

STATE OF MICHIGAN
COURT OF APPEALS

ASSOCIATED BUILDERS AND
CONTRACTORS,

Plaintiff-Appellee,

v

CITY OF LANSING,

Defendant-Appellant.

FOR PUBLICATION
May 27, 2014

No. 313684
Ingham Circuit Court
LC No. 12-000406-CZ

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

SAWYER, P.J. (*dissenting*).

I respectfully dissent.

The majority seems to recognize that the ordinance at issue is invalid under the Supreme Court's ruling in *Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923). And the majority acknowledges that we are required to follow the decisions of the Supreme Court. *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008). But the majority argues that there has been a sufficient change in the law in the ninety years following the *Lennane* decision to warrant this Court ignoring it. I disagree.

The majority looks to a phrase in Const 1963, art 7, § 34, not contained in the 1908 Constitution, which states that provisions of the constitution and law concerning cities "shall be liberally construed" in the favor of the city. The majority also looks to various decisions of this Court and the Supreme Court that reiterate that principle. I certainly have no basis to disagree with that general principle. But what is lacking is any provision in the constitution or statute that expressly grants a city the authority to enact the type of ordinance at issue here that represents a change in law after the ruling in *Lennane*. That is, there is no particular reason to believe that the people in enacting the 1963 Constitution had any disagreement with the holding in *Lennane*. Nor has the Legislature seen fit to amend the Home Rule City Act, MCL 117.1 *et seq.* to explicitly grant the authority which *Lennane* concluded that cities lack. Indeed, the majority acknowledges that the statutory grant of authority to cities to enact ordinances, MCL 117.4j(3), reads the same today as it did at the time of *Lennane*. *Ante*, slip op at 4 n 2.

What the majority overlooks is that the broad grant of authority to the cities, which authority is to be "liberally construed" in favor of the city, is to regulate matters of "municipal concern" and that *Lennane* held that the type of ordinance at issue in that case and in the case at

bar involves issues of *state* concern. *Lennane*, 225 Mich at 641. The Supreme Court in *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115-116; 715 NW2d 28 (2006), reiterated that a municipality derives its authority from either a grant by the Legislature or the constitution itself. But both the constitution and the HRCA only grant cities the authority to legislate over issues of municipal concern. Const 1963, art 7, § 22; MCL 117.4j(3). Indeed, in discussing the various cases that state that cities enjoy a broad grant of authority, the majority conveniently omits the fact that those cases make that statement in the context of the cities' power over municipal concerns. See, e.g., *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 270; 566 NW2d 514 (1997) ("the home rule cities act affords home rule cities broad power to act on behalf of municipal concerns").

Furthermore, this principle is not contradicted by the majority's observation that a home rule city's police power "is of the same general scope and nature as that of the State." *People v Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945). Rather, cities possess such broad police powers within the area of authority granted to them by the constitution or statute. Indeed, *Sell* found that the ordinance at issue was within the powers granted by statute.¹

And the Court's conclusion in *Lennane* that this is a matter of state concern has never been overruled. Therefore, even if we apply a "liberal construction" to defendant's powers, they do not extend to this ordinance until and unless the Supreme Court revisits its conclusion in *Lennane*, or the Legislature explicitly grants cities the power to adopt prevailing wage ordinances.

In sum, while it may be time for the Supreme Court to revisit *Lennane* and determine whether the principles set forth in that decision remain applicable today, it is within the province of the Supreme Court to do so, not this Court. That is, even if I were to accept all of the majority's arguments why the ordinance in this case is within defendant's authority to adopt were it not for the holding in *Lennane*, I would nevertheless be compelled to conclude that, because of *Lennane*, this Court would lack the authority to uphold the ordinance. To do so would overstep our bounds. It is not for us to reject the continued viability of *Lennane*. It is for defendant to persuade the Supreme Court to do so.

I would affirm.

/s/ David H. Sawyer

¹ Interestingly, it also found that, because the ordinance at issue was part of an emergency war-time measure to assist the federal government in the war effort, "this ordinance should not be judged by the same tests as those applied to an ordinance enacted in peace time." 310 Mich at 319. Accordingly, we should not look too closely at *Sell* for any general legal principle.