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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REPLY BRIEF
ON BEHALF OF PLAINTIFFS/APPELLANTS MICHIGAN ASSOCIATION OF HOME BUILDERS, ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION

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I. INTRODUCTION

Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders") filed its Application for Leave to Appeal (the "Application") with this Court on November 8, 2017. Defendant/Appellee, the City of Troy (the "City") filed its Answer to the Application (the "City's Answer") on December 6, 2017. The Builders now file this Reply Brief.

II. THE BUILDERS' CLAIMS

Section 22 of the Construction Code Act (the "CCA") requires that fees be: (1) "reasonable;" (2) "bear a reasonable relation to the cost" of Building Department services; and (3) be used for "operation of" the Building Department only and "for no other purpose." MCL 125.1522(1) (emphasis supplied). The Headlee Amendment prohibits taxation by local units of government through taxes disguised as fees. Const 1963, art 9, §31.

The Builders' claim that the City's production of a large annual surplus from fees charged by the City to users of the City's Building Department services (the "User Fee Surplus") violates Section 22 of the CCA. The Builders' claim that the City's deposit of the User Fee Surplus into its general fund and use for general purposes violates Section 22 of the CCA. The Builders' claim that these same actions violate the Headlee Amendment to the Michigan Constitution.

III. THE CITY HAS FAILED TO REFUTE ITS VIOLATION OF THE CCA AND THE HEADLEE AMENDMENT

The City does not dispute the essential facts of the Builders' case. The City admits that since 2010, it has received an annual "Surplus" from the user fees generated through the operation of its Building Department (the "User Fee Surplus"). City's Answer, p 6. The City further admits

that it continues, to this day, to receive an annual User Fee Surplus from the operation of its Building Department and will in the future.[1] City's Answer, p 6. The City admits that per its contract with SafeBuilt of Michigan, Inc ("SafeBuilt"), the User Fee Surplus it retains is currently 25% of the "billable" Building Department revenue. City's Answer, pp 6-7. The City does not refute that per its own financial documents; specifically, its Comprehensive Annual Financial Reports (CAFRs"), the total User Fee Surplus as of 2014 was $1,498,565. City's Answer, p 6. Nor does the City dispute that by 2016, the total User Fee Surplus amount had increased to $2,326,061. And, the City admits that the User Fee Surplus is deposited into its general fund and is not used to pay current operating expenses of its Building Department. Miller Dep Tran, pp 98, 120 and 127, Exhibit E to Application; Lamareto Dep Tran, pp 37, 43 and 46, Exhibit D to Application. These actions alone constitute at least two violations of the CCA:

1. The fees do not bear a reasonable relation to the cost (a 25% or $2.3+ million surplus is unreasonable).

2. The fees are being used for a purpose other than operation of the Building Department.

The bulk of the City's Answer pertains to its alleged *use* of the User Fee Surplus. A consistent failure in the City's case, however, is its lack of recognition of the multiple requirements of Section 22. That is, in the end, the CCA is as concerned with the issue of the *use* of surplus

[1] The City hems and haws a little as to future Use Fee Surplus funds, claiming that there could be an economic downturn. This statement is inaccurate. The User Fee Surplus occurs every year because of the cost savings achieved by employing SafeBuilt. The User Fee Surplus does not occur every year because of an economic upswing or any economic condition whatsoever. Therefore, assuming SafeBuilt continues to operate the City's Building Department in the current manner, and fees and operating costs remain at their current ratios, the annual User Fee Surplus will continue – and in large amounts consistent with prior years.

money as it is with the issue of there even *being* surplus money in the first place – the amount of fees shall bear a reasonable relation to costs. Again, it is the Builders' position that a 25% overcharge is unreasonable on its face.

The City's "go to" response to the amount of its fees is, and always has been, that it has virtually unfettered discretion to determine the amount of fees. City's Answer, pp 23-26. This "response" merely "begs the question" – then why were Section 22 of the CCA and the Headlee Amendment enacted in the first place? The answer to this question demonstrates the deficiencies in the City's argument. There obvious purposes of Section 22 of the CCA and Headlee Amendment are to provide legislative and judicial oversight, parameters and limitations the discretion afforded to local units of government to set fees. Therefore, the City's discretion to set the amount of fees is tempered by Michigan statutory and constitutional law; in this instance, Section 22 of the CCA and the Headlee Amendment. The City's discretion to set the amount of fees is not boundless and its fees in this case are unreasonable and not reasonably related to the cost of services.

IV. THE CITY'S RESPONSE BRIEF DEMONSTRATES ISSUES OF MATERIAL FACT

The City claims that its use of the User Fee Surplus is lawful under Section 22 of the CCA because, although it is deposited into the general fund and, therefore, ultimately used for general purposes, it is initially used to repay prior loans from the general fund to the Building Department and only secondarily used for general purposes. This is untrue. This "intermediary" use of the User Fee Surplus to repay alleged historical shortfalls incurred in the operation of the Building Department does not somehow cleanse the entire transaction of violations of Section 22 of the CCA. In the end, the User Fee Surplus is being used for purposes other than

operating the Building Department. And, at all times, the fees are being used for purposes other than operating the Building Department – (1) to repay a loan; and/or (2) for general, unconditional purposes such as road repair, snow removal, park maintenance, etc. The City's admitted use of the User Fee Surplus violates the CCA as a matter of law.

Alternatively, however, the purported facts, alleged to support the City's claim in this regard are inconclusive at best and thus, present material issues of fact. For example, the City claims that its CAFRs demonstrate the existence of the alleged deficit that it is using the User Fee Surplus to repay. City's Answer, p 5. This is untrue. The CAFRs simply report an alleged deficit; they do not prove one actually exists. Moreover, the CAFRs in which the alleged "shortfalls" are recorded are simply received by Treasury and made available on its website for public inspection. MCL 141.429. The State Treasurer does not approve the CAFRs. Nor does the State Treasurer audit the CAFRs. Therefore, contrary to the City's claims, the CAFRs do not prove that the alleged deficit exists.[2] Accordingly, assuming that the use of fees to repay historical shortfalls in the operation of the Building Department is a permissible use under Section 22 of the CCA, and assuming further still that a 25% upcharge on Building Department services is reasonable and reasonably related to the cost of providing services, there are nonetheless still material issues of fact surrounding the actual existence of a deficit, the amount of the deficit, the reasons why the deficit arose, the intent to repay the deficit at the time it was created and the use of the User Fee

[2] Further still, the City's proofs are completely devoid of any budget, expense or appropriation documents which would demonstrate the transfers of money from the general fund to the Building Department, thereby creating the deficit, or from the Building Department to the general fund to repay this alleged deficit.

Surplus to repay the deficit. The decisions of the lower courts were, therefore, erroneous and should be reversed.

V. THE CITY'S "ADDITIONAL" REASONS FOR DENYING LEAVE ARE WITHOUT MERIT

At pages 19-21 of its Answer, the City presents this Court with two "alternative" arguments against granting leave to appeal: (1) that there is no private cause of action under the CCA; and (2) that the doctrine of separation of powers precludes this Court's review of this case. These arguments were raised below as alternative bases for the circuit court to grant summary disposition and for the Court of Appeals to affirm the circuit court's grant of summary disposition. However, neither the circuit court nor the Court of Appeals addressed them. Therefore, contrary to the City's assertions, it is not incumbent upon this Court to address them now. *Camden v Kaufman,* 240 Mich App 389, 399; 613 NW2d 334 (2000) (generally, appellate courts will not address an issue that was not decided below). This case law notwithstanding, neither of the City's alternative arguments have merit.

A. The Builders May Seek Declaratory and Injunctive Relief for the City's Violation of Section 22 of the CCA

The City claims that the CCA does not create a private right of action as a result of which, the Builders' claims for injunctive and declaratory relief must be dismissed. The City cites *Lash v Traverse City,* 479 Mich 180; 735 NW2d 628 (2007) in support of its argument. In *Lash,* this Court held that a statute related to local government employee residency requirements did not create a private cause of action for money damages in light of governmental immunity principles. *Id.* at 194 and 196. However, this Court further held that "[p]laintiff could enforce the statute by seeking injunctive relief pursuant to MCR 3.310 or declaratory relief pursuant to MCR 2.605(A)(1)."

Id. at 196 (emphases supplied). Thus, the City's own case law supports the Builders' claims for injunctive and declaratory relief.

In fact, *Lash* is one of the many cases consistently employing the principle that courts may provide injunctive relief where government officials do not conform to their statutory duties. Indeed, just prior to its decision in *Lash*, this Court observed that "this Court has permitted a plaintiff to seek injunctive relief when a government official does not conform to his or her statutory duty to distribute funds in a specified manner." *South Haven v Van Buren Co Bd of Comm'rs,* 478 Mich 518, 531; 734 NW2d 533 (2007). This Court in *South Haven* further held that enjoining the collection of an unlawful tax or ordering a refund "would be unexceptional exercises of the power of the judiciary to give injunctive relief to prevent illegal acts." *Id.,* citing Const 1963, art 6, §§1, 4 and 13.

Similarly, the City's reliance on *Office Planning Grp, Inc v Baraga-Houghton-Keweenaw CDB,* 472 Mich 479; 697 NW2d 871 (2005) is also misplaced. In *Office Planning,* this Court found that under federal tests regarding whether a federal statute created a private cause of action, there was no statutory authority to require a head start agency to disgorge all contract bid documents to a disgruntled and unsuccessful bidder. The key to that case, however, was that the statute at issue therein "proscribe[d] no conduct as unlawful." *Office Planning,* 472 Mich at 498. By contrast, Section 22 expressly makes it unlawful for the City to use fee dollars for "any other purpose" beyond "operation" of the Building Department. MCL 125.1522(1). Further, the *Office Planning* decision predates *Lash* and, therefore, could not have considered the rule announced in *Lash* that even absent an express private right of action, statutes governing public conduct may be enforced by equitable and declaratory relief. The *Office Planning* case does not support the City's argument.

Further still, it is black-letter law in Michigan that if a statute creates a remedy for its violation, and no common law counterpart exists, the remedy (or as the City argues, lack of it) in the statute is generally exclusive. E.g., *Lewandowski v Nuclear Mgt,* 272 Mich App 120, 127; 724 NW2d 718 (2006); *Driver v Hanley,* 207 Mich App 13, 18; 523 NW2d 815 (1994); *Mack v Detroit* (On Remand), 254 Mich App 498, 501; 658 NW2d 492 (2003). Here, however, the opposite is true. There has long been a pre-Headlee Amendment common law claim and remedy under Michigan law for unreasonable fees, fees that are not reasonably related to the cost of service, and fees that are not spent for the regulatory purpose claimed. See, for example, *Detroit Retail Druggists' Ass'n v Detroit,* 267 Mich 405; 255 NW 217 (1934); *Fletcher Oil Co v Bay City,* 247 Mich 572; 226 NW 248 (1929); *Vernor v Sec'y of State,* 179 Mich 157; 146 NW 338 (1914). Thus, Section 22 of the CCA merely provides that which was already required under Michigan law regarding lawful fees and the absence of an express statutory remedy for money damages does not equate to the absence of any remedy.

Finally, as discussed by this Court in its prior opinion, neither the State Construction Code Commission nor its director may conduct a "performance evaluation" investigation into the establishment of fees by the City. *Michigan Ass'n of Home Bldrs v City of Troy,* 497 Mich 281, 288; 871 NW2d 1 (2015). Thereafter, absent judicial review via the filing of a private cause of action, there exists no oversight or enforcement mechanism for Section 22 of the CCA.

The City's claim that there is no private cause of action under Section 22 of the CCA is without merit. This Court, therefore, should not deny the Application on this alternative basis.

B. The Builders' Claims are Not Barred by Separation of Powers Principles

The City claims that the doctrine of separation of powers bars the Builders' claims. In support of this proposition, the City cites *Warda v Flushing City Council,* 472 Mich 326; 696 NW2d 671 (2005), for the principle that "whenever a statute confers legislative authority, the judiciary is precluded from reviewing the discretionary action." The City thus concludes that because Section 22 of the CCA confers the authority to establish reasonable fees in the legislative body of a governmental subdivision (here, the City Council), the courts are barred from reviewing the City Council's actions establishing fees. As *Warda* itself illustrates, this claim is also untrue.

In *Warda*, this Court considered whether a city's discretionary decision to refuse to pay the attorney fees of a former police officer was subject to court review under the statute in question. *Warda,* 472 Mich at 332. The statute, MCL 691.1408(2), provided that when a criminal prosecution is brought against a public employee based on conduct in the course of employment "the government agency may pay for . . . an attorney" for that person. *Warda,* 472 Mich at 331. Initially, this Court noted that "may" connotes a discretionary activity and that "the statute does not limit or qualify the word 'may' (with, for instance, a requirement of reasonableness) or provide any other standards." This Court then concluded that the question was not justiciable. *Id.* at 332 and 333. In so doing, this Court "stress[ed] that its opinion only precludes the judiciary from reviewing the discretionary decision-making of legislative and executive agencies. Where decision-making falls outside the scope of such discretion, such decision-making would be subject to judicial review." *Id.,* n 3. This Court observed that, if a municipality paid the attorney fees of a non-employee or officer under this statute (i.e., violated the statute), the discretion provided

in the statute "would not preclude the courts from reviewing such a decision." *Id.* In other words, there is no unchecked discretion for cities to break the law.

As this concept is applied here, Section 22 does not say the City "may" establish reasonable fees, that "may" bear reasonable relation to costs and "may" be used for the Building Department. Rather, Section 22 provides that the City "shall" establish reasonable fees that "shall" bear "reasonable relation" to costs, and that the City "shall" use these fees only for Building Department purposes. MCL 125.1522(1) (emphasis added). This is not discretionary and, to the extent there is some discretion in setting fees initially, the requirement that they be "reasonable" provides the exact judicial review guidepost this Court found lacking in *Warda*.

Moreover, no other case cited by the City supports its proposition that Section 22 precludes courts from hearing fee reasonableness challenges. For example, the City cites *Beaman v Montante,* 377 Mich 31, 36; 138 NW2d 764 (1966), for the proposition that "[a]bsent peculiar circumstances, a court may not supervise a public official's *contemplated* performance of his or her duties without violating separation of powers." (Emphasis added). However, the City misquoted this Court. The *Beaman* Court actually stated:

> [A] court may not with propriety, without violating our principles of the separation of governmental powers, Art III, §2, Constitution of 1963, supervise a public official's contemplated performance of his duties, absent peculiar circumstances, as for example, when an injunctive order is issued to restrain a public official from performing unlawful or unauthorized acts. See *Hunt v State Highway Commissioner* (1957), 350 Mich 309; 86 NW2d 345; *Michigan Salt Works v Baird* (1913), 173 Mich 655; 139 NW 1030.

Beaman, 377 Mich at 36 (emphasis supplied). Thus, the *Beaman* opinion supports the Builders' position on the separation of powers claim.[3]

In sum, the City's "Separation of Powers" argument simply provides no basis for this Court to deny the Application. To the contrary, the Court of Appeals' decision should simply be reversed.

VI. CONCLUSION AND RELIEF REQUESTED

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

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[3] Further, the issue in *Beaman,* and thus the context in which the above-stated quote was made, was on the question of the ripeness of the case. *Beaman,* 377 Mich at 36. As a result, the *Beaman* Court's ultimate ruling, that the trial court did not have jurisdiction over "a cause of action which had not yet arisen," is wholly unrelated to the claims in this case.