

IN THE SUPREME COURT  
APPEAL FROM MICHIGAN COURT OF APPEALS

*In re* APPLICATION OF MICHIGAN ELECTRIC  
TRANSMISSION COMPANY FOR  
TRANSMISSION LINE

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CHARTER TOWNSHIP OF OSHTEMO,  
Appellant,

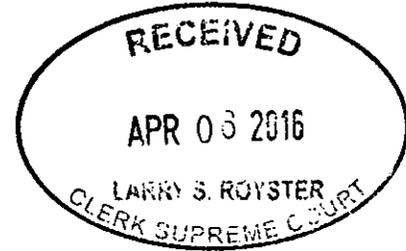
v

MICHIGAN ELECTRIC TRANSMISSION  
COMPANY LLC,  
Petitioner-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION,  
Appellee.

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

APPELLANT OSHTEMO CHARTER TOWNSHIP'S  
BRIEF IN REPLY TO APPELLEE METC'S BRIEF ON APPEAL

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Dated: April 8, 2016

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## INTRODUCTION

Appellee METC brief begins by asserting that this case, at its core, “is about whether local governments may unreasonably balkanize the electric transmission system and jeopardize the electric grid...” (METC brief, p 1.). This, like the other arguments contained therein, is a mischaracterization and a not-so-subtle smoke and mirror show to misdirect this Court and present the **illusion** that this case is not glaringly straightforward in nature. The core of this case, in truth, is whether the legislature may, through the Electronic Transmission Line Certification Act, PA 30 of 1995, MCL 460.561, et seq. (hereinafter ETLCA) negate and supersede the Michigan Constitution’s requirement of local municipal consent for utility lines. METC’s arguments rely on the assumption that allowing the municipal consent required in the first sentence of Const 1963, art 7, § 29, would necessarily be inherently *unreasonable* and ignores well established law holding that constitutional provisions may not be negated or abrogated by the legislature or through tortured judicial interpretation.

### I. STANDARD OF REVIEW

In its section regarding the standard of review, Appellee METC’s brief attempts to make this case primarily about review of an MPSC order and fact finding therein in an attempt, Appellant believes, to lead this Court to conclude that somehow the Appellant had heavy burdens for reversal that it cannot possibly meet. Review of the constitutionality of a statute presents a question of law that is reviewed de novo. *Blank v. Dep’t of Corrections*, 462 Mich 103, 112; 611 NW2d 530 (2000). A statute is presumed constitutional, unless its unconstitutionality is readily apparent. *Id.* In this case, the conflict between the ETLCA and the consent clause is readily apparent. Appellant has not failed to meet some heavy burden of proof as alleged by Appellee.

II. THE ETLCA (ACT 30) DOES CONFLICT WITH THE CONSENT CLAUSE OF CONST 1963, ART 7, § 29.

Appellee METC asserts in its brief that “neither the MPSC nor the Court of Appeals held that Act 30 ‘preempted’ the Constitution.” (METC brief, p 24.). Appellant begs to differ. The Township has always asserted its right to municipal consent pursuant to Const. 1963, art 7, § 29. The MPSC held that “under the plain language of §§ 3 and 10 of Act 30, the Commission’s grant of the CPCN preempts Oshtemo’s Ordinance.” (Appendix p 227a.). The Court of Appeals upheld this ruling, stating that “the certificate took precedence over a conflicting ordinance.” *In re Application of Mich Elec Transmission Co*, 309 Mich App 1, 15; 867 NW2d 911 (2014). This holding failed to recognize that Const, 1963, art 7, § 29 contains three separate powers:

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.
- TCG Detroit v Dearborn*, 261 Mich App 69, 79; 680 NW2d 24 (2004).

The Court of Appeals’ holding seemed to focus on the third right, and, utilizing the general language of Const 1963, art 7, § 22, interpreted that the Township’s rights with regard to the establishment of utility lines was subject to the enactments of the legislature, thereby negating the right of consent since Act 30 provides that once granted a certificate the utility need not seek or obtain municipal approval. MCL 460.570(3). As analyzed in Appellant’s original brief, this is bootstrap logic of the most patently obvious sort. (See also the analysis, *infra*.).

Whether one calls it preemption or taking precedence, the effect is the same. As a result of the MPSC and Court of Appeals holdings, the Township was deprived of the right to consent called for in the Michigan Constitution.

