STATE OF MICHIGAN
MICHIGAN SUPREME COURT

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

Plaintiffs-Appellants,

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

v.

CITY OF TROY, a Michigan Municipal Corporation,

Defendant-Appellee.
_____/

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DEFENDANT-APPELLEE CITY OF TROY'S SUPPLEMENTAL BRIEF IN SUPPORT OF ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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SUPPLEMENTAL STATEMENT OF QUESTIONS INVOLVED

Defendant-Appellee accepts Plaintiffs-Appellants supplemental statement of questions involved.

INTRODUCTION

On June 20, 2018 this Court entered an order directing the Clerk to schedule oral argument on whether to grant Plaintiffs-Appellants' (hereafter "Plaintiffs") application for leave to appeal. The Court also ordered the parties to file supplemental briefs addressing four specific issues. Each of these issues is discussed below.

COUNTER-STATEMENT OF FACTS

Defendant-Appellee City of the Troy (hereafter "City") incorporates by reference its counter-statement of facts set forth in its answer to the application for leave to appeal. Apx 1b – 21b.

ARGUMENT

I. THE CITY'S DECISION TO APPLY A FEE SURPLUS UNDER THE CONSTRUCTION CODE ACT, MCL 125.1522, TO OFFSET SHORTFALLS FROM PREVIOUS YEARS COMPORTS WITH THE STATUTE.

The Court has asked the parties to file a supplemental briefing, first addressing:

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 Section 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. June 20, 2018 Supreme Court Order.

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

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

MCL 125.1522 (1) places three limitations on a municipality's authority to establish construction code fees. The first statutory limitation requires that the fees be reasonable. Next, the statute requires that the fees be reasonably related to the cost of the service. Third, the fees shall only be used for the operation of the enforcing agency. The City has satisfied these three prongs. Any unexpected City surplus, where the annual amount received for CCA operations exceeds CCA expenditures, has been applied to reduce the shortfalls in the CCA account from previous years, and there is a detailed accounting of the City's general fund to verify this fact. Although Plaintiffs challenge that any such transfer on the basis that it is transferred to the City's general fund account, this is not contrary to the statute, and Plaintiffs fail to provide any cite to support their accusation. The City, similar to many other municipalities, uses its general fund as its primary bank account, but creates many separate sub-accounts within the general fund to accommodate use restrictions. This detailed accounting, with all the sub-accounts, is viewable in the City's annual budget document and all the required financial reporting. For these sub-accounts, there is no co-mingling, which allows for compliance with any use restrictions. The City's CCA account is a separate sub-account, and the money deposited and expended is tracked in detail. The segregated CCA financial reporting is recorded in the City's CAFR. The State of Michigan requires municipalities to segregate and annually report the CCA account balances, but it does not preclude the use of a municipality's general fund, and therefore Plaintiffs' arguments should be rejected.

Plaintiffs next argue that it is somehow inappropriate for the City to apply any current year CCA surpluses to offset shortfalls based on previous years of CCA

enforcement. In 2000, the State of Michigan started requiring municipalities to keep a historical and separate record of CCA activities, and to note the current amounts in the CCA accounts. The City has complied with this requirement. Contrary to Plaintiffs' assertions, the Troy City Council has not deliberately increased its building permit fees to offset shortfalls from past years. Instead, the recent surpluses have been a by-product of the more efficient contract with SafeBuilt, as well as a profitable economic period, and these surplus amounts have been applied in the segregated CCA account to offset past shortfalls.

The Troy City Council – the City's legislative body – is charged with the duty to estimate how much money will be needed on an annual basis to perform all functions required under the CCA, and then on this basis, establish fees. Council is vested with discretion in this function, as long as the fees are reasonably related to the cost of enforcing the CCA. The City has benefitted from the current productive economy, and there has admittedly been a surplus for the past few years, which has allowed the City to maintain the same building permit fees, and there have been no increases for the past several years. However, the City's receipt of unexpected annual surpluses is not an abuse of City Council's discretion. Furthermore, it is appropriate and good stewardship for City Council to consider past expenses and costs and the overall financial picture when determining municipal rates to be charged for its services. *Trahey v Inkster,* 311 Mich App 582, 597; 876 NW2d 582 (2015). It is undisputed that Michigan's economy has been cyclical, with good years and lean years, and most of the CCA enforcement costs are personnel related, which are difficult to adjust on an immediate basis. Section 22 of the CCA does not preclude a historic review in the

exercise of a municipality's discretion where the focus is limited to CCA activities, both past and future. Rather than deferring to the City Council's discretion in setting fees, Plaintiffs attempt to challenge the City's formula as unreasonable on its face. They argue that the contract the City entered into with its private contractor, which provides the City with 25% of all building permit fees, is somehow a violation of the CCA. They do not cite any authority or provide any evidence to support this assertion, and they fail to account for the City's annual CCA expenditures which fall outside the contract, and are reimbursed through the City's receipt of the 25%. This includes but is not limited to the majority of the salary and benefits of the City employee who serves as the Building Official under the terms of the City's agreement with SafeBuilt, as well as many other City CCA services that are required to be performed by City employees, not by SafeBuilt.

As noted in the City's initial answer to the application for leave to appeal, the use of the term "reasonable" or "reasonably" in a statute entails the balancing of factors. *Coblentz v Novi,* 475 Mich 558, 575; 719 NW2d 73 (2006), *Lease Acceptance Corp v Adams,* 272 Mich App 209, 222; 724 NW2d 724 (2006). In cases involving the reasonableness of fees, the determination "*must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case*." *Merrelli v City of St. Clair Shores,* 355 Mich 575, 583 - 584; 96 NW2d 144 (1959), quoting from *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338, 341 (1914). In this case, Plaintiffs have not satisfied their burden to demonstrate that City Council abused its discretion when setting the building permit fees.

Plaintiffs incorrectly argue that the City arbitrarily increased its fees for the sole purpose of increasing revenue to provide for other City services. The Troy City Council has not increased its current permit fees since 2009. On February 18, 2008, the Troy City Council was notified that the revenue generated by building permit fees did not cover the expenditures of the building department. City Council subsequently approved building permit fee increases, which were again adjusted in 2009. This public records documentation was supplied to Plaintiffs, and is also available on line, as well as attached to the Appendix. See Apx 46b – 52 b. In this 2008 memorandum, City Council was advised that even with an increase in building department fees, there would still be a shortfall for CCA operations. In time, it was hoped that the revenues would balance out with expenditures. This is further evidence that the City Council properly exercised its discretion in setting fees that did not generate a profit that could be used for unrelated general fund activities. City Council's modest building permit increase was designed to address only CCA activities, and was reasonable, even though there would still be a shortfall. Since the historic shortfall was attributed to the operation of the building department (enforcing agency), the fees established were intended to bear a reasonable relation to the cost of the acts and service provided by the building department. In the first few years after the 2008 fee increase, the CCA expenditures continued to exceed the building permit revenues through 2011. See Apx 66b, 68b, 69b. In 2012, for the first time in several years, the yearly building permit fees actually exceeded the CCA enforcement costs, resulting in a fee surplus. See Apx 71b. The City opted to keep the building fees consistent, especially since Troy couldn't predict that the positive economic conditions would continue, leading to significant

building demand. When a surplus was actually achieved for subsequent years, the City reasonably chose to apply that surplus to reduce the City's significant cumulative shortfall that had accumulated in the prior years since 2000 for the multiple years when the costs of CCA enforcement exceeded revenues. These past costs were incurred in the "operation of the enforcing agency," for which the City separately accounted in its financial statements. The application of the fee surplus to reduce the shortfalls of previous years was in accordance with the provisions of Section 22 of the CCA.

Plaintiffs argue that the City may only consider "current" operations in the setting of fees. They have not proffered any evidence that the City, in its discretion, did anything but consider "current" operations in setting the fees. However, Plaintiffs also declare that current fee payers are intentionally being overcharged to offset a shortfall created by prior fee payers being undercharged, which is a complete mischaracterization. Although there were significant yearly shortfalls incurred prior to the City's contract with SafeBuilt, the City was concerned that a substantial increase to its building permit fees would discourage new development, and this would ultimately result in a downward spiral. Thus, the City did not undercharge for its permit fees, but instead, reasonably determined the established fees at the time were appropriate and in the best interest of the City and its residents. Contrary to Plaintiffs' assertions, the State statute vests discretion with the City Council, and there is no mandate to set fees that exactly match the expenditures, especially since the fee setting process can only be a best estimate of what the future revenue and expenses will be in the coming year. Plaintiffs are incorrect in their interpretation of Section 22 of the CCA, since that construction would have required the City to substantially increase its fees in economic

downturn years. Presumably, Plaintiffs' members were paying for City building permit fees during the shortfall years, and it is doubtful they would have appreciated a large increase for permit fees at that time, or felt that they were being undercharged. Additionally, a substantial increase in the permit fee may have proportionately reduced the number of permit applications, resulting in less revenue. However, the enforcement expenditures, which are mostly personnel costs, would have remained constant. Also, if the Plaintiff's restricted reading of the statute were correct, then there would need to be quarterly fee reviews to account for any change in the economy or building environment or the number of permit applications. The mere fact the current economic situation has resulted in a fee surplus does not mean the current individual fee payers are being overcharged. Rather, the current fees, which have not been increased since before the City's contract with SafeBuilt, are reasonable based on the particular circumstances that exist in the City of Troy.

Plaintiffs also contend that depositing the surplus into the City's general fund "is not for the purpose of 'the operation of the building department'" They claim when the City deposits money in the general fund, the fees can be used for "any purposes the City chooses." This accusation ignores the financial information that was provided to Plaintiffs during discovery. Plaintiffs were provided with copies of excerpts from the City's annual Comprehensive Annual Reports (CAFR's). See Apx 53b – 76b. Plaintiffs were also allowed to take the deposition of the City's Financial Services Director, Thomas Darling. Apx 77b – 207b. As explained by Mr. Darling, all revenues are deposited into the general fund, whether restricted or not. Darling Dep Tr 105, Apx 182b. The City separately tracks and accounts for different streams of revenue and

expenditures, and especially for CCA costs and expenses, which are annually recorded in the City's CAFR document. Darling Dep Tr 105, Apx 182b. For example, the CAFR for the year ending June 30, 2013 shows that the City's cumulative shortfall as of July 1, 2012 was $6,437,733. Apx 74b. The building permit revenue for that year was $2,401,357, while the total construction code expenses were $1,912,435. Apx 74b. Accordingly, for that year, the surplus was $488,922. As shown by the CAFR, that surplus was applied against the cumulative CCA shortfall, resulting in a reduction of the shortfall to $5,948,811 as of June 30, 2013. Although the money was deposited into the general fund, the CAFR clearly indicates the surplus was applied to the costs of the operation of the building department in compliance with Section 22 of the CCA. Therefore, depositing the surplus into the general fund does not violate the provisions of the statute because the surplus is used to pay the costs of the operation of the building department. This money was not used for other general fund purposes or City programs, and could not be used without major discrepancies and financial repercussions.

In their supplemental brief, Plaintiffs offer a comparison of subsection 2 of Section 22, MCL 125.1522(2), with subsection 1, MCL 125.1522 (1). Subsection 2 requires the director of the Department of Licensing and Regulatory Affairs to establish fees to be charged by the Construction Code Commission for services performed by the commission. That section also states that that if there is a surplus, the state treasurer may invest the surplus into the state construction code fund. Plaintiffs contend that since this provision expressly allows for a surplus, and authorizes any surplus to be used for something other than the operation of the commission, the absence of similar

express language in subsection 1 means that the legislature did not intend municipalities to have similar powers. This argument is meritless.

If the City receives a surplus of CCA revenue over expenditures, those amounts are required to pay the costs of the operation of the building department. Thus, whether subsection 2 of Section 22 allows a State surplus to be used for some other purpose is not even relevant to the issue in this case. Second, the fact the legislature included specific duties in subsection 2 that were not included in subsection 1 reveals, contrary to Plaintiffs argument, that the legislative intent was to provide local units of government broad discretion in deciding what constitutes "operation of the enforcing agency" when establishing fees and how any fee surplus may be applied. Since statutory provisions relating to municipal concerns must be construed in the City's favor, Const. 1963, Art. 7, § 34, Section 22 (1) must be read as giving each municipality the discretion to decide how best to meet the requirements of the statute based on the particular circumstances of the community.

In their supplemental brief, Plaintiffs reiterate the argument made in their application for leave to appeal that other provisions of MCL 125.1522 require the Court to conclude that "operation of the enforcing agency" only applies to the current CCA enforcement operations. They argue that if all the provisions of Section 22 are read in harmony, it shows that "operation of the enforcing agency" only refers to present activities. As determined by the Court of Appeals:

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

> *temporal constraint, such as 'currently performed,' 'to be performed,' or 'previously performed.'"* COA Op, p 4.

As noted in the City's initial answer to the application for leave to appeal, Plaintiffs' argument is not persuasive because there is nothing in the context of the statute that would allow one to reasonably conclude the establishment of fees can only be related to current activities.

Plaintiffs also claim the City's practice violates the common law upon which Section 22(1) is based. This argument is flawed. Initially, the only common law case cited by Plaintiffs involving building permit fees is the *Merrelli* case. In *Merrelli,* the City amended its ordinances to increase the actual amount of its fees. *Id.,* 585. The result was that the total fees from building permits had increased from $180,223 in 1954 to $514,109 in 1955. *Id.* There was no evidence of a corresponding increase in the expense of regulation. *Id.* Moreover, there was no claim in *Merrelli* that the City's building division had been operating at a loss in previous years. The Court determined the increased fees were improper because they were disproportionate to the costs of the administration and enforcement of the building code. *Id.,* 586-587. The Court found the City was using the increased revenue to pay for unrelated City expenses that had nothing to do with enforcement of the building code. *Id.,* 586. The Court noted:

> *"The burden of additional revenue must of course, be carried, for fire, and police, and sanitation, but it cannot be loaded onto the administration and enforcement of the building code." Id.,* 586.

In contrast, any fee surplus Troy received was not used for any purpose other than the operation of the building department. As demonstrated by the CAFR's, all the surplus is applied towards costs related to the operation of the building department.

There is no evidence the City is using the surplus for any other purpose such as the costs of operation the police and fire departments. Accordingly, the Plaintiffs reliance on common law cases is misplaced.

There is, however, a principle derived from common law that is applicable to the present case. The *Merrelli* Court, citing *Vernor v Secretary of State,* 179 Mich 157, 167-170; 146 NW 338 (1914) explained:

> "*It is true that it has been held that what is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable unless the contrary appears upon the face of the law itself, or is established by proper evidence." Merrelli,* 583-584.

In this case, the City of Troy properly exercised its discretion in establishing its permit fees, and is entitled to a presumption of validity. The City's decision to use fee surplus to offset the cumulative shortfall from past operations of the building department is deemed reasonable, and Plaintiffs have failed to present any evidence to the contrary.

Similar to the argument previously raised in Plaintiffs application for leave to appeal, they state in the supplemental brief that the City's actions impede the purpose and policy of MCL 125.1522 (1) requiring statewide uniformity. However, the supplemental brief fails to specifically explain how the City's action impedes such uniformity. Moreover, the uniformity mandated by the statute only requires that the provisions relating to the actual construction of buildings and structures be consistent from one municipality to another. The vesting of discretion with the individual local legislative body to set the fees evidences a legislative expected non-uniformity for Section 22 (MCL 125.1522). Had the legislature wanted uniformity, the fees would have

been set by the State. Instead, the statute allows each local unit of government to determine the appropriate amount to charge for its building permits and carry out their responsibilities under the CCA based on the unique circumstances of the community.

Plaintiffs also contend that requiring today's customers to pay "inflated prices" for services the City "undercharged" for eight years prior violates the purpose and policy of MCL 125.1522 (1). They cite no authority in support of this argument other than the Court of Appeal dissent, which also fails to cite any authority. Additionally, Plaintiffs' claim that the current customers are paying "inflated" charges is disingenuous, since the City's permit fees have not been increased since 2009 and remain among the lowest permit fees charged in the State.

Plaintiffs continue to rely on the cases *City of Taylor v Detroit Edison Co*, 475 Mich; 715 NW2d 28 (2006) and *Hanselman v Killeen,* 419 Mich 168; 351 NW2d 28 (2006) for the proposition that local governments cannot exceed the authority provided by statute. As discussed in the City's answer to the application for leave to appeal, neither of these cases support Plaintiffs argument because MCL 125.1522 (1) specifically grants local units of government, such as the City of Troy, the authority to establish CCA fees. As previously noted, this statutory authority must be construed in the City's favor. Const. 1963, Art. 7, § 34. Doing so makes it clear that local units of government have the discretion to set reasonable building permit fees (CCA fees), and to determine the best way to use those fees to satisfy its enforcement obligations under the CCA. Therefore, the City's use of fee surplus to pay for shortfalls in previous years by transfer of the surplus to the general fund does not violate the constraints of Section 22. The City's fees are reasonable, bear a reasonable relation to the cost of acts and

services provided by the enforcing agency, and are used only for the operation of the enforcing agency.

II. PLAINTIFFS-APPELLANTS DO NOT HAVE A PRIVATE CAUSE OF ACTION AGAINST A GOVERNMENTAL SUBDIVISION FOR ENFORCEMENT OF THE CCA, MCL 125.1508b(1)

Even if Plaintiffs were able to overcome their burden to establish a violation of the Construction Code Act under MCL 125.1522, Plaintiffs are precluded from further action, since there is no express or implied private cause of action under the CCA.

Section 8b of the CCA, MCL 125.1508 b (1) contains the only provision regarding enforcement of the statute. It states:

> *"Except as otherwise provided in this section, the director is responsible for administration and enforcement of this act and code."*

This statutory provision vests only the Director of the Licensing and Regulatory Affairs with enforcement powers. There are no explicit provisions granting a private cause of action. A cardinal rule of statutory instruction is that courts may not speculate as to the probable intent of the Legislature beyond the words employed in the statute, and when the language of the statute is clear and unambiguous, the statute must be applied and interpreted as written. *Forster v Delton School District,* 176 Mich App 582 (1989). The Legislature did not expressly authorize a private cause of action, and in contrast, made it clear that only the Director is empowered to enforce the CCA. Therefore, Plaintiffs civil action is precluded.

Plaintiffs cite *General Aviation, Inc v Capital Region Airport Authority,* 224 Mich App 710, 715; 569 NW2d 883 (1979), for the proposition that they have a private cause of action. Plaintiffs argue that the failure to include the express right to bring a private cause of action in the Construction Code Act statute is not fatal, since the Construction

Code Act must be supplemented by common law. In order to prevail in this argument, Plaintiffs first must persuade this Court that the Construction Code Act is merely a recitation of the common law, rather than a comprehensive legislative enactment that imposes duties and rights beyond what is found in the common law. Although Plaintiffs cite a court challenge to the reasonableness of a fee prior to the enactment of the CCA, they have not established that governmental subdivisions were subject to common law duties comparable to those now imposed by MCL 125.1522 (1). Plaintiffs have not identified a common law counterpart to MCL 125.1522 (1), and they have not proven there was a preserved common law right to an independent cause of action. As a result, the remedies set forth in the statute (CCA) are deemed exclusive, and Plaintiffs cannot supplant the statutory limitations with common law. Since the CCA does not expressly authorize a private cause of action, the Plaintiffs are precluded from pursuing one to enforce MCL 125.1522 (1).

Plaintiffs next claim that there is an implied cause of action, because the remedies provided in the statute are inadequate and there are no adequate means to enforce the provisions of Section 22(1). However, Section 22(1) as it pertains to the duties of a legislative body of a governmental subdivision is not the type of provision for which a remedy is needed. That section requires the legislative body to exercise its discretion and establish reasonable fees reasonably related to the costs of services provided by the enforcing agency. A cause of action seeking a judicial remedy dictating specifically how a legislative body should exercise its discretion is not appropriate. In an older case describing whether a cause of action existed to enforce duties proscribed by municipal legislation, the synopsis of this Court's opinion stated:

> *No private right of action can arise from an act of legislation or from a failure in duties of a political nature, such as the enforcement of police regulations. Nor can municipal discretion be reviewed by the courts when the right to exercