STATE OF MICHIGAN

COURT OF APPEALS

F & F ALL SEASONS INC.,

Plaintiff-Appellant,

v

MILTON TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
April 19, 2002

No. 228669
Cass County Circuit Court
LC No. 99-001016-CZ

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying its motion for summary disposition and granting defendant's motion for summary disposition. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant because the ordinance improperly usurps the township board's ability to use its discretion in granting or denying permits and the ordinance is in direct conflict with a state statute. Plaintiff claims that because MCL 750.243b provides for a procedure by which a party may acquire a permit to use fireworks that are otherwise prohibited by MCL 750.243a, defendant must accept and have a method to review such permit requests. We disagree. A trial court's decision to grant summary disposition is reviewed de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In Michigan, it is unlawful to sell or keep for sale, possess, furnish, transport, use, or explode certain fireworks, including what is generally defined as Class B fireworks. MCL 750.243a(2). As defined in MCL 750.243a(1)(b), Class B fireworks include:

> toy torpedoes, railway torpedoes, firecrackers or salutes that do not qualify as class C fireworks, exhibition display pieces, aeroplane flares, illuminating projectiles, incendiary projectiles, incendiary grenades, smoke projectiles or bombs containing expelling charges but without bursting charges, flash powders in inner units not exceeding 2 ounces each, flash sheets in interior packages, flash powder or spreader cartridges containing not more than 72 grains of flash powder each, and other similar devices.

Although Class B fireworks are generally prohibited in Michigan, a local municipality "may grant a permit" for such fireworks pursuant to MCL 750.243b(1), which provides:

> [T]he township board of a township, upon application in writing, . . . *may grant a permit* for the use of fireworks otherwise prohibited by section 243a . . . for public display . . . . [Emphasis added.]

In the present case, defendant enacted a township ordinance that prohibits the use of Class B fireworks, including any display of such fireworks under any circumstances. The township ordinance in question states that its purpose is to

> prohibit and make unlawful the use of Class B fireworks . . . within the Township for public display . . . in order to minimize or reduce the potential fire and safety hazard created by the explosion of Class B fireworks and otherwise provide for the health, safety and welfare and residents and property owners of the Township by the prohibition of Class B fireworks displays.

We find no merit with regard to plaintiff's first argument that the ordinance improperly usurps the township board's ability to use discretion in granting or denying permits. In making this argument, plaintiff relies on two cases, *Rieth v Keeler*, 230 Mich App 346; 583 NW2d 552 (1998) and *Hanks v SLB Management, Inc*, 188 Mich App 656; 471 NW2d 621 (1991). These cases are distinguishable from and inapplicable to the present case because they involved a trial court's failure to exercise its discretion. Plaintiff cites no authority that defendant township is governed by the same standard. Further, defendant did exercise its discretion in this case by enacting the ordinance and still has the discretion to rescind or amend that ordinance at a later time.

Further, contrary to plaintiff's assertion, the ordinance in question does not directly conflict with MCL 750.243b. A municipality is precluded from enacting an ordinance if the ordinance is in direct conflict with a state statute.[1] *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977). "A direct conflict exists . . . when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id*. at 322, n 4.

Plaintiff argues that defendant "cannot prohibit what is permitted by the state." Thus, it would appear that plaintiff is erroneously assuming that Class B fireworks are permitted because a permit process is provided for under MCL 750.243b. However, what plaintiff fails to realize is

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[1] A municipality is also precluded from enacting an ordinance if the state statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even where no direct conflict exists between the two schemes of regulation. *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977). On appeal, although defendant and amicus curiae address preemption, it appears that plaintiff only raises the conflict argument and does not raise the preemption argument. "'[P]reemption' and 'conflict' are separate doctrines upon which a municipal ordinance may be found to be invalid." *Detroit v Recorder's Court Judge*, 104 Mich App 214, 231; 304 NW2d 829 (1981). Plaintiff has failed to address any of the guidelines to determine whether preemption exists in this case. *Id*. at 322-324 (certain guidelines should be examined to determine if the state has preempted the field of regulation that the city seeks to enter). Thus, this issue has been waived. *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997). In any event, we agree with the trial court that no preemption exists in this matter.

