RECEIVED by MSC 12/6/2017 4:16:28 PM

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

MICHIGAN ASSOCIATION OF HOME BUILDERS; ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN; AND MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION, Michigan Non-Profit Corporations,

Plaintiffs-Appellants,

Supreme Court No. 156737
Court of Appeals Case No. 331708
Circuit Court Case No. 10-115620-CZ

v.

CITY OF TROY, a Michigan Municipal Corporation,

Defendant-Appellee.

_____/

GREGORY L. McCLELLAND (P28894)
MELISSA A. HAGEN (P42868)
MCCLELLAND & ANDERSON, LLP
Attorneys for Plaintiffs-Appellants
1305 S. Washington Ave., Ste. 102
Lansing, Michigan 48910
(517) 482-4890

LORI GRIGG BLUHM (P46908)
ALLAN T. MOTZNY (P37580)
Attorneys for Defendant-Appellee
500 W. Big Beaver Rd.
Troy, MI 48084
248-524-3320

_____/

DEFENDANT-APPELLEE CITY OF TROY'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 12/6/2017 4:16:28 PM

TABLE OF CONTENTS

RECEIVED by MSC 12/6/2017 4:16:28 PM

INDEX OF AUTHORITIES

RECEIVED by MSC 12/6/2017 4:16:28 PM

Statutes & Constitutional Provisions

Rules

Other Provisions

RECEIVED by MSC 12/6/2017 4:16:28 PM

STATEMENT OF JURISDICTIONAL BASIS

Defendant-Appellee concurs with Plaintiffs-Appellants' "Statement of Judgment Appealed From."

RECEIVED by MSC 12/6/2017 4:16:28 PM

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DOES PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL ESTABLISH SUFFICIENT GROUNDS JUSTIFYING FURTHER JUDICIAL REVIEW?

Plaintiffs-Appellants Answer: Yes

Defendant-Appellee Answers: No

The Circuit Court and the Court of Appeals did not answer this question.

II. DOES THE CITY'S PAYMENT OF BUILDING PERMIT REVENUES INTO A GENERAL FUND ACCOUNT FOR PAST AND PRESENT CONSTRUCTION CODE ACT ENFORCEMENT SATISFY THE REQUIREMENT OF MCL 125.1522(1) THAT REVENUES BE USED FOR THE OPERATION OF THE ENFORCING AGENCY?

Plaintiffs-Appellants Answer: No
Defendant-Appellee Answers: Yes
The Circuit Court and the Court of Appeals Answers: Yes

III. DO THE CITY'S BUILDING PERMIT FEES CONSTITUTE A TAX IN VIOLATION OF THE HEADLEE AMENDMENT TO THE MICHIGAN CONSTITUTION?

Plaintiffs-Appellants Answer: Yes
Defendant-Appellee Answers: No
The Circuit Court and the Court of Appeals Answers: No

RECEIVED by MSC 12/6/2017 4:16:28 PM

COUNTER-STATEMENT OF FACTS

Plaintiffs-Appellants (hereafter "Plaintiffs") filed a cause of action against the Defendant-Appellee City of Troy alleging the City's Building Inspection Department fees violated MCL 125.1522, a provision of the Single State Construction Code Act, MCL 125.1501 *et seq.* ("CCA"), and Const 1963, art 9, § 31, a provision of the Headlee Amendment. The Oakland County Circuit Court initially granted summary disposition in favor of the City on grounds the Plaintiffs failed to exhaust administrative remedies. The Court of Appeals affirmed this Court's ruling, but this Court reversed and remanded the case. On remand, the Circuit Court allowed additional discovery and then considered motions for summary disposition from both parties. The Circuit Court rejected Plaintiffs' claims and granted summary disposition in favor of the City of Troy on February 5, 2016. Plaintiffs appealed to the Court of Appeals. The Court of Appeals affirmed the lower court's decision on September 28, 2017. The City challenges some of Plaintiffs' version of the procedural history, as set forth on pages 2 and 3 of the Application for Leave to Appeal. Plaintiffs fail to mention that prior to the hearing on the motion for summary disposition, the trial court permitted additional discovery on remand, and Plaintiffs were provided with all the requested financial information from the City. There are errors in Plaintiffs statement of the underlying facts, requiring the City to supplement with an accurate recitation.

The City's costs to enforce the CCA were continuing to increase, and instead of significantly raising the building permit fees, the City of Troy explored alternative options designed to keep the costs of building permits low, spurring continued development in the City. On June 7, 2010, after a bid process, the Troy City Council awarded a

RECEIVED by MSC 12/6/2017 4:16:28 PM

contract to SafeBuilt to provide building inspection services. The decision to contract building inspection services was intended to bring more efficiency to the City's enforcement of the CCA (MCL 125.1501, *et seq*.). This new privatization measure allowed the City to continue to charge the same building permit fees that had been in place for some time, even though these fees had not been sufficient to cover the costs of operating the internal City Building Department. Without the move to SafeBuilt, the City would have necessarily substantially increased its building permit fees to cover the CCA costs, and this would likely have spiraled, since higher building permit fees were likely to discourage continued development, resulting in less income. Prior to SafeBuilt, the City could not predict how many building permits would be requested in any given year. The City needed to maintain an internal staff that was dedicated to the enforcement of the CCA, so there were fixed costs that were not covered by the permit revenue. Based on a statutory amendment to the CCA in 1999 (1999 PA 245), the City has continued to track all revenue and expenditures for CCA enforcement since 2000. Based on this tracking, the City accumulated a deficit for each tracking year that the City's internal Building Department (City employees) handled the CCA enforcement. The City follows the guidance from Treasury Bulletins (Bulletin 2000-2 and clarifying Bulletin 2000-6) in tracking both the annual cost of CCA enforcement and also the cumulative totals for each year since 2000. This accounting is recorded in the City's annual Comprehensive Annual Financial Report (CAFR), which is an official financial report and public document filed with the State of Michigan Department of Treasury, and is also distributed to the residents and posted on the City's web site. The relevant excerpts from the lengthy annual CAFR reports from 2004 to 2014 were provided to the

RECEIVED by MSC 12/6/2017 4:16:28 PM

Circuit Court as exhibits, and they are attached to this answer as **Exhibit A**. In accordance with the Uniform Budgeting and Accounting Act, MCL 141.421 *et seq.,* the Department of Treasury is charged with the oversight of CAFR reports and other mandated municipal financial reporting, and therefore has the ability to demand corrections should there be any inaccurate reporting in the CAFR report or in the City's financial records. This has never been an issue with the City's reports, and the City has consistently received awards for its excellence in financial reporting.

The City made its very tough decision to terminate and retire several internal City employees who were performing only CCA responsibilities, and hire out these services with a qualified contractor, SafeBuilt. This unique but more efficient outsourcing process required other internal City employees to assume some of the duties that could not be handled by SafeBuilt, which include but are not limited to the Chief Building Inspector and other City employees charged with contractual oversight and implementation. These direct and indirect City expenditures are properly considered when the City sets its fees under the CCA, but Plaintiffs erroneously exclude these City expenditures and limit the financial analysis to SafeBuilt. MCL 125.1522(1) requires the City Council to establish reasonable fees which are intended to "*bear a reasonable relation to the cost, including overhead*…" These fees are required to be set in advance, and therefore they can only be estimates based on the best available information. In exercising its discretion in setting these fees, the City looks to the financial tracking, as set forth above and reported in each CAFR, and at the end of the fiscal year, evaluates the anticipated costs versus revenue. If the City did not annually cover its costs, including overhead, then the City could potentially increase the building

RECEIVED by MSC 12/6/2017 4:16:28 PM

permit fees. If the City received more building permit revenue than the cost of CCA enforcement, then the City could potentially reduce the building permit fees.

According to the CAFR documents **(Exhibit A)**, the City's internal Building Inspections Department's costs of CCA enforcement annually exceeded the amount of revenue generated by building permits since 2000. According to John Lamerato, the City's retired Assistant City Manager of Finance and Administration, he prepared the annual CAFR reports as part of his job responsibilities. He testified that in completing the CCA calculations for the 2004 to 2010 CAFR reports, he first determined the actual costs each year to operate the City's internal Building Inspections Department. **(See deposition transcript of John Lamerato, pp. 14-15, which is attached as Exhibit B).** He was able to keep track of these departmental expenditures through the City's financial software. These internal department expenditures were recorded on each annual CAFR as the "direct costs," and this number ties directly to the actual expenses of the City's Building Inspection Department, which is also recorded on the City's annual financial reports, which are independently audited each year. There are also indirect costs to enforce the CCA, and MCL 125.1522 expressly allows for the inclusion of these costs in the required accounting and reporting. 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 a significant amount of manual inputting. This tracking is not required by the state statute, and would increase the costs of CCA enforcement, since additional employees would need to be hired to perform the accounting functions. Instead, the City employed a conservative 8% overhead allocation to use as the indirect

RECEIVED by MSC 12/6/2017 4:16:28 PM

cost of enforcement of the CCA, which is a practice that is routinely used in construction contracts. Lamerato explained the City's practice in his deposition as follows:

> *Walsh College and graduate students performed the study for the City a number of years ago, and they came up with a – normal, I would say, for cities is around 10 % for direct and over administrative costs, and they came up with a figure of 8% as a number, and that's what we've been using since it was done by an outside firm and outside agency.*
> **Lamerato, Dep Tr 16.**

According to the annual CAFR reports **(Exhibit A)**, the City has used this 8% formula to calculate the overhead or indirect expenses since at least 2004. Starting at zero for 2000, and tracking the cumulative amounts for each year thereafter, the City's annual CAFR reports show the building permit revenue in relation to the City's actual direct and estimated indirect costs, as follows:

Yearly net shortfall or surplus[1]	Cumulative shortfall
$ (1,027, 685) 2001- July 1, 2003	$(1,027,685)
$ (545,735) as of July 1, 2004	$(1,573,420)
$ (571,992) as of July 1, 2005	$(2,145,412)
$ (577,839) as of July 1, 2006	$(2,723,251)
$ (825,047) as of July 1, 2007	$(3,548,298)
$ (972,349) as of July 1, 2008	$(4,520,647)
$ (1,141,888) as of July 1, 2009	$(5,662,535)
$ (1,042,911) as of July 1, 2010	$(6,659,862)
$ (47,354) as of July 1, 2011	$(6,707,216)
$ 269,483 as of July 1, 2012	$(6,437,733)
$ 488,922 as of July 1, 2013	$(5,948,811)
$ 325,512 as of July 1, 2014	$(5,623,299)

As is evident from the above chart, there were several years where the building permit costs did not cover the costs of operating an internal City Building Department. This also occurred even though the City contracted with SafeBuilt. Since 2012, whether as a result of increased building in the City or more efficiencies, the yearly building permit fees have covered the CCA enforcement costs. Over the three years,

[1] Shortfalls are shown in parenthesis.

RECEIVED by MSC 12/6/2017 4:16:28 PM

this has resulted in an average "surplus" of approximately $360,000, but it is difficult to predict if this trend, and the residential building boom will continue into the future. Plaintiffs ignore the unpredictability of the fee setting process and the impact of the cyclical economy, and jump to the conclusion that recent trend, where revenues exceed expenditures, will continue in perpetuity. A downturn would reduce the amount of permits, and correspondingly generate less revenue to cover the costs that cannot easily be adjusted or reduced (fixed costs). A correspondingly large increase in the building permit fee would likely discourage builders from new development, which would also result in reduced revenue. With fee setting, Cities are required to perform a delicate balancing to encourage vibrant communities as well as self-sufficiency, and in analyzing these factors, the City maintained the same CCA building permits 2009 for several years, even though the City had entered into a contract with SafeBuilt, which temporarily has resulted in more CCA revenue than expenses. **(See Exhibit C, Mark Miller deposition, p. 160, and Exhibits D and E, which reflect Troy's fees from 2009 – 2015)**.

On page 1 of the Application, Plaintiffs erroneously state that since 2014, the City admits that there is a total fee surplus of $1,498,565. The City does not dispute the financial records, which are incorporated into the chart above, but disagrees with Plaintiff's conclusion, especially since any revenue received over expenditures was applied directly to reduce the City's significant cumulative shortfall as a result of CCA enforcement since 2000.

Under the City's contract, SafeBuilt is paid 75% of the building permit revenue for years where the building permit fee revenue exceeds $1,000,000 (80% otherwise). The

RECEIVED by MSC 12/6/2017 4:16:28 PM

remaining 25% (20%) is used to cover the costs of internal City employees who are performing CCA tasks that SafeBuilt cannot perform (direct and indirect costs). If these direct and indirect costs are less than 25%, then any excess is applied directly to reduce the significant cumulative deficit for CCA enforcement. Contrary to Plaintiff's assertions in the Application, the CCA revenue is NOT used for City of Troy general fund purposes that are unrelated to CCA activities.

Plaintiffs incorrectly characterize the "retained 100% of other 'non-billable' Building Department fees," as reimbursement to the City for CCA enforcement. The so-called "non-billable" fees are building bonds and escrow fees that are not related to CCA activities, and therefore are not properly included as revenue under the CCA. **(See Exhibit F, Thomas E. Darling deposition, p 9)**. Thus, contrary to Plaintiffs implication, all fees subject to the CCA are accounted for in the 80/20 or 75/25 split between SafeBuilt and the City.

Plaintiffs also erroneously state on page 1 and 9 of the Application that the CCA revenues are available for "unrestricted use" as part of the City's general fund. Contrary to this statement, all CCA revenues are used by the City for only CCA enforcement purposes- either past or present. All building permit funds are separately accounted for in segregated CCA accounts, and are used only for CCA enforcement purposes. Plaintiffs impertinently mischaracterize the City's contract with SafeBuilt as a "kickback" contract on page 5 of the Application. As explained below, every expenditure is legitimate and supported by invoices, and the City does not receive any windfall or "kickback."

RECEIVED by MSC 12/6/2017 4:16:28 PM

As part of the discovery, Troy's Director of Financial Services Thomas Darling explains the City's financial accounting process for the contract with SafeBuilt, and the measures taken to insure that all CCA revenues are used in accordance with the CCA. Pursuant to the contract, SafeBuilt processes and collects the building inspection permits and fees on behalf of the City. **Darling Dep Tr 8.** All the collected fees are then deposited with the City, and are kept track of in a separate ledger account. **Darling Dep Tr.** On a monthly basis, SafeBuilt prepares an invoice summarizing the chargeable fees, and that invoice is submitted to the City Manager's Office for review and approval. **Darling Dep Tr 9.** As part of this process, the charges are then input into the City's financial software, and coded so that the amounts can subsequently be used in the City's preparation of its Comprehensive Annual Financial Report (CAFR) and other financial reports. **Darling Dep Tr 58, 60, 63, 74, 78, 81, 82, 96, 97, 100, 101.** After this review, the City's financial team then processes a check for SafeBuilt. **Darling Dep Tr 9, 56.** The City's financial software allows for the retrieval of the accumulated annual building permit revenue and the Construction Code expenses for the year. **Darling Dep Tr 100, 101.** The City then can determine whether there is a net surplus or shortfall for the particular year, and reports this information into the CAFR. Each CAFR also tracks the accumulated annual CCA enforcement calculations for each year since July 1, 2001. As noted above, the relevant excerpts from the annual CAFR reports from 2004 to 2014 were all submitted to the Circuit Court in connection with the cross motions for summary disposition. Mr. Darling prepared the CAFR reports from 2011 through 2014 and compiled the information set forth in the CAFR.[2] **Darling Dep Tr 16.** The CAFR documents are audited each year and they are also provided to the

[2] The CAFR for 2015 had not yet been issued at the time of Tom Darling's deposition. **Darling Dep Tr 15.**

RECEIVED by MSC 12/6/2017 4:16:28 PM

Michigan Department of Treasury. **Darling Dep Tr 46.** Each CAFR has a provision for "Stewardship, Compliance and Accountability – State Construction Code Act, which specifically demonstrates the City's compliance with the CCA for the year in question. **Darling Dep Tr 105.**

Darling explained at his deposition that the total of all Construction Code expenditures for a year are listed in the City's annual Budget document (in addition to the CAFR), but there are detailed accounts that are used to determine what goes into that total. **Darling Dep Tr 22, 56.** The expenditures reported on the CAFR include direct costs, such as the money paid to SafeBuilt. **Darling Dep Tr 27.** Additionally, there are indirect costs related to Construction Code activity that are properly included as an expenditure. The CAFR reports include a figure of eight percent as an indirect cost. **Darling Dep Tr 43.** As noted above, the 8% estimate was based on a study conducted by Walsh College. Thomas Darling's affidavit that was filed in the Circuit Court, a copy of which is attached as **Exhibit G**, reveals the 8% figure allows for reimbursement of the many additional costs that are incurred by the Defendant City of Troy in the enforcement of the CCA. According to Mr. Darling's affidavit, 8% is actually a conservative figure based on his comparative calculation estimating the amount of time expended by other City Departments that support SafeBuilt in the administration and enforcement of the CCA.

Plaintiffs mistakenly assert that the City's budget document must include the detail that is set forth in the CAFR in order for there to be repayment against the cumulative CCA enforcement shortfall. (Application, p. 11). In making this argument, Plaintiffs confuse the CAFR reporting requirements with the budget requirements. The

RECEIVED by MSC 12/6/2017 4:16:28 PM

City's budget itemizes the estimated revenues and expenditures for the upcoming year. The CAFR report is an after the fact report, based on actual expenditures and revenues. Plaintiffs argue that the City's CAFR documents are somehow "flawed" (Plaintiffs' application for leave to appeal, p. 1). If this were true, then the State Treasurer would have required corrective action in accordance with the Uniform Budgeting and Accounting Act, MCL 141.421, *et seq*. As required by MCL 141.424, the City provides its CAFR's to the State on an annual basis. The State Treasurer is charged with the responsibility to review these reports, and has the power to take any necessary corrective action for any errors or statutory violations (MCL 141.431). Since no such action has been taken, there is at least tacit approval of the Troy's accounting practices by the State Treasurer. In addition to the State Treasurer review, the City must also have its financial records independently audited. As noted in Thomas Darling's affidavit **(Exhibit G)**, Troy has received unqualified letters from its independent auditors for each year subsequent to the 1999 CCA amendments, which signifies that Troy's accounting practices are appropriate.

Plaintiffs also erroneously accuse the City of understating revenue by only counting "building permit" revenue and omitting other fee and permit revenue and by failing to include lease payments from SafeBuilt (Plaintiffs' application for leave to appeal p. 12). Thomas Darling explained at his deposition that the CCA fee revenue that is reported in the CAFR's is tracked from receipts by payment code reports. **Darling Dep Tr 99.** The Plaintiffs were supplied with all the receipts by payment code reports through June 30, 2015. By way of example, copies of the receipt by payment code reports for the fiscal year beginning July 1, 2012 and ending June 30, 2013 are

RECEIVED by MSC 12/6/2017 4:16:28 PM

attached to this answer as **Exhibit H**. A review of these reports clearly show, contrary to Plaintiffs allegation, that in addition to building permit fees, permit plan review fees, certificate of occupancy fees, demolition (building demo) permit fees, grade and drainage (grade fee) fees, fence permit fees and contractor's license fees (business lic., elec, plg, htg, etc) fees and other CCA fees are included as revenue. SafeBuilt leases space for offices in the Troy City Hall, but these lease payments are not revenue chargeable under the CCA, contrary to Plaintiffs' argument. **Darling Dep Tr 84 – 87.** Instead these are SafeBuilt's business expenditures, similar to those of any business entity. This is also true for vehicle leases or computer equipment, which are similarly not CCA expenditures, but instead are inherent business costs that SafeBuilt would need to pay in order to serve its customer, the City of Troy. SafeBuilt would have these business expenses whether they were housed in City Hall or in another location, and whether they used City cars or leased from other entities. The CCA only requires the City to account "for acts and services performed by the enforcing agency" under the CCA. As such, Plaintiffs' contention that the City has understated the total amount of CCA activity revenue is without merit. The City has properly included all its CCA permit fee revenue.

In their application, on page 9, Plaintiffs emphasize the fact that the City does not have a separate building department fund into which the user fee surplus is deposited. As explained in more detail below, the City is not able to now create a separate fund because there remains a cumulative shortfall, and a new fund cannot be started with a deficit. Once the cumulative shortfall is eliminated, a separate fund may then be established.

RECEIVED by MSC 12/6/2017 4:16:28 PM

Plaintiff's also inaccurately state on page 9 of their application that the building department had "annual shortfalls which were covered by the City with appropriations from its general fund." There were no appropriations to cover shortfalls. Instead, as explained by Thomas Darling in his deposition, if there are shortfalls, the shortfall is managed with the available resources using the fund balance. **Darling Dep Tr 50.**

On page 12 of the Applications, Plaintiffs make unsupported allegations that the City charged the Building Department for the cost of doing contract work for other cities but did not credit the Building Department for revenue generated from that work. On this same page, Plaintiffs also attempt to challenge Troy's practice of using the 8% Walsh Estimate instead of the "core services" measure for indirect costs. Plaintiffs actually characterize the Walsh study as fiction in footnote 7 on page 12 of the Application. Although the City admits it no longer has a written copy of the Walsh study, Plaintiffs did not demonstrate that the 8% estimate is inaccurate. As previously noted, Thomas Darling determined that the 8% figure was actually a conservative figure based on his calculations. The fact that the City "cannot track indirect costs," as stated on page 12 of the Application, does not invalidate the 8% figure, as alleged by Plaintiffs, since indirect costs by their very nature are difficult to track with specificity, and CCA, as well as many other state and federal laws, does not require such a labor intensive process, and instead allows conservative estimates. The federal government allows for indirect costs up to 10%.

Plaintiffs also argue that the City has erroneously charged the costs of the Zoning Board of Appeals as a CCA expenditure, but this is incorrect. There was admittedly one occasion, in 2011, when $5,905 in Zoning Board of Appeals

RECEIVED by MSC 12/6/2017 4:16:28 PM

expenditures was erroneously reported in Thomas Darling's first preparation of the CAFR document, but this was corrected in subsequent years, and is not reflected in the cumulative CCA enforcement calculations, including the cumulative totals, which exceed $5.6 million dollars. **Darling Dep Tr 76-77**

Plaintiffs were provided with all the City's financial documentation relating to CCA revenues and expenditures, including the CAFR's and receipts by payment code reports. As demonstrated above, the documentation verifies that all the revenue the City received from CCA activity was used for the operation of the Building Inspection Department. Plaintiffs' allegations that Troy either over reported its CCA enforcement expenditures or under reported CCA revenue are simply not true.

In granting summary disposition in favor of the City, the Circuit Court specifically ruled that "*using building department revenue to reimburse the general fund for those expenses [past building department expenses] does not violate the statute's [MCL 125.1522(1)] requirement that revenue be spent on the 'operation of' the building department.*" Cir Ct Op, p 5. The Court noted the Plaintiffs contention that "*the operation of the building*" was intended to limit the use of fees to expenses incurred in the present year of operation was "*not supported by the plain language of the statute, which contains no such limitation.*" *Id.*

The Circuit Court also ruled the City's building department fees did not constitute a tax in violation of the Headlee Amendment to the Michigan Constitution. *Id,* p 6. Applying the three criteria outlined in *Bolt v. City of Lansing*, 459 Mich 152, 159; 587 NW2d 264 (1998), the Court concluded the City's building department fees were fees and not taxes. *Id,* p 9.

RECEIVED by MSC 12/6/2017 4:16:28 PM

In affirming the Circuit Court decision, the Court of Appeals rejected Plaintiffs contention that MCL 125.1522(1) precludes the City from using surplus user fees to offset past shortfalls. COA Op, p 3. As noted by the Court, the plain language of MCL 125.1522(1) "*simply does not contain any wording that would support plaintiff's interpretation.*" *Id.* The Court applied the general rules of statutory construction and analyzed the various provisions of the statute and affirmatively ruled the "*plaintiffs' contention that placement of the surplus fees into the general fund and their use to offset prior shortfalls of the Building Department is in violation of MCL 125.1522(1), is without merit.*" *Id,* p 7.

In rejecting the Plaintiffs Headlee Amendment claim, the Court of Appeals applied the three criteria outlined in *Bolt,* and determined the City's fees are regulatory in nature (*Id*, p 8); that they are proportionate to the costs of services (*Id*, p 9); and that they are voluntary (*Id*, p 10). Accordingly, the Court determined the City's fees were not disguised taxes in violation of the Headlee Amendment and ruled the Circuit Court properly granted summary disposition in favor of the City. *Id.*

The Plaintiffs, unsurprisingly, include several references to the Court of Appeals dissenting opinion in its application for leave to appeal. The dissent states, among other things, that the "*record contains no evidence to support defendant's claim that it actually ran a deficit during any previous budget years…*" COA Op, dissent, p 3. The dissent ignores the fact the City provided the Plaintiffs with all financial data requested, and, as noted in the majority opinion, "*testimony elicited from Darling identified in detail the listing of revenues associated with defendant's Building Department in detail*." COA Op, p 6. The dissent also concludes "*I believe that defendant's sizeable surplus was*

RECEIVED by MSC 12/6/2017 4:16:28 PM

the direct result of defendant's attempt to raise revenue by charging excessive fees." COA, Op, p 3. The problem with this conclusion is there is no evidence to show the City charged excessive fees or that its intent was to generate revenue. In fact, the City's permit fees were not increased over 2009 levels. The dissent also fails to consider the well-established legal principle that municipal fees are presumed reasonable unless contrary evidence appears on the face of the law itself or is established by proper evidence, *Graham v. Kochville Twp.*, 236 Mich App 141, 154–155; 599 NW2d 793 (1999). The dissent further disregards established precedent requiring the Plaintiffs to prove the City's fees constitute a tax imposed without voter approval. *Bolt*, 160. The City is not required to prove its fees are valid and reasonable. It is Plaintiff's burden to show otherwise. As recognized by the majority opinion of the Court of Appeals, the Plaintiffs failed to meet their burden, and therefore, summary disposition in favor of the City was properly granted. COA Op, p 6, 9, 10.

ARGUMENT

PLAINTIFFS-APPELLANTS APPLICATION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS JUSTIFYING FURTHER JUDICIAL REVIEW OF THE LOWER COURTS DECISIONS

A. STANDARD OF REVIEW

Before this Court exercises its unfettered discretion in deciding whether to grant an application for leave to appeal, Plaintiffs are required to demonstrate that the case meets one of the six different grounds set forth in MCR 7.305(B)(1) – (6). In this case, Plaintiffs rely on MCR 7.305(B)(3) and MCR 7.305(B)(5) as the basis for their request.

RECEIVED by MSC 12/6/2017 4:16:28 PM

Under MCR 7.305(B)(3), Plaintiffs must establish that the issue in the case "*involves legal principles of major significance to the state's jurisprudence*". Under MCR 7.305(B)(5), Plaintiffs must establish that the Court of Appeals decision "*is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.*" A finding is clearly erroneous when, on review of the whole record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Boyd v. Civil Serv. Comm'n*, 220 Mich App 226, 234–235; 559 NW2d 342 (1996). "Material injustice" is not defined in Michigan appellate decisions. However, an "injustice" is the withholding or denial of justice. Blacks Law Dictionary (5th ed). The term "material" has been defined to include "important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form." *Id.* Thus, a material injustice occurs if someone is denied justice and that denial affects the merits of a case. As set forth below, Plaintiffs have failed to establish either of these criteria, and therefore this case is not worthy of the Court's consideration, and the Application should be denied.

B. FURTHER JUDICIAL REVIEW IS NOT WARRANTED IN THIS CASE

Plaintiffs assert this case presents legal principles of major significance to the State's jurisprudence and requires this Court's intervention due the erroneous decisions of the lower courts. In making this argument, Plaintiffs theorize that there are "kickback" contractual arrangements for building inspection services occurring throughout the State of Michigan, but they fail to produce any evidence to support this bold claim. As stated above, the City's accounting practices are in accordance with the CCA, have been approved by independent auditors, and are public documents that are filed with the

RECEIVED by MSC 12/6/2017 4:16:28 PM

State of Michigan Treasurer. Absent this unsubstantiated fear of widespread municipal finance manipulation, there is no other basis for this Court's review, since the decisions of the lower courts in this case were based on well-established legal principles involving statutory interpretation and the presumed reasonableness of municipal fees. Also, as discussed in more detail below, the decision of the Court of Appeals is not clearly erroneous. In cases where the law is well settled and the Court's decision merely entails an application of the law to the facts, this is not considered an issue of major significance to the jurisprudence of this State, as required by MCR 7.305(B)(3). *People v. Tyrer*, 385 Mich 484, 489–490; 189 NW2d 226 (1971). In *Tyrer,* this Court initially granted leave to appeal, in order to decide whether evidence as to malice in a second-degree murder prosecution was sufficient to be considered by a jury. On reconsideration, this Court determined that leave to appeal was improvidently granted, since malice questions usually involve an application of the law to specific facts. Id, 490-491. In dismissing the appeal, this Court noted that the law of malice, though intricate, is fairly well settled in history, and therefore this was not a question of first impression that justified the Court's review of the case. *Id.* at 490.

Likewise, in this case, the law is well settled that municipal charges are presumed reasonable unless established otherwise. *Merrelli v. City of St. Clair Shores*, 355 Mich 575, 583–584; 96 NW2d 144 (1959). Plaintiffs are not asking this Court to change that law. Instead, Plaintiffs' application for leave to appeal argues the facts in this case in an attempt to show that the City's fees are not reasonable – an argument rejected by both the lower courts. Plaintiffs' Headlee Amendment claim is also a fact based argument. Plaintiffs do not seek to change the three prong analysis set forth in

RECEIVED by MSC 12/6/2017 4:16:28 PM

the *Bolt* case that has been followed by Michigan Courts for over 18 years to determine whether a municipal fee constitutes a tax. Plaintiffs merely disagree with the conclusion reached by the lower courts even though those courts properly addressed the three criteria as required by *Bolt*.

One of the arguments made by the Plaintiffs is that a municipality cannot use present surpluses to offset past shortfalls. This argument, however, has already been addressed by the Michigan Court of Appeals in a prior case. In *Trahey v. City of Inkster*, 311 Mich App 582, 597–598; 876 NW2d 582 (2015), citing *In re Consumers Energy Application For Rate Increase*, 291 Mich App 106, 113–114; 804 NW2d 574 (2010), the Court held that past expenses and costs may be taken into account when determining a new utility rate. Although Plaintiffs attempt to distinguish the *Trahey* case by claiming the decision is only applicable to public utility cases, a review of the decision indicates the Court's conclusion was based on the principle that municipal fees are presumed reasonable unless there is evidence to the contrary. The Court noted the plaintiff in that case failed to provide "*evidence showing that the method chosen by the city to maintain its operations and repay its debts was unreasonable, and absent evidence of impropriety, we will not independently scrutinize the municipal ratemaking methods employed by the city.*" *Trahey,* 597-598. In this case, as in *Trahey,* the lower courts determined a municipal fee structure in which a portion of the revenue from the fees is used to offset past shortfalls is presumed reasonable unless proven otherwise. In this case, the lower courts opined that Plaintiffs failed to overcome the well-established principle that municipal fees are presumed reasonable. This case does not present legal principles of major significance to the state's jurisprudence.

RECEIVED by MSC 12/6/2017 4:16:28 PM

It is also clear that Plaintiffs are not seeking any type of decision that would alter the way Michigan courts construe statutes. The Court of Appeals followed the general rules of statutory construction in determining the City's fees did not violate MCL 125.1522. Plaintiffs' legal argument in the Application appears to hinge on established rules of statutory construction. Plaintiffs are not suggesting that this Court apply any new or different method for determining the meaning of the statute. Instead, Plaintiffs object to the conclusions reached by the lower courts after applying the general rules of statutory construction. The crux of Plaintiffs' case requires the application of existing law to specific facts, and therefore it is not an appropriate case for which an application for leave to appeal should be granted. *Tyrer*, 490-491. The Plaintiffs have not shown the issues in this case involve legal principles of major significance to the state's jurisprudence as required by MCR 7.305(B)(3). Therefore, the application for leave to appeal should be denied.

Another reason why further judicial review is not warranted is that the CCA does not authorize a private cause of action. The legislative body of a governmental subdivision is the entity responsible for establishing fees pursuant to MCL 125.1522(1). *Michigan Ass'n of Home Builders v. City of Troy*, 497 Mich 281, 288; 871 NW2d 1 (2015). Accordingly, in Troy, the Troy City Council is authorized to establish its own building permit fees. There is no express statutory provision allowing Plaintiffs to challenge the Troy City Council's establishment of fees under the CCA.

The Supreme Court in *Lash v. City of Traverse City*, 479 Mich 180, 735 NW2d 628 (2007), determined that a Plaintiff could not pursue a civil action for money damages against his City employer based on an alleged violation of MCL 15.602, since

RECEIVED by MSC 12/6/2017 4:16:28 PM

there was no express statutory authorization permitting a private cause of action. *Lash,* 194. Although *Lash* requested monetary damages, this rule has also been applied in lawsuits where only equitable relief is requested. *Office Planning Grp., Inc. v. Baraga-Houghton-Keweenaw Child Dev. Bd.*, 472 Mich 479, 697 NW2d 871 (2005). In the *Office Planning Group* case, the plaintiff unsuccessfully sought enforcement of the federal Head Start Act (42 USC 9839(a)), but the Court ruled there was no authority to initiate a private cause of action to enforce the statute. *Office Planning Group,* 504. According to *Office Planning Group,* courts must examine the text of the particular statute to determine if there is an explicit or implicit intent to provide for the initiation of a private cause of action. *Id.* In that case, the Court concluded that since the statute "*does not provide for a private cause of action to enforce the disclosure requirement of § 9839(a), plaintiff has failed to state a cognizable claim.*" *Id.,* 505. As with the Head Start Act in *Office Planning,* the CCA does not expressly or implicitly allow a private cause of action against a legislative body for a violation of the Act.

Another reason further judicial review should be declined is based on the concept of the separation of powers. As noted above, MCL 125.1522(1) confers upon the Troy City Council the legislative authority to establish building permit fees. Whenever a statute confers legislative authority, the judiciary is precluded from reviewing the discretionary action of the legislative body. *Warda v. City Council of City of Flushing*, 472 Mich 326, 332 – 333 and n3; 696 NW2d 671 (2005). The statute specifically provides that a legislative body is required to set permit fees "*that bear a reasonable relation"* to the costs "*including overhead*" of the acts and services provided by the enforcing agency. Thus, the Troy City Council is given the discretion to determine what

RECEIVED by MSC 12/6/2017 4:16:28 PM

fees are reasonable based on its particular circumstances. As long as the legislative body acts within its discretion, the courts may not interpose. *In re Mfr.'s Freight Forwarding Co.*, 294 Mich 57, 65; 292 NW 678 (1940), quoting from *Louisville & N.R. Co. v. Garrett*, 231 US 298, 34 S Ct 48, 54, 58 L. Ed 229 (1913). When a statute assigns specific duties to a public official or to the executive or legislative branch of government, the Court "cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated…" *Straus v. Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999). Absent peculiar circumstances, a court may not supervise a public official's contemplated performance of his or her duties without violating the principles of separation of powers. *Beaman v. Montante*, 377 Mich 31, 36; 138 NW2d 764 (1966).

MCL 125.1522(1) expressly defers to the municipal legislative body in setting of reasonable fees, based on an analysis of the costs of the enforcing agency. If Plaintiffs disagree with Troy City Council's legislative determination, their remedy is to show up at a City Council meeting and request a change or to work towards electing a more responsive City Council in the next election. The lower courts deferred to the Troy City Council, and affirmed the reasonableness of the City of Troy's building permit fees and the compliance with the CCA. The CCA statute does not authorize judicial review of a legislative body's exercise of discretion in establishing fees under the CCA, and there is no reason for additional judicial review. Plaintiff's application for leave to appeal should be denied.

RECEIVED by MSC 12/6/2017 4:16:28 PM

C. THE LOWER COURTS CORRECTLY DETERMINED THE PAYMENT OF BUILDING DEPARTMENT REVENUES INTO THE GENERAL FUND FOR PAST AND PRESENT CONSTRUCTION CODE ACT ENFORCEMENT DOES NOT VIOLATE MCL 125.1522(1)

The Circuit Court's grant of summary disposition in favor of the City and the affirmance by the Court of Appeals was appropriate, since Plaintiffs failed to establish any violation of the CCA. The Plaintiffs have failed to demonstrate the decisions of the lower courts are clearly erroneous. Therefore, this Court should deny the application for leave to appeal.

Section 22 of the CCA, MCL 125.1522(1) provides as follows:

> *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.*

The City's CAFR reports demonstrate the City of Troy has used CCA fees only for the operation of the enforcing agency, in compliance with MCL 125.1522(1). The building permit fees established by the City of Troy, which have not increased since 2009, bear a reasonable relation to the cost, including overhead, of the acts and services performed in the operation of Construction Code activities as required by the

RECEIVED by MSC 12/6/2017 4:16:28 PM

statute. Since all the fees received by the City are used to cover the direct and indirect costs of Construction Code activities, and for the restoration of the cumulative shortfall that has accrued as the result of the previous Construction Code Act performance, the City is in full compliance with the CCA.

In the application for leave to appeal, Plaintiffs cite *Hanselman v. Killeen*, 419 Mich 168, 187; 351 NW2d 544 (1984) and argue that the City's establishment of its CCA fees violated one of the two limits imposed on municipalities through the statutory language. According to Plaintiffs, MCL 125.1522(1) places two limitations on a municipality's authority to establish construction code fees. The first statutory limitation requires a governmental subdivision *"shall establish reasonable fees…intended to bear a reasonable relation to the cost…"* The second limitation in the statute that requires that 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."* Plaintiffs have failed to support their argument that the City's fees are invalid as a result of a violation of these two provisions.

With regard to the provision that requires the City to establish reasonable fees that bear a reasonable relation to the cost of the services provided, Plaintiffs merely argue the City violated the statute because a user surplus fee in an amount of 25% is unreasonable per se. Plaintiffs cite no authority or provide any evidence to support this assertion. They rely solely on the Court of Appeals dissenting opinion that states "*I believe that a 20-25% surplus is unreasonable on its face.*" COA Op Dissent, p 2. This dissenting opinion does not refer to any evidence or authority to support this belief. This opinion, shared by Plaintiffs and the dissenting judge, fails to recognize that the

RECEIVED by MSC 12/6/2017 4:16:28 PM

provisions of MCL 125.1522(1) which authorize the legislative body of a city to "*establish reasonable fees*" bearing a "*reasonable relation to the cost"* to the governmental subdivision of the acts and services, also provide that the governmental subdivision may also consider "*overhead"* when determining the amount of the fees. See COA, Op, p 5. Additionally, Plaintiffs and the dissenting judge also fail to recognize that there are costs incurred by the City in having its employees perform duties under the CCA that cannot be performed by SafeBuilt. As stated by the majority opinion: *"it would be an oversimplification to assert that any and all monies generated by the Building Department in excess of those attributable to the SafeBuilt contractural agreement with defendant comprise a surplus." Id.* Moreover, in describing what may be considered by the governmental subdivision in establishing the fees, the statute is "*without limitation*" in deciding the costs of enforcement of the CCA. This language clearly negates the Plaintiffs argument that MCL 125.1522(1) limits the discretion that may be exercised by the City in establishing fees.

Contrary to the arguments raised by Plaintiff, the explicit provisions of the statute reveal the Legislative intent to give local units of government the discretion to determine how the fees should be used in the operation of the enforcing agency. The use of the term "reasonable" or "reasonably" in a statute will likely entail the balancing of factors. *Coblentz v. City of Novi*, 475 Mich 558, 575; 719 NW2d 73 (2006), *Lease Acceptance Corp. v. Adams*, 272 Mich App 209, 222; 724 NW2d 724 (2006). In cases involving fees, "it has been held that what is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case." *Merrelli*, 583 -584; quoting from *Vernor v. Sec'y of State*, 179

RECEIVED by MSC 12/6/2017 4:16:28 PM

Mich 157, 168; 146 NW 338, 341 (1914). The Courts should not interpose their own beliefs when a matter involves the proper exercise of legislative discretion. *Manufacturer's Freight Forwarding Co*, 65. Thus, under MCL 125.1522(1), the City has discretion to determine whether the amount of its fees are reasonably related to the cost, including overhead, to the governmental subdivision of the acts and services provided by the enforcing agency. In this case, the City of Troy properly exercised its discretion under the statute, and set its fees to cover all direct and indirect costs. For those years when the permit fees resulted in excess revenue over CCA enforcement expenses, these amounts were applied directly to reduce the cumulative shortfall of CCA enforcement, which has been an authorized practice since 2001, based on the legislative change stating that building permit fee revenue could only be used for CCA enforcement purposes, and could not be used for other governmental functions.

Plaintiffs also cite the case of *City of Taylor v. Detroit Edison Co.*, 475 Mich 109, 115–116; 715 NW2d 28 (2006) for the proposition that local governments cannot exceed the authority provided by statute. Absent the CCA's express grant of municipal authority to establish CCA fees, the foregoing case might be applicable. However, MCL 125.1522(1) specifically grants local units of government, such as the City of Troy, the authority to establish CCA fees, and therefore Plaintiffs reliance on this case is misplaced.

Moreover, the statutory authority to establish CCA fees must be construed in the City's favor. Section 34 of Article VII of the Michigan Constitution states:

> "*The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.*"

RECEIVED by MSC 12/6/2017 4:16:28 PM

Applying this provision to the case at hand makes clear the intent of MCL 125.1522(1) was to give local units of government the discretion to set reasonable building permit fees (CCA fees), and to determine the best way to use those fees to satisfy its enforcement obligations under the CCA. Court intervention is allowed only when there is an established unreasonableness, which has not been proven here.

Plaintiffs also urge this Court to interfere with the City's CCA fee setting process by resorting to a dictionary definition of the word "operation," which they argue somehow precludes the use of building permit fees received in one year from being used for enforcement in any other year. Under the rules of statutory construction, it is possible for a Court to consult dictionary definitions when a word is not defined in a statute. *Rose Hill Ctr., Inc. v. Holly Twp.*, 224 Mich App 28, 33; 568 NW2d 332 (1997). Plaintiffs, however, enhance the selected dictionary definition to argue that the term "operation" refers only to present activities or a "present state of functioning." Plaintiffs' analysis is flawed because their selected definitions of the term "operation" does not even use the term "present."

Plaintiffs creative dictionary based interpretation contravenes established rules of statutory construction. A court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent. *Michigan Educ. Ass'n v. Sec'y of State*, 489 Mich 194, 217; 801 NW2d 35 (2011). Courts may not speculate regarding legislative intent beyond the words expressed in the statute. *Id.* at 217–218. Nothing may be read into a statute that is not within the manifest intent of the Legislature that is not within the act itself. *Id.* at 218. Plaintiffs' interpretation casually adds the word "present" into the statute when there is no basis for doing so. If it were the intent of the legislature to limit

RECEIVED by MSC 12/6/2017 4:16:28 PM

the use of construction code fees to the present year of operation of the enforcing agency, then express language to that effect would have been included. The absence of such language refutes Plaintiffs' interpretation of the statute. As noted by the Court of Appeals, Plaintiffs restrictive interpretation "*is not supported by the plain language of the statute … where it does not evidence a temporal component associated with the use of the surplus fees or the operation of the building department."* COA Op, p 4 (citations omitted). Also, Plaintiffs stilted interpretation would prohibit municipal governments from addressing a situation where they incorrectly predicted the estimates of building permit revenue and expenditures at the time of setting the building permit fees, and either the revenue was not realized, or the expenditures for enforcing the CCA were greater than expected.

Plaintiffs rely on the *Deschaine v. St. Germain*, 256 Mich App 665, 669–670; 671 NW2d 79 (2003) case for its proposition that the statutory term "operation" should be interpreted in the present tense only. However, that case is distinguishable. In *Deschaine*, the Court analyzed a provision of Michigan's guardianship statute that provided in part that a court may appoint a guardian for a minor if a parent or parents "… '*permit' the minor to reside with another person*…" In construing the intent of this provision, the *Deschaine* Court looked to the context of the term, and found that the statutory term "permit" was used in the present tense, and did not apply to past grants of permission. *Id..* Citing *Chmielewski v. Xermac, Inc.*, 457 Mich 593, 610; 580 NW2d 817 (1998) n 20; 580 NW2d 817 (1998), the Court noted that statutory language must be evaluated considering the present tense of the verbs employed. *Deschaine,* 670*.* Since the term "permit" was used in its present tense in the statute, the Court held that

RECEIVED by MSC 12/6/2017 4:16:28 PM

there must be current permission granted for a minor to reside with another person. In contrast, the term "operation" as used in MCL 125.1522(1) is not a present tense verb. Instead, the term is used in a general sense without specifying whether "operation" of the enforcing agency means the past, present, or future. Following the *Deschaine* holding, if the legislative intent was to limit the use of CCA fees to offset only the present operation of the enforcing agency, the statute would have stated that the fees could only be used to "operate" the enforcing agency. The term "operate" is a present tense verb that the Legislature could have used if it were its intent to only allow CCA fees to be used for present activity. Thus, Plaintiffs' argument that MCL 125.1522(1) restricts the CCA fee revenues to offset present CCA enforcement operations is meritless.

Plaintiffs also incorrectly claim that other provisions of MCL 125.1522 require the Court to conclude that "operation of the enforcing agency" only applies to the current CCA enforcement operations. Plaintiffs contend that the phrases "services and acts" of the "enforcing agency" for which fees can be charged, which includes "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" and "hearing appeals," somehow requires a construction in the present tense. As determined by the Court of Appeals:

> "*…the first sentence of MCL 125.1522(1) provides for the establishment of fees 'for acts and services performed …' Our reading of the statutory language confirms that use of the term 'performed' can be understood to mean future, current, and past services provided. We reach this conclusion where there is no restricting or limiting language preceding the word 'performed' indicating a temporal constraint, such as 'currently performed,' 'to be performed,' or 'previously performed.'"* COA Op, p 4.

RECEIVED by MSC 12/6/2017 4:16:28 PM

Once again, Plaintiffs' argument is not persuasive because there is nothing in the context of the statute that would allow one to reasonably conclude the establishment of fees can only be related to current activities.

Plaintiffs also argue that rulings of the lower courts contradict the statewide uniformity mandated by MCL 125.1522(1). However, the uniformity mandated by the statute only requires that the provisions relating to the actual construction of buildings and structures be consistent from one municipality to another. There is nothing in the CCA that would require the permit fees to be the same in each municipality. If the CCA is construed to require statewide uniformity among all municipalities as it relates to the fees that may be charged, municipalities would be deprived of the statutory ability to determine how to carry out their responsibilities under the CCA based on the unique circumstances of the community. Plaintiffs want to deprive municipalities with historical shortfalls from addressing any incorrect predictions of annual CCA revenue and expenditures. This approach should be rejected as unsupported by the statutory language. Each individual municipality should be allowed to establish its fees based on the unique factors affecting the community. The key to determining Troy's compliance with MCL 125.1522(1) is whether or not the fees are reasonable based on the circumstances present in the City of Troy. Plaintiffs have failed to show the City of Troy acted unreasonably in establishing its building permit fees, which have remained the same since 2009 and are among the lowest in the entire State of Michigan. The fact that Troy's fees have remained the same since 2009 also undermines Plaintiffs claim that the fees are unreasonable based on their argument that current fee payers are paying a premium to make up for the fee subsidy provided to past fee payers.

RECEIVED by MSC 12/6/2017 4:16:28 PM

Plaintiffs also misinterpret the Treasury guidance in their pleadings. The ability to use current CCA surplus to offset past CCA losses is actually supported by the State Treasurer in Michigan Department of Treasury Bulletin 2000-6, a copy of which is attached as Exhibit M to Plaintiffs application for leave to appeal. Under this Treasury Bulletin, municipalities are not required to have a segregated special revenue fund, "as long as the local unit's fee structure is not intended to recover the full cost of the enforcing agency and the local unit has the ability to track the full costs and revenues of this activity without creating a separate fund." Plaintiffs incorrectly interpret this bulletin as requiring the City to keep a separate segregated revenue account. Based on the guidance in this bulletin, the City of Troy tracks the full costs and revenues from its CCA activities in its CAFR documents. This tracking includes the annual amounts, as well as the cumulative totals. Since this tracking is being done, there is no requirement for the City to have a segregated special revenue fund, as Plaintiffs contend. Moreover, as Plaintiffs correctly point out in their Application, the City of Troy cannot establish a special revenue fund to track CCA revenue and expenditures because a revenue fund cannot be started with a deficit. For the year 2000, the year the CCA required a new accounting process for Construction Code activities, the City of Troy had an accumulated shortfall because its Construction Code activity expenses exceeded its revenues. Section 6 of Bulletin 2000-6 provides:

> "If a local unit's calculation results in an excess of expenditures over revenues for the period January 1, 2000 to the end of the fiscal year, the new fund should not begin with a deficit."

Plaintiffs now want the City of Troy to do exactly what is prohibited by a revenue ruling. Since a new special revenue fund cannot start with a deficit, and since Troy has

RECEIVED by MSC 12/6/2017 4:16:28 PM

had a cumulative shortfall between Construction Code revenue and expenses since 2000, the effective date of the CCA revisions, the City cannot now establish a special revenue fund to account for CCA enforcement activities.

The Department of Treasury's recommendation for segregating CCA activities is significant since it contemplates a surplus in revenues for CCA activities in one year can be used for CCA activities in another year. There would be no other purpose in establishing a special revenue fund unless any surplus was intended to be available for CCA activities in subsequent years. As stated by the Court of Appeals, "*Treasury implicitly recognized that surpluses can occur and they may be used to offset shortfalls in different fiscal years."* COA Op, p 7. Accordingly, the surplus does not need to be used for "present" operations of the Building Inspection Department, as argued by Plaintiffs. There is nothing to preclude the use of a surplus to offset a cumulative shortfall resulting from CCA activities in previous years. In accordance with the Uniform Budgeting and Accounting Act, MCL 141.421 *et seq.,* the State Treasurer is charged with the oversight of CAFR reports and other mandated municipal financial reporting, and therefore has the ability to demand corrections should there be any inaccurate reporting in the CAFR report or in the City's financial records. Troy's CAFRs, which were annually submitted to the State Treasurer, clearly depict that any yearly net surplus has been consistently applied to reduce the cumulative shortfall. The State Treasurer has not demanded any corrections or required the City to establish a separate fund. The lack of enforcement action against the City by the State Treasurer evidences at least tacit approval of Troy's use of the building permit revenue to offset a cumulative shortfall. This action is both proper and legal.

RECEIVED by MSC 12/6/2017 4:16:28 PM

Plaintiffs also contend the lower courts should be reversed for public policy reasons. A review of this section of the application for leave to appeal indicates Plaintiffs are merely rehashing their uniformity argument and asserting arguments based on the Headlee Amendment (which are addressed below). Moreover, public policy would be adversely affected should this Court grant Plaintiffs application for leave to appeal and ultimately reverse the decisions of the lower courts. Section 9 of the CCA, MCL 125.1509, specifically authorizes governmental subdivisions to contract with private entities to perform services relating to the enforcement of the CCA. This provision allows municipalities to use the services of a private contractor if doing so would allow the municipality to streamline services and reduce expenses. If the lower courts' decisions in this case are reversed, the effect would be to discourage other municipalities from choosing to privatize their building departments even if doing so would ultimately save taxpayer money by reducing costs. If a local unit of government has to be concerned that its decision to privatize its building department for the benefit of the community will be scrutinized by the courts, the legislative bodies of such communities may decide to forego any privatization discussion despite the potential benefits that could be achieved. Thus, reversing the lower courts' decisions in this case would have a detrimental effect on the ability of a city, township and/or village to enter into a private contract for the benefit of its citizens.

Plaintiffs have failed to demonstrate the existence of any evidence that proves the City's establishment or use of its CCA fees violate MCL 125.1522(1). The City's fees are reasonable and all the revenue from the fees established under the CCA has been used for the operation of the enforcing agency. Therefore, there is no basis for

RECEIVED by MSC 12/6/2017 4:16:28 PM

reversing the decisions of the Circuit Court and the Court of Appeals. The Plaintiffs application for leave to appeal should be denied.

D. THE LOWER COURTS CORRECTLY DETERMINED THE CITY'S BUILDING INSPECTION DEPARTMENT FEES ARE NOT TAXES IN VIOLATION OF THE HEADLEE AMENDMENT TO THE MICHIGAN CONSTITUTION

The Plaintiffs' claim that the City violated the Headlee Amendment is without merit. Article IX, Section 31 of the Michigan Constitution of 1963 (Headlee Amendment) states, in pertinent part:

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

To establish a Headlee Amendment violation, the Plaintiffs must prove the City's fees constitute a tax imposed without voter approval. *Bolt*, 160. As noted in the *Bolt* case, a charge that is a user fee is not affected by the Headlee Amendment. *Id.* at 159. In distinguishing between a valid user fee and a tax, the Court must examine three criteria: 1) " a user fee must serve a regulatory purpose rather than a revenue raising purpose"; 2) a user fee "must be proportionate to the necessary costs of the service"; 3) and a user fee is voluntary. *Id.* at 161-162.

The building permit fees charged by the City are imposed in furtherance of the City's power to regulate the public health, safety and welfare. These fees serve a regulatory purpose, which is to insure that any new or improved construction is sound and in accordance with the safety measures required by the State of Michigan and the

RECEIVED by MSC 12/6/2017 4:16:28 PM

building codes. Troy's primary purpose of charging building permit fees is regulatory, as opposed to revenue generation. The CAFRs show the cost of enforcement of the CCA exceeded the amount of revenue generated by building permits for several years. Subsequently, in those years when the revenues exceeded the expense, the surplus was applied to reduce the cumulative shortfall. Overall, Troy's building permit fees are reasonably related to the cost of providing the service of Construction Code enforcement and are thus regulatory.

Contrary to Plaintiffs contention, the City's building permit fees are not comparable to the storm water management charge discussed in *Jackson Cty. v. City of Jackson*, 302 Mich App 90, 836 NW2d 903 (2013), which was held to be a tax and not a valid user fee. In *Jackson,* the City adopted a new ordinance establishing a new utility to operate and maintain the city's storm water management program. The ordinance also established a new charge on all property owners to pay the costs of operating and maintaining the storm water system, which costs were previously paid from the City's general and street funds. *Id.* at 107. The Court held this violated *Bolt* because there was evidence the new charge was primarily imposed to raise revenue, as opposed to serving a regulatory purpose. *Id.* at 106. For one thing, the ordinance did not require the city or property owners to identify, monitor, and/or treat contaminated storm water. *Id.* There were very few provisions of regulation and no provisions regulating the discharge of storm water runoff. Additionally, since the new charge was used to pay for existing services that were previously paid for by other funds, the Court concluded the charge had an overriding revenue generating purpose. *Id.* at 107. The Court also noted the new charge was a tax because it was designed to confer a benefit on the general

RECEIVED by MSC 12/6/2017 4:16:28 PM

public whereas a valid user fee is designed to confer a particularized benefit on the persons who pay the fee.

In this case, the individuals who pay a permit fee to the City of Troy are subject to numerous regulations that comprise the State Construction Code (CCA) that is enforced in the City. MCL 125.1504, MCL 125.1508a. The existence of such regulations confirm that the permit fees are established for regulatory purposes. Also, the City of Troy has not created any "new" charges designed to raise additional revenue to pay for services that were previously paid from other funds. Instead, the City charges the same permit fees that existed in 2009, and if there happens to be a surplus of CCA revenue over expenditures, the surplus is used to repay past shortfalls that were absorbed by the general fund. As noted by the Court of Appeals:

> "*This last point is what differentiates this case from Bolt and Jackson Co. In both those cases the offending party implemented a fee based system to either raise revenue (Bolt) or to replace declining general fund revenue that used to support the water system (Jackson Co). As the Bolt Court put it, the fee in that case 'constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of regulatory activity.' … Here, however, the same fee has been charged for many years to support the same building department, and defendant did not implement this fee to make up for, or save from spending, tax revenue."* COA Op, p 9.

Lastly, the permit fees paid to the City only confer a benefit upon the individuals who obtain the permit, and not the general public. Thus, considering all the factors that were used to distinguish a tax from a valid user fee in the *Jackson* case, it is clear the City's CCA permit fees serve a regulatory purpose as opposed to a revenue raising purpose.

Additional proof that Troy's permit fees are valid user fees, as opposed to an unlawful tax, is the fact the City's fees are proportionate to the necessary costs of the

RECEIVED by MSC 12/6/2017 4:16:28 PM

service. Plaintiff has failed to present any evidence that the revenue from the City's CCA activities is used to for anything other than services related to the enforcement of the CCA. In the Circuit Court, the Plaintiffs argued the 20% to 25%, which is retained by the City after paying SafeBuilt, is "surplus" used for general revenue purposes and not for services reasonably related to the cost of building department services. They argued the "surplus" was a disguised tax that was not approved by the voters. This argument ignored the fact the CCA expressly allows for the recoupment of all costs incurred in enforcement of the CCA, including overhead costs. A portion of the 20% to 25% offsets the City's costs in having an internal City employee from one of the other City departments perform the Building Code Official responsibilities, which cannot be performed by SafeBuilt. A Building Code Official is required as part of CCA enforcement, and at the time of the City's contract with SafeBuilt, there was some ambiguity as to whether an independent contractor, such as SafeBuilt, could serve as the designated Building Code Official. The City's contract with SafeBuilt requires the City to supply the Building Code Official. Plaintiffs' arguments, if successful, would deprive the City of the ability to recoup the costs of providing Building Code Official services. The City also has incurred additional costs in the administration and financial accounting under the contract with Safe Built. The City of Troy attempted to account for these types of overhead costs by using a formula that was proposed by students at Walsh College. According to this formula, the overhead costs were calculated at 8%. The City's unique relationship with SafeBuilt actually imposes new responsibilities on other City employees, including but not limited to the City Clerk, the City Treasurer, the City Manager, the Finance Department, the City Attorney's Office, the Planning

RECEIVED by MSC 12/6/2017 4:16:28 PM

Department, the Fire Department, and numerous other employees. These administrative services are also part of the regulatory function, and are necessary to effectuate compliance with the State's Building codes. The 20 to 25% percent that is retained by the City is intended to recoup some of these regulatory costs.

Furthermore, the case law interpreting the Headlee Amendment recognizes there is no bright line for distinguishing between a valid user fee and a tax. *Bolt*, 160. Thus, the setting of regulatory fees is not an exact science, but instead must reflect reasonable efforts to predict the actual costs of a municipal activity. The building permit fees, which were not increased at the time that the City contracted with SafeBuilt, were designed to cover the predicted costs of enforcing the State's building codes. Thus, Troy's building permit fees are proportionate to the necessary costs of services. The Court must presume the City's fees are reasonable "unless the contrary appears on the face of the law itself or is established by proper evidence…" *Graham v Kochville Township,* 154-155, quoting from *Vernor v Secretary of State,* 168. In this case, Plaintiffs have failed to cite any law or present evidence sufficient to rebut the presumption that the City's fees are reasonably related to the costs of services provided.

Finally, the City's permit fees are only imposed on those persons who intend to build or renovate their property, and therefore these charges are voluntary. As such, the permit fees are permissible "user fees", and are not "illegal taxes" prohibited by Article 9, Section 31 of the Michigan constitution of 1963. *Bolt; Wheeler v. Charter Twp. of Shelby*, 265 Mich App 657, 697 NW2d 180 (2005); *Lapeer Cty. Abstract & Title*

RECEIVED by MSC 12/6/2017 4:16:28 PM

Co. v. Lapeer Cty. Register of Deeds, 264 Mich App 167, 691 NW2d 11 (2004). As noted in *Bolt:*

> "*One of the distinguishing factors of a tax is that it is compulsory by law, 'whereas payments of user fees are only compulsory for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all' Headlee Blue Ribbon Commission Report, supra,* § 5, p 29"

Unlike the *Bolt* storm water service charge that was imposed on all properties in the city pursuant to an ordinance, the building permit fees at issue in this case are not compulsory by law. Accordingly, the City's fees in this case are deemed voluntary, and therefore do not constitute a tax.

Since Plaintiffs failed to produce evidence showing that the City's building permit fees were a tax as opposed to a valid use fee, the Court of Appeals decision affirming the Circuit Court decision granting summary disposition in favor of the City of Troy is not clearly erroneous. Therefore, the application for leave to appeal should be denied.

RELIEF SOUGHT

Defendant-Appellee City of Troy requests that this Court deny Plaintiffs application for leave to appeal, or alternatively that this Court enter a final order affirming the Circuit Court and the Court of Appeals.

RECEIVED by MSC 12/6/2017 4:16:28 PM

Dated: December 6, 2017

CITY OF TROY
CITY ATTORNEY'S OFFICE

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

PROOF OF SERVICE

Lori Grigg Bluhm certifies that on December 6, 2017, she served a copy of Defendant-Appellee City of Troy's Answer to Application for Leave to Appeal upon Gregory L. McClelland, McClelland & Anderson, LLP at gmcclelland@malansing.com and Melissa A. Hagen, McClelland & Anderson, LLP at mhagen@malansing.com via the Michigan Supreme Court TruFiling System and its contents are true to the best of my information, knowledge and belief.

*/s/ Lori Grigg Bluhm*_____
LORI GRIGG BLUHM