PUBLIC CORPORATION LAW SECTION
Respectfully submits the following position on:

*

Amicus Curiae Brief in Jeffrey K. Haynes and Karen M. Haynes vs. Village of Beulah

*

The Public Corporation Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Public Corporation Law Section is 614.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 21. The number who voted in favor to this position was 12. The number who voted opposed to this position was 0. The number who abstained from voting was 1.

SBM State Bar of Michigan | PUBLIC CORPORATION LAW SECTION

Report on Public Policy Position

Name of Section:
Public Corporation Law Section

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Regarding:
Amicus Curiae Brief in Jeffrey K. Haynes and Karen M. Haynes vs. Village of Beulah

Date position was adopted:
January 21, 2014

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
21

Number who voted in favor and opposed to the position:
12 Voted for position
0 Voted against position
1 Abstained from vote
8 Did not vote

Position:
The issues presented in this case—having to do with the potential loss of portions of public rights-of-way by virtue of an illegal encroachment by an adjacent property owner—have significant public interest to all municipalities in the State of Michigan. The extent to which a reversal of the trial court's reasoned opinion, applying MCL 247.190 to preclude the loss of Village right-of-way by acquiescence, would affect municipalities throughout the state would be hard to overstate. There are no doubt countless encroachments of a similar nature and extent into the some 20,000 miles of city/village rights-of-way that communities in Michigan have long understood and expected could ***not*** ripen into some claim of right or ownership. That has in fact been the hard and fast rule in Michigan for more than a century. While the adjacent property owners here rely heavily on this Court's decision in *Mason v Menominee*, 282 Mich App 525; 766 NW2d 888 (2009), that case does not apply here, because it did not involve public highways such as these and was incorrectly decided, in any event, and thus should not factor into this Court's decision for the reasons elaborated in the proposed *Amicus* brief.

Explanation of the position, including any recommended amendments:
See attached document.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

JEFFREY K. HAYNES and KAREN M. HAYNES,

Plaintiffs/Counter-Defendants/Appellants,

-vs-

VILLAGE OF BEULAH, a Michigan municipal corporation,

Defendant/Counter-Plaintiff/Appellee.
_____/

Court of Appeals No. 317391

Lower Court Case No. 12-9517-CH

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_____/

BRIEF *AMICUS CURIAE* OF THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN AND THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT/COUNTER-PLAINTIFF/APPELLEE VILLAGE OF BEULAH

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STATEMENT OF THE BASIS OF JURISDICTION

Amici incorporate the Statement of Basis of Jurisdiction of the Appellee Village of Beulah.

STATEMENT OF THE QUESTIONS PRESENTED

I. DOES MCL 247.190 APPLY TO THE VILLAGE STREETS AT ISSUE AND BAR PLAINTIFFS' CLAIM OF ACQUIESCENCE?

Plaintiffs/Counter-Defendants/Appellants answer: No
Defendant/Counter-Plaintiff/Appellee answers: Yes
The Trial Court answered: Yes
The Court of Appeals should answer: Yes
Amici Curiae MML and PCLS answer: Yes

II. SHOULD THE HOLDING OF *MASON V MENOMINEE,* ALLOWING A CLAIM OF ACQUIESCENCE IN PUBLIC PARKLAND, BE EXTENDED TO PUBLIC RIGHTS-OF-WAY, AS PROPOSED BY THE APPELLANTS, DESPITE THE FACT THAT *MASON* WAS INCORRECTLY DECIDED AND SHOULD BE CORRECTED BY THIS COURT?

Plaintiffs/Counter-Defendants/Appellants answer: Yes
Defendant/Counter-Plaintiff/Appellee would answer: No
The Trial Court did not reach the issue.
The Court of Appeals should answer: No
Amici Curiae MML and PCLS answer: No

STATEMENT OF INTEREST

The Public Corporation Law Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 590 attorneys who generally represent the interests of government corporations, agencies, departments and boards, including townships, counties, villages, cities, schools and charter and special authorities. The Public Corporation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the State Bar of Michigan website, public service programs, and publication of *Public Corporation Law Quarterly*. Although membership in the Public Corporation Section is open to all members of the State Bar, the focus of the Section is centered on laws and procedures relating to public law and government corporations, agencies, departments and boards, including townships, counties, villages, cities, schools and charter or special authorities. The Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Public Corporation Law Section of the State Bar of Michigan participates in cases that are significant to governmental entities throughout the State of Michigan. The Public Corporation Law Section has filed numerous *Amicus Curiae* briefs before the appellate courts.

The Public Corporation Law Section Council, the decision-making body of the Section, is comprised of 21 members. The filing of this *Amicus Curiae* Brief was authorized at the November 9, 2013 regular meeting of the Council. Thirteen Council members were present at the meeting, and the motion passed on a vote of 12-0, with one abstention. No Council member opposed the filing. The position expressed in this *Amicus Curiae* Brief is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan.

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages, many of which

are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors[1], which is broadly representative of its members. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The issues presented in this case—having to do with the potential loss of portions of public rights-of-way by virtue of an illegal encroachment by an adjacent property owner—have significant public interest to all municipalities in the State of Michigan. The extent to which a reversal of the trial court's reasoned opinion would affect municipalities throughout the state would be hard to overstate. There are no doubt countless encroachments of a similar nature and extent into the some 20,000 miles of city/village rights-of-way in Michigan. These communities have long understood and expected that such encroachments could ***not*** ripen into some claim of right or ownership, because that has been the hard and fast rule in Michigan for more than a century. While the adjacent property owners here rely heavily on this Court's decision in *Mason v Menominee*, 282 Mich App 525; 766 NW2d 888 (2009), that case does not apply here, because it did not involve public roads such as these. But *Mason* was incorrectly decided, in any event, and thus should not factor into this Court's decision for the reasons elaborated upon below.

[1] The 2013-2014 Board of Directors of the Legal Defense Fund are: Lori Grigg Bluhm, Chair, City Attorney, Troy; Clyde J. Robinson, Vice-Chair, City Attorney, Kalamazoo; Randall L. Brown, City Attorney, Portage; Eric D. Williams, City Attorney, Big Rapids; James O. Branson, City Attorney, Midland; James J. Murray, City Attorney, Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee; John C. Schrier, City Attorney, Muskegon; Thomas R. Schultz, City Attorney, Farmington and Novi; Catherine M. Mich, City Attorney, Grand Rapids; Daniel P. Gilmartin, Executive Director and CEO of Michigan Municipal League; Jacqueline Noonan, Mayor, Utica, and President, Michigan Municipal League; and William C. Mathewson, General Counsel, Michigan Municipal League and Fund Administrator.

INTRODUCTION

The Appellants in this case, the Hayneses, ask this Court to hold that a homeowner who puts railroad ties and a line of rocks within platted road rights-of-way—the exact width and location of which were easily discernible at the time and at all points thereafter by reference to documents on file at the Appellee Village and elsewhere—can claim ownership of that portion of the platted street under the doctrine of acquiescence. The Hayneses do not allege that they, or their predecessors, ever had a conversation with anyone at the Village about the location of the respective property lines. They never assert that any employee or officer of the Village actually thought that the railroad ties and/or rocks actually marked the edge of the platted right-of-way of either street. Nor do they deny that the placement of the encroachments in the rights-of-way was by Village Ordinance an illegal act—punishable by up to 90 days in jail—at the time it was done. Finally, the Hayneses' complaint lacks any assertion that any Village employee or official had the authority or ability to "acquiesce" in that ordinance violation, or to the change to the boundary line of the street, a fact that in and of itself should be enough to defeat an acquiescence claim on its face.

The trial court did not reach the merits of the Hayneses' acquiescence claim, however. The trial court instead granted the Village's Motion for Summary Disposition and dismissed the claim on the grounds that MCL 247.190, currently codified as part of the Highways Chapter of the Michigan Compiled Laws, barred an acquiescence claim to the streets at issue. MCL 247.190 states that all "public highways shall be and remain a highway of the width at which they were dedicated," and that "no encroachments by fences, buildings, or otherwise which may have been made since the . . . dedication . . . shall give the party or parties, firm or corporation so encroaching, any title or right to the land so encroached upon."

The Hayneses assert on appeal that this section of the Highways Chapter does not apply to platted village streets or roads. *Amici* agree with the Appellee Village that, when read in

context and in *pari materia* with other relevant statutory provisions, the section clearly ***does*** apply. Initially adopted in 1925, it replaced several provisions of the 1909 General Highway Laws, and when read in the context of that act as subsequently codified, the term "public highway" for purposes of the Act plainly included streets and roads within a city or village, as several decisions of the appellate courts of this state have recognized.

Although the trial court did not reach the question whether the doctrine of acquiescence even applied as against a village street, because of its reliance on MCL 247.190, the Hayneses' Brief on Appeal spends a significant amount of time posturing their claim as simply a logical extension of this Court's decision in *Mason v City of Menominee*, *supra*, which held that acquiescence could apply to public lands (in that case, the property was part of a city park). Although this Court need not reach that question, because the trial court's ruling did not reach the "merits" of the actual claim of acquiescence, the idea pressed by the Hayneses that asserting acquiescence, or its close relative adverse possession, against a municipality with respect to a street (or a park or other public ground) is normal, or typical, or not unusual, demands a response.

When the *Mason* case was appealed to the Michigan Supreme Court (which denied leave to appeal on September 23, 2009), both the Public Corporation Law Section of the State Bar and the Michigan Municipal League Defense Fund filed an amicus brief on behalf of Menominee, arguing that acquiescence and adverse possession could not be asserted against a municipality. The argument relied on the relevant provisions of the Revised Judicature Act, MCL 600.5801 and MCL 600.5821, and not MCL 247.190, which is at issue in this case. This Court should find in the Village's favor on the applicability of MCL 247.190, but the Court should also be aware in reaching that conclusion that the primarily focus of the Hayneses' argument—that acquiescence can apply at all to these public streets, or to any public grounds—is incorrect, and this Court will need to revisit its decision in the *Mason* case at some point.

The implications of the Hayneses' arguments that they have acquired part of Lake Street and Commercial Street by acquiescence are staggering. They argue that the simple act of laying some railroad ties on the ground and placing a row of rocks in the right-of-way, coupled with the failure of the Village to remove those encroachments for a period of 15 years, took that land from the public and made it theirs. Yet what the Hayneses did is no different from what property owners all over the State of Michigan, in surely every municipality of any size and countless platted subdivisions, have done.

The reason why acquiescence or adverse possession cannot reasonably apply to public streets in particular was memorably articulated by the Missouri Supreme Court in *Laclede-Kristy Clay Products Co. v City of St. Louis*, 246 MO 446; 151 SW 460 (1912), a case decided at roughly the same time Michigan was re-writing and strengthening its highway laws:

> There are greater reasons why city streets should not be subject to destruction by nonuse or adverse possession than can be found applicable to any other kind of property. No other kind of public property is subject to more persistent and insidious attacks, or is less diligently guarded against seizure.

There are roughly 20,000 miles of local municipal (city/village) roads in Michigan.[2] The ruling that the Hayneses seek would not apply to just the streets in the Village of Beulah, or even just to villages. It would extend to every mile of local roads and streets in Michigan. Beulah might be small, but the Court can imagine how a city like Novi, with about 170 miles of local streets, or Farmington Hills (240 miles), or Grand Rapids (600 miles)[3] would fare when faced with such a change in the law affecting their rights-of-way.

What the Hayneses ask this Court to do is to put at risk an incalculable amount of that public right-of-way and to authorize a massive transfer of public property into the hands of trespassers through nothing more than the inattention of municipal employees or officials. For

[2] http://www.michiganhighways.org/introduction.html
[3] See Exhibit A.

a century the law has been clear that there is a distinction between public and private property when it comes to acquiescence and adverse possession. Both are so plainly contrary to the very concept of dedication and acceptance of public roads and the idea of a right-of-way, and this sort of argument is exactly what MCL 247.190, and §§ 600.5801 and 600.5821 of the Revised Judicature Act, were intended to protect the public against.

It is precisely because of provisions like MCL 247.190 and the construction of the Revised Judicature Act before the *Mason* decision that the Village of Beulah had, at the time of the alleged encroachments, ***no reason*** to think that the railroad ties or the line of rocks placed in its rights-of-way would have affected its title thereto in any way. No relevant statutes on this subject have changed to merit the fundamental shift in the law that these Appellants propose—only *Mason*, which should not be extended now to the most basic thing municipalities do: opening and maintaining public road systems.

STATEMENT OF FACTS

Amici adopt the Statement of Facts as set forth in the Appellee Village's Brief of Appeal.

STANDARD OF REVIEW

The trial court below granted summary disposition to the Village. A trial court's determination to grant summary disposition is reviewed by an appellate court *de novo*. Issues of statutory interpretation and other questions of law are reviewed *de novo*. *DEQ v Worth Twp*, 491 Mich 227, 237-238; 814 NW2d 646 (2012); *2000 Baum Family Trust v Babel,* 488 Mich 136, 143; 793 NW2d 633 (2010); *Eggleston v Bio–Med. Applications of Detroit, Inc.,* 468 Mich 29, 32, 658 N.W.2d 139 (2003).

ARGUMENT

I. MCL 247.190 DOES APPLY TO THE VILLAGE STREETS AT ISSUE AND BARS PLAINTIFFS' CLAIM OF ACQUIESCENCE.

MCL 247.190 states in full:

> ***All public highways for which the right of way has at any time been dedicated***, given or purchased, ***shall be and remain a highway of the width so dedicated***, given or purchased, ***and no encroachments*** by fences, buildings or otherwise ***which may have been made since the*** purchase, ***dedication*** or gift nor any encroachments which were within the limits of such right of way at the time of such purchase, dedication or gift, and no encroachments which may hereafter be made, ***shall give the party or parties, firm or corporation so encroaching, any title or right to the land so encroached upon***. (Emphasis added.)

The Village's Brief on Appeal lays out the history of the dedication and acceptance of Lake Street and Commercial Street, and *Amici* cannot add to that discussion. The Village argues that the completion of the dedication process triggered the preclusive effect of MCL 247.190, and that the right-of-way is what it was at the time of dedication, regardless of any encroachment. *Amici* agree.

The Hayneses argue in response that the provision does not apply to the streets at issue for three reasons: (1) because the term "public highways" does not include platted village streets; (2) because construing the term "public highways" to include streets would violate the statutory construction rule about not rendering words "surplusage" in those instances where both the term "public highway" and "streets" are used in the same statutory provision; and (3) because MCL 247.190 applies only to adverse possession claims. None of these arguments is sufficient to rebut the clear language of the statute and its interpretation and application over the years.

MCL 247.190 was originally enacted as Section 20 of Public Act 368 of 1925. (See Exhibit B.) Section 21 of that Act was a "repealer" clause. It repealed "Chapter Seven of Act

Number Two Hundred Eighty Three of the Public Acts of Nineteen Hundred Nine, being Sections Four Thousand Four Hundred One to Four Thousand Four Hundred Fourteen, both inclusive of the Compiled Laws of Nineteen Hundred Fifteen. . . ."

The repealed provisions recited in Public Act 368 were part of a much longer act, Public Act 283 of 1909, a comprehensive set of provisions that were either assembled from existing laws or drafted so as to "revise, consolidate and add to the laws relating to the establishment, opening, improvement, maintenance and use of the public highways and private roads . . .," among other things. Section 1 of the 1909 Act confirms its broad scope:

> Public highways and private roads may be established, open, improved and maintained within this state under the provisions of this Act, and the counties, townships, cities, ***villages*** and districts of the state shall possess the authority herein prescribed for the building, repairing, and preservation of bridges and culverts, the draining of highways, the cutting of weeds and brush and the improvement of highways and the duties of state, county, township, city, ***village*** and district highway officials as defined in this Act. (Emphasis added.)

The 1909 Act, then, was a general highway law. Chapter 1 of the 1909 Act related to the laying out, altering, and discontinuing of highways. Section 20 of Chapter 1 defined public highways as follows:

> ***All highways regularly established in pursuance of existing laws***, all the roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or may hereafter be laid out and not recorded, and which shall have been used eight years or more, ***shall be deemed public highways, subject to be altered or discontinued according to the provisions of this Act***. All highways that are or may become such by time and use shall be four rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be two rods in width on each side of such lines. (Emphasis added.)

This definition is not, by its terms, limited to township, county, or state roads; it is inclusive and broad in scope and does not clearly exclude city or village streets.

As originally enacted, Chapter 7 of the 1909 Act was entitled "The Obstruction of Highways and Encroachments Thereon." It contained eleven sections with similar provisions to those later included in Public Act 368 of 1925—including Section 7, which stated a specific requirement that a right-of-way dedicated at 66 feet shall remain 66 feet in width, and was not subject to encroachment. (See Exhibit C.) That provision, along with the entire Chapter 7 of the 1909 Act, is what was ***replaced by*** the provisions of Act 368 of 1925, including the language that eventually became MCL 247.190:

> All public highways for which the right of way has at any time been dedicated, given or purchased, shall be and remain a highway of the width so dedicated, given or purchased, and no encroachments by fences, buildings or otherwise which may have been made since the purchase, dedication or gift nor any encroachments which were within the limits of such right of way at the time of such purchase, dedication or gift, and no encroachments which may hereafter be made, shall give the party or parties, firm or corporation so encroaching, any title or right to the land so encroached upon.

So, as initially enacted, the provisions of the 1909 Act relating to obstructions and encroachments used the term "public highways" in the context of the very same law expressly defining that term. When the revised language of the 1925 Act was introduced, it too was clearly made part of that same general highway law that included the broad definition of "public highway," which had remained unchanged. The 1929 Codified Laws continued the broad definition of "public highway" in Chapter 1 of the General Highway Law, §3936, and placed the unaltered provisions of Public Act 368 of 1925 in Chapter 6 of that same law. (See Exhibit D.)

The Court must take notice of, and give effect to, the fact that these provisions—at the time they were being written—were all part of one general highway law. The goal when construing any statutory provision is to ascertain the Legislature's intent. *Robinson v City of Lansing,* 486 Mich 1, 15; 782 NW2d 171 (2010). To determine that intent, statutory provisions are not to be read in isolation, but rather are to be read together to harmonize their meaning

and give effect to the act as whole. *Id.* at 15. "[W]ords and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole." *People v Couzens,* 480 Mich 240, 249, 747 NW2d 849 (2008) (quotation marks and citation omitted).

The broad meaning of the term "public highway" when the general highway laws were being written and/or codified (1909, 1925, and 1929) can be confirmed by reference to the accepted general meaning of that term at that time. The Village has properly cited *Burdick v Harbor Springs Lumber Company*, 167 Mich 673; 133 NW 822 (1911), for its proposition that the term "highway" is a "generic name for all kinds of public ways, including … streets … In short, every public thoroughfare is a highway." *Burdick's* understanding was confirmed by the Supreme Court in the subsequent case of *In Re Petition of Carson*, 362 Mich 409, 412; 107 NW2d 902 (1961), at exactly the time the Hayneses now argue that the encroachments or obstructions were likely to have been placed in the road rights-of-way (the 1950s/1960s). See also, *Johnson v City of Saginaw*, 368 Mich 502, 505; 118 NW2d 310 (1962), citing both *Burdick* and *In Re Petition of Carson* to reach the conclusion that the terms "public highway" included a city street.

The definition of "public highway" in Section 20 of the 1909 Act is not significant only because it gives a broad scope to the prohibition on encroachments into such highways ripening into right or title in what ultimately became MCL 247.190. Section 20 of the 1909 Act is also important because it supplies the basis for the concept of what is now referred to as the "highway-by-user" doctrine. That doctrine says that if the public has been using a road as a public way for a period of time, it will become a public road of a specified width. Section 20 of the 1909 Act is the codified form of that rule, which *Amici* assert applied to ***all*** municipalities. That this highway-by user provision applies to city and village streets, and not just to what the Hayneses would characterize as highways within a township or county, has been decided and

settled by any number of cases, the most significant of which is probably the well-known Michigan Supreme Court case of *City of Kentwood v Estate of Sommersyke*, 458 Mich 642; 581 NW2d 670 (1998).

The highway-by-user analysis is also indirectly relevant here despite the formal dedication of the two streets at issue. In 1971, around the very time that the Hayneses argue that their predecessors had placed the encroachments in the streets, and thus very likely while the 15-year time period was still running, this Court decided *Sharkey v City of Petoskey*, 30 Mich App 640; 186 NW2d 744 (1971), which should be dispositive of this case. The street at issue was a municipal street (but not platted) that had been improved with pavement and utilities. The plaintiffs in *Sharkey* argued, as the Hayneses do here, that their placement of certain improvements within the right-of-way of the street (a lawn, a fence, and even a garage in one area) had given them rights over the affected area. This Court disagreed, citing MCL 247.190 and addressing the question whether the street was a "public highway" directly. The Court first determined that the dedication of the street to the City, and the City's acceptance of the dedication, had by law resulted in a street that was 66 feet (four rods) wide. It then held that MCL 247.190 directly applied to that city street to preclude a reduction in the dedicated width or any private right or title by way of encroachment.

The *Sharkey* case is then, for all intents and purposes, this case, with one exception—the dedication and acceptance here was "cleaner" by virtue of the formal platting of Lake and Commercial streets at their stated width. In *Sharkey*, the Court was required to first determine that width, and it is important to follow the approach it took. It cited *Chene v City of Detroit,* 262 Mich. 253, 258, 247 N.W. 172 (1933), as describing the "common law" dedication process. *Sharkey*, at 643. To find that the city street at issue in that case was a public street 66 feet wide, however, the *Chene* Court cited the highway-by-user language that is directly traceable back to Section 20 of the 1909 Act above:

The statute provides:

> "All highways * * * that shall have been used as such for ten (10) years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight (8) years or more, shall be deemed public highways. * * *" Comp. Laws 1929, § 3936.

Here the road had been laid out, its boundaries plainly indicated, and a 24-foot pavement built in the center, which had been used by the public for more than ten years. The statute clearly prevents the abutting property owners or the public authorities from now closing the street, except in the manner authorized by law.

The point of tracing that history is this: The prohibition against an encroachment ripening into some right in a "public highway," now codified at MCL 247.190, was part of the same 1909 general highway law that defined "public highway" very broadly to include ***any*** highway established by law as well as any highway-by-user. That definition was originally placed in Section 20 of the 1909 law, but ultimately came to be codified at MCL 221.20. That section—the highway-by-user section—has since been held by the Michigan Supreme Court in both *Chene* and *City of Kentwood* to apply to municipal streets. Thus, the broad definition of "public highway" now attached to the words of MCL 221.20 must necessarily also have been attached to those same words when they were part of the same 1909 general highway law that also housed Public Act 368 of 1925, which is now the anti-encroachment provision found in MCL 247.190.[4]

[4] Another example of then-contemporary legislation that used the term "public highway" in the context of the general highways law to apply broadly to include streets and roads is Public Act 341 of 1927. As codified in the general highways law in 1929, at §§ 3950 through 3955—that is, as part of Chapter 1 of the Act initially adopted in 1909 and containing the definition of public highway quoted above—§ 3950 stated:

> No ***public highway*** which borders upon, or is adjacent to any lake, or the general course of any stream or crosses any stream, nor any portion of such highway so bordering upon a lake or general course of any stream, ***shall be discontinued*** by the order or action of any official or officials or of any township, city or incorporated ***village*** of the state, until an order authorizing same shall have been made by the circuit court of the county in which such highway is situated in the manner as hereinafter provided. (Emphasis added.)

The Hayneses' alternative argument that construing the term "public highway" in MCL 247.190 to include "streets" or "roads" would violate statutory rules of construction against "surplusage" is an argument about distinctions that have no difference. They cite a number of statutory provisions, including several from the General Law Village Act, MCL 61.1, *et seq.* through 75.1, *et seq.*, that use both the term "highway" and the term "street" (or "road"). They then argue that the words must mean different things.

But that is not always or necessarily the case. The rule against construing words within any statute to be "surplusage" is intended to guard against a court ignoring a word, or failing to realize and apply a distinction between words. The rule is by its terms a general one, and it applies "if at all possible." *See, e.g., Pittsfield Twp v Washtenaw County,* 468 Mich 702, 714; 664 NW2d 193 (2003).

Here, the Legislature appears to have used similar words, or words effectively meaning the same thing, to convey an intent to cover an entire subject—to make clear, in other words, that any kind of thoroughfare is covered by the particular provision at issue. That does not render the additional words surplusage; rather, it makes the intent of the scope of the provisions cited as treating ***all*** forms of highways the same that much more obvious. As the Michigan Supreme Court stated in *People v Thompson*, 477 Mich 146, 153-154; 730 NW2d 708 (2007):

> We cannot define these terms in a manner that is inconsistent with how they are commonly understood just because they are separated by the word "or." In other words, the fact that these two terms are separated by the word "or" does not give us the authority to give these two terms distinct meanings when they are commonly understood to have the same meaning. If two words have the same meaning, then we must give them the same meaning even where they are separated by the word "or."

As part of the general highway laws, the term "public highway" plainly included the streets or roads in a city or village.

Burdick and *In Re Petition of Carson,* as confirmed by *Johnson v Saginaw*, establish the common understanding in this case. Those cases say that it was "commonly understood" when the laws at issue were written that "public highway" in fact included city and village roads and streets. [5]

Finally, the Hayneses attempt to distinguish *Sharkey v City of Petoskey*, *supra*, because it involved a claim of adverse possession rather than acquiescence. This argument, too, makes a distinction without a difference. MCL 247.190 does not use the term "adverse possession." It talks about the width of the highway being and remaining the width dedicated, and states that encroachments of any kind shall not give "***any*** title or right to the land so encroached upon." That statutory language is broad enough to include both acquiescence and adverse possession, both of which are intended to vest title and right in the alleged possessor.

Recognizing the thinness of that argument, the Hayneses then argue that *Sharkey* is just wrongly decided. They fault this Court for assuming, without basis, that all streets are public highways, and for not citing any authority for that proposition. They ask this Court to ignore its prior decision in *Sharkey* because of this alleged lack of analysis.

For all of the reasons stated above, *Amici* agree with the Village that *Sharkey* was correctly decided, and that its precedential effect should not be ignored by this Court. But the Hayneses' position that a potentially dispositive case should be ignored as wrongly decided is ironic, since it is *Amici's* position that there is in fact a case that is deeply relevant to the Hayneses' entire claim that ***was*** wrongly decided, and that should be revisited by this Court. But that case is not *Sharkey*; rather, it is the main case on which the Hayneses rely: *Mason v Menominee, supra*.

[5] Nor does the Hayneses' argument do anything more than point out the ***use*** of different words. They do not allege, for example, that when the various statutes use the phrase "highway, street, and road," those are somehow treated differently. In each instance, the use of those similar words appears to be an attempt to clarify that ***all*** such rights-of-way of thoroughfares are subject to the same rule.

For the reasons discussed below, *Amici* suggest that in the absence of that incorrect decision in *Mason*, this unprecedented claim by the Hayneses would not likely be before this Court. *Amici* further suggest that unless and until this Court revisits the decision in *Mason* to correct it, vast amounts of public land will be at risk of transfer from the public trust to individuals or entities who occupy that public land without permission—or, as here, in violation of a criminal law. This works an unprecedented harm against the public interest. The basis for such a claim is a single paragraph—admittedly in a published opinion of this Court—that contains none of the analysis that should have been necessary to alter a century's worth of legislative policy and case law clearly establishing that the concepts of adverse possession and acquiescence do not apply against municipalities.

To extend that decision to the situation now before the Court, involving a platted public street, would result in a sea change in the law protecting public rights-of-way from encroachment, without there ever having been a change in a single relevant statute. The Court must ask itself—as municipalities around the state have asked following the *Mason* decision—how it has come to pass that the law could change for seemingly no reason. Or, stated otherwise, why was it clear for the last century or so that cases like this one could not be brought?

II. THE HOLDING OF *MASON V MENOMINEE,* ALLOWING A CLAIM OF ACQUIESCENCE IN PUBLIC PARKLAND, SHOULD NOT BE TO EXTENDED PUBLIC RIGHTS-OF-WAY, AS PROPOSED BY THE APPELLANTS, BECAUSE *MASON* WAS INCORRECTLY DECIDED AND SHOULD BE CORRECTED BY THIS COURT, NOT EXTENDED.

The trial court below held that MCL 247.190 precluded the Hayneses' acquiescence claim and it was right. Yet, the Hayneses' Brief on Appeal contains a great deal of argument about the concept of acquiescence and the *Mason* case. Even if the issue has not been fully litigated yet below, the Hayneses' Brief begs response on the repeated assertion that *Mason* "requires applying acquiescence to [their] claim." Brief on Appeal, p. 10.

The irony of the Hayneses' position is that they are using a legal concept—acquiescence—that has as its underlying premise the notion that two abutting property owners have "peacefully" and by informal agreement determined to treat a different line than the correct and proper line between their parcels as a new property line. At the same time, they acknowledge the existence of a law, Village of Beulah Ordinance No. 18, "Protecting Public Streets and Public Places," that makes what the Hayneses' predecessors were alleged to have done in the 1950s/1960s a crime for which they could have been fined and/or imprisoned for up to 90 days in jail. (See Exhibit E.) Given that legal prohibition against the Village allowing the establishment of a new right-of-way line, the Hayneses' argument that it is "required" to apply here could not be more ill-considered.

a) A municipality cannot acquiesce in the giving away of public land. It cannot do by accident or inattention that which it cannot do on purpose.

The whole point of the doctrine of acquiescence is that there has been an accommodation reached that both parties are clear about and satisfied with. That is why acquiescence is easier to prove than adverse possession. While related, acquiescence and adverse possession are in some ways very different. As explained in *Warner v Noble*, 286 Mich 654, 662; 282 NW 855 (1938), ***adverse possession*** is the possession of someone else's property by a claim of right and with a certain degree of "hostility," meaning an intention to antagonistically dispute the right or title of another. ***Acquiescence***, on the other hand, requires no proof of hostility or any claim of right; it results instead from the parties peaceably agreeing that a particular line is the boundary between their properties. See generally, *Warner v Noble*, 286 Mich 654, 662; 282 NW2d 855 (1938). See also, *McQueen v Black*, 168 Mich App 641; 425 NW2d 203 (1988) and *Connelly v Buckingham*, 136 Mich App 462; 357 NW2d 70 (1984). The two causes of action even have different burdens of proof. A claim of adverse possession must be proven by clear and cogent evidence, while acquiescence must only be

established by a preponderance of the evidence; and also unlike adverse possession, no claim of right must be made or proven. *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001).[6]

But this Court in *Walters v Snyder*, 225 Mich 219; 570 NW2d 301 (1997) (*Walters I*) explained that, as a result of these different standards for transferring title to property in order to show acquiescence, ***both*** parties must acquiesce in the treatment of a different property line as the "new" line. The problem with attempting to apply that concept to a municipality is that no one individual has the authority or ability to do the acquiescing or treating or agreeing necessary to make out an acquiescence claim. For example, who allegedly acted to approve a new property line here? Not the Village Council, which passed no ordinance or resolutions. And not the Village President, who executed no agreements.

It is no response to say that these individuals "allowed" the Hayneses and their predecessors to occupy the right-of-way. Municipalities are not estopped to deny the effectiveness of the unauthorized and illegal acts of its officers and employees. *Cross v Whedon*, 93 Mich App 13; 285 NW2d, 780 (1979), citing *Parker v Twp of West Bloomfield*, 60 Mich App 583, 592; 221 NW2d 424 (1975); *Blackman Twp v Koller*, 357 Mich 186; 98 NW2d

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[6] There are three distinct types or branches of acquiescence, although only the first and probably most common form of acquiescence—acquiescence for the statutory period of limitations—is relevant here:

> ***First***, there is acquiescence in a given boundary line for the prescriptive period. [The following cases seem to support this proposition: *Renwick v Noggle*, 247 Mich 150, 225 NW 535 (1929); *Dupont v Starring*, 42 Mich 492, 4 NW 190 (1880); *Wood v Denton*, 53 Mich App 435, 219 NW2d 798 (1974); *DeHollander v Holwerda Greenhouses*, 45 Mich App 564, 207 NW2d 187 (1973).] ***Second*** [is] that species of acquiescence where a bona fide controversy existed followed by agreement and acquiescence which need not continue for the statutory period. [*DeHollander*; *Moore v Ottawa Equip Co*], 26 Mich App 89; 181 NW2d 780 (1970); *Maes v Olmsted*, 247 Mich 180; 225 NW 583 (1929); *Hanlon v Ten Hove*, 235 Mich 227; 209 NW 169 (1926). . . . Somewhat less of an [*sic*] consensus exists as to the rationale underlying the ***third*** species of the acquiescence doctrine [the intent of the common grantor to effect the practical location of a boundary line]. Compare *Maes v Olmsted*, *supra*, and *Daley v Gruber*, 361 Mich 358; 104 NW2d 807 (1960), with [*Flynn v Glenney*], 51 Mich 580; 17 NW 65 (1883). . . . (Emphasis added.)

McGee v Eriksen, 151 Mich App 551, 558; 215 NW2d 571 (1974). See, also, *Pyne v Elliott*, 53 Mich App 419; 220 NW2d 54 (1974).

538 (1959); and *City of Highland Park v Oakland County Drain Comm'r*, 300 Mich 501; 2 NW2d 479 (1942). That is why the existence of Ordinance No. 18 is so crucial to this point—the Hayneses and their predecessors are deemed to have known that no one at the Village had the right or authority to acquiesce in ceding part the Village's right-of-way to them.

Similarly, municipal corporations themselves may not act beyond the scope of their powers. *Cross*, *supra*, at 19. "The Village" is not some amorphous thing. It is a legal entity—a municipal corporation—that operates under rules that govern its conduct. The General Law Village Act, MCL 61.1, *et seq.* through 75.1, *et seq.*, contains many of those rules, including for example, the requirement that *selling* land requires an ordinance approved by the Village Council, MCL 67.4; the requirement that parkland cannot be sold without a vote of the people, MCL 67.4; and the requirement that a public notice and hearing is required before any street or "public ground" can be vacated or discontinued, MCL 67.13. So, even if the Village had ***wanted*** to get rid of a portion of the roadway at issue, some specific requirements would have to have been met.

The Village is also, as a public entity, precluded from simply conferring a gift of property that it owns on a private citizen or resident of the Village. There is a general concept in the law that a municipality is prohibited from giving money or things of public value to private individuals without receiving something of specific value in return. See, e.g., *Skutt v City of Grand Rapids*, 275 Mich 258; 266 NW 344 (1936). 1963 Mich Const, art 10, §12, and art 8, §25. Any such act is considered *ultra vires* to the power of the municipality. *Kaplan v City of Huntington Woods*, 357 Mich 512; 99 NW2d 514 (1959).

While Michigan had never had an appellate decision on the issue of whether acquiescence applies to municipalities, until the *Mason* case, other states have. The following analysis, from a court writing at a time roughly contemporaneous with the time Michigan passed its statutes exempting public property from adverse possession, could just as easily

have been summarizing what was Michigan law, before *Mason*, on the "authority" of a municipality to "acquiesce" in something like giving away its public land before *Mason*:

> It is further contended by the appellant that, the road having been located upon the irregular line, as contended for by him, and having been used by the public for a long period of time, even if the same is not upon the true line, the said line has been acquiesced in, and cannot now be disputed.
>
> In *Quinn v Baage*, 138 Iowa 425, 114 NW 205, we said:
>
> > 'Manifestly, the doctrine of acquiescence can have no application to the fixing of a boundary between the abutting owner and the highway; ***for no one representing the public is authorized to enter into an agreement upon or to acquiesce in any particular location***.'
>
> In *Bidwell v McCuen*, 183 Iowa 633, 166 NW 369, we said:
>
> > 'There has been no acquiescence in the line upon the part of the public, as claimed by counsel for appellant, for the manifest reason that ***no one representing the public was authorized to enter into an agreement upon, or acquiescence in, any particular location thereof***.'
>
> The doctrine of acquiescence is held not to apply to highway-boundary disputes in which a governmental agency is a party. (*Emphasis added*.)

Langle v Brauch, 185 NW 28 (Iowa Sup, 1892).

Put simply, the Court of Appeals panel in *Mason* lost sight of the fact that what is at issue is ***public*** property. In the context of this case, the ordinance provision that prevents the encroachment could not be more clear. The Hayneses and their predecessors were prohibited from placing the encroachments that are now relied on. Such an ordinance benefits the Hayneses as much as it does everyone else in the Village—they drive or walk on all the other Village streets like everyone else; they make use of the improvements to the Village's right-of-way like everyone else.

But more than that, the ordinance here put them on notice that "the Village" was not actually treating—could not treat—the railroad ties or rock line as a boundary such that, if enough time passes, title will vest in them. The ordinance prohibits giving the Hayneses the property at issue; what other actual agreement sufficient to establish acquiescence can there be with that prohibition in place? The *Mason* case, as interpreted by the Hayneses, allows something to happen by oversight or error or inadvertence that the elected or appointed officials or employees of the Village ***could not have done on purpose***. That concept cannot and should not be extended to public road rights-of-way.

b) An adjacent property owner cannot gain title to municipal property, including a right-of-way, by adverse possession or acquiescence, because the municipality never loses the right to come to court and seek recovery of that property. Because the 15-year statute of limitations does not apply to municipalities, it never "runs" against it, and a plaintiff in a quiet title case claiming municipal land by adverse possession or acquiescence can therefore never prove an essential element of those claims: the passage of the 15-year period and the vesting of title/right in them as opposed to the municipality.

The Hayneses make a point of arguing that they "could have" sought title to the property at issue by way of adverse possession as well. No appellate court of this state has yet held that to be true, since *Mason* only discusses acquiescence. But an analysis of the history and operation of the laws regarding the application of the statute of limitations explains why that should not be true—and also explains why the *Mason* panel's decision on the related theory of acquiescence was incorrect and should be revisited.

Although the general or default limitations period for "recovery of land" is stated in MCL 600.5801(4) as 15 years, a separate provision of the RJA, MCL 600.5821(2), ***exempts*** municipal corporations from the passage of that limitations period:

> (2) Actions ***brought by*** any municipal corporation for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitation. (Emphasis added.)

The *Mason* panel held that this language in § 5821(2) meant that only if a municipality was a ***plaintiff*** in a case could it avoid the running of the statute of limitations. If it was the ***defendant*** in the case—that is, if the other party seeking its land "beat" the municipality to court—then the municipal property could be taken. *Mason, supra*, 528-529. *Amici* disagree—as does a century of case law. The practical effect of the above provision is to exempt municipal property from adverse possession or acquiescence claims ***even if the municipality is the defendant in a suit*** to quiet title brought by someone in possession of public land.

As further explained below, because the right of a municipality to file a lawsuit to re-enter and recover its property (by way of an action for ejectment, quiet title, or otherwise) is not subject to loss by the passage of time, the title to that property never automatically vests in the one seeking to assert adverse possession of it; i.e., never ripens into title. The municipality does not actually have to "bring" an action to recover its land. The mere fact that the municipality ***can*** at any time bring the action against someone in possession of its property, even after 15 years, defeats the very possibility of adverse possession of that property. *Pastorino v City of Detroit*, 182 Mich 5; 148 NW 231 (1914); *Gorte v Dep't of Transportation*, 202 Mich App 161, 168-169; 507 NW2d 797 (1993).

(i) The mechanics of the statute of limitations as relates to adverse possession of municipal property.

In order to properly explain the operation of §5801/§5821, a good understanding of the ***mechanics*** of adverse possession is needed. Adverse possession is a method of acquiring title to property by holding possession of it in a specified manner for a statutory period. In Michigan, the manner of possession must be open, notorious, exclusive, hostile, and under a claim of right. *Burns v Foster*, 348 Mich 8; 81 NW 2d 386 (1957); *Caywood v DNR*, 71 Mich App 322; 248 NW2d 253 (1976). Importantly—and this is part of the issue with the *Mason* Court's understanding of the way the concept works—the period of time that it must be held is

15 years not because that is derived ***directly*** from a statute on the subject of adverse possession, but rather by ***indirect*** reference to the statutory limitations period for the record title holder to come into court and "bring" an action to recover possession of his or her land. "Adverse possession is based on the fact of the running of the statute of limitations applicable to actions for the recovery of property. In other words, the doctrine of adverse possession ***is primarily an application of the defense of limitations of actions***." 3 Am Jur 2, Adverse Possession, §3, p 94.

In Michigan, the limitations period for an action to re-enter and/or recover land—and therefore the statutory period that a trespasser/adverse possessor must hold property—is established not in MCL 600.5821, the section addressed by the *Mason* panel, but in MCL 600.5801, which states in full:

> ***No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless***, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, ***he commences the action or makes the entry within the periods of time prescribed by this section***.
>
> (1) When the defendant claims title to the land in question by or through some deed made upon the sale of the premises by an executor, administrator, guardian, or testamentary trustee; or by a sheriff or other property ministerial officer under the order, judgment, process, or decree of a court or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale the period of limitation is 5 years.
>
> (2) When the defendant claims title under some deed made by an officer of this state or of the United States who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state the period of limitation is 10 years.
>
> (3) When the defendant claims title through a devise in any will, the period of limitation is 15 years after the probate of the will in this state.
>
> (4) ***In all other cases under this section, the period of limitation is 15 years.*** (*Emphasis added.)*

In Michigan, as in most states, additional elements must be proven (actual, visible, open, notorious, exclusive, continuous, and uninterrupted possession under color or claim of right), but it is the possession for the statutory period that triggers the trespasser's right and destroys those of the record title holder. And therefore the passage of that 15 years is an element of any claim of title by adverse possession.

A key and essential concept of adverse possession is that as soon as the statutory period ends the title vests in the adverse possessor/trespasser by operation of law. It is automatic, and no suit by the adverse possessor is actually required to "confirm" title. In *Gorte v Michigan Dep't of Transportation*, 202 Mich App at 168-169, the Court of Appeals confirmed that the divestiture of title is ***automatic*** upon the running of the period:

> Generally, the expiration of a period of limitation vests the rights of the claimant. [*People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992).] It is further the general view with respect to adverse possession that, upon the expiration of the period of limitation, the party claiming adverse possession is vested with title to the land, and this title is good against the former owner and against third parties. . . . Defendant argues the contrary view, that plaintiffs' possession of the property merely gave plaintiffs the ability, before the amendment of §5821, to raise the expiration of the period of limitation as a defense to defendant's assertion of title.
>
> Contrary to defendant's arguments, however, Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. *Gardner v Gardner*, 257 Mich 172, 176; 241 NW2d 179 (1932). Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, ***not when an action regarding the title to the property is brought***. As further explained in 3 Am Jur 2d, Adverse Possession, §5, adverse possession "is based on the fact of running of the statute of limitations applicable to actions for the recovery of property, so it is primarily an application of the defense of limitations of actions. . . . An adverse possession statute creates a period of limitations on an action to quiet title that runs only against the record owner of the land; the adverse possessor is ***under no duty to quiet title by judicial action,***

> ***nor to vigorously assert his or her right at every opportunity***. (*Emphasis added*.)

Thus, by operation of MCL 600.5801, in Michigan as a general proposition a record title owner loses its right to re-enter and regain possession of land after 15 years. This, again, is key to understanding where the *Mason* panel went wrong: in Michigan, a municipality never loses the right to re-enter or regain possession.

(ii) "Time does not pass against the sovereign."

That was not always the case in Michigan. Under the common law dating back to the origins of the common law concepts of adverse possession and prescription, the rule was that they did not lie against the sovereign—*nullum tempus occurrit regi*: "time does not run against the king." See, generally, *Guaranty Trust Co v United States*, 304 US 126, 129; 58 SCt 785; 82 LEd 2d 1224; *City of Detroit v 19675 Hasse*, 258 Mich App 438; 671 NW2d 150 (2003).

Up until the early 20th Century, Michigan was actually an exception to that general common law rule, at least as related to adverse possession. It was not until 1907 that Michigan joined the majority of states by enacting legislation, PA 46 of 1907, directly providing that adverse possession was not applicable against public land: "no rights as against the public shall be acquired by any person . . . by reason of the occupation or use of any pubic highway, street or alley, or of any public grounds, or any part or portion thereof, in any township, village or city in this State, whether such occupation or use be adverse or otherwise."

As this Court explained shortly after the adoption of PA 46 of 1907, in *Pastorino v City of Detroit*, *supra*, at 10:

> [T]he great weight of authority in the United States is to the effect that title by prescription cannot be acquired against a city. The principle upon which this rule is founded is said to be that a city merely holds title to its streets and possession of them in trust for the general public, and has no authority to dispose of them or their use for other purposes, by lease, license, sale or gift. This is recognized as a general rule of law by most of the text-writers upon municipal corporations, and with due notice of and

deference to conflicting views in certain jurisdictions, it is well stated in *McQuillan on Mun. Corp*. vol. 3, §1396, as follows:

> There is much conflict in the decisions as to whether the right to a street or alley may be lost by adverse possession. In a few states such property is looked upon the same as any property held by an individual, and the maxim *'nullus tempus occurrit regis'* is considered not applicable to municipal corporations, so far as street and alleys are concerned, and hence title can be acquired to all or part of a street by adverse possession. However, the great weight of authority is to the contrary, and it is held in nearly all states that the rights of the public in a street or alley cannot be divested by adverse possession for the statutory period.

Seven states, including Michigan, are enumerated as holding, or having held, contrary to the general rule. ***Several of these states including Michigan have been brought into line with the general rule by subsequent legislation, following the decisions rendered by their courts holding otherwise***. (Emphasis added.)

In 1915, the Michigan legislature assembled the first Judicature Act, the predecessor of the current Revised Judicature Act, MCL 600.1, *et seq*. The relevant provisions of the 1915 act are contained in Chapter 9, Limitation of Actions (§12311):

> ***Hereafter no person shall bring or maintain any action for the recovery of any lands, or the possession thereof, or make any entry thereupon, unless such action is commenced or entry made within the time herein limited therefor***, after the right to make such entry or to bring such action shall have first accrued to the plaintiff, or to some person through whom he claims to-wit:
>
> 1. Within five years, where the defendant claims title to the land in question, by or through some deed made upon a sale thereof by an executor, administrator, guardian or testamentary trustee, or by a sheriff, or other proper ministerial officer, * * *;
>
> 2. Within ten years, where the defendant claims title under a deed made by some officer of this state, or of the United States, * * *;
>
> 3. Within fifteen years in all other cases: ***Provided, That the provisions of this section shall not apply to actions brought by any municipal corporation, for the***

> ***recovery of the possession of any public highway, street or alley, or any other public grounds***. (*Emphasis added*.)

This provision has not changed much since then. The 15-year period currently found in §5801(4) is stated in §3 above—which, significantly, also includes the statement that the limitation provisions of the section do not apply to actions brought by a municipal corporation for recovery of the listed public property; that "proviso" is now currently found in §5821(2).[7]

For many decades after the adoption of the 1907 act and 1915 Judicature Act, courts in Michigan understood and recognized that the exemption of municipalities from the running of the 15-year limitation period did in fact preclude the successful argument of adverse possession against a municipality, ***even in a suit for quiet title with the municipality as the defendant***. None of those cases read any kind of limitation on the application of the exemption depending on whether the municipal corporation was the plaintiff or the defendant in the suit.

In the most recent of these, *Adams Outdoor Advertising, Inc v Canton* Twp, 269 Mich App 365, 372-373; 711 NW2d 391 (2006), the Court of Appeals stated the matter in unequivocal terms:

> It is also undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation.

Adams had a good historical and legal basis for saying that the matter was undisputed by other appellate decisions over the years:

Rindone v Corey Community Church, 355 Mich 311, 316; 55 NW2d 844 (1952):

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[7] The Compilers' Comment in the 1915 statute, on Page 4362, makes clear that the legislature's intent was to continue the 1907 rule against adverse possession of municipal land:

> It was formerly the rule that title could be acquired by adverse possession of property within the limits of a street—*Flynn v Detroit*, 93/500; citing *Big Rapids v Comstock*, 65/78; *Essexville v Emery*, 90/183; and in a public alley—*Vier v Detroit*, 100/616. See further, *Wyman v St. John's*, 100/571. But this rule was abolished by Act 46, 1907, ***reenacted in substance by subsection 3 of this section***. (*Emphasis added*.)

"It is unnecessary in this case to determine the public rights in First Street north of Water, but we do note in passing the following: Prior to 1907 it might have been possible to acquire private rights in public streets by adverse possession. Since the enactment of PA 1907, No. 46 (see Cl. 1948, §609.1, Par. 3) [Stat. Ann. §27.593]), Michigan has been in line with the general rule which forbids the acquiring of such rights by prescription. The development of the law on this subject is presented in *Pastorino v City of Detroit*, 182 Mich 5 (Ann Cas 1916 D, 768)."

Engleman v City of Kalamazoo, 229 Mich 603, 608; 201 NW2d 80 (1925):
"Plaintiff succeeded in establishing prescriptive right against the city because '[t]he right was claimed for nearly 37 years prior to the passage of Act No. 46, Public Acts 1907 (3 Comp Laws 1915, §12311, Subd. 3). This period was sufficient to acquire the easement claimed."

Hawkins v Dillman, 268 Mich 43, 489-490; 256 NW 492 (1934):
"This possession…did not continue for a sufficient time to establish title by adverse possession prior to the enactment of Act No. 46 of Acts 1907, forbidding the acquisition of rights in public highways by adverse possession."

Olsen v Village of Grand Beach, 282 Mich 364, 368-69; 276 NW 481 (1937):
"[I]t appears that plaintiffs could acquire no rights in these platted streets except on the theory of having acquired such rights by adverse possession. The possibility of their making such a claim is foreclosed by statute. (3 Comp Laws 1929, §13964, Subd. 3.)"

Arduino v Detroit, 249 Mich 382, 387; 228 NW 694 (1930):
"Can the plaintiffs acquire title by adverse possession to Parcel B, which is designated on the plat as an alley and dedicated to the public? Since the enactment of Act No. 46, Pub. Acts 1907 (superseded by the Judicature Act, 3 Comp Laws 1915, §12311), it is not possible to obtain titled against a public by adverse possession."

Note the dates of these cases—all well after the codification in 1915, more or less in its current form.

Treatise writers expounding Michigan law took the same unequivocal view. *Michigan Real Property Law* (3rd Ed., 2005), §12.7, states:

> Any person adversely possessing the land of another may, after the required 15-year period, establish fee simple marketable record title to the property being possessed. Adverse possession may not be established ***against*** a municipal corporation for the recovery of any public highway, street, alley, or other public ground. MCL 600.5821(2). (*Emphasis added*.)

Similarly, 25 *Michigan Law & Practice*, Adverse Possession, §212, states: "The common law rule that a claim of adverse possession may give good title against a city is now limited by statute excepting public highways, streets, alleys, and other public ground that municipal corporations may own," citing MCL 600.5821.

(iii) The *Mason* decision.

So, for a good century before *Mason*, §5821(2) was seen to clearly apply—along with § 5801—to preclude the taking of municipal property by adverse possession (and therefor by statutory acquiescence) even when the municipality was the defendant. How, then, did the *Mason* panel end up changing that rule so drastically? The answer is that it did not address the fact that the failure of the 15 year ever to pass against the City in that case meant that the plaintiff-landowner never had the ability to prove that essential "element" of an adverse possession/acquiescence claim—and that this was true no matter who the plaintiff or defendant is.

Here is the Court's ***entire*** discussion of this profoundly important issue affecting all publicly-owned lands held by municipal corporations in Michigan:

> While subsection (1) applies to '[a]ctions for the recovery of any land where the state is a party,' subsection (2) applies to '[a]ctions brought by any municipal corporations.' It is evident from the language employed in subsection (1) that the Legislature could have made subsection (2) applicable in all cases, brought both by and against, a municipality. The Legislature, however, chose not to do so. Further, interpreting subsection (2) to apply to any case in which a municipality is a party would render the words "brought by" in subsection (2) nugatory. Finally, an acquiescence claim involves a limitations period. *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993). The term 'periods of limitations' in MCL 600.5821(2) renders that provision applicable to claims asserting acquiescence for the statutory period. Thus, because the language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property, it does not preclude plaintiffs' claim.

Put simply, the panel focused on only §5821(2), without reference to the other things it works with. It compounded that error by focusing on the ***wrong phrase*** in §5821(2).

The *Mason* panel cited the usual statutory construction cases for the proposition that the goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the legislature, *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004), and that where the intent of the legislature is "unambiguously conveyed, the statute speaks for itself and judicial construction is neither necessary nor permitted." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). But courts must also read the language in question in the context of the ***statute as a whole***, and must also give statutes that relate to the same thing a similar interpretation. "Statutes *in pari materia* are statutes sharing a common purpose or relating to the same subject. They are construed together as one law, regardless of whether they contain any reference to one another." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 312; 596 NW2d 591 (1999), citing *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998).

Here, both the majority opinion and the concurrence in *Mason* discussed the language in the provision indicating that the limitations period does not apply in actions "brought by" a municipal corporation. But both failed to note—in fact, both completely ignored—the more important language in §5821(2) that says that the provision relates to actions for "the ***recovery of*** the possession of any public highway, street, alley, or any other public ground...." Again, §5821(2) "modifies" §5801, which also only has to do with a plaintiff bringing "action for the ***recovery*** or possession of any lands or make any entry upon any lands..." and provides that it must be done within 15 years. In other words, it is no mistake that both §5801 and §5821(2) relate only to limitations on the ***bringing of*** an action; that is the point and nature of

a limitation of actions provision. It only applies to cut off the right of ***a plaintiff*** to bring a cause of action.[8]

As relates to the acquiescence claim in this case, the "statutory period" involved is the same 15-year limitations period for adverse possession claims set forth in MCL 600.5801(4). *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). Thus, it is fair to say that this kind of acquiescence and the separate doctrine of adverse possession are rooted in the same statutory concepts—as the Court recognized in *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993):

> At the root of claims of title by adverse possession and the type of acquiescence plaintiffs claim is the statute of limitations on actions to recover possession of land. In most cases, an action for the recovery or possession of land must be brought within 15 years after the cause of action first accrues. MCL 600.5801; MSA 27A.5801. ***The law of acquiescence is concerned with a specific application of the statute of limitations as to adjoining property owners who are mistaken about where the line between their property is***. (Emphasis added.)

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[8] The majority opinion points out that the legislature could easily have done to §5821(2) what it did to §5821(1), when it was amended in 1988 to state that the statute of limitations does not apply "in any case in which the state is a party." It is true that the in the 1915 judicature act that created the predecessor of §5821(2) and exempted municipalities from the statute, the state was not similarly exempted. The 1988 act corrected that by providing that "Actions for the recovery of any land where the ***state*** is a party are not subject to the periods of limitations, or laches…."

The majority opinion makes the rhetorical point that "the legislature could have made subsection (2) [that is, §5821(2)] applicable in all cases, brought both by ***and against*** a municipality. The legislature, however, chose not to do so. (*Mason, supra*, at 529; *emphasis added*.)" This statement, rather than helping the Court of Appeals' conclusion, actually proves the point that it did not read §5821(2) in the larger context of §5801 and the common law.

Inserting the phrase "or against" before a "municipal corporation" would have done absolutely nothing to affect the ability of a municipal corporation to defend its own property in an adverse possession claim, ***because the property affected by the language insertion would not be the municipality's property***. This error by the *Mason* panel has to do, again, with glossing over the words "recovery of." If the municipality were a defendant in a claim brought by someone to "recover possession of" their property, the municipality would have to be the one ***claiming*** ownership of property by adverse possession. So, in addition to the indirect effect noted above, the fact that the exception only applies to municipalities has a very real effect compared to §5821(1): it makes private lands subject to adverse possession by ***municipalities***. *Jonkers v Summit Township*, 278 Mich 263; 747 NW 2d 901 (2008); *Bachus v Township of West Traverse*, 122 Mich App 557; 332 NW 2d 535 (1983).

So, a plaintiff seeking to quiet title in himself or herself on a theory of acquiescence must prove, as an ***element of the claim***, that the statute of limitations has passed as against the defendant record title holder, who can no longer sue to recover the land. If that time period has not passed—that is, if the record title holder still has the right to enter upon the property or to commence an action "for the recovery of" the property that is not barred by the statute of limitations—then that element of the plaintiff's acquiescence claim cannot be met and title will not be quieted in the plaintiff against the record title holding defendant.

The Court of Appeals in *Mason* should have found that the concept of "acquiescence for the statutory period" does not apply to municipal property for the same reason that adverse possession does not apply to municipalities: If the claim of the abutting landowner is "rooted in" (*Kipka, supra*, at 438) the passage of the 15-year statutory limitations period of MCL 600.5801(4), and if under MCL 600.5821(2) that 15-year period does not pass or expire as to a claim brought by a municipality, it necessarily follows that an element of the acquiescence claim—holding the possession until the point in time that the record title owner can no longer sue—cannot be satisfied as against a municipality because that time ***never lapses***.

CONCLUSION AND RELIEF REQUESTED

The Village's argument that MCL 247.190 applies to preclude the claim against its rights-of-way is undoubtedly correct. The Hayneses' argument that the provision is part of a set of laws that relate only to county, township, or state roads is contrary to both the language of the acts and laws at issue and with appellate decisions applying them. Regardless of where it is now in the state's codified laws, the history of that provision establishes that it was part of a set of general highway laws that plainly extended to city and village streets. This Court should therefore affirm the trial court's grant of summary disposition to the Village.

In reviewing the parties' arguments, however, the Court should be wary of the constant refrain in the Hayneses' brief that *Mason v Menominee* somehow "requires" the concept of

acquiescence to apply to their encroachments into a road right-of-way—that is, the idea that it would somehow be unusual for the Court to rule otherwise. *Mason* did not involve a public road right-of-way. It was also wrongly decided by the panel involved, and this Court will need to revisit that panel's very brief discussion of the issue given its potential scope and effect as more claims like the Hayneses' are made against public roads and other lands. With no change in the language of any statute, *Mason* changed a century of clearly-established law that plainly held that the concepts of acquiescence and adverse possession do not apply to municipalities. That ruling needs to be revisited by this Court to set the law back to its original position, not extended as contemplated by Appellants.

Respectfully submitted,

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