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IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hood, P.J. and Shapiro and Yates, JJ.

SIXARP, LLC ,
d/b/a Praxis Packaging Solutions,
Petitioner-Appellee,

v.

Byron Township,
Respondent-Appellant.

Supreme Court Case No.: 166190

Court of Appeals Case No.: 361888

Tax Tribunal Docket No.: 21-000523-TT

Petitioner-Appellee's Supplemental Brief

Oral Argument Requested

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Statement of the Basis of Jurisdiction

Appellee agrees with Appellant's Statement of Jurisdiction in its Supplemental Brief, filed May 22, 2024.

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Questions Presented by the Court's 04/10/2024 Order

1. Did the assessor's Denial satisfy the requirements of MCL 211.9m(3) and MCL 211.9n(3) and/or due process?

   Petitioner-Appellee answers: No

   Respondent-Appellant answers: Yes

   Tax Tribunal answered: Yes

   Court of Appeals answered: No

2. Did the Denial's failure to satisfy those requirements relieve the Petitioner-Appellee of the requirement to protest the denial at the 2021 March board of review?

   Petitioner-Appellee answers: Yes

   Respondent-Appellant answers: No

   Tax Tribunal answered: No

   Court of Appeals answered: Yes

3. Can the Michigan Tax Tribunal exercise jurisdiction over this case?

   Petitioner-Appellee answers: Yes

   Respondent-Appellant answers: No

   Tax Tribunal answered: No

   Court of Appeals answered: Yes

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Introduction

When an assessor denies a taxpayer the eligible manufacturing personal property (EMPP) exemption, the taxpayer is entitled to notice "in writing of the reason for the denial and advising the person that the denial must be appealed to the board of review under section 30 by filing a combined document." MCL 211.9m(3).[1] The Court of Appeals held that Respondent-Appellant Byron Township (the Township) did not comply with notice requirements under MCL 211.9m: (1) the assessor did not advise the taxpayer, Petitioner-Appellee (Praxis), of the board of review's meeting schedule; (2) the board adjourned its meetings on March 9 although the Township published March 10 as the last day the board would meet; (3) the Township's assessor did not accept Praxis's letter appeal submitted on March 10 although the Township's newspaper publications stated appeals would be accepted on March 10; (4) the board denied Praxis's requests for an in-person appearance before the board; and (5) the assessor did not inform Praxis it was required to re-file the exemption application (called the combined document) with the board.

This Court posed three questions about the Township's application in an Order dated April 10, 2024. Praxis answers those questions as follows.

First, the assessor's Denial does not comply with MCL 211.9m(3) as briefed by Praxis in its Brief on Appeal, filed September 13, 2022, which is incorporated here by reference. The assessor's Denial also violates due process. Similar questions regarding defective notices have been answered by the Court many times in different contexts. The Court has not hesitated to hold the "plain language on the face of the notice" does not comport with due process. See, for example, *Alan v Wayne Co*, 388 Mich 210, 351-52; 200 NW2d 628 (1972). When reviewing a defective notice, the threshold inquiry is whether it is the type of notice that gives rise to due process

[1] References to MCL 211.9m are to both MCL 211.9m and MCL 211.9n.

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guarantees. *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265, 288; 831 NW2d 204 (2013). The assessor's Denial is a tax notice, and so it is the type of notice afforded constitutional protections. The second inquiry analyzes the reasonableness of the notice. *Id*. Reasonableness is analyzed based on the "plain language on the face of the notice." *Alan*, 388 Mich at 351-52. The plain language on the face of the assessor's Denial omits information necessary to educate the taxpayer about how to perfect an appeal and makes overtly misleading statements; accordingly, the notice does not adequately protect the taxpayer's due process right to notice and an opportunity to be heard. The Court of Appeals correctly held that the notice failed to comply with MCL 211.9m(3) and violated Praxis's due process rights. [2]

Second, Praxis was relieved of the requirement to appear before the board before filing a petition with the Tax Tribunal. This is an issue of first impression regarding a board of review appearance under MCL 211.9m(3) appealing an EMPP denial. Appellate interpretations regarding a board of review appearance under MCL 205.735a are instructive. A board of review appearance under MCL 205.735a (and its predecessor, MCL 205.735) is waived when the taxing authority's deficient notice contributed to the taxpayer not appearing before the board. *W & E Burnside, Inc v Bangor Twp*, 402 Mich at 950l (1978); *Spranger v City of Warren*, 308 Mich App 477, 482-83; 865 NW2d 52 (2014); and *Parkview Memorial Ass'n v City of Livonia*, 183 Mich App 116, 119-21; 454 NW2d 169 (1990).[3] The Court of Appeals holding aligns, finding that the Township's

[2] *SIXARP LLC d/b/a Praxis Packaging Solutions v Byron Twp*, __ Mich App __; __ NW2d __ (2023) (COA Docket No. 361888) ("SIXARP"), slip op at 13; a copy of the opinion is attached to the Township's Application for Leave to Appeal, filed 10/3/2023 as Exhibit 1.

[3] The Supreme Court reviewed and denied the City of Livonia's application for leave to appeal in *Parkview*: "the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court." 437 Mich 924 (1991); see also the Court's order denying the City of Livonia's motion for reconsideration, issued June 11, 1991 (1991 Mich LEXIS 1280).

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failure to provide adequate notice of the time or manner for appealing the denial of the EMPP exemption pursuant to MCL 211.9m(3) contributed to Praxis not appearing before the board and, like the taxpayers in the cases cited above, Praxis could "bypass" the board and appeal directly to the Tribunal.[4] Notably, the Legislature chose not to mention "jurisdiction" in MCL 211.9m (as it did in MCL 205.735a), indicating a more clear intent that the board of review requirement in MCL 211.9m is a waivable procedural requirement, not a jurisdictional bar to appealing to the Tax Tribunal. See, for example, *Harrow v DOD*, __ US __; 144 S Ct 1178; 218 L Ed 2d 502; 2024 US LEXIS 2171 (2024).

Third, the Court asks whether the Tribunal "can *exercise* jurisdiction" over this case. The procedural history instructs that the focus should be on whether the Court of Appeals can require the Tribunal to exercise jurisdiction on remand. The Tax Tribunal did not exercise jurisdiction, so an inquiry into whether the Tribunal properly exercised jurisdiction is not before this Court. The issue is whether the Court of Appeals, after it resolved the constitutional due process questions, can compel the Tribunal to exercise jurisdiction on remand over Praxis's tax exemption claim. And the answer to that is "yes." *W & E Burnside, Inc, supra*; *Spranger, supra*; and *Parkview Memorial Ass'n, supra*. See also *Highland-Howell Dev Co, LLC v Marion Twp,* 478 Mich 932; 733 NW2d 761 (2007). Indeed, when the Court of Appeals remands a tax exemption case to the Tax Tribunal, the Tribunal has no choice but to exercise jurisdiction over the exemption claim and review it de novo under MCL 205.735a(2).

Pertinent Facts

Praxis incorporates the Counter-Statement of Facts at pp. 4-14 of its Answer to the

[4] *SIXARP*, slip op., pp. 7-12.

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Township's Application for Leave to Appeal, filed with the Court on October 31, 2023.[5] The following facts are particularly relevant to the questions presented by the Court.

I. 2021 assessor's Denial.

The 2021 EMPP Denial issued by the assessor on February 9, 2021, stated:[6]

> I certify that based on my review, the qualified new personal property and/or the qualified existing personal property claimed on Form 5278 does not meet the definition of Eligible Manufacturing Personal Property as defined by MCL 211.9m and/or MCL 211.9n, therefore **the Eligible Manufacturing Personal Property exemption is denied.**
>
> . . .
>
> **Notification of Taxpayers Right of Appeal**
>
> A taxpayer who timely and properly filed Form 5278 may appeal an assessor's denial of the EMPP exemption to the March Board of Review under MCL 211.30. In the case of a qualified error as defined in MCL 211.53b, an appeal may be made to the July or December Board of Review. The July or December Board of Review may not hear an appeal of a denial of the exemption from the March Board of Review.
>
> Filing a protest with the Board of Review is necessary to protect your right to further appeal an EMPP exemption dispute to the Michigan Tax Tribunal. Michigan Tax Tribunal forms are available at www.michigan.gov/taxtrib.

The assessor's Denial acknowledges, "[w]hen issuing a denial, the assessor must notify the taxpayer of the denial and their right to appeal." The assessor's Denial does not provide a phone number, email address, or mailing address for the board of review. It does not provide the dates, times, and location of the board of review meetings. It does not state whether a board of review appearance must be made in person or whether an appearance can be made by letter. It does not state the taxpayer must re-file the combined document with the board of review.[7]

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[5] Praxis cites its Appendix and Supplemental Appendix filed with the Michigan Court of Appeals, marked as "COA App." A through AA and "COA Supp. App." BB through DD, and the Appendix filed with its Answer to the Michigan Supreme Court, marked as "MSC App." A through G.

[6] 2021 assessor's Denial, COA App. D, pp. 037a.

[7] The Township acknowledges this. Appellant's Supplemental Brief, filed May 22, 2024 (Twp

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II. The EMPP has been granted since 2022.

In 2022, the Township denied the exemption again. But, this time, because the 2022 Denial explained the reason for the denial and the procedure for appealing, Praxis was able to resolve the Township's questions at the board of review, and the exemption was granted for 2022 and each year since then. The assessor's 2022 Denial stated:

> Your request for an EMPP exemption has been denied as your request and/or the property at issue does not comply with the requirements of MCL 211.9m and/or MCL 211.9n. This includes, but is not limited to, apparent noncompliance with one or more of the following factors:
>
> __X__ You did not entirely own, lease, or occupy the real property upon which the personal property at issue was located as required by MCL 211.9m(6)(c) & (g).
>
> . . .
>
> **Notification of Right to Appeal**
>
> If you timely and properly filed Form 5278, a protest to appeal may be filed with the Byron Township 2022 March Board of Review. A proper and timely protest to the Byron Township 2022 March Board of Review is necessary to retain your right to appeal to the Michigan Tax Tribunal. A protest to the March Board of Review must be made pursuant to the requirements of MCL 211.9m, MCL 211.9n, and MCL 211.30. This includes, but is not limited to, filing Form 5278 with the March Board of Review before its final meeting. For the 2022 tax year the Byron Township March Board of Review will meet as follows: **DATES**
>
> **March 14, 2022 9:00am-5:30pm**
>
> **March 15, 2022 1:00pm-9:00pm**
>
> Your right and timeline to appeal may differ if this notice of denial was issued after the March Board of Review adjourned or if the documentation you submitted contained a qualified error. Please refer to MCL 211.9m, MCL 211.9n, and MCL 211.30 for more information.
>
> **Questions** regarding the denial of your requested EMPP exemption or the appeal process can be directed to the Byron Township Assessor at (616) 878–6033.

Supp Brief), p. 6.

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Unlike the 2021 Denial, the 2022 Denial included dates and times of the board of review meetings, stated that the combined document must be filed with the board, and provided a reason for the denial ("[y]ou did not entirely own, lease, or occupy the real property upon which the personal property at issue was located").

III. Correction of misrepresentations in the Township's Supplemental Brief.

Praxis seeks to correct the following misstatements of fact made in the Township's Supplemental Brief.

Misstatement 1: The assessor denied the exemption request using a "Treasury form." Twp Supp Brief, pp. 1 and 10.

The Township does not cite any support in the record for this statement. That is because there is no support for it. The Michigan Department of Treasury (Treasury) contains a list of its official, approved forms.[8] The form used by the Township is not on the list. It is also not listed on Treasury's website page called "Personal Property Tax Exemptions," which provides links to forms relating to an EMPP exemption and a link to the State Tax Commission Assessor Guide to Eligible Manufacturing Personal Property Tax Exemption and ESA ("STC Guide").[9] The STC Guide does not contain any reference to a sample denial form either.[10] The Township's bald allegation it is a "Treasury" form should be given no weight by this Court.

Misstatement 2: "Praxis acknowledged that it had no knowledge of the existence of [the Grand Rapids Press] postings." Twp Supp Brief, p. 4.

The Township does not cite any support in the record for this statement. That is because there is no support for it.

---

[8] A copy of the Treasury's list of "Local Government Official Forms" is at COA App. Q, pp. 122a-130a.
[9] A copy of the Treasury's webpage for "Personal Property Tax Exemptions" is at COA App. R, pp. 131a-133a.
[10] STC Guide, p 17, App. S, p. 151a (emphasis added).

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Misstatement 3: "Praxis hired a tax professional who was informed of the March board meetings by Praxis at least two weeks before the meetings took place." Twp Supp Brief, pp. 4, 11.

The Township does not cite any support in the record for this statement. That is because there is no support for it. The record supports that Praxis made multiple attempts to request an in-person hearing before the board, but each time the Township's assessor failed to provide them a hearing date and, instead, only vaguely said to email him a letter with an agency agreement instead.[11] In fact, the Township's assessor never states in his own affidavit that he ever gave Praxis the dates of when the board was meeting.[12] Likewise, the Denial did not specify dates the board was meeting.[13] There is no support for the Township's contention that Praxis's tax professional "was informed" of the March board meetings.

Misstatement 4: "The record establishes that Praxis had actual knowledge of the March board dates." Twp Supp Brief, pp. 6, 11, 12.

The Township loosely cites to p. 13 of the Tax Tribunal's Opinion. The Opinion, however, does not make a finding Praxis had "actual notice." The Opinion instead holds that the notice of assessment provided notice of the board dates, but the Opinion does not hold Praxis had "actual knowledge." Praxis otherwise incorporates its response to Misstatement 3 above.

[11] Karsten Aff., ¶ 5, COA App. O at 103a (attesting that he "contacted Mr. Baker . . . to request a hearing date" but he "did not provide a hearing date"); Pohl Aff., ¶¶ 7-8, COA App. P, pp. 109a-110a (attesting that she left Mr. Baker a voicemail "requesting an in-person hearing at the March Board of Review" but received a return voicemail in which Mr. Baker failed to provide a hearing date).

[12] Baker's Aff., ¶ 7, COA Supp. App. CC, pp. 217a.

[13] 2021 assessor's Denial, COA App. D, pp. 037a.

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Argument

I. Answer to Question 1: The assessor's Denial did not satisfy the requirements of MCL 211.9m(3) and/or due process.

A. Standard of review.

When statutory interpretation is involved, a tribunal's decision is reviewed de novo. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). The Court reviews de novo as a question of law the determination of whether a party has been afforded due process. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

B. Introduction.

The issue of how the assessor's Denial did not comply with MCL 211.9m(3) was briefed in Praxis's Brief on Appeal, filed with the Court of Appeals on September 13, 2022 (COA Brief on Appeal). The COA Brief on Appeal, pp. 15-23, is accordingly incorporated here by reference. Praxis also briefed, in general at pp. 15-23, how the assessor's communications, as well as the assessor's rejection of Praxis's board of review letter appeal, timely submitted on March 10, 2021, denied due process by depriving Praxis of an opportunity to be heard.

The Court, however, also questions whether the Denial itself violated due process. Similar questions regarding defective notices have been answered by the Court many times in different contexts. The Court has not hesitated to hold the "plain language on the face of the notice" does not comport with due process. See, for example, *Alan*, 388 Mich at 351-52. The Court should first consider the threshold question of whether the assessor's Denial is the type of notice that gives rise to due process guarantees of notice and an opportunity to be heard. *Elba Twp*, 493 Mich at 288. If it is the type of notice giving rise to constitutional protections, then the Court will analyze the reasonableness of the notice. *Id*. Following Supreme Court jurisprudence regarding the constitutional sufficiency of tax notices, the Court's first question is answered as follows: the

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assessor's Denial does not satisfy due process requirements.

C. The assessor's Denial is the type of notice giving rise to constitutional due process protections.

The threshold question is whether the notice is the type of notice giving rise to due process protections. Under Michigan's Constitution, "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The United States Constitution similarly provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV. A fundamental requirement of due process . . . is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950). Due process minimally requires notice and an opportunity to be heard in a meaningful time and manner. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).[14]

Not all types of notices sent by municipalities under various statutory schemes rise to the level of requiring compliance with due process protections. Only those that deprive a person of life, liberty, or property warrant constitutional scrutiny.[15] An assessment of a tax constitutes a

[14] At p. 11 of the Township's Supp. Brief, the Township alleges "[t]he State is … afforded great flexibility in satisfying the requirements of due process in the field of taxation," "because of the significant interest states have in their own financial stability," citing to cases involving the Michigan Department of Treasury and Florida Division of Alcoholic Beverages & Tobacco. But this is a property tax appeal, not a case adverse to the State. These holdings do not apply here.

[15] The bar is low regarding what constitutes a deprivation of property. "Where a man's automobile or color television set is at stake, due process requires notice and a prior hearing before a creditor is entitled to retake possession." *Dow v State*, 46 Mich App 101, 114; 207 NW2d 441 (1973) (JH Gillis, dissenting), citing *Inter City Motor Sales v Judge of the Common Pleas Court for the City of Detroit*, 42 Mich App 112; 201 NW2d 378 (1972); *Fuentes v Shevin*, 407 US 67; 92 S Ct 1983; 32 L Ed 2d 556 (1972).

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deprivation of property. *McKesson Corp v Div of Alcoholic Bevs & Tobacco*, 496 US 18; 110 S Ct 2238; 110 L Ed 2d 17 (1990). "An owner of real property is entitled to the protection of constitutional due process with respect to the assessment and collection of property taxes." *Spranger*, 308 Mich App at 482-483. When a notice relates to the assessment of a tax, a property owner is "constitutionally entitled to notice regarding the assessment" and an opportunity to object. *Elba Twp*, 493 Mich at 292, citing *Chicago, M, SP, & PR Co v Risty*, 276 US 567; 48 S Ct 396; 72 L Ed 703 (1928) and *Utley v St Petersburg*, 292 US 106; 54 S Ct 593; 78 L Ed 1155 (1934). (See also the discussion about a taxpayer's right to notice and opportunity to protest when a tax assessment is increased at pp. 32-36 of Praxis's COA Brief on Appeal).

When a tax exemption is denied, constitutional due process requires notice and an opportunity to be heard. *Spranger*, 308 Mich App at 482-483. The assessor's Denial is accordingly a type of notice required to afford the recipient of constitutional due process protections.

D. The assessor's Denial – on its face – did not comport with due process requirements.

With the threshold inquiry resolved that the assessor's Denial is the type of notice that must afford the recipient with due process protections, the next inquiry is to review "the plain language on the face of the notice" and determine whether it complied with due process requirements. *Alan*, 388 Mich at 351-52.

Notice of the opportunity to be heard must be meaningful. *City of West Covina v Perkins*, 525 US 234, 240; 119 S Ct 678; 142 L Ed 2d 636 (1999); *Mudge v Macomb Co*, 458 Mich 87, 101; 580 NW2d 845 (1998). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 US at 314. "[W[hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing

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the absentee might reasonably adopt to accomplish it." *Id*. at 315.

The "plain language on the face of the notice" – alone – must be enough to enable the taxpayer to make a "meaningfully informed decision." *Alan*, 388 Mich at 351. In *Alan*, the Court invalidated a proposed tax bond for a new sports stadium in Detroit, because the notices sent did not afford due process. The Court found the tax bond notices were misleading and defective as they failed to inform the reader of their purpose. *Id*. at 351-52. The Court rejected the county's defense that the notices conformed to "accepted practice," finding "[c]ustomary process is not necessarily due process." *Id*. at 352. The Court stressed the importance of a notice being worded in a way that clearly communicates to the taxpayer how to respond to the notice:

> To comport with due process any notice respecting petition rights on bonds supported by any pledge of tax power must state to whom the notice is issued and for what purpose: (a) it must tell, in this case, the electors and taxpayers of Wayne County that it is issued for their benefit; (b) it must contain enough information so that **it can be told from its face in plain and understandable language** that the notice concerns some particular right or obligation respecting the subject matter of the notice; (c) the notice must explain the nature of the right (or obligation) and **what is required to exercise it** and the consequence of not exercising it; (d) regarding the subject matter of the notice **there must be enough information so that a meaningfully informed decision respecting the right can reasonably be made from information supplied in plain language on the face of the notice**.
>
> Defendants' counsel say, however, that people complained in the past when too much information was printed. We do not require and would not tolerate a *magnum opus* as misleading in its complexity as this "Notice" is in its brevity. Counsel knows as well as the Court that **it takes as few words in plain English to tell taxpayers about potential burdens** as it does to mislead them in compact legal phrases of art.
>
> **Where public officials are acting under a constitutional and statutory duty to give notice to the public of what the government proposes**, and especially where it concerns rights of electors respecting important undertakings of government such as the issuance of bonds secured by taxing powers, then **the government and its public officials, in the exercise of the duty of informing, occupy a position of trust and a fiduciary standard should be applied to them**. *Cf, Barkey v Nick*, 11 Mich App 381, 385 (1968).
>
> In giving notice to taxpayers regarding public securities, to comport with due

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> process the notice must be phrased with the general legal sophistication of its beneficiaries in mind. **As phrased it must not make any misleading or untrue statement; or fail to explain, or omit any fact which would be important to the taxpayer or elector in deciding to exercise his right**. In short, the notice may not be misleading under all the circumstances.

Id. at 352-53 (emphasis added).

The Court rejected the county's argument that other sources of information could cure defects on the face of the notice. *Id*. at 228, fn. 84. The Court was firm in holding the notice – standing alone – was misleading, and "misleading process is not due process." *Id.* at 227.

The Court of Appeals followed *Alan* in a special assessment tax case, holding the plain language on the face of a notice did not comport with due process. In *Trussell v Decker*, 147 Mich App 312; 382 NW2d 778 (1985), the township sent notices to taxpayers regarding a hearing, providing the date, time, and place. However, the notices did not inform the taxpayers that the special assessment could be stopped if landowners who owned more than 20% of the total land area filed objections at or before the hearing. *Id*. at 320-21. The taxpayer's counsel articulated how the notice was not meaningful:

> Mrs. Trussell went out there, ready, willing and able to object, unfortunately for her, she either didn't go to law school, or hadn't talked to a lawyer, or wasn't sophisticated enough to read the Public Acts of this State, so she didn't know that her objections *had to be in writing*, had to be signed by owners of more than 20 percent of the area involved, and of those objection [sic] had to be filed at or before that meeting …

Id. at 321. The Court agreed:

> Although persons sophisticated in the law, such as lawyers, judges and elected officials, might well realize, or at least suspect, that they have rights under statutes other than those set forth in a public notice, the average resident of Union Township reading the notice might well conclude that his only right, at least until the date and time of the public hearing, was to attend the public hearing and voice his objections. This is particularly so because of the last sentence in the notice which stated that all objections and comments concerning the proposed project would be heard at the meeting.

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Id. at 325.

These general principles were applied recently in the context of a property tax exemption case. In *Spranger*, 308 Mich App 477, the taxpayer applied for a property tax exemption. The board of review scheduled a "special hearing" following its regular meeting dates for consideration of the taxpayer's exemption application. *Id*. at 478. The taxpayer, however, did not receive notice in writing about the hearing date and failed to appear. *Id*. The Court noted under MCL 211.30(3) a taxpayer or their agent that has a scheduled hearing "must be afforded an opportunity to be heard." *Id*. at 483. "For this statutory right to have any meaning at all, a local taxing authority must necessarily inform the taxpayer or his or her agent of the date and time of the scheduled hearing." *Id*. Because the taxpayer failed to appear before the board, the Tax Tribunal dismissed the case. The Court of Appeals vacated the Tribunal's decision and remanded the case to "provide petitioner with notice and a meaningful opportunity to be heard." *Id*. at 485. A taxpayer applying for an exemption is "entitled to the protection of constitutional due process." *Id.* at 482-483.

The plain language on the face of the assessor's Denial informs (or fails to inform) the reader of the following:

- The Denial is appealed to the March board of review "under MCL 211.30."
- The board of review meeting dates and times were not provided.
- The location of the board of review meetings was not provided.
- The Denial was silent regarding whether an in-person appearance before the board was required.
- The Denial was silent regarding whether a letter appeal could be submitted to the board and, if so, what the due date was for submitting a letter appeal.
- The Denial does not provide a contact name, phone number, mailing address, or email address for the March board of review. (The board of review is a separate governing body from the assessor.)
- The Denial does not state the taxpayer must submit the combined document to the

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board to appeal.

- The Denial does not provide the reasoning for the denial, stating only the property "does not meet the definition of Eligible Manufacturing Personal Property as defined by MCL 211.9m and/or MCL 211.9n."

- The Denial states that if there was a "qualified error as defined in MCL 211.53b, an appeal may be made to the July or December Board of Review."

The plain language on the face of the assessor's Denial omits facts "which would be important to the taxpayer … in deciding to exercise his right." *Alan*, 388 Mich at 225. These defects on the face of the Denial cannot be cured by information otherwise provided to the taxpayer (such as, on the notice of assessment). *Id.* In addition to omitting important information, the assessor's Denial is also defective, because it is overtly misleading in two ways.

First, the Denial states in some circumstances, an appeal may be taken to the July or December board of review. 2016 PA 108 however eliminated the authority of the July or December board of review to correct EMPP exemption denials.[16] The Denial's statement that "an appeal may be made to the July or December Board of Review" if there was a qualified error is simply not true and misleading. See MCL 211.53a and 2016 PA 108.

Second, the Denial states an appeal to the March board of review is "under MCL 211.30." But reading MCL 211.30 does not provide the following information:

- The meeting dates and times of the board of review;

- The location of the board of review meetings;

- Whether an in-person appearance before the board was required;

- Whether a letter appeal could be submitted to the board and, if so, what the due date

[16] Prior to 2016, "an error made in the denial of a claim of exemption for personal property under section 9m, 9n, or 9o" was a qualified error under MCL 211.53a(10)(h) that the July or December board of review was empowered to correct under MCL 211.53a(3) and 53a(7). 2016 PA 108 eliminated all references to MCL 211.9m and 9n from MCL 211.53a, thereby eliminating the power of the July or December board of review to correct EMPP denials as qualified errors.

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was for submitting a letter appeal;

- A contact name, phone number, mailing address, or email address for the March board of review; and
- What documents the taxpayer needs to submit to the March board of review, such as a copy of the combined document.

Even an attorney cannot read MCL 211.30 and glean this important information necessary for a taxpayer to perfect their right to appeal. Indeed, MCL 211.30 merely sets forth certain parameters within which all boards of review across Michigan must operate. MCL 211.30 was not intended to be read by taxpayers to advise them of their due process rights for appealing property tax assessments and exemption denials but instead was meant to guide the conduct of boards of review. It is the responsibility of boards of review to communicate the details regarding meeting dates, times, locations, etc., to taxpayers.

A close reading of MCL 211.30 demonstrates it does not provide a "how to" guide to a taxpayer seeking to perfect a protest to the board. For tax year 2021, MCL 211.30 instructed a board may begin meeting on Monday, March 8 [MCL 211.30(1)], but the board may instead elect, in the alternative, to begin meeting on Tuesday, March 9, or Wednesday, March 10 [MCL 211.30(2)].

MCL 211.30(3) provided some parameters regarding the times of meetings, but without knowing whether the township elected to begin meeting on Monday, March 8; Tuesday, March 9; or Wednesday, March 10, the times are not helpful. MCL 211.30(3) further stated that the board shall meet a certain number of hours "during the remainder of that week" which meant the board could have elected to conduct meetings on Thursday, March 11; Friday, March 12; and/or Saturday, March 13. MCL 211.30(3) required that the board meet at least 3 hours after 6 p.m., but it did not state which day, leaving the reader uninformed about whether the board would meet in the evening on Monday, Tuesday, Wednesday, Thursday, Friday, or Saturday that week.

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MCL 211.30(3) did instruct that if a person has a "scheduled appointment," they "must be afforded an opportunity to be heard by the board of review." Notably here, Praxis's representatives twice called the assessor and asked for a scheduled appointment, and twice the assessor denied those requests.

MCL 211.30(3) further instructed that the "board of review shall schedule a final meeting after the board of review … exempts personal property under section 9m, 9n, or 9o …" But MCL 211.30 did not provide the date on which this final exemption meeting would be conducted. But the assessor was required to incorporate the board's changes into the tax roll by Wednesday, April 7, 2021, under MCL 211.30(6), so a plain reading of MCL 211.30 instructed that the board of review could conduct a final exemption meeting any day before April 7, 2021. Indeed, such was the case in *Spranger*, 308 Mich App 477, where the board of review scheduled a "special hearing" following its regular meeting dates for consideration of the taxpayer's exemption application. *Id*. at 478.

The plain language on the face of the assessor's Denial – instructing Praxis to read MCL 211.30 – is accordingly misleading. The plain language on the face of the assessor's Denial does not comport with due process requirements. *Alan*, 388 Mich at 223-25.[17]

[17] The linchpin to the Township's argument is that it gave notice regarding the board of review meetings via the notice of assessment issued under MCL 211.24c. However, the plain language on the face of the assessor's Denial does not refer to the notice of assessment. Regardless, the notice of assessment is not a reliable source of information applicable to EMPP denials, as the Township is only required to send a notice of assessment when there is an "increase in the tentative state equalized valuation or the tentative taxable value for the year." MCL 211.24c. In other words, if the values on the roll do not increase from one year to the next, the assessor is not required to send a notice of assessment, and so it would not be reliable for the language of the assessor's Denial to cross reference the notice of assessment. Regardless, a taxpayer is not required to piece together information about its appeal rights from other sources. *Alan*, 388 Mich at 228, fn. 84. Secondary sources of information cannot cure deficiencies of a notice. *Id*. Additionally, notably absent from MCL 211.9m is any reference to an MCL 211.24c notice of assessment. An MCL 211.24c notice of assessment – not required to be sent every year – is simply not a reliable source of information

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E. If the Court holds that a taxpayer is sufficiently informed of its appeal rights by the mere reference to "MCL 211.30" on the EMPP denial, then the taxpayer must be considered sufficiently informed as well by the information provided in MCL 211.29 as the statutes are in pari materia and must be read together.

If the Court disagrees with the analysis above and finds that the mere reference to MCL 211.30 on the assessor's Denial comports with due process requirements, then the information provided in MCL 211.30 must be read in the context of all the board of review statutes, MCL 211.28 through 211.33a. They are in pari materia and so must be read together.

MCL 211.29, 30, and 30a, in particular, establish the requirements for board of review meetings each year. *Oakwood Farms Associates v Oxford*, 107 Mich App 602; 309 NW2d 685 (1981). These statutes establish a board of review's "error-correction mechanisms." *Mich Props, LLC v Meridian Twp*, 491 Mich 518; 817 NW2d 548 (2012); see also *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). "As long as the board of review fulfills the statutory public meeting requirements [under MCL 211.29, 30, and 30a], it is our opinion that a protest to be timely must be brought to the board's attention within the time frame of those public meetings." *Oakwood Farms Associates*, 107 Mich App at 605-6.

MCL 211.29 requires that the board of review publish the date, time, and place of the meetings three times in a newspaper:

> Notice of the date, time, and place of the meeting of the board of review shall be given at least 1 week before the meeting by publication in a generally circulated newspaper serving the area. The notice shall appear in 3 successive issues of the newspaper where available; otherwise, by the posting of the notice in 5 conspicuous places in the township.[18]

The board must follow the published schedule.

An assessment was invalidated when the taxpayer attempted to appear before the board on

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regarding a taxpayer's right to protest an EMPP exemption denial.

[18] The record does not support that notice was posted in five conspicuous places in the township.

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a scheduled meeting date, but the board had retired early. In *Caledonia v Rose*, 94 Mich 216; 53 NW 927 (1892), the taxpayer "was entitled to assume that the board would remain in session the full length of time provided by the statute, and to arrange to be present any day he chose." *Id*. at 218. See also *Hampton Twp v Wespinter*, 185 Mich 29, 32; 151 NW 643 (1915) (the taxpayer was wrongfully deprived of a hearing when the township failed to post information regarding adjournment); and *Auditor General v Chandler*, 108 Mich 569; 66 NW 482 (1896) (a tax assessment was invalidated when the taxpayer appeared on a published meeting date but the board adjourned prematurely, even when the board of review offered to schedule an appointment for the taxpayer after the board's regular meetings).

Regarding a letter appeal, if it is received on the last day of the published meeting dates, the letter appeal is timely submitted. *Oakwood Farms Associates*, 107 Mich App at 606. In *Oakwood*, it was published in the local newspaper that the board would meet on March 4, 5, 10 and 11 in 1980. *Id.* at 604. The court noted if the taxpayer's letter appeal had been received by March 11 (instead of March 13), it would have been timely received. *Id*. at 606.

Here, the Township does not dispute that the Denial did not give Praxis notice of the board's schedule and location.[19] The Township, instead, asserts Praxis "received notice of the March Board of Review's schedule and location" through newspaper publications.[20] The Township's notice about the board meetings was published multiple times in the Grand Rapids Press on February 21, 2021, February 23, 2021, and February 25, 2021.[21]

Praxis complied with the newspaper publication notice by submitting a letter appeal by

[19] Township's COA Brief on Appeal, pp. 12-14; see also 2021 assessor's Denial, COA App. D at 36a.
[20] Township's COA Brief on Appeal, pp. 12-13 & n 47. See also COA Supp. App. BB at 216a.
[21] Township's Motion for Summary Disposition, p 9; Township's Exhibit C, ¶5 at COA App. CC at 217a; and Township's Exhibit G, newspaper publication notice at COA Supp. App. BB at 216a.

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March 10.[22] The Township's newspaper notice stated:

> **Board of Review appointments may be made by contacting the Assessor's Office from March 1st through March 10th.**[23]

The Township's newspaper publications also emphasized the board meetings would not conclude on March 9th, stating:

> Notice is hereby given that the Board of Review shall convene on the 8th day of March, 2021 and shall sit not less than three calendar days to review the 2021 Assessment Roll of the Township of Byron and to hear complaints of persons considering themselves aggrieved by these values. Residents and non-resident taxpayers may file his or her protest by letter without a personal appearance . . . .

Again, that is exactly what Praxis did – it submitted a letter appeal to the assessor **by March 10**, the third calendar day. The Township was required to accept Praxis's timely filed letter appeal. *Oakwood Farms Associates*, 107 Mich App at 606.

The plain language on the face of the assessor's Denial does not comport with due process requirements: important information was omitted, and it is overtly misleading in two critical ways. *Alan*, 388 Mich at 223-25. But regardless, even if this Court determines the plain language on the face of the assessor's Denial does comport with due process requirements by referring the reader to "MCL 211.30," then MCL 211.30 must be read in pari materia with MCL 211.29, and the Township must be held to the information published three times in a local newspaper. Praxis's letter appeal was submitted timely. *Oakwood Farms Associates*, 107 Mich App at 606.

[22] COA App. P, pp. 116a-121a.
[23] COA Supp. App. BB, pp. 216a (emphasis added).

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II. Answer to Question 2: The statutory and constitutional deficiencies on the face of the assessor's Denial relieved Praxis of the requirement to protest the Denial at the 2021 March board of review.

A. Standard of review.

When statutory interpretation is involved, a tribunal's decision is reviewed de novo. *Briggs Tax Serv, LLC*, 485 Mich at 75. The Court also reviews de novo as a question of law the determination of whether a party has been afforded due process. *Reed*, 265 Mich App at 157.

B. Introduction.

A board of review is not the gatekeeper to the Tax Tribunal. Most property tax appeals to the Tax Tribunal are no longer preceded by a board of review appearance. MCL 205.735a does not require a board of review appearance as a condition precedent to valuation and exemption assessment disputes for commercial real property, industrial real property, developmental real property, personal property (as long as a personal property statement was timely filed), and property subject to taxation under the commercial redevelopment act, the enterprise zone act, the technology park development act, the obsolete property rehabilitation act, the commercial rehabilitation act. Even in the context of EMPP exemptions, a board of review appearance is not always required. MCL 211.9m(3).

Prior to the 2007 enactment of MCL 205.735a, MCL 205.735 required a board of review appearance for valuation and exemption disputes. *However*, a taxpayer was relieved from appearing before the board if the taxpayer's due process rights were violated. *W & E Burnside, Inc*, 402 Mich at 950l; *Spranger*, 308 Mich App at 482-83; and *Parkview Memorial Ass'n*, 183 Mich App at 119-21. In alignment with these cases, the Court of Appeals found that the Township's failure to provide adequate notice of the time or manner for appealing the assessor's Denial contributed to Praxis not appearing before the board and, like the taxpayers in the cases cited above, Praxis could appeal directly to the Tax Tribunal without satisfying the board of review

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protest requirement.[24]

C. An unmet jurisdictional prerequisite under the General Property Tax Act is not necessarily a bar to filing in the Tax Tribunal.

The jurisdictional provisions in the GPTA "'must be construed in a constitutional manner if possible.'" *Highland-Howell Dev Co, LLC*, 478 Mich at 933, quoting *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). In *Highland-Howell Dev Co, LLC*, a property owner protested a special assessment directly to the Tribunal without first protesting at a special assessment hearing. *Id*. at 932. MCL 205.735(1), at the time, stated that "the special assessment must be protested at the hearing held for the purpose of confirming the special assessment roll ***before the tribunal acquires jurisdiction of the dispute***." The special assessment plan, finalized in 1996, included a sanitary sewer trunk line running across the owner's property. *Id*. Many years later, in 2004, the township passed a resolution changing the plan and eliminating the line on the owner's property. *Id*. at 933. The owner filed a petition with the Tax Tribunal within 30 days of the resolution under MCL 205.735(2). *Id*.

The Court held that the jurisdictional prerequisite of first protesting at a special assessment hearing was excused, because the owner did not have a reason to protest when the hearing was held in 1996. *Id*. The Supreme Court held that the Tribunal had jurisdiction, despite the owner not complying with MCL 205.735(1), because "the statutes at issue here cannot be construed in a manner that would deny petitioner due process of law." *Id*. The Supreme Court held that because the owner filed its petition within 30 days, the Tribunal was vested with jurisdiction under MCL 205.735(2). *Id*. The pertinent part of MCL 205.735(2) is now codified at MCL 205.735a(6) which provides that "[i]n all other matters, the jurisdiction of the tribunal is invoked by a party in interest,

[24] *SIXARP*, slip op., pp. 7-12.

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as petition, filing a written petition within 35 days after the final decision, ruling, or determination."[25]

In so holding, the Court relied on *W & E Burnside, Inc*, "in which this Court remanded the case to the tribunal to determine whether the petitioner was entitled to noticed even though the protest requirement of § 735(1) was not satisfied." *Highland-Howell Dev Co, LLC*, 478 Mich at 933, citing *W & E Burnside*, 402 Mich at 950l.

D. An appearance before a board of review is a waivable procedural requirement.

The Court of Appeals holding – that Praxis's appearance before the board was a waivable procedural requirement – is supported by several appellate decisions.

In *W & E Burnside, Inc v Bangor Twp*, the township increased the assessed value from $48,000 to $100,000 without notifying the taxpayer in early 1975. *W & E Burnside, Inc v Bangor Twp*, 77 Mich App 618, 619; 259 NW2d 160 (1977), rev'd 402 Mich 950l (1978). After discovering the increase in December 1975, the taxpayer filed suit in Bay County Circuit Court seeking a refund. *Id*. The parties stipulated to remove the case to the Tax Tribunal. *Id*. The Tribunal, however, dismissed the case, because the taxpayer failed to exhaust its administrative remedies by first protesting to the board of review under MCL 205.735 (1), even though the taxpayer did not have notice of the increase until December. *Id*.

The Court of Appeals held that MCL 211.24c required the assessor to give notice of the increase by first class mail and of the time and place of the meeting of the board:

> We find that when required by the statute, the sending of notice is a prerequisite to a valid increase in a tax assessment. See *Fisher v Muller*, 53 Mich App 110; 218 NW2d 821 (1974). It is necessary to give full effect to the notice statute for any other interpretation would mean that in situations such as the one herein presented where the tax statement (actual notice of the increase) post dates the board of review meeting, the opportunity to be heard would be foreclosed to the taxpayer and the

[25] The timeliness of Praxis's petition is not at issue under MCL 205.735a(6).

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purpose of the statute not achieved.

Id. at 623-624. The COA, however, held that the Tax Tribunal did not have jurisdiction and remanded to the Bay City Circuit Court. *Id*. at 624-625.

The Michigan Supreme Court swiftly reversed, finding the Tax Tribunal indeed had jurisdiction, remanding the case to the Tax Tribunal with instructions that if "a notice should have been sent, the assessment increase is invalid . . . ." *W & E Burnside, Inc*, 402 Mich at 9501.

In *Spranger*, 308 Mich App 477, the taxpayer applied for a property tax exemption. The board of review scheduled a "special hearing" following its regular meeting dates for consideration of the taxpayer's exemption application. *Id*. at 478. The taxpayer, however, did not receive notice in writing about the hearing date and failed to appear. *Id*. Because the taxpayer failed to appear before the board, the Tax Tribunal dismissed the case. The Court of Appeals vacated the Tribunal's decision and remanded to the Tax Tribunal to "provide petitioner with notice and a meaningful opportunity to be heard." *Id*. at 485. The Court determined that the requisite appearance before the board was a waivable requirement. A taxpayer applying for an exemption is "entitled to the protection of constitutional due process." *Id.* at 482-483.

Parkview Memorial Ass'n, 183 Mich App at 119-121, aligns with *W & E Burnside, Inc*, *Spranger*, and *Highland-Howell Dev Co, LLC*, in holding that while an appearance before the board of review is often required prior to filing a petition with the Tax Tribunal, it is a not a statutory prerequisite where a taxpayer is denied its right to notice and an opportunity to be heard. In *Parkview Memorial Ass'n*, the Court determined the taxpayers could challenge their personal property tax assessments before the Tax Tribunal even though they had not appeared before the board of review. The taxpayers filed petitions in the Tax Tribunal to contest the tax assessments of tombs they owned. *Id*. at 118. They did not receive notices of assessment until after the last meeting of the board. *Id.* at 117-118. The Tax Tribunal dismissed the petitions, finding it lacked

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jurisdiction because the taxpayers had not appeared before the board. *Id*. at 118.

The Court of Appeals reversed. *Id.* at 121-122. While the Court noted that a protest to the board of review was a condition precedent to the Tax Tribunal's exercise of jurisdiction, it found that because the city's notice did not comply with MCL 211.24c(5), it was impossible for the taxpayers to satisfy that condition precedent. *Id*. at 118-120. The Court found that the board requirement was waivable, relying on the "remedial approach" employed by the Supreme Court in *W & E Burnside, Inc*, 402 Mich 950l ("afford[ing] taxpayers[,] . . . who demonstrate that they have been deprived of notice of an assessment in time to protest before the board of review, an opportunity to obtain a review of the assessment in the Tax Tribunal"). *Id*. at 120-121. The Court of Appeals held that MCL 205.731 (not MCL 205.735) sets forth the jurisdiction of the tribunal; in contrast, MCL 205.735 is not "a limitation on subject-matter jurisdiction" but, rather, contains "procedural requirements for perfecting an appeal in the Tax Tribunal." *Id*., citing *W & E Burnside, Inc*, 402 Mich 9501. The Court held that the taxpayers would be denied due process if not given an opportunity to be heard. *Id*. at 120. The Court remanded the case to the Tax Tribunal, stating the "Tax Tribunal shall assume subject matter jurisdiction over [the] petitioners' assessment disputes." *Id*. at 121-122.

The Township criticizes *Parkview Memorial Ass'n*, because it is a published Court of Appeals decision issued in 1990. The Township, however, fails to acknowledge that the City of Livonia – twice – sought the Michigan Supreme Court's review of the Court of Appeals opinion. The Supreme Court issued an order, stating "the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court." 437 Mich 924 (1991); see also the Court's order denying the City of Livonia's motion for reconsideration, issued June 11, 1991 (1991 Mich LEXIS 1280). The Supreme Court was not

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interested then in reviewing the *Parkview* decision and should not be interested now in reviewing it (and reversing it as the Township suggests).

The Court of Appeals recognized the procedural nature of the requirements in MCL 205.735 more recently in *Michigan State Univ [MSU] v City of Lansing*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2005 (Docket No. 250813).[26] In *MSU*, the city took away the exemption on a conference center owned by the university.[27] The university claimed not to have received notice of the resulting increase in the assessment until after the board of review had concluded their meetings.[28]

The Court of Appeals held that the city failed to demonstrate that it gave the university timely notice of the assessment increase and, therefore, deprived the university of the right to protest to the board of review. Although MCL 205.735 required a board appearance, the Court held that the "procedural" requirement was waived, and the taxpayer could appeal directly to the Michigan Tax Tribunal under MCL 205.735(2).[29] The Court of Appeals found *Parkview Memorial Ass'n* compelling (although not "binding" under MCR 7.215(J)(1)) as it was "predicated on a Supreme Court decision [*W & E Burnside, Inc*] which is, of course, binding precedent that trumps opinions emanating from this Court."[30] The Court also found that the inference in the *EDS* case and its progeny – that MCL 205.735 establishes non-waivable subject-matter jurisdiction requirements – was not applicable nor "on point."[31] Instead, the Court in *MSU* found *Parkview* to

[26] See *MSU*, COA App. W, pp. 183a-188a.
[27] *MSU*, at * 2, COA App. W, p. 183a.
[28] *Id*. at *3-4, COA App. W, pp. 183a-184a.
[29] *Id*. at *12-13, COA App. W, p. 186a.
[30] *Id*. at *12, COA App. W, p. 186a.
[31] *Id*., COA App. W, p. 186a. The two inapplicable cases mentioned in *MSU* are inapplicable here as well. In *Elec Data Sys Corp v Twp of Flint*, 253 Mich App 538; 656 NW2d 215 (2002), the taxpayer did not file its petition with the Tax Tribunal by the June 30 due date. The Court held "the time requirements contained in MCL 205.735(2) are jurisdictional in nature." *Id*. at 543. The

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be "directly and more on point" because "it specifically addresses the failure to provide timely notice that would have allowed a party to meet the requirements of MCL 205.735."[32]

In this case, the Court of Appeals found *MSU* and another unpublished opinion, *Morehouse v Twp of Mackinaw* (*Morehouse*),[33] "persuasive," noting both followed the holding of *Parkview Memorial Ass'n* (and, thereby, this Court's remedial approach in *W & E Burnside, Inc*) to "support the principle that in instances of inadequate notice, this Court may waive the protest requirement and allow the case to proceed before the MTT."[34] Regarding those cases, the Court noted:[35]

> In *Morehouse*, the petitioners did not receive notice until after the Board of Review met. *Morehouse*, unpub op at 3-4. Following *Parkview*, the *Morehouse* Court affirmed the MTT's decision to hear the case, despite the petitioners' failure to first appeal to the Board of Review. *Id*. at 4. Similarly, in *Mich State Univ*, this Court concluded there was "no evidence to contradict MSU's position" that the notice of assessment "was actually received" after the deadline for it to protest to the Board of Review. *Mich State Univ*, unpub op at 3. The *Mich State Univ* Court affirmed the MTT's exercise of jurisdiction and, citing *Parkview*, concluded that "[i]f a taxing authority can avoid board and tribunal review of assessments by mailing untimely notices, a property owner's due process rights are unquestionably impaired."

Like the notices (or lack thereof) in *W & E Burnside, Inc*, *Spranger*, *Parkview Memorial Ass'n*, and *MSU*, the assessor's Denial did not provide Praxis with an opportunity to appeal. The Court of Appeals' holding – that Praxis's appearance before the board of review was waived –

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timeliness of Praxis's petition is not at issue under MCL 205.735a(6). Likewise, *Covert Twp v Consumers Power Co*, 217 Mich App 352; 551 NW2d 464 (1996), is not applicable. In that case, the township contracted with the state to assess the property. The township was not pleased with the state's assessment, and so filed a petition with the Tax Tribunal to protest it. The Tax Tribunal and Court of Appeals held that the township did not have standing to challenge the tax assessment and further held that the township did not appear before the board of review before filing a petition with the Tax Tribunal. Unlike Praxis, the township did not assert that it was somehow prevented from appearing before its own board.

[32] *MSU*, at *12, COA App. W, p. 186a

[33] *Morehouse v Twp of Mackinaw*, unpublished per curiam opinion of the Court of Appeals, issued March 17, 2009 (Docket No. 281483), COA App. X, pp. 189a-192a.

[34] *SIXARP*, slip op at 12, citing *Barclae v Zarb*, 300 Mich App 455, 469; 834 NW2d 100 (2013).

[35] *Id*. at 5.

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aligns with *W & E Burnside, Inc*, *Highland-Howell Dev Co, LLC*, *Spranger*, *Parkview Memorial Ass'n*, *MSU*, and *Morehouse* ("*Burnside* and its progeny").

The Legislature "cannot create a statutory regime that allows for constitutional violations with no recourse." *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 10-11; 732 NW2d 458 (2007) (*Perfecting Church*). If the taxing authority's notice is deficient in such a way that a taxpayer is prevented from making an appearance and perfecting an appeal to the board, the taxpayer's appearance is not required to further pursue an appeal at the Tax Tribunal to protest an exemption denial. *Spranger*, 308 Mich App at 483-85.

E. The holding in *Burnside* and its progeny – that a board appearance is a waivable procedural requirement – aligns with the United States Supreme Court's reasoning in a decision recently issued on May 24, 2024.

On May 24, 2024, the United States Supreme Court opined on the jurisdiction of a federal court to review a federal employee's appeal of a Merit Systems Protection Board decision when the employee's appeal was filed after the period for appeal expired. *Harrow, supra*. The federal circuit court dismissed, believing the appeal deadline was an unwaivable "jurisdictional requirement." *Id*. at *6. The employee did not receive notice of the decision from which he sought to appeal until after the appeal period expired. *Id*. at *5. The U.S. Supreme Court held the statutory deadline for appealing was not jurisdictional, finding such a requirement to be flexible, unless Congress specifically provided for it to be unbending and jurisdictional:

> The procedural requirements that Congress enacts to govern the litigation process are only occasionally as strict as they seem… But Congress legislates against the backdrop of judicial doctrines creating exceptions, and typically expects those doctrines to apply.

Id. at *6-7. The U.S. Supreme Court was compelled by the fact the statute at issue did not specifically mention "jurisdiction." *Id*. *9-10.

Considering this case, and the statute at issue – MCL 211.9m – through the lens provided

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by the U.S. Supreme Court in *Harrow*, brings into focus that the Michigan Legislature did not mention "jurisdiction" in MCL 211.9m. According to *Harrow*, the absence of a reference to "jurisdiction" means the Michigan Legislature did not intend for the board of review appearance to trigger the Tax Tribunal's jurisdiction. Contrast MCL 211.9m to MCL 205.735a which specifically states an "assessment must be protested before the board of review before the tribunal acquires jurisdiction of the dispute under subsection (6)." Unlike in MCL 205.735a, the Michigan Legislature chose not it use the word "jurisdiction" in MCL 211.9m. The board of review appearance in MCL 211.9m accordingly was meant to be more flexible. Indeed, the Legislature specifically provided that not all EMPP denial protests must go to the board first before appealing to the Tribunal. MCL 211.9m(3). The reasoning in *Harrow* supports the Court of Appeals' conclusion in this case that the board appearance requirement in MCL 211.9m(3) was waivable and not a bar to the Tax Tribunal exercising its jurisdiction.

This interpretation also aligns with the Legislature's intent in adopting the EMPP exemption in 2014. Michigan sought to "make the state a more attractive place for businesses to invest and grow"[36] and so began phasing out certain property taxes on manufacturers. To encourage manufacturers to invest and grow in Michigan, the state adopted the EMPP exemption, exempting 100% of the personal property used at a business predominantly used for manufacturing. MCL 211.9m. The flexibility provided in MCL 211.9m by purposefully leaving out a reference to "jurisdiction" aligns with the Legislature's intent to openly encourage manufacturing in Michigan by exempting all personal property in a manufacturing facility.

[36] See the Michigan Economic Development Corporation, *Services / Incentives & Taxes*, Praxis's COA Brief on Appeal, p. 1, n 1.

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F. The Administrative Procedures Act also supports the Court of Appeals holding that Praxis could bypass the board of review.

The Tax Tribunal Rules do not contemplate what happens if a taxpayer's board appearance is compromised by a deficient notice. If an applicable tribunal rule does not exist, the Administrative Procedures Act, 1969 PA 306, MCL 24.201 *et seq.*, applies. MTTR 792.10215. Under MCL 24.301, "[a] preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy."

Here, the assessor's Denial is the "preliminary" action generally "not immediately reviewable." The assessor's Denial, however, did not comply with MCL 211.9m and/or due process requirements, and so a board of review appeal did "not provide an adequate remedy." MCL 24.301. "Exhaustion of administrative remedies is not an inflexible condition precedent to judicial consideration, however, and will not be required if review of the agency's final decision would not provide an adequate remedy, MCLA 24.301 [], *i.e.*, if it would run counter to the policies which underlie the doctrine." *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981), quoting *IBM*, 75 Mich App at 610. See also *Saginaw v Herberg*, 117 Mich App 173, 178; 323 NW2d 640 (1982).

MCL 24.301 has been invoked as a means for the Tribunal to have jurisdiction without a protest to the board, not necessarily because notice was deficient, but because the board appearance would have been futile. *Manor House Apartments v City of Warren*, 204 Mich App 603, 605-606; 516 NW2d 530 (1994). In *Manor House*, the taxpayer disagreed with an annual property tax assessment but instead of protesting to the board of review, the taxpayer appealed directly to the Tax Tribunal. *Id*. at 604. The Court of Appeals agreed with the taxpayer that an appeal to the board of review would have been futile. *Id*. at 605-606. The Tax Tribunal erred in dismissing the case as

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it deprived the taxpayer of procedural due process even though a protest to the board of review was required, and the taxpayer did not appear before the board. *Id*. at 605 (citation omitted).

Similarly, in *Ass'n of Little Friends, Inc v Escanaba*, 138 Mich App 302, 305; 360 NW2d 602 (1984), the taxpayer filed an appeal of an exemption denial directly to the Tax Tribunal without first protesting to the board. The Court held that even though MCL 205.735(1) required the taxpayer to first appear before the board, it would have been futile and therefore was not required. *Id*. at 311. The taxpayer had appeared before the board the year before, and the board denied the taxpayer's exemption claim. *Id*. at 305. The Court held, "it is reasonable to assume that the board's finding that petitioner was not entitled to tax-exempt status in one year would not be reversed in a subsequent year . . . ." *Id*. at 311. The Tax Tribunal had jurisdiction, even though the taxpayer did not even attempt to appear before the board. *Id*. See also *Nomads, Inc v Romulus*, 154 Mich App 46, 58-59; 397 NW2d 210 (1986) (the Tax Tribunal had jurisdiction even though the taxpayer did not protest an assessment of lessee-user tax); *Garratt v Oakland Twp*, an unpublished opinion per curiam of the Court of Appeals, issued January 26, 2012 (Docket No. 300136),[37] at *8-11 (the Tax Tribunal had jurisdiction even though the taxpayer did not protest the denial of a principal residence exemption to the board of review, because such a protest would have been futile, when the board denied the exemption in the previous year).

In addition to futility, *Turner* noted two other reasons for bypassing the board of review:

> (1) where the party assessed has no notice of the assessment; or
>
> (2) where local officials have committed constructive fraud.

Turner, 108 Mich App at 106-13. These are judicially-created reasons handled on a case-by-case basis, and so the list is potentially not exhaustive.

[37] See COA Supp. App. DD, p. 220a, for a copy of the *Garratt v Oakland Twp* opinion.

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In this case, the actions of the Township's assessor led Praxis to submit a letter appeal to the board on March 10. To the extent the Township asserts Praxis' protest was not timely (which it cannot – and should not – given its multiple newspaper publications stating otherwise), Praxis' appearance before the board was excused under MCL 24.301 as Praxis would be denied an "adequate remedy." Considering all the facts and circumstances in this case, the only adequate remedy, that honors Praxis's right to due process, is to allow Praxis to bypass the board of review.

This result does not undermine the rule that a party must exhaust administrative remedies first. Rather, it puts some of the burden on the taxing authority to do what they are required to do under MCL 211.9m and/or constitutional due process. If the taxing authority fails to comply, there must be a consequence. Additionally, the taxing authority must follow its own published guidance on how and when taxpayers were to protest to the board of review; so too should there be a consequence when the taxing authority ignores its own published statements.

III. Answer to Question 3: The Tax Tribunal can exercise jurisdiction over this case.

A. Standard of review.

Whether the Tax Tribunal has jurisdiction is a question of law reviewed de novo. *Hillsdale Co Senior Servs v Hillsdale Co*, 494 Mich 46, 51; 832 NW2d 728 (2013), citing *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013).

B. Introduction.

The Court of Appeals may require the Tax Tribunal to exercise jurisdiction over a property tax case on remand. This Court need not determine whether the Tax Tribunal was authorized to exercise jurisdiction over the case when first filed by Praxis, because the Tax Tribunal dismissed the case in lieu of exercising its jurisdiction. Instead, the issue is whether the Court of Appeals may require the Tribunal to exercise jurisdiction on remand and review Praxis's exemption claim. And the answer to that question is "yes." *W & E Burnside, Inc*, 402 Mich at 950l; *Spranger*, 308

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Mich App at 482-83; and *Parkview Memorial Ass'n*, 183 Mich App at 119-121. Indeed, when the Court of Appeals remands a tax exemption case to the Tax Tribunal, the Tribunal has no choice but to exercise jurisdiction and review the exemption claim de novo under MCL 205.735a(2).

C. Tax Tribunal jurisdiction in general.

The Tax Tribunal has "exclusive and original jurisdiction" under MCL 205.731 over the following:

> (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 the property tax laws of this state.
>
> (b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state. . . .
>
> (e) Any other proceeding provided by law.

"The tribunal's jurisdiction is based either on the subject matter of the proceeding (*e.g.*, a direct review of a final decision of an agency relating to special assessments under property tax laws) or the type of relief requested (*i.e.*, a refund or redetermination of a tax under the property tax laws)." *Wikman v Novi*, 413 Mich 617, 631; 322 NW2d 103 (1982). The Tax Tribunal has jurisdiction: this is a proceeding for the direct review of the assessor's denial, which is final and not subject to further appeal [MCL 205.731(a)] and for a refund of property tax [MCL 205.731(b)].

The question posed by the Court is whether the Tax Tribunal may *exercise* this jurisdiction.

D. The Tax Tribunal must exercise its jurisdiction when compelled to do so on remand by the Court of Appeals.

Appellate courts have consistently held that where a due process violation impacted the taxpayer's ability to appear before the board of review, the taxpayer's appearance is excused, and the Tax Tribunal has jurisdiction to consider the taxpayer's property tax appeal on remand. *W & E Burnside, Inc*, 402 Mich at 950l; *Spranger*, 308 Mich App 477 at 484-85; and *Parkview Memorial*

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Ass'n, 183 Mich App at 119-121. See also *Highland-Howell Dev Co, LLC* (holding the "Tax Tribunal shall assume subject matter jurisdiction over [the] petitioners' assessment disputes").

MCL 205.731 sets forth the jurisdiction of the tribunal; in contrast, MCL 205.735a is not "a limitation on subject-matter jurisdiction" but, rather, contains "procedural requirements for perfecting an appeal in the Tax Tribunal." *Parkview Memorial Ass'n*, citing *W & E Burnside, Inc*, 402 Mich 950l. The Court in *Parkview Memorial Ass'n* remanded the case to the Tax Tribunal, stating the "Tax Tribunal shall assume subject matter jurisdiction over [the] petitioners' assessment disputes." *Id*. at 121-122.

Spranger, 308 Mich App at 484-85, provides a novel and nuanced discussion regarding the Tax Tribunal's jurisdiction on remand. In *Spranger*, the Court of Appeals held that the Tribunal did not initially have jurisdiction to consider the constitutional question regarding whether the board of review's deficient notice regarding the exemption claim hearing. *Id*. at 484 citing *WPW Acquisition Co v City of Troy (On Remand)*, 254 Mich App 6, 8; 656 NW2d 881 (2002). The Court, however, held the "only available remedy" was for the case to be remanded to the Tax Tribunal. *Id*. at 484. On remand, exercising its de novo review under MCL 205.735a(2), "the Tax Tribunal will be in a position to cure the earlier constitutional error by providing petitioner with the procedural due process that she was denied." *Id*. at 484-85, citing *Johnston v Livonia*, 177 Mich App 200, 207-208; 441 NW2d 41 (1989) and *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988). The Court remanded the "matter to the Tax Tribunal for an independent consideration de novo of petitioner's request for a poverty exemption under MCL 211.7u for tax year 2012." *Id*. at 485.

In other words, the Court in *Spranger* held the Tax Tribunal could not consider whether the taxpayer's due process rights were violated, but the Court of Appeals could make such a

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determination. And upon making such a determination, the Court of Appeals remedied the due process violation by remanding the case to the Tax Tribunal to consider the taxpayer's exemption claim de novo, allowing the taxpayer to supplement the exemption application and to present new evidence. *Id*. at 485. There is no question the Tax Tribunal, on remand, may exercise its jurisdiction to review an exemption decision under MCL 205.731(a) which is also a refund request under MCL 205.731(b).[38]

Here, the Court of Appeals properly considered and disposed of the constitutional questions, determining Praxis's due process rights were violated. With those constitutional issues resolved and remedied, the Tax Tribunal may exercise its jurisdiction – indeed must exercise its jurisdiction (as ordered to do so by the Court of Appeals) – on remand to review Praxis's exemption claim, a matter that clearly falls within the Tax Tribunal's jurisdiction under MCL 205.731. The Court of Appeals decision in this case to reverse and remand to the Tax Tribunal to consider Praxis's exemption claim is supported by the Supreme Court's decision in *W & E Burnside, Inc*, the Supreme Court's decision in *Highland-Howell Dev Co, LLC*, the Court of Appeals published decision in *Spranger*, and the Court of Appeals published decision in *Parkview Memorial Ass'n*.

[38] With the constitutional questions resolved by the Court of Appeals, the Tax Tribunal is authorized to exercise its jurisdiction on remand over the exemption claim. There is case law that supports the Tax Tribunal did have jurisdiction to consider the constitutional questions first posed by Praxis on summary disposition. See discussion at pp. 38-40 in Praxis's COA Brief on Appeal. The question, however, of whether the Tax Tribunal had jurisdiction to resolve the constitutional questions when the case was first filed does not need to be reached by this Court, as the Court of Appeals had jurisdiction to resolve those constitutional questions and to remand the case to the Tax Tribunal to resolve the property tax exemption question.

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Conclusion

Praxis respectfully requests that this Court deny the Township's Application for Leave.

Date: June 11, 2024

Respectfully submitted,

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Certificate of Compliance

Pursuant to MCR 7.212(B)(3), I hereby certify that there are 12,106 words in Petitioner-Appellee's Supplemental Brief, including headings, footnotes, citations and quotations contained in the Introduction, Pertinent Facts, Argument, and Conclusion sections of its Brief.

/s/ Jackie J. Cook
Jackie J. Cook