

STATE OF MICHIGAN  
IN THE SUPREME COURT

CLAM LAKE TOWNSHIP, a Michigan  
general law township; and HARING  
CHARTER TOWNSHIP, a Michigan charter  
township,

Supreme Court Docket No. 151800

Court of Appeals Case No. 324022

Appellants,

Wexford County Circuit Case No. 14-25391-AA  
Honorable William M. Fagerman

v

State Boundary Commission Docket 13-AP-2

THE STATE BOUNDARY COMMISSION,  
an administrative agency within the Michigan  
Department of Licensing and Regulatory  
Affairs; TERIDEE LLC, a Michigan limited  
liability company; and, THE CITY OF  
CADILLAC, a Michigan home rule city,

Appellees.

Ronald M. Redick (P61122)  
Mika Meyers Beckett & Jones, PLC  
Attorneys for Appellants  
900 Monroe Avenue, NW  
Grand Rapids, MI 49503  
(616) 632-8000

Randall W. Kraker (P27776)  
Brion B. Doyle (P67870)  
Varnum, LLP  
Attorneys for Appellee, TeriDee, LLC  
Bridgewater Place  
P.O. Box 352  
Grand Rapids, MI 49501-0352  
(616) 336-6000

Michael D. Homier (P60318)  
Foster Swift Collins & Smith PC  
Attorneys for Appellee, City of Cadillac  
1700 E. Beltline Ave. NE, Ste. 200  
Grand Rapids, MI 49525  
(616) 726-2200

Bill Schuette (P32532)  
Patrick Fitzgerald (P69964)  
Attorney General, State of Michigan  
Attorney for Appellee, the State Boundary  
Commission  
525 W. Ottawa, 7th Floor  
PO Box 30212  
Lansing, MI 48909  
(517) 373-1110

**APPELLANTS' SECOND REPLY BRIEF:**

**REPLY TO THE BRIEF IN OPPOSITION OF APPELLEE,  
STATE BOUNDARY COMMISSION**

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES..... ii

REPLY ARGUMENTS ..... 1

I. *CASCO TWP'S* HOLDING IS NOT "SETTLED" LAW..... 1

II. THE SBC TACITLY ADMITS THAT THE SBC HAS NO JURISDICTION TO CONSIDER ACT 425 AGREEMENTS..... 1

III. THE AGREEMENT'S ECONOMIC DEVELOPMENT PROJECT IS VALID..... 3

IV. THE AGREEMENT LAWFULLY PROVIDES FOR REVENUE SHARING ..... 5

V. THE GIFTOS E-MAILS ARE IRRELEVANT ..... 7

VI. THE SBC IS SUBJECT TO COLLATERAL ESTOPPEL..... 7

REQUEST FOR RELIEF ..... 9

**INDEX OF AUTHORITIES**

**Michigan Cases**

*A&D Development v Michigan Commercial Ins Mut*,  
 No. 301296 (Feb., 28, 2012)..... 1

*Casco Twp v SBC*,  
 243 Mich App 392; 622 NW2d 332 (2000), *app den*, 465 Mich 855 (2001)..... 1

*Czymbor’s Timber, Inc v City of Saginaw*,  
 478 Mich 348, 356; 733 NW2d 1 (2007)..... 2

*Eikhoff v Detroit Charter Comm*,  
 176 Mich 535, 540; 142 NW 746 (1913)..... 2

*Holton v Ward*,  
 303 Mich App 718; 847 NW2d 1 (2014)..... 9

*Mason Co Civil Research Council v Mason Co*,  
 343 Mich 313, 326-327; 72 NW2d 292 (1955) ..... 2

*Mayor of Lansing v Pub Service Comm*,  
 470 Mich 154, 161; 680 NW2d 840 (2004)..... 3

*McKibbin v Mich Corp & Sec Comm*,  
 3269 Mich 69, 82; 119 NW2d 557 (1963)..... 2

*People v McIntire*,  
 461 Mich 147, 155, 159; 599 NW2d 102 (1999)..... 3

*People v Wilson*,  
 496 Mich 91; 852 NW2d 134 (2014)..... 9

*Renny v Dep’t of Trans*,  
 478 Mich 490, 505, n36; 734 NW2d 518 (2007)..... 10

*St Joseph Twp v SBC*,  
 101 Mich App 407, 414; 300 NW2d 578 (1981)..... 10

*Twp of Casco v Sec of State*,  
 472 Mich 566, 603; 701 NW2d 102 (2005)..... 4

*York v Detroit (After Remand)*,  
 438 Mich 744, 767; 475 NW2d 346 (1991)..... 2

