

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
[Meter, P.J., and O'Connell and Davis, JJ.]

FORD MOTOR COMPANY

Supreme Court Nos. 133400-06

Petitioner-Appellee,

Court of Appeals No. 262487

v

Wayne Circuit Court

STATE TAX COMMISSION,

LC Nos. 04-430612-AA

04-430613-AA

04-430614-AA

Respondent-Appellant,

and

DEPARTMENT OF ENVIRONMENTAL
QUALITY

BRIEF FOR APPELLANTS
MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY
AND MICHIGAN STATE TAX
COMMISSION

Respondent-Appellant,

and

CITY OF DEARBORN,

Intervening Respondent-Appellant.

FORD MOTOR COMPANY,

Court of Appeals No. 262488

Wayne Circuit Court

Petitioner-Appellee,

LC Nos. 04-430612-AA

v

04-430613-AA

04-430614-AA

STATE TAX COMMISSION,

Respondent-Appellant,

and

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondent-Appellant,

and

CITY OF DEARBORN,

Intervening Respondent-Appellee.

December 7, 2007

FORD MOTOR COMPANY,

Petitioner-Appellee,

v

STATE TAX COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondents-Appellants,
and

CITY OF DEARBORN,

Intervening Respondent-Appellant.

Court of Appeals No. 262500

Wayne Circuit Court

LC Nos. 04-430612-AA

04-430613-AA

04-430614-AA

DETROIT DIESEL CORPORATION,

Petitioner-Appellee and
Cross-Appellant,

v

STATE TAX COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondents-Appellants and
Cross-Appellees,
and

CHARTER TOWNSHIP OF REDFORD,

Intervening Respondent.

Court of Appeals No. 263188

Wayne Circuit Court

LC No. 04-430915-AA

FORD MOTOR COMPANY,

Petitioner-Appellee,

v

STATE TAX COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondents-Appellants.

Court of Appeals No. 264154

Wayne Circuit Court

LC No. 05-507760-AA

DAIMLERCHRYSLER CORP,
Petitioner-Appellee and
Cross-Appellant,

v

STATE TAX COMMISSION,
DEPARTMENT OF ENVIRONMENTAL
QUALITY AND TOWNSHIP OF
SYLVAN,

Respondents-Appellants and
Cross-Appellees.

Court of Appeals No. 265686
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LC No. 2005-000250-AA

DAIMLERCHRYSLER CORP,
Petitioner-Appellee and
Cross-Appellant,

v

STATE TAX COMMISSION,
DEPARTMENT OF ENVIRONMENTAL
QUALITY AND CITY OF AUBURN
HILLS,

Respondents-Appellants and
Cross-Appellees.

Court of Appeals No. 267565
Oakland Circuit Court
LC No. 05-064732-AA

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QUESTION PRESENTED FOR REVIEW

- I. This Court has repeatedly held that (1) plain and unambiguous language is to be enforced as written, (2) statutes are to be read as a whole, and (3) statutory tax exemptions are to be strictly construed. In plain and unambiguous language MCL 324.5901 and 324.5903 of Part 59 of the Natural Resources and Environmental Protection Act (NREPA) authorize a tax exemption for air pollution control equipment that is both "installed or acquired for the primary purpose of controlling or disposing of air pollution . . . within this state" and "operated primarily for the control, capture, and removal of pollutants from the air." The Department of Environmental Quality (DEQ) construed §§5901 and 5903 to apply only to equipment that itself functions to *capture and dispose of* air pollution that would otherwise be released within Michigan. Appellee automobile and engine manufacturers were each denied the tax exemption for their equipment called "test cells." These "test cells" are used during research and development, design, and manufacturing solely to test emissions from sample vehicles and engines as part of the manufacture of end products that are not specifically destined for use within Michigan. The test cells actually release the tested emissions into Michigan's air.

Does the subject equipment qualify for Part 59 tax exemption even though these "test cells" function solely to *test* (and not to capture and dispose of) emissions from sample vehicles and engines that are not specifically destined for use within Michigan?

INTRODUCTION

The sole issue in these consolidated cases is the proper application of a tax credit statute to undisputed material facts. The determinative question is whether the Michigan Department of Environmental Quality's (DEQ) construction of the subject statute, and the resulting administrative decisions, should stand. At stake is whether certain motor vehicle and engine manufacturers should pay real and personal property taxes to local communities on property collectively worth over 700 million dollars.

The statute in question, Part 59 of the Natural Resources and Environmental Protection Act (Part 59)¹ authorizes a tax exemption for air pollution control devices that operate "primarily" to "capture" and "remove" pollutants from *Michigan's* air. Appellee automobile and engine manufacturers were each denied the tax exemption for their equipment called "test cells." These "test cells" are used during research and development, design, and manufacturing solely to *test* emissions from sample vehicles and engines as part of the manufacture of end products that are not specifically destined for use within Michigan. *The test cells actually release the tested emissions into Michigan's air.* Appellee automobile and engine manufacturers nonetheless claim their test cells qualify for Part 59 tax exemption.

Part 59 was enacted in 1965 as an incentive to utilize air pollution control equipment to facilitate air pollution control in Michigan. Under Part 59 the DEQ is expressly authorized to make the operative findings as to whether particular equipment and property qualify for Part 59 tax exemption. The DEQ construes Part 59 to allow the tax exemption only for equipment designed and operated to physically capture and dispose of pollutants to prevent its release into Michigan's air. In 2001, DEQ considered for the first time whether "test cell" equipment qualifies for Part 59 tax exemption. Although DEQ originally found the tax exemption applied

¹ MCL 324.5901 *et seq.*

to test cells, DEQ later determined its original finding was erroneous and that test cells do not qualify for Part 59 tax exemption.

Part 59's plain language limits the tax exemption to property and equipment with a "primary purpose" to capture and remove pollutants from *Michigan's* air, and the test cells simply do not qualify. In addition, other established canons of statutory construction support the plain language reading of Part 59 that the exemption does not apply. The Court of Appeals' decision should be reversed and the findings of the DEQ and the resulting tax exemption denials by the Michigan State Tax Commission should be upheld.

STATEMENT OF PROCEEDINGS AND FACTS

I. INTRODUCTION

This appeal involves seven consolidated cases² in which Appellees Ford Motor Company (Ford), DaimlerChrysler Corporation (DaimlerChrysler), and Detroit Diesel Corporation (Detroit Diesel), each applied to the Tax Commission, under Part 59, for "air pollution control equipment" tax exemptions for their "test cells" — and were each denied the tax exemption. "Test cells," described in more detail below, do not physically control or dispose of air pollution, but rather are used during the research and development, design, and manufacturing stages to analyze motor vehicle and engine exhaust emissions for compliance with federal air emission regulations. After three of four circuit courts affirmed DEQ's denial of the tax exemption, the Court of Appeals reversed all of the agency decisions, and allowed the tax exemptions.³ There are no material disputed facts. These consolidated cases solely pose issues of statutory interpretation.

Eight Part 59 tax exemption applications are included within the seven consolidated cases:

² Final consolidating order in *DaimlerChrysler v Michigan State Tax Comm*, Docket No. 267565 (March 23, 2006).

³ In one of the seven cases, distinct from the "test cell" applications, Detroit Diesel filed a tax exemption application for its "Equinox" diesel engine production line. The Court of Appeals upheld agency denial of this application and Appellants Tax Commission and DEQ are not challenging that ruling.

<u>Applicant</u>	<u>Location/Equipment</u>	<u>Claimed Exemption Value</u>	<u>SIC Application No.</u>	<u>Court of Appeals Case No.</u>
Ford	Allen Park Test Lab	\$ 23,940,480.00	1-3106	262487* ⁴
Ford	Dearborn Dynamometer Lab	\$ 35,000,000.00	1-2391-01	262488*
Ford	Dearborn Vehicle Emissions Labs	\$ 11,449,105.00	1-3104	262500*
Ford	Allen Park Test Lab	\$ 8,000,000.00	1-2967-01	264154
DC	Auburn Hills Chrysler Tech Center	\$ 51,974,723.00	1-3088	267565
DC	Chelsea Proving Grounds	\$111,814,687.48	1-3083	265686
DD	Redford Emission Develop. Test Cells	\$ 7,144,229.00	1-3111	263188# ⁵
DD	Redford Equinox Engine Prod Line	\$ 27,653,147.00	1-3112	263188#
		Subtotal: \$276,976,371.48		

In 2001, Ford filed the first Part 59 application requesting a tax exemption for "test cells" equipment and property (Application No. 1-2967). This application was granted by the Tax Commission after review and approval by Appellant DEQ.⁶ In 2004, the DEQ re-evaluated Ford's "test cell" application and informed the Tax Commission the application should not have been approved by DEQ and should be revoked. The Tax Commission declined to revoke the Part 59 tax exemption certificate. During 2003-2004, Ford, DaimlerChrysler, Detroit Diesel, and the American Suzuki Motor Corporation (American Suzuki)⁷ filed several other Part 59 applications for similar test cells equipment and property. All of these applications were denied by the DEQ and the Tax Commission and are the Part 59 tax exemption applications directly at issue in this appeal.

In 2007, the General Motors Corporation (GM) filed twelve Part 59 applications for its test cells equipment and property located in various communities. Consequently, there are 13 other Part 59 "test cell" tax exemption applications that will be impacted by the ruling in this matter:

⁴ *These three cases were consolidated at the Circuit court level. Each case addresses all three indicated Tax Commission applications, but in relation to different parties.

⁵ These two tax exemption applications, for separate locations, were contained in a single circuit court action and retain a single case number.

⁶ See, MCL 324.5902(2) and MCL 324.5903.

⁷ The American Suzuki matter is presently being held in abeyance by circuit court order "until final resolution" of this matter.

<u>Applicant</u>	<u>Location/Equipment</u>	<u>Claimed Exemption Value</u>	<u>SIC Application No.</u>
American Suzuki	Wixom Facility	\$ 3,856,128 00	1-3223
General Motors Corp.	Warren Facility	\$ 10,186,218 00	1-3383
General Motors Corp.	Milford Proving Gds	\$ 4,916,117.00	1-3384
General Motors Corp.	Milford Facility	\$ 16,023,462.00	1-3385
General Motors Corp.	Milford Facility	\$ 31,632,325 00	1-3386
General Motors Corp.	Warren Facility	\$ 14,050,111 00	1-3387
General Motors Corp.	Romulus Facility	\$ 17,142,600.00	1-3388
General Motors Corp.	Romulus Facility	\$ 21,589,120.00	1-3389
General Motors Corp.	Milford Proving Gds	\$ 47,828,750 00	1-3390
General Motors Corp.	Romulus Facility	\$ 15,680,142 00	1-3399
General Motors Corp.	Warren Facility	\$ 77,074,863 00	1-3402
General Motors Corp.	Milford Facility	\$ 72,439,091 00	1-3410
General Motors Corp.	Milford Facility	\$ 94,677,633.00	1-3411
		Subtotal: \$427,096,560.00	
		GRAND TOTAL: \$704,072,931.48	

II. LEGAL BACKGROUND

In 1965 the Michigan Legislature enacted what is now Part 59, Air Pollution Control Facility; Tax Exemption, of the Natural Resources and Environmental Protection Act, (NREPA).⁸ Part 59 is a tax exemption statute and its operative provisions have remained unchanged since 1965.⁹

The Tax Commission is charged with the general administration of Part 59.¹⁰ But with regard to the key provisions, §§5901 and 5903, the Legislature vested what is now DEQ with "the authority . . . to determine whether or not air pollution control exists within the meaning of this act [part]."¹¹

Other than the Court of Appeals opinion presently under review, there are only two reported cases interpreting Part 59.

⁸ 1965 PA 250, C.L.1948 §336.1 *et seq.*, now MCL 324.5901 *et seq.* (App 1a-2a).

⁹ *See*, 1965 PA 250, C.L.1948 §§336.1 and 3. (App 1a).

¹⁰ *See*, MCL 324.5902, MCL 324.5905-5908.

¹¹ MCL 324.5901 and MCL 324.5903. *See also*, MCL 324.5902 ("Before issuing a certificate the [Tax Commission] shall seek the approval of the [DEQ]"), and MCL 324.5908 ("The state tax commission may adopt rules as it considers necessary for the administration of this part. These rules shall not abridge the authority of the department to determine whether or not air pollution control exists within the meaning of this part.")

In 1975 the Court of Appeals decided *Meijer, Inc v State Tax Commission*¹² allowing the Part 59 tax exemption for a "baler and compactor" that replaced an incinerator to dispose of solid wastes, thereby ending all releases of air pollution from the incinerator.

In 1980 this Court decided *Covert Twp Assessor v State Tax Commission*¹³ allowing the tax exemption for a nuclear power plant facility's containment building, spray and cooling systems, and a gaseous radwaste system. These devices were designed to prevent, in the event of an accident, the release of pollutants into the air.

III. UNDISPUTED FACTS AND UNDERLYING PROCEEDINGS

"Test cells" are the property and equipment collectively at issue in these consolidated cases,¹⁴ and are used similarly by Ford, Detroit Diesel, and DaimlerChrysler. The test cells are used during research and development, designing, and manufacturing of motor vehicle and engine production to test for end-product compliance with the federal Clean Air Act.¹⁵ The test cells vary as to specific design, but all share a common function. Vehicles and engines are placed in a testing position, either in a closed room or in a bay with a hose attached to the exhaust tailpipe. While the vehicle or engine is emitting exhaust, samples of the exhaust emissions are sent through devices that measure for various substances to determine

¹² *Meijer, Inc v State Tax Comm*, 66 Mich App 280; 238 NW2d 582 (1975).

¹³ *Covert Twp Assessor v State Tax Comm*, 407 Mich 561; 287 NW2d 895 (1980)

¹⁴ Detroit Diesel also requested the Part 59 tax exemption for its "Equinox" diesel engine assembly line. *See*, Detroit Diesel Cross-Application for Leave to Appeal (SC No. 133403).

¹⁵ 42 USC §4701 *et seq*.

whether that particular product design would comply with federal air pollution emission regulations under the federal Clean Air Act.¹⁶

Ford's Applications

On October 15, 2001, Ford requested first Part 59 tax exemption application (No. 1-2967) to exempt "test cells" at its Allen Park Test Lab valued at \$234,170,800.00. (App 3a-47a). Initially, the DEQ issued its findings that the test cells at Ford's Allen Park Test Lab qualified for the Part 59 tax exemption for the full claimed valued of \$234,170,800.00. (App 48a-49a). On December 29, 2001, the Tax Commission mailed to Ford a Part 59 tax exemption certificate exempting the test cells at Ford's Allen Park Test Lab for the full claimed valued of \$234,170,800.00. (App 50a-51a). On December 1, 2004, DEQ issued a re-evaluation of Ford's first-ever Part 59 test cell application (Application No. 1-2967), stating that its prior determination was "in error," and recommending that Ford's tax exemption certificate for the Allen Park Test Lab test cells be revoked. (App 122a-123a). On August 24, 2005, the Tax Commission declined to revoke this tax exemption certificate (App 154a) and on November 7, 2005, the Tax Commission affirmed but clarified that decision. (App 176a-177a).

In 2003 and 2004, Ford filed with the Tax Commission four Part 59 tax exemption applications for its test cell operations: 1) the Dearborn Dynamometer Lab for \$35,000,000.00 (Application No. 1-2391); 2) the Dearborn Vehicle Emissions Research Test Labs for \$11,449,105.00 (Application No. 1-3104); 3) the Allen Park Test Lab for \$23,940,480.00

¹⁶ These fundamental facts are not disputed and are admitted by each of the Appellees: *See*, Ford Brief in Opposition to Application for Leave to Appeal (SC Nos. 133400-06, Docket Entry No. 73), pp 1, 7-9; Daimler Chrysler Brief (Court of Appeals No. 265686, Docket Entry No. 28), pp 1-3, 13-15, 21-22, 27, and DaimlerChrysler Brief (Court of Appeals No. 267565, Docket Entry No. 36), pp 1-3, 12-14, 16-18, and 23; and Detroit Diesel Cross-Application for Leave to Appeal (SC No. 133403, Docket Entry No. 75), pp 1-3. *See also*, Tax Commission Hearing Transcript of Richard Middleton on behalf of Daimler Chrysler (10-28-04). (App 113a-117a).

(Application No. 1-3106); and 4) the Allen Park Test Lab for an additional \$8,000,000 00 (Application No. 1-2967-01).¹⁷

In 2004 and 2005, consistent with the DEQ's June and December 2004 post-hearing findings (App 92a-97a, 126a-127a), the Tax Commission issued Final Denial Notice Letters that denied *in toto* Ford's Application No. 1-3104 for the Dearborn Vehicle Emissions Research Test Labs and Ford's Application Nos 1-3106 and 1-2967-01 for the Allen Park Test Lab, and issued an Amended Certificate Final Notice Letter granting a Part 59 air pollution control tax exemption in the amount of \$2,700,000.00 (not the requested \$35,000,000) for Application No. 1-2391-01 for the Dearborn Dynamometer Lab. (App 102a-108a) The Tax Commission and DEQ granted Application No. 1-2391-01 for that portion of the equipment called "Thermal Recuperative Oxidizers." The DEQ's approval letter explains that "[t]he applicant states the 'purpose of the thermal recuperative oxidizers is to burn the VOC emissions created during the engine emission testing before the polluted air stream is released to the environment ' It is important to note that this is the only engine or vehicle testing facility among the six testing facilities that is (sic) under appeal before the Tax Commission that has actually installed air pollution control equipment to control, capture, and remove air pollutants from the polluted air stream." (App 97a).

On appeal by Ford, the circuit court reversed the agency decisions on three of Ford's air pollution control tax exemption applications (Application Nos. 1-2391-01, 1-3104, and 1-3106), opining that "this Court is constrained by [the *Meijer*¹⁸] decision to find that the testing equipment . . . is ancillary equipment in the control of air pollution" under the published DEQ

¹⁷ Of the applications directly at issue, only Application No. 1-3103 is included in Appellants' Appendix. (App 52a-73a). The other test call applications in this consolidated matter are materially the same.

¹⁸ *Meijer, Inc v State Tax Comm*, 66 Mich App 280; 238 NW2d 582 (1975).

Guidelines,¹⁹ and is therefore entitled to the tax exemption. (App 135a). On July 8, 2005, the same circuit court issued a companion ruling reversing the agency denial on Ford's fourth air pollution control tax exemption application and granting the full exemption. (Application No. 1-2967-01). (App 150a-153a).

The Court of Appeals upheld the Part 59 tax exemptions for all four Ford "test cell" Part 59 tax exemption applications (App 191a-200a). On September 21, 2007, leave to appeal to this Court was granted. (App 201a-203a).

DaimlerChrysler Corporation's Applications

In 2003, DaimlerChrysler filed two Part 59 air pollution control tax exemption applications, for two of its test cell operations: 1) the Chelsea Proving Grounds in Sylvan Township for \$111,814,687 (Application No. 1-3083); and 2) the Auburn Hills Chrysler Technical Center for \$51,974,723 (Application No. 1-3088).

In January, 2005, consistent with the DEQ's November 2004 post-hearing findings (App 118a-121a), the Tax Commission issued its Final Denial Notice Letters that denied in their entirety DaimlerChrysler Application No. 1-3083 for the Chelsea Proving Grounds in Sylvan Township and DaimlerChrysler Application No. 1-3088 for the Auburn Hills Chrysler Technical Center. (App 128a-129a).

On appeal by DaimlerChrysler, the circuit court affirmed the agency decisions of DEQ and Tax Commission on Application No. 1-3083 for the Chelsea Proving Grounds in Sylvan Township. (App 155a-156a). The circuit court stated:

[T]here is substantial evidence in this case to support the DEQ's decision that the test cells are not facilities^[20]. . . . [T]he evidence solicited at the STC underlies the fact that the test cells do not physically control, dispose, capture and/or remove pollutions (sic) from the air . . . and the primary purpose of the test cells is to test

¹⁹ DEQ's *Tax Exemptions for Air Pollution Control* (Guidelines). (App 74a-91a).

²⁰ MCL 324.5901 defines eligible "facility" for purposes of MCL 324.5901 *et seq.*

the emissions to confirm whether they comply with [air pollution control] requirements. . . . [(App 169a, 170a-171a)].

The circuit court affirmed the agency decisions on DaimlerChrysler's other application, No. 1-3088, for the Auburn Hills Chrysler Technical Center. (App 178a-190a). The circuit court opined:

Stated another way, there is competent and substantial evidence that the Test Cells are incidental to controlling or disposing of air pollution. See, *Covert Township Assessor*, [407 Mich 561] at 580-581 [(1980)]. This evidence, coupled with the plain language of [MCL 324.5901, *et seq.*] indicating that the Legislature intended the exemption to apply to a facility that operates for the primary purpose of controlling, capturing, or removing air pollution – as opposed to operating for the primary purpose of producing engines for sale – demonstrates that the [DEQ] acted within its discretion. [(App 185a-186a)].

The Court of Appeals reversed and allowed the Part 59 tax exemptions for the two DaimlerChrysler Part 59 tax exemptions. (App 191a-200a). On September 21, 2007, leave to appeal to this Court was granted. (App 201a-203a).

Detroit Diesel Corporation's Applications

In 2003, Detroit Diesel filed a Part 59 air pollution control tax exemption application for its Redford Township Emission Development Test Cells for \$7,144,229.00 (Application No. 1-3111); and a Part 59 tax exemption application for its Redford Township "Equinox" Diesel Engine Production Line for \$27,653,147.00 (Application No. 1-3112). In August 2004, consistent with the DEQ's June 2004 post-hearing findings (App 98a-101a), the Tax Commission issued its Final Denial Notice Letter that denied Application No. 1-3111 for the Redford Township Emissions Development test cells and Application No. 1-3112 for the Redford Township Equinox Diesel Engine Production Line. (App 109a-112a).

On appeal by Detroit Diesel, the circuit court affirmed the agency decisions denying both of Detroit Diesel's air pollution control tax exemption applications (Application Nos. 1-3111 and 1-3112). (App 138a-149a). The circuit court stated:

In the present case, upon review of the whole record, the plain language of the statute, relevant case law, and the DEQ Guidelines, the Court finds that there is substantial evidence in support of the DEQ's decision that neither the test cells nor the Equinox Line are "facilities" within the meaning of [Part 59].^[21]

* * *

The plain language of [Part 59] indicates that the legislature intended for the exemption to apply to a facility that operates for the primary purpose of controlling, capturing, or removing air pollution, as opposed to operating for the primary purpose of producing engines for sale [(App 144a, 146a)]

The Court of Appeals held the Part 59 tax exemption on Detroit Diesel's Application No. 1-3111 for the Redford Township Emissions Development Test Cells and Application should have been granted but affirmed the agency denials of Detroit Diesel's Application No. 1-3112 for the Redford Township Equinox Diesel Engine Production Line. (App 191a-200a). On September 21, 2007, leave to appeal to this Court was granted.²² (App 201a-203a).

American Suzuki's Part 59 Tax Exemption Application

In June 2004, American Suzuki filed a Part 59 air pollution control tax exemption application for its Wixom Facility Test Cells for \$3,856,128.00 (Application No. 1-3223). In January 2004, consistent with the DEQ's December 2004 post-hearing findings (App 124a-125a), the Tax Commission denied American Suzuki's Application No. 1-3223 for its Wixom Facility. (App 131a). On appeal by American Suzuki, the circuit court entered a stipulated order "to hold this case in abeyance until final resolution of the Ford cases." (App 136a-137a)

GM's Part 59 Tax Exemption Applications

On June 15, 2007, GM filed twelve separate Part 59 tax exemption applications, for its test cells as listed in the table on page 5, *supra*. Collectively, these twelve Part 59 GM

²¹ MCL 324.5901 defines "facility" for purposes of Part 59.

²² The Court of Appeals' affirmation of the agency denial of Application No. 1-3112 for the "Equinox" Diesel Engine Production Line is not being challenged in this appeal. See, footnote 16.

applications and the American Suzuki application together request tax exemptions for \$427,096,560.00 in test cell equipment and property. On September 28, 2007, DEQ submitted its findings to the Tax Commission that each of the twelve GM Part 59 applications should be denied. It is anticipated the Tax Commission will follow the usual procedure for Part 59 applications and notify GM and the local governments of the opportunity for a hearing before the Tax Commission²³

²³ These GM applications and records are not part of the record in this case. DEQ and Tax Commission suggest this Court take judicial notice of the GM records as public records.

ARGUMENT

- I. Under the plain and unambiguous language of §§5901 and 5903 the primary purpose of eligible pollution control equipment must be to control or remove air pollution within the State and none of the vehicle and engine emission testing equipment (test cells) qualify for Part 59 tax exemption.**

A. Standard of Review

This matter involves review of an agency's interpretation of a statute. The Administrative Procedures Act (APA)²⁴ authorizes a court to overturn an agency decision if it is "[i]n violation of . . . a statute," "[i]n excess of the statutory authority, or is "[n]ot supported by competent, material and substantial evidence."²⁵ The present matter involves solely statutory interpretation and application to undisputed material facts. Questions of statutory interpretation are reviewed *de novo*.²⁶

B. Summary of Argument

Sections 5901 and 5903 of Part 59 plainly and unambiguously identify the requirements that must be satisfied to qualify for tax exemption under Part 59. There is no need to engage in statutory construction beyond the plain words of the statute.

The controlling language in §5901 requires that to qualify for the exemption, the subject equipment or property be²⁷:

installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state;

The controlling language in §5903 requires that to qualify for the exemption, the subject equipment or property must be²⁸ :

²⁴ MCL 24.201 *et seq.*

²⁵ MCL 24.306(1).

²⁶ *Ayar v Foodland Distribs.*, 472 Mich 713, 715; 698 NW2d 188 (2005).

²⁷ MCL 324.5901 (emphasis added).

²⁸ MCL 324.5903 (emphasis added).

designed and operated *primarily for the control, capture, and removal of pollutants from the air*, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 [Air Pollution Control, of the NREPA, MCL 324.5501 *et seq*] and rules promulgated under that part.

None of the subject test cells qualify for Part 59 tax exemption because none of the test cells were "installed or acquired for the primary purpose of controlling or disposing of air pollution . . . within this state" under §5901, and none of the test cells are "designed and operated primarily for the control, capture, and removal of pollutants from the air," under §5903. Rather, the subject test cells are motor vehicle and engine air emission *testing* equipment that simply *test* air emissions during research and development, designing, and manufacturing motor vehicles and motor vehicle engines. It is an undisputed fact that the subject test cells do not control, dispose, capture, or remove *any* air pollution. Moreover, the subject test cells were not installed and are not operated with any purpose -- much less the "the primary purpose" or "primarily" -- to control, dispose, capture, or remove "air pollution . . . within this state," as explicitly required under Part 59. Accordingly, none of the subject test cells qualify for Part 59 tax exemption under the ordinary meaning of the clear and unambiguous language in §§5901 and 5903.

C. Argument

In relevant part, sections 5901 and 5903 of Part 59 provide as follows:

Sec. 5901. As used in this part, "facility" means machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state. Facility includes an incinerator equipped with a pollution abatement device in effective operation. Facility does not include an air conditioner, dust collector, fan, or other similar facility for the benefit of personnel or of a business. Facility also means the following, if the installation was completed on or after July 23, 1965:

(a) Conversion or modification of a fuel burning system to effect air pollution control. The fuel burner portion only of the system is eligible for tax exemption.

(b) Installation of a new fuel burning system to effect air pollution control. The fuel burner portion only of the system is eligible for tax exemption.

(c) A process change involving production equipment made to satisfy the requirements of part 55 and rules promulgated under that part. The maximum cost allowed shall be 25% of the cost of the new process unit but shall not exceed the cost of the conventional control equipment applied on the basis of the new process production rate on the preexisting process.

* * *

Sec. 5903. If the department finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 and rules promulgated under that part, the department shall notify the state tax commission, which shall issue a certificate. The effective date of the certificate is the date on which the certificate is issued.

The foremost rule of statutory construction is to discern and give effect to the intent of the Legislature.²⁹ Where statutory language is clear, it should be applied as written and only where it is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.³⁰ Terms not defined in the statute itself should be given their plain and ordinary meaning.³¹ To determine the plain and ordinary meaning of a statutory term, it is appropriate to consult dictionary definitions.³² Statutes should be read as a whole and words should be read in context.³³

²⁹ *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

³⁰ *Sun Valley Foods*, 460 Mich at 236.

³¹ *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In addition, MCL 8.3a states that all words and phrases in statutes "shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

³² *Koontz*, 466 Mich at 312.

³³ *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003).

Sections 5901 and 5903 create a two-part test: first, the subject property must satisfy the definition of "facility" under §5901, and then the DEQ must find that the subject property satisfies the "designed and operated primarily for" requirements of §5903.

1. **Section 5901 defines a facility as only those things that have as their primary purpose controlling air pollution in Michigan. The test cells do not meet this definition.**

The definition of "facility" under §5901 at issue here³⁴ contains three distinct requirements. The subject property must be:

- 1) "machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures";
- 2) "installed or acquired for the primary purpose of controlling or disposing of air pollution";
- 3) "that if released would render the air harmful or inimical to the public health or to property within this state."

It is admitted that all the subject test cells are "machinery, equipment, [or] structures." However, all the subject test cells fail to satisfy the second and third requirements.

It is undisputed the test cells themselves do not "control" or "dispose" of *any* air pollution. It is admitted by Ford, DaimlerChrysler, and Detroit Diesel that their respective test cells solely *test* motor vehicle and engine emissions for pollution — as the emissions/pollution pass through their test cells — for the purpose of determining how particular vehicle and engine products are performing during the design and manufacture process with respect to EPA emissions requirements.³⁵ The Court of Appeals articulated the undisputed principal facts as follows:

The test cells test, analyze, and monitor the pollution emitted by vehicles and engines and enable Ford, DC, and DD to produce products for sale that conform with EPA requirements. [(App 194a).]

³⁴ Additional definitions for "facility," in §5901(a)-(c), are not relevant to test cells.

³⁵ See footnote 18.

It is also admitted the test cells then allow the emissions/pollution that pass through the test cells to be released, through ductwork, outdoors into the air.³⁶ Accordingly, the test cells fail the second §5901 requirement because they admittedly do not themselves "control" or "dispose" of *any* air pollution, and in fact release uncontrolled pollutants.

The test cells also fail the third §5901 requirement. Since the test cells themselves do not control or dispose of *any* pollution — and actually release pollution to Michigan's air — it is necessarily true that the test cells themselves do not control or dispose of pollution "that if released would render the air harmful or inimical to the public health or to property *within this state*." The test cells do not — and do not have the "primary purpose" to — control or dispose of *pollution released in Michigan*. Accordingly, the test cells also fail the third §5901 requirement.

The manufacturers' argument depends on reading the phrase "the primary purpose" so broadly — to include the end-product result of emission testing; i.e., motor vehicle and engine products that, after final manufacture, sale, and distribution far outside of Michigan, will operate in compliance with federal air emission requirements — that it has virtually no limits.³⁷ But, even if the words "the primary purpose" are read to include not only the test cells' immediate physical purpose of *testing* emission pollutants but also the "purpose" of contributing to the design and manufacturing process that ultimately produces vehicle and engine products that will later operate within federal emission standards, the test cells' purpose is not directed to addressing pollution "released . . . within this state." The subject product testing operations simply do not have "the primary purpose," of preventing pollution *specifically within Michigan*.

³⁶ Tax Commission Hearing Transcript of Richard Middleton on behalf of DaimlerChrysler (10-28-04). (App 116a-117a).

³⁷ Under this interpretation, Part 59 tax exemption would be available for any facility designing or manufacturing air pollution control equipment, or products that contain an air pollution control device.

When considering the unambiguous language of §5901, the test cells fail to satisfy the §5901 definition of "facility." "The primary purpose" of the test cells is to ensure that motor vehicle and engine products sold throughout the United States satisfy federal air emission standards, not to control or remove air pollution in Michigan.

2. Section 5903 defines the requirements for the tax exemption. Even if the test cells are facilities under §5901, they do not meet §5903's requirements.

Section 5903 contains three requirements to qualify for Part 59 tax exemption:

- 1) "the department finds the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and";
- 2) "is suitable, reasonably adequate, and";
- 3) "meets the intent and purposes of part 55 and rules promulgated under that part. . . ."

It is clear that the first requirement — whether "the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air" — essentially duplicates the second requirement under §5901 — that it was "installed or acquired for the primary purpose of controlling or disposing of air pollution." Accordingly, for the reasons stated above, the test cells are not designed or operated primarily for the purpose of controlling, capturing or removing pollutants from the air under the first §5903 requirement.

The second and third §5903 requirements — that the subject property is "suitable, reasonably adequate and meets the intent and purposes of part 55" — were not identified as factors in any findings by the DEQ. Of course, it was unnecessary for DEQ to make a finding on the second and third §5903 requirements because DEQ had already determined each of the subject test cells did not satisfy the definition of "facility" under §5901 and so were not "designed and operated primarily for the control, capture, and removal of pollutants from the air" under the first §5903 requirement. Were further findings necessary, however, it is clear the subject test cells would not meet the third §5903 requirement because they were not installed and

are not operated to "meet the intent and purposes of Part 55^[38] and rules promulgated under that part." The test cells operate solely to satisfy *federal* motor vehicle and engine emission standards. With limited exception, federal law prohibits the State of Michigan from regulating emissions from motor vehicles.³⁹ The test cells, which operate solely to satisfy *federal* air emission regulations, cannot be said to operate to "meet[] the intent and purposes of part 55."

D. Conclusion

The following language from the administrative record of DaimlerChrysler's Application No. 1-3088 is substantively identical to DEQ's final findings for each of the subject test cells, and demonstrates that the plain and common sense meaning of the terms was applied by DEQ⁴⁰:

On October 28, 2004, the DEQ attended the STC hearing on the appeal for the above application. The DEQ has re-evaluated this application, including the information that was presented at the Hearing, pursuant to Part 59 The DEQ reaffirms its original finding that none of the equipment requested to be exempt qualifies for exemption pursuant to Sections 5901 and 5903 of Part 59 of NREPA.

The applicant has requested tax exemption for the vehicle testing and ancillary equipment located at its Chrysler Technical Center. The testing of vehicles is one of the manufacturing steps that the applicant takes in researching, designing, manufacturing, testing, marketing, servicing, and selling vehicles. None of the requested equipment controls, captures or removes pollutants generated by the vehicle testing equipment. The testing of the vehicles at the Chrysler Technical Center actually generates air contaminants which are emitted into the air in an uncontrolled manner. The applicant has not satisfied its burden of establishing that its described machinery, equipment, structures, or related accessories were installed or acquired and designed and operated to physically control, dispose, capture, and/or remove air pollutants from the air, that if released would render the air harmful, pursuant to the intent of Sections 5901 and 5903 of Part 59 of NREPA, as separate and distinct from apparent other purposes of measuring, recording and assessing data to determine if a product is fit for continued production or commercial sales, or for other research, manufacturing, marketing,

³⁸ Part 55 is found at MCL 324.5501 *et seq.*, and is Michigan's Air Pollution Control statute.

³⁹ The Clean Air Act precludes states from regulating auto emissions. 42 USC §7543(a). The sole exception allows California to seek a waiver from the U.S. EPA allowing it to regulate auto emissions. 42 USC §7543(b). If a waiver is granted, other states may adopt an identical regulation. 42 USC §7507. Michigan has never adopted such a regulation.

⁴⁰ *See*, App 92a-97a, 98a-101a, 118a-121a, 126a-127a, 136a-137a.

or sales purposes. The DEQ continues to find that the applicant has not established a primary purpose qualifying for a tax exemption under Part 59.

The DEQ's interpretation and application of §§5901 and 5903 gives effect to the plain meaning of the language used in Part 59, and should be upheld.

II. The plain language reading of §§5901 and 5903 that the subject test cells do not qualify for Part 59 tax exemption is supported by other canons of statutory construction: 1) when read in context and as a whole, other §5901 provisions support limiting the facilities eligible for the exemption; and 2) as a tax exemption statute Part 59 is to be strictly construed in favor of limiting the exemption.

A. Standard of Review

This matter involves review of an agency's interpretation of a statute. The APA authorizes a court to overturn an agency decision if it is "[i]n violation of . . . a statute" or "[i]n excess of the statutory authority, or is "[n]ot supported by competent, material and substantial evidence."⁴¹ The present matter involves solely statutory interpretation and application to undisputed material facts. Questions of statutory interpretation are reviewed de novo.⁴²

B. Summary of Argument

The conclusion that the plain language of §§5901 and 5903 disallows Part 59 tax exemption for the subject test cells is supported by:

- a) Other §5901 provisions limiting the facilities eligible for the tax exemption;
- b) The statutory interpretation principle that tax exemption statutes are to be strictly construed; and
- c) Precedent granting "great deference" to agency determinations and precedent granting "the greatest weight" to longstanding interpretations by an agency legislatively chosen to administer the statute.

⁴¹ MCL 24.306(1).

⁴² *Ayar v Foodland Distribs.*, 472 Mich at 715.

C. Argument

1. When read in context and as a whole other §5901 provisions support a strict construction limiting the facilities eligible for the tax exemption.

Precedent from this Court directs that a statute should be read "as a whole" when assessing if legislative intent is clear and unambiguous⁴³:

While it is axiomatic that this Court must enforce clear and unambiguous statutory provisions as written, *Nordman v Calhoun*, 332 Mich 460, 465; 51 NW2d 906 (1952); *Ypsilanti Police Officers Ass'n v Eastern Michigan University*, 62 Mich App 87, 92; 233 NW2d 497 (1975), it is equally true that "[what] is 'plain and unambiguous' often depends on one's frame of reference". *Shiffer v Board of Education of Gibraltar School Dist*, 393 Mich 190, 194; 224 NW2d 255 (1974). The whole act provides this proper "frame of reference" in cases of statutory construction: "A statutory provision that is in dispute must be read in light of the general purpose of the act and in conjunction with the pertinent provisions thereof." *Romeo Homes, Inc v Comm'r of Revenue*, 361 Mich 128, 135; 105 NW2d 186 (1960).

In addition to the operative §5901 provisions discussed above, other §5901 provisions read as follows:

Facility includes an incinerator equipped with a pollution abatement device in effective operation. *Facility does not include* an air conditioner, dust collector, fan, or other similar facility for the benefit of personnel or of a business. *Facility also means* the following, if the installation was completed on or after July 23, 1965:

(a) Conversion or modification of a fuel burning system to effect air pollution control. *The fuel burner portion only of the system is eligible for tax exemption.*

(b) Installation of a new fuel burning system to effect air pollution control. *The fuel burner portion only of the system is eligible for tax exemption.*

(c) A process change involving production equipment *made to satisfy the requirements of part 55* and rules promulgated under that part. The maximum cost allowed shall be 25% of the cost of the new process unit but shall not exceed the cost of the conventional control equipment

⁴³ *Metropolitan Council 23, etc v Oakland County*, 409 Mich 299, 318-319; 294 NW2d 578 (1980) (Emphasis added). Accord, *Sun Valley Foods Co*, 460 Mich at 236; *Sweatt*, 468 Mich at 179-180.

applied on the basis of the new process production rate on the preexisting process. [Emphasis added.]

All of this language is limiting. It limits the devices that qualify as a "facility": an otherwise qualifying incinerator must also be "in effective operation"; devices that actually do capture and dispose of air pollution (*i.e.*, air conditioner and dust collector) must not also be "for the benefit of personnel or of a business"; if part of a larger fuel burning system (even if installed for air pollution control purposes) "[t]he fuel burner portion only" can qualify as a facility; and an otherwise qualifying "process change" must also be "made to satisfy . . . Part 55," Michigan's Air Pollution Control Act.

The intent of the Legislature was clearly to limit the Part 59 exemption to devices (and to only that portion of any larger device or system) that directly contributes to air pollution control in Michigan. Reading the relevant provisions in light of other portions of the statute makes clear that §§5901 and 5903 were not intended to include the subject test cells that are not intended and do not control air pollution in Michigan.

2. Under longstanding precedent tax exemption statutes are to be strictly construed. This further supports limited the equipment eligible for the tax exemption.

This Court has consistently held that tax exemption statutes are to be strictly construed. In *Michigan Baptist Homes & Development Co v Ann Arbor*, this Court described the significant public interest served by this principle⁴⁴:

Exemption from taxation effects the unequal removal of the burden generally placed on all landowners to share in the support of local government. Since exemption is the antithesis of tax equality, *exemption statutes are to be strictly construed in favor of the taxing unit.*

⁴⁴ *Michigan Baptist Homes & Development Co v Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976). (Emphasis added.)

Likewise, in *Retirement Homes of Detroit Annual Conference of United Methodist Church, Inc v Sylvan Township*, this Court stated⁴⁵:

A property tax exemption is in derogation of the principle that all property shall bear a proportionate share of the tax burden and, consequently, *a tax exemption will be strictly construed.*

As a tax exemption statute, Part 59 must be strictly construed. This principle supports the plain language interpretation, which ensures that the exemption applies only to equipment primarily intended to control air pollution in this State; not to companies merely seeking to meet federal requirements throughout the country.

III. The Legislature clearly intended to authorize DEQ to determine eligibility for Part 59 tax exemptions. To the extent construction of the statute beyond its plain meaning is required, DEQ's interpretation of Part 59 denying the tax exemptions is entitled to deference.

As demonstrated above, this matter should be decided, and the tax exemption denials upheld, by reference to the plain language of the statute and the undisputed fact that the test cells are not primarily intended for controlling pollution in this state. To the extent further statutory construction is required, deference should be given to DEQ's interpretation of Part 59 and its decision to deny the exemptions.

It is beyond dispute that DEQ was given the authority to make the relevant determinations to grant or deny the tax exemption under Part 59. In no less than three sections of the statute, the Legislature made DEQ's authority clear:

Sec. 5902.(2) Before issuing a certificate, the state tax commission *shall seek approval of the department*^[46] [Emphasis added.]

⁴⁵ *Retirement Homes of Detroit Annual Conference of United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348; 330 NW2d 682 (1982) (emphasis added).

⁴⁶ The original act, 1965 PA 250, C.L.1948 §336.1 *et seq.*, at § 336.2(2), read "shall seek approval of the state health commissioner"; and at § 336.8 read, "shall not bridge *sic* the authority of the state health commissioner to determine" Currently, by Executive Order No. 1995-18, "department" within MCL 324 5901 *et seq.* is defined as the Department of Environmental Quality.

* * *

Sec. 5903. If *the department finds* that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 and rules promulgated under that part, *the department* shall notify the state tax commission, which *shall* issue a certificate. [Emphasis added.]

* * *

Sec. 5908. The state tax commission may adopt rules as it considers necessary for the administration of this part. *These rules shall not abridge the authority of the department to determine whether or not air pollution control exists within the meaning of this part.* [Emphasis added.]

The deference due to final agency evidentiary determinations by reviewing courts was explained in *Kurzyniec v Department of Social Servs*⁴⁷:

When there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). Great deference should be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise. *Traverse Oil Co v Chairman, Natural Resources Comm.*, 153 Mich App 679, 691; 396 NW2d 498 (1986).

Similarly, deference is provided to an agency interpretation of statutes they are charged with implementing. The level of deference has been described variously as: "due deference," "respectful consideration," and "such weight as is appropriate" in light of the statute at issue and the record of the case.⁴⁸ Recently, this Court stated that while it was not bound by agency interpretation and that it could not overcome the plain meaning of the statute, it would afford deference to longstanding interpretations⁴⁹:

⁴⁷ *Kurzyniec v Department of Social Servs*, 207 Mich App 531, 537; 526 NW2d 191 (1994).

⁴⁸ *See, Consumers Power Co v PSC*, 460 Mich 148, 172-175; 596 NW2d 126 (1999) (Brickley, J., dissenting) (survey of many cases addressing deference to administrative agency construction of statutes).

⁴⁹ *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23-24; 678 NW2d 619 (2004), quoting *Ludington Service Corp v Ins Comm'r*, 444 Mich 481, 505; 511 NW2d 661 (1994).

This Court, of course, is not bound by Court of Appeals decisions. Nor are we bound by the department's use of a narrow version of the real object test. Although this Court affords deference to the construction of statutory provisions by any particular department of the government and used for a long period, the department's interpretation "is not binding on this Court and 'cannot be used to overcome the statute's plain meaning'"

Regardless of the precise level of deference to be accorded an agency's interpretation of a statute it implements, DEQ's construction of the statute at hand and its technical and legal determination that the equipment at issue fails to meet the statutory criteria for the exemption falls easily within the penumbra of even the lowest level of deference. As discussed fully above, it is beyond dispute that:

- the test cells function solely to test for pollutants in sample products and do not themselves capture or control *any* pollution – in fact, releasing it into the air;
- the test cells "primary purpose" is to test engines sold nationwide or globally, not capturing or controlling pollution to be released *within Michigan*; and
- due to federal preemption of vehicle and engine emissions regulation, the test cells cannot "meet the intent and purposes of Part 55" but instead are intended to meet federal emissions standards.

As DEQ's concise and cogent findings denying the exemptions explain,⁵⁰ the test cells simply do not meet the definition of an eligible "facility" under §5901 or the other standards provided in §5903 because they are not designed and operated with any particular or primary purpose to control air pollution in Michigan.

Appellees will likely point to DEQ Guidelines⁵¹ stating that the Part 59 tax exemption may be available for "ancillary equipment" in arguing that the exemption provisions should be read expansively to cover their test cells. Unlike the test cells, however, "ancillary equipment" as defined by DEQ *directly monitors* operating air pollution control devices that are *actually preventing pollution* from being released into Michigan's air. DEQ guidelines provide that the

⁵⁰ See, pp 19-20 of this Brief.

⁵¹ DEQ's *Tax Exemptions for Air Pollution Control (Guidelines)* (App 74a-91a).

tax exemption may be available for only two very specific types of "ancillary equipment":

1) rooftop television monitors for directly viewing ongoing smokestack emissions, and 2) testing equipment that must both be located "in-stack" (e.g., physically inside an emission smokestack) and function solely to measure the ongoing control, capture, and removal of pollutants during the actual working life of that particular in-stack air pollution control device.⁵² These rooftop television monitors and "in-stack" equipment are components of and directly related to the functioning of operating pollution control equipment located in the state. DEQ's internal guidance identifying such equipment as potentially tax exempt does not support judicially expanding the exemption to cover the subject test cells that have absolutely no connection with presently operating pollution control devices in Michigan.

Under any level of deference, the undisputed material facts in the record for each of the subject Part 59 tax exemption applications demonstrate that DEQ's interpretation and application of §§5901 and 5903 is not "in violation of" or "in excess of statutory authority" under Part 59. To the contrary, the denial of the exemptions is consistent with the plain language of the statute and well within the agency's authority.

⁵² DEQ Guidelines, pp 7, 9-10, 12 (App 80a, 82a-83a, 85a).

IV. The Court of Appeals misapplied *Meijer* and *Covert*, which are factually distinguishable and inapposite to the issues presented here. Those decisions do not support the Court of Appeals' expansive reading of the tax exemption to cover the test cells.

A. Standard of Review

This matter involves review of an agency's interpretation of a statute. The APA authorizes a court to overturn an agency decision if it is "[i]n violation of . . . a statute," "[i]n excess of the statutory authority, or "[n]ot supported by competent, material and substantial evidence."⁵³ The present matter involves solely statutory interpretation and application to undisputed material facts. Questions of statutory interpretation are reviewed de novo⁵⁴

B. Summary of Argument

In *Meijer*⁵⁵ and *Covert*,⁵⁶ the only two published cases interpreting Part 59, an undisputed factual premise was that the facilities at issue physically captured and/or disposed of pollution that would otherwise be released into *Michigan's* air. That materially distinguishes those cases from the present matter where the facilities capture no pollution. In part because of the failure to recognize this important factual distinction, the Court of Appeals misapplied certain statements and rulings from these decisions in holding that the tax exemption should be expansively read to cover the subject test cells.

C. Argument

With respect to *Meijer* and *Covert*, the Court of Appeals stated, Opinion, pp 5, 7:

Meijer supports the conclusion that the test cells need not themselves physically remove pollution from the air, as long as the primary purpose of the test cells is to control pollution.

* * *

⁵³ MCL 24.306(1).

⁵⁴ *Ayar v Foodland Distributions*, 472 Mich 713, 715; 698 NW2d 188 (2005).

⁵⁵ *Meijer, Inc v State Tax Comm*, 66 Mich App 280; 238 NW2d 582 (1975).

⁵⁶ *Covert Twp Assessor v State Tax Comm*, 407 Mich 561; 287 NW2d 895 (1980).

Covert Twp makes clear that the test cells can qualify for tax exemptions even if the primary motivation of Ford, DC, and DD in installing the test cells was to ensure that their products could be sold.

As general statements of the rules laid down in these cases, these summaries are accurate. *Meijer* states that particular facilities do not have to physically "grab" pollution out of the air to be considered tax exempt under Part 59.⁵⁷ And *Covert* does stand for the proposition that a person's motivation for installing pollution control equipment is not controlling. But, contrary to the Court of Appeals' decision, the general rules of *Meijer* and *Covert* do not apply to the facts of this case. Both *Meijer* and *Covert* involved facilities clearly designed and operated to directly "control, capture or dispose" of pollutants that would otherwise be released within Michigan. This is unlike the test cells at issue which are not designed to and do not control pollution at all, but actually result in releases to Michigan's air.

In *Meijer*, an incinerator used for burning waste at Meijer's waste processing facility was out of compliance with state air pollution regulations. The incinerator system was replaced with a compactor and baler system, which allowed recycling and land filling all the waste, producing no air pollution. The court in *Meijer* ruled that replacing an incinerator system that emits air pollution with a compactor and baler system that emits no air pollution qualified the compactor and baler device for the tax exemption. The court in *Meijer* first determined that the compacting and baling system was a "facility" because it was acquired for the "primary purpose" of capturing and disposing of pollutants that would otherwise be released in Michigan by the burning of the waste⁵⁸:

Whether something constitutes a facility within the meaning of the act thus depends on the primary reason for its acquisition and/or installation. The

⁵⁷ As an example of DEQ applying this rule, see the discussion of monitoring devices DEQ considers eligible for the tax exemption to the extent they are part of equipment that actually controls pollution, e.g., cameras monitoring smokestack emissions. Argument III, p 26, *supra*.

⁵⁸ *Meijer, Inc v State Tax Comm*, 66 Mich App at 282-284.

language does not focus on the functional characteristic of the object itself. The initial question is whether appellee acquired and installed the balers and compactors in order to prevent, control or abate air pollution. If so, was that the primary reason?

* * *

Based upon the evidence, one may fairly conclude, as did the lower court, that the primary reason for the acquisition of balers and compactors was appellee's desire to abate air pollution. The fact that appellee chose this alternative means of waste disposal owing to the need to comply with state and local air pollution standards lends credence to the conclusion. The baling and compacting facility is thus a facility within the meaning of the act.

Finding that the baling and compacting facility was a "facility" for purposes of §5901 of Part 59, the Court of Appeals went on to find that the facility was designed and operated "primarily for the control, capture and removal of pollutants from the air" under §5903. It then addressed whether the exemption should be applied to the compacting and baling equipment itself. Responding to the State's argument that the compactors and balers should not be exempt because they did not physically remove pollutants from the air, the Court held:⁵⁹

Appellant [the State Tax Commission] construes the statute to read that tax exempt status is available only if the particular device removes pollutants from the air. Under this approach, if the appellee had placed a device on the previously utilized incinerators which reduced pollution control by 70 percent, it would be eligible for a tax exemption. However, the replacement of polluting incinerators with a method that completely eliminates pollution would not entitle appellee to take advantage of the exemption. This novel construction is without merit.

Thus, *Meijer* did decide that equipment which didn't actually remove pollutants from the air could be eligible for the Part 59 tax exemption. But the context for the *Meijer* court's decision to grant the exemption was that the equipment was part of a facility primarily intended to and that does control air pollution in Michigan. The Court of Appeals in the present case seized the language out of this context and applied it to the test cells at issue here. But the

⁵⁹ *Meijer, Inc v State Tax Comm*, 66 Mich App at 285-286.

Meijer decision simply does not support granting the tax exemption in this matter where the test cells themselves do not and are not part of a facility that actually controls pollution.

The pertinent issue in *Covert* was whether certain nuclear power plant equipment designed to control pollution (the nuclear reactor containment building, its spray system, cooling system and gaseous radioactive waste system) was eligible for the Part 59 exemption even though the construction was pursuant to federal nuclear regulatory requirements and the primary motivation for the construction was to comply with federal regulations. This Court determined that the motivation or intent was not controlling. Initially quoting from the State Tax Commission decision granting the exemption, this Court held that the exemption was not dependent upon the equipment being under direct State regulation⁶⁰:

We agree with the holding of the tax commission below that:

"The intent and purposes of the Air Pollution Act and Rules * * * are to control pollution and thereby to protect the health, welfare and safety of Michigan citizens, the productive capability of the assets of those citizens, and the natural resources of the State. That intent and those purposes are served by pollution control facilities constructed within the State of Michigan whether required by reason of federal or state regulation. Compatibility with intent and purposes is not dependent upon regulation. Such compatibility is established by the ability of a facility to control pollution. It is not regulation that is the *quid pro quo* for tax exemption. That *quid pro quo* is the control of pollution and, thereby, the protection of the health, welfare and safety of Michigan citizens and their assets. It is the fact that pollution control is *provided* that is important and not whether that pollution control is provided in response to state or federal regulation. . . ."

The Court next rejected the contention that the equipment was not eligible because it was installed to meet federal regulations and was intended to prevent releases in case of an accident⁶¹:

Neither of these arguments can be sustained. The use of the words "primary purpose" in § 1, and "operated primarily for" in § 3 of the Air Exemption Act evidences a legislative concern with the primary purpose served by the facility for

⁶⁰ *Covert Twp Assessor v State Tax Comm*, 407 Mich at 578-579.

⁶¹ *Covert Twp Assessor v State Tax Comm*, 407 Mich at 580-581.

which exemption is sought. This purpose need not, necessarily, align with the motivation of the persons installing, acquiring or operating the facilities.

The Court of Appeals relied on *Covert* for the proposition that the motive for installing and operating pollution control equipment is not controlling in deciding whether the tax exemption applies and held that Appellees could qualify for the exemption even if the motive "in installing the test cells was to ensure that their products could be sold."⁶² *Covert* supports the proposition that the motive for installing pollution control equipment is not controlling, but it is also clear that the facility at issue there (part of Consumers' Palisades Nuclear Plant) -- unlike the test cells in the present case -- was designed to capture and dispose of the air pollution that would otherwise be released *in Michigan*

The Court of Appeals below cited to select portions of *Meijer* and *Covert* to support its decision in the underlying case. But it ignored the significant fact that distinguishes those cases from this matter: the facilities at issue in *Meijer* and *Covert* would physically capture and/or dispose of pollution that would otherwise be released into *Michigan's* air, while the test cells in the present case capture no pollution. Because of its failure to recognize this fundamental factual distinction, the Court of Appeals misapplied those decisions and erroneously held that the tax exemption covered the subject test cells.

⁶² *Opinion, p 7.*

CONCLUSION

The Court of Appeals failed to apply Part 59 as written. The Act's operative language, in §§5901 and 5903, is plain and unambiguous. It is limited to controlling air pollution *in Michigan*. To qualify for Part 59 tax exemption, §§5901 and 5903 plainly require subject property to be "installed or acquired for the primary purpose of controlling or disposing of air pollution . . . within this state" and to be "operated primarily for the control, capture, and removal of pollutants from the air."

It is undisputed the subject test cells are used during research and development, design, and manufacturing solely to *test* emissions from sample vehicles and engines as part of the manufacture of end products that are not specifically destined for use within Michigan. The test cells, in fact, actually release the tested emissions into Michigan's air. Thus, the test cells do not satisfy the plain meaning of the operative language of §§5901 and 5903. The DEQ, the agency uniquely authorized by the Legislature to make determinations under §§5901 and 5903, correctly applied the plain language when it denied Part 59 tax exemptions for the subject test cells. These administrative decisions are entitled to great deference and should be upheld.

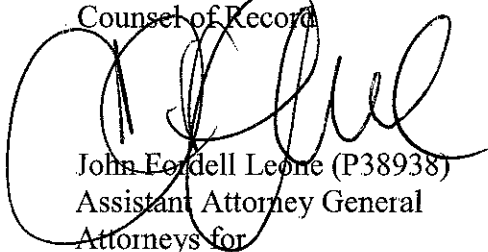
RELIEF SOUGHT

This Court should uphold the DEQ findings that the subject test cells do not qualify for Part 59 tax exemption and uphold the resulting tax exemption denials by the Tax Commission, and reverse the Court of Appeals.

Respectfully submitted,

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