Indeed, it is significant to note that METC did not have to seek MPSC approval through the certificate process. Act 30 requires a utility to adhere to the certificate process set forth

therein to establish major transmission lines. However, the lines at issue in this case were ordinary transmission lines, not major transmission lines, and therefore, the process is discretionary. MCL 460.565; MCL 460.569. METC admits in its brief that it did so as a discretionary matter to avoid the Townships review and consent. Appellee states “(a)voiding this process...was a chief reason METC filed its application with the MPSC.” (METC brief, p 25.). METC makes much of the requirements in the Township’s Ordinances, inferring that they were burdensome. But the information sought was no more burdensome than that required in the MPSC process and perhaps less so. Instead, METC sought a process that it believed would deprive the Township of the consent called for by the people of the State of Michigan in their Constitution.

Even though METC says in its brief that this case is not about preemption, to paraphrase Shakespeare, preemption by any other name has the same stink. METC’s argument may be long and twisty, but when the Gordian knot is unraveled, the logic goes like this:

1. The Michigan Constitution in art 7, § 29 requires local government consent for electric transmission lines.
2. Consent must be reasonable and consistent with state law.
3. Local government consent would balkanize and jeopardize the electrical grid.
4. The ETLCA provides for a reasonable state process to avoid local government consent.
5. Therefore, requiring local government consent is not reasonable and is not consistent with the law of ETLCA.
6. The Certificate issued pursuant to the ETLCA “takes precedence” over local approval.
7. Thus, local government consent is not required.

**A. METC’S ARGUMENT THAT ACT 30 ONLY CONFLICTS WITH THE TOWNSHIP’S ORDINANCE(S) IS ERRONEOUS AS A MATTER OF LAW AND LOGIC.**

While, Appellee argues that there is not preemption earlier in its brief, Argument II.A. seems to admit that preemption or something akin to preemption is at the heart of its reasoning. METC sets forth ETLCA § 10 which 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.” MCL 460.570 (1).

Then Appellee argues that the Township’s Utility Ordinance as to a portion of the proposed lines being underground conflicts with the certificate granted by the MPSC and therefore, then argues that since there is conflict, the certificate takes precedence. The Township then, according to this logic, does not get a right of consent in this case.

This argument ignores or deliberately obscures three vital points:

(1) The right of consent in the first sentence of Const 1963, art 7, § 29 is separate and distinct from the franchise and reasonable control rights and therefore is separate and distinct from the Township’s Utility Ordinance. The consent requirement is self-executing. (See page 7 of this brief, *infra*.) The Township does not need to implement its consent through an ordinance or resolution; it may do so by a motion at an open meeting.

(2) The Utility Ordinance was adopted to implement the **reasonable** control right. Merely, by adopting an ordinance which controls the process for dealing with a request for consent, the Township does not somehow lose its right of consent. The analysis must be multi-step since there are three distinct rights within § 29. Instead, Appellee conflates all three into one and then asserts that state statute takes precedence.

(3) Appellee’s entire argument ignores the huge elephant in the room, or in the law as it were, i.e., that the legislature does not have authority to negate a constitutional provision.

*Attorney General ex rel. O’Hara v Montgomery*, 275 Mich 504; 267 NW 550 (1936).

Constitutional mandate cannot be restricted or limited by the whims of a legislative body through enactment of a statute.” *AFSCME Council 25 v Wayne County*, 292 Mich App 68, 93; 811 NW2d 4 (2011).

Act 30 makes provision for a certificate that takes *precedence* over local municipal consent in direct opposition with the Constitution in art 7, § 29 and thus is unconstitutional. Appellee states: “It’s the certificate that conflicts with the ordinance...” as if somehow that will remove the unconstitutionality because it is not the ETLCA itself. It is not the Township’s Utility or Zoning Ordinances with which the Act conflicts; it is the Constitution’s consent requirement.

B. METC’S ARGUMENT THAT THE ETLCA DOES NOT CONFLICT WITH CONST 1963, ART 7, § 29, EMPLOYS FALLACIOUS REASONING AND IGNORES LEGAL PRECEDENT IT CITES REGARDING CONSTITUTIONAL INTERPRETATION AND CONSTRUCTION.

