STATE OF MICHIGAN

COURT OF APPEALS

CIERRA BUILDING COMPANY, Plaintiff-Appellee, v CHARTER TOWNSHIP OF HARRISON, Defendant-Appellant.	UNPUBLISHED February 17, 2009 No. 280628 Macomb Circuit Court LC No. 05-004997-CZ

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's order granting a declaratory judgment in favor of plaintiff in this zoning dispute. For the reasons set forth in this opinion, we reverse the trial court's granting of declaratory relief in favor of plaintiff.

I. Background

In 2005, the Harrison Township Planning Commission considered and denied plaintiff's request to rezone nine separate lots from B-3 General Commercial to R-1-D Single Residential. Plaintiff thereafter filed a complaint seeking declaratory relief and alleging that defendant's actions had violated its procedural due process and equal protection rights. On the date scheduled for trial, plaintiff orally moved to amend its complaint before the bench trial began.

Plaintiff requested that the trial court make a declaratory determination interpreting Harrison Township's Zoning Ordinance, which plaintiff argued was a "pyramid" whereby uses in "lower" classifications were permitted in "higher" classifications. Under plaintiff's pyramid theory, plaintiff opined that as a matter of right, it was entitled to build residential dwellings on its nine lots. Defendant did not offer an alternative reading of the Ordinance, but did, however, allege that Ordinance § 10.40(A) and § 3.09 seemed to directly conflict.[1] Therefore, defendant requested that the trial court determine which of the two sections was more specific.

[1] The part relevant to plaintiff's argument in Section 10.40(A) states that "any one of more of the permitted uses in section 10.30 of the B-2 district, except as otherwise provided herein." [Ordinance Section 10.40(A)(1)]. Section 3.09 of the Ordinance states: "No dwelling shall be (continued…)

On August 17, 2007, the trial court issued an opinion and order granting plaintiff's motion for declaratory relief and ruling that it may use its nine lots for single family residences in accordance with the R-1-D zoning district. The trial court accepted plaintiff's proposed reading of the Ordinance as a pyramid and resolved the conflict between Ordinance § 10.40(A)(5) and § 3.09 by determining that § 3.09 was the more general provision.

II. Statutory Interpretation of Zoning Ordinance.

Statutory interpretation presents a question of law considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). The rules of statutory interpretation also apply to ordinances,[2] *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 568 n 15; 737 NW2d 476 (2007), and we review the trial court's interpretation of the township zoning ordinance de novo. *Twp of Yankee Springs v Fox*, 264 Mich App 604, 606; 692 NW2d 728 (2004).

The main goal of statutory interpretation is to "ascertain and to give effect of the intent of the Legislature." *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). The first criterion in determining intent is the specific language of the statute. *Id*. The Legislature is presumed to have intended the meaning it plainly expressed. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), and clear statutory language must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). If the meaning of the language is clear, judicial construction is normally not necessary or permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). A provision "is ambiguous only if it irreconcilably conflicts with another provision, or when it is *equally* susceptible to more than a single meaning." *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation and internal punctuation omitted, emphasis in original).

The trial court correctly noted that if § 3.09 and § 10.10(A)(5) directly conflicted, then the appropriate method of interpretation was for the specific provision to prevail over the more general provision. *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008). In such a situation, the trial court's analysis of § 10.10(A)(5) as more specific than § 3.09 would appear to be correct. The trial court erred, however, when it accepted both parties' assumption that the Ordinance be read in as a pyramid. Such a reading of the Ordinance violates this Court's well-settled principles of statutory interpretation. Ordinance § 10.10(A)(5) does not apply to plaintiff's property because § 10.10(A)(5) governs the O-1 Office Service zoning district, not plaintiff's nine lots, which are located in the B-3 General Business zoning district. Therefore, the trial court erred by relying on a purported conflict between § 3.09 and § 10.10(A)(5).

(…continued)

erected in an commercial, industrial or other nonresidential districts. However, the sleeping quarters of a watchman or a caretaker, not constructed as permanent sleeping or housekeeping facilities, may be permitted in such districts in conformance with the specific requirements of the particular district."

[2] This Court interprets ordinances in the same manner that it interprets statutes. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422; 616 NW2d 243 (2000). Therefore, our discussion of statutory interpretation equally applies to the interpretation of ordinances.

Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Plaintiff's proposed reading, however, ignores language written and distinctions drawn, which evidence that the drafters never intended to create a pyramid. The drafters of the Ordinance made explicit distinctions between the various provisions. For example, Section 10.40(A)(1), § 10.30(A)(1), and § 10.20(A)(1) each contain the phrase "except as otherwise provided herein," whereas § 10.10(A)(5) does not. Further, the drafters wrote § 10.40(A)(1) and § 10.20(A)(1) as virtually identical provisions, with the only distinction being the additional section that operates as a "permitted use" in each provision. In contrast, the drafters in § 10.30(A)(1) added an additional sentence allowing for not one, but two, additional sections to be "permitted uses." A similar provision does not exist in any of the other provisions.

When interpreting a statute, the reviewing court should presume that every word has some meaning. *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 565; 741 NW2d 549 (2007). We cannot ignore distinctions made by the drafters within the Ordinance's plain language. Instead, we must presume that these different words and sentences each have meaning. As we have noted, as far as possible, effect should be given to every clause and sentence. *VanderWerp v Plainfield Twp*, 278 Mich App 624, 627; 752 NW2d 479 (2008). Plaintiff's proposed reading of the Ordinance does not give effect to every clause and sentence. Instead, plaintiff ignores salient clauses such as § 10.20(A)(1) altogether and fails to address distinctions created by the drafters in § 10.40, § 10.30, § 10.20, and § 10.10.

The basis of plaintiff's argument would virtually render the intent of the Ordinance to contain certain uses to particular areas of Harrison Township void. When reviewing the Ordinance as a whole, it is clear that the drafter's intended that as you move backward from heavy industrial use to light residential, almost every step of the process contains some form of a permitted use from the prior step. Critical to understanding the Ordinance is that each step of that process stands alone. Hence, in the classification for the plaintiff's property, B-3, the owner is permitted "[A]ny one or more of the permitted uses in section 10.30 of the B-2 district…" However, the crux of plaintiff's argument is that you fall down all the stairs by stringing together a series of permitted uses from each prior classification until you arrive from a general business district to a residential property. Such a reading clearly conflicts with the plain wording and meaning of the Ordinances as a whole.

Plaintiff's reading of the Ordinance also ignores that among the relevant provisions only § 10.30(A)(1) expands its language to include *both* "[a]ny one or more of the permitted uses in section § 10.20 of the B-1 district, except as otherwise provided herein," *and* "[p]ermitted uses in the O-1 district[.]" A similar second sentence does not appear in § 10.40(A)(1) or § 10.20(A)(1), and we view the omission of such a sentence as intentional. *Id*. Because we do not include provisions that the drafters did not include themselves, the trial court erred by applying the second sentence of § 10.30(A)(1) as if the drafters had wrote a similar sentence in the other relevant provisions. The omission of a provision in one part of a statute that is included in another part should be interpreted as intentional and the courts should not include provisions that the Legislature did not. *Polkton Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

III. Declaratory Relief and Reasonableness under Zoning Ordinance

The parties also dispute whether the Ordinance is an unreasonable restriction on plaintiff's use of its property. The parties addressed this issue in their trial briefs, but the trial court did not address the issue and instead determined that the Ordinance permitted plaintiff's proposed use of its nine lots. Thus, this issue is unpreserved. Appellate consideration of an issue raised before but not specifically decided by the trial court is not precluded. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 324; 651 NW2d 811 (2002). Review may be granted if consideration of the issue is necessary to a proper determination of the case or if the question is one of law concerning which the necessary facts have been presented. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

We presume that a challenged zoning ordinance is valid. *Dorman v Clinton Twp*, 269 Mich App 638, 650; 714 NW2d 350 (2006). Here, plaintiff had the burden to show that the Ordinance was an arbitrary and unreasonable restriction on its use of the property. *Kyser v Kasson Twp*, 278 Mich App 743 (2008); 755 NW2d 190 (2008).

