STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(SMOLENSKI, P.J., and JANSEN and FITZGERALD, JJ.)

CHARTER TOWNSHIP OF NORTHVILLE,
a Michigan charter township,

Plaintiff,

-and-

No. 120213

HEATHER SCHULZ and JEFFREY SCHULZ, MARY LOWE and GEORGE LOWE, ERIC HANPETER and LAURA HANPETER, FRANK CORONA and MARCELLA CORONA, DAVID MALMIN and LEE ANN MALMIN, JOHN MILLER and DEBRA MILLER, TOM CONWELL and EVY CONWELL, MARY BETH YAKIMA and DAN YAKIMA, RICHARD LEE and PATTY LEE, BETH PETERSON and RICK PETERSON, JOHN BUCHANAN, KEN BUCHANAN, LARRY GREGORY and NANCY GREGORY, K. MAUREEN WYNALEK and JAMES WYNALEK, HAROLD W. BULGER and SANDRA A. BULGER,

COA No. 219124

Wayne Circuit Court
LC No. 98-816747-CZ
KATHLEEN I. MACDONALD, J.

Intervening Plaintiffs-Appellants,

-vs-

NORTHVILLE PUBLIC SCHOOLS, a Michigan municipal corporation, LEONARD R. REZMIERSKI, Superintendent of Northville Public Schools, and the BOARD OF EDUCATION OF NORTHVILLE PUBLIC SCHOOLS,

Defendants-Appellees.

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DEFENDANTS-APPELLEES' BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF BASIS OF JURISDICTION

On April 12, 1999, Wayne Circuit Judge KATHLEEN I. MACDONALD, entered a final order dismissing an action seeking declaratory and injunctive relief against Defendants-Appellees. On August 17, 2001, the Court of Appeals issued an opinion affirming that order. On October 30, 2002, this Court entered an order granting a delayed application for leave to appeal by Intervening Plaintiffs-Appellants. *Schulz v Northville Public Schools*, ___ Mich ___; 654 NW2d 327 (2002). This Court has jurisdiction pursuant to MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE JUDGMENTS OF THE TRIAL COURT AND THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE PLAIN LANGUAGE OF MCL 380.1263(3) OBJECTIVELY MANIFESTS A LEGISLATIVE INTENT TO EXEMPT SITE PLANS FOR SCHOOL BUILDINGS FROM LOCAL ZONING CONTROLS.

Intervening Plaintiffs-Appellants answer: "No."

Defendants-Appellees answer: "Yes."

This Court should answer: "Yes."

II. WHETHER THE ARGUMENTS ADVANCED BY INTERVENORS AND THEIR SUPPORTING AMICI CURIAE CANNOT OVERCOME THE PLAIN LANGUAGE OF § 1263(3).

Intervening Plaintiffs-Appellants answer: "No."

Defendants-Appellees answer: "Yes."

This Court should answer: "Yes."

III. WHETHER THIS COURT SHOULD DECLINE TO HOLD THAT THE STATUTE AT ISSUE UNCONSTITUTIONALLY DELEGATES LEGISLATIVE AUTHORITY TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

Intervening Plaintiffs-Appellants answer: "No."

Defendants-Appellees answer: "Yes."

This Court should answer: "Yes."

COUNTER-STATEMENT OF FACTS

A. INTRODUCTION.

On August 17, 2001, the Court of Appeals (SMOLENSKI, P.J., and JANSEN and FITZGERALD, JJ.) issued a decision (**Apx 110A-116A**) affirming an April 12, 1999 final order by Wayne Circuit Court Judge KATHLEEN I. MACDONALD (**Apx 108A-109A**), which dismissed claims for declaratory and injunctive relief by Plaintiff, the Charter Township of Northville (hereinafter "the Township"), and several Northville residents, Intervening Plaintiffs-Appellants (hereinafter "Intervenors"), against Defendants-Appellees, Northville Public Schools, the Board of Education for Northville Public Schools, and Dr. Leonard R. Rezmierski (hereinafter collectively "the District" or "the School District"). The Township sued, alleging that the District was building its new high school in violation of the Township's zoning ordinance. The Township initially moved for a preliminary injunction, which the circuit court denied by order dated July 10, 1998 (**Apx 108B-109B**), because the District was exempt from the Township's zoning ordinance by virtue of § 1263(3) of the Revised School Code, MCL 380.1263(3) (**Apx 105B-106B**). For that same reason, and because the circuit court found no merit to the assertion that § 1263(3) was unconstitutional, the court ultimately denied a motion by the Township and Intervenors for summary disposition pursuant to MCR 2.116(C)(9) (**Apx 168B-173B**). That ruling then formed the basis for the final order dismissing the action with prejudice (**Apx 108A-109A**).

The Township and Intervenors each appealed as of right to the Court of Appeals, but the Township dismissed its appeal after settling its differences with the District. Intervenors persisted. Ultimately, the Court of Appeals determined "that the statute is constitutional and that its plain language exempts school construction projects from local land use regulations, including zoning and site plan reviews." (**Apx 112A**).

B. HISTORICAL/LEGAL BACKGROUND.

In order to fully appreciate events as they unfolded, it is first necessary to have some background on the state of the law regarding the regulation of the construction of school buildings and site plans for those buildings both prior to 1990 and subsequent to 1990. Since 1937, local units of government have lacked authority to regulate the construction of public and nonpublic school buildings inasmuch as the entire field of school construction was deemed to have been preempted by the Construction of School Building Act (CSBA), 1937 PA 306, MCL 388.851 *et seq*. See, e.g., OAG, 1955-56, No 2792, pp 687-688 (November 21, 1956). This remained true following the promulgation of the State Construction Code Act of 1972, 1972 PA 230, MCL 125.1501, *et seq*. See, e.g., OAG, 1975-1976, No. 4914, pp 237-239 (January 13, 1976). See also MCL 125.1508(9) (now repealed)[1] stating that "[l]ocally adopted codes do not apply to public or nonpublic schools within the governmental subdivision without concurrence by the school authorities having jurisdiction."

Nonetheless, controversies arose regarding whether local units of government could regulate certain aspects of school construction by school authorities through local zoning authority. In *Cody Park Ass'n v Royal Oak School Dist*, 116 Mich App 103; 321 NW2d 855 (1982), the issue was whether a school district could acquire property from a cemetery and convert it into a school bus facility without first securing city permission. The Court of Appeals looked at the

[1] Pursuant to 1999 PA 245, MCL 125.1508 was repealed upon the upon the effective date (August 1, 2001) of the last of certain state administrative rules comprising the single state construction code. This does not alter the fact that local units of government remain without authority to regulate the construction of school buildings. See, e.g., 2002 PA 628 (amending the CSBA so that schools must be built in conformance with the single state construction code).

powers invested in the school district by the School Code and determined that its grant of power to locate and acquire buildings and property was not exclusive and did not exempt the school district from local zoning ordinances. *Id.* at 106-108. Subsequently, in *Lutheran High School Ass'n v Farmington Hills*, 146 Mich App 641; 381 NW2d 417 (1985), the Court of Appeals addressed whether a nonpublic school could construct a gymnasium, or even operate, absent a zoning variance from the city. Relying, in part, on *Cody Park*, the Court of Appeals concluded that the nonpublic school was subject to local zoning. *Id.*

However, as this Court later expressly recognized, the decisions in *Cody Park Ass'n* and *Lutheran High School Ass'n* were effectively overruled in 1990 by act of the Legislature. Specifically, in 1990, the Legislature enacted 1990 PA 159, making the following provision part of what was then The School Code of 1976 and is now The Revised School Code:

> 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 of a school site unless the design or construction is in compliance with . . . sections 388.851 to 388.855a of the Michigan Compiled Laws. *The superintendent of public instruction*[2] *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 <u>and of site plans for those school buildings</u>*. [MCL 380.1263(3) (emphasis added).][3]

Subsequently, in *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 664 n 3; 593 NW2d 534 (1999), this Court expressly acknowledged "that the decisions in *Cody Park Ass'n* [and] *Lutheran*

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[2] The Superintendent of Public Instruction is the head of the Department of Education and serves at the pleasure of the State School Board, which itself is a body elected directly by the people and is thereby accountable to the public. See Const 1963, art 8, § 3.

[3] As will be detailed in the Argument section of this Brief, Intervenors's primary assertion is that this subsection merely provided the Superintendent of Public Instruction with exclusive jurisdiction over issues governed by the CSBA, which would mean the Legislature accomplished nothing.

High School Ass'n . . . have since been 'overruled' by subsequent legislative amendment[ ] of the statute[ ] at issue in those cases."

C. FACTUAL BACKGROUND.

The instant litigation arose from events that occurred after the enactment of § 1263(3) when the School District, in an effort to meet the growing needs of the students and communities it serves, embarked on the sizable task of constructing a new high school. Geographically, the School District serves students from the City of Northville, the Township of Northville, parts of the City of Novi, parts of the City of South Lyon, and parts of Salem Township. Indeed, the District's boundaries do not even lie wholly within Wayne County, but also encompass portions of Oakland and Washtenaw Counties. In the years preceding the instant litigation, the District experienced explosive growth in enrollment, which was projected to continue into the indefinite future (**Apx 69B**). For example, in 1998, the District's only high school at the time was well over its 1,325 student capacity (**Apx 69B**). The District's enrollment projections at the time indicated that there would be: 1,503 high school students in the 1999-00 school year; 1,562 high school students in 2000-01 school year; 1,634 high school students in the 2001-02 school year; and 1,771 high school students in the 2002-03 school year[4] (**Apx 69B**).

The District simply could not educate these numbers of high school students in its then-existing facility without significantly compromising the quality of their education and significantly

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[4] Although the actual enrollment numbers are not technically part of the record on appeal, the District would note that the projections were not far off. The District's actual high school enrollment was: 1,462 high school students in the 1999-00 school year; 1,555 high school students in 2000-01 school year; 1,592 high school students in the 2001-02 school year; and 1,746 high school students in the 2002-03 school year.

increasing operational expenditures. For instance, absent a new facility, the District would have been required to severely curtail the availability of important course selections, such as Advanced Placement classes. (**Apx 71B-72B**.) The District would also have had to implement a split schedule, meaning that older students (juniors and seniors) would attend from early morning until noon and younger students (freshman and sophomores) would attend school from noon until early evening (**Apx 71B-72B**). Of course, the implementation of a such a split schedule would have limited the ability of younger students to participate with older students in extra-curricular activities, such as athletics and club activities. Moreover, a split schedule would have also resulted in significant additional operational costs. For example, the District would have been required to service bus routes twice per day at an additional cost of approximately $230,000.00 per year. (**Apx 71B-72B**.)

As a consequence, in 1996, the District, which through its elected Board of Education is directly accountable to the public, brought these concerns, and others, to the attention of District residents. In June 1997, District residents responded by voting in favor of a $61,500,000.00 bond issue to build a new high school. (**Apx 69B**.) The District chose to build the new high school on property located in the Township, which the District had owned since 1974 (**Apx 69B-70B**). As part of the process, the District prominently announced its plans and held a number of "Town Meetings" with District residents and Township officials to ensure that the new high school would not only service its students, but also meet the legitimate concerns of the Township and District residents (**Apx 69B**).

The District also shared its site plan for the new high school with Township zoning officials for comment, despite the fact that the project was not subject to the Township's zoning ordinance

(**Apx 70B**). Indeed, the Township's zoning officials made numerous and detailed comments, suggestions and criticisms regarding almost every aspect of the District's site plan. These comments included such concerns as the fact that foul balls from the athletic field might land in the detention pond and be lost, and that the trunks of the shrubs that the District was planting on the site were not of the appropriate thickness. In all, the Township provided the District with over 90 concerns regarding the site plan for the new high school. In the spirit of cooperation, the District painstakingly accommodated as many of the Township concerns as could be reasonably justified, and provided written responses to the Township regarding each and every concern. (**Apx 70B, 74B-78B**). Indeed, it has always been the District's position, and remains true today, that the site plan of the new high school was not in violation of the substantive mandates of the Township's zoning ordinance.[5]

Nevertheless, the Township was not satisfied with *nearly* complete compliance with each and every item on its list of concerns. In this regard, the Township was spurred on by a handful of well-to-do residents who had recently acquired lots for upscale homes adjacent to the site of the District's new high school--and had done so with full knowledge of the District's plan to build the school. In fact, it is undisputed that the lots were purchased from a developer who obtained the property from the School District (**Apx 16B-18B, 49B-50B**). Apparently unmindful of the

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[5] The District provided a detailed explanation of its position in this regard to the circuit court (**Apx 125B-129B, 162B**). However, the circuit court rested its decision on the fact that the statute exempted the District from having to comply with the Township's ordinance and, therefore, never reached the question regarding whether the school's site would have complied with the ordinance if it was applicable (**Apx 170B-173B**).

District's countervailing concerns,[6] the Township then sought to halt the construction of the new high school until each of its wishes were fully realized.

D. LITIGATION IN THE TRIAL COURT.

On May 28, 1998, the Township filed the instant lawsuit, along with a motion for a preliminary injunction, alleging that the School District was building its new high school in violation of the Township's zoning ordinance (**Apx 48B-64B**). On June 6, 2002, the above-mentioned group of homeowners filed a motion to intervene, alleging that, absent compliance by the District with Township zoning, their property would suffer such "adverse and incompatible impacts [as] noise, lights, trespassing and wayward soccer balls." (**Apx 65B-67B**.) At the June 12, 1998 hearing on the motion for a preliminary injunction, the following colloquy occurred between the court and the District's counsel relevant to the motion to intervene:

> *The Court.* Let me interrupt you for a moment so that Ms. Friedlaender, if she wants to add to this, has standing to do so. Does anyone object to her motion to intervene?
>
> *Mr. Lusk.* No, your Honor.
>
> *The Court.* That motion is granted. [**Apx 81B-82B**.]

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[6] For example, the District operates a unique Special Education Center Program that serves severely impaired special education students aged fourteen to twenty-six, from fourteen different communities. At the time, the program was being temporarily operated out of a building owned by the Livonia Public Schools because of a lack of space within the School District. Upon completion of the new high school, students from one of the District's middle schools were transferred to the old high school, freeing up the previous middle school for the Special Education Center Program. Because the Livonia Public Schools had already committed their building to another use, if the Township had succeeded in delaying the construction of the new high school, it is likely that the District would have been forced to cancel the Special Education Center Program. (**Apx 71B**).

Hence, while counsel for the District may have consented to the intervention insofar as Intervenors could participate and make any arguments in furtherance of their interests, counsel for the District never conceded anything with regard to the merits of Intervenors' arguments nor the right of Intervenors to advance particular arguments for which they lacked irreducible minimum qualifications for standing. As of that time, neither the complaint nor Intervenors' motion mentioned a challenge to the constitutionality of § 1263(3), and the entire hearing proceeded without the issue ever being raised (**Apx 79B-107B**).[7] In any event, on the basis of MCL 380.1263(3), the trial court denied the motion for a preliminary injunction (**Apx 105B-106B**).

As discovery commenced, it became clear that the Township and Intervenors would be seeking factual support for a narrow interpretation of the term "site plan" in order to assert that the plain language of MCL 380.1263(3) did not foreclose the District from having to subject the exterior features of the "site" on which the school building was located to review and approval by the Township's zoning officials. In doing so, Intervenors deposed Ms. Carol Wohlenberg, the Deputy Superintendent for Administration for the State Department of Education, on September 2, 1998. Ms. Wohlenberg testified (**Apx 119B-120B**) that the Superintendent of Public Instruction has transferred the review function for school construction and site plans to the Department of

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[7] Intervenors first raised the argument that MCL 380.1263(3) is unconstitutional in their First Amended Complaint on July 30, 1998 (**Apx 112B-113B**). Consequently, the fact that the District did not object to their intervention over a month earlier can hardly be viewed as a waiver of their lack of standing to raise the issue.

Consumer and Industry Services (CIS)[8] pursuant to an inter-agency agreement (**Apx 34A-36A**)[9]. Mr. Dan Dykstra, the Assistant Deputy Director for CIS's Office of First Safety, testified to the manner in which CIS carried out its duties under the inter-agency agreement (**Apx 59A**).

Mr. Irving Poke, the Chief of the Plan Review Division for CIS's Bureau of Construction Codes, who holds a degree in architecture from the University of Detroit, testified to having extensive experience reviewing construction and site plans for state facilities, including universities and public schools (**Apx 64A**). Intervenors' attorney, Ms. Friedlaender, marked a copy of § 1263(3) and asked Mr. Poke for his understanding of the term "site plan" as used therein. Mr. Poke responded as follows:

> Site plans, as we use them, identify features of a developed piece of property. So for what we use them for -- and I'm speaking of the Bureau of Construction Codes -- and in carrying out our responsibilities, is to understand the relationships of the buildings, structures, and equipment that is located on a piece of property and its proximity to the property lines, in some cases, and their proximity to each other for application of the construction code. [**Apx 69A**.]

Mr. Poke elaborated on cross-examination by the District's attorney:

> *Q.* You testified to an understanding of the term site plan based on your education and experience ... is that correct?
>
> *A.* Yes.
>
> *Q.* And I think you used something along the lines of, a site plan describes the features of the developed piece of property. Does that sound correct?

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[8] Actually, the transfer was originally to the Department of Labor and the Department of Commerce which were incorporated into CIS by Executive Order.

[9] This Court may note that the inter-agency agreement had expired. However, Ms. Wohlenberg testified that the Department of Education and CIS have continued to operate under the terms of the agreement since that time (**Apx 120B**). Ms. Wohlenberg's testimony on this point was confirmed by CIS representative Mr. Dan Dykstra (**Apx 59A**).

A. Yes.

Q. That sounds like a pretty broad definition to me.

A. Okay.

Q. Would that include such things as site circulation?

A. Would the site plan include site circulation?

Q. Yes.

A. Sure.

Q. Lighting?

A. Yes.

Q. Open space?

A. Yes.

Q. Building size?

A. Yes.

Q. Building height?

A. Yes.

Q. Drainage?

A. Yes.

Q. Landscaping?

A. Yes.

Q. Buffering?

A. Yes.

Q. Setbacks?

A. Yes.

Q. Ingress and egress?

A. Yes.

Q In the case of an institutional facility, the location of things like sports fields and tracks?

A. Yes. [**Apx 70A-71A.**]

Mr. Poke was then asked whether his responses to these questions were based on his "understanding of the word site plan generally as an architect." Mr. Poke responded: "Yes. And the things that you just described are textbook. That's a textbook description of site plans in any architectural school that you attend in any country." (**Apx 71A.**)

E. THE CIRCUIT COURT JUDGMENT.

Following discovery, the Township and Intervenors moved for Summary Disposition, pursuant to MCR 2.116(C)(9). At a hearing held on January 22, 1999, the circuit court heard oral argument from the parties, as well as from *amicus curiae* Michigan Association of School Boards[10] (**Apx 138B-168B**). Afterward, the court looked to the language of MCL 380.1263(3), particularly that portion that reads:

> 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.

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[10] In the lower courts, *amicus curiae* briefs were submitted in support of the Township and the District. The MASB submitted briefs in support of the District's position, while the Michigan Municipal League and Michigan Township Association submitted briefs on behalf of the Township's position.

The circuit court then ruled that, pursuant to the plain and unambiguous language of this statute, the Superintendent of Public Instruction had exclusive jurisdiction to review and approve school site plans, and thus the Township had no jurisdiction over zoning issues related to the high school. Specifically, the court stated:

> The language couldn't be more clear. And when a statute is clear and unambiguous there's no need to resort to legislative history. This statute grants the superintendent of public instruction the sole and exclusive review and approval of plans, specific and site plans.
>
> * * *
>
> I think the legislature is clear in what they're saying. If they're not clear, it is not for this court to rewrite this legislation. Therefore, I think it needs to be applied as written and there's no construction necessary. There's no need for the court to interpret the meaning or resort to any legislative history the language is clear; sole and exclusive jurisdiction to me means exactly that.
>
> I don't think the legislature intended the schools to be subject to local regulation, nor did they expect to be subject to any judicial requirements that they complied with local regulations.
>
> I do not find any merit [to the argument] that this statute is unconstitutional. Therefore, plaintiffs' motions are denied. [**Apx 172B-173B**].

Although the District had not itself moved for summary disposition, Intervenors and the Township submitted an order that was a final order disposing all claims in the case,[11] which was entered on April 12, 1999 (**Apx 108A-109A**).

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[11] Of course, it was well within the circuit court's power to render a judgment for the District when disposing of a motion for summary disposition by the Township and Intervenors. That is, when ruling on a motion for summary disposition, "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

F. THE COURT OF APPEALS JUDGMENT.

At the Court of Appeals, Intervenors made most of the same arguments that they presently urge. Addressing Intervenors' assertion that the grant of "sole and exclusive jurisdiction" over site plans in § 1263(3) should be read as only referencing site plan issues covered by the CSBA, the Court of Appeals expressly rejected what it called a "strained construction of the statutory language," noting that this Court had previously found that such terms as "exclusive jurisdiction" clearly evinced a legislative intent to exempt a unit of government from local zoning ordinances. Indeed, the Court of Appeals "fail[ed] to see how the Legislature's intent could have been more clearly expressed." (**Apx 113A-114A**.) Further, the Court of Appeals found that the Construction of School Buildings Act, MCL 388.851 to 388.855a, gave ample guidance to school officials who undertake to design school construction projects,[12] and the fact that the legislative scheme does not place the interests of adjacent property owners in a paramount position over the interests of public education was an election made by the Legislature between competing policies (**Apx 114A-115A**).

[12] It has never been in dispute that MCL 388.851(a) requires the Superintendent of Public Instruction, in cooperation with the state fire marshal and state health commissioner, to publish a set of informative guidelines that set forth good school building planning procedures. Nor was it ever disputed that this publication includes an entire detailed section on site selection and site planning, including landscaping and the like. (**Apx 1B-13B**).

ARGUMENT

I. THE JUDGMENTS OF THE TRIAL COURT AND THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE PLAIN LANGUAGE OF MCL 380.1263(3) OBJECTIVELY MANIFESTS A LEGISLATIVE INTENT TO EXEMPT SITE PLANS FOR SCHOOL BUILDINGS FROM LOCAL ZONING CONTROLS.

Standard of Review. Whether MCL 380.1263(3) exempts school construction projects from local land use regulations, including zoning controls and site plan reviews, presents a question of statutory interpretation. This Court reviews such questions de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 463 Mich 353, 357, n 8; 616 NW2d 677 (2000). Likewise, this Court reviews rulings on motions for summary disposition de novo. *Stanton v City of Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002).

Discussion. Legislative intent controls whether a governmental unit is exempt from local zoning control. Where statutory language is unambiguous, its plain meaning reflects legislative intent, and judicial construction is not permitted. Legislation bestowing "exclusive jurisdiction" on a governmental unit is an unambiguous expression of legislative intent. The Revised School Code vests "sole and exclusive jurisdiction" over the review and approval of site plans for schools in the Superintendent of Public Instruction. This plain language unambiguously evinces a legislative intent to exempt school site plan designs from local zoning controls and site plan reviews, which definitively establishes that the rulings of the circuit court and Court of Appeals were correct. Moreover, the Legislative history of § 1263(3) supports the same conclusion.

In a series of cases involving statutory language that is <u>less</u> explicit than what is at issue in the instant case, this Court has articulated the rule governing when a governmental unit is exempt

from local zoning controls. The first of these was *Dearden v City of Detroit*, 403 Mich 257; 269 NW2d 139 (1978). That case involved a dispute between the Michigan Department of Corrections (MDOC) and the City of Detroit, which arose when the MDOC leased from the archdiocese a parcel of property to use as a neighborhood rehabilitation center. The archdiocese applied to the city for a variance, which was ultimately denied by the zoning board of appeals. Both the circuit court and Court of Appeals upheld the city's decision. However this Court reversed, holding that the MDOC center was not subject to local zoning ordinances. In so holding, this Court reviewed its prior cases and concluded:

> The common thread running through these cases, although not clearly stated in some, is an attempt to determine the intent of the Legislature when deciding whether a governmental unit is subject to a municipal zoning ordinance. We hold today 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. [*Dearden, supra* at 264 (emphasis added).]

In concluding that the Legislature had intended to exempt the MDOC from local zoning regulations, this Court relied upon the general legislation establishing the MDOC, MCL 791.201 *et seq.*, and in particular the statute describing the jurisdiction of the MDOC, MCL 791.204, which provided that the MDOC "shall have exclusive jurisdiction over . . . penal institutions." *Dearden, supra* at 265. In addition, the Court emphasized the fact that the preamble to the act establishing the MDOC, evinced a legislative intent to nullify any laws that were inconsistent with the MDOC's exclusive jurisdiction over penal institutions. *Id.*

Subsequently, in *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 669; 593 NW2d 534 (1999), this Court considered whether the Department of Natural Resources (DNR) was required to comply with local zoning ordinances when constructing a public access boat launch on

Burt Lake. This Court began by reaffirming the *Dearden* test regarding legislative intent, but came to a different result than it did in *Dearden* because of the difference in the statutory language governing the DNR and that governing the MDOC. Specifically, in *Burt Twp* this Court examined the texts of the Township Zoning Act (TZA), MCL 125.271 *et seq.*, and the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, and concluded that the two acts provided coextensive statutory rights over such waterfront developments. *Burt Twp, supra* at 663-671. In so doing, this Court noted that the Legislature had only granted the DNR "power and jurisdiction" to manage land under its control, rather than granting it exclusive jurisdiction to do so. *Id.* at 669. "According the DNR 'power and jurisdiction' to manage land within its control is not the same as granting it *exclusive* control." *Id.* at 670. Importantly, this Court made it clear that, had the Legislature given the DNR, under the NREPA, the "exclusive jurisdiction" to manage land within its control, such language would have certainly exempted it from the local zoning power bestowed by the TZA. *Id.* at 669. Perhaps more importantly, for present purposes, this Court expressly stated that two cases holding that school districts were subject to local zoning control, had been effectively overruled by subsequent legislation. *Id.* at 664 n 3.

More recently, in *Byrne v State of Michigan*, 463 Mich 652; 624 NW2d 906 (2001), this Court considered the meaning of 1996 PA 538, MCL 28.281 *et seq.*, as it applied to the selection of communication tower sites by the Michigan State Police for the Michigan Public Safety Communications System (MPSCS). The relevant statute, MCL 28.282(2), provided for the Director of the Department of State Police to select locations for the towers and to then notify the local unit of government with zoning authority over a selected site. If the selected site did not comply with local zoning, the local authority could either grant a special use permit or propose an

alternate site. If the alternate site was not in keeping with the MPSCS siting requirements, then the tower could be constructed at the originally selected site. This Court affirmed the Court of Appeals holding that "the clear import" of this statute "was to exempt the State Police from local zoning ordinances." *Id.* at 660. Although the statute did not use the more certain language "exclusive jurisdiction," it did specifically contemplate selection by the State Police of a site that was incompatible with local zoning, and nonetheless provided that construction could proceed.[13]

A. The Language of MCL 380.1263(3) Clearly and Unambiguously Evinces an Intent to Exempt School Site Plans from Local Zoning Control.

In the instant case, the Revised School Code, specifically MCL 380.1263(3), provides the definitive answer to the question presented, i.e., whether the Legislature has evinced an intention to exempt school building construction and site plans from local zoning ordinances. That provision provides in clear and concise terms that it is the Superintendent of Public Instruction who has "sole and exclusive jurisdiction" to review and approve both "construction" and "site plans" for school buildings:

> The superintendent of public instruction has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction,

[13] This Court might also wish to consider *Capital Region Airport Authority v Charter Twp of DeWitt*, 236 Mich App 576; 601 NW2d 141 (1999), lv den 461 Mich 996 (2000). In that case, the Court of Appeals considered whether a state agency charged with operating a city airport was exempt from complying with a township's zoning ordinance when it wanted to develop a business park on airport grounds. The Court of Appeals examined the text of §§ 1, 7 and 9 of the Airport Authorities Act, MCL 259.801, 259.807 and 259.809, and concluded that, despite the lack of such phrases as "exclusive jurisdiction," the Legislature had evinced an intent to endow the agency with "exclusive jurisdiction over aeronautical activities on airport property." 236 Mich App at 590-591. However, the Court went on to hold that the CRAA and the township shared coextensive authority over non-aeronautical development of airport land. *Id.* at 595.

> or remodeling of school buildings used for instructional or noninstructional school purposes and of site plans for those school buildings. [emphasis added].

As noted, while the Legislature need not use such language as "exclusive jurisdiction" in order to exempt a governmental unit from local zoning control, when it does use such language the intent to exempt is a certainty. *Burt Twp, supra* at 669.

Because the language employed by the Legislature in MCL 380.1263(3) is plain and unambiguous, it must be applied as written. *Grand Traverse County v State of Michigan*, 450 Mich 457, 464; 538 NW2d 1 (1995). That is, "[w]here statutory language is clear and unambiguous, its plain meaning reflects legislative intent, and judicial construction is not permitted." *Michalski v Bar-Levav*, 463 Mich 723, 731; 625 NW2d 754 (2001). See also, e.g., *Nawrocki v Macomb Co Rd Com'n*, 463 Mich 143, 159; 615 NW2d 702 (Mich 2000) ("[i]t is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent"); *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000) ("[w]hen statutory language is clear and unambiguous, the court must honor the legislative intent as clearly indicated in that language and no further construction is required or permitted").

Under MCL 380.1263(3), the Legislature has granted the Superintendent of Public Instruction the sole and exclusive jurisdiction to review and approve both school building construction and site plans for those school buildings. This grant of sole and exclusive jurisdiction to the Superintendent clearly indicates that the Legislature wanted the Superintendent to review and approve school building construction and site plans to the exclusion of all others. See, e.g, *JP*

Francis & Associates v United States, 902 F2d 740, 742 (CA 9, 1990) (finding term "exclusive jurisdiction" to mean that court with "exclusive jurisdiction" has jurisdiction to the exclusion of all other courts). Additionally, according to *Black's Law Dictionary* (6th Ed, 1951), "these words [exclusive jurisdiction] preclude the idea of co-existence, and mean possessed to exclusion of all others."

Not only did the circuit court and Court of Appeals in this case agree that the legislative intent expressed in MCL 380.1263(3) could not be more clear, but the Attorney General has likewise opined on the clarity and expansiveness of this statutory language. Specifically, in OAG 1997, No. 6957, the Attorney General considered whether a school district must obtain a permit from a local historic district commission under the Local Historic Districts Act prior to erecting a large, illuminated sign in front of a school located within a local historic district. The Attorney General first concluded that nothing within the Local Historic District Act exempted school districts or school buildings from the Act. The Attorney General then reviewed both the Construction of School Buildings Act, MCL 388.851 *et seq.*, and MCL 380.1263(3), and concluded that under *Dearden*, the Legislature clearly intended to exempt school buildings from local zoning ordinances:

> 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. *Dearden v Detroit,* 403 Mich 257, 264; 269 NW2d 139 (1978). The school building construction act, *supra,* requires that school construction and remodeling by a local school district be approved by the state superintendent of public instruction. The Revised School Code reaffirms that authority and vests the superintendent of public instruction with exclusive jurisdiction over school construction and remodeling. <u>A reading of these statutes demonstrates that the state has delegated to the superintendent of public instruction the exclusive approval of local school district building construction plans and has exempted school building construction from local regulations.</u>

> It is my opinion, therefore, that a local school district is not required to obtain a permit under the Local Historic Districts Act before commencing work affecting the exterior appearance of a school building located within a local historic district.
>
> It is further my opinion that the state, through enactment of the school building construction act and the Revised School Code has exempted from local regulation the construction and remodeling of school buildings by local school districts. [OAG 1997, No. 6957, p 614 (emphasis added).]

As noted in OAG 1997, No. 6957, further evidence of the Legislative intent to exempt school buildings from local zoning is the Construction of School Buildings Act, MCL 388.851 *et seq*. That statute, though less explicit than the Revised School Code provision, also granted plan approval to the Superintendent. See MCL 388.851(a) (amended 2002). Moreover, in the title to the Act, the Legislature indicated an intent to ". . . repeal all acts and parts of acts, general, local and special, inconsistent with or contrary to the provisions of this act." 1937 PA 306.

The statutory language contained in MCL 380.1263(3) is equally, if not more, clear regarding the Legislature's intent to exempt school building construction and site plans from local zoning than was the language at issue in *Dearden*. That is, in *Dearden*, the MDOC was exempt from local zoning because it had been given "exclusive jurisdiction" over penal institutions, whereas here, the Superintendent of Public Instruction has "sole and exclusive jurisdiction" to review and approve school site plans. The only purpose of employing redundant language in this manner would be to emphasize the very point that Intervenors refuse to accept.

Moreover, as mentioned, this Court expressly opined that two Court of Appeals opinions decided prior to the enactment of § 1263(3), which held that school districts were subject to local zoning control, had been effectively overruled by this subsequent legislation. *Burt Twp, supra*

at 664 n 3 ("the decisions in *Cody Park Ass'n* [and] *Lutheran High School Ass'n* . . . have since been 'overruled' by subsequent legislative amendment[ ] of the statute[ ] at issue in those cases").

B. As Further Support For The Conclusion That The Statutory Language At Issue Is Clear, The Contemporaneous And Subsequent Legislative History Reveals That The Legislature Did, And Continues To, Interpret § 1263(3) To Exempt School Districts From Local Zoning Control.

Because the statute at issue is clear and unambiguous, there is no need for this Court to resort to legislative history in order to discern legislative intent. When, as in this case, the language is clear, the Legislature must have intended the meaning it plainly expressed, and the statute must be enforced as written. *Michalski, supra*, 463 Mich at 731; *Nawrocki, supra*, 463 Mich at 159. Moreover, this Court has made it clear that the interpretation given a statute by a subsequent Legislature provides a shaky basis for discerning the legislative intent of a prior Legislature. See *Donjakowski v Alpena Power Co*, 460 Mich 243, 258-261; 596 NW2d 574 (1999). See also *United States v Price*, 361 US 304, 313; 80 S Ct 326; 4 L Ed 2d 334 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). Nonetheless, in the interest of completeness, as well as convincingly establishing that Intervenors' interpretation of MCL 380.1263(3) lacks any arguable support, the District submits that the legislative history is consistent with the plain language of the statute.

The legislative history reveals that MCL 380.1263(3) was enacted to provide the Superintendent with sole and exclusive jurisdiction over school building construction and site plan review and approval. Specifically, the House Legislative Analysis on HB 5451 (**Apx 32A-33A**), which became 1990 PA 159, indicates that under ". . . the bill, <u>the superintendent of public instruction would have sole and exclusive jurisdiction over the review and approval of plans and</u>

specifications for construction-related work done on instructional or noninstructional school buildings as well as over the site plans for the buildings." (Emphasis added).

The legislative history also reveals a clear intent to exempt both the plans and specifications for buildings as well as plans and specifications for the entire site. For example, the House Legislative Analysis indicates that ". . . the bill specifies that a school district board could not design or build a school building to be used for instructional or noninstructional school purposes or design and implement a design for a school site unless the design or construction complied with Public Act 306 of 1937." (**Apx 32A** [emphasis added]).

A review of subsequent actions by the Legislature reveals a pattern of unsuccessful attempts to amend or repeal § 1263(3). These actions indicate a current legislative intent to maintain the exclusive jurisdiction of the Superintendent, and serve as evidence that the Legislature's interpretation of the current language of the statute is the same as the District's, the trial court's, the Court of Appeals' and this Court's reading of § 1263(3). Clearly, Intervenors are nearly alone in their anomalous interpretation.

Specifically, in 1991, the House, through HB 4122, sought to amend the jurisdiction of the Superintendent, but the bill never left the Committee on Education (**Apx 14B**). Two years later SB 0408 was created to "remove authority of superintendent of public instruction to review and approve or disapprove plans and specifications," but that bill also never made it out of committee (**Apx 15B**). In addition, in 1995, the entire School Code of 1976 was revamped and re-codified as the Revised School Code. Again, however, the Legislature deemed it neither necessary nor desirable to amend MCL 380.1263(3) in order to eliminate the Superintendent's sole and exclusive jurisdiction. In 1998, HB 5654 sought, amongst other things, to eliminate the Superintendent's

exclusive jurisdiction and to grant that same jurisdiction to the Director of the Department of Consumer and Industry Services or her designee. That bill (**Apx 19B-38B**) was not passed by the Legislature. In addition, as revealed in the House Legislative Analysis to that bill, HB 5654 was deemed necessary in order to alter the current state of the law, i.e., to eliminate the Superintendent's currently held exclusive jurisdiction over zoning and construction plans (**Apx 44B**). Finally, on May 1, 2001, HB 4687 was introduced, and on October 11, 2001, HB 5187 was introduced. This bill has been reintroduced in the 2003-2004 Legislative session as SB 25 and has again been sent to the Education Committee. HB 4687, if passed, would amend MCL 380.1263 to prohibit a school district from building a school or acquiring a site for a school until that district has reached an agreement with the municipality in which the site is located as to making the required infrastructure improvements (**Apx 175B-183B**). HB 5187 / SB 25, if passed, would amend MCL 380.1263(3) to provide that, beginning with schools built or occupied after its effective date, all local zoning laws generally applicable in a jurisdiction would apply to the location and siting of a public school (**Apx 178B-183B**).

Hence, the legislative history of the statute reveals that the Legislature intended to grant sole and exclusive jurisdiction to the Superintendent of Public Instruction over the review and approval of school construction and site plans. Moreover, the Legislature's treatment of the issue since 1990 reveals that subsequent Legislatures have interpreted MCL 380.1263(3) as having effectuated that result.

II. THE ARGUMENTS ADVANCED BY INTERVENORS AND THEIR SUPPORTING AMICI CURIAE CANNOT OVERCOME THE PLAIN LANGUAGE OF § 1263(3).

Standard of Review. See Issue I (de novo review for questions regarding statutory interpretation, as well as for rulings on motions for summary disposition).

Discussion. Even if this Court were to go beyond merely looking to the plain language of the statute, it should still conclude that the Legislature evinced an intent to exempt school districts from local zoning control. First, Intervenors' interpretation of the relevant statutory provision would inappropriately render much of its language nugatory surplusage. Second, the statutes from which local zoning authority derives can be easily harmonized with a reading of § 1263(3) that exempts school districts from local zoning control. Third, there is no basis for asserting that the adequacy of the Superintendent's site plan review is sufficient justification to ignore the plain language of the statute. Fourth, Intervenors' "absurd result" argument is not applicable when the statutory language is clear and unambiguous. Furthermore, there is nothing absurd about the Legislature's clearly expressed result, and this Court should decline to reject the policy choices of the Michigan Legislature in favor of other policy choices. Finally, Intervenors' argument regarding lack of due process is wholly without merit.

A. Intervenors' Strained Interpretation of § 1263(3) Would Render Part of the Statutory Language Nugatory, Would Deem the Legislature to Have Engaged in a Useless Act, and Ignores the Rule that Technical Terms Must Be Given Their Peculiar and Appropriate Meanings.

Despite its clear and unambiguous language, Intervenors erroneously argue that this Court should engage in judicial construction of the statute. Further, Intervenors would have this Court hold that, through MCL 380.1263(3), the Legislature only intended to exempt school districts from

local review of construction plans and specifications and site issues that are covered by the CSBA. However, even if this Court were inclined to indulge in judicial construction, Intervenors' interpretation cannot be sustained.

First, Intervenors' argument that the sole and exclusive jurisdiction applies only to the construction phase of the building and to "site issues" covered by the CSBA is contrary to the plain terms of the statute, which uses "site" in MCL 380.1263(1) and (2) in a context where it could not be limited to the building, and which indicates that the Superintendent's authority goes to "plans and specifications for the construction . . . of school buildings . . . and of site plans for those school buildings." MCL 380.1263(3) (emphasis added). Obviously the Legislature considered "construction" plans and "site plans" for the building to be different plans, and to cover different phases or aspects of the overall school development, or the separate phrases would not have been utilized. To read it as Intervenors suggest, would require the Court to read the phrases "plans and specifications for construction" and "site plans for those school buildings" to mean one and the same thing, which would be contrary to a construing court's obligation to give effect to all the words employed in the statute, and avoid any construction that would render some statutory language nugatory surplusage. See *Omelenchuk v City of Warren*, 466 Mich 524, 527-528; 647 NW2d 493 (2002); *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001); *Bradley v Saranac Community Schools,* 455 Mich 285, 299; 565 NW2d 650 (1997). "It is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and courts should avoid a construction that would render any part of the statute surplusage or nugatory." *In re MCI Telecommunications Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). Acceptance of Intervenors' argument would require this Court to not only

ignore the plain meaning of the statute, but would render the words "and site plans for those school buildings" nugatory surplusage.

Second, prior to the passage of 1990 PA 159, which established MCL 380.1263(3), the Legislature had already exempted school districts from local construction codes. That is, MCL 125.1508(9), from 1980, and throughout all of the period of time at issue,[14] expressly provided that public schools were not subject to local construction codes unless compliance with such is agreed to by school authorities:

> Locally adopted codes do not apply to public or nonpublic schools within the governmental subdivision without concurrence by the school authorities having jurisdiction.

Thus, if the Legislature had, through MCL 380.1263(3), merely exempted–as Intervenors argue–school building construction from local building codes, as opposed to zoning codes as well, it would have been accomplishing nothing, because the State Construction Code already provided as much. Such a conclusion, however, is directly contrary to the well-laid rule that when the Legislature acts, it is presumed to not have taken a useless act. *Girard v Wagenmaker*, 437 Mich 231, 244; 470 NW2d 372 (1991); *Klopfenstein v Rohlfing,* 356 Mich 192, 202; 96 NW2d 782 (1959). Because Intervenors' argument is directly contrary to this principle, and to the plain language of the statute, it should be rejected.

Also supporting this conclusion is the rule of statutory construction that when a statute contains a technical term which is undefined by the statute, the Court should accord that term its "peculiar and appropriate" meaning. MCL 8.3a; *Consumers Power Co v Public Service Comm'n*,

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[14] See n 1, *supra.*

460 Mich 148, 163; 596 NW2d 126 (1999); *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997); *Decker v Flood*, 248 Mich App 75, 82; 638 NW2d 163 (2001); *Vanderlaan v Tri-County Community Hospital,* 209 Mich App 328, 332; 530 NW2d 186 (1995). The peculiar meaning ascribed to the term "site plan" in the architectural field, as detailed in the Counter-Statement of Facts, was accurately set forth by Mr. Irvin Poke, who was deposed by the Township. In his testimony, Mr. Poke, who has been Chief of Plan Review for the Bureau of Construction Codes, Department of Consumer & Industry Services, indicated that "site plan" is a common and well-understood phrase in the architectural field that has a specific meaning, which includes the features of a developed piece of property (**Apx 69A**). As Mr. Poke testified, the "textbook" definition of the term "site plan," as it is taught in architectural schools and applied in the field, includes such things as site circulation, setbacks, lighting, open space, building size, building height, drainage, landscaping, buffering, and ingress and egress (**Apx 71A**). Hence, the technical term "site plan" does not have the limited meaning argued for by Intervenors. Instead, its peculiar meaning in the field at issue is the one that must be enforced by this Court.

B. Statutes That Identify the Education Needs of Residents As One of The Purposes For Which Local Units of Government May Zone Are Easily Harmonized With the Plain Language Interpretation of § 1263(3).

Intervenors and their supporters erroneously attempt to argue that the statute expressly exempting school site plans from local zoning control, i.e., MCL 380.1263(3), must not mean *what* it clearly says because other statutes, which authorize local zoning control, identify meeting the need for education as being among the purposes for such zoning control. See, e.g., MCL 125.271 (facilitating education among purposes for township zoning); MCL 125.321 (inclusion of schools

in township planning); MCL 125.581 (facilitating education among purposes for city and village zoning). However, the mere fact that local authorities are directed to use their zoning authority to plan for schools and facilitate education does not mean that these statutes are in conflict with the Revised School Code or that the Superintendent of Public Instruction does not have sole and exclusive jurisdiction to review and approve site plans for school buildings. In fact, such a conclusion ignores the rule that applies when statutes are in *pari materia.*

> "Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other." [*State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Michigan Bell*, 374 Mich 543, 558; 132 NW2d 660 (1965).][15]

Hence, in this situation, the TZA, the TPA, and the City and Village Zoning Act, although not expressly mentioning whether school site plans are exempt from local zoning control, must be read as if they contained the express exemption found in § 1263(3) of the Revised School Code. This point is well illustrated in *Burt Twp, supra*, where this Court looked at the texts of the several applicable statutes together to see if there was a legislative intent to exempt the DNR from local zoning control over its boat launch. Significantly, that is the case where this Court said that, if the Legislature had used the words "exclusive jurisdiction" in the NREPA when defining the DNR's

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[15] Curiously, Intervenors and their supporting Amici acknowledge the rule that applies when statutes are in *pari materia*, but then fail to apply the rule appropriately. Instead, they appear to suggest that merely because § 1263(3) is outnumbered by other statutes that relate to the subject, but which are silent on the issue of whether school districts are exempt from local zoning control, that harmonizing the statutes somehow requires ignoring the plain language of § 1263(3).

authority over land within its control, then construction of the boat launch in that case would certainly have been exempt from local zoning control. *Burt Twp, supra* at 669.

Furthermore, when reading the relevant provisions of the zoning statutes as one enactment with provisions of the Revised School Code and the CSBA with which they are in *pari materia*, it is the duty of a court to, "if reasonably possible, construe them [all] so as to give meaning to each; that is, to harmonize them." *Nowell v Titan Ins Co*, 466 Mich 478, 484; 648 NW2d 157 (2002). See also *Lindsey v Harper Hosp*, 455 Mich 56, 65; 564 NW2d 861 (1997) ("[u]nder the rule of construction of statutes in pari materia, it is appropriate to harmonize statutory provisions that serve a common purpose when attempting to discern the intent of the Legislature").

In the instant case, harmonizing the statutes is easily accomplished. It is axiomatic that controlling land use to facilitate education and provide for schools cannot be accomplished simply by controlling school site plans–it also requires proper control over the land uses in proximity to school property. For instance, in order to avoid a school being situated next to a toxic dump, not only would school officials, subject to review and approval of the Superintendent of Public Instruction, need to exercise their authority so as to not build a school next to a toxic dump, but local zoning officials would also have to exercise their authority so as to not permit nearby property owners to operate a toxic dump next to a school. Consequently, notwithstanding the fact that the Legislature has reposed the sole and exclusive jurisdiction to review and approve school site plans in the Superintendent of Public Instruction, it is nevertheless incumbent on local units of government to exercise their zoning authority to, among other things, plan for schools and facilitate the education needs of their residents.

C. Intervenors' Opinion That The Superintendent's Review of School Site Plans is Inadequate Does Not Compel The Conclusion That § 1263(3) Should Be Interpreted Differently From Its Plain Language Meaning.

Intervenors argue that the Superintendent of Public Instruction does not, in practice, perform an *adequate* review of the site plans submitted by school districts and, therefore, the statute must not grant the Superintendent sole and exclusive jurisdiction to review and approve site plans for school buildings because a court should defer to an agency's construction of the statute it administers.

Intervenors' argument regarding an agency's construction of a statute cannot be maintained in light of the clear and unequivocal language contained in MCL 380.1263(3). As this Court found in *Western Michigan University v State, supra*, the rule that a court gives deference to an agency's construction of a statute cannot be utilized if no construction of the statute is needed, i.e., when the language of the statute is clear and can be given its plain and ordinary meaning. Because MCL 380.1263(3) is clear and can be given its plain and ordinary meaning, this Court cannot and need not address the Superintendent's construction of his duties under the statute.

Moreover, even if the Court were to reach that rule of deference, it would not be applicable in this case. It is well-settled that an agency's construction is not controlling and cannot be used to overcome a statute's plain meaning. See *Little Caesar Enterprises v Department of Treasury*, 226 Mich App 624, 633; 575 NW2d 562 (1997). If this Court were to accept Intervenors' argument that the Superintendent's actual performance implies that he does not view the Revised School Code to give him exclusive jurisdiction to approve school site plans, such an executive construction would be directly contrary to the plain meaning and clear language of

MCL 380.1263(3) and could not be followed. The Executive Branch cannot change the meaning of a clear statute by administering it in a way that contradicts its plain meaning. If Intervenors have a disagreement with how the Superintendent is administering the statute, those grievances are not properly addressed in a lawsuit against the District. Instead, such complaints are more appropriately addressed directly to the Superintendent, or the State Board of Education, or to the Legislature.

D. Intervenors' Cannot Rely on the "Absurd Result" Rule To Overcome the Plain Meaning of Unambiguous Statutory Language. Further, the Legislature's Result Is Not Absurd, and This Court Cannot Substitute Its Views For A Policy Chosen By the Legislature.

Intervenors also argue that MCL 380.1263(3) must not displace local land development regulations of school sites because it does not provide a substitute set of regulations that address the identical concerns. Notably, Intervenors do not premise this argument on any language found in the statute. This is likely so because, as noted, the language is clear and unequivocal and precludes the Township from exercising any authority over the review and approval of site plans for school buildings.

As for the idea that exempting school site plans from local zoning control is absurd, the District must point out that this Court has definitively stated that an ostensibly absurd result, standing alone, is not enough to overcome a statute's clear and unambiguous language. That is, judicial construction is not necessary absent an ambiguity, and it is inappropriate to invoke the "absurd result" rule in order "to rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 403-404; 605 NW2d 300 (2000). See also *People v McIntire*, 461 Mich 147, 155-159; 599

NW2d 102 (1999) (a supposed "absurd result" is not, standing alone, enough to overcome plain statutory language, and "correction of . . . policy choices is not a judicial function as long as the legislative choices do not offend the constitution").

Moreover, it is Intervenors' argument itself that is absurd. Why would it be unreasonable for the Legislature to think that a school board, rather than a local zoning board or township council, should be the appropriate public body to have the primary decision making responsibility regarding such matters as how a school yard should be landscaped and where the parking lots and athletic fields should be located? Why would it be absurd to think that the school board, while having its decisions subject to review and approval by the Superintendent of Public Instruction, would not also be responsive to the concerns of its constituents? Does a municipal zoning authority have a monopoly on wisdom regarding proper land use? Why would it be better for decisions that affect all of the residents of a school district to be subject to decisions by officials representing only a portion of the district?[16] Local units of government often exercise the power to exempt themselves from the zoning restrictions they apply to others, and many other institutions of government are exempt from local zoning control. From where do Intervenors draw the presumption governmental entities are incapable of self-regulation? If Intervenors' presumption

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[16] Consider how unfair it is for the Township, which is accountable to only a small portion of the School District's residents, to dictate how funds belonging to the residents of the entire District are to be spent. This Court has previously recognized that "taxation without representation" is, itself, a denial of fundamental rights that cannot be permitted. *Wilkins v Bentley*, 385 Mich 670, 694; 189 NW2d 423 (1971) (noting that "[t]he cry of the American revolution of 'no taxation without representation' articulated the desire of the colonists to have a voice in selecting the officials who made the decisions affecting their daily lives," and holding that a certain residency restriction on voting amounted to taxation without representation and was, therefore, in violation of Equal Protection).

were correct, we should have countless examples of governmental entities abusing their freedom from external zoning control.

In this case, the record reveals that the District was extremely cooperative in addressing the Township's concerns regarding the new high school's site plan (**Apx 70B, 74B-78B**), and it appears perfectly reasonable for a school board, subject to review and approval by the Superintendent, to weigh the hardships in addressing such concerns in view of its obligation to educate students. Indeed, although the trial court never reached the issue, it has always been the District's position that its site plan meets all of the substantive requirements of the Township's zoning ordinance. (**Apx 125B-129B, 162B**.) The facts of the instant case bear out the wisdom of where the Legislature put its trust–by comparison to the great lengths that the School District went to in order to address the concerns of Township zoning officials, it is apparent that Township officials gave little or no regard to the hardships that the District's students might face in order for the Township to have each and every one of its trivial concerns satisfied. As the Court of Appeals concluded, "[t]o the extent that the interests of local property owners and the interests of public education conflict, the Legislature has chosen the side of public education." (**Apx 115A**.) Consequently, it is not this Court's role "to substitute [its] own policy decisions for those already made by the Legislature." *DiBenedetto, supra* at 404.

Nonetheless, Intervenors attempt to support their "absurd result" argument by looking to the cases from other states, interpreting different statutes. However, it is well-settled that Michigan courts will not look to decisions from other jurisdictions to interpret Michigan statutes that are not similar to those reviewed in the out-of-state decisions. *Bayer v Jackson City Bank & Trust Company,* 335 Mich 99, 110; 55 NW2d 746 (1952) ("[d]ecisions from other jurisdictions based

on the language of statutes that differ from the Michigan law are obviously not of controlling significance"); *Frankenmuth Mutual Insurance Company v Marlette Homes Inc,* 219 Mich App 165, 168-169; 555 NW2d 510 (1996) rev'd on other grounds, 456 Mich 511 (1998) ("[b]ecause Michigan's statute of repose differs from other states, we decline to look to other jurisdictions' interpretations of their statutes of repose for guidance [and] we will resort to our rules of statutory construction to determine the intent of the Legislature in drafting Michigan's statute"). Indeed, a review of the foreign decisions relied on by Intervenors reveals that neither the statutes at issue in those cases, nor the circumstances in those cases, have any similarity to the statute and facts involved in the instant case.

In *Edmonds School District No 15 v City of Mt Lake Terrace,* 77 Wash 2d 609, 613; 465 P2d 117 (1970), the court, in ruling that school districts were subject to local building codes, explicitly indicated that, because the Washington Legislature had not passed a statute prohibiting cities from exacting a permit fee or imposing its building code upon a school district, it had " left its subordinate municipalities free to regulate each other in those activities which traditionally are thought to lie within their particular competence and are more proximate to their respective functions." Likewise, in *Port Arthur Independent School District v City of Grose,* 376 SW2d 330 (Texas, 1964), the State of Texas had not enacted any type of statutory provision indicating an intention to exempt school buildings from local construction codes. Similarly, in *Cedar Rapids Community School District v City of Cedar Rapids,* 106 NW2d 655, 658-659 (Iowa, 1960), there was no statutory provision granting exclusive jurisdiction to a state official to review and approve site plans for school buildings. In fact, in *Cedar Rapids,* the court distinguished its decision from those of other states on the basis that Iowa did not have any constitutional or statutory provisions

that preempted regulating the construction of school buildings. In *School District of Philadelphia v Zoning Board of Adjustment,* 417 Pa 277; 207 A2d 864, 867 (1965), the court was not presented with a specific statutory provision which granted sole and exclusive jurisdiction to a state official to review and approve site plans for school buildings. Rather, the statutory provision asserted by the school district as exempting itself from local zoning merely provided that a "city shall not exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the general assembly which are regulating public schools."

Consequently, although Intervenors perhaps think they are advancing persuasive foreign authority of sister State Supreme Courts, what they are doing in actuality is pointing to the policy choices made by the Legislatures of several sister states.[17] However, it is not for this Court to rewrite legislation in order to express a preference for policy choices made by other state Legislatures.

E. Intervenors' "Due Process" Argument Is Wholly Without Merit.

Intervenors assert that interpreting § 1263(3) to exempt school districts from local zoning control would deprive them of due process of law because they do not have a fixed procedure whereby they may be heard with regard to the Superintendent's approval of school site plans (see

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[17] Moreover, in those cases where the Legislature of a sister state has had in place a statutory indication of a policy choice to exempt a unit of government from local zoning control, the decisions inevitably come out in favor of exemption. See, e.g., *Rutgers v Piluso*, 60 NJ 142, 149-159; 286 A2d 697 (1972) (holding that legislative intent controls whether governmental units are immune from municipal land use regulations and that the legislation creating the university in question indicated an intent not to let the development of Rutgers as a public university be "thwarted or restricted by local land use regulations and that it is immune therefrom"); *Hall v City of Taft*, 47 Cal2d 177, 184-189; 302 P2d 574 (1956) (holding that state regulation of the construction of school building implicitly preempted such regulation of school buildings by municipalities).

Intervenors' Brief on Appeal, pp 33-35).[18] "Due Process" is a term that includes both: (1) the preservation of fundamental rights that are implicit in concept of ordered liberty;[19] and (2) appropriate fairness in the procedures whereby government deprives an individual of life, liberty or property.[20] Intervenors' argument does not appear to fit within either category. For instance, they cannot legitimately argue that the passage of § 1263(3) denied them an interest in their property inasmuch as it is undisputed that the School District owned that property in 1990 when the statute was passed, and they bought that property with the Superintendent's exclusive jurisdiction already in place (**Apx 16B-18B, 49B-50B**). Consequently, it appears that Intervenors are actually arguing that they have either a liberty interest or some fundamental interest in controlling what their neighbors do with their property. In other words, Intervenors take the novel position that subjecting one's neighbors to zoning–with all of the government intrusion and control that comes with it–is an inherent right to which they are entitled. While the District is not unmindful of the benefits of zoning, it must be acknowledged that zoning is the antithesis of inherent freedom and, rather than being deeply rooted in the historical concept of ordered liberty, it is one of the hallmarks of the modern administrative state.

Nonetheless, assuming arguendo that Intervenors had a "right" to participate in the process whereby school site plans are approved, there is no merit to the assertion that they were denied

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[18] The District notes that Intervenors have clearly articulated this argument for the first time in their Brief on Appeal and, therefore, suggest that Intervenors have failed to properly preserve it.

[19] See, e.g., *Palko v Connecticut*, 302 US 319, 325-326; 58 S Ct 149; 82 L Ed 288 (1937); *People v Kevorkian*, 447 Mich 436, 475; 527 NW2d 714 (1994).

[20] See, e.g., *Mathews v Eldridge*, 424 US 319, 333-334, 96 S Ct 893; 47 L Ed 2d 18 (1976); *In re Brock*, 442 Mich 101, 110-111; 499 NW2d 752 (1993).

such right. The District held "Town Meetings" to obtain resident input. The District's board is a public body that has regular public meetings where they could voice their concerns. They could have, either formally or informally, petitioned the Superintendent of Public Education to withhold approval of the District's site plan based on their concerns. Likewise, having brought their views to the Township, the Township could have addressed its more-than-90 concerns not only to the District but to the Superintendent of Public Instruction. Finally, they could have directly challenged the Superintendent's approval in circuit court under the minimum constitutional standard of Const 1963, art 6, § 28. *McBride v Pontiac School Dist*, 218 Mich App 113, 122-123; 553 NW2d 646 (1996); *J & P Market, Inc v Liquor Control Comm*, 199 Mich App 646, 650-651; 502 NW2d 374 (1993).

III. THIS COURT SHOULD DECLINE TO HOLD THAT THE STATUTE AT ISSUE UNCONSTITUTIONALLY DELEGATES LEGISLATIVE AUTHORITY TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

Standard of Review. "Review of the constitutionality of a statute presents a question of law that is reviewed de novo." *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001). "A statute is presumed constitutional, unless its unconstitutionality is readily apparent." *Id.* "The power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict." *Council of Organizations and Others for Education About Parochiaid Inc v Governor,* 455 Mich 557, 570; 566 NW2d 208 (1997), citing *Thayer v Department of Agriculture,* 323 Mich 403, 413; 35 NW2d 360 (1949). Indeed, "statutes are accorded a strong presumption of validity and constitutionality [and] courts must construe statutes as constitutional absent a clear showing of unconstitutionality." *People v Piper,* 223 Mich App 642, 645; 567 NW2d 483 (1997) (emphasis added); *Rowley v Garvin,* 221 Mich App 699,

707; 562 NW2d 262 (1997). "Every reasonable presumption or intendment must be indulged in favor of the validity of the Act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision that a court will refuse to sustain its validity." *Council of Organizations, supra,* 455 Mich at 570, quoting *Cady v Detroit,* 289 Mich 499, 505; 286 NW 805 (1939). In addition, "[a] valid statute is not rendered unconstitutional on the basis of improper administration." *Council of Organizations, supra* at 570-571, citing *People v Kirby,* 440 Mich 485, 493; 487 NW2d 404 (1992).

Additionally, the issue of whether Intervenors have standing to contest the constitutionality of the statute at issue on delegation grounds is a question of law that this Court reviews de novo. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002).

Discussion. As a threshold matter, Intervenors lack the irreducible minimum requirements for standing to assert that § 1263(3) was an unconstitutional delegation of legislative power to the executive branch. Moreover, contrary to the Court of Appeals decision, the District did not waive any objection to Intervenors' standing to advance this argument. However, assuming this Court is inclined to entertain that argument, the Superintendent's discretion to review and approve school site plans is clearly guided by sufficient standards, that are as reasonably precise as necessary under the circumstances, so that the Superintendent exercises administrative, not legislative, power and exercises discretionary, not arbitrary, authority. Consequently, Intervenors cannot overcome the strong presumption that MCL 380.1263(3) is constitutional.

A. Intervenors Lack Standing To Challenge the Constitutionality of § 1263(3).

The District disagrees with the judgment of the Court of Appeals to the extent that it deemed the District to have waived any issue regarding Intervenors' standing to challenge the constitutionality of § 1263(3).[21] At the hearing on the Motion to Intervene, counsel for the District indicated that it had no objection to the motion to intervene, but did not concede the merits of Intervenor's yet-to-be-articulated arguments. At that time, the case was only about whether the District should be enjoined from proceeding with building its new high school. The constitutionality of § 1263(3) had not yet been challenged. (**Apx 79B-107B, 110B-114B**.) Clearly, one's standing to be in a case (i.e., one's interest in a certain result) is separate and distinct from one's standing to raise a particular issue in furtherance of the sought result.[22] It makes no sense to say that Intervenors, by virtue of intervening, should be placed in a better position than if they had filed the complaint in the first instance. The District raised standing in its affirmative defenses to Intervenors' complaint (**Apx 115B-117B**) and, thereafter, consistently maintained that such risks as that posed by a stray soccer ball did not vest Intervenors with standing to challenge the constitutionality of MCL 380.1263(3) (**Apx 130B-135B**).

Moreover, because Michigan has adopted the federal test for the irreducible minimum requirements of standing (see *infra*), it is worth noting that federal courts have consistently found

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[21] The Court of Appeals concluded this in a footnote with little analysis (**Apx 115A**).

[22] Nowhere is this more clear than in the criminal context where defendants often try to assert the constitutional rights of another in order to suppress evidence. Although they clearly have standing to defend themselves in their case and it would benefit them greatly if they could assert the rights of another, they lack standing to do so. See *Rakas v Illinois*, 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978); *People v Smith*, 420 Mich 1, 23-24; 360 NW2d 841 (1984).

that standing is an issue that courts should address *sua sponte*, if need be, regardless whether it was preserved below. See *United States v Hays*, 515 US 737; 115 S Ct 2431, 2435; 132 L Ed 2d 635 (1995) (we have an independent obligation to examine our own jurisdiction, and standing is perhaps the most important jurisdictional doctrine); *FW/PBS, Inc v City of Dallas*, 493 US 215, 231; 110 S Ct 596; 107 L Ed 2d 603 (1990) (even when the parties concede jurisdiction, we must satisfy ourselves of our own jurisdiction and that of the lower court); *Sierra Club, Lone Star Chapter v Cedar Point Oil Co*, 73 F3d 546, 555 n 22 (CA 5, 1996) (standing "is a jurisdictional requirement, and may always be addressed for the first time on appeal"); *Community First Bank v National Credit Union Admin*, 41 F3d 1050, 1053 (CA 6, 1994) (standing "is a qualifying hurdle that plaintiffs must satisfy even if raised sua sponte by the court").

Consistent with its previous position, the District again asserts that Intervenors lack standing to challenge the constitutionality of § 1263(3) on the grounds presented. The requirement that a party have standing is rooted in, and closely related to, the concept of separation of powers.

> "[T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." [*Lee v Macomb County Bd of Com'rs*, 464 Mich 726, 735; 629 NW2d 900 (2001), quoting *Lewis v Casey*, 518 US 343; 116 S Ct 2174 (1996).]

Michigan has adopted the federal standard for establishing standing. The "irreducible minimum" requirements include:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be

> fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [*Lee, supra* at 739-740, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (some internal quotation and editing marks omitted).]

Standing is an absolute prerequisite. *Lee, supra.* See also *Rogan v Morton*, 167 Mich App 483, 486; 423 NW2d 237 (1988) (standing requirements serve "to ensure that only those who have a substantial interest will be allowed to come into the court and complain").

Hence, in the instant case, it is not enough that Intervenors have alleged some harm from the District's act of building a new high school. In order to have standing to challenge the constitutionality of a delegation of authority under § 1263(3), it would be incumbent on them to show: (1) that the threat of a stray soccer ball, etc., is a concrete and actual injury to them; (2) that this "injury" was *caused* by the delegation that they complain of; and (3) that the "injury" is *likely* to be redressed by a declaration that § 1263(3) is unconstitutional as an impermissible delegation of legislative power to the executive branch. Further, in order to establish causation where the plaintiff's alleged injury is the result of the regulation of someone else, such as the instant case, although establishing standing is not precluded, the burden on a plaintiff is "substantially more difficult." *Lujan, supra*, 112 S Ct at 2137.

Here, Intervenors cannot establish the irreducible minimum requirements for standing. First, they cannot establish any "injury in fact" which is concrete and particularized, and actual or imminent, not "conjectural" or "hypothetical." Intervenors expressly averred that their alleged "injury" was the threat of an occasional loose soccer ball, the possibility that lights might reflect onto their property, and the possibility of increased noise. (**Apx 65B-67B**). These "threats" of

"possible" injuries are precisely the type of "conjectural" or "hypothetical" harms which the doctrine of standing precludes.

Second, Intervenors cannot establish a causal connection between the injury and the conduct complained of–i.e., the delegation of power by the Legislature to the Superintendent of Public Instruction. As noted, Intervenors' burden in this regard is "substantially" greater because of the fact that the statute was directed at regulating others. *Lujan, supra*. By its own terms, § 1263(3) merely reposes the power to review and approve site plans for schools with an appropriate agency within the Executive Branch of state government. There is nothing in the purpose nor language of the statute that could be said to be the "cause" of Intervenor's claimed injury. It is simply speculation to say that if the Legislature had not enacted § 1263(3), or had filled it with more guidelines, that Intervenors would be in any better position with regard to their alleged injury.

Third, it is not likely that Intervenor's injury would be "redressed by a favorable decision." The high school is in place and the Township and School District reached agreement regarding the high school site plan before the Court of Appeals considered the case. Further, there is nothing to suggest that if the statute included additional guidelines that the Intervenors "injury" would be redressed.

B. The Grant of Exclusive Jurisdiction To The Superintendent of Public Instruction By § 1263(3) Does Not Violate the Nondelegation Doctrine.

Intervenors assert that MCL 380.1263(3) is unconstitutional on the grounds that it does not contain sufficient standards to guide the Superintendent's decisions. The central principle at work in the constitutional limitation they invoke (which is known as the "delegation doctrine" or the "nondelegation doctrine") is one of separation of powers. *Blank v Dep't of Corrections*, 462 Mich

103, 124-125 (KELLY, J. joined by CORRIGAN and YOUNG, JJ.), 130 (WEAVER, C.J., writing separately), 136, n 7, 153-154 (MARKMAN, J., concurring), 166-168 (CAVANAGH, J. dissenting); 611 NW2d 530 (2000). That is to say, the Legislature is not permitted to delegate its legislative powers to the Executive Branch of government any more than the Judicial or Executive Branches of government may delegate their respective functions to one another. Although administering the law is a function inherent to the Executive Branch, the efficient operation of the modern administrative state requires that, as part of its administrative function, the Executive Branch be permitted to fill in the interstices of legislation that it administers, usually by promulgating rules and regulations. The non-delegation doctrine says that such promulgation of rules by the Executive Branch is permissible, and is not an unconstitutional delegation of legislative power to the Executive Branch, provided that the legislation conferring such power on the Executive Branch includes sufficient standards or guidelines, "as reasonably precise as the subject matter requires or permits" so that the delegation may be construed as "conferring administrative not legislative power and as vesting discretionary, not arbitrary authority." *People v Turmon*, 417 Mich 638, 644; 340 NW2d 620 (1983), quoting *Dep't of Natural Resources v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976), quoting *Argo Oil Corp v Atwood*, 274 Mich 47, 53; 264 NW 285 (1935) (internal quotation marks omitted).

As noted by this Court in *Blank, supra*, it is the presence of sufficient guidelines that distinguishes whether a statutory assignment of a policymaking function to the Executive Branch is a permissible assignment of administrative power or an impermissible delegation of legislative power. The analysis of whether the guidelines are sufficient is as follows:

> First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. *Argo Oil Corp v Atwood, supra* 53.
>
> Second, the standard should be "as reasonably precise as the subject matter requires or permits." *Osius v City of St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956).
>
> The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation. The "various" and "varying" detail associated with managing the natural resources has led to recognition by the courts that it is impractical for the Legislature to provide specific regulations and that this function must be performed by the designated administrative officials. *People v Soule*, 238 Mich 130, 140; 213 NW 195 (1927). See *United States v Grimaud*, 220 US 506; 31 S Ct 480; 55 L Ed 563 (1910).
>
> Third, if possible the statute must be construed in such a way as to "render it valid, not invalid," as conferring "administrative, not legislative" power and as vesting "discretionary, not arbitrary, authority." *Argo Oil supra* at 53. [*Seaman, supra*, 396 Mich at 309 (footnotes omitted).]

See also *Blank, supra*, 462 Mich at 124-125 (KELLY, J. joined by CORRIGAN and YOUNG, JJ.), 136, n 7, 153-154 (MARKMAN, J., concurring), 166-168 (CAVANAGH, J. dissenting).

With regard to the review and approval function assigned by MCL 380.1263(3), the Superintendent's decision is not one which "declares the policy of the law" or fixes the legal principles. Rather, the Superintendent is performing what is undeniably an executive function by ensuring compliance with the law. Pursuant to MCL 380.1263(3), the Superintendent possesses sole and exclusive jurisdiction in the approval of school construction and site plans. That jurisdiction, however, is constrained by the general powers provision of the Revised School Code, MCL 380.1 *et seq*. The general powers provision, MCL 380.11a, provides in pertinent part:

> (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; <u>and, except as provided by law, may exercise a power incidental or appropriate to the performance of any function related to operation of</u>

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:

> (a) Educating pupils. In addition to educating pupils in grades K-12, this function may include operation of preschool, lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons.
>
> (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.
>
> (d) Hiring, contracting for, scheduling, supervising, or terminating employees, independent contractors, and others to carry out school district powers. A school district may indemnify its employees.
>
> (e) Receiving, accounting for, investing, or expending school district money; borrowing money and pledging school district funds for repayment; and qualifying for state school aid and other public or private money from local, regional, state, or federal sources.

Although Intervenors complain that the Superintendent possesses broad discretion unfettered by legislative standards, the limitation on the Department of Education's authority is clear. It may exercise powers "in the interests of public or secondary education" which are "incidental or appropriate to" construction of a school building. MCL 380.11a(3)(c) (emphasis added). This standard is consistent with this Court's oft-repeated assertion that "control of the public school system is a State matter, vested by the Constitution in the legislature." *Imlay Township v State Board of Education,* 359 Mich 478, 483; 102 NW2d 720 (1960). The determination of what falls within the "interests of education," therefore, should enjoy a great degree of judicial deference. Intervenors ignore the general powers provision set forth in the Revised School Code and the

acknowledged need for allowing officials to determine what best represents the "interests of public elementary and secondary education."

The sole and exclusive jurisdiction vested in the Superintendent of Public Instruction also requires that the exercise of approval authority be conditioned on first meeting a number of strict statutory building safety and construction requirements. A school district may not 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." MCL 380.1263(3) (emphasis added). Those sections spell out specific safety and construction requirements, and greatly detract from Intervenors' argument that there is not a sufficiently specific delegation to the Superintendent.

In a case analogous to the one at bar, the Court of Appeals upheld a delegation to the Michigan Public Service Commission to determine whether a telecommunications service was "adverse to the public interest" and thus subject to license revocation. *GTE North, Inc v Public Service Commission*, 215 Mich App 137; 544 NW2d 678 (1996). In reference to the first factor of the constitutional delegation principles, the Court noted that, in light of the broad purpose to promote competition in the telecommunications industry, the "adverse to the public interest standard" was "something that could be objectively determined, rather than a wholly amorphous and standardless concept." *Id.* at 159.

There can be no doubt that the education of Michigan citizens carries a purpose even broader and more important than public utilities. The Constitution itself contains a provision that states that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Const

1963, art 8, § 1 (emphasis added). In reliance on that provision, the Michigan Supreme Court has noted that "[i]t is clear that Michigan's interest in education is long-standing and of the highest importance," and declared that the state has a "compelling interest in the education of its citizens." *Sheridan Road Baptist Church v Department of Education*, 426 Mich 462; 396 NW2d 373, 380 (1986) (per Williams, C.J., with two justices concurring in the result) (emphasis added). In short, just as the "adverse to the public interest" standard could be objectively determined, so can the "in the interests of public elementary and secondary education" standard set forth in the Revised School Code.

With respect to the potential for abuse of discretion factor, this Court has noted:

> An agency's high degree of proximity to the elective process (appointment by the governor and confirmation by the senate) is, in our opinion, an additional, substantial factor assuring that the public is not left unprotected from an uncontrolled, arbitrary power in the hands of remote administrative officials. [*Westervelt v Natural Resources Commission*, 402 Mich 412, 449; 263 NW2d 564, 580 (1978) (emphasis added).]

See also *Michigan Podiatric Medical Ass'n v National Foot Care Program*, 175 Mich App 723, 730; 438 NW2d 349, 352 (1989) ("we note that the public is protected from arbitrary use of § 21042 because the decision as to appropriate legislation has a high degree of proximity to the elective process").

In this case, the Superintendent of Public Instruction, who serves as the "principal executive" of the Department of Education, is appointed by the state Board of Education, a body elected directly by the people. Const 1963, art 8, § 3. The Superintendent's term of office is set by the Board, which includes by implication the right to shorten the term of office. *Straus v Governor,* 459 Mich 526, 544-545; 592 NW2d 53 (1999). Thus, the proximity to elected officials

on which the Supreme Court relied in *Westervelt* applies with equal force with respect to the Superintendent of Public Instruction. If he acts arbitrarily, the Board--which is directly responsible to the voters--can decide to shorten his term of office.

The third factor also requires that the statute be "construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power." Determining whether a delegation represents an administrative or legislative function is not a simple task. However, this Court has drawn the following distinction:

> While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution. [*Smith v Behrendt*, 278 Mich 91, 97-98; 270 NW 227, 230 (1936)]

The Superintendent's power to review and approve site plans is, in its essence, an administrative function. The statute provides him with the sole and exclusive jurisdiction to review and approve plans for school building construction and site plans for those building sites but only after complying with sections 388.851 to 388.855a of the Michigan Compiled Laws. In addition, as noted above, what comprises a site plan review is well-known amongst architects and is undisputed in the record. Indeed, the only legislative policy decision was made by the Legislature, and that decision was to have the Superintendent review and approve site plans. How that task is carried out is an administrative function.[23]

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[23] In asserting that § 1263(3) is unconstitutional, Intervenors' rely on *Blue Cross Blue Shield of Michigan v Governor*, 422 Mich 1; 367 NW2d 1 (1985). However, although that case dealt with

Furthermore, the Legislature's desire for a decision-maker to be able to consider evolving industry or professional standards is a legitimate factor in determining whether guidelines are as reasonably precise as the subject matter permits. See *Turmon, supra* at 652. This further suggests that the Superintendent's authority to review and approve site plans is constitutional. As the District's architect, Mr. Irwin Poke, testified, the term "site plan" is a common phrase in the architectural field which has a specific meaning that includes the features of a developed piece of property (**Apx 69A**). The Department of Education's authority to review and approve site plans therefore carries with it the accepted standards of the architectural field as to what constitutes an appropriate site plan.

In *Blank, supra*, a delegation of rule-making authority to the Department of Corrections was upheld where the authority was limited only by three broad purposes. That is, under the MDOC's enabling act, the rules had to be for: (1) "[t]he control, management, and operation of

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the delegation of an approval function, it is quite unlike the instant case. Pursuant to the act at issue in that case, a nonprofit health care corporation was required to establish a risk factor for each line of its business. The Insurance Commissioner was then to either "approve" or "disapprove" of the risk factors, without any guidance in the statute for making the decision. In essence, because the Insurance Commissioner was given no rule by which to determine whether the health care corporation had complied with a nebulously stated obligation, the Insurance Commissioner was basically free to define his own authority, making his caprice the law so far as the health care corporation was concerned. See *Id.* at 50-55.

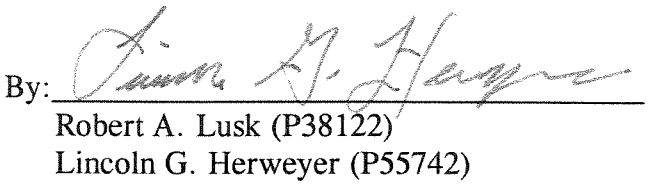
Consider how different the instant situation is. Here, a public body (i.e., the school board) is tasked with making decisions regarding school construction and design, and is required by MCL 380.1263(3) to do so in accordance with the CSBA and pursuant to the goals of the Revised School Code. Moreover, a school board is responsive directly to the people, and is otherwise regulated by statute and imbued with obligation. Meanwhile, the Superintendent of Public Instruction, within his own obligations under the Revised School Code, is then given the function of determining whether the School Board has met its well-defined obligations. The Superintendent does not essentially "legislate" by edict, but rather, performs the administrative task of deciding whether the school board did or did not comply with its obligations.

the general affairs of the department;" (2) "[t]he management and control of state penal institutions;" and (3) those ends deemed "necessary and expedient for the proper administration" of the enabling act. *Id.* at 125-126. In the instant case, the purposes for which the Superintendent of Public Instruction may act are limited at least that much in the Michigan Constitution alone.[24] In fact, in light of the modern trend to accept broad legislative delegations of authority and in consideration of the principles set forth by Michigan case law, the statute at hand represents a modest delegation of a simple decision which is constrained by the Superintendent's interpretation of what best represents the interests of education. Therefore, Intervenors' challenge to the constitutionality of MCL 380.1263(3) should be rejected.

CONCLUSION

WHEREFORE, Defendants-Appellees NORTHVILLE PUBLIC SCHOOLS, LEONARD R. REZMIERSKI and the BOARD OF EDUCATION OF NORTHVILLE PUBLIC SCHOOLS respectfully request that this Honorable Court **affirm** the judgments of the Court of Appeals and circuit court.

Respectfully submitted,



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Dated: January 27, 2003
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[24] "The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote and be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law." Const 1963, art 8, § 3. See also MCL 16.405.

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(SMOLENSKI, P.J., and JANSEN and FITZGERALD, JJ.)

CHARTER TOWNSHIP OF NORTHVILLE,
a Michigan charter township,

Plaintiff,

-and-

HEATHER SCHULZ and JEFFREY SCHULZ, MARY LOWE and GEORGE LOWE, ERIC HANPETER and LAURA HANPETER, FRANK CORONA and MARCELLA CORONA, DAVID MALMIN and LEE ANN MALMIN, JOHN MILLER and DEBRA MILLER, TOM CONWELL and EVY CONWELL, MARY BETH YAKIMA and DAN YAKIMA, RICHARD LEE and PATTY LEE, BETH PETERSON and RICK PETERSON, JOHN BUCHANAN, KEN BUCHANAN, LARRY GREGORY and NANCY GREGORY, K. MAUREEN WYNALEK and JAMES WYNALEK, HAROLD W. BULGER and SANDRA A. BULGER,

Intervening Plaintiffs-Appellants,

-vs-

NORTHVILLE PUBLIC SCHOOLS, a Michigan municipal corporation, LEONARD R. REZMIERSKI, Superintendent of Northville Public Schools, and the BOARD OF EDUCATION OF NORTHVILLE PUBLIC SCHOOLS,

Defendants-Appellees.

No. 120213

COA No. 219124

Wayne Circuit Court
LC No. 98-816747-CZ
KATHLEEN I. MACDONALD, J.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

The undersigned, being first duly sworn, deposes and says that she is an employee of Keller Thoma, and that on this 27th day of January, 2003, she served, via United States first-class mail, the appropriate number of copies of the following documents:

1. DEFENDANTS-APPELLEES' BRIEF ON APPEAL; and this

2. PROOF OF SERVICE

upon the following person(s):

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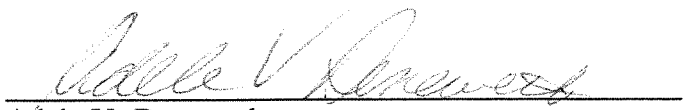
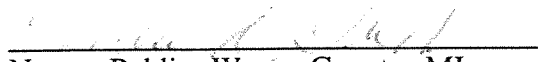

Adele V. Deneweth

Subscribed and sworn to before me
this 27th day of January, 2003.


Notary Public, Wayne County, MI
My Commission Expires: 12/03/05
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