

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Peter D. O'Connell (Presiding Judge)
Patrick M. Meter and Michael F. Gadola

CLAM LAKE TOWNSHIP, A MICHIGAN
GENERAL LAW TOWNSHIP; AND
HARING CHARTER TOWNSHIP, A
MICHIGAN CHARTER TOWNSHIP
Plaintiffs-Appellants

Supreme Court No. 151800

Court of Appeals No. 325350

Wexford Circuit Court
No. 14-25391-AA

v

THE STATE BOUNDARY COMMISSION,
AND 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,
Defendants-Appellees

The appeal involves a disputed request for a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

**BRIEF ON APPEAL OF APPELLEE STATE BOUNDARY COMMISSION
ORAL ARGUMENT REQUESTED**

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STATEMENT OF JURISDICTION

This appeal stems from a decision of Defendant-Appellee State Boundary Commission (SBC) to grant a petition filed by Co-Defendant-Appellee TeriDee, LLC, to annex land from Plaintiff-Appellant Clam Lake Township to Co-Defendant-Appellee City of Cadillac. Clam Lake and Co-Plaintiff-Appellant Haring Township (collectively referred to as the Townships) correctly assert that this Court has the right to exercise judicial power over cases, such as this one, involving petitions for annexation that have been granted by the State Boundary Commission under State Boundary Commission Act (SBC Act), MCL 123.1001 *et seq*; see also MCR 7.303(B).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The SBC Act provides for judicial review of every final decision “in the manner” prescribed by the Administrative Procedures Act. But neither the SBC Act nor the APA confers standing to an individual who disagrees with a decision of the SBC, and the Constitution provides for review only as to final agency decisions that affect private rights or licenses. Do the Townships have standing to seek judicial review of the underlying annexation decision?

Appellant’s answer: Yes.

Appellees’ answer: No.

Circuit Court’s answer: Did not answer.

Court of Appeals’ answer: Did not answer.

- 2a. Did *Casco Township v State Boundary Commission*, 243 Mich App 392 (2000), correctly hold that the SBC has the authority to determine the validity of an agreement made under the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq.* (Act 425)?

Appellant’s answer: No.

Appellees’ answer: Yes.

Circuit Court’s answer: Did not answer.

Court of Appeals’ answer: Did not answer.

- 2b. Did the SBC in this case properly determine that the Townships’ purported Act 425 Agreement was invalid?

Appellant’s answer: No.

Appellees’ answer: Yes.

Circuit Court’s answer: Yes.

Court of Appeals’ answer: Did not answer.

3. Collateral estoppel is only applicable to administrative decisions that are *adjudicatory* in nature. This Court has recognized that the fixing of municipal boundaries is legislative function. Given the legislative nature of annexations, does the doctrine of collateral estoppel apply to invalidate the SBC's decision to grant the underlying petition?

Appellant's answer: Yes.

Appellees' answer: No.

Circuit Court's answer: No.

Court of Appeals' answer: Did not answer.

INTRODUCTION

This appeal stems from an administrative decision involving the legislative question whether to annex certain territory from Clam Lake to the City of Cadillac. The neighboring townships of Clam Lake and Haring have fought this decision on every front, going so far as to execute a “contract” between themselves that they unilaterally declared as having the effect of insulating the territory from annexation. But the alleged “contract” was properly viewed as a sham by the SBC because it did not include any agreement with the property owner, which would be required to develop the property.

The second prong of the Townships attack is their assertion that the SBC is bound by the judicial doctrine of collateral estoppel to deny the annexation petition because it had previously done so in the past and did not announce any change in circumstance to explain the difference between the two outcomes. But the administrative proceeding at issue is being legislative in nature, and legislative proceedings are not subject to collateral estoppel. And the Townships ignore along the way all of the authorities that have stated, emphatically, that such matters are *not* subject to collateral estoppel.

At a higher level, the issues raised bring to the fore some more basic—yet essentially unanswered—questions as to *who* can challenge the discretionary determination to adjust a municipal boundary and then against which standard is that determination tested? In any case, the Townships fail to reach the high bar for the extraordinary relief that they are seeking.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The role of the SBC in making annexation decisions

The SBC was created by the SBC Act and established to consider petitions for incorporation and consolidations of cities and villages, as well as petitions for annexation of territory from a township to a city. MCL 123.1011a. A petition for annexation is to be filed with the SBC, which “after determining the validity of the petition,” shall hold a public hearing before “approving, denying, or revising a petition. MCL 117.9.

By Executive Order, the SBC is a Type II advisory board to the Director of the Department of Licensing and Regulatory Affairs (LARA), who exercises the power of the SBC. See Executive Orders 1996-2, paragraph II(5); 2003-18, paragraph II(A); 2011-4, paragraph (1)(A).¹

The criteria for exemption from annexation under section 9 of Act 425, MCL 124.29

Relevant to the case at bar, an exception from annexation exists under Act 425, which permits local units of government to conditionally transfer property for the purposes of promoting an “economic development project.” See MCL 124.21.

Section 1 of Act 425 defines “economic development project” as:

[L]and and existing or planned improvements suitable for use by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water. Economic development project includes necessary buildings, improvements, or structures suitable for and

¹ The advisory role of type II agencies is discussed in OAG , 1965-1966, No 4479A, pp 262, 278 (May, 1966).

intended for or incidental to use as an industrial or commercial enterprise or housing development; and includes industrial park or industrial site improvements and port improvements or housing development incidental to an industrial or commercial enterprise; and includes the machinery, furnishings, and equipment necessary, suitable, intended for, or incidental to a commercial, industrial, or residential use in connection with the buildings or structures.

Once a conditional transfer of property has been filed with the Secretary of State, a certified copy of such agreement constitutes “prima facie evidence of the conditional transfer” but is not conclusive. MCL 124.30. In particular, when a petition for annexation covers territory that is subject to an Act 425 agreement, the SBC has the authority to examine the agreement and determine whether it complies with Act 425. If it does, then (and only then) will it act as a statutory bar to annexation. If it does not, the SBC is authorized to consider an annexation petition on its merits under the applicable statutory criteria.

The SBC’s consideration of the issues in this case

TeriDee sought to annex the territory at issue to Cadillac so it could then develop a retail center on the property it owned therein. (SBC Appendix, 1b-4b.) In its response to a questionnaire of the SBC staff on October 8, 2013, TeriDee summarized why it considered the proposed annexation to be necessary:

TeriDee has been trying to develop this property for a retail center for over five years, but has been stymied by actions of Clam Lake Township and Haring Charter Township. There is a demand for such development at this location.

Clam Lake Township does not own municipal sewer or municipal water services. The City of Cadillac has available City sewer and water services in the immediate vicinity which can be provided on a cost effective and timely basis to the proposed development. Petitioners desire to connect to City sewer and water services. The

City has indicated its willingness to provide those services to the property when it is annexed. The proposed development will provide a significant number of much needed jobs for the area as well as a significant increase to the area's tax base. [(SBC Appendix, 1b.)]

TeriDee also stated that, after exploring possible alternatives, it considered annexation to Cadillac to be its best and only viable option for obtaining immediate and cost-effective access to public sewer and water services. (SBC Appendix, 1b.)) In its response to the SBC's questionnaire, Cadillac confirmed its ability and willingness to provide the subject property with public sewer and water services if the annexation were approved. (Appellants' Appendix, 984a-1000a.)

Shortly after TeriDee filed the annexation petition, the Clam Lake and Haring filed a joint appearance, along with a "notice" indicating that the subject-property was not actually located within Clam Lake (as was indicated in TeriDee's petition); rather, the Townships asserted that the subject-property had been conditionally transferred (along with certain contiguous lands) from Clam Lake to Haring under an agreement between them that was executed under the Intergovernmental Conditional Transfer of Property by Contract Act, being Act 425 of 1984 (Act 425). The "notice" further stated that, as a result of the Townships' transfer agreement, annexation of any portion of the subject property was barred by Act 425.

After convening a meeting to consider the legal sufficiency of the annexation petition, the SBC declared it to be sufficient (Appellants' Appendix 150a-180a; 939a-942a) and scheduled a public hearing, as provided under section 8 of the SBC Act, MCL 123.1008. (SBC Appendix 5a-8a.)

Prior to the scheduled public hearing, TeriDee, Cadillac, and the Townships each presented information to the SBC in response to questionnaires sent to them by the SBC's staff. (SBC Appendix, 1.4b-4b; Appellants' Appendix, 961a-979a; 984a-1000a.) At the public hearing itself, TeriDee, Cadillac, and the Townships (along with the general public) were given the opportunity to comment on the pending annexation petition, along with the Townships' transfer agreement covering the same territory. (Appellants' Appendix, 182a-274a.) The SBC also invited the submission of written comments. (SBC Appendix 9b-170b.)

The Townships objected to the annexation on several grounds, the primary one being that the subject property allegedly was already covered by a purported Act 425 agreement and, thus, was exempt from annexation. (Appellants' Appendix, 1015a-1041a.) In addition, the Townships asserted that the annexation petition should be denied because it did not "comply with or advance any of the essential 18 criteria" under section 9 of the SBC Act, MCL 123.1009. (Appellants' Appendix, 1041a-1054a.) In particular, the Townships complained that the development contemplated by the annexation petition would conflict with the local and regional "land use plans for the area." (Appellants' Appendix, 1044a-1048a.) The Townships also reiterated that they had "joined in the Act 425 Agreement to assure that only reasonable-scale, high quality commercial development can occur in the immediate proximity to the highway interchange, but in a manner that is protective of existing residential populations, through requirements for buffers, open space and additional residential use." (Appellants' Appendix, 1018a; 1030a-1031a.)

Following the public hearing, the SBC convened to consider the merits of the petition and ultimately decided, by a 4-1 vote, to approve the annexation petition. At its next regularly scheduled meetings, the SBC approved the minutes from its previous session and signed (through its Chair, Dennis Schornack), a proposal for decision, which was entered as a final order by Steve Arwood, the then-acting Director of the Michigan Department of Licensing and Regulatory Affairs (LARA), on June 26, 2014. (Appellants' Appendix, 127a.)

The circuit court's decision affirming the SBC

The Townships sought judicial review of the SBC's decision granting the annexation petition by filing a petition for review in the Wexford County Circuit Court. Following the submission of written and oral arguments by the parties, the circuit court affirmed the SBC's decision granting the underlying annexation decision by way of a 15-page opinion on appeal. (Appellants' Appendix, 130a-144a.)

In pertinent part, the circuit court ruled that:

[T]he property in question was not precluded from annexation because the Act 425 Agreement which applied to the subject property is invalid. The SBC's decision to provide for annexation is supported by competent, material and substantial evidence on the whole record and is not arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. [(Appendix, 144a.)]

The Court of Appeals' denial of leave

The Court of Appeals denied the Townships' application for leave to appeal by way of an order entered on May 26, 2015. (Appellants' Appendix, 146a.)

ARGUMENT

I. **The Townships do not have standing to appeal the SBC's decision granting annexation.**

Although this case raises several issues, the initial, and pivotal, issue is whether the Townships even have standing to seek judicial review of the underlying administrative determination. It is conceded that this issue is being raised for the first time at this stage of appeal; the timing of this presentation is explained by the unique posture of this case, whereby the Court has granted leave, in part, for the express purpose of considering whether the Court of Appeals' decision in *Casco*—a case that is directly on point and relied upon by the SBC—was correctly decided.

Given the Court's willingness to revisit *Casco*, this case presents a prime opportunity to resolve a threshold issue—one that is interwoven into the issue of whether collateral estoppel applies to the SBC and its decision to grant the underlying annexation petition. This issue is standing. Given the political and discretionary nature of annexation determinations, the open-ended criteria involved, and this Court's explicit recognition that annexation proceedings do not involve vested rights, or entail a contested case hearing, do the Townships have standing to seek judicial review of the underlying annexation petition?

This question is not raised in the abstract; nor is it intended as an academic exercise. To the contrary, a review of the case law demonstrates that the issue is seldom discussed and when it is, the lower courts' treatment of the subject has been uneven at best. Insofar as the ability of a municipality to seek judicial review of a decision *granting* annexation has been recognized, see e.g., *Casco Township v State*

Boundary Commission, 243 Mich App 392 (2000), and *Midland Township v State Boundary Commission*, 401 Mich 641, 670-671 (1977), such recognition has been implicit. Significantly, however, this implicit recognition contravenes several bedrock principles of municipal law jurisprudence, ones that have been recognized *explicitly* by this Court. In particular, this Court has recognized both that an annexation proceeding is not a contested case and that no one (not individuals or municipalities themselves) has a vested right in municipal boundaries. *Midland*, 401 Mich. at 670-671.

A. Standard of Review

Whether a party has standing is a question of law that is reviewed *novo*. *Manuel v Gill*, 481 Mich 637, 642 (2008). Although this Court does not generally review an issue that was not decided by the lower court, it may do so, see e.g., *Kallman v Sunseekers Prop Owners Ass'n, LLC*, 480 Mich 1099 (2008), and is urged to do so here, considering the issue is one of law and all of the facts needed for resolution are present.

Questions of statutory interpretation are also subject to review *de novo*. *Manuel*, 481 Mich at 643.

B. Analysis

To maintain an appeal, a person must ordinarily be “aggrieved” by the lower court’s [or tribunal’s]—decision.” *Spires v Bergman*, 276 Mich App 432, 441 (2007);

see also MCR 7.203(A). It is not enough that the person is disappointed in the result. *Groves v Dept of Corr*, 295 Mich App 1, 5 (2011).

The general rule regarding standing is set forth in *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349, 372 (2010):

[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Lansing Schools set forth a “limited, prudential” approach to standing, anchored in whether a litigant’s interest suffices to “ensure sincere and vigorous advocacy,” *Id.* at 355 (internal citations omitted), and that the benchmark for standing is “substantial interest” in an issue. *Id.* at 359.

The SBC respectfully requests that this Court determine, on the basis of its own pronouncements, which have been adopted by lower courts and tribunals and applied to a variety of analogous contexts, that under the circumstances presented, the Townships do not have standing to seek judicial review.

1. Neither the SBC Act nor the APA confers standing onto the Townships to seek judicial review of the annexation determination at issue.

Given the fact that boundary adjustments are legislative in nature, and do not implicate vested rights, it follows that the statutory right to seek judicial review under Section 18 of the SBC Act is constrained by principles of standing. In any

event, the Administrative Procedures Act merely provides the method of review; it does not purport to allow a *non-party* to an administrative proceeding that is *not a contested case* to appeal a resulting administrative decision. The upshot, of course, is that while “every decision” of the SBC is “subject to review,” MCL 123.1018, that review can only be initiated—and sustained—by one who has a legal right or interest, i.e., standing.² On this front, neither the SBC Act nor the APA explicitly permit a municipality who is disappointed by, or who disagrees with, an annexation decision to seek judicial review.

2. The implication that the Townships have standing to seek judicial review of the underlying annexation decision is belied by bedrock principles of municipal law jurisprudence.

In the context of municipal law, scant attention has been paid to whether and, if so under what circumstances, a person (whether a private individual or a public body corporate) has standing to seek judicial review of a SBC decision *granting* an annexation petition. It is noted with emphasis, however, that the few published decisions that actually discuss the issue have concluded in the negative.

For instance, in *Avon Township v Michigan State Boundary Commission*, 96 Mich App 736 (1980), the court held that a township did not have the right to attack

² It is noted that Article 6, § 28 of the Michigan Constitution provides for judicial review of administrative determinations—other than “contested cases”—that are “judicial or quasi-judicial and affect private rights or licenses.” Because the underlying administrative proceedings did not involve a contested case or concern private rights or licenses, Article 6 § 28 does not confer standing onto the Townships.

a decision of the SBC granting a petition annexing certain territory from that township to a neighboring city. To like effect, in *Matter of Annexation of Territory in Larkin Township to City of Midland*, 146 Mich App 29, 35 (1985), the court similarly held that individuals who were residents of the township from which territory was annexed did not have standing to challenge the SBC's decision. The court's holding in this regard was explicitly premised on this Court's reasoning in *Midland Township*, 401 Mich at 670-671, which recognized that:

An annexation proceeding is not a 'contested case' even though the commission must hold a public hearing and representatives of a city, village or township and other persons have a right to be heard at such a hearing before the commission makes its determination. That procedural right does not create any substantive legal right in a 'named party' and, hence, the 'legal rights' of a 'named party' are not required by the 1968 act and the 1970 amendment to be determined after an opportunity for an evidentiary hearing within the meaning of the Administrative Procedures Act.

Midland Township's recognition that an annexation proceeding is not a "contested case" fits precisely in its attendant holding that the adjustment of municipal boundaries does not implicate any vested rights or personal interests: "The Legislature is free to change city, village and township boundaries at will" and "no governmental authority or person has any legal right in the boundaries of a city, village, or township." *Midland Twp*, 401 Mich at 669, 670-671.

There can be little question that the Townships have no right in their (or any) boundary, as boundary adjustment matters involve neither vested rights nor property interests. Why, then, should the Townships here have any *right* themselves to seek judicial review of a boundary adjustment determination? Again, annexation proceedings are not contested cases; there are no adversarial "parties."

To the extent the Townships have any interest here, it is no different than that of the public at large. *Avon Twp*, 96 Mich App at 698, citing *Midland Twp*, 401 Mich 641 (“[N]o person or township has any vested right to or legally protected interest in the boundaries of governmental units, irrespective of inconveniences and burdens that may attend a change in those boundaries.”). Furthermore, what can be gained by subjecting the political calculus involved in the granting of a boundary adjustment to judicial review?

By way of contrast, in the alternative scenario—one in which a petition is denied for a *procedural* ground—the petitioner actually has an interest at stake, i.e., his or her rights in the process of petitioning for the adjustment of a boundary. In the case of a denial, the petitioner clearly has an interest in vindicating those *procedural rights*—to ensure that it was not denied as a matter of administrative caprice or whimsy; to test whether the denial was made under the appropriate statutory criteria.

Whether or not the Townships have the general right to seek judicial review of the underlying annexation determination—or even a limited right (e.g., insofar as the determination allegedly affected their claimed “contract” rights)—the matter of the interest at stake (if any) is a question that runs throughout the remaining questions at hand.

II. The Court of Appeals correctly decided in *Casco* that the SBC has the authority to determine the validity of a purported Act 425 agreement, and in this case, the SBC properly determined that the Townships’ purported Act 425 agreement was a sham.

The Townships contend that the SBC should have refrained from exercising its jurisdiction to decide the underlying annexation petition until the issue of whether the subject-territory was exempt from annexation—on the basis of a purported 425 agreement—was separately resolved, presumably through a declaratory action in the circuit court. (Appellants’ Brief, pp 14-15.) Ignoring for the moment the fact that the circuit court *did*, in a separate declaratory action, rule that the Townships’ purported Act 425 agreement was invalid (Appellants’ Appendix, 131a (ruling that the Townships’ “Act 425 agreement” was invalid “because it violates public policy as containing contract zoning”), the parties have nevertheless been directed by this Court to address whether *Casco* was correctly decided. That decision expressly and correctly, held that: (1) the SBC has jurisdiction to decide the validity of a purported Act 425 agreement to transfer the subject-territory; and that (2) evidence supported conclusions that the agreements were illusory, were formed in order to block future annexation by the city, and were therefore invalid.

A. Standard of Review

As presented in this case, the question concerning the SBC’s jurisdiction to grant the underlying annexation petition is one of law that is reviewed *novo*. *Michigan’s Adventure, Inc v Dalton Twp*, 287 Mich App 151, 153 (2010). Because an administrative agency has only the power that the Legislature has conferred on it,

Oshtemo Charter Twp v Kalamazoo Co Rd Comm, 302 Mich App 574, 584 (2013), the issue becomes one of statutory construction, which is also reviewed de novo. *In re Harper*, 302 Mich App 349, 352 (2013), *Manuel*, 481 Mich at 643.

B. Analysis

Consistent with the goal of effectuating legislative intent, legislative power conferred to an agency includes that which is expressly granted and that which is granted by necessary or fair implication, i.e., “powers necessary to a full effectuation of authority expressly granted.” *In re Quality of Service Standards for Regulated Telecommunication Services*, 204 Mich App. 607, 613 (1994). However, to comport with the delegation doctrine, Const 1963, art 4, § 1, and the separation-of-powers doctrine, Const 1963, art 3, § 2, the legislative grant of authority must include standards that sufficiently check the exercise of delegated power—that are as precise as the subject matter permits considering its complexity—yet allow the Legislature to “avail itself of the resources and expertise of agencies and individuals to assist the formulation and execution of legislative policy.” *Taylor v Gate Pharmaceuticals*, 248 Mich App 472, 478 (2001), quoting *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 51, (1985).

1. The SBC has plenary authority over boundary disputes within its jurisdiction.

As was recognized in *Casco*, the Legislature created the SBC to establish an independent authority with “broad powers concerning annexations.” *Casco Twp*, 243 Mich App at 397, citing *Owosso Twp v Owosso*, 385 Mich 587, 590 (1971). The plain

text of subsection 9(2) of the Home Rule City Act, MCL 117.9(2), expressly empowers the SBC to determine “the validity of the petition or resolution” concerning annexation and also recognizes the commission’s duties concerning “processing and approving, denying, or revising a petition or resolution for annexation. . . .” *Casco Twp*, 243 Mich App at 397-398. Section 11a of the SBC Act, MCL 123.1011a, in turn, sets forth the procedures for annexation and provides, “[t]he commission shall have jurisdiction over petitions or resolutions for annexation.” *Id.*

The plain text of MCL 124.29 also shows that the SBC necessarily must consider the validity of “Act 425 Agreements.” When the SBC has a petition before it, as here, it must also determine whether the petition is blocked by a valid “Act 425 agreement.” See MCL 124.29 (“While a [Act 425 agreement] is in effect, another method of annexation or transfer shall not take place for any portion of an area transferred under contract.”). Simply put, the SBC needs to determine whether there is an agreement “in effect” before it can resolve a petition for annexation. A determination that such an agreement is invalid might not be binding outside the context of the SBC—that is, the Townships might be able to go to a circuit court and get a declaratory judgment, quite separate from the SBC proceedings, stating that the agreement is valid. But the SBC can only fulfill *its* duty to comply with MCL 124.29 by determining whether there is an Act 425 agreement “in effect,” and an agreement cannot be “in effect” if it is an invalid, sham agreement.

In *Owosso Township*, 385 Mich at 590, this Court observed that, prior to the establishment of the SBC, the provision for annexation of territory by municipal corporations was purely a function of the Legislature, citing *Goethal v Kent County Supervisors*, 361 Mich 104 (1960), and that the then-newly-enacted SBC Act was “comprehensive” in nature and aimed at dealing with this area of law. Indeed, prior to the 1970 amendments to the SBC Act, all annexations had to be approved by the electors of the affected districts, being “the whole of each city, village, or township from which territory is to be taken or to which territory is to be annexed.” *Shelby Charter Twp v State Boundary Com’n*, 425 Mich 50, 58 (1986), citing §§ MCL 78.5 and 117.9. This Court observed that “[t]hese referenda elections frequently generated a great deal of divisiveness and litigation.” *Id.*

With this backdrop in mind, it can hardly be questioned that boundary adjustment matters are legislative in nature and that the SBC possesses plenary authority over boundary adjustment matters consigned to its jurisdiction. Indeed, its authority in that regard extends to determining whether its jurisdiction is precluded, or otherwise constrained, by other statutes. This point was illustrated emphatically in *Casco*, but has also been recognized by this Court in *Shelby Charter Township*, 425 Mich 50 (1990).

In *Shelby Charter Township*, the question before the Court was, as here, whether the SBC exceeded its statutory authority in deciding that a charter township was not exempt from annexation on the basis of another statute. The statute at issue was the Charter Townships Act, MCL 42.1 *et seq*, which provides

that a charter township meeting certain qualifications set forth therein “is exempt from annexation.” MCL 42.34(1). There, this Court rejected the very arguments being raised by the Townships here, holding instead that the SBC “did not exceed its statutory authority” in deciding that the charter township failed to meet the criteria which would otherwise form the basis of its claimed exemption from annexation. *Id.*, at 77. In so doing, this Court, implicitly (if not explicitly), recognized that the SBC possesses the inherent authority to decide whether territory is exempt from its jurisdiction.

Moreover, as is demonstrated also by this Court’s decision in *Shelby Charter Township, Casco* hardly turned our state law “on its head.” (Appellants’ Brief, p 17.) If anything, the Townships’ arguments in support of their sham “Act 425 agreement” demonstrate the wisdom—and necessity—of the *Casco* decision. Were the Townships’ claims to be accepted, then a proclamation by any amenable municipal cohorts would suffice to interminably frustrate any and every annexation petition that they might oppose. A petitioner seeking annexation, like TeriDee, would face the impossible task of initiating a declaratory action to determine the validity of any and every so-called agreement until each is finally resolved by the courts. In the meantime, the Townships could trumpet their purported “Act 425 agreement(s)” to block the SBC’s consideration of a pending annexation petition affecting the same territory.

In addition, nothing would prevent the Townships from executing numerous, successive “Act 425 agreements,” no matter their validity, to effectively insulate

their territories from annexation.³ This cannot possibly be the result that the Legislature intended when it created the SBC and vested it with specific jurisdiction to consider such annexation petitions. Nor could the Legislature have intended to empower municipalities to ward off annexation by executing phony contracts.⁴

Accordingly, and contrary to the Townships' assertion that the court in *Casco* decided "out of thin air and without even a pretense of arguable statutory authority" (Appellants' Brief, p 14), there is, in fact, support for the notion that, by having jurisdiction to consider and decide annexation petitions under the SBC Act, the SBC necessarily possessed the authority to consider whether its jurisdiction was precluded by a purported Act 425 agreement covering the same territory.

The record reflects that the SBC specifically considered whether its jurisdiction to decide the underlying annexation petition was proscribed. To that end, the SBC identified numerous deficiencies in the Townships' agreement—all of which support the SBC's principal conclusion that the purported agreement was merely a pretext to thwart the exercise of its jurisdiction over TeriDee's petition, as it so obviously was not being used to promote an "economic development" purpose. This is exactly the type of illusory agreement that the Court of Appeals aptly termed as a "sham" in *Casco*.

³ Here, in fact, the Townships' purported "Act 425 agreement" was the culmination of not one or two, but *three* separate documents (styled as "amendments") that were executed over the course of several months.

⁴ In municipal law parlance, these types of agreements have been dubbed "shark repellent." *Casco Twp*, 243 Mich App at 400, 402.

a. The Townships’ “agreement” lacked a clearly defined economic development project.

The Townships’ “Act 425 agreement” that purported to conditionally transfer the very same territory that is covered by the annexation petition now at issue (and was filed five days after the petition) described the subject-territory as being “proposed for the implementation of an economic development project under Act 425,” with said “economic development” project consisting of two aspects:

(a) the construction of a mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development (as described further in Article I, Paragraph 6 of this Agreement), in order to balance the property owners’ desire for commercial use with the need to protect the interests of surrounding residential property owners; and,

(b) the provision of public wastewater services and public water supply services to the Transferred Area, so as to foster the new mixed-use development and to provide the protection of the environment, including, but not limited to, protection of ground water and surface water on and below the Transferred Area.

The SBC concluded that, notwithstanding these empty, circular recitals, the agreement did not, in fact, identify an “economic development project that is allowed by Act 425.” (Appellants’ Appendix, 13a.) Among numerous other deficiencies, the SBC observed that the Townships did not consult the owner of the property—*TeriDee*— for whom these “provisions” were ostensibly made. (Appendix, 13a.) In other words, the SBC aptly recognized that the Townships cannot claim an exemption from annexation on the basis of “mixed-use commercial/residential development” that is not actually being planned by the only person who could do so, i.e., *the property owner*.

The Townships attack the SBC's sensible observation in this regard on grounds that it evinces an "erroneous belief that lack of prior meeting with the land owner constitutes a legal ground on which to invalidate an Act 425 Agreement" and that "[n]owhere in the Act 425 statute does it state that local units must first meet with the property owner before entering a conditional transfer agreement."

(Appellants' Brief, p 35.) With respect, the Townships' argument clearly misses the mark: regardless of any "plan" that the Townships' might have concocted, the execution of the plan would depend on the willingness of the very person they did not even bother to consult—*TeriDee*.

It is not a far stretch to imagine that the Townships might have "allowed" instead for TeriDee's property to be developed as an amusement park, by prescribing height restrictions for roller coasters, planning the layout of concession stands, designating the number of parking spots and so forth. But what the Townships' argument fails to take into account is that empty hope coupled with an "allowance" for a certain type of "reasonable, quality development to occur" (Appellants' Brief, p 32) neither constitutes an economic development plan, nor is it indicative of actual economic development. In other words: it is a sham.

In arguing to the contrary, the Townships go on to baldly assert that the additional "provision" of waste water services likewise constitute "planned improvements" and, thus, satisfy the requirements of Act 425. (Appellants' Brief, pp 26-28.) But the Townships still do not (because they cannot) identify an actual *planned improvement* upon which the purported transfer of land was premised. In

other words, there is simply no nexus between their declaration of the provision of waste water and the land at issue. By the Townships' logic, the existence of a waste water treatment plant (in *Haring Township*, no less) could, itself, insulate every corner of *Clam Lake Township* from future annexation, which would be effective "shark repellent" indeed. *Casco*, 243 Mich App at 402.

Furthermore, despite the Townships' subsequent efforts to bolster the purported "economic development project" provisions through the filing of two amendments (App 944a-959a; 1630a-1635a), the fact remains that no such "project" was ever identified. Accordingly, the SBC's conclusion that its jurisdiction over the annexation petition was not preempted by a valid 425 agreement was not only reasonable but was amply substantiated.

b. The timing and circumstances surrounding the Townships' purported adoption of the transfer "agreement" support the SBC's conclusion that that it was merely a pretext to block annexation.

In light of the illusory purpose of the Townships' purported agreement, not to mention the circuit court's separate declaratory judgment recognizing its invalidity, nothing more needs to be said in regard to the pretextual nature of the agreement. But, without belaboring the point, it nevertheless bears noting that the timing and circumstances of the Townships' execution of their agreement further support the conclusion that the Townships' agreement was a sham, starting with the Townships' history of entering into a prior "sham" 425 agreement to block a

previous petition for annexation by TeriDee, and the fact that the instant attempt followed in those same footsteps.

Furthermore, e-mails exchanged between Township officials and area residents discussing ways to block TeriDee's planned development show that the timing of the Townships' ensuing 425 "agreement" was no coincidence. For instance, these e-mails discussed TeriDee's planned development, along with county-level zoning changes to accommodate it, as a "**New threat on the horizon . . .**" (Vol 2, Item 13a, Exhibit D, e-mail from George Giftos sent on February 21, 2013 at 08:17.) The e-mails reflect the concern that, "[i]f County Commissioners eliminate zoning immediately . . . TeriDee would have the ability to begin their development." (Vol, 2, Item 13, Exhibit D, e-mail from George Giftos sent on February 21, 2013 at 08:17.) Discussions soon centered on a question posed by George Giftos: "I wonder if it's time to pursue another 425 agreement to cover the property by Haring's zoning?" (Vol 2, Item 13a, Exhibit D, e-mail from George Giftos sent on February 21, 2013 at 10:01.)

While the Townships gloss over these statements as being the idle ramblings of a neighborhood gadfly,⁵ there is no escaping the fact that these e-mails neatly dovetail with the Townships' ensuing "agreement" to transfer the subject property pursuant to Act 425, which was reached during a hastily convened special "joint

⁵ In fact, George Giftos is a member of the Haring Township Planning Committee. (Appellants' Appendix, 1011a-1012a.)

public hearing” of the Townships on May 8, 2013, the purpose of which was succinctly described in another Giftos e-mail:

As you know, last year, the State Boundary Commission ruled that the 425 annexation agreement between Clam Lake and Haring Townships was invalid. They also voted 3-2 to deny the annexation of the TerriDee [sic] property at the Southeast Corner of the M55/131 interchange to the City of Cadillac. One of the reasons for the reversal of the annexation between Clam Lake and Haring was that there was no plan for any economic improvement by that move. In the meantime, Clam Lake has been negotiating with the City for water and sewer in their DDA district and McGuire’s Resort. They thought they had a deal, but the City changed their demands and would only decide to provide those services to Clam Lake as long as they would allow the annexation of that property to the City. (These are the same City officials who told me last year that they didn’t want that property!). Allowing the City to annex that property would set a precedent and could result in further property loss from Clam Lake to the City. Talks with the City for these services have ceased and Clam Lake again began discussing the possibility of obtaining those services from Haring (Haring is set to begin construction on their own water treatment plant)

Current plans are to reenter into a 425 agreement between Clam Lake and Haring Townships with the objective to provide sewer service to the TerriDee [sic] property and continue to the Clam Lake DDA district. This plan also allows for rezoning and development of that property as a PUD, with a set of restrictions as to the development of that property. These restrictions are necessary to protect the surrounding residential areas, and recognize that another bout with the State Boundary Commission could result in their allowing annexation to the City. That would result in a development far more distasteful than the one proposed in our agreement. I know that most of us would prefer no development at all, but long term, that’s not practical. At some point in the future, that property will be developed and this proposed zoning would be in our best interests. This is a proactive step and after sifting through several meetings during the development of this plan, I can live with it. Our best plan of action is to support this plan. [Vol 2, Item 13a, e-mail from George Giftos sent on May 2, 2013 at 02:35.]

Suffice it to say, these e-mails leave a distinct and lasting impression that the Townships’ purported “agreement” to transfer the subject property was motivated

solely as a means to thwart, by any means necessary, TeriDee's planned development. Accordingly, the SBC properly considered these e-mails, and thereafter reasonably surmised that they reinforced the conclusion that nothing prevented the exercise of its discretion as to the petition before it. (Vol 2, Item 13a, pages 3-4, paragraphs 6d-e.)

III. The doctrine of collateral estoppel does not apply to boundary adjustment determinations.

Bearing in mind that the adjustment of boundaries is a legislative function, one that is grounded in politics—not historical reconciliation—it follows logically that the Legislature would not—and did not—intend that that the SBC in which it reposed this function would be bound by the judicial doctrine of collateral estoppel. As will be explained, collateral estoppel applies only to agencies engaged in the adjudication of facts and legal rights. Here, of course, the decision to grant a petition for a boundary adjustment is a legislative one and does not involve the adjudication of legal rights. *Midland Twp*, 401 Mich at 670-671.

A. Analysis.

The common law preclusion doctrine of collateral estoppel⁶ imposes a state of finality to litigation where the same parties have previously had a full and fair

⁶ It is noted that Michigan courts frequently discuss the related doctrine of res judicata in similar terms, often interchangeably. The distinction between these related preclusion doctrines is a fine one—collateral estoppel refers to *issue* preclusion; res judicata refers to *claim* preclusion. Although more recent court decisions have more clearly made this distinction, see e.g., *People v Gates*, 434 Mich 146, 155, n 7 (1990), for present purposes, i.e., analyzing whether the SBC was

opportunity to adjudicate their claims. *Nummer v Dep't of Treasury*, 448 Mich 534, 541 (1995). Collateral estoppel, or issue preclusion, operates to bar the relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior action. *Horn v Dep't of Corrections*, 216 Mich App 58, 62 (1996). “For collateral estoppel to apply, a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment.” *Nummer*, 448 Mich at 542, quoting *Storey v Meijer, Inc*, 431 Mich 368, 373, n 3 (1988). In the administrative context, however, collateral estoppel is only applicable to determinations that are adjudicatory in nature; that is, where the decision stems from a judicial, or “quasi-judicial,” proceeding (as distinguished from a proceeding that is legislative (or “quasi-legislative”)), and then only where the Legislature intends the decision to be final absent an appeal. *Pennwalt Corp v Pub Serv Com'n*, 166 Mich App 1, 7–9 (1988); see also *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 399 Mich 449, 457-458 (1976).

On an even more basic level, collateral estoppel is a limitation on the *parties*, not the *tribunal*. Collateral estoppel, after all, is an affirmative defense that can be waived by the parties. MCR 2.111(F)(3)(a); 2.116(C)(7) & (D)(2). It is the doctrine of precedent, not of collateral estoppel, that urges a tribunal, like this one, to reach the same outcome if the same parties come back.

precluded from granting the instant petition in light of its previous denial of a similar petition, the difference between the two preclusion doctrines is immaterial.

As will be explained, neither the underlying administrative proceedings nor the boundary adjustment determination that followed lend themselves to the application of any preclusion doctrine. Moreover, both the SBC Act and the Home Rule City Act evince the Legislature's intent that a *denial* of a boundary adjustment petition is not meant to be final.

1. Legislative questions are not subject to collateral estoppel.

This Court has recognized, time and again, that “[t]he fixing of municipal boundaries is generally considered to be a legislative function.” *Shelby Charter Twp*, 425 Mich at 56-58, quoting *Village of Kingsford v Cudlip*, 258 Mich 144 (1932). And so, for more than a hundred years, it has been settled that, “[t]he changing of the boundaries of a political division is a legislative question, and the power to annex territory to municipalities has often been delegated to boards of supervisors or other public bodies.” *Oakman v Hosmer*, 185 Mich 359, 362 (1915).

True to the spirit of the legislative question at hand—that neither municipalities nor their boundaries are meant to be static, and that the legislative power in that regard is not to be constrained, the SBC is not only allowed to consider, but is required to consider, in light of the wide-ranging criteria, whether to exercise its discretion to grant the petition before it. For that reason, MCL 117.9(6) and MCL 123.1012(3) contemplate a two-year waiting period before resubmission of certain boundary adjustment petitions (namely, annexation and consolidation, respectively).

Importantly, this Court has expressly recognized, in the analogous context of utility-rate-fixing, that such questions are *legislative* and, thus, not subject to collateral estoppel. *Detroit v Michigan Public Utilities Comm*, 288 Mich 267, 286-287 (1939); see also *Consumers Energy Co v Michigan Pub Serv Com'n*, 268 Mich App 171, 177 (2005); *Pennwalt Corp v Pub Service Comm*, 166 Mich App at 7-9; *Detroit Edison Co v Public Service Comm*, 127 Mich App 499, 524 (1983). In *Prentis v Atlantic Coast Line Co*, 211 US 210, 226-227 (1908), which was quoted with approval by the Michigan Court of Appeals in *Pennwalt Corp*, 166 Mich App at 8, the United States Supreme Court explained the legislative nature of fixing utility rates:

The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals . . . and especially by its learned president in his pointed remarks

And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up.

As in the case of fixing utility rates, an administrative determination involving the fixing of municipal boundaries is a *legislative act*. Accordingly, and for the reasons explained by *Prentis* and its progeny, the annexation determination at issue is not subject to collateral estoppel.

a. Boundary determinations are not adjudicatory.

As noted already, for collateral estoppel to apply in the context of an administrative determination, the determination itself must be adjudicatory. *Senior Accountants*, 399 Mich at 457-458. “To determine whether an administrative agency’s determination is adjudicatory in nature, courts compare the agency’s procedures to court procedures to determine whether they are similar.” *Natural Resources Defense Counsel v Dep’t of Environmental Quality*, 300 Mich App 79, 86 (2013). “Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents.” *Id.*

This Court has made clear that the administrative procedures underlying an annexation determination are *not* “contested cases” within the meaning of the APA, in that they do not involve the determination of legal rights as between adverse parties and, thus, do not require an *evidentiary* hearing. *Midland Twp*, 401 Mich at 669, 670-671. And, as the Court of Appeals recently recognized, the key to whether a decision is adjudicatory in nature is whether the underlying proceedings provided for an *evidentiary hearing*. *William Beaumont Hospital v Wass*, ___ Mich App ___, published opinion of the Court of Appeals in Docket No. 323393 (decided on May 17, 2016), slip opinion at p 5 (attached).

In relying on the Court of Appeals’ decision in *Holton v Ward*, 303 Mich App 718 (2014)—a case involving the adjudication of property rights—to support their theory that collateral estoppel applies to annexation determinations by the SBC

(Appellants' Brief, pp 44, 45, 46), the Townships ignore the critical difference between that case and the one at hand: *Holton* involved an evidentiary hearing; this one does not. This dispositive difference was discussed at length in the more recent Court of Appeals decision, *Wass, supra*, which specifically distinguished *Holton* on the basis of whether an evidentiary hearing was involved. *Id.*, slip opinion at p 5. In fact, *Wass* further specified that the ability to present arguments and documentary evidence before a decision-maker is *not* tantamount to an evidentiary hearing, and so held that the administration decision at hand was not adjudicatory in nature and, thus, was not subject to collateral estoppel. *Id.*

b. Boundary determinations are not final.

The pronouncements on this subject could not be any clearer: boundaries have never been, are not, and never will be, static. That is to say, no person or township has any right or interest in the boundaries of a municipality, *Midland Twp*, 401 Mich at 664, no matter the cost or inconvenience that a change in those boundaries might cause. *Avon Twp*, 96 Mich App at 751. It follows logically that, in the absence of a clear, statutory restriction on this dynamic power, this Court should not invent one.

But that is exactly what the Townships are asking for here, starting with their creative conception of what the Legislature intended by its proscription of a successive petition being filed within two years of one that had previously been denied. (Appellants' Brief, pp 47-48.) Although the Townships acknowledge that “the statute says nothing about what may or may not occur after the two-year

prohibition has expired,” they nevertheless venture that, “[t]his means that that the Legislature has done *nothing* to alter the common law” (Appellants’ Brief, p 47), even though the Townships themselves offer no legal support for their theory that collateral estoppel applies to legislative questions in the first place. (Appellants’ Brief, p 47.)

In any case, the more obvious inference, considering the background and subject matter, is that the two-year restriction ties in to the very purpose for which the SBC was created—that is the establishment of a central body to decide political questions that had, up to that point, and with few exceptions, “been based on an automatic election.” *Shelby Charter Twp*, 425 Mich at 59 (quoting the Statement of Representative Anderson, 1977 House Journal 942). In this light, it stands to reason that the Legislature more likely intended to establish a limit on what had previously been a political tool wielded indiscriminately by quarreling factions; in other words, a “cooling off” period.

This interpretation not only makes logical sense, it also comports in every particular with the plain language of the statutes at hand, and is consistent with the agency’s longstanding interpretation, which has been in place for *more than 40 years*. See e.g., *Avon Twp*, 96 Mich App 736 (involving the granting of an annexation petition following a previous denial). Both in the context of annexation under the Home Rule City Act (MCL 117.9(6)) and consolidation under the SBC Act (MCL 123.1012(3), the Legislature has intended, and so the SBC has accepted, that a prior denial of a petition requesting a boundary adjustment does not compel the

denial of a subsequent petition. And, just like people can change their minds when voting on questions of annexation—even in successive instances—so too can the SBC when exercising the same function. In either case, the question to be decided is not one of historical reconciliation but one that is “forward-looking.” *Id.*, at 751.

Moreover, collateral estoppel “applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally.” *Gates*, 434 Mich at 158, citing *Dowling v United States*, 493 US 342 (1990) and *Sealfon v United States*, 332 US 575 (1948). Although the Townships do not specify the issue that the SBC is allegedly precluded from deciding, let alone any clear, definite, and unequivocal findings or conclusions to which the SBC is allegedly bound, it bears emphasizing that—apart from the different outcomes—there is nothing internally inconsistent between the SBC’s prior determination and the instant one. Compare App 1117a-1118a, with App 11a-127a. More pointedly, the Townships do not (and cannot) point to any finding in the first instance that is contradicted by a finding in the second. The SBC’s decision denying TeriDee’s original petition for annexation was explained solely on the basis that:

The State Boundary has considered the requirements in section 9 of 1968 PA 191, MCL 123.10009 and has come to the conclusion that these criteria support the majority vote of the Commission. The Commission recommends that in the case of Docket # 11-AP-2, Petition for Annexation of Territory in Clam Lake Township to the City of Cadillac, Wexford County, be denied by the Director of the Department of Licensing and Regulatory Affairs. [(App. 1118a.)]

Given this reasoning, it cannot be said that “the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally.” *Gates*, 434 Mich at 158

(internal citations omitted). Indeed, the criteria for annexation is open-ended and no single factor is determinative of whether a petition should be granted (or denied).⁷

Furthermore, in light of the fact that the SBC enumerated findings in support of its decision to grant *the second* petition for annexation (Appellants' Appendix 11a-15a), the doctrine of collateral estoppel does not apply in this instance, for its ultimate decision is a "value judgment based on the particular facts and circumstances of the annexation under consideration." *Midland Twp*, 401 Mich at 669. In any event, the decision granting annexation reflects that the SBC reasonably applied its discretion in weighing the criteria and articulating how the circumstances favored annexation. Given the factors involved in this annexation petition, particularly the economic advantage afforded to the area and the enhancement of cost-effective public services, the annexation decision was reasonable and within the power of the SBC.⁸

⁷ This Court has explained that boundary determinations made under MCL 123.1009 do not require detailed particularity "in explication of criteria or standards." *Midland Twp*, 401 Mich at 669

⁸ It is noted that Michigan courts have long recognized that the criteria set forth in MCL 123.1009 "implicitly require the SBC to look with favor on a larger community" and that, "with its emphasis on future growth and ability to provide services, it is inevitable that the Boundary Commission will favor a municipality with open space and a large tax base relative to population." See e.g., *Village of Wolverine Lake v State Boundary Comm'n*, 79 Mich App 56 (1977).

2. The authority relied upon by the Townships is distinguishable in subject matter and substance.

In arguing that the SBC was bound to deny the underlying petition for annexation on the basis of collateral estoppel, the Townships not only ignore the essence of a boundary determination, but they also conflate the unique nature of annexation proceedings to those that are purely judicial in nature. As discussed already, SBC determinations are *legislative* at their core—not judicial. *Oakman*, 185 Mich at 362 (1915) (“The changing of boundaries of a political division is a legislative question . . .”). That reality is reflected in the fact that the proceedings involved are not *contested cases* and do not involve determinations of *vested* rights between *adverse* parties. For these reasons, this Court has recognized that annexation proceedings are “unique.” *Midland Twp*, 401 Mich at 664.

This distinction is lost on the Townships—as reflected in the manner in which they dismiss the circuit court’s (correct) decision to decline their invitation to apply the doctrine of collateral estoppel to the underlying annexation decision:

This was a novel decision, for the reason that the Michigan appellate courts have *never* exempted an administrative agency from the common law rule of collateral estoppel. The circuit court thus gave unique status to the SBC, as being the only Michigan administrative agency that is ostensibly allowed to engage in arbitrary and capricious decision-making, by ignoring its prior decisions. [(Appellants’ Brief, p 46.)]

As a matter of fact, the circuit court *did* give “unique status” to the SBC—and with good reason. In arguing to the contrary, the Townships repeat the errors of their counterparts in the *Midland Twp* case and, thus, deserve the same admonishment: “These contentions ignore the unique nature of annexation proceedings.” *Midland Twp*, 401 Mich at 664.

The Townships compound their error by comparing annexation determinations to those involving the entitlement to Social Security and Black Lung disability benefits under inapposite federal statutes. (Appellants’ Brief, pp 46-47.) Aside from the obvious facial disparities between these types of statutes—municipal boundary determinations are discretionary determinations, whereas entitlement to federal disability benefits is mandatory, upon satisfaction of the underlying factual criteria—neither the Social Security Act nor the Black Lung Benefits Act, has a provision, similar to that which is issue here, providing for string-free reapplication after two years.

In the context of deciding entitlement to federal disability benefits, it makes sense to apply the doctrine of collateral estoppel to preclude an applicant from relitigating factual matters that have already been considered and decided, but it does not in the case of forward-looking discretionary determinations of whether municipal boundaries *should* be adjusted. The Townships offer neither a coherent explanation nor any parallel citation to applicable authority in which Michigan courts have applied the concept of collateral estoppel to questions that are legislative in nature; and with good reason, because no such authority exists. In any event, the Townships’ inapposite offerings were properly rejected by the circuit court and should likewise be rejected here.

As discussed, the SBC maintains that its boundary determinations are akin to public-utility-rate fixing cases, in that both involve “legislative questions” that are to be answered, not purely on the basis of *facts*, but rather in regard to “the

making of a rule for the future.” *Pennwalt Corp*, 166 Mich App at 8, quoting *Prentis*, 211 US at 226. This conclusion should apply with equal—if not greater—force to the “unique” administrative determination at issue here—one that is *discretionary* and decided under on *open-ended* criteria simply on the basis of “reasonableness,” as has been recognized by this Court:

Resolution of a controverted annexation unavoidably involves political considerations and the exercise of a large measure of discretion. Evaluation of the record and of the commission's balancing of the criteria and determination of reasonableness implicates the merits of the proposed annexation and poses considerable risk of drawing the judiciary into the resolution of what continues to be despite the adoption of the administrative format essentially a political question. [*Midland Twp*, 401 Mich at 673-674.]

Given the nature of the administrative decision at issue, the circuit court properly rebuffed the Townships’ cries to apply collateral estoppel.

3. The two-year re-filing provision contained in MCL 123.1012(3) reinforces the conclusion that collateral estoppel does not apply to SBC determinations.

As to their discussion of the two-year reapplication provision found in MCL 123.1012(3) regarding petitions for consolidation, the Townships summarily conclude that the statute is “inapplicable” because the instant dispute concerns an annexation, not consolidation, and that even if the statute were to apply, the Townships would be “entitled to judgment” because that statute bases the timing of reapplications relative to the date a previous petition was denied. (Appellants’ Brief, p 49.) With respect, the Townships appear to miss the obvious parallels between the two statutes and choose instead to selectively focus on the inapplicable minutiae. In any event, the Townships overlook the fact that, like annexations, the

decision of whether boundaries should be adjusted under a consolidation is not static. Nor can the question be decided upon the rote application of a rigid factual criteria.

In short—and contrary to the Townships’ unsubstantiated proclamation that, “[i]n Michigan, administrative tribunals are universally subject to principles of collateral estoppel, under the common law” (Appellants’ Brief, p 48)—a review of applicable authorities demonstrates that a SBC determination denying a petition for annexation is *not* to be given preclusive effect.

CONCLUSION AND RELIEF REQUESTED

In summary, the SBC properly considered the annexation criteria set forth in MCL 123.1009 and reasonably concluded that its jurisdiction was invoked and that the petition satisfied those requirements. Given the factors involved in this annexation petition, particularly the economic advantage afforded to the area and the enhancement of cost-effective public services, all of which are political considerations that fall squarely within the SBC’s discretionary authority, the resulting decision was reasonable, and within the power of the SBC, and should be affirmed.

Accordingly, the SBC respectfully requests a decision holding that: (1) *Casco Twp v State Boundary Comm’n*, 243 Mich App 392, 399 (2000), correctly held that the State Boundary Commission (SBC) has the authority to determine the validity of an agreement made pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 et seq. (Act 425); (2) the SBC

in this case properly determined that the Townships' Act 425 Agreement was invalid; and that (3) the doctrine of collateral estoppel does not apply to invalidate the SBC's 2014 approval of the instant annexation petition on the basis of the SBC's 2012 denial of a petition for annexation covering the same territory.

Respectfully submitted,

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Dated: August 5, 2016
2014-0082102-C

ATTACHMENT

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM BEAUMONT HOSPITAL,

Plaintiff,

v

JON WASS,

Defendant/Third-Party Plaintiff-
Appellant,

v

TIME INSURANCE COMPANY,

Third-Party Defendant-Appellee.

FOR PUBLICATION

May 17, 2016

9:05 a.m.

No. 323393

Oakland Circuit Court

LC No. 2013-136932-CK

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

Defendant/third-party plaintiff Jon Wass appeals from a trial court order granting third-party defendant Time Insurance Company (Time) summary disposition of Wass's breach of contract claim. The trial court concluded that because the Office of Financial and Insurance Regulations (OFIR), an administrative agency, had already issued a decision pursuant to the external review procedures in MCL 550.1915(1), the breach of contract claim was barred by res judicata and collateral estoppel. MCL 550.1915(3), however, provides that subsection (1) does not preclude Wass from seeking other remedies available under state and federal law. And because Wass was not entitled to an evidentiary hearing at any level of the administrative proceedings, the administrative decision rendered under MCL 550.1915(1) does not have preclusive effect in this case. Accordingly, we reverse and remand for further proceedings.

I. BACKGROUND

On June 28, 2011, Time issued a certificate of insurance to Wass that provided major medical coverage. Pertinent to this dispute, the policy contained a preexisting conditions limitation. After Wass was diagnosed with and began receiving treatment for colon cancer, Time denied his claim for benefits, asserting that the colon cancer was a preexisting condition. Wass appealed the denial to Time's internal grievance panel, which also concluded that the colon

cancer was a preexisting condition. Time informed Wass that the grievance panel's decision was the last avenue available for an internal review, but advised him that he could seek an external review by the OFIR pursuant to the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq.*

Wass requested an external review of Time's denial of coverage from the OFIR, which assigned the review to an Independent Review Organization (IRO). Under MCL 550.1911(9), (11), and (13), the IRO was required to review "all of the information and documents" that Time used in making its adverse determination, "any other information submitted in writing" by Wass or Wass's representative, and, to the extent it was available and appropriate, the IRO could also consider additional documentary evidence listed in the statute, such as medical records and practice guidelines. The IRO was not authorized to conduct an evidentiary hearing or hear testimony.¹ The IRO concluded that the colon cancer was a preexisting condition,² thereby precluding Wass from receiving benefits. The OFIR adopted the IRO's recommendation that Wass be denied coverage.

Wass appealed the OFIR's decision to the Oakland Circuit Court pursuant to the provision providing for such review in MCL 550.1915(1). The trial court's review of the OFIR decision was limited to determining whether the decision was authorized by law. See *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 455; 688 NW2d 523 (2004). "[A]n agency's decision that 'is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious,' is a decision that is *not* authorized by law." *Id.* (quotation omitted; alteration and emphasis in original). The trial court did not conduct an evidentiary hearing. Instead, it reviewed the OFIR record and opinion and concluded that the ruling "was not contrary to law or arbitrary and capricious." Wass did not appeal the circuit court's decision to this Court.

¹ See *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 460-462; 688 NW2d 523 (2004) (recognizing that PRIRA's external review procedure does not require an evidentiary hearing).

² MCL 500.3406f(1)(a) provides:

(1) An insurer may exclude or limit coverage for a condition as follows:

(a) For an individual covered under an individual policy or certificate or any other policy or certificate not covered under subdivision (b) or (c), only if the exclusion or limitation relates to a condition for which medical advice, diagnosis, care, or treatment was recommended or received within 6 months before enrollment and the exclusion or limitation does not extend for more than 12 months after the effective date of the policy or certificate.

We agree with the trial court that this definition, rather than the definition in the insurance policy, applies in this case.

On January 3, 2013, plaintiff William Beaumont Hospital filed a complaint against Wass in district court, seeking payment from Wass for the reasonable and necessary medical services it had provided. After Wass answered and filed a motion to stay the proceedings, the case was transferred to the circuit court. Wass then filed a third-party complaint against Time, alleging breach of contract and asserting that Time was responsible for the amounts sought by Beaumont Hospital. Time asserted in its answer that it had no contractual duty to pay Wass's health care expenses because the contract did not cover his preexisting condition during the pertinent time frame. The insurance company then filed a motion for summary disposition under MCR 2.116(C)(7), asserting that Wass's claims were barred by res judicata and collateral estoppel because of the June 2012 decision by the OFIR. The trial court agreed and granted the motion for summary disposition in Time's favor. Wass now appeals that decision.

II. ANALYSIS

PRIRA contemplates an aggrieved party being able to pursue both an administrative review and a claim in circuit court. MCL 550.1915 provides:

(1) An external review decision and an expedited external review decision are the final administrative remedies available under this act. A person aggrieved by an external review decision or an expedited external review decision may seek judicial review no later than 60 days from the date of the decision in the circuit court for the county where the covered person resides or in the circuit court of Ingham county.

(2) Subsection (1) does not preclude a health carrier from seeking other remedies available under applicable state law.

(3) Subsection (1) does not preclude a covered person from seeking other remedies available under applicable federal or state law.

(4) A covered person or the covered person's authorized representative may not file a subsequent request for external review involving the same adverse determination or final adverse determination for which the covered person has already received an external review decision under this act. [emphasis added.]³

³ The purpose of statutory interpretation is to determine the Legislature's intent, beginning with the statutory language. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). When the statutory language clearly expresses the Legislature's intent, "no further construction is required or permitted." *Id.* In giving meaning to a statutory provision, this Court considers the provision within the context of the whole statute and "give[s] effect to every word, phrase, and clause . . . [to] avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Subsection (1) provides that the final administrative remedies under PRIRA are an external review by the OFIR followed by a review by the circuit court. However, subsection (3) plainly provides that subsection (1) does not preclude an aggrieved party from pursuing other remedies under state and federal law, which would include the right to bring an original and separate action in circuit court for breach of contract. There is, notably, no election of remedies language in the statute, nor will we read such a requirement into the statute. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011). Accordingly, the statutory language does not preclude Wass's suit.

Nevertheless, we must determine whether his suit is precluded by the common law doctrines of res judicata and collateral estoppel.⁴

The preclusion doctrines of res judicata and collateral estoppel "serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *Nummer v Dep't of Treasury*, 448 Mich 534, 541; 533 NW2d 250 (1995). Res judicata applies if "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotations and alterations omitted).

In *Standard Auto Parts Co v Employment Security Comm*, 3 Mich App 561, 570; 143 NW2d 135 (1966), this Court explained:

In general, the answer given by the courts to the question whether decisions of administrative tribunals are capable of being *res judicata* depends upon the nature of the administrative action involved. *The doctrine of res judicata has been applied to administrative action that is characterized by the courts as "judicial" or "quasi judicial"*, while to administrative determinations of "administrative", "executive", or "legislative" nature, the rules of *res judicata* have been held to be inapplicable. 42 Am Jur, Public Administrative Law, § 161, p 520. [second emphasis added.]

The preclusion doctrines are applicable to administrative decisions (1) that are "adjudicatory in nature," (2) where a method of appeal is provided, and (3) where it is clear that the legislature

⁴ We review de novo a circuit court's decision on a motion for summary disposition and questions of law, including the application of a legal doctrine such as res judicata. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). The application of collateral estoppel is also a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

“intended to make the decision final absent an appeal.” *Nummer*, 448 Mich at 542; see also *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 29, 38; 620 NW2d 657 (2000).

“To determine whether an administrative agency’s determination is adjudicatory in nature, courts compare the agency’s procedures to court procedures to determine whether they are similar.” *Natural Resources Defense Counsel v Dep’t of Environmental Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013). “Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents.” *Id.*

The Restatement of Judgments, 2d, § 83, p 266, provides in pertinent part:

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication

The Comments provide that “[w]here an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication.” Restatement of Judgments, § 8, comment *b*, p 268. Further, “[i]n the performance of adjudicative functions . . . administrative agencies are generally required by law to employ procedures substantially similar to those used in courts.” Restatement of Judgments, § 8, comment *b*, p 269. Additionally, in *Holton v Ward*, 303 Mich App 718, 734; 847 NW2d 1 (2014), this Court held that an administrative decision by the Department of Environmental Quality, had preclusive effect. In that case, an evidentiary hearing was held during which an administrative law judge “heard testimony from additional witnesses and reviewed a large body of evidence.” *Id.* at 732.

In this case, the OFIR’s decision was not adjudicatory in nature because no level of the proceedings provided for an evidentiary hearing. Although a plaintiff or his representative was entitled to present a written statement and documentary evidence, MCL 550.1911(11), PRIRA’s external review procedure is not substantially similar to the procedure employed by courts. Specifically, although the parties are free to submit documentary evidence, no witnesses may be produced or compelled to appear for examination by the parties or by the factfinder, and the parties cannot cross-examine the individuals responsible for the insurer’s decision or any medical experts on whose opinion those individuals relied.

In *English*, 263 Mich App at 463, we upheld PRIRA’s administrative process against a due process challenge. We recognized that the review process was limited in that it did not provide for an evidentiary hearing or other procedures typical to courts. *Id.* at 460-462. We listed several reasons why PRIRA’s limited process was constitutional, one of which was the fact “that although the external review decision constitutes the final administrative remedy under PRIRA, the act ‘does not preclude a health carrier from seeking other remedies available under applicable state law.’ ” *Id.* at 463, quoting MCL 550.1915(2). Likewise the external review decision does not preclude a covered person from seeking other remedies available under applicable state law. MCL 550.1915(3). To preclude those other remedies based on the limited

administrative process provided for by PRIRA would require us to reconsider the constitutionality of that process.

In support of its argument that preclusion applies, Time cites four cases where an administrative decision was given preclusive effect. However, each of those cases involved administrative procedures far more extensive than those provided for in PRIRA. In *Nummer*, the plaintiff challenged a decision by the Michigan Civil Service Commission that denied his claims for breach of contract and discrimination on the basis of race and gender. *Nummer*, 448 Mich at 539-540. In that case, the plaintiff “was represented by counsel before the agency; had the opportunity to, and did in fact, call witnesses; and had a full hearing on the merits of his claim.” *Id.* at 542-543. In addition, the *Nummer* Court made clear that its decision to give administrative decisions preclusive authority would only “affect agency decisions by formal hearing.” *Id.* at 543, 543 n 7.⁵ Next, in *Minicuci*, the plaintiff challenged a decision by the Michigan Department of Labor that he was not entitled to additional wages under the wages and fringe benefits act, MCL 408.471 *et seq.* *Minicuci*, 243 Mich App at 30. However, in that matter the plaintiff had a right to an evidentiary hearing on administrative appeal. *Id.* at 38. Time’s reliance on *Dearborn Hts Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120; 592 NW2d 408 (1998) is also unavailing. In that case, the issue of whether the administrative proceedings were adjudicatory in nature was never even raised. Moreover, the parties in that case were permitted to call and question witnesses. *Id.* at 125. Finally, in *Senior Accountants, Analysts and Appraisers Ass’n v City of Detroit*, 60 Mich App 606, 613; 231 NW2d 479 (1975), this Court held that a decision against the plaintiff by the Michigan Employment Relations Commission (MERC) had preclusive effect. However, under MCL 423.216, the parties to a proceeding before MERC are entitled to an evidentiary hearing before a hearing officer.

Accordingly, given that the proceedings before the OFIR were not adjudicatory in nature, the first element required to give an administrative decision preclusive effect is not satisfied. Thus, the preclusion doctrines do not apply to the decision of the OFIR. See *Nummer*, 448 Mich at 542; *Minicuci*, 243 Mich App at 38.

Additionally, the third element required to apply the preclusion doctrines to an administrative decision, i.e., that it is clear that the legislature intended to make the determination final when no appeal is taken, is also not satisfied in this case. In *Nummer*, our Supreme Court concluded that, in enacting the Civil Rights Act, MCL 37.2101 *et seq.*, “the Legislature [clearly] intended to make the Civil Rights Commission’s findings final in the absence of an appeal[.]” *Nummer*, 448 Mich at 551. The Court explained that the Legislature had explicitly provided only one remedy from an adverse agency determination: a direct appeal to the circuit court. *Id.* The statute did not contain any other language concerning the preclusive effect of the Civil Rights Commission’s findings or conclusion. *Id.* at 547, 551. The Court concluded that if the

⁵ Moreover, in *Nummer* the administrative decision was subject to a de novo review by the circuit court, requiring his claim to be reviewed under “a competent, material, and substantial evidence standard.” *Nummer*, 448 Mich at 543-544. In contrast, the review provided by the circuit court in this case was not de novo and the OFIR decision was only reviewed to determine if it was contrary to law.

Legislature intended “a new, original action . . . it would have said so more directly.” *Id.* at 551. Similarly, in *Dearborn Hts*, this Court held:

[E]ven if the teacher tenure act is silent concerning whether a determination by the [State Tenure C]ommission is to be given preclusive effect, in the absence of legislative intent to the contrary, the applicability of principles of preclusion is presumed. . . . [I]t is instructive that, pursuant to the Administrative Procedures Act, the only procedure available to a party aggrieved by a final decision of the commission is direct review by the courts. MCL 24.301; MSA 3.560(201). Because the appeal process, by its very nature, does not contemplate a new, original action, the commission’s decision is clearly intended to be a final decision on the merits. [*Dearborn Hts*, 233 Mich App at 129-130.]

Finally, in *Minicuci*, we reached the same conclusion when interpreting the Legislature’s intent in enacting the wage act. In *Minicuci*, the wage act only provided “for appellate judicial review of the hearing referee’s determinations.” *Minicuci*, 243 Mich App at 40. As a result, we concluded that the Legislature intended to make the department’s administrative determination final absent an appeal. *Id.* at 40-41.

Unlike the statutes in *Nummer*, *Dearborn Hts*, and *Minicuci*, the statutory language in PRIRA explicitly provides that other remedies under state and federal law are not precluded by a party’s decision to pursue an external review before the OFIR under subsection (1). MCL 550.1915(3). As such, the OFIR’s decision is not entitled to preclusive effect because the legislature did not clearly intend to make the determination of the OFIR final when no appeal is taken. Instead, the legislature contemplated, and statutorily provided that, a plaintiff could file an action in circuit court even if such an action touches upon issues or claims raised during the external review procedure in subsection (1). See MCL 550.1915(3). Accordingly, because it is not clear that the legislature intended to make the OFIR’s determination final when no appeal is taken, the preclusion doctrines do not apply.

III. CONCLUSION

MCL 550.1915 provides that a party aggrieved of a decision by the OFIR can pursue both an external review before the OFIR and a claim in circuit court. Further, Wass’s circuit court claim is not barred by res judicata or collateral estoppel. Both doctrines only apply to administrative decisions that are adjudicatory in nature and in cases where it is clear that the legislature intended to make the administrative decision final in the absence of an appeal. *Nummer*, 448 Mich at 542; *Minicuci*, 243 Mich App at 38. Here, the proceedings were not adjudicatory in nature because no evidentiary hearing was held. Moreover, given that the statute provided for an aggrieved party to proceed with both an external review under MCL 550.1915(1) and to pursue other actions under MCL 550.1915(3), it is plain that the legislature did not intend a decision under subsection (1) to be final in the absence of an appeal.⁶ For these reasons, we

⁶ We note that a contrary ruling could, at least in some cases, run afoul of the Employee Retirement and Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq.* See *Rush*

conclude that the trial court erred when it held that Wass's claim was barred by res judicata and collateral estoppel.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher

Prudential HMO, Inc v Moran, 536 US 355; 122 S Ct 2151; 153 L Ed 2d 375 (2002); see also Wexler, *A Patient's Right to Independent Review: Has Michigan's Act Changed after Rush Prudential HMO, Inc v Moran?*, 81 Mich B J 19, 21-22 (Nov, 2002).