

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals
Hon. William C. Whitbeck
Hon. Joel P. Hoekstra
Hon. Kurtis T. Wilder

TOLL NORTHVILLE LIMITED
PARTNERSHIP, a Michigan limited
partnership; and BILTMORE-WINEMAN,
LLC, a Michigan limited liability company,

Supreme Court Docket No. 132466

Court of Appeals No. 259021

Plaintiffs/Appellees,

Wayne County Circuit Court
No. 03-326658-CZ

v

TOWNSHIP OF NORTHVILLE,
Defendant/Appellant.

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**MICHIGAN ASSOCIATION OF REALTORS®
BRIEF AMICUS CURIAE IN SUPPORT OF
THE POSITION OF PLAINTIFFS/APPELLEES,
TOLL NORTHVILLE LIMITED PARTNERSHIP
AND BILTMORE-WINEMAN, LLC**

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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae, Michigan Association of REALTORS[®], states that this Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302, Appellant having filed its Application for Leave to Appeal on November 14, 2006 from the Opinion of the Court of Appeals affirming the decision of the trial court entered October 3, 2006, and this Court having granted the Application for Leave to Appeal by Order entered May 25, 2007.

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT MCL 211.34d(1)(b)(viii) WAS UNCONSTITUTIONAL FOR THE REASON THAT THE TERM "ADDITIONS," AS UNDERSTOOD PRE-PROPOSAL A, DID NOT INCLUDE PUBLIC SERVICE IMPROVEMENTS?

The Court of Appeals would answer, "Yes";

The Circuit Court would answer, "Yes";

Plaintiffs/Appellees, Toll Northville Limited Partnership and Biltmore-Wineman, LLC, answers, "Yes";

Defendant/Appellant, Township of Northville, would answer "No";

Amicus Curiae, Michigan Association of REALTORS®, answers "Yes."

- II. DO PUBLIC POLICY CONCERNS WEIGH IN FAVOR OF AFFIRMING THE COURT OF APPEALS' DECISION?

The Court of Appeals would answer, "Yes";

The Circuit Court would answer, "Yes";

Plaintiffs/Appellees, Toll Northville Limited Partnership and Biltmore-Wineman, LLC, answers, "Yes";

Defendant/Appellant, Township of Northville, would answer "No";

Amicus Curiae, Michigan Association of REALTORS®, answers "Yes."

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the “Association”) is Michigan’s largest non-profit trade association, comprised of 48 local boards and a membership of more than 31,000 brokers and salespersons licensed under Michigan law. Each day, the Association’s members are involved in hundreds of real estate transactions, many of which involve the sale of vacant lots and newly constructed homes in new developments. One of the primary goals of the Association is to provide the opportunity for all Michigan residents to own or rent affordable housing. To promote this goal and others, the Association seeks to oppose laws and court decisions which delay, restrict, or otherwise impede the ability of the Association’s members to sell affordable housing in Michigan.

At issue in this appeal is the constitutionality of MCL 211.34d(1)(b)(viii) which, in the context of expanding the definition of “additions,” provides for an increase in taxable value and, thus, property taxes upon completion of public improvements in a real estate development. If so, this translates into higher housing costs. More specifically, the discrete issue in this case is whether “public service” improvements are “additions” – within the meaning of that term pre-Proposal A. See, Supreme Court Order, May 25, 2007. The circuit court found that public improvements were not within the meaning of “additions,” as that term’s meaning was understood prior to the passage of Proposal A. Therefore, the circuit court found MCL 211.34d(1)(b)(viii) to be unconstitutional, granted summary disposition in favor of Plaintiffs/Appellees, and denied Defendant/Appellant’s motion for summary disposition.

The Court of Appeals affirmed, stating:

[W]e conclude that MCL 211.34d(1)(b)(viii) is unconstitutional because it is inconsistent with the meaning of the term “additions” as established by Proposal A. And, accordingly, we conclude that to the extent the Township relied on this unconstitutional statutory provision to increase the assessment on the parcels at issue, solely on

the basis of the subject public service improvements, it violated the cap on annual increases in taxable value imposed by Const 1963, art 9, § 3.

“Court of Appeals’ Opinion,” attached as Exhibit 1, pp 14-15. The Court of Appeals correctly determined that the term “additions” was not understood to include public service improvements at the time Proposal A was passed. Accordingly, the decision of the Court of Appeals may be affirmed.

The issue in this appeal directly affects the ability of REALTORS® to sell affordable housing. The issue presented to this Court is critical to Association members. Therefore, the Association now files its Motion for Leave to File a Brief Amicus Curiae in Support of the Position of Plaintiffs/Appellees and this Brief Amicus Curiae in support of the position of Plaintiffs/Appellees.

In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), the Michigan Supreme Court stated: “This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae” The Association believes that this is a case of important public interest, and the outcome of this case is of continued and vital concern to the Association and its members. The Association’s experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. Accordingly, the Association seeks leave to file this Brief Amicus Curiae in support of the position of Plaintiffs/Appellees.

II. STATEMENT OF FACTS

The Association accepts the Statement of Facts contained in Plaintiffs/Appellees’ Brief on Appeal, as highlighted by the following:

1. Plaintiffs/Appellees, Toll Northville Limited Partnership (“Toll Northville”) and Biltmore-Wineman, LLC (“Biltmore”) (collectively, “Plaintiffs”), are engaged in the business of real estate development.

2. Plaintiffs are the developers of residential property (single-family homes and condominiums) located in the Township of Northville (the “Township”).

3. The majority of the residential lots are sold by Plaintiffs to future home owners as vacant lots. The future home owners simultaneously contract with one of the Plaintiffs for the construction of the home.

4. As a condition to subdividing the property into individual lots, selling those lots and constructing residences on those lots, Plaintiffs paid millions of dollars for the installation of the infrastructure for the development, which included roads, water service, sewer service, natural gas service, telephone service, electrical service and sidewalks (the “Public Service Improvements”).

5. The roads, sewers and sidewalks, the construction of which was paid for by Plaintiffs, will be owned by a public entity and will be for the benefit of the “public.”

6. The equipment, structures and easements that facilitate the water, sewer, electrical, telephone and natural gas services will be assessed as personal property to the utility companies that own them.

7. As lots are sold, the lots are assessed at a taxable value equal to 50% of true cash value.

8. As a result of the installation of the Public Service Improvements, the Township increased the taxable value of the property and Plaintiffs appealed the tax assessments to the Michigan Tax Tribunal.

9. Plaintiffs claimed that the Township lacked authority to increase the taxable value of the property because the statute upon which it relied to do so [MCL 211.34d(1)(b)(viii)] was unconstitutional.

10. Since the Tax Tribunal lacks jurisdiction to decide the constitutionality of a statute, the Tax Tribunal proceeding was placed in abeyance and this lawsuit, seeking a declaratory judgment that MCL 211.34d(1)(b)(viii) is unconstitutional, was filed.

11. Following a hearing on the parties' cross-motions for summary disposition, the circuit court granted the relief sought by Plaintiffs, finding MCL 211.34d(1)(b)(viii) to be unconstitutional (the "Circuit Court Opinion").

12. The Township appealed the Circuit Court Opinion to the Court of Appeals on November 9, 2004.

13. The Court of Appeals affirmed the Circuit Court Opinion and held that MCL 211.34d(1)(b)(viii) is unconstitutional because it is inconsistent with the term "additional" as established by Proposal A. See, Court of Appeals' Opinion, October 3, 2006, attached as Exhibit 1.

14. The Township filed an Application for Leave to Appeal with this Court on November 14, 2006 (the "Application").

15. The Application was granted on May 25, 2007, and this Court directed:

The parties shall address the constitutionality of MCL 211.34d(1)(b)(viii) and whether "public service" improvements (such as water service, sewer service, utility service) are "additions" to the property within the meaning of Proposal A, Const 1963, art 9, § 3, which allow for increased taxation of the property.

Supreme Court Order, May 25, 2007, ¶ 1.

16. The Supreme Court Order further stated:

The motions for leave to file briefs amicus curiae are GRANTED. Other persons or groups interested in determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Supreme Court Order, May 25, 2007, ¶ 2.

17. The Association now files this Motion and accompanying Brief Amicus Curiae in Support of the Position of Plaintiffs/Appellees, Toll Northville Limited Partnership and Biltmore-Wineman, LLC., and respectfully requests that this Court grant its Motion for Leave to File Brief Amicus Curiae.

III. ARGUMENT

A. **The Court of Appeals Correctly Determined That MCL 211.34(d)(1)(b)(viii) Was Unconstitutional For The Reason That The Term “Additions,” As Understood Pre-Proposal A, Did Not Include Public Service Improvements**

1. **Standard Of Review**

The standard of review in this matter is de novo as it involves a decision regarding the constitutionality of a statute. *Gilson v Dep’t of Treasury*, 215 Mich App 43, 49; 544 NW2d 673 (1996).

2. **Historical Overview And Issue On Appeal**

Prior to Proposal A, property taxes were levied on a property’s state equalized value (“SEV”). SEV is equal to 50% of the true cash value of the property. Proposal A amended the Constitution such that taxes beginning in calendar year 1995 were levied on taxable value (“TV”). Pursuant to Proposal A, the TV of a residence or business cannot increase in any one year by more than five percent or the rate of inflation, whichever is less, excluding the value of “additions” or

losses. When the property is sold, the tax base reverts to SEV and the subsequent annual growth is capped again. Mich Const 1963, art 9, § 3.

At the time Proposal A was passed (March 15, 1994), “additions” was defined in the General Property Tax Act (“GPTA”) as:

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 unit’s immediately preceding year’s assessment role.

MCL 211.34d(1)(a), as then in effect. See also, *WPW Acquisition Co v City of Troy*, 466 Mich 117, 122; 643 NW2d 564 (2002). In turn, “[n]ew construction and improvements” was defined as “additions less losses.” MCL 211.34d(1)(e), as then in effect. See, 1982 PA 539, a copy of which is attached as Exhibit 2.

After the passage of Proposal A, the Legislature amended the definition of “additions” to include, in pertinent part:

(b) For taxes levied after 1994, “additions” means, except as provided in subdivision (c), all of the following:

* * *

(viii) Public services. As used in this subparagraph, “public services” means water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or street lighting. For purposes of determining the taxable value of real property under section 27a, the value of public services is the amount of increase in true cash value of the property attributable to the available public services multiplied by 0.50 and shall be added in the calendar year following the calendar year when those public services are initially available.

MCL 211.34d(1)(b)(viii). However, consistent with the pre-Proposal A version of MCL 211.34d(1), the definition of “additions” continued to include “new construction,” and new construction

continued to be defined as “additions less losses” [MCL 211.34d(1)(j)]. New construction was further defined as “property not in existence on the immediately preceding tax day,” “not replacement construction” and “the physical addition of equipment and furnishings subject to the provisions set forth in section 27(2)(a) to (o).” MCL 211.34(1)(b)(iii).¹

The issue in this case, like the issue in this Court’s recent decision in *WPW Acquisition*, is whether MCL 211.34d(1)(b)(viii) is unconstitutional for the reason that, for purposes of Section 3, it defines “additions” in a way that is “inconsistent with the established meaning of the term at the time it was added to the constitutional provision by the passage of Proposal A.” *WPW Acquisition*, 466 Mich at 123.² Both the circuit court and the Court of Appeals correctly found that it was. Court of Appeals’ Opinion, p 15, Exhibit 1. Because the Court of Appeals reached the correct conclusion, this Court should affirm the Court of Appeals’ decision.

3. The Meaning Of “Additions”

In *WPW Acquisition*, this Court found that the term “additions,” as used in Proposal A, is a “technical legal term or phrase of art in the law.” Therefore, the meaning to be given to the term “additions,” in determining the constitutionality of the provisions of MCL 211.34d(1)(b), is the “meaning that those sophisticated in the law understood at the time of enactment **unless it is clear from the constitutional language that some other meaning was intended.**” *WPW*

¹ MCL 211.27(2)(a) to (o) is a list of items which are considered minimal maintenance and which are not to be considered by the assessor in determining the value of the property for assessment purposes until such time as the property is sold.

² The precise issue in *WPW Acquisition* was the constitutionality of another subsection of MCL 211.34d(1)(b) which purported to expand the definition of “additions” to include an increase in value attributable to a property’s occupancy rate. This Court held that MCL 211.34d(1)(b)(vii) was unconstitutional. *WPW Acquisition*, 466 Mich at 123.

Acquisition, quoting *Michigan Coalition of State Employees Unions v Civil Service Comm'n*, 465 Mich 212, 223; 634 NW2d 692 (2001) (emphasis added). Proposal A does not clearly provide that a meaning for “additions,” other than the definition then in place, was intended. Accordingly, the proper focus here is on what “those sophisticated in the law” understood “additions” to mean in March 1994 when Proposal A was adopted.

Insight into the meaning of “additions,” prior to Proposal A, can be gleaned from several sources. The majority of these sources are accurately discussed by the Court of Appeals in its Opinion. In response, Amicus Curiae, Michigan State Tax Commission (the “Tax Commission”), argues that the term “additions,” as understood pre-Proposal A, included “public services” because the term “additions,” as defined in the Headlee Amendment, included “public services.” Tax Commission Amicus Brief, pp 8-9. The Tax Commission’s argument is flawed for at least two reasons.

First, comparing the Headlee Amendment to Proposal A is simply comparing apples to oranges. The Headlee Amendment generally placed an inflation rate cap on the increase of taxes on local taxing authorities as to all property combined within that unit of local government and without regard to any specific parcel of property. By comparison, Proposal A placed an inflation rate cap (or 5%, whichever is less) on the increase of taxes on individually owned pieces of property. Const 1963, art 9, § 3. Further, the Headlee Amendment “cap” is constant. Const 1963, art 9, § 31. By contrast, the Proposal A “cap” comes off when the individual piece of property is transferred. Moreover, the Headlee Amendment, because it pertains to the taxation of all property located within the unit of local government, the public service improvements are, in fact, physically located within

and on the property to be taxed. Parcel A, on the other hand, pertains to individual pieces of property upon which the public service improvements are not physically located.

In sum, the Headlee Amendment created a mechanism for reducing or containing property taxes as a whole, within each local unit of government, when assessments increase faster than the rate of inflation. As stated by the Attorney General:

Thus, for example, if the property tax revenue of a township is generated by one of the 15 mills received from the annual allocation and the assessed valuation as equalized of property in the township increases by a greater percentage than the increase in the General Price Level, that one mill rate must be "rolled back" as provided in Const 1963, art 9, § 31 unless the qualified electors in that township vote to restore that tax rate or vote for additional millage.

OAG, 1979-1980, No 5562 (September 17, 1979). Proposal A created a mechanism for capping increases in property taxes on individual parcels until such parcels are transferred. Quite simply, what is relevant or pertinent for purposes of the Headlee Amendment is not relevant or pertinent for purposes of Proposal A. The "addition" created by the Headlee Amendment did not cause individual parcels of property to be specifically taxed for the actual cost of public service improvements. Such an addition did not exist prior to the adoption of Proposal A.

Second, the Tax Commission's argument fails to account for all relevant amendments to Section 34d of the GPTA. Shortly after the Headlee Amendment was passed, the Legislature enacted Section 34d, which provided the following definition of "additions":

"Additions" means all increases in value caused by new construction, **improvements caused by new construction** or a physical addition of equipment or furnishings, and the value of property which was exempt from taxes or not included on the assessment unit's previous year's assessment roll.

MCL 211.34d(1)(a), then in effect. In 1982, the Legislature amended the definition of “additions” to mean:

. . . all increases in value caused by new construction in the classification, a physical addition of equipment or furnishings in the classification, and the value of property which was exempt from taxes or not included on the assessment unit’s previous year’s assessment roll for the classification, and, for property in a classification which was classified as part of a different class in the previous year, the value assigned to that property in the previous year.

See, excerpt from Senate Substitute for House Bill No. 4096, Exhibit 3 and 1982 PA 539, Exhibit 2.

Therefore, at the time Proposal A was passed, the term “additions” meant increases in value caused by:

1. “new construction” – defined as “additions less losses” [MCL 211.34d(1)(a) and MCL 211.34d(1)(e), then in effect];
2. “a physical addition of equipment or furnishing” [MCL 211.34d(1)(a), then in effect]; and
3. “the value of property that was exempt from taxes or not included on the assessment unit’s immediately preceding year’s assessment role” [MCL 211.34d(1)(a), then in effect].

1982 PA 539, Exhibit 2. The term “additions” no longer included “improvements caused by new construction.” Assuming, but denying, that public service improvements were ever related to “additions,” public service improvements are items required for or “caused” by new construction. Yet, at the time of the passage of Proposal A, the Legislature had amended the GPTA to specifically delete/exclude this time of improvement from the definition of “additions,” and, thus, from what may be considered for purposes of increasing TV.

It is Black Letter Law that the Legislature (“those sophisticated in the law”) is presumed to be aware of all existing statutes when enacting a new statute. *Walén v Dep’t of*

Corrections, 443 Mich 240; 505 NW2d 519 (1993); *Wayne County v Wayne County Retirement Comm'n*, 267 Mich App 230, 244; 704 NW2d 117 (2005) (“When enacting legislation, the Legislature is presumed to have knowledge of existing laws and to have considered the effect of new laws on the existing laws.”); *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 14; 687 NW2d 309 (2004) (“The Legislature is presumed to be familiar with the rules of statutory construction and to have considered the effect of a new law on existing laws.”). Further, changes in an act must be construed in light of preceding statutes and historical developments. *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 417 fn 15; 653 NW2d 415 (2002), citing *DeVormer v DeVormer*, 240 Mich App 601, 607; 618 NW2d 39 (2000) (“Courts may examine the legislative history of an act as well as the history of the time during which the act was passed to ascertain the reason for the act.”), and *Twentieth Century Fox Home Entertainment v Dep't of Treasury*, 270 Mich App 539, 546; 716 NW2d 598 (2006).

In sum, once all of the amendments to Section 34d of the GPTA are considered, it is apparent that what was considered an “addition” at the time of the Headlee Amendment was no longer considered an “addition” at the time Proposal A passed. Therefore, like the increase in value attributable to the property’s occupancy rate at issue in *WPW Acquisition*, increases in value due to public services were not “additions” within the meaning “that those sophisticated in the law understood” at the time that Proposal A was passed. The Tax Commission’s analogy of Proposal A to the Headlee Amendment is without merit, and MCL 211.34d(1)(b)(viii) is unconstitutional.

B. Public Policy Considerations Weigh Heavily In Favor Of Affirming The Court Of Appeals' Decision

Under the Land Division Act, a developer cannot sell lots without a final plat approval. MCL 560.264; MCL 560.265; MCL 560.266; MCL 560.267. And, a developer cannot get final plat approval unless all roads and public service improvements are installed and public utility easements are provided. MCL 560.181; MCL 560.190; MCL 560.192; Northville Ordinance, §§ 78-139. Therefore, a developer cannot sell lots without installing public service improvements.

Accordingly, public utilities do not add value until the developer receives final plat approval because, until that time, no lots can be sold. And, because the “cap” comes off at the time of sale, Proposal A is working just the way it was intended to work – to not allow the taxable value to increase due to factors out of the control of the owner (public service improvements are required in order to develop and sell residential housing).

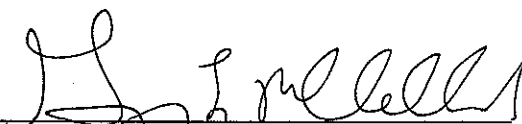
Moreover, as a policy matter, these “public improvements,” which are required as a condition of development, are just that – for the benefit of the public. Developers pay for the cost of these improvements which are then dedicated to the government/public, in the case of roads and sewers, and to utility companies, in the case of water, electric, natural gas, etc. In short, the developers pay for/install public service improvements which are then, for lack of a better word, “donated” to the public. The public receives the initial cost-free benefit of the improvements themselves. The public continues to benefit through all future property tax revenues (which increase as lots are sold) and utility personal property tax revenues which the utility companies pay. MCL 211.8(g).

Finally, if property taxes are increased during the development phase, these increased costs will be passed on to the individual homeowners.³ Not only is housing now less affordable, but the homeowners are paying for these “improvements” twice – once before they ever own the property and second when they buy the property and the property taxes are “uncapped.” And, homeowners are paying for these “improvements” at such time as they have no real value to anyone.

IV. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, the Opinion of the Court of Appeals should be affirmed.

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³ An alternative scenario is a significant decline in new construction caused by the inability of developers to absorb the additional cost – even for the period of time between installation of the improvement and the sale of units of the development. Decreased construction activity equates to a weaker Michigan economy.