

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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Appeal from the Michigan Court of Appeals  
Donofrio, P.J. and Zahra and Kelly, J.J.  
Docket No. 262437

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HIGHLAND-HOWELL DEVELOPMENT  
COMPANY, L.L.C.,

Supreme Court No. 130698

Petitioner-Appellant,

Court of Appeals Docket No. 262437

vs.

Michigan Tax Tribunal  
Docket No. 307906

TOWNSHIP OF MARION,

Respondent-Appellee.

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**BRIEF ON APPEAL OF RESPONDENT-APPELLEE TOWNSHIP OF MARION**

**ORAL ARGUMENT REQUESTED**

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**STATEMENT OF THE BASIS OF JURISDICTION**

Respondent-Appellee Township of Marion states that Petitioner-Appellant's jurisdictional summary, in which it bases this Court's jurisdiction on MCR 7.301(A)(2), is complete and correct.

**COUNTER-STATEMENT OF QUESTIONS INVOLVED**

1. Did the Court of Appeals properly affirm the decision of the Michigan Tax Tribunal that Petitioner-Appellant Highland-Howell's challenge to its December 1996 special assessment was precluded by the Tribunal's holding in a prior Petition that a departure from the requirements of the Public Improvements Act, MCL 41.721 et seq., does not excuse the jurisdictional requirements of the Tax Tribunal Act, MCL 205.701 et seq.?

The Michigan Tax Tribunal would say YES.

The Court of Appeals would say YES.

Respondent-Appellee says YES.

2. Did the Court of Appeals properly hold that Petitioner-Appellant Highland-Howell's claim that Respondent-Appellee Township of Marion should be required to rebuild the sewer in accordance with the original plans because the Township failed to comply with the Public Improvements Act, MCL 41.721 et seq., when it adopted its Resolution of May 13, 2004 was not within the exclusive and original jurisdiction of the Michigan Tax Tribunal?

The Michigan Tax Tribunal did not answer this question.

The Court of Appeals would say YES.

Respondent-Appellee says YES.

3. Does the October 15, 2004 Opinion and Order of the Livingston County Circuit Court, which ruled that Respondent had no clear legal duty to construct an east-west sewer trunk line across Petitioner-Appellant's property, bar re-litigation of the claims and issues raised in the

Petition below as they relate to the May 13, 2004 Resolution of the Township's Board of Trustees formally approving and ratifying informal plan changes made in 1997?

The Michigan Tax Tribunal did not answer this question.

The Court of Appeals did not answer this question.

Respondent-Appellee says YES.

## COUNTER-STATEMENT OF FACTS

### Introduction

Petitioner/Appellant Highland-Howell Development Company, LLC (“Highland”) appeals by leave granted from the January 31, 2006 unpublished per curiam decision of the Michigan Court of Appeals below. In this decision, the Court of Appeals affirmed an Order of the Michigan Tax Tribunal (“MTT”), on reconsideration, granting summary disposition in favor of Respondent/Appellee Township of Marion (“Township”).

In an earlier MTT Petition dated July 21, 1998, Highland sought to challenge a special assessment for sanitary sewer improvements levied on its property pursuant to the confirmation of a special assessment roll by the Township on December 2, 1996. This Petition was assigned MTT Docket No. 261431.

Highland’s Petition in Docket No. 261431 alleged, *inter alia*, that the Township unlawfully made material changes in the sewer project plans, including the post-confirmation elimination of an east-west trunk line traversing Highland’s property, which substantially reduced the benefits conferred on its property by the sewer improvements. A hearing on this Petition was held in the MTT in July of 2003, and the Tribunal’s “Opinion and Judgment – Final Decision on Proposed Judgment” was entered on March 19, 2004. In its March 19, 2004 Opinion and Judgment, the MTT affirmed the “Proposed Opinion and Judgment” of Administrative Law Judge Thomas A. Halick, which dismissed the Petition for lack of subject matter jurisdiction. Copies of the MTT’s Opinion and Judgment and Judge Halick’s Proposed Opinion and Judgment are set forth in the Township’s Appendix (“Apx. \_\_\_ b”) at Apx. 1b and in Highland’s Appendix (“Apx. \_\_\_ a”) at Apx. 46a.

In its Petition in the instant case, MTT Docket No. 307906, Highland sought to revive its failed challenge to the Township's sewer system plan changes by once again alleging that the Township's 1997 informal elimination of the east-west trunk line across its property, which was formalized by a Township Board Resolution adopted on May 13, 2004, substantially changed the benefit to Highland's property contrary to statute. In the alternative, Highland asserted that, due to this "changed benefit", its special assessment was not proportional to the benefit to its property. Copies of Highland's Petition in this case and the Township Board's May 13, 2004 "Resolution Ratifying Certain Changes In Plans for Sanitary Sewer Improvements" are included in the parties' appendices at Apx. 3b and Apx. 85a, respectively.

Near the time it instituted its initial MTT Petition in July of 1998, Highland also brought an action in the Livingston County Circuit Court in which it asserted claims arising out of the Township's changes to the sewer improvements. After appeals to the Court of Appeals and this Court, that action returned to the Circuit Court and Highland filed a Third Amended Complaint on June 22, 2004 – just 13 days subsequent to the filing of its MTT Petition in the instant case – that included five counts.

Count 3 was entitled "Declaratory Judgment", and its substance was virtually identical to the claim asserted in its June 9, 2004 MTT Petition. A copy of Highland's Third Amended Complaint in the Livingston County Circuit Court action is included in the Township's Appendix at Apx. 8b.

In a final Opinion and Order entered on October 15, 2004, the Livingston County Circuit Court granted the Township's motion for summary disposition on all five counts of Highland's Third Amended Complaint. As of that date, the Township's motion for summary disposition of the MTT Petition in the instant case was awaiting decision. Believing that the MTT should

consider the Circuit Court's Opinion and Order, the Township filed a motion to supplement its summary disposition brief to include the same. However, this motion literally crossed in the mail with the MTT's October 25, 2004 Order denying the parties' cross motions for summary disposition. Thus, the Township soon thereafter filed its motion for reconsideration of the MTT's denial of its summary disposition motion on November 5, 2004, arguing that the Circuit Court's October 15, 2004 Final Opinion and Order was *res judicata* and barred Highland from pursuing the claim in its Petition. Copies of the Township's motion for summary disposition with supporting brief, the Circuit Court's October 15, 2004 Opinion and Order, the MTT's October 25, 2004 Order denying the parties' Cross Motions for Summary Disposition, and the Township's November 5, 2004 motion for reconsideration with supporting brief are included in the parties' appendices at Apx. 17b, Apx. 106a, Apx. 13a, and Apx. 78b, respectively. Highland's appeal to the Court of Appeals from the Livingston County Circuit Court's Opinion and Order was dismissed by stipulation of the parties in a Court of Appeals Order dated February 22, 2005; a copy of this Order is included in the Township's Appendix at Apx. 114b.

In its April 15, 2005 Order Granting the Township's Motion for Reconsideration and Granting the Township's Motion for Summary Disposition, the MTT changed its view of the March 19, 2004 "Opinion and Judgment – Final Decision on Proposed Judgment" in MTT Docket No. 261431, and concluded that it was indeed an adjudication on the merits "with regard to the questions of law and fact relevant to the Tribunal's lack of jurisdiction over the petition filed in Docket No. 261431". The MTT's April 15, 2005 Order did not address the Township's argument concerning the *res judicata* effect of the Circuit Court's October 15, 2004 Opinion and Order. A copy of the MTT's April 15, 2005 Order is included in Highland's Appendix at Apx. 8a.

The Court of Appeals affirmed the MTT's Order granting summary disposition in the Township's favor in an unpublished per curiam decision dated January 31, 2006; a copy of this decision is included in Highland's Appendix at Apx. 20a. In its analysis, the Court of Appeals held that the dismissal of the Petition in MTT Docket No. 261431 barred the Petition in the instant case on the basis of collateral estoppel with respect to Highland's challenge to its December 2, 1996 special assessment. In reaching this holding, the Court of Appeals correctly observed that the issue of whether a change in the sewer plans after confirmation of the special assessment roll entitled Highland to mount an otherwise untimely challenge to its assessment "was already resolved in the prior petition ..." and was "actually and necessarily determined in the prior proceeding." Opinion, p. 5 (Apx. 24a).

The Court of Appeals then separately analyzed Highland's claim of entitlement to declaratory and injunctive relief in relation to its challenge to the Township Board's May 13, 2004 Resolution formally approving and ratifying changes to the sewer plans. In rejecting Highland's argument that these claims could be pursued in the Tax Tribunal, the Court of Appeals correctly determined that they were not within the Tribunal's exclusive jurisdiction because claims for 1) failure to comply with the Public Improvements Act and 2) an order compelling construction of a sewer line do not seek review "relating to ... special assessments... under property tax laws" and do not seek "a refund or redetermination of a tax under the property tax laws." Opinion, p. 6 (Apx. 25a).

#### **Facts Material to Proceedings Below**

In its April 15, 2005 Order below, the MTT relied on the findings of fact and conclusions of law made by MTT Administrative Law Judge Thomas A. Halick in his January 27, 2004 Proposed Opinion and Judgment in MTT Docket No. 261431 – an Opinion and Judgment made

final by the MTT on March 19, 2004 (Apx. 46a and Apx. 1b). In his 38-page Proposed Opinion and Judgment, Judge Halick made a number of findings and conclusions that are germane to Highland's Petition in the instant case, in which Highland sought to challenge its special assessment levied in December of 1996 based on the Township Board's Resolution of May 13, 2004.

Judge Halick's bedrock findings, based on the undisputed facts, were that Highland did not protest at the November 14, 1996 hearing as required by statute and did not file its Petition within 30 days of the December 2, 1996 special assessment roll confirmation; therefore, the assessments on the roll became "final and conclusive" under MCL 41.726(3). Because Highland's Petition was not filed until July of 1998, it was untimely. (Apx. 58a – 59a).

In addressing Highland's argument that its filing delay should be excused because the Township informally changed the approved sewer plans after confirming the special assessment roll, Judge Halick first found that the Township had not made the plan changes in conformity with the applicable statute, MCL 41.725, "because it did not approve the changes to the plan by a resolution" (Apx. 66a). As stated at pages 23 and 26 of his Opinion and Judgment (Apx. 68a – 71a):

. . . during or after the hearing required under Section 724, the board may change the plans; but under Section 725 the board must finally approve the plans by resolution, with any changes made since the time of the hearing.

\* \* \*

If changes are made after the confirmation of the special assessment roll, the statutory requirement that the board approve plans by resolution still applies. Therefore, before it could amend the plans to eliminate the trunk line, Respondent was required to pass a resolution for that purpose.

Judge Halick went on to find, however, that the Township's lack of formal action did not invalidate the special assessment roll or any individual assessment thereon (Apx. 76a).

The basis for this finding was that the controlling legislation, 1954 PA 188, "does not provide a remedy, penalty, or consequence for departing from statutory procedures in this present context. This departure . . . does not provide legal authority to excuse the jurisdictional requirements in the Tax Tribunal Act in this case" (Apx. 77a).

In rejecting Highland's claim that barring it from contesting its special assessment under the circumstances would amount to a deprivation of due process, Judge Halick stated that "the tribunal has no authority to invoke Due Process . . . to excuse or avoid the statutory jurisdictional requirements in this case" (Apx. 65a). Of final significance to the instant case, Judge Halick made the following finding concerning the Township's post-confirmation plan changes:

The Tax Tribunal finds that in our present case, neither the official nor unofficial changes to the *plans* rendered the December 2, 1996 confirmation of the *roll* invalid, nor did it render any assessment on an individual property invalid.

Apx. 62a.

Based on his above findings and conclusions, Judge Halick dismissed Highland's Petition in MTT Docket No. 261431 for lack of subject matter jurisdiction. This dismissal was affirmed and made final by the MTT in its "Opinion and Judgment – Final Decision on Proposed Judgment" entered on March 19, 2004 (Apx. 1b). Highland's Claim of Appeal to the Court of Appeals from the MTT's Opinion and Judgment was dismissed for lack of jurisdiction on May 26, 2004, and its Application for Leave to Appeal therefrom was denied "for lack of merit in the grounds presented" on August 13, 2004. Copies of these Court of Appeals Orders of May 26, 2004 and August 13, 2004 are included in the Township's Appendix at 115b and 116b, respectively.

In response to Judge Halick's determination that the Township's post-confirmation plan change eliminating the east-west trunk line traversing Highland's property was not in conformity with 1954 PA 188 because it was not made pursuant to a resolution, the Township's Board adopted such a resolution on May 13, 2004. Entitled "Resolution Ratifying Certain Changes In Plans for Sanitary Sewer Improvements", this Board action formally acknowledged, approved and ratified all plan changes made since the project plans were originally accepted, approved and ordered filed with the Township Clerk by resolution of March 16, 1996 (Apx. 85a). This Resolution also rescinded all previous resolutions that were inconsistent therewith.

In its Petition below (Apx. 3b), Highland alleged that the Township informally eliminated the east-west sewer trunk line across its property in violation of law, and that the Township's Board adopted the May 13, 2004 Resolution "purporting to approve changes in the plans for the sewer project, including elimination of the sewer trunk line across Highland's property" (Apx. 5b). Highland further alleged that the Township Board's unlawful conduct rendered the plan change void, or in the alternative that it substantially changed the benefit to Highland of the sewer improvements and thus rendered the special assessment disproportional to the benefit to the property (Apx. 5b, ¶¶13-14). Highland concluded therefrom that it "is entitled now to challenge the amount of the special assessment on its property" (Apx. 5b, ¶15).

At the same time Highland was seeking to revive its failed challenge to the special assessment for sewer improvements by attacking the validity of the Township Board's May 13, 2004 Resolution in MTT Docket No. 307906 below, it attempted to pursue the same challenge in the Livingston County Circuit Court action that had been remanded by this Court. See Highland-Howell Development Co, LLC v Twp of Marion, 469 Mich 673; 677 NW2d 810 (2004). In its Third Amended Complaint in that action, filed on June 22, 2004, Highland alleged in Count 3 –

Declaratory Judgment – that the Township, in violation of law, informally eliminated the trunk line traversing its property from the project plans in 1997 and formally eliminated the same line from the plans by Resolution of May 13, 2004 (Apx. 12b, ¶¶24 and 25).

In his Opinion and Order granting the Township’s motion for summary disposition on all five counts of Highland’s Third Amended Complaint, Judge Stanley J. Latreille relied on the MTT’s findings and conclusions in MTT Docket No. 261431 concerning the validity and effect of the changes made by the Township to the sewer project plans, including the elimination of the subject trunk line, after the special assessment roll was confirmed on December 2, 1996. Specifically, Judge Latreille ruled that based on the MTT’s decision in Docket No. 261431, there was no genuine issue of fact as to whether the Township had validly and lawfully approved and ratified the informal plan changes of 1997 by its Board’s May 13, 2004 Resolution (Apx. 111a – 112a).

Addressing the Declaratory Judgment claim in Count 3, which alleged that the Township had an obligation to build the sewer project according to the plans in existence on the December 2, 1996 roll confirmation date (including the trunk line across Highland’s property) and that the Township could not make post-confirmation plan changes, Judge Latreille observed that Highland “essentially raises the same arguments that it used to support its claims in Counts I and II” (Apx. 112a). He then proceeded to rule that the Township was entitled to summary disposition “under several theories”, including the absence of a genuine issue of material fact, the pendency of the same claim between the parties in the earlier filed MTT Petition in Docket No. 307906, and the lack of subject matter jurisdiction (Apx. 113a).

Ten days after Judge Latreille issued his October 15, 2004 Opinion and Order dismissing Highland’s Third Amended Complaint, and absent knowledge of the same, the MTT entered its

Order denying the parties' cross motions for summary disposition in Docket No. 307906 below. In its October 25, 2004 Order, the MTT first found that the Township Board's May 13, 2004 Resolution eliminating the trunk line across Highland's property "is valid pursuant to MCL 41.725(1)(b)" (Apx. 18a). It then proceeded to find that its dismissal of Docket No. 261431 for lack of subject matter jurisdiction was not *res judicata* because it was not on the merits and because the facts in Docket No. 307906 had substantially changed and thus could not have been litigated in the prior proceeding (Apx. 18a).

In granting the Township's motion for reconsideration of the October 25, 2004 Order denying summary disposition, the MTT did not rely on the intervening ruling of Judge Latreille in the Livingston County Circuit Court case as the Township argued it should. Instead, the MTT revisited its earlier ruling and concluded that the March 19, 2004 "Opinion and Judgment – Final Decision on Proposed Judgment" in Docket No. 261431 was indeed a "**final order**" that had the effect of severing Docket No. 261431 from Docket No. 266543(sic)<sup>1</sup> and dismissing Docket No. 261431 with prejudice" (Apx. 10a). This conclusion led the MTT to rule that the March 19, 2004 decision has *res judicata* effect and compels dismissal of the instant Petition:

The Tribunal's March 19, 2004 final Opinion and Judgment dismissing Docket No. 261431 was an adjudication on the merits with regard to the questions of law and fact relevant to the Tribunal's lack of jurisdiction over the Petition filed in Docket No. 261431... The factual and legal conclusions in Docket No. 261431 are dispositive in this case and have *res judicata* effect. It has been ruled that the Tribunal lacks jurisdiction over the special assessment on the role (sic) that was validly confirmed on December 2, 1996, and that the role (sic) became final and conclusive and not subject to appeal 30 days after confirmation. No subsequent act or omission by Respondent changed that legal ruling.

Apx. 10a.

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<sup>1</sup> Docket No. 261431 had been consolidated with Docket No. 266534 by MTT Order of November 1, 2000 (See Appellant's Appendix, Exhibit D4, p. 6).

Expanding on this ruling, the MTT further held as follows:

The Tribunal's March 19, 2004 final Opinion and Judgment that dismissed Docket No. 261431 fully considered and rendered legal conclusions with regard to all issues pertaining to *official* or *unofficial* changes to the plans in relation to the jurisdiction of the Tribunal. It was held that the *unofficial* changes did not allow the Tribunal to assert jurisdiction over the special assessment role (sic) approved on December 2, 1996. The *official* resolution of Marion Township adopted May 13, 2004 that "acknowledged, approved and ratified" the change in the plans does not alter the previous ruling that the Tribunal lacks jurisdiction over the 1996 special assessment role (sic).

\* \* \*

Therefore, the jurisdictional issues raised in the Petition filed in this case with regard to the special assessment roll confirmed December 2, 1996 have already been decided. It was previously ruled that changes in the plans, "official or unofficial", have no effect upon the validity and conclusiveness of the December 2, 1996 special assessment role (sic). The May 13, 2004 Resolution by the Township of Marion does not allow Petitioner to appeal the special assessment that was confirmed December 2, 1996. **"By law, the amounts assessed on the roll confirmed December 2, 1996 became final and conclusive 30 days after confirmation and cannot be overturned at this time. MCL 41.726(3)."** March 19, 2004 Opinion and Judgment – Final Decision on Proposed Opinion and Judgment.

The Tribunal's Order Denying Respondent's Motion for Summary Disposition entered October 25, 2004 did not fully take into account the March 19, 2004 Opinion and Judgment when it found that there were "still genuine issues of material fact as to whether the special assessment imposed on Petitioner's property is proportional to the benefit to the property by the sewer improvement project". Any issues of fact pertaining to the 1996 special assessment in Docket No. 307906 are not before the Tribunal because there is no jurisdiction over that appeal. There are no factual issues with regard to the lack of jurisdiction.

Based on the matters discussed above and the reasons set forth in Respondent's brief in support of its motion for summary disposition, this case shall be dismissed.

Apx. 10a – 12a.

\* \* \*

In its December 29, 2006 Order granting Highland's application for leave to appeal, this Court directed the parties to include among the issues to be briefed four specific issues, the first of which is "what was the specific benefit conferred on petitioner's property by the special assessment confirmed in 1996 . . ." To assist the Court in resolving this issue, the Township offers the following facts for the Court's consideration.

First, at the hearing in MTT Docket No. 261431, the admissibility of the record from which was stipulated to by the parties in the Counsel Conference Summary filed with the MTT in Docket No. 307906 below (Highland's Apx. 1a, Trib. Entry Dkt. 906, Line 7, Co. Con. Summ.), Highland's counsel, Richard Bisio, made the following admission when addressing the Tribunal on the subject of the benefit to the property from the special assessment in issue:

Mr. Bisio: . . . People are being assessed for the benefit to their property, and that is providing the sewer system to their property, as Mr. Goodman has argued repeatedly with respect to Highland-Howell. That's why people are being assessed. What they pay for and what they get is sewer service, and the point we're trying to make here is that some people were assessed, but not all, and those are the people who bore the costs of providing sewer services.

Township's Apx. 118-119b, Vol. I of Proceedings in MTT Dt. 431, pp. 241-242 (emphasis added).

Second, the Township's Sewer and Water Ordinance provides in chapter Four, Section 1 under the heading "Purpose" as follows:

This Chapter will set forth the rules which apply to persons who have pre-paid charges for connection to the system either through cash payments to the Township or special assessments against benefited real estate and thereby received a right to connection to either the sewer system, the water system or both.

Township's Apx. 121b, Sewer and Water Ord., Ch. Four, Sec. 1, p. 87 (emphasis added).<sup>2</sup>

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<sup>2</sup> Although the Township's Sewer and Water Ordinance is not part of the record below or the record in MTT Docket No. 261431, this Court may take judicial notice thereof pursuant to MRE 202(a)(2).

## ARGUMENT

### I. INTRODUCTION

The Court of Appeals decision below, from which leave to appeal has been granted by this Court, contains two holdings: (1) the issue of whether official or unofficial changes to the sewer improvement plans made subsequent to confirmation of the special assessment roll can serve as a basis for excusing the jurisdictional requirements in the Tax Tribunal Act when the changes are not made in conformity with the provisions of the Public Improvements Act was resolved in the prior Tax Tribunal proceeding between these same parties in Docket No. 261431, and relitigation of the issue in the instant proceeding is precluded by the doctrine of collateral estoppel; and (2) Highland's challenge to the change in sewer improvement plans effected by the Township's Resolution of May 13, 2004 relates to compliance with the Public Improvements Act and is thus outside of the Tax Tribunal's exclusive jurisdiction. Highland's brief on appeal, however, makes no argument whatsoever with regard to the collateral estoppel holding, and Highland has therefore waived and abandoned this issue on appeal. Dora v Lesinski, 351 Mich 579; 88 NW2d 592 (1958); Wortman v R. L. Coolsaet Construction Co., 305 Mich 176; 9 NW2d 50 (1943); English v Blue Cross Blue Shield of Michigan, 263 Mich App 449; 688 NW2d 523 (2004), lv den 472 Mich 937 (2005).

With respect to the issue of whether Highland's challenge to the sewer plan changes effected by the Township's May 13, 2004 Resolution is outside the exclusive jurisdiction of the Tax Tribunal – the foundation of each of the three questions posed in Highland's Statement of Questions Involved – Highland once again fails to address the holding of the Court of Appeals below that it is precluded from contesting its special assessment at this late date; Highland further fails to acknowledge that the May 13, 2004 Resolution merely approves and ratifies

previously made sewer plan changes and concerns neither confirmation of the special assessment roll nor Highland's special assessment for sewer improvements. Whereas the Court of Appeals below was very careful to distinguish between the claims in Highland's Petition which (1) challenge its December 1996 special assessment and (2) challenge the Township's May 2004 Resolution, Highland's brief on appeal demonstrates no such discipline but instead lumps the two claims together in a feeble attempt to persuade this Court of its alleged right to challenge its 1996 special assessment as a result of the Township's 2004 approval and ratification of post-confirmation plan changes.

Finally, all of Highland's "due process" arguments concerning compliance with statutory procedures and notice requirements flow from the legally flawed premise that the Township was required by the Public Improvements Act to afford due process safeguards in connection with the making of changes to the plans for sewer improvements. In fact, the statute contains no such requirements, and Highland's arguments founded upon this flawed premise are entirely baseless.

As the Township embarks upon its own arguments in response to the matters raised by Highland in its brief, counsel is mindful of the fact that this Court, in its Order granting leave to appeal, has directed the parties to include among the issues to be briefed matters beyond those addressed by the Tax Tribunal and the Court of Appeals below, and this directive will be followed. At the same time, however, the Township would point out that Highland's brief on appeal is limited to the four issues raised in this Court's Order granting leave to appeal, and does not directly challenge the holdings of the Court of Appeals below from which leave has been granted. Thus, while it may appear that the Township's brief addresses issues not raised in Highland's brief and is not a true "response brief" to that extent, the Township feels compelled

to discuss the propriety of the holdings from which Highland has actually appealed in an effort to adhere to the discipline of appellate advocacy which guides and limits the actions of this Court.

## **II. STANDARDS OF REVIEW**

The standards of review stated in Highland's brief are complete and correct. The Township would note, however, that the Tax Tribunal made no findings of fact below; rather, its decision was based on stipulated facts (see Apx. 9a).

## **III. THE COURT OF APPEALS CORRECTLY HELD THAT COLLATERAL ESTOPPEL APPLIES TO PRECLUDE RELITIGATION OF THE ISSUE OF WHETHER THE TOWNSHIP'S ALLEGED FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE PUBLIC IMPROVEMENTS ACT EXCUSED THE JURISDICTIONAL REQUIREMENTS OF MCL 205.735(1) AND (2).**

In its decision below, after reviewing the "rather extensive" factual and procedural history of this case, the Court of Appeals began its analysis by noting that its review of the MTT's decision was limited to determining whether the MTT "committed an error of law or adopted a wrong legal principle", citing Michigan Milk Producers Ass'n v Dep't of Treasury, 242 Mich App 486, 490; 618 NW2d 917 (2000). Apx. 23a. The Court then proceeded to explain its rationale for holding that the doctrine of collateral estoppel precludes relitigation of issues actually and necessarily determined by the MTT in prior MTT Docket No. 261431.

The Court accurately stated that collateral estoppel "precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding," citing Barrow v Pritchard, 235 Mich App 478, 480; 597 NW2d 853 (1999). In addition, the Court accurately noted that for collateral estoppel to apply, "the same parties

must have had a full and fair opportunity to litigate the issue,” citing VanVorous v Burmeister, 262 Mich App 467, 480; 687 NW2d 132 (2004). Apx. 24a.

Applying these principles of collateral estoppel, the Court then focused on the facts and issues litigated by Highland and the Township in prior MTT Docket No. 261431 - - a proceeding which required the MTT to determine whether post-confirmation changes in the plans for a sewer system can serve to excuse a property owner’s failure to comply with the jurisdictional requirements of MCL 205.735(1) and (2). In so doing, the Court noted that the MTT made the following determinations in prior Docket No. 261431:

- It lacked jurisdiction over Highland’s challenge to the 12/2/96<sup>3</sup> confirmation of the special assessment for sewer service because Highland did not satisfy the protest and appeal requirements of MCL 205.735(1) and (2);
- Neither official nor unofficial changes to the *plans* rendered the 12/2/96 confirmation of the special assessment *roll* invalid, nor did such plan changes render any assessment on any individual parcel of property invalid;
- There was no basis upon which the MTT could excuse Highland’s failure to comply with the jurisdictional requirements of MCL 205.735(1) and (2), notwithstanding the Township’s post-confirmation plan changes, because Highland’s arguments were based on equity and due process and the MTT had no authority to invoke due process or equity to excuse statutory jurisdictional requirements;
- The Township’s failure to change the sewer plans in accordance with the Public Improvements Act (by failing to adopt a formal resolution) did not give the MTT jurisdiction over Highland’s challenge to its 12/2/96 assessment; and
- The Public Improvements Act does not provide a remedy, penalty, or consequence for departing from statutory procedures in the context of the Docket No. 261431 proceeding.

Apx. 21a.

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<sup>3</sup> At page 2, line 3 of its Opinion below (A12), the Court of Appeals mistakenly states “1999” as the year of confirmation of the roll; subsequent references in the Opinion to “the December 2, 1996 assessment” make it clear that this is a mere typographical error.

With respect to the collateral estoppel doctrine's requirement that the prior proceeding must culminate in a valid final judgment, the Court of Appeals below noted that Highland's claim of appeal from the MTT's "Opinion and Judgment - - Final Decision on Proposed Judgment" was dismissed for lack of jurisdiction (Apx. 115b), and that its application for leave to appeal therefrom, in which it argued that the MTT erred in ruling that its failure to comply with the requirements of MCL 205.735 deprived the Tribunal of jurisdiction over its challenge to the 12/2/96 special assessment, was denied "for lack of merit in the grounds presented." Apx. 21a and Apx. 116b. While Highland argued at pages 43-44 of its application for leave to appeal in the instant case that MTT Docket No. 261431 "never culminated in a valid final judgment before Docket [No. 307906] was dismissed," it conveniently omitted any reference to the fact that the grounds presented in its application for leave to appeal from the final decision of the MTT in Docket No. 261431 were deemed to be lacking in merit by the Court of Appeals in its Order of August 13, 2004 (Apx. 116b) – an Order that pre-dated the MTT's dismissal of Docket No. 307906 by eight months (A11).<sup>4</sup>

Highland's argument in its application for leave to appeal<sup>5</sup> that the MTT's March 19, 2004 Opinion and Judgment is not "final" for purposes of collateral estoppel was predicated on the erroneous assertion that "final" has the same meaning in the contexts of appeals as of right

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<sup>4</sup> The Michigan Court of Appeals has consistently held that the denial of an application for leave to appeal "for lack of merit in the grounds presented," as opposed to a denial for "failure to persuade the Court of the need for immediate appellate review," is a decision on the merits of the issues raised. See, e.g., People v Hayden, 132 Mich App 273, 297; 348 NW2d 672 (1984); People v Douglas, 122 Mich App 526, 529-530; 332 NW2d 521 (1983); and People v Wiley, 112 Mich App 344, 346; 315 NW2d 540 (1981). Highland did not seek further appellate relief in MTT Docket No. 261431, and it is thereby foreclosed from arguing that the MTT's Judgment in that case is not a final judgment.

<sup>5</sup> As noted in the Introduction section of the Township's Argument herein, Highland makes no argument whatsoever in its brief concerning the collateral estoppel holding of the Court of Appeals below, and has therefore waived and abandoned this issue on appeal. To the extent, however, that this court nevertheless decides to consider the merits of this aspect of the Court of Appeals' holding, the Township includes this argument to demonstrate the propriety thereof.

and the application of preclusion doctrines. In fact, while an otherwise “final” decision of a court or tribunal may not be appealable as of right because the case in which it is issued is consolidated with another case,<sup>6</sup> it will be deemed “final” for purposes of the preclusion doctrines of *res judicata* and collateral estoppel if it is sufficiently firm to be accorded preclusive effect and is not tentative, provisional or contingent. See, Restatement 2d of Judgments, § 13 and Comment b thereto; See also, Sherman v Jacobson, 247 F Supp 261 (SDNY 1965), in which the court expounded upon the reasons for ascribing different meanings to “final” in the appellate review and preclusion doctrine contexts as follows:

... “final” in the *res judicata* or collateral estoppel sense is not identical to “final” in the rule governing the jurisdiction of appellate courts. An examination of the policies underlying *res judicata* and collateral estoppel and the requirement that judgments be “final” to be appealable shows why this is so. *Res judicata* is not merely a matter of procedure inherited from a more technical era but is founded on the policy of preventing needless litigation. It is “a principle which seeks to bring litigation to an end and promote certainty in legal relations”. The final judgment rule is designed to prevent “enfeebling judicial administration” which would result from “permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment”. Effectuation of these policies would clearly be hampered if “final” were given the same meaning in each context. A consistently broad interpretation of the term would flood the appellate courts with piecemeal litigation, while a narrow interpretation would allow a litigant to bring an endless number of lawsuits. It follows, therefore, that “final” for *res judicata* purposes must be construed in the light of the considerations of that doctrine, rather than be automatically equated with “final” in the final judgment rule.

247 F Supp at 268 (citations omitted).

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<sup>6</sup> Pursuant to the Michigan Court Rules, a judgment that does not dispose of all the claims, and adjudicate the rights and liabilities of all the parties, is not a “final judgment” as defined by MCR 7.202(6) and is thus not appealable as of right under MCR 7.203(A)(1).

Based on the foregoing, it is clear that the consolidation of MTT Docket Nos. 261431 and 266534 had no effect on the “finality” of the MTT’s Opinion and Judgment in Docket No. 261431 for purposes of the applicability of the doctrine of collateral estoppel. Furthermore, whether and when Docket No. 266534 was severed from Docket No. 261431<sup>7</sup> is not germane to the issue of the finality of the MTT’s Opinion and Judgment, as wrongly suggested by Highland at page 44 of its application for leave to appeal, because Docket No. 266534 involves issues separate and distinct from those involved in Docket No. 261431.

Collateral estoppel applies to bar Highland’s attempt to relitigate the issue of whether official or unofficial sewer plan changes made after confirmation of the special assessment roll can serve to excuse Highland’s failure to meet the jurisdictional requirements of MCL 205.735(1) and (2). This issue was fully, finally and necessarily determined in MTT Docket No. 261431, and the Court of Appeals below committed no error in so holding. The suggestion that the “issues” in Docket Nos. 261431 and 307906 were different because Docket No. 261431 was decided before the Township’s Board adopted its May 13, 2004 Resolution formally removing the sewer line traversing Highland’s property ignores the full scope of the MTT’s decision in Docket No. 261431:

The Tax Tribunal finds that in our present case, neither the official nor unofficial changes to the *plans* rendered the December 2, 1996 confirmation of the *roll* invalid, nor did it render any assessment on an individual property invalid.

Apx. 62a.

When properly viewed, this ruling is seen to encompass any and all official and unofficial post-confirmation *plan* changes relative to their legal impact on *roll* confirmation and assessments,

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<sup>7</sup> On December 1, 2004, the MTT issued an Order consolidating Docket No. 266534 with Docket No. 307906 (Dkt. No. 18). This Order was entered several months after the Court of Appeals denied Highland’s application for leave to appeal in Docket No. 261431 “for lack of merit in the grounds presented” (A14).

including the “official” action of the Township’s Board on May 13, 2004 ratifying and approving earlier “unofficial” plan changes. Accordingly, the Court of Appeals did not err in ruling that collateral estoppel barred Highland from once again challenging its December 1996 special assessment for sewer service, and Highland’s failure to make any argument whatsoever regarding this ruling compels affirmance by this Court of the decision below.

**IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE MTT LACKED JURISDICTION TO ADJUDICATE HIGHLAND’S CLAIMS THAT THE TOWNSHIP FAILED TO COMPLY WITH THE PUBLIC IMPROVEMENTS ACT AND THAT THE TOWNSHIP SHOULD BE REQUIRED TO BUILD THE SEWER SYSTEM IN A CERTAIN MANNER.**

As noted above, Highland sought to revive its failed challenge to its December 1996 special assessment by alleging in MTT Docket No. 307906 that the Township’s failure to comply with the Public Improvements Act, MCL 41.721 *et seq.*, in connection with its adoption of the May 13, 2004 Resolution entitled it to now challenge the amount of that assessment. The relief sought in Highland’s Petition in Docket No. 307906 was broken down into two separate components: 1) the reduction of Highland’s special assessment imposed by confirmation of the roll on December 2, 1996, and 2) declaratory and injunctive relief voiding the sewer plan changes formalized by the Township’s May 13, 2004 Resolution, determining that the “governing plans” for the project are those adopted by the Township prior to the December 2, 1996 roll confirmation, and ordering the Township to build the project according to the pre-confirmation plans. With respect to the first component of requested relief, the Court of Appeals below properly held that the same was barred by the doctrine of collateral estoppel (see Argument III, *supra*). As for the second component, the Court of Appeals held that the MTT lacked jurisdiction to award such relief because the claims asserted did not seek review “relating

to ... special assessments ...” and did not seek a “refund or redetermination of a tax ...” MCL 205.731(a) and (b); Opinion, p. 6 (Apx. 25a). In so holding, the Court of Appeals correctly applied the jurisdictional statute to the claims presented in accordance with case law precedent, and Highland’s argument to the contrary is without merit.<sup>8</sup>

MCL 205.731 establishes the parameters of the MTT’s jurisdiction as follows:

The tribunal’s original and exclusive jurisdiction shall be:

- (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws.
- (b) A proceeding for refund or redetermination of a tax under the property tax laws.

Assuming *arguendo* that the Township Board’s May 13, 2004 Resolution is “a final decision, finding, ruling, determination, or order of an agency”, MCL 205.731(a), the Court of Appeals correctly held that Highland’s claim that this Resolution’s failure to comply with the Public Improvements Act was not a claim for review of an agency decision “relating to ... special assessments ... under property tax laws.” MCL 205.731(a). Indeed, a review of the Resolution reveals that it had no effect on the amount of Highland’s special assessment or on the availability of sewer service to Highland’s property.<sup>9</sup> For this reason, the Resolution did not “relate to” Highland’s special assessment.

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<sup>8</sup> Highland’s brief wrongly assumes and never establishes that the Township’s May 13, 2004 Resolution approving and ratifying prior plan changes for the sewer improvements somehow entitles it to challenge the proportionality of its special assessment as confirmed on a roll in December of 1996. At the very most, assuming *arguendo* that the Tribunal had jurisdiction over Highland’s Petition below, at issue therein would have been the plan changes effected by adoption of the Resolution, not Highland’s special assessment and not the validity of that assessment. Of course, however, the Court of Appeals below carefully and correctly analyzed and decided the jurisdictional issue, thus rendering moot Highland’s argument that the Resolution did not comply with the requirements of the Public Improvements Act.

<sup>9</sup> At no point during the nearly nine years in which Highland’s challenges to its special assessment have been pending in various courts and the MTT has Highland ever explained, or presented authority to support, how the

Highland's argument at pages 37-38 of its brief that its Petition in MTT Docket No. 307906 was a proceeding "related to . . . special assessments" is unpersuasive. After demonstrating that "relating to" means connected with or with reference to, Highland asserts that its challenge to the Township's May 13, 2004 Resolution "related to" the Township's special assessment confirmed in December of 1996 because it alleged a failure to comply with the Public Improvements Act and it was under this Act that the special assessment came into being. Beyond the uncontested fact that the May 13, 2004 Resolution has absolutely nothing to do with, and in no way affects, the special assessments levied by the Township in 1996, Highland's argument wholly ignores the reality that its Petition below did not make a direct challenge to its special assessment, but instead claimed a failure to comply with the Public Improvement Act's provisions concerning plan changes for public improvements. Such a claim surely does not raise questions concerning the factual underpinnings of taxes, and Highland should know better having successfully argued this jurisdictional point to this Court in Highland-Howell Development Co, LLC v Township of Marion, 469 Mich 673, 677-678; 677 NW2d 810 (2004), in which it was held that common law tort and contract claims are not within the original and exclusive jurisdiction of the MTT. In Highland-Howell, the claims at issue concerned the Township's alleged breach of a promise to construct the same sewer line involved in the instant case. Relying on the distinctions drawn in its earlier decisions in Wikman v City of Novi, 413 Mich 617; 322 NW2d 103 (1982) and Romulus City Treasurer v Wayne County Drain Comm'r, 413 Mich 728; 322 NW2d 152 (1982), this Court concluded that an alleged breach of promise to

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Township could have constructed a sewer line across its property and how Highland could have accessed that line for its own use without some form of an easement agreement. Highland's special assessment for sewer service entitled it to have a sewer line brought to its property, and there is no issue as to whether Highland has received the benefit of this improvement. The fact that, had the parties negotiated some form of agreement entitling the Township to come onto Highland's property to build a sewer line thereon and entitling Highland to tap into that line, an additional benefit beyond the availability of sewer service may have been received by Highland, is and always has been a red herring in these cases.

build a sewer line in connection with a special assessment sewer project is not a direct challenge to a special assessment and is not the type of claim that the Legislature intended the MTT's exclusive jurisdiction to encompass. 469 Mich at 676-678.

Just as a common law tort or contract claim arising out of a breach of promise to build a sewer line as part of a special assessment project is not a claim within the MTT's original and exclusive jurisdiction, Highland-Howell, supra, neither is a claim that a change in the sewer line was made in violation of the Public Improvements Act. In both circumstances, there is no direct challenge to a special assessment and there is no issue concerning the factual underpinnings of taxes because resolution of the claim has no effect on the amount of the property owner's special assessment or its receipt of sewer service for which the assessment is levied. Accordingly, the Court of Appeals below properly ruled that Highland's challenge to the formal change in sewer plans embodied in the Township Board's May 13, 2004 Resolution was not within the MTT's original and exclusive jurisdiction.<sup>10</sup>

Finally, while Highland's claim for relief arising out of its challenge to the December 2, 1996 special assessment concededly sought a "refund or redetermination of a tax under the property tax laws," MCL 205.731(2), its claim arising out of its challenge to the Township Board's May 13, 2004 resolution did not seek such relief. Accordingly, the Court of Appeals correctly held that Highland's claim concerning the May, 2004 Resolution was not within the MTT's original and exclusive jurisdiction as set forth in MCL 205.731(2).

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<sup>10</sup> In addition, the alleged legal duty to build the disputed sewer line has been fully and finally adjudicated by the Livingston County Circuit Court in its Opinion and Order of October 15, 2004 (Apx. 106a), the appeal from which was dismissed by Order of the Court of Appeals dated February 22, 2005 (Apx. 114b).

**V. THE OCTOBER 15, 2004 OPINION AND ORDER OF THE LIVINGSTON COUNTY CIRCUIT COURT BARS RELITIGATION OF THE CLAIMS AND ISSUES RAISED IN THE PETITION IN DOCKET NO. 307906 BELOW AS THEY RELATE TO THE EFFECT OF THE TOWNSHIP BOARD'S MAY 13, 2004 RESOLUTION.**

An alternative basis for concluding that the Court of Appeals reached the correct result below lies in the October 15, 2004 Opinion and Order of the Livingston County Circuit Court (Apx. 106a). In that Opinion and Order, Judge Latreille ruled that the Township had no clear legal duty to construct the disputed sewer line across Highland's property, "especially in light of the subsequent ratification and approval of the 1997 changes." Opinion and Order, p. 7 (Apx. 112a). Inasmuch as Highland was seeking declaratory and injunctive relief in MTT Docket No. 307906 that would require the Township to build the disputed sewer line, it is apparent that Judge Latreille's final Opinion and Order – the appeal from which was dismissed by the Court of Appeals on February 22, 2005 pursuant to a stipulation of the parties (Apx. 114b) – precludes the claim on which this request for relief was based under well established principles of *res judicata*. Sewell v Clean Cut Mgmt, Inc, 463 Mich 569, 575; 621 NW2d 222 (2001); Dart v Dart, 460 Mich 573, 586; 597 NW2d 82 (1999).

**VI. THE CORRECT ANSWERS TO THE FOUR QUESTIONS POSED BY THIS COURT IN ITS ORDER GRANTING LEAVE TO APPEAL PROVIDE FURTHER SUPPORT FOR AFFIRMANCE OF THE COURT OF APPEALS' DECISION BELOW.**

In its December 29, 2006 Order granting leave to appeal, this Court directed the parties to brief the following four issues:

- (1) what was the specific benefit conferred on petitioner's property by the special assessment confirmed in 1996, *see Kadzban v Grandville*, 442 Mich 495 (1993);
- (2) whether that benefit was reduced by the informal change in the improvement plan or

respondent's May 13, 2004 resolution; (3) whether respondent's informal change or respondent's May 13, 2004 resolution is reviewable by the Michigan Tax Tribunal under MCL 205.731(a); and (4) what remedy, if any, petitioner would have if the change in the improvement plan after confirmation of the special assessment roll reduced the value that accrued to petitioner's property such that the benefit became unreasonably disproportionate to the amount assessed.

The Township submits that the correct answers to these questions should lead this Court to conclude that the Court of Appeals reached the right result below, because they demonstrate that the removal of the east-west trunk line traversing Highland's property from the sewer system plans (informally in 1997 and formally in 2004) did not reduce the benefit conferred on Highland's property by the special assessment, and further establish that the remedy, if any, available to Highland under the circumstances posed by the Court would lie in a court of competent jurisdiction, not in the Tax Tribunal.

**A. The specific benefit conferred on Highland's property by the special assessment confirmed in 1996 was the availability of sanitary sewer service.**

To answer the Court's first question, it is necessary to understand three separate concepts: (1) the nature of the improvement at issue, (2) the specific benefit conferred on an assessed property by virtue of the improvement, and (3) the methodology by which the benefit is to be determined.

The first concept – the nature of the improvement – is addressed in Section 2 of the Public Improvements Act, MCL 41.722. With regard to the instant case, this Section of the Act provides that among the improvements authorized by the Act are “the construction, improvement, and maintenance of . . . sanitary sewers . . .” MCL 41.722(1)(a). There is no dispute in this case that the “improvement” actually constructed by the Township was a sanitary

sewer system that was brought to the western boundary of Highland's property for connection (see Highland's Brief on Appeal, p. 1).

The second concept – the specific benefit conferred on an assessed property by virtue of the improvement for which the property has been specially assessed – is not addressed in the Public Improvements Act. Michigan case law, however, has addressed the concept by describing it as a “special benefit in addition to the benefit that was conferred upon the community as a whole.” See Kadzban v City of Grandville, 442 Mich 495, 501; 502 NW2d 299 (1993). While there is a dearth of case law addressing the manner in which the “specific” or “special” benefit is to be determined, the case of Stybel Plumbing, Inc v Oak Park, 40 Mich App 108; 198 NW2d 781 (1972) holds that this benefit “is measured by its available potential, not the immediate use to which it can be put.” 40 Mich App at 110, citing Crampton v Royal Oak, 362 Mich 503, 517; 108 NW2d 16 (1961). Thus, it matters not whether the owner of specially assessed property actually puts the improvement to its intended use; rather, the “specific” or “special” benefit conferred on the property is the availability of the service provided by the improvement – in the instant case, sanitary sewer service.<sup>11</sup> In the words of Highland's counsel, Richard Bisio, stated at the hearing in MTT Docket No. 261431:

People are being assessed for the benefit to their property, and that is providing the sewer system to their property . . . What they pay for and what they get is sewer service. . .

Apx. 118b – 119b.

Moreover, as expressed in the Township's Sewer and Water Ordinance at Chapter Four, Section 1, property owners specially assessed for sanitary sewer improvements “thereby received

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<sup>11</sup> Highland clutters its brief with an extended, irrelevant discussion intended to establish that the “improvement” is not sewer service but is instead the physical construction of the sewer system, and seeks to support this point with citations to the statutes in seven other jurisdictions. See Highland's brief, pp. 24-25. In truth, the improvement provides a service, and the benefit therefrom is the availability of the service.

a right to connection to . . . the sewer system . . .” Apx. 121b. What can thus be gleaned from the confluence of the case law, Highland’s counsel’s admissions and the Township’s Ordinance provisions is that the “specific benefit” conferred on Highland’s property by the special assessment confirmed in 1996 was the right to avail itself of the service provided by the improvement, i.e., sanitary sewer service, by connecting to the system actually constructed.

The third concept – the methodology by which the benefit is to be determined – is not directly implicated by this Court’s first question but warrants discussion here because Highland improperly seizes upon it as a means to segue into an argument concerning the proportionality of its special assessment to the benefit conferred on its property by the improvement. More specifically, although Highland correctly sets forth “the difference in market value with and without the improvement” as the proper measure of the “benefit,” citing Dixon Rd v City of Novi, 426 Mich 390; 395 NW2d 211 (1986) and Kadzban v City of Grandville, *supra*, it fails to demonstrate how this measurement standard assists the Court in answering the questions posed in its Order granting leave to appeal. What Highland does instead is embark upon an extended discussion at pages 26-30 of its brief of how the unofficial removal of the east-west trunk line traversing its property in 1997 allegedly reduced the benefit and thus created disproportionality between that benefit and the amount of its special assessment. Why Highland sees fit to include such a discussion in its brief is far from clear, given (1) its wholesale failure to address the jurisdictional grounds on which its Petition below was dismissed, and (2) its failure to come to terms with the fact that the claims not otherwise barred by the prior adjudication in MTT Docket No. 261431 were adjudicated with finality in the Township’s favor in the Livingston County Circuit Court litigation before Judge Latreille.

In sum, the answer to this Court's first question is the availability of sanitary sewer service, represented by Highland's ability to connect to the system at the western boundary of its property.

**B. The availability of sewer service was not reduced by the informal change in the improvement plan or the Township's May 13, 2004 Resolution.**

Highland's argument is that by changing the sewer system plans to eliminate the east-west trunk line traversing its property, the "benefit" to its property was reduced because it could no longer simply tap into this line with lateral connections, but would instead be required to construct more infrastructure to service its proposed development of the site as a manufactured home community. As the Township has demonstrated above, the correct measure of the "benefit" to Highland's property is the availability of sewer service, not some allegedly vested right to have the sewer system built according to a particular plan. Inasmuch as the premise of Highland's argument is flawed, i.e., it misstates the nature of the "benefit", its conclusion that the removal of this east-west trunk line reduced the "benefit" is erroneous.

Notwithstanding the fact that the Township's change to the plans for sanitary sewer system improvements – a change made informally in 1997 and formally in the May 13, 2004 Resolution – eliminated an east-west trunk line traversing Highland's property, this plan change in no way reduced or eliminated the "benefit" to Highland's property. The reason this is so is that after the trunk line was removed, Highland was still able to avail itself of the utilization of the sewer system by connecting to the system at the western boundary of its property. See Highland's brief, p. 1. In other words, Highland's property was served with sanitary sewer before and after the removal of this trunk line.

Highland confuses the "benefit" to its property from the sanitary sewer improvements actually constructed by the Township pursuant to the Public Improvements Act with the

“benefit” that would have accrued to its property (1) if the Township had acquired an easement to construct the east-west trunk line across Highland’s property, (2) if the Township had then actually built the trunk line, and (3) if the Township had then given Highland the right to tap into the trunk line. The fact that none of these three things ever occurred may well have deprived Highland of their potential “benefit,” but such “benefit” is entirely separate from the “benefit” conferred on the property as a result of serving the property with sewer by bringing the pipe to the property’s boundary. Indeed, Highland’s failure and refusal to acknowledge the distinction drawn above, and its mantra-like repetition of the erroneous claim that the removal of the trunk line decreased or eliminated the “benefit” to its property, highlight the lack of credibility inherent in its arguments on appeal.

**C. Neither the informal plan changes made in 1997 nor the formal plan changes made in the Township’s May 13, 2004 Resolution are reviewable by the MTT under MCL 205.731(a).**

MCL 205.731(a) provides that the exclusive and original jurisdiction of the Michigan Tax Tribunal shall be as follows:

- (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws. (emphasis added).

In the instant case, Highland attempted to rely upon the Township’s May 13, 2004 Resolution approving and ratifying previously made changes to the sewer system plans as the basis of two separate claims: (1) a claim challenging the proportionality of its special assessment levied in December of 1996, and (2) a claim that the plan changes approved and ratified in the Resolution were not made in compliance with the Public Improvements Act. Apx. 3b (MTT Petition in Docket No. 307906). As the Township has demonstrated in Argument IV above, the Court of

Appeals correctly held that the Michigan Tax Tribunal lacked jurisdiction to adjudicate Highland's claim that the Township's plan changes violated the Public Improvements Act.

The Township will not reiterate Argument IV here, except to emphasize that this argument is founded upon this Court's decision in Highland-Howell Development Co, LLC v Township of Marion, 469 Mich 673; 677 NW2d 810 (2004). Based on the holding in this case, the answer to the Court's third question posed in its Order granting leave to appeal is "No."

**D. If a plan change made after confirmation of the special assessment roll creates disproportionality between the amount of the special assessment and the benefit conferred on the property by virtue of the improvement, a property owner's remedy would lie in a court of competent jurisdiction for declaratory, injunctive and/or mandamus relief.**

The Township addressed this very issue in its Supplemental Brief in Opposition to Petitioner-Appellant's Application for Leave to Appeal dated August 10, 2006, at pages 1 through 4 thereof. Apx. 122b. The arguments set forth in this Supplemental Brief are incorporated herein by reference, as are the arguments advanced on this issue by *amicus curiae* The Michigan Townships Association at pages 1 through 9 of its *Amicus Curiae* Brief dated October 9, 2006. Apx. 132b. Without repeating those arguments here, the Township would simply emphasize the critical point, so directly and persuasively demonstrated in the Michigan Township Association's *amicus curiae* brief, that the Public Improvements Act does not provide for notice and a hearing on the approved plans for an improvement, whether as originally adopted or subsequently changed. Apx. 132b, pp. 5-9. Inasmuch as Highland's argument that the protest and timing requirements of the Tax Tribunal Act and the Public Improvements Act are excused when the failure to give statutorily required notice violates due process is based on

cases wherein the statute at issue actually required the giving of notice,<sup>12</sup> these cases are inapposite and Highland's argument is unfounded.

In sum, Highland's remedy, if any, under the circumstances posed in the fourth issue raised in this Court's Order granting leave to appeal was an action in a court of competent jurisdiction. Indeed, Highland pursued such a remedy in the Livingston County Circuit Court. Apx. 8b, Third Amended Complaint in Case No. 98-16767-CZ, Count 3 – Declaratory Judgment. In the context of the issue raised by this Court, it matters not that the remedy sought by Highland in the Circuit Court was not awarded, because a different result would ensue in a case where the plan change actually eliminated the benefit for which the property owner had been specially assessed.<sup>13</sup>

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<sup>12</sup> See W & E Burnside, Inc v Bangor Twp, 402 Mich 9501; 314 NW2d 196 (1978), Szymanski v City of Westland, 420 Mich 301; 362 NW2d 224 (1984), and other cases cited at pages 43-44 of Highland's brief.

<sup>13</sup> As discussed in the Township's Supplemental Brief in Opposition to Highland's Application for Leave to Appeal at page 3, Apx. 128b, the only change to plans for sewer improvements that could "materially affect the benefit to the owner's property" is one that eliminated the sewer service provided by the improvement in its entirety; property is either served or not served.

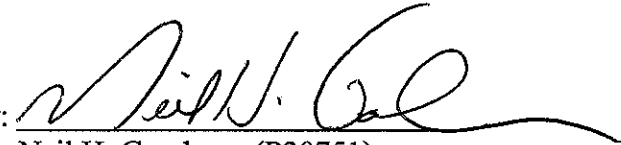
**RELIEF REQUESTED**

The Township of Marion prays for entry of an Order affirming the decision of the Court of Appeals below in Docket No. 262437.

Respectfully submitted,

CLARK HILL PLC

By:



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Dated: March 29, 2007

5416147v.1

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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Appeal from the Michigan Court of Appeals  
Donofrio, P.J. and Zahra and Kelly, J.J.  
Docket No. 262437

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HIGHLAND-HOWELL DEVELOPMENT  
COMPANY, L.L.C.,

Supreme Court No. 130698

Petitioner-Appellant,

Court of Appeals Docket No. 262437

vs.

Michigan Tax Tribunal  
Docket No. 307906

TOWNSHIP OF MARION,

Respondent-Appellee.

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**PROOF OF SERVICE**

