Order

Michigan Supreme Court
Lansing, Michigan

May 28, 2021

161652

TRUGREEN LIMITED PARTNERSHIP,
Plaintiff-Appellant,

v

SC: 161652
COA: 344142
Ct of Claims: 17-000141-MT

DEPARTMENT OF TREASURY,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the April 10, 2020 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the April 10, 2020 judgment of the Court of Appeals and we REMAND this case to that court for reconsideration in light of *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333 (2020).

We do not retain jurisdiction.

t0525

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 28, 2021

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

TRUGREEN LIMITED PARTNERSHIP, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	FOR PUBLICATION April 10, 2020 9:00 a.m. No. 344142 Court of Claims LC No. 17-000141-MT

Before: SHAPIRO, P.J., and GLEICHER and SWARTZLE, JJ.

GLEICHER, J.

Michigan's use tax exempts property consumed in the tilling, planting, caring for or harvesting things of the soil, or in the breeding, raising or caring of livestock, poultry or horticultural products for further growth. These words conjure images of our state's bean fields, dairy farms, and cherry orchards. The question presented is whether the Legislature intended that a lawn care company would reap the fruits of this exemption. The statutory vocabulary describes a tax subsidy aimed at growing Michigan's agricultural economy, not ornamental grass and shrubs. The Court of Claims reached the same conclusion. We affirm.

I

The history of the statute at issue dates back to 1935, when the Legislature first exempted from "sale at retail" under the General Sales Tax Act "any transaction . . . of tangible personal property . . . for consumption or use in industrial processing or agricultural producing." 129 CL 3663-1(b.1), as amended by 1935 PA 77. Two years later, the Legislature exempted the same transactions from the use tax. 1929 CL 3663-44(g), as amended by 1937 PA 94.

Between 1937 and 2012 the Legislature revised the use tax language several times. For more information regarding the amendments, see this link to the Legislature's website: http://bit.ly/2Rc7zG5. The version of the statute in effect during the tax years relevant here exempts from the use tax:

> *Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth.* This exemption includes machinery that is capable of simultaneously harvesting grain or other crops and biomass and machinery used for the purpose of harvesting biomass. This exemption includes agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land used in the production of agricultural products as a business enterprise and includes a portable grain bin, which means a structure that is used or is to be used to shelter grain and that is designed to be disassembled without significant damage to its component parts. This exemption does not include transfers of food, fuel, clothing, or similar tangible personal property for personal living or human consumption. This exemption does not include tangible personal property permanently affixed to and becoming a structural part of real estate. As used in this subdivision, "biomass" means crop residue used to produce energy or agricultural crops grown specifically for the production of energy. [MCL 205.94(1)(f), as amended by 2012 PA 474 (emphasis added).[1]]

Our task is to determine whether the italicized language applies to TruGreen.

TruGreen offers its customers lawn and ornamental plant care services. An affidavit submitted by TruGreen's director of technical operations describes that TruGreen's business is built around seasonal or annual service subscriptions entered into by residential homeowners and commercial, institutional and private landowners. For a set fee, the company cares for grass, trees, and shrubbery at a variety of locations in addition to homes, including school grounds, parks, athletic fields, business parks, malls, airports, roadways and pastures not used for agricultural production. TruGreen utilizes fertilizers, herbicides, and insecticides to care for its customers' turfs and ornamental plants, providing nutrients, controlling weeds, and preventing insects. Sometimes TruGreen must "amend" the soil after testing it by adding additional ingredients (such as lime, sulfur, gypsum, or iron) to enhance the health of grass, trees, or shrubs. It also aerates lawns and adds additional seed to remedy bare spots. TruGreen does not offer services to nurseries, tree or nut farms, or individuals or entities engaged in fruit or vegetable production. The affidavit elucidates: "Our branch location business licenses are specific to turf and ornamental plant care only."

In November 2015, TruGreen requested a use tax refund in the amount of $4,745.39 for the fertilizer, grass seed, and other products it used in its commercial lawn care business during a 31-day period in 2012. The Department of Treasury denied the refund claim and TruGreen requested an informal conference. Before the conference could be held, TruGreen submitted

[1] A different version of the statute applied to part of the 2012 tax year, but the operative language in the first sentence remained the same.

another use tax refund claim for a longer period (four and a half years) in the amount of $1,168,333.49.

A referee concluded that TruGreen had established its eligibility for the exemption and was entitled to a refund. The referee reasoned that "there are only two requirements for this exemption, (1) that a person be engaged in a business enterprise, and (2) the tangible personal property be used and consumed in the . . . planting [or] caring for . . . things of the soil." In 2004, the referee noted, the Legislature removed language from the statute requiring that an entity be engaged in "agricultural production."[2] The referee concluded, "Petitioner is engaged in a business enterprise (servicing lawns) and used and consumed the tangible personal property purchased (grass seed and fertilizer) in the planting and caring for of [sic] things of the soil. As such, the grass seed and fertilizer it purchased meets the two requirements set forth in [MCL 205.94(1)(f)] for exemption from use tax in Michigan."

The department issued a "Decision and Order of Determination" denying the refund claim, reasoning that "the statute and administrative rules requiring tangible personal property to be used within agricultural production remained valid notwithstanding [the 2004] amendment." According to the department, caselaw following the amendment continued to construe the exemption as implicating "agricultural production." "In giving proper meaning to the undefined phrase 'things of the soil,' " the department advocated, "it is important to consider that Michigan follows the doctrine 'that a word or phrase is given meaning by the context of its setting . . . .' " The other words in the statutory "setting" support that the Legislature envisioned that "things of the soil" meant growing, cultivating, or extracting crops or comparable things.

TruGreen appealed in the Court of Claims, where the parties filed cross-motions for summary disposition. TruGreen raised two arguments in support of its eligibility for the exemption. First, TruGreen contended, its activities satisfy the plain language of the statute, as the company is engaged in "tilling, planting . . . [and] caring for . . . things of the soil." Second, TruGreen argues that this Court's opinion in *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570, 571; 473 NW2d 783 (1991), compels the same conclusion, asserting that it stands for the proposition "that agricultural production is not required by the statute."

The Court of Claims rejected both arguments, ruling that the statute required the claimant to create or contribute to an agricultural or horticultural product. Citing several of this Court's cases interpreting MCL 205.94(1)(f), the Court of Claims observed that all "support the conclusion that production of horticultural or agricultural products *is* necessary." (Emphasis in original.) The

[2] The 2004 amendment eliminated two sentences from the statute: "At the time of the transfer of that tangible personal property, the transferee shall sign a statement, in a form approved by the department, stating that the property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. The statement shall be accepted by the courts as prima facie evidence of the exemption." MCL 205.94(1)(f), as amended by 2004 PA 172. We discuss this amendment later in the opinion.

Court of Claims denied TruGreen's motion for reconsideration and TruGreen now appeals as of right.

II

Because this case presents a purely legal question, our review is de novo. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010). A few tax principles, combined with a couple of interpretive precepts, inform our thinking.

"Tax exemptions are the antithesis of tax equality" and therefore must be "strictly construed," generally "in favor of the taxing authority." *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 31; 558 NW2d 444 (1996). Justice COOLEY explained the underlying rationale for considering tax exemptions cautiously and conservatively as follows:

> "Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant." [*Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

Thus, TruGreen bears a heavy burden. It must demonstrate that the Legislature had the economic interests of lawn care companies in mind when it enacted the exemption, MCL 205.94(1)(f). "Implications" and "inferences" do not suffice.[3]

[3] The dissent takes issue with Justice COOLEY's approach to the construction of tax exemptions, preferring the views expressed in Scalia & Garner, *Reading Law: The Interpreting of Legal Texts* (St. Paul: Thomson/West, 2012). The quote "cannot be taken at face value," the dissent maintains, as a "reasonable doubt" standard of proof could not possibly apply in this civil case. True enough, and likely the dissent correctly pegs that aspect of the quote as a "rhetorical flourish." But "rhetorical flourish" or not, our Supreme Court put its thumb on Justice COOLEY's side of the scale in 1948 in *Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948), and kept it there as recently as 1980 in *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 754; 298 NW2d 422 (1980) ("Justice COOLEY best summarized the rule of law in his treatise on taxation[.]"). As Scalia and Garner point out, *Reading Law* at 359, the United States Supreme Court has set out the same principles as recently as 2011 in *Mayo Foundation for Med Ed & Research v United States*, 562 US 44, 59-60; 131 S Ct 704; 178 L Ed 2d 588 (2011) ("[W]e have

Against this legal backdrop, we turn to the words. The exemption applies to:

> Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. . . . [MCL 205.94(1)(f), as amended by 2012 PA 474.]

TruGreen contends that that because it "plants" grass and is engaged in "caring for things of the soil," it is excused from paying use taxes on the fertilizer, insecticides, and myriad other products it consumes to keep customers' lawns green and healthy. Employing a purely textual approach, TruGreen urges that its activities fall within the realm of "horticulture" and "caring for" soil. The analysis is simple, TruGreen insists. Because it uses and consumes tangible personal property to "plant" and "care for" grass, trees and shrubs—indisputably things of the soil—it is plainly and unambiguously entitled to the use tax exemption.

Often, "[w]hat is 'plain and unambiguous' . . . depends on one's frame of reference." *Shiffer v Bd of Ed of Gibraltar Sch Dist*, 393 Mich 190, 194; 224 NW2d 255 (1974). Were we to consider the words and phrases cherry-picked by TruGreen in isolation from the rest of the text, we might agree that TruGreen should prevail. TruGreen's proposed interpretive methodology, however, reduces the statute's meaning to a couple of selectively harvested words, and buries the balance of the text. This approach risks an interpretation in tension with the whole text's most logical and natural meaning. Rather than plucking words from the statute, we focus on the whole textual landscape. We endeavor to harmonize *all* the words, thereby cultivating a coherent reading that promotes the Legislature's goals while maintaining fidelity to underlying legal principles. Here, those principles counsel in favor of a narrow reading of the exemption, rooted in the rationale for relieving certain entities from the burden of paying the tax.

"[T]he meaning of statutory language, plain or not, depends on context." *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Id*. (cleaned up).[4] This focus on the big picture echoes a primary canon of

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instructed that 'exemptions from taxation are to be construed narrowly[.]' "). And our Supreme Court has oft repeated that statutory exceptions to governmental immunity are to be "narrowly construed," *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 158; 615 NW2d 702 (2000), another "rule" that is entirely judge-made. But see Justice VIVIANO's concurring opinion in *Schaub as Next Friend of Schaub v Seyler*, 504 Mich 987; 934 NW2d 46, 49 (2019), which seems to call into question the application of such rules.

[4] This opinion uses the parenthetical "cleaned up" to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

construction: the individual, discrete words of a statute must be read holistically "with a view to their place in the overall statutory scheme." *Davis v Mich Dep't of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 167 ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."); *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367-368; 917 NW2d 603 (2018) ("However, we do not read statutory language in isolation and must construe its meaning in light of the context of its use.").[5]

The exemption's first relevant sentence is a string of participles: tilling, planting, caring for, harvesting, breeding, and raising. The words describe actions respecting "things of the soil" or "livestock, poultry or horticultural products." They are located in a statute creating an exemption from taxation, which we must strictly construe. Although grass and trees are "things of the soil," that phrase is surrounded by words describing activities that take place on farms. A "fundamental principle of statutory construction (and, indeed, of language itself) [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v United States*, 508 US 129, 132; 113 S Ct 1993; 124 L Ed 2d 44 (1993). TruGreen plants grass and cares for it. But the grass it plants and tends is decorative, and the work it does is unrelated to crop cultivation or agriculture in general. Considered within its contextual milieu, the term "things of the soil" pertains to the products of farms and horticultural businesses, not blades of well-tended grass.[6]

Independent of the rest of the statute, the terms "caring for" and "planting" could apply to TruGreen's lawn care enterprise, and the vivisectionist model of statutory interpretation supports that result. Our Supreme Court has applied such an approach, we acknowledge, in cases such as *Robinson v Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000) (relying on a dictionary definition of the word "the"), and *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 160; 615 NW2d 702 (2000) (examining the four sentences of a single statutory subsection separately and

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[5] Like TruGreen, the dissent champions a purely textual approach, emphasizing that "things of the soil" means "things" (grass is a "thing") that come from the "soil" (grass comes from the soil). True enough—no one disputes that grass is a "thing of the soil." But the meaning of a phrase also depends on how its constituent parts are joined and interact. Sometimes "things of the soil" do not grow from the soil at all. See 1 *The Schocken Bible: The Five Books of Moses* (Random House 2000), Genesis 1:25 ("God made the wildlife of the earth after their kind, and the herd-animals after their kind, and all crawling things of the soil after their kind.").

[6] TruGreen's interpretation would extend the use tax exemption to every lawn care and tree service company doing business in Michigan. And consistent with TruGreen's interpretation of "things of the soil," those businesses would be eligible for a *sales* tax exemption on lawn and garden-related purchases, as Michigan's sales tax includes the same exemption. See MCL 205.54a(1)(e) (stating that "a sale of tangible personal property to a person engaged in a business enterprise that uses or consumes the tangible personal property, directly or indirectly, for either the tilling, planting, draining, caring for, maintaining, or harvesting of things of the soil or the breeding, raising, or caring for livestock, poultry, or horticultural products" is exempt from sales tax).

independently to discern their meaning). Nevertheless, the "context is king" method we employ today has a long and healthy pedigree. For example, the United States Supreme Court has explained that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v United States*, 494 US 152, 156; 110 S Ct 997; 108 L Ed 2d 132 (1990). The Michigan Supreme Court has frequently followed the same interpretive pathway, counseling that words "must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute, construed in the light of history and common sense." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). More recently, in *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (cleaned up), the Supreme Court highlighted that the statutory language at issue in that case did not "stand alone" and "should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." Our Supreme Court continued, "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context," which requires interpreting courts to refrain from "divorc[ing]" "words and clauses . . . from those which precede and those which follow." *Id*. (cleaned up). "[W]ords grouped in a list should be given related meaning." *Id*. (cleaned up).

The words closely adjoining "planting" and "caring for things of the soil" are: "tilling," "harvesting of things of the soil," "breeding," "raising," "caring for livestock, poultry, or horticultural products," and "the transfers of livestock, poultry, or horticultural products for further growth." This collection of words and phrases logically connotes that the use tax exemption incentivizes investment in the agricultural realm.[7] Farmers "till," "plant," "care for" and "harvest" things of the soil; they also "care for" animals. Several sentences that followed these, then located in the same statutory subsection, reinforce that the Legislature intended the exemption to apply to agricultural activities.[8] The second sentence of MCL 205.94(1)(f), as amended by 2012 PA 474, stated that the "exemption includes machinery that is capable of simultaneously harvesting grain or other crops and biomass and machinery used for the purpose of harvesting biomass."[9] The third sentence further provided that the "exemption includes agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land used in the production of agricultural products as a business enterprise and includes a portable grain bin . . . ." Read as a cohesive whole, MCL 205.94(1) was and is intended to benefit businesses that contribute to our state's agricultural sector.

[7] Promoting agricultural investment benefits Michigan's economy and helps put local food on our tables. Lawns, on the other hand, demand fertilizer, water, energy, and land. The exemption from taxation at issue encourages the *production* of market resources, not their consumption.

[8] The remaining sentences of MCL 205.94(1)(f), as amended by 2012 PA 474, have since been moved to other subsections of the statute.

[9] The subsection defined "biomass" as "crop residue used to produce energy or agricultural crops grown specifically for the production of energy." MCL 205.94(1)(f), as amended by 2012 PA 474.

III

We are not the first judges to conclude that MCL 205.94(1) applies to businesses associated with agriculture. The caselaw has consistently referred to the statutory subsection at issue as the "agricultural-production exemption." See *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 50 n 14; 869 NW2d 810 (2015); *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 235; 818 NW2d 489 (2012); *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 488; 618 NW2d 917 (2000); *Kappen Tree Service, LLC v Dep't of Treasury*, unpublished opinion of the Court of Appeals, issued April 26, 2016 (Docket No 325984), slip op at 3.

William Mueller & Sons, 189 Mich App 570, is instructive. In that case, we held the exemption applicable to Mueller & Sons' purchase of fertilizer equipment. Mueller & Sons was "in the business of testing farm soil, recommending fertilizer mixes, and selling seed and fertilizer to farmers." *Id*. at 571. The company also purchased produce from farmers, and both used fertilization-application equipment and offered it for rent to farmers. *Id*. This Court rebuffed the department's argument that to qualify for the exemption the taxpayer had to *directly* produce agricultural products, and instead explained that "[s]ection 4(f), by its plain language, exempts property sold to a business enterprise if the property is used for agricultural or horticultural growth." *Id*. at 573. The taxpayer itself need not engage "in the business of producing agricultural products[.]" *Id*. at 573-574. The touchstone, we highlighted, was involvement in an agricultural endeavor. *Id*. at 574.

TruGreen asserts that *Mueller* is inapposite, as the statute in effect at that time included the following two sentences:

> [A]t the time of the transfer of that tangible personal property, the transferee shall sign a statement, in a form approved by the department, stating that the property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. The statement shall be accepted by the courts as prima facie evidence of the exemption. [MCL 205.94(f), as amended by 1978 PA 262.]

In 2004, the Legislature eliminated this signed-statement requirement. 2004 PA 172. The elimination of statutory language sometimes supplies an indicator of legislative intent. *Sam v Balardo*, 411 Mich 405, 430; 308 NW2d 142 (1981). Here, however, all that was removed was a certification requirement. The Court of Claims noted that this amendment was part of a larger legislative plan to adopt the Streamlined Sales and Use Tax Administration Act, MCL 205.801 *et seq*. The seller now bears the burden of identifying the ground for an exemption, not the purchaser. See MCL 205.104b(1). This administrative change did not alter the design, structure, purpose or meaning of the rest of the statute.

MCL 205.94(1) permits a tax exemption for property used in agricultural production and supply. TruGreen is not involved in any agricultural endeavors. Applying an organic approach to *all* the statutory words, we affirm the Court of Claims.

/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro

STATE OF MICHIGAN

COURT OF APPEALS

TRUGREEN LIMITED PARTNERSHIP, Plaintiff-Appellant,	FOR PUBLICATION April 10, 2020
v	No. 344142 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 17-000141-MT

Before: SHAPIRO, P.J., and GLEICHER and SWARTZLE, JJ.

SHAPIRO, P.J. (*concurring*).

I concur fully in Judge Gleicher's opinion. I write separately only to address some aspects of the dissenting opinion. First, despite its fine prose, the dissent's analysis rests on a single point i.e., that the phrase "things of the soil" is not a term of art. I disagree. That phrase is plainly a term of art and patching together definitions of its individual component words is not consistent with proper statutory interpretation. Second, the dissent's approach would greatly expand the scope of this tax exemption beyond what it has been for 70 years. To accomplish that, I suggest that more than a dictionary is required. Third, the dissent does not give respectful consideration to the interpretation by the body charged with applying the statute.

I. "THINGS OF THE SOIL" IS A TERM OF ART

The dissent rests on its assertion that interpretation of the statute at issue does not require "an effort to unearth the meaning of oft-obscure, technical language." To the contrary: the origin and meaning of the phrase "things of the soil" is most certainly obscure. I doubt that any member

of this Court has ever heard the phrase in conversation or even seen it in a book other than perhaps the Bible.[1]

A term of art has been defined as "a word or phrase that has a specific meaning or precise meaning within a given discipline or field and might have a different meaning in common usage."[2] Accordingly, we are to construe the term by its established use in the law, not by looking up the individual words in the dictionary. This not a new idea and is mandated by statute. MCL 8.3(a) provides that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but *technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, **shall** be construed and understood according to such peculiar and appropriate meaning*." (Emphasis added).

Consistent with decades of caselaw, I conclude that the phrase "things of the soil" has an established meaning in Michigan law, i.e., crops grown for harvest and sale. Despite the dissent's confidence that every reasonable person would know that this phrase includes residential lawns, no case has even suggested such a reading in 70 years. Nor has any taxpayer—until this case—made such a claim.

II. THE CONTEXT

The dissent reads the first sentence of the statute in isolation. For example, the second sentence does not refer to the "caring for horticulture" but to the "caring for horticultural products." MCL 205.94(1)(f). A product is an object that may be sold to another. TruGreen does not explain how the grass it cares for is a "product" and for good reason. With rare exceptions (which will likely fall within the exemption) private residential plants and lawns are not for sale. They are not "products." TruGreen does not care for something that will become a product. Rather it provides a service to residential property owners who would never qualify for the exemption themselves. Certainly "products" are used to care for the private lawn but no product, horticultural or otherwise is created.

Reading the rest of the statute leads to the same conclusion. The items specifically listed as falling within the exemption are:

- machinery capable of harvesting grain or other crops or biomass

[1] Some translations of Genesis 9:20 describe Noah, after the flood, as "a man of the soil," English Standard Version (2001); New International Version, (2011), while other translations describe him as a "farmer," New American Standard Bible (1995); New King James Version, (2020).

[2] <http://www.dictionary.com> (last accessed March 18, 2020). It is similarly defined elsewhere as "an expression or phrase that has a defined meaning when used in a particular context or knowledge environment." <http://www.justia.com/dictionary> (last accessed March 23, 2020).

- agricultural land tile or other drainage system "used in the production of agricultural products"
- portable grain bins
- grain drying equipment
- greenhouses. [MCL 205.94(1)(f).]

It would be highly unusual for a private residence to use "portable grain bins," "grain drying equipment" or any of the other items that were intended to fall within the exemption and exemplify its scope. And of course, the exemplar list does not include anything that would be particularly used to maintain a private lawn or garden.[3]

The dissent suggests that the Legislature could have made its intention regarding non-agricultural application of the exemption clear by including the terms "for agricultural purposes." This is a straw man argument—one could just as easily say that the Legislature could simply have added the phrase "including lawn care" or "including services to residential property."

III. THE DEPARTMENT'S INTERPRETATION

In my view, the agency has not overstepped its authority; rather, it has exercised its lawful authority to apply the law defining the scope of this particular tax exemption and has done so consistent with the statute. It is well-settled that "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935) (quotation marks and citation omitted). Moreover,

> while not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws, and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the Legislature. [*Id*. at 296-297 (quotation marks and citation omitted).]

The Department's long-standing construction of the statute is not in conflict with "the indicated spirit and purpose" of the statute yet the dissent gives its construction no credence

[3] TruGreen and the dissent rely on *Mueller & Sons Inc v Dept of Treasury*, 189 Mich App 570 (1991)—the only case to apply the exemption to non-farmers. However, *Mueller* extended the exception to only one category of businesses—those that provide services to farms. The sole property for which the exemption was sought and granted was fertilizer equipment, which the petitioner used to perform "a contractual service *to farmers* for their application of fertilizer." *Id*. at 572 (emphasis added). It is one thing to apply the exemption to those who contract to do the work farmers would otherwise do themselves. See also *Michigan Milk Producers Ass'n v Dept' of Treasury*. 242 Mich App 486; 618 NW2d 917 (2000). It is quite another to apply it to every company whose work involves anything that is found in soil.

whatsoever, let alone respectful consideration. The dissent reads as though interpretation of this statute did not exist prior to the time its author picked up the dictionary.[4]

IV. JURISPRUDENCE BY DICTIONARY

The use of dictionaries as sources of law is a very recent phenomenon. For 140 years, from 1845 through 1984, the Michigan Supreme Court cited to a lay dictionary in less than 1% of its cases. From 1985 through 1994, it cited to lay dictionaries in about 8% of cases and from 1995 to 2005 (as the "textualist" era began) in 14%. Since then there has been an explosion in reliance on the dictionary; from 2005 to the present, the Court has cited lay dictionaries in an astonishing 37% of cases.[5] More Supreme Court cases were decided using lay dictionaries in the era since 2000 than in the entire 155 years that preceded it.

This explosion in courts' use of dictionaries has occurred in the face of intense criticism from legal scholars, language experts, and even dictionary editors. Critics point out that it allows for dictionary shopping and cherry-picking;[6] that it is inconsistent with language theory; and that

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[4] I am not impressed by the dissent's view of the legislative history. First the dissent reminds us that legislative history is of no moment; only the literal text of the statute matters. Then, the dissent reverses course and speculates at length about the motives of the Legislature through a number of revisions over decades. The dissent's bottom line, however, is that by adopting the phrase "things of the soil" in 1949 the Legislature unambiguously intended to allow the exemption to apply beyond farming; an intent that eluded discovery for nearly 70 years.

[5] From preliminary data supplied by Professor Joseph Kimble for a work in progress. The cases do not include orders.

[6] There are many dictionaries and each assign multiple meanings to most words. This invites judges to "cherry pick" the definition that suits their position and ignore the others. For example, the dissent cites the definition of "thing" in the *Oxford English Dictionary* (1933) and asserts that it is defined as "[a]pplied (usually with a qualifying word) to a living being or creature; occasionally to a plant." Here the dissent is clearly cherry-picking. First, the definition refers to "a living being or creature," which if relied on would mean that earthworms, voles, and other creatures must also be considered "things of the soil," a view the dissent rejects without explanation. Second, the dissent reads as if its selected definition is the only one in the *OED*. To the contrary, the definitions of "thing" in the 1933 *OED* runs to over two full pages in a font so small as to be barely readable. Thus, the definition underlying the dissent's entire analysis has been picked not merely from one cherry tree, but from an entire orchard. Some examples of the definitions not mentioned in the dissent include "a being without life or consciousness; an inanimate object," "a piece of property," "an event, occurrence, incident," "a material substance," "what is proper," "that with which one is concerned," "that which is to be done," "an entity of any kind," "a being or entity consisting of matter, or occupying space" and many, many others. Moreover, there is a section for the use of the word "thing" in "phrases, special collocation, and combinations," yet the phrase "things of the soil" is not defined there.

legislative drafters themselves apparently do not rely on dictionaries to any great extent.[7] The authors of one exhaustive study of United States Supreme Court opinions concluded that "the image of dictionary usage as . . . authoritative is little more than a mirage."[8]

Nevertheless, jurisprudence by dictionary remains tempting; it requires no effort beyond looking up a few words and picking the definition that support the author's position. More insidiously, it implies that reasoned good-faith discussion, analysis of caselaw and context, and stare decisis are not aids to interpretation, but rather stumbling blocks on the path to the absolute clarity that can only be provided by a dictionary. Dictionary usage has become a fetish by which reasoned analysis, criticism, and concern for actually existing conditions are rendered irrelevant to the judicial process. Despite the ease of deciding cases by dictionary, the question is what the intent of the Legislature was, not what the intent of a dictionary editor is. The Legislature has no official dictionary and has not commanded us to conclusively rely on a particular, or indeed any, dictionary in order to understand its intent.

The fetishization of dictionaries has even led thoughtful jurists like our dissenting colleague to conclude that any attempt by the courts to interpret a statute by means other than a dictionary is "outside of our proper role and competency." Such an approach dispenses with the constitutional fact that the judiciary is an independent co-equal branch of government and ultimately responsible for the interpretation of statutes and their fair application in individual cases.[9] The judiciary is not subservient to the editors of dictionaries and the dictionary is not established by our constitution as the guiding force in jurisprudence. I suggest that it is time we put the dictionary back on the shelf and resume our constitutional role.

/s/ Douglas B. Shapiro

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[7] See e.g., Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000–2015*, 62 Wayne L Rev 347, 359–60 (2017) (summarizing, with references, some of the grounds for criticism). See also Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz St L J 275, 334 (1998) ("[Dictionaries'] purpose of giving readers and speakers approximate meanings of words so that they begin to understand the meaning of the word in context makes dictionaries ill-suited for determining the meaning of a particular word in a particular statute."); Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 NYU J Legislation & Public Policy 401, 401 (2003) ("[J]ust as medical science has progressed since the time of leech treatments, the science of linguistics has progressed since the time that scholars believed that dictionaries held the key to sentence meaning. Dictionaries simply are not capable of explaining complex linguistic phenomena, but they are seductive.").

[8] Brudney & Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm & Mary L Rev 483, 492 (2013).

[9] "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803).

STATE OF MICHIGAN

COURT OF APPEALS

TRUGREEN LIMITED PARTNERSHIP, Plaintiff-Appellant,	FOR PUBLICATION April 10, 2020
v	No. 344142 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 17-000141-MT

Before: SHAPIRO, P.J., and GLEICHER and SWARTZLE, JJ.

SWARTZLE, J. (*dissenting*)

Some tax cases present questions of byzantine statutory construction. One's Latin must be refreshed, venerable treatises and opinions consulted, the warp and woof of the code analyzed, all in an effort to unearth the meaning of oft-obscure, technical language.

This is not one of those cases—or, rather, it should not have been one.

As it must, the legal analysis follows, but the analysis seems superfluous. The reasonable reader knows what "things of the soil" means, a vegetative entity of some sort (e.g., a wheat plant, a shrub). This reader knows that every "product" is a thing, but not every "thing" is a product, so it logically follows that every "product of the soil" (a/k/a agricultural product) is a thing of the soil, but not every "thing of the soil" is a product of the soil. This reader knows that farmers plant seeds and care for plants so that agricultural products can be reaped, but this reader also knows that others plant seeds and care for plants for purposes apart from such reaping. This reader knows that when the Legislature removes words that were actually in a statute or bill (e.g., "agricultural product," "agricultural production," "agricultural purpose"), it does so for a reason. This reader knows that an imprecise label like "agricultural-production exemption" does not become more precise through mere repetition. And last but certainly not least, this reader knows that, under the separation of powers enshrined in our Constitution, the Executive and Judicial branches are supposed to defer to the Legislature on matters of public policy like tax law. This is all that a reasonable reader needs to know to conclude that the taxpayer in this case is entitled to the use-tax exemption.

The majority and department, however, read things differently. Because I cannot abide their reading, I respectfully dissent.

I. STATUTORY INTERPRETATION IN GENERAL

Under separation-of-powers principles, courts must give effect to the Legislature's intent as expressed in statute absent a particular constitutional constraint. "Courts may not speculate regarding legislative intent beyond the words expressed in a statute." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014) (cleaned up).

Therefore, to determine the meaning of a statute, we must first look to the text. When doing so, we must consider both the meaning of the particular term or phrase at issue as well as its statutory context and history. *People v Pinkney*, 501 Mich 259, 268 & 276-277 n 41; 912 NW2d 535 (2018); *2000 Baum Family Trust v Babel*, 488 Mich 136, 175; 793 NW2d 633 (2010). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003) (cleaned up). "Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 554-555; 912 NW2d 593 (2018). "A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *Id.* at 554 (cleaned up).

II. THE TEXT, CONTEXT, AND HISTORY OF "THINGS OF THE SOIL"

To begin, I focus initially on the *actual* semantic meaning of the "things of the soil," then on the *actual* syntactic context of that phrase, and finally on the *full* statutory and legislative history of the exemption. This approach comports with the "fair reading" school of interpretation: "The interpretation that would be given to a text by a reasonable reader, fully competent in the language, who seeks to understand what the text meant at its adoption, and who considers the purpose of the text but derives purpose from the words actually used." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, (St. Paul: Thompson/West, 2012), p 428.

The Specific Text. The parties agree that TruGreen's refund claims are subject to the following exemption from the use tax:

> Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. . . . [MCL 205.94(1)(f), as amended by 2012 PA 474.]

Although the statutory provision can be subdivided in various ways, and some parts have no relevance to the dispute here (e.g., breeding of livestock), the provision sets forth two conditions relevant to this dispute that must be satisfied to qualify for the use-tax exemption—(1) the taxpayer must be engaged in a business enterprise; and (2) the property sold to the taxpayer must be used by that taxpayer for "planting" or "caring for . . . the things of the soil." There are no other listed

conditions or exceptions found in the text of MCL 205.94(1)(f) that are relevant to TruGreen's refund claims. Nor have the parties brought to the Court's attention any other provision of the tax code that expressly conditions or otherwise restricts TruGreen's claims, and my own review has likewise found none.

On its face, this provision has a rather straightforward application. If a taxpayer is engaged in a business enterprise, and if the business activity—with the attendant costs for property used to engage in the activity—includes planting or caring for "things of the soil," then the taxpayer qualifies for an exemption from the use tax. The phrase "things of the soil" is not defined in the statute, nor has it "acquired a unique meaning at common law" that should be read into the statute. *Pinkney*, 501 Mich at 273 (cleaned up). Turning to *The Oxford English Dictionary* (1933), the most relevant definitions of "thing" in this context are "An entity of any kind" and "Applied (usually with qualifying word) to a living being or creature; occasionally to a plant,"[1] and the phrase "of the soil" seems clearly to mean that the living being or entity comes from, lives in, is connected with, or is otherwise related to soil. And considering that each of the activities listed—"tilling, planting, caring for, or harvesting"—somehow involves vegetative growth (as opposed to worms and the like), it is evident that "things of the soil" means some kind of vegetative being or entity, i.e., beings or entities belonging to the plant kingdom.

With respect to TruGreen, the record confirms that it is a business enterprise and that it plants grass seed for some of its customers. More generally, in its brief on appeal, the department has **conceded** that TruGreen "cares for its customers' lawns, trees, and shrubs," and in the next sentence the department **equates this** with "caring for the things of the soil." The record supports this concession. Thus, based on a plain reading of the operative language of the tax exemption, it would appear that TruGreen is off to a good start.

The Broader Statutory Context. Turning to the broader statutory context, a careful analysis of the context supports this plain reading. To begin, the operative use-tax exemption language from the 2012 version can be grammatically outlined as follows:

- The following are exempt from the tax levied under this act,
    - Property sold
    - to a person
    - engaged in a business enterprise and
    - using and consuming the property
        - in the tilling, planting, caring for, or harvesting of the things of the soil or

[1] As explored in greater detail *infra*, the phrase "things of the soil" was added by our Legislature in 1949. Accordingly, when considering a particular word, the Court "must look to the meaning of words at the time they were enacted." *People v Rogers*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 346348); slip op at 6. As indicated in *The Oxford English Dictionary*, the meaning of "thing" referenced here derives from various texts, ranging in date from 888 to 1858 to 1910 CE. Apart from the occasional devotee of Martin Heidegger, it is doubted that any reasonable reader will take umbrage at the definition of "thing" offered here.

- in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth

Several observations flow from analyzing the context. First and most obviously, nowhere in this operative text is the term "agricultural production" or a similar term even found. This observation alone cuts against a contrary reading, given how easy it would have been simply to write—"agricultural products"—if that is what the Legislature had actually intended. (More on this later.)

Second, diving a bit deeper, structurally there are two wholly separate prepositional phrases, each beginning with "in," one ending with "things of the soil" and the other ending with "for further growth." The two phrases are separated by "or," and there is nothing to suggest that this "or" should be read as anything other than disjunctive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133, 140 (2010). Thus, structurally each phrase stands separate on its own.

Flowing from the first and second observations, it is further observed that the only use of the term "products" in the entire exemption is with respect to the wholly separate phrase dealing with "livestock, poultry, or horticultural products." While one must be cautious not to put too much weight on the canon that "the express mention of one thing implies the exclusion of other similar things," *People v Garrison*, 495 Mich 362, 372; 852 NW2d 45 (2014), it does seem worth mentioning that this illustrates, at the very least, the Legislature's ability to limit the exemption with respect to certain kinds of "products" when it wants to do so, i.e., "livestock, poultry, or horticultural *products*."

Fourth, the four activities listed in the relevant phrase—"tilling, planting, caring for, or harvesting of"—are similarly separated by "or" rather than "and." There is nothing in the statute to suggest that this "or" should be read as a conjunctive, see *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995), and, in fact, it appears quite clear that the exemption is available to a business enterprise that, for example, uses equipment to till "things of the soil" but does not also harvest those things. Thus, an entity need not engage in all four activities to be eligible for the exemption.

Fifth, the four activities all encompass the life cycle of a vegetative entity, but only a vegetative entity that involves some human management or involvement. The activities do not include, for example, the growth of a plant in the middle of a rainforest untouched by human hands. The activities are *human* ones (with or without the aid of machinery, chemicals, or other human technology), and the activities are centered on or otherwise involved in the care and management of a vegetative entity.

Sixth and finally, encompassed within the set of activities is certainly agricultural production. But the object of the activities—"things of the soil"—is not itself limited to agricultural products, and the four activities are necessarily broader than mere agriculture. One can certainly plant and care for a vegetative entity without necessarily harvesting something from it for sale in the future. A contrary reading would necessarily imply that any "thing[] of the soil" that is tilled, planted, cared for, or harvested would always and everywhere have to result in an

agricultural product. In other words, the contrary reading would equate *things of the soil that are tilled, planted, cared for, or harvested* with *agricultural products*.

But this is question begging and, more critically, it is a false equivalency. Many vegetative things (e.g., plants, flowers, trees) are planted or otherwise cared for, but do not themselves produce or otherwise result in a product for sale on the market. While it is not necessary to identify what "things of the soil" means in every conceivable context, it can be said with some confidence that "things" is a more expansive concept than "products." Thus, the set of all *"things of the soil" that are tilled, planted, cared for, or harvested* encompasses each and every agricultural product, but the set of all *agricultural products* does not encompass each and every "thing[] of the soil" that is tilled, planted, cared for, or harvested. Simply put, the phrase "things of the soil" in this context has a logically broader meaning than mere agricultural products.

The Legislature could have used the phrase "agricultural products" or even "products of the soil" as the object of the four listed activities, but it eschewed those and similar labels and instead chose a logically broader one, "things of the soil." Under the plain meaning and statutory context of the use-tax exemption, TruGreen remains on solid ground.

The Lengthy History. Next, statutory and legislative history. With respect to this history, it should be noted at the outset that (i) the history is lengthy and (ii) not outcome determinative, but (iii) several pertinent observations can be made. Taking a cue from the majority, I will not recite the full history of the exemption in exhaustive detail; instead, a few key highlights will suffice:

- In 1937, the Legislature enacted a use-tax exemption for "tangible personal property" used in "agricultural producing." [1937 PA 94 § 4(g).]

- In 1949, the Legislature revised the exemption by deleting "agricultural producing" and replacing the term with "things of the soil." It also added a certification provision for "horticultural or agricultural products." [MCL 205.94(1)(g), as amended by 1949 PA 273.]

- The Legislature revised the exemption again in 1970. This time it added a catch-line heading ("Agricultural production") and made other changes not relevant to this dispute. [MCL 205.94(f), as amended by 1970 PA 15.]

- The provision remained much the same until 2004, when the Legislature left out the catch-line heading and deleted the certification provision, among other revisions. This omitted *any* legislative mention of "agricultural production" with respect to the exemption. [MCL 205.94(1)(f), as amended by 2004 PA 172.]

- In 2008 and 2012, the Legislature made further minor revisions to the exemption. These are the provisions relevant to the tax years in question. The operative language is identical in both versions:

> (1) The following are exempt from the tax levied under this act, subject to subsection (2):
>
> * * *
>
> (f) Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. [MCL 205.94(1)(f), as amended by 2012 PA 474.]

In 2017, a package of bills amending various tax exemptions was introduced in our House of Representatives. Two of the bills, HB 4561 and HB 4564, involved exemptions for "things of the soil." As introduced, the bills would have made the exemptions expressly limited to "agricultural purposes"—i.e., the relevant language would have changed to ". . . . things of the soil *for agricultural purposes* . . ." (emphasis added). Not surprisingly, the department supported the change. The House passed the bills with the included express limitation, but the language was eventually stripped from the bills in the Senate. The Senate passed the bills without the language, the House concurred, and the Governor signed the bills. See 2018 PA 114. The current exemption thus reads:

> (1) The following are exempt from the tax levied under this act, subject to subsection (2):
>
> * * *
>
> (f) Except as otherwise provided under subsection (3), property sold to a person engaged in a business enterprise that uses or consumes the property, directly or indirectly, for either the tilling, planting, draining, caring for, maintaining, or harvesting of things of the soil or the breeding, raising, or caring for livestock, poultry, or horticultural products, including the transfers of livestock, poultry, or horticultural products for further growth. [MCL 205.94(1)(f), as amended by 2018 PA 114.]

What can the reasonable reader glean from this history? A few things. The original use-tax exemption was enacted in 1937 to focus on "agricultural producing," but then twelve years later, any mention of "agricultural producing" was omitted and replaced with "things of the soil." When the Legislature uses a different word or phrase in revising a statute, absent clear indication that it was done for purely stylistic reasons, the new word or phrase should signal a change in meaning. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

At the same time that the Legislature added "things of the soil," it also added the term "agricultural products" in the new certification provision. Yet, as this Court held in *William Mueller & Sons, Inc v Dep't of Treasury*, 189 Mich App 570, 574; 473 NW2d 783 (1991), the certification provision did not create a requirement related to "agricultural products," but rather provided a means for the creation of prima facie evidence in support of an exemption claim. Thus, the fact that the Legislature added the term "agricultural products" in 1949 is of little moment here. Moreover, the entire certification provision was omitted from the exemption in 2004.

At first blush, it would seem significant that the Legislature added the catch-line heading in 1970. The Legislature has long instructed, however, that catch-line headings "shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate." MCL 8.4b. A catch-line heading is merely for the "convenience to persons using publications of the statutes," *id.*, and therefore courts and departments must ignore the heading for purposes of determining what the statute means, *In re Lovell*, 226 Mich App 84, 87 n 3; 572 NW2d 44 (1997). In any event, the catch-line heading was omitted by the Legislature in subsequent amendments. See, e.g., 2004 PA 172.

This statutory history, while somewhat muddled, does suggest that by at least 2004, the Legislature had settled on a broad exemption. Specifically, by 2004, (i) the Legislature had jettisoned the original "agricultural producing" scope and replaced it with "things of the soil"; (ii) it had added and then removed the narrower catch-line heading; and (iii) it had omitted any mention of "agriculture" or "agricultural" in the operative part of the exemption (the only references are later in the provision regarding land tiles). While not conclusive by itself, this history is consistent with and supports the reading presented here.

What to make of the recent legislative history, i.e., HB 4561 and 4564? In one respect, it is not relevant because we are interpreting prior versions of the statute. See *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). In another respect, however, it is relevant because this legislative activity shows, at a minimum, that the Legislature knows full well how to draft a provision that would clearly narrow the exemption to "agricultural purposes." In fact, the department supported such a provision, the House (originally) supported such a provision, but the Senate did not. By the time the Senate sent the legislation back to the House for a concurrence vote, the proposed provision had been stripped out and replaced with the existing provision ("things of the soil"), with nary a mention of "agricultural producing," "agricultural products," or "agricultural purposes."

The reasonable reader can speculate on why the language was removed as the bills traversed the Legislature. Maybe, for instance, some of the legislators observed that well-manicured lawns provide esthetic benefits to third parties, and those legislators wanted to subsidize the provision of such benefits.[2] Or, maybe, other legislators simply supported lower taxes on businesses like TruGreen. These and other speculations are, however, just that—speculations. What can be known for certain from the recent legislative activity is that (i) the Legislature was asked to narrow the exemption at the same time that this dispute was working its way through the

[2] Some have argued that tax laws must further some public good. There is no logical reason that esthetic goods—which grass, trees, and ornamental plants surely are—cannot be considered public goods. A public good is one whose benefit inures largely to the public as opposed to a single person or firm—technically, the good is non-excludable and non-rivalrous. The esthetic values of well-manicured lawns, parks, and commercial and other public spaces are, by and large, non-excludable and the enjoyment by one does not diminish the enjoyment by another. Whether the esthetic values created by TruGreen's services *should* qualify as a "public good" for tax purposes is a policy question for the Legislature, not a judicial one for this Court or an administrative one for the department.

courts, (ii) the Legislature considered narrowing the language, but (iii) the Legislature ultimately rejected the narrower language. *Id.* (noting that the "highest quality" of legislative history is that which includes "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted").

After considering the text, context, and history of the use-tax exemption, where does this leave our reasonable reader? A few takeaways seem unavoidable. The meaning of the phrase "things of the soil" is broader than the phrase "agricultural products" or even "products of the soil." The context of the statute supports the plain, broader meaning of the phrase. And while not itself conclusive, the statutory and legislative history lends support to a broader understanding of the exemption, especially when the reader compares the phrase chosen and retained by the Legislature ("things of the soil") with the phrases rejected and jettisoned by it ("agricultural producing," "agricultural products," "agricultural purposes"). Frankly, one has to wonder how the Legislature could have more clearly evidenced that a broad meaning was intended. It replaced a narrow term with a broad one; it reserved the term "products" for a logically separate category in a grammatically separate phrase; it eschewed any mention of "agriculture" or "agricultural" in the relevant part of the provision; and, when recently asked to modify "things of the soil" with "agricultural purposes," the Legislature said *No*.

Given all of this, I submit that the reasonable reader is left with but one conclusion—TruGreen qualifies for the use-tax exemption.

III. THE MAJORITY OPINION

The reasonable reader need go no further. My analysis has been set out in detail, and the reader can compare this with the majority's analysis and determine on their own who has the sounder case. For those who want to press on, however, I offer a few additional observations, none of which are necessary to my analysis.

Thumb on the Scale. The majority starts out its opinion by placing a collective thumb on the interpretative scale in favor of the department. In support, the majority references a quote from Justice Cooley's treatise on taxation that the grant of an exemption " 'must be beyond reasonable doubt.' " *Detroit v Detroit Commercial College*, 322 Mich 142, 149; 33 NW2d 737 (1948), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403. But this cannot be taken at face value. "Beyond reasonable doubt" is the burden needed for the government to take a person's liberty (and, in other jurisdictions, possibly even life) away; it cannot plausibly be the burden needed for a taxpayer to obtain a tax exemption. This rhetorical flourish should remain just that.

More substantively, while our Supreme Court has stated that courts should strictly construe tax exemptions, it has also clarified that this does not mean that tax exemptions should be given "a strained construction adverse to the Legislature's intent." *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 665; 378 NW2d 737 (1985). "Like any other governmental intrusion on property or personal freedom, a tax statute should be given its fair meaning, and this includes a fair interpretation of any exceptions it contains." Scalia & Garner, *Reading Law*, p 362.

I read our case law to mean that, when construing a tax exemption, a court should—as with any other statute—start by analyzing the text, context, and history of the exemption using common,

generally accepted interpretive tools (e.g., definitions, rules of grammar, changes in statutory language). If the exemption is ambiguous (i.e., it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning), only then should the court turn to various interpretive canons of construction, one of which being that when there remains doubt about a tax exemption's meaning, the push goes against the taxpayer. It is not at all clear to me how the majority is using the "strictly construed" canon, but I suspect it is using it more strictly than it should.

Bones and Tarot Cards. Even more concerning is the majority's contextual analysis. From what I can tell, the majority's analysis consists of ripping words from their context, jumbling them together, and then drawing conclusions from the resulting "collection of words and phrases." Take this example: "The exemption's first relevant sentence is a string of participles: tilling, planting, caring for, harvesting, breeding, and raising. The words describe actions respecting 'things of the soil' or 'livestock, poultry or horticultural products.' " Or take another example: "The words closely adjoining 'planting' and 'caring for things of the soil' are: 'tilling,' 'harvesting of things of the soil,' 'breeding,' 'raising,' 'caring for livestock, poultry, or horticultural products,' and 'the transfers of livestock, poultry, or horticultural products for further growth.' " Compare the majority's lists with the actual language of the statute set out earlier.

The majority has indeed identified a "collection of words and phrases" from the exemption—just not the "collection of words and phrases" as they actually appear in the actual statutory language. As shown earlier, the grammatical structure of the exemption does not suggest that "breeding" or "raising" has anything to do with "things of the soil." Nor does "livestock, poultry, or horticultural products" or "for further growth" having anything to do with the prior, separate prepositional phrase. In fact, the use of "products" in the separate phrase argues against the majority's reading, but by jumbling everything together into a "collection of words and phrases," the majority can infer meanings that are not there. This is a bones-and-tarot-cards method of contextual analysis.

An Imprecise Label Does Not Become More Precise by Repetition. The majority seems also to draw support from several prior decisions of this Court. Under principles of stare decisis, if our Supreme Court or a panel of this Court had held in a published decision that the department's interpretation was the correct one, then I would be bound to follow the holding, notwithstanding my understanding of the plain meaning of the statute set out earlier. See *Associated Builders and Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016).

All parties agree that there is no Supreme Court decision on-point. As for the decisions of this Court cited by the majority, I readily concede that those decisions have referred to the exemption as the "agricultural production exemption." See, e.g., *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 49 n 14; 869 NW2d 810 (2015); *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 234; 818 NW2d 489 (2012); *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 491; 618 NW2d 917 (2000). This is not surprising, though, since the Legislature at one time referred to this exemption by a similar catch-line heading (though no longer), and end uses of "things of the soil" certainly include (though are not limited to) agricultural products.

In *William Mueller & Sons*, 189 Mich App at 571, the taxpayer was assessed a use tax on fertilizer equipment that it claimed was involved in agricultural production. The Court held that the taxpayer qualified for the exemption because it was undisputed that the taxpayer was a business enterprise and the equipment was used in the "tilling, planting, caring for, or harvesting of things of the soil." *Id.* at 573. The Court rejected the department's position that the taxpayer had to be "in the business of producing agricultural products" for the exemption to apply. *Id.* at 573-574. Importantly for this case, there is no holding or even analysis in *William Mueller & Sons* related to what "things of the soil" means.

Likewise, the Legislature's intended scope of the phrase "things of the soil" was not at issue in *Mich Milk Producers Ass'n*, 242 Mich App 486, or *Sietsema Farms*, 296 Mich App 232. In *Mich Milk Producers*, 242 Mich App at 487-488, 495, there was no question that "milk production" was within the scope of the exemption, and the question was whether the use of the equipment was for producing milk (exempt) or marketing milk (not exempt). Similarly, in *Sietsema Farms*, 296 Mich App at 240, there was no question that feeding livestock and poultry fit within the scope of the exemption, and the question was whether the property was actually being used to feed livestock and poultry.

While I acknowledge that prior panels have used the term "agricultural production" to refer to the exemption, this Court is bound by the holdings of prior published decisions, not the shorthand labels used in those decisions. And an imprecise short-hand label does not become more precise with mere repetition.

IV. THE DEPARTMENT'S REMAINING ARGUMENTS

In addition to those accepted by the majority, the department offers alternative arguments in support of its position. Unlike those accepted by the majority, these other arguments have little to do with the statute's text. The department asserts, for instance, that use-tax exemptions are intended to prevent the pyramiding of taxes on commercial products. Tax pyramiding means the imposition of a tax on a tax, and for those who want their taxes to be transparent, such pyramiding is generally frowned upon. Because TruGreen's services do not directly or even indirectly result in the sale of a taxable agricultural product to an end-user, the department maintains that there is no risk of pyramiding a sales tax on top of a use tax, and, therefore, the purpose of the exemption would be undermined if TruGreen received the use-tax exemption.

Accepting that tax pyramiding is a policy vice to be avoided, the department's reliance on this argument has several flaws. Rather than cite to the "highest quality" of legislative history in support of its argument, such as actual, official activity of the Legislature (e.g., votes and amendments), *In re Certified Question*, 468 Mich at 115 n 5, the department points us to a journal article and a legislative analysis. Neither is particularly reliable in determining whether MCL 205.94(1)(f) was intended, in fact, to eliminate any risk of tax pyramiding with respect to "things of the soil."

Furthermore, although the department couches this as an argument from historical development, this is really an argument from policy implication. The department has identified a cogent tax policy—use-tax exemptions are intended to avoid tax pyramiding—and because TruGreen's commercial activities purportedly do not run the risk of tax pyramiding, then the

rationale for the tax policy does not support an exemption for TruGreen. But, as this Court recognized in *D'Agostini*, 322 Mich App at 560, "It is not our place to divine *why* the Legislature" enacted a tax statute to favor or disfavor a particular taxpayer or taxable activity. "Rather, it is our place only to determine *whether* the Legislature did or did not do so . . . ." *Id.* Similarly, our Supreme Court made clear in *Pinkney*, 501 Mich at 285-288, that if the plain meaning of the statute is clear but a court believes that the Legislature made a mistake that "frustrates [the] purpose" of the statute, then the court must apply the statute as written and leave it to the Legislature to determine whether a change is needed.

In fact, the very concept of tax pyramiding is suspect with respect to agricultural products. To illustrate, it is important to recognize first that many agricultural products are ultimately sold to end users as food or food ingredients for human consumption. In Michigan, most food for human consumption is exempt from sales tax, MCL 205.54g(1)(a), so there is no risk of tax pyramiding with respect to these food products, at least as it relates to the imposition of a sales tax on an end-product on top of a use tax on the inputs of production. And yet, even though there is no risk of tax pyramiding on sweet corn, for example, a Michigan farmer would likely be eligible for a use-tax exemption when harvesting sweet corn for sale at the local farmers' market. This is not the place nor the record for an extensive examination of tax pyramiding with respect to all agricultural products, but needless to say, the department's policy-based argument—(i) TruGreen's services are not subject to sales tax, (ii) tax pyramiding is not a risk, and therefore (iii) the use-tax exemption does not apply—has little persuasive force here.

Finally, the department asks this Court to defer to Rule 205.51, the department's administrative rule implementing the use-tax exemption. Unlike the statute itself, the rule specifically prohibits a taxpayer from claiming a use-tax exemption where the property is for "use on homes or other noncommercial gardens, lawns, parks, boulevards, and golf courses or for use by landscape gardeners." The department promulgated the rule under the administrative procedures act of 1969, MCL 24.201 *et seq*., in accordance with authority delegated to it by the Legislature, MCL 205.3(b), 205.59(2), and 205.100(2). Yet, because the statute is clear that "things of the soil" is broader than mere agricultural production, the department cannot impose a requirement that the Legislature did not see fit to add itself. "An administrative rule cannot exceed the statutory authority granted by the Legislature." *William Mueller & Sons*, 189 Mich App at 574.

V. CONCLUSION

Tax laws have consequences. Some consequences might be thought of as "intended"—e.g., raising revenue, avoiding pyramiding, cultivating a favored industry—and some might be thought of as "unintended"—e.g., a "tax loophole" if favoring the taxpayer, a "jobs killer" if disfavoring the taxpayer. The reasonable reader might surmise that TruGreen was not whom the Legislature considered when it enacted and subsequently amended (several times) the use-tax exemption for "things of the soil."

But this surmising is outside of the Court's proper role and institutional competence. See *People v Al-Saiegh*, 244 Mich App 391, 399; 625 NW2d 419 (2001). Our role, rather, is to interpret and apply the statute as-written, and when, as here, the text has a plain meaning, supported by context and history, then it is that plain meaning that we should apply. Once we have laid the particular consequence bare, it is up to the Legislature to determine whether it intends the

consequence to endure or not. With its ruling today, the majority has stepped outside of our proper role and competency. And finally, speaking of consequences, it will not be lost on the reasonable reader that, although no doubt unintended by the majority, the unavoidable consequence of today's ruling is that the department has gained in the Judiciary what could not be gained in the Legislature.

For all of these reasons, I cannot join the majority and thus respectfully dissent.

POSTSCRIPT

There is a certain futility when a dissent responds to a separate concurring opinion. Neither opinion garnered a majority vote, so it is just one failed opinion responding to another failed opinion. Frankly, had the concurring opinion concluded with its Part III, this postscript would not have been written.

After all, does it really need to be observed that there is a certain disconnect in suggesting, on the one hand, that a phrase is "most certainly obscure," but then asserting, on the other hand, that the phrase is a well-established term of art based on decades of case law—case law without a single holding to that effect? Does it really need to be pointed out that in the use of context, the concurring opinion repeats (and compounds) the majority's error of abusing context by picking a phrase in one part of the sentence ("horticultural products") and applying it to a grammatically separate part? Does it really need to be said that, with respect to the department's interpretation, I have given it the same respectful consideration as did its own referee at the outset of this tax dispute? These hardly seem points worth making in response to the concurring opinion.

But then we get to Part IV and the so-called "fetishization of dictionaries." Several observations are in order. First, that is a rather odd accusation, but let us leave the word choice alone and get to the substance. Second, for the life of me I cannot find anything in the dissent to suggest that the use of *The Oxford English Dictionary* absolves this Court from "reasoned good-faith discussion, analysis of caselaw and context, and stare decisis." Maybe I shouldn't have summarized my dissenting analysis in the introduction? Maybe I should have moved my discussion of case law and stare decisis closer to the beginning? I thought these were merely stylistic choices.

Third and more substantively, this is not the place for a general defense of the use of dictionaries to aid with the interpretation of statutes and contracts. There are already two long, detailed opinions and a separate concurring opinion, so whatever follows after the proverbial beating of the dead horse, we're there. So, my concluding observations. A dictionary is a tool for interpretation, nothing more, nothing less. Just as a hammer is a tool that can be used expertly, poorly, or even maliciously (just ask Rusty Sabich's wife in *Presumed Innocent*), the same can be said about a dictionary. Scalia & Garner, *Reading Law*, pp 415-424. And, just as an expert carpenter may use a hammer and other tools to construct a new kitchen, the expert judge may use a dictionary and other tools to interpret a statue or contract. Given that the concurring judge has done precisely this in literally dozens of opinions as recently as October 2019 for such obscure terms as "should," *Jendrusina v Mishra*, 316 Mich App 621, 626 & n 1; 892 NW2d 423 (2016), "continuing," *People v Carll*, 322 Mich App 690, 704-705; 915 NW2d 387 (2018), and "health care," *People v Anderson*, __ Mich App __; __ NW2d __ (2019) (Docket Nos. 343272-343281), slip op at 7 & n 6, I presume that the concurring judge understands this proper usage, but he just

wants to make a rhetorical point. Fair enough, but was the concurring judge eschewing his "constitutional role" in those and scores of other cases when he consulted a dictionary?

We expect citizens to abide by our government's laws, and this is right. We use the government's police powers to enforce those laws, and this is also right. Is it going too far to suggest that a citizen should be able to use a good dictionary from the shelf as one tool in the interpretive toolbox to understand what our government's laws mean? It seems rather undemocratic to argue the contrary.

/s/ Brock A. Swartzle