STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF MT. PLEASANT

Petitioner-Appellant,

-vs-

MICHIGAN STATE TAX COMMISSION,

Respondent-Appellee,

_____/

Supreme Court No. 129453

Court of Appeals No. 253744

Michigan Tax Tribunal Docket Nos. 191496, 196247, 238596, 240992, 240993, 240994, & 240995

CITY OF MT. PLEASANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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A. THE TAX TRIBUNAL AND COURT OF APPEALS IMPROPERLY NARROWED THE SCOPE OF MCL 211.7m BY FAILING TO GIVE EFFECT TO THE LANGUAGE EXEMPTING PROPERTY "USED FOR PUBLIC PURPOSES."

The Michigan State Tax Commission argues that the issue presented is "simple" and insists that Mt. Pleasant merely "intended to do" certain things with the property at issue, rather than using the property for public purposes as is required under MCL 211.7m. (Tax Commission's Brief, p 4). The Tax Commission asserts that "at the time the exemption was claimed, all that Mt. Pleasant was doing with the property was watching it sit empty while they waited to sell it." (Tax Commission's Brief, p 5). But this argument depends upon flawed logic. Under the Tax Commission's approach, if the property is "empty," it is not being used for public purposes. Nothing in text or logic supports this proposition. The Tax Commission's argument is also predicated upon what logicians call a false disjunction or the fallacy of non-exclusivity. See generally, Douglas Lind, Logic and Legal Reasoning (The National Judicial College, 2001), pp 209-212.

Many public purposes use property while it is "empty." Open spaces, buffers along public roads, and projects that are underway but not yet to the building stage all involve property that is empty of any buildings or structures. MCL 211.7m does not impose any requirement that buildings, structures, or persons by physically on property for the exemption to apply. Nor does MCL 211.7m require taxation of empty property. To the contrary, the Legislature employed broad language to create the exemption for all property "used for public purposes." MCL 211.7m.

Likewise, the Tax Commission sets up an implicit, but false disjunction, in its discussion of the relationship between the City and the property. The Tax Commission asserts that the City was 'intending to" do certain things with the property; it then implicitly contends that, because it was intending to do these things, rather than doing them, the property was not being "used for

public purposes." Nothing in the text of MCL 211.7m supports the notion that property is only "used for public purposes," once the City has met its public purpose. And adopting such a test is fraught with difficulty because it would require the taxing authority to analyze whether the "public purpose" had been met or whether the public entity's purpose had achieved "fruition." Under this approach, property purchased to build a town hall would not be exempt before the town hall was built, had opened, and was operational. Using this artificial distinction between "intending" and "using" would render property taxable after purchase until the process of clearing the land, performing any environmental clean-up, obtaining necessary permits, and constructing any buildings necessary for the public purpose. This is flatly inconsistent with the legislative dictate in MCL 211.7m because the category of property being "used for public purposes" includes the use of property to build an office for public employees or to clear it of environmental contaminants before making it a storage yard for municipal vehicles. The Tax Commission takes the position that the City of Mt. Pleasant's property is taxable because "its intentions had not yet seen fruition when it claimed the exemption." (Tax Commission's Brief, p 6). But this requirement has no grounding in the text of MCL 211.7m. Rather, it amounts to an effort to engraft an additional requirement onto the statute, and one that would prove completely unworkable in practice.

As this Court recognized in *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), a government's efforts to pursue the goal of economic development is for a public purpose. 471 Mich at 462. The county obtained a patchwork of property, funded by a partial grant of $21 million from the Federal Aviation Administration (FAA), which allowed it to purchase properties near the projected airport expansion and negatively-impacted by increased noise. Eventually, the county purchased approximately five hundred acres of nonadjacent plots located to the south of Metropolitan Airport. The county's plan for these properties was to use

them to foster economic growth, by assembling large parcels suitable for development. According to this Court, this activity was undertaken for public purposes. Consistent with *Hathcock*, when a government assembles property and prepares it for suitable developments to attract economic growth and improve the tax base, the property is "used for public purposes." MCL 211.7m.

Mt. Pleasant was not simply watching property sit empty. It was actively engaged in acquiring property to empower the City to annex the area. It then assembled and prepared the property with infrastructure for eventual sale for economic development purposes. The property was being used to accomplish these purposes. Thus, it was exempt from taxation.

B. A Canon Of Construction Cannot Be Used To Override The Unambiguous Text Of A Statute And The Canon Relied On Here Does Not Apply To One Governmental Taxing Entity Challenging Taxes Sought By Another Governmental Taxing Entity.

The Tax Commission insists that the City of Mt. Pleasant bears the burden of claiming an exemption under MCL 211.7m. But in support of this assertion, the Tax Commission offers only authority imposing a burden on private entities, and not on a taxing entity claiming an exemption from tax payment to a different taxing entity. (Tax Commission's Brief, p 7). In *Elias Brothers Restaurants, Inc v Treasury Dep't*, 452 Mich 144; 549 NW2d 837 (1996), for example, the Court required a private restaurant to bear the burden of demonstrating that it was entitled to an exemption under the "industrial processing" exemption. 452 Mich at 150. In doing so, the Court relied on *Tercheck v Treasury Dep't*, 171 Mich App 508, 510-511; 431 NW2d 208 (1988). The Court explained that, tax exemptions are interpreted in this manner because they "represent the antithesis of tax equality." 452 Mich at 150. *Tercheck* likewise involved interpretation of a use tax exemption as it applied to a private entity, in that case a dental laboratory. 171 Mich App at

510.[1]

None of the decisions relied upon by the Tax Commission involved an exemption for government property used for public purposes. And none involved one governmental entity taxing another governmental entity. To the contrary, each of them dealt with a general rule of taxation and a private entity's effort to avoid taxation by fitting its case into an exemption. The Tax Commission quotes from Justice Smith's poetic analogy of "taxation, like rain fall[ing] on all alike." *Estate of Smith v Dep't of Revenue*, 343 Mich 291, 297; 72 NW2d 287 (1955). But this text was not intended to place an evidentiary burden on a local government when evaluating whether its property is exempt from taxation by a different level of government. To the contrary, the *Smith* court was discussing the canon of interpretation that requires a legislative body to clearly and without ambiguity define a preference in or an exemption from taxation. 343 Mich at 297. Review of the entire paragraph makes that clear.

As the Utah Supreme Court explained, the Tax Commission's approach would defeat the purpose of the exemption, which is to ensure that taxpayers from one governmental entity are not subsidizing the taxpayers of another. *Interwest Aviation v County Bd of Equalization of Salt Lake County*, 743 P2d 1222, 1225 (Utah, 1987). Equally important, the language in MCL 211.7m is not ambiguous. The legislature used a phrase that reaches broadly to encompass property "used for public purposes." *Id.* The language encompasses virtually any use of property by a governmental entity, unless it has "leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business

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[1]*Edison v Michigan Dep't of Revenue*, 362 Mich 158; 106 NW2d 802 (1961) involved the question of whether road contractors building concrete highways and, in the process, using and consuming major equipment, were exempt from taxation under the use tax because their activity amounted to an industrial pursuit and was exempt from the use tax. *City of Detroit v Detroit Commercial College*, 322 Mich 142; 33 NW2d 737 (1948) dealt with whether a commercial college owed personal property tax.

conducted for profit." MCL 211.181. Such an interpretation harmonizes MCL 211.7m with MCL 211.181, and gives effect to both provisions' plain language, thereby carrying out the Legislature's intent. See *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001) ("We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature."); *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998) (if statutes can be construed in a manner that avoids conflict, then that construction should control the analysis). Properly interpreted, MCL 211.7m provides an extremely broad exemption to property that is owned by a local government. It sets forth a limitation that is basically co-extensive with the local government's governmental powers. At the same time, MCL 211.181 prevents a windfall to private entities, and ensures taxation when government-owned property is used for private profit-making purposes. This analysis also ensures that taxation policies are not distorted by requiring one government entity to bear the taxes that properly belong to the taxpayers of another governmental entity.

Contrary to the Tax Commission's position, well-respected treatises on municipal and taxation law recognize the special status of governmental units when considering the operation of general tax laws. Cooley taught that a municipality is presumed to be outside the intent of the legislature when it enacts general tax laws:

> Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes. All such property is taxable if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact. The grant, therefore, in general terms, to a city of the power

> to tax will not be held to confer power to tax state or county property. Page 172 (2d Ed.)

People v Ingalls, 238 Mich 423, 427; 213 NW 713 (1927) quoting Cooley on Taxation (2d ed), p 179. See also Thomas M. Cooley, 2 The Law of Taxation § 621 (4th ed, 1924), pp 1312-1317. Property held by municipalities, like property held by the state, is not included as taxable property "on the theory that such taxation would merely be taking money out of one pocket and putting it in another...." *Id.* at 1317. Cooley explained:

> While in some states it is held that the strict construction rule applies equally well to alleged exemptions of municipal property, the better rule is that strict construction of exemption statutes applies to exemptions of property held in private ownership but not to exemptions of public property. In case of property owned by the state or a city or other public corporation, an express exemption should not be construed with the same degree of strictness that applies to exemptions contrary to the policy of the state, since as to such property "exemption is the rule and taxation the exception."

Id. at 1414-1415. The *Ingalls* court also looked to the well-respected book by Dillon on Municipal Corporations, which announced the same presumption against finding a tax on public uses of a municipality. 238 Mich at 427 quoting Dillon on Municipal Corporations, § 773. See also John F. Dillon, IV Commentaries on the Law of Municipal Corporations (1911), pp 2431-2434.

MCL 211.7m offers an unambiguous legislative directive to exempt from taxation all property "used for public purposes" by a municipality, such as the City of Mt. Pleasant. When interpreting this language, the Court should apply the plain meaning of the text, which is consistent with the notion that the state does not ordinarily impose taxes on a local government. The states does not do so because such a measure merely requires the local government to raise additional taxes to pay the state taxes. In addition, state taxation of municipal property requires local taxpayers to, in essence, subsidize the taxpayers of the state. In other words, it tends to have a distorting effect on the tax system and, rather than fostering equality of treatment,

impedes it.

C. *TRAVERSE CITY V EAST BAY TWP* IS NOT INCONSISTENT WITH A DETERMINATION THAT THE CITY OF MT. PLEASANT'S PROPERTY IS EXEMPT AND, TO THE EXTENT THIS COURT DISAGREES, IT SHOULD BE OVERRULED.

The Tax Commission argues that this appeal does not present a case of "first impression," but is controlled by *Traverse City v East Bay Twp*, 190 Mich 327; 157 NW 85 (1916). But the Court has never addressed the issue presented here, which is whether the Michigan Legislature exempted property from taxation pursuant to MCL 211.7m on the basis that it is "used for public purposes" when the property is owned by a city after having been acquired to allow the area to be annexed to that city and is being assembled and prepared with infrastructure for eventual sale for economic development purposes that have been determined by the city to be in the public interest. And *Traverse City* dealt with a much narrower issue, which was whether property that the city conceded was "not being used, we admit that, it is undeveloped now, but being held for the purpose of future development...." 190 Mich at 328. The city explained that there was "a good waterfall there, and we expect to develop it or use it when the business of the city demands it." *Id.* The outcome was, perhaps, determined by counsel for the City's inartful wording, since holding property for development as an energy source amounts to use of the property.

The Court also looked to the evidence regarding the City's need for expanded power. The record revealed "no definite plans for construction, not definite plans for putting it before the people or getting it in shape so it could be done." *Id.* at 329. In fact, given the state of municipal authority at the time, the defendant asserted that the city lacked authority "under the law, to purchase and own the lands in question." *Id.* at 331. The Court declined to address that issue because it concluded that the "use which warrants exemption mentioned in the statute is a present use, and not an indefinite prospective use." 190 Mich at 331. Thus, at its broadest, the Court's holding excludes from the exemption property that the local government has admitted

that it is not being presently used but is merely being held for an indefinite prospective use.

That holding does not control here where, from the moment of its acquisition, the City of Mt. Pleasant's property was used to annex property and then to foster economic development and add to low- and moderate-income housing located within the City. The city manager, Paul Preston, recalled a study from the 1980s indicating the need for "about a hundred units of low and moderate income housing per year for a ten-year period in order to meet the needs that we saw in the community." (Tr, 9/26/02, p 10; Apx 108a). No land was available within the City to permit this needed construction. (*Id.*) Thus, the City acquired property, which was provided to low and moderate income housing developers. (*Id.*) Much of the housing eventually developed on the property was subsidized. (*Id.*, pp 26-29; Apx 124a-127a). The City then negotiated a payment-in-lieu-of-tax arrangement with developers using a sliding scale. (*Id.*, pp 68-70; Apx 166a-168a).

In addition, the property was used from its acquisition to improve traffic safety by permitting the annexation of property necessary to complete various road projects. (Tr, 9/26/02, pp 12-18; Apx 110a-116a). This plan was developed when the City determined that it could not extend Bellows Street and Preston Street to Isabella because "we did not own the land, so we had to acquire the land." (*Id.*, p 14; Apx 112a). Before the project, the City had control of only two major streets within its borders, Broadway and High Streets. (*Id.*, p 15; Apx 113a). The acquisition of land allowed the City to extend these two streets. (*Id.*) In addition, this road project allowed the City to reduce the response time for its public safety vehicles. (*Id.*) For the City to accomplish these purposes, it was necessary to annex the property. (*Id.*, pp 15-16; Apx 113a-114a). In contrast, at trial in the *Traverse City* case the city's witness was asked "There has been no attempt on the part of that former company or the city to improve or change the natural conditions of it?" He testified, "No; no change." *Traverse City* at 329. Mt. Pleasant, however,

did improve and change the property.

The City also needed to acquire property for annexation in order to "provide for a future industrial tax base in accordance with the objectives of the City's master plan." (*Id.*, p 16; Apx 114a). Before acquiring and annexing the additional property, about 40% of the City's land was nontaxable. (*Id.*, p 17; Apx 115a). The acquisition was necessary to extend the major streets to serve an increased traffic demand and to obtain land that could be used for future industrial development. (*Id.*, p 18; Apx 116a). The acquisition was also necessary to enable the city to annex the property. Annexation could only be accomplished with certainty by the City purchasing the land and then annexing it pursuant to MCL 117.9(8). That provision of the Home Rule Cities Act permits a city to annex land simply by resolution of its legislative body, but only where it owns all of the land being annexed and where the land is vacant. It provides, in pertinent part:

> Any other annexation method would involve either the permission of the affected township, a contested boundary commission proceeding, and/or a vote of the people.

MCL 117.9(8).

In pursuing this purpose, the City had a conceptual site plan prepared, which provided a guide for orderly development. (*Id.*, p 19; Apx 117a). The conceptual site plan divided the property into various zones to accommodate future land uses under the master plan. (*Id.*) The property placed within the industrial zone was used to attract industries and foster economic growth. (*Id.*, pp 20-21; Apx 118a-119a). The City did not compete with developers in carrying out this project; it worked with them and helped them by "fronting the cost for the infrastructure, the roads, the water, and sewer." (*Id.*, p 22; Apx 120a). Industrial companies were permitted to submit bids to develop property in the industrial park, and were some were granted tax abatements. (*Id.*, pp 29-30; Apx 127a-128a). The industrial park was also a platted subdivision

and properties were sold to a variety of businesses from "the very early days of the project, and as time has gone on, the park has filled." (*Id.*, p 71; Apx 169a). Only a single ten-acre site was left at the time of the hearing. (*Id.*) The parcels remaining on December 31, 1998, were transferred to the Economic Development Corporation, which was by then created. (*Id.*, pp 71-72; Apx 169a-170a).

The statute contains no "current use" requirement as urged by the Tax Commission and adopted by the Tax Tribunal and Court of Appeals. Such an interpretation runs counter to the plain language of MCL 211.7m. It also contravenes the notion that the legislature must speak clearly when it intends to tax government property. And it is inconsistent with the backdrop of taxation and exemption set forth in MCL 211.181 and the other statutes discussed in the City's principal brief on appeal.

The Tax Commission concedes, as it must, that "promoting the formation of new jobs, affordable housing, and a healthy economy are goals that benefit the public." (Tax Commission's Brief, p 11). But it argues that the property was not used for those purposes at the time. This argument should be rejected because it is inconsistent with the dictionary definition of "used," which means to "employ." Unquestionably, the City employed the property to annex it. It also employed the property to foster low- and moderate-income housing, to attract industrial development, and to address its traffic problems. Thus, it was exempt and a reversal is required.

D. MCL 211.7m Is Properly Interpreted Against The Fabric Of Tax Laws Governing Municipal Property.

Rather than addressing the argument presented in Section F of the City of Mt. Pleasant's brief on appeal on the merits, the Tax Commission merely asserts that the specific exemptions discussed were not applicable, notes that the Court did not direct the parties to brief this issue, asserts in conclusory terms that the Court is being invited to rewrite MCL 211.7m, and then

declines to address the issue.

This Court has regularly taught that legal issues should be determined against the backdrop of the law governing that area. See e.g., *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000) ("against this backdrop of the current state of controlling legal principles regarding sexual harassment under Michigan law, we turn our attention to whether the principles adopted by the United States Supreme Court in *Faragher* and *Ellerth* should now apply in cases brought under the Michigan Civil Rights Act"); *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993) (the trial courts of this state must also evaluate the admissibility of other acts evidence against the backdrop of the law governing included and cognate offenses).

The Tax Commission offers no response to the key point made in the City's brief, which is that the economic development statutes referenced by the Court of Appeals were enacted in order to give other entities the same tax exemption already available to the City by virtue of MCL 211.7m's broad language. The Tax Commission persuaded the Court of Appeals that the grant of an exemption to an agency not listed in 211.7m amounts to a legislative denial of an exemption to a 211.7m municipality. But this conclusion does not flow from either the language of the exemption or the exemption when read in light of other provisions. Nor does it fit with the timing of the statutes, since MCL 211.7m was enacted long before the more recent statutes, which have extended the scope of the exemption by applying it to other entities. The Court of Appeals decision amounts to a judicial override of a broadly-worded exemption in the absence of textual support and contrary to a correct understanding of legislative policy as embodied in the words of the act. Having established a broad exemption for municipalities in MCL 211.7m, the Legislature later extended it to various other governmental entities engaged in similar economic development purposes. (Mt. Pleasant's Brief, pp 29-35). Mt. Pleasant's reading of the statutes affords home rule cities a tax exemption for property acquired and used for public purposes,

which includes to foster economic development. *Hathcock, supra*. It also coincides with MCL 211.181, which limits this broad exemption by imposing taxes when the government-owned property is leased, loaned, or used for private purposes. The best reading of MCL 211.7m. harmonizes it against the backdrop of other statutes, and the broad principles regarding taxation of local governments. Under this reading, the City's property is exempt. Thus, a reversal is required.

RELIEF

Wherefore, the City of Mt. Pleasant respectfully requests this Court to reverse the Court of Appeals and Tax Tribunal, hold that the disputed parcels are exempt from taxation under MCL 211.7m, and grant them such other relief as is warranted in law and equity.

Respectfully submitted,

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