

IN THE SUPREME COURT

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Appeal from the Court of Appeals
Whitbeck, C. J., Hoekstra, and Wilder, J. J.

TOLL NORTHVILLE LIMITED
PARTNERSHIP, a Michigan Limited
Partnership; and BILTMORE WINEMAN,
LLC, a Michigan Limited Liability
Company,

Plaintiffs/Appellees,

v

TOWNSHIP OF NORTHVILLE,

Defendant/Appellant.

Supreme Court No. 132466

Court of Appeals No. 259021

Wayne County Circuit Court
No. 03-326658-CZ

REPLY BRIEF ON APPEAL OF DEFENDANT/APPELLANT TOWNSHIP OF NORTHVILLE

**THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE
CONSTITUTION, A STATUTE, RULE OR REGULATION, OR
OTHER STATE GOVERNMENTAL ACTION IS INVALID**

ORAL ARGUMENT REQUESTED

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I. ARGUMENT.

A. INTRODUCTION.

It is a historical fact that public service improvements¹ were understood by those sophisticated in the law to be included in the pre-Proposal A definition of "additions".² The Township's Brief on Appeal along with the amicus curiae briefs of the State Tax Commission, Michigan Townships Association, Michigan Municipal League, Michigan Assessors Association and Michigan Association of School Boards aptly support this fact. Either by way of administration or impact, the Township and these amicus curiae parties were sophisticated in their understanding of the pre-Proposal A definition of "additions" and their arguments evidence this fact. Instead, however, many years after Proposal A,³ the Appellees, through sophism, have convinced the Court of Appeals⁴ to revise history. Contrary to law, the lower courts have agreed with the strained construction and outlandish analogies set forth by the Appellees. It is almost inconceivable that the lower courts would find that an additional increase in the taxable value of property caused by a developer's physical change in the use of raw land through the addition of millions of dollars of public service improvements is somehow violative of the intent of Proposal A. The Township contends that upon thoughtful analysis, this Honorable Court will realize the fallacious nature of the arguments relied upon by the lower courts and instead hold MCL 211.34d(1)(b)(viii) constitutional. While also keeping in mind the arguments from the briefs of the Township and its amicus curiae supporters, the following is intended to highlight and rebut a number of the Appellee's specious arguments.

¹ MCL 211.34d(1)(b)(viii), Apx. 48a.

² MCL 211.34d(1)(a), Apx. 81a.

³ Apx 54a.

⁴ Court of Appeals Opinion, Apx. 31a-45a.

B. UNCONSTITUTIONALITY IS NOT "CLEARLY APPARENT".

The Court of Appeals completely ignored the rule that statutes are presumed constitutional and courts have a duty to construe a statute in a manner that is constitutional unless the unconstitutionality is "clearly apparent".⁵ The Appellees also summarily dismiss this important rule and argue that the Township uses it to make the Constitution conform to statute.⁶ This contention by the Appellee could not be further from the truth. The presumption is just that, a presumption placing the burden on the challenging party to show a "clearly apparent" unconstitutionality. The statute is clothed with a strong presumption of constitutionality, however, if it is "clearly apparent", the statute may be held unconstitutional. It is self evident that the statute must conform with the Constitution.

In this case it is not "clearly apparent" that MCL 211.34d(1)(b)(viii) is unconstitutional. Among other things, the Court of Appeals and Appellees dissimilar analogies and extreme construction do not support a "clearly apparent" unconstitutionality. Certainly, the constitutionality of a tax statute should not be taken lightly and the principles of law regarding such a challenge should not be glossed over. The Township contends that this strong presumption of constitutionality must be overcome by something more than just a reasonable difference of opinions. While it was "clearly apparent" that an increase in occupancy was not considered an "addition" pre-Proposal A,⁷ it is not so "clearly apparent" when considering the specified public service improvements set forth in MCL 211.34d(1)(b)(viii). An increase in occupancy rate did not fall within the scope of an

⁵ See Caterpillar, Inc. v Dept of Treasury, Rev Div, 440 Mich 400 at 413-415; 488 NW2d 182 (1992) for a number of well established principles of law regarding a constitutional challenge to a tax statute. These principles have not been followed by the lower courts in this case.

⁶ Appellee's Brief, p 34.

⁷ WPW Acquisition Co. v City of Troy, 466 Mich 117; 643 NW2d 564 (2002).

increase in value caused by new construction or the addition of equipment or furnishings, as provided for in the pre-Proposal A definition of "additions".⁸ The same, however, is not true when considering an increase in value due to the physical construction and availability of new public service improvements appurtenant to a specific property. As will be further discussed, analysis of the pre-Proposal A definition of "additions" and the intent of Proposal A does not lead to the conclusion that there exists a "clearly apparent" unconstitutionality in MCL 211.34d(1)(b)(viii).

C. THE ADDITIONAL LANGUAGE INTERPRETED INTO THE PRE-PROPOSAL A DEFINITION OF "ADDITIONS" IS IMPROPER.

The Court of Appeals' acceptance of the Appellees' interpretation of "additions", holding MCL 211.34d(1)(b)(viii) unconstitutional, effectively rewrote the pre-Proposal A definition of "additions"⁹ to state that the new construction or physical addition of equipment or furnishings must be owned by the property owner, be located entirely on the property and must not be added as a government requirement for development. Writing all of these qualifiers in the pre-Proposal A definition of "additions" does not lend support to a finding that the unconstitutionality of MCL 211.34d(1)(b)(viii) is "clearly apparent". The Appellees' arguments essentially request that the court invent its own legislative definition of "additions" to meet the Appellees' desired outcome. If the pre-Proposal A Legislature intended to place these qualifiers on the definition, they would have, or Proposal A could have used a different term than "additions" as was defined in statute at such time.¹⁰

As stated in WPW:

⁸ Apx. 81a.

⁹ Apx. 81a.

¹⁰ Pohutski v City of Allen Park, 465 Mich 675, 683-684; 641 NW2d 219 (2002).

“When Proposal A was adopted (that is, on March 15, 1994), the General Property Tax Act defined ‘additions’ to mean all increases in value caused by new construction or a physical addition of equipment or furnishings, and the value of property that was exempt from taxes or not included on the assessment units immediately preceding year’s assessment roll.” [MCL 211.34d(1)(a) as then in effect].¹¹ (Emphasis added).

This definition plainly included any new construction or any physical addition of equipment or furnishings which cause an increase in value. The public service improvements provided for in MCL 211.34d(1)(b)(viii) clearly fall within this definition. If, as in this case, a developer chooses to change the nature of its vacant property and construct a residential development, it is indisputable that the public sewer, water, electricity and other improvements are necessarily constructed and made available as an integral part of the development project and that such new improvements cause an increase in the value of the property. It is particularly enlightening to review the word "furnishings" as used in the pre-Proposal A definition of "additions". "Furnishing" is defined in Merriam Webster's New Collegiate Dictionary (1976) as "an object that tends to increase comfort or utility". The enumerated public service improvements are clearly subsumed within this definition, as they all are added to increase the comfort and utility of the specified property. Holding MCL 211.34d(1)(b)(viii) as constitutional provides for a reasonable reading of the pre-Proposal A definition of "additions" and does not require the insertion of numerous nonapparent qualifiers into such language as claimed by the Appellees.

D. HISTORICAL ADMINISTRATION OF THE PRE-PROPOSAL A DEFINITION OF ADDITIONS SHOULD NOT BE DISCOUNTED.

The Appellees try to minimize the importance of the pre-Proposal A definition of "additions" and the instructions to Form L-4025.¹² The Appellees' view of Form L-4025 as

¹¹ WPW, Supra at 122; 567.

¹² Apx. 77a-78a.

an obscure form¹³ only acts to show either their ignorance or deceit regarding this matter. Factually, Form L-4025 has been used by every assessing municipality in this State since enactment of the Headlee Amendment in 1978.¹⁴ The importance of this form to carry out a constitutional requirement and its annual use are far from obscure to those sophisticated in the law regarding the definition of "additions". Since the time of the Headlee Amendment, "additions" has been a required operational assessing definition used by local assessors, the State Tax Commission and the Department of Treasury. The Appellees want to minimize the impact of this fact because their arguments lose credibility when analyzed in light of the pre-Proposal A administration of the term "additions". It is important to highlight that the Form L-4025 instructions demonstrate that increases in occupancy would not have been treated as "additions" pre-Proposal A and this is in concurrence with this Honorable Court's ruling in WPW, Supra. It is also important to note from the instructions to Form L-4025 that public service improvements¹⁵ would be considered "additions" pre-Proposal A irrespective of the owner of the real estate or whether the improvements are entirely located on a specified property. Can the Court look at the instructions to Form L-4025¹⁶ and determine that it is "clearly apparent" that the pre-Proposal A definition of "additions" did not include the specified public service improvements? The Township contends not. Frankly, with 16 years of prior administration of the definition of "additions" pre-Proposal A, one would believe that if there were "clearly apparent" facts that public service improvements were not included, the Appellees and its amicus curiae supporters would have been able to meet their burden and

¹³ Appellees Brief, p 25.

¹⁴ Apx 55a.

¹⁵ MCL 211.34d(1)(b)(viii).

¹⁶ Apx. 77a-78a.

provide some evidence of this fact. They are, however, unable to deliver any such facts because they do not exist and instead they engage in a vain attempt to minimize the importance of the pre-Proposal A administration of the definition of "additions".

The Appellees misstate the Township's position, indicating that under the Township's interpretation of Form L-4025, higher occupancy rates would be considered an addition as it increases assessed value.¹⁷ What the Appellees deceptively gloss over is the fact that none of the examples of "additions" contained in the instructions for Form L-4025 would include an increase in occupancy rates. The Form L-4025 instructions also clearly refer back to the statutory definition of "additions"¹⁸ in place at that time. The question before this Honorable Court only requires the constitutionality of those specified "additions" in MCL 211.34d(1)(b)(viii) to be addressed and such "additions" constitutionality is supported by analysis of the pre-Proposal A administration of the definition of "additions".

E. INCREASING THE TAXABLE VALUE DUE TO PUBLIC SERVICE IMPROVEMENTS IS NOT DOUBLE TAXATION.

The issue of double taxation as presented by the Appellees¹⁹ is a "red herring" and the acceptance of this concept by the Court of Appeals²⁰ sets a very dangerous precedent which if left unchanged will wreak havoc upon the present assessment and taxation process. The issue of double taxation is a non-issue as a tax on personal property is separate and distinct from an increase in taxable value to real property caused by the public service improvements. These are two separate taxes on two separate things. The

¹⁷ Appellees Brief, p 24.

¹⁸ Apx. 81a.

¹⁹ Appellees Brief, pp 15-19.

²⁰ Apx. 41a-42a.

real property owner is not paying a tax on the personal property but rather the increase in value to the real estate caused by the availability of the "furnishings" to the property.

Both the Court of Appeals²¹ and the Appellees²² contend that the increase in value for the public service improvements will be factored into the taxable value of the real estate upon its transfer even if MCL 211.34d(1)(b)(viii) is unconstitutional. This, however, would not be the case if the Court of Appeals' finding of double taxation were upheld. If an increase in value due to the public service improvement represents a double taxation then such value could not be incorporated into the taxable value of the property upon its transfer as this would still be double taxation. This folly presented by the double taxation argument would require that even upon the transfer of a property improved with public sewer, water, sidewalks, electric and other public services, such improvements could not be factored into the new taxable value of the property. The improved property would have no higher taxable value than a similarly situated unimproved property. This outcome defies logic and highlights why the "addition" to taxable value for public service improvements does not constitute double taxation. The Appellees argue that the Township fails to address the issue that utility equipment may be taxed as personal property to the utility company. The Appellant does, in fact, address this issue throughout its brief in noting that the increase in value to the real estate is caused by the installation and availability of the appurtenant public service improvement rather than simply the value of the equipment itself. The personal property taxes are separate from the real property taxes and do not involve a double taxation issue.

²¹ Apx. 44a.

²² Appellees Brief, pp 42-43.

F. THE IMPACT OF THE COURT OF APPEALS DECISION IS FAR REACHING.

Appellees, their amicus curiae supporters and the Court of Appeals mistakenly view the unconstitutionality of MCL 211.34d(1)(b)(viii) as a residential development issue. Actually, however, the issue regarding the constitutionality of MCL 211.34d(1)(b)(viii) also affects commercial and industrial development and redevelopment everywhere in the state. For example, if a large retail store purchases a parcel of land which it then develops for its store, it would be typical for there to be large expenditures for public sewer and water infrastructure in addition to other public service improvements for the new development. These public service improvements would be "additions" under MCL 211.34d(1)(b)(viii) and would cause an increase in the taxable value of the previously undeveloped parcel. The same goes for industrial development or redevelopment where the new construction involves the "addition" of public service improvements. The impact of the Court of Appeals' decision regarding the constitutionality of MCL 211.34d(1)(b)(viii) is far reaching and touches wherever new development or redevelopment occurs, whether it be in a city, village or township. Many situations are not covered by the proposition that the damage caused by holding MCL 211.34d(1)(b)(viii) unconstitutional is limited by the fact that in a short period of time a transfer of the residential property would occur and the public service improvements could then be factored into the new taxable value. If we look again at the above example of development of a property for a large retail store, it can be seen that if the public service improvements are not an "addition" at the time of the improvement, then they may never end up being factored into the taxable value of the retail store property as, in many cases, such development is performed by the owner with no intent to transfer the property. This would also be true with other industrial and commercial development or

redevelopment in addition to residential complexes such as apartments where the owner does not intend to transfer the property. As demonstrated, the impact of holding MCL 211.34d(1)(b)(viii) unconstitutional is far greater than lead to believe.

The Township further contends that based upon the Court of Appeals' ruling some developers who do intend to transfer their property might purposely design their real estate transaction to transfer the property first to the end user and then physically make the public service improvement available so as to avoid any "addition" in taxable value due to such improvements. The Court of Appeals seems to have not fully understood the overall effect of holding this statute unconstitutional.

G. THE ANALOGIES USED BY THE APPELLEES ARE DISSIMILAR TO INCLUDING PUBLIC SERVICE IMPROVEMENTS AS "ADDITIONS".

The Appellees make a number of misguided and deceptive analogies in an attempt to show that additions to taxable value must only include those things owned by the taxpayer and on the taxpayer's property. The Appellees in their analogies absurdly claim a similarity between public service improvements as defined in MCL 211.34d(1)(b)(viii) and such other things as a recreation center, a neighbor fixing up their property, freeways, shopping malls, cellular towers, community centers or a "cool city" downtown. These fallacious analogies are in no way similar to the public service improvements which are defined in MCL 211.34d(1)(b)(viii) and it is hard to imagine how the Court of Appeals could have accepted these types of analogies. It can easily be understood that the specified public service improvements do not involve a subset of any of these expressed analogies.

The enumerated public service improvements are vastly different than the analogies used by the Appellees and the Court of Appeals. The most obvious difference is that the analogies have no direct physical nexus to an increase in the utility of the pertinent

property. The construction and availability of the enumerated public service improvements all have a direct physical nexus to the utility of property improved causing an increase in value. This is in contrast to the general effect on community prices that occur from projects that benefit the community in general (i.e., a new school, recreational center, a neighbor's improvement of their property). For example, when a property is improved by the addition of a new public sewer system, the sewage from the property does not just magically end up at the sewage treatment plant but, rather, by way of pipes appurtenant to the property itself. This system provides a special benefit to the property itself completely unrelated to any community benefit. A neighbor fixing up their home or a new recreational center would in no way be considered new construction or furnishings to another's property within the intent of Proposal A. Frankly, it is absurd to equate an increase in community valuations in general to that of the addition of public service improvements and furnishings of such things as electricity, water or an access road to a new development. The enumerated public service improvements have a direct physical nexus to the improved property directly adding to the utility of that property separate and distinct from all other properties in the community. The treatment of such public service improvements as "additions" is consistent with Proposal A and the pre-Proposal A definition of "additions".

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Dated: September 11, 2007

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