

STATE OF MICHIGAN
COURT OF APPEALS

BILLBOARDS BY JOHNSON, INC.,

Plaintiff-Appellant,

v

TOWNSHIP OF ALGOMA,

Defendant-Appellee,

and

MICHIGAN TOWNSHIPS ASSOCIATION,

Amicus Curiae.

UNPUBLISHED

July 20, 2006

No. 267920

Kent Circuit Court

LC No. 05-006822-CZ

Before: Talbot, P.J., and Owens and Murray, J.J.

PER CURIAM.

Plaintiff, Billboards by Johnson, Inc., appeals as of right from the trial court order granting summary disposition in favor of defendant, Algoma Township. We affirm.

I. Facts and Procedural Background

This action arises out of a dispute regarding the placement of a billboard for advertising on a section of property in Algoma Township. Plaintiff's business activities include the manufacture and installation of advertising signs throughout Michigan. Plaintiff entered into a lease agreement for property located at 300 South State Street in the Township of Algoma for the purpose of installing a double-sided billboard. The property is located in an "adjacent area" of US-131, and therefore, any billboards or commercial signs on the property are subject to state regulation under Michigan's Highway Advertising Act (HAA), MCL 252.301 *et seq.*¹ Plaintiff sought and obtained from the state of Michigan permits for outdoor commercial advertising at that location. The property is also zoned C-2, which is defendant's general business district. Plaintiff sought a building permit from defendant, but was informed that § 25.8(c) of the

¹ See MCL 252.302(o) (defining an "adjacent area" as an area within 3,000 feet of an interstate).

township's zoning ordinance designates a billboard as the principal use of a parcel and limits each parcel to a single principal use. The property at issue already contains a principal use consisting of a commercial strip mall building.

After learning of this billboard ordinance, plaintiff filed a three-count complaint containing the following: (1) a facial and as-applied challenge to the ordinance on First Amendment and substantive due process grounds, (2) a facial challenge to the ordinance based on its preemption by the HAA, and (3) an as-applied challenge to the ordinance based on the unlawful, arbitrary and unreasonable exercise of police power. Thereafter, plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10), reasserting that the ordinance violated its constitutional rights to free speech and due process, was preempted by the HAA, and was an invalid exercise of police power. Plaintiff requested that the trial court determine as a matter of law that any billboards subject to the HAA are designated as the accessory uses of the subject parcels and that § 25.8(c) of the zoning ordinance is unenforceable with regard to the subject property.

Defendant filed a cross-motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), contending that the ordinance at issue satisfied the First Amendment as it was a content-neutral restriction on the means and manner of billboard advertising which serves significant governmental interests and allows for ample means of alternative communication. Defendant also asserted that the ordinance provided a rational means of promoting legitimate governmental interests, and thereby satisfied due process requirements. Defendant argued that the ordinance was a regulation of spacing that was more stringent than the HAA imposed, and thus, it was not preempted by the HAA, and that § 3 was not intended to preempt a municipality's regulation of billboards as a principal use of property.²

Prior to the summary disposition hearing, defendant filed a supplemental brief arguing that *Twp of Homer v Billboards by Johnson, Inc*, 268 Mich App 500; 708 NW2d 737 (2005), was dispositive because it provided further support for the township's claim that the ordinance was not preempted by the HAA. Plaintiff asserted that *Homer* was inapplicable because its ruling was based on preemption under § 4 of the HAA, not on the language of § 3.

Following oral arguments, the trial court granted summary disposition in favor of defendant. Regarding the constitutional issue, the trial court ruled that § 25.8(c) was a content-neutral regulation and that plaintiff failed to satisfy its burden of negating its validity. Regarding the preemption issue, the trial court ruled that the ordinance was a permissive regulation of the

² Defendant also contended that summary disposition was proper pursuant to MCR 2.116(C)(4) for lack of subject matter jurisdiction over plaintiff's "as-applied" challenges to the ordinance. Defendant argued that, because plaintiff failed to obtain a final administrative decision regarding the application of the ordinance to its proposed billboard by seeking a variance, the matter was not ripe for review. Plaintiff agreed with defendant on this matter and conceded to dismissal of its "as-applied" claims before the summary disposition hearing. Thus, the claims remaining were plaintiff's "facial" challenges to § 25.8(c) based on the alleged constitutional violations and preemption by the HAA.

spacing of billboards and was not in conflict with the language of § 3 of the HAA. Specifically, the trial court reasoned that defendant “is effectively regulating the spacing of billboards by prohibiting billboards from being on the same parcel of land that has another principal use,” which “results in a greater separation between billboards and other on-site sign structures.” Because “a local government can adopt regulations that govern the size, spacing, and lighting of the billboard so long as the local regulation is not more permissive than the MHAA[,]” the trial court concluded that the ordinance was not preempted by the HAA. Furthermore, the trial court reasoned that the disputed language in § 3 was not “a regulation on how billboards can be designated but, rather, an expressed legislative statement that the optimum use of private property as for commercial purposes is something other than billboards, which have a significant and protected and legitimate interest, nonetheless.”

On January 3, 2006, in accordance with its ruling from the bench, the trial court entered a written order denying plaintiff’s motion for partial summary disposition, granting defendant’s motion for summary disposition and dismissing plaintiff’s claims.

II. Standard of Review

We review de novo a trial court’s decision to grant or deny summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A claim under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The reviewing court must consider the affidavits, depositions, admissions, or other documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is appropriate when except for the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Corley, supra* at 278.

Moreover, statutory interpretation and the applicability of a statute are questions of law that we review de novo. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377 (2001). The primary goal of statutory interpretation is to give effect to legislative intent, while being mindful of the presumption that unambiguous language must be enforced as written. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). The rules of statutory interpretation apply with the same force to the interpretation of a municipal ordinance. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). Furthermore, “a trial court’s ruling on a constitutional challenge to a zoning ordinance is reviewed de novo.” *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 525; 569 NW2d 841 (1997).

III. Analysis

A. Preemption and Conflict of Law

Plaintiff asserts that the ordinance designating a billboard as the principal use of a parcel is invalid because the Legislature intended to preempt the field of use designations, and because the ordinance directly conflicts with the statutory designation. We disagree.

“[A] municipal ordinance is preempted by state law if 1) the statute completely occupies the field that ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute.” *Rental Prop Owners Ass’n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). Section 4 of the HAA states that “[t]his act regulates and controls the size, lighting, and spacing of signs and sign structures in adjacent areas and occupies the whole field of that regulation and control,” and lists four exceptions to this rule. MCL 252.304. One such exception allows townships to “regulate and control the size, lighting, and spacing of signs and sign structures,” but prevents townships from “permit[ing] a sign or sign structure that is otherwise prohibited by this act or requir[ing] or caus[ing] the removal of lawfully erected signs or sign structures subject to this act without the payment of just compensation.” MCL 252.304(a). In *Twp of Homer*, our Court recently confirmed the prior interpretation of this statute as indicating “that preemption extends only to the area of regulation, which is, size, lighting and spacing in adjacent areas,’ so the HAA ‘does not pre-empt local governments from regulating areas unrelated to spacing, lighting and size of signs in adjacent areas.’” *Id.* at 503, quoting *Central Advertising Co v St Joseph Twp*, 125 Mich App 548, 552; 337 NW2d 15 (1983). In addition, we held that “the HAA sets forth minimum requirements that a township cannot fall below, but that a township is free to *exceed*. Thus, the township may enact ordinances that are more restrictive than required by the HAA.” *Twp of Homer, supra* at 504 (emphasis added); see also *Rental Prop Owners Ass’n, supra* at 261-262, quoting 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409 (“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.”). We note, however, that a township is prohibited from enacting an ordinance that has the effect of a total prohibition of billboards. *Adams Outdoor Advertising, Inc, supra* at 684-685.

As part of its regulation of “the size, number, location and manner of display of signs,” defendant restricts billboards in the following manner:

A billboard located on a lot or parcel of land shall constitute the principal use of that lot or parcel. No other principal use shall be located on the same lot or parcel as the billboard. [Algoma Township Zoning Ordinance, § 25.8(c).]

Defendant’s regulation does not prohibit all billboards. Rather, it is a limitation on whether signs can be placed on a parcel, resulting in a form of restriction on the spacing of signs within the township. The regulation prohibits billboards from being placed on the same parcel of land that already has a principal use. A companion restriction requires that a billboard meet the minimum building setback requirements. Algoma Township Zoning Ordinance, § 25.8(f). Combining these regulations ensures that a billboard will not be placed on a parcel of land with other on-site signs and will be separated from the signs on an adjoining parcel by at least the minimum setback applicable to each parcel. As the trial court properly noted, the result is a greater separation in the distance between billboards and on-site sign structures. Because a township is permitted to enact ordinances that are more restrictive than those required by the HAA, defendant’s spacing regulation of billboards in § 25.8(c) is not preempted by state statute. *Twp of Homer, supra*.

Although § 4 of the HAA expressly addresses the issue of preemption, plaintiff claims that the HAA preempts defendant’s ordinance based on the findings in § 3 of the statute. Section 3 sets forth legislative findings and the purposes of the act:

To improve and enhance scenic beauty consistent with section 131 of title 23 of the United States Code, . . . the legislature finds it appropriate to regulate and control outdoor advertising and outdoor advertising as it pertains to tobacco adjacent to the interstate highway, freeway, and primary highway systems, and outdoor advertising as it pertains to tobacco on secondary highway, major street, and local roads within this state and that *outdoor advertising is a legitimate accessory commercial use of private property*, is an integral part of the marketing function and an established segment of the economy of this state. In addition, the legislature finds it appropriate to protect minors from exposure to advertising that encourages them to illegally possess tobacco. [MCL 252.303 (emphasis added).]

Plaintiff contends that the finding that “outdoor advertising is a legitimate accessory commercial use of private property” indicates that the Legislature intended for billboards to be considered accessory uses, not principal uses of property.

In interpreting the intent of the Legislature, we must give effect to each word, phrase and clause in a statute while considering the plain meaning of the word or phrase and its purpose and placement in the statutory scheme. *Anderson v Myers*, 268 Mich App 713, 714-715; 709 NW2d 171 (2005). The statement at issue is not contained within § 4, the section expressly addressing a township’s scope of authority regarding the regulation of signs and billboards. Rather, it is contained within the section designated as the “purpose” of the act, and is in actuality a legislative finding.³ In this section the Legislature “finds” that outdoor advertising is appropriate because it is an important part of marketing function, provides economic benefit and is a legitimate accessory commercial use of private property. However, generally the “preamble” or “findings” set forth by the Legislature are not considered part of the act, and “cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous” *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306, 391 n 24; 685 NW2d 221 (2004) (Markman, J., concurring in part, dissenting in part), quoting *Yazoo & M V R Co v Thomas*, 132 US 174, 188; 10 S Ct 68; 33 L Ed 302 (1889). This holds true because unambiguous language in a statute must be enforced as written. *Gladych, supra* at 597.

Here, there is no ambiguity in the act regarding the state and local government’s respective role in the regulation and control of signs and billboards. As noted, § 4 states that the HAA regulates and controls the entire field of size, lighting and spacing of signs. However, §4 further provides an exception, allowing a township to enact an ordinance regulating these areas as long as the ordinance is more restrictive than the regulation in the HAA. See *Twp of Homer, supra* at 504. Because this provision is clear and unambiguous, it is improper and unnecessary to resort to the legislative findings in the “purpose” section of the act to ascertain the intent and meaning of the legislature with regard to this area of regulation. See *Taxpayers of Michigan Against Casinos, supra* at 391 n 24.

³ This purpose is “[t]o improve and enhance scenic beauty consistent with section 131 of title 23 of the United States Code.” Therefore, the Legislature found “it appropriate to regulate and control outdoor advertising,” particularly as it relates to tobacco advertising.

Even if the finding was relevant, when read in context, the use of the word “accessory” in § 3 does not address the number of commercial activities that can take place on private property, as does the ordinance. The term “accessory” has been defined as “a subordinate or supplementary part, object, or the like, used mainly for convenience, attractiveness, safety, etc.” *Random House Webster’s Unabridged Dictionary* (1998). Thus, the use of the word “accessory” by the Legislature indicates a subordinate or supplementary commercial use of private property, in contrast to the main or common commercial use of such property. A statement acknowledging that outdoor advertising is an established and legitimate commercial use of private property, even if not the most advantageous use of such property, does not impact how many “commercial uses” can be on a particular parcel of property.⁴ That issue is addressed by the ordinance, and therefore no conflict exists between § 3 and the ordinance.

For all these reasons, we hold that the trial court did not err in granting summary disposition in favor of defendant on this issue.

B. Constitutionality

Next, plaintiff contends that defendant’s ordinance violates its constitutional due process and free speech rights (Plaintiff’s Brief on Appeal, pp 15-17). We disagree.

“The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws.” *Rental Property Owners Ass’n, supra* at 253. Moreover, a municipal ordinance exercising police powers is presumed to be constitutional, and the party opposing the ordinance has the burden of proving otherwise. *Id*; see also *Township of Farmington v Scott*, 374 Mich 536, 541-542; 132 NW2d 607 (1965).

Under § 25.8(c), defendant regulates the spacing of signs and billboards by designating such structures as principal uses of property. This ordinance is content-neutral as it places no restriction on the content of the billboard and indicates no bias, censorship or partiality toward a particular viewpoint over another. See *Gannett Outdoor Co of Michigan v City of Troy*, 156 Mich App 126, 136; 409 NW2d 719 (1986). Moreover, the ordinance supports the enumerated purposes for regulating signs under the act, which include “[t]o conserve and enhance community character,” “[t]o promote the economic viability of commercial areas by minimizing visual clutter,” “[t]o avoid visual pollution and hazardous conditions” and “[t]o promote reasonable uniformity in size, number or placement of signs within districts.” Algoma Township Zoning Ordinance, § 25.1. Michigan case law recognizes a township’s broad authority to regulate billboard advertising for aesthetic and safety purposes. See *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 692-693; 600 NW2d 339 (1999); *Gannett Outdoor Co*

⁴ The legitimacy of the use of signs and billboards is important because it entitles their owners to just compensation upon removal. See *Lamar Advertising Co v Charter Twp of Clinton*, 241 F Supp 2d 793, 800 (ED Mich, 2003) (citing the mandate under 23 USC 131(g) that requires just compensation to be paid upon the removal of an outdoor advertising sign that has been lawfully erected pursuant to state law).

of Michigan, supra at 136. Thus, the enumerated purposes in the ordinance are legitimate reasons for regulating signs and fall within the township's broad authority to regulate. After our review, we hold that plaintiff failed to overcome the presumption that no reasonable governmental interest was advanced by the billboard ordinance, and therefore, the trial court did not err in granting summary disposition on this basis.

Affirmed.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Christopher M. Murray