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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SUPPLEMENTAL 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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SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE CREATION OF A FEE SURPLUS GENERATED BY AN ENFORCING AGENCY UNDER THE CONSTRUCTION CODE ACT (CCA), MCL 125.1501 ET SEQ., AND THE USE OF THAT SURPLUS TO PAY FOR SHORTFALLS IN PREVIOUS YEARS BY TRANSFER OF THE SURPLUS INTO THE CITY'S GENERAL FUND, VIOLATES THE CONSTRAINTS OF § 22 THAT FEES BE REASONABLE, BE INTENDED TO BEAR A REASONABLE RELATION TO THE COST OF ACTS AND SERVICES PROVIDED BY THE ENFORCING AGENCY, AND BE USED ONLY FOR THE OPERATION OF THE ENFORCING AGENCY OR THE CONSTRUCTION BOARD OF APPEALS, OR BOTH?

The Court of Appeals answered: "No."

The Circuit Court answered: "No."

Plaintiffs-Appellants answer: "Yes."

Defendant/Appellee answers: "No."

II. IF SO, WHETHER APPELLANTS HAVE A PRIVATE CAUSE OF ACTION AGAINST A GOVERNMENTAL SUBDIVISION FOR ENFORCEMENT OF THE CCA, MCL 125.1508b(1)?

The Court of Appeals did not answer this question.

The Circuit Court did not answer this question.

Plaintiffs-Appellants answer: "Yes."

Defendant/Appellee answers: "No."

III. WHETHER APPELLANTS ARE "TAXPAYERS" THAT HAVE STANDING TO FILE SUIT PURSUANT TO THE HEADLEE AMENDMENT, CONST 1963, ART 9, §32?

The Court of Appeals did not answer this question.

The Circuit Court did not answer this question.

Plaintiffs-Appellants answer: "Yes."

Defendant/Appellee answers: "No."

IV. IF SO, WHETHER THE CHALLENGED FEES VIOLATE THE HEADLEE AMENDMENT, CONST 1963, ART 9, §31?

The Court of Appeals answered: "No."

The Circuit Court answered: "No."

Plaintiffs-Appellants answer: "Yes."

Defendant/Appellee answers: "No."

I. INTRODUCTION/BASIS FOR SUPPLEMENTAL BRIEF

On November 8, 2017, Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders") filed their Application for Leave to Appeal (the "Application") the September 28, 2017, 2-1 Opinion of the Michigan Court of Appeals (the "COA Opinion"). By Order dated June 20, 2018, this Court directed the scheduling of oral argument on whether to grant the Application or take other action. This Supplemental Brief is filed in accordance with this Court's June 20, 2018 Order and addresses the four (4) questions set forth therein. For the reasons set forth in the Application and herein, the Builders respectfully ask this Court to peremptorily reverse the COA Opinion and remand this case to the Oakland County Circuit Court for entry of an order granting summary disposition in favor of the Builders or, alternatively, grant the Builders' Application.

II. STATEMENT OF FACTS

The Builders incorporate by reference the Statement of Facts set forth in their Application, highlighted as follows:

1. Defendant/Appellee, City of Troy (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 City's Building Department. City of Troy Professional Services Agreement (the "Contract"), Appendix, p 4a. City's Brief in Opposition to the Application ("City's Brief"), pp 1-2.

2. The City admits, that in consideration for the services provided, SafeBuilt retained 80% of the fees collected for building permits, plan reviews, certificates of occupancy and inspections ("billable fees"), and the City retained the 20% surplus. Further, after "billable" fees exceeded $1,000,000 in the first Contract year, the City retained 25% of the "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. Contract, §3.2, p 2, Appendix, p 5a; City's Brief, pp 6-7.

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.[1]

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

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.

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.[2]

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

8. The City admits, that for the 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 that it has no budget, appropriation or expense documents 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 cost overruns is a line item in its CAFRs which are neither audited nor approved by the Michigan Department of Treasury. The CAFRs

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[1] 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.

[2] 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.

simply report a deficit; they do not prove that one actually exists. COA Op, Dissent, p 3, Appendix, p 64a.[3]

10. The City admits, that it cannot track indirect building department costs and, instead, uses an 8% of all CCA expenditures estimate for indirect/overhead costs derived from an alleged study performed by graduate students at Walsh College. City's Brief, pp 5 and 12.[4]

Based on these facts, the Builders filed this lawsuit in 2010 seeking declaratory relief – that the City's action violates the CCA and the Headlee Amendment – and injunctive relief – prohibiting future violations of the CCA and the Headlee Amendment by the City.

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[3] Contrary to the majority Opinion of the Court of Appeals, and as noted by the dissent, this statement of fact **directly** contradicts the alleged testimony of City employees that the City's "methods of accounting" are "iron-clad" and 100% accurate. COA Op, p 6, n 3, Appendix, p 57a. 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, Appendix, p 64a.

[4] The City and the Court of Appeals majority attempted to justify the User Fee Surplus as necessary to cover indirect costs, such as the salary of the Building Official. COA Op, pp 4-5, Appendix, pp 55a-56a. This, however, is a leap in logic not borne 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. There are no other specific indirect/overhead costs identified by either the City or 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 a 17% surplus that remains unaccounted for – except as pure surplus deposited into the general fund.

Verified Complaint, Appendix, pp 26a-40a. The Builders are not seeking restitution or money damages. Verified Complaint, Appendix, pp 26a-40a.

III. ARGUMENT AND LAW

A. The Creation of a Fee Surplus Generated by an Enforcing Agency Under the Construction Code Act (CCA), MCL 125.1501 *et seq.*, and the Use of That Surplus to Pay for Shortfalls in Previous Years by Transfer of the Surplus into the City's General Fund, Violates the Constraints of §22 That Fees Be Reasonable, Be Intended to Bear a Reasonable Relation to the Cost of Acts and Services Provided by the Enforcing Agency, and Be Used Only for the Operation of the Enforcing Agency or the Construction Board of Appeals, or Both.

This issue is one of statutory interpretation, reviewed *de novo* by this Court. *Cardinal Mooney High School v Mich High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991). There are three mandatory constraints on local units of government imposed by Section 22(1) of the CCA which are relevant in this case. One – the amount of the fee "shall" be reasonable. Two – the amount of the fee "shall" be reasonably related to the cost of providing the service. And, three – the fees collected "shall" **only be used 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 has violated, and continues to violate, all three of these limitations set forth in Section 22(1). The fees charged, which by design indicate User Surplus Fees, an amount of 25% over cost, is unreasonable on its face and does not bear a reasonable relation to the actual cost of providing building department services. In addition, the City's deposit of the User Fee Surplus into its general fund and subsequent use for general fund purposes (as an alleged loan repayment) is inconsistent with the express limitation of Section 22(1) that fees generated pursuant to Section 22(1)

be used only to operate the building department (or construction board of appeals) and for no other purpose.

1. The Creation of a More than an Incidental Fee Surplus by an Enforcing Agency Violates §22(1) of the CCA.

Michigan's rules of statutory interpretation require that all Michigan courts give effect to the Legislature's intent as expressed in the words of the statute. The words of a statute are given their plain and ordinary meaning and, if unambiguous, are simply enforced as written. Only if the statutory language is ambiguous may a court look beyond the statute to determine the Legislature's intent. *Pohutski v City of Farmington Hills*, 465 Mich 675, 683; 641 NW2d 219 (2002). Here, the unambiguous language of Section 22 of the CCA allows local units of government to establish and charge fees in an amount sufficient to cover their direct and indirect costs – but, for no other purpose. COA Op, pp 4-5, Appendix pp 55a-56a.

The plain and ordinary meaning of Section 22(1) provides a mechanism for local units of government to fully fund their building departments. The plain and ordinary meaning of Section 22(1), however, does not provide a mechanism for local units of government to generate additional revenue – at least not in the amounts generated here. Why? Because once operating costs are covered, and more than an incidental surplus exists, there is no longer a reasonable relationship between the amount of the fees and the cost of providing services. Simply stated, a 20-25% surplus is unreasonable on its face and, as a matter of common sense, does not "bear a reasonable relation to the cost." That is, the mere presence of a surplus of the magnitude at issue

here[5] demonstrates the vast disparity between the amount of the fees collected and the actual cost of operating the Building Department – a disparity which violates Section 22(1).

Further, the Court of Appeals' construction of Section 22(1) requires current fee payers to overpay to offset a theoretical shortfall created by prior fee payers' underpayment.[6] In fact, the City admits that current payers are paying a premium to subsidize the alleged discount provided by the City to past fee payers. There is simply no language in Section 22(1) which allows for the collection of a surplus to pay for past deficits created from providing past services and Michigan courts may not, as a matter of law, add language to a statute. *Kirkaldy v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007). And, allowing for overcharging for current services to make up prior deficits invites municipalities to arbitrarily increase (or decrease) fees above (or below) the cost of services at any point in time and then subsequently reverse course to either provide "reduced costs" services or recoup artificially created deficits. In all instances, the amount of the fees is skewed and no longer "bears a reasonable relation to the cost" of the services provided. Accordingly, Section 22(1) simply cannot be construed to force current fee payers to pay back the discount that the City purportedly voluntarily provided to prior fee payers in past years.

Finally, where a statutory definition is absent, courts may look to dictionary definitions for guidance. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004). "Surplus" is defined as "[t]hat which remains of a fund appropriated for a particular purpose; the remainder of a thing; the overplus; the residue." *Black's Law Dictionary* (5th ed), p 1294.

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[5] $2,326,061 over just six (6) years.

[6] The Court may recall that the City has failed to produce any evidence establishing that an actual deficit/shortfall exists. Therefore, the alleged deficit/shortfall is merely theoretical. Appendix, p 64a.

"Surplus" is also defined as "the amount that remains when use or need is satisfied." *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, by definition, the mere presence of a "surplus" demonstrates that the fee amounts are more than what is reasonable to cover actual costs of operation. Therefore, under the reasonableness standard of Section 22(1), it is simply unlawful for fees collected under Section 22(1) to result in the presence of a large fee surplus.

2. The Use of a Surplus for Anything Other than the Operation of the Building Department, the Construction Board of Appeals, or Both, Violates §22 of the CCA.

Courts must interpret statutes in a manner that avoids rendering any part of the statute surplusage or nugatory. And, when parsing out a statute, a court gives effect to every clause and sentence again, according to its plain and ordinary meaning. *Pohutski*, 465 Mich at 683-684. Section 22(1) of the CCA requires that fees be used "for the *operation* of the enforcing agency" and not "for any other purpose." MCL 125.1522(1) (emphasis added). Raising money for the purpose of repaying alleged prior allocations from the general fund to the building department is not for the purpose of "the operation of the building department." It is for the purpose of alleged loan repayment.[7] Depositing money into the general fund is not for the purpose of "the operation of the building department." It is for any purpose the City chooses. Allowing such practices renders nugatory the last phrase of Section 22 – "shall not use the fees for any other purpose."

In addition, courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute. *South Haven v Van Buren Co Bd of Comm'rs*,

[7] Again, the City has never provided any proof whatsoever that it actually ran a deficit during any previous budget years. Appendix, p 64a.

478 Mich 518, 530-531; 734 NW2d 533 (2007). In this case, there are notable, relevant differences between subparts (1) and (2) of Section 22 of the CCA. Subsection (2) provides:

> To accomplish the objectives of this section and this act, a state construction code fund is created. The director, after approval by the commission and following a public hearing held by the commission, shall establish reasonable fees to be charged by the commission for acts and services performed by the commission including, without limitation, inspection of plans and specifications, issuance of certificates of acceptability, testing and evaluation of new products, methods and processes of construction or alteration, issuance of building permits, inspection of construction undertaken pursuant to a building permit, the issuance of certificates of use and occupancy, and hearing of appeals. Fees established by the department shall be intended to bear a reasonable relation to the cost, including overhead, of the service or act. Until the director establishes fees pursuant to this act, the fees established pursuant to this subsection shall remain in effect. The state treasurer shall be the custodian of the fund and may invest the surplus of the fund in investments as in the state treasurer's judgment are in the best interest of the fund. Earnings from those investments shall be credited to the fund. The state treasurer shall notify the director and the legislature of interest credited and the balance of the fund as of September 30 of each year. The director shall supervise and administer the fund. Fees received by the department and money collected under this act shall be deposited in the state construction code fund and shall be appropriated by the legislature for the operation of the bureau of construction codes, and indirect overhead expenses in the department. Funds that are unexpended at the end of each fiscal year shall be returned to the state construction code fund. A self-supporting fund shall be established within the commission to provide for the purchase and sale of codes and standards to the general public.

MCL 125.1522(2).

Accordingly, unlike subsection (1), subsection (2) of Section 22 both permits the accumulation of a surplus and directs how that surplus may be used. Specifically, subsection (2) creates the state construction code fund (the "Fund") and allows the director of the Department of

Licensing and Regulatory Affairs (the "Department"), with oversight by the Construction Code Commission (the "Commission") and public hearing, to establish fees to be charged for acts and services performed by the Commission. MCL 125.1522(2). The state treasurer is made custodian of the Fund and "may invest the surplus of the Fund in investments as in the state treasurer's judgment are in the best interest of the Fund." *Id.* Earnings from those investments are credited to the Fund. *Id.* Subsection (1) does not contain a similar provision. However, the language of Subsection (2) certainly establishes that if the Legislature had wanted to draft Subsection (1) so as to allow for the creation of a surplus and the use of that surplus for something other than the operation of the building department, it knew how to do so. Obviously, however, it did not and instead provided an express limitation on the use of funds (surplus or otherwise) – "for the operation of the building department" and not "for any other purpose." MCL 125.1522(1).

Finally, when interpreting a statute, courts properly read words and phrases in the context of the entire statute. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008). And, a statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. *Wayne Co v Auditor Gen*, 250 Mich 227, 234; 229 NW2d 911 (1930). The CCA does not define "operation of the enforcing agency." However, other provisions of Section 22 provide context. Section 22 lists several "services and acts" of the "enforcing agency" for which fees can be charged, including "issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of occupancy," along with "hearing appeals." MCL 125.1522(1). Contrary to the majority Opinion of the Court of Appeals, nothing therein contemplates, for example, paying today for a hearing appeal that occurred several years ago.

3. The City's Practice Violates the Common Law Upon Which Section 22(1) is Based.

In construing the language of a statute, courts must keep in mind that the Michigan Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted. *Walters v Leech,* 279 Mich App 707; 761 NW2d 143 (2008). And, the common law, which has been adopted as part of Michigan's jurisprudence, remains in force until amended or repealed. *Id.*

A construction of Section 22(1) that allows the use of the User Fee Surplus for general purposes based on past theoretical shortfalls is contrary to the entire body of common law that defines lawful municipal "fees." The common law of Michigan, currently and historically, requires that fee amounts must be reasonably related to the cost of delivering service. This is true of pre-CCA and post-CCA.

For example, as early as 1914, this Court held that a license fee, for the registration, identification and regulation of motor vehicles, would not be upheld where the revenue derived was disproportionate to the cost of providing the service. *Vernor v Sec'y of State*, 179 Mich 157, 167; 146 NW 338 (1914). In *Vernor*, this Court took judicial notice of the unreasonableness of the fee at issue therein, stating:

> The expense of operating the department, including the furnishing of the lists of owners to the county clerks, will be so inconsiderable, compared with the amount collected, that we must take judicial notice that the great amount of surplus (probably more than half a million dollars) renders the imposition of the license fee or tax so wholly and palpably unreasonable as to invalidate the law as a license measure, and to stamp upon it the intention of imposing a tax instead of a license. The clear purpose of the Legislature in exacting so large an amount from the owners of automobiles was to produce a fund for

> highway purposes under the guise of regulation, which makes it a tax measure which clearly is not covered by the title of the act.

Vernor, 179 Mich at 169.

More recently, in *Merrelli v City of St Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959), this Court considered the amount of fees charged for building permits and found them to be invalid as a result of the amount of revenue derived from the permits being disproportionate to the cost of issuing the permits. *Id.* at 585. In *Merrelli*, this Court explained:

> At this point lies the fatal defect in the defendant's [City of St. Clair Shores'] course of action. We would not, of course, be construed as holding that only the direct costs (e.g., the salaries of inspectors) are chargeable to the new construction. The indirect costs, as well, of administering and enforcing the police regulation are recoverable, but they must in fact be such indirect costs, as distinguished from the costs of expanded government services, and they must be established by reasonably accurate accounting procedures and not, as is sometimes the case in the figures before us, by mere "guestimate" (the word is that of a witness) unsupported by other than speculation.

Id. at 588.

And, similarly in *Checker Cab Co v Twp of Romulus,* 371 Mich 232; 123 NW2d 772 (1963), this Court invalidated the township's taxicab licensing ordinance where the revenues derived therefrom "would equal or exceed its entire budget for both the police and ordinance enforcement departments, only a small portion of the time of which involves matters relating to regulation of the operation of taxicabs in the township." *Id.* at 237. This Court concluded:

> . . . the license fees charged are so much greater than reasonably necessary to reimburse the township for its costs of regulating the licensed business that the ordinance is in fact a revenue measure rather than a valid exercise of the police power and, for that reason, must be declared invalid. See *Vernor v Secretary of State,* 179 Mich 157; 146 NW 338; *Fletcher Oil Co v City of Bay City,* 247 Mich 572; 266 NW 248; *North Star Line, Inc v City of*

> *Grand Rapids,* 259 Mich 654; 244 NW 192; and *Merrelli v City of St Clair Shores,* 355 Mich 575; 96 NW2d 144.

Id. at 237-238.

The CCA was enacted in 1972 (effective January 1, 1973), at which time, the Legislature, building from the common law, codified within the CCA, the long-standing principle of "reasonable" municipal fees as it relates to the cost of providing or administering the service. The CCA did not amend, change or overrule this case law. Therefore, the common law cases preceding the enactment of the CCA remain good law today and, as the building block used by the Legislature to draft Section 22(1), provide useful insight into the proper interpretation of Section 22(1) as follows:

1. This Court can take judicial notice of an unreasonable fee;

2. Where fees are intended for a purpose other than defraying the expenses of providing the relevant service, they are unreasonable;

3. Where fee amounts are not supported by the accurate accounting, they are likely to be unreasonable; and

4. Where the amount collected is "great," in comparison to the expense of operations, the fee is "so wholly and palpably unreasonable as to invalidate the law as a license measure."

Vernor, 179 Mich at 169; *Merrelli*, 355 Mich at 588; *Checker Cab*, 371 Mich at 237-238. In sum, fees cannot be used as subterfuge for revenue-raising measures. *Merrelli*, 355 Mich at 588.

4. Use of the User Fee Surplus to Theoretically Offset Alleged Historical Shortfalls Violates the Purpose and Policy of Section 22(1) of the CCA.

A court must look to the object of a statute and the harm that it was designed to remedy and apply a reasonable construction that best accomplishes the purpose of the statute. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 392-393; 559 NW2d 98 (1996). The CCA,

as originally enacted in 1972, allowed local governments to exempt themselves from certain parts of the CCA such as the building code provisions and, in their place, adopt and amend any 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, Appendix, p 1a. As stated by this Court in its earlier opinion in this case:

> The CCA creates a state construction code that governs innumerable aspects related to the construction, use, and occupation of residential and commercial buildings and structures. The CCA and the construction code "apply throughout the state," and the CCA provides that, except as otherwise provided, the director [of the department of licensing and regulatory affairs] is responsible for administering and enforcing both the CCA and the construction code.

Mich Ass'n of Home Builders v City of Troy, 497 Mich 281, 285-286; 871 NW2d 1 (2015) (footnotes omitted).[8]

One of the concerns addressed by the 1999 amendments was the lack of uniformity in building code requirements and compliance costs created by the ability of local units of government to adopt their own building code. Senate Legislative Analysis, SB 463, June 16, 2000, p 1, Appendix 1a. Such uniformity, however, is impeded by the City's actions. The City charges fees

[8] Because the director of the department of licensing and regulatory affairs is primarily responsible for administering and enforcing the CCA, Section 22(1), allowing units of local government to establish, collect and retain fees for building department services, only as 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).

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 allegedly undercharged for, at a minimum, eight (8) years prior. Today's users did not agree to or approve their subsidizing of the City's earlier choices to not budget for a fully funded Building Department. Therefore, the fees paid by today's users which are not attributable to today's costs, are actually revenue generated by the City to make up for prior budget deficits. This practice violates Section 22(1) of the CCA and the Headlee Amendment of the 1963 Michigan Constitution. In addition, it is simply unfair and contrary to public policy to have today's residential builders and their customers paying a premium in the form of inflated prices for residential construction.

Code enforcement is an aspect of the state power delegated to qualified local units that cannot exceed the authority provided by statute. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115-16; 715 NW2d 28 (2006). And, local governments have no inherent powers and possess only those limited powers conferred by the Constitution and statute. *Hanselman v Killeen*, 419 Mich 168, 187; 351 NW2d 544 (1984). These maxims are important here because the City is given only limited powers under Section 22(1) because fees, unlike taxes, are not voter approved. Section 22(1) makes municipalities accountable and guards against fraud and "creative" accounting practices. As stated by the Court of Appeals dissent:

> To allow defendant's building department to run deficits by choice and then overcharge future users to make up for those deficits undermines the purpose of the statute, which is to ensure a direct and reasonable relationship between the acts and services performed by the department and the cost of providing those services to each individual served. Although the statute allows defendant to apply an incidental surplus to the costs of operating the building department,

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

COA Op, Dissent, pp 2 and 3, Appendix, pp 63a-64a.

B. The Builders Have a Private Cause of Action Against a Governmental Subdivision for Enforcement of the CCA, MCL 125.1508b(1).

The relevant legal standards in Michigan for determining whether a private cause exists against a governmental subdivision for enforcement of the CCA are as follows:

1. Generally, where a statute creates a right or duty not found in the common law, the remedies provided in the statute are exclusive. *General Aviation, Inc v Capital Region Airport Authority*, 224 Mich App 710, 715; 569 NW2d 883 (1997), lv denied, 458 Mich 864 (1998).

2. Courts may infer statutory remedies:

   a. if the remedies in the statute are plainly inadequate;

   - or -

   b. the act provides no adequate means of enforcement of its provisions. *Id.*

3. An implied, statutory private cause of action for declaratory and equitable relief may exist even though a statutory private cause of action for monetary damages does not exist. *Lash v City of Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007) (plaintiff could enforce the statute by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)(1)).

These three rules of law support the Builders' legal entitlement to a private cause of action for declaratory and equitable relief under the CCA.

1. Section 22(1) Creates Duties Found at Common Law and, therefore, Section 22(1) Remedies, to the Extent Any Exist, are Not Exclusive.

First, as discussed earlier, since at least 1914, there has been a 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; 266 NW 248 (1929); *Vernor v Sec'y of State*, 179 Mich 157; 146 NW 338 (1914). Accordingly, Section 22(1) does not create "a right or duty not found at common law." Therefore, the remedies provided in the CCA to the extent they exist at all, are not exclusive and the Builders may pursue their claims for declaratory and injunctive relief based generally on unreasonable fees and, specifically, on the provisions of Section 22(1).

2. An Implied Private Cause of Action Exists Under the CCA.

Second, a cause of action to enforce Section 22(1) should be inferred – the remedies to enforce Section 22 are plainly inadequate (non-existent actually) and the CCA provides no adequate means to enforce the provisions of Section 22(1). MCL 125.1508b(1), specifically cited by this Court in its June 20, 2018 Order directing supplemental briefs, provides:

> Except as otherwise provided in this section, the director [of the department of licensing and regulatory affairs] is responsible for administration and enforcement of this act and the code. A governmental subdivision may by ordinance assume responsibility for administration and enforcement of this act within its political boundary. A county ordinance adopted pursuant to this act shall be adopted by the county board of commissioners and shall be

> signed by the chairperson of the county board of commissioners and certified by the county clerk.

MCL 125.1508b(1). This section of the CCA establishes that the director of the department of licensing and regulatory affairs is primarily responsible for administering and enforcing the CCA and the Building Code. Governmental subdivisions may assume the responsibility of administering and enforcing the CCA and the Building Code if they are appropriately registered. MCL 125.1508b(1) further describes:

> 1. How a governmental subdivision registers to administer and enforce the act and the code (initially and after-the-fact);
>
> 2. How a governmental subdivision rescinds its election to administer and enforce the act and the code (initially and after-the-fact);
>
> 3. The enforcement mechanisms available to a governmental subdivision that has elected to administer and enforce the act and the code (initially and after-the-fact); for addressing violations of the code such as a municipal civil infraction; and
>
> 4. The responsibilities of the director to administer and enforce the act and code in those governmental subdivisions which have not elected to administer and enforce the act and code.

MCL 125.1508b(1).

None of these provisions provide for oversight of governmental subdivisions as they establish fees. None of these provisions provide any remedies and/or mechanisms for the enforcement of the fee provisions of the CCA against governmental subdivisions as they establish fees. And, as already ruled by this Court, neither the director nor the commission were given oversight and enforcement powers into the establishment of fees by the City. *Mich Ass'n of Home Builders v City of Troy,* 497 Mich at 288. Accordingly, absent judicial review via the filing

of a private cause of action, there exists no oversight for, or enforcement mechanism of, the fee provisions of Section 22(1) of the CCA.[9]

In sum, it simply cannot be the legislative intent that governmental subdivisions police themselves as to the establishment, amount and use of fees under Section 22(1) of the CCA. Rather, logic dictates the need for some type of third-party oversight and enforcement. In the absence of express third-party oversight and enforcement, logic further dictates that the Legislature must have intended to allow private actions to enforce the statutory fee requirements imposed on governmental subdivisions by Section 22(1) of the CCA.[10]

3. A Private Cause Exists for Declaratory and Equitable Relief.

Assuming but denying that a cause of action for monetary damages may not be inferred, Michigan law may, nonetheless, imply a private cause of action for declaratory and equitable relief. This Court has, on many occasions, found this to be the case.

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[9] By contrast, other provisions of the CCA, unrelated to fees established by governmental subdivisions, establish some oversight and/or enforcement methods. For example, Section 22(2) allows the director of the department of licensing and regulatory affairs to establish fees for the State Fund but only with the approval of the state construction code commission and after public hearing. Similarly, civil penalties with enforcement by prosecuting attorneys and the attorney general exist within the CCA for unlawful conduct by building inspectors and unlicensed residential builders. MCL 125.1523 and MCL 125.1523a.

[10] This conclusion correlates with a recent, albeit unpublished, opinion of the Court of Appeals in which the Court of Appeals, relying on this Court's decision in *Tkachik v Mandeville*, 487 Mich 38; 790 NW2d 260 (2010), held that the plaintiff therein properly brought both a Headlee Amendment claim and an unjust enrichment claim based on the defendant township's violation of Section 22(1) of the CCA. *Logan v Charter Twp of West Bloomfield*, unpublished opinion per curiam of the Court of Appeals, issued Jan 11, 2018 (Docket No. 333452); 2018 WL 383751, Appendix, p 66a. An Application for Leave to Appeal, Case No. 157493, the Court of Appeals decision in *Logan* was filed on April 4, 2018 and is currently pending before this Court.

For example, in *Lash*, *supra*, the plaintiff sued defendant Traverse City for monetary damages, alleging that the city denied him employment because he did not meet the city's residency requirement and that the residency requirement violated MCL 15.602(2). *Lash,* 479 Mich at 182-183. This Court held that the city's residency requirement violated MCL 15.602(2); however, this Court also held that nothing in MCL 15.602(2) permitted the plaintiff to maintain a private cause of action for damages against the city. *Id.* at 183. In response to the plaintiff's contention that a private cause of action for damages was the only mechanism to enforce MCL 15.602(2), this Court opined that the plaintiff could have enforced the statute by seeking injunctive relief under MCR 3.310 or declaratory relief under MCR 2.605(A)(1), *Id.* at 196 – the difference being that a claim for money damages could be contrary to governmental immunity whereas claims for declaratory and injunctive relief are not. *Id.* at 194.

In fact, *Lash* is one of the many cases consistently employing the principle that courts may provide injunctive and declaratory 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). In *South Haven*, this Court 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. See also, *Thomson v Dearborn*, 347 Mich 365; 79 NW2d 841 (1956) (permitting a plaintiff to seek an injunction against the misappropriation of funds); *City of Jackson v Comm'r of Revenue*, 316 Mich 694, 719; 26 NW2d 569 (1947) (a provision specifying that the distribution of

levied funds among units of local government was "self-executing," and therefore could be enforced by mandamus).

The rationale for this distinction between monetary and equitable claims in terms of what remedies a statute might allow was discussed by this Court in *Tkachik v Mandeville*, 487 Mich 38; 790 NW2d 260 (2010):

> While legislative action that provides an adequate remedy by statute precludes equitable relief, the *absence* of such action does not. This is so because "[e]very equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate." 30A CJS, Equity, §93, at 289 (1992). Equity allows "complete justice" to be done in a case by "adapt[ing] its judgment[s] to the special circumstances of the case." 27A Am Jur 2d, Equity, §2, at 520-521.

Id. at 46. In keeping with the well-established jurisprudence from this Court's case law, the Builders may pursue claims for declaratory and equitable relief for violations of Section 22(1) of the CCA.

4. The Case Law Relied on by the City Does Not Apply or Actually Supports the Builders' Position.

Finally, the case law cited previously by the City for the proposition that the CCA does not create a private right of action either does not apply or actually supports the Builders' position. For example, the City relies on *Lash, supra,* for the proposition that no private cause of action exists under the CCA. However, as previously discussed, this Court in *Lash* held that although 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, "[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 194 and 196. Thus, the City's own case law supports the Builders' claims for injunctive and declaratory relief.

Similarly, the City's past 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(1) 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.

5. Conclusion

In conclusion, the Builders have a private cause of action for declaratory and equitable relief to enforce the fee limitations placed on governmental subdivisions by Section 22(1) of the CCA. Statutory remedies for Section 22(1) do not exist. Even if remedies did exist, they would not be exclusive. And, pursuant to this Court's precedent in *Lash*, declaratory and equitable claims may be pursued even if claims for money damages may not.

C. The Builders Have Standing

Standing is a legal term which measures the existence of a party's interest in the outcome of litigation. In general, to have standing, a party's interest must assure sincere and

vigorous advocacy. *Mich License Beverage Ass'n v Behnan Hall, Inc,* 82 Mich App 319, 324; 266 NW2d 808 (1978).

The Builders are statewide associations whose members develop and build single and multi-family homes throughout Michigan. The Builders are associations comprised of taxpayers – many of whom have paid the specific "fees" at issue in this lawsuit. One of their primary goals is to provide the opportunity for all Michigan residents to own or rent affordable housing. To promote this goal and others, they oppose laws and court decisions which delay, restrict or otherwise impede the ability of their members to construct affordable housing in Michigan. They do so through litigation filed on behalf of their members. The Builders' interest in this 10-year old lawsuit is sincere and vigorous.

1. The Builders Have Standing to File Suit Pursuant to the Headlee Amendment, Const 1963, art 9, §32.

Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not injured in a manner that is different from the public at large. *Inglis v Pub Sch Employees Retirement Bd,* 374 Mich 10; 131 NW2d 54 (1964). Therefore, under general standing principles, a taxpayer has no standing to challenge the expenditure of public funds where the threatened injury to him is no different than that to taxpayers generally. *Waterford Sch Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980).

Section 32 provides:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

Const 1963, art 9, §32. Accordingly, the Headlee Amendment to the Michigan Constitution, at §32, eases the general legal limitations on taxpayer suits. *Waterford,* 98 Mich app at 663. That is, as an exception to general standing requirements, the "plain language of [§]32 indicates an intent to provide standing to taxpayers to enforce the substantive provisions of the amendment." *Id.* at 662. As stated by this Court:

> And, relevant to the specific constitutional provision at issue here, the Headlee Amendment, we have noted that in enacting this amendment the voters "were ... concerned with ensuring control of local funding and taxation by the people most affected, the local taxpayers. The Headlee Amendment is the voters' effort to link funding, taxes, and control." *Durant v State Bd of Ed,* 424 Mich 364, 383; 381 NW2d 662 (1985). Specifically relevant to the case at bar, we held that §32 is an explicit grant of standing to taxpayers to bring suits under the Headlee Amendment. *Id.* at 394; 381 NW2d 662.

MaComb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch, 455 Mich 1, 7; 564 NW2d 457 (1997) (footnotes omitted).

Under Michigan case law, both persons and entities (in a representative capacity) have standing under §32 to bring claims under the Headlee Amendment. For example, in *Saginaw Co v Buena Vista Sch Dist*, 196 Mich App 363; 493 NW2d 437 (1992), the county sued the school district under §31 of the Headlee Amendment, after the school district raised its property tax rate without approval of a majority of qualified electors in the district. *Id.* at 364. The Court of Appeals rejected the school district's attack on the county's standing under Headlee, stating: "We are satisfied that plaintiff has sufficient interest in the outcome to have standing to bring this action. Plaintiff alleges that defendant's action will result in its losing over a million dollars in tax revenues." *Id.* at 366 (citation omitted).

Similarly, in *Wayne Co Chief Executive v Governor*, 230 Mich App 258; 583 NW2d 512 (1998), the county sued the state, alleging that implementation of certain legislative acts affecting probate courts caused it to incur additional administrative and operating expenses in violation of §29 of the Headlee Amendment, which requires state financing of necessary increased costs of activities or services required of local government by state law. *Id.* at 262-263. Again, the Court of Appeals found that "because plaintiffs are effectively representing the interests of taxpayers, §32 properly grants plaintiffs standing to bring this suit pursuant to §29 of the Headlee Amendment." *Id.* at 271 (citations omitted).

Likewise, in *Taxpayers Allied for Constitutional Taxation v Wayne Co,* 203 Mich App 537, 542; 513 NW2d 202 (1994), rev'd on other grounds 450 Mich 119; 537 NW2d 596 (1995), the Court of Appeals held that the plaintiff therein, an association of taxpayers, had standing under §32 of the Headlee Amendment to challenge the county's increase of an existing tax without voter approval under §31 of the Headlee Amendment. And, in *Oakland Co v Michigan,* 456 Mich 144, 167; 566 NW2d 616 (1997) (plurality opinion), this Court stated:

> As for standing, we believe that local units of government have standing to sue on behalf of the public they represent under §29 of Headlee. *Waterford School Dist v State Bd of Ed*, 98 Mich App 658; 296 NW2d 328 (1980). Furthermore, the reasoning of Durant with respect to attorney fees suggests that all entities and persons bringing a claim for relief under §29 should ordinarily be treated similarly.

Id. at 167 (emphasis supplied).[11] The Builders have standing to bring this claim under the Headlee Amendment.

2. The Builders Have Standing Under Michigan's General Standing Laws.

As discussed, §32 of the Headlee Amendment is "in addition" to the general rules of law regarding standing. Stated otherwise, §32 is not the exclusive means by which a party can have standing to bring a claim under the Headlee Amendment.

Prior to July 17, 2001, standing in Michigan was a limited, prudential doctrine intended to "ensure sincere and vigorous advocacy" by parties. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 359; 792 NW2d 686 (2010). As further explained by this Court in *Lansing Schools*:

> If a party had a cause of action under law, then standing was not an issue. But where a cause of action was not provided at law, the Court, in its discretion, would consider whether a litigant had standing based on a special injury or right or substantial interest that would be detrimentally affected in a manner different from the

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[11] The reasoning in *Durant v Dep't of Ed* (*On Second Remand*), 186 Mich App 83, 118; 463 NW2d 461 (1990), referenced by this Court in the *Oakland Co* case was:

> [L]itigation brought pursuant to §32 can be complex and protracted. The financial outlay needed for maintaining a suit of this nature can be extremely burdensome and inhibitive. Attorney fees compose a substantial portion of such outlays. Without the ability to recoup all costs of maintaining an action to enforce the Headlee Amendment, including reasonable attorney fees, the average taxpayer could not withstand the financial obligation incurred as a result of exercising that taxpayer's right to bring suit. Accordingly, we conclude that, in ratifying the Headlee Amendment, "the great mass of people themselves" intended the term "cost" to include reasonable attorney fees.

Id. at 118. This rationale was subsequently expressly adopted by this Court in *MaComb Co*, 455 Mich at 7.

> citizenry at large, or because, in the context of a statutory scheme, the Legislature had intended to confer standing on the litigant. It was not necessary to address the merits of the case in order to address standing.

Id.

On July 17, 2001, this Court decided the case of *Lee v MaComb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), in which Michigan adopted a constitutional standard developed under federal law. Under the then-new constitutional standard, a litigant had to prove three separate elements to have standing as follows:

> First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Id. at 739, quoting *Lujan v Defenders of Wildlife,* 504 US 555, 560-561; 112 S Ct 2130, 119 L Ed 2d 351 (1992).

The constitutional standard for standing remained the law in Michigan until July 31, 2010, at which time this Court, in *Lansing Schools*, stated and held:

> [W]e overrule *Lee* and its progeny and hold that Michigan standing jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan's long-standing historical approach to standing.

Lansing Schools, 487 Mich at 352-353. Under Michigan's current standing law, the Builders have standing for at least three reasons.

First, the purpose of the standing doctrine is once again to assess whether a party's interest in the litigation is sufficient to ensure sincere and vigorous advocacy. And, standing exists as a matter of law where a statutory scheme (such as the Headlee Amendment) confers standing or a cause of action is provided by law. *Lansing Schools,* 487 Mich at 359 ("If a party had a cause of action under law, then standing was not an issue."); See also, *Trademark Props of Mich, LLC v Federal Nat'l Mtg Ass'n,* 308 Mich App 132, 136; 863 NW2d 344 (2014) ("When a cause of action exists under law, or when the Legislature has expressly conferred standing, those circumstances are sufficient to establish standing. *Lansing Sch*, 487 Mich at 357; 792 NW2d 686.").

In either case, the Builders' sincerity and vigor in their advocacy of this 10-year old lawsuit is self-evident. In fact, litigation of this kind is a large part of the Builders' express mission statement. The Builders bring lawsuits like this one on behalf of their members to address and correct issues too costly and/or time consuming for their individual members. Advocacy on behalf of their members is an important and constant undertaking of the Builders. Moreover, there is a statutory scheme, the Headlee Amendment, which provides a cause of action and, therefore, standing, for the claims raised here. Accordingly, the Builders have standing.

Second, under Michigan law, it is sufficient to establish standing to seek a declaratory judgment when a litigant meets the requirements of the rule governing declaratory judgments, MCR 2.605. *Lansing Schools*, 487 Mich at 372. See also, *UAW v Central Mich Univ Trustees,* 295 Mich App 486, 495; 815 NW2d 132 (2012) ("MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness.").

Here, the Builders' ability to seek declaratory relief has never been questioned. An "actual controversy," as required by MCR 2.605 exists – the City wants to charge additional fees for Building Department services to recoup alleged prior shortfalls and the Builders and their members who pay the exorbitant fees maintain that the City's practice violates the CCA. The essential requirement of an "actual controversy" under the rule is that the plaintiff pleads and proves facts that demonstrate an "adverse interest necessitating the sharpening of the issues raised." *Id.* That requirement is met here and, again, the Builders have standing.

Third, as a general proposition, associations have standing to represent their members. The Michigan Court of Appeals has stated:

> Further, our courts have held that a voluntary association whose "sole purpose is to represent the interest of its members, many of whom are riparian land owners," may bring suit to effectuate that purpose, regardless of whether the association itself owns any land.

Civic Ass'n of Hammond Lake v Hammond Lake Estates No. 3 Lots 126-135, 271 Mich App 130, 135-146; 721 NW2d 801 (2006), quoting *White Lake Improvement Ass'n v Whitehall*, 22 Mich App 262, 272-274; 177 NW2d 473 (1970). See also, *In re Filing Requirements,* 210 Mich App 681, 691–692; 534 NW2d 234 (1995), in which the Court of Appeals held that plaintiff trade associations, representing small telephone companies and local exchange carriers had standing based on their members' interest in the issues involved therein.

In addition, in several cases involving nonprofit association or organization plaintiffs, this Court has stated:

> A nonprofit organization has standing to bring suit in the interest of its members if its members would have standing as individual plaintiffs.

See, for example, *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004) and *Mich Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007), both overruled by *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). These cases, although technically overruled, may still nonetheless be instructive on the standing issue raised here. Both the *Nat'l Wildlife* and *Mich Citizens* opinions were overruled as to the test (constitutional federal versus prudential Michigan) to be applied to determine questions of standing. Arguably, if associations had standing in *Nat'l Wildlife* and *Mich Citizens* under the more arduous, three-factor constitutional test, they would have standing under the less-stringent prudential approach of today. And, the logic for affording associations standing to represent their members, as first articulated in 1970 (and in a case relying on the prudential Michigan standard), remains applicable today.

> No constructive purpose would be served by requiring the members of the plaintiff association who are riparian owners to maintain this action individually and thereby require that they seek in some other fashion financial and other support from the other affected landowners. Additionally, allowing the landowners to associate together for this purpose may avoid a multiplicity of suits; the difficulties that are likely to be encountered where there are a large number of plaintiffs are all too familiar to anyone who has had experience in such litigation. The most expedient way for the riparian owners to obtain a determination on the merits is to allow them to combine and join together for this purpose with others of a like interest under a single banner both before and at the time of suit: 'The only practical judicial policy when people pool their capital, their interests or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.'

White Lake Improvement Ass'n, 22 Mich App at 272-273. See also, *Muskegon Bldg and Constr Trades v Muskegon Area Intermediate Sch Dist*, 130 Mich App 420; 343 NW2d 579 (1984) (also a case resolved under the prudential Michigan standard), in which the Court of Appeals stated:

> In the case *sub judice,* it is clear that plaintiff was organized as a representative association to enhance the political and economic power of its trade organization members and, ultimately, the individual members of these trade organizations. Clearly, as in *White Lake,* plaintiff here was organized to establish and protect the rights and interests of its members. Plaintiff has a direct interest in defendant's compliance with the prevailing wage act since its existence and health is dependent upon the existence and health of its member organizations, which organizations will wither or die if they are unable to effectively protect their members.

Id. at 427-428 (footnote omitted).

3. Conclusion

The Builders have standing to bring the Headlee Amendment claim. Standing exists both under §32 of the Headlee Amendment and Michigan's current (and prior) general standards for standing.

D. The City's Fees Violate The Headlee Amendment

Since the time of filing the Application, there have been no published appellate opinions located by the Builders which have addressed the merits of a §31 Headlee Amendment Claim. Accordingly, as directed by this Court, the Builders do not, herein, submit a restatement of their Application, but do incorporate by reference, the arguments made and authority cited in their Application and provide the following summary.

The building fees are not truly fees but, rather, a disguised tax. The building fees, even if truly used to pay back alleged historical loans/shortfalls from the City's general fund for the

operation of the Building Department, fail to pass muster under each of the three criteria articulated by this Court in *Bolt v City of Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998).[12]

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

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

Bolt, 459 Mich at 168. The Court of Appeals erred by affirming the Circuit Court's grant of summary disposition to the City on the Builders' Headlee Amendment claim. The Court of Appeals majority Opinion should be reversed.

IV. 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

[12] 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. *Bolt*, 459 Mich at 161.

entry of an order granting summary disposition in favor of the Builders or, alternatively, grant the Builders' Application for Leave to Appeal.

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