Appellee METC’s brief in this section accurately recounts the language of Const 1963, art 7, § 29 noting that it contains three separate clauses: (1) consent, (2) franchise, and (3) reasonable control *City of Lansing v State of Michigan and Wolverine Pipe Line Company*, 275 Mich App 423, 431; 737 NW2d 818 (2007), and gives lip service to the fact that the first clause, i.e., consent, is that which is primarily at issue in this case.

Appellee correctly states that the primary objective is to realize the intent of the people by whom and for whom the Constitution was ratified. *National Pride at Work, Inc v Governor of Michigan*, 274 Mich App 147, 157; 732 NW2d 139 (2007). Citing *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 39-40; 703 NW2d 822 (2005), the Appellee notes that the Court’s task is to ascertain and give effect to the common understanding of the text at the time of ratification. If the language is clear, reliance on extrinsic evidence is inappropriate, citing *In re Proposal C*, 384 Mich 390, 405; 185 NW2d 9 (1971). However, Appellee stops short of recognizing other established rules of constitutional construction.

It is well settled that every provision in our constitution must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). All

constitutional provisions enjoy equal dignity and require construction of every clause or section of a constitution consistently with its words, to protect and guard its purposes. *In re Proposals D & H*, 417 Mich 409, 421; 339 NW2d 848 (1983). “Words must be given their ordinary meanings....” *Lapeer Co Clerk, supra* at 156; 665 NW2d 452. **If there is a conflict between general and specific provisions in a constitution, the more specific provision must control in a case relating to its subject matter.** *National Pride at Work, Inc., supra* at 153.

As stated previously, Appellee acknowledges that the primary clause at issue in Const 1963, art 7, § 29 is the consent clause contained in the first sentence. This section states as follows:

“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 . . .”

In contrast Const 1963, art 7, § 22 is clearly a provision as to municipal authority with regard to adoption of ordinances and resolutions in general, providing:

“Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law . . .”

There can be no doubt that § 29 is the more specific of the two sections concerning municipal authority regarding public utilities and the placement of utility lines within municipal boundaries. Nevertheless, Appellee asserts, in direct opposition to the black letter law on interpretation of constitutional provisions, that the general language of § 22 should be elevated over and limit the specific authority contained in § 29. Moreover, this reasoning fails to recognize that municipal consent need not be exercised via ordinance or resolution but by

ordinary motion and thus is not subject to the terms of art 7, § 22 at all. Appellee attempts to assert that the provision is not self-executing but this is erroneous.

The case of *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986), is instructive. At issue therein was the constitutionality of a statute which provided that a petition for constitutional amendment was stale if made more than 180 days before filing. Appellants argued that the statute was in conflict with Const 1963, art 12, § 2. However, the Court recognized that art 12, § 2, itself stated that “Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.” Therefore, the framers of the Constitution invited legislative enactment prescribing the petition process in the section itself. The framers of the Constitution could have done the same to art 7, § 29, but did not. The absence of that language itself indicates that the people did not so intend.

In part, Appellee’s mistaken reasoning appears to be due to the fact that Appellee’s, even though it notes that the consent clause is being interpreted, chooses to focus instead on the “reasonable control” clause of art 7, § 29 to argue that municipal consent is not “unfettered.”

The Township, acknowledges that consent must not be unreasonably withheld or conditioned. However, Appellee’s interpretation of the consent clause in art 7, § 29 — utilizing the general language of § 22 and the ETLCA— would void or negate the need for any municipal consent or at best make such consent a rubber stamp that in no cases could be denied or conditioned as long as a petitioner obtained MPSC approval. This is a circular logic that clearly results in the abrogation, negation and emasculation of the consent provision.

It is a long and winding road to get to Appellee’s interpretation, but it boils down to this:

- (1) Art 7, § 29 requires municipal consent for the establishment of electrical transmission lines.
- (2) Art 7, § 22 provides that municipal ordinances and resolutions in general are subject to legislative enactment.
- (3) Thus, municipal consent for utility lines are subject to legislative enactment.

- (4) Legislative enactment in Act 30 offers a procedure whereby the utility company may obtain a certificate that takes precedence over municipal consent.
- (5) Thus, the Township does not get a right to consent to the establishment of electrical transmission lines.

There is no way but to conclude that Act 30 is being interpreted to negate, contravene, and preclude the municipal consent called for in art 7, § 29.

