STATE OF MICHIGAN

COURT OF APPEALS

ROGER NEWELL and ARELENE NEWELL,

Plaintiffs/Counter-Defendants-Appellants,

v

VILLAGE OF OTTER LAKE,

Defendant/Counter-Plaintiff-Appellee,

and

COUNTY OF LAPEER,

Defendant.

UNPUBLISHED
November 15, 2011

No. 299543
Lapeer Circuit Court
LC No. 09-041526-CZ

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a grant of summary disposition to defendant Otter Lake (defendant). We affirm.

Plaintiffs own approximately 23 acres of land located at Phelps Court in the village of Otter Lake.[1] On August 9, 2004, the village adopted a resolution creating a special assessment district for the sanitary sewage system. Plaintiffs were assessed $10,475. Plaintiffs appealed to the Michigan Tax Tribunal, arguing, in part, that they should not be subject to the special assessment because the house on the property was more than 400 feet from the road and had a working septic system. On February 7, 2005, after plaintiffs' appeal to the Tax Tribunal, the village adopted an ordinance defining an "available public sanitary sewer system" as "[a] public Sanitary Sewer System located in a right of way, easement, highway, street, or public way which

[1] Ten of the 23 acres are located within the village.

crosses, adjoins, or abuts a parcel upon which a Structure is located."[2] This differs from MCL 333.12751(c), which defines that same phrase as "a public sanitary sewer system located in a right of way, easement, highway, street, or public way which crosses, adjoins, or abuts upon the property and passing not more than 200 feet at the nearest point from a structure in which sanitary sewage originates."

A hearing regarding the special assessment occurred on September 14, 2005, with plaintiffs arguing, in part, that the special assessment against them was invalid because they received no benefit from it. The Tax Tribunal upheld the assessment, reasoning that (1) plaintiffs' argument that they were told they would not have to connect with the sewer was not tenable because of the public documents indicating that all parcels situated within the special assessment district would be subject to the special assessment, and (2) plaintiffs' evidence that their parcel would not benefit from the public sewer was unreliable and not credible, and although defendant's evidence was also problematic, plaintiffs bore the burden of proof and thus the special assessment would be affirmed.

Plaintiffs paid the $10,475 assessment but, because they were not connected to the sewer system, they did not pay the operation and maintenance fee that was assessed beginning in April 2007 and every quarter thereafter. They were then notified of delinquency.

Plaintiffs filed suit in the circuit court, arguing that that the village's ordinance was preempted by MCL 333.12751 *et seq*., that the operation and maintenance fee violated the Headlee Amendment of the Michigan Constitution, and that the assessment violated the right to equal protection under the Michigan Constitution. After the parties filed motions for summary disposition,[3] the trial court ruled in favor of defendant. The trial court ruled that plaintiffs' preemption argument was untenable because (1) it could have been resolved in the earlier tax tribunal proceedings and thus was barred by res judicata, and (2) a municipality may expand upon state regulations so long as there is no conflict between the two schemes. With regard to the Headlee Amendment argument, the trial court ruled that this argument was barred by res judicata and that the operation and maintenance fee was a valid user fee and not a tax and thus did not violate Headlee.[4]

On appeal, plaintiffs argue that they do not have to connect to the sewer system and be subject to the operation and maintenance fee because MCL 333.12751(c) preempts the

[2] The ordinance defines "structure" as a privately owned building with sewage-generating facilities.

[3] Defendant moved for summary disposition under MCR 2.116(C)(4), (7), and (10). Plaintiffs moved for summary disposition under MCR 2.116(C)(10).

[4] The equal protection argument is not at issue in this appeal.

applicable village ordinance.[5] Again, MCL 333.12751(c) defines "[a]vailable public sanitary sewer system" as "a public sanitary sewer system located in a right of way, easement, highway, street, or public way which crosses, adjoins, or abuts upon the property and passing not more than 200 feet at the nearest point from a structure in which sanitary sewage originates." The village ordinance defines this phrase as "[a] public Sanitary Sewer System located in a right of way, easement, highway, street, or public way which crosses, adjoins, or abuts a parcel upon which a Structure is located."

In *American Federation of State, County, and Municipal Employees Michigan Council 25 v Detroit*, 252 Mich App 293, 309-310; 652 NW2d 240 (2002), aff'd 468 Mich 388 (2003), this Court stated that

> a municipality is precluded from enacting an ordinance if the ordinance directly conflicts with a state statute or if the state statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, even where no direct conflict exists between the two schemes of regulation. A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. [Citation omitted.]

We cannot find a direct conflict here, because the ordinance merely expands upon the definition provided by the statute. For guidance we look to *Detroit v Qualls*, 434 Mich 340, 362; 454 NW2d 374 (1990), in which we quoted with approval the following passage from 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409:

> "The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements . . . . The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective."

See also *Miller v Fabius Twp Bd, St Joseph Co*, 366 Mich 250, 258-259; 114 NW2d 205 (1962). The ordinance essentially "goes further" than the statute, and we find no direct conflict between the provisions.

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[5] We review de novo both a trial court's grant of summary disposition and a claim of constitutional error. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008); *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

Plaintiffs contend that the state scheme "occupies the field of regulation" and that, therefore, the ordinance is preempted. We disagree. As noted in *Attorney General v Detroit*, 225 Mich 631, 637; 196 NW 391 (1923): "In matters of public health, of police, and numerous other activities, the municipality acts as an agent of the state. It owns waterworks and electric light plants as proprietors, and its management of them are matters of local concern, as are numerous other activities pertaining to the locality as distinguished from the state at large." MCL 67.1 provides that a village may enact ordinances relating to "public health" and may "make other regulations for the safety and good government of the village and the general welfare of its inhabitants that are not inconsistent with the general laws of this state." Clearly, a sewer system is a matter of local concern and relates to public health. Moreover, the village ordinance in question is not inconsistent with state law but merely expands upon state law.

Plaintiffs cite *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977), in arguing for preemption. In *Llewellyn*, *id*. at 322, the Court indicated that it would "look to certain guidelines" in deciding whether "the state has thus preempted the field of regulation which the city seeks to enter in this case . . . ." The Court first stated that "where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted." *Id*. at 323. MCL 333.12758(2) states that "Sections 12752 to 12758 are in addition to and not in limitation of the power of a governmental unit to adopt, amend, and enforce ordinances relating to the connection of a structure in which sanitary sewage originates to its public sanitary sewer system." Plaintiffs argue that because MCL 333.12758(2) does not refer to § 12751, the pertinent definition in MCL 333.12751(c) is exclusive. We cannot agree with this interpretation. First, § 12758 refers to § 12758 itself, thus providing evidence that changes to the scheme by local governments were anticipated. Moreover, we cannot conclude that the mere omission of section § 12751 from § 12758 is equivalent to the *Llewellyn* factor of "state law expressly provid[ing] that the state's authority to regulate in a specified area of the law is to be exclusive." In fact, § 12758 tends to indicate that the state's authority to regulate in the area of sewers is *not* exclusive.

The *Llewellyn* Court also stated that "the pervasiveness of the state regulatory scheme may support a finding of preemption." *Id*. at 323. This factor weighs against a finding of preemption in the present case. Indeed, the statutory scheme clearly anticipates that local governments would have powers relating to sewer systems, and, as noted above, villages are given specific statutory powers relating to public health.

The *Llewellyn* Court also stated that "the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id*. at 324. The nature of the subject matter here clearly does *not* demand exclusive state regulation. Indeed, sewer ordinances relate to local structures and systems, over which local municipalities should have some sovereignty.

The final consideration mentioned in *Llewellyen* is that "preemption of a field of regulation may be implied upon an examination of legislative history." *Id*. at 323. While the legislative history could arguably be read to provide some support for plaintiffs' argument (given that the Legislature, in § 12758(2), later employed the words "[s]ections 12752 to 12758" instead of the earlier "[t]his act"), we will not use this single *Llewellyn* factor to make a finding of

preemption in this case. Considering the factors as a whole, we find no preemption and no basis for reversal.

Plaintiffs also argue that the maintenance and user fee is a violation of the Headlee Amendment of the Michigan Constitution as applied to them. Const 1963, art 9, § 31, in accordance with the Headlee Amendment, provides:

> Units of Local Government are hereby prohibiting from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

A user fee is not affected by this provision. *Bolt v City of Lansing*, 459 Mich 152, 159; 587 NW2d 264 (1998).

There are three criteria to consider when determining whether an assessment is a user fee as opposed to a tax. "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. . . . A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id*. at 161-162. Clearly the fee here is serving a regulatory and not a revenue-raising purpose; it is assessed in order to cover the costs of treating the sewage, and there is no evidence that the fee is disproportionate for this purpose. Indeed, defendant indicated below that "[t]he Village uses the fee to finance maintenance expenses at the sewer plant, such as chemicals, equipment, utilities, etc.," and that the fee was based on "[m]aintenance costs divided by the number of units within the Sanitary Sewer Special Assessment District." The third criterion, voluntariness (see *id*. at 162), does lean in favor of plaintiffs, but, viewing the criteria *as a whole*, we conclude, as did the trial court, that the fee is a user fee and not a tax.[6]

Given our resolution of the foregoing issues, we need not address plaintiffs' arguments concerning res judicata.

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[6] While it could be argued that the user-fee-versus-tax analysis does not apply as strongly to the accrued user fees, i.e., the fees charged before plaintiffs' connection to the sewer, we decline to grant any relief with respect to these fees. Defendant, in its counterclaim, argued that under the ordinance, a penalty equal to "the User Charges that would have accrued and been payable had the connection been made" applies. At a hearing on June 12, 2010, the trial court indicated that, in its earlier ruling on the motion for summary disposition, it had by implication ruled in favor of defendant on the counterclaim. We find that plaintiffs have not adequately developed an argument on appeal regarding why they should not owe the accrued user fees.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter