2003-25

STATE OF MICHIGAN

IN THE COURT OF APPEALS

The VILLAGE OF HOLLY, a Michigan municipal corporation, and the DOWNTOWN DEVELOPMENT AUTHORITY of the VILLAGE OF HOLLY, a Michigan body corporate,

Plaintiffs-Appellants,

vs.

HOLLY TOWNSHIP, a Michigan public body corporate; BERNICE ALEXANDER, HOLLY TOWNSHIP TREASURER

Defendants-Appellees.

Court of Appeals
No. 254379

Lower Court
No. 02-045928-CZ

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BRIEF OF AMICUS CURIAE THE MICHIGAN MUNICIPAL LEAGUE

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in the Plaintiffs-Appellants' brief is correct and is adopted by the Amicus Curiae.

STATEMENT OF QUESTIONS PRESENTED

Does the provision at MCL 125.1653(3), which allows a governing body of a taxing jurisdiction levying ad valorem property taxes that would otherwise be subject to capture to exempt its taxes from capture by adopting a resolution within 60 days after a public hearing, apply solely to the public hearing authorized under the same MCL section 125.1653?

Plaintiffs-Appellants' answer: Yes.

Defendants-Appellees' answer: No

Amicus Curiae Answer: Yes

Circuit Court's Answer: No

STATEMENT OF FACTS

The Michigan Municipal League accepts the statement of facts asserted by the Village of Holly and the Downtown Development Authority of the Village of Holly as complete and correct.

INTRODUCTION AND SUMMARY

The Amicus Curiae is the Michigan Municipal League (the "Municipal League"), a non-profit corporation created in 1899 to represent and advance the interests of cities and villages and to improve those municipal entities through educational programs and cooperative efforts. The Municipal League's participation in this matter was authorized by the Board of Directors of the Michigan Municipal League Legal Defense Fund, whose purpose is to represent the Municipal League's interest in litigation that has statewide repercussions for all of its member municipalities.

Michigan cities, villages and townships are authorized under the Downtown Development Authority Act, Act 197, Public Acts of Michigan, 1975, as amended, to create municipal corporations called downtown development authorities ("DDAs") to promote economic development and prevent deterioration of downtown business districts. To date, 360 DDAs have been created in Michigan[1]. DDAs are empowered to carry out the rehabilitation of downtown areas using tax increment financing plans to pay for the rehabilitation. Tax increment financing is a tool for economic development that allows a DDA to "capture" property taxes which are levied by other taxing units (city, village, township, county, schools, community college, library, parks, etc.) against property within the downtown district.

At the time the tax increment financing plan is adopted, the value of property in the DDA district is frozen. Although the taxing units continue to receive tax revenues based on the frozen value, the DDA can capture the taxes from any increase over the frozen value. The DDA is entitled to capture the taxes on the increase on the theory that the increase in value was a result of the improvements made by the DDA. The DDA can use the captured tax increment revenues to pay for public improvements in the DDA District to promote economic development. Many DDAs issue bonds to pay for the public improvements and use the tax increment revenues to pay the debt service on the bonds.

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[1] Information from the Office of the Great Seal, Michigan Secretary of State, Oct. 20, 2004.

In the present case, the Circuit Court took the erroneous position that a governing body of a taxing jurisdiction which levies ad valorem property tax that would otherwise be subject to capture by a DDA may exempt its taxes from capture after *any* public hearing relating to the DDA, not solely after the public hearing which establishes the authority and designates the boundaries of the downtown district.

The decision of the Circuit Court is significant to Michigan municipalities because it goes to the heart of tax increment financing and the ability of municipalities and DDAs to exercise their power and implement the purposes of Michigan's tax increment financing acts. The practical result of the Circuit Court's ruling is that taxing jurisdictions will be allowed to exempt their taxes from capture *at any time throughout the life of a downtown development authority* each time a public hearing of the authority is held, regardless of the purpose of the public hearing. If that decision is allowed to stand, the State's downtown development authorities will no longer be able to rely on a predictable stream of revenue upon which to base financial decisions and issue bonds to pay for downtown improvements. Once *any* tax increment financing plan and development plan is approved, an authority would be dissuaded from ever amending a plan because its revenue stream could be put at risk with each additional public hearing. If taxing units can opt out of capture at any time there is a public hearing on a plan, and they do so, the reduction of revenues could result in Michigan municipalities not being able to pay debt service on bonds issued to finance downtown revitalization projects. This could result in DDAs defaulting on their debts or municipalities being required to pay the DDA's debts from other sources and cutting municipal services to do so. Clearly this is not what the legislature intended when it drafted and enacted the Downtown Development Authority Act, Public Act 197 of 1975.

ARGUMENT

I. STANDARD OF REVIEW

To the extent the Plaintiffs-Appellants identified the standard of review as *de novo*, they are correct. The primary issue is one of statutory interpretation. "Issues of statutory interpretation are questions of law and are therefore reviewed de novo." Oade v Jackson Nat'l Life, 465 Mich 244, 250; 632 NW2d 126 (2001).

II. THE CIRCUIT COURT MISCONSTRUED THE DOWNTOWN DEVELOPMENT AUTHORITY ACT, PUBLIC ACT 197 OF 1975

A. Summary of Argument and Circuit Court Decision.

The Downtown Development Authority Act, Public Act 197 of 1975 (the "DDA Act"), sets forth procedures for a city, village or township to establish a DDA to prevent deterioration in its business district and promote economic growth. See MCL 125.1651 et seq. The DDA Act clearly contemplates two different kinds of public hearing, each with a distinct purpose, and provides separate procedures for each type of public hearing in separate sections of the DDA Act. The first public hearing provided for under the DDA Act is for the creation of the downtown development authority and the designation of its boundaries (a "Section 3 Public Hearing"). See DDA Act, section 3, MCL 125.1653. The second public hearing provided for under the DDA Act is for the approval of a tax increment financing plan and a development plan (a "Section 18 Public Hearing"). See DDA Act, section 18, MCL 125.1668. The decision of the Circuit Court effectively erases any distinction between the two public hearings and ignores the express purpose of each hearing.

Defendants-Appellees argued below, and the Circuit Court agreed, that a provision in section 3 of the DDA Act, MCL 125.1653, which allows a taxing jurisdiction to exempt its taxes, or "opt out," from capture within 60 days of a hearing on the establishment of a downtown development authority and its boundaries, also applies to a public hearing under section 18, MCL 125.1688, to approve a tax

increment financing plan and a development plan. This result is contrary to the well-established rules of statutory construction and lacks any basis in law or fact. Furthermore, this result is contrary to the plain language of the statute, the legislature's intent, public policy and common sense. The Circuit Court's interpretation of the DDA Act threatens to have devastating effects on downtown development authorities. For the foregoing reasons and based upon the analysis below, the Michigan Municipal League respectfully requests that the Circuit Court decision be reversed and the opt out provisions of the DDA Act section 3(3), MCL 125.1653(3), be interpreted to apply solely to a Section 3 Public Hearing establishing a downtown development authority and establishing its boundaries, as the legislature intended.

B. The Downtown Development Authority Act

Under the DDA Act, the establishment of a downtown development authority and the subsequent development and execution of its purpose can be broken down into two primary "parts" or phases. First, the municipality creates a downtown development authority and, simultaneously, designates the boundaries of the downtown district pursuant to the procedures set forth in section 3 of the DDA Act. See MCL 125.1653. Section 3 specifically sets forth the requirements for creating a downtown development authority and designating its boundaries:

> Sec. 3.
>
> (1) When the governing body of a municipality determines that it is necessary for the best interests of the public to halt property value deterioration and increase property tax valuation where possible in its business district, to eliminate the causes of that deterioration, and to promote economic growth, the governing body may, by resolution, declare its intention to create and provide for the operation of an authority.
>
> (2) In the resolution of intent, *the governing body shall set a date for the holding of a public hearing on the adoption of a proposed ordinance creating the authority and designating the boundaries of the downtown district.* Notice of the public hearing shall be published twice in a newspaper of general circulation in the municipality, not less than 20 or more than 40 days before the date of the hearing. Not less than 20 days before the hearing, the governing body proposing to create the authority

shall also mail notice of the hearing to the property taxpayers of record in the proposed district and for a public hearing to be held after February 15, 1994 to the governing body of each taxing jurisdiction levying taxes that would be subject to capture if the authority is established and a tax increment financing plan is approved. Failure of a property taxpayer to receive the notice shall not invalidate these proceedings. Notice of the hearing shall be posted in at least 20 conspicuous and public places in the proposed downtown district not less than 20 days before the hearing. The notice shall state the date, time, and place of the hearing, and shall describe the boundaries of the proposed downtown district. A citizen, taxpayer, or property owner of the municipality or an official from a taxing jurisdiction with millage that would be subject to capture has the right to be heard in regard to the establishment of the authority and the boundaries of the proposed downtown district. The governing body of the municipality shall not incorporate land into the downtown district not included in the description contained in the notice of public hearing, but it may eliminate described lands from the downtown district in the final determination of the boundaries.

(3) Not more than 60 days after a public hearing held after February 15, 1994, the governing body of a taxing jurisdiction levying ad valorem property taxes that would otherwise be subject to capture may exempt its taxes from capture by adopting a resolution to that effect and filing a copy with the clerk of the municipality proposing to create the authority. The resolution takes effect when filed with that clerk and remains effective until a copy of a resolution rescinding that resolution is filed with that clerk.

(4) Not less than 60 days after the public hearing, if the governing body of the municipality intends to proceed with the establishment of the authority, it shall adopt, by majority vote of its members, an ordinance establishing the authority and designating the boundaries of the downtown district within which the authority shall exercise its powers. The adoption of the ordinance is subject to any applicable statutory or charter provisions in respect to the approval or disapproval by the chief executive or other officer of the municipality and the adoption of an ordinance over his veto. This ordinance shall be filed with the secretary of state promptly after its adoption and shall be published at least once in a newspaper of general circulation in the municipality.

(5) The governing body of the municipality may alter or amend the boundaries of the downtown district to include or exclude lands from the downtown district pursuant to the same requirements for adopting the ordinance creating the authority.

MCL 125.1653 (emphasis added).

Under section 3(2), a public hearing is required "on the adoption of a proposed ordinance creating the authority and designating the boundaries of the downtown district." MCL 125.1653(2). Section 3(2) also sets forth express provisions for giving notice of the public hearing by general publication and specific notice to taxpayers and the governing body of each taxing jurisdiction which would be subject to capture of its taxes under the authority. See MCL 125.1653(2). The opt out provision here at issue appears at section 3(3) of the DDA Act. This opt out provision does not appear, nor is it cross-referenced, in any other section of the DDA Act.

Second, after the authority and the downtown district are created, the authority develops, and the municipality approves, a tax increment financing plan pursuant to section 14, MCL 125.1664, including a development plan pursuant to section 17, MCL 125.1667. Section 14(3) specifically provides that the approval of the tax increment financing plan "shall be pursuant to the notice, hearing, and disclosure provisions of *section 18*," for approving the development plan and tax increment financing plan. See MCL 125.1664(3) (emphasis added). Section 18 provides a separate procedure for public notice and public hearing requirements to be followed to approve a tax increment financing plan and a development plan:

> Sec. 18.
>
> (1) The governing body, *before adoption of an ordinance approving a development plan or tax increment financing plan, shall hold a public hearing on the development plan.* Notice of the time and place of the hearing shall be given by publication twice in a newspaper of general circulation designated by the municipality, the first of which shall be not less than 20 days before the date set for the hearing. Notice of the hearing shall be posted in at least 20 conspicuous and public places in the downtown district not less than 20 days before the hearing. Notice shall also be mailed to all property taxpayers of record in the downtown district not less than 20 days before the hearing.
>
> (2) Notice of the time and place of hearing on a development plan shall contain: a description of the proposed development area in relation to highways, streets, streams, or otherwise; a statement that maps, plats, and a description of the development plan, including the method of relocating families and individuals who may be displaced from the area, are available

> for public inspection at a place designated in the notice, and that all aspects of the development plan will be open for discussion at the public hearing; and other information that the governing body deems appropriate. At the time set for hearing, the governing body shall provide an opportunity for interested persons to be heard and shall receive and consider communications in writing with reference thereto. The hearing shall provide the fullest opportunity for expression of opinion, for argument on the merits, and for introduction of documentary evidence pertinent to the development plan. The governing body shall make and preserve a record of the public hearing, including all data presented thereat.

See MCL 125.1668 (emphasis added). There is no opt out provision in section 18, nor does that section reference the opt out provision contained in section 3.

1. The Circuit Court's Interpretation of Section 3(3) of the DDA Act Ignores the Plain Meaning of the Act and Renders Portions of the DDA Act Duplicative and Nugatory.

> The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its intent. If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.

Gilbert v Second Injury Fund, 463 Mich 866; 616 NW2d 161 (2000).

"[T]he plain and unambiguous language of a statute must be applied as written. . . . [P]rovisions of a statute that could be in conflict must, if possible, be read harmoniously." Nowell v Titan Ins Co, 466 Mich 478, 482; 648 NW2d 157 (2002). "[I]n construing a statute a court is to presume that every word has some force or meaning and we are to avoid any construction that would render a statute or any portion of it nugatory." Michigan Mutual Ins Co v Allstate Ins Co, 146 Mich App 475, 481; 382 NW2d 169; 172 (1985). "The court must presume that every word has some meaning and, if possible, effect should be given to each provision." Danse Corp v City of Madison Heights, 466 Mich 175, 182; 644 NW2d 721 (2002).

The Circuit Court's construction of section 3(3) of the DDA Act is contrary to the well-settled rules of statutory construction. Under a plain reading of section 3, MCL 125.1653, all the subsections within section 3 relate solely to the adoption of the ordinance creating the downtown development authority and establishing or amending the district boundaries. The subsections of section 3 take a municipality step-by-step through the creation of a downtown development authority and determination of its boundaries, from determining the necessity of creating an authority, through the resolution of intent, the notice of hearing and the Section 3 Public Hearing on the creation of the authority and boundaries, to the final ordinance establishing the authority and designating the boundaries. See MCL 125.1653.

The Circuit Court would have one subsection within section 3 apply to any other public hearing authorized under the DDA Act, without the benefit of cross-references to this section or a general provision within the statute to support this application. The Circuit Court simply reads into the DDA Act that which is not there. This is contrary to a plain reading of section 3 and the DDA Act.

Section 3(2) sets forth specific notice provisions for the Section 3 Public Hearing and states that the notice shall contain "the date, time, and place of the hearing, and shall describe the boundaries of the proposed downtown district." MCL 125.1653(2). Section 3(2) also states that "[a] citizen, taxpayer, or property owner of the municipality or an official from a taxing jurisdiction with millage that would be subject to capture has the right to be heard in regard to the establishment of the authority and the boundaries of the proposed district." MCL 125.1653(2). Section 3(3) contains the opt out provision at issue. Section 3(4) sets forth the ordinance requirements for the governing body of the municipality establishing the authority and district, and section 3(5) states that the same requirements must be followed to alter or amend the boundaries of the downtown district. Section 3 deals exclusively with the procedures, including a public hearing, for establishing a downtown development authority and the boundaries of the downtown district.

When section 3 is read in the context of the entire DDA Act, the Circuit Court's error becomes even more obvious. As discussed above, the two public hearings provided for under the DDA Act are set forth in separate sections of the act, serve distinct purposes, and have distinct procedures. See MCL 125.1653, .1668. The contents of a notice for a Section 18 Public Hearing are substantively different than the required contents of the notice for a Section 3 Public Hearing, which is indicative of the different purpose of a Section 18 Public Hearing.

Under section 18, the notice of "the time and place" of the public hearing must contain

> [A] description of the proposed development area in relation to highways, streets, streams, or otherwise; a statement that maps, plats and a description of the development plan, including the method of relocating families and individuals who may be displaced from the area, are available for public inspection at a place designated in the notice, and that all aspects of the development plan will be open for discussion at the public hearing; and other information that the governing body deems appropriate.

MCL 125. 1668(2). Under section 3, the notice of public hearing shall contain "the date, time, and place of the hearing, and shall describe the boundaries of the proposed downtown district." MCL 125.1653(2). Clearly the content of the notice of each hearing is specifically tailored to the purposes of that hearing.

Furthermore, the notice requirements between the two public hearings are different. Under section 3(2), the governing body creating the authority is required to

> [M]ail notice of the hearing to the property tax payers of record in the proposed district and for a public hearing to be held after February 15, 1994 *to the governing body of each taxing jurisdiction levying taxes that would be subject to capture* if the authority is established and a tax increment financing plan is approved.

MCL 125.1653(2) (emphasis added). Although section 18 provides for mailing of the notice of hearing to "all property taxpayers of record in the downtown district," there is no requirement that the notice of hearing be mailed to the governing bodies of the taxing jurisdictions subject to capture. It does not stand to reason that the legislature would connect the important opt out option with a Section 18 Public

Hearing, yet provide no provisions for noticing the taxing jurisdictions of the public hearing. Instead, section 14 provides that

> *Before the public hearing on the tax increment financing plan* [Section 18 Public Hearing], *the governing body shall provide a reasonable opportunity to the taxing jurisdictions levying taxes subject to capture to meet with the governing body.* The authority shall fully inform the taxing jurisdictions of the fiscal and economic implications of the proposed development area. The taxing jurisdictions *may* present their recommendations at the public hearing on the tax increment financing plan. The authority *may* enter into agreements with the taxing jurisdictions and the governing body of the municipality in which the development area is located to share a portion of the captured assessed value of the district.

MCL 125.1664(4) (emphasis added). The last sentence in section 14(4) is the counterpart to the section 3(3) opt out provision. If the legislature had intended to give the taxing jurisdictions the right to opt out after the development plan and tax increment financing plan hearing, they would have included the opt out language at section 14. They did not. By the plain language of the statute, the legislature gave the taxing jurisdictions the authority to enter into tax sharing agreements with the DDA. The taxing jurisdictions were not given the right to opt out. They were given the right to negotiate their best deal.

Neither public hearing section contains cross-references to the other public hearing, which would have been an easy solution for the legislature, had it intended this result. In fact, section 14 of the DDA Act states that "[a]pproval of the tax increment financing plan shall be pursuant to the notice, hearing, and disclosure provisions of *section 18*," not section 3. Section 14, MCL 125.1664(3) (emphasis added). In the overall context of the DDA Act, this makes logical and chronological sense. By the time the authority is developing the tax increment financing plan and development plan, the authority must know upon what tax increments it can rely. If a taxing jurisdiction were allowed to opt out after the plans were developed and a hearing was held pursuant to section 18, one can imagine the confusion and circuity that would ensue. Plans would have to be repeatedly altered as Section 18 Public Hearings were

held and taxing jurisdictions opted out. The authority would have to go back to the drawing board again and again, with no conclusive measure of the tax increments on which it could rely.

Furthermore, the Circuit Court's reading of section 3(3) in effect renders portions of sections 14 and 18 nugatory. If provisions for a Section 3 Public Hearing apply equally to "any required public hearing, incident to the Act," Op. & Order at 3, the legislature could have saved effort and ink by referencing one public hearing throughout the DDA Act. It did not. It provided separate and specific procedures for a hearing under section 18. Finally, the requirement under section 14(4) that, prior to the public hearing on the tax increment financing plan, the governing body provide a reasonable opportunity for the taxing jurisdictions whose taxes are subject to capture to meet with it would be duplicative and unnecessary. Section 3 already provides that "an official from a taxing jurisdiction with millage that would be subject to capture has the right to be heard" at the hearing, and has the right to exempt its taxes from capture within 60 days after the hearing. See MCL 125.1653(2), (3).

The Circuit Court's interpretation of section 3(3) is contrary to the plain language of section 3 and of the DDA Act read as a whole and provides inconsistency between the two public hearings required under the DDA Act. The Circuit Court's interpretation cannot be supported unless one reads into the DDA Act provisions which simply do not exist within the Act. Furthermore, under the Circuit Court's reading, section 3(3) would usurp the function of section 14(4) and effectively render it nugatory.

2. The Circuit Court's Interpretation of Section 3(3) of the DDA Act is Contrary to the Legislature's Intent as Shown By The Legislature's Other Tax Increment Statutory Amendments.

The primary rule governing the interpretation of statutes is to "ascertain and give effect to the intention of the Legislature." VanAntwerp v State, 334 Mich 593, 600; 55 NW2d 108, 112 (1952); Neal v Wilkes, 470 Mich 661, 665; 685 NW2d 648 (2004) ("[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature."). Should this Court find that the language in

section 3(3) is ambiguous, the Court may look beyond the words of the statute to ascertain the legislature's intent. See Gilbert, 463 Mich at 866 ("Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.") While Amicus Curiae the Municipal League does not concede that section 3 requires anything more than a plain reading that the opt out provision of section 3(3) applies solely to a Section 3 Public Hearing to establish the authority and the authority's boundaries, we assume for the sake of argument that provision 3(3) is ambiguous.

Statutes which went into effect on the same day and which relate to the same subject matter "must be construed together for the purpose of determining legislative intent." VanAntwerp, 334 Mich at 605; 55 NW2d at 114 (1952). Plaintiffs-Appellants' assertion that section 3 of the DDA Act applies solely to a Section 3 Public Hearing is consistent with the legislative intent of the 1993 amendments to Michigan's three primary tax increment finance statutes: the DDA Act, the Local Development Financing Act, Public Act 281 of 1986, MCL 125.2151 et seq. (commonly referred to as the "LDFA Act"), and the Tax Increment Finance Authority Act, Public Act 450 of 1980, MCL 125.1801 et seq. (the "TIFA Act")[2].

a. The Legislature's Failure to Apply the Opt Out Provision to the Tax Increment Finance Authority Act Establishes That The Opt Out Does Not Apply to DDA, LDFA or TIFA Hearings to Approve Development Plans and Tax Increment Financing Plans

[2] Like the DDA Act, the LDFA Act and the TIFA Act provide a municipality with the power to create municipal corporations which can use tax increment revenues, as described in Introduction and Summary, above, to finance their purposes. The Local Development Financing Act provides that a municipality may establish a Local Development Financing Authority for the purposes of encouraging local development and promoting economic growth. See MCL 125.2151 et seq. The Tax Increment Finance Authority Act provides that a municipality may establish a Tax Increment Finance Authority for the purposes of preventing urban deterioration, encouraging economic development and activity, and encouraging neighborhood revitalization and historic preservation. See MCL 125.1801 et seq.

In 1993, House Bills 5009, 5010 and 5018 were enacted as part of the Proposal A package in response to the reduction in school property taxes. The bills amended the TIFA Act, the DDA Act and the LDFA Act, respectively. See House Legislative Analysis Section p 6 (Dec 7, 1993), Ex. A. The section 3 opt out provision of the DDA Act, which gives a governing body of a taxing jurisdiction not more than 60 days after a public hearing to exempt its taxes from capture, was also added, verbatim, to the LDFA Act. This provision was added to the DDA Act and the LDFA Act with the 1993 amendments, effective March 15, 1994.

Section 4 of the LDFA Act is similar to section 3 of the DDA Act as it sets forth procedures for establishing a local development finance authority and establishing the boundaries of the authority district. See MCL 125.2154. Like section 3 of the DDA Act, Section 4 of the LDFA Act sets forth specific requirements for a public hearing. Section 4 of the LDFA Act requires that notice of the public hearing be given by general publication and by mail to the taxpayers of record in the proposed district and the governing body of each taxing jurisdiction which levies taxes which would be subject to capture by the proposed authority. Section 4(3) of the LDFA Act contains the same "opt out" language found in the DDA Act. Section 4(3) provides:

> Not more than 60 days after a public hearing held after February 15, 1994, the governing body of a taxing jurisdiction with millage that would otherwise be subject to capture may exempt its taxes from capture by adopting a resolution to that effect and filing a copy with the clerk of the municipality proposing to create the authority.

MCL 125.2154(4). Like the DDA Act, the LDFA Act sets forth separate provisions for the public hearing on the approval of the development plan and/or the tax increment financing plan. Section 16 of the LDFA Act sets forth procedures for notice of the plan hearing and holding the plan hearing, which is distinct from the requirements for a public hearing under section 4 of the LDFA Act.

Although the opt out language was added verbatim to both the DDA Act and the LDFA Act in 1993, the language was *not* added to the TIFA Act which was amended at the same time. This is

because the legislature intended the opt out provision to apply only to a new authority or amendments to its boundaries. The TIFA Act was amended in 1986 to provide that "[b]eginning January 1, 1987, a new authority or authority district *shall not be created* and the boundaries of an authority district *shall not be expanded* to include additional land." MCL 125.1829(1) (emphasis added). This limitation does not appear in either the DDA Act or the LDFA Act. Because no new TIFAs can be created nor boundaries amended under state law, there was no need for an opt out provision in the TIFA Act.

Like the DDA Act and the LDFA Act, new development areas, development plans and tax increment financing plans within an established TIFA district can still be created. Under sections 17 and 18 of the TIFA Act, a public hearing is required to be held to approve the development plan and the tax increment plan, however, the legislature did not add the "opt out" language. There was no need to add the opt out language to the TIFA Act. There could be no more public hearings under the TIFA Act to create an authority or amend its boundaries, therefore, the opt out language, limited to the creation of the authority and the district boundaries as the legislature intended, would not have applied. Had the legislature intended the opt-out to apply to a public hearing on the development plan and the tax increment financing plan, it would have necessarily included it in the TIFA Act. It did not do so. It was the legislature's intent that the opt out language of the DDA Act apply solely to a Section 3 Public Hearing to create an authority and determine the district boundaries.

b. Since the 60-Day Waiting Period Does Not Appear in Section 18, the 60-day Opt Out Does Not Apply to a Section 18 Public Hearing.

Likewise, when the legislature amended the DDA Act to add the opt out provision, it also added a 60-day waiting period after the Section 3 Public Hearing before the municipality can adopt an ordinance establishing the authority and designating the boundaries of the authority district. MCL 125.1653(4); see also MCL 125.2154(4) (60-day waiting period added to LDFA Act). "*Not less than* 60 days after the public hearing, if the governing body of the municipality intends to proceed with the

establishment of the authority, it shall adopt, by majority vote of its members, an ordinance establishing the authority and designating the boundaries of the downtown district within which the authority shall exercise its powers." MCL 125.1653(4) (emphasis added). This 60-day waiting period parallels the 60-day period in which taxing jurisdictions may opt out following the public hearing on the authority and boundaries and was added by the same amending legislation. See MCL 125.1653(3) (DDA Act); MCL 125.2154(3) (LDFA Act). The 60-day waiting period was not added to section 18 of the DDA Act, which provides for the hearing on the development and tax increment financing plan, nor was it added to the plan hearing section of the LDFA Act. Section 18 of the DDA Act provides that "[t]he governing body after a public hearing on the development plan or the tax increment financing plan, or both, with notice thereof given in accordance with section 18, shall determine whether the development plan or tax increment financing plan constitutes a public purpose. If it determines that the development plan or tax increment financing plan constitutes a public purpose, *it shall then* approve or reject the plan, or approve it with modification, by ordinance . . . ." MCL 125.1669(1) (emphasis added).

Furthermore, the TIFA Act has no 60-day waiting period with regard to the municipality adopting an ordinance after the public hearing on the authority and authority district boundaries. The TIFA Act provides that "*[a]fter the public hearing*, if the governing body intends to proceed with the establishment of the authority, *it shall adopt*, by majority vote of its members, a resolution establishing the authority and designating the boundaries of the authority district within which the authority shall exercise its powers." MCL 125.1803(3) (emphasis added).

Had the legislature intended the opt out to apply to the DDA Section 18 Public Hearing on the development plan and the tax increment financing plan, surely the legislature would have provided a period of time in which a municipality could opt out, as it provided in section 3. Furthermore, if the legislature had intended the opt out provision to be applicable to a public hearing other than a hearing on establishing the authority district and establishing or amending those boundaries, it would have provided

the same provision in the TIFA Act. It did not. The legislature did not intend the opt out provision to apply to any public hearing other than a public hearing held to establish an authority and establish or amend its boundaries.

3. Plaintiffs-Appellants' Reading of Section 3(3) of the DDA Act is Consistent with the Tax Commission's Interpretation

Under Michigan law, "the long standing interpretation of a statute by those charged with the duty of executing it is entitled to the most respectful consideration and ought not to be overruled without cogent reasons." Production Credit Association of Lansing v Department of Treasury, 128 Mich App 196, 197-98; 339 NW2d 871 (1983).

