STATE OF MICHIGAN

COURT OF APPEALS

OSHTEMO CHARTER TOWNSHIP,

Petitioner-Appellant,

v

KALAMAZOO COUNTY & KALAMAZOO COUNTY BOARD OF COMMISSIONERS,

Respondents-Appellees.

FOR PUBLICATION
September 30, 2021
9:00 a.m.

No. 355634
Tax Tribunal
LC No. 19-003982-TT

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

SHAPIRO, J.

The Headlee Amendment provides that a local unit of government may not levy a tax without voter approval unless the tax was authorized at the time of Headlee's ratification in 1978. At that time, Michigan law permitted general law townships to levy property taxes at a rate not greater than one mill, while charter townships were permitted to levy property taxes up to five mills.[1] When Headlee was adopted, petitioner was a general law township, but in 1979 it became a charter township by resolution of the township board.[2]

In 2019, petitioner determined that its property tax rate, which was .9703 mills, was insufficient to service the needs of its 24,000 residents, and its Board passed a resolution requesting

[1] See MCL 211.211(d) (governing general law townships), as amended by 1978 PA 359; MCL 42.27 (governing charter townships), as amended by 1976 PA 90. These statutory limitations have not been changed to date. See MCL 211.211(4); MCL 42.27(2).

[2] A township having a population of 2,000 or more may incorporate as a charter township. See MCL 42.1(2). Eligible townships may incorporate by a majority vote of the electors. MCL 42.2. In 1976, the Charter Township Act was amended to allow the township board to adopt a resolution of intent to approve incorporation, subject to the electors' right of referendum. See MCL 42.3a(2)(b), as enacted by 1976 PA 90.

that the Kalamazoo County Board of Commissioners allow it to levy an additional .5 mills for general tax purposes.[3] The Board of Commissioners denied the request, relying on an opinion from the Attorney General, OAG 1985-1986, No. 6285 (April 17, 1985), p 46, concluding that charter townships that incorporated after the Headlee Amendment was ratified remain limited to the millage rate for general law townships as provided by the Property Tax Limitation Act, MCL 211.201 *et seq*., unless a higher tax rate was approved by a vote of the township electors. Petitioner appealed to the Michigan Tax Tribunal (MTT) seeking a ruling that it could levy up to five mills for general tax purposes pursuant to MCL 42.27(2) of the Charter Township Act, MCL 42.1 *et seq*. The MTT, relying primarily on the Attorney General opinion, rejected petitioner's arguments and petitioner appealed to this Court.[4]

The question before us, therefore, is whether petitioner remains limited to the tax rate for general law townships because it was a general law township at the time Headlee was adopted or whether, having later become a charter township, the relevant limit on its taxing authority is the limit applicable to charter townships at the time Headlee was adopted. We conclude that the Attorney General opinion is inconsistent with later-decided caselaw from the Michigan Supreme Court and that petitioner may levy the charter township millage rate. Accordingly, we conclude that the MTT made an error of law and reverse its judgment.[5]

I. ANALYSIS

The primary objective when interpreting constitutional provisions "is to realize the intent of the people by whom and for whom the constitution was ratified." *Toll Northville LTD v Twp of Northville*, 480 Mich 6, 11; 743 NW2d 902 (2008) (quotation marks and citation omitted). The "common understanding" of a constitutional provision is typically discerned "by applying each term's plain meaning at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). Courts "may also consider the circumstances surrounding the adoption of the provision and the purpose sought to be accomplished by the provision." *Taxpayers for Michigan Constitutional Government v Michigan*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket Nos. 160658, 160660); slip op at 7.

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[3] Petitioner also requested a proposed road millage levy of .5 mills, which was also denied by the Board of Commissioners. The MTT reversed this decision, holding that the proposed road millage was authorized by law pursuant to MCL 247.670. Respondents did not cross-appeal that decision, and therefore the road millage will not be further addressed.

[4] The Michigan Townships Association has filed an amicus brief in support of petitioner's position on appeal.

[5] If fraud is not alleged, the MTT's decision is reviewed "for misapplication of the law or adoption of a wrong principle." *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). This Court reviews de novo questions of law. *Foster v Van Buren Co*, 332 Mich App 273, 280; 956 NW2d 554 (2020).

"The Headlee Amendment added §§ 25 through 34 to Article 9 of the Michigan Constitution." *Michigan Ass'n of Home Builders v Troy*, 504 Mich 204, 208 n 3; 934 NW2d 713 (2019). This case specifically concerns Section 31 of the Headlee Amendment, which provides in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const 1963, art 9, § 31.]

"The plain language of art 9, § 31, excludes from its scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified." *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000).

In *American Axle*, 461 Mich at 357, the Supreme Court approved a line of Section 31 cases from this Court standing for the proposition "that the Headlee exemption of taxes authorized by law when the section was ratified permits the levying of previously authorized taxes even where they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date." Petitioner argues that this case falls squarely within this formulation of the "authorized by law" exemption. We agree.

American Axle observed that "[i]n several cases, changes in circumstances after the ratification of Headlee have been found to make levy of taxes constitutional where, without those changed circumstances, the increases would have been forbidden." *Id*. For our purposes, the most instructive case is *Saginaw Co v Buena Vista Sch Dist*, 196 Mich App 363; 493 NW2d 437 (1993). In that case, the county voters had approved property tax limitations in 1974 generally limiting school districts to 9.05 mills but allowing districts located entirely within one city or charter township to levy an additional mill. *Id*. at 364. In 1990, the defendant-school district redrew its borders so that it was located entirely within one charter township. *Id*. at 365. This Court held that the district could levy the higher millage without voter approval:

> The Headlee Amendment requires voter approval only if a unit of local government wants to impose taxes at a rate higher than that authorized by law at the time of its adoption. Const 1963, art 9, § 31. In 1978, school districts in Saginaw County located entirely within a charter township were authorized by law to levy taxes at a rate of 10.05 mills. We find that, because it is now located entirely within Buena Vista Charter Township, defendant's tax rate of 10.05 mills is not above the rate authorized by law at the time the Headlee Amendment was ratified. The category of school district into which defendant now fits existed in 1978, the tax in question was authorized by law (it was not a new kind of tax), and the rate (10.05 mills) was an authorized rate. *When defendant's geographical configuration changed, it then became eligible to tax according to the applicable preexisting tax structure*. Furthermore, before the Headlee Amendment, a simple rearrangement of boundaries would have empowered the defendant to increase the tax from 9.05 to 10.05 mills. That is all that occurred post-Headlee. Therefore, no voter approval

> was required for defendant to raise its millage to 10.05 mills. [*Id*. at 366 (emphasis added), quoted in *American Axle*, 461 Mich at 358-359.]

We agree with petitioner that *Saginaw Co* is highly analogous to the instant case. As in *Saginaw Co*, the tax in question was authorized by law when Headlee was ratified. Further, townships were able to incorporate as charter townships by resolution in 1978, and had petitioner's resolution to incorporate become final before Headlee was ratified, it could have levied a charter millage without voter approval. But, like *Saginaw Co*, the necessary change in circumstances for petitioner to levy the disputed tax did not occur until after 1978. When that change occurred, the charter township millage rate was not a "new" tax, but a previously authorized one that petitioner was now eligible to levy.

Respondents argue that *Saginaw Co* does not control the outcome here because there is a difference between changing the boundaries of a school district (which authorized an additional mill in taxes) and a change of structure from a general law township to a charter township (which allows a tax increase of about four mills). Respondents fail to explain, however, why these are *material* distinctions such that a different result is warranted.[6] The question is simply whether the tax was authorized by law when Headlee was ratified; the amount of the tax and the nature of the changed circumstances making it applicable are not relevant to that inquiry.

Similarly, the MTT did not adequately explain its conclusion that this case is distinguishable because a township incorporating as a charter township by resolution is not a "mere" change in circumstances. We agree with the amicus brief that this creates an arbitrary standard to determine whether the requirement of voter approval applies in these types of Section 31 cases. More important, it deviates from the clear standard established by *American Axle* that a tax is exempt from the requirement of voter approval if there was pre-Headlee authority for the tax and the local unit of government is eligible to levy the tax because of a post-Headlee change in circumstances. See *American Axle*, 461 Mich at 357. Any other consideration is not relevant to whether the tax was authorized by law when Headlee was ratified, which is all that the exemption requires.

The MTT also relied on the fact that *Saginaw Co* distinguished that case from the Attorney General opinion addressing the question at issue in this case:

> The two opinions of the Attorney General plaintiff cites, OAG, 1985-1986, No 6285, p 46 (April 17, 1985), and OAG, 1989-1990, No 6588, p 149 (June 16, 1989),[7] deal with a quite different situation, the effect of a township becoming a

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[6] Respondents also argue that *Saginaw Co* is distinguishable because the voters in that case had approved the property tax rates and "so Headlee's requirement of voter approval had been met." But *Saginaw Co* did not hold that the electorate's approval of the tax rates satisfied Headlee's voter-approval requirement. Rather, this Court held that the disputed tax did not require voter approval. *Saginaw Co*, 196 Mich App at 439.

[7] In OAG 1989-1900, No. 6588, the Attorney General addressed a derivative question based on the conclusion in OAG 1985-1986, No. 6285, that charter townships like petitioner are limited to

> charter township. Such a change exposes property owners to a new category of taxes. [*Saginaw Co*, 196 Mich App at 365.]

As the MTT recognized, this statement is nonbinding dicta because it was not necessary to this Court's resolution of the question before it. See *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13, 21 n 15; 857 NW2d 520 (2014). Nor was this statement referenced or adopted in *American Axle*. See *American Axle*, 461 Mich at 358-359. Nonetheless, the MTT was persuaded that a change from a general law township to a charter township allows a township to levy "new taxes." But no explanation has been offered for why the tax in this case should be considered "new," while the one in *Saginaw Co* should not. In both cases, the local unit of government "became eligible to tax according to the applicable preexisting tax structure" after a post-Headlee change in circumstances. *Saginaw Co*, 196 Mich App at 366. The increased millage rate in *Saginaw Co* was not a "new kind of tax" because it was authorized by law at the time of Headlee's ratification. See *id*. The same is true of the charter township millage rate.[8]

As for the opinion of the Attorney General, we decline to follow it for several reasons.[9] See *Mich Ed Ass'n Political Action Comm v Secretary of State*, 241 Mich App 432, 441-442; 616 NW2d 234 (2000) ("[O]pinions by attorneys general do not constitute binding authority."). First, *American Axle* is binding precedent that postdates OAG 1985-1986, No. 6285. *American Axle* did not address the precise question at issue in this case, but for the reasons discussed its adoption of caselaw from this Court and its guidance on when the "authorized by law" exemption applies controls the outcome here. Second, while it was appropriate for the Attorney General to consider that Headlee arose from a "tax revolt" and that a constitutional provision should be interpreted in a way that effectuates its purpose, see *Lockwood v Comm'r of Revenue*, 357 Mich 517, 557; 98

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the general township millage rate. But only OAG 1985-1986, No. 6285, substantively addressed the question currently before this Court.

[8] *American Axle* also approved of our decision in *Smith v Scio Twp*, 173 Mich App 381; 433 NW2d 855 (1988), in which the township electorate passed two proposals, one to incorporate as a charter township and a second to limit its millage authority to the level of a general law township. *Id*. at 384-384. This Court held that specific voter approval for the charter township millage rate was not required and that the electorate could not limit the charter township's taxing authority. *Id*. at 388-391. Although this case concerned a related subject matter, it did not address—either directly or by analogy—the question before us, which concerns the application of Headlee when the charter township incorporates by resolution rather than by vote of the electorate. Thus, both parties' reliance on this case is misplaced. See *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016) (explaining that to derive a rule law from the facts of a case "when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture.").

[9] Petitioner's argument that the MTT improperly relied on extrinsic evidence by considering the Attorney General opinion is without merit. Extrinsic evidence may not be considered when a constitutional provision is unambiguous. *Nat'l Pride At Work, Inc v Governor of Michigan*, 481 Mich 56, 80; 748 NW2d 532 (2008). But an opinion of the Attorney General is not extrinsic evidence; it is opinion on a question of law that is properly considered by courts.

NW2d 753 (1959), the Attorney General seemed to presume that any post-Headlee tax increase requires voter approval. See OAG 1985-1986, No. 6285, p 49. This ignores, however, that "[t]he plain language of art 9, § 31, excludes from its scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified." *American Axle*, 461 Mich at 362. In other words, the fact that the disputed tax will result in increased taxes is not dispositive; it must be first examined whether the tax was "authorized by law" when Headlee was ratified, which the Attorney General failed to adequately consider.

Finally, the Attorney General's conclusion that charter townships like petitioner remain general law townships for taxing purposes is inconsistent with the statutory acts governing township taxing authority. The Charter Township Act provides the millage rates for charter townships, MCL 42.27(2); *Bailey v Charter Twp of Pontiac*, 138 Mich App 742, 743-744; 360 NW2d 621 (1984), and the Property Tax Limitation Act controls the millage rate for general law townships, MCL 211.211(4). The Property Tax Limitation Act specifically excludes charter townships from its scope: "The [county tax allocation] board shall approve minimum tax rates . . . for townships *other than charter townships*, of 1 mill[.]" MCL 211.211(4) (emphasis added). Accordingly, there is no statutory basis for a charter township to continue as a general law township for taxing purposes. In contrast, our holding that petitioner may levy a charter millage has the benefit of harmonizing Headlee with the statutory acts because the taxing authority for all charter townships will be governed by the Charter Township Act.[10]

II. CONCLUSION

The MTT erred by concluding that petitioner may not levy a charter millage. Binding caselaw from the Supreme Court establishes that the tax at issue in this case falls within Section 31's "authorized by law" exemption. We decline to follow the nonbinding Attorney General opinion that predated the Supreme Court caselaw.

Reverse and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs because a public question is involved.

/s/ Douglas B. Shapiro
/s/ Jane M. Beckering
/s/ Brock A. Swartzle

[10] We note that MCL 42.27(2) does not require charter townships to levy the full charter millage of five mills, but rather limits the township to that rate without voter approval. And if a township board chooses to increase its millage rate, the township voters can express their approval or disapproval at the next election.