C. APPELLEE'S ARGUMENTS MISSTATE THE LAW AND APPELLANT'S ARGUMENTS.

It should be noted that Appellee's brief mentions the Michigan Zoning Enabling Act which, in MCL 125.3205(1)(a) states that zoning ordinances are subject to the ETLCA. There are two things wrong with the way Appellee uses this citation. First, the Utility Ordinance of the Township is a police power ordinance and not a zoning ordinance. *Austin v Older*, 283 Mich 667; 278 NW 727 (1938). Second, no matter whether in the Zoning Enabling Act or in the ETLCA, the legislature does not have the authority to negate a constitutional mandate.

Even Appellee's brief recognizes that a constitutional provision should not be nullified through the interpretation process. (METC brief, p 34). However, Appellee then goes forward to argue for nullification of the municipal consent clause under the guise that the Township's consent would be unreasonably denied or conditioned based.

Focusing on the Township Ordinance provisions as to "underground lines", Appellee cites the case of *City of Taylor v Detroit Edison Co*, 475 Mich 109; 715 NW2d 28 (2006). However, that case is distinguishable from the instant one in that it deals with the reasonable control clause of § 29 AND concerns the **relocation of existing lines** not the establishment of **new** utility lines. Appellee seems to assert that since METC has established other utility lines within the Township in prior years as part of projects unrelated to the instant one, that somehow the Township has already granted consent, and this is akin to relocating those lines as in *City of*

*Taylor, supra*. This reasoning ignores the fact that consent language in § 29 refers to establishing lines. As analyzed previously, the franchise clause (which concerns the general doing business within the township) is a separate and distinct clause. Moreover, while the MPSC has promulgated rules governing the relocation of existing utility wires, and therefore the City of Taylor's Ordinance conflicted with these regulations, the MPSC has not promulgated any rules concerning the establishment of new wires underground. There is no conflict with the Ordinance's requirements as to underground construction or that the cost of that be borne by the utility. In fact the MPSC ALJ who heard the testimony and evidence recommended that the certificate be conditioned upon compliance with the Ordinance (Appendix 212a). The MPSC did not adhere to this ALJ recommendation in its order seemingly based upon the erroneous holding that local municipal consent was preempted.

### III. APPELLEE'S FINAL ARGUMENT IS AN EXERCISE IN CIRCULAR REASONING.

The final section of Appellee's brief engages in another long circular argument concerning preemption or "taking precedence," asserting that the MPSC certificate preempts or takes precedence over the Township's Ordinance. When broken down it goes like this:

- (1) METC voluntarily subjected itself to the MPSC certificate process in order to avoid seeking municipal consent and application of the Township's Ordinances including the Public Utility Ordinance.
- (2) The MPSC granted a certificate for the project (CPCN), finding that the local Ordinance was preempted.
- (3) The ETLCA (Act 30) states that once granted the CPCN takes precedence over local consent and local Ordinance
- (4) Therefore, the local Ordinances conflict with the ETLCA and are unreasonable, thus not a proper exercise of reasonable control under the third clause of art 7, § 29. The Township Ordinances are preempted and therefore they are unreasonable and preempted.

If this Court were to adopt this reasoning it would essentially be saying that the Township's Ordinances are preempted because they are preempted.

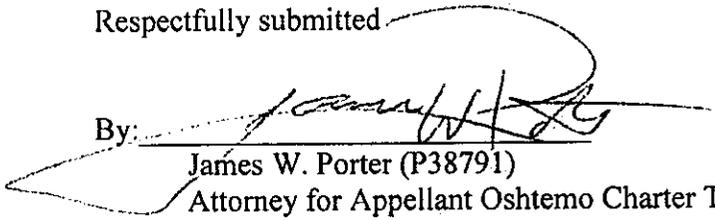
There is no inherent conflict between the Township's Ordinances and the ETLCA provisions or promulgated rules concerning the placement and construction of new lines. The conflict and alleged preemption comes not from the substantive terms of the ETLCA and its purported negation of local municipal consent in general where a certificate is granted.

RELIEF REQUESTED

Appellant Township requests that this Court reject the arguments of Appellee METC in this case and overturn the holdings of the MPSC as affirmed by the Court of Appeals.

Respectfully submitted

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