The Michigan State Tax Commission (the "Tax Commission") is charged with the duty of administering and enforcing the DDA Act. Under the DDA Act, "[t]he state tax commission may institute proceedings to compel enforcement of this act. . . . The state tax commission may promulgate rules necessary for the administration of this act pursuant to the administrative procedures act . . . ." MCL 125.1681. The Tax Commission has issued various Bulletins and publications to administer the DDA Act. The Tax Commission provides the following explanation of the opt out provision:

> The "opt out" provision is provided in the acts:
>
> - DDA PA 197 of 1975 MCL 125.1653, Section 3(3)
> - TIFA PA 450 of 1980 not applicable
> - LDFA PA 281 of 1986 MCL 125.2154, Section 4(3)
>
> These provisions only apply to public hearings for the formation of new authorities and for the amending of authority district boundaries. The municipality must notify the affected taxing jurisdictions. . . . The taxing jurisdictions may "opt out" as follows:
>
> > The DDA act states "Not more than 60 days after a public hearing held after February 15, 1994, the governing body of a taxing jurisdiction levying ad valorem property taxes that would otherwise be subject to capture may exempt its taxes from capture by adopting a resolution to that effect and filing a copy with the clerk of the municipality proposing to create the authority."
> >
> > . . .
>
> The "opt out" provision does apply to new authorities or to amending the authority district boundaries.

. . .

The "opt out" provision does not apply to:

- Amending plan projects without expanding authority district boundaries.
- Amending the duration of the plan without expanding authority district boundaries.
- Amending the boundaries of a DDA plan's development area, within the existing DDA district boundaries.
- A new DDA plan within the existing DDA district boundaries.
- The amendment to an LDFA development plan or tax increment finance plan within existing LDFA district boundaries.

Michigan Department of Treasury, FTD 3305 (Rev. 4-01), *Frequently Asked Questions About Tax Increment Financing* p 8-9, Ex. B hereto. Plaintiffs-Appellants' interpretation that the opt out provision of section 3 of the DDA Act applies only to a Section 3 Public Hearing to establish a downtown development authority and delineate its boundaries is consistent with the State Tax Commission's interpretation of the DDA Act.

4. Defendants-Appellees' Reading of Section 3(3) of the DDA Act is Contrary to the Purposes of the DDA Act and Has Consequences Not Intended By the Legislature

"[S]tatutory language should be given a reasonable construction considering the purpose of the statute and the object sought to be accomplished." King v Director of the Midland County Department of Social Services, 73 Mich App 253, 258; 251 NW2d 270 (1977) (citations omitted). The preamble to the DDA Act lists among the purposes of the act "to authorize the levy and collection of taxes; to authorize the issuance of bonds and other evidences of indebtedness; [and] to authorize the use of tax increment financing." See MCL 125.1651 et seq., Preamble. The legislature clearly intended that the DDA have the authority to enter into financial obligations to meet its objectives of correcting and preventing deterioration in business districts and encouraging historic preservation. See MCL 125.1651 et seq., Preamble. If Defendants-Appellees' interpretation of section 3 is allowed to stand, taxing units could not only opt out after any public hearing on a development or tax increment financing plan, but could opt out on *any amendment* to the plans, no matter when that amendment might occur. A DDA would be unable to forecast its revenues when adopting or amending a plan. The Defendants-Appellees'

interpretation of section 3 also threatens the ability of a DDA and municipality to pay debt service on outstanding bonds or other indebtedness. The DDA would come up short in tax increment revenues if taxing units could opt out whenever plans are amended.

Defendants-Appellees' interpretation of section 3 leads to a result contrary to the legislature's intent. At the least, it would have a chilling effect on a DDA *ever* amending a development and tax increment financing plan. Taken to its extreme, yet logical conclusion, Defendants-Appellees' interpretation would lead to a default on bonds and other indebtedness by DDAs and Michigan municipalities. The opt out provision applies solely to Section 3 Public Hearings on establishing an authority district and amending the boundaries of the authority district. Only then can DDAs reliably forecast their revenue and exercise their authority to issue bonds and other indebtedness to pay for public improvements and fulfill their mission of downtown revitalization.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing arguments and authorities, the Amicus Curiae, Michigan Municipal League, respectfully requests that this Court approve the remedies sought in the appeal of the Plaintiffs-Appellants, Village of Holly and the Downtown Development Authority of the Village of Holly, and reverse the Circuit Court's decision.

Respectfully submitted,

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