STATE OF MICHIGAN

COURT OF APPEALS

FENTON CHARTER TOWNSHIP,

Petitioner-Appellee/Cross-Appellee,

v

B/K/G DEVELOPMENT, L.L.C.,

Respondent-Cross-Appellant,

and

THE CITY OF FENTON,

Respondent,

and

MICHIGAN STATE BOUNDARY COMMISSION,

Respondent-Appellant.

UNPUBLISHED
June 22, 2006

No. 259265
Genessee Circuit Court
LC No. 04-78490-AA

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Respondent-appellant, Michigan State Boundary Commission (the commission), appeals by leave granted the circuit court's opinion and order invalidating the commission's decision to allow a portion of Fenton Township to be annexed to the City of Fenton. BKG Development, L.L.C. (BKG), owner of the property in question, cross-appeals the same order. We affirm.

I. Basic Facts and Procedure

This appeal arises from BKG's attempt to have property it owns in Fenton Township annexed to the City of Fenton, which property borders both the township and the city. Starting in 2002, BKG sought to develop the property, a little more than 15 acres, for residential use. The Michigan Department of Environmental Quality informed BKG that well-water on the site contained approximately two and a half times the acceptable level for arsenic under newly imposed federal rules. As such, the state recommended BKG seek water service from the City of

Fenton because the township did not supply water to the site, although it did provide approximately 82 percent of its households with sewer service. Consequently, BKG petitioned the commission for annexation.

The commission approved the annexation and held the township was not exempt from annexation. Specifically, the commission determined that MCL 42.34(1)(f) does not exempt the property within the township from annexation. In doing so, the commission determined that the township's sewer service was "illusory" because, although sewer service was available to the property in question, no potable water service was available.

The circuit court reversed the commission. The court held that the language of MCL 42.34(1)(f) was clear. The statute allows townships chartered after June 15, 1978, to be exempt from annexation if certain conditions apply. The court determined that, because Fenton Township, chartered in 1980, met the conditions enumerated, including the fact that it supplied sewer service, it was exempt from annexation. Specifically, the court determined that the language relied on by the township required that a township seeking exemption provide "water or sewer services, or both," and found that the language "is not ambiguous and that it clearly means that a township can be exempt if it provides either water or sewer services."

II. Analysis

On appeal, the commission and BKG argue that the circuit court erred by ignoring both the "competent, material and substantial evidence" relied on by the commission and settled law. Specifically, BKG cites *Shelby Charter Twp v State Boundary Comm*, 425 Mich 50; 387 NW2d 792 (1986), for the proposition that the decision of a commission cannot be overturned if competent, material, and substantial evidence supports its final judgment.

A. Standard of Review

In *Bureau of Worker's & Unemployment Compensation v Detroit Medical Ctr*, 267 Mich App 500, 504; 705 NW2d 524 (2005), this Court concluded that our review of a trial court's disposition of an appeal arising from an agency's determination is limited to clear error. As such, we will overturn a circuit court's disposition of an administrative appeal "only if we are left with the definite and firm conviction that a mistake has been made." *Id*. However, questions of statutory interpretation are still subject to *de novo* review. *Id*. Moreover, although this Court affords deference to an agency's long-standing interpretation of a statute, it will not give deference where the determination is clearly wrong. *Dana v American Youth Foundation*, 257 Mich App 208, 215; 668 NW2d 174 (2003).

B. The Court Properly Interpreted and Applied the Statutory Exemption

Section 34 of the Charter Township Act, MCL 42.1 *et seq*., exempts a township from annexation if the township satisfies various criteria. MCL 42.34(1) reads:

> A charter township existing on June 15, 1978, or a township incorporated after June 15, 1978 as a charter township that complies with the following standards, is exempt from annexation to any contiguous city or village except as provided in subsections (2)[1] to (8):
>
> (a) Has a state equalized valuation of not less than $25,000,000.00.
>
> (b) Has a minimum population density of 150 persons per square mile . . . .
>
> (c) Provides fire protection service by contract or otherwise.
>
> (d) Is governed by a comprehensive zoning ordinance or master plan.
>
> (e) Provides solid waste disposal services to township residents, within or without the township, by contract, license, or municipal ownership.
>
> (f) *Provides water or sewer services, or both*, by contract or otherwise.
>
> (g) Provides police protection through contract with the sheriff in addition to normal sheriff patrol, through an intergovernmental contract, or through its own police department. [Emphasis added.]

At a February 6, 2003 public hearing before the commission, the township presented proofs regarding the enumerated criteria. With the exception of subpart (1)(f), the commission and BKG do not dispute that the township satisfies the criteria. The township admits that it provided no water service. Thus, the issue in this case is whether the township's sewer service to 82 percent of its residents satisfies the exemption criteria. We conclude that it does.

In *Shelby*, *supra* at 56-71, the Michigan Supreme Court supplied detailed analysis of the statutory evolution of the boundary commission and annexation legislation that culminated in the statute at issue here. The Supreme Court pointed to the substantive nature of the criteria enumerated in the provision, e.g., the minimum population density, necessary fire and police protection, $25,000,000 minimum equalization value, etc. *Id*. at 73. The Court read those requirements to mean that the Legislature intended townships to provide more than de minimus water and sewer services to avoid annexation. *Id*. at 74-76. It then analyzed the specific criteria concerning water and sewer services:

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[1] Subsection (2) states: Notwithstanding subsection (1), the state boundary commission may, under procedures initiated and conducted under section 9 of the home rule city act, 1909 PA 279, MCL 117.9, order a portion or portions of a charter township to be annexed as necessary to eliminate free standing islands of the township completely surrounded by an annexing city, or to straighten or align the exterior boundaries of the city or village in a manner that the charter township and city or village contain uniform straight boundaries wherever possible.

> Rather than supporting the construction of the statute Shelby urges, that the provision of "any" water or sewer services is sufficient to satisfy the statute's requirements, this legislative history supports the opposite conclusion. There would have been no real need to reduce the standard from "water *and* sewer services" to "water *and or* sewer services" to "water *or* sewer services, *or both*," if the requirement of providing water and sewer services were purely a de minimus, pro forma standard. Furthermore, that the Legislature *reduced* the substantive requirement does not indicate that it also *transformed* what were substantive requirements into purely pro forma standards. Instead, that the Legislature expressly acted to reduce the services a charter township had to provide in order to qualify for exemption, but did not in any way indicate an intention to move from substantive service requirements to purely pro forma service requirements, implies that it had no intention of doing so. Thus, this legislative history also supports the conclusion that the standard contained in § 34(1)(f) imposes more than a pro forma, de minimus requirement. *Id*. at 76-77 (emphasis original).

In *Shelby*, the township supplied water to less than a third of the homes in the township and sewer services to approximately 6 percent of the land area. *Id*. at 54-55. In holding that the commission did not exceed its statutory authority when it concluded that the township failed to meet the standard for exemption, the Supreme Court essentially determined that the township's coverage was de minimus and fell short of the threshold necessary to satisfy the statute. *Id*. at 52, 77.

Unfortunately, the Supreme Court does not provide a bright-line test to guide us in determining what amount of water or sewer service is needed to be more than de minimus service. Nor did the Court declare that the provision in question must be read to mean that every household be served by a township water and sewer system in order to meet the requirement. As such, we gauge our determination in this case on whether Fenton Township supplied something more than did the petitioner in *Shelby* but less than complete coverage to all residents.

Because the township here supplied sewer coverage to approximately 82 percent of its residents, we conclude that Fenton Township satisfied the criteria under *Shelby*, i.e., that 82 percent sewer coverage is far from de minimus service. Moreover, we conclude the commission's determination that such service was "illusory" to be without merit. The statutory language, although declared ambiguous under *Shelby* when determining the *amount* of coverage required, is not ambiguous when determining whether water "or" sewer service is required. The statute reads: "water or sewer services, or both." This clearly means that a township can be exempt if it provides *either* water *or* sewer services. The commission erred as a matter of law by interpreting the statute to mean something other than what the plain language expresses.[2]

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[2] See *Ludington Service Corp v Acting Comm'r of Ins*, 444 Mich 481, 503-504; 511 NW2d 661 (1994) (stating that deference to an agency's interpretation will not overcome a statute's plain meaning).

Because the township satisfied the requirements for exemption, the trial court did not err in reversing the commission and in holding that the township was exempt from annexation.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio