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STATE OF MICHIGAN

IN THE COURT OF APPEALS

CLAM LAKE TOWNSHIP and HARING TOWNSHIP,

Appellants,

v

THE STATE BOUNDARY COMMISSION, TERIDEE, LLC, and THE CITY OF CADILLAC,

Appellees.

_____/

COA Docket No. 325350

Wexford Circuit Court
Case No. 14-25391-AA

State Boundary Commission
Docket No. 13-AP-2

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AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF APPELLEES

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STATEMENT OF THE BASIS OF JURISDICTION

The Michigan Municipal League ("MML") agrees with and adopts the "Jurisdictional Statement" in Appellee City of Cadillac's Brief in Opposition to Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED[1]

I. DOES THE TOWNSHIP'S CONDITIONAL TRANSFER AGREEMENT FULFILL THE STATUTORY CRITERIA OF ACT 425, SUCH THAT THE STATE BOUNDARY COMMISSION WAS REQUIRED TO DENY THE ANNEXATION PETITION COVERING THE SAME LANDS?

The State Boundary Commission answered "No."

The circuit court answered "No."

Appellees answer "No."

The MML answers "No."

Appellants answer "Yes."

II. IS THE STATE BOUNDARY COMMISSION SUBJECT TO COLLATERAL ESTOPPEL, SUCH THAT IT WAS REQUIRED TO DENY THE IDENTICAL ANNEXATION PETITION IT HAD ALREADY DENIED PREVIOUSLY, WHEN THERE HAD BEEN NO INTERVENING CHANGE IN CIRCUMSTANCES?

The State Boundary Commission answered "No."

The circuit court answered "No."

Appellees answer "No."

The MML answers "No."

Appellants answer "Yes."

[1] As stated by Appellants in their Application for Leave to Appeal.

STATEMENT OF FACTS

The MML adopts by reference the Statement of Facts set forth by the City of Cadillac in its Brief in Opposition to Application for Leave to Appeal.

DISCUSSION

I. THE COURT OF APPEALS HAS DECIDED IN A PRECEDENTIALLY BINDING, PUBLISHED OPINION THAT THE STATE BOUNDARY COMMISSION HAS LEGAL AUTHORITY TO DETERMINE WHETHER A VALID CONDITIONAL TRANSFER AGREEMENT EXISTS UNDER ACT 425 PRECLUDING THE COMMISSION'S CONSIDERATION OF AN ANNEXATION PETITION COVERING THE SAME LAND; APPELLANTS' APPLICATION FOR LEAVE TO APPEAL SHOULD BE DENIED BEC AUSE IT SEEKS A RESULT THAT WOULD BE IN DIRECT CONFLICT WITH THAT PUBLISHED DECISION, AND WOULD PREVENT THE COMMISSION FROM PERFORMING ITS DELEGATED FUNCTION

A. Standard of Review

Whether an administrative agency has jurisdiction is a legal question that is reviewed de novo on appeal. *Kasberg v Ypsilanti Twp,* 287 Mich App 563, 566; 792 NW2d 1 (2010). However, as discussed below, the jurisdictional issue raised in this case was previously decided by the Court of Appeals in the published case of *Twp of Casco v State Boundary Comm'n,* 243 Mich App 392, 398; 622 NW2d 332 (2000), lv den 465 Mich 855 (2001). Thus, the MML agrees with the City of Cadillac that the de novo standard does not apply and that under *Casco* the State Boundary Commission's decision is subject to review under the "competent, material, and substantial evidence" standard. *Id.* at 399.

B. Legal and procedural background.

"Dating back to the early 1800s, annexation is the one of the oldest methods of adjusting local government boundaries to meet the needs of people for government services."[2] Through the State Boundary Commission Act, MCL 123.1001 *et seq*., the Michigan Legislature has vested the State Boundary Commission ("SBC" or "Commission") with jurisdiction over petitions or

[2] Coe, Charles, "Costs and Benefits of Municipal Annexation," *State & Local Governmental Review*, Vol. 15, No. 1 (Winter 1983), p 44.

resolutions for annexation. MCL 123.1011a. See also Section 9 of the Home Rule City Act, being MCL 117.9, which governs annexation proceedings.

A limitation on annexation is found in the Intergovernmental Conditional Transfer of Property by Contract Act ("Act 425"), MCL 124.21 *et seq.* Act 425 authorizes local units (cities, townships, villages) to enter into a contract (an "Act 425 agreement") for the conditional transfer of property for the purpose of an economic development project. MCL 124.22. "Unless the contract specifically provides otherwise, property which is conditionally transferred by a contract under [Act 425] is, for the term of the contract and for all purposes, under the jurisdiction of the local unit to which the property is transferred." MCL 124.28.

"Act 425 agreements thus allow municipalities conditionally to revise their borders without recourse to, or interference from, the [SBC]." *Twp of Casco v State Boundary Comm'n,* 243 Mich App 392, 398; 622 NW2d 332 (2000), lv den 465 Mich 855 (2001). Section 9 of Act 425, MCL 124.29, states that "[w]hile a contract under this act is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract." Thus, if an Act 425 agreement has been validly enacted and properly filed, the SBC cannot act upon a petition for annexation for the area submitted under MCL 117.9 and MCL 123.1011a.[3]

As set forth in the City of Cadillac's brief, which provides a complete procedural history of this case, the property owner, TeriDee, wished to develop its property for commercial purposes and, consistent with its development goals, sought to annex its property into the City of

[3] "The bar to 'another method of annexation or transfer'…has been viewed by some townships as a way to inoculate themselves from annexations regardless of the viability or seriousness of their economic development project." Pineau, Robert, "Drawing New Boundaries", *Michigan Bar Journal* (August 2002), p 31.

Cadillac because the City offered services that were desirable for the development. The Appellant Townships purported to enter into an Act 425 agreement concerning the subject property prior to the filing of the annexation petition, and argued that the Act 425 agreement divested the SBC of jurisdiction to consider the annexation petition. Following a public hearing and a review of the evidence presented by all interested parties, the SBC determined that the Act 425 agreement did not meet the statutory requirements of Act 425 and, therefore, did not preclude the SBC from acting upon the annexation petition. The SBC ultimately granted the petition for annexation, and the Townships appealed. On appeal, the circuit court affirmed the SBC's decision. The Appellant Townships have sought leave to appeal in this Court and, for the reasons set forth below and in the City of Cadillac's brief, the application does not raise any issues meriting review by this Court and should be denied in its entirety.

C. The law is clear—the SBC has jurisdiction to determine the validity of an Act 425 Agreement.

The Appellant Townships argue in their application that the existence of their Act 425 agreement deprived the SBC of jurisdiction over the annexation petition. Appellants claim that only the "local units" to an Act 425 agreement—and not the SBC—have authority to administer and apply Act 425. Appellants assert that the SBC has "absolutely no authority to interpret or apply Act 425" or "to adjudicate the wisdom or desirability of an Act 425 agreement…." Appellants piece their argument together with heavy reliance on the rule that an agency has no implied powers and that its power and authority must be conferred by statute. See e.g., *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 582; 810 NW2d 110 (2011). Appellants conclude that the SBC erred "by invalidating the Agreement on grounds that constitute an unlawful expansion of its statutory authority and jurisdiction." Application, p 18.

Specifically, Appellants argue that the SBC does not have statutory authority to examine the contents of an Act 425 agreement to determine whether the agreement meets the requirements of Act 425 and that, in doing so, the SBC in this case exceeded its jurisdictional boundaries. However, clearly revealing the weakness of this argument, Appellants concede on page 18 of their application that the Court of Appeals has issued a published decision recognizing "that the SBC has subject matter jurisdiction to consider whether a conditional transfer agreement satisfies the minimum criteria of Act 425 in those limited circumstances an annexation petition has been filed, covering the same lands." Application, p 18.

In *Twp of Casco v State Boundary Comm'n,* 243 Mich App 392; 622 NW2d 332 (2000), lv den 465 Mich 855 (2001), the Court of Appeals *unquestionably* held that the SBC has jurisdiction to determine whether an Act 425 agreement is valid for purposes of deciding whether the agreement bars the SBC from entertaining a petition for annexation concerning the same land. In *Casco*, property owners sought to develop their property for commercial purposes. The property was located in two townships, but was in close proximity to the city. In July 1996, the property owners filed a petition seeking to annex land into the city, claiming that the city "had the capacity to provide water, sewer, and other services immediately and at minimal cost, while the townships would not develop such capacity for several years." *Id.* at 395. However, earlier in November 1995 and January 1996, the townships had filed Act 425 agreements indicating an intent to transfer land—including the property owners' land—from Columbus Township and Casco Township into Lenox Township.

In November 1997, the SBC concluded (like it did in this case) that the Act 425 agreements did not meet the statutory criteria, and approved the petition for annexation. The townships appealed (as the Townships have done in this case), arguing that MCL 124.29

prohibited the annexation and that the SBC lacked the legal authority to determine the validity of the Act 425 agreements in the first place. The trial court rejected the townships' arguments, concluding that "the purpose of the agreements was to bind nonparties in derogation of their rights, to limit the authority of the commission, and to "ward off any attempts by municipalities to annex a portion of the Townships." *Id.* at 401-402. On further appeal, the Court of Appeals affirmed the trial court's decision, holding (1) that the SBC had jurisdiction to determine the validity of townships' Act 425 agreements, and (2) that the SBC's determination that the Act 425 agreements were illusory and merely a pretext to avoid annexation were supported by competent, material and substantial evidence.

Notably, the *Casco* Court clearly rejected the argument being advanced by the Townships in this case—that the SBC exceeded its authority or jurisdiction when it undertook to decide the legal validity of the Act 425 agreements. The Court initially noted that, under MCL 117.9(2), the SBC has the power to determine "the validity of the petition or resolution" concerning annexation and has duties concerning 'processing and approving, denying, or revising a petition or resolution for annexation....'. *Id.* at 397-378.

The Court then explained:

> At issue is the commission's role in determining whether an Act 425 agreement is valid for purposes of deciding whether the agreement bars the commission from entertaining a petition for annexation concerning the same land. The plain wording of MCL 124.29 provides that "a contract under this act" presently "in effect" bars other forms of "annexation or transfer" of the affected territory. This language expressly requires an Act 425 agreement that is "in effect" and, therefore, necessitates a valid agreement. Consequently, *this statutory bar to the commission's consideration of an annexation petition requires an agreement that fulfills the statutory criteria, rather than a fictional agreement intended only to deprive the commission of jurisdiction*.
>
> The townships argue that either the circuit court should review the issue of jurisdiction de novo or that the circuit court should have sole jurisdiction to

> determine the validity of an Act 425 agreement. According to the townships, any document purporting to be an Act 425 agreement, once signed and filed according to the specified procedure, absolutely bars any action on the part of the commission concerning the same territory, without regard to the substance of the agreement. We disagree. *In light of the broad grant of statutory authority to the commission over matters relating to the establishment of boundaries and annexations, we hold that the commission had the authority and jurisdiction to decide the validity of the Act 425 agreements. Logic dictates that the commission had the authority to consider the validity of two agreements that, if valid, would have barred its authority to process, approve, deny, or revise a petition or resolution for annexation. The commission would not otherwise have been able to perform its function of resolving the petition*. See *Shelby Charter Twp v State Boundary Comm'n*, 425 Mich 50, 73-77; 387 NW2d 792 (1986) (the commission may proceed with an annexation petition where it has identified only "pro forma" or "de minimus" exercises of statutory measures that would otherwise supplant its jurisdiction); *Judges of the 74th Judicial Dist v Bay Co*, 385 Mich 710, 728-729; 190 NW2d 219 (1971) (an administrative agency is competent to determine its own jurisdiction). The commission's determination was thereafter subject to review in the circuit court. MCL 24.301, MCL 123.1018; *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 731; 605 NW2d 18 (1999). [*Id.* at 398-400 (emphasis added).]

The Court of Appeals then concluded that there was competent, material and substantial evidence to support the SBC's findings that the townships' Act 425 agreements were illusory and, therefore, invalid. The Court explored the evidence in the record, affirming the lower court findings that the Act 425 agreements fell short of the statutory requirements of Act 425 because they failed to provide for improvements to the property necessary for the planned industrial, commercial or housing development; they were simply agreements to share services and not a true transfer of property. The Court of Appeals noted (as had the trial court) that "the townships had not entered into any real plan for economic development" and that "the parties who had filed the annexation petition with the commission developed a record that supported the commission's conclusion that the agreements were essentially an attempt to avoid annexation." *Id.* at 401-402.

Thus, *Casco* easily disposes of Appellants' argument that the SBC exceeded its statutory authority in this case when it determined that the Townships' Act 425 agreement was legally

insufficient and did not deprive the SBC of jurisdiction over the annexation petition covering the same land.

Casco also disposes of Appellants' argument that the Act 425 agreement was entitled to a presumption of validity under which it should have withstood agency and judicial scrutiny. Appellants rely on MCL 124.30, which states in part that "[t]he contract or a copy of the contract certified by that county clerk or by the secretary of state is prima facie evidence of the conditional transfer." Yet, the *Casco* Court addressed—and patently rejected—this very argument, specifically stating that MCL 124.30 "does not preclude a finding that the agreement was a sham." Appellants have not identified any error in this conclusion, nor can they as the presumption created in MCL 124.30 is clearly rebuttable. See e.g., *American Cas Co v Costello,* 174 Mich App 1, 7; 435 NW2d 760 (1989) ("[s]tatutory language making proof of one fact prima facie evidence of another fact is analogous to a statutory rebuttable presumption"). Thus, there was no error in the SBC's consideration of the Act 425 agreement to determine if it was a sham.

D. Appellants' argument that a bulk of the *Casco* decision is "irrelevant obiter dictum" is wholly without merit, and does not merit a different result in this case.

In an attempt to avoid the outcome dictated by *Casco,* Appellants suggest that once the *Casco* Court determined the SBC had jurisdiction to determine the validity of the Act 425 agreements, "[a]nything else the Court said after that point was irrelevant obiter dictum." Application, p 20. This argument completely misses the mark.

The *Casco* Court stated that one of the issues squarely before the Court was "whether competent, material, and substantial evidence supported the commission's determination that the Act 425 agreements were merely a pretext to avoid annexation." *Casco, supra,* 243 Mich App at

395. And, as this Court explained in *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007):

> The rule of stare decisis requires courts to reach the same result as in one case when the same or substantially similar issues are presented in another case with different parties. Stare decisis does not arise from a point addressed in obiter dictum. However, ***an issue that is intentionally addressed and decided is not dictum if the issue is germane to the controversy in the case, even if the issue was not necessarily decisive of the controversy in the case***. This Court is bound by stare decisis to follow the decisions of our Supreme Court. [Citations omitted; emphasis added.][4]

See also *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 fn 3; 713 NW2d 750 (2006) (defining dicta as "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand….").

Even a cursory review of *Casco* reveals that the Court was called upon to decide "whether competent, material, and substantial evidence supported the commission's determination that the Act 425 agreements were merely a pretext to avoid annexation," *Casco, supra*, 243 Mich App at 396. Thus, contrary to Appellants' argument, the Court of Appeals' statements regarding the validity of the Act 425 agreements were clearly necessary to a determination of the case and were, therefore, not dicta.

E. Appellants' disagreement with the decision in *Casco* or its impact on the outcome of this case does not merit further review by this Court, as Appellants have not shown that the decision was wrongly decided, or provided any basis on which to revisit the decision.

Appellants criticize those portions of the *Casco* decision discussing the illusory nature of the Act 425 agreements as exceeding the principles of appropriate judicial restraint and

[4] "Stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

substituting speculation for administrative fact-finding. Clearly the Michigan Supreme Court did not find such error in the decision, as it denied the townships' application for leave to appeal. 465 Mich 855. While Appellants disagree with the *Casco* decision and its impact on the outcome of this case, they have provided no basis on which to grant their application and to provide the relief they are requesting. Applicants have utterly failed to distinguish *Casco* and there has been no intervening change in the law that merits review of that decision. Even if Appellants had suggested that *Casco* be revisited, this Court is bound by the decision and it would be appropriate to decline such an invitation to revisit the issue. MCR 7.215(C)(2).[5]

Appellants posit a "sky is falling" argument—that the SBC will invalidate "*any* Act 425 agreement that will interfere with the SBC's annexation powers, based on irrelevant factors"—and ask this Court to ascertain the validity of the Act 425 agreement from the face of the agreement itself. Application, p 22-23. However, as the *Casco* Court recognized, and as common sense dictates, determination of whether an agreement is a sham may require examination of additional evidence. See e.g., *NAG Enterprises, Inc v All State Industries, Inc,* 407 Mich 407, 410; 285 NW2d 770 (1979) (recognizing a well-established exception to the parole evidence rule that allows the admission of extrinsic evidence to show that a writing is a

[5] Even assuming arguendo that *Casco* was wrongly decided—which the MML strongly rejects—"the mere fact that an earlier case was wrongly decided does not mean that overruling it is invariably appropriate." *Robinson, supra,* 462 Mich at 466. It is apparent from the parties' briefs that the *Casco* decision is widely accepted and represents a rule of law that is fundamental to annexation proceedings in this state. Overruling *Casco* would prejudice the parties filing annexation petitions, as they would be precluded from advancing their annexation request at the SBC while presumably being forced to litigate the validity of purported Act 425 agreements in an entirely different forum. It would also clearly prejudice property owners whose properties may be unwittingly or involuntarily included in 425 agreements, and who would then have no recourse in the annexation process, even if the Act 425 agreements were illusory as they were determined to be in *Casco* and this case. These considerations further weigh against disturbing the well-reasoned holding in *Casco.*

sham); *Hamade v Sunoco Inc (R&M)*, 271 Mich App 145, 167; 721 NW2d 233 (2006) ("extrinsic evidence may be presented to attack the validity of the contract as a whole…to show…that the writing was a sham"). Thus, it is entirely appropriate (and necessary) for the SBC to make that determination on the entire record—not from the face of the purported Act 425 agreement. And while Appellants suggest that the trial court should be limited in its ability to review the SBC determination, the trial court is statutorily required to examine the entire record in reviewing the decision on appeal. See MCL 24.306 (a decision must be "supported by competent, material and substantial evidence *on the whole record*") (emphasis added).

Thus, the SBC was well within its statutory authority when it reviewed the validity of the purported Act 425 Agreement. As in *Casco*, the record revealed that the Act 425 agreement was essentially an attempt to avoid annexation.[6] Thus, the SBC properly concluded that it was not barred from processing the annexation petition.

Under the Townships' position they would be free to block an annexation through execution of a "facially valid" Act 425 agreement, free from any scrutiny by the SBC. Their argument clearly and improperly seeks to elevate form over substance, injecting further conflict into the annexation process. See *Zurcher v Herveat*, 238 Mich App 267, 277; 605 NW2d 329 (1999) (discussing the distinction between the *form* of a contract and the *substance* of a contract). Again, *Casco* disposes of the Townships' argument. The *Casco* Court plainly rejected the notion that any document purporting to be an Act 425 agreement absolutely bars action by SBC without regard to the substance of the agreement. *Casco, supra,* 243 Mich App at 398-400.

[6] The MML agrees with and incorporates the arguments by the City of Cadillac regarding the competent, material and substantial evidence in the record supporting the SBC's ultimate decision that the agreement was illusory.

Appellants urge a different result in this case, but present no law in support of their position. Nor do Appellants address how weakening the SBC or usurping its statutory powers will help property owners achieve their goals of developing land in a cost-effective and timely manner. *Casco* does not prohibit townships from barring annexation of township land by providing for *real* economic development alternatives through *legitimate* Act 425 agreements. It does, however, recognize the Legislature's decision to vest the SBC with the authority to determine the legitimacy of such agreements and, hence, whether it is barred from acting upon otherwise legally valid annexation petitions.

For all of these reasons, the Townships' application should be denied in its entirety.

II. THE TRIAL COURT DID NOT ERR IN DECLINING TO APPLY A PRECLUSION DOCTRINE TO THE SBC'S EARLIER DENIAL OF A PETITION FOR ANNEXATION BECAUSE, CONTRARY TO THE APPELLANT TOWNSHIPS' ARGUMENT, COLLATERAL ESTOPPEL DOES NOT APPLY TO THE SBC'S DENIAL OF AN ANNEXATION PETITION

A. The preclusion doctrines have been applied to give preclusive effect to administrative decisions where certain factors are met.

Res judicata and collateral estoppel, informally known as preclusion doctrines, are "judicial creations, developed and extended from the common law." *Nummer v Treasury Dep't*, 448 Mich 534, 544; 533 NW2d 250, 254 (1995). As our Supreme Court explained in *Nummer:*

> The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims. By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation. Whether the determination is made by an agency or court is inapposite; the interest in avoiding costly and repetitive litigation, as well as preserving judicial resources, still remains. [*Id.* at 541-542.]

In this case, Appellants argue that the SBC was collaterally estopped from granting the annexation petition because it had previously denied a similar application. "Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp,* 269 Mich App 527, 530; 711 NW2d 438 (2006).

Michigan courts have recognized the preclusive effect of administrative decisions. In *O'Keefe v Dep't of Social Services,* 162 Mich App 498; 413 NW2d 32 (1987), the Court of Appeals held that an administrative decision barred the plaintiff from bringing a subsequent action against the defendant, explaining:

> It is established law in this state that the doctrines of res judicata and collateral estoppel apply to administrative determinations which are adjudicatory in nature where a method of appeal is provided and where it is clear that it was the legislative intention to make the determination final in the absence of an appeal.

Similarly, in *Minicuci v Scientific Data Management, Inc,* 243 Mich App 28; 620 NW2d 657 (2000), the Court of Appeals held that denial of the plaintiff's administrative claim under the wage act barred him from bringing separate breach of contract and sales commissions claims against the defendant.

Collateral estoppel will preclude litigation on the basis of an administrative decision where the following requirements are satisfied:

1. A question of fact essential to the judgment was actually litigated and determined by a valid and final judgment;
2. The same parties had a full opportunity to litigate the issue;
3. There is mutuality of estoppel;
4. The administrative determination must have been adjudicatory in nature;
5. There was a right to appeal the administrative determination; and
6. The Legislature must have intended to make the decision final absent an appeal.

Minicuci, supra, 243 Mich App at 33, citing *Nummer, supra*, 448 Mich at 542.

B. The preclusion doctrines do not apply to a purely legislative function.

While the doctrines of res judicata or collateral estoppel apply to administrative decisions that are adjudicatory in nature, they "cannot apply in a pure sense" to a legislative, rather than a judicial, function. *In re Consumers Energy Application for Rate Increase,* 291 Mich App 106, 122; 804 NW2d 574 (2010).

The SBC—like other administrative agencies—performs both "quasi-legislative" and "quasi-judicial" functions. *In re Complaint of Rovas Against SBC Michigan,* 482 Mich 90, 100-

101; 754 NW2d 259 (2008); see also *Blue Water Isles Co v Dep't of Natural Resources,* 171 Mich App 526, 533; 431 NW2d 53 (1988) (agencies often perform quasi-judicial and quasi-legislative functions). The SBC performs some quasi-judicial functions when it conducts business at adjudicative sessions. For example, the SBC may, at an adjudicative session (as opposed to an administrative session) "[d]ecide the legal sufficiency of a docket before its call for a public hearing." AC R 123.21(a); AC R 123.24. It is required to conduct public hearings, to "present findings of fact and conclusions of law at an adjudicated session", and recommend by resolution the disposition of the matter. R 123.61. It may be called upon to make other legal determinations as well. See e.g., OAG No. 5543 (August 15, 1979) (discussing the SBC "passing upon the validity of an annexation referendum petition").

However, even though the SBC processes annexation petitions in a quasi-judicial manner, its final decision to grant or deny an annexation petition is a purely legislative determination. "The extension of the boundaries of a city or town is viewed as purely a political matter, entirely within the power of the state legislature to regulate." *Goethal v Bd of Sup'rs of Kent Co,* 361 Mich 104, 113; 104 NW2d 794 (1960), quoting 2 McQuillin Municipal Corporations, § 7.10 (3rd ed). "No city, village, township or person has any vested right or legally protected interest in the boundaries of such governmental units. The Legislature is free to change city, village and township boundaries at will." *Midland Twp v Boundary Comm'n,* 401 Mich 641, 664; 259 NW2d 326 (1977).

> The fixing of municipal boundaries is generally considered to be a legislative function. In this State the power vested in the legislature to provide for incorporation of cities and villages is in no way limited by Constitution (art. 8, §§ 20, 21) (home rule amendment), and the power conferred on the legislature by the Constitution (art. 8, § 20) to provide by general law for incorporation of cities and villages includes change of boundaries when needed. In the absence of

> constitutional inhibition the legislature may submit the determination of boundaries to courts, or to municipal authorities, or to the qualified electors.
>
> The changing of the boundaries of political divisions is a legislative question, and the power to annex territory to municipalities has often been delegated to boards of supervisors or other public bodies. [*Shelby Charter Twp, supra,* 425 Mich at 56 n 3.]

See also *Meridian Charter Twp v Ingham Co Clerk,* 285 Mich App 581, 594; 777 NW2d 452 (2009) ("the fixing of municipal boundaries is a legislative function").[7]

"In the absence of constitutional inhibition the Legislature may submit the determination of boundaries to courts, or to municipal authorities, or to the qualified electors." *Hempel ex rel Michigan Limestone & Chemical Co v Rogers Twp,* 313 Mich 1, 9-10; 120 NW2d 78 (1945). As discussed above and in *Casco, supra,* the Legislature has vested the SBC with jurisdiction over annexation petitions.[8] However, that does not change the nature of the boundary adjustment; it remains a legislative determination that is not subject to collateral estoppel.

Importantly, if denials of annexation petitions were subject to collateral estoppel as urged by Appellants, the effect would be to elevate the denial of a petition to the status of an enforceable "right," which is clearly contrary to the law of this state. As stated above, "No city, village, township or person has any vested right or legally protected interest in the boundaries of

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[7] Because there are no "private rights" in municipal boundaries, "the constitutional provision concerning judicial review of administrative action does not limit Commission proceedings." *Midland Twp, supra* at 673, citing Const 1963, art 6 §28. "No vested right or legally protected interest being involved, the judiciary ought to be especially circumspect in reviewing Commission rulings and determinations." *Id*. at 674.

[8] The delegation of authority was upheld in *Midland Twp, supra,* 401 Mich at 650. As our Supreme Court recognized in *Shelby Charter Twp, supra,* 425 Mich at 59, the MML was instrumental in the creation of the SBC and the "compromise" that resulted in the delegation of authority over annexations to the SBC. The intent, in part, was to address the inequities in the pre-1970 procedures and to create an impartial body "which would make decisions on the basis of facts rather than emotions." *Id.* at 59-60.

such governmental units. The Legislature is free to change city, village and township boundaries at will." *Midland Twp, supra,* 401 Mich at 664. If the Appellants' position is accepted, a prior denial of an annexation petition or boundary change request becomes, in essence, a "vested right" that is not otherwise recognized or enforceable under Michigan law. Such a result cannot be sustained and, thus, the application should be denied for lack of merit.

C. Even if the denial of an annexation petition is not considered as a matter of law to be a legislative determination that is exempt from collateral estoppel, the Legislature has clearly expressed its intent to exempt the denial of an annexation petition from the limitations of collateral estoppel and, thus, the preclusion doctrine still does not apply.

Even if the Court concludes that SBC decisions may be subject to collateral estoppel, or that denial of an annexation petition is not exempt from collateral estoppel as a legislative determination, the Legislature has nevertheless clearly expressed its intent to exempt the denial of an annexation petition from collateral estoppel.

"Collateral estoppel, also known as issue preclusion, is a common-law doctrine that gives finality to litigants." *People v Wilson,* 496 Mich 91, 98; 852 NW2d 134 (2014). Collateral estoppel is a judicial creation. *Howell v Vito's Trucking & Excavating Co,* 20 Mich App 140, 146; 173 NW2d 777 (1969), rev'd on other gds 386 Mich 37 (1971). Because collateral estoppel is a judicial creation, the presumption of preclusion will not apply " 'when a statutory purpose to the contrary is evident.' " *Astoria Federal S & L Ass'n v Solimino,* 501 US 104, 108; 111 S Ct 2166; 115 L Ed 2d 96 (1991), quoting *Isbrandtsen Co v Johnson*, 343 US 779, 783; 72 S Ct 1011; 96 L Ed 1294 (1952). In *Astoria, supra,* 501 US at 108-110, the Supreme Court noted that the presumption of preclusion may be overcome where Congress "expressly or impliedly" evinces its intention on the issue.

> This interpretative presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme. [*Id.* at 108.]

This rule has been equally applied to the preclusion doctrine of res judicata. In *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 630; 808 NW2d 471 (2010), this Court explained:

> res judicata is a "judicially created" doctrine, *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999), and must not be applied when its application would subvert the intent of the Legislature, *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632, 642; 433 NW2d 787 (1988) (opinion by Griffin, J.); *Juncaj v C & H Indus*, 161 Mich App 724, 734; 411 NW2d 839 (1987), vacated on other grounds 432 Mich 1219 (1989); see also *Texas Instruments Inc v Cypress Semiconductor Corp*, 90 F3d 1558, 1568 (CA Fed, 1996) (observing that "an administrative agency decision, issued pursuant to a statute, cannot have preclusive effect when [the Legislature], either expressly or impliedly, indicated that it intended otherwise").

"Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent." *Wold Architects & Engineers, supra*, 474 Mich at 233. "The best evidence of the Legislature's intent is the language of the statute." *Bennett, supra,* 289 Mich App at 631, citing *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004).

MCL 117.9(6) reads:

> The commission shall reject a petition or resolution for annexation of territory that includes all or any part of the territory which was described in any petition or resolution for annexation filed within the preceding 2 years and which was denied by the commission or was defeated in an election under subsection (5).

The Court's primary responsibility when interpreting a statute such as MCL 117.9(6) is to ascertain and give effect to the intent of the Legislature by examining the language of the statute. And the statute clearly contemplates that the SBC—*after a 2-year waiting period*—may consider an identical or similar annexation petition, even if it the petition was previously denied by the SBC or defeated in an election under MCL 117.9(5).

To accept Appellants' collateral estoppel argument, the Court would be required to ignore this statute or, at a minimum, read an important phrase out of the statute. Appellants' collateral estoppel argument suggests that the statute be read and applied as follows:

> The commission shall reject a petition or resolution for annexation of territory that includes all or any part of the territory which was described in any petition or resolution for annexation ~~*filed within the preceding 2 years and*~~ which was denied by the commission or was defeated in an election under subsection (5).

Clearly such an interpretation is not permitted under the rules of statutory construction. In *Brown v Genesee Co Bd of Commr's,* 464 Mich 430, 438; 628 NW2d 471 (2001), the Court noted that "when construing a statute, we presume that every word has meaning; our interpretation should not render any part of the statute nugatory." Appellants' interpretation also conflicts with the plain language of MCL 117.8(3), which states that a petition for annexation under MCL 117.6 "covering the same territory, or part of the same territory, shall not be considered by the county board of commissioners *more often than once in every 2 years*" (emphasis added).

To be clear, the circuit court did not—as Appellants argue—hold that the SBC is entirely exempt from collateral estoppel. Nothing in the circuit court's decision suggests that an SBC decision would not be entitled to preclusive effect where, for example, a person attempts to relitigate the issues in a subsequent civil proceeding arising out of an annexation petition or resolution. The circuit court merely held—and the MML agrees—that the preclusion doctrines do not prohibit an applicant from reapplying (i.e., submitting a second petition or resolution) for annexation following expiration of the 2-year waiting period. Application of the preclusion doctrines to bar an applicant's subsequent petition following the 2-year waiting period would clearly subvert the intent of the Legislature.

MCL 117.9(6) expresses a clear Legislative intent to contravene the common law rules of preclusion in the context of annexation. As discussed above, this is within the province of the Legislature. See e.g., *Smith v Perkins Bd of Ed*, 708 F3d 821, 827-828 (6th Cir, 2013) (holding that common law collateral estoppel principles did not apply to claims brought under the ADA because Congress demonstrated a contrary intent). See also MCL 123.1006, which contemplates that the SBC *will receive* successive petitions or resolutions for boundary adjustment proceedings "covering all or any part of the same territory." The statute simply requires the SBC to process the petition or resolution "first filed" before a petition or resolution "subsequently filed." Thus, Appellants' collateral estoppel argument does not merit review by this Court.

D. The SBC is not barred from considering subsequent annexation petitions absent a change in circumstances.

Nothing in MCL 117.9 or MCL 123.1006 requires a finding of changed circumstances before consideration of a subsequent annexation petition as urged by Appellants. It is clear that, after two years, a denial of an annexation petition is not a "final" decision in the sense that a petitioner *may* file the same or similar petition. MCL 117.9(6) reflects a legislative intent to impose a short, temporal limit the preclusive effect of a denial, and shows that the Legislature did not intend for the denial to be "final" in the sense that the annexation request could not be revisited at a later time. Cf. *Minicuci, supra,* 243 Mich App at 39-41, in which the Court of Appeals explains that where an act expressly provides only for appellate judicial review of an administrative decision "and does not reflect any legislative intent to limit the preclusive effect of administrative…determinations," it follows that "the Legislature intended to make the department's administrative determination final absent an appeal."

Appellants urge the Court to read into the statute a requirement that there be a demonstrated change in circumstances. However, as this Court noted in *Detroit Pub Sch v Conn,* 308 Mich App 234, 248; 863 NW2d 3743 (2014), "nothing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself." "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Id.* (citations and quotation marks omitted).

The administrative finality urged by Appellants is inconsistent with MCL 117.9 and other statutory schemes in Michigan. In fact, there are various situations in which the Legislature has empowered administrative agencies to revisit an issue, petition or application after a period of time—without a material or substantial (or any) change in circumstances. By way of example:

- Section 437(2) of the Michigan Business Tax Act, MCL 208.1437(2), states that "[i]f a project is denied under this subsection, a taxpayer is not prohibited from subsequently applying under this subsection for the same project or for another project."

- Similarly, MCL 208.1437(3) and (4) state that "[i]f a project is denied under this subsection, a taxpayer is not prohibited from subsequently applying under this subsection or subsection [(4) or (3), respectively] for the same project or for another project."

- Section 1413 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.1413, sets forth the procedure for obtaining a "clean corporate citizen" designation for a facility. The statute provides that "[i]f the application is disapproved, the unsuccessful applicant may reapply for a clean corporate citizen designation at any time," and the applicant may even incorporate documents attached to the prior application by reference.

- Similarly, Section 36104 of NREPA, MCL 324.36104, sets forth the procedure for obtaining a farmland development rights agreement. It states that if an application is denied, "[a]n applicant may reapply for a farmland development rights agreement following a 1-year waiting period." MCL 324.36104(11).

- MCL 324.36105(4) states that an applicant whose application for an open space development rights easement "may reapply for an open space development rights easement beginning 1 year after the rejection." MCL 324.36105(4). See also MCL 324.36106(10) (same).

- MCL 324.63712(7) states that "[i]f the department determines the status of an active cell-unit does not meet the conditions or requirements for reclassification to interim cell-unit status, the operator may not reapply for reclassification of the same active cell-unit until 1 year from the previous request." MCL 324.63712(7).

- MCL 333.5462 states that "[i]f the department disapproves a [lead-based paint] training program's application for accreditation, the applicant may reapply for accreditation at any time."

- See also MCL 333.5464 which states that with regard to refresher courses under the Public Health Code, "[i]f the department denies a training program's application for accreditation of a refresher course, the applicant may reapply for accreditation at any time."

In the context of annexation, placing a burden on the applicant to identify a substantial change since the prior application is inconsistent with the administrative scheme, the relief sought, and the law governing annexation. As the circuit court properly recognized, "[t]he annexation question is essentially political" and "[t]he ultimate decision will be a value judgment based on the particular facts and circumstances of annexation under consideration." *Midland Twp, supra*, 401 Mich at 669-671.

The legislative purpose behind the SBC was to establish an independent authority with "broad powers concerning annexations" and to allow annexations to take place for the general benefit of the areas concerned, instead of for the private benefit of individuals. *Owosso Twp. v. Owosso*, 385 Mich 587, 590; 189 NW2d 421 (1971). Annexation decisions are impacted by factors that are internal and external to a petition, including but not limited to the characteristics of the property and surrounding area, availability and desirability of services and improvements, changes in business demands or competition, and outside influences such as changes in the

economy or political climate. Our Supreme Court recently acknowledged that matters of public concern "may be influenced by the changing fiscal conditions of the state, the evolving policy priorities of governmental bodies, constitutional modifications and other initiatives of the people, and the ebb and flow of state, national, and global economies." *AFT Michigan v State of Michigan,* 497 Mich 197, 215; 866 NW2d 782 (2015) (public employment).

The Legislature was presumably aware of the myriad factors impacting annexation decisions, and has long-determined the sufficiency of a 2-year waiting period between annexation petitions. This Court "must give due deference to acts of the Legislature, and we will not inquire into the wisdom of its legislation." *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guar Ass'n,* 456 Mich 590, 612-613; 575 NW2d 751 (1998).

This holds true in matters of concern to local governments, including controversial matters such as annexation. See e.g., *Mayor of City of Lansing v Michigan Pub Svc Comm'n,* 470 Mich 154, 161; 680 NW2d 840 (2004), in which our Supreme Court held that a petroleum pipeline company was required to get the city's consent before constructing its pipeline. There, the Court acknowledged that its

> reading of the statute may facilitate frivolous and potentially crippling resistance from local governments along the route of a utility project. Such an argument, however, misunderstands the role of the courts. Our task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.

CONCLUSION AND RELIEF REQUESTED

For all of the reasons discussed above, the Appellant Townships' application for leave to appeal should be denied in its entirety, as it seeks a result that conflicts with well-settled principles of statutory interpretation, annexation, and collateral estoppel. While Appellants disagree with the outcome below—which was dictated in large part by the well-reasoned, binding decision in *Casco Twp supra*—they have not demonstrated any reversible error in the decisions that merit review by this Court.

Respectfully submitted,

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