**Statutes**

MCL 117.9(6) ..... 9, 10

MCL 123.1009 ..... 9

MCL 123.21(a) ..... 5

MCL 124.22(1) ..... 6

MCL 124.23(c) ..... 4, 6

**Other Authorities**

Ed White, Detroit Free Press (AP),  
    <http://www.freep.com/story/news/local/michigan/2015/01/10/anti-gay-attorney-appeal/21549113/> (accessed July 16, 2015)..... 8

MCR 7.302(B)(3)..... 9

MCR 7.302(E)..... 1

Clam Lake Township and Haring Charter Township (the “Townships”) submit this Reply Brief, pursuant to MCR 7.302(E), in rebuttal to the Brief filed by Appellee, the State Boundary Commission (“SBC”). Some of the SBC’s arguments are the same as those advanced by Appellee, TeriDee, LLC, which the Townships have already addressed in their Reply to TeriDee’s Brief. Accordingly, the Townships confine this Reply to the different or additional arguments that the SBC advances in its own Brief.

## REPLY ARGUMENTS

### I. *CASCO TWP’S HOLDING IS NOT “SETTLED” LAW*

In support of its arguments against granting leave to appeal, the SBC refers to the Court of Appeals’ decision in *Casco Twp*<sup>1</sup> as being “settled” law. SBC Brief at p. 15. That is hardly the case. *Casco Twp* was not affirmed by this Court on its merits. Moreover, in the 15 years since it was decided, the holding of *Casco Twp* has never been followed nor cited by any subsequent panel of the Court of Appeals.<sup>2</sup> In short, a Michigan appellate court has never expressed agreement with the holding of *Casco Twp*. Far from being “settled” law, *Casco Twp* actually run afoul of the “settled” law established by this Court, as the Townships have already shown in their Application, and will further demonstrate below.

### II. **THE SBC TACITLY ADMITS THAT THE SBC HAS NO JURISDICTION TO CONSIDER ACT 425 AGREEMENTS**

The SBC argues that it has jurisdiction to consider the validity of Act 425 Agreements. SBC Brief at pp. 15-17. But it doing so, the SBC ends up tacitly admitting that such jurisdiction does not exist. This is made evident by the fact that the SBC cannot identify a single provision of Act 425 which even mentions the SBC – yet alone grants it any authority to administer or apply the statute in

<sup>1</sup> *Casco Twp v SBC*, 243 Mich App 392; 622 NW2d 332 (2000), *app den*, 465 Mich 855 (2001).

<sup>2</sup> It was cited *once* by the Court of Appeals, in an unpublished opinion, but for a proposition that actually supports the Townships’ position. *See A&D Development v Michigan Commercial Ins Mut*, No. 301296 (Feb., 28, 2012) (“[A]gencies cannot exceed the statutory authority granted by the Legislature.”).

any fashion. *Id.* This tacit admission needs to be juxtaposed against the “settled” law that has been established by this Court for over a century, which is that any authority an agency exercises must be expressly granted by the Legislature, by way of clear and unmistakable statutory language. *Eikhoff v Detroit Charter Comm*, 176 Mich 535, 540; 142 NW 746 (1913); *Mason Co Civil Research Council v Mason Co*, 343 Mich 313, 326-327; 72 NW2d 292 (1955); *McKibbin v Mich Corp & Sec Comm*, 3269 Mich 69, 82; 119 NW2d 557 (1963); *York v Detroit (After Remand)*, 438 Mich 744, 767; 475 NW2d 346 (1991); *Czymbor’s Timber, Inc v City of Saginaw*, 478 Mich 348, 356; 733 NW2d 1 (2007).

But being undeterred by this venerable body of controlling law, the SBC argues that, despite the complete absence of statutory authority, it should nonetheless have jurisdiction to determine the validity of Act 425 Agreements because of the “wisdom” of such an outcome, and because this would be the “more logical approach.” SBC Brief at pp. 16, 17.<sup>3</sup> The Court has consistently rejected this type of jurisprudence, where the judiciary would serve as an uber-policymaker to the Legislature – making sure that statutes are re-written, under the guise of interpretation, so as to be “wiser” or “more logical.” *People v McIntire*, 461 Mich 147, 155, 159; 599 NW2d 102 (1999).<sup>4</sup> See also, *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004).<sup>5</sup>

---

<sup>3</sup> The SBC also argues that it would be “impossible” for petitioners, like TeriDee, to initiate a declaratory action in court to determine the validity of an Act 425 agreement. The SBC cannot truly be serious about this. Since when did it become “impossible” to have a court determine the validity of a contract? This type of ludicrous position serves to demonstrate just how desperate the SBC is to ensure that it retains the authority to reject every Act 425 agreement that might interfere with its subjective belief that annexation is a better option.

<sup>4</sup> “[I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution.”

<sup>5</sup> “Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that . . . some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.”

As Justice Young has eloquently explained, somewhat more recently:

It is not the role of this Court to rewrite the law so that its resulting policy is more “logical,” or perhaps palatable, to a particular party or the Court. It is our constitutional role to give effect to the intent of the Legislature by enforcing the statute as written. What defendants in these cases (or any other case) may view as “absurd” reflects an actual policy choice adopted by a majority of the Legislature and approved by the Governor. If defendants prefer an alternative policy choice, the proper forum is the Legislature, not this Court.

*Twp of Casco v Sec of State*, 472 Mich 566, 603; 701 NW2d 102 (2005) (Young, J., concurring and dissenting).

The Court should therefore reject the SBC’s request to endow it with jurisdiction over Act 425 agreements, under the guise of making Act 425 reflect a “wiser” or “more logical” policy choice. The Legislature has made the clear choice that the SBC should have *nothing* to do with Act 425 agreements, and so the Court should enforce that intention by peremptorily reversing the SBC Decision in this matter.

### **III. THE AGREEMENT’S ECONOMIC DEVELOPMENT PROJECT IS VALID**

The SBC criticizes the economic development project of the Townships’ Agreement, as reflected in Art. I, §3 thereof (**ROP at 9A**), characterizing these provisions as “empty, circular recitals” that are invalid because they do not reflect the exact “project” that TeriDee has expressed a desire to build. SBC Brief at p. 18-19. This shows a conspicuous lack of understanding of the Act 425 statute, on more than one level.<sup>6</sup>

First, the SBC is legally incorrect in taking the position that an economic development plan must be designed to meet the specific demands of a particular developer or real estate speculator, such as TeriDee. SBC Answer at p. 18. Private developers are not even mentioned in Act 425. Instead, the economic development project is to be developed based on the “established city, village, township, county, or regional land use plan.” MCL 124.23(c). This is exactly how the Townships’

---

<sup>6</sup> Perhaps we should not be surprised by this, because the Legislature has not given the SBC any authority to administer, interpret or apply Act 425.

Agreement is designed, but in the preposterous regulatory scheme created by the SBC, consistency with the regional land use plan is something to be avoided, whereas violating the regional land use plan through annexation is something to be encouraged.<sup>7</sup>

The SBC's errant ways continue, when it demands that an Act 425 agreement, to be valid, identify a very specific project, like a hotel, restaurant, grocery store, etc. Once again, this ignores the plain statutory language. Act 425 generically defines an "economic development project" as being "planned *improvements suitable for use* by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water." MCL 123.21(a) [emphasis added]. Thus, the focus of Act 425 is not on identifying or designating a specific land use. Instead, the statute's focus is on providing specific municipal "improvements," such as municipal sewer and/or municipal water, that *can be used by* an "industrial or commercial enterprise, or housing development" and which will otherwise "protect . . . groundwater or surface water." And that is exactly what the Townships' Agreement does. It provides for the extension of Haring's public sewer and public water services to the Transferred Area so that these services can be "use[d] by" a mixed-use, planned unit development consisting of "commercial enterprise" near the US-131/M-55 intersection and "housing development" on the balance of the Transferred Area. And as an ancillary matter, the Agreement includes provisions for the adoption of generic development standards for the Transferred Area, so that appropriate regulatory provisions are in place to allow that type of development to occur. The SBC, by demanding something more specific than this, or by requiring that a landowner be allowed to do exactly what it wants to do, is re-writing Act 425 to include fictional requirements that simply do not exist.

---

<sup>7</sup> The circuit court expressly held that TeriDee's development plan "is contrary to regional land use plans." See 12/19/14 Opinion on Appeal at p. 12. Appellees have not appealed that holding.

And by engaging in this re-write of Act 425, the SBC is radically distorting the Legislature's intent by effectively handing over the statute's administration to private developers. As noted above, the subjective interests of developers are not even mentioned in the Act; instead, the Legislature has commanded that local units enter Act 425 agreements with an eye toward consistency with the local land use plan. MCL 124.23(c). But what the SBC has created is a regulatory scheme where a developer can reject an Agreement's economic development plan, even though the plan is consistent with the regional land use plan, by simply saying, "That's not what I want, so I won't do it," and thereby have the SBC invalidate the Agreement on that basis. Conversely, if a developer likes an Agreement's economic development plan, then the Agreement is automatically valid, at least under the SBC's reasoning. What the SBC has done, therefore, is to abdicate to private developers the responsibility for determining whether an Act 425 agreement is valid. No longer is an Agreement's economic development project "controlled by a written contract agreed to by the affected local units," nor is it to be consistent with the "regional land use plan." MCL 124.22(1); MCL 124.23(c). Instead, if a developer likes the project, the Agreement is valid; but if a developer doesn't like the project, then the Agreement is invalid. The Court should not allow this dangerous abdication of governmental authority to continue. Reversal is required.

#### **IV. THE AGREEMENT LAWFULLY PROVIDES FOR REVENUE SHARING**

With regard to revenue sharing, the SBC incorrectly states that "the Townships do not dispute the fact that Haring would keep all of the revenue." SBC Brief at p. 20. That statement is absolutely false, in more than one respect. First, the Townships intend to share a portion of the connection fees that are generated from "upstream" connectors to the Haring water system and "downstream" connectors to the Haring sewer system, within Haring Township. **ROP at 8D** (7-Day Rebuttal at pp. 12-13). This is a logical plan, because these sewer and water lines generate a benefit to both Townships. However, because the proportion or magnitude of revenue sharing cannot be

appropriately determined until the lines have been installed and the final project costs have been determined, the Townships have agreed to amend their Agreement at such time when these final costs can be known, to specify the precise degree of utility revenue sharing. **ROP at 3D** (Act 425 Agreement at Art. II). This particular approach to the sharing of *utility* revenue is a reflection of the fact that implementation of the Agreement – and the extension of utilities in particular – is a dynamic process, not a static one, such that the Townships need the flexibility to address future unknowns by proper amendment. There is nothing improper about this.

Second, the SBC, by referring to Haring as “keep[ing]” all property tax revenue is fundamentally misapprehending the situation that exists with *all* Act 425 agreements. Specifically, Haring, like *all* transferee townships, has no tax revenue to “keep” from the Transferred Area, for the reason that it was not receiving any tax revenue from the Transferred Area at the inception of the Agreement. It is *only* the transferor township (in this instance, Clam Lake) that has possession of all tax revenue at the inception of an agreement, and so it is *only* the transferor township that is in a position to “share” tax revenue from the transferred lands. And so if a particular Act 425 agreement hypothetically included no provision(s) to alter this pre-existing status quo, the transferor township would be the only party able to “keep” the tax revenue, which might violate Act 425 if there was no other authorization for revenue sharing in the hypothetical agreement. But that is *not* what the Townships have done. Instead, Clam Lake, as the transferor township, and as the *only* party in possession of the tax revenue from the Transferred Area at the inception of the Agreement, has agreed to share all of that particular revenue stream with Haring, as expressly authorized by the Agreement. **ROP at 3D** (Agreement at Art. I, ¶7 [transferring all property tax revenue from the Transferred Area to Haring]).

The SBC’s inability to understand or apply these procedural mechanics undoubtedly arises from the fact that it has been given no statutory authority to administer Act 425, and therefore is in

no position to properly interpret or apply it. The Court should “fix” this problem, by declaring that the SBC has no jurisdiction to decide the validity of Act 425 agreements, consistent with the Legislature’s intent.

#### **V. THE GIFTOS E-MAILS ARE IRRELEVANT**

Like the other Appellees, the SBC cannot even begin to explain how the irrelevant, uninformed personal opinions of Mr. Giftos, as reflected in his e-mails to the neighborhood opposition group, were somehow magically transformed into the official opinions of both Townships. SBC Brief at pp. 21-23. The Townships have already dealt with this subject, to a large degree, in their Reply to TeriDee. However, the Attorney General’s office is uniquely susceptible to criticism for taking this type of outrageous position. In that regard, the Court is certainly aware of the sad, ugly story of the now disgraced ex-assistant attorney general, Andrew Shirvell, who was fired by the Attorney General for spewing bigoted, hate-mongering electronic messages in his off-hours.<sup>8</sup> But according to the position that the Attorney General’s office is now taking on behalf of the SBC in this appeal, Mr. Shirvell’s hate-filled electronic messages would automatically constitute the official position of the Attorney General’s office. That is an extreme example, to be sure. But it accurately points out the outright silliness of the position that is being taking by the SBC in this case, where the unsolicited e-mail comments of one member of the public are automatically attributed to elected officials. The Court should cast aside this diversionary chaff; it is irrelevant.

#### **VI. THE SBC IS SUBJECT TO COLLATERAL ESTOPPEL**

The SBC tries to convince the Court that the Townships’ Application should be denied because there is not a single case expressly deciding whether the SBC is subject to collateral estoppel. SBC Brief at p. 26. That is a quizzical line of argument, because the SBC’s observation

---

<sup>8</sup> See, e.g, Ed White, Detroit Free Press (AP), <http://www.freep.com/story/news/local/michigan/2015/01/10/anti-gay-attorney-appeal/21549113/> (accessed July 16, 2015).

leads to the exact opposite conclusion. As the circuit court correctly held, the legal question of whether collateral estoppel applies to the SBC is “one of first impression within the State of Michigan.” *See* 12/19/14 Opinion on Appeal at p. 14. Ergo, this is the precise type of legal issue for which leave should be granted, to resolve a heretofore unresolved issue of significance under Michigan’s jurisprudence. *Cf.*, MCR 7.302(B)(3).

The SBC also argues that applying collateral estoppel to SBC annexation decisions is not permitted because this would be like adding another criterion to MCL 123.1009. SBC Answer at p. 25. The SBC is legally incorrect on this point because collateral estoppel is a judicial doctrine, created at the common law. *People v Wilson*, 496 Mich 91; 852 NW2d 134 (2014). Accordingly, it applies to *all* final, quasi-judicial administrative decisions that are judicially reviewable, without regard to whether the doctrine is or is not mentioned in a statute. *Holton v Ward*, 303 Mich App 718; 847 NW2d 1 (2014). If collateral estoppel was required to be a part of a statute in order to be applied to an administrative agency, then the doctrine would cease to exist at the administrative level, because there is no Michigan statute that lists collateral estoppel as one of the criteria to be considered. But the doctrine undisputedly does apply to Michigan administrative agencies, thus showing the folly of the SBC’s position.

Moreover, the application of collateral estoppel does not conflict with any of the statutory provisions relating to annexation proceedings. For example, there is no conflict with MCL 117.9(6), as the SBC argues, because that statute does not affirmatively authorize anything; it is written in strictly prohibitory terms. But being undeterred by this prohibitory language, the SBC asks the Court to interpret MCL 117.9(6) as though it “implicitly confers” extra authority on the SBC to consider re-filings. SBC Brief at p. 24. That is, of course, improper. *Renny v Dep’t of Trans*, 478 Mich 490, 505, n36; 734 NW2d 518 (2007) (statutes are to be given explicit meaning, not implicit meaning).

Consistent with the Townships’ position, the Court of Appeals has recognized that MCL

117.9(6) is *not* meant to expand opportunities for submitting duplicate petitions; its purpose is just the opposite: to “prevent[] a municipality from filing repeated petitions.” *St Joseph Twp v SBC*, 101 Mich App 407, 414; 300 NW2d 578 (1981). Thus, the actual effect of MCL 117.9(6) is to place even *greater restrictions* on the SBC’s ability to receive duplicate applications, as compared to other agencies. Any other Michigan administrative agency may lawfully receive a duplicate application from day-to-day. And as long as the material circumstances have changed, collateral estoppel would not prevent the agency from reaching a different decision. Not so, however, with the SBC. MCL 117.9(6) flatly *prohibits* the SBC from even *accepting* an identical<sup>9</sup> petition for at least two years, but does not otherwise exempt the SBC from the common law doctrine of collateral estoppel that applies to *all* agencies when they make a *decision*. The SBC’s contrary position is legally incorrect, and should be rejected.

### REQUEST FOR RELIEF

For the additional reasons stated herein, the Townships respectfully request that this Honorable Court either peremptorily reverse and vacate the SBC’s Decision, or grant the Townships’ Application for Leave, to allow review after full briefing and argument.

Respectfully submitted,  
MIKA MEYERS BECKETT & JONES PLC  
Attorneys for Appellants

Dated: July 27, 2015

By:           /s/Ronald M. Redick            
Ronald M. Redick (P61122)  
900 Monroe Avenue, NW,  
Grand Rapids, MI 49503  
(616) 632-8000

---

<sup>9</sup> The SBC alleges that the SBC denied TeriDee’s “similar [petition] two years earlier.” SBC Brief at p. 24. It wasn’t just “similar,” it was “identical,” as the SBC itself determined. **ROP at 11B** (Memo at p. 1, ¶1).