

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Appellants,

v

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.

Supreme Court Docket No. 151800

Court of Appeals Case No. 324022

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

State Boundary Commission Docket 13-AP-2

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APPELLANTS' FIRST REPLY BRIEF:

REPLY TO THE BRIEF IN OPPOSITION OF APPELLEE, TERIDEE, LLC

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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, TeriDee, LLC.

REPLY TO COUNTER-STATEMENT OF FACTS

TeriDee alleges that “Haring does not have public sanitary sewer services” and so could not have provided sewer service “until the summer 2015.” TeriDee Brief at pp. 7, 28. That allegation is incorrect. During these entire proceedings, Haring has owned and operated its own wastewater collection system; and as a result of the circuit court’s decision in Case No. 08-20967-CK, Haring has been awarded 121,000 gpd of additional capacity in the Cadillac WWTP, which Haring could have used, during any time in these proceedings, to serve the Transferred Area. **ROP at 4E**, p. 11. Moreover, the new Haring WWTP is already operational, and could be providing service to the Transferred Area *right now*, if TeriDee cooperated with the Townships. This should be contrasted with the City, which, to date, has *still* not provided sewer services to the Transferred Area.

TeriDee also alleges that the SBC denied TeriDee’s first annexation petition, in 2012, “without explanation.” TeriDee Brief at p. 9. That is incorrect. The first denial was supported by the SBC’s factual finding that the proposed annexation area was both zoned and planned by the County for Forest Recreation use. **ROP at 7C** (30-Day Sub. Exb. 3).

TeriDee also uses its Counter-Statement of Facts to engage in a form of obfuscation that should not be tolerated by the Court. Specifically, TeriDee engages in the cute trickery of blurring the distinction between Haring’s contractual obligation to provide sewer/water services to the Transferred Area (which is within Haring, under the Agreement) vs. the remainder of Clam Lake. TeriDee Brief at pp. 12-13, 26. This is improper. The plain terms of Act 425 require that an “economic development project” be planned *only* for the lands that are transferred under the agreement. *See* MCL 124.22(1). Therefore, for the purpose of considering the validity of the Agreement, it is irrelevant whether or not Haring is required to provide utility services to other areas

of Clam Lake. Haring is required to provide sewer and water services to the Transferred Area (**ROP at 3D**, Agreement, Art. I, §§ 3 and 4(a)) – a fact which is so self-evident that, in the companion case captioned as *TeriDee, et al v Clam Lake Twp, et al*, Case No. 13-24803-CH (Wexford County Circuit Court), COA Docket No. 324022, TeriDee expressly admitted, in its Complaint, that the Townships’ Agreement “requires Haring . . . to provide public wastewater and public water supply services to the Transferred Area for the entire term of the . . . Agreement. Pls’ Amd Compl at ¶59.

REPLY ARGUMENTS

I. THE COURT SHOULD OVERRULE *CASCO TWP*

TeriDee implicitly accuses the Townships of hypocrisy, for reason that the Townships previously relied on *Casco Twp*¹ as a basis for having the SBC consider the validity of the Act 425 Agreement, but now argue that the SBC has no jurisdiction to consider the validity of Act 425 agreements. TeriDee Brief at pp. 4. That criticism is fair, to a degree, for the reason that the criticism’s underlying factual premise is true, to wit, that the Township did previously invoke *Casco Twp* for that purpose. But the criticism is nonetheless irrelevant, for the reason that the Townships cannot create subject matter jurisdiction where none exists. *Hillsdale County Sr Services, Inc v Hillsdale County*, 494 Mich 46, 51 n3; 832 NW2d 728 (2013). And more important, the Townships’ inconsistent arguments have the beneficial impact of placing this dispute in precisely the right context, so that the Court can observe, up close, the type of mischief that necessarily ensues when an agency is given authority to administer a statute it knows nothing about.

In that regard, what we have here is a situation where *Casco Twp* endowed the SBC with jurisdiction to administer a statute, when this was clearly not intended by the Legislature. And worse yet, the *Casco Twp* decision did this with a statute that, by its express terms, was *expressly intended* by the Legislature to interfere with the SBC’s authority to approve annexation petitions

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

(MCL 124.29), and thereby prevent the SBC from exercising that which is basically the only authority it has – to approve annexations. And so quite predictably, the SBC is now administering Act 425 in a way that, contrary to MCL 124.29, instead ensures its annexation powers are *not* impinged upon by Act 425.² As shown by the undisputed facts of this appeal, the SBC is doing this by literally “making up” extra-statutory reasons to invalidate agreements that, like the Townships’ Agreement, obviously satisfy the express statutory requirements of Act 425, whenever the SBC subjectively believes that annexation would be more beneficial to private development interests.

In contrast, however, the *Casco Twp* case did not provide this type of appropriate factual platform for Supreme Court review. That is because, in *Casco Twp*, the Court was presented with Act 425 agreements that were obviously invalid: (a) they did not include any economic development project whatsoever, in violation of MCL 124.22; and, (b) they were entered by townships that did not have their own sewer or water systems and therefore had no independent ability to provide such services to the transferred areas. There was little to be gained, therefore, by granting leave in *Casco Twp*, inasmuch as the *Casco* agreements were on an inevitable march toward invalidation, no matter who did the invalidating.

But now, in this appeal, the Court can see just how widely the SBC has veered outside the statutory contours of Act 425, by invalidating a fully-compliant Act 425 Agreement on preposterous extra-statutory grounds such as, *inter alia*, the existence of public comment (a) in favor of a conditional transfer that would preserve the regional land use plan, and (b) in opposition to an annexation that would violate the regional land use plan.³ This needs to stop. And this appeal

² See Justice Levin’s dissenting opinion (Justice Riley, concurring) in *Shelby Charter Twp v SBC*, 425 Mich 50, 80; 387 NW2d 792 (1986) (noting that the Court should not rely on the SBC’s interpretation of a statute that restricts its authority to approve annexations, because the SBC actively opposes legislation that would limit its annexation authority).

³ 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.

presents the right platform for the Court to slam on the breaks. *Casco Twp* should be overruled.

II. TERIDEE WRONGLY INVOKES *STARE DECISIS*

TeriDee attempts to invoke *stare decisis* as a reason that the Court should deny the Townships' Application, arguing that because the Court denied leave in *Casco Twp* [465 Mich 855 (2001)], the Court has already established that the SBC has jurisdiction to decide the validity of Act 425 agreements. TeriDee Brief at pp. 17-21. TeriDee is of course legally incorrect. The Court's reasons for denial of applications for leave "are not to be published, and are not to be regarded as precedent" [MCR 7.321(4)], and so principles of *stare decisis* are not implicated by the Townships' request to have the Court consider this novel jurisdictional issue, for which the Court has never made a decision on this merits. This rule has been a part of our state's law for nearly a century, and has been regularly invoked by this Court. *Malooly v York Heating & Ventilating Corp*, 270 Mich 240, 247; 258 NW 622 (1935); *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328; 57 NW2d 901 (1953); *State Bar v Brotherhood of RR Trainmen*, 383 Mich 201, 208; 174 NW2d 811 (1970), *rev'd on other grounds* at 401 US 576 (1971); *Tebo v Havlik*, 418 Mich 350, 363, n2; 343 NW2d 181 (1984). *Stare decisis* is not, therefore, a barrier to this Court's reversal of *Casco Twp*.

III. TERIDEE MIS-STATES THE APPLICABLE STANDARD OF REVIEW

TeriDee acknowledges that SBC decisions are subject to review under the Administrative Procedures Act ("APA") (TeriDee Brief at p. 15), but then wrongly argues that a court's review is limited to considering whether substantial, competent and material evidence supports the SBC's factual findings (*id.* at pp. 15-16)). That is legally incorrect. SBC decisions are subject to review under *all* six of the standards of §106 of the APA, MCL 24.306, including, in particular, the standard requiring that an SBC decision not be "in excess of the statutory authority or jurisdiction" of the SBC. *Chase v SBC*, 103 Mich App 193, 203-204; 303 NW2d 186 (1981); *see also*, MCL 24.306(1)(b). The question of whether an SBC decision was made in violation of a statute or made

in excess of the SBC's jurisdiction is a question of law, which is reviewed *de novo* on appeal. *Shelby Twp, supra* at 50, 52, 72-73.

TeriDee's initial legal error about the proper standard of review propagates and multiplies itself (TeriDee Brief at p. 17) when TeriDee thereafter side-steps the fact that the Townships do not so much challenge SBC's specific factual findings (save a few, which are undisputedly false), but are instead arguing that those largely undisputed facts are not a statutory basis for invalidating an Act 425 agreement. *See* Township Application for Leave at pp. 34-44. To avoid this inconvenient fact, TeriDee argues in same spirit as the erroneous *Casco Twp* dictum, and thus *invents*, out of thin air, a supposed SBC factual finding that does not exist. Specifically, TeriDee argues that "the SBC made the factual finding that the Township entered into the Act 425 Agreement solely as a means to bar annexation." TeriDee Brief at p. 17 [emphasis in original]. It is undisputed, however, that the SBC never made such a factual finding; it does not exist. **ROP at 13A** (SBC Decision).⁴ The SBC's actual finding was that the Townships' Agreement was "[n]ot being used to promote economic development," as supported by five sub-findings, none of which state that the Townships intended to interfere with annexation. *Id.* (SBC Decision at pp. 3-4). Thus, TeriDee has offered not a single disputed SBC factual finding against which the substantial evidence test could be applied.

As the Townships correctly demonstrated in their Application, the SBC's error is a *legal* one, stemming from the fact that the SBC wrongly *exercised* its jurisdiction (assuming, *arguendo*, it had jurisdiction in the first instance) by invalidating the Townships' Agreement on extra-statutory grounds that are not supported by the plain language of Act 425. *De novo* review therefore applies.

IV. TERIDEE TACITLY ADMITS THAT *CASCO TWP* IS MOSTLY DICTUM

TeriDee refuses to acknowledge that the majority of *Casco Twp* is dictum. But then, by way

⁴ And so here we see again, more evidence of the serious mischief that has been caused by *Casco Twp*: giving members of the bar tacit approval to invent supposed factual findings to justify SBC decisions, whenever the *actual* factual findings are insufficient to do so.

of its own arguments, TeriDee accidentally ends-up admitting it is dictum. This is made most obvious at p. 23 of TeriDee’s Brief, where TeriDee lists the various “findings” that the SBC supposedly made to invalidate the *Casco* agreements. The problem with these supposed “findings” is that the SBC *did not make any of them*, except that a “transfer of land has not occurred.” **ROP at 7C** (30-Day Sub at Exb. 34). All of the other supposed “findings” that TeriDee cites were invented rationales that the *Casco Twp* court hypothesized *might have existed* for the purpose of supporting the SBC’s decision. But since these supposed SBC “findings” did not actually exist (*id.*), and because the *Casco* court was reviewing a case where the SBC’s *actual* findings were not being disputed (*Casco Twp* at 402), anything the *Casco Twp* decision said about applying the substantial evidence test to the *legal* question of whether a contract complies with Act 425 is obiter dictum.

V. THE GIFTOS E-MAILS ARE IRRELEVANT

TeriDee has made the Giftos e-mails the thematic centerpiece of its Brief. TeriDee Brief at pp. 10-12, 25, 26-27, 29. Yet, throughout its diatribe, TeriDee cannot explain how the personal opinions of one neighborhood gadfly – who undisputedly had nothing to do with developing the Agreement and who, by his own admission, was relying only on incorrect, secondhand knowledge – can be used to impugn the motives of 12 different Board members, only one of whom (Supervisor Rosser) even read Giftos’ e-mails. *See Townships’ Application for Leave* at pp. 6-7.

The most pertinent observation that can be made about the Giftos e-mail is this: *Of course* he wanted the Agreement to prevent annexation! Why would anyone (including TeriDee) think otherwise? Mr. Giftos resides in a subdivision directly across from the TeriDee property, at 5908 Evergreen Drive. **ROP at 7D** (#36) and is the leader of the neighborhood opposition group. He and his neighbors purchased their homes in reliance on the long-established land use plan, which the annexation would destroy, but the Agreement preserves. Mr. Giftos thus had every right, under the First Amendment, to petition his government on his own personal views, and to “e-rally” his

neighbors to assemble at public meetings in support of the same cause. But his personal views do not magically become those of the Township Board members, simply because he expressed them in a *one-way* e-mail communication to 32 neighbors, and which was simply cc'd to a township official.

On that point, the Court should carefully note how TeriDee has subtly distorted the truth by characterizing the situation as one where Township officials “exchanged” e-mails with Mr. Giftos. TeriDee Brief at p. 11. The subtle non-truth that is being perpetuated by the word “exchanged” is that Township officials were allegedly plotting with Mr. Giftos, by e-mail, in support of some sort of conspiracy. In this respect, TeriDee forgets that e-mail is a two-way form of communication: you can either *send* e-mail, or *receive* it. And another important aspect of e-mail communication is that no one, including elected officials, can control what e-mails they might receive.

So, with these very simple technological observations in mind, it is incorrect for TeriDee to say that incriminating e-mails were being “exchanged” between Township officials and Mr. Giftos. Again, the e-mails about which TeriDee is so concerned appear in *one-way* e-mail communications from Mr. Giftos to a neighborhood group of 32 persons, and the Township supervisors are merely cc'd on these same e-mails. **ROP at 13A** (SBC Decision at Exb. D). It is undisputed, however, that the Township Supervisors never responded to the supposedly incriminating e-mails from Mr. Giftos; nor did they ever condone or express agreement with him. They ignored Mr. Giftos. The only exception is when Supervisor Rosser told Mr. Giftos that he had “nothing to say” to him. *Id.* To this day, neither TeriDee nor the SBC can offer a plausible explanation for how a disgruntled neighborhood resident magically became the official spokesman for the Township Boards of each Township, simply by sending these one-way e-mails. This is just another example of mischief that *Casco Twp* has perpetuated, where the mere existence of public opposition to annexation is now a magic wand that can be used to erase a fully-compliant Act 425 Agreement. The Court should put an end to this type of legal error.

VI. THE SBC IS SUBJECT TO COLLATERAL ESTOPPEL

TeriDee is legally incorrect when it argues that the Court of Appeals already decided, in *Avon Twp v State Boundary Comm*, 96 Mich App 736; 293 NW2d 691 (1980) and *Twp of St Joseph v State Boundary Comm*, 101 Mich App 407; 300 NW2d 578 (1981), that the SBC is not subject to collateral estoppel. TeriDee Brief at p. 33-34. *Avon Twp* involved the limited question of whether the two-year waiting period of MCL 117.9(6) runs from the *filing* of a prior petition, or a *decision* on a prior petition. The *Avon* court held that it runs from the date of the original filing, and so held the petition in question was legally sufficient, and so could be accepted by the SBC. The Townships have no quarrel with that holding. The problem here, however, is not that the SBC *accepted* the TeriDee petition – MCL 117.9(6) allowed the SBC to accept it. The problem is how the SBC *decided* the TeriDee application, to wit, by ignoring the fact that there had been absolutely no change in material circumstances since the time of the prior denial, such that principles of collateral estoppel should have resulted in denial of the exact same petition. The applicability or possibility of collateral estoppel was not even raised in *Avon Twp*, and so has no bearing here.

The *Twp of St Joseph* decision is equally inapposite. That case merely stands for the proposition that the two-year waiting period of MCL 117.9(6) is not implicated when the SBC denies a petition on grounds of legal insufficiency, as opposed to denying it on its merits. The case had nothing to do with collateral estoppel, and so, once again, has no bearing here.

Turning then to the elements of Michigan’s administrative collateral estoppel doctrine, TeriDee unsuccessfully attempts to argue in avoidance of that doctrine. First, TeriDee incorrectly argues that SBC decisions are not “final” because reapplications are allowed. TeriDee Brief at p. 34. TeriDee is miscomprehending what “final” means in the context of administrative law. The “finality” of an agency decision turns on whether the agency has finished its work sufficiently to allow judicial review. LeDuc, *Michigan Administrative Law* (2013 ed.), §10:20. And in that

respect, the Legislature has expressly declared that SBC annexation decisions are final and subject to judicial review. MCL 117.9(12); MCL 123.1018. And with regard to the requirement that an administrative decision-making process be “adjudicatory” in nature to be subject to collateral estoppel, the SBC has, itself, declared that its decision-making process is “adjudicatory.” MAC R 123.20-123.23.⁵ TeriDee’s contrary argument is that the SBC is not adjudicatory because, “Having come from the legislature itself, there can be no question that the power to decide annexation petitions is a legislative function.” TeriDee Brief at p. 36. This statement reflects a conspicuous misunderstanding of administrative law. TeriDee is overlooking the fact that *all* agency powers come directly from the legislature, including adjudicative powers. *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 582; 810 NW2d 110 (2011). Agencies have no powers, at all, other than what the legislature grants them. *Id.* Thus, there is nothing special about the fact that the SBC received its annexation authority from the Legislature. The SBC is adjudicatory because, by its own rules, it conducts “adjudicative” hearings on annexation petitions. *See* TeriDee Brief at p. 29 (admitting that the SBC conducts an “adjudicative session” on annexation petitions).

Nor can TeriDee avoid collateral estoppel by invoking the “political question” doctrine. TeriDee Brief at p. 35. Whatever deference the courts might give to SBC fact-finding when reviewing an annexation decision, such decisions are not subject to the “political question” doctrine. The “political question” doctrine applies only to decisions that are not judicially reviewable, *at all*, because they are constitutionally committed to another branch of government. *Makowski v Governor*, 495 Mich 465, 472; 852 NW2d 61 (2014). That doctrine cannot possibly apply to the SBC because the Legislature has expressly declared that SBC annexation decisions *are* subject to judicial review under the APA. MCL 117.9(12); MCL 123.1018). By doing so, the legislature

⁵ The SBC refers to itself as “a **quasi-judicial body adjudicating** many types of municipal boundary adjustments. . .” *See* http://www.michigan.gov/lara/0,4601,7-154-10575_17394_17565-173342--,00.html (accessed July 15, 2015). [Emphasis added].

placed SBC annexation decisions squarely within the category of decisions to which collateral estoppel applies.

TeriDee's last-ditch effort to avoid collateral estoppel is to argue that they allegedly provided more evidence about City utilities in the 2013-2014 proceedings. TeriDee Brief at p. 37-38. That is a legally incorrect position. The application of collateral estoppel does not depend on the identity of proffered evidence in the first and second proceedings; rather, the doctrine applies to the re-litigation by the same parties of the same *issue* (i.e., whether TeriDee's property should be annexed into the City), unless there has been an intervening "material change in circumstances." *Winchester v WA Foote Memorial Hosp, Inc*, 153 Mich App 489; 396 NW2d 456 (1986). The Seventh Circuit cogently explained this same point in *Sahara Coal Co v Office of Workers' Compensation Programs*, 946 F2d 554, 556 (CA7, 1991), holding that new evidence cannot act in avoidance of collateral estoppel, where conditions have not materially changed. In the most recent SBC proceedings, TeriDee was acting in derogation of this principle by simply presenting a few additional facts about the exact same circumstances that had already existed at the time its first petition was denied. Collateral estoppel should have been applied so as to prevent this.

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,

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