Comstock Township,
Petitioner,

v

Kalamazoo County and Kalamazoo County Board of Commissioners,
Respondents.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 19-003909

Presiding Judge
Peter M. Kopke

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

As a result of a telephonic status conference, the Tribunal entered orders on March 10, 2020 and April 8, 2020, establishing dates for the filing of briefs and responses to briefs to resolve the underlying legal issue in the above-captioned case through summary disposition.[1] In compliance with those orders, the parties filed briefs on May 13, 2020 and responses on June 3, 2020.

The Tribunal has reviewed the briefs, the responses, and the case file and finds that there are no genuine issues of material fact and that the granting of summary disposition in favor of Petitioner is warranted.

PARTIES' CONTENTIONS

Respondents contend that "Petitioner's proposed tax levy of 1.5 mills for road purposes was not approved, on the grounds that it was not authorized by law." More specifically, Respondents contend that:

1. "Petitioner's proposed charter township levy without a vote of the electors was not authorized by law, because it would violate the Headlee Amendments to the Michigan Constitution, Const 1963, art. 9, §§ 25-34, as Comstock Charter Township was not incorporated prior to December 23, 1978, []or incorporated after that date by a vote of the electors."

[1] The Tribunal entered an Order on April 8, 2020, granting Petitioner's April 1, 2020 Motion to extend the dates established in the March 10, 2020 Scheduling Order.

2. "Petitioner's proposed road millage levy under MCL 247.670 without a vote of the electors was not authorized by law, because it would exceed Petitioner's constitutional maximum tax levy. Const 1963, art. 9, § 6[.]"

Respondents also contend that:

1. Petitioner "has acknowledged that it became a Charter Township by resolution of the Township Board, and not by a vote of the people, effective in 1979, i.e., after the effective of the Headlee Amendment on December 22, 1978."

2. Petitioner "would argue that under MCL 247.670, it may levy up to an additional 3 mills for the purpose of maintenance or improvement to reads, without a vote of the people. MCL 247.670 pre-dates the Headlee Amendment, such that the proposed levy would generally be authorized without a vote of the people."

3. "In general, the Headlee Amendment requires that any increase in taxes be approved by 'direct voter approval.' Const 1963, art. 9, § 25. Case law interpreting the Headlee Amendment holds that certain taxes that were 'authorized by law' before December 22, 1978 (see Const 1963, art. 9, § 31), may be imposed without a vote of the people, even if they were not actually levied before December 22, 1978 . . . . However, the Michigan Attorney General has opined that a township which became a charter township by resolution after 1978 is not entitled to levy the full Charter millage of 5 mils . . . . Rather, the Township must continue to operate under the maximum authorized 1 mill rate. Comstock is presently operating under a maximum tax rate, as adjusted b the Headless rollback under MCL 211.34d, of 0.9764 mills."

4. "Petitioner would argue that it is a charter township, and as such falls with the exception for charter townships in the second paragraph of Const 1963, art, 9, § 6 to the general tax limitation set forth in the first paragraph of that section . . . . But Comstock Township became a Charter Township after 1978 without a vote of the people, and thus as stated in OAG, 1985-1986, No. 6285 (April 17, 1985) . . . 'such a township would continue as a general law township for purposes of its taxing authority unless and until a vote of the township's electors approved the higher millage levy, as required by the Headlee Amendment.'"

5. ". . . *Scio Township* . . . ultimately determined that voter approval to authorize the higher charter millage limit was needed, but the voter approval of Charter itself satisfied this requirement.[2] In the instant case, Comstock Township has

[2] See *Smith v Scio Twp*, 173 Mich App 381; 433 NW2d 855 (1988).

had neither a direct vote on the proposed road millage increase, nor a vote on the change to charter township status. The higher charter township millage limits are therefore not applicable, as concluded by the formal Attorney General Opinions." Rather, "[t]he additional millage, per formal Attorney General Opinions, must be within the Township's authorized limit, and not in addition to that amount."

6. Petitioner "may argue, on the basis of the above-cited case law, as well as *Saginaw County* . . . that since charter townships were exempt from the millage limitation in Const 1963, art. 9, § 6 before 1978, then Comstock Township should be able to do so at the present time, even though it was not itself a charter township before December 22, 1978 . . . . Comstock Township apparently sees no distinction between the changing of the boundaries of the Buena Vista School District after 1978, which allowed it to increase its tax rate by an additional one mill, and the post-1978 change of structure of the Township from a general law township to a charter township, which arguably would entitle it to exemption from the constitutional millage limitation.[3] However, there is a distinction, and the Attorney General's Opinion No. 6285 cited above is directly on point. The post-Headlee case law does not repudiate the relevant Attorney General's Opinion."

7. "Petitioner may further argue that the County Board previously approved a road millage levy at various rates in 2016, 2017 and 2018, based upon the legal opinion of the County's then-Corporate Counsel, Thom Canny . . . . However, Attorney Canny only confirmed that the road maintenance and improvement millage itself as authorized under MCL 247.670 did not require a vote of the electorate under the Headlee Amendments, and so advised the Comstock Township Attorney. Attorney Canny was not asked for an opinion as to whether such road maintenance and improvement millage could fit within the Township's constitutional tax limitation under Const 1963, art. 9, sec. 6, and thus did not render an opinion on that issue . . . . Regardless, the County Board's review of the Township's Tax Rate Request is made on an annual basis, and it is not bound by past decisions, nor to perpetuate previous errors."

As for Petitioner, Petitioner contends that it had "the legal authority to levy the requested 2019 road improvement millage of 1.5 mills pursuant to MCL 247.6[7]0 without submitting the question to a vote of its electorate." Petitioner also contends that:

1. "Although such millage levy was approved in prior years, the County, in 2019, reversed course and now determined that the levy of the road millage without a vote of the Township electorate was not authorized by law . . . . Notably, the 2019 Kalamazoo County Resolution failed to properly analyze the Michigan

[3] See *Saginaw County v Buena Vista School District*, 196 Mich App 363; 493 NW2d 437 (1993).

Constitution, binding case precedent in *American Axle* . . . and relevant statutory law.[4] Instead of [] following a clear analysis of the specific language as set forth herein, the County, in making its new determination in 2019, engaged in a twisted process relying on citing to outdated and inapplicable Attorney General Opinions and case law."

2. "The County makes a critical, incorrect distinction that is not based in law by finding a difference between a charter township incorporated by the electors and a charter township incorporated by resolution . . . . there is absolutely no legal distinction in the authorities and responsibilities stemming from how the township was incorporated under the Charter Township Act. The County, relying on theories from whole cloth, incorrectly determined that such distinction was determinative under law. Thereafter, and based on this initial misunderstanding of law of a charter township's authority, the County next mistakenly concluded that charter townships incorporated by resolution after the Headlee Amendment may only levy the separate voted millage amount levied by the township prior to incorporation as a charter township. Moreover, such theories more importantly fail to recognize that the authority to incorporate as a charter township by resolution and ley charter tax rates existed prior to the adoption of the Headlee Amendment."

3. ". . . the County's mistaken conclusion also fails to properly consider Article 9 Section 6 of the Michigan Constitution of 1963 which provides a tax rate limitation on certain municipalities requiring a vote to exceed certain limitations contained therein (often referred to as the 15/18/50 mill limitations). Critical to a review of this Section is the fact that Article 9 Section 6 specifically exempts charter townships from application of such limitations for charter township millage and other tax levies where such limitations are provided by general law. Even in light of this clear exemption, the County still tries to apply the tax limitation in Article 9 Section 6 to the Charter Township of Comstock, as a method of limiting the Charter Township of Comstock's authority to levy a millage. Instead, charter townships, by their statutory charter, all have the authority to support their annual budget by a levy of charter millage not to exceed $^1/_2$ of 1 percent (i.e. equivalent to 5 mills) of the assessed value of all real and personal property in the township without a vote of the electorate. More specifically, this amount is not subject to the tax limitation in said Article 9 Section 6. And, more importantly herein, the road millage as levied by the Charter Township of Comstock is, likewise, not subject to the Constitutional tax limitation in a charter township, as MCL 247.670 limits the levy to 3 mills without a vote of the electorate."

4. "While the Charter Township of Comstock incorporated by resolution in 1979, practically speaking such incorporation date after the effective date of

[4] See *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352; 604 NW2d 330 (2000).

> Headlee carries with it no special consequence. There are not different types of charter townships; a charter township is a charter township, regardless of the incorporation procedure used. The various types of incorporation procedures existed prior to Headlee. Once incorporated, the Charter Township of Comstock was a new successor municipal corporation to the general law township of Comstock and, accordingly, was no longer subject to the same tax limitations. At that point, the Charter Township of Comstock was free to levy the road millage without a vote of the electorate. Charter townships and general law townships are distinct types of municipalities and are not subject to the same tax limitations."

5. "Pursuant to the following arguments, it will be clearly apparent that the County action was erroneous as a matter of law and that the Charter Township of Comstock is permitted to levy the road millage under MCL 247.670 without a vote of the electors. In reaching this conclusion, this Honorable Tribunal will consider the fundamental legal question of whether a charter township's ability to levy charter millage or other tax authorized by general law without a vote of the electorate is dependent on the procedure used for the charter township's incorporation after the effective date of the Headlee Amendment; to wit was the charter township incorporated by resolution and is such incorporation procedure determinative in the above situation."

On June 3, 2020, the parties filed responses to the opposing party's brief. In its Response, Petitioner contends that:[5]

1. "As will be discussed herein, the Respondent's arguments are nothing short of sophistry, relying on outdated or inapplicable Attorney General Opinions and case law. Incredibly, the Respondent's Brief barely references the seminal case of *American Axle* . . . and in the one time doing so leaves out the germane last portion of the Michigan Supreme Court's determination. *American Axle* provided that . . . the Headlee exemption of taxes authorized by law when the section was ratified permits the levying of previously authorized taxes even where they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date."

[5] Petitioner also contends:

> "The prior County Attorney did not just advise counsel that the road improvement millage as authorized under MCL 247.670 did not require a vote under the Headlee Amendment but then advised Mr. Hansen, the County Equalization Director, **to include the road millage in the Apportionment Report**. The County then approved the Township's road improvement millage in 2016, 2017, and 2018. The subsequent action by the County to reject the Township's 1.5 mill road levy was clearly in error." [Emphasis in the original.]

2. “In support of the Township's position from the Township's Briefs, it is incontrovertible that:

    a. The Township's 1.5 mill road improvement levy without a vote of the electorate was made pursuant to MCL 247.670.
    b. MCL 247.670 authorizes a township to levy up to 3 mills without a vote of the electorate since the 1950's.
    c. The authorization for the millage levy under MCL 247.670 existed long before the Headlee Amendments, effective December 23, 1978.
    d. The Township’s levy of a 1.5 mill road millage without a vote does not violate Article 9, Section 31 of the Headlee amendments since the authority under MCL 247.670 predated December 23, 1978.
    e. The tax limitations in Article 9 Section 6 of the Michigan Constitution of 1963(Article 9 Section 6), also known as the 15/18/50 mill tax limitations, do not apply to charter township taxes where the tax limitations are provided by charter or by general law.
    f. This non-application of the 15/18/50 mill tax limitations for charter townships predated the Headlee Amendments.
    g. The 3 mills without a vote tax levy for the Township’s road improvement millage is set forth in MCL 247.670 and therefore such limitation is ‘provided by law’ as required in Article 9, Section 6.
    h. The Charter Township of Comstock was properly incorporated by resolution as a Charter Township in 1979 under the Charter Township Act, MCL 42.1 et seq.
    i. The ability to incorporate as a charter township by resolution under the Charter Township Act predates the Headlee Amendments.
    j. Article 9, Section 6 does not provide for any different treatment for a charter township based upon when it is incorporated or how it is incorporated.
    k. The Township did not perform any action that it wasn’t authorized to perform pre-Headlee (i.e. become a charter township by resolution and levy a road improvement millage).

    These incontrovertible truths demonstrating the validity of the Township road improvement levy are in no way nullified by the arguments contained in the Respondent’s Brief.”

3. “The Respondent favorably cites *Taxpayers United Michigan Foundation v Washtenaw County* . . .[6] Importantly, in Taxpayers Unite, the Court of Appeals cited the rule established in American Axle, determining that the Roads Act provided authorization to levy without a vote prior to the Headlee Amendments. Upon close review, this case actually supports the fact that the

[6] See the unpublished opinion *per curiam* issued by the Court of Appeals in *Taxpayers United Michigan Foundation v Washtenaw County*, on August 17, 2016 (Docket No. 332469), *lv app den* 500 Mich 947; 890 NW2d 671 (2017).

Township's road millage under similar preexisting authority in MCL 247.670 does not violate Headlee.

4. ". . . the Township road millage is not subject to the Article 9 Section 6 15/18/50 mill limitations as a charter township. A charter county, a city, a village, and a charter township, among others, are all exempt from the 15/18/50 mill limitation pursuant to the specific language in Article 9 Section 6. Washtenaw County, however, is not a charter county and therefore it is subject to the 50[-]mill limitation. Accordingly, while this limitation is applicable to Washtenaw County, it is irrelevant to the Township here . . . . Respondent misses this not-very-subtle distinction and goes on to cite *Grosse Ile Committee for Legal Taxation v Twp of Grosse Ile* . . . for the for the proposition that pre-Headlee constitutional tax limitations in Article 9 Section 6 are carried over notwithstanding the Headlee Amendments in 1978.[7] Again[,] the critical distinction is that Grosse lle Township is a general law township, not a charter township. In *Grosse Ile*[,] the pertinent question was whether Headlee Amendments allowed the general law township to exceed the 50[-]mill limitation by vote of the electorate. As indicated above, the court ruled that the general law township was still subject to the 50[-]mill limitation and could not exceed that cap, even by vote of the electorate. This 50[-]mill limitation was contained in Article 9 Section 6 prior to Headlee and after, and again this limitation is not applicable to charter townships. The Charter Township of Comstock is not subject to the 50[-]mill limitation since it falls into the charter exception in Article 9 Section 6.

5. "The Respondent singularly mentions the seminal case of *American Axle* for the proposition 'that certain taxes that were 'authorized by law' before December 22, 1978 (see Const 1963, art 9, Section 31), may be imposed without a vote of the people, even if they were not actually levied before December 22, 1978.' While this statement by the Respondent is correct, it conveniently leaves off an important part of the Michigan Supreme Court's determination. In *American Axle,* 461 Mich at 357, the Michigan Supreme Court more completely added that the above allowance of preexisting tax authority even though not levied before the Headlee Amendment also applied 'even though the circumstances making the tax or rate applicable did not exist before that date.' This change of circumstances language is important as it allows a general law township to incorporate as a charter township and still make use of the pre-existing taxing powers of a charter township."

6. "*American Axle* draws no distinction in how a charter township is incorporated. Prior to the Headlee amendments certain general law townships, such as Comstock, were 'authorized by law' to incorporate as a

[7] See *Grosse Ile Committee for Legal Taxation v Gross Ile Township*, 129 Mich App 477; 342 NW2d 582 (1983).

charter township either by vote of the electorate or by resolution. If incorporation was by resolution there was, and is, a right of referendum of the public to force the issue to a vote (built in protections for the public). This change of circumstances from a general law township to a charter township was allowed by law prior to the Headlee Amendments. Regardless of how a charter township incorporates, it has the same authorities and responsibilities as every other charter township, including taxing authority. This includes the exception from the 15/18/50 mill tax limitations contained in Article 9 Section 6.

7. "Quite simply, the Township levy of 1.5 mills for road improvements under MCL 247.670 was authorized by law prior to Headlee; therefore, the tax limitations of Article 9 Section 6 do not apply since the Township is a charter township. *American Axle* allows for this changed circumstance. These processes to become a charter township and levy the road millage were known when the Headlee Amendments were passed by the voters."

8. "The decision in *American Axle* is binding case law and must be followed without adding additional limitations on its expression of taxation authority. It has provided a much[-]needed bright line analysis from 2000 to date and is often looked to for guidance. The Respondent has presently taken an obstructionist view of the Township's millage levy for roads by failing to acknowledge the full importance of the binding *American Axle* opinion. Respondent instead left out an important part of the decision in its brief and, by doing so, relies on earlier cases and attorney general opinions that did not have the benefit of this bright[]line analysis."

9. "The Respondent relies on a number of Attorney General Opinions to try to make its erroneous point that because the Charter Township of Comstock became a charter township by resolution after 1978 it is not entitled to levy the full charter millage of 5 mills. These Opinions are principally based on OAG 1985-1986, No. 6285 (April 17, 1985) . . . . [and] OAG 6285 is in direct opposition to *American Axle* . . . . The Opinion [also] determined out of whole cloth that a charter township that incorporated after Headlee by resolution would only have the authority to levy its pre-charter general law township millage rate . . . . [and] there is no basis for a charter township to continue as a general law township for tax purposes."

10. ". . . the *Scio* case cannot be used at this time to argue that the Township cannot levy its 1.5 mills for roads without a vote under MCL 247.670" as "the case was not analyzed in light of the *American Axle* case and further that the decision did not analyze a charter township that was incorporated by resolution." As for the Saginaw County case, "Respondent tries to distinguish [that case] . . . from the situation in this case but it clearly supports the Township's position."

In their Response, Respondents contend that:

1. "The arguments raised by Petitioner in its Brief are the same as those raised in advance of the County Board of Commissioners' determination that Petitioner's proposed road millage increase was not authorized by law, and have been directly addressed in Respondent's initial Brief, with supportive case law and authorities attached."

2. "Respondent's position in this matter is based chiefly upon the persuasive authority of OAG, 1985-1986, No. 6285 (April 17, 1985), and OAG, 1989-1990, No. 6588 (June 16, 1989), which are directly on point in determining that a township which became a charter township by resolution (i.e., without a vote of the people) after the effective date of the Headlee Amendment in 1978 is not entitled to levy the full Charter millage of 5 mills, but rather, must continue to operate under the maximum authorized 1 mill rate. This limitation also applies to additional taxes such as the proposed road millage under MCL 247.670. These Attorney General Opinions are applicable to State agencies and officers[] and have not been directly overturned by judicial order."[8]

3. "Petitioner admits of its post-Headlee incorporation as a Charter Township by resolution, without a vote of the electorate. Petitioner's argument relies primarily on the Supreme Court's decision in *American Axle* . . . which did not specifically address the issue that is before the Tax Tribunal in this case, nor specifically overrule the Attorney General Opinions relied upon by Respondent . . . . Rather, *American Axle* dealt with the issue of judgment tax levies under MCL 600.6093, which pre-dated Headlee (the historic foundation for this statute was originally enacted in 1887), but is by its terms applicable to any municipality, i.e., both general law and charter townships were empowered both pre- and post-Headlee to levy taxes in addition to otherwise authorized millages to pay judgments. See Const 1963, art. 9, sec. 31."

4. "By contrast, when the Headlee Amendment was ratified in 1978, Comstock Township as a general law township was not 'empowered' at that time to levy the full 5 mills that a charter township was authorized to levy under MCL 42.27(2).[9] The intent of the people is paramount in the interpretation of a constitutional provision. The purpose and intent of the Headlee Amendment was to require voter approval for new or increased local taxes. See Const 1963, art. 9, sec. 25 . . . . Thus, a general law township could not thereafter effectively raise local taxes without a vote of the people by the expediency of adopting a resolution to become a charter township, as emphasized by the Attorney General in the Opinions reasonably relied upon by Respondent that make the distinction between charter townships that were incorporated post-

[8] See *Beer & Wine Ass'n v Atty General*, 142 Mich App 294, 300; 370 NW2d 328 (1985).
[9] See *Bailey v Muskegon County Board of Comm'rs*, 122 Mich App 808, 821; 333 NW2d 144 (1983).

> Headlee by resolution only, and those that are authorized by a vote of the electorate . . . . This distinction is evident in other case law cited by Respondent in its initial Brief, including *Smith* [case] . . . in which the vote of the people was necessary to raise the tax limits, where the vote to become a charter township was deemed sufficient to do so. This was consistent with both the letter and the 'tax revolt' spirit of Headlee.[10] See also *Saginaw County* . . . in which the tax increase was authorized by a vote of the people, which vote itself took into account the potential change in structure of the School District . . . Under this analysis, a general law township which became a charter township after 1978 without a vote of the people cannot avoid the tax limitations in Const 1963, art. 9, sec. 6. The case of *Taxpayers United Michigan Foundation v Washtenaw County* . . . cited by Petitioner, is unavailing, as the Court there was without jurisdiction to rule on the tax limit issue. Therefore, although Comstock Township was empowered to levy a road millage under MCL 247.670 both before and after 1978 without a vote of the people (which Respondent does not dispute), it was always required to do so within its constitutional limits, absent a vote of the people to increase those limits."[11]

5. "The Opinions of the Attorney General cited above, with which Kalamazoo County agreed, are to the effect that the Headlee Amendment, by operation of law, precludes a township that incorporated as a charter township by resolution only after 1978 from taking advantage of the higher statutory charter millage limits, or of the higher limits on total taxation enjoyed by a charter township. To do so requires a vote of the people, either to incorporate as a charter township, or to increase its taxes. Otherwise, the Headlee Amendment constitutional provision would be rendered devoid of meaning and effect, contrary to the will of the people of the State of Michigan who ratified it."

STANDARD OF REVIEW

There are no specific Tribunal rules governing requests for summary disposition. Thus, the Tribunal is bound to follow the Michigan Rules of Court in rendering decisions on such requests.[12] In this case, the parties request summary disposition in their respective favors under MCR 2.116(C)(10).[13] Summary disposition under MCR

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[10] See *Saginaw County*, *supra*.
[11] See *Grosse Ile Committee*, *supra* at 494-495; OAG, 1985-1986, No. 6285 (April 17, 1985); OAG, 1956 (Vol. II), No. 2577, p 255 (May 7, 1956); OAG, 1955 (Vol I), No. 2318, p 560 (October 20, 1955). To like effect, see OAG, 2015, No. 7287 (October 21, 2015).
[12] See TTR 215.
[13] Although Respondents' brief does not specifically state the Court Rule under which it requests summary disposition, the Tribunal concludes that it requests summary disposition under MCR 2.116(C)(10) because its argument concerns statutory interpretation, which would be appropriate under MCR 2.116(C)(10).

2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the requesting party asserts there is no genuine issue of material fact. Under subsection (C)(10), a request for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the requesting party is entitled to judgment as a matter of law.[14]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-requesting party.[15] The requesting party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[16] The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.[17] Where the burden of proof at trial on a dispositive issue rests on a non-requesting party, the non-requesting party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[18] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the request is properly granted.[19]

CONCLUSIONS OF LAW

The Tribunal has carefully considered both parties' briefs and responses under MCR 2.116 (C)(10) and finds that denying Respondents' request and granting Petitioner's request is, as indicated above, warranted. Although the parties do not dispute the Tribunal's jurisdiction, the Tribunal nonetheless confirms its subject matter jurisdiction over the underlying issue in this case, as the dispute concerns a millage levy and the Supreme Court has stated that a dispute concerning the number of mills levied is within the Tribunal's exclusive and original jurisdiction.[20]

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[14] See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).
[15] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[16] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[17] *Id.*
[18] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[19] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[20] See *Hillsdale Co Senior Servs v Hillsdale Co*, 494 Mich 46, 54-55; 832 NW2d 728 (2013), which provides, in pertinent part:

The parties do, however, dispute whether Petitioner's millage is authorized. Petitioner's rate request for the 2019 tax year shows an operating millage of 0.9764 and "extra voted millages."[21] Under the Property Tax Limitation Act,[22] a general law township may levy up to 1 mill, subject to the Headlee rollback fraction.[23] MCL 42.27(2) provides a limit for a charter townships of 5 mills. The parties do not dispute that, at the time the Headlee Amendment was ratified, Petitioner had not been incorporated as a charter township, and thus at that time it could only levy the general law township limit of 1 mill. As such, the Tribunal must determine whether Petitioner's subsequent incorporation by resolution authorized it to levy up to the charter township limit of 5 mills.

In that regard, Article IX, Section 6 of the Michigan Constitution provides limitations on mills levied:

> Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. Under procedures provided by law, which shall guarantee the right of initiative, separate tax limitations for any county and for the townships and for school districts therein, the aggregate of which shall not exceed 18 mills on each dollar of such valuation, may be adopted and thereafter altered by the vote of a majority of the qualified electors of such county voting thereon, in lieu of the limitation hereinbefore established. These limitations may be increased to an aggregate of not to exceed 50 mills on each dollar of valuation, for a period of not to exceed 20 years at any one time, if approved by a majority of the electors, qualified under Section 6 of Article II of this constitution, voting on the question.[24]

However, these limitations do not

> Plaintiffs simply argue that defendant is required to levy and spend more – that defendant must levy a larger "amount of charge," 100 percent of the full 0.5 mill. Accordingly, this case does pertain to "rates." Thus, all four elements of MCL 205.731(a) are satisfied, and the tribunal possesses exclusive and original jurisdiction in this case.

[21] See 2019 Tax Rate Request, attached as part of exhibit C to Petitioner's Motion pdf p 43.
[22] See 1933 PA 62, MCL. 211.201 *et seq*.
[23] See MCL 211.201, *et seq*., and MCL 311.34d. See also OAG 1985-1986, No. 6285 (explaining that "the limitation for a general law township is approximately one mill, as compared to the five[-]mill limitation of a charter township").
[24] See Const 1963, art 9, § 6.

> apply . . . subject to the provisions of Section 25 through 34 of this article, **to taxes imposed for any other purpose by any city, village, charter county, charter township, charter authority or other authority, the tax limitations of which are provided by charter or by general law**.[25]

As such, Petitioner's tax limitations are not provided by Section 6. Rather, for a charter township such as Petitioner, Section 31, part of the Headlee Amendment,[26] provides said limitations:

> Units of Local Government are hereby prohibited **from levying any tax not authorized by law or charter when this section is ratified** or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, **without the approval of a majority of the qualified electors of that unit of Local Government voting thereon**.[27]

The authorities most directly on point are opinions of the Attorney General, which are not binding precedent but can be considered persuasive.[28] In an opinion issued in 1985, the Attorney General was asked "[w]hen a general law township incorporates a charter township, by resolution and without a vote of the township electors, after the effective date of the 1978 amendments to Const 1963, art 9 (the Headlee Amendment), is the township prohibited from levying millage at a charter township rate which is higher than the rate it was previously authorized to levy as a general law township?"[29] The Attorney General cited caselaw that explained that "[t]he Headlee Amendment grew out of the spirit of 'tax revolt' and was designed to place specific limitations on state and local revenues. The ultimate purpose was to place public spending under direct popular control."[30] The opinion also relied on *Lockwood v Comm'r of Revenue*:[31]

> A constitutional limitation must be construed to effectuate, not to abolish, the protection sought by it to be afforded. It was Mr. Justice CAMPBELL who wrote as long ago as the 13th volume of the Michigan reports that:

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[25] See Const 1963, art 9, § 6 (emphasis added).
[26] "The Headlee Amendment, adopted by referendum effective December 23, 1978, amended Const. 1963, art. 9, § 6, and added §§ 25–34. Art. 9, § 6." See *American Axle*, *supra* at 355–356.
[27] See Const 1963, art 9, § 31 (emphasis added).
[28] See *Williams v City of Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000).
[29] See OAG 1985-1986, No. 6285 (April 17, 1985).
[30] *Id*., citing *Waterford School Dist v State Bd of Educ*, 98 Mich App 658, 663; 296 NW2d 328 (1980) and *Grosse Ile Committee*, *supra*.
[31] See *Lockwood v Comm'r of Revenue*, 357 Mich 517, 557-558; 98 NW2d 753 (1959).

> If the people, in establishing their government, see fit to place restrictions upon the exercise of any privilege, it must be assumed that in their view the exercise of the privilege without the restriction would be inexpedient and dangerous, and would not, therefore, have been permitted. Every restriction imposed by the Constitution must be considered as something which was designed to guard the public welfare, and it would be a violation of duty to give it any less than the fair and legitimate force which its terms require. What the people have said they design[] they have an absolute and paramount right to have respected . . . .
>
> The presumption of constitutionality cloaking all the acts of our co-ordinate branch of government cannot prevail where the statute is "prohibited by the express language of the Constitution or by necessary implication."

Based upon these authorities, the Attorney General reasoned:

> While the Headlee Amendment did not impose a requirement of voter approval upon the incorporation of a charter township, it did impose a requirement of voter approval for the increase in authorized millage resulting from a change from general law township status to charter township status. Thus, the Headlee Amendment super[s]eded the authorized millage limitation for a charter township, MCL 42.27; MSA 5.46(27), when a charter township became incorporated subsequent to the effective date of Headlee, without a vote of the township's electors pursuant to MCL 42.3a(2)(b); MSA 5.46(3a)(2)(b). Such a township would continue as a general law township for purposes of its taxing authority unless and until a vote of the township's electors approved the higher millage levy, as required by the Headlee Amendment. As indicated in footnote 3 above, 25 such charter townships are already in existence. With the reduction in the population requirement of 1984 PA 361, from 5,000 to 2,000, an additional 301 general law townships will be eligible to adopt charter township status by final resolution only.
>
> It is my opinion, therefore, that charter townships incorporated after December 22, 1978, the effective date of Const 1963, art 9, Sec. 31, by final resolution of the township board and without an approving vote of the township's electors, are prohibited from levying millage at a charter township rate higher than the township's previously authorized millage limitation as a general law township.

When interpreting constitutional provisions, two rules of construction apply, the first of which is that "the interpretation should be the sense most obvious to the common

understanding; the one which reasonable minds, the great mass of people themselves, would give it."[32] The second rule is to consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished."[33] The Tribunal finds the opinion of the Attorney General persuasive because the most obvious understanding of the Headlee Amendment is that an increase in taxes, such as a township having the authority to increase its millage, must be approved by the voters. Further, the Headlee Amendment's purpose was "to place public spending under direct popular control,"[34] and this purpose would be thwarted if a township could accomplish an increase in taxes by resolution. The Tribunal recognizes that incorporating by resolution is provided by statute, and that incorporation by resolution has an accompanying right of referendum by the taxpayers.[35] Although a vote to incorporate gives a charter township the authority to levy up to 5 mills without direct approval of the millage,[36] the Tribunal is unaware of any caselaw holding that failure to exercise a right of referendum for incorporation is the same as the "approval of a majority of the qualified electors"[37] required by the Headlee Amendment.

Caselaw is also instructive. In *Bailey v Muskegon County Board of Commissioners*,[38] the Court of Appeals looked to the drafter's notes for the Headlee Amendment, which stated that the amendment's intent "was to permit Local units to retain those taxing powers they had by state law or local charter prior to the effective date of the amendment."[39] The Court explained that

> . . . the term 'authorized by law' does not require that a tax actually be levied on the date that the Headlee Amendment became effective. Rather, it requires only that a local government be *empowered* to levy the tax on

[32] See *Makowski v Governor*, 495 Mich 465, 472; 852 NW2d 61 (2014) (quotation marks and citation omitted).
[33] *Id*. (quotation marks, citation, and alteration omitted).
[34] See *Waterford School Dist*, *supra* at 663 and *Grosse Ile Committee*, *supra*.
[35] See MCL 42.3a(2)(b).
[36] See *Smith*, *supra* at 388.
[37] See Const 1963, art 9, § 31 (emphasis added).
[38] See *Bailey*, *supra*.
[39] *Id*. at 821 (citation omitted).

> the date that the Headlee Amendment was ratified, even if the local government had not exercised its authority."[40]

In *Smith*, the Court explained:

> The plain language of Headlee prohibits a local government from levying a tax in excess of that permitted by law or charter and it prohibits increasing the authorized tax rate without approval of the electors. But nowhere does Headlee require a direct vote of the electors in order to permit a local unit of government to increase taxes if the local unit of government has the authority by law or charter to levy the increase."[41]

In *Saginaw Co*, the county voters approved millages related to school districts in 1974, before the passage of the Headlee Amendment.[42] The resolution approving the millages provided that school districts could levy 9.05 mills, but school districts located entirely within a city or charter township could levy an additional mill.[43] At the time of the Headlee Amendment's passage, the school district at issue was located in two townships, but later redrew its boundaries so that it was entirely within one charter township.[44] The Court stated that the higher millage rate was authorized by law at the time the Headlee Amendment was passed and the tax was "not a new kind of tax."[45] It explained that "[w]hen defendant's geographical configuration changed, it then became eligible to tax according to the applicable **preexisting tax structure**."[46]

Finally, in *American Axle*, the City of Hamtramck added a levy of 30 mills to 1994 tax bills under the authority of MCL 600.6093.[47] The Supreme Court explained that the "Headlee exemption of taxes authorized by law when the section was ratified permits the levying of previously authorized taxes even where they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date."[48] The *American Axle* Court relied in part on

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[40] *Id*.
[41] See *Smith*, *supra* at 386.
[42] See *Saginaw Co*, *supra* at 364.
[43] *Id*.
[44] *Id*.
[45] *Id*. at 366.
[46] *Id*. (emphasis added).
[47] See *American Axle*, *supra* at 355.
[48] *Id*. at 357.

the analysis in *Bailey*. The Court concluded that MCL 600.6093 gave the City of Hamtramck "preexisting authorization" to levy the tax and thus voter approval was not required.[49]

The Tribunal concludes that Petitioner was not "authorized by law" to levy the charter millage at the time the Headlee Amendment was passed, and as such, its limitation is 1 mill adjusted by the Headlee Rollback Fraction. As stated above, the Tribunal considers OAG 1985-1986, No. 6285 to be persuasive. The Court in *Bailey* also explained that, for a tax to have been "authorized by law" at the time the Headlee Amendment was passed, the local unit must have been empowered to levy the tax, even if it had not done so.[50] The taxes at issue in *Saginaw Co* and *American Axle* fit this definition. In *Saginaw Co*, the voters had already approved an extra one mill levy for school districts that fit entirely within a charter township.[51] The tax at issue in *American Axle* was already law as part of the Revised Judicature Act at the time the Headlee Amendment was passed.[52] Here, however, Petitioner was not empowered to levy the charter township millage at the time the Headlee Amendment was ratified. And the Tribunal concludes that incorporating by resolution after the Headlee Amendment is not a mere "change in circumstances." In dicta, the *Saginaw Co* Court referenced two of the opinions relied upon by Respondents, OAG, 1985–1986, No. 6285, p 46 (April 17, 1985), and OAG, 1989–1990, No. 6588, p 149 (June 16, 1989), and distinguished the opinions from the case before it. The Court of Appeals recognized that a change from a general law township to a charter law township "exposes property owners to a new category of taxes."[53] Although not binding, the Tribunal may consider dicta to be persuasive.[54] The Tribunal is persuaded that a change from a general law township to a charter township constitutes a change in the "tax structure,"[55] because it allows a township to levy new taxes. Although Petitioner had the authority to incorporate by

[49] *Id.* at 364.
[50] See *Bailey*, *supra* at 821.
[51] See *Saginaw Co*, *supra* at 364.
[52] See *American Axle*, *supra* at 364.
[53] See *Saginaw Co, supra* at 365.
[54] See *Carr v City of Lansing*, 259 Mich App 376, 383–384; 674 NW2d 168 (2003).
[55] See *Saginaw Co*, *supra* at 366.

resolution prior to the Headlee Amendment,[56] it did not have the authority to levy the charter township millage because it was not a charter township at that time. Petitioner's argument that it must be allowed to levy the charter millage is belied by the fact that it functioned under a 1 mill levy, adjusted by the Headlee Rollback fraction, for the 2016, 2017, and 2018 tax years.[57] Accordingly, because Petitioner was not a charter township prior to the passage of the Headlee Amendment, it was not authorized to levy the charter township rate at that time.

The Tribunal concludes, however, that Petitioner was authorized to levy the tax at issue. The tax at issue arises under MCL 247.670, which provides, in pertinent part, that

> the township board of **any township** may also levy a property tax of not to exceed 3 mills on each dollar of assessed valuation of the township in any year for the maintenance or improvement of county roads within the township or for the widening of state trunk line highways, as aforesaid, without submitting the question to the electors of said township. . . .[58]

As stated above, the Court in *Bailey* stated that a local unit is authorized by law if it is "**empowered** to levy the tax on the date that the Headlee Amendment was ratified, even if the local government had not exercised its authority."[59] The Legislature placed this statute into law in 1951,[60] and, as a result, it had been enacted before the Headlee Amendment was ratified. Further, Petitioner would have had the authority to levy this tax regardless of being a general law township because the statute provides that **any** township could levy the tax. MCL 247.670 provides both the authority to levy the tax and the rate that a township could levy without a vote. The Tribunal therefore concludes that Petitioner was "authorized by law" to levy the tax under MCL 247.670 prior to the ratification of the Headlee Amendment.

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[56] See MCL 42.3a.
[57] See 2016, 2017, and 2018 Tax Rate Requests, attached as part of exhibit C to Petitioner's Motion, pdf pp 40-42.
[58] See MCL 247.670 (emphasis added).
[59] See *Bailey*, *supra* at 821.
[60] See 1951 PA 51.

Respondents argue that Petitioner may not levy the millage requested because it must be within Petitioner's authorized limit, citing opinions of the Attorney General.[61] The Tribunal concludes that Petitioner had the authority to levy the tax under MCL 247.670 because the statute allows townships to levy the tax above its authorized rate. One of the opinions cited by Respondents states that a vote is required to levy the tax under MCL 247.670 when the levy would exceed the township's authorized limit, and that "[s]uch a vote is not a vote for a levy, but is a vote to raise the tax limitation ceiling for the township."[62] As stated above, opinions of the Attorney General are not binding precedent but can be considered persuasive.[63] The Tribunal concludes that MCL 247.670 unambiguously grants a township the authority to levy the tax up to 3 mills without a vote of the people, and that it did so prior to the ratification of the Headlee Amendment.

Further, the allocated millage limit under the Property Tax Limitation Act may be exceeded with a vote of the people.[64] By expressly granting any township the authority to levy up to 3 mills without a vote of the people, MCL 247.670 effectively allows the township to levy an additional tax above the limit. In other words, the limitations are those that may not be exceeded without a vote, and because no vote is required, those limitations do not apply to the tax levy under MCL 247.670. In addition, "a fundamental rule of [statutory] construction is that every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible."[65] The township already had the authority to levy up to its allocated or charter millage, and to appropriate any unexpended balances in the general fund or "county road fund of the county for the maintenance and/or improvement of county roads within the townships, or for the widening of state trunk line highways beyond the width required for state trunk

[61] See OAG, 1985-1986, No. 6285 (April 17, 1985), II OAG, 1956, No. 2577, p 255 (May 7, 1956), I OAG, 1955, No. 2318, p 560 (October 20, 1955), and OAG, 2015, No. 7287 (October 21, 2015).
[62] See OAG, 1955 (Vol I), No. 2318, p 560 (October 20, 1955).
[63] See *Williams*, 243 Mich App at 557.
[64] See Const 1963, art 9, § 6, 1933 PA 62, MCL. 211.201 *et seq*. The Tribunal notes that the 5-mill charter millage may also be exceeded with a vote of the people. See MCL 42.27(2).
[65] See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 714; 664 NW2d 193 (2003) *citing Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 364; 459 NW2d 279 (1990).

line traffic in unincorporated areas of such township . . . ."[66] If a township could only levy the road millage up to either its allocated or charter millage, MCL 247.670's grant of authority to levy up to 3 mills without a vote of the people would be surplusage, because it could already do so.

In sum, the Tribunal concludes that Petitioner did not have the authority to levy the 5-mill charter millage, but that it could levy the mills under MCL 247.670, nonetheless. Finally, the Tribunal concludes that Respondents' determinations for previous tax years are irrelevant because such determinations are made "each year."[67]

PROPOSED JUDGMENT

IT IS ORDERED that Respondents' Request for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Petitioner's Request for Summary Disposition is GRANTED.

EXCEPTIONS

This is a **proposed** decision ("POJ") prepared by the Michigan Administrative Hearings System and **not** a final decision.[68] As such, **no** action should be taken based on this decision, as the parties have 20 days from date of entry of this POJ to **notify** the Tribunal **in writing if they do not agree with the POJ and** to **state in writing** why they do not agree with the POJ (i.e., exceptions).

Exceptions are **limited** to the evidence submitted and any matter addressed in the POJ. There is no fee for filing exceptions and the opposing party has 14 days from the date the exceptions were mailed to that party to file a written response to the exceptions.[69]

Exceptions and responses filed by **e-mail or facsimile** will **not** be considered in the rendering of the Final Opinion and Judgment. A copy of a party's written exceptions or response **must** be sent to the opposing party **by mail or email, if** email service is agreed upon by the parties**,** and proof must be submitted to the Tribunal demonstrating that the exceptions or response were served on the opposing party.

After the expiration of the time period for the opposing party to file a response to the exceptions, the Tribunal will review the case file, including the POJ and all exceptions and responses, if any, and:

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[66] See MCL 247.670.
[67] See MCL 211.37.
[68] See MCL 205.726.
[69] See MCL 205.762(2) and TTR 289(1) and (2).

1. Issue a Final Opinion and Judgment (FOJ) adopting the POJ as the final decision.
2. Issue an FOJ modifying the POJ and adopting the Modified POJ as the final decision.
3. Issue an Order vacating the POJ and ordering such other action as is necessary and appropriate.

Entered: September 28, 2020 By Peter M. Kogler

PMK/wmm

Comstock Township,
Petitioner,

v

Kalamazoo County and Kalamazoo County Board of Commissioners,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 19-003909

Presiding Judge
Steven M. Bieda

FINAL OPINION AND JUDGMENT

The Tribunal issued a Proposed Opinion and Judgment (POJ) on September 28, 2020. The POJ states, in pertinent part, "[t]he parties have 20 days from date of entry of this POJ to notify the Tribunal in writing, by mail or by electronic filing, if available, if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions)."

Neither party has filed exceptions to the POJ.

The Administrative Law Judge (ALJ) considered the testimony and evidence submitted and made specific findings of fact and conclusions of law. The ALJ's determination that Petitioner was authorized to levy the tax at issue under MCL 247.670 is supported by the evidence and applicable statutory and case law.

Given the above, the Tribunal adopts the POJ as the Tribunal's final decision in this case.[1] The Tribunal also incorporates by reference the Conclusions of Law contained in the POJ in this Final Opinion and Judgment. As a result:

IT IS ORDERED that Respondent's Request for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Petitioner's Request for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that the October 15, 2019 Resolution Authorizing 2019 Tax Rates for Comstock Township Within Statutory Limits is VACATED.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

[1] See MCL 205.726.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A motion for reconsideration must be filed with the Tribunal with the required filing fee within 21 days from the date of entry of the final decision.[2] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[3] You are required to serve a copy of the motion on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[4] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[5]

A claim of appeal must be filed with the Michigan Court of Appeals with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[6] You are required to file a copy of the claim of appeal with filing fee with the Tribunal in order to certify the record on appeal.[7] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[8]

By _____

Entered: November 16, 2020
ssm

[2] See TTR 261 and 257.
[3] See TTR 217 and 267.
[4] See TTR 261 and 225.
[5] See TTR 261 and 257.
[6] See MCL 205.753 and MCR 7.204.
[7] See TTR 213.
[8] See TTR 217 and 267.

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IT IS FURTHER ORDERED that Petitioner's Request for Summary Disposition is GRANTED.

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