

IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS

In re APPLICATION OF MICHIGAN ELECTRIC
TRANSMISSION COMPANY FOR
TRANSMISSION LINE

CHARTER TOWNSHIP OF OSHTEMO,
Appellant,

v

MICHIGAN ELECTRIC TRANSMISSION
COMPANY LLC,
Petitioner-Appellee,

SC: 150695
COA: 317893
MPSC No.: 00-017041

and

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellee.

BRIEF ON APPEAL

APPELLANT OSHTEMO CHARTER TOWNSHIP

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION
OF THE CONSTITUTION, A STATUTE, RULE OR
REGULATION, OR OTHER STATE GOVERNMENTAL
ACTION IS INVALID

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Dated: February 12, 2016

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STATEMENT OF JURISDICTION

This Court's jurisdiction is based upon MCR 7.303 (B)(1) which authorizes discretionary review after a decision by the Michigan Court of Appeals. Appellant Township's application for leave to appeal to this Court was granted by order of December 23, 2015, to determine whether the Electric Transmission Line Certification Act, 1995 PA 30, is consistent with the first sentence of the Michigan Constitution in Const 1963, art 7, § 29.

STATEMENT OF FACTS

In December of 2010, the Michigan Electric Transmission Company, LLC (hereinafter “METC”) approached Oshtemo Charter Township (hereinafter "Township") seeking to construct an electric transmission line in the southern portion of the Township through a pristine oak savannah forest. However, METC's information was sketchy. METC provided the Township only a vague verbal description of the project without maps or analysis of the proposed route. METC did not provide information regarding the route selection process. The Township representatives requested METC consider a route along the I-94 corridor or within a railroad right-of-way so as to preserve the natural resources of the Township and prevent a new scar across the rural residential character of the Township. In spite of numerous requests for information, METC failed and refused to provide further more detailed information to the Township. Direct Prefiled Testimony of Elizabeth Heiny-Cogswell, Appendix p 112a-115a.

Because METC failed to provide even rudimentary information to the Township residents or to the Township itself, and due to the fact that the proposed transmission line was not a high-voltage transmission line, it appeared that METC would proceed with the project with absolutely no public input or governmental oversight of any kind. In order to protect the interests of its citizens and meet its constitutional and legislative duty to protect the public health, safety and welfare of its residents, the Township amended its Public Utility Ordinance, which Ordinance was originally enacted in 1975. The Oshtemo Charter Township Board passed a Resolution Adopting Ordinance No. 525 Amending Ordinance No. 114, Appendix p 99a. The Oshtemo Charter Township Public Utility Ordinance at issue is No. 114, as amended, Appendix p 103a. The amendment, effective November 22, 2011, sought to ensure that the citizens of the Township would have input into the process, either before the Township Board or before the

Michigan Public Service Commission and to minimize the negative impacts associated with the installation of the proposed transmission line. The amendment was enacted in conjunction with the preexisting provisions of the Township Zoning Ordinance based upon Township's Master Plan 2011.

There has been no finding by the Public Service Commission or any Court that the Township Public Utility Ordinance is unreasonable or outside the authority granted to the Township under the Michigan Constitution and state law regarding ordinance promulgation. Michigan Public Service Commission Order, Appendix p 205a and Michigan Court of Appeals Opinion, Appendix p 229a.

METC refused to proceed before the Township in order to obtain consent for the installation of the proposed electric transmission line, and on July 31, 2012, filed an application with the Michigan Public Service Commission (hereinafter "MPSC") under the Electric Transmission Line Certification Act, 1995 PA 30 (Act 30); MCL 460.561, et seq., seeking a certificate of public convenience and necessity (hereinafter "CPCN") for the construction of an electric transmission line other than a major transmission line.

The Township's petition to intervene was granted on September 12, 2012, as was that of certain citizens of Oshtemo Charter Township. Michigan Public Service Commission Docket Entries, Doc. No. 0081, Appendix p 4a and Doc. No. 0031, Appendix p 7a.

An evidentiary hearing was held on January 29, 2013. All parties filed briefs and reply briefs. The Township asserted: 1) that METC had failed to comply with substantive and procedural due process, 2) that METC had failed to meet the requirements of Section 8 of Act 30 (MCL 460.568 (5)(a)), and 3) that the Township's Public Utility Ordinance was applicable and

required the underground construction of a portion of the transmission line. Michigan Public Service Commission Docket Entries, Doc. No. 0121, Appendix p 3a.

On April 29, 2013, the Administrative Law Judge (hereinafter "ALJ") issued her proposal for a decision (hereinafter "PFD") upholding the applicability of the Township's Ordinances. The PFD found that the Public Utility Ordinance was not preempted by state law and proposed requiring the permit be conditioned upon underground construction of 1,500-2,000 feet of the transmission line, or in the alternative, require METC to make an additional showing that any local benefits of underground construction did not justify the burden on ratepayers for the project. The ALJ also proposed denial of METC's application based on the finding that METC had failed to show that the benefits of the project justified the financial, environmental and social costs of the project under Section 8 of PA 30. Michigan Public Service Commission Docket Entries, Doc. No. 0133, Appendix p 2a.

The MPSC, in its order of July 29, 2013, rejected the recommendation in the PFD, Appendix p 140a, that the CPCN be conditioned on METC's compliance with the Township's ordinances and the alternative recommendation that the record be reopened. The MPSC granted METC's application for the transmission line, holding that the Electric Transmission Line Certification Act, 1995 PA 30, preempted the Township's Public Utility Ordinance. Michigan Public Service Commission Order, Appendix p 205a.

The MPSC's final order was served upon the parties on August 2, 2013. Michigan Public Service Commission Docket Entries, Doc. No. 0145, Appendix p 2a.

The Township filed its claim of appeal with the Court of Appeals on August 23, 2013. Michigan Court of Appeals Docket Entries, Doc. No. 0001, Appendix p 11a. The Court of Appeals issued its decision on November 18, 2014. The Court of Appeals upheld the MPSC's

Order, holding that the Township's right to a consent as provided in Michigan's Const 1963, art 7, § 29 was subject to preemption by the Legislature in the Electric Transmission Line Certification Act based upon Const 1963, art 7, § 22. Michigan Court of Appeals Docket Entries, Doc. No. 0098, Appendix p 22a.

The Appellant filed its application for leave to appeal and its brief in support before this Court on December 19, 2014. Michigan Court of Appeals Entries, Doc. No. 0102, Appendix p 18a. This Court granted Appellant's application for leave on December 23, 2015. Michigan Court of Appeals Docket Entries, Doc. No. 0120, Appendix p 25a.

STATEMENT OF QUESTIONS INVOLVED

I. IS THE ELECTRIC TRANSMISSION LINE CERTIFICATION ACT, 1995 PA 30, (ETLCA) INCONSISTENT WITH THE FIRST SENTENCE OF CONST 1963, ART 7, § 29, AND THEREFORE UNCONSTITUTIONAL?

