

STATE OF MICHIGAN
IN THE SUPREME COURT

LAKE FOREST PARTNERS 2, INC.,
Petitioner-Appellee,

v

DEPARTMENT OF TREASURY,
Respondent-Appellant.

Supreme Court No. 132013
Court of Appeals No. 257417
Michigan Tax Tribunal No. 00-292089

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**MOTION TO FILE AMICUS CURIAE BRIEF
BY WASHTENAW COUNTY,
ON BEHALF OF RESPONDENT-APPELLANT DEPARTMENT OF TREASURY**

Washtenaw County, through counsel, respectfully requests permission to file an amicus curiae brief in the above-captioned action, pursuant to the Michigan Supreme Court order entered in this matter on February 9, 2007. Permission to file an amicus curiae brief is requested for the following reasons:

1. The action is important because transfer taxes are credited to the state school aid fund established in section 11 of article IX of the state constitution of 1963. Any interpretation of the transfer tax act that circumvents the duty to pay transfer taxes in full is a significant public policy concern.

2. The act at issue, the State Real Estate Transfer Tax Act (“SRETTA”), MCL 207.521 *et seq.* is virtually identical to the Real Estate Transfer Tax Act (“RETTA”), MCL 207.501 *et seq.*; the only difference being the SRETTA provides for state transfer taxes while the RETTA provides for county transfer taxes. Judicial interpretation of one act, for all practical purposes, will be binding on both acts. The outcome of this case will have far-reaching consequences for all counties in this state.

3. In addition to the reasons above, this action is important to Washtenaw County because the lower court proceedings have been diluted with inaccurate information concerning a consent agreement entered into between Petitioner-Appellee Lake Forest and Washtenaw County, which involved a prior action, *Washtenaw County v Lake Forest Partners 2, Inc*, that is not a part of this action, and did not include the Department of Treasury as a party.

4. The consent agreement followed the Washtenaw Circuit Court’s ruling that Lake Forest violated the transfer tax act by insufficient payment of transfer taxes. Unfortunately, the Circuit Court only granted prospective relief, and did not allow the county to recoup any lost transfer taxes. Washtenaw County does not accept or support Lake Forest’s transfer tax

practices. Washtenaw County entered into the consent agreement based on other considerations, specifically as a matter of economy.

5. Washtenaw County is not submitting this Amicus Brief to recoup lost transfer taxes, or in any way relitigate the prior action *Washtenaw County v Lake Forest Partners 2, Inc.*

6. Washtenaw County submits this Amicus Brief wholly in support of the position of the Department of Treasury.

7. As a friend of the Court in the capacity of amicus curiae, Washtenaw County submits this motion and its Amicus Brief, to contribute a different perspective to the issues which hopefully will aid this Court in making a fully-informed decision in this matter.

WHEREFORE, Washtenaw County respectfully request this Court permit it to file an amicus brief in this matter.

Respectfully submitted,

Dated: 3/9/07

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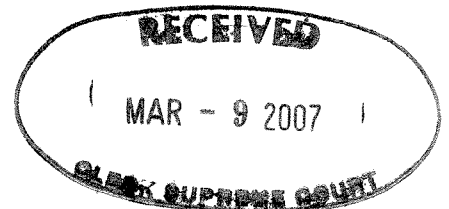
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AMICUS CURIAE BRIEF
BY WASHTENAW COUNTY, ON BEHALF OF
RESPONDENT-APPELLANT DEPARTMENT OF TREASURY

Oral Argument Requested



**ORDER APPEALED FROM
AND RELIEF SOUGHT**

1. Order Appealed From

Michigan Court of Appeals Order of June 6, 2006, No. 257417, reported at 271 Mich. App. 244; 720 N.W.2d 770 (2006), Davis, J., dissenting.

2. Relief Sought

Reversal of the above Court of Appeals Order, and reinstatement of the Tax Tribunal Order of July 12, 2004 in favor of Respondent-Appellant Department of Treasury, under the clear language of MCL 207.501, *et seq.* (State Real Estate Transfer Tax Act), that transfer tax is based only on recorded written instruments that convey a property interest.

QUESTION PRESENTED

Did the Court of Appeals majority err in interpreting the State Real Estate Transfer Tax Act such that transfer tax could be based on a partial amount of the whole real estate transaction.

Respondent-Appellant Department of Treasury's answer: Yes

Amicus Washtenaw County's answer:..... Yes

Petitioner-Appellee Lake Forest Partners 2, Inc.'s answer: No

Amicus MI Association of Realtors' answer: No

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MATERIAL PROCEEDINGS AND FACT

A. Nature of the Action

This matter involves an appeal from a Michigan Tax Tribunal order regarding calculation of transfer taxes under the State Real Estate Transfer Tax Act (“SRETTA”), MCL 207.521 *et seq.* The matter includes statutory interpretation of the act.

The position of Respondent-Appellant Department of Treasury, and amicus Washtenaw County, is: 1) the SRETTA imposes a transfer tax on a written instrument that conveys a property interest “when the instrument is recorded,” MCL 207.523(1); 2) the act requires the tax be based on the fair market value of the property when a written instrument conveying the property is recorded, pursuant to the definition of “value” under MCL 207.522; 3) equitable interests may transfer through unrecorded written instruments, but the property value at the time such an interest transfers through an unrecorded written instrument cannot be the base upon which the tax is imposed; and 4) the act speaks to recorded written instruments only.

The position of Petitioner-Appellee Lake Forest 2, Inc. and amicus Michigan Association of Realtors, is that the transfer tax can be based on a written instrument that transfers a property interest even though that written instrument is not recorded.

The action is significant because transfer taxes, after collection, are credited to the state school aid fund established in section 11 of article IX of the state constitution of 1963:

Sec. 11. There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education, and school employees' retirement systems, as provided by law.

MI Const. art. IX, § 11 (2006).

This amicus brief argues the act is clear and unambiguous in not permitting transfer tax to be based on a written instrument unless that particular written instrument is recorded.

B. Character of the Pleadings and Proceedings

Petitioner-Appellee Lake Forest 2 Inc. petitioned the Michigan Tax Tribunal to appeal Respondent-Appellant Department of Treasury's assessment against it. The assessment was based on insufficient payment of real estate transfer taxes. The Michigan Tax Tribunal entered an order on July 12, 2004, upholding the assessment and granting the Department of Treasury's Motion for Summary Disposition, copy attached as Appendix 1.

Petitioner-Appellee Lake Forest appealed the tax tribunal order to the Michigan Court of Appeals, which entered an order on June 6, 2006, reversing the tax tribunal decision, reported at 271 Mich. App. 244; 720 N.W.2d 770 (2006), Davis, J., dissenting, copy at Appendix 2.

Respondent-Appellant Department of Treasury filed an Application for Leave to this Court. This Court entered an order on February 9, 2007, directing the Clerk to schedule oral argument on whether to grant the application or take other peremptory action, granting the motions for leave to file briefs amicus curiae, and permitting the parties to file supplemental briefs within 28 days.

C. Substance of Proof

The substance of proof is the State Real Estate Transfer Tax Act ("SRETTA"), MCL 207.521 *et seq.*, and the following stipulated facts quoted from the Tax Tribunal order at pages 5-10. Please note that the prior action referred to, *Washtenaw County v Lake Forest Partners 2, Inc*, is not part of this action and did not include the Department of Treasury:

1. Petitioner, Lake Forest Partners 2, Inc. ("Lake Forest"), is a Michigan corporation with its principal place of business in Pittsfield Township, Michigan (which is located in Washtenaw County, Michigan).
2. Respondent contends that Petitioner owes real estate transfer taxes in the amount of \$ 65,968.00, together with interest computed in accordance with sections 23 and 24 of 1941 PA 122, and penalty in the amount of \$ 16,492.00 for the tax period January 1, 1997 through September 30, 2000.