As the trial court noted, townships have no inherent powers, but only possess the limited powers conferred on them by the Legislature or the state constitution. *Hess v Cannon Twp*, 265 Mich App 582, 590; 696 NW2d 742 (2005). According to the Michigan Township Zoning Act ("TZA"), the predecessor[3] to the current Michigan Zoning Enabling Act, townships have authority to "provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township outside the limits of cities and villages which regulate the use of land and structures . . . ." MCL 125.271; *Grabow v Macomb Twp*, 270 Mich App 222, 227; 714 NW2d 674 (2006). The TZA is the enabling statute that vests a township with the authority to regulate land use, and among other things, the TZA authorizes zoning ordinances, MCL 125.273. *Id.* This Court construes statutes related to townships liberally in their favor. Const 1963, art 7, § 34; *Burt Twp v DNR*, 459 Mich 659, 666; 593 NW2d 534 (1999).

Under the general rule, a zoning ordinance will be presumed valid, with the burden on the party attacking it to show it to be an arbitrary and unreasonable restriction upon the owner's use of his property. On the day scheduled for trial where plaintiff would have attempted to show that the Ordinance was an unreasonable restriction on its proposed use, plaintiff made an oral motion to amend its complaint based on its reading of the Ordinance as a pyramid. The trial court granted this motion. As a result, neither party presented the arguments made in their trial briefs. The parties did, however, recapitulate some of their arguments in this Court, including the "reasonableness" argument. Because this issue involves a question of law and the facts necessary for its resolution have been presented, we may consider the "reasonableness" of defendant's refusal of plaintiff's request to rezone its nine lots for residential development. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

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[3] Pursuant to MCL 125.3702(2), the repeal of the TZA by the Michigan Zoning Enabling Act, effective July 1, 2006, does not affect the applicability of the TZA here because litigation between the parties was pending on June 30, 2006.

Both parties concede that, "the court generally looks to the existing uses and the zoning of nearby properties in determining reasonableness." *Schwartz v City of Flint*, 426 Mich 295, 328; 395 NW2d 678 (1986). Defendant zoned and master planned plaintiff's property for general commercial or business use in accordance with Harrison Township's 1992 Master Plan. The land surrounding plaintiff's property includes B-3 zoning to the north, south, and west as well as R-1-D zoning to the east. Nearby properties include a party store, various businesses, and a restaurant. One nonconforming single family residence is located north of plaintiff's property.

Plaintiff cites *Williams v City of Troy*, 269 Mich App 670; 713 NW2d 805 (2005`), as one instance where this Court noted that the city of Troy was "statutorily required to approve a site plan that was submitted in compliance with its zoning ordinance and other applicable laws." In contrast to *Williams*, however, plaintiff's plans for the nine lots do not comply with the Ordinance. Therefore, defendant has no obligation, statutory or otherwise, to rezone plaintiff's property.

A basic goal of land use regulation is to segregate incompatible uses. *Dorman*, *supra* at 652. In Articles 9 through 12 of the Ordinance, the drafters expressly segregate incompatible uses by providing different requirements and zoning districts for residential, office and business, waterfront, and manufacturing development uses. The drafters did not allow for the construction of residential housing within the B-3 General Business zoning district. We recognize that such segregation reflects a basic goal of land use regulation. *Id*. A master plan adopted in compliance with statutory requirements by a responsible political body is of itself evidence of reasonableness. *Parkdale Homes Inc v Clinton Twp*, 23 Mich App 682, 686; 179 NW2d 232 (1970). Therefore, we conclude that plaintiff failed to shoulder its evidentiary burden regarding "reasonableness" and that the trial court improperly granted a declaratory judgment in favor of plaintiff.

Reversed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello