisdiction of Haring and subject to its zoning ordinances for the duration of the transfer. While Haring may later amend its zoning ordinance over the transferred area, initially, it is still required to adopt into its ordinance the minimum

requirements provided in the agreement before it may consider and approve an application for development. This clearly contracts away Haring's zoning power.¹ It is irrelevant whether Haring later amends its zoning ordinance over the transferred area, because initially, it may only accept an application for development that complies with the minimum requirements in the agreement. Therefore, the trial court did not err in determining that the agreement unlawfully contracts away Haring's legislative zoning power and was therefore void.

*4 [2] Next, defendants argue that if the minimum zoning requirements are unlawful, they may be severed pursuant to the severability clause of the amended agreement, and the remainder of the agreement would remain valid. We disagree. "The primary consideration in determining whether a contractual provision is severable is the intent of the parties." *Prof Rehab. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 228 Mich.App. 167, 174, 577 N.W.2d 909 (1998). In looking at the intent of the parties, our Supreme Court has explained that two principal factors should be considered:

first, "whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other"; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties. 3 Williston, Contracts (3d ed), § 532, p 764. However, "[e]ven though the consideration for each agreement is distinct, if the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded ... as entire and not divisible." *Id.*, p. 765. 577 N.W.2d 909. [*Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 521, 616 n. 87, 473 N.W.2d 652 (1991).]

Although the agreement was amended to include a severability clause, defendants indicate that the only reason the severability clause was added to the agreement was because at the time of the amendment, Haring had "independently" adopted the minimum requirements of the agreement into its zoning ordinance. Therefore, defendants did not care if the zoning requirements were severed from the agreement. Testimony of both Haring and Clam Lake officials indicates that had

Haring not adopted the minimum requirements into its zoning ordinance, defendants would not have added the severability provision because they deemed those minimum requirements of utmost importance in deciding to conditionally transfer the property. Even the agreement plainly states that the parties wanted Haring to regulate development of the transferred area, rather than leave it to the county, and the agreement provided for the manner in which Haring would rezone the property once it was transferred. If a future Haring board were to amend the zoning ordinance over the transferred area in a way that differs from the minimum requirements of the agreement, it would interfere with what defendants intended when entering the agreement. Therefore, while the parties may have intended that the zoning provisions be severable when they amended the agreement, the evidence shows that the provisions were “so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance” of those provisions. Dumas, 437 Mich. at 616 n. 87, 473 N.W.2d 652. Accordingly, the agreement must be regarded as entire and not divisible, *id.*, and because the contract contains unlawful provisions, the trial court did not err in concluding that it was void.

*5 Finally, defendants argue that § 6 of Act 425 allows for contract zoning, and therefore, the minimum zoning requirements of the agreement were authorized by statute. We disagree. We review de novo questions of statutory interpretation. Ford Motor Co. v. Dep't of Treasury, 496 Mich. 382, 389, 852 N.W.2d 786 (2014). When interpreting statutes, this Court must first examine the language of the statute. *Id.* “If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.” *Id.* (citation and quotation marks omitted). This Court explained in MidAmerican Energy v. Dep't of Treasury, 308 Mich.App. 362, 370, 863 N.W.2d 387 (2014),

“Statutory interpretation requires an holistic approach. A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme.” SMK, LLC v. Dep't of Treasury, 298 Mich.App. 302, 309, 826 N.W.2d 186 (2012), *aff'd in part and rev'd in part sub nom Fradco, Inc. v. Dep't of Treasury*, 495 Mich. 104, 118, 845 N.W.2d 81 (2014) (citation omitted). “When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined.”

“Book-Gilbert v. Greenleaf, 302 Mich.App. 538, 541, 840 N.W.2d 743 (2013) (citation omitted) (alteration in original). Doing so requires us to “avoid a construction that would render any part of a statute surplusage or nugatory, and “[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.” “People v. Redden, 290 Mich.App. 65, 76–77, 799 N.W.2d 184 (2010) (citation omitted) (alteration in original)....

At issue is MCL 124.26, which provides,

If applicable to the transfer, a contract under this act may provide for any of the following:

- (a) Any method by which the contract may be rescinded or terminated by any participating local unit before the stated date of termination.
- (b) The manner of employing, engaging, compensating, transferring, or discharging personnel required for the economic development project to be carried out under the contract.
- (c) The fixing and collecting of charges, rates, rents, or fees, where appropriate, and the adoption of ordinances and their enforcement by or with the assistance of the participating local units.
- (d) The manner in which purchases shall be made and contracts entered into.
- (e) The acceptance of gifts, grants, assistance funds, or bequests.
- (f) The manner of responding for any liabilities that might be incurred through performance of the contract and insuring against any such liability.
- (g) Any other necessary and proper matters agreed upon by the participating local units.

Specifically, defendants argue that the term “ordinances” in subsection (c) encompasses all types of ordinances, including zoning, and therefore the statute allows for contract zoning in Act 425 agreements. This interpretation, however, reads more words into the statute than are present. The plain language of the statute provides that an agreement may state which local unit will fix and collect rates and adopt and enforce ordinances. The statute does not state that the agreement may provide

for the manner in which the participating local units will adopt ordinances, such as dictating how a local unit must zone or rezone the property.

*6 [3] While defendants correctly note that the Legislature has authorized other forms of contract zoning, see MCL 125.3405, MCL 125.3503, and MCL 125.3504, those statutory provisions, by their plain language, specifically provide a mechanism for contract zoning and provide the necessary requirements. In this case, subsection (c) does not do so. Rather, it generally states that the agreement may provide for “the adoption of ordinances and their enforcement by or with the assistance

of the participating local units.” This is nothing more than determining which local unit has jurisdiction over the property in terms of governing it and does not necessarily encompass the right to contract zone. Therefore, we conclude that § 6 of Act 425 does not allow for contract zoning.

Affirmed.

All Citations

Not Reported in N.W.2d, 2015 WL 8286094

Footnotes

1 As plaintiffs note, this prevents Haring from determining how it wishes to rezone the transferred area to accomplish economic development. For example, if Haring wanted to forgo rezoning and apply a use variance it could not do so.

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