APPELLANT SAYS	YES
APPELLEES SAY	NO

II. IS THE CONSENT REQUIREMENT OF THE FIRST SENTENCE OF ART 7, § 29 OF THE MICHIGAN CONSTITUTION SEPARATE AND DISTINCT FROM THE REASONABLE CONTROL PROVISION OF THE SECOND SENTENCE OF ART 7, § 29?

APPELLANT SAYS	YES
APPELLEES SAY	NO

III. DOES STARE DECISIS REQUIRE THAT THE PURPORTED PREEMPTION OF MUNICIPAL CONSENT IN THE ETLCA BE UPHELD AS CONSTITUTIONAL?

APPELLANT SAYS	NO
APPELLEES SAY	YES

IV. WAS THE TOWNSHIP'S PUBLIC UTILITY ORDINANCE ADOPTED TO EXERCISE THE CONSENT AUTHORITY GRANTED TO THE TOWNSHIP AND REQUIRED BY THE FIRST SENTENCE OF CONST 1963, ART 7, § 29 AND TO IMPLEMENT THE REASONABLE CONTROL PROVISION OF THE SECOND SENTENCE OF ART 7, § 29, AND IS NOT PREEMPTED NOR IN CONFLICT WITH STATE LEGISLATION IN THE FORM OF THE ETLCA?

APPELLANT SAYS	YES
APPELLEES SAY	NO

STANDARD OF REVIEW

The constitutionality of a legislative act is a question of law that is reviewed de novo. *DeRose v DeRose*, 469 Mich 320, 326; 666 NW 2d 636 (2003). *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001); *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000). A statute is presumed constitutional, unless its unconstitutionality is readily apparent. *Tolksdorf, supra* at 5.

The constitutionality of a statute must be determined on the basis of provisions of the act itself, and the party challenging the constitutionality of the statute has the burden of proving the law's invalidity. *TCG Detroit v City of Dearborn*, 261 Mich App 69, 77; 680 NW2d 24 (2004); *Complete Auto & Truck Parts, Inc. v Secretary of State*, 264 Mich App 655; 692 NW2d 847 (2004).

ARGUMENTS

- I. THE ELECTRIC TRANSMISSION LINE CERTIFICATION ACT, 1995 PA 30, (ETLCA) IS INCONSISTENT WITH THE FIRST SENTENCE OF CONST 1963, ART 7, § 29, AND THEREFORE UNCONSTITUTIONAL.
 - A. THE "COMMON UNDERSTANDING" OF THE FIRST SENTENCE OF CONST 1963, ART 7, § 29 REQUIRES MUNICIPAL CONSENT FOR UTILITY LINES IN THE PUBLIC WAY.

The rules of textual construction applicable to constitutional provisions are of primary importance in this case. As stated in *Michigan United Conservation Clubs v Sec of State*, 464 Mich 359; 630 NW2d 297 (2001):

“Each provision of a State Constitution is the direct word of the people of the State, not that of the scribes thereof,” Lockwood v. Nims, 357 Mich. 517, 565, 98 N.W.2d 753 (1959) (BLACK, J., concurring), and therefore “[w]e must never forget that it is a Constitution we are expounding,” *id.*, quoting M’Culloch v. Maryland, 4 Wheat. (17 U.S.) 316, 407, 4 L.Ed. 579 (1819).”*id* at 373.

The primary goal is to give effect to the intent of the people of the State of Michigan who ratified the Constitution. This is accomplished by applying the rule of *common understanding*.

id. This rule is described in an often cited quote from Supreme Court Justice Cooley:

“A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. The constitution does not derive its force from the convention which framed, but from the people who ratified it. The intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, But rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.” *In re Proposal C*, 384 Mich 390, 405; 185 NW2d 9 (1971).

At issue in this case is the first sentence of art 7, § 29 of Michigan’s Constitution which section provides in pertinent part:

“No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, **without the consent** of the duly constituted authority of the county, township, city or village;...” (Emphasis added.)

Anyone making a common sense reading of this provision would conclude that it requires municipal consent for the establishment of utility facilities within that municipality’s jurisdictional boundaries. The people of the State of Michigan, in ratifying the Constitution, intended to invest their local municipalities with this control, authority and obligation. There can be no other understanding but that the people conditioned the use of public ways by a public utility upon such grant of consent.

A court may not construe a constitutional clause to impede or defeat its meaning. *Michigan United, supra* at 419 citing *Michigan Farm Bureau v Hare*, 379 Mich 387, 393-4; 151 NW2d 797 (1967).

The reasoning of this Court in *Michigan Farm Bureau v Hare, supra*, is instructive. In that case, the Court considered whether a legislation enactment was at odds with Michigan's Constitution regarding the referendum process in Const 1963, art 2, § 9. The *Hare* Court found the legislative enactment was unconstitutional because it would permit an *outright legislative defeat* of the process called for in the Constitution. *id* 394. The Court found that the legislation would emasculate and gut the constitutional process.

“ . . . what then of warranted worth would be left in section 9 beyond, of course, the slower and more involved initiatory process? Quite unintentionally to be sure, plaintiffs are requesting that the judicial branch emasculate the reserved referral process.” *id* at 395.

The MPSC and Court of Appeals in this case each held that the municipal consent called for in Const 1963, art 7, § 29 was preempted by the ETLCA (MCL 460.561 et seq). In this case, what is left of the requirement of municipal consent as required by the first sentence of Const. 1963, art 7, § 29, after the ETLCA? The provision, as it must be commonly understood and interpreted, is emasculated, gutted and negated outright by legislative enactment in the ETLCA.

The test for unconstitutionality of in this case is, therefore, absurdly simple and can be answered in three simple questions:

1. Did Oshtemo Charter Township consent to Petitioner METC's use of its public ways and consent to the establishment of its lines within the Township? Answer: No.
2. Does the ETLCA purport to supersede the municipal consent called for by the Michigan Constitution? Answer: Yes.

3. Did the Public Service Commission (as upheld by the Court of Appeals) use the ETLCA to deny the Township its constitutional authority to consent to Petitioner's utility lines in this case? Answer: Yes.

There can be no other conclusion but that first sentence of Const 1963, art 7, § 29 is contravened, hindered and defeated by the ETLCA in this case and thus unconstitutional.

Appellant submits that this Court should find that the portions of the ETLCA purporting to preempt municipal consent are void.

B. THE MICHIGAN LEGISLATURE LACKS THE AUTHORITY TO DISPENSE WITH A LOCAL MUNICIPALITY'S CONSENT FOR A UTILITY TO OPERATE WITHIN ITS JURISDICTION AS IT PURPORTS TO DO IN THE ETLCA.

The people of the state of Michigan are sovereign, and in their sovereignty, granted authority to both the Michigan Legislature and local municipalities. Any interpretation of the Constitution must recognize: (1) what authority was granted, (2) to whom the authority was granted, and (3) under what limitations the authority was granted.

1. The Michigan Constitution is not a grant of power to the Legislature but a limitation on the general legislative authority.

In order to determine whether the **general authority** granted to the Legislature in enacting the Electric Transmission Line Certification Act, 1995 PA 30 (ETLCA) was consistent with the general provisions of Michigan Constitution of 1963, art 7, § 22, or should yield to the **specific authority** given to the local municipalities under the Const 1963, art 7, § 29, one must first understand the structure of the Michigan Constitution.

In *Romano v Aten et al*, 323 Mich 533, 536-537; 35 NW2d 701 (1949), the Michigan Supreme Court stated that:

“The function of a state constitution is not to legislate in detail, but to *generally* set limits upon the otherwise plenary powers of the legislature.”(Emphasis added)

See also *Attorney General ex rel. O’Hara v Montgomery*, 275 Mich 504; 267 NW 550 (1936), in which this Court stated that:

“The legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States. The constitution of the State is not a grant of power. It is a limitation upon authority.” *id at 538*. (Emphasis added)

It follows that “[a] fundamental and indisputable tenet of law is that a constitutional mandate cannot be restricted or limited by the whims of a legislative body through enactment of a statute.” *American Federation of State, County and Municipal Employees, Council 25 v Wayne County*, 292 Mich App 68, 93; 811 NW2d 4 (2011).

The Township submits that the specific rights granted to the Township by the people of the state of Michigan cannot be swept aside by the Legislature in violation of the limitations placed upon the Legislature by the Michigan Const 1963, art 7, § 29.

2. The people granted local municipalities the right to consent to utilities wishing to operate within their jurisdictional boundaries, and such right cannot be dispensed with by the Legislature.

The Township’s authority to consent to utilities is derived from the people – not the Legislature. “The sovereign power of Michigan rests in its people.” *In the matter of Jacob Spangler*, 11 Mich 298, 1863 WL 1181 (1863).

If the people exercise their sovereign power and grant to a local municipality the right to consent in order for a utility to operate within its jurisdictional boundaries, the Legislature cannot take such authority away.

The holding in *City of Lansing v State of Michigan and Wolverine Pipe Line Company*, 275 Mich App 423; 737 NW2d 818 (2007), states:

“Local governments generally derive their authority from the Legislature, citing Const 1963, art 7 §§ 1, 17, and 21. However, ‘the Constitution reserves to local governments certain authorities.’” *City of Taylor, supra* at 116, 715 N.W.2d 28. One such reservation is found under Const 1963, art 7, § 29, . . .”

Although the consent clause is framed as a limitation on the activities of utilities, it is, in effect, a grant of authority to local units of government. See *People v McGraw*, 184 Mich 233, 238; 150 NW 836 (1915), stating that this section placed utilities under the control of the local authorities.

In the present case, the MPSC held that:

“ . . . under the plain language of Sections 3 and 10 of Act 30, the Commission’s grant of the CPCN preempts Oshtemo’s ordinance.” MSPC Order, page 26. (emphasis added) Michigan Public Service Commission order, Appendix p 227a.

The Court of Appeals did nothing to correct that error.

The holdings of the MPSC and COA in this case are inconsistent with this Court’s recognition that any act which attempts to take away all control of local highways granted to the local municipalities is unconstitutional and void.

People v McGraw, supra, at 238-9, states as follows:

“By giving the language of the whole section its ordinary and natural meaning, public utilities were placed under control of the local authorities and the local authorities may control within reason the

use of their streets for any purposes whatsoever not inconsistent with the state law.

* * *

But as section 9, Act 318, Public Acts 1909, clearly attempts to take away from the cities *all control* of their highways with reference to the use thereof by motor vehicles, such parts of said section which forbid the cities from exercising reasonable control of their highways as herein defined must be held to be unconstitutional and void.”

The Michigan Constitution controls any legislative act repugnant to it. *Marbury v Madison*, 1 Cranch 137; 5 US 137; 2 L Ed 60 (1803.); *Lewis v State*, 464 Mich 781; 629 NW2d 868 (2001)The Michigan Constitution grants this Court the judicial power – nothing more and nothing less – and neither the Legislature nor this Court itself possesses the authority to redefine these limits.

Similar in nature to the statement made by Justice Marshall in *Marbury v Madison*, *supra*, the Court of Appeals, referencing the position of this Court, has stated that:

“The Legislature cannot adopt a statutory standard which conflicts with a constitutional standard. *Hamilton v Secretary of State*, 227 Mich. 111; 198 N.W. 843 (1924); *Wolverine Golf Club v Secretary of State*, 384 Mich. 461; 185 N.W.2d 392 (1971).” *Anchor Bay Concerned Citizens, et al, v People of the State of Michigan ex rel. Frank J. Kelley, Attorney General*, 55 Mich App 428; 223 NW2d 3 (1974).

Since the ETLCA operates to dispense with the local municipalities’ consent for utilities to operate within its jurisdiction, the act is repugnant to the Michigan Const 1963, art 7, § 29, it must be held unconstitutional and void.

II. THE CONSENT REQUIREMENT OF THE FIRST SENTENCE OF ART 7, § 29 OF THE MICHIGAN CONSTITUTION IS SEPARATE AND DISTINCT FROM THE REASONABLE CONTROL PROVISION OF THE SECOND SENTENCE OF ART 7, § 29.

Const 1963, art 7, § 29, provides as follows in its entirety:

“Sec. 29. No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.”

Breaking this section down, there are actually three rights granted to local municipalities under § 29 of the Michigan Constitution.

1. The right to consent to utilities.
2. The right to grant franchises to utilities.
3. The right to reasonable control of streets and public places.

No Michigan court has ever interpreted that these rights are the same or a single right.

The Court of Appeals in *TCG Detroit v Dearborn*, 261 Mich App 69, 680 NW2d 24 (2004) stated that:

“Const 1963, art 7, § 29 has three clauses. The first states that public utilities cannot use the rights-of-way of local units of government for wires, poles, conduits, and so forth without consent; the second clause forbids a utility from conducting local business without first obtaining a franchise; and the third clause declares that local units of government retain the right to reasonably control their highways, streets, alleys, and public places.”

See also, *City of Lansing v State of Michigan and Wolverine Pipe Line Company*, 275 Mich App 423, 431; 737 NW 2d 818 (2007). In footnote 3 the Court of Appeals stated:

“We reject Wolverine’s contention that the limitations placed on the general reservation of authority found in the second sentence of § 29 apply to the first two clauses of the first sentence. The first sentence limits the activities of utilities by granting local governments the power to grant or withhold a franchise and to grant or withhold consent to use the highways, streets, alleys, or other public places. This is in stark contrast to the broadly worded *reservation* of authority to regulate highways, streets, alleys, and other public places provided in the second sentence. In construing

Const 1908, art 8, § 28, our Supreme Court noted that the section, when read as a whole, accomplished two things: ‘[P]ublic utilities were placed under control of the local authorities, and the local authorities may control within reason the use of their streets for any purposes whatsoever not inconsistent with the State law.’ *People v. McGraw*, 184 Mich. 233, 238, 150 N.W. 836 (1915). Hence, these grants of authority are distinct, and the limitations applicable to the reservation of authority to regulate highways, streets, alleys, and other public places do not necessarily apply to the other clauses. For this reason, we find the authorities discussing the general reservation of reasonable control over highways, streets, alleys, and other public places inappropriate. See e.g., *City of Taylor, supra*, at 116, 715 N.W.2d 28 (examining that section of Const 1963, art 7, § 29 that *reserved* authority to exercise reasonable control over the enumerated areas – highways, streets, alleys, and other public places – to local units of government).”

