STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hon. Colleen O'Brien, Presiding Judge

MICHIGAN ASSOCIATION OF HOME BUILDERS; ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN; and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION, Michigan nonprofit corporations,

Plaintiffs/Appellants,

v

CITY OF TROY,
a Michigan Home Rule City,

Defendant/Appellee.
_____/

Supreme Court No. _____

Court of Appeals No. 331708

Lower Court No. 10-115620-CZ

Gregory L. McClelland (P28894)
Melissa A. Hagen (P42868)
McCLELLAND & ANDERSON, LLP
Attorneys for Plaintiffs/Appellants
1305 S. Washington Avenue, Suite 102
Lansing, MI 48910
(517) 482-4890
_____/

Lori Grigg Bluhm (P46908)
Allan T. Motzny (P37580)
Attorneys for Defendant/Appellee
500 W. Big Beaver Road
Troy, MI 48084
(248) 524-3320

APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF PLAINTIFFS/APPELLANTS MICHIGAN ASSOCIATION OF HOME BUILDERS, ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION

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STATEMENT OF JUDGMENT APPEALED FROM

This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302, Plaintiff-Appellants, the Michigan Association of Homebuilders, the Associated Builders and Contractors of Michigan, and the Michigan Plumbing and Mechanical Contractors Association, having timely filed this Application for Leave to Appeal from the September 28, 2017, 2-1 Opinion of the Michigan Court of Appeals ("COA Opinion"). A copy of the Court of Appeals majority Opinion ("COA Op") is attached as Exhibit A. A copy of the Court of Appeals dissenting Opinion ("COA Op, Dissent") is attached as Exhibit B.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED BY AFFIRMING THE CIRCUIT COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF THE CITY AND DENIAL OF SUMMARY DISPOSITION IN FAVOR OF THE BUILDERS ON THE BUILDERS' CLAIM UNDER SECTION 22 OF THE CONSTRUCTION CODE ACT ("CCA"):

A. WHERE, CONTRARY TO THE COURT OF APPEALS INTERPRETATION, USE OF THE USER FEE SURPLUS TO THEORETICALLY OFFSET ALLEGED HISTORICAL SHORTFALLS VIOLATES THE PLAIN LANGUAGE OF SECTION 22 OF THE CCA?

B. WHERE USE OF THE USER FEE SURPLUS TO THEORETICALLY OFFSET ALLEGED HISTORICAL SHORTFALLS VIOLATES SECTION 22 BASED ON SECTION 22's INTERRELATIONSHIP WITH OTHER PROVISIONS OF THE CCA AND OTHER MICHIGAN LAWS?

C. WHERE USE OF THE USER FEE SURPLUS TO THEORETICALLY OFFSET ALLEGED HISTORICAL SHORTFALLS VIOLATES THE PURPOSE OF SECTION 22 OF THE CCA?

The Court of Appeals answered: "No."

The Circuit Court answered: "No."

Plaintiffs-Appellants answer: "Yes."

Defendant-Appellee answers: "No."

II. WHETHER THE COURT OF APPEALS ERRED BY AFFIRMING THE CIRCUIT COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF THE CITY AND DENIAL OF SUMMARY DISPOSITION IN FAVOR OF THE BUILDERS ON THE BUILDERS' CLAIM UNDER THE HEADLEE AMENDMENT OF THE MICHIGAN CONSTITUTION:

A. WHERE THE FEE SERVES A REVENUE-RAISING PURPOSE?

B. WHERE THE FEE IS NOT PROPORTIONATE TO THE COST OF SERVICE?

C. WHERE THE FEE IS UNDERTAKEN BY THE CONSUMER INVOLUNTARILY?

The Court of Appeals answered: "No."

The Circuit Court answered: "No."

Plaintiffs-Appellants answer: "Yes."

Defendant-Appellee answers: "No."

I. INTRODUCTION/PROCEDURAL BACKGROUND

This lawsuit involves the unlawful effect of Defendant/Appellee, City of Troy's (the "City") privatization of its Building Department through its contract with SafeBuilt of Michigan, Inc. ("SafeBuilt"). See, City of Troy Professional Services Agreement (the "Contract"), Exhibit C. SafeBuilt provides a "turnkey" building department services operation in exchange for receiving 75-80% of the "billable" fees listed in the Contract. The City retains the 20-25% surplus. Deposition Transcript of John Lamerato ("Lamerato Dep Tran"), p 21, Exhibit D; Contract, §3.2, p 2, Exhibit C. The City also retains 100% of other "non-billable" Building Department fees to which SafeBuilt is not entitled. Deposition Transcript of Mark Miller ("Miller Dep Tran"), p 122, Exhibit E. This arrangement generated a substantial fee surplus for the City starting in 2010-11 and for all years thereafter (the "User Fee Surplus"). The City admits that, as of 2014, the total User Fee Surplus was $1,498,565. 2011 Calculations, Exhibit F; COA Op, Dissent, p 2, Exhibit B. According to public records, that total was increased to $2,326,061 by 2016.[1] The City continues to collect the User Fee Surplus to this day.

The User Fee Surplus was not, and is still not, used to operate the Building Department. Instead, as admitted by the City, the entire User Fee Surplus has been, and continues to be,

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[1] These amounts are found in the 2015 and 2016 Comprehensive Annual Financial Reports ("CAFRs") filed by the City with the State of Michigan Department of Treasury. The 2015 City of Troy CAFR is publically available at: https://troymi.gov/Departments/City%20Manager/Financial%20Services/Financial%20Documents/CAFR/CAFR%202015.pdf; Fee Surplus reported at p 61 (of report), p 70/187 (of pdf). The 2016 City of Troy CAFR is publically available at: https://troymi.gov/Departments/City%20Manager/Financial%20Services/Financial%20Documents/CAFR/CAFR%202016.pdf; Fee Surplus reported at p 61 (of report), p 70/189 (of pdf). Judicial notice can be taken at any stage of the proceeding. MRE 201(e).

deposited into the City's general fund for general, unrestricted use. Miller Dep Tran, pp 98, 120 and 127, Exhibit E; Lamareto Dep Tran, pp 37, 43 and 46, Exhibit D.

As a result, Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders") filed a 3-count Verified Complaint on December 15, 2010, alleging violations of the State Construction Code Act ("CCA") (Count I), the Headlee Amendment to the Michigan Constitution (Count II), and seeking declaratory and injunctive relief for these violations (Count III). More specifically, the Builders alleged that the City's deposit of User Fee Surplus into the general fund violated Section 22 of the CCA, which requires that fees be: (1) "reasonable;" (2) "bear a reasonable relation to the cost" of Building Department services; and (3) be used for "operation of" the Building Department only and "for no other purpose." MCL 125.1522(1) (emphasis supplied). In addition, the Builders claimed that the City's use of the User Fee Surplus for general revenue purposes constitutes an unlawful tax that violates the Headlee Amendment to Michigan's Constitution. Const 1963, art 9, §31. Thus, the Builders sought declaratory and injunctive relief to require that all Building Department revenue be segregated and used solely for the Building Department, consistent with the CCA and Michigan's Constitution. MCL 141.421, *et seq*; Const 1963, art 7, §32.

After completion of some, but not all, discovery, the Builders moved for summary disposition pursuant to MCR 2.116(C)(10) on all counts. The City filed its brief in opposition seeking summary disposition in its favor under MCR 2.116(I)(2). On November 13, 2012, the Circuit Court issued its Opinion and Order denying the Builders' motion for summary disposition, granting summary disposition in favor of the City and dismissing the Builders' Complaint in its entirety based on the

Builders' failure to exhaust their administrative remedies under Section 9b of the CCA. The Court of Appeals affirmed the decision of the Circuit Court in an unpublished opinion issued March 13, 2014. *Mich Ass'n of Home Builders v Troy*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2014 (Docket No. 313688). The Builders filed an Application for Leave to Appeal with this Court. This Court ordered and heard oral argument on whether to grant the Builders' Application or take other peremptory action. **In a unanimous Opinion, this Court reversed the judgment of the Court of Appeals and remanded the case to the Circuit Court for further proceedings on the merits of the Builders' claims. *Mich Ass'n of Home Builders v Troy*, 497 Mich 281; 871 NW2d 1 (2015).**

On remand, the parties renewed their cross-motions for summary disposition on the issues discussed above. On February 5, 2016, the Circuit Court granted summary disposition in favor of the City and denied the Builder's motion for summary disposition concluding that the City's deposit of the User Fee Surplus into its general fund did not violate either the CCA or the Headlee Amendment. Circuit Court Opinion, February 5, 2016 ("Cir Ct Op"), p 6, Exhibit G. More specifically, the Circuit Court found that although the City was depositing the User Surplus Fees into the general fund which, in general, was prohibited under the CCA, the City was doing so for the statutorily permitted purpose of repaying prior allocations of tax dollars from the general fund to the building department used to cover shortfalls incurred in the operation of the building department from years prior to the SafeBuilt Contract. *Id.*, p 5. In addition, the Circuit Court dismissed the Builders' claim under the Headlee Amendment finding that the fees were for a regulatory purpose which were proportionate to the cost of operating the building department (if you assume the repayment of prior tax dollar allocations from the general fund is a

proper operating cost) and were paid voluntarily by only persons wanting to build upon, or renovate, their properties. *Id.*, p 9.

On September 28, 2017, the Court of Appeals, in a 2-1 decision, affirmed the Circuit Court's grant of summary disposition in favor of the City and its denial of the Builders' motion for summary disposition. On the issue of the City's violation of the CCA, the majority opinion of the Court of Appeals found that the CCA did not prohibit the City's actions, relying on an improper interpretation and construction of the CCA as well as public utility case law and a "Numbered Letter" issued by the Michigan Department of Treasury ("Treasury") to find that Treasury had at least implicitly, if not explicitly, recognized that surpluses could be collected and used to offset shortfalls from prior fiscal years which had been covered with money from the general fund. COA Op, pp 6-7, Exhibit A. On the Headlee Amendment claim, the majority found that the CCA was regulatory in nature, that the fees were reasonable (again, if you assume that repayment of prior allocations from the general fund is a proper operating cost) and that the fees were paid voluntarily. *Id.*, pp 8-10.

From the COA Opinion, the Builders file this Application for Leave to Appeal with this Court (the "Application"). The City has violated, and continues to violate, the CCA and the Headlee Amendment. Accordingly, this Court should peremptorily reverse the COA Opinion and remand this case to the Oakland County Circuit Court for entry of an order granting summary disposition in favor of the Builders or, alternatively, grant the Builders' Application.

II. GROUNDS FOR PEREMPTORY REVERSAL OR ACCEPTANCE OF APPLICATION

The issues raised in this Application are grounds upon which leave should be granted. MCR 7.302(B). In particular, this case presents issues involving legal principles of major significance to this state's jurisprudence and requires this Court's intervention due to the erroneous decisions of the lower courts which, if left intact, will cause material injustice to countless members of the public.

Almost eight years ago, when this lawsuit was filed, the Contract at issue here was the only "kickback" contract in the State; that is, a contract pursuant to which an independent third party operates the building department of a local unit of government but "kicks back" a percentage of the fees generated by that operation to the local unit of government. Today, however, there are numerous "kickback" arrangements between private inspection companies and local units of government. And, in the vast majority of these instances, the local government does not, as here, have the "fig leaf" of repayment of an alleged shortfall to hide behind. Accordingly, and unfortunately, this case does not present an isolated instance of municipal finance manipulation in contradiction of Michigan statutory and constitutional law. Rather, this case impacts upon many instances of municipal finance manipulation. This case, therefore, presents questions involving legal principles of major significance to this State's jurisprudence; namely, the interpretation of the CCA and the Headlee Amendment to the Michigan Constitution which were enacted, in part, to limit and control assessment and taxation by local units of government. *Adair v Mich*, 497 Mich 89, 102; 860 NW2d 93 (2014), quoting *Durant v Mich*, 456 Mich 175, 214; 566 NW2d 272 (1997) ("The Headlee Amendment was adopted with 'the primary purpose of relieving the electorate from overwhelming and overreaching taxation.'")

In addition, absent this Court's reversal of the opinions of the lower courts, injustices of a relatively large magnitude will continue to occur statewide. Section 22 of the CCA and the Headlee Amendment both limit local governments in their assessment of fees by requiring that those fees bear a reasonable relation to the cost of the service being provided. Here, that is not true. By definition, a surplus, which the City admits to having, is an amount in excess of cost.[2] The Surplus amount the City receives is significant – 25% of certain Building Department revenues and 100% of other Building Department revenues. Contract, §3.2, p 2, Exhibit C.

Originally, the City anticipated that it would take 40+ years to repay the alleged cumulative "shortfall" amount of $6,500,000 to the general fund. Lamareto Dep Tran, pp 74-75, Exhibit D. Accordingly, for a total of 40+ years, rather than pass any cost savings derived from the privatization of its building department under the SafeBuilt Contract to users of the building department services, as intended by the CCA and the Headlee Amendment, the City planned to retain the User Fee Surplus for general purposes.

However, as the City's plan unfolded, expectations were drastically exceeded, resulting in anything but a negligible User Fee Surplus. Rather, as stated by the dissent in the COA Opinion, the User Fee Surplus amount is "unreasonable on its face." COA Op, Dissent, p 2, Exhibit B. The annual User Fee Surplus amounts disclosed by the City are:

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[2] This Court may consult dictionary definitions for the common and ordinary meaning of a word. *Citizens Ins Co v Pro-Seal Serv Grp, Inc,* 477 Mich 75, 84; 730 NW2d 682 (2007). *Merriam-Webster's Collegiate Dictionary* (9th ed), p 1188, defines the term "surplus," in relevant part, as "the amount that remains when use or need is satisfied." The term "satisfy" is defined, in relevant part, as "to carry out the terms of (as a contract): DISCHARGE," and "to meet a financial obligation to." *Id.* at 1044.

2011	-	$414,648
2012	-	$269,483
2013	-	$488,922
2014	-	$325,512
Total		$1,498,565

Id.; 2011 Calculations, Exhibit F. In addition, per public documents filed by the City with Treasury, the User Fee Surplus amounts after 2014 continued to accrue in large amounts and were, again, deposited into the City's general fund:

2015	-	$443,036
2016	-	$384,460[3]

Adding these amounts to the 2011-2014 User Fee Surplus Amounts yields a 6-year total of $2,326,061.

In the end, the building department users are paying far in excess of the actual costs for building department services and are subsidizing other municipal expenses, departments and services. And, even if you assume that the User Fee Surplus is truly being used to repay the general fund for prior years' allocation of funds to the building department,[4] the result remains the same – the building department users are paying far in excess of the actual costs for building department services and are subsidizing other municipal expenses, departments and services. Having the "sons pay for the sins of the fathers" is precisely the type of financial manipulation sought

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[3] The 2015 City of Troy CAFR is publically available at: https://troymi.gov/Departments/City%20Manager/Financial%20Services/Financial%20Documents/CAFR/CAFR%202015.pdf; Fee Surplus reported at p 61 (of report), p 70/187 (of pdf). The 2016 City of Troy CAFR is publically available at: https://troymi.gov/Departments/City%20Manager/Financial%20Services/Financial%20Documents/CAFR/CAFR%202016.pdf; Fee Surplus reported at p 61 (of report), p 70/189 (of pdf). Judicial notice can be taken at any stage of the proceeding. MRE 201(e).

[4] A disputed fact which the Builders do not concede.

to be prevented by the CCA and the Headlee Amendment. Allowing local units of government to sustain such practices creates numerous instances of manifest injustice upon the public.

For these reasons, this Court should peremptorily reverse the COA Opinion and remand this case to the Oakland County Circuit Court for entry of an order granting summary disposition in favor of the Builders or, alternatively, grant the Builders' Application.

III. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In a few instances in its opinion, the Court of Appeal majority states that as to certain issues, the Builders' proofs are lacking. For example, at page 6 of its opinion, the majority states:

> Plaintiffs have not come forward, however, with any evidence to demonstrate that, in deriving the fees to be charged, an amount has been included to compensate for prior shortfalls in defendant's calculation.
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> * * *
>
> However, our review of the record did not yield evidence to contradict testimony elicited on behalf of defendant regarding its methods of accounting and asserting the accurate representation of the fees and service costs collected and expenditures incurred in the operation of the Building Department.

COA Op, p 6, Exhibit A. These statements are simply untrue. As discussed below, in some instances, such as evidence demonstrating that the amount of the fees includes an amount "to compensate for prior shortfalls," the evidence is the City's admission. In other instances, the Court of Appeals simply overlooked the Builders' evidence – evidence which created material issues of fact.

On July 1, 2010, the City privatized its Building Department by hiring SafeBuilt to perform most of the functions of its Building Department, such as inspections and plan reviews. Contract, §2,

p 2, Exhibit C. Pursuant to the Contract, SafeBuilt retained 80% of the "billable" fees listed in the Contract, and the City retained the 20% surplus. Lamerato Dep Tran, p 21, Exhibit D. The City also retained 100% of other "non-billable" Building Department fees. *Id.*, p 21-22; Miller Dep Tran, pp 122-124. Further, as "billable" fees exceeded $1,000,000 in the first Contract year, the City retained 25% of the "billable" fees, with 75% to SafeBuilt, along with 100% of "non-billable" fees for the remaining Contract term. Contract, §3.2, p 2, Exhibit C. After the first year of the Contract, the "billable" fee arrangement remained at 75% for SafeBuilt and 25% kicked back to the City. *Id.*

The City has never used this User Fee Surplus for operation of the Building Department. Instead, for over a period of 7+ years now, the City has deposited the User Fee Surplus into the general fund for unrestricted use for general, non-Building Department items. City Attorney Letter, Exhibit H; Miller Dep Tran, pp 98, 120 and 127, Exhibit E; Lamerato Dep Tran, pp 37, 43 and 46, Exhibit D. **It is uncontested that there is no separate Building Department fund or "special revenue fund" into which the User Fee Surplus is deposited.** Lamerato Dep Tran, pp 84-85, Exhibit D. It is further uncontested that revenues contained in the general fund are not segregated by department. Deposition Transcript of Thomas E. Darling ("Darling Dep Tran"), p 86, Exhibit I.

The City claims that, historically, the Building Department had annual shortfalls which were covered by the City with appropriations from its general fund. The City thus justifies its deposit of the User Fee Surplus into the general fund by claiming that it is only repaying these historical shortfalls. City Attorney Letter, Exhibit H; Szerlag/Lamerato email, Exhibit J; Lamerato Dep Tran, p 75, Exhibit D. However, and as noted by the COA Opinion dissent, Justice Kathleen Jansen, the alleged shortfalls did not just happen by accident. Rather,

> Defendant concedes that it made a management decision to subsidize its building department during the period of alleged deficit with general funds and keep building department fees low during that time period. Perhaps defendant's choice was pragmatic, but it was a choice. It clearly chose *not* to charge fees reasonably related to the cost of performing services during those years, and it now attempts to shuffle funds back into its general account through the back door of operational "surplus." The statute does not allow defendant to charge current payers and permit applicants more than what is reasonable in order to make up for losses it chose to incur by failing to charge previous permit applicants appropriately under the statute. To hold that under MCL 125.1522(1), a city may engage in such creative budgeting would create a poor precedent. Under the majority's interpretation of the statute, a city might permissibly choose to create a shortfall in any given year and unfairly charge unreasonable rates in subsequent years, completely defeating the goal of ensuring that each individual fee-payer pays for the acts and services he or she is provided.

COA Op, Dissent, p 3, Exhibit B.

Moreover, there are no *real* Building Department "shortfalls." To the contrary, the City's budgets have always balanced and the City continually amends its budgets, which begin as projections of future expenses, to match the actual expenditures. Miller Dep Tran, pp 63-64, Exhibit E. The alleged "shortfalls" are not loans or debts to be repaid. The alleged "shortfalls" do not represent any actual transfer of funds. The City did not incur long-term debt to finance its operations. Lamerato Dep Tran, p 19-20, Exhibit D; Darling Dep Tran, p 49, Exhibit I. Rather, historically, when Building Department costs exceeded the permit revenue, instead of increasing the amount of fees to reasonably relate to the actual Building Department operation costs, the City *chose* to absorb those costs with *appropriations* from the general fund. Darling Dep Tran,

pp 50-51, Exhibit I; Miller Dep Tran, pp 74-75, Exhibit E; Lamerato Dep Tran, p 19, Exhibit D.[5] Thus, the City elected to subsidize its Building Department over a period of several years with tax payer money.

Further, noticeably absent from the City's proofs is even a single budget, appropriation or expense document to demonstrate that the User Fee Surplus is actually used to repay alleged "shortfalls" from prior years. Darling Dep Tran, pp 21, 45, 52, 54, 105-106 and 128-130, Exhibit I. Instead, the only place where the City records the alleged "shortfall" amounts is a cumulative number recorded in the City's CAFRs – which are not, as implied by the City, audited or approved by Treasury. *Id.*, pp 45 and 105-106.[6] Accordingly, as admitted by the City, the alleged "shortfalls" are mere estimates – numbers without supporting documentation. *Id.*, pp 105-106.

Further still, based on the City's own evidence, even the estimated cumulative "shortfall" number is flawed and overstated. In particular, the City's own witnesses admitted that the CAFRs understate revenue by only counting "building permit" revenue, omitting other fee and permit revenue, not counting revenue from SafeBuilt lease payments that cover all overhead,

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[5] Appropriations are not loans. The general fund did not loan money to the Building Department. See, generally, MCL 141.422a(3) ("Appropriation" means an authorization granted by a legislative body to incur obligations and to expend public funds for a stated purpose) and *Black's Law Dictionary* (7th ed), p 98 (appropriation, . . . [a] legislative body's act of setting aside a sum of money for the public purpose; the sum of money so voted).

[6] Specifically, the CAFRs in which the alleged "shortfalls" are recorded are simply received by Treasury and made available on its website for public inspections. MCL 141.429. The State Treasurer does not approve the CAFRs. The State Treasurer does not audit the CAFRs. Therefore, contrary to the City's claims, the State Treasurer has not approved the City's use of the User Fee Surplus to offset historical shortfalls in the Building Department budget or the correlating annual transfers of the User Fee Surplus to the City's general fund. The CAFRs simply report an alleged deficit; they do not prove that one actually exists.

and not counting revenue other cities paid for the City's Building Department services.

More specifically, the City admits:

1. that it charged the Building Department for the cost of doing contract work for other cities, but did not credit the Building Department for the revenue generated from that work;

2. that the costs of the unrelated Zoning Board of Appeals were mistakenly attributed to the Building Department in the CAFRs, thus overstating costs;

3. that SafeBuilt lease payments are not counted as Building Department revenue, yet indirect costs relating to SafeBuilt are still charged to the Building Department in the CAFRs;

4. that the CAFRs only record "SafeBuilt billable" fees as revenue while omitting other fees of which the City retains 100%;

5. that it cannot track all indirect costs charged to the Building Department as expenses; and

6. that it uses an 8% estimate for indirect costs derived from a study allegedly performed by graduate students at Walsh College – the "Walsh Study."[7]

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[7] The "Walsh Study," however, is fiction. The City has never produced a written report or anything tangible to support the existence of the Walsh Study. Likewise, there is no witness, on behalf of the City, who has ever seen, much less reviewed and analyzed, the Walsh Study. In fact, in his affidavit, Mr. Darling admits:

> 9. The City's CAFR reports also provide for estimated indirect costs for enforcement of the State Construction Code. The estimated Indirect costs for the City's CAFR reports for 2004, 2005, 2006, 2007, 2008, 2009, 2010 represent 8% of the direct costs of enforcement of the State Construction Code.
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> 10. Upon information and belief, the 8% figure was suggested as a result of an informal study performed by Walsh College graduate students several years ago. I have not had the opportunity to review the Walsh College study.

Affidavit of Thomas Darling, CPA ("Darling Affidavit"), Exhibit K. Further, Mr. Lamerato, the City's Assistant City Manager for Finance & Administration until July 1, 2011, admitted that the City should not be using an 8% estimate for its indirect costs but, instead, should be using the more accurate "core services" measure. Lamerato Dep Tran, pp 5, 30-31, 65-72 and 75-77, Exhibit D.

Id., pp 68-73, 76-77, 83-87 and 89-90; Darling Affidavit, ¶¶9-10, Exhibit K. The cumulative "shortfall" figures in the CAFRs are incorrect and unreliable and create material issues of fact. As correctly stated by the Court of Appeals dissent:

> Also telling is what the record does *not* include. The record is suspiciously devoid of any building department budgets, despite the fact that at least one building department employee testified that detailed building department budgets were scrupulously maintained. The record contains no evidence to support defendant's claim that it actually ran a deficit during any previous budget years, or to explain what expenses the building department incurred during those years to create a more than $6 million shortfall. As proof that it suffered a deficit, defendant relies solely on past Comprehensive Annual Financial Reports (CAFRs) which, in describing defendant's general revenue and expenses, list a total amount for "[c]urrent year building permit revenue" and a total amount of "[r]elated expenses" before reporting the building department's yearly net shortfall. As their name implies, these CAFRs simply *report* a building department deficit, they do not prove that one actually existed. Defendant processes all of its financial transactions through one general fund. Without a specific building department budget, it is not clear whether and how defendant incurred such massive deficits. And although the majority suggests, in a footnote, that there is no evidence to "contradict testimony elicited on behalf of defendant regarding *its methods of accounting* and asserting the accurate representation of the fees and service costs collected and expenditures incurred in the operation of the Building Department," it conspicuously fails to mention that the record contains no such representation of fees and expenditures.

COA Op, Dissent, p 3, Exhibit B (emphasis supplied).

However, in ruling on the cross-motions for summary disposition, the Circuit Court erroneously assumed that a Building Department operations cumulative shortfall existed, that all of the User Fee Surplus was being used to repay the cumulative shortfall and only to repay the cumulative shortfall, and that the City's estimates of the amount of the cumulative shortfall were accurate. Then, based on these erroneous assumptions, the Circuit Court ruled that the City's

practice of depositing the User Fee Surplus into the general fund as repayment for the shortfalls did not violate the CCA. The Circuit Court stated:

> Because one of the building department's current expenses is reimbursing the general fund for past building department expenses absorbed by the general fund, using the building department revenue to reimburse the general fund for those expenses does not violate the statute's requirement that the revenue be spent on "the operation of" the building department.

Cir Ct Op, p 5, Exhibit G.

The Circuit Court also concluded that the City's collection of the User Fee Surplus did not violate the Headlee Amendment to the Michigan Constitution. The Circuit Court stated:

> In sum, this Court concludes that the building department charges are fees rather than taxes. The fees serve a regulatory purpose and are reasonably related to the expenses of the building department. Defendant did not impose a new charge on taxpayers, but, in effect, reduced its direct costs by entering into the Safe Built contract so that building department revenue more closely equaled total department expenses, which include repayment of past shortfalls.

Id., p 9.

The Court of Appeals majority not only perpetuated these erroneous assumptions, but took them a step further by assuming that although a surplus existed, fees were still "reasonable." COA Op, p 6, Exhibit A. The Court majority stated:

> While accepting the proposition that some amount of a surplus can be generated even if the fees are reasonable, the next question is whether it is permissible, under MCL 125.1522(1), to use that surplus or overage for the payment of past shortfalls incurred. Again, the sole statutory restriction MCL 125.1522(1) imposes is that "[t]he legislative body of a governmental subdivision shall only use fees generated under this section for the operation of the enforcing agency . . . and shall not use the fees for any other purpose."

Id. As support for its conclusion to the aforementioned question, the Court of Appeals misinterpreted certain guidance letters from Treasury and erroneously relied upon public utility case law, stating:

> In addressing implementation of the CCA, the Department of Treasury has recognized the possibility of the collection of "excess fees," defined as "excess of revenue over expenditures," which are to be "included in the separate fund balance or retained earnings of the separate special revenue fund or enterprise fund." It was further indicated that a general fund could be used to appropriate monies to compensate for a shortfall. Treasury also acknowledged the possibility of the collection of excess fees, requiring only their segregation with the expectation that any such funds will be carried over into the next fiscal year. Read in conjunction with the directives pertaining to a "local unit's accounting system," requiring accumulated totals for (a) revenues generated, (b) costs incurred, and (c) "cumulative excess revenues over or (under) expenditures," Treasury implicitly recognized that surpluses can occur and that they may be used to offset shortfalls in different fiscal years. This is consistent with this Court's ruling in *Trahey v City of Inkster,* 311 Mich App 582, 597-598; 876 NW2d 582 (2015), a case involving the reasonableness of utility rates, where this Court recognized, in the context of a municipality's water and sewer department, that "[t]imely payment of the . . . department's debt was necessary for its continued operation, and therefore constituted part of the actual cost of providing the service."

Id., pp 6-7 (footnote omitted). The Court of Appeals similarly concluded that the City's actions did not violate the Headlee Amendment, finding that the fees at issue met all three criteria under the test announced by this Court in *Bolt v Lansing*, 459 Mich 152; 587 NW2d 264 (1998); specifically, (1) that the fees are regulatory in nature because they support a regulatory purpose;[8] (2) that the

[8] As discussed below, this conclusion is not true for the User Fee Surplus. Those fees are not used for any alleged regulatory purpose of the CCA. They are deposited into the general fund as revenue, for general use purposes such as road repair, snow removal, park maintenance, etc.

amount of the fees at issue were proportionate to the necessary costs of the service; and (3) that the fees were voluntary in nature. COA Op, pp 8-10, Exhibit A.

As discussed below, these rulings are in error. The correct analysis is found in the dissenting opinion of Justice Kathleen Jansen, in which she states:

> I believe that on its face, MCL 125.1522(1) reflects intent to limit building department fees imposed to the cost, within reason but as closely as possible, to the department of providing those particular services. The statute allows the building department to cover the cost of providing the acts and services mandated under the CCA, consistent with the long-established principle that a fee must be related to the cost of the actual goods or services provided. The statute is intended to provide a mechanism through which a city may fully fund its building department, but not to generate additional revenue.
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> * * *
>
> The statute does not allow defendant to charge current payers and permit applicants more than what is reasonable in order to make up for losses it chose to incur by failing to charge previous permit applicants appropriately under the statute. To hold that under MCL 125.1522(1), a city may engage in such creative budgeting would create a poor precedent. Under the majority's interpretation of the statute, a city might permissibly choose to create a shortfall in any given year and unfairly charge unreasonable rates in subsequent years, completely defeating the goal of ensuring that each individual fee-payer pays for the acts and services he or she is provided.
>
> * * *
>
> While I believe defendant's practice of depositing excess surplus funds into its general fund to repay alleged prior shortfalls constitutes a clear violation of MCL 125.1522(1), and therefore eliminates the need for this Court to address the constitutional issue presented, I believe that defendant's actions may also have implications under the Headlee Amendment. I disagree with the majority's conclusion that the fees charged by defendant are related to or associated with the provision of specific services provided by the building department. Rather, for the reasons discussed, I believe that defendant's sizeable surplus was the direct result of defendant's

> attempt to raise revenue by charging excessive fees. Further, I would argue that while the person paying a reasonable building department fee receives a corresponding benefit "not generally shared by other members of society," *Bolt,* 459 Mich at 164, it is the public that receives the benefit of the excess funds generated by defendant's revenue-generating practice. These excess funds, which are not reasonably related to a regulatory purpose or the cost of services provided to their payer, are deposited into defendant's general fund and used for the benefit of all residents. Because I am unconvinced that defendant's building department fees are solely regulatory, rather than revenue-generating, I believe questions remain regarding whether defendant's fee surplus constitutes a tax under the Amendment.

COA Op, Dissent, pp 2-4, Exhibit B. The majority Opinion of the Court of Appeals, affirming the grant of summary disposition by the Circuit Court in favor of the City should be reversed. Summary disposition should have been granted in favor of the Builders.

IV. ARGUMENT AND LAW

A. Standard of Review

A decision to deny or grant summary disposition as well as issues of statutory interpretation and application are reviewed *de novo*. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003); *McJunkin v Cellasto Plastic Corp,* 461 Mich 590, 596; 608 NW2d 57 (2000). Likewise, whether a charge is a lawful "user fee" or a "tax" which violates the Headlee Amendment to the Michigan Constitution is a question of law that is reviewed *de novo*. *Oakland Co v Michigan,* 456 Mich 144, 149; 566 NW2d 616 (1997).

B. The City Has Violated Section 22 of the CCA

"Local governments have no inherent powers and possess only those powers which are expressly conferred on them by the Sate Constitution or State statute or which are necessarily implied therefrom." *Hanselman v Killeen*, 419 Mich 168, 187; 351 NW2d 544 (1984). The CCA creates a statewide construction code that applies to "innumerable aspects" of construction, use and occupation of both residential and commercial buildings. *Mich Ass'n of Home Builders*, 497 Mich at 285. The director of the Department of Licensing and Regulatory Affairs, or his/her authorized representative, is responsible for administering and enforcing the CCA and the construction code. *Id.* at 285-286. An exception to this plenary authority exists such that local units of government may assume responsibility for administering and enforcing the CCA and the construction code. *Id.* at 286. This assumption of responsibility, however, has limitations.

Two such limitations exist in the form of MCL 125.1522(1), Section 22 of the CCA, which provides:

> The legislative body of a governmental subdivision shall establish **reasonable fees** to be charged by the governmental subdivision for acts and services performed by the enforcing agency or construction board of appeals under this act, which fees shall be intended to **bear a reasonable relation to the cost**, including overhead, to the governmental subdivision of the acts and services, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of appeals, hearing appeals in accordance with this act. The enforcing agency shall collect the fees established under this subsection. The legislative body of a governmental subdivision **shall only use fees generated under this section for the operation of the enforcing agency** or the construction board of appeals, or both, and **shall not use the fees for any other purpose**.

MCL 125.1522(1) (emphasis supplied). As the plain text of the statute mandates, a municipal government, such as the City, may assume responsibility for administering and enforcing the CCA and the construction code, but only if: (1) the fee amounts charged for building department services are "reasonable" and "bear a reasonable relation to the cost" of providing building department services; and (2) the sole purpose for which the money collected by the local unit of government for building department services is to operate the building department or construction board of appeals. *Id.*

It is the Builders' position in this lawsuit, that the City has violated, and continues to violate, the limitations set forth in Section 22. The User Surplus Fees, in an amount of 25% over cost is unreasonable and does not bear a reasonable relation to the actual cost of providing building department services. In addition, the City's deposit of the User Fee Surplus into its general fund and subsequent use for general fund purposes is inconsistent with the express limitation of Section 22 that fees generated pursuant to Section 22 be used only to operate the building department (or construction board of appeals) and for no other purpose.

1. Use of the User Fee Surplus to Theoretically Offset Alleged Historical Shortfalls Violates the Plain Language of Section 22 of the CCA

The Court of Appeals found that the City's deposit of the User Fee Surplus into its general fund does not violate the plain language of Section 22 because the City applies the User Fee Surplus to historical financial shortfalls of the Building Department, which were covered with allocations from the general fund. COA Op, pp 3-4, Exhibit A. The Court of Appeals concluded that because all fee amounts collected go toward building department services, past and present, the fee amount charged is reasonable and reasonable in relation to the cost of providing the services,

past and present. *Id.*, pp 5-6. The Court further concluded that, by using the User Fee Surplus to repay shortfalls of the Building Department, the City was spending the User Fee Surplus on "the operation of" the Building Department, past and present, as required by Section 22 of the CCA. *Id.* The Court of Appeals majority based these conclusions on its reading of Section 22 as lacking any "temporal component associated with the use of the surplus fees or operation of the building department." *Id.*, p 4. These conclusions, however, are erroneous and constitute an over-analysis of the plain and ordinary language of Section 22 and the legislative intent in enacting Section 22.

The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The Legislature is presumed to have intended the meaning it plainly expressed. If the plain and ordinary meaning of the statutory language is clear, then judicial construction is neither necessary nor permitted. A court is required to enforce a clear and unambiguous statute as written. *Pohutski v Allen Park,* 465 Mich 675, 683; 641 NW2d 219 (2002). That is, a court does not have the liberty to change the meaning of statutory language that is plain and clear, nor can it ignore established rules of statutory construction. *Doe v Dep't of Corrections,* 240 Mich App 199, 201; 611 NW2d 1 (2000). And, "[a]s far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

a. The User Fee Surplus is Not Reasonable or Reasonably Related to the Cost of Operations

"The determination of reasonableness is generally considered by courts to be a question of fact." *Novi v Detroit*, 433 Mich 414, 431; 466 NW2d 118 (1989). Section 22 allows local units of government to charge fees in an amount sufficient to cover their "reasonable" direct and indirect costs. COA Op, pp 4-5, Exhibit A. Thus, the plain language of Section 22 provides a mechanism for local units of government to fully fund their building departments – but not generate additional revenue – at least not in the amounts generated here. Instead, once operating costs are covered, which the City admits occurred here, and more than an incidental surplus exists, there is no longer a reasonable relationship between the amount of the fees and the cost of providing services. As stated by the Court of Appeals dissent:

> To allow defendant's building department to run deficits by choice and then overcharge future users to make up for those deficits undermines the purpose of the statute, which is to ensure a direct and reasonable relationship between the acts and services performed by the department and the cost of providing those services to each individual served. Although the statute allows defendant to apply an incidental surplus to the costs of operating the building department, it does not allow defendant to *create* a surplus in order to recoup what defendant contends was a deficit from prior years.
>
> Although defendant concedes that it has retained SAFEbuilt to provide the acts and services of its building department, it charges fees to cover the cost of compensating SAFEbuilt with an intentional 20-25% surplus. Defendant claims that some of these funds are then used to cover indirect costs of operating the building department, such as covering 40% of the building code official's salary and maintaining the building it leases to SAFEbuilt. However, I believe that a 20-25% surplus is unreasonable on its face. Indeed, defendant used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 deposited directly into defendant's general fund over the course of only three years. This "surplus" is not negligible.

> Common sense indicates that it is not incidental. The amount of surplus generated, on its own, indicates that defendant is engaged in a revenue-raising venture. Regardless of whether it is raising the revenue to cover alleged prior shortfalls, or any other cost of operating the building department, such an endeavor violates the clear meaning of MCL 125.1522(1).

COA Op, Dissent, pp 2-3, Exhibit B.[9]

Moreover, Section 22 was not written with the intention of determining reasonableness in relation to several years of fees versus several years of costs. As a practical matter, the analysis of whether fees are reasonably related to the cost of providing a service becomes more and more convoluted with each additional year that is included in the analysis. The costs of providing services changes over time. Thus, an amount that is reasonable today may not have been reasonable years before. Yet, under the City's accounting, some portion of the fee amount collected today must be added to the actual amount collected during the shortfall years to determine if the fees from those years were "reasonable" and "reasonably related to the cost of providing services." Common sense dictates that the Legislature did not envision such a convoluted and cumbersome analysis. Nor does it seem reasonable that the Legislature consciously chose to provide a loophole for local units of government to play a "shell game" with its residents' money. The mere presence of the

[9] Further, contrary to the opinion of the Court of Appeals majority it is not the Builders' argument that a surplus, in any amount, is prohibited by Section 22. COA Op, p 4, Exhibit A. It is the Builders' argument that a surplus of 25%, in the amounts generated here, is unreasonable and does not bear a reasonable relation to the actual cost of providing building services. Further, again contrary to the Court of Appeals' majority opinion, it is not necessary that the Builders provide a "breakdown and analysis for each type of fee to determine if the surplus is attributable to all or a majority of the services provided." *Id.*, p 5. It is sufficient to prove a violation of Section 22 of the CCA where the municipality admits to charging its residents 25% over cost. Simply put, fee amounts which are 25% over costs do not bear a reasonable relation to the costs.

User Fee Surplus of the magnitude at issue here[10] demonstrates the vast disparity between the amount of the fees collected and the actual cost of operating the Building Department. The Court of Appeals reversibly erred by failing to consider this gross disparity. The Dissent properly considered this imbalance and, therefore, properly concluded that the City has violated, and continues to violate, Section 22 of the CCA. This Court should reverse the majority opinion of the Court of Appeals.

b. The User Fee Surplus is Not Used for Operation of the Building Department

The second limitation on a municipality's assumption of control of the administration and enforcement of the CCA and the construction code contained in Section 22 is a constraint on the use of the money collected from Building Department fees. In this respect, Section 22 of the CCA plainly and unambiguously requires that fees be used "for the *operation* of the enforcing agency" and not "for any other purpose." MCL 125.1522(1) (emphasis added). The City violated this plain and unambiguous directive in two (2) ways. First, raising money for the purpose of repaying alleged prior allocations from the general fund to the building department is not for the purpose of "the operation of the building department." It is for the purpose of repayment. Thus, the City's practice of using the User Fee Surplus to repay alleged prior allocations is for an "other purpose" and violates the CCA. Second, once the User Fee Surplus is deposited into the general fund, it is not for the purpose of "the operation of the building department." It is used to benefit the general public for any purpose the City chooses. Thus, again, the City's practice of depositing the User Fee Surplus in the general fund and using it for general, unconditional purposes, is an "other purpose"

[10] $2,326,061 over just six (6) years.

and violates the CCA. Any other interpretation renders nugatory the last phrase of Section 22 ("shall not use the fees for any other purpose"). The Court of Appeals interpretation is, thus, contrary to Michigan statutory interpretation law. *Pohutski*, 465 Mich at 484.[11]

Further, contrary to the interpretation of the Court of Appeals, Section 22 *is* drafted in the present tense – "operations" – not the past or present perfect tense – "operated" or "have operated." This specific distinction is of particular relevance under Michigan law. For example, in *Deschaine v Germain,* 256 Mich App 665; 671 NW2d 79 (2003), the Court of Appeals interpreted the statutory language of a section of Michigan's guardianship act, finding that the statute was drafted in the present tense as distinguishable from the present perfect tense (permit versus have permitted), stating:

> In our view, the plain language of the statute states that if parents permit their child to permanently reside with someone else when the guardianship issue arises, the court may appoint a guardian for the child. See MCL §700.5204(2)(b). Note that the term "permit," the meaning of which the parties primarily contest here, is in the present tense.[] Thus, the permission referred to in the statute **must be currently occurring** – which would be shown by the child's actual presence in the care of another – when the guardianship issue arises. See, *e.g., Michalski v Bar-Levav,* 463 Mich 723, 733; 625 NW2d 754 (2001) (statutory language must be evaluated considering the present tense of the verbs employed); *Chmielewski v Xermac, Inc,* 457 Mich 593, 610 n 20; 580 NW2d 817 (1998) (Court's reading of statute "honors the Legislature's choice of the present tense"); *Farm Bureau Mut Ins Co of Michigan v Porter & Heckman, Inc,* 220 Mich App 627, 642 n 11; 560 NW2d 367 (1997) (present-tense definition of "owner" applied to "current" owners).

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[11] Moreover, allowing one "other purpose" here can lead to the allowance of still "other" purposes "down the road." For example, could a municipality charge fees in excess of the actual cost of operation for the purpose of stock-piling money for anticipated increases in the cost of future Building Department operations? The answer should be no.

Id. at 669-670 (emphasis supplied; footnote omitted). More importantly, in at least two instances, this Court has made the same distinction, stating:

> "[H]as determined" is the present perfect tense of the verb "determine." The present perfect tense generally" indicates action that was started in the past and has recently been completed or is continuing up to the present time" . . . .

In re CAW, 469 Mich 192, 202; 665 NW2 475 (2003), quoting *Girard v Wagenmaker*, 437 Mich 231, 242; 470 NW2d 372 (1991). As such, Section 22 of the CCA prohibits the use of present user fees for the theoretical repayment of alleged past shortfalls. The statute does not allow for the use of present fees to pay for past operations. Fees can only be used for the "operation" of the Building Department, which, under Michigan law, means "currently occurring."[12]

This interpretation comports with basic grammar rules and construction. For example, in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court interpreted the statutory phrase "the proximate cause." Initially, this Court noted that in some instances, the Legislature uses the phrase "*a* proximate cause" but, at other times, uses the phrase "*the* proximate cause," stating:

> Nevertheless, the fact that the Legislature sometimes uses "a proximate cause" and at other times uses "the proximate cause" does not, of course, answer the question what "the proximate cause" means other than to show that the two phrases should not be interpreted the same way. Our duty is to give meaning to the Legislature's choice of one word over the other.

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[12] The Court of Appeals majority opined that, because Section 22 does not contain a temporal limitation on the use of fees, fees collected today can be used to pay building department costs of the past. This analysis is flawed in that, taken to its logical conclusion, it allows fees collected today to pay building department costs past, present and future, with no reference whatsoever to a timeframe or limitation on the length of time a local unit of government can go back or forward. Indefinitely?

Id. at 461. As to the relevance of this distinction, using rules of grammatical context, this Court concluded that the Legislature's use of the word "the" as opposed to "a," denoted singular rather than plural, stating:

> Further, recognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause.

Id. at 462. Similarly, the Legislature drafted Section 22 using "the" as a definite article and "operation" as a singular noun. Therefore, Section 22, and the phrase "the operation of the enforcing agency," contemplates *one* operation. Section 22 limits the City's use of the User Fee Surplus to a single year's operations and the City's use of the fees for multiple operations over multiple years violates Section 22. Section 22 simply has nothing to do with past operations.

The CCA does not define "operation of the enforcing agency." However, other provisions of Section 22 provide context. A court, when interpreting a statute, properly reads words and phrases in the context of the entire statute. *Herman*, 481 Mich at 366. This, however, the Court of Appeals failed to do – considering only a few words or phrases or the perceived absence thereof as support of its temporal restrictions analysis. COA Op, p 4, Exhibit A. In actuality, Section 22 lists several "services and acts" of the "enforcing agency" for which fees can be charged, including "issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of occupancy," along with "hearing appeals." MCL 125.1522(1). The statute describes these activities as current activities. That is, a user pays a reasonable permit fee, the building department issues a permit, examines plans, inspects, and (where appropriate) issues the requisite certificate. Nothing therein contemplates paying a fee for services provided years ago. Again, Section 22 relates

only to present/current activities and bars the use of the User Fee Surplus to pay for historical shortfalls in Building Department revenue.

Likewise, dictionary definitions, an argument the Court of Appeals again failed to consider, contradict the holdings of the lower courts. This Court has routinely used dictionary definitions to ascertain plain meaning. See, for example, *Citizens Ins Co*, 477 Mich at 84. *Black's Law Dictionary* defines "operation" as "[e]xertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity." *Black's Law Dictionary* (6th ed), p 1092. "Operation" is also defined as "a: an exertion of power or influence <the *operation* of a drug> b: the quality or *state of being functional or operative* <the plant is *now* in *operation*> c: a method or manner *of functioning* <a machine of very simple *operation*>." *Merriam-Webster's Collegiate Dictionary* (10th ed), p 815 (emphasis added). These definitions reference only a present state of functioning. Again, the term "operation," within the meaning of Section 22, relates only to the present.

In short, the mandate on the face of Section 22 against using fees for any purpose other than the "*operation* of the enforcing agency or the construction board of appeals" prohibits transfer of the User Fee Surplus to the general fund and prohibits their use to theoretically offset past shortfalls. Section 22 is drafted in the present tense, provides present time examples of what "operations" include and mandates that "[t]he legislative body . . . shall not use the fees for any other purpose." MCL 125.1522(1) (emphasis supplied). Basic rules of grammar and dictionary definitions support this conclusion. The Court of Appeals reversibly erred in ruling otherwise.

2. Use of the User Fee Surplus to Theoretically Offset Alleged Historical Shortfalls Violates Section 22 of the CCA Based on Section 22's Interrelationship with Other Provisions of the CCA and Other Michigan Laws

Under Michigan law, statutes are not to be interpreted in a vacuum. The interpretation of a specific word, phrase or provision should be consistent with the statute as a whole. *Wayne Co v Auditor Gen*, 250 Mich 227, 233; 229 NW2d 911 (1930). That is, individual words and phrases, while important, should be read in the context of the entire legislative scheme. *Herman*, 481 Mich at 366. While defining particular words in statutes, a court must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. *Id.,* quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). And, the interpretation of a statute should be made in relation to other related laws. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010); *Travelers Ins v U-Haul of Mich Inc*, 235 Mich App 273, 279; 597 NW2d 235 (1999). A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. *Wayne Co*, 250 Mich at 233. The CCA's overall statutory scheme, Treasury's interpretation of the CCA, and Section 22's relation to other laws all lead to the conclusion that Section 22 prohibits the general use of the User Fee Surplus based on past shortfalls.

a. The Uniformity Mandated by the CCA Requires Reversal of the Court of Appeals

The CCA as a whole, and the operation of Section 22 within it, contradict the ruling of the Court of Appeals. The CCA made construction codes and their enforcement uniform throughout the state. MCL 125.1508a(1). In fact, statewide uniformity is a hallmark of the CCA. *Mich Ass'n of Home Builders,* 497 Mich at 285-286. This uniformity is consistent with the maxim that code

enforcement is an aspect of the state police power delegated to qualified local units that cannot exceed the authority provided by statute. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115-16; 715 NW2d 28 (2006).

Nothing in Michigan's comprehensive uniform statewide scheme authorizes a local agency to use a user fee surplus to supplement the general fund or offset alleged historical shortfalls with fees paid by users of building department services. Allowing such offsets by local governments conflicts with the uniform scheme of the CCA and could lead to absurd results. For example, the term "operation" of a building department would be interpreted to permit municipalities with historical shortfalls to collect "reasonable fees plus amounts to repay shortfalls," while requiring municipalities without such shortfalls to collect only "reasonable fees." The CCA and its goal of uniformity simply do not contemplate or allow for such divergence. The CCA uniformly restricts the use of reasonable fees for current operations, without qualification. Its provisions do not change based on the history of a particular municipality. Rather, the CCA, in its entirety, refutes the Court of Appeals ruling that the User Fee Surplus can be applied to past shortfalls.

b. Treasury Guidance Interpreting the CCA Require Reversal of the Circuit Court

Agency interpretations of statutes within their purview are "entitled to respectful consideration" and should not be departed from "without cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). Where necessary, an agency's determination is an aid in discerning the Legislature's intent, assuming that the interpretation does not conflict with the plain language of the statute. *Id.*

As its name would indicate, the Uniform Budgeting and Accounting Act ("UBAA") establishes a uniform system of local government budgeting and accounting. The accounting within the local unit of government is the responsibility of Treasury under Public Act 2 of 1968, as amended. Consistent with the UBAA and oversight of local governments by Treasury and as authorized by MCL 141.421(1) and MCL 141.440a(1), Treasury has issued two "Numbered Letters" to provide guidance to local governments on how to implement the 1999 amendments to Section 22 – at issue here. Initial Numbered Letter (2000-2), Exhibit L; Updated Numbered Letter (2000-6), Exhibit M. Under these Numbered Letters, Treasury interprets Section 22 to: (1) require the City to establish a separate special revenue fund for its Building Department fees; (2) prohibit the City from using the User Fee Surplus for general fund purposes; and (3) prohibit the City from starting any Building Department budgetary fund with a deficit. Specifically, Treasury's Initial Numbered Letter provides:

1. Fees must be "reasonable" and must "bear a reasonable relationship" to the cost of operating the Building Department; and

2. Fees may only be used for Building Department operations and "a separate special revenue fund must be established to account for the [building] department enforcement activities."

Initial Numbered Letter (2000-2), Exhibit L. The Initial Numbered Letter further states that "[i]n the past [prior to the 1999 amendment of the CCA] the accounting was generally established as a general fund activity. However, because PA 245 of 1999 [Section 22 amendment] requires that these fees only be used for a specific purpose, a separate special revenue fund must be established." Initial Numbered Letter (2000-2), Exhibit L.

After the issuance of the Initial Numbered Letter, Treasury received "several questions" related to local implementation of the "Restricted Use of Funds" provision of Section 22. Treasury, therefore, issued an "update and clarification." Updated Numbered Letter (2000-6), Exhibit M. Highlighting Section 22 at issue here, Treasury provided:

1. Establishing a separate fund for Building Department revenues is mandatory, unless the Building Department revenue is not intended to cover the full costs of the service and the local government has the ability to track the full costs and revenue of Building Department activities without creating a separate fund.[13]

2. Any new fund established to account for the CCA's Restricted Use of Funds Provisions "should not begin with a deficit." And, all fees collected must be included in the balance of the requisite separate fund.

Id. (emphasis supplied).

Therefore, with regard to the User Fee Surplus, the City is required by Section 22, the UBAA and Treasury guidance to create a separate fund for its Building Department fees and that fund cannot begin with a deficit. "All" fees, not just the fees sufficient to cover current operations, "must" be included in that separate account. And, application of the User Fee Surplus to past shortfalls would amount to starting the fund with a deficit, as current fee payers would effectively be repaying the deficits created by prior years' operations. The Numbered Letters of Treasury support reversing the majority opinion of the Court of Appeals.

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[13] Here, the City admits that it cannot track all indirect costs of its Building Department services. Lamerato Dep Tran, pp 5, 30-31, 65-72 and 75-77, Exhibit D. In its Brief below, the City admitted: "Unfortunately, the City did not and does not have financial software that can separately record each of these indirect costs of CCA enforcement, and the act of individually tracking each such expenditure on a spreadsheet would require manual inputting, adding to the overall cost of CCA enforcement." Accordingly, contrary to the Court of Appeals' conclusion that the City is not required to have a fund separate and apart from its general fund (COA Op, pp 6-7, n 4, Exhibit A), the City does not qualify for the exception to the separate fund requirement and is in violation of the CCA.

The Court of Appeals majority concluded that Treasury's Numbered Letters implicitly permit the City to collect the User Fee Surplus and apply it to offset shortfalls from prior years based on Treasury's discussion of "excess fees" within those Letters and its general accounting directives that "excess revenues" be disclosed. Since Treasury conceives of the possibility of "excess fees," the Court of Appeals reasoned, "Treasury implicitly recognized that surpluses can occur and that they may be used to offset shortfalls in different fiscal years." COA Op, p 7, Exhibit A. This analysis not only constitutes a "logical leap" of monumental proportions, but it contradicts the language of Section 22 and the Updated Numbered Letter itself. Specifically, Treasury states:

> 5. What happens to any excess fees collected?
> Any excess fees collected (excess of revenue over expenditures must be included in the separate fund balance or retained earnings of the separate special revenue fund or enterprise fund.
>
> * * *
>
> **7. Can the General Fund make an appropriation to the fund to make up a shortfall?**
> Yes.

Updated Numbered Letter (2000-6), Exhibit M. As such, while it is permissible to appropriate funds from a general fund to a building department fund to make up shortfalls, it is not permissible to transfer excess funds from the building department fund to the general fund. Rather, these excess funds must be "included in a separate fund balance or retained earnings." *Id.* Therefore, contrary to the majority opinion of the Court of Appeals, Treasury does not, expressly or implicitly, permit a local unit of government to purposefully collect a large annual surplus through its assessment of building department fees for deposit into the general fund for unrestricted use by the municipality.

Treasury's guidance, interpreting Section 22 of the CCA, prohibits the City's use of the User Fee Surplus to repay the General Fund – even to repay alleged historical shortfalls.

Likewise, the Court of Appeals' reliance on *Trahey v Inkster*, 311 Mich App 582; 876 NW2d 582 (2015) as support for its conclusion that the User Fee Surplus is properly used to repay debt incurred in the operation of the Building Department is erroneous. The differences between *Trahey* and this case are fairly substantial.

First, *Trahey* is a public utility rates case – not a CCA case. As such, *Trahey* involved different statutory framework; namely, the Inkster City Charter and MCL 123.41, regarding sewer and water rates.[14] *Trahey* did not involve a statute with language limiting the use of fees collected like Section 22 – "and shall not use the fees for any other purpose." *Trahey*, 311 Mich App at 597.

Second, *Trahey* involved different State administrative oversights. Public utility rates must be pre-approved by the Public Utilities Commission. MCL 460.6a. There is no commission pre-approval of building department fee rates – just the limitation that the fee amounts must "bear a reasonable relation to the cost." Therefore, in the absence of strict and mandating administrative oversight, as in the case of utilities, the amount limitation of Section 22 should be strictly enforced.

Third, as a public utility rates case, *Trahey* was subject to a "long recognized principle" under Michigan law, that "municipal utility rates are presumptively reasonable."

[14] In relevant part, MCL 123.41 provides: "The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making."

Trahey, 311 Mich App at 589. There is no such "long recognized principle" related to Section 22 of the CCA.

Fourth, public utility law includes a long line of cases allowing rate structures to include past expenses and costs. *Id.* at 597. There is no such case law related to rates established under Section 22. *Trahey* does not apply here and the Court of Appeals erred by relying upon it.

c. Well-Established Fee Reasonableness Principles Require Reversal of the Court of Appeals

In addition, a construction of Section 22 that allows the use of the User Fee Surplus for general purposes based on past theoretical shortfalls is contrary to the entire body of law that defines lawful municipal "fees." In Michigan, currently and historically, fees must be reasonably related to the costs of delivering service. This is true of pre-Headlee Amendment and post-Headlee Amendment fee "reasonableness" challenges. *Merrelli v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959) (fees that generate revenue are subject to the taxing power); *Bolt*, 459 Mich at 161 (fee must bear reasonable relationship to costs of providing service; only taxes may raise revenue). Fees cannot be used as subterfuge for revenue-raising measures. *Merrelli*, 355 Mich at 588.

By definition, the presence of a "surplus" indicates more than what is reasonable to cover actual costs of operation. "Surplus" is defined as "[t]hat which remains of a fund appropriated for a particular purpose; the remainder of a thing; the overplus; the residue." *Black's Law Dictionary* (5th ed), p 1294. Therefore, under reasonableness principles, it is unlawful to have a large fee surplus. It therefore follows, that such a surplus cannot be directed to past shortfalls, theoretical or actual, since such a surplus should not exist.

Further, the Court of Appeals' construction of Section 22 requires current fee payers to overpay to offset a theoretical shortfall created by prior fee payers' underpayment. The City admits that current payers are paying a fee premium to subsidize the discount provided by the City to past fee payers. Lamerato Dep Tran, pp 78-79, Exhibit D. This too is contrary to the principle that fees must be reasonable in relation to the cost of services. Allowing a practice of overcharging to make up prior deficits invites municipalities to arbitrarily increase fees beyond the cost of services such that the fees no longer "bear a reasonable" relation to the cost "of the services provided." Accordingly, Section 22 cannot be construed to force current fee payers to pay back the budgeted-for discount the City provided to prior fee payers. The Court of Appeals' decision otherwise, should be reversed.

d. Tax Principles Require Reversal of the Court of Appeals

The deposit of fee dollars into a general fund is an indicator that a charge may be an unlawful tax, while the deposit of fee dollars into a separate special revenue fund tends to indicate the charge may be a lawful fee. For example, in *Bolt*, this Court struck down a sewer separation fee as a disguised tax in part because sewer separation was historically paid for with Lansing's general fund tax dollars. *Bolt*, 459 Mich at 168.

Similarly, the prevailing position in other states is that it is unlawful to transfer fee-generated dollars from a dedicated or special revenue fund into a general fund. Doing so creates an unlawful or unconstitutional tax. For instance, the Hawaii Supreme Court held that its Legislature's transfer of insurance regulatory fees from a special revenue fund to the general fund transformed the otherwise valid regulatory fees into unconstitutional taxes. *Hawaii Insurers Council v Lingle*, 201 P3d 564 (2008). Several other states have also held that the transfer of a fee surplus from a

dedicated or special revenue fund into a general fund amounts to unlawful revenue raising, even where the activity starts as lawful fee collection. *Id.* at 582. These cases include *Health Servs Med Corp of Central New York Inc v Chassin*, 175 Misc 2d 621; 668 NYS2d 1006, 1009-10 (1998), aff'd by 259 AD2d 1053; 689 NYS2d 875 (1999) (statutory HMO payments to hospitals became unconstitutional taxes when they were later diverted to the general fund); and *Radio Common Carriers of New York, Inc v State of New York,* 158 Misc 2d 695; 601 NYS2d 513, 515-16 (1993) (fee on paging devices was a disguised tax because it did not go to a separate fund to support the fee's stated purpose, but instead went into the general fund). Further, a "transportation utility fee" was upheld as valid, but only after the Colorado Supreme Court struck the provision that allowed the city council to transfer surplus fee revenues from a dedicated special revenue fund into the general fund. *Bloom v Ft Collins*, 784 P2d 304, 311; 58 USLW 2402 (Colo, 1989). Likewise, a Nevada statute that transferred fee dollars from a dedicated fund held by a regional public water cooperative into the State's general fund was held to be a revenue-raising measure that violated the Nevada constitution. *Clean Water Coalition v The M Resort, LLC*, 255 P3d 247, 256-58 (Nev, 2011); *see also, Emerson College v Boston,* 391 Mass 415; 462 NE2d 1098, 1106 (Mass, 1984) (legislative use of fee proceeds for reasons other than the purpose for which fees were assessed indicates unlawful revenue-raising).

Like Hawaii and these other states, Michigan's test to determine disguised taxes looks, in part, to whether the regulatory agency "places the money in a special fund," or whether the fees are "used for a general purpose." *Hawaii Insurers,* 201 P3d at 578. Thus, between *Bolt*, *supra*, and the law of other states, it is unlawful to transfer surplus fee dollars that are supposed to be used for a dedicated purpose into a general fund. Here, the Court

of Appeals' construction of Section 22, that would allow fee dollars to be deposited into the general fund, violates Michigan law that holds that transfer of surplus user fees to a general fund transforms the fee into an unconstitutional tax. Again, the Court of Appeals' majority opinion should be reversed.

3. Use of the User Fee Surplus to Theoretically Offset Alleged Historical Shortfalls Violates the Purpose and Policy of Section 22 of the CCA

A court must look to the object of a statute and the harm that it was designed to remedy and apply a reasonable construction that best accomplishes the purpose of the statute. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 392-393; 559 NW2d 98 (1996). A statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. *Wayne Co,* 250 Mich at 234. Statutes should be construed so as to prevent absurd results, injustice or prejudice to the public interest. *Franges v Gen Motors Corp,* 404 Mich 590, 612; 274 NW2d 392 (1979).

The CCA was originally enacted in 1972 and applied throughout the Sate except that local governments could exempt themselves from certain parts of the CCA such as the building code provisions and, in their place, adopt and amend a nationally recognized model building code. The Legislature amended the CCA in 1999 to bring all units of local government within its purview, provide for statewide application of the CCA and the State Construction Code and thereby achieve uniformity across the State. Senate Legislative Analysis, SB 463, June 16, 2000, p 1, Exhibit N. As stated by this Court in its earlier opinion in this case:

> The CCA creates a state construction code that governs innumerable aspects related to the construction, use, and occupation of residential and commercial buildings and structures. The CCA and the

> construction code "apply throughout the state," and the CCA provides that, except as otherwise provided, the director is responsible for administering and enforcing both the CCA and the construction code.

Michigan Ass'n of Home Builders, 497 Mich at 285-286 (footnotes omitted).[15]

One of the concerns addressed by the 1999 amendments was the lack of uniformity in building code requirements and compliance costs created by the ability of local units of government to adopt their own building code. Senate Legislative Analysis, SB 463, June 16, 2000, p 1, Exhibit N. Such uniformity, however, is impeded by the City's actions. Rather than make its fees consistent with other units of local government, as well as the statute (reasonably related to the cost of services), the City charges fees in amounts which created an annual surplus which it then uses for purposes other than operating its building department. As a result, today's customers are paying inflated prices for services for which the City knowingly undercharged for, at a minimum, eight (8) years prior. Today's users did not agree to or approve their subsidizing of the City's earlier choices to not budget for a fully funded Building Department. Therefore, the fees paid by today's users which are not attributable to today's costs, appear more like revenue generated by the City to make up for prior budget deficits. This practice violates Section 22 and the Headlee Amendment of the 1963 Michigan Constitution. In addition, it is simply unfair and contrary to public policy to have today's residential builders and their customers paying a premium in the form of inflated prices

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[15] Because the director is primarily responsible for administering and enforcing the CCA, Section 22, allowing units of local government to establish, collect and retain fees for building department services, is an exception to that general rule. Under Michigan's laws of statutory construction, exceptions to a statutory scheme are to be narrowly construed. *Lee v JH Lee & Son*, 72 Mich App 257, 260; 249 NW2d 380 (1976); *Grand Rapids Motor Coach Co v Public Serv Comm*, 323 Mich 624, 634; 36 NW2d 299 (1949).

for residential construction contrary to the intent of the 1999 amendments to the CCA to provide uniformity and affordability.

The Court of Appeals noted in its majority opinion that the City did not increase the amount of its fees in order to obtain the User Fee Surplus, insinuating that, because fee amounts remained the same while operating cost declined under the SafeBuilt Contract, the fees are reasonable. Assuming but denying this to be true, this analysis remains flawed. The City's fees must also be reasonably related to the cost of providing the service. If, in recent years, the City has experienced a decline in the cost of providing building department services, that cost savings should be passed on to home builders and to purchasers of new homes and renovations. The limited discretion in determining fee amounts, afforded to the City by the Legislature, does not extend to determining that this cost savings should be used to subsidize non-building department services.

Code enforcement is an aspect of the state power delegated to qualified local units that cannot exceed the authority provided by statute. *Taylor*, 475 Mich at 115-16. And, local governments have no inherent powers and possess only those limited powers conferred by the Constitution and statute. *Hanselman*, 419 Mich at 187. These maxims are important here because the City is only given limited powers under Section 22 because fees, unlike taxes, are not voter approved. The general public needs, and gets, protection from limiting legislation such as Section 22. Section 22 makes municipalities accountable to their citizens and protects them from fraud and "creative" accounting practices. As stated by the dissent:

> To allow defendant's building department to run deficits by choice and then overcharge future users to make up for those deficits undermines the purpose of the statute, which is to ensure a direct and reasonable relationship between the acts and services performed by the department and the cost of providing those services to each

> individual served. Although the statute allows defendant to apply an incidental surplus to the costs of operating the building department, it does not allow defendant to *create* a surplus in order to recoup what defendant contends was a deficit from prior years.
>
> * * *
>
> The statute does not allow defendant to charge current payers and permit applicants more than what is reasonable in order to make up for losses it chose to incur by failing to charge previous permit applicants appropriately under the statute. To hold that under MCL 125.1522(1), a city may engage in such creative budgeting would create a poor precedent. Under the majority's interpretation of the statute, a city might permissibly choose to create a shortfall in any given year and unfairly charge unreasonable rates in subsequent years, completely defeating the goal of ensuring that each individual fee-payer pays for the acts and services he or she is provided.

COA Op, Dissent, pp 2 and 3, Exhibit B.

4. Conclusion Under Section 22 of the CCA

In conclusion, Section 22 of the CCA, MCL 125.1522(1), requires that fees charged for Building Department services be "reasonable" and that they "bear a reasonable relation to the cost" of providing building inspection services. Section 22 also prohibits the use of such fees for anything other than the operation of the Building Department and Construction Board of Appeals. The City's practice of charging fees in excess of the cost of services for the alleged purpose of paying back the general fund for historical shortfalls in the Building Department budget violates all of the relevant provisions of Section 22, according to their plain and ordinary meaning. This practice is also contrary to the overall purpose of the CCA of uniformity, Treasury guidance on Section 22, Michigan common law on "fee reasonableness," tax principles and the purpose of Section 22. Therefore, the Court or Appeals reversibly erred and should be reversed.

C. The City's Fees Violate The Headlee Amendment

In general, a "fee" is an amount of money which:

> generally is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.

Saginaw Co v John Sexton Corp of Mich, 232 Mich App 202, 210; 591 NW2d 52 (1998) (citations omitted). However, a regulatory fee will be construed as an illegal tax where it fails to pass scrutiny under a certain 3-part test announced by this Court in *Bolt*, 459 Mich at 161. The three primary criteria to be considered when distinguishing between a tax and a fee are: (1) whether the fee serves a "regulatory purpose rather than a revenue-raising purpose;" (2) whether there is proportionality between the amount of the fee and the cost of the service; and (3) whether the fee is voluntary and can be avoided through the payer declining the fee-funded service. *Id.* These three factors have some flexibility and are viewed in totality; that is, the strength or weakness on one factor will not necessarily decide the issue. *Id.* at 167, n 16; *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, courts are instructed to look beyond titles and descriptions given by the parties to ascertain what is truly occurring. *Adams Outdoor Advertising v East Lansing*, 439 Mich 209, 231; 483 NW2d 38 (1992) (Levin, J. concurring), citing *Krajenke Buick Sales v Kopkowski,* 322 Mich 250, 252; 33 NW2d 781 (1948).

Fees found to be hidden taxes "unquestionably" violate the Headlee Amendment. Here, the City's practice of charging fees that exceed the current cost of operation of the Building Department and depositing the User Fee Surplus into its general fund makes the User Fee Surplus an unlawful tax increase that was not approved by voters. This practice, therefore, violates the Michigan Constitution. Const 1963, art 9, §§31 and 32.

1. The Building Department Fees Have a Revenue-Raising Rather than a Regulatory Purpose

As *Bolt* instructs, the first factor considered is whether a challenged fee has a regulatory or revenue-raising purpose. *Bolt*, 459 Mich at 161. "Regulatory purpose" analysis looks to whether the challenged charge regulates conduct, or whether it simply raises revenue. *Id.* at 166. For example, in *Merrelli*, 355 Mich 575, the Supreme Court examined the City of St. Clair Shores' (the "city") fees charged for building permits. The city had adopted a series of ordinances regulating construction and requiring the payment of certain fees in order to commence construction. *Id.* at 577. According to the city, it increased the fee amounts in order to accommodate for the tripling of its population over a 5-year period and attendant cost increases. *Id.* at 579. This Court found the purported fee to be an illegal tax not solely associated with the regulatory cost of operating the building, but also associated with the cost of expanded government services generally. *Id.* at 588. This Court stated:

> The police power may not be used as a subterfuge to enact and enforce what is in reality a revenue-raising ordinance. Cooley, Taxation, 4th ed, §1980. Here the testimony of the various city officials in support of the schedule of amended fees makes it clear that what was sought to be defrayed was, in the words of Chief Justice Vanderbilt, 'the general cost of government under the guise of reimbursement for the special services required by the regulation and control of new buildings.' At this point lies the fatal defect in the defendant's course of action.

Id.

Similarly, the Court of Appeals found a storm water management charge to be a disguised tax in violation of the Headlee Amendment where the charge was found to serve a dual purpose: (1) the regulatory purpose of financing a portion of the means by which the city protects

local waterways; and (2) the revenue-raising purpose of funding certain government activities. *Jackson Co v City of Jackson*, 302 Mich App 90, 105-106; 836 NW2d 903 (2013). Therein, the city had historically funded the operation and maintenance of its storm water management system with money from its general and street funds. Monies in the general and street funds were generated through property and gasoline taxes and vehicle registration fees. When the revenue from these taxes and fees declined, the city commissioned a feasibility study of establishing a storm water utility for the purpose of funding its storm water management through "user fees." *Id.* at 94. Thereafter, the city adopted its "Storm Water Utility Ordinance," established a storm water enterprise fund and began collecting storm water management charges. *Id.* at 98. In relevant part, the Storm Water Utility Ordinance required the city to deposit all revenue generated by the storm water management charges into a certain storm water enterprise fund and prohibited the city from using money generated by the storm water management charges for any purpose other than the "costs to acquire, construct, finance, operate and maintain a storm water system." *Id.* at 95.

However, the city's own documents demonstrated that the charge was a disguised tax driven by the city's desire to relieve the general and street funds from the burden of paying the cost of the storm water system. *Id.* at 106-107. Thus, the Court concluded that the Ordinance violated the first prong of the *Bolt* Court's 3-prong test, stating:

> The fact that the impetus for creating the storm water utility and for imposing the charge was the need to generate new revenue to alleviate the budgetary pressures associated with the city's declining general fund and street fund revenues, and the fact that the city's activities were previously paid for by these other funds are factors that support a conclusion that the management charge has an overriding revenue-generating purpose that outweighs the minimal regulatory purpose of the charge and, therefore, that the charge is a tax, not a utility user fee. The Headlee Amendment bars municipalities from

> supplementing their existing revenue streams by redefining various government activities as services and then enacting "user fees" for those services.

Id. at 107-108, citing *Bolt*, 459 Mich at 169.

Here, as the City admits, the User Fee Surplus is deposited in its general fund and purportedly used to make up for prior shortfalls in costs associated with operating the Building Department. This is, in essence, the *Jackson County* case. In both cases, the city used monies from the general fund to, in whole or in part, fund a service provided by the city. Then, later, when lack of revenue made it incapable of doing so, charges were either created or increased in order to make up for the shortfall. This is a revenue-raising purpose. The City is using increased building fees to generate revenue to pay back purported loans. The alleged fees, therefore, do not serve a regulatory purpose.[16]

2. The Building Department Fees are Not Proportional to the Cost of Service

Closely related to the first factor reviewed is the second factor – whether the user fees are proportionate to the necessary costs of service. *Bolt*, 459 Mich at 161-162. See also, *Graham,* 236 Mich App at 151 (regulatory purpose and proportionality issues intertwined). A regulatory fee will be construed as an illegal tax when the revenue generated by the regulation exceeds the cost

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[16] The Court of Appeals majority concluded that the building department fees were regulatory because the CCA is regulatory. COA Op, pp 8-9, Exhibit A. This argument misses the mark. While the CCA may be regulatory, the Use Fee Surplus is not. The City's sizable surplus was the direct result of defendant's attempt to raise revenue by charging excessive fees. Further, while the person paying a reasonable building department fee receives a corresponding benefit "not generally shared by other members of society," *Bolt,* 459 Mich at 164, it is the public that receives the benefit of the excess funds generated by defendant's revenue-generating practice. These excess funds, which are not reasonably related to a regulatory purpose or the cost of services provided to their payer, are deposited into defendant's general fund and used for the benefit of all residents.

of the regulation. *Rouge Parkway Assoc v City of Wayne*, 423 Mich 411, 419; 377 NW2d 748 (1985).

In *Bolt*, the Supreme Court concluded that the storm water service charge there at issue failed under its 3-prong test, in part, because the charge was not proportionate to the necessary costs of service. *Bolt*, 459 Mich at 165. Rather, the charge resulted in a surplus because it benefitted more persons than the particular person upon whom it was imposed. *Id.* In relevant part, this Court stated:

> [T]he charges imposed do not correspond to the benefits conferred. Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary sewer system. In fact, many of them have paid for such separation through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction. Moreover, the charge applies to all property owners, rather than only to those who actually benefit. **A true "fee," however, is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed.** *Bray, supra* at 162, 341 NW2d 92; *Nat'l Cable Television Ass'n v United States, supra* at 340-342, 94 SCt 1146.

Id. (emphasis supplied).

A similar situation exists in this case. The people benefitted by the current increased fees are: (1) the person upon whom the fee is imposed; (2) the people who historically received discounted fees during the time when the cost of the operation of the Building Department was supplemented by funds from the general fund; and (3) the general public who receive benefits from

the fees being funneled through the general fund and spent on roads, parks, etc. Again, a true "fee" confers a benefit only on the particular person on whom it is imposed. That is not the case here.[17]

The Court of Appeals found that the City's fees are not revenue generating and are proportionate to the cost of service (prongs 1 and 2), in part, because when the years in which a surplus was created are "netted out" against the years in which a deficit existed, the amount of fees are reasonably related to cost of providing the service. COA Op, p 9, Exhibit A. There is, however, no statutory or common law authority to support this analysis. Rather, as of today, and for the years at issue in this lawsuit, the City's fees grossly exceeded the then current cost of providing the service. As a result, the particular individual upon whom the fee is imposed is not benefitted. To the contrary, this individual is overpaying for the same service for which a different individual, several years earlier, underpaid. This is not permitted under Michigan law and violates the Headlee Amendment.

3. The Building Department Fees are Not Voluntary

Under *Bolt*, the third factor to be considered is whether a fee is voluntary. *Bolt*, 459 Mich at 162. A true fee is voluntary whereas a tax is not. *Id.* Here, the Court of Appeals found that the building fees are voluntary in that they are only paid "by those who want – or need – the services of the building department." COA Op, p 10, Exhibit A. This Court, however, rejected this precise theory:

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[17] Moreover, the simple fact that there is a very large surplus illustrates that fees are not proportionate to expenses. Again, "Surplus" is defined as "[t]hat which remains of a fund appropriated for a particular purpose; the remainder of a thing; the overplus; the residue." *Black's Law Dictionary* (5th ed), p 1294.

> The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property.

Bolt, 459 Mich at 168.

Accordingly, what the Court of Appeals claims is a "choice" a homeowner or Builder may make to pay a permit fee or not, to this Court, it is a false choice. Having to choose between paying a fee or leaving one's real property idle, obsolete or in a dangerous state of disrepair is not a choice under this Court's precedent. *Id.* The building fees are not truly voluntary. At a minimum, the User Fee Surplus portion of the building fees is not voluntary. A homeowner or Builder must pay them and help fund the general fund and/or offset the discounted fees previously paid by others, or forego a valuable property right.

4. Conclusion Under Headlee Amendment Claim

In conclusion, the building fees are not truly fees but, rather, a disguised tax. The building fees, even if truly used to pay back alleged historical loans/shortfalls from the City's general fund for the operation of the Building Department, fail to pass muster under each of the three criteria articulated by the *Bolt* Court.

First, the increased fees serve the primary purpose of raising revenue to repay alleged loans from the general fund. Second, the amount of the fees is not proportionate to expenses – there is a large "surplus" and the fees benefit more people than just the person paying the fee. Third, the claimed voluntariness of the payment is deceptive since paying the exorbitant fee and allegedly reimbursing the general fund is the only way to exercise one's property rights. The Court

of Appeals erred by affirming the Circuit Court's grant of summary disposition to the City on the Builders' Headlee Amendment claim. The Court of Appeals majority Opinion should be reversed.

V. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, this Court should peremptorily reverse the September 28, 2017 Opinion of the Court of Appeals and remand this case to the Oakland County Circuit Court for a decision on the merits of the Builders' Motion for Summary Disposition or, alternatively, grant the Builders' Application for Leave to Appeal.

McCLELLAND & ANDERSON, LLP
Attorneys for Plaintiffs/Appellants

By: */s/Gregory L. McClelland*
Gregory L. McClelland (P28894)
Melissa A. Hagen (P42868)
Business Address:
1305 S. Washington Ave, Suite 102
Lansing, MI 48910
Telephone: (517) 482-4890

Date: November 8, 2017

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EXHIBITS TO APPLICATION FOR LEAVE TO APPEAL
ON BEHALF OF PLAINTIFFS/APPELLANTS
MICHIGAN ASSOCIATION OF HOME BUILDERS,
ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,
and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION

A. Court of Appeals Opinion, September 28, 2017 ("COA Op")

B. Court of Appeals Opinion, Dissent, September 28, 2017 ("COA Op, Dissent")

C. City of Troy Professional Services Agreement (the "Contract"),

D. Deposition Transcript of John Lamerato ("Lamerato Dep Tran"), p 5, 19-22, 30-31, 37, 43, 46, 65-72, 75-79, 84-85, 122

E. Deposition Transcript of Mark Miller ("Miller Dep Tran"), pp 63-64, 74-75, 98, 120, 122-124, 127

F. 2011 Calculations

G. Circuit Court Opinion, February 5, 2016 ("Cir Ct Op")

H. City Attorney Letter

I. Deposition Transcript of Thomas E. Darling ("Darling Dep Tran"), pp 21, 45, 49, 50-52, 54, 68-73, 76-77, 83-87, 89-90, 105-106, 128-130

J. Szerlag/Lamerato email

K. Affidavit of Thomas Darling ("Darling Affidavit")

L. Initial Numbered Letter (2000-2)

M. Updated Numbered Letter (2000-6)

N. Senate Legislative Analysis, SB 463, June 16, 2000, p 1