STATE OF MICHIGAN

IN THE COURT OF APPEALS

CITY OF BAY CITY,
a municipal corporation,

Plaintiff-Appellant,

v.

RICHARD BRZEZINSKI,
Treasurer for the County of Bay,

Defendant-Appellee.
_____/

Court of Appeals Docket No: 294556
Bay County Circuit Court
Case No. 08-3598-CZ

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BRIEF OF AMICI CURIAE THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF BASIS OF JURISDICTION

Amici Curiae adopt the jurisdictional summary in the Appellant City of Bay City's Brief on Appeal.

STATEMENT OF QUESTIONS PRESENTED

1. **DOES THE PLAIN LANGUAGE OF MCL 211.78M PROVIDE AUTHORITY FOR THE FORECLOSING GOVERNMENTAL UNIT TO REVIEW OR REJECT THE PUBLIC PURPOSE DETERMINATION OF A CITY, VILLAGE OR TOWNSHIP?**

Plaintiff-Appellant answers:	No
Defendant-Appellee answers:	Yes
The Trial Court answers:	Yes
Amici Curiae answers:	No

2. **DOES THE PLAIN LANGUAGE OF MCL 211.78M MANDATE THE FORECLOSING GOVERNMENTAL UNIT TO CONVEY THE PROPERTY TO THE APPELLANT?**

Plaintiff-Appellant answers:	Yes
Defendant-Appellee answers:	No
The Trial Court answers:	No
Amici Curiae answers:	Yes

STATEMENT OF FACTS AND PROCEEDINGS

Amici Curiae adopt the Statement of Facts and Proceedings in the Appellant City of Bay City's Brief on Appeal.

DESCRIPTION OF AMICI CURIAE

The Michigan Municipal League

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 is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund, which was established in 1983, is to represent the member local governments in litigation of statewide significance. It provides support and assistance to cities and villages and their attorneys in court cases and other matters where the issues have a broad impact on both the municipality involved and on other municipalities in the State. This brief of Amici Curiae is authorized by the Legal Defense Fund's Board of Directors.

The Michigan Townships Association

The Michigan Townships Association ("MTA") is a non-profit organization formed in 1953 to provide a unified voice for Michigan's township governments and to help township leaders govern more efficiently and improve the services they provide to residents. More than 99% of Michigan's 1,242 townships are MTA members. Through its website, seminars, publications, county chapters, written communication, telephone calls, monthly electronic newsletters and legislative faxes, MTA keeps members informed of current issues facing townships.

INTRODUCTION

The practical effect of the trial court's decision, if it is allowed to stand, would be the amendment of a state statute, not by legislative action, but merely by the interpretation of a local governmental official and local circuit court. This, despite the fact that the plain language of the statute does not contain the words necessary to support such an interpretation and resulting amendment. Worse yet, the interpretation adds a review of the action of one local governmental unit by another local governmental unit, notwithstanding the fact that in other instances where one local governmental unit has been given statutory authority to review the action of another local governmental unit, that authority has been clearly and expressly set forth in the statute.

In this case, a duly elected local legislative body (the Appellant) made a finding (by unanimous vote) that the acquisition of four parcels of tax-reverted property would stimulate private investment through the redevelopment of those parcels and thus would constitute a public purpose. The local legislative body also found that improving and selling those parcels would constitute economic development efforts that would ensure a healthy and growing tax base for the city. This finding was entirely within their statutory powers and authority. Nevertheless, another local official (the Appellee), with no statutory authority to do so, took it upon himself to review and override that decision.

The local circuit court, despite the legislative determination of public purpose by the local legislative body, ruled that the acquisition of two of the four parcels did not constitute a public purpose and thus could not be acquired by the local legislative body. The circuit court ruled this way despite 1) the clear and long-standing judicial rule in Michigan that courts are required to give considerable deference to a legislative body's determination of public purpose, and 2) numerous statutes which give local legislative bodies the power to do exactly what the City was

proposing to do here. The circuit court concluded that the acquisition of two of the four parcels was not a public purpose because the use the City planned to make of them was "too speculative."

While there are certain limited factors that courts may use in analyzing whether a use constitutes a public propose, being "too speculative" is not one of them. Simply put, there is no statutory or case law that authorizes a court to override a legislative body's determination of public purpose on the ground that the proposed use is "too speculative." Because the local legislative body had not yet acquired the properties, any and all plans for their use could be considered "too speculative." As long as the public body has plans for the properties that it intends to implement to promote a public purpose, there is no authority for the courts to review those plans to determine whether they are "too speculative" or not.

The decision below stands to have a divisive effect on local governments across the state. If the trial court's ruling is upheld, the decisions of local governments seeking to exercise their statutory right to acquire tax-foreclosed property will be subject to review and rejection by foreclosing governmental units. This will vie local elected governing bodies against local treasurers, as in this case. This is certainly not the result the Legislature had in mind when it enacted this statute, especially at a time when governmental bodies are being encouraged to cooperate in their efforts to revitalize economic development state-wide.

STANDARD OF REVIEW

This case involves matters of statutory construction, which are reviewed *de novo*. *Mayor of Lansing v Public Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004). The cardinal principle of statutory construction is that courts must give effect to legislative intent. See *e.g.*, *Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005). If the Court finds

that the language of the statute is clear, no further analysis is necessary or allowed and the Court must apply the legislation as it is written. *Eggleston v Bio-Medical Applications*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Hesse v Ashland Oil*, 466 Mich 21, 30; 642 NW2d 330 (2002).

This case also involves the review of a legislative determination of public purpose. There is a long history of judicial deference to legislative determinations of local governments. *See Mid-Michigan Farm and Grain Assoc. v Henning*, 127 Mich App 735; 339 NW2d 243 (1983) (holding legislative determinations are only subject to review by the courts if palpably arbitrary and incorrect).

ARGUMENTS

1. THE PLAIN LANGUAGE OF MCL 211.78M PROVIDES NO AUTHORITY FOR THE FORECLOSING GOVERNMENTAL UNIT TO REVIEW OR REJECT THE PUBLIC PURPOSE DETERMINATION OF A CITY, VILLAGE OR TOWNSHIP.

A. Trial Court's Decision Effectively Amends the Statute

The trial court's decision should be reversed because it effectively amends Section 78m of the tax foreclosure statute. This is best illustrated by showing the language effectively added to the statute in underlined text, the same technique the Legislature uses to demonstrate amendments in proposed legislation:

> Sec. 78m. (1) Not later than the first Tuesday in July, immediately succeeding the entry of judgment under section 78k vesting absolute title to tax delinquent property in the foreclosing governmental unit, this state is granted the right of first refusal to purchase property at the greater of the minimum bid or its fair market value by paying that amount to the foreclosing governmental unit if the foreclosing governmental unit is not this state. If this state elects not to purchase the property under its right of first refusal, a city, village, or township may purchase for a public purpose, subject to review and approval of the foreclosing governmental unit, any property located within that city, village, or township set forth in the judgment and subject to sale under this section by payment to the foreclosing governmental unit of the minimum bid.

The trial court's decision has given the foreclosing governmental unit a veto right over the City's declared public purpose. Certainly, if the Legislature intended to vest veto power in the foreclosing governmental unit, it would have written such power into the statute itself. Also, the Legislature, if it desired to confer such power in the foreclosing governmental unit would have likely provided statutory criteria for use by the foreclosing governmental unit in its review of the public purpose determination. The tax foreclosure statute as written by the Legislature confers no such power on the foreclosing governmental unit.

In other instances where the Legislature has provided statutory authority for one local governmental unit to review the action of another local governmental unit, that authority is clearly expressed and set forth in the statute. Examples include the Zoning Enabling Act (2006 PA 110, MCL 125.3101, *et seq.*), the Planning Enabling Act (2008 PA 33, MCL 125.3801, *et seq.*) the Downtown Development Authority Act (1975 PA 197, MCL 125.1651, *et seq.*) the Local Development Financing Act (1986 PA 281, MCL 125.2151, *et seq.*), the Tax Increment Finance Authority Act (1980 PA 450, MCL 125.1801, *et seq.*), the Corridor Improvement Authority Act (2005 PA 280, MCL 125.2871, *et seq.*), the Resort District Rehabilitation Act (1986 PA 59, MCL 125.2201, *et seq.*), and the Urban Cooperation Act (1967 PA 7, MCL 124.501, *et seq.*).

The Zoning Enabling Act (2006 PA 110, MCL 125.3101, *et seq.*) provides an excellent example of the Legislature's intent to confer powers to one governmental unit to review and make a recommendation regarding the actions of another governmental unit. Section 307 of the act requires that townships submit proposed zoning ordinances to the county for review and recommendation and sets forth clear procedures and timing requirements for this process:

> (1) Following the hearing required in section 306, a township shall submit for review and recommendation the proposed zoning ordinance, including any zoning

maps, to the zoning commission of the county in which the township is situated if a county zoning commission has been appointed as provided under this act.

(2) If there is not a county zoning commission or county planning commission, the proposed zoning ordinance shall be submitted to the coordinating zoning committee. The coordinating zoning committee shall be composed of either 3 or 5 members appointed by the legislative body of the county for the purpose of coordinating the zoning ordinances proposed for adoption under this act with the zoning ordinances of a township, city, or village having a common boundary with the township.

(3) The county will have waived its right for review and recommendation of an ordinance if the recommendation of the county zoning commission, planning commission, or coordinating zoning committee has not been received by the township within 30 days from the date the proposed ordinance is received by the county.

(4) The legislative body of a county by resolution may waive its right to review township ordinances and amendments under this section.

MCL 125.3307. (emphasis added)

Similarly, the Planning Enabling Act (2008 PA 33, MCL 125.3801, *et seq.*) sets forth clear procedures requiring local units of government, through their planning commissions, to submit proposed master plans to other governmental agencies for review and comment. Section 41 of the act requires cities, villages and townships (each defined by the act as a "municipality") to submit proposed master plans to: the planning commission or legislative body "of each municipality located within or contiguous to the local unit of government." MCL 125.3841(2)(a). The pertinent sections read as follows:

(2) If the legislative body approves the distribution of the proposed master plan, it shall notify the secretary of the planning commission, and the secretary of the planning commission shall submit, in the manner provided in section 39(3), a copy of the proposed master plan, for review and comment, to all of the following:

(a) For any local unit of government proposing a master plan, the planning commission, or if there is no planning commission, the legislative body, of each municipality located within or contiguous to the local unit of government.

MCL 125.3841(2). (emphasis added)

This section goes on to require that cities, villages and townships also submit the proposed master plan to regional planning commissions and the county planning commission or the county board of commissioners, along with a statement of compliance with other sections of the act:

> (d) For a municipality proposing a master plan, the regional planning commission for the region in which the municipality is located, if there is no county planning commission for the county in which that local unit of government is located. If there is a county planning commission, the secretary of the planning commission may submit a copy of the proposed master plan to the regional planning commission but is not required to do so.
>
> (e) For a municipality proposing a master plan, the county planning commission, or if there is no county planning commission, the county board of commissioners, for the county in which that municipality is located. The secretary of the planning commission shall concurrently submit to the county planning commission, in the manner provided in section 39(3), a statement that the requirements of subdivision (a) have been met or, if there is no county planning commission, shall submit to the county board of commissioners, in the manner provided in section 39(3), a statement that the requirements of subdivisions (a) and (d) have been met. The statement shall be signed by the secretary and shall include the name and address of each planning commission or legislative body to which a copy of the proposed master plan was submitted under subdivision (a) or (d), as applicable, and the date of submittal.

MCL 125.3841(2).

Counties proposing master plans are also required to submit their plans for review and comment to the regional planning commission and contiguous counties:

> (b) For a county proposing a master plan, the regional planning commission for the region in which the county is located, if any.
>
> (c) For a county proposing a master plan, the county planning commission, or if there is no county planning commission, the county board of commissioners, for each county located contiguous to the county.

MCL 125.3841(2). (emphasis added)

Any proposed master plan which includes a "master street plan" must also be submitted to the county road commission and state transportation department. MCL 125.3841(2)(g).

Entities receiving proposed master plans for review are statutorily entitled to submit advisory comments to the proposing governmental unit within 63 days of receipt. MCL 125.3841(3).

As is clear from the above-quoted sections, the Legislature went to great lengths to set forth a thorough set of procedures for these intergovernmental review processes.

Another group of statutes in which the Legislature has provided express authority for one governmental unit to review the actions of another governmental unit are the tax increment financing statutes. The Downtown Development Authority Act, (1975 PA 197, MCL 125.1651, *et. seq.*) provides that the governing body of the municipality must review and approved any development plan proposed by an authority. MCL 125.1668. The act provides an elaborate process for the governing body to review any development plan proposed by an authority, including holding a public hearing after specific notice requirements. *Id.* The governing body of the municipality must also annually review and approve of the authority's operating budget (in a prescribed form) before it may be approved by the authority's board of directors. MCL 125.1678. Although a tax increment authority is created by and closely related to its governing body, it is, nonetheless, a separate and distinct public body corporate. MCL 125.1652. Both the Local Development Financing Act (1986 PA 281, MCL 125.3101, *et seq.*) and Tax Increment Finance Act (1980 PA 450, MCL 125.1801, *et seq.*) have virtually identical requirements for local development finance authorities and tax increment finance authorities, respectively. *See* MCL 125.2166, 125.2167, 125.2169, 125.1817, 125.1818, 125.1825.

These examples prove that when the Legislature intends to provide authority for one local governmental unit to review the action of another local governmental unit, such authority is clearly expressed and set forth in the statute. Absent such express authority (as in this case), there is no such power to review.

The Appellee relies on MCL 211.78 as providing authority obligating Appellee to review Appellant's declared public purpose. MCL 211.78 is in fact the Legislature's findings and determinations of public purpose as a foundation for enacting the statute:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.

MCL 211.78.

This section is not a grant of review power to Appellee. When the Legislature has intended to grant authority to one local unit of government to review the actions of another local unit of government, it has done so expressly within the statute.

B. The Trial Court Erred in Ruling that the City's Declared Public Purpose was too Speculative

> "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor."
> Mich Const. 1963, Art. 7 Sec. 34.

The Appellant made a legislative determination that the property purchases in this case served a public purpose. Our courts have a long history of judicial deference towards local legislative determinations, particularly with respect to determinations of public purpose. "The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect." *Gregory Marina, Inc. v City of Detroit*, 378 Mich 364, 396; 144 NW2d 503 (1966) (quoting 37 Am.Jur., Municipal Corporations, s 120, pp. 734, 735). This holds true for local determinations and those of the Legislature. "Like the courts of other states, we decline to second-guess the wisdom of the Legislature in the area of public purpose determinations." *In*

re Request for Advisory Opinion on Constitutionality of 1986 PA 281, 430 Mich 93, 130; 422 N.W.2d 186 (1988) (citing *Wolper v Charleston City Council* 287 S.C. 209, 216; 336 S.E.2d 891; R.E. Short Co. v. Minneapolis, 269 N.W.2d 331, 337 (Minn., 1978) (court will "pay great deference to the initial legislative determination that a particular project serves a public purpose")).

Our courts have held that, generally, "a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose." *Hays v City of Kalamazoo*, 316 Mich 443, 453; 25 NW2d 787 (1947). The courts have also consistently recognized that economic development serves a public purpose. *Wayne Co. v Hathcock*, 471 Mich 445, 461-462; 684 NW2d 765 (2004).

Courts have struck down development projects only in connection with determinations of whether property is currently being "used for public purposes". Thus, the court in *Hathcock* found that Wayne County's plan to acquire property for economic development purposes constituted a public purpose, but did not meet the more narrow constitutional interpretation of public "use" within the exercise of eminent domain. In *City of Mt. Pleasant*, the court held that property acquired by the city for purposes of economic development was tax exempt because the city met the requirement that the property be "used for public purposes" under the General Property Tax Act. *City of Mt. Pleasant v State Tax Comm'n*, 477 Mich 50, 54; 729 NW2d 833 (2007); MCL 211.7m. In contrast, the court in *Traverse City v. East Bay Tp.* determined that certain lands did not qualify as tax exempt because "[t]he lands not only are not used for any public purpose, but they are not used for *any* purpose," nor was there any plan in place regarding future use of the lands, *Traverse City v. East Bay Tp.*, 190 Mich 327, 330; 157 NW 85 (1916)

(cited and emphasis added in *City of Mt. Pleasant*, 447 Mich at 57). The *City of Mt. Pleasant* and *Traverse City* courts reviewed the status of city actions in actively planning and preparing the land for development because of the General Property Tax Act requirement that the land be currently *used* for a public purpose to be characterized as tax exempt.

Similar to *Hathcock*, the *Mt. Pleasant* court distinguished the "use" requirement from the broader determination of "public purpose", stating that "[b]ecause we have determined that the city's efforts at economic development and enhancing the tax base were for 'public purposes', we must *next* determine when the city 'used' the land for these public purposes." *City of Mt. Pleasant*, 477 Mich at 56 (emphasis added). The present case is distinguished from *Hathcock* and *City of Mt. Pleasant* because there is no constitutional or statutory requirement of current public "use" at issue. The issue in this case focuses solely on the city's determination of "public purpose." Courts have consistently interpreted "public purpose" broadly, and reviewed particular actions accomplished by a governmental unit *only* when making the more narrow determination of "use". Courts have also consistently upheld the characterization of economic development as a valid public purpose without any review of the status of plans that have been established to achieve such development.

The state has, further, granted the Appellant broad powers to engage in economic development. Among the statutes authorizing the Appellant to engage in various methods of economic development are: the Brownfield Redevelopment Financing Act (1996 PA 381, MCL 125.2651, *et seq.*); the Economic Development Corporations Act (1974 PA 338, MCL 125.1601, *et seq.*); the Downtown Development Authority Act (197 PA 1975, 125.1651, *et seq.*); the Technology Park Development Act (1984 PA 385, MCL 207.701, *et seq.*); the Local Development Financing Act (1986 PA 281, MCL 125.1251, *et seq.*); the Tax Increment Finance Authority Act (1980 PA 450, MCL 125.1801, *et seq.*); the Corridor Improvement Authority Act

(2005 PA 280, MCL 125.2871, *et seq.*); the Plant Rehabilitation and Industrial Development Districts Act (1974 PA 198, MCL 207.551, *et seq.*), Renaissance Zone Act (1996 PA 376, MCL 125.2681, *et seq.*); Obsolete Property Rehabilitation Act (2000 PA 146, MCL 125.2781, *et seq.*).

The Appellant has vast economic development experience and was attempting to further promote the economic growth of the city through the property acquisitions sought in this case. After review of the potential for economic development and the requirement that such development satisfy a public purpose, and after engaging in planning related to the development of the property, the Appellant adopted a formal resolution memorializing its findings and declaration. This court should give deference to the Appellant's declaration of public purpose.

Any plan which the Appellant devises may be considered "too speculative", as the Appellant has not yet acquired the property nor had an opportunity to carryout those plans. However, public policy of this state, as evidenced by numerous statutes and court decisions recognizing economic development as a valid public purpose, is to encourage cities to engage in economic development activities.

The trial court erred in ruling the Appellant's declared public purpose was "too speculative."

2. THE PLAIN LANGUAGE OF MCL 211.78M MANDATES THE FORECLOSING GOVERNMENTAL UNIT TO CONVEY THE PROPERTY TO THE APPELLANT

A. The Legislature's Use of the Word "Shall" is a Mandatory Directive.

The plain language of MCL 211.78m clearly directs the Appellee to convey the property to the Appellant. The statute grants no discretion to Appellee, but mandates that the property be conveyed:

> If property is purchased by a city, village, township, or county under this subsection, the foreclosing governmental unit shall convey the property to the purchasing city, village, township, or county within 30 days.

MCL 211.78m. (emphasis added)

The words of the Legislature are clear. The Legislature's use of the word "shall" indicates a mandatory and imperative directive. *E.g., Burton v Reed City Hosp. Corp.*, 471 Mich 745, 752; 691 NW2d 424 (2005) (citing *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000)). In general, the word "shall" carries a mandatory, nondiscretionary connotation. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 494; 740 NW2d 734 (2007) (citing *People v Brown*, 249 Mich App 382; 642 NW2d 382 (2002)). The term "shall" in a statute unambiguously denotes mandatory, rather than discretionary action. *Consumers Energy v Mich Public Service Com'n*, 268 Mich App 171, 175; 707 NW2d 633 (2005) (citing *Roberts v Mecosta Co. Gen. Hosp.*, 466 Mich 57, 65; 642 NW2d 663 (2002)). Shall is a mandatory term, not a permissive one. *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006) (citing *Burton*, *supra*, 471 Mich at 752). *Contra. Church & Church, Inc. v A-1 Carpentry*, 281 Mich App 330; 766 NW2d 30 (2008) (the use of the term "may" instead of "shall" indicates discretionary rather than mandatory action.).

In reviewing a statute, if the Court finds that the language of the statute is clear, no further analysis is necessary or allowed and the Court must apply the legislation as it is written. *Eggleston v Bio-Medical Applications*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Hesse v Ashland Oil*, 466 Mich 21, 30; 642 NW2d 330 (2002). The Legislature's use of the word "shall" is clear and unambiguous and the Appellee is required to convey the property to the Appellant without discretion. There is no room in the wording of the statute for Appellee to exercise what may be his view of Appellant's determination of a public purpose.

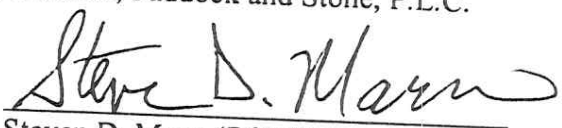
CONCLUSION AND RELIEF REQUESTED

The plain language of the statute is clear and should be enforced as written by the Legislature. Enforcing the statute as enacted avoids judicial amendment and saves local governmental units from being at odds over the tax foreclosure process.

For the reasons set forth above, Amici Curiae respectfully request that this Court grant the relief prayed for by Appellant and reverse and remand the decision of the trial court.

Respectfully submitted,

Miller, Canfield, Paddock and Stone, P.L.C.

By: 

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