Because the two sentences of art 7, § 29 of the Michigan Constitution grant three separate and distinct rights to local municipalities, each right must be protected. Every clause of a constitutional provision must be given equal dignity in order to protect and guard its purpose. *In re Proposals D & H*, 417 Mich 409, 421; 339 NW2d 848 (1983). Also, no provision should be read so as to nullify the other. *In re Request for Advisory Opinion Regarding the Constitution of 2005 PA 71*, 479 Mich 1, 740 NW2d 444 (2007); *National Pride at Work, Inc v Governor of Michigan*, 274 Mich App 147, 732 NW2d 139 (2007).

In applying these rules of construction, Justice Markman in *City of Lansing v State of Michigan and Wolverine Pipe Line Company*, 480 Mich 1104; 745 NW2d 109 (2008), noted:

“The specific right in the first sentence of art. 7, § 29, to refuse consent to utility projects, fits logically within the city’s general right in the second sentence to exercise ‘reasonable control’ over its streets. Therefore, to give meaning and effect to both sentences, it may be inferred that there is some difference in terms of the Legislature’s authority to overrule the city with regard to its exercise of the more specific right in comparison with its exercise of the more general right. However, the Court of Appeals renders these rights indistinguishable in terms of the Legislature’s overruling authority, treating the specific right to refuse consent in an identical manner as the general right of ‘reasonable control.’ Thus, the Court of Appeals arguably gives no effect at all to the first sentence of art. 7, § 29.” *id* at 1105.

The Court of Appeals ignored the more specific provisions of the first sentence of Const 1963, art 7, § 29 and subrogated the first sentence of art 7, § 29 to art 7, § 22. In addition, the argument that art 7, § 29 must yield to art 7, § 22 ignores the fact that the people granted local municipalities the right to consent to utilities operating within their jurisdictions, and the Legislature cannot dispense with that right. The Court of Appeals in this case held that:

“The arguments that Act 30 preempted Oshtemo Township’s ordinance and is unconstitutional ignores the clear language of constitutional provisions, MCL 460.570(1), and binding precedent.

Const 1963, art 7, § 29 makes a utility’s use of public places and rights of way subject to local approval. A local government is authorized to enact resolutions and ordinances relating to such matters; however, those enactments are ‘subject to the constitution and law.’ Const 1963, art 7, § 22.” Michigan Court of Appeals opinion, Appendix p 238a.

The Court of Appeals provided no analysis of the rights given to Oshtemo Charter Township under the first sentence of art 7, § 29 of the Michigan Constitution before subjecting those rights to the reasonableness provisions of the second sentence of art 7, § 29. The result was that the Oshtemo Charter Township consent was neither sought nor received.

III. STARE DECISIS DOES NOT REQUIRE THAT THE PURPORTED PREEMPTION OF MUNICIPAL CONSENT IN THE ETLCA BE UPHELD AS CONSTITUTIONAL.

Stare decisis is the doctrine that it is preferred to abide by and adhere to previously decided cases. Stare decisis is generally the preferred course because it promotes the even-handed, predictable and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and received integrity of the judicial process. *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW 2d 307 (2000). However, stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions. *Robinson, supra*.

In determining whether to overrule a prior case, this Court first considers whether the earlier case was wrongly decided. *Rowland v Washtenaw County Road Com'n*, 477 Mich 197; 731 NW 2d 41 (2007).

Appellant submits that holding the ETLCA is unconstitutional in so far as it purports to preempt municipal consent, is consistent with the prior legal precedent of this Court. Municipal consent for a public utility was before this Court in *Mayor of City of Lansing v Michigan Public Service Com'm and Wolverine Pipe Line Company*, 470 Mich 154; 680 NW2d 840 (2004). In that case, just as in the instant one, a public utility (a petroleum pipeline company) applied to the MPSC for approval of a pipeline route through the City of Lansing, and the City intervened. The MPSC determined that the pipeline company was not required to submit the City's approval with its MPSC application, and an appeal followed. This Court held that the pipeline company was required to obtain the City's consent, but that the consent need not be obtained prior to application to the MPSC. *Supra* at 156. This ruling was made even in face of argument by the pipeline company that requiring local consent would allow for "crippling resistance" from local units along the pipeline route. *Supra* at 164.

While the Township asserts that no such crippling resistance would result in that denial of consent remains subject to the reasonableness requirement (i.e., the consent cannot be arbitrarily withheld or unreasonably conditioned), Appellant Township agrees with the majority in the *Mayor of City of Lansing (aka Wolverine Pipe Line Company)* case. It is not for the courts to overrule a requirement provided by law.

The *Mayor of City of Lansing* case was decided at a time when MCL 247.183 echoed Const 1963, art 7, § 29, in requiring municipal consent for use of public ways by a public utility. Thereafter, the Legislature amended the statute to remove the local consent requirement.

The Court of Appeals considered this amended legislation and its constitutionality in the case of *City of Lansing v State of Michigan and Wolverine Pipe Line Company*, 275 Mich App 423; 737 NW2d 818 (2007). The COA began with a correct analysis:

“Notwithstanding the consent clause of § 29, the Legislature has provided that qualified utilities do not need to obtain the consent of local governments in order to enter upon, construct, and maintain utility lines and structures longitudinally within limited access highway rights-of-way and under any public roads, streets, or other subsurfaces that intersect a limited access highway at a different grade. MCL 247.183(2). Hence, MCL 247.183(2) appears to directly conflict with § 29. *Id* at 432.”

But then the Court veered into a tortured analysis to conclude that even though the statute negating consent was in *direct* conflict with art 7, § 29 mandate, the general power of Const 1963, art 7, § 22 controlled, and therefore the statute was not unconstitutional. *Id* at 433.

The MPSC and the Court of Appeals in this case followed this same tortured interpretation.

This is clear error of law and twists the common understanding of the Constitution’s provisions. In a nutshell, this reasoning then is that the Constitution requires a public utility to

obtain municipal consent but that consent is not required because the Legislature can limit municipal authority by virtue of § 22? Thus, the consent required in § 29 is not in fact required? By this convoluted construction, the Legislature is empowered to negate, repeal, and defeat the consent requirement *expressly* set forth in § 29. This is bootstrap logic of the most blatant kind which appears to have been used to reach a desired result not the result intended by the people of the state of Michigan in ratifying their Constitution.

In the *City of Taylor v Detroit Edison Co*, 475 Mich 109; 715 NW2d 28 (2006), this Court considered the scope of a city's power of utilities under the *reasonable control* provision of Const 1963, art 7, § 29.

“Notwithstanding that local governments obtain their authority from the Legislature, the Constitution reserves to local governments certain authorities. In this case, plaintiff relies on the authority to exercise reasonable control over its streets, which is specifically reserved in art. 7, § 29. *id* at 116.”

However, the Court focused on the third power enumerated in § 29, i.e., the power reasonable control of highways, etc., and whether the city's ordinance was reasonable. The Court held:

“A municipality may regulate “highways, streets, alleys, and public places” to the degree such regulations are consistent with state law.” *id* at 121.