3. Lake Forest's practice with respect to the payment of real estate transfer taxes on lot sales was as follows: In cases where only the lot existed at the time of contract, it paid real estate transfer taxes on the value of the lot only. In cases where a house existed on the lot at the time of contract, it paid real estate transfer taxes on the value of both the lot and the house.
4. The very transactions involved in this case were also the subject of a prior Circuit Court case, *Washtenaw County v Lake Forest Partners 2, Inc*, Case No. 00-579-CH, which was brought in the Spring of 2000 (the "prior case"). In that case, the County initially sought recovery of county and state real estate transfer taxes, but later confined its claims to county real estate transfer taxes. The Department of Treasury decided not to be a named party to the prior case.
5. In each of the transactions involved in this case and in the prior case, Lake Forest sold a vacant lot to a customer and concurrently entered an agreement to build a house for that customer. The agreement to sell the lot and the agreement to construct a home were embodied in a single document entitled "purchase agreement," which separately set forth the consideration for the lot sale and the consideration for the construction of the house. Lake Forest paid real estate transfer tax to the County and the State based on the value of the vacant lot as it existed at the time of the purchase agreement.
6. The County took the position that Lake Forest should have paid real estate transfer taxes on the combined value of the lot and the home that was ultimately built on the lot.
7. The parties in the prior case filed cross-motions for summary disposition, which were resolved in an August 15, 2001 Opinion and Order of the Circuit Court. The Circuit Court ruled that Lake Forest was not liable for any of the claimed county real estate transfer tax deficiency. The Circuit Court's Opinion and Order is attached [to the Stipulation] as Exhibit 1.
8. The Circuit Court subsequently issued a consent order for the purpose of clarifying how post-complaint transactions involving the simultaneous sale of a vacant lot and entry of a contract to build a home were to be treated for real estate transfer tax purposes. Lake Forest had been using a single document to reflect both the lot sale and the contract to build a house. Under the consent order, so long as two documents in the prescribed form are used to reflect the lot sale and home construction contract, the real estate transfer tax will be assessed on the value of the vacant lot only, and not on the value of the lot and the home that is ultimately built on the lot. The consent order (which was stipulated to by Lake Forest and the County) is attached [to the Stipulation] as Exhibit 2.
9. The Department of Treasury maintains that the provisions of the consent order do not apply to the determination of the state real estate transfer tax. The Department does not endorse the language of that order. Lake Forest's position is that, while it has no objection to using the two-document form in order to meet the County's requirements for paying tax on the value of the vacant lot only, the relevant statutory language does not make the amount of transfer tax turn on the number of documents used to evidence the transaction.
10. The Department of Treasury did not participate directly in the prior case. The Department was made aware of the proceedings in the prior case by means of written and oral communications from Ian James Reach, the attorney for the County in the prior

case. Mr. Reach provided copies of filings in that case to Respondent, including the Complaint and the Court's August 15, 2001 Opinion and Order. Mr. Reach also provided Respondent with copies of documents obtained during discovery in the prior case, and these documents were later used to complete the audit and make the assessment in this case.

11. Following the audit, Respondent issued Intent to Assess K447066 to Petitioner.
12. An informal conference regarding Respondent's Intent to Assess was held on October 30, 2001, and a report was issued.
13. A Decision and Order of Determination was issued on May 20, 2002.
14. Final Assessment K447066 was issued on May 28, 2002.
15. The Treasury Department takes the position that Petitioner owes additional SRETT with respect to the real estate transactions due to Lake Forest's understatement of its real estate transfer tax base. Specifically, like the County in the prior case, the Department contends that the real estate transfer tax should have been computed not on the value of the vacant lot that was transferred, but rather on the value of the lot and the home that was ultimately constructed on it. Just as it argued in the prior case, Lake Forest contends that it was liable for payment of real estate transfer taxes on the value of the lot only.
16. If real estate transfer taxes for the transactions at issue are calculated on the value of the vacant lot only, then Lake Forest owes no additional real estate transfer taxes.

D. and E. Dates of Important Instruments and Events, Trial and Appeal Court Orders

- July 12, 2004, the Michigan Tax Tribunal entered an order in favor of Respondent-Appellant Department of Treasury.
- August 17, 2004, Petitioner-Appellee filed a claim of appeal in the Michigan Court of Appeals.
- June 6, 2006, the Michigan Court of Appeals entered an order reversing the Tax Tribunal decision.
- September 6, 2006, Respondent-Appellant Department of Treasury filed an application for leave in this Court.
- February 9, 2007, this Court entered an order directing the Clerk to schedule oral argument on the application or take peremptory action, granting motions to file amicus briefs and supplemental briefs by March 9, 2007.

ARGUMENT

I. The Tax Tribunal correctly interpreted the State Real Estate Transfer Tax act, MCL 207.521 *et seq.*, that the property value at the time the warranty deed is delivered to the purchaser for recording, is the base upon which the transfer tax is imposed, representing the whole transaction of an improved lot and house. The Court of Appeals erred in reversing this decision.

A. Standard of Review

“We will generally defer to the tax tribunal's interpretation of statutes that it is delegated to administer.” *Lionel Trains v. Chesterfield Twp.*, 224 Mich App 350, 355; 568 NW2d 685 (1997). The statute at issue, MCL 207.521 *et seq.*, State Real Estate Transfer Tax Act (“SRETTA”) is administered by the tax tribunal.

Under *de novo* review of statutory interpretation, if the language of the statute is unambiguous on its face, “the drafter is presumed to have intended the meaning plainly expressed and further judicial interpretation is not permitted.” *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003).

[W]e take note of the applicable standard of appellate review. In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988).

Michigan Bell v Department of Treasury, 445 Mich 470, 476; 518 NW2d 808, 811 (1994).

B. The Court of Appeals erred in interpreting the State Real Estate Transfer Tax Act such that transfer tax could be based on a partial amount of the whole transaction.

The two most important sections of the act at issue are MCL 207.522(c), which contains the definitions of “value” of the transfer, and MCL 207.523, which describes the “Included instruments” in the transfer.

“Value” is defined as, “the current or fair market worth in terms of legal monetary exchange at the time of transfer.” MCL 207.522(c). The transfer contemplated under the act involves an “included instrument” under MCL 207.522 that is recorded. “Included instruments” under MCL 207.522 are the following:

(1) There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:

(a) Contracts for the sale or exchange of property or any interest in the property of any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.

(b) Deeds or instruments of conveyance of property or any interest in property, for consideration.

MCL 207.523 (emphasis provided).

This case centers on the five words at the end of MCL 207.523(1), “when the instrument is recorded.” The Court of Appeals interpretation of MCL 207.523 disregarded those five words. The plain meaning of MCL 207.523(1) includes those five words.

In each of the transactions at issue, Lake Forest entered into purchase agreements for the sale of land and construction of a home. Under the terms of the agreement, purchasers were not entitled to delivery of the deed until the home was constructed and paid for by the purchaser at a closing. When the deed was delivered for recording at the closing, the fair market value of the land was substantially more due to the home construction upon it. At the closing Lake Forest only paid transfer tax on the value of an unimproved lot.

Lake Forest argues that the original purchase agreement transferred an equitable interest to the purchasers, and the transfer tax could be based on this written instrument, even though this written instrument was never recorded. However, the act imposes a transfer tax on a written instrument “when the instrument is recorded,” MCL 207.523(1).

Nothing in the act prevents the recording of a purchase agreement or any other written instrument that evidences the transfer of a property interest. In fact, the act contemplates a transfer tax on each and every recorded written instrument that transfers any property interest. However, unrecorded written instruments are not within the scope of the act. For this reason, the Tax Tribunal was correct in concluding that transfer taxes cannot be based on the value of a property at the time a property interest transfers unless the written instrument evidencing the transfer is recorded. In short, no tax is due on an unrecorded written instrument.

The recording of a written instrument registering title triggers the tax, and the tax is based on the value of what is then being transferred. It is not based on an earlier transfer that might occur by an unrecorded written instrument, such as executing a purchase agreement.

In this case, the recorded instrument was the warranty deed, pursuant to a purchase agreement that sold an improved lot with a house worth several hundred thousand dollars on it. This Court has already concluded in a prior case that the tax is triggered when registering title. The prior case involved a different issue of when a cause of action for a transfer tax refund accrues, but this Court's interpretation of the tax act applies soundly in this case:

A cause of action for a refund of the real property transfer tax accrues at the time the tax is due. n.5.

n.5. For the real property transfer tax, unlike some other taxes, the date the tax is due will necessarily be the date the tax is paid, because payment appears to be a condition of registering title. See M.C.L. § 207.502; M.S.A. § 7.456(2).

Taxpayers Allied for Constitutional Taxation v Wayne County, 450 Mich 119, 123; 537 NW2d 596, 598 (1995).

MCL 207.502 quoted in *Taxpayers Allied*, above, is identical to MCL 207.523; the only difference being MCL 207.502 is under the Real Estate Transfer Tax Act ("RETTA") for collection of county taxes, while MCL 207.523 is under the State Real Estate Transfer Tax

Act (“SRETTA”) for collection of state transfer taxes.

Other sections of the act support the interpretation that the tax is triggered when registering title to the property. Section 8, MCL 207.528 (documentary Stamps), and Section 9, MCL 207.529 (providing an alternate means to documentary stamps), both contemplate placing evidence of payment of transfer taxes on the recorded written instrument that registers title to the property. Again, there is no provision for unrecorded documents.

Section 12, MCL 207.532, also support the interpretation that the tax is triggered when registering title to the property. It provides that the total tax “shall be imposed only once,” with the option of making a partial payment of the tax on one recorded instrument, and the balance on the final recorded instrument. Under the purchase agreements at issue in this case, the delivery of the deed for recording is contingent on payment of both the lot and constructed home. The transfer taxes while imposed only once on the total amount of the purchase agreement, could be paid in two installments.

Consider, for example, a purchase agreement for \$380,000, that lists \$80,000.00 for the price of the lot and \$300,000 for the price of home construction. The purchase agreement, or any similar contractual written instrument such as a land contract, could be recorded upon execution, with transfer taxes paid on the value of the lot at that time, \$80,000.00. Transfer taxes on the remaining \$300,000 home construction would then be due at the closing when the deed is delivered for recording. Section 12 contemplates this scenario for imposing the tax once, then paying it in partial payments. However, in this case Lake Forest only made a partial tax payment based on the value of the land before the house was constructed. This ran afoul of the act because in each of the 45 transactions at issue, a purchase agreement was signed that contemplated the purchase of land and a house constructed on the land.

No part of the purchase agreement gave the buyer the right to purchase the land and receive a deed for the land, and then choose another builder to separately construct the home. The transaction required that Lake Forest be allowed to construct and profit from the home before the land would be conveyed.

In any similar new construction transaction across this state, a purchaser who signs a purchase agreement for a new home spends the majority of time on decisions affecting the home, such as floorplan, finishes, colors, appliances, etc. Likewise, the developer spends the majority of its time, resources and money on construction of the home during the time between purchase agreement execution and closing. Lake Forest's profit on the transaction was inextricably intertwined with the construction of the home. The land itself was only a part of the transaction.

The General Property Tax Act likewise interprets property transactions for taxing purposes. Under the General Property Tax Act, the purchase price of a property includes the lot and home constructed on it when both are represented in one transaction (as in the case with the purchase agreements at issue):

As used in this subsection, "purchase price" means the total consideration agreed to in an arms-length transaction and not at a forced sale paid by the purchaser of the property, stated in dollars, whether or not paid in dollars.

MCL 211.27(5).

The purchase agreements at issue require a Certificate of Occupancy be issued by a local building authority as a condition of closing. A Certificate of Occupancy reflects a fully constructed residence on a property meeting habitability codes, at the time the deed at closing. Lake Forest's position that the transaction should only be taxed on the value of a vacant lot runs afoul of the transfer tax act, and general property tax act definitions of valuation and assessment for purposes of taxation.

It is undisputed that Lake Forest is a home building company. Economies of scale drive home builders to purchase large parcels of property to develop into as many lots as legally permitted, for the purpose of building as many homes as possible to achieve the largest profit. The construction of the house is the reason for the land sale. Their separation is form over substance. They culminate in one transaction for which one deed conveying legal title is delivered for recording after construction of the house.

There is legal authority to require the imposition of transfer taxes on the full price of the purchase agreement (price of lot, plus price of house) even when a developer chooses to record a written instrument when an equitable interest transfers upon the execution of the purchase agreement, even before construction begins. This Court upheld a Tax Tribunal decision permitting the Department of Treasury to add intangible property to tangible property for assessment and taxation purposes:

The tribunal explained: The exemplification of the going concern concept is found in the telephone pole, which is of very little intrinsic worth without the franchise to operate it legally. The value of that franchise, in large part, brings value to that pole, not the pole itself; a so-called "synergy" occurs. It therefore follows that the franchise and other unquantifiable intangibles are essential and valuable components of certain real and personal tangible property (e.g., poles/wires) and, unless otherwise prohibited, must be included in the valuation of the tangible property. [Docket No. 90553, March 13, 1990, p 7.]

The tribunal concluded that its consideration of "the intangible elements of the going concern under the unit valuation method [is] consistent with the Michigan constitutional and statutory framework." *Id.*, p 13.

Michigan Bell v Department of Treasury, 445 Mich 470; 518 NW2d 808, 809-10 (1994).

In the present case, there is little intrinsic worth to a purchase agreement for a lot and house, without a fully constructed house. The purpose of the sale of the lot is for constructing a house upon it, as is intended for all other residential lots in housing developments. The transfer tax act doesn't require the builder to pay for the value of the lot and house until a title

transfer takes place through a recorded written instrument, which evidences a house has been constructed on the lot. Even though the vacant land is the only tangible item when the purchase agreement is executed, the intangible to-be-constructed home is a condition of closing on the whole transaction and therefore, is the “synergy” that permits taxation of the whole transaction.

The definition of “Property” in the transfer tax act includes “all right to and interests in land, tenements, real estate, or real property.” MCL 207.522(b). This is supported by *Michigan Bell*, wherein this Court broadly construed valuation and assessment:

We find that the Legislature's use of the words "all property" conveyed a meaning that is unambiguous and provides authority for inclusion of both tangible and intangible property in the valuation and assessment of property for purposes of taxation under Act 282.

Michigan Bell v Department of Treasury, 445 Mich at 479-80.

Our legislators have provided property tax acts that define property as including both tangibles and intangibles for purposes of valuation in taxation.

The transfer taxes paid by Petitioner-Appellee Lake Forest only fulfill a portion of the transfer tax act requirements. Lake Forest, and other developers have no reason to stop this practice until legal authority prohibits the practice. Policing this practice results in enormous costs to local units of government. That the practice has been on-going does not constitute acceptance of the practice.

This lawsuit is the mechanism to end the practice. The consent agreement between Lake Forest and Washtenaw County does not constitute acceptance of the practice, particularly when it was entered into as a matter of economy after the Circuit Judge had ruled that Lake Forest improperly interpreted the act by paying only a portion of the transfer taxes due. This amicus brief is a testimony to Washtenaw County’s rejection of Lake Forest’s practice.

This amicus brief relies upon, and incorporates by reference the Tax Tribunal's analysis rejecting Lake Forest's arguments for collateral estoppel and res judicata, see Appendix 1. That analysis is well-reasoned and should be affirmed by this Court.


The Court of Appeals opinion should be peremptorily reversed because it will continue to allow builders and developers to follow the unauthorized practice of paying only a small portion of the total transfer tax due on any given transaction. Section 12 of the act does allow for portions of the transfer tax to be paid throughout the transaction, but is clear that one tax is to be paid on the whole transaction, even if paid in separate parts.

CONCLUSION and REQUEST FOR RELIEF

The language of the transfer tax act does not support the Court of Appeals' interpretation. The purpose of the act, to impose a tax on the transfer of all interests in a property, is defeated by the Court of Appeals' opinion. In addition, the school aid fund represents an important public interest. Public policy concerns support a broad interpretation of the act to ensure full payment of transfer taxes representing the whole property transaction, regardless of however many contracts are signed between a seller and purchaser. The decision of the Court of Appeals should be peremptorily reversed.

Respectfully submitted,

Dated: 3/9/07

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