STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals,
Peter D. O'Connell (Presiding Judge), Patrick M. Meter, and Michael F. Gadola

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CLAM LAKE TOWNSHIP, a Michigan general law township; and HARING CHARTER TOWNSHIP, a Michigan charter township,

Appellants,

v

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS (THE STATE BOUNDARY COMMISSION), a state administrative agency; TERIDEE LLC, a Michigan limited liability company; and, THE CITY OF CADILLAC, a Michigan home rule city,

Appellees.
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Supreme Court Docket No. 151800

Court of Appeals Case No. 325350

Wexford County Circuit Case No. 14-25391-AA
Honorable William M. Fagerman

State Boundary Commission Docket 13-AP-2

APPELLANTS' REPLY BRIEF IN RESPONSE TO APPELLEE'S BRIEF OF THE STATE BOUNDARY COMMISSION

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Clam Lake Township and Haring Charter Township (the "Townships") submit this Reply Brief, pursuant to MCR 7.312(E)(3), in rebuttal to the Brief filed by Appellee, the State Boundary Commission ("SBC").

REPLY ARGUMENTS

I. THE TOWNSHIPS HAVE STANDING TO APPEAL

For the first time in this proceeding, the SBC argues that the Townships do not have standing to assert their appeal. SBC Brief at pp. 7-12. The SBC is legally incorrect in this respect. The fundamental error made by the SBC is that it attempts to artificially conflate the two distinctly different types of decisions the SBC made in this matter, in an attempt to falsely characterize the Townships' appeal as being nothing more than an appeal of an annexation decision. *Id*. In truth, however, the Townships are appealing two separate SBC decisions made under two separate statutes, one of which has nothing to do with approving an annexation petition: (1) the SBC invalidated the contract the Townships entered under Act 425, and (2) the SBC approved an annexation petition under the State Boundary Commission Act.[1] The Townships' appeals of these two different decisions give rise to completely different standing inquiries, which are addressed separately below.

A. The Townships Have Standing to Challenge The Invalidation of Their Contract

At the most basic level, Clam Lake and Haring are simply two parties that have entered a binding contract, through which they have exchanged valuable consideration: (a) Haring will provide public water and sewer services to the Transferred Area and otherwise perform all governmental services to the Transferred Area for a period of 20 years, in exchange for, *inter alia*, the tax revenue

[1] That these are distinct and independent decisions is made clear by the fact that, when the SBC invalidated the Townships' 2011 Act 425 Agreement, it nonetheless denied TeriDee's identical annexation petition at the same time. Appendix, 1118a. Thus, the SBC's decision to invalidate an Act 425 agreement has no necessary correlation with the question of whether it will or will not approve an annexation petition covering the same lands. And this must necessarily be the case, because the minimum statutory requirements for an Act 425 agreement are not even remotely similar to the criteria that the SBC must consider when evaluating an annexation petition.

generated from the Transferred Area for that same period, and (b) Clam Lake will thereafter receive the enhanced tax revenues that are generated from the Transferred Area as a result of its taxable value having been substantially increased by (i) the provision of Haring sewer and water services and (ii) the interim construction of the high-quality development that is promoted by the Agreement's economic development plan – neither of which Clam Lake could accomplish on its own because of its lack of public services and lack of zoning authority. And so what the SBC has done in this case, by invalidating the Agreement, is to deprive two contracting parties of all of the benefits and valuable consideration they expected to receive by entering their contract.

In this correctly-viewed context, it is unquestionable that the Townships have standing to appeal the SBC's invalidation of the Agreement. It is axiomatic that a party to a contract has standing to seek relief based upon adverse action suffered under that same contract. *Clark v Dalman*, 379 Mich 251, 260; 150 NW2d 755 (1967). And this is true, whether the Court applies the prudential standing doctrine reflected in *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), or the overruled constitutional standing doctrine reflected in cases such as *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 629 NW2d 900 (2001). This is so because, (a) there is an actual controversy between the parties as to the validity of the Agreement and the SBC's authority to invalidate it, thus satisfying the prudential standard (*Lansing Schools* at 372, citing MCR 2.605), and (b) the SBC has already directly imposed a concrete and particularized injury on the Townships by invalidating their Agreement and denying them the benefits thereof, and that injury would be immediately redressed by a favorable decision, thus satisfying *Lee's* constitutional standard. *Lee* at 739. Thus, no matter what "standing" doctrine is applied, the Townships have standing to appeal the SBC's decision to invalidate the Agreement.

B. The Townships Have Standing to Appeal The Annexation Decision

The Townships also have standing to appeal the separate aspect of the SBC decision that

approved the annexation petition. The Legislature has expressly created a cause of action to appeal *every* annexation decision made by the SBC. *See* MCL 123.1008.[2] Importantly, when expressly creating this cause of action, the Legislature did not impose any special standing requirements, but instead only specified that the "manner" of appealing would be through the *procedures* specified by the Michigan APA.[3] With this cause of action having been expressly created by the Legislature, the Townships satisfy the prudential standing test. *See Lansing Schools* at 372 ("[A] litigant has standing whenever there is a legal cause of action").

If the Court instead used this case as an opportunity for overruling *Lansing Schools* and reinstituting the *Lee* test[4], the analysis would admittedly be different, inasmuch as the Court, when applying *Lee*, has held that the Legislature cannot create a cause of action that grants standing to "any person." *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007). But the SBC's standing analysis is nonetheless still flawed under the *Lee* criteria. The flaw is two-fold. First, the SBC articulates no basis for overruling the most recent decisions of the Court that have expressly recognized that municipalities may appeal SBC annexation decisions that affect their jurisdictional boundaries. *See*, e.g., *Twp of Union v SBC*, 432 Mich 873; 435 NW2d 752 (1989); *Shelby Charter Twp v SBC*, 425 Mich 50; 387 NW2d 792 (1986). Second, the SBC fails to recognize that the primary decision it relies upon to challenge the Townships' standing, *Midland Twp v SBC*, 401 Mich 641; 259 NW2d 326 (1977), actually made a substantive decision about whether the SBC's "procedures, rulings and determinations . . . were

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[2] "*Every* final decision by the commission shall be subject to judicial review in a manner prescribed in [the Michigan Administrative Procedures Act, MCL 24.201, *et seq*.] [Emphasis added].

[3] *See Webster's Ninth New Collegiate Dictionary* (1986) (defining "manner," in relevant part, as being "a mode of procedure."); *see* also, *American Heritage Dictionary* (4th ed) (defining "manner," in relevant part as "[a] way of doing something . . . synonym at 'method'").

[4] This would not be appropriate at this juncture, because the Court has neither allowed the parties to brief this controversial issue nor invited interested members of the legal community to weigh-in through amicus participation.

consistent with constitutional and statutory requirements" (*id*. at 674), and thus recognized that the appellant-township had standing to challenge the contested annexation decision that had altered its municipal boundaries. The SBC has not articulated any cognizable basis for overruling *Twp of Union*, *Shelby Twp* or *Midland Twp*, and so the Court should not accept its empty invitation to do so.

II. THE SBC TACITLY ADMITS THAT THE SBC HAS NO JURISDICTION TO INVALIDATE ACT 425 AGREEMENTS

The SBC argues that it has jurisdiction to invalidate Act 425 agreements. SBC Brief at pp. 14-18. But in doing so, the SBC ends up tacitly admitting that such jurisdiction does not exist. This is made evident by the fact that the SBC cannot identify a single provision of Act 425 which even mentions the SBC – yet alone grants it any authority to administer or apply the statute in any fashion. *Id*. This tacit admission needs to be juxtaposed against the settled law that has been established by this Court for over a century, which is that any authority an agency exercises must be *expressly* granted by the Legislature, by way of clear and unmistakable statutory language. *See*, e.g., *Eikhoff v Detroit Charter Comm*, 176 Mich 535, 540; 142 NW 746 (1913); *Czymbor's Timber, Inc v City of Saginaw*, 478 Mich 348, 356; 733 NW2d 1 (2007).[5]

But being undeterred by this venerable body of controlling law, the SBC argues that, despite the complete absence of statutory authority, it should nonetheless have jurisdiction to invalidate 425 agreements because of the "wisdom" of such an outcome. SBC Brief at p. 17.[6] The Court has

[5] The SBC erroneously cites *In re Quality of Service Standards*, 204 Mich App 607 (1994) for the incorrect proposition that agencies can have any type of implied powers that are "necessary or fair." That case does not so hold. It holds only that an agency may have implied *rulemaking authority* under a statute that otherwise expressly grants the agency authority. That principle has no applicability here, where it is undisputed that the SBC has no express authority under Act 425.

[6] The SBC also argues that it would be "impossible" for petitioners, like TeriDee, to initiate a declaratory action in court to determine the validity of an Act 425 agreement. SBC Brief at p. 17. The SBC cannot truly be serious about this. Since when did it become "impossible" to have a court determine the validity of a contract? This type of ludicrous position serves to demonstrate just how desperate the SBC is to ensure that it retains the authority to reject *every* Act 425 agreement that might interfere with its subjective belief that annexation is a better option.

consistently rejected this type of jurisprudence, where the judiciary would serve as an uber-policymaker to the Legislature – making sure that statutes are re-written, under the guise of interpretation, so as to be "wiser" or "more logical." *People v McIntire*, 461 Mich 147, 155, 159; 599 NW2d 102 (1999). *See* also, *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004). As Justice Young has eloquently explained, somewhat more recently:

> It is not the role of this Court to rewrite the law so that its resulting policy is more "logical," or perhaps palatable, to a particular party or the Court . . . If defendants prefer an alternative policy choice, the proper forum is the Legislature, not this Court. *Twp of Casco v Sec of State*, 472 Mich 566, 603; 701 NW2d 102 (2005) (Young, J., concurring and dissenting).

The Court should therefore reject the SBC's request to endow it with jurisdiction over Act 425 agreements, under the guise of making Act 425 reflect a "wiser" policy choice. The Legislature has made the clear choice that the SBC should have *nothing* to do with Act 425 agreements, and so the Court should enforce that intention by reversing the SBC's decision in this matter.

III. THE AGREEMENT'S ECONOMIC DEVELOPMENT PROJECT IS VALID

The SBC criticizes the economic development project of the Townships' Agreement, as reflected in Art. I, §3 thereof, characterizing these provisions as "empty, circular recitals" that are invalid because they do not reflect the exact "project" that TeriDee has expressed a desire to build. SBC Brief at p. 19. This shows a conspicuous lack of understanding of Act 425's basic provisions.

Nowhere in Act 425 does it state that the economic development plan must be designed to meet the specific demands of a particular developer or real estate speculator, such as TeriDee. Private developers are not even mentioned in Act 425. Instead, the economic development project is to be developed based on the "established city, village, township, county, or regional land use plan." MCL 124.23(c). This is exactly how the Townships' Agreement is designed, but in the preposterous regulatory scheme created by the SBC, consistency with the regional land use plan is a "sham" (SBC Brief at p. 20), whereas violating the regional land use plan through annexation is something to be

encouraged.[7]

On this same theme, the SBC's insistence that an Act 425 agreement allow the precise land use a private developer wants ignores Act 425's definition of "economic development project." Act 425 generically defines an "economic development project" as being "planned *improvements* *suitable for use by* an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water." MCL 123.21(a) [emphasis added]. Thus, the focus of Act 425 is not on identifying or designating a specific land use. Instead, the statute's focus is on providing specific municipal "improvements," such as municipal sewer and/or municipal water, that *can be used by* an "industrial or commercial enterprise, or housing development" and which will otherwise "protect . . . groundwater or surface water." And that is exactly what the Townships' Agreement does. It provides for the extension of Haring's public sewer and public water services to the Transferred Area so that these services can be "use[d] by" a mixed-use, planned unit development consisting of "commercial enterprise" near the US-131/M-55 intersection and "housing development" on the balance of the Transferred Area. The SBC, by demanding something more specific than this, or by requiring that a landowner be allowed to do exactly what it wants to do, is re-writing Act 425 to include fictional requirements that do not exist.

And by engaging in this re-write of Act 425, the SBC is radically distorting the Legislature's intent by effectively handing over the statute's administration to private developers. As noted above, the subjective interests of developers are not even mentioned in the Act; instead, the Legislature has commanded that local units enter Act 425 agreements with an eye toward consistency with the local land use plan. MCL 124.23(c). But what the SBC has created is a regulatory scheme where a developer can reject an Agreement's economic development plan, even though the plan is consistent

[7] The circuit court expressly held that TeriDee's development plan "is contrary to regional land use plans." Appendix, 141a. The SBC has not disagreed with that holding.

with the regional land use plan, by simply saying, "That's not what I want, so I won't do it," and thereby have the SBC invalidate the Agreement on that basis. Conversely, if a developer likes an Agreement's economic development plan, then the Agreement is automatically valid, at least under the SBC's reasoning. What the SBC has done, therefore, is to abdicate to private developers the responsibility for determining whether an Act 425 agreement is valid. No longer is an Agreement's economic development project "controlled by a written contract agreed to by the affected local units," nor is it to be consistent with the "regional land use plan." MCL 124.22(1); MCL 124.23(c). Instead, if a developer likes the project, the Agreement is valid; but if a developer doesn't like the project, then the Agreement is invalid. The Court should not allow this dangerous abdication of governmental authority to continue.

Finally, the SBC is being purposefully obtuse about the content of the record when it argues that the Townships had not actually "planned" to extend sewer and water to the Transferred Area. SBC Brief at pp. 20-21. The SBC record actually reveals the following salient and *undisputed* facts:

- The Townships had been actively planning, since at least the summer of 2011 (Appendix, 1508a-1510a) to enter a joint partnership for the sharing of sewer services, and had even jointly retained the same engineer to develop this project. *Id.*, 1515a.

- The Townships' joint engineer had developed project plans and costs estimates for the extension of both sewer and water lines to the Transferred Area. *Id.*, 1214a, 1222a.

- The Townships' joint engineer ensured that the Haring water system had capacity and pressure to serve the Transferred Area, *Id.* 1215a.

- The Townships' joint engineer ensured that the new Haring WWTP was designed with capacity to serve the Transferred Area. *Id.*, 11215a-1216a.

- The Townships' joint engineer included the Transferred Area in its December 2013 Water System Reliability Study for the purpose of demonstrating to the MDEQ that adequate capacity and pressure existed in the Haring water system to serve the Transferred Area. *Id.*, 1917a-1918a. The MDEQ concurred that adequate capacity and flow existed to serve the Transferred Area. *Id.*, 1920a.

- The new Haring WWTP was placed on a construction schedule that was designed to allow TeriDee's property to have Haring sewer and water services by June 30, 2015, if TeriDee

cooperated by constructing the needed sewer and water line extensions contemporaneous with the construction of the WWTP. *Id.*, 1668a.

The SBC's purposeful refusal to acknowledge any of these undisputed facts is just another glaring example of the SBC's recalcitrance. It could not be clearer that the SBC intends to invalidate each and every Act 425 agreement it encounters, if it would interfere with its desire to instead approve an annexation. The Court should put an abrupt end to this abuse of administrative authority.

IV. THE GIFTOS E-MAILS ARE IRRELEVANT

Like the other Appellees, the SBC cannot even begin to explain how the irrelevant, uninformed personal opinions of Mr. Giftos, as reflected in his e-mails to the neighborhood opposition group, were somehow magically transformed into the official opinions of both Townships. SBC Brief at pp. 22-24. The Townships have already dealt with this subject, to a large degree, in their other reply briefs. However, the Attorney General's office is uniquely susceptible to criticism for taking this type of outrageous position. In that regard, the Court is certainly aware of the sad, ugly story of the now disgraced ex-assistant attorney general, Andrew Shirvell, who was fired by the Attorney General for spewing bigoted, hate-mongering electronic messages in his off-hours.[8] But according to the position that the Attorney General's office is now taking on behalf of the SBC in this appeal, Mr. Shirvell's hate-filled electronic messages would automatically constitute the official position of the Attorney General's office. That is an extreme example, to be sure. But it accurately points out the outright silliness of the position that is being taking by the SBC in this case, where the unsolicited e-mail comments of one member of the public are automatically attributed to elected officials. The Court should cast aside this diversionary chaff; it is irrelevant.

V. THE SBC IS SUBJECT TO COLLATERAL ESTOPPEL

The SBC unsuccessfully tries to argue in avoidance of collateral estoppel through reliance on

[8] *See Shirvell v Dep't of Attorney General*, 308 Mich App 702; 866 NW2d 478 (2005), *lv den* 498 Mich 943; 872 NW2d 220 (2015).

the Court of Appeals' recent published opinion *William Beaumont Hosp v Wass*, __ Mich App __; __ NW2d __ (Docket No. 323393, May 17, 2016). The SBC relies on *Wass* for the proposition that SBC annexation proceedings are not "adjudicative" in nature. However, a cursory review of the SBC's own rules (MAC R 123.1, *et seq*.) demonstrates that SBC annexation proceedings have nearly all of the indicia of an adjudicative proceeding, as described in *Wass*. This conclusion starts with the predicate observation that the SBC Rules expressly refer to annexation proceedings as being an "adjudicative session."[9] Rule 123.20. And the other SBC Rules support that same characterization:

- Parties have a right to present witnesses. Rule 53(1).
- Parties have a right to be represented by counsel. *Id*.
- Parties have a right to receive notice of all filings and to receive copies of the same. Rule 56(2); Rule 32(4).
- Annexation decisions are made by "order" that must include "findings of fact and conclusions of law." Rule 23.
- The parties may file "pleadings," including answers to objections, a memorandum brief on issues of fact or law, and such other pleadings as the commission may allow to be filed. Rule 34.
- Transcripts are prepared for adjudicative sessions. Rule 23; *see* also, Appendix, 276a-342a.
- The SBC Commissioners can take notice of fact (Rule 54), similar to a court (MRE 201).
- Parties may submit exhibits and briefs. Rule 56(1).

Thus, as discussed in *Wass*, SBC annexation proceedings are "[q]uasi-judical proceedings" having "procedural characteristics common to courts," placing them squarely within the confines of Michigan administrative collateral estoppel doctrine.

Moreover, the application of collateral estoppel does not conflict with MCL 117.9(6), as the SBC incorrectly argues. That statute does not affirmatively authorize anything; it is written in strictly prohibitory terms. But being undeterred by this plain prohibitory language, the SBC asks the Court to instead make the "inference" that MCL 117.9(6) exempts the SBC from collateral estoppel. SBC

[9] The SBC refers to itself as "a **quasi-judicial body adjudicating** many types of municipal boundary adjustments. . ." *See* http://www.michigan.gov/lara/0,4601,7-154-10575_17394_17565-173342--,00.html (accessed August 10, 2016). [Emphasis added].

Brief at p. 30. That is, of course, improper. *Renny v Dep't of Trans*, 478 Mich 490, 505, n36; 734 NW2d 518 (2007) (statutes are to be given explicit meaning, not inferred or implicit meaning). Consistent with the Townships' position, the Court of Appeals has recognized that MCL 117.9(6) is *not* meant to expand opportunities for submitting duplicate petitions; its purpose is just the opposite: to "prevent[] a municipality from filing repeated petitions." *Twp of St Joseph v State Boundary Comm*, 101 Mich App 407, 414; 300 NW2d 578 (1981).

And the SBC is missing the point when it attempts to justify its contrary position on the basis of its alleged 40-year history of making different decisions on resubmitted petitions. SBC Brief at p. 30. The question here is not a global one of whether the SBC can *ever* make a conflicting decision on a resubmitted petition (it can, when the material facts have changed, consistent with the collateral estoppel doctrine). The question here is whether the SBC could lawfully make a conflicting decision *in this particular situation*, where it is undisputed that (a) the first and second petitions were identical in all respects and (b) not a single material fact had changed between the first and second proceedings. Indeed, the SBC has not even tried to identify any material circumstances that had changed between the first and second petitions, because to do so would be futile. The end result is that the SBC is attempting to defend an arbitrary and capricious decision, which is the very thing that collateral estoppel is designed to prevent. The Court should intervene to stop this unlawful conduct.

REQUEST FOR RELIEF

For the additional reasons stated herein, the Townships respectfully request that this Honorable Court reverse and vacate the SBC's decisions in their entirety.

Respectfully submitted,

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Dated: August 25, 2016

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