STATE OF MICHIGAN

IN THE COURT OF APPEALS

JOHNNIE COLEMAN, DARRYL E. BUCHANAN, CITY COUNCIL OF THE CITY OF FLINT, AND SCOTT KINCAID, AN INDIVIDUAL AND PRESIDENT OF THE CITY COUNCIL OF THE CITY OF FLINT

Plaintiffs-Appellees

vs.

STATE OF MICHIGAN,

Defendant-Appellant

Court of Appeals
Docket No. 243029

Circuit Court No. 02-1017-AV

BRIEF OF AMICUS CURIAE

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INTRODUCTION AND SUMMARY

Amicus Curiae the Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership consists of 511 Michigan cities and villages, of which 430 are also members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The present case involves the Local Government Fiscal Responsibility Act (the "Act"), MCL 141.1201 et seq., a seldom-used statute that provides a variety of remedies when the state and a municipality are confronting a municipality's serious financial woes. The Act includes a grant of extraordinary powers to the Governor in a case where a municipality facing a serious financial problem has been recalcitrant in taking advantage of the expertise and technical assistance available in the Act to address the problem.

Amicus Curiae takes no position as to the conclusions reached by the Governor in the instant case. Instead, Amicus Curiae strongly urges this Court to announce that in future applications of the Local Government Fiscal Responsibility Act, future Governors must follow *all* procedural steps plainly and clearly outlined in the Act before taking the extraordinary remedy of wresting control of a local government from the hands of its electors and elected officials. In the present case, the State shortened each step and obliterated the hearing procedure in its haste to takeover the City. In doing so, it failed to allow the City of Flint and its newly appointed administration an opportunity to avert a takeover by showing its concerted efforts to timely address its financial issues.

LAW AND FACTS

The Local Government Fiscal Responsibility Act (MCL 141.1201-141.1291) sets out a clear process by which the State administration may interact with and intervene in the financial operation of a local government. The procedural steps of the Act are outlined below. By way of brief summary , it is respectfully suggested that in the present case, the State ignored or truncated many of the procedural steps the Act mandates. One such requirement, and the focus of Amicus Curiae's present brief, relates to the review hearing provided for in the Act, outlined at step nine, below.

1. One of a number of specified events causes the State Treasurer to begin a preliminary review of the financial condition of a local government. MCL 141.1212(1)

2. The State Treasurer notifies the local government in writing that he is beginning a review. MCL 141.1212(2)

3. The State Treasurer meets with the local government and "at this meeting . . . shall receive, discuss, and consider information provided by the local government concerning the existence of and seriousness of financial conditions within the local government". Id.

4. Within 30 days after beginning his preliminary review the State Treasurer informs the Governor whether or not the investigation has determined "that a serious financial problem may exist because 1 or more conditions indicative of a serious financial problem exist within the local government". Id.

5. If the State Treasurer reports to the Governor that a serious financial problem may exist, the Governor shall appoint a review team. MCL 141.1213.

6. The review team has the power to review the books and records of the local government, to use the services of other state agencies and employees, and to sign a consent agreement with the chief administrative officer of the local government, setting out a long-range financial recovery plan requiring specific local actions and enforcement. Id.

7. Within 60 days the review team is to complete its review and report to the Governor with one of three conclusions: (a) there is no serious financial problem, (b) there is a serious financial problem but the review team and the local government have reached a consent agreement containing a long-range plan to resolve the problem, or (c) a local government financial emergency exists because no satisfactory plan exists to resolve the problem. MCL 141.1214(3).

8. The Governor makes a determination based on that review and gives notice to the local government that the local government has 10 days to request a hearing conducted by the Governor or the Governor's representative. MCL 141.1215.

9. If so requested by the local government, the Governor or the Governor's representative holds the hearing. Following the hearing, the Governor either confirms or revokes the determination. And if the Governor confirms his determination, he reports the findings of fact of the *continuing* or *newly developed* conditions or events providing a basis for the confirmation of the local financial emergency. Id.

10. The local government may appeal the financial emergency determination in the circuit court of the county where it is located or in the circuit court for the County of Ingham. The standard of review for the appeal is whether the determination is "not supported by competent, material, and substantial evidence on the whole record", or "arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion." MCL 141.1217.

In alleged compliance with the Act's requirements, the State Department of Treasury issued a February 4, 2000 internal memorandum outlining a "Summary of Local Government Fiscal Responsibility Act Process." (Official Record of the Financial Review of the City of Flint ("O.R."), 2(C)). Steps One and Two of the Summary expressly eliminate the Act's requirements of notice to the local government and attendance at a meeting with the local government to "receive, discuss, and consider" information provided by the local government. See Section 12(2) of the Act, outlined as Steps Two and Three above. Steps One and Two of the Treasurer's Summary provide

simply that the Treasurer carries out the preliminary review and then reports to the Governor. Id.

In the present case, the State Treasurer apparently followed the steps outlined in the Summary rather than comporting with the steps mandated in the Act.[1] Having failed to give the required notice and to hold the required meeting, the State Treasurer failed to consider information the City of Flint has repeatedly said was available to the State Treasurer at that time – i.e., that the people of the City had recalled the mayor three weeks before commencement of the preliminary review and that the interim mayor had already initiated extreme steps to address the problems outlined in the City's financial audits.

Having failed to take that information from the City, and, indeed, even to discuss with the City whether the actions the new City officials were then taking would be effective or useful, the State Treasurer took five days to begin and end the preliminary review and gave notice to the Governor, based solely on a 6-month-old audit[2], that a serious financial problem did exist in the City of Flint.

The State Treasurer's notice to the Governor also exceeded the State Treasurer's discretion. The State Treasurer's statutory duty at this time was only to state whether "a serious financial problem *may* exist because one or more conditions *indicative of* a

[1] Our review of the Official Record did not reveal the information referred to in the opinion of the Court below that the Deputy State Treasurer might in fact have met with the City Officials during the preliminary review.

[2] Amicus Curiae notes that the information in Flint's audits was indeed indicative of an extremely serious financial problem, and that the extremity of that information may well have colored the perspective of the State Treasurer. The nature of that information should not, however, permit the State Treasurer to skip the steps required in the clear language of the Act.

serious financial problem exist within the local government." MCL 141.1212(3). By leaping to the conclusion that a financial problem existed without first permitting the Review Team to complete a thorough review of the state of affairs since the time of the audit, the Treasurer again truncated the clear procedural steps required in the Act. Thus, instead of exercising the clear statutory duty to discover whether conditions "indicative" of a serious problem existed, giving rise to a serious investigation by a review team to determine what had happened since the audit and whether any action had been taken since the audit or could be taken now by the local government to correct the conditions indicative of a serious financial problem, the State Treasurer arrogated to himself the duty to make the final conclusion before review was undertaken.

Thereafter, the Governor appointed a Review Team that began and ended its review in less than one month. In April 2002, the Review Team met on one occasion with Flint residents who had "previously issued to city officials a report and recommendations concerning operations in the Flint Finance Department". None of the residents were local government officials. (See O.R. 2(G)). The citizens' report (O.R. 2(G)), issued six months previously, on September 20, 2001, contained several recommendations to the officials who had been in charge of the City in 2001 but were ousted in March, 2002. There is no evidence in the Official Record that the Review Team heard any information of interest from those interested citizens about current events and either accepted that information, evaluated it or rejected it. There is no evidence in the Official Record that the Review Team even considered whether the new

City administration and the now empowered[3] City Council were ignoring the advice set forth in the September Report.

The Review Team also met briefly on one occasion with the newly hired Finance Director and the newly hired Budget Director of the City, and expressed as "noteworthy" the fact that "city officials failed to present any comprehensive plan to address the current financial emergency". (O.R. 1, p.5). The Review Team did not indicate to which "city officials" it was referring, but it clearly could not have been referring to these two newly hired officials without simultaneously noting that those officials had just been hired and had applied themselves immediately to the development of such a plan. Instead, the Review Team found that "it did not appear that city officials have moved with the degree of vigor commensurate with the seriousness of the existing financial condition." Id. As support for this conclusion, the Review Team noted a failure to eliminate the so-called "non-qualified deferred compensation" arrangement for non-union city employees, despite the fact that this step was in the works given that three weeks after that meeting, the City Council passed an ordinance eliminating this arrangement. (O.R. 1, pp. 5-6, n.3).

Finally, the Review Team met briefly with some of the members of the Flint City Council and with the City's auditors. Despite the fact that the budget and finance directors were newly hired, the Review Team found it "surprising" that there was a

[3] Amicus Curiae notes that the City of Flint is a "strong mayor" form of government, placing the City Council ordinarily in a position of removal from the day to day operations of the City. The recall of the former mayor early in March of 2002 released the City Council from the restraints imposed by the separation of powers contemplated in the City Charter until a replacement mayor could be elected.

difference of opinion among old City Officials regarding likely the amount of the general fund deficit for the current fiscal year ending June 30. Id., p. 6. From the information presented by the City of Flint in its attempt to have someone at the State "hear" it, this difference of opinion, had the Review Team asked a few days later, might have been found to be attributable to the difference between the steps being initiated by the new administration to halt expenditures versus the knowledge base of the old members of the City Council. Had the Review Team spent more than one day in meetings with the Council members and the new administration, it might in fact have "heard" and been able to comment on and evaluate the steps that the administration was proposing to Council and the Council's present willingness to take them. Instead, the Review Team paid no attention to the current conditions, but only to the events that had occurred in the past.

From the Review Team's Report, it is also apparent that the Review Team made no attempt to exercise the special powers granted it under Section 14(1)(c) of the Act – i.e., to develop a consent agreement with the new City administration and the clearly willing City Council that would "provide for remedial measures considered necessary including a long-range financial recovery plan requiring specific local actions." MCL 141.1214(1)(c). Interestingly and importantly, it is just this agreement and plan that would have permitted the State to have avoided a takeover of the City. Notably, section 14(3) provides that the Review Team's obligation is to report whether "a serious financial problem exists in the local government, but a consent agreement containing a plan to resolve the problem has been adopted pursuant to section 14(1)(c)", ***or*** that "a

local government financial emergency exists because no satisfactory plan exists to resolve a serious financial problem." MCL 141.1214(3).

After the Review Team found that a financial emergency existed because no satisfactory plan existed to resolve a serious financial problem, the Governor issued his preliminary determination that a financial emergency existed and notified the City of its right under MCL 141.215 to "request a hearing" conducted by the Governor or the Governor's designate. (O.R. 4). Not surprisingly under the circumstances, the Interim Mayor and the City Council of the City of Flint each formally requested a "hearing". (O.R. 5, 6). Unfortunately, however, the Chief Deputy Treasurer presiding over the hearing as the Governor's designee announced that her role would not be to listen to new facts, but rather that the hearing was only an opportunity for the City to "appeal . . . the Review Team's findings, to determine that they were not arbitrary or capricious, or ***that they weren't made on the evidence that was presented at <u>that</u> time.***" (O.R. 9, p. 3). In other words, the State would not consider or accept any evidence regarding the City's plan to address its serious financial problems.

To compound problems at the hearing, in considering the City's objections to the Governor's preliminary determination, the Deputy State Treasurer erroneously applied the standard of review articulated in Section 17 of the Act – the standard to be exercised by a local circuit court in case of an appeal from a <u>final</u> determination of the Governor. <u>Id</u>. As discussed below, this merging of the terms "hearing" and "appeal", as used by the Legislature in two separate sections of the Act, constituted a clear misinterpretation of the

Act and was beyond the discretion of the administration.[4] Further, basing a final determination on facts existing months before the hearing, without consideration of "continuing" or "newly developed" conditions in the City, clearly exceeded the Governor's discretion, since the Act mandates consideration of "continuing or newly developed" conditions in the final determination. Allowing the Treasurer's interpretation to stand threatens the clear intent of the Legislature to maintain a delicate balance between the harsh extreme of a State takeover of financially troubled communities and continuing mismanagement of financial affairs by locally elected officials.

ARGUMENT

I. NEITHER THE GOVERNOR NOR THE COURTS OF THIS STATE HAVE THE POWER TO IGNORE THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE LOCAL GOVERNMENT FISCAL RESPONSIBILITY ACT MANDATING THAT THE GOVERNOR AND STATE TREASURER *HEAR* EVIDENCE FROM THE LOCAL GOVERNMENT.

The Michigan Supreme Court has recently reiterated long-standing principles of statutory construction in Koontz v Ameritech Services, Inc., 645 NW 2d 34 (2002) as follows:

> "When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from words expressed in the statute. [citations omitted] When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. [citations omitted] Because the proper role of the judiciary is to interpret and not write the law, courts

[4] Amicus Curiae does not address the issues raised by the Attorney General relating to the "law of the case" doctrine, except to state that the law of this case cannot be that the Governor has unrestrained discretion to "interpret" the Local Government Fiscal Responsibility Act in such a way as to cause the word "hearing" to have none of its ordinary and plain meaning.

simply lack authority to venture beyond the unambiguous text of a statute.

"Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. [citations omitted] Further, we give undefined statutory terms their plain and ordinary meanings. [citations omitted] In those situations, we may consult dictionary definitions." 645 NW2d 34, 39 (2002).

Applying these principles to the present case compels the following conclusions:

1. The Legislature used the word "hearing" in Section 15 of the Act and the word "appeal" in Section 17, leading to the obvious conclusion that the Legislature intended two different procedural steps.

2. Failing to give the word "hearing" a meaning different from the word "appeal" as used in Sections 15 and 17 of the Act would render the word "hearing" nugatory and meaningless, in clear violation of the principles of statutory construction articulated by the Michigan Supreme Court.

3. Had the Legislature wished to provide that the terms "hearing" and "appeal" were identical, it could have either used the same word or stated that the standard for the hearing in Section 15 was the same as the standard for appeal in Section 17. It did not.

4. As required by the principles of statutory construction articulated by the Michigan Supreme Court, since the word "hearing" was undefined, the Treasurer should have given the word its "plain and ordinary meaning".

5. Before resorting to a dictionary, the Treasurer should have looked to case law defining the word "hearing" as follows:
"A hearing embodies the right to be heard on the controverted facts, as well as upon the law." Carpenters' Dist Council, Detroit, Wayne and Oakland Counties and Vicinity, of United Broth. of Carpenters and Joiners of America, AFL-CIO v Cicci, 261 F2d 5, 8 (6th Cir 1958).

6. Resorting to a dictionary, the Court and the Governor and Department of Treasury would also find that the word "hearing" at a minimum includes the concept of "listening" – i.e., the opportunity to be heard, to present

one's side of the case; or a "listening to arguments". *Merriam-Webster On-Line Collegiate Dictionary*, www.m-w.com.

7. Therefore, the Treasurer and the lower court lacked the discretion to convert the word "hearing" into the word "appeal" in the process outlined by the Local Government Fiscal Responsibility Act, and doing so constituted a clearly "unwarranted exercise of discretion".

The law is also clear that, "while the construction given a statute by those charged with the duty of administering it is entitled to respectful consideration, especially when the statute is ambiguous, such an administrative interpretation is not binding on the Courts and must be rejected if not in accord with the intent of the Legislature." Lanzo Const Co, Inc v Michigan Dept of Labor, Bureau of Safety and Regulation, Construction Safety Division, 86 Mich App 408, 414; 272 NW2d 662 (1978), *citing* Howard Pore, Inc v State Com'r of Revenue, 322 Mich 49, 66; 33 NW2d 657 (1948). In more recent cases, the Michigan Supreme Court has held, for example, that "although this Court generally accords due deference to an administrative agency charged with executing a particular statute, we grant no deference here because the plain meaning of the statute controls. 'An agency interpretation cannot overcome the plain meaning of a statute.' Consumers Power Co v Public Service Comm., 460 Mich 148, 157, n 8; 596 NW2d 126 (1999)." Koontz v Ameritech Services, Inc, 645 NW 2d 34, 45 (2002) (reversing Court of Appeals decision that rested its determination of the meaning of "receive" on sources outside the statute).

In other words, although the Department of Treasury clearly has the responsibility and authority to interpret the language of the Local Government Fiscal Responsibility Act, it lacks the authority to do so when the statute itself is not ambiguous and when the

interpretation is not in accord with the clear intent of the Legislature to mandate several opportunities for the local government to be "heard".

Furthermore, the Legislature clearly intended the "hearing" to give rise to findings of fact about the "continuing" circumstances in the local government, not about what might have been true or only partially true when the Review Team conducted its very cursory review. Such a Legislative intent is found in the very concise statutory requirement that the Governor's determination after the hearing include the "findings of fact of the *continuing or newly* developed conditions or events providing a basis for the confirmation of a local financial emergency." MCL 141.1215(2). Thus, in having failed to "hear" any evidence concerning current conditions in the City of Flint at the time of the "hearing" – in fact, having ruled that the Governor's designate would not even consider hearing that evidence – the Governor's final determination clearly exceeded the discretion accorded the Governor to confirm a determination based on *continuing or newly developed conditions or events.*

The Attorney General would interpret this language as to mean that the continuing or newly developed conditions or events must necessarily only be those that demonstrate a worsened or unchanged condition, and not one that has bettered itself. The result of this interpretation, however, is nonsense. Since the administration's interpretation was that it would hear ***no*** new evidence at the hearing, it could clearly not have heard either evidence of an improved condition *or* a worsened or unchanged condition.

CONCLUSION AND RELIEF REQUESTED

Amicus Curiae respectfully requests that this Honorable Court uphold the lower court's conclusion that the Governor's determination that a financial emergency existed in Flint was based on an unwarranted exercise of discretion because the Governor failed to hear evidence regarding the City's condition at the time of the hearing (i.e., whether the conditions described in the 2001 audited financial statements the Treasurer relied upon were *continuing* and whether the plan developed by the City between April 1 and June 30, 2002 was unsatisfactory. The extraordinary remedies provided in the Act militate the application of the strictest adherence by the Governor to the very clear procedural requirements outlined in the Act.

Respectfully submitted,

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September 17, 2002

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September 17, 2002

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Re: Johnnie Coleman, et al, v State of Michigan
Court of Appeals Docket No. 243029
Circuit Court No. 02-1017-AV

Dear Ms. Watson:

Enclosed for filing please find an original and four copies of a **Motion for Leave to File Amicus Curiae Brief on Behalf of the Michigan Municipal League; Brief of Amicus Curiae**, and a **Proof of Service** relative to the above-referenced matter. Also enclosed please find our check in the amount of $75.00 for the filing fee.

Thank you for your assistance in this matter.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: _____
Clifford T. Flood

Enclosures

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