STATE OF MICHIGAN

IN THE 49TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OSCEOLA

NESTLE WATERS NORTH AMERICA INC.,

Appellant, Case No. 17-14990-AA

v

OSCEOLA TOWNSHIP,

Appellee.



**OPINION AND ORDER**

This matter comes before the Court based upon Nestle Waters North America Inc.'s (NWNA) filing an appeal of the decision of the June 20, 2017 Osceola Township Zoning Board of Appeals (ZBA), which upheld an April 18, 2017 decision of the Osceola Township Planning Commission to deny approval of NWNA's proposed booster-pump building.

NWNA currently operates a well house and a water pipeline in Osceola County. This project was constructed in 2008 and transports water pumped from a well at White Pine Springs to a load station located in Evart, Michigan. The pipeline runs in part across real property owned by Spring Hill Camps. Spring Hill Camps has consented to allow NWNA to build the building in question on their property. This would allow the booster pump to be installed near the midpoint of the pipeline. The property owned by Spring Hill Camps is located in Osceola Township in the A-1 (Agricultural) Zoning District.

NWNA requested zoning approval to build a 12' X 22' building which would house a booster pump along the existing pipeline. On November 22, 2016, the Planning Commission adopted two resolutions finding that the booster-pump building complies with all standards applicable to special land uses as stated in both §§ 6.2 and 7.5 of the zoning ordinance; however,

it denied the zoning-request finding that the request fell within zoning ordinance § 21.3 under the classification of "essential service" and, therefore, applied a "public convenience and necessity" standard. Neither the meeting minutes nor a resolution of the Planning Commission contains any reason or explanation why this project was classified as an essential service. The Planning Commission found that this "public convenience and necessity" standard was not met. The Zoning Board of Appeals ended in a 1:1 tie vote; and pursuant to the zoning ordinance, a tie vote results in the Planning Commission's decision being upheld.

The NWNA argues they are entitled to a zoning permit under alternative theories within the zoning ordinance: first, that the requested use is an accessory use and complies with all the requirements of the ordinance for accessory uses; and, second, that the request complies with all the requirements of a special land use and could be approved under the zoning ordinance § 13.3.7 as an "extractive operation" or under §13.3.2 as "facilities" for the centralized bulk collection, storage, and distribution of agriculture products to wholesale and retail markets. NWNA argues that classification as an essential service by the Zoning Board of Appeals was error, but, nonetheless, the building could be approved under the standards for essential services. Osceola Township argues that "essential services" is the only section of the ordinance that could apply to this project and that the project fails to meet the requirements of that section.

On appeal, the court shall review the record and decision of the ZBA to ensure the decision (1) complies with the constitution and laws of the state; (2) is based upon proper procedure; (3) is supported by competent, material, and substantial evidence on the record; and (4) represents the reasonable exercise of discretion granted by law to the zoning board of appeals. MCL 125.3606(1).

The court reviews questions of law de novo. *Brandon v Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000), *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). The interpretation of a zoning ordinance is a question of law subject to de novo review. *Id.* In reviewing an interpretation of a zoning ordinance, the court shall apply the same rules that govern the interpretation of statutes. *Great Lakes Society v Georgetown Charter Twp.*, 281 Mich App 396, 407; 761 NW2d 371 (2008). If the language of the zoning ordinance is clear and unambiguous, a court is required to strictly apply the ordinance as written without regard to extrinsic matters, such as policy preferences of local zoning officials. *Id.* The Michigan Supreme Court, in *MDEQ v Worth Twp*, 491 Mich 227, 237-38; 814 NW2d 646 (2012), explained:

> . . . this Court must "ascertain and give effect to the intent of the Legislature." The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute. In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory. "As far as possible, effect should be given to every phrase, clause, and word in the statute." Moreover, the statutory language must be read and understood in its grammatical context. When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases while important should be read in the context of the entire legislative scheme.

Osceola Township argues this review includes "respectful consideration" be given to an agency's interpretation pursuant to *Complaint of Rovas against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008). NWNA counters that in *Rovas* ". . . the Supreme Court made clear that no 'deference' is to be afforded to an agency's interpretation of a statute, and criticized the lower court for having deferentially acceded to an agency's interpretation, in derogation of the statute's plain language." *Id.* at 108–09. The Court in *Rovas* specifically states, ". . . we hold and reaffirm that an agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may

not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language. An agency's interpretation, to the extent it is persuasive, can aid in that endeavor." *Id.* at 93.

The Court will first address the classification of essential services since that is the section relied upon by the Zoning Board of Appeals in making its decision. The Osceola Township Zoning Ordinance refers to the category of essential public services in two different sections:

> 2 General Provisions
>
> 2.8 Essential Public Services.
>
> The erection, construction, alteration, or maintenance of essential services, shall be permitted as authorized or regulated by law and other ordinances in any use District, it being the intention hereof to exempt such erection, construction, alteration, and maintenance from the application of this Ordinance, except those which may be considered a danger to the community health, safety, and welfare.
>
> 21 Enactment and Sever-ability [*sic*]
>
> 21.3 Essential Services: Exceptions, Required Approval.
>
> It shall be lawful for essential public services to establish and conduct themselves in any district of the Township, and except as hereinafter provided, the erection, construction, alteration or maintenance of essential services shall be permitted in any district as authorized or regulated by law and other ordinances of the Township, it being the intention hereof to except such erection, construction, alteration and maintenance from the application of this ordinance except as hereinafter provided.
>
> The erection or construction of any building or structure for essential services, including but not limited to electrical substations, gas regulator stations, sanitary treatment facilities or other similar facilities shall be designed and erected to conform harmoniously with the general architecture and plan of such district in which they are to be erected, shall not interfere with the planned use of such district, and shall be subject to the prior approval of the Planning Commission. Plans and specifications for such building or structure shall be tendered to the Zoning Administrator and the Planning Commission as a prerequisite of such approval; furthermore, the Planning Commission shall have the power to permit any essential public service to erect and use an essential service

> building or structure in any permitted district, to a greater height or of a greater area than the district requirements established; provided such board shall first find such structure or building necessary for the public convenience and necessity.

The parties disagree on the classification of this zoning permit request under the section for "essential services." The zoning ordinance does not define the term "essential services." NWNA argues that this project is not an essential service pursuant *to Kersheske v Twp of Thomas*, 2 Mich App 1, 4; 138 NW2d 509 (1965), where the Court of Appeals held that "essential service" provisions are "meant to exempt the Township from being subject to its own zoning ordinance." *Id.* Further, the plain meaning of "essential" is "something necessary, indispensable, or unavoidable." *Webster's Ninth New Collegiate Dictionary* (1986). "Service" is defined as "a facility supplying some public demand." *Id.* Osceola Township argues that the booster-pump facility is a building or structure for essential services pursuant to the definition in § 21.3, which describes the use as "including but not limited to electrical substations, gas regulator stations, sanitary treatment facilities or other similar facilities." The focus of this argument is on the "other similar facilities" portion of this sentence. The Township believes that the booster-pump building is similar to the items listed in the ordinance. The Court agrees with the argument of the Township on this point. The service in question in this case is the provision of water to the public. There can be no dispute that water is essential to human life. Therefore, the facts meet the definition of "essential" given the plain meaning of the word as applied to the facts of the case. In this case the water is not supplied directly to people's homes, as the other services listed in this section may be, but instead is being made available to a broader section of the public by being bottled and available for sale to the general public. This booster- pump facility would supply a quantity of water to the bottling facility, which in turn would supply "a public demand" for bottled water. As such, applying the rule of construction known as 'ejusdem

gneries', the facility proposed by NWNA is a thing of the "same kind, class or character as those specifically enumerated" in the zoning ordinance. *People v Smith*, 393 Mich 432, 436; 225 NW2d 165 (1975). Given the nature of water as essential and the fact that the facility supplies a public demand, the Court finds this proposed booster-pump facility is properly classified as an essential public service under the zoning ordinance.

The parties disagree on the application of the proviso contained in the final line of § 21.3, which states "provided such board shall first find such structure or building necessary for the public convenience and necessity." Osceola Township argues this proviso applies to the entire section and any request that falls within the definition of "essential services" must meet the requirement that the building or structure is necessary for the public convenience and necessity. The ZBA explained:

> Section 21.3 of the Zoning Ordinance requires Nestle to meet the "public convenience and necessity" standard. The proviso in the last clause of that section does not only apply to the immediately preceding clause, but rather to the entire second paragraph. The entire second paragraph applies to essential services structures and buildings, and there is no compelling reason that the 'public convenience and necessity' is only relevant when a structure or building is proposed at a greater height or area than otherwise permitted. For purposes of zoning, increased height or area over Zoning Ordinance standards are subject to the 'practical difficulties' standard. Adding a 'public convenience and necessity' standard only for increased height and area makes no sense in the zoning context. (ZBA Resolution No. 20170620-A)

The Zoning Board of Appeals found it was this requirement that was lacking in the NWNA's request to build the booster-pump building.

NWNA argues that this proviso only applies to the immediately preceding portion of the ordinance that states ". . . furthermore, the Planning Commission shall have the power to permit any essential public service to erect and use an essential service building or structure in any

permitted district, to a greater height or of a greater area than the district requirements established. . . ."

The Michigan Supreme Court, in *Saginaw County Twp. Officers Ass'n v City of Saginaw*, 373 Mich 477, 130 NW2d 30 (1964), held "a proviso is used to limit, modify or explain the main part of the section to which it is appended. *Id.* at 482. Furthermore, a general rule of statutory construction is that "the office of a proviso is to limit, modify or explain the main part of the section, to which it is attached, rather than to enlarge its provisions, unless it is clearly apparent that the Legislature intended a more comprehensive meaning." *Luce v Rogers*, 181 Mich 599, 603, 148 NW2d 381 (1914).

Following the rules of statutory construction, this Court must interpret the zoning ordinance to give meaning to every phrase, clause, and word in the ordinance. Here, two different sections of the zoning ordinance address "essential services." Section 2.8 grants broad authority to the Township by stating, ". . . it being the intention hereof to exempt such erection, construction, alteration, and maintenance from the application of this Ordinance, except those which may be considered a danger to the community health, safety, and welfare." Section 21.3 then places limitations on that authority in a more specific manner. These limitations are contained in the second paragraph of § 21.3. This paragraph contains only two sentences, with various forms of punctuation in each sentence. The first sentence states:

> The erection or construction of any building or structure for essential services, including but not limited to electrical substations, gas regulator stations, sanitary treatment facilities or other similar facilities shall be designed and erected to conform harmoniously with the general architecture and plan of such district in which they are to be erected, shall not interfere with the planned use of such district, and shall be subject to the prior approval of the Planning Commission.

The second sentence continues:

> Plans and specifications for such building or structure shall be tendered to the Zoning Administrator and the Planning Commission as a prerequisite of such approval; furthermore, the Planning Commission shall have the power to permit any essential public service to erect and use an essential service building or structure in any permitted district, to a greater height or of a greater area than the district requirements established; *provided such board shall first find such structure or building necessary for the public convenience and necessity.* (Emphasis added.)

If the proviso is applied to the entire section, it would enlarge its provisions and render the broad grant of authority of § 2.8 as surplusage. Limiting the proviso to the immediately preceding section allows the zoning ordinance § 21.3 to be read in harmony with § 2.8. The interpretation espoused by Osceola Township would render these two sections in conflict with each other because the standard in § 2.8 requires approval of "essential services" "except those which may be considered a danger to the community health, safety, and welfare." Section 21.3 would change the standard in all cases to be a finding that the structure or building is necessary for the "public convenience and necessity." This would impose two different standards on the same question. This inconsistency can only be resolved by finding that the proviso at the end of § 21.3 only applies to the specific sentence to which it is appended. Therefore, neither the Planning Commission nor the Zoning Board of Appeals was required to make a finding of public convenience and necessity before issuing a zoning permit to NWNA for this specific building request. Since this finding was the stated reason for denial of the zoning permit to NWNA, the denial was in error. This Court hereby orders the issuance of a zoning permit to NWNA to construct the booster-pump house as requested. Having made this finding, the Court does not address the additional arguments presented by NWNA.

IT IS SO ORDERED.

Dated: December 20, 2017

Susan K. Sniegowski
Susan K. Sniegowski
Circuit Judge

51ST CIRCUIT COURT
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