Implicit in this decision is that the utility was required to obtain municipal consent in the first place.

Nevertheless, to the extent that prior precedent would support upholding the constitutionality of the ETLCA's negation of municipal consent, the prior precedent must be overturned.

The Court, in *Robinson v City of Detroit*, 462 Mich 439; 613 NW 2d 307 (2000), set forth the principles relating to stare decisis:

“Stare decisis is generally ‘the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’... However, stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes.” *id* at 319-320.

In this case, Appellant submits that stare decisis should not be used to uphold the constitutionality of the ETLCA’s denial of municipal consent.

IV. THE TOWNSHIP’S PUBLIC UTILITY ORDINANCE WAS ADOPTED TO EXERCISE THE CONSENT AUTHORITY GRANTED TO THE TOWNSHIP AND REQUIRED BY THE FIRST SENTENCE OF CONST 1963, ART 7, § 29, AND TO IMPLEMENT THE REASONABLE CONTROL PROVISION OF THE SECOND SENTENCE OF ART 7, § 29, AND IS NOT PREEMPTED NOR IN CONFLICT WITH STATE LEGISLATION IN THE FORM OF THE ETLCA.

It may be that in making its convoluted construction of Michigan’s Constitution in order to avoid municipal consent, the concern of the MPSC and Court of Appeals has been that requiring municipal consent would allow local municipalities to obstruct and prevent establishment of utility facilities throughout the state, and that statewide concerns should overrule local municipal health, safety and welfare objectives. However, this is not the case. As analyzed previously, Const 1963, art 7, § 29 has three distinct powers and obligations. While, municipal consent is clearly and plainly required by the first sentence, it is just as clear that the third obligation requires that such consent not be arbitrary or unreasonably withheld or conditioned.

In order to exercise its constitutional mandate and authority over utilities, Oshtemo Charter Township enacted its Public Utility Ordinance (Ordinance No. 114) Appendix p 103a, on October 14, 1979. This Ordinance was amended on November 11, 2011, by the adoption of Ordinance No. 525. Resolution, Appendix p 99a. This amended Ordinance was enacted in conjunction with the preexisting provisions of the Township Zoning Ordinance and Township

Master Plan 2011. Section 34, Zoning Ordinance, Appendix p 26a. There has been no holding by the MPSC or Court of Appeals that this ordinance is unreasonable or arbitrary or an invalid exercise of municipal authority. The refusal to adhere to the ordinance was premised instead on a finding of preemption by the ETLCA and without regard to its reasonableness.

Petitioner METC refused to proceed before the Township Board and filed its application with the MPSC on July 29, 2013, under ETLCA 1995, PA 30; MCL 460.561, seeking a certificate of public convenience and necessity (CPCN) for certification of an electrical transmission line.

The MPSC held that:

“Finally, the Commission agrees with the Staff and METC that under the plain language of Sections 3 and 10 of Act 30, the Commission’s grant of the CPCN preempts Oshtemo’s ordinance. Moreover, the Commission agrees with the Staff that the burden of proof demonstrating the practicality and expense of undergrounding these portions of the line in accordance with the ordinance, was Oshtemo’s not METC’s. And the Commission finds that Oshtemo failed to carry its burden; it merely offered a proposal and expected METC to undertake the required analysis. The Commission therefore rejects the recommendation in the PFD that the CPCN be conditioned on METC’s compliance with the ordinance, and the alternative recommendation that the record be reopened.” Michigan Public Service Commission order, Appendix p 227a-228a.

The Court of Appeals in its decision in this case agreed with the MPSC and stated:

“The arguments that Act 30 preempted Oshtemo Township’s ordinance and is unconstitutional ignores the clear language of constitutional provisions, MCL 460.570(1), and binding precedent.

Const 1963, art 7, § 29 makes a utility’s use of public places and rights of way subject to local approval. A local government is authorized to enact resolutions and ordinances relating to such matters; however, those enactments are ‘subject to the constitution and law.’ Const 1963, art 7, § 22.” Michigan Court of Appeals opinion, Appendix p 238a.

Section 3 of the Electric Transmission Line Certification Act, MCL 460.561, et seq, relied upon by the MPSC provides only that the "act shall control in any conflict between the act and any other law of the state." Section 10 (MCL 460.570) provides:

“If the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate. (Emphasis added)

Therefore, by the very existence of this section the entire field is not preempted by state law. In fact, Section 10 allows for local ordinance provisions to apply where they do not conflict. As a matter of law, the Michigan Public Service Commission was obligated to construe the Township’s ordinances as consistent with state law if at all possible. The MPSC was required to determine whether there was actual conflict between the Township's Public Utility Ordinance provisions and the grant of a certificate here. Instead, in direct contravention of the legislative’s expressed intent to the contrary, the MPSC found the ordinance was preempted.

The question of preemption of local ordinances by Act 30 was decided in the case of *City of Taylor v Detroit Edison Co*, 475 Mich 109; 715 NW2d 28 (2006). There the City of Taylor sought to apply its local ordinance to control the placement of transmission lines and require Detroit Edison to relocate certain lines underground. The City filed an action for declaratory relief in circuit court rather than before the MPSC as in the instant case.

The Michigan Supreme Court’s holding first recognized that local governments have the authority to adopt ordinances governing municipal concerns to the degree the regulation does not conflict with state law. *City of Taylor, supra* at 116. The Court opined, therefore, that the city's ordinance was applicable unless in actual conflict with Act 30 or the rules promulgated thereunder. The Court ruled that while the City's ordinance might regulate "in a manner that possibly

creates a conflict", the Court held that the MPSC, not the circuit court, had jurisdiction. They instructed that the MPSC "should assess whether there is an actual conflict". *Supra* at 119. Thus, Detroit Edison specifically decided that a municipal requirement that transmission lines be placed underground was not as a matter of law preempted by state law by the very existence of §§ 3 and 10 of PA 30. Instead an assessment of actual conflict on a case-by-case basis was required according to the *City of Taylor* Court.

Therefore, the MPSC's decision in the instant case directly contravenes the *City of Taylor* case and must be overturned as a matter of law. The MPSC ruled that PA 30 preempted all local regulation by the Township and failed to assess if there was an actual conflict between the provisions of the Township's ordinances and state law. The Township submits that there is no actual conflict and therefore a proper exercise of its authority under the second sentence of Const 1963, art 7, §29.

The Township's ordinances do not regulate the location of the line, nor do they regulate the construction of the line, and therefore, the ordinances are not in conflict with the MPSC's certificate of public convenience and necessity. Because the Township's ordinances are not in conflict under § 10 of PA 30 of 1995, and in spite of the fact that they may impose additional regulations, the ordinances should be allowed to stand. *Eanes v City of Detroit*, 279 Mich 531; 272 NW2d 896 (1937); *Michigan United Conservation Clubs v City of Cadillac*, 51 Mich App. 299; 214 NW2d 736 (1974).

- A. THE TOWNSHIP'S PUBLIC UTILITY ORDINANCE AND ZONING ORDINANCE ARE NOT IN CONFLICT OR INCONSISTENT WITH STATE LAW.