that MCL 750.243a(2) already *prohibits* the use of Class B fireworks, and MCL 750.243b only provides that the township "may" grant a permit, which indicates discretion and not a mandate. *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 631; 583 NW2d 215 (1998). Thus, defendant is only prohibiting what the state is already prohibiting, and is not permitting what the state is prohibiting or prohibiting what the state is permitting. *Llewellyn*, *supra* at 322, n 4. MCL 750.243b clearly gives defendant the option to issue a permit. There is, however, no statutory requirement that defendant must consider a request for a fireworks display. In this case, defendant has chosen not to issue any permits because of the hazard created by fireworks displays. This is certainly within defendant's authority. In *Detroit v Qualls*, 434 Mich 340, 363; 454 NW2d 374 (1990), our Supreme Court stated:

> [T]he municipality retains reasonable control of fireworks which is such control as cannot be said to be unreasonable and inconsistent with regulations established by state law. This construction allows a municipality to recognize local conditions and enact rules and regulations peculiarly adapted to such conditions. . . . As hazardous materials, the very nature of fireworks lends itself unquestionably to regulation adapted to local conditions. [Citation omitted.]

We conclude that the township ordinance does not conflict with MCL 750.243b.

Plaintiff also states that defendant's proffered reasons for enacting the ordinance are no longer valid. Plaintiff claims that since the trial court's decision in this matter, defendant has contracted for both fire and EMS services and that the recently adopted National Fire Protection Association's rules governing fireworks displays remedies the problem of the township board members having no knowledge and expertise in pyrotechnics. Plaintiff's assertions do not warrant reversal or a remand in this matter.

When an ordinance is enacted in the interest of the public health, safety, and welfare, it is presumed to be valid. *Square Lake Hills Condominium Assoc v Bloomfield Twp*, 437 Mich 310, 318, n 14 (Riley, J.); 471 NW2d 321 (1991); *Kirk v Tyrone Twp*, 398 Mich 429, 439; 247 NW2d 848 (1976). However, the ordinance may be declared invalid only when it plainly appears that it does not tend to promote the public health, safety, and welfare and the power to legislate has been exercised arbitrarily. *Square Lake Hills*, *supra* at 318-319, n 14. Further, the test for determining whether an ordinance is reasonable requires a determination of the existence of a rational relationship between the exercise of police power and the public health, safety, morals, or general welfare in a particular manner in a case. *Id*. at 318. Township ordinances are not subject to judicial intervention absent an abuse of discretion, excessive use of power, or error of law. *Id*. at 317. This Court will not substitute its judgment for that of a township official when reviewing a township ordinance. *Id*.

According to the ordinance in this case, it was enacted to reduce the potential fire and safety hazard created by the explosion of Class B fireworks and to provide for the health, safety, and welfare of the residents of the township. The ordinance states that the township board has no expertise in fireworks and that the township has no fire department and no police department within its borders. Defendant also claims that it has no ambulance service or rescue equipment located within its borders. Regardless of whether defendant has contracted recently with neighboring communities for fire and police protection, the fact remains that these services are not provided for within its borders, and any hazard resulting from any fireworks displays cannot

be as quickly remedied. For these reasons, the ordinance is reasonable regardless of whether the National Fire Protection Association has now issued certain rules regarding fireworks displays. Because the ordinance clearly tends to promote the public safety, health, and welfare and the power to legislate has not been exercised arbitrarily, we will not declare the ordinance to be invalid. *Square Lake Hills, supra* at 318-319, n 14. We find no abuse of discretion, excessive use of power, or error of law; therefore, judicial intervention is inappropriate. *Id*. at 317.

We affirm.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray