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. 156737 Court of Appeals No. 331708 Lower Court No. 10-115620-CZ

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MICHIGAN REALTORS®' AMICUS CURIAE BRIEF IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL OF PLAINTIFFS/APPELLANTS

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STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND RELIEF SOUGHT

This case involves one of several contracts entered into recently between a Michigan local unit of government and a privately-owned company pursuant to which the company essentially provides a turnkey operation of the building department of the local unit of government. The private company is compensated from the fees, such as construction permit fees, paid by users of the building department's services. However, the private company retains only a percentage of the total amount of fees collected and "kicks back" the balance of the fees collected to the local unit of government. This practice violates Section 22 of the State Construction Code Act ("CCA") and the Headlee Amendment to the Michigan Constitution.

Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders") filed this lawsuit, in part, to enjoin the continuation of this practice by Defendant/Appellee, City of Troy (the "City"). The Circuit Court granted the City's motion for summary disposition and, in a split decision, the Court of Appeals affirmed. 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.

On November 8, 2017, the Builders filed a timely Application for Leave to Appeal from the September 28, 2017, majority Opinion of the Court of Appeals (the "Application"). The Application, which Amicus Curiae supports, seeks peremptory reversal of the majority Court of Appeals' Opinion and remand to the Oakland County Circuit Court with instructions to grant the Builders' motion for summary disposition. Alternatively, this Court should grant the Application.

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' CLAIMS UNDER SECTION 22 OF THE CCA WHERE THE PLAIN LANGUAGE OF SECTION 22 PROHIBITS THE CITY'S CURRENT PRACTICE OF OVERCHARGING FOR BUILDING DEPARTMENT SERVICES AND USING THOSE PROCEEDS FOR PURPOSES OTHER THAN OPERATING THE BUILDING DEPARTMENT?

The Court of Appeals Answered: "No."

The Circuit Court Answered: "No."

Plaintiffs/Appellants Answer: "Yes."

Defendant/Appellee Answers: "No."

Amicus Curiae Answers: "Yes."

II. WHETHER PUBLIC POLICY CONSIDERATIONS FAVOR REVERSING THE DECISION OF THE COURT OF APPEALS 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' CLAIMS UNDER SECTION 22 OF THE CCA AND/OR THE HEADLEE AMENDMENT TO THE MICHIGAN CONSTITUTION?

The Court of Appeals Answered: "No."

The Circuit Court Answered: "No."

Plaintiffs/Appellants Answer: "Yes."

Defendant/Appellee Answers: "No."

Amicus Curiae Answers: "Yes."

I. INTRODUCTION/STATEMENT OF INTEREST

The Michigan REALTORS® (the "Association") is Michigan's largest non-profit trade association, comprised of 47 local boards and a membership of more than 24,000 brokers and sales persons licensed under Michigan law. The present case involves an issue of major significance to the Association, its members and their clients – the development of affordable, new residential housing. Each day, the Association's members are involved in hundreds of real estate transactions involving the sale of newly constructed residential property. For this reason, the Association and its members have a significant interest in the outcome of any court decision which might address or otherwise impact the construction of residential housing.

At issue in this appeal is the permissible amounts, and uses, of fees charged to residential builders and others by local units of government for building permits, inspections, certificates of occupancy and other costs associated with residential construction. Section 22 of the CCA restricts both the amount and the uses of such fees 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**.

MCL 125.1522(1) (emphasis supplied). Similarly, the Headlee Amendment to the Michigan Constitution prohibits local units of government from taxing their citizens under the guise of charging fees. Const 1963, art 9, §31.[1]

In recent years, through the privatization of its Building Department, the City of Troy (the "City") has collected fees in amounts far in excess of the cost of operating its Building Department (the "User Fee Surplus"). The City has placed each year's User Fee Surplus into its general fund which it can then use for any purpose. **In just six years, the User Fee Surplus which the City deposited into its general fund totaled $2,326,061.** The City continues this practice today.

The City claims that this practice is permitted under Section 22 of the CCA and the Headlee Amendment because, in years prior to the User Fee Surplus, the City operated its Building Department at a deficit, which it chose to cover with money from the general fund. The Circuit Court upheld the City's practice stating:

> This Court concludes that the payment of building permit revenue into the general fund to repay past building department shortfalls satisfies the requirement that the revenue be used for "the operation of" the building department. 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.

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[1] In particular, claims made under the Headlee Amendment are reviewed by Michigan Courts under a 3-part test announced by this Court in *Bolt v Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998). 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.*

Circuit Court Opinion, February 5, 2016 ("Cir Ct Op"), p 5, Exhibit C. The Circuit Court's analysis is flawed for at least two reasons.

First, the Circuit Court's analysis ignores the plain and unambiguous language of two important provisions of Section 22: (1) that fee amounts must be reasonably related to the actual costs of providing building department services; and (2) that building department fees are to be used only for operation of the building department and not "for any other purpose." MCL 125.1522(1) (emphasis supplied). The Circuit Court's ruling, therefore, is contrary to Michigan's basic yet foremost rules of statutory construction. Second, the Circuit Court's analysis ignores the purpose of, and underlying policy for, Section 22 which is to make construction and real property development affordable. The Circuit Court's opinion, therefore, adversely impacts the ability of REALTORS® to sell residential housing and the ability of the public at large to purchase residential housing.

The majority Opinion of the Court of Appeals suffers from the same infirmities as the Circuit Court Opinion – it ignores the legislative history and policy behind Section 22 as well as the plain language of Section 22; specifically, the language limiting fee amount and fee uses quoted above. The correct analysis is reflected in the Court of Appeals' dissenting Opinion of Justice Kathleen Jansen:

> 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.

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

One of the primary goals of the Association is to provide the opportunity for all Michigan residents to own and/or build affordable housing. To promote this goal and others, the Association seeks to oppose laws and court decisions which delay, restrict, or otherwise impede the ability of the Association's members to sell affordable housing. The Association believes that this is a case of important public interest, and that the outcome of this case is of continued and vital concern to the Association, its members and Michigan residents. **In fact, as discussed in more detail below, just since the filing of this lawsuit, several more instances of building department privatization arrangements, resulting in the generation of revenue and profits, have been discovered.** The experience and expertise of the Association could be beneficial to this Court in the resolution of the issues presented by this appeal. In *Grand Rapids v Consumers Power Co,* 216 Mich 409, 415; 185 NW 852 (1921), the Michigan Supreme Court stated: "This Court is always desirous of having

all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ."

The Circuit Court erred by granting summary disposition in favor of the City and denying summary disposition in favor of the Builders. The Court of Appeals erred by affirming these decisions of the Circuit Court. The Association, therefore, seeks leave to file this brief amicus curiae in support of the Application of the Builders and the reversal of the opinions of the lower courts.

II. STATEMENT OF FACTS

The Association accepts the Statement of Facts contained in the Builders' Application. However, because the majority of the Court of Appeals incorrectly opines that the Builders' proofs are somehow lacking, Amicus Curiae highlights for this Court the following admissions (or failures to refute) made by the City which, in combination, reflect in full, the facts upon which the City is shown to have violated Section 22 of the CCA and the Headlee Amendment. These admissions also belie the Court of Appeals assertion that the determination of "reasonableness" of fees requires "a breakdown and analysis for each type of fee" [COA Op, p 5] – an analysis which the majority later states is one in which Michigan Courts should not engage. COA Op, p 7, citing public utility rate making case *Trahey v City of Inkster*, 311 Mich App 582; 876 NW2d 582 (2015).[2]

1. The City admits, that on July 1, 2010, the City entered into a contract with SafeBuilt of Michigan, Inc. ("SafeBuilt") pursuant to which SafeBuilt performs most of the functions of the

[2] As discussed below, not only is the majority Opinion obviously disingenuous on the issue of the burden of proof and depth of analysis on the reasonableness of fees but, as also discussed in detail below, this supposition is contrary to the plain language of Section 22 of the CCA.

City's Building Department. City of Troy Professional Services Agreement (the "Contract"), Exhibit D. City's Brief, pp 1-2.

2. The City admits, that in consideration for the services provided, SafeBuilt retained 80% of the "billable" fees listed in the Contract, and the City retained the 20% surplus. The City also retained 100% of other "non-billable" Building Department fees. Further, after "billable" fees exceeded $1,000,000 in the first Contract year, the City retained 25% of the "billable" fees, along with its 100% of "non-billable" fees. After the first year of the Contract, the "billable" fee arrangement remained at 75% for SafeBuilt and 25% kicked back to the City again, along with 100% of "non-billable" fees. Contract, §3.2, p 2, Exhibit D; City's Brief, pp 6-7.[3]

3. The City admits, that in every year since 2010, the fees collected for services provided by the City's Building Department have been in excess of its actual operating costs, creating an annual User Fee Surplus. City's Brief, p 6.[4]

4. The City admits, that the User Fee Surplus has never been placed in a segregated fund or set aside for future costs and expenses related to the operation of the Building Department. City's Brief, p 11.

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[3] The City claims that 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." This is untrue. The City's own documents establish 79 types of fees that are non-billable, such as soil erosion inspection and permit fees, signs, sewer taps, water benefit and meter fees, and sidewalk fees, which are wholly unrelated to bonds or escrow fees. See, Exhibit L to the Builder's Summary Disposition Brief and Exhibit E hereto.

[4] In fact, the Contract appears to be designed to achieve this result. Specifically, one can assume that SafeBuilt would not agree to perform services at a financial loss. Therefore, assuming some profit (say 5%) for SafeBuilt, the actual cost of the building department services is roughly 70% of what is actually being charged.

5. The City admits, that on an annual basis, the User Fee Surplus has been deposited into the City's general fund and was not used to pay the then current expenses of its Building Department. City's Brief, p 6.[5]

6. The City does not refute that, according to public records created by the City, as of 2016, the six-year total User Fee Surplus, deposited into the City's general fund, was $2,323,061. City Brief, p 6.[6]

7. The City admits that it continues, to this day, to receive an annual User Fee Surplus. City's Brief, p 6.[7]

8. The City admits, that for nine years preceding its receipt of the User Fee Surplus (2003-2011), the City undercharged for building fees and/or underbudgeted for operating costs, creating annual cost overruns in the Building Department budget. City's Brief, p 5.

9. The City does not refute its failure to produce even a single budget, appropriation or expense document to demonstrate that the User Fee Surplus is actually used to repay alleged cost overruns in the Building Department from 2003-2011. The City's only documentation of the alleged

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[5] Money deposited into the City's general fund may be used for any purpose the City chooses, including road improvements, elections, insurance, parks and recreation, etc. See, Michigan Department of Treasury, *Uniform Budget Manual,* Sample Township, General Fund, p 18, Exhibit F.

[6] The annual amounts of User Fee Surplus are provided in the City's Comprehensive Annual Financial Reports ("CAFRs") filed by the City with the State of Michigan Department of Treasury.

[7] The City claims that the future of the User Fee Surplus is uncertain and is subject to the unpredictable economy. This is not quite accurate. The User Fee Surplus is the result of cost savings achieved by employing SafeBuilt to operate the City's Building Department. There is no reason to believe that this manner of operation will not continue. Therefore, with fees and operating cost remaining at their current scale, an annual User Fee Surplus will continue.

cost overruns is a line item in its CAFRs which are not, as implied by the City, audited or approved by the Michigan Department of Treasury. The CAFRs simply report a deficit; they do not prove that one actually exists. COA Op, Dissent, p 3, Exhibit B.[8]

10. The City admits, that it cannot track indirect building department costs and, instead, uses an 8% estimate for indirect/overhead costs derived from an alleged study performed by graduate students at Walsh College. City's Brief, pp 5 and 12.[9]

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[8] Contrary to the majority Opinion of the Court of Appeals, and as noted by the dissent, this statement of fact **does** contradict alleged testimony of City employees (which the majority does not cite or quote) that the City's "methods of accounting" are "iron-clad" and 100% accurate. COA Op, p 6, n 3, Exhibit A. As 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.

COA Op, Dissent, p 3, Exhibit B.

[9] The Court of Appeals majority attempted to justify the User Fee Surplus as necessary to cover these indirect costs, such as the salary of the Building Official. COA Op, pp 4-5, Exhibit A. This, however, is a leap in logic not bourne out by the facts or common sense. The Building Official's salary is the only specific indirect/overhead cost referenced by the majority of the Court of Appeals. That is, there are no other specific indirect/overhead costs identified by the Court of Appeals' majority which comprise the 8% of the estimated indirect/overhead costs. It is extremely unlikely that the Building Official's salary constitutes the entire 8% estimate of indirect/overhead costs. However, even assuming that it does, the actual annual User Fee Surplus is 25% and 25% less 8% leaves 17% that is still unaccounted for – except as pure surplus deposited into the general fund.

III. ARGUMENT

A. Standard of Review

This Court's review of this matter is de novo. A decision to deny or grant summary disposition as well as issues of statutory interpretation and application are all 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 State of* Mich, 456 Mich 144, 149; 566 NW2d 616 (1997).

B. The Circuit Court's Opinion is Contrary to Michigan's Well-Established Rules of Statutory Construction.

1. The Relevant Rules of Statutory Interpretation

"The overriding goal guiding judicial interpretation of statutes is to discover and give effect to legislative intent." *Bio-Magnetic Resonance, Inc v Dep't of Public Health,* 234 Mich App 225, 229; 593 NW2d 641 (1999) (citations omitted). Once the intent of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *In re Certified Question,* 433 Mich 710, 722; 449 NW2d 660 (1989).

Initially, the court examines the most reliable evidence of the Legislature's intent – the language of the statute itself. *Whitman v City of Burton,* 493 Mich 303, 311; 831 NW2d 223 (2013). "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd,* 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the

court must avoid a construction that would render part of the statute surplusage or nugatory. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931); *Johnson v Recca,* 492 Mich 169, 177; 821 NW2d 520 (2012). And, "[a] necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language. If a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010).

2. Legislative Intent and the Plain and Ordinary Meaning Rules of Statutory Interpretation Mandate Reversal of the Lower Courts

This is the second time that this case is before this Court on an issue of statutory interpretation. The issue previously before this Court was whether Section 9b of the CCA, MCL 125.1509b, required the Builders to exhaust administrative remedies before filing this lawsuit. Following oral argument on whether to grant plaintiffs' application for leave to appeal or take other peremptory action, this Court, in a unanimous Memorandum Opinion, reversed the judgments of the Circuit Court and Court of Appeals and held that exhaustion of administrative remedies was not required under the CCA. *Michigan Ass'n of Home Builders v City of Troy,* 497 Mich 281; 871 NW2d 1 (2015), attached as Exhibit G. This Court's decision in 2015 turned on its interpretation of the "plain language" of the applicable CCA provision. Disagreeing with the interpretation advanced by the City and the lower Courts, this Court stated:

> Had the Legislature intended to permit the director to conduct a performance evaluation of the Troy City Council, it surely could have said so. We presume that the Legislature intended the meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature.

Michigan Ass'n of Home Builders, 497 Mich at 288, citing *Lash v Traverse City*, 479 Mich 180, 189; 735 NW2d 628 (2007). A strikingly similar analysis applies here.

a. The Amount of the Fees Charged Must "Reasonably Relate" to the Cost

The first sentence of Section 22 of the CCA establishes one of two limitations placed on those local units of government which elect to assume responsibility for administering and enforcing the CCA – a limitation on the amount of fees charged – as follows:

> **(1) 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.**

MCL 125.1522(1) (emphasis supplied) (the "Amount Provision").

The Court of Appeals' initial point of analysis and application of the Amount Provision was to note that the "existence of a surplus does not automatically result in a determination that the fees charged are unreasonable and, therefore, [does] not satisfy the dictates of MCL 125.1522(1)."

COA Op, p 5, Exhibit A. The Court of Appeals majority then engaged in supposition and an analysis of hypothetical facts not before the Court:

> A surplus may occur within a particular financial year, not because the fees are unreasonable, but simply because the services being provided have not entailed the amount of time, energy, or resources normally, or on average, required for the delivery of the particular service.

COA Op, p 5, Exhibit A. From there, the Court of Appeals majority concluded that in order to make a "reasonableness" determination, each individual fee for each individual service would need to be examined – a "burden of proof" which the Home Builders did not meet. The Court of Appeals is incorrect for at least two reasons.

First, Section 22 requires no such analysis. The plain and unambiguous language of Section 22 requires an analysis of the amount of "fees" (plural) versus the "cost . . . to the governmental subdivision of the acts" (plural) "and services" (plural). There is simply nothing in the statute that requires a line-by-line, item-by-item analysis of the type mandated by the Court of Appeals majority. The Court of Appeals majority invented its own "burden of proof" in contradiction to the applicable statutory language.

Second, "reasonableness," as defined in Section 22, requires simply that the fees charged for Building Department services bear a "reasonable relation" to the cost of providing said services. The Court of Appeals majority, however, engaged in no such analysis and never compared the total overall fee revenue to the total overall cost of providing services. Therefore, the majority never undertook the specific analysis required by the Legislature through its enactment of Section 22 of the CCA.

Accordingly, because the Court of Appeals majority incorrectly required a level of analysis/burden of proof not required, or even permitted, by Section 22 and failed to engage in the analysis actually required by Section 22, the Court of Appeals majority should be reversed.

Further, the Court of Appeals noted in its majority opinion that the City did not purposefully increase the amount of its fees in order to obtain the User Fee Surplus, insinuating that this alleged "fact" alone demonstrates that the City's fees are "reasonable." COA Op, p 6, Exhibit A. Specifically, the majority stated:

> 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.

COA Op, p 6, Exhibit A. However, again, this is only part of the necessary inquiry and only part of the statutory limitation placed on the amount of fees. The City's fees must also be "reasonably related" to the cost of providing building department services. Under this "reasonably related" statutory definition and/or inquiry of what is "reasonable," it is simply irrelevant whether the City purposefully increased the amount of its fees in order to obtain a surplus or not.[10] Again, the majority of the Court of Appeals engaged in an improper analysis under Section 22 of the CCA and should be reversed.

The proper analysis of the amount of fees charged was, however, accomplished by the Court of Appeals dissent. Therein, Justice Jansen stated:

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[10] However, as noted by the Court of appeals dissent, it appears that by structuring its contract with SafeBuilt so as to receive a 20% profit, the City did engage in some purposeful action to obtain the User Fee Surplus.

> This Court's role in interpreting a statute is to, as closely as possible, decipher and carry out the expressed legislative intent. *McCormick v Carrier,* 487 Mich 180, 191; 795 NW2d 517 (2010). The clearest indicator of Legislative intent, and the initial focus of any statutory analysis, is the plain language of the statute itself. *Id.* at 191-192. "We interpret the words in the statute in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *Johnson v Recca,* 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks, alterations, and citation omitted). "In doing so, courts 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *Id.,* quoting *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002).
>
> 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.

COA Op, Dissent, p 2, Exhibit B. Having undertaken the proper analysis, the Court of Appeals dissent was able to draw the proper conclusion, as follows:

> . . . 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. This Court should peremptorily reverse the opinion of the Court of Appeals majority for the reasons stated in the Court of Appeals dissent.

b. The Use of the Fees Charged Must be for the Operation of the Building Department

The last sentence of Section 22 of the CCA establishes the second of the two limitations placed on those local units of government which elect to assume responsibility for administering and enforcing the CCA – a limitation on the use of the fees charged – as follows:

> 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) (the "Use Provision"). In the Use Provision, the Legislature clearly and unambiguously stated: "[t]he 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 . . . ." As a matter of law, the word "shall" is unambiguous and requires mandatory rather than discretionary action. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). The word "only" is also unambiguous and means "[s]olely; merely; for no other purpose; at no other time; in no otherwise; of or by itself; without anything more; exclusive; nothing else or more." *Black's Law Dictionary* (5th ed), p 982. Accordingly, based solely on the first phrase of the Use Provision of Section 22, there is only one use to which fees may be put and that use is non-discretionary – the operation of the enforcing agency – here, the City's Building Department.

However, the Legislature was not quite done with its mandate. The Legislature added a second phrase to the Use Provision – "and shall not use the fees for any other purpose." Again, the Legislature used the mandatory word "shall." And, as discussed above, the phrase not "for any other purpose" translates to "only." *Black's Law Dictionary* (5th ed), p 982 (the word "only" means "for no other purpose"). Thus, in an effort to emphasize **and overemphasize** its point, the Legislature stated **and restated** the absolute, non-discretionary statutory restriction on the use of fees. This emphatic and redundant method of drafting illustrates an adamant intent on the part of the Legislature to prohibit the use of the fees for all purposes other than the operation of the enforcing agency.

Here, the City is funneling fee money into the general fund which it can then use on road improvements, elections, insurance, parks and recreation, or any other purpose the City sees fit. These are clearly purposes prohibited by statute. The Court of Appeals' majority mistakenly condones practice stating that the City is merely repaying prior shortfalls in the Building Department operating budget which were previously absorbed by the general fund. Thus, the City is doing through the back door that which is expressly prohibited through the front door. This "sleight of hand" is likewise an unlawful purpose. The repayment of shortfall from years past is, in and of itself, not a lawful purpose; that is, not for the purpose of the operation of the enforcing agency. And, again, the ultimate outcome and ultimate use of the fees by the City, under its current practice, is in direct conflict with the plain and ordinary language of the Use Provision of the CCA as well as the Legislative intent of having self-funded building departments throughout the State which provide affordable services. As stated by the Court of Appeals dissent:

> 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. The decision of the Court of Appeals should be summarily reversed.

3. Section 22 of the CCA Speaks Only to the Present.

The Court of Appeals majority ruled that it was permissible under Section 22 of the CCA for the City to use the User Fee Surplus to repay alleged deficits incurred in the operation of its Building Department between 2003 and 2011. The majority stated:

> Notably, 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, Exhibit A. The majority's analysis is erroneous.

According to this Court, if legislation were intended by the Legislature to speak to the past, the Legislature would write the statute using the present perfect tense. For example, in *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003), this Court, quoting its decision in *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991), stated:

> 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 at 202. The Legislature's use of the present tense in Section 22 illustrates its intent that the statute pertain to current operations; not past.

Further, under basic grammar rules and construction, Section 22 limits the City's use of the User Fee Surplus to a single year's operations. 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." This Court stated:

> 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.

Robinson, 462 Mich at 461. 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.

Robinson, 462 Mich 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. 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 and the decision of the Court of Appeals majority to the contrary should be reversed.

4. The City Does Not Have the Carté Blanche Discretion Regarding Fees that it Claims to Have

The City argues that its practice of charging fees in amounts 25% in excess of costs and depositing the User Fee Surplus to the general fund is permitted under Section 22, in which, the City claims, the Legislature intended to give local units of government discretion, "without limitation." In particular, the City states: ". . . 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." City's Brief, p 24. This is untrue for at least four reasons.

First – the plain and ordinary language of Section 22 does not give the City unfettered discretion to determine the amount or use of the fees. Rather, arguably, pursuant to the Amount Provision, fee amounts "shall" "bear a reasonable relation to the cost" of providing the services. Similarly, pursuant to the Use Provision, fees "shall" only be used to operate the enforcing agency and "shall" not be used for any other purpose. MCL 125.1522(1) (emphasis supplied). The Legislature's intentional use of the word "shall," as opposed to "may," makes these provisions mandatory – obligatory – compulsory – commanding and, required by law. *Merriam-Webster's Collegiate Dictionary* (9th ed), p 722.

Second, the City's reliance on Section 34 of Article VII of the Michigan Constitution as support for its claimed unrestrained discretion in setting and using fees is misplaced. Section 34 of Article VII of the Michigan Constitution provides: "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const 1963, art 7, §34. However, liberal construction is not paramount to enforcing the intent of the Legislature which, in this case, is to make the building departments of units of local government self-funded while maintaining affordable services, thereby promoting growth, development and uniformity. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 44; 761 NW2d 269 (2008). Further, under Michigan statutory interpretation law, the more specific statute (Section 22 of the CCA) takes precedence over the more general statute (the Michigan Constitution) and the more recently enacted statute (CCA - 1999) takes precedence over the earlier one (Constitution - 1963). *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008); *Travelers Ins v U-Haul of Mich, Inc,* 235 Mich App 273, 280; 597 NW2d 235 (1999). Again, the City's authority fails to support its claim.

Third, the City's self-proclaimed "lawful" discretionary use of the User Fee Surplus – to repay past shortfalls in the operating budget previously absorbed by the general fund – is also prohibited by Michigan law on statutory interpretation. A court may not add words or language to a statute even if it believes that the additional language is prudent. *Kirkaldy v Rim,* 478 Mich 581, 587; 734 NW2d 201 (2007) (J. Cavanaugh, concurring). Here, in order to validate the City's interpretation, the Court would need to modify the phrase "operation of the enforcing agency" by

adding the phrase "past and current" to the Use of Fees Provision (sentence #2) of Section 22. Michigan law prohibits such an interpretation.

Finally, the discretion, if any, afforded to the City by the Legislature as to the amount and use of fees does not extend to determining that any cost savings resulting from greater efficiencies should be used to subsidize non-building department services or costs. Rather, in Section 22, the Legislature stressed that fees "shall" be used to operate the enforcing agency and "shall" not be used for any other purpose. If the City has experienced a decline in the cost of providing building department services, that cost savings should be passed on to the users of those services, including home builders and the purchasers of new homes and renovations.

C. The Circuit Court's Opinion is Contrary to Public Policy

1. The Purpose of the CCA is Furthered by Reversing the Decisions of the Lower Courts

When interpreting a statute, 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). And, statutes should be construed so as to prevent 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 State 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 H. As stated by the 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).[11]

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 and the corresponding variances in compliance requirements and cost. Senate Legislative Analysis, SB 463, June 16, 2000, p 1, Exhibit H. 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, eight plus years prior. Today's users did not agree to, or approve, their subsidizing of the City's earlier "low-balling" of its fees in budgeting for, and operating, its Building Department. Therefore, the fees paid by today's users which are not

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[11] 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).

attributable to today's costs, appear more like revenue generated by the City for the sole purpose of repaying these prior budget deficits. This practice violates the purpose of Section 22 – to achieve uniformity in fees such that they truly relate to the cost of providing services. This practice violates the Headlee Amendment of the 1963 Michigan Constitution – to relieve "the electorate from overwhelming and overreaching taxation." *Adair v Mich*, 497 Mich 89, 102; 860 NW2d 93 (2014), quoting *Durant v Mich*, 456 Mich 175, 214; 566 NW2d 272 (1997). In addition, it is simply contrary to public policy to have today's residential builders and their customers paying a premium in the form of inflated prices for residential construction contrary to the intent of the 1999 amendments to the CCA of uniformity and affordability. Construction is not stimulated – it is stifled. The sale of new housing is not stimulated – it is stifled.

2. The Use of "Kickback" Contracts by Local Units of Government is Becoming Pervasive

Almost a decade ago, the contract between the City and SafeBuilt was the first of its kind; that is, the first contract in which an independent third party operates the building department of a local unit of government in exchange for a percentage of the service fees collected and then "kicks back" a percentage of the fees generated by that operation to the local unit of government. Now, according to Amicus Curiae, The Michigan Municipal League, *et al*, there are at least "16 other communities" who have contracted with SafeBuilt – many of which employ "kickback" contracts like the one at issue here. For example, Muskegon, like the City here, pays 80% of some fees to SafeBuilt and retains 20% of those fees and 100% of other fees (i.e., rental property, telecommunications, housing warrant inspection, and property maintenance code approval fees). When this fee structure is coupled with SafeBuilt's performance of all the work associated with

those fees, including paying all costs associated with the Building Official, a fee overcharge and surplus results. This structural 20% profit margin for Muskegon renders the fees unreasonable and in violation of Section 22 of the CCA. A copy of the "Muskegon/SafeBuilt Contract" is attached as Exhibit I.

Similarly, in Genoa Township, SafeBuilt keeps 85% of certain fees and "kicks back" 15% to the Township. See, "Genoa Township/SafeBuilt Contract," Exhibit J. The City of Harper Woods and the City of Muskegon Heights both receive a 20% "kickback," while the City of Norton Shores takes a 25% "kickback." Copies of the "Harper Woods/SafeBuilt Contract," "Muskegon Heights/SafeBuilt Contract," and "Norton Shores/SafeBuilt Contract" are attached as Exhibits K, L and M. Again, these 15-25% profit margins result from overcharges for services – a practice which violates the CCA and the Headlee Amendment. This practice, initiated by the City eight years ago, is growing, and continues to grow. Left unchecked, the pervasive and ubiquitous overcharging of construction fees will noticeably and negatively impact residential and other construction and the attendant sales and purchases thereof. This outcome is contrary to public policy.[12]

IV. CONCLUSION/RELIEF REQUESTED

For all the foregoing reasons, the Association respectfully requests that this Court grant the Association leave to file the accompanying Amicus Curiae Brief in support of the position of

[12] Moreover, requiring local units of government to adhere to the requirements of Section 22 of the CCA and the Headlee Amendment will not, as proclaimed by the City and Amicus Curiae, deal a "death blow" to the privatization of building services. Rather, as demonstrated by SafeBuilt contracts with the City of Owosso (Exhibit N) and the Charter Township of Mundy (Exhibit O), privatization is possible using flat rates and/or per hour rates (not percentages), presumably based on actual costs. The difference is, the Owosso and Mundy contracts have no apparent "kickback" profit margins built right into the express terms of the contracts.

Plaintiffs/Appellants and reverse the granting of the City's Motion for Summary Disposition and the denial of the Builders' Motion for Summary Disposition and remand this matter to the Circuit Court with instructions to enter an order denying the City's Motion for Summary Disposition and granting the Builders' Motion for Summary Disposition.

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LIST OF EXHIBITS
TO MICHIGAN REALTORS®' AMICUS CURIAE BRIEF
IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL
OF PLAINTIFFS/APPELLANTS

A. Court of Appeals Opinion ("COA Op")

B. Court of Appeals Dissent ("COA OP, Dissent")

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

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

E. City's Non-Billable Fees

F. Michigan Department of Treasury, *Uniform Budget Manual*, Sample Township, General Fund

G. *Michigan Ass'n of Home Builders v City of Troy,* 497 Mich 281; 871 NW2d 1 (2015)

H. Senate Legislative Analysis, SB 463, June 16, 2000

I. Muskegon/SafeBuilt Contract

J. Genoa Township/SafeBuilt Contract

K. Harper Woods/SafeBuilt Contract

L. Muskegon Heights/SafeBuilt Contract

M. Norton Shores/SafeBuilt Contract

N. City of Owosso/SafeBuilt Contract

O. Charter Township of Mundy/SafeBuilt Contract