

YORK, DOLAN & TOMLINSON, P.C.

Attorneys and Counselors at Law
42850 Garfield, Suite 101
Clinton Township, Michigan 48038
586-263-5050
Fax 586-263-4763

John A. Dolan (jdolan@yorkdolanlaw.com)
Timothy D. Tomlinson (ttomlinson@yorkdolanlaw.com)

Fred A. York (1930-1989)

October 8, 2008

RECEIVED

OCT 09 2008

Mr. Robert Hoepfner
County Highway Engineer
Road Commission of Macomb County
Administration Building
117 South Groesbeck Highway
Mt. Clemens, MI 48043

Re: Charter Township of Shelby v Department of State Police, et al

Dear Mr. Hoepfner:

Enclosed is a copy of the Opinion and Order from the Court dated October 6, 2008. The Road Commission has won. An appeal by right exists with the Township. They must file a claim of appeal within 21 days from October 6, 2008. We will advise if any appeal is filed.

The Court essentially held that the Township had opted out of the process as a result of its conduct. The Township conducted its own study but failed to utilize any accepted engineering principles. The Court equated this with opting out and has ruled in our favor. The door is left open that a Township or municipality could block changes in speed limits by utilizing accepted engineering principles to support its position. Please share this result with the Board. Please contact me should you have any questions. We remain,

Very truly yours,

YORK, DOLAN & TOMLINSON, P.C.

John A. Dolan

/gad
enclosure

STATE OF MICHIGAN

RECEIVED

MACOMB COUNTY CIRCUIT COURT

OCT 08 2008

CHARTER TOWNSHIP OF SHELBY,
A Municipal Corporation,

**YORK, DOLAN &
TOMLINSON, P.C.**

Plaintiff,

vs.

Case No. 2007-4082-CZ

DEPARTMENT OF STATE POLICE and
ROAD COMMISSION FOR THE COUNTY
OF MACOMB,

Defendants.

OPINION AND ORDER

Plaintiff moves for summary disposition. Defendants countermove for summary disposition in their favor.

Plaintiff filed this complaint for declaratory relief on September 19, 2007. This case concerns Mound Road, a county highway, in Shelby Township, which abuts property zoned for residential use interspersed with schools and churches. Plaintiff contends that on March 28, 2006, the road commission informed plaintiff that it and the Michigan State Police had completed a survey for reviewing the speed limit on Mound Road from M-59 to 26 Mile. On April 6, 2006, plaintiff's designated representative disagreed with posting a new 50 MPH speed limit from M-59 to 26 Mile on Mound Road and forwarded its disapproval to the road commission. Nevertheless, on April 18, 2007, the Michigan State Police signed traffic control order No. S 50-18-06, and on May 3, 2007, the road commission signed the same, which rescinded a prior traffic control order with a 45 MPH speed limit, traffic control order S 50-252-

89. Plaintiff contends that defendants violated MCL 257.628(2) by executing and implementing Traffic Control Order S 50-18-06 without the unanimous consent of Shelby Township, the road commission and the Michigan State Police. Plaintiff contends that defendants misapplied MCL 257.675 in the execution and implementation of Traffic Control Order S 50-18-06 as it does not regulate speed limit signage. Plaintiff brings claims for violation of MCL 257.628—declaratory relief (count I); and declaratory relief—inapplicability of MCL 257.675 (count II). Plaintiff now moves for summary disposition; defendants countermove in response.

Plaintiff argues that MCL 257.628(2) explicitly requires three parties, the county road commission, the state police, and the township board, to unanimously consent before maximum speed limits may be changed along county highways, such as Mound Road. Additionally, plaintiff argues that defendants mistakenly rely on MCL 257.675; it does not present a basis for posting the new speed limit signage, but pertains to parking signage. Plaintiff asserts that upon finding of the proposed increase in the speed limits, residents urged the township supervisor against it. Plaintiff further contends that its designated representative, the chief of police, informed the county road commission that the township did not approve of the change. Plaintiff insists it did not exclude itself from the decision-making process at any time. Plaintiff contends that despite the township's express written disapproval of the increase, defendants filed TCO S 50-18-06 with the Macomb County Clerk representing "compliance" as "voluntary" under the "authority" of MCL 257.628 and 257.675.

Plaintiff argues, first, that MCL 257.628(2) clearly requires unanimous agreement upon completion of an engineering and traffic investigation between the County Road Commission, Township Board and State Police before county highway maximum and minimum speeds may be determined and established.

Second, plaintiff argues that the statute upon which defendants rely in posting new speed signs without the township's consent, MCL 257.675, is intended to regulate parking, and the subsection regarding signage, MCL 257.675(4) refers to the road commission's and state transportation commission's authority to erect signs regarding parking of automobiles. Therefore, plaintiff contends, TCO S 50-18-06 must be set aside and S-50-252-89 must be restored.

Further, plaintiff argues that even if it is determined that 257.628(2) is ambiguous, legislative history clearly shows that the Michigan legislature intended for local input when township boards were included in the decision making process for altering county highway maximum speed limits.

In response, the road commission agrees there are no genuine issues of material fact, and asserts that summary disposition should be granted in its favor instead. The road commission argues that plaintiff is precluded from objecting to the speed limit change as a result of unreasonably withholding its approval of the request for the speed zone change. Defendant contends plaintiff is precluded from objecting to the speed zone change as a result of a failure to exercise discretion based upon an engineering and traffic investigation suitable to determine whether a reasonable or safe speed is found to exist. Further, defendant contends that pursuant to MCL 257.628(5), the road commission and state police have authority to regulate speed control signs without the input of the Township, and, accordingly, the Township is without power or authority to object to such regulation. Further, defendant contends that if the statute in question, MCL 257.628(2), is interpreted as not requiring adherence to recognized traffic and engineering principles on the part of the Township, it would be rendered unconstitutionally void for vagueness, for allowing the township unfettered discretion in withholding its consent.

The road commission argues that a duty is imposed upon a governmental entity to exercise discretion reasonably in withholding consent and the Township has violated this duty. Second, defendant argues that the opinion drawn that a change in speed is unwarranted is without a proper legal foundation and is unsupportable under any acted test of opinion testimony. Here, defendant contends that the Township's representative, Chief Leman, did nothing to acquaint himself with accepted methodology for establishing speed limits. Defendant contends the process Shelby engaged in comes nowhere near meeting what otherwise would be the requirements for presenting reliable and accepted evidence. Defendant contends this demonstrates that the Township acted unreasonably in withholding its consent. Third, defendant maintains that the road commission and the state police have authority to regulate the speed of vehicles on Mound Road without the input of the Township pursuant to MCL 257.628(5), notwithstanding the verbiage requiring the assent of the Township in MCL 257.628(2). Fourth, defendant contends that the Township's statutory construction argument should be rejected since it relies upon flaws principles of statutory construction, including legislative analysis.

Fifth, in the alternative, defendant argues that if the Court finds no duty within MCL 257.628(2) to exercise discretion reasonably adhering to an accepted methodology for engineering and traffic investigation, then the statute is unconstitutional.

The Michigan State Police also respond. The police respond that MCL 257.628(2) requires the speed limit to be determined "upon the basis of an engineering and traffic investigation." The police state that the 85th percentile speed is the standard generally used to establish speed limits. The police contend in refusing to follow this rule, Shelby Township failed to comply with MCL 257.628(2). Finally, the police state that the Michigan State Police is ready and willing to redo an investigation to determine the 85th percentile to establish a safe speed.

In additional briefing, the township argues that it has the constitutional right of “reasonable control” over county highway Mound Road.

The township moves for summary disposition pursuant to MCR 2.116(C)(8). Defendants move for summary disposition pursuant to MCR 2.116(I)(2), (C)(8) and (C)(10). A motion brought under MCR 2.116(C)(8) tests the sufficiency of the complaint on the basis of the pleadings alone. *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). The trial court must grant the defendant's motion if no factual development could justify the asserted claim for relief. *By Lo Oil*, 26. A (C)(10) motion tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. *By Lo Oil*, 26. The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *By Lo Oil Co*, 26. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *By Lo Oil Co*, 26-27.

Issues of statutory interpretation are reviewed do novo. *City of East Lansing v Dep't of State Police*, 269 Mich App 333, 334-335; 712 NW2d 519 (2005). The rules of statutory construction require the courts to give effect to the Legislature's intent. *Universal Underwriters Ins Group v Auto Club Ins Assoc*, 256 Mich App 541, 544; 666 NW2d 294 (2003). “This Court should first look to the specific statutory language to determine the intent of the Legislature,” which is “presumed to intend the meaning that the statute plainly expresses.” *Id.* If the language is clear and unambiguous, “the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted.” *Id.* If reasonable minds could differ regarding the

meaning of a statute, judicial construction is warranted. *Id.* A court must not read into a statute anything “that is not within the manifest intent of the Legislature as gathered from the act itself.”

Id.

The pertinent statute in this case is MCL 257.628, “speed limits,” subsections (2) and (5), set forth as follows:

- (2) **If the county road commission, the township board, and the department of state police unanimously determine upon the basis of an engineering and traffic investigation that the speed of vehicular traffic on a county highway is greater or less than is reasonable or safe under the conditions found to exist upon any part of the highway, then acting unanimously they may establish a reasonable and safe maximum or minimum speed limit on that county highway that is effective at the times determined when appropriate signs giving notice of the speed limit are erected on the highway. A township board that does not wish to continue as part of the process provided by this subsection shall notify in writing the county road commission. . . .**

.....

- (5) **If upon investigation the state transportation department or county road commission and the department of state police find it in the interest of public safety, they may order the township board, or city or village officials to erect and maintain, take down, or regulate the speed control signs, signals, or devices as directed, and in default of an order the state transportation department or county road commission may cause the designated signs, signals, and devices to be erected and maintained, taken down, regulated, or controlled, in the manner previously directed, and pay for the erecting and maintenance, removal, regulation, or control of the sign, signal, or device out of the highway fund designated.**

As a preliminary matter, it is clear that defendant road commission’s reliance on subsection (5) is misplaced. Nowhere in this subsection does it read that the road commission and state police may actually change the speed limit without the Township’s approval, which would be in direct contravention of subsection (2). Instead, subsection (5) merely reads that either the state transportation department, or the road commission and state police, if they find it in the interest

of public safety, may order the township board to put up speed control signs and the like. The language is plain and unambiguous.

Second, this leads the Court to interpretation of subsection (2) itself. It does provide that all three entities—the township, the road commission and the state police—must “unanimously” agree to change the speed limit, unless the township opts out. However, it also provides that such determination must be based upon an “engineering and traffic investigation” that the speed of vehicular traffic on a county highway is greater or less than is reasonable or safe under the conditions found to exist upon any part of the highway.

The Motor Vehicle Code does not set forth what constitutes a valid “engineering and traffic investigation” per se. However, the road commission and state police in this case provided evidence that a standard regarding such investigations exists. The road commission presents the affidavit of Adam Merchant, a licensed professional engineer employed by the Board of County Road Commissioners for the County of Macomb. (Def MCRC Ex A) Merchant swears that he is licensed by the State of Michigan as a registered professional engineer, has a bachelor’s degree in civil engineering, and a masters degree in civil engineering with a specialization in transportation. Further, Merchant states he is certified as a professional traffic operations engineer. Merchant indicates that road commission employees conducted an engineering and traffic study, and in accordance with accepted engineering principles, accumulated data which reflected the speed of vehicles in the subject area in order to obtain a statistically reliable sample. Merchant states that they identified the 85th percentile speed at which traffic was flowing based on data accumulated. Merchant further contends that the speed at which 85% of the vehicles are traveling has been generally determined to be the appropriate speed limit, which minimizes accident risk and maximizes motorist compliance. Merchant

contends that numerous research documents support utilizing the 85th percentile method, including research under the authority of the State of Michigan and Federal Highway Administration. Merchant further avers that he has reviewed the deposition transcript of Police Chief Robert Leman and the data that was presented to him, and Merchant personally is unaware of any accepted methodology for establishing speed limits which would permit conclusions about speed limits to be drawn from the data used by Chief Leman.

The road commission further presents correspondence dated March 28, 2006, to the township, indicating that the road commission and state police had conducted the study, and inviting the township to either agree or disagree with their findings. (MCRC Ex B) In response, Chief Leman of the township replied by letter dated April 6, 2006, that he had instructed his traffic sergeant to conduct a study of the traffic flow, traffic accidents, and other related information pertaining to Mound Road, and concluded that the speed limit should not be raised. (MCRC Ex C) The road commission then issued a letter dated April 11, 2006, asking the township to forward a copy of its data to them for their review and inclusion in the study, noting that the additional data would be included in the determination of the Mound Road speed limit, and shared with the state police, who would make the final determination. (MCRC, Ex D)

The township's study is described and set forth in Chief Leman's deposition testimony, presented by both parties. Leman testified that he had his traffic sergeant investigate three criteria--crashes along Mound Road, the type of businesses and residential areas in that area, and the type of tickets that were being written in that area. (Tr 8) Leman testified he chose those criteria because he felt in his experience and expertise that those were the three main areas that affected the speed of the road. (Tr 11) Leman testified that while he had information of how the base of speed limits are statistically achieved, he did not look into that information. (Tr 11)

Leman testified that he was familiar with the 85th percentile guide. (Tr 12) With regard to the traffic tickets criterion, Lemman stated he believed that a two-year study of tickets issued would be a fair representation of traffic. When asked, “So just sort of an intuitive decision by you, would that be a fair statement,” Lemman affirmed, “Yes.” (Tr 13) When asked if he were aware of any reports or studies that supported using tickets issued as a basis for establishing speed limits, Lemman stated he was not. (Tr 13)

With regard to the third criterion—residences and businesses in the area—the information gathered was “just probably a verbal report from the sergeant to me regarding that, those stretches of the township.” (Tr 13-14) Further, Lemman testified he could not recall offhand what the verbal report was. (Tr 14)

With regard to the first criterion—crashes—Lemman testified that he looked at all crashes over a two-year period, meaning the types of violations, the types of crashes, the severity of the crashes and the hazardous actions involved with the crashes. (Tr 15-16) A written report was prepared, which revealed that the majority of crashes involved either failure to stop in assured clear distance or failure to yield to traffic. (Tr 16) Lemman stated that at the time he reported this information to Ralph Maccarone, township supervisor, he had no speed study information available to him to show what the actual traffic speed was in that area. (Tr 17)

Thus, the Court is persuaded that reasonable minds could not find that the township conducted an “engineering and traffic investigation,” as contemplated by MCL 257.628(2). Instead, by his own admission the police chief conducted the criteria to be used on his own “intuition” as to what was relevant. No engineer was involved. While the township contends that the only way it could opt out of the decision making process under this statute is by expressly notifying the county road commission that it wished to, the Court does not agree.

While the statute does read that “[a] township board that does not wish to continue as part of the process provided by this subsection shall notify in writing the county road commission,” this does not signify it is the only way a township board can be said to have withdrawn from “the process provided by this subsection. . . .” The Court is persuaded that the process provided by this subsection is the “engineering and traffic investigation.” Further, as stated, the evidence presented is that only one “engineering and traffic investigation” was conducted in this case—that by the road commission and state police. Again, the evidence presented is that the township was invited to participate in the engineering and traffic investigation by forwarding its “data” to the road commission and state police for inclusion in the study. It declined to do so. The Court is persuaded that the township’s failure to participate constitutes a failure to continue as part of the process provided in the statute. Moreover, while the township strictly construes the language providing that a change of speed limit must be arrived at “unanimously” by all three entities, the inclusion of the language that “[a] township board that does not wish to continue” may opt out indicates that the Legislature intended that if the township opted out and the other two entities decided the speed limit needed to be changed, the latter two would suffice.

In sum, the Court is persuaded that summary disposition is properly granted to defendants. The Court is persuaded that the constitutional issues raised by the parties need not be reached.

For the foregoing reasons, plaintiff’s motion for summary disposition is DENIED. Defendants’ motion for summary disposition is GRANTED. In compliance with MCR

2.602(A)(3), the Court states this *Opinion and Order* resolves the last pending claim and CLOSSES this case.

IT IS SO ORDERED.

JAMES M. BIERNAT

HON. JAMES M. BIERNAT
Circuit Court Judge

OCT 06 2008

DATED: October 6, 2008

A TRUE COPY
Carmella Sabaugh
COUNTY CLERK

BY Jaune Schott
DEPUTY CLERK

cc: Robert Huth, Jr., Attorney for Plaintiff
Robert F. Cella, Attorney for Plaintiff
Patrick Isom, Assistant Attorney General
John Dolan, Attorney for Defendant