Appellees argued that Section 10 of the Electric Transmission Line Certification Act law preempted the Township's Public Utility Ordinance. However, analyzing the present case under the *McGraw* test, and the State statute under which Petitioners/Appellees made their request, it is clear that State law does not preempt the local ordinance.

MCL 460.570(1), being Section 10 of the Electric Transmission Line Certification Act, states:

“Sec. 10. (1) If the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate.” (emphasis added)

Appellant would argue that there is nothing inconsistent or conflicting with state law and the Township's Public Utility Ordinance because Ordinance No.114 does not regulate the location or the construction of the proposed transmission line. Appendix p 103a. A fair reading of the statute would be that the Township's Public Utility Ordinance cannot dictate the location of the line within the Township nor dictate how the line is built or constructed. The request to bury a limited portion of the line does neither. Appellees cannot cite any state law whatsoever which controls or requires the power lines in this case to travel overhead. Therefore, there is no conflict between the local ordinance and state law.

The Michigan Court of Appeals was quick to point out in the *City of Lansing v State of Michigan and Wolverine Pipe Line Company, supra*, that prior to the legislature amending MCL 247.183 to provide that qualified utilities do not need to obtain the consent of local governmental units, that the City of Lansing would have prevailed in its claim against Wolverine Pipe Line. In fact, the Court noted:

“The Court determined in *Lansing Mayor I* that, under MCL 247.183, Wolverine was required to obtain plaintiff's consent, but

did not have to obtain the consent before it could file its application with the PSC. Id. at 8-16, 666 N.W.2d 298. On further appeal, our Supreme Court likewise concluded that MCL 247.183 required Wolverine to obtain plaintiff's consent, but Wolverine did not need to obtain the consent before submitting its application to the PSC. Lansing Mayor v. Pub. Service Comm., 470 Mich. 154, 680 N.W.2d 840 (2004) (Lansing Mayor II)." *id* at 426.

It was only after the legislature removed the consent provision from MCL 247.183 that the state of Michigan and Wolverine Pipe Line prevailed before the Court. In the present case, no state laws exist with which the Oshtemo Charter Township Public Utility Ordinance is in conflict.

The Michigan Supreme Court noted in the *City of Taylor, supra*, that but for the MPSC Rules adopted in the 1970's, to-wit: Rule 460.516 regarding the replacement of existing overhead lines, the City of Taylor would likely have prevailed in that case. In fact, the Court pointed out that:

"As an initial matter, all the cases from this Court holding that a municipality has the power to force a utility to relocate its facilities at its own expense were decided before MPSC's promulgation of rules regarding the underground relocation of wires. Thus, there was no State law for the municipal action to conflict with." *id* at 120.

As analyzed in Argument I, the legislature may not as a matter of law preempt the constitutional authority granted to the Township in the first sentence of Const 1963, art 7, § 29, and is a proper and exercise of the authority granted in the second sentence thereof.

Neither is the Township Zoning Ordinance preempted by state law. The transmission line route chosen by METC/ITC will severely impact the planning and zoning developments of the Township. After years of work, the Township established a Master Plan to develop the Oshtemo Village Area upon which the Village Form-Based Code was developed. Section 34 of

Oshtemo Charter Township Zoning Ordinance Exhibit 5, Appendix p 26a. This Village Area sits on the southern edge of the Township, just north of I-94. The 9th Street Corridor is the gateway to the Township, and the METC/ITC transmission line will bring a blight on the Village.

Oshtemo Charter Township Zoning Map Exhibit 6, Appendix p 96a-98a.

This Form-Based Code goes well beyond normal zoning standards and creates a standard for all development and establishes a vision for the community, a vision which will never develop if the METC/ITC transmission line is allowed to tower over it without regard to the local community's character and concerns. Michigan law does not allow for stripping away local zoning control.

MCL 460.570(2), being § 10 of the Electric Transmission Line Certification Act, states:

“(2) A zoning ordinance or limitation imposed after an electric utility, affiliated transmission company, or independent transmission company files for a certificate shall not limit or impair the transmission line's construction, operation, or maintenance.” (emphasis added)

First, the Township would point out its Zoning Ordinance and key provisions have been in place since 1984.

Further, nothing in the Township Zoning Ordinance limits or impairs the transmission line's construction, operation or maintenance. The Michigan Supreme Court in *Detroit Edison Company v City of Wixom*, 382 Mich 673; 172 NW2d 382 (1969), struck down a height limitation on high tension power lines. However, the Supreme Court did so because Edison was found to have acquired a vested property right *prior* to the City's enactment of the zoning ordinance. METC/ITC has no such vested rights.

Detroit Edison argued that the MPSC had supremacy over Michigan electric service facilities. The Supreme Court rejected Edison's argument and held:

“Edison argues that it cannot serve two masters. Because of the size and capacity of the proposed line, the Michigan public **385 service commission requires towers averaging 132 feet high. By its ordinance, the city limits tower height to 100 feet. Citing Detroit Edison Company v. Corporation & Securities Commission (1962), 367 Mich. 104, 116 N.W.2d 194, Edison argues the principle of plenary supremacy of public service commission control over Michigan electric service utilities. (emphasis added)

* * *

The commission is not interested-nor should it be-in the [sic] effect which the construction will have on the development of the communities through which it passes. If its determination were to be binding upon local units of government, the absence of public hearings and notification to affected municipalities would suggest due process shortcomings.

The city, on the other hand, has a legitimate though narrow area of concern. It cannot prevent the construction of all high tension lines, any more than it can bar the conduct of any other legitimate enterprise. Gust v. Township of Canton (1955), 342 Mich. 436, 70 N.W.2d 772. (emphasis added)

But a city does have an interest in the location and route of a high tension electric power line. It is a specific land use which is not compatible with other land uses. It is a land use which characterizes the neighborhood, and influences the development of adjacent real estate. (emphasis added)

The public service commission statute does not vest the commission with authority to determine the routes of high tension lines except as those routes *683 bear upon ‘rates, fares, fees, charges, services, rules, conditions of service * * * ‘ or the ‘formation, operation or direction of such public utilities.’ C.L.S.1961, s 460.1 et seq. (Stat. Ann. 1965 Cum. Supp. s 22.13(1) et seq.). The first sentence of C.L.S.1961, s 460.6 (Stat. Ann. 1965 Cum. Supp. s 22.13(6) vests the commission ‘* * * with complete power and jurisdiction to regulate all public utilities in the state * * * **except as otherwise restricted by law.**’ *id* at 681-683 (emphasis added)

All the Township's Zoning Ordinance requires is that the transmission line, as it passes through the Village Area, be underground. The Township's Public Utility Ordinance requires that power lines be underground to a point 250 feet either side of the public right-of-way. Public Utility Ordinance, Appendix p 103a. This would require approximately 1,500-2,000 feet of the transmission line to be placed underground. This requirement is very limited in scope, is focused solely on the negative developmental impact which the transmission line would have on the Village Area and addresses the problem without affecting the route or the construction of the line itself. The MPSC in the *International Transmission Company, d/b/a ITC Transmission, for a certificate of public convenience and necessity for the construction of a transmission line running from and through Genoa, Oceola, Hartland, Brighton and Milford townships in Livingston and Oakland counties*, Case No. U-14861 case held, on request for reconsideration, that "The requirement that the lines be underground is not the offensive element of the ordinance in this instance." The MPSC, on page 38 of its decision in Case No. U-14861, found that it was the fact that the lines would be underground for 20.8 miles, which would nearly double the cost of the project, which caused it to be unreasonable, an argument which Appellant will address later.

B. THE TOWNSHIP'S ORDINANCES DO NOT CONFLICT WITH STATE REGULATIONS.

Appellant Oshtemo Charter Township could not locate any state regulations which specifically deal with placing electric "transmission lines" of this nature under a public street. The Township suspects that METC/ITC will likely try to bootstrap an argument based upon state regulations controlling distribution facilities. However, the only regulations which deal with electric lines being placed underground are located at Michigan Administrative Code Rules 460.511 through 460.519. However, these Regulations only apply to electric "distribution facilities" as defined by Rule 1, which read as follows:

“Rule 1. In the case of all underground extensions of electric distribution facilities as covered by these rules, the real estate developer or customer shall make a contribution in aid of construction to the utility in an amount equal to the estimated difference in cost between overhead and underground facilities. “Distribution facilities” means those operated at 15,000 volts or less to ground for wye connected systems and 20,000 volts or less for delta connected systems.” (emphasis added)

Rule 1 refers to “these rules” (R 460.511-R 460.519) and limits their application to “distribution facilities” of 15,000 or 20,000 volts or less depending on connection.

Section 1 of the Electric Transmission Line Certification Act defines a “transmission line” as “all structures, equipment and real property necessary to transfer electricity at system bulk supply voltage of 100 kilovolts or more.” MCL 460.562(K). There are no state regulations governing transmission lines.

While the MPSC has rightly held that it is not required to promulgate rules on all issues, the MPSC in *Hartland* Case No. U-14861, correctly held:

“... the failure to adopt administrative rules is not a fatal defect. The Commission is not obligated to adopt administrative rules because the Legislature used the phrase ‘the Commission may’ in passing Section 14 of Act 30, which connotes direction on the part of the Commission with regard to the adoption of administrative rules, and because the Legislature also provided in Section 14 for the Commission to conduct Act 30 proceedings in the absence of administrative rules.” (Pg 37)

However, Appellant would argue that the MPSC had to provide some rationale for finding that the ordinance is preempted and we would argue that, in this case, the MPSC Regulations themselves are insufficient. Unlike the regulations in the *Hartland* matter, Case No. U-14861, as the Appellant will argue later, the ordinance requirements of Oshtemo Charter Township are not unreasonable.

The Michigan Supreme Court noted, in the *City of Taylor v Detroit Edison Co, supra*, that but for the MPSC Rules adopted in the 1970's, to-wit: Rule 460.516 regarding the replacement of existing overhead lines, the City of Taylor would likely have prevailed in that case. In fact, the Court pointed out that:

“As an initial matter, all the cases from this Court holding that a municipality has the power to force a utility to relocate its facilities at its own expense were decided before MPSC’s promulgation of rules regarding the underground relocation of wires. Thus, there was no State law for the municipal action to conflict with.” *id* at 120.

We would argue in this case there is also no state regulation with which to conflict with because none of the regulations adopted by the MPSC conflict with the Township’s Public Utility Ordinance or Township Zoning Ordinance.

To the extent that there are state regulations on underground lines, they favor the Township’s position. While Appellant has pointed out to this Honorable Court that the regulations for underground lines found in the *Michigan Administrative Code*, Rule 460.511 – 460.519 are not applicable in this case, if they were, Rule 460.517 would require METC to place the lines underground in compliance with local ordinance. *Michigan Administrative Code*, Rule 460.517 reads as follows:

“The utility shall bear the cost of construction where electric facilities are placed underground at the option of the utility for its own convenience, or where underground construction is required by ordinance in heavily congested business districts.” (Emphasis added)

Ninth Street is the gateway to the Township as traffic flows from I-94 north on Ninth Street into the Township and the Village of Oshtemo. It is a highly congested area leading into the Village Core, which needs the protection of this Court. The Village Area should, at the very

least, be afforded the same protection from high voltage transmission lines as are afforded to local municipalities from regular distribution facilities – perhaps more.

C. THE TOWNSHIP’S ORDINANCES ARE REASONABLE AND SHOULD BE UPHELD.

Appellant has demonstrated that its ordinances are not inconsistent or in conflict, either with state law or state regulation. The only basis upon which to invalidate the Township’s ordinances would be finding them to be unreasonable. As stated previously, the controlling precedent in this case is *McGraw, supra*. In the *McGraw* case, the Supreme Court held that:

“Taking the sections together, they should be so construed as to give the power to municipalities [sic] to pass such ordinances and regulations with reference to their highways and bridges as are not inconsistent with the general state law. In other words, the municipality retains *reasonable control* of its highways, which is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the state itself with reference thereto. This construction allows a municipality to recognize local and peculiar conditions, and to pass ordinances, regulating traffic on its streets, which do not contravene the state laws. The congested condition of traffic on many of the streets of the city of Detroit is a matter of common knowledge, and these conditions make it absolutely necessary, for the protection of pedestrians and the drivers of vehicles, to enact rules and regulations peculiarly adapted to the conditions there found, and to enact ordinances to diminish the danger, and the words ‘reasonable control’ in section 28 give the power to meet just such conditions.” *supra* at 239.

This quote has been cited both by the *City of Taylor* case, *supra*, and the *City of Lansing* case, *supra*, as the precedent upon which the MPSC should make its decision with regard to the validity of the Township’s Public Utility Ordinance and Zoning Ordinance. The key is what is reasonable.

The Township would argue that its Public Utility Ordinance is very reasonable. Generally, the scope of control is very limited – 250 feet either side of a public highway. The ordinance does not dictate the type of construction. The ordinance does not control the route. The ordinance is not prohibitive, nor does it add expediently to the cost.

In U-14861, the Hartland ordinance required 20.8 miles of line to be placed underground at a cost of \$24,000,000 for a project which originally was projected to cost \$15,000,000. Also, in the *Hartland* case, ITC expressed concern regarding ground outages and heat build-up. In the present case, only a small portion of the transmission line would have to be placed underground (approximately 1,500-2,000 feet) in segments of 500-600 feet, except for the Village Area which would require approximately 2,000 feet of transmission line to be placed underground.

By limiting most of the underground segments to approximately 500 feet METC/ITC should avoid heat build-up issues or difficulties in locating underground outages.

The MPSC in its consideration of Hartland's request for reconsideration held that "the requirement that the lines be underground is not the offensive element of the ordinance." The objection was the excessive cost and the impact on rates. Given the fact that the cost to comply with the local ordinances in this case will likely not exceed the contingent amount of the proposed project, it should not be a factor in the present case.

Contrary to the conclusions in the order issued July 29, 2013, the Michigan Public Service Commission does not hold preeminent authority over the siting of a new transmission line. In fact, the Michigan Supreme Court stated, in the *Detroit Edison Co v City of Wixom, supra*, that the Public Service Commission statute does not vest the Commission with the authority to determine the routes of high tension lines, except as those route bear upon rates, fares, fees,

charges, service rules, conditions of service or the formation, operation or direction of such public utilities. MCL 460.1, et seq. The Court went on to point out that the first sentence of MCL 460.6 vests the Commission with complete power and jurisdiction to regulate all public utilities in the State, except as otherwise restricted by law.

“The public service commission statute does not vest the commission with authority to determine the routes of high tension lines except as those routes *683 bear upon ‘rates, fares, fees, charges, services, rules, conditions of service * * * ‘ or the ‘formation, operation or direction of such public utilities.’ C.L.S.1961, s 460.1 et seq. (Stat. Ann. 1965 Cum. Supp. s 22.13(1) et seq.). The first sentence of C.L.S.1961, s 460.6 (Stat. Ann. 1965 Cum. Supp. s 22.13(6) vests the commission ‘* * * with complete power and jurisdiction to regulate all public utilities in the state * * * except as otherwise restricted by law.’” *id* at 682-683 (Emphasis added).

In that case, the court specifically found that MPSC’s authority was limited. There is no ruling in *Wixom* which stands for the proposition that the Commission has “preeminent authority.”

Appellant would further contend that its regulations are eminently reasonable, consistent with the authority granted to the Township under the state Constitution, consistent with general state law and consistent with the zoning authority granted to the Township. Evidence of the reasonableness of the Township’s ordinances can be found in state law.

Certainly, the state Legislature would not impose an unreasonable limitation or regulation upon utilities operating within the State. The State, just like Oshtemo Charter Township, thought it was reasonable to require utilities to be based underground rather than overhead for certain roadways. MCL 247.183(2) provides:

“(2) A utility as defined in 23 CFR 645.105(m) may enter upon, construct, and maintain utility lines and structures, including pipe lines, longitudinally within limited access highway rights-of-way

and under any public road, street, or other subsurface that intersects any limited access highway at a different grade, in accordance with standards approved by the state transportation commission and the Michigan public service commission that conform to governing federal laws and regulations and is not required to obtain the consent of the governing body of the city, village, or township as required under subsection (1). **The standards shall require that the lines and structures be underground and be placed in a manner that will not increase highway maintenance costs for the state transportation department.** The standards may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights-of-way. The imposition of a reasonable charge is a governmental function, offsetting a portion of the capital, maintenance, and permitting expense of the limited access highway, and is not a proprietary function. The charge shall be calculated to reflect a 1-time installation permit fee that shall not exceed \$1,000.00 per mile of longitudinal use of limited access highway rights-of-way with a minimum fee of \$5,000.00 per permit. If the 1-time installation permit fee does not cover the reasonable and actual costs to the department in issuing the permit, the department may assess the utility for the remaining balance. All revenue received under this subsection shall be used for capital and maintenance expenses incurred for limited access highways, including the cost of issuing the permit.” (emphasis added)

Appellant would argue that its own regulations are not any more onerous than those placed on public utilities by the state itself, and therefore, its ordinances should be upheld.

D. ALTHOUGH THE LEGISLATURE MAY NOT IMPAIR THE RIGHT OF CONSENT, A PUBLIC UTILITY STILL HAS RECOURSE IF CONSENT IS DENIED.

The Court of Appeals in the *City of South Haven v South Haven Charter Township*, 204 Mich App 49; 514 NW2d 176 (1994), is instructive with regard to the Township’s authority, pursuant to Const 1963, art 7, § 29, to withhold its consent regarding a public utility’s use of the public rights-of-way. The Court held:

“It is clear that the trial court could not issue a writ of mandamus compelling the township to consent to the city’s request for permission to extend its water pipeline along Blue Star Memorial

Highway. The reason for this is that the granting or denying of consent by the township is discretionary, and a court cannot by mandamus compel a discretionary act. *Delly v. Bureau of State Lottery*, 183 Mich App 258, 261, 454 NW2d 141 (1990). In this matter the granting or withholding of consent by the township is a discretionary legislative function, and the township has the right to grant or withhold consent under Const. 1963, Art. 7, §29, provided the township's decision is not arbitrary and unreasonable. *Union Township v City of Mt. Pleasant*, 381 Mich 82, 90, 158 NW2d 905 (1968)." *id* at 52.

As in the case of *City of South Haven v South Haven Charter Township, supra*, there are a long line of cases cited by the Michigan Court of Appeals in *TCG Detroit v Dearborn*, 261 Mich App 69; 680 NW2d 24 (2004) which clearly state that, even though a municipality's authority to consent cannot be dispensed with, it also cannot be arbitrarily withheld. The cases cited in the *TCG* case beginning on page 87 stand for the proposition that the Legislature can not infringe upon a municipality's right to control its streets and that consent is required, but that such consent cannot be unreasonably refused or unreasonably burdensome. *Detroit v Detroit United Railway*, 172 Mich 136; 137 NW 645 (1912); *Detroit, Wyandotte and Trenton Transit Company v Detroit*, 260 Mich 124; 244 NW 424 (1932); *People ex rel Maybury v Mutual Gas-Light Company of Detroit*, 38 Mich 154; 1878 WL 6914 (1878); *Union Township v Mt. Pleasant*, 381 Mich 82; 158 NW2d 905 (1968).

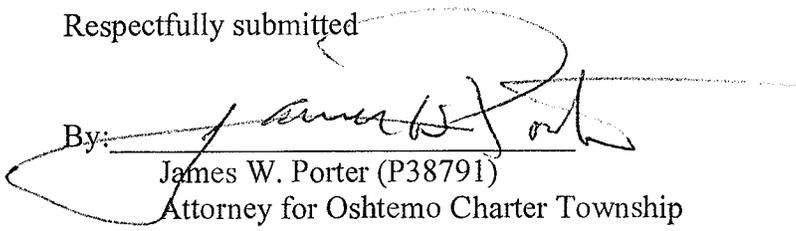
In its conclusion, the Court in *TCG, supra*, held that the question was whether the state could limit the city's ability to set the terms on which consent could be granted. Because the power to set fees was an implied permissive contractual authority and not a broad legislative authority, the Court held that the city could not withhold consent unreasonably or arbitrarily. Therefore, a reasonableness standard was applied, but unlike the case of *TCG*, which was an implied constitutional provision, the Township in this case has an expressed specific constitutional grant of authority to consent. While withholding consent cannot be arbitrary

and unreasonable, the weight of authority to exercise or withhold consent weighs in favor of the Township -- not the utility. The specific grant of authority given in the Constitution supports upholding the Township's Public Utility Ordinance.

RELIEF REQUESTED

Appellant Oshtemo Charter Township requests that this Court hold that the ETLCA is unconstitutional to the extent that it purports to preempt the requirement of municipal consent for the use of public ways by public utilities. And therefore, Appellant requests that this Court reverse the holdings of the MPSC and Court of Appeals in this case. Appellant requests that Petitioner be required to submit itself to the application of the Township's Public Utility Ordinance prior to establishing any public utility facilities within its boundaries.

Respectfully submitted

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