

STATE OF MICHIGAN
IN THE SUPREME COURT

CLAM LAKE TOWNSHIP and HARING
TOWNSHIP,

MSC Docket No. 151800

COA Docket No. 325350

Appellants,

v

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

Wexford Circuit Court
Case No. 14-25391-AA

State Boundary Commission
Docket No. 13-AP-2

Appellees.

Submitted with

TERIDEE LLC, JOHN F. KOETJE TRUST,
and DELIA KOETJE TRUST,

MSC Docket No. 153008

COA Docket No. 324022

Plaintiffs/Appellees,

v

HARING CHARTER TOWNSHIP and CLAM
LAKE TOWNSHIP,

Wexford Circuit Court
Case No. 13-024803-CH

Defendants/Appellants.

**AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE
IN SUPPORT OF THE APPELLEES STATE BOUNDARY COMMISSION,
TERIDEE, LLC, AND THE CITY OF CADILLAC**

Dated: August 26, 2016

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STATEMENT OF THE BASIS OF JURISDICTION

The Michigan Municipal League (“MML”) agrees with and adopts the Statement of Jurisdiction in Defendant-Appellee State Boundary Commission’s brief on appeal.

STATEMENT OF QUESTIONS PRESENTED¹

- I. DID *CASCO TWP v STATE BOUNDARY COMM’N*, 243 MICH APP 392, 399 (2000), CORRECTLY HOLD THAT THE STATE BOUNDARY COMMISSION HAS THE AUTHORITY TO DETERMINE THE VALIDITY OF AN AGREEMENT MADE PURSUANT TO THE INTERGOVERNMENTAL CONDITIONAL TRANSFER OF PROPERTY BY CONTRACT ACT, 1984 PA 425, MCL 124.21 *et seq.* (ACT 425)?

The State Boundary Commission implicitly answered “Yes.”

The circuit court implicitly answered “Yes.”

Appellees (City, TeriDee, and SBC) answer “Yes.”

Appellants (Townships) answer “No.”

The Michigan Municipal League answers “Yes.”

The Court of Appeals did not answer.

- II. DID THE STATE BOUNDARY COMMISSION PROPERLY DETERMINE THAT THE APPELLANT TOWNSHIPS’ ACT 425 AGREEMENT WAS INVALID (OR IN OTHER WORDS, DID THE STATE BOUNDARY COMMISSION PROPERLY CONCLUDE BASED ON THE RECORD THAT THE ACT 425 AGREEMENT DID NOT FULFILL THE STATUTORY CRITERIA OF ACT 425, SUCH THAT THE STATE BOUNDARY COMMISSION WAS NOT DEPRIVED OF JURISDICTION OVER THE PROPERTY OWNER’S ANNEXIATION PETITION)?

The State Boundary Commission answered “Yes.”

The circuit court implicitly answered “Yes.”

Appellees (City, TeriDee and SBC) answer “Yes.”

Appellants (Townships) answer “No.”

The Michigan Municipal League answers “Yes.”

The Court of Appeals did not answer.

¹ From this Court’s June 3, 2016 Amendment to Order entered in Docket Nos. 151800 and 153008.

- III. WHETHER, DESPITE THE LANGUAGE OF MCL 117.9(6) AND MCL 123.1012(3) (PROVIDING A TWO-YEAR WAITING PERIOD BEFORE RESUBMISSION OF A PETITION FOR ANNEXATION), THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE DOCTRINE OF COLLATERAL ESTOPPEL DID NOT APPLY TO INVALIDATE THE SBC'S 2014 APPROVAL OF THE APPELLEE PROPERTY OWNERS' PETITION FOR ANNEXATION ON THE BASIS OF THE SBC'S DENIAL OF THE SAME PROPERTY OWNER'S PETITION IN 2012 BECAUSE MORE THAN TWO YEARS HAD ELAPSED SINCE THE EARLIER PETITION WAS FILED?

The circuit court answered "Yes."

Appellees (City, TeriDee and SBC) answer "Yes."

Appellants (Townships) answer "No."

The Michigan Municipal League answers "Yes."

The Court of Appeals did not answer.

- IV. WHETHER, IN DOCKET NO. 153008:²

- (a) *INVERNESS MOBILE HOME COMMUNITY V BEDFORD TWP*, 263 MICH APP 241 (2004) APPLIES TO THE TOWNSHIPS' ACT 425 AGREEMENT;

The Court of Appeals answered "Yes."

Appellees and the Michigan Municipal League answer "Yes."

Appellants answer "No."

- (b) WHETHER THE CHALLENGED PROVISIONS OF THE ACT 425 AGREEMENT WERE NEVERTHELESS AUTHORIZED BY MCL 124.26(c)?

The Court of Appeals answered "No."

Appellees and the Michigan Municipal League answer "No."

Appellants answer "Yes."

- (c) IF THE CHALLENGED PROVISIONS ARE VOID, WHETHER THE OFFENDING PROVISIONS WERE SEVERABLE?

The Court of Appeals answered "No."

Appellees and the Michigan Municipal League answer "No."

Appellants answer "Yes."

² This Court invited the Michigan Municipal League to address these issues which are on appeal in Docket No. 153008—the companion case to Docket No. 151800—and instructed amici curiae to file briefs in Docket No. 151800 only.

STATEMENT OF FACTS

The MML concurs with the Statement of Facts set forth by the City of Cadillac in its Brief on Appeal in Docket No. 153008, and the Counter-Statement of Facts and Proceedings set forth by the State Boundary Commission in its Brief on Appeal in Docket No. 153008, and does not repeat the facts here as it would be unnecessarily duplicative.

DISCUSSION

I. THE COURT OF APPEALS CORRECTLY HELD IN TWP OF CASCO V STATE BOUNDARY COMM’N, 243 MICH APP 392 (2000), THAT THE STATE BOUNDARY COMMISSION HAS 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 AND THE STATE BOUNDARY COMMISSION PROPERLY EXAMINED THE TOWNSHIP’S 425 AGREEMENT AND DETERMINED THAT IT DID NOT OPERATE TO BAR THE COMMISSION’S CONSIDERATION OF THE ANNEXATION PETITION

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). “Likewise, questions of statutory interpretation are subject to review de novo. When interpreting a statute, our foremost rule of construction is to discern and give effect to the Legislature’s intent.” *Wyandotte Elec Supply Co v Electrical Tech Sys, Inc*, 499 Mich 127, 137; 881 NW2d 95 (2016) (citation omitted).

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.”³ Through the State Boundary Commission Act (the “SBC Act”), MCL 123.1001 *et seq.*, the Michigan Legislature has expressly vested the State Boundary Commission (“SBC” or “Commission”) with jurisdiction over petitions or resolutions for annexation. MCL 123.1011a. See also Section 9 of the Home Rule City Act, being MCL 117.9, which governs annexation proceedings.

³ Coe, Charles, “Costs and Benefits of Municipal Annexation,” *State & Local Governmental Review*, Vol. 15, No. 1 (Winter 1983), p 44.

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” (emphasis added). Thus, only if an Act 425 agreement has been validly enacted and properly filed is the SBC prohibited from granting a petition for annexation for the territory submitted under MCL 117.9 and MCL 123.1011a.⁴

As set forth in the briefs filed by the City of Cadillac (“City”) and SBC, which provide the procedural history of this case, the property owner TeriDee, LLC wished to develop its property for commercial purposes and, consistent with its development goals, sought to annex its property into the City 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

⁴ “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.

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 the interested parties, the SBC determined that the Townships' 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. On May 26, 2015, the Court of Appeals denied the Township's application for leave to appeal "for lack of merit in the grounds presented." The appeal is before this Court on leave granted but, for the reasons discussed below, the circuit court decision should be affirmed.

C. The Townships should be precluded from arguing that the circuit court had exclusive authority to determine the validity of the Act 425 agreement because that is directly contrary to the position they took in the circuit court.

At the outset, it cannot be overlooked that the Townships have taken diametrically opposed positions regarding the SBC's jurisdiction to determine the validity of the Act 425 agreement. While they urge this Court in Docket No. 151800 to overrule *Casco* and hold that the jurisdiction to determine the validity of an Act 425 agreement is vested exclusively in the circuit court, that is directly contrary to the position they took in the circuit court and Court of appeals in Docket No. 153008 (the "Companion Case"). In fact, the Court of Appeals opinion in the Companion Case, slip op at 2, states:

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that both counts should be dismissed *because the SBC had primary jurisdiction to rule on the validity of the agreement under Act 425.*

* * *

The trial court dismissed Count I, finding that the SBC had primary jurisdiction to determine the validity of the agreement, specifically whether it complied with the requirements of Act 425. [Emphasis added.]

Because the Townships disagreed with the SBC's ultimate decision, however, they ask this Court in Docket No. 151800 to hold that the SBC without jurisdiction to determine the validity of the Act 425 Agreement. Granting the relief requested by the Townships would require the Court to ignore this legal ping pong and run afoul of the rules of appellate practice in this state. Stated differently, a party cannot assign error to something which its own attorney deemed proper at trial, *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), and seek relief on appeal on the basis of a position contrary to that taken below, *Flint City Council v Michigan*, 253 Mich App 378, 395; 655 NW2d 604 (2002). See also *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997) (“a party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court”).

Moreover, the circuit court accepted the Townships' argument as true and, thus, the Townships should be estopped from arguing that the SBC lacked jurisdiction to determine the validity of the Act 425 agreement. *Paschke v Retool Industries*, 445 Mich 502, 510; 519 NW2d 441 (1994) (in order to invoke estoppel, some indication must exist that the court in the earlier proceeding accepted that party's position as true). For these reasons, the Townships should not prevail in their attempt to deprive the SBC of the jurisdiction they recognized—and advocated for—below.

D. *Casco* clearly holds that the SBC has jurisdiction to determine the validity of an Act 425 Agreement for purposes of determining whether it can exercise authority over a petition for annexation.

Appellant Townships argue that the mere existence of their Act 425 agreement deprived the SBC of jurisdiction over the annexation petition. The Townships claim that only the “local units” to an Act 425 agreement—and not the SBC—have authority to administer and apply Act 425. The Townships 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. 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, that is directly contrary to a published decision of the Court of Appeals that has, for over 15 years since this Court denied leave to appeal, recognized that the SBC does, in fact, have jurisdiction to consider whether an Act 425 agreement is valid in those circumstances where there is a competing annexation petition covering the same lands.

In *Twp of Casco v State Boundary Comm’n*, 243 Mich App 392, 398; 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 (as it did in this case) that the Act 425 agreements did not meet requisite 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 concluded 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 the Townships’ 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 the Townships’ suggestion that the Act 425 agreement was entitled to a presumption of validity that operated as a shield against agency and judicial scrutiny. The Townships 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.” The Townships have not identified any error in this conclusion, nor can they as the presumption created in MCL 124.30 clearly is, and is intended to be, 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 Townships’ Act 425 agreement to determine if it was a sham.

E. The Townships' 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*, the Townships suggest that once the *Casco* Court determined the SBC had jurisdiction to determine the validity of the Act 425 agreements, anything the Court said after that point was irrelevant obiter dictum. This argument completely misses the mark. One of the issues squarely before the *Casco* 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 our appellate courts recognize that "*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.*" *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). 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.

Thus, there is no question that the *Casco* decision is binding precedent and that the SBC exercised its authority consistent with that decision. "The rule of stare decisis requires courts to

reach the same result as in one case when the same or substantially similar issues are *Griswold, supra*, 276 Mich App at 563. The Townships attempt to escape the result mandated by *Casco* by asking this Court to overrule it but, as discussed below, the case was correctly decided, and correctly applied to this case.

F. The *Casco* Court correctly decided that the SBC has the authority to determine the validity of an Act 425 agreement (i.e., whether a valid 425 agreement is “in effect” such that it would preclude the SBC from exercising its statutory authority over an annexation petition).

The Townships argue that *Casco* is based on the false premise that a property owner has a right to have his or her property transferred to a neighboring municipality through annexation. The argument is misplaced, as no party has suggested that there is any “right” to annexation, or that an Act 425 agreement is invalid if it interferes with the “rights” that may be granted by the SBC. Contrary to the Townships’ reading of *Casco*, the Court of Appeals was not suggesting that a person has a right to annexation, but there is certainly a right to *seek* annexation, and the SBC has the power and an obligation to receive and process annexation petitions, whatever the outcome. Thus, the Townships’ “dichotomy” argument is a red herring.

The Townships 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 substituting speculation for administrative fact-finding. Clearly the Michigan Supreme Court did not find such error in the decision, as it denied the township’s application for leave to appeal. 465 Mich 855. While the Townships disagree with the *Casco* decision and its impact on the outcome of this case, the *Casco* Court correctly decided that the SBC has the authority to determine the validity of an Act 425 agreement—that is, the SBC has the authority to determine

whether a valid 425 agreement is in effect such that it would preclude the SBC from exercising its statutory authority over an annexation petition.

The Townships take the position that because the SBC is not mentioned in Act 425, it is without any jurisdiction to determine whether an Act 425 agreement is in effect. This argument is without merit because it simply ignores that the SBC is granted plenary jurisdiction over annexation petitions and resolutions in other statutes. As the *Casco* Court recognized, “[t]he legislative purpose behind the State Boundary Commission was to establish an independent authority with ‘broad power concerning annexations....’ ” *Casco, supra*, 243 Mich App at 397.

Subsection 9(2) of the Home Rule City Act, 1909 PA 279, MCL 117.9(2), provides that the commission has the power to determine “the validity of the petition or resolution” concerning annexation and also recognizes the commission’s duties concerning “processing and approving, denying, or revising a petition or resolution for annexation....” MCL 123.1011a, setting forth procedures, provides, “The commission shall have jurisdiction over petitions or resolutions for annexation as provided in [MCL 117.9].” [*Id.* at 397-398.]

Contrary to the Townships’ argument, the circuit court did not grant “implied” powers to the SBC. MCL 124.29 expressly states that where an Act 425 agreement “is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under the contract.” The Legislature intended for the SBC Act to be “comprehensive” and to address the “divisiveness and litigation” that frequently resulted from the annexation process that predated the SBC Act. See e.g., *Shelby, supra*, 425 Mich at 58. In fact, the *Shelby* Court confirmed that the SBC has inherent authority to determine its jurisdiction and thus, in that case, it did not exceed its statutory authority in deciding whether property was exempt from annexation through application of the Charter Township Act. Similarly, the *Casco* Court correctly decided that the SBC does not exceed its statutory authority in deciding whether property is exempt from annexation by operation of Act 425.

Thus, when the SBC receives a petition for annexation, it must necessarily determine if there is an Act 425 agreement “in effect” covering the same land, thereby barring the annexation. The *Casco* Court correctly determined that without the authority to consider the validity of an Act 425 agreement, the SBC would not otherwise be able to perform its broad statutory functions, specifically the function of resolving an annexation petition.⁵

Importantly, despite the Townships’ criticism of *Casco*, they ultimately concede that the SBC is the appropriate body to determine whether an Act 425 agreement is valid. In fact, on page 24 of their Brief on Appeal, they assert that “this is exactly where the SBC has run amuck with the dictum of *Casco Twp*. **The SBC no longer limits its review of an Act 425 agreement to a simple determination of whether the plain terms of an agreement comply with the plain terms of the Act 425 statute.**” Thus, the Townships *admit* that the SBC has authority to determine the validity of an Act 425 agreement—they just want to prevent the SBC from looking beyond the title of a purported Act 425 agreement to ascertain its true intent. In light of the Townships’ concession that the SBC has a role in reviewing Act 425 agreements, *Casco* should remain undisturbed as it does not suggest anything to the contrary.

⁵ Contrary to the Townships’ argument, the SBC is not attempting to be the arbiter of all Act 425 agreements. As the SBC has noted on page 15 of its Brief in Appeal, there may be circumstances under which a circuit court action may be required to determine the enforceability or meaning of an Act 425 agreement. For example, a contract dispute or breach of contract action between parties to the Act 425 agreement would be an appropriate action to be resolved in circuit court. The SBC is not suggesting that it is the appropriate body to resolve disputes regarding revenue sharing or other terms, conditions or obligations that arise under an Act 425 agreement. But, the SBC must be permitted to examine the validity of a purported Act 425 agreement in order to exercise its statutory authority over annexation petitions. And, because the SBC’s decision is based on a factual record, a hearing process, and is subject to review on appeal, the current process provides a remedy for those local units that have an interest in or are aggrieved by the decision.

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 and unnecessary 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.

As the *Casco* Court correctly recognized, and as this case demonstrates, at times the determination regarding the validity of an Act 425 agreement may require examination of additional evidence. This is especially true where, as here, a property owner submits a petition for annexation and is then immediately confronted with an Act 425 agreement covering the same land. In that case, examination of other record evidence may be required to determine whether the timing of the agreement was coincidental (unlikely), or whether it is a sham intended only to block the annexation. 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 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, the SBC was well within its statutory authority when it reviewed the validity of the purported Act 425 Agreement, and it was 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. Similarly, 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). Here, 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 through the usual, established procedures.

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.

G. *Casco* should not be overruled because more injury will result from overruling the case than following it.

Even if this Court is convinced that *Casco* was wrongly decided, that does not require this Court to overrule the decision. In fact, the question of whether *Casco* was correctly decided cannot be decided in a vacuum, but must be answered against the backdrop of the long-

⁶ The MML agrees with and incorporates the arguments by the City and SBC regarding the record evidence supporting the SBC’s ultimate decision that the agreement was illusory.

recognized caution and restraint that is exercised when deciding whether a case was wrongly decided and, if so, whether to overrule the precedent. As the Court explained in *People v Tanner*, 496 Mich 199, 250-251; 853 NW2d 653 (2014):

When this Court determines that a case has been wrongly decided...it must next determine whether it should overrule that precedent, a decision that should never be undertaken lightly. The application of 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 Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998).

The *Tanner* Court recognized that “the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned”; however, there are limited circumstances under which this Court will overrule prior case law.

In *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000), this Court outlined a test for determining when it is appropriate to depart from stare decisis. The Court must first consider whether the previous decision was wrongly decided. *Id.* at 464. The Court must then apply the following three-part test to determine whether the doctrine of stare decisis nonetheless supports upholding the previously decided case: (1) whether the decision defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision. *Id.* Regarding the reliance interest, “the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *Id.* at 466.

These factors weigh heavily in favor of upholding *Casco*. As discussed above, *Casco* was correctly decided. Working the 3-part test backward, no party has identified any change in

the law or facts that no longer justifies the decision. Further, reliance interests would work an undue hardship if the decision is overturned, and the decision does not defy practical workability. In fact, the workability of the *Casco* holding and the current process utilized under the SBC Act is highlighted by the alternative suggested by the Townships.

The Townships cannot dispute that there will continue to be instances in which a developer or owner of property wishes to have property annexed into an adjoining city for development purposes, but who discovers that the property is involuntarily the subject (or partial subject) of an Act 425 agreement that the local units involved claim bars annexation of the land. That is what occurred in this case and, under these circumstances the owner or developer has an interest in determining whether the 425 agreement is “valid” (i.e., “in effect”) for purposes of barring annexation. The city to which the annexation was sought also has an interest in whether the Act 425 agreement is “valid” for purposes of barring the requested annexation.

Contrary to the Townships’ suggestion, these interested parties cannot simply run to circuit court for a determination of whether the Act 425 agreement is “valid.” First, for the reasons also discussed in the SBC’s appeal brief, there is a real possibility that these interested parties may not have standing to challenge the Act 425 agreement, or even to seek a declaration regarding its validity. Municipalities do not have a vested right in their municipal boundaries. “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). Moreover, a court does not have jurisdiction over an action for a declaratory judgment in the absence of an “actual controversy.” MCR 2.605; see also *Leemreis v Sherman Twp*, 273 Mich App 691, 703; 731 NW2d 787 (2007) (“In the absence of an actual controversy,

the trial court lacks subject-matter jurisdiction to enter a declaratory judgment”). Based on the tenor of the Townships’ appeal brief in Docket No. 153008, it is apparent that while they claim the issue should be raised in circuit court, in actuality they strongly oppose the ability of a non-party (a “stranger”) to an Act 425 agreement to challenge or even question the validity of such an agreement.⁷

In addition, requiring an owner or developer whose property was involuntarily included in an Act 425 agreement to initiate and maintain a circuit court action is unduly burdensome in terms of cost and time because the litigants could be forced to proceed through the trial court and multiple stages of appeals, all at significant expense and burden. Meanwhile, as the litigation continues, the economic and financial drivers that were the impetus for the annexation (and perhaps even for the Act 425 agreement) may change, worsen, or disappear altogether. Forcing parties to engage in drawn-out litigation over the validity of an Act 425 agreement would stymie economic development and job creation, thus having the opposite effect of that intended by the Legislature in authorizing boundary line adjustments. It would also encourage local units to enter into sham 425 agreements for the purpose of creating a roadblock to annexation, and will dissuade developers from pursuing development projects because of the increased risk and expense of litigation.

It is important to recognize that under the Townships’ interpretation of Act 425, once a paper is offered as an Act 425 agreement—regardless of its contents—it operates to cease all

⁷ The Townships state on page 1 of their Brief on Appeal in Docket No. 153008 that the property owners “are not parties to the Act 425 Agreement, nor do they have any third-party rights under the Agreement—that is undisputed.” On page 22 of their brief, they characterize TeriDee as “a stranger who has no legally protected interest under the Townships’ Agreement.” Presumably these same Townships would not capitulate to a circuit court action to determine the validity of

annexation procedures concerning the same land, unless and until a circuit court or appellate court decides that the Act 425 agreement is not valid. The danger in this proposal, of course, is that local units could sit back during annexation proceedings and wait until the annexation is close to being approved by the SBC before hastily entering into an Act 425 agreement for the purpose of putting the brakes on the annexation process and forcing litigation on the validity of the Act 425 agreement. This gamesmanship and waste of resources that would result from this kind of “wait and see” approach cannot be condoned by this Court. Nor should this Court encourage the use of an Act 425 agreement as a blanket shield against annexation. Neither Act 425 nor the SBC Act contemplate the SBC being forced to halt annexation proceedings that are in progress (maybe even close to being decided) where an Act 425 agreement is belatedly filed. That is, however, precisely the type of stall tactic that the Townships’ proposal would encourage.

Thus, it is the Townships’ proposal that defies practical workability, and that would work an undue hardship. *Casco*, on the other hand, provides the groundwork for an efficient administration of the annexation process, a process that was accepted by this Court in denying leave to appeal over 15 years ago, and that has since the case was decided been followed without the need for court intervention or protracted litigation to the degree suggested by the Townships.

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 and to the drafting and application of 425 agreements. More injury will result from overruling *Casco* than would result from following it. Overruling *Casco* would prejudice the parties filing annexation petitions, as they would be precluded from advancing their annexation request at the SBC while

their agreement and, in fact, they argued below that the circuit court was not the proper forum for that determination to be made.

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 Act 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*.

II. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE SBC'S DECISION THAT THE ACT 425 AGREEMENT DID NOT MEET THE STATUTORY REQUIREMENTS AND, THEREFORE, DID NOT REQUIRE THAT THE SBC DENY THE ANNEXATION PETITION FILED FOR THE SAME PROPERTY

A. Standard of Review

The SBC's decision is subject to review under the "competent, material, and substantial evidence" standard. *Casco, supra*, at 399. While Appellants urge a de novo standard of review, our appellate courts have recognized that while legal questions affecting a contract's validity are reviewed de novo, factual questions are subject to a different standard of review. See e.g., *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006) ("We review for clear error the findings of fact underlying the circuit judge's determination whether a valid contract was formed"); *Wright v Wright*, 279 Mich App 291, 297; 761 NW2d 443 (2008) (the Court "reviews de novo a trial court's interpretation of a contract and its resolution of any legal questions that affect a contract's validity, but any factual questions regarding the validity of the contract's formation are reviewed for clear error").

B. The Act 425 Agreement was not “in effect” at the time the annexation petition was filed.

MCL 124.29 states that “[w]hile a contract under [Act 425] is in effect, another method of annexation or transfer shall not take place....” In Michigan, a contract must be valid to have legal effect. Hence a contract cannot be “in effect” unless the contract is valid. See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 547; 872 NW2d 412 (2015), in which this Court discussed the difference between a “valid contract” and a “void contract,” the latter being an oxymoron because it “is not a contract at all.” See also *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 215-217; 565 NW2d 907 (1997), in which the Court of Appeals held where no valid insurance contract existed at the time of the accident, no contract was in effect.

Under the plain language of Act 425, an Act 425 agreement does not take effect until it is filed with the County Clerk and Secretary of State pursuant to MCL 124.30. The Townships’ Act 425 agreement was not filed—i.e., *did not become effective*—until five days after the annexation petition was submitted. Thus, MCL 124.29 did not bar the SBC from accepting, processing, or even approving the annexation petition because the Legislature expressly intended only for a contract “in effect” at the time of the petition to bar “another method of annexation or transfer.” To read the statute in any other manner creates the “wait and see” situation described above, in which the local units could wait and enter into a sham Act 425 agreement at any time during annexation proceedings—even as the proceedings were concluding—to block the annexation. Thus, the timing of the purported Act 425 agreement, along with the record evidence demonstrating that the agreement was sought as a means to deny the SBC of jurisdiction (most notably the email correspondence referenced and quoted in the Appellees’ briefs) supported the SBC and circuit court conclusions that the agreement was illusory.

C. The Act 425 Agreement did not meet the statutory requirements of Act 425.

Additionally, for the reasons discussed at length in the City and SBC's briefs on appeal, the Act 425 Agreement did not meet the statutory requirements of Act 425. Those arguments are not repeated here, however it bears emphasizing that the Townships' position is fundamentally flawed and based on a misunderstanding of one of the underlying principles of Act 425. The Townships' challenge the SBC's determination that the agreement did not identify an "economic development project that is allowed by Act 425", asserting that their failure to consult with the property owner (TeriDee) was not fatal to their agreement. The Townships admit on page 34 of their Brief that they did not meet with the owner, but they claim that nowhere in Act 425 does it require local units to meet with the property owner before entering into an Act 425 agreement.

To the contrary, Act 425 expressly requires that the subject of an Act 425 agreement be an "economic development project" that is clearly defined as:

land and existing or planned improvements suitable for use by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water. Economic development project includes necessary buildings, improvements, or structures suitable for and intended for or incidental to use as an industrial or commercial enterprise or housing development; and includes industrial park or industrial site improvements and port improvements or housing development incidental to an industrial or commercial enterprise; and includes the machinery, furnishings, and equipment necessary, suitable, intended for, or incidental to a commercial, industrial, or residential use in connection with the buildings or structures. [MCL 124.21(a) (emphasis added).]

Thus, not only does Act 425 expressly require that the project be suitable for an industrial or commercial enterprise, housing development, or the protection of the environment, it also requires that the improvements be existing or "planned."

Common sense dictates that an Act 425 agreement that is supposedly intended to benefit a certain property cannot contain "planned" improvements where the property owner is unaware

of, and was never consulted regarding the project. This is especially true where, as here, the described project necessarily depends on the property owner's cooperation, participation, and financing. To avoid the obvious contradiction, the Townships claim that the Act 425 agreement was a two-fold economic development project: it allows the owners of the transferred area to seek rezoning to a mixed-use commercial/residential PUD, and it provides for the provision of wastewater and water services to the area to foster such use. Given that the property owner was not consulted and was not the genesis for the agreement—and in fact sought to invalidate the agreement—this is not an example of a “planned” improvement and the SBC correctly noted this deficiency in determining that the agreement did not meet the statutory requirements. It is also difficult to see how any of this project is “planned” in light of the Townships’ position that Haring is free to rezone the transferred area to accommodate any use, and there is no obligation to extend utilities into the transferred area absent an agreement by the landowner—who did not request the services and has no rights under the Act 425 agreement—to cover all of the costs.

In fact, the Townships’ true motivations for entering into the agreement are revealed in part on pages 42-43 of their brief: without the Act 425 agreement, “Clam Lake would have been placed into a situation where it would have to forever kowtow to the City for utility services”, “Clam Lake would have lost control of its development destiny”, and Haring Township “would have lost a valuable new customer base at a time when it is actively looking for new customers for its new WWTP.” The MML agrees with the SBC’s assertion on page 20 of its Brief on Appeal that “the Townships still do not (because they cannot) identify an actual *planned improvement* upon which the purported transfer of land was premised” (emphasis in original).

D. The Act 425 agreement did not operate to bar the annexation because it was void as against public policy and, thus, was not in effect at the time of the annexation.

A contract is not enforceable if it is against public policy. *Epps, supra*, 498 Mich at 542. See also *Skutt v City of Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936) (the “public policy of the government is to be found in its statutes” and a contract against public policy is void); *1031 Lapeer LLC v Rice*, 290 Mich App 225, 231; 810 NW2d 293 (2010) (“Contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void”). In this case, the circuit court held that the Act 425 Agreement was void as against public policy. See the discussion in Issue IV, *infra*, and the Appellees’ briefs on appeal in Docket No. 153008. This independent determination by the circuit court further supports the SBC’s determination that the Act 425 agreement was not valid or “in effect” and thus did not operate to deprive the SBC of jurisdiction over the annexation petition.

III. 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. Standard of Review

Whether collateral estoppel applies is a question of law reviewed de novo on appeal. *Estes v Titus*, 481 Mich 573, 578–579; 751 NW2d 493 (2008).

B. 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.

In this case, the trial court correctly determined that the preclusion doctrines did not bar the SBC from considering the annexation petition, and Appellants have failed to show any error in that determination.

C. 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”).⁸

“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.⁹ 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 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”

⁸ 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.

⁹ 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.

that is not otherwise recognized or enforceable under Michigan law. Such a result cannot be sustained and, thus, the Townships' argument must be rejected.

D. 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 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 the petition was previously denied by the SBC or defeated in an election under MCL 117.9(5). In fact, this is not the first time that subsequent annexation petitions were filed concerning the same area. See e.g., *Twp of Avon v State Boundary Comm’n*, 96 Mich App 736, 751-752; 293 NW2d 691 (1980) (holding that the Home Rule Cities Act did not require dismissal of an annexation petition where a previous annexation involving the same area was denied by the Boundary Commission).

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.”

E. 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 to 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 never be revisited in the future. 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). Further revealing the weakness of the Townships’ position, the Townships fail to identify the proper forum in which to challenge whether there has been a material change in circumstances. Presumably, based on their allegations that the SBC lacks authority to determine its jurisdiction, the Townships would take the position that the determination must be made through a declaratory action in circuit court. That is just as unworkable—for the same reasons—as the circuit court action the Townships propose for determination of whether a purported Act 425 agreement divests the SBC of jurisdiction over an annexation petition.

Regardless, 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:

- MCL 123.1012(3) authorizes the SBC to adjust municipal boundaries through a consolidation petition, even a second or subsequent petition involving identical municipalities so long as more than two (2) years has passed since the vote on the earlier petition.
- 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 two-year waiting period between annexation petitions. In fact, the two-year waiting period was applied to annexation proceedings long before the SBC Act was enacted in 1968. Before the SBC was established, annexation proposals were submitted for a vote by the electorate. In *Groh v City of Battle Creek*, 362 Mich 653, 657; 118 NW2d 829 (1962), the Court addressed an earlier statute requiring a two-year waiting period between annexation proposals covering the same territory or parts thereof, noting that “the evil sought to be avoided by [the statute] was the coercive effect upon the electorate of repeated proposals for annexation.” See also *Godwin Heights Pub Sch v Kent Co Bd of*

Supervisors, 363 Mich 337; 109 NW2d 771 (1961) (concluding that the statute imposing two-year restriction on successive annexation petitions was unambiguous and the Court would not read limitations into the statute). The two-year waiting period was carried over into the SBC Act and, consistent with *Groh* and *Godwin Heights*, this Court should reject the Townships' invitation to read anything into the statute, or to question the Legislature's judgment.

This Court has stated that it "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.

For these reasons, the Townships' collateral estoppel argument must be rejected.

IV. THE COURT OF APPEALS DECISION IN DOCKET NO. 153008 SHOULD BE AFFIRMED AS THE APPELLANT TOWNSHIPS HAVE NOT ESTABLISHED ANY REVERSIBLE ERROR

In Docket No. 153008 (Court of Appeals Docket No. 324022), the Plaintiff/Appellee landowners, including TeriDee, initiated an action against the Townships seeking a declaration that the Townships' Act 425 agreement was invalid or void. The trial court granted summary disposition in favor of the Plaintiffs holding that the contract was void and, on appeal, the Court

of Appeals affirmed the trial court's decision. The Court of Appeals held that the Act 425 agreement unlawfully contracted away Haring Township's zoning authority, that Act 425 does not allow for contract zoning, and that the agreement's zoning requirements were not severable. This Court has invited the MML to address these issues and, for the reasons discussed below, the MML concurs with the Court of Appeals and urges this Court to affirm the decision on appeal.

A. Standard of Review

The grant of summary disposition, as well as issues involving contract and statutory interpretation, are reviewed de novo on appeal. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

B. The Court of Appeals correctly held that *Inverness Mobile Home Community v Bedford Twp*, 263 Mich App 241 (2004) applies to the Townships' Act 425 Agreement.

The Court of Appeals noted in its decision that “[t]he parties do not contest the principle of law that a township board may not contract away its legislative powers, which includes its power to zone and rezone property”, citing *Inverness Mobile Home Community, Ltd v Bedford Twp*, 263 Mich App 241, 247-248; 687 NW2d 869 (2004). *Inverness* stemmed from a zoning dispute that was settled via consent judgment. The trial court vacated four paragraphs in the consent judgment that it deemed void as against public policy because they “operated to disenfranchise votes and inappropriately bind future township boards.” *Id.* at 245-246. The provisions at issue: (1) required the township to master plan a parcel of a minimize size for a new manufactured home community development; (2) gave the plaintiffs five years to locate and option such future parcel and notify the township of its location; (3) recognized development of a manufactured home community as a reasonable use of the future parcel and prohibited the denial of such use; and (4) gave the township four months after identification of the future parcel to

master plan the parcel for manufactured home community development, after which the plaintiffs were required to apply for rezoning of the parcel.

On appeal, the Court of Appeals affirmed the trial court’s decision that the challenged provisions constituted an improper delegation of the township’s legislative authority and improperly restricted the legislative decision-making of future township boards. The Court emphasized that “[t]he power to zone and rezone property is a legislative function” and that “while a township board may, by contract, bind future boards in matters of a business or proprietary nature, a township board may not contract away its legislative powers.” *Inverness, supra*, 263 Mich App at 247-248 (citations omitted). The Court held that the consent judgment—which required the township’s master plan to be amended by a future township board to permit a manufactured housing development—impermissibly contracted away the legislative powers of a future governing body.

Because a zoning ordinance must be based on the applicable master plan, and because the master plan is a factor in determining the reasonableness of the zoning ordinance, the adoption of a master plan is tantamount to a legislative act.

The precise terms of the disputed consent judgment make it clear that the intent of the agreement is legislative in nature. Paragraph 10 of the consent judgment mandates the amendment of the master plan to provide for a new manufactured home community development, and paragraph 12 of the consent judgment provides that a future use consistent with the master plan is deemed reasonable. The language regarding future use that limits future boards from making determinations about what is reasonable deprives future boards of “discretion which public policy demands should be left unimpaired.” [*Id.* at 248 (citation omitted).]

In this case, the Court of Appeals affirmed the trial court’s decision holding that the Act 425 Agreement improperly contracted away Haring Township’s zoning authority because:

- It specifically provided how Haring Township was to rezone the transferred area;
- It required the portions already developed for residential housing to be zoned in a Haring zoning district that was comparable to the existing County zoning and existing land use, thereby removing any discretion to leave the area zoned by the County or to rezone it to a preferred district;
- It required Haring to rezone the undeveloped portion of the transferred area to a mixed-use planned unit development (PUD);
- It required Haring to adopt provisions into its zoning ordinance allowing for such PUDs and specifically providing the minimum zoning requirements dictated by the agreement before it could even consider a property owner’s application for development;
- It required Haring to apply the minimum requirements in the agreement, trumping Haring own requirements if the agreement’s requirements were more stringent than Haring’s own general PUD regulations; and
- While the agreement gave Haring the right to unilaterally amend its zoning ordinance as it pertained to the transferred area at a later time, it was irrelevant given that initially Haring could only accept an application for development that complied with the minimum requirements in the agreement. The Court of Appeals agreed with the Plaintiffs that the agreement prohibited Haring from determining how it wishes to rezone the transferred area to accomplish economic development. If, for example, Haring wanted to forgo rezoning and apply a use variance, the agreement would prohibit it from exercising such authority.

The Court of Appeals correctly held that *Inverness* applied to the Townships’ Act 425 Agreement because the agreement resulted in a change in the township’s zoning ordinance and deprives the public “of the avenues normally available to challenge the adoption of an amended zoning ordinance, including referendum.” *Id.* at 249 n 2. The Act 425 agreement contained legislative requirements to be imposed on future boards—namely it mandates an amendment to the zoning ordinance and a rezoning, thereby prohibiting future township boards from exercising discretion. Thus, *Inverness* squarely applies.

The Townships claim on page 6 of their Brief on Appeal that they intended to interpret the Act 425 Agreement “so that Haring has independent legislative authority to determine the

content of the zoning regulations that will apply to the Transferred Area” and after the circuit court’s ruling they adopted resolutions to “clarify” their original intent. However, the parole evidence rule prohibits the use of extrinsic evidence to interpret unambiguous language in a contract. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). Further, while the Townships claim they (as the contracting parties) should be permitted rely on any extrinsic evidence to interpret the contract, this Court has long held that “[c]ourts are governed by what the parties said and did, and not merely by their unexpressed subjective intent.” *Fletcher v Bd of Ed of Sch Dist Fractional No 5*, 323 Mich 343, 348; 35 NW2d 177 (1948). “The intention must be gathered, not from what a party now says he then thought but from the contract itself.” *Id.* (citation omitted).

Thus, the Townships’ argument that they are free to inject meaning or intent into the written contract as they see fit not only conflicts with Michigan law, but if accepted by the Court would also allow parties to an Act 425 agreement to cure deficiencies (or “undo” illegalities) in the agreements by simply having the local units adopt corrective resolutions or amendments after-the-fact. Under the Townships’ proposal—where the validity of the agreement must be litigated in circuit court (and on appeal) to a final decision before any annexation proceedings may commence—this new rule of contract interpretation being espoused by the Townships’ would create an even more unworkable alternative to the current SBC process.

Next, even though the Townships recognized below that a township board may not contract away its legislative powers, which includes its power to zone and rezone property, they nevertheless attempt to defend the inclusion of specific zoning development standards in their agreement. On page 7 of their brief, the Townships argue that the development standards that were required to be incorporated into Haring Township’s zoning ordinance “did not appear out of

ether”, but were based on recommendations of a Corridor Study. The Townships’ heavy reliance on this study—as opposed to an actual “planned” economic development project—supports the lower court decisions. Moreover, the wisdom of a particular legislative act is, by its nature, to be determined by the legislative body and not the Court. See e.g., *Council of Organizations & Others for Educ About Parochiaid, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997) (the Court does not inquire into the wisdom of legislation). Thus, the Townships’ “no harm, no foul” argument actually underscores the correctness of the *Inverness* decision and its application in this case.

The Townships also argue that because Haring had adopted its own PUD development regulations before the standards were recited in the amended Act 425 Agreement “Haring could not be contractually bound to adopt what it had already adopted.” Townships’ Brief, p 8. However, the Townships readily admit that the original Act 425 Agreement violated the prohibitions announced in *Inverness*, and the timing of the adoption of the development standards and the *subsequent amendment* of the agreement do not cure the illegality. The Townships admit that Haring’s actions “specified that the Transferred Area would be subject to the same general type of development standards *that the Townships had originally envisioned....*” Townships’ Brief, p 16. The Townships’ claim that Haring acted independent of Clam Lake Township between the execution of the original agreement and the subsequent amendments is inapposite because Haring was acting against the backdrop of the original agreement and in a self-serving attempt to cure the deficiencies that were alleged (and acknowledged) regarding the original agreement. Not to mention, Haring would be bound under the agreement to at a minimum *retain* the minimum PUD standards in its zoning ordinance, as removal of the contractual standards would violate the contract. And, as the circuit court and

Court of Appeals recognized, the agreement specifically stated that if the regulations in the agreement were more stringent than those adopted by Haring, the more stringent regulations “shall apply.” Thus, Haring was contractually bound by the minimum PUD standards of the agreement.

Haring was also contractually bound to rezone the developed portion of the transferred area. This is clearly prohibited under the rule most recently announced in *Inverness*. The Townships argue on page 28 of their Brief that because Haring was required to rezone it to the zoning district most comparable to the County zoning that was in effect, “there would be no effective change in the pre-existing County zoning....” Again, this goes to the wisdom, not legality, of the forced legislation.

Ultimately, the Townships admit that their Act 425 agreement was in violation of *Inverness*, but ask this Court to bless their attempt to get around *Inverness* by having Haring Township subsequently take action to amend its zoning ordinance, and then claim that it is not bound by the amended contractual provisions requiring the adoption of certain zoning ordinance amendments because it already acted on its own accord. The Townships argue on page 40 that because the provision has not been implemented (i.e., Haring has not actually rezoned the property), “there is no evidence that Haring has been bound” by the provision. This argument is without merit as contractual provisions do not lay dormant, waiting for their legality to be determined if and when they are implemented. Nor can this Court simply ignore the contractual terms as the Townships suggest. See *Zahn v Kroger Co of Mich*, 483 Mich 34, 41; 764 NW2d 207 (2009) (“Courts may not make a new contract for parties under the guise of a construction of the contract, if doing so will ignore the plain meaning of words chosen by the parties”).

In an attempt to avoid the outcome dictated by *Inverness*, the Townships argue that *Inverness*—like *Casco*—was wrongly decided. The Townships argue that the *Inverness* Court erred in concluding that the “adoption of a master plan is tantamount to a legislative act.” *Inverness, supra* at 249. The Townships argue in their Supplemental Brief at page 3 that because a master plan is “a non-binding policy document” it “lacks the *sine qua non* of a legislative act.” The Townships fail to recognize that the legislative body may assert the right to approve or reject the master plan. MCL 125.3843(3). Regardless, the Townships acknowledge on page 4 of their Supplemental Brief that “the *Inverness* court **correctly recognized the rule that a township board cannot contract away its legislative powers....**”¹⁰ Thus, despite the Townships’ disagreement with the holding in *Inverness*, the principles of law—and the result they require in this case—do not change.

C. The Court of Appeals correctly held that the challenged provisions of the Act 425 agreement were not authorized by MCL 124.26(c).

Defendants argue that even if Haring was bound by the development standards in the Act 425 agreement, it would not invalidate the agreement because MCL 124.26(c) allows for contract zoning. MCL 124.26 states:

If applicable to the transfer, a contract under this act may provide for any of the following:

¹⁰ The Michigan Townships Association (“MTA”) urges the adoption of a new rule, claiming on page 6 of its amicus brief filed in Docket No. 153008 that “the *Inverness* holding is the general rule and a township board may contract away a future board’s legislative authority if it is authorized to do so by law.” While the Michigan Constitution encourages cooperation between municipalities, none of the authority cited by the MTA authorizes a township board to contract away a future board’s legislative authority. Further, creating or maintaining zoning to further an economic development project does not require the transfer of legislative functions as the MTA claims. In fact, the Townships have taken the position that their Act 425 agreement would be valid—and project could be effectuated—without any of the challenged (and unlawful) zoning provisions.

- (a) Any method by which the contract may be rescinded or terminated by any participating local unit before the stated date of termination.
- (b) The manner of employing, engaging, compensating, transferring, or discharging personnel required for the economic development project to be carried out under the contract.
- (c) The fixing and collecting of charges, rates, rents, or fees, where appropriate, and the adoption of ordinances and their enforcement by or with the assistance of the participating local units.
- (d) The manner in which purchases shall be made and contracts entered into.
- (e) The acceptance of gifts, grants, assistance funds, or bequests.
- (f) The manner of responding for any liabilities that might be incurred through performance of the contract and insuring against any such liability.
- (g) Any other necessary and proper matters agreed upon by the participating local units.

The Townships argue, as they did below, that the term “ordinances” in MCL 124.26(c) encompasses zoning ordinances and, therefore, Act 425 authorizes contract zoning. The Court of Appeals rejected this argument, finding that the Townships’ interpretation “reads more words into the statute than are present.” This is consistent with long-settled rules of statutory interpretation.

Another pertinent rule for construing a statute provides that 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.’ ” [*Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014).]

The Court of Appeals correctly concluded that MCL 124.26(c) “is nothing more than determining which local unit has jurisdiction over the property in terms of governing it and does not necessarily encompass the right to contract zone.” Clearly the Legislature did not intend for Act 425 contracts to dictate the content of a local zoning ordinance. Thus, MCL 124.26(c) does

not expressly authorize contract zoning as the Townships suggest. Further, while the Townships argue that contract zoning under Act 425 would be no different than contract zoning authorized under the Michigan Zoning Enabling Act (“MZEA”), MCL 125.3101 *et seq.*, in actuality the differences would be glaring.

For example, MCL 125.3405 authorizes conditional rezoning, but it applies only where a landowner makes a voluntary offer in writing to abide by certain conditions. This process leaves it to the property owner in large part to determine the scope and nature of the development or proposed use and creates binding conditions upon a rezoning. This is clearly opposite of the Townships’ Act 425 agreement, which contains terms and conditions that were adopted without a review process or public hearing, and which were intended to be forced upon the property owner regardless of the use or development intended or preferred by that owner. Unlike the MZEA, Act 425 does not provide any mechanism for contract zoning, or any process for reviewing its terms. Again, here the landowner was admittedly not included in the process and—according to the Townships—has no enforceable rights under the Act 425 agreement. Thus, it could not be further from the type of conditional zoning permitted under MCL 125.3405.

Furthermore, the Townships have taken the position that they are free to amend the agreement and Haring is free to amend its zoning ordinance as it pleases, thus any alleged “contract zoning” would be illusory under the circumstances. Cf. MCL 125.3405(3), which states that in a conditional rezoning “[t]he local government *shall not add to or alter the conditions approved*” (emphasis added). Cf. also MCL 125.3405(5), which states that “[a] local unit of government *shall not require* a landowner to offer conditions as a requirement for rezoning” (emphasis added).

Conditional zoning may also be accomplished under the MZEA through the PUD rezoning process. MCL 125.3503; 125.3504(4). However, again, this is typically the result of bilateral negotiations between the local unit and the land owner, based on a legitimate zoning objective, and approved following a public hearing. This process cannot occur without participation and agreement by the landowner and a meeting of the minds. In fact, MCL 125.3504(5) specifically states that “[t]he conditions imposed with respect to the approval of a land use or activity shall be recorded in the record of the approval action and remain unchanged except upon the *mutual consent* of the approving authority and the landowner” (emphasis added).

Thus, while the Townships claim that “there is nothing special about the fact that the Legislature has authorized another valid form of contract zoning under Act 425”, it cannot be overlooked that the Townships’ interpretation would lead to the only circumstance where contract zoning is authorized without any participation or agreement by the property owner, or even where the property owner is opposed to the purposed zoning. See also 8 McQuillin Mun Corp § 25:104 (3d ed.) (“Contract zoning requires an agreement between the ultimate zoning authority *and the zoning applicant or property owner*”) (emphasis added).

Contract zoning is generally disfavored because it represents a bargaining away of the legislative body’s police power. It also usurps the statutory procedures designed to insure notice and a fair hearing for all interested parties. Nowhere has the Legislature seen fit to expressly authorize contract zoning between municipalities and this Court should not read any such authority into Act 425. It is well established that “townships possess only those powers that are expressly granted by or fairly implied from the Michigan Constitution or actions of the Legislature.” *Oshtemo Ch Twp v Kalamazoo Co Rd Comm’n*, 302 Mich App 574, 584; 841

NW2d 135 (2013). Townships are granted various zoning powers under the MZEA, none of which expressly or impliedly grant townships the power to engage in contract zoning with another municipality. Nor is such power needed in order to effectuate an Act 425 agreement. While an Act 425 agreement may dictate the transfer of zoning jurisdiction to the transferee municipality, the transferee municipality then dictates how the transferred area will be zoned (i.e., if rezoning or some other approval is required). In fact, nothing in Act 425 requires that there be any change in zoning at all and, thus, if the Court of Appeals decision is left to stand it will not alter the practical effect, usefulness, or customary treatment of Act 425 agreements.

D. The Court of Appeals correctly held that the offending provisions of the Act 425 agreement were not severable because they were central to the agreement.

As the Court of Appeals recognized, “[t]he primary consideration in determining whether a contractual provision is severable is the intent of the parties.” *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). This Court has identified two key factors in ascertaining the intent of the parties:

first, “whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other”; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties. 3 Williston, Contracts (3d ed), § 532, p 764. However, “[e]ven though the consideration for each agreement is distinct, if the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded...as entire and not divisible.” *Id*, p 765. [*Dumas v Auto Club Ins Ass’n*, 437 Mich 521, 616 n 87; 473 NW2d 652 (1991).]

The Townships included the severability clause in the amended agreement because, as discussed above, Haring had attempted to cure the deficiencies in the Act 425 agreement as a result of the circuit court litigation. Because Haring achieved what the Townships intended in

their original agreement through these “alternative” means, the Townships allegedly viewed the development standards as severable (despite the admission by several board members and the Townships that the development standards were necessary and important to the original agreement). As the Court of Appeals correctly stated at page 4 of its opinion:

If a future Haring board were to amend the zoning ordinance over the transferred area in a way that differs from the minimum requirements of the agreement, it would interfere with what defendants intended when entering the agreement. Therefore, while the parties may have intended that the zoning provisions be severable when they amended the agreement, the evidence shows that the provisions were “so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance” of those provisions. *Dumas*, 437 Mich at 616 n 87. Accordingly, the agreement must be regarded as entire and not divisible, *Id.*, and because the contract contains unlawful provisions, the trial court did not err in concluding that it was void.

Reading the agreement in context, it is obvious that the rezoning and zoning restrictions set forth in the agreement and amended agreements were central to the parties’ agreement. The alleged purpose of the agreement was to foster a particular type of mixed-use commercial/residential PUD development on the transferred area. Thus, the provisions are “interdependent and the parties would have entered into one in the absence of the other” and, therefore, “the contract will be regarded...as entire and not divisible.” *Stokes v Millen Roofing Co*, 466 Mich 660, 666; 649 NW2d 391 (2002). Thus, the Court of Appeals correctly held that the offending provisions of the Act 425 agreement were not severable and the decision should stand.

CONCLUSION AND RELIEF REQUESTED

For all of the reasons discussed above, the circuit court's decision in Docket No. 151800 and the Court of Appeals decision in Docket No. 153008 should be affirmed. Appellant Townships seek a result that conflicts with well-settled principles governing statutory interpretation, jurisdiction, annexation, collateral estoppel, and contract zoning. In addition, while Appellants disagree with the outcome below, the decisions were consistent with the well-reasoned decisions in *Casco* and *Inverness*. Appellants urge this Court to conclude that both published decisions were wrongfully decided, to upend multiple aspects of our current laws, and to replace well-established procedures with an unworkable, litigious process. If the Townships succeed in their attempt to reinvent Act 425, it will set the stage to insulate Act 425 agreements from scrutiny, thereby allowing them to be used at the whim of local units to invade the province of the State Boundary Commission and to bar annexation proceedings that serve a lawful, legitimate governmental purpose in this state. This Court should decline the Townships' invitation to elevate an Act 425 agreement in significance or priority when its true purpose, as in this case, is to prevent annexation and restrict development.

Respectfully submitted,

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