

STATE OF MICHIGAN
COURT OF APPEALS

BARAGA COUNTY EQUALIZATION and
MICHIGAN STATE TAX COMMISSION,

UNPUBLISHED
March 10, 1998O

Plaintiffs-Appellees,

v

No. 197195
Michigan Tax Tribunal
LC No. 00210750

RICHARD DELENE and NANCY DELENE,

Defendants-Appellants,

and

RICHARD DELENE and NANCY DELENE,

Plaintiffs-Appellants,

v

LC No. 00213496

BARAGA TOWNSHIP and MICHIGAN
STATE TAX COMMISSION,

Defendants-Appellees.

Before: MacKenzie, P.J., and Holbrook, Jr. and Saad, JJ.

PER CURIAM.

Richard and Nancy Delene (the Delenes) appeal by right from a Michigan Tax Tribunal (MTT) order assessing for the 1994 and 1995 tax years both developmental and residential property owned by the Delenes, based on its calculation of true cash value, MCL 211.27(1); MSA 7.27(1), and a sales comparison approach. The Delenes argued that the MTT should have assessed both categories of their property at \$0 for both the 1994 and 1995 tax years. We affirm.

The Delenes own property in Baraga County, Michigan, most of which had been classified as developmental land. In 1982, the Delenes received from the United States Army Corps of Engineers a construction permit regarding certain sections of their property. Subsequently, the Michigan Department of Natural Resources (DNR) claimed that the Delenes' construction had exceeded that authorized by the DNR permit, in violation of Michigan's wetland protection act, MCL 324.30301 *et seq.*; MSA 13A.30101 *et seq.* In November 1992, the DNR obtained a preliminary injunction from Ingham Circuit Court granting the State of Michigan unlimited access to the Delenes' property and prohibiting the Delenes from continuing their development activities without first obtaining a DNR permit. The Baraga Township Board of Review took the Delenes' legal troubles into consideration when assessing their developmental property and concluded that \$0 constituted the proper assessment. The Baraga County Equalization Department (Baraga County) later filed a petition with the MTT seeking to set aside the township board of review's allegedly improper assessment, which Baraga County claimed did not reflect the property's *actual value*. The Delenes responded to Baraga County's petition, and additionally filed their own petition with the MTT requesting that it set aside the township board of review's assessment of the Delenes' residential property, claiming that their *residential* property also qualified for a \$0 assessment due to their legal entanglements. The MTT consolidated these actions, and granted the Michigan State Tax Commission (MSTC)'s motions to intervene in each action against the Delenes.

I

The Delenes first argue that neither Baraga County nor the MSTC possessed standing to challenge the Baraga Township Board of Review's individual assessment of the Delenes' developmental property. We need not address this argument, however, because the Delenes failed to preserve this issue for appeal. *McCready v Hoffius*, 222 Mich App 210, 218; 564 NW2d 493 (1997). MCR 2.116(D)(2) requires that a party objecting pursuant to MCR 2.116(C)(5) to the opposing party's legal capacity to sue and who fails to either object in their responsive pleading or by filing a permissible amendment to their pleading waives the objection. The 1996 AACS, R 205.1245(3) similarly states the Tax Tribunal rule of procedure that "[a]ll defenses not asserted in either the answer or by appropriate motion are waived." The Delenes alleged that on May 16, 1995, almost eleven months after Baraga County filed its petition for reassessment of the Delenes' developmental property, they moved to dismiss Baraga County's petition on the basis that Baraga County did not have standing. However, the instant MTT record does not indicate that the Delenes filed at any time any objection to the standing of either Baraga County or the MSTC. Therefore, MCR 2.116(D) and 1996 AACS, R 205.1245(3) preclude the Delenes from now asserting their lack of standing defense.

II

The Delenes next contend that the MSTC filed an improper ex-parte communication with the MTT judge and that the judge improperly construed the ex-parte communication as a motion to strike and improperly ruled on the motion. We agree, but conclude that the trial court's error resulted in no prejudice to the Delenes. Although the Delenes also failed to object below to the MSTC's submission of an ex parte communication and the trial court's ruling on it and thus "this issue is unpreserved . . . we will still review it because the issue is a question of law and the facts necessary for the resolution of the

question have been presented.” *Westfield Companies v Grand Valley Health Plan*, 224 Mich App 385, 387; 568 NW2d 854 (1997).

The MTT exists as a quasi-judicial agency within the executive branch of government, specifically the Michigan Department of Treasury. MCL 205.721; MSA 7.650(21). Therefore, the Administrative Procedures Act, MCL 24.201 *et seq.*, MSA 3.560(101) *et seq.*, applies to MTT hearings. MCL 24.203(2); MSA 3.560(103)(2). The MSTC’s ex-parte letter to the MTT judge and the judge’s consideration of the ex parte letter violated MCL 24.282; MSA 3.560(182), which generally prohibits ex-parte communications between a party and the tribunal judge or factfinder. *Kassab v Acho*, 125 Mich App 442, 454; 336 NW2d 816 (1983). However, this Court may set aside the MTT judge’s administrative action or order only when “substantial rights of the petitioner have been prejudiced because the decision or order is . . . [m]ade upon unlawful procedure resulting in material prejudice to a party.” MCL 24.306(c); MSA 3.560(206)(c). Although the MTT judge considered the MSTC’s ex-parte communication (motion to strike), he denied the motion and it in no way altered the evidence that the parties had submitted to the MTT. Thus, we conclude that, although the MTT judge erred by considering the MSTC’s ex-parte motion, this error resulted in no prejudice to the Delenes.

III

Finally, the Delenes argue that the MTT judge erroneously considered and incorporated into his opinion information contained in the MSTC’s improper ex-parte communication that did not otherwise appear in the MTT record. We disagree. The Delenes again failed to preserve this issue on appeal, and we need not consider it. *McCready, supra*. However, we note that the information the MTT judge allegedly incorporated into his opinion did indeed appear elsewhere in the MTT record -- in a filing by the Delenes -- and that the MSTC’s letter contained none of the facts on which the MTT judge based his opinion. This argument of the Delenes is completely without merit.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald L. Holbrook, Jr.
/s/ Henry William Saad