

STATE OF MICHIGAN  
IN THE SUPREME COURT

LAKE FOREST PARTNERS 2, INC.,  
a Michigan corporation,

Appellee-Petitioner,

v

MICHIGAN DEPARTMENT OF TREASURY,

Appellant-Respondent.

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Supreme Court No. 132013

Court of Appeals No. 257417

Michigan Tax Tribunal No. 00-292089

**APPELLEE-PETTITIONER'S SUPPLEMENTAL BRIEF**

This brief is filed in response to the Court's order of February 9, 2007. Appellee Lake Forest Partners 2 relies primarily on its Brief in Response to Application for Leave to Appeal, filed October 9, 2006. This supplemental brief is intended only to highlight to the Court some aspects of Lake Forest's argument that may not have received sufficient emphasis.

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**COUNTER STATEMENT OF QUESTIONS PRESENTED**

Appellee-Petitioner Lake Forest Partners 2, Inc. relies on the Counter-Statement of Questions Presented in its Brief in Response to Application for Leave to Appeal, filed October 9, 2006.

**STATEMENT OF MATERIAL FACTS AND PROCEEDINGS**

Appellee-Petitioner Lake Forest Partners 2, Inc. relies on the Statement of Material Facts and Proceedings in its Brief in Response to Application for Leave to Appeal, filed October 9, 2006.

## ARGUMENT

### **I. Treasury's new construction of the statute is unrelated to actual practice and would lead to absurd results.**

In its earlier brief, Lake Forest described how Treasury's new position is completely inconsistent with the position it took before the Tax Tribunal and before the Court of Appeals, as well as with the position it took in the Pulte advice letter. In fact, Treasury has never before advanced this argument.<sup>1</sup> Nor has the procedure that Treasury is asking this Court to impose ever been used by the Washtenaw County treasurer's office, the agency charged with actually collecting the transfer tax on behalf of the state in this case. Nor, insofar as Appellee is aware, does any other county in Michigan follow what Treasury now—for the first time—asserts is the statute's "plain meaning."

It is no accident that Treasury has never before made the argument it now advances, or that no one has ever understood the statute to mean what Treasury now claims. The reason is simple: Treasury's tortured reading of the statute leads to tortured results. Here is one of the things that would happen under Treasury's version of the transfer tax: if a farmer sold vacant land to a buyer on a land contract—let us say for \$60,000—and the land contract were recorded, the selling farmer would be responsible for the transfer tax based on \$60,000. If, during the term of the land contract, the buyer built a luxury home on the land, then at the conclusion of the term (typically several years), when the deed passed to the buyer and was recorded, the *seller* (the farmer) would be responsible for a transfer tax on the additional value—perhaps ten or more times the (fair) price the seller actually contracted for years earlier.

It is not possible that the Legislature intended this result.

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<sup>1</sup> Except in its motion for reconsideration to the Court of Appeals.

Nor is it possible to find any way in which Treasury's position would not *require* this absurd outcome. According to Treasury's theory, there have been two transfers, each one a taxable event. (The result would be the same if the land contract were not recorded, except that the seller would pay the total amount of the tax in one installment rather than two.) Treasury's theory results in what is effectively an excise tax on the building of a home—and worse still, an excise tax charged to a party who may have absolutely nothing to do with building that home and in an amount that may have no relationship to the price actually received by the seller.

The language of the statute would have to be absolutely unambiguous, the Legislature's intent unmistakable, to justify so unlikely a procedure.

## **II. The judgment for Lake Forest should stand even if this Court were to accept Treasury's construction of the statute**

As Lake Forest has pointed out in its earlier brief, Treasury's new two-transfer construction of the statute was not raised in the proceeding before the Tax Tribunal or to the Court of Appeals (except in a motion for reconsideration). The argument is therefore not properly before this Court. *See e.g. In re Forfeiture of Certain Personal Property*, 441 Mich. 77, 84 (1992) (“[i]ssues and arguments raised for the first time on appeal are not subject to review”); *People v. Grant*, 445 Mich. 535, 546 (1994) (issues must be raised in trial court to preserve them for appellate review); *Pro-Staffers, Inc. v. Premier Manufacturing Support Services*, 252 Mich. App. 318, (2002) (raising an issue for the first time in a motion for reconsideration does not preserve it for appellate review).

But even if the Court were to find it appropriate to consider Treasury's new argument, the judgment in favor of appellee Lake Forest should not be disturbed. Lake Forest made several

meritorious alternative arguments to the Court of Appeals that that court did not need to decide in ruling for Lake Forest. This Court may affirm the Court of Appeals on any of those grounds.

**A. If this Court were to find merit in Treasury’s construction of the Statute, that would establish that the Statute is ambiguous, and Lake Forest would therefore be entitled to a favorable construction of the Act.**

This Court has laid down special rules governing statutory construction of tax statutes. Perhaps the most fundamental of these rules is that “ambiguities in the language of a tax statute are to be resolved in favor of a taxpayer.” *Michigan Bell Telephone Co. v. Department of Treasury*, 445 Mich. 470, 476 (1994); *see also Evanston YMCA Camp v. State Tax Commission*, 369 Mich. 1, 7 (1962) (“imposition provisions of a taxing statute should be construed in favor of the taxpayer”).

This rule confers something resembling a due process protection for taxpayers, and originates from the same concerns as does that constitutional guarantee. It recognizes that fundamental fairness requires that taxpayers have actual notice of what a taxing statute requires before the taxpayer can be assessed for failing to pay a tax, or part of a tax, that the State claims is due. If a court finds a tax statute to be ambiguous, it may use settled principles of statutory construction to resolve the ambiguity *prospectively*. The taxpayer who makes the ambiguity challenge is, however, entitled to the benefit of the most favorable construction of the statute.

Two judges of the Court of Appeals agreed with Lake Forest’s interpretation of the statute in this case. No judge of any court in Michigan, so far as Appellee knows, has ever accepted Treasury’s new interpretation. Even more fundamentally, Treasury itself has advanced two diametrically opposed constructions of the Act. Assuming, as we should, that each was asserted in good faith, it is impossible for Treasury to claim that the statute *unambiguously*

means what it now says it means. If Treasury could believe that *both* its interpretations are reasonable and supported by the language of the statute, it has—in any ordinary understanding of the term—confessed that the statute is ambiguous. And if the statute is ambiguous, the ambiguity must be construed in favor of Lake Forest.

**B. Treasury is collaterally estopped from collecting additional taxes in this case**

Treasury wishes this Court to decide in its favor issues that were decided adversely to its position in earlier proceedings. Lake Forest is entitled to the *defensive* use of the doctrine of collateral estoppel to prevent Treasury from repeatedly relitigating the same questions—even if Treasury chooses a new theory each time.

**1. The Washtenaw Circuit Court decision**

The Circuit Court litigation involved the same 45 parcels of land as here. The issue was the construction of the transfer tax as it relates to the county's portion of the transfer tax, MCL 207.501 *et seq.* In this case, the state portion of the same tax is at issue, MCL 207.522 *et seq.* But the questions under each section are identical: when does a “transfer” take place, at what point in time is the value of the property to be assessed, when must the tax be paid? The decision of the Circuit Court would not bind a stranger to the litigation, but Treasury was no stranger to those proceedings—neither in theory<sup>2</sup> nor in fact. As described in Lake Forest's principal brief at 43-44, the attorney for Washtenaw County coordinated his prosecution of the case against Lake Forest with the representatives of the state. The state therefore received all the benefits of participating in the case—*but it left itself free to try again if it lost.*

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<sup>2</sup> As explained in Lake Forest's principal brief at 39-40, the various subdivisions of the state are “creatures of the same sovereign.”

This Court should not allow the state, with all its power and resources, to “keep trying until it gets it right.” Treasury has thus far chosen not to answer Lake Forest’s assertion that Treasury participated in the Circuit Court case. It *cannot* deny, of course, that under Michigan law, it and the county are two components of the same sovereign. For both reasons, it is bound by the judgment of the Circuit Court.

## 2. The *Sunshine* case

The Tax Tribunal’s rejected Lake Forest’s collateral estoppel argument based on the *Sunshine* case because of a fundamental misunderstanding of the law. A litigant may invoke collateral estoppel *defensively* without having been a party in the original case.. Treasury was indisputably a party in *Sunshine* and had a full opportunity to—and did—argue exactly the same issue it wishes to argue here. Treasury urged that a land-contract seller who also enters into a contract to build a home on the land owes transfer tax on the value of the property after the home is built, not on the value at the time the land contract is entered into. That is exactly the position Treasury takes here. It is of course true—as Lake Forest has repeatedly stressed—that Treasury now has a new theory to justify its position. But *the issue it is litigating* and the result that it is seeking, are identical to the issue it litigated and the result it sought in *Sunshine*. It lost on the merits in that attempt. It is estopped from trying again.

### C. Any ruling adverse to Lake Forest should be given prospective application only

The question of retroactive application, like the doctrine that an ambiguous tax statute should be construed in favor of the taxpayer, involves due process considerations. In Michigan,

a holding should be given prospective application when the holding was not “clearly foreshadowed” and when the balance of justice would make it unfair to apply the statute retrospectively. *See e.g., Lindsey v. Harper Hospital*, 455 Mich 56, 68 (1997).

As far as the first prong is concerned, the Pulte advice letter, the *Sunshine* case, the Washtenaw County litigation, and the subsequent stipulated order between Lake Forest and the county—all “foreshadowed” that Treasury’s position would not prevail. The decision of the Court of Appeals further reinforces this conclusion.

On the second prong, Lake Forest’s good faith is relevant. The Circuit Court specifically found that Lake Forest acted in good faith. Even Treasury has agreed that Lake Forest has accurately valued the lots in question and has paid the tax that would be due if Lake Forest’s position is sustained.

**CONCLUSION AND RELIEF REQUESTED**

For all of the foregoing reasons, as well as for the reasons stated in its brief of October 9, 2006, Lake Forest respectfully requests this Court to deny Treasury’s Application for Leave to Appeal or summarily to affirm the Court of Appeals.

Johnson & Gray, P.C.

By: 

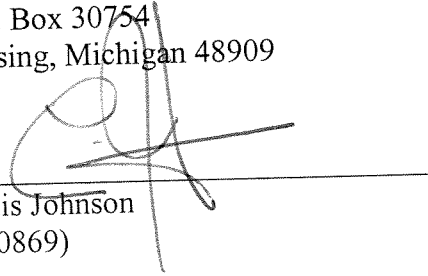
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March 7, 2007

## PROOF OF SERVICE

Louis Johnson, counsel for Lake Forest Partners, Inc., hereby states that on March 7, 2007, he served a copy of its Supplemental Brief on the Appellant-Respondent by causing the Brief to be sent by first-class mail with the correct postage to:

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