

STATE OF MICHIGAN
COURT OF APPEALS

CHARTER TOWNSHIP OF BLOOMFIELD,

Plaintiff-Appellee/Cross-Appellant,

and

VILLAGE OF BEVERLY HILLS,

Intervening Plaintiff-Appellee,

v

BIRMINGHAM PUBLIC SCHOOLS,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

January 31, 2003

No. 230996

Oakland Circuit Court

LC No. 00-025056-CH

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

The Charter Township of Bloomfield (“the township”) filed suit against defendant seeking to enjoin construction of a wireless communications tower at a school that defendant owns and operates in the township as a violation of the township’s zoning ordinance that prohibited the construction of such towers on school grounds. The Village of Beverly Hills intervened as a plaintiff, alleging that the two wireless communications towers defendant had already constructed at two public schools it operates in the Village of Beverly Hills violated its wireless communications ordinance. Defendant moved for summary disposition, arguing that it was exempt from the local zoning ordinances by MCL 380.1263(3) of the Revised School Code. Both the township and intervenor amended their complaints and argued that MCL 380.1263(3) of the Revised School Code was an unconstitutional and improper delegation of legislative power to the superintendent of public instruction because the statute lacks standards for the construction of school buildings. The trial court denied defendant’s motion and granted summary disposition in the favor of the township and intervenor pursuant to MCR 2.116(I)(2).

Defendant appeals as of right, arguing that there was clear legislative intent to grant the superintendent of public instruction with sole and exclusive jurisdiction over the matter, and that the lease agreement was the type of agreement contemplated and allowed by the Legislature. The township filed a claim of cross appeal, challenging the constitutionality of a provision of the Revised School Code, MCL 380.2163(3). We affirm.

The question before this Court is whether the Birmingham Public Schools, as a governmental unit, is exempt from local zoning ordinances when it plans to construct on public school grounds wireless communications towers that are to be predominantly used for commercial purposes. We conclude that defendant is subject to the local zoning ordinances because sole and exclusive jurisdiction vests in the superintendent of public instruction only for those buildings and projects that are designed for “school purposes.”

This Court reviews a trial court’s grant or denial of summary disposition de novo. *Diehl v Danuloff*, 242 Mich App 120, 122; 618 NW2d 83 (2000). “When reviewing a motion for summary disposition under MCR 2.116(C)(7), the court must accept the nonmoving party’s well-pleaded allegations as true and construe the allegations in the nonmovant’s favor to determine whether any factual development could provide a basis for recovery.” *Id.* at 123. The court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties. *Id.* “If there are no facts in dispute, whether the claim is statutorily barred by immunity is a question of law.” *Id.*

It is undisputed that defendant is a governmental unit. MCL 691.1401(b), (d). In *Dearden v City of Detroit*, 403 Mich 257, 264; 269 NW2d 139 (1978), our Supreme Court held that “the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances.” It is also undisputed that the Township Zoning Act, MCL 125.271 *et seq.*, gives the township broad authority to define the use for each district within the township, and that the Township Zoning Act states that the provisions in the township’s ordinances take precedence over provisions of other ordinances, MCL 125.298.

Defendant argues that, read together, the language of MCL 380.1263(3) and MCL 380.11a of the Revised School Code show clear legislative intent to immunize the school district from local zoning ordinances for the particular enterprise at question. In particular, defendant asserts that its immunity is derived from the “sole and exclusive jurisdiction” that MCL 380.1263(3) grants the superintendent in reviewing and approving site plans. MCL 380.1263(3) provides:

The board of a school district shall not design or build a school building to be used for instructional or noninstructional school purposes or design and implement the design for a school site unless the design or construction is in compliance with Act No. 306 of the Public Acts of 1937, being sections 388.851 to 388.855a of the Michigan Compiled Laws [Construction of Schools Building Act]. *The superintendent of public instruction has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or noninstructional school purposes and of site plans for those school buildings.* [Emphasis added.]

Defendant asserts that its lease agreement with the wireless communications company falls under the phrase “site plans for those school buildings.” Defendant contends that the phrase “used for instructional or noninstructional school purposes” modifies only the immediately

preceding phrase, the first “school buildings” phrase used in that sentence, and does not refer to the second “school buildings” phrase used in the latter part of sentence. Defendant points to the “site plans for those school buildings” to mean the site plans for any building that the school district plans to build, in other words, a building constructed by the school district – a school district building – but not necessarily a building used for school purposes.

The basic rules of statutory interpretation are as follows:

A fundamental rule of statutory construction is to ascertain the purpose and intent of the Legislature in enacting the provision. Statutory language should be construed reasonably and the purpose of the statute should be kept in mind. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted and courts must apply the statute as written. [*Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000) (citations omitted).]

Recognizing that the Revised School Code does not define the phrase “site plans,” this Court recently explained that “[a] site plan expresses the design that a local school district has chosen for the construction of new school facilities.” *Schulz v Northville Public Schools*, 247 Mich App 178, 187-188; 635 NW2d 508 (2001), lv gtd ___ Mich ___ (2002). It is also worth noting that, while the parties elaborately argued whether the phrase “used for instructional or noninstructional school purposes” in the statute describes “those school buildings,” it does not appear that the parties referred to the statutory definition of “school buildings.” MCL 388.851a, which is expressly mentioned in the statute at issue, defines “school buildings” as “all buildings used for school purposes.”

In light of the above, defendant’s strained reading of the statute is without merit. Reading MCL 380.1263(3) and MCL 388.851a together, it is clear that the superintendent was granted sole and exclusive jurisdiction (1) to review and approve plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or noninstructional school purposes; and (2) to review and approve site plans for those school buildings “used for school purposes.” On appeal, defendant expressly concedes that the project is not a “school building.” Therefore, given the plain language of MCL 380.1263(3), we conclude that the superintendent does not have sole and exclusive jurisdiction over the project because it is admittedly not a school building.

Defendant also claims that its agreement with the private wireless communication company constitutes the type of appropriate school district activities that are legislatively authorized by MCL 380.11a(3)(b)-(c) and (4) of the Revised School Code, which provide:

(3) A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to any power expressly stated in this act; and, except as provided by law, may exercise a power incidental or appropriate to the performance of any function related to operation of the school district in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:

* * *

(b) Providing for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity.

(c) Acquiring, constructing, maintaining, repairing, renovating, disposing of, or conveying school property, facilities, equipment, technology, or furnishings.

* * *

(4) A general powers school district may enter into agreements or cooperative arrangements with other entities, public or private, or join organizations as part of performing the functions of the school district.

Each of the above provisions entails the performance of functions related to the operation of the school district in the interests of public elementary and secondary education. It is important to note that, while defendant describes its lease agreement with the wireless communication company as part of the statute's "appropriate school district activities," and asserts that a portion of the tower was to be used for school purposes and the revenue generated from the lease was to be used for school programs, not once on this record has defendant alleged that the construction of wireless communication towers on public school property and leasing portions of the towers to a commercial wireless company were in "the performance of functions related to the operation of the school district" pursuant to MCL 380.11a.

A school district has a statutory right to acquire, construct, and maintain school property. MCL 380.11a(3)(c); MCL 380.401a(1). According to MCL 380.5(5), a "public school" means, in pertinent part, "a public elementary or secondary educational entity or agency that is established under this act, has as its primary mission the teaching and learning of academic and vocational-technical skills and knowledge, and is operated by a school district." MCL 380.6(1), in pertinent part, provides that a "school district" or a "local school district" means "a general powers school district organized under this act." The enabling act of the Revised School Code of 1976, MCL 380.1 *et seq.*, provides that the purpose of the act is:

to provide a system of public instruction and elementary and secondary schools; to revise, consolidate, and clarify the laws relating to elementary and secondary education; to provide for the organization, regulation, and maintenance of schools, school districts . . . to prescribe rights, powers, duties, and privileges of schools, school districts, . . . to provide for the levy and collection of taxes; to provide for the borrowing of money and issuance of bonds and other evidences of indebtedness; to establish a fund and provide for expenditures from that fund

Here, it cannot be said, from the language of the enabling act or the above statutory provisions, that the Legislature assigned to school districts the authority over the construction of wireless communications towers and leasing them to commercial companies for profit, the type of activity that defendant proposes. Accordingly, we hold that the trial court properly ruled that

defendant was subject to the local zoning ordinances, and properly granted summary disposition in favor of the township and intervenor.

In support of its argument that legislative intent exists for the superintendent to have sole and exclusive jurisdiction over the subject matter of the instant case, defendant relies on several cases.¹ However, the facts in each of those cases are distinguishable from the basic facts in the instant case. The common thread in those cases is that the government units, alleging governmental immunity from local zoning ordinances, were performing their clearly authorized and expressed statutorily mandated functions or operations, while defendant in the instant case was not.

II

During the pendency of this appeal, this Court, in *Schulz*, *supra* at 188-189, decided the issue of the constitutionality of MCL 380.1263(3), upholding the statute. The *Schulz* Court reasoned that the Revised School Code lawfully delegates legislative authority to the superintendent regarding the design and construction of school buildings because the Construction of School Buildings Act, MCL 388.851 *et seq*, provides “extremely detailed standards governing the design and construction of school buildings.” *Schulz*, *supra* at 188. The Court held that these provisions were “sufficiently precise and provide adequate guidance to the school officials.” *Id.*

On cross-appeal,² the township argues that the ruling in *Schulz* is not controlling in this case because it did not address the issue of whether MCL 380.1263(3) unconstitutionally delegates uncontrolled discretion in the superintendent concerning construction standards such as the Michigan Building Code, the Michigan Mechanical Code and the Michigan Plumbing Code. We decline to read *Schulz* in such a restrictive manner. *Schulz* addressed the issue of the statute’s constitutionality in regards to the superintendent’s discretion concerning school design and construction. *Schulz*, *supra* at 188. Contrary to the township’s assertion, the Construction of

¹ The cases that defendant relies on in support of its argument are *Burt Twp v Dep’t of Natural Resources*, 459 Mich 659; 593 NW2d 534 (1999), *Dearden, supra*, *Schulz, supra*, *Addison Twp v Dep’t of State Police (On Remand)*, 220 Mich App 550; 560 NW2d 67 (1996), *Lutheran High School Ass’n of Greater Detroit v City of Farmington Hills*, 146 Mich App 641; 381 NW2d 417 (1985), and *Cody Park Ass’n v Royal Oak School District*, 116 Mich App 103; 321 NW2d 855 (1982). We note that the decisions in *Addison Twp*, *Lutheran High School Ass’n*, and *Cody Park Ass’n* have since been “overruled” by subsequent legislative amendments of the statutes at issue in those cases.

² We note that in response to the township’s cross-appeal defendant argues that the township lacks standing to raise a cross-appeal because the township is not an “aggrieved party.” Whether a party has standing to bring this appeal is a question of law that is reviewed de novo. *Dep’t of Consumer & Indus Servs v Shah*, 236 Mich App 381, 384; 600 NW2d 406 (1999). Defendant misunderstands the distinction between an “appeal of right” and a cross-appeal. See MCR 7.203; MCR 7.203(d), and MCR 7.207(A)(1). Moreover, the two cases defendant relies on discussed appeals of right, not cross-appeals. *Dep’t of Consumer & Indus Servs, supra* at 384; *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994). The township’s cross-appeal is properly before this Court.

School Buildings Act does provide standards for construction issues other than fire and electrical safety. MCL 388.851(a) provides, in part,

The superintendent of public instruction or his authorized agent shall not issue such approval until he has secured in writing the approval of the state fire marshal, *or the appropriate municipal official* when certification as described in section 3 [MCL 388.853] has been made, *relative to factors concerning fire safety and of the health department having jurisdiction relative to factors affecting water supply, sanitation and food handling.* [Emphasis added.]

Furthermore, the *Schulz* Court concluded that the Revised School Code and the Construction of Schools Building Act contained adequate safeguards to ensure against misuse of delegated power. *Schulz, supra* at 189. The Court also noted that “[t]he agency’s high degree of proximity to the elective process . . . is, in our opinion, an additional, substantial factor assuring that the public is not left unprotected from uncontrolled, arbitrary power in the hands of remote administrative officials.” *Id.* Therefore, we hold that *Schulz* is dispositive of the township’s constitutionality challenge.³

The township also argues that the superintendent impermissibly attempted to delegate authority to review defendant’s site plan to the Department of Consumer and Industry Affairs without legislative authority. We find that such a delegation is permitted by the statute because (1) MCL 388.851(a) specifically provides that the superintendent’s authorized agent may issue approval of the plan and (2) the responsibility for plan review and construction inspections of schools was transferred from the state fire marshal to the Department of Consumer and Industry Affairs by Executive Order 1997-2.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens

³ We are aware that the Michigan Supreme Court has granted this case leave to appeal. *Charter Twp of Northville v Schulz*, ___ Mich ___; ___ NW2d ___ (2002). However, until our Supreme Court overrules this Court, we are bound to follow our precedent. MCR 7.215(C)(2).