

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 262437

HIGHLAND-HOWELL DEVELOPMENT
COMPANY, LLC,

Petitioner-Appellant,

Supreme Court No. 130698

Court of Appeals No. 262437

Michigan Tax Tribunal No. 307906

v

TOWNSHIP OF MARION,

Respondent-Appellee.

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REPLY BRIEF ON APPEAL – PETITIONER-APPELLANT

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case involves a \$3.2 million “bait and switch” by Appellee Marion Township. The Township exercised its statutory powers under the Public Improvements Act, 1954 PA 188, MCL 41.721-41.738 (“Act 188”), to levy a special assessment against Appellant Highland Howell Development Company, L.L.C’s Property. At all times before the special assessment’s confirmation, the improvement construction design that the Township presented to the public included a sewer trunk line across the Property, a design that benefited the Property by allowing Highland to tie individual residential units on the Property into the sewer system easily and economically. Seven years after the special assessment, the Township adopted a resolution that left the assessment unchanged but, retroactively and without the notice to property owners or hearing required by Act 188, ratified an alteration of the improvement construction design that removed the trunk line from the Property and reduced the benefit for which the Property had been specially assessed. Contrary to the lower courts’ decisions, a property owner is not left without remedy to protest such an egregious and non-compliant township action. Instead, the Tax Tribunal Act, 1973 PA 186, MCL 205.701-205.779 (“Tax Tribunal Act”) grants the Michigan Tax Tribunal (“MTT”) broad jurisdiction over township decisions relating to special assessments and Act 188 and decisions of this Court define the standards by which the Township’s actions must be judged. Highland is entitled to relief from the Township’s actions.

ARGUMENT

I. “AVAILABILITY” OF SANITARY SEWER “SERVICE” IS NOT THE IMPROVEMENT TO BE EVALUATED.

The Township and amicus Michigan Township Association (“MTA”) claim that the nature of the improvement and benefit at issue is merely the “availability” of sanitary sewer “service,” not the construction of the trunk line described to property owners and the public

when the special assessment was proposed. As support for its argument, the Township relies on a 35-year old Court of Appeals decision, *Stybel Plumbing, Inc v Oak Park*, 40 Mich App 108; 198 NW2d 781 (1972), and an out-of-context quotation of a remark made by Highland's legal counsel at a hearing. The MTA primarily relies upon *Blades v Genesee County Drain District*, 375 Mich 683; 135 NW2d 420 (1965), a decision, like *Stybel*, issued decades before this Court's seminal special assessment opinion, *Dixon Rd v City of Novi*, 426 Mich 390; 395 NW2d 211 (1986), and equally prominent decision, *Kadzban v City of Grandville*, 442 Mich 495; 502 NW2d 299 (1993).

Neither the *Blades* nor the *Stybel* decision directly concerns the threshold issue of what **improvement** must be evaluated in determining whether a benefit has been conferred. The *Blades* plaintiffs argued that "no benefit could or would accrue to their properties from the **construction and laying** of the trunk line," *Blades*, 375 Mich at 687 (emphasis added); the Court disagreed, determining that a benefit to the properties did exist. But neither the plaintiffs nor the Court conducted an analysis of what improvement must be evaluated; instead all appear to have assumed that the trunkline's **construction** was the improvement that would (or would not) confer the benefit:

[T]he **construction** of the trunk line will make available for the benefit of plaintiffs' properties and others that which is not now in existence, namely, a line to which such laterals may be connected to carry sewage from their properties. Without its **construction** such benefit would not be available to these properties.

Blades, 375 Mich at 688 (emphasis added.) It is true, as the MTA observes, that the Court mentioned the "accessability" of the "service," but it did so with reference to physical construction:

. . . [D]efendants point out that the very accessibility of the indicated service, **created by the trunk line**, would make lands theretofore usable only as farm lands more desirable

for development into platted, residential areas, and thus, create an enhanced value of lands.

Blades, 375 Mich at 688 (emphasis added.) *Stybel* similarly does not address the threshold issue of the improvement to be evaluated in determining benefit.¹

The MTA's reliance on *Blades* is inapt for the additional reason that Highland, unlike the *Blades* plaintiffs, does not assert that the altered improvement design might confer **no** benefit to the Property. Instead, Highland consistently has contended that it has been **deprived of an opportunity** to quantify whether or the extent to which a benefit—enhanced market value—was conferred by the improvement as altered by the Township after the special assessment was confirmed and the time for challenging the special assessment had expired. Thus, even if, *arguendo*, the improvement to be evaluated were the service, neither the Township nor its amicus has provided a basis for determining whether the assessment for such improvement is valid. Neither has made any attempt to show that the value of the “service” made “available” by the project as built, i.e., without trunkline, is equal to that which would have been made “available” by the project as originally proposed and assessed. Calling a benefit an “available service” does not exempt it from the statutory and due process requirement of proportionality to the amount assessed.

As discussed in Highland's Brief on Appeal at pp 24-25, Section 2(1)(a) of Act 188 identifies the improvement to be evaluated in any benefits analysis. It states in relevant part: “[T]he following types of **improvements** may be made under this act . . . [t]he **construction,**

¹ Moreover, the language from *Stybel* on which the Township relies addresses an issue not present in this case, i.e., the *Stybel* plaintiffs' assertion that the existence of a benefit depends on the immediate use to which the specially assessed property will be put, not on a potential future use. The *Stybel* court rejected the plaintiffs' contentions, holding that their light industrial property, specially assessed for the construction of an adjacent service drive and parking area, would receive a “direct benefit” from the project. *Stybel*, 40 Mich App at 111.

improvement and maintenance of storm or sanitary sewers” MCL 41.722(1)(a) (emphasis added).² This authorizing language focuses on the physical construction of the sewer and is silent with regard to the availability of or access to the service. The Legislature’s reference to sewer **improvement construction** in subsection 2(1)(a) is in contrast to other subsections of Section 2(1) that refer to **services**. Moreover, in discussing the test for determining whether a benefit has been conferred, the Court in *Dixon Rd* cited Page and Jones, *Taxation by Local and Special Assessment*, vol. II, § 653, p. 1114 which stated in part that “[i]f the **construction of such improvement** increases the market value of such property, such property receives a benefit and the amount of such benefit is measured by the amount of such increase.” *Dixon Rd*, 426 Mich at 399 (emphasis added).

Finally, the remark by legal counsel at the MTT hearing in Docket 431 is taken out of context and mischaracterized by the Township. It was not made with reference to the nature of the improvement for which the Property was assessed. Instead, as the record reflects, counsel’s reference to “sewer service”—a snippet from thousands of pages of testimony, briefing, and oral argument—concerned whether the Township had followed the statutory process for determining what properties belonged in the assessment district. *See* Transcript pp 238-245, Apx. 118b-119b. Moreover, the remark, argument from counsel, cannot override the statutory language defining

² The MTA emphasizes a distinction in Act 188 between “improvements” and “plans,” noting that the statute provides for objections to improvements but not to plans. It is a meaningless distinction. The construction plans illustrate the improvement. The statutorily mandated plans inform individuals whose property will be assessed what the improvement will be—in this case the construction of a sanitary sewer infrastructure. The plans allow an individual property owner to evaluate, in advance of the assessment’s levy, whether the improvement will benefit his property and whether he should exercise his objection rights. Indeed, if the only relevant considerations in determining the existence of a benefit were service, as the Township and MTA assert, Act 188’s requirements of producing and publishing the improvement plans to the public would be superfluous and meaningless. Public notification could be accomplished by a mere listing of the affected properties because each would have the same service “available.”

public improvement; nor does it dilute Highland's argument, as consistently articulated in its numerous pleadings and briefs, that it is entitled to challenge the changed benefit and disproportionality resulting from the Township's post-confirmation alterations of improvement construction plans.

II. THE BENEFIT TO HIGHLAND'S PROPERTY WAS REDUCED.

The Township insists at pp 27-29 of its Brief that its actions resulted in no reduced benefit to Highland or disproportionality in the special assessment because the May 13, 2004 resolution did not change the fact that Highland's Property would have sewer service "available." As discussed *supra*, the public improvement to be evaluated is not the service, but the physical construction of the sewer improvement. And the record -- the testimony and MTT dicta from Docket 431 -- suggests not only that the parties and MTT hearing officer shared this view, but that the benefit to the Property was reduced by the post-assessment charge. The Township makes no attempt to refute statements in the 431 record to the effect that the trunk line was an "integral part of the program that would have provided a substantial benefit to the subject" (Apx. 50a-51a, Trib. 1/27/04 Order Dkt. 431, p. 5, ¶ 4); that Highland would have objected to the amount of the special assessment if the improvement plan on which the special assessment roll was confirmed had not included a sewer trunk line across the Property (Apx. 53a, Trib. Order Dkt. 431, p. 8, ¶10.); and that removal of the trunk line saved the Township \$750,000 to \$800,000 and was a benefit that would have inured to the Property (Apx. 76a-77a, Trib. Order Dkt. 431, pp 31-32).

III. THE MTT POSSESSES JURISDICTION OVER DOCKET 906.

A. Sections 31(a) And (b) Of The Tax Tribunal Act Grant Jurisdiction.

Although the Township appears to concede that the May 13, 2004 resolution is a “final decision, finding, ruling, determination, or order of an agency,” it argues that Section 31(a) of the Tax Tribunal Act does not grant the Tribunal jurisdiction over Highland’s Docket 906 petition because the petition did not request review of an agency decision “relating to” special assessments. The Township does not cite to any controlling law in support of its argument, but conclusorily states that the May 13, 2004 resolution, challenged in the Docket 906 petition, “had no effect on the amount of Highland’s special assessment or the availability of sewer service to Highland property,” “has absolutely nothing to do with, and in no way affects, the special assessments levied by the Township in 1996,” “does not raise questions concerning the factual underpinnings of taxes,” and, at most gives rise to only a common law claim in tort or for breach of promise to build a sewer line (Twp. Brief, p 21, 22).

As a threshold matter, the Township mischaracterizes the relief sought by Highland’s Docket 906 petition, which clearly requests review of an agency decision “relating to” special assessments. The petition requests the MTT to declare that (i) the Township has no legal basis for altering the public improvement plans; (ii) the alterations ratified by the May 13, 2004 resolution are illegal and void; (iii) the governing plans are those presented to the public before the special assessment was confirmed in 1996; (iv) the Township must construct the public improvement project in accordance with the plans presented to the public before the special assessment’s 1996 confirmation; and, in the alternative, (v) the special assessment must be reduced and a refund issued because it is disproportionate to the benefit received. (Apx. 90a.) The Docket 906 petition thus attacked the Township’s process, the resulting altered

improvement, the assessment's proportionality in light of a changed benefit, and the assessment amount.

The Township's jurisdictional argument also is not supported by the statute's plain language. In Section 31 of the Tax Tribunal Act, the Legislature used the **broad** term "relating to," which is understood under dictionary definitions and court decisions only to require a connection, association or effect. See *The American Heritage Dictionary* (2nd Ed) (1991), p. 1043; *Confectionary Products, Inc v Heller Financial, Inc*, 973 F2d 474 (CA 6, 1992), *cert den* 506 US 1079 (1993) (Court holding that a matter is "related to" the bankruptcy case so as to be within the district court's jurisdiction if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy); *Metropolitan Life Ins v Pressley*, 82 F3d 126 (CA 6, 1996), *cert den*, 520 US 1263 (1997) (a law "relates to" ERISA plan if it has connection with or reference to such a plan). Presumably the Township would not have drafted and ratified the May 13, 2004 resolution if it were not intended to have some effect on, association with, or connection to the special assessment levied by the Township.

The Township's attempt to limit the MTT's jurisdiction narrowly to disputes concerning only the special assessment **amount** likewise fails. There is no such restriction in Section 31's language. Indeed, in *Wikman v City of Novi*, 413 Mich 617, 626; 322 NW2d 103 (1982), this Court ruled that the MTT had exclusive jurisdiction over the plaintiffs' claim that the township determined the special assessment in an arbitrary and capricious manner because the plaintiffs' action sought "direct review of the governmental unit's decision concerning a special assessment for a public improvement." Like *Wikman*, Highland's Docket 906 petition sought direct review of the Township's official decision to change the public improvement design plans presented to and relied upon by the public—a decision that implicated the Township's failure to follow the

statutory and due process procedure for levying assessments and its failure to levy a proportionate special assessment.

Finally, the Township errs in its assertion that the MTT lacks jurisdiction under Section 31(b) of the Tax Tribunal Act because Highland's challenge to the May 13, 2004 resolution failed to request a refund or redetermination of a tax. The Docket 906 petition addressed the resolution and explicitly sought a reduction in the assessment and a refund. (Apx. 90a.)

B. Waiver, Res Judicata, And Collateral Estoppel Principles Do Not Apply.

The Township does not deny that the process by which it altered the public improvement plans did not conform to Act 188's requirements or that a special assessment is invalid if not proportional to the benefit conferred or that the lower courts' decisions deny a remedy for such noncompliance or disproportionality. Instead, the Township relies on waiver, collateral estoppel, and *res judicata* arguments to sidestep the critical issues presented by its extra-legal actions.

The cases relied on by the Township to argue that Highland has "waived and abandoned ...on appeal" any claimed error in the Court of Appeals are inapposite. The cases, which pre-date the Court of Appeals existence, hold that an issue raised in a party's "Questions Presented" but not briefed is waived or abandoned. Highland's Brief on Appeal does not raise in its Questions Presented an issue whether the Court of Appeals erred in holding that collateral estoppel bars relitigation of the lack of jurisdiction holding. Therefore, the "raised but not briefed" basis for waiver does not apply.

However, in its briefs in support of leave to appeal, Highland raised and extensively addressed why it was error for the lower courts to determine that collateral estoppel and *res judicata* principles bar Highland's Docket 906 petition. *See* Highland's Application for Leave to Appeal, pp 27-28, 41-44; Reply Brief in Support of Application, pp 2-7. Highland has neither

placed the Court in an uninformed position with regard to preclusion issues nor abandoned its preclusion arguments; instead, in identifying the issues it has in its Statement of Questions Involved, it has attempted to address this Court's evolving analysis by addressing the Court's remaining questions in a concise and straightforward manner.

To the extent this Court remains concerned with the application of preclusion principles to this case, Highland's position, as previously demonstrated in its briefs filed with this Court is clear: neither collateral estoppel nor *res judicata* principles bar the Docket 906 petition. Collateral estoppel does not apply because the issues raised in Docket 906 were not and *could not* have been raised in the prior proceeding because the prior proceeding was concluded before the May 13, 2004 resolution was ratified. Michigan law does not apply preclusion principles to actions that arise *after* judgment in the first action. *Askew v Ann Arbor Public Schools*, 431 Mich 714, 726; 433 NW2d 800 (1998); *Siira v Employers Mut Liability Ins Co*, 87 Mich App 227, 234; 274 NW2d 26 (1978). Further, the prior action (Docket 431) never culminated in a valid final judgment and Highland was deprived of an opportunity to fully and fairly litigate the case because the Township **successfully argued** on appeal that the order in Docket 431 was not a final, appealable order because the case with which it was consolidated, Docket 531, was still pending.

Res judicata principles cannot bar the Docket 906 petition for similar reasons. The Circuit Court decision was not decided on the merits because it was dismissed for lack of subject matter jurisdiction and such a dismissal has no *res judicata* effect. *See* MCR 2.504(B)(3)(a); *Laude v Cossins*, 334 Mich 622, 625-626; 55 NW2d 123 (1952); *In re Quinney's Estate*, 287 Mich 329, 338-339; 283 NW 599 (1939). Further, the Docket 906 petition claims that the amount levied on the Property was disproportionate in light of the changed design plan—a claim

that was not and could not have been made in the Circuit Court because it is within the MTT's exclusive jurisdiction under MCL 205.731. Dismissal of a claim by a court of limited jurisdiction has no *res judicata* effect on claims that are outside that court's jurisdiction. 1 Restatement Judgments 2d, ch. 3, Former Adjudication, § 26(1)(c), pp 233-234.

CONCLUSION AND RELIEF REQUESTED

Highland-Howell Development Company, LLC respectfully requests that the Court (1) reverse the MTT and Court of Appeals decisions; (2) determine that the special assessment on the Property is invalid and order a full refund of Highland's special assessment; or, in the alternative, (3) determine that the special assessment on the Property is invalid, and remand this case to the MTT for a determination whether the Township's post-confirmation change to the public improvement plan results in a special assessment that is disproportionate to the benefit the public improvement confers and, if so, to order appropriate relief including, *inter alia*, invalidation or reduction of the special assessment, with appropriate refund; or reassessment in accordance with Section 13 of Act 188.

Respectfully submitted,

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Dated: April 19, 2007

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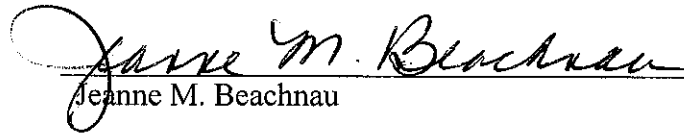
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COUNTY OF INGHAM)

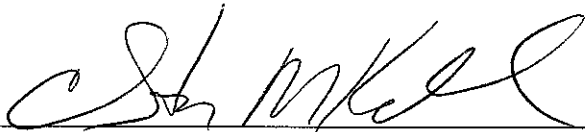
Jeanne M. Beachnau, an employee of Dykema Gossett PLLC, being first duly sworn,
deposes and says that on the 19th day of April, 2007, she served two copies of Reply Brief on

Appeal - Petitioner-Appellant Highland-Howell Development Company, LLC. - Oral Argument Requested, upon Mr. Neil H. Goodman, Clark Hill PLC, Attorney for Respondent-Appellee, at 255 S. Woodward Avenue, Third Floor, Birmingham, MI 48009 and Mr. Richard Bisio, Co-Counsel for Petitioner-Appellant, at 201 W. Big Beaver Road, Suite 600, Troy, MI 48084, by enclosing copies of the same in an envelope properly addressed, and by depositing said envelope in the United States Mail with postage thereon having been fully prepaid.



Jeanne M. Beachnau

Subscribed and sworn before
me this 19th day of April, 2007.



Christine M. Kischnick, Notary Public, Tuscola Co., MI
Acting in Ingham County, Michigan
My Commission Expires: 09/21/07

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