

STATE OF MICHIGAN
IN THE SUPREME COURT

**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,

Supreme Court Docket No. 153008
Court of Appeals Docket No. 324022
Wexford County Circuit Court
Case No. 13-24803-CH
Hon. William M. Fagerman

v

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

Defendants/Appellants.

**APPELLANTS' SUPPLEMENTAL BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED**

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INTRODUCTION

On June 3, 2016, the Court issued an Amendment to Order (**Tab 1**), the purpose of which was to amend the Court's April 6, 2016 Order that granted leave to appeal (**Tab 2**), so as to rephrase the issues to be briefed by the parties. The only substantive change related to Issue #1.¹ In the original order, Issue #1 was phrased as follows:

“[W]hether the defendants townships' Agreement pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21, *et seq.* (Act 425), was void because certain provisions of the Agreement contracted away Haring Township's legislative zoning authority.”

In the amended order, Issue #1 has now been rephrased as follows:

“[W]hether *Inverness Mobile Home Community v Bedford Township*, 263 Mich App 241 (2004), applies to defendant townships' Agreement pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21, *et seq.*”

When the amended order was sent to the parties, it was accompanied by correspondence from the Court Clerk, stating that Appellants have the option of submitting a supplemental brief by not later than July 1, 2016, for the purpose of addressing the issues as restated in the amended order.

Tab 3. Appellants now submit this supplemental brief for the sole purpose of addressing Issue #1, as restated in the amended order.

With respect to Issues #2 and #3, Appellants understand the logic behind the Court's decision to reverse the order of those two issues, but Appellants will nonetheless stand on their existing Brief on Appeal, for reason that Appellants' arguments on Issues #2 and #3 would remain the same, whether re-ordered or not.

¹ The amended order also reversed the order of Issue #2 and Issue #3, but made no substantive change to the phrasing of those two issues.

SUPPLEMENTAL ARGUMENT

Standard of Review. The circuit court granted Appellees-Plaintiffs’ motion for summary disposition pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2), and the Court of Appeals affirmed. The Court reviews *de novo* a decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). As sub-issues, this appeal also raises questions of contract interpretation and statutory interpretation, each of which are also reviewed *de novo* on appeal. *Rednour v Hastings Mut Ins Co*, 468 Mich 241, 253; 661 NW2d 562 (2003) (contract interpretation); *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013) (statutory interpretation).

I. *INVERNESS MOBILE HOME COMMUNITY V BEDFORD TOWNSHIP*, 263 MICH APP 241 (2004), DOES NOT APPLY TO DEFENDANT TOWNSHIPS’ AGREEMENT PURSUANT TO THE INTERGOVERNMENTAL CONDITIONAL TRANSFER OF PROPERTY BY CONTRACT ACT, 1984 PA 425, MCL 124.21, ET SEQ.

In the lower courts, Appellees relied heavily on *Inverness Mobile Home Comm, Ltd v Bedford Twp*, 263 Mich App 241; 687 NW2d 869 (2004), as a means of attacking Art. I, §6.a.2 of the Townships’ Act 425 Agreement. They argued that *Inverness* is on point and mandates a finding that Art. I, §6.a.2 of the Agreement is invalid, as constituting illegal contract zoning. In a very important respect, *Inverness* is just plain wrong, as demonstrated below in Section I.A. But the Townships will nonetheless also demonstrate in Section I.B that the underlying reasoning of *Inverness* is entirely inapposite, when applied to the Townships’ Act 425 Agreement.

A. *Inverness* Was Wrongly Decided

Inverness involved a consent judgment that was entered as a means of settling a zoning lawsuit between a mobile home park developer and a township. In pertinent part, ¶¶ 10 through 13 of the consent judgment provided that the defendant-township was required to amend its Master Plan, so as to designate an unspecified parcel of land (the “Future Property”) as being planned for

new manufactured home community development. *Id.* at 243-245. The consent judgment specified a procedure through which the Future Property would be identified by the plaintiff-developer and then approved by the defendant-township for designation in the Master Plan, if the Future Property met specified criteria. *Id.*² If the parties disagreed about whether an identified Future Property met the specified criteria, the dispute was to be resolved by the circuit court. *Id.* Five years after entry of the consent judgment, such a dispute arose, and so the plaintiff-developer sought judicial review in the circuit court. *Id.* at p. 245. The defendant-township countered by requesting relief from ¶¶10-13 of the consent judgment, on the basis that these provisions constituted an improper delegation of its legislative powers by contract. *Id.*

The circuit court agreed with the defendant-township and thus voided ¶¶10-13 of the consent judgment as being against public policy, because these provisions inappropriately bound the discretion of future township boards. *Id.* at 246. On appellate review, the Court of Appeals affirmed, holding as follows:

The question here is whether this consent judgment, directing that the master plan would be amended by a future township board to permit a manufactured housing development, constitutes an act that impermissibly contracted away the legislative powers of a future governing body. We hold that it does. *Id.* at 248.

In reaching this holding, the Court of Appeals reasoned that the “adoption of a master plan is tantamount to a legislative act.” *Id.* at p. 249. But it is not. *Inverness* was wrongly decided in this respect because a master plan is not an ordinance, rule or regulation. It is a non-binding policy document that merely contains recommendations and which serves as a general guidance for future development, and thus lacks the *sine qua non* of a legislative act. *See, e.g., Cole’s Home & Land Co, LLC v City of Grand Rapids*, 271 Mich App 84, 91; 720 NW2d 324 (2006). Reflective of this,

² The consent judgment did not require the defendant-township to rezone the Future Property, nor did it require the defendant-township to amend its zoning ordinance in any particular manner. It did, however, prevent the defendant-township from raising certain legal defenses as a reason for not allowing the Future Property to be developed as a manufactured housing community. *Id.* at 244-245 (¶12 of consent judgment).

§43(3) of the Michigan Planning Enabling Act expressly allows a master plan to be adopted by a planning commission, which is an administrative body having no legislative powers whatsoever. *See* MCL 125.3843(3).

Thus, even though the *Inverness* court correctly recognized the rule that a township board cannot contract away its legislative powers (*id.* at 248), the *Inverness* court ultimately committed legal error by applying that rule to what was quintessentially a *non*-legislative act, such that no legislative powers were being bound in the first instance. And a similar type of legal error would result here, if the Court applied *Inverness* to the Townships' Act 425 Agreement. As explained below, this is because the Townships' Agreement does not bind the legislative zoning authority of the Haring Board in any manner that is not already expressly provided by statutory law.

B. *Inverness* Is Inapposite

The reasoning of *Inverness* is not even implicated by the Townships' Agreement for the plain and simple reason that Haring is *not* contractually bound by the design standards stated in Art. I, §6.a.2 of the *Amended* Agreement. As the Townships have already demonstrated in their Brief on Appeal (ATs' Brief on Appeal at pp. 8-11, 29-30), it is undisputed that the materially-revised PUD development standards of Art. I, §6.a.2 of the First Amended Agreement had already been independently developed and adopted by Haring, on September 9, 2013, *before* the time that the First Amended Agreement was approved on September 18, 2013 and before the time when it subsequently became effective, on October 21, 2013. Thus, if Art. I, §6.a.2 of the Amended Agreement is construed as requiring Haring to adopt the development standards stated immediately thereafter, then Art. I, §6.a.2 of the Agreement requires Haring to do *nothing*. Haring had already independently developed and adopted those exact same development standards on its own, *before* the First Amendment took effect, and so Haring is not required to take any new zoning action, at all. This is where any attempt to apply *Inverness* to the Townships' Agreement falls flat on its face.

It is horn book law a contractual promise to do something that has already been done is invalid, for lack of consideration. *Easley v R G Mortensen*, 370 Mich 115, 120; 121 NW2d 420 (1963); *Shirey v Camden*, 314 Mich 128; 22 NW2d 98 (1946). This is known as “past consideration,” and it will not constitute legal consideration for a subsequent promise. *Shirey* at 138. The end game, therefore, is that Art. I, §6.a.2 of the Agreement did not constitute a contractual requirement at all, thus making it impossible for Art. I, §6.a.2 to have bound Haring’s legislative zoning authority. Further reinforcing this conclusion is the fact that Haring has expressly retained the unfettered legislative discretion to continue amending the development standards for the Transferred Area any time after the adoption of the First Amended Agreement, as plainly stated in Art. I, §6.c of the Agreement. Thus, the subject of contract zoning is not even implicated by the Townships’ Amended Agreement.

And the “shall be zoned” language of Art. I, §6.a.2 does nothing to change that conclusion. The legally correct interpretation of the Agreement – which the parties to the Agreement themselves intended and applied – is that Art. I, §6.a.2 of the Agreement needs to be read in conjunction with and harmoniously with Art. I, §6.c of the Agreement, so as to grant Haring the independent legislative authority to amend the mixed-use PUD standards of the Agreement, so that the applicable mixed-use PUD standards that are ultimately reflected in the Haring zoning ordinance might be different (and *are* different) than those in the Agreement. As such, the “shall be rezoned” language stated in Art. I, §6.a.2 would come into effect only if the property owners submitted a zoning application that fully complied with mixed-use PUD standards, *as then-stated in the Haring zoning ordinance*. And such a requirement is plainly lawful.

Principally, this is because Haring is already required, by statute, to approve a PUD application that fully complies with its zoning ordinance, as expressly stated in the statutory

provisions of the Michigan Zoning Enabling Act (“MZEA”) that pertain to special land uses and planned unit developments. Specifically, §504 of the MZEA provides, in relevant part, as follows:

125.3504 Regulations and standards governing consideration and approval of special land uses and planned unit developments

* * *

(3) A request for approval of a land use or activity **shall be approved** if the request is in compliance with the standards stated in the zoning ordinance, the conditions imposed under the zoning ordinance, other applicable ordinances, and state and federal statutes. MCL 125.3504(3) [emphasis added].

Thus, all Haring has done under Art. I, §6.a.2 is to agree to comply with the preexisting statutory requirement of MCL 125.3504(3) (i.e., to approve a mixed-use PUD application that complies with the standards of its zoning ordinance). But that is not a contractual promise at all, because it is horn book law that agreeing to undertake a preexisting statutory duty is not consideration to support a contract. *Borg-Warner Acceptance Corp v Dep’t of State*, 433 Mich 16, 21; 444 NW2d 786 (1989) (quoting 1 Williston, Contracts (3d ed), § 132, p 557); *General Aviation, Inc v Capital Region Airport Auth*, 224 Mich App 710, 715; 569 NW2d 883 (1997). And so once again, the Townships’ Agreement does not even implicate the concept of contract zoning, thus making *Inverness* entirely inapposite.

This same conclusion is compelled by the fact that Haring, under the Agreement, has retained the unfettered legislative discretion to determine whether a particular zoning application does or does not comply with the mixed-use PUD standards of the Haring Zoning Ordinance. This is completely unlike *Inverness*. In *Inverness*, the consent judgment effectively stripped the defendant-township of its legislative discretion to determine whether the Future Property, once identified, was suited for manufactured housing community use. *Inverness, supra* at 244-245 (¶12 of consent judgment). Here, however, Haring (and Haring alone) has independently identified and designated the lands that are future planned for mixed-use PUD development (*see* ATs’ Brief on Appeal at pp. 17-18), and the

Agreement has left Haring with the unfettered legislative discretion to determine (a) what the mixed-use PUD standards of its zoning ordinance will be, and (b) whether the mixed-use PUD standards of its zoning ordinance have or have not been satisfied by any particular zoning application for those same lands. Moreover, if the Haring Board denies a zoning application for the Transferred Area, it is free to raise any applicable defenses that would demonstrate noncompliance with the standards of the zoning ordinance. Thus, the Haring Board has not had its legislative discretion bound in the same manner that the consent judgment bound the defendant-township in *Inverness*. The *Inverness* consent judgment and the Townships' Act 425 Agreement do not share even the remotest of similarities.

The fundamental problem with attempting to apply *Inverness* to the "shall be rezoned" language of Art. I, §6.a.2 is that *Inverness* does not even address the unique subject matter of PUDs, and so the court in that case did not have occasion to even consider MCL 125.3504(3), nor its Legislative mandate that a fully-compliant PUD application "shall be approved." And there is absolutely nothing in *Inverness* to suggest that MCL 125.3504(3) is invalid or that a municipality is not bound by the mandatory PUD-approval language included therein. Therefore, *Inverness* is entirely inapposite in relation to the Agreement.

CONCLUSION AND REQUEST FOR RELIEF

The Act 425 Agreement is valid because it does not bind the legislative zoning authority of Haring, except to the extent that state law already expressly provides, under MCL 125.3504(3). *Inverness* does absolutely nothing to change that legally correct conclusion.

For this additional reason, the Townships respectfully request that this Honorable Court reverse the lower courts' decisions in all respects; hold that the Agreement is valid and enforceable; hold that annexation of the Transferred Area is void; and, hold that the Transferred Area has been

continuously within Haring's jurisdiction since June 10, 2013, when the Townships' Act 425 Agreement became effective.

Respectfully submitted,

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Dated: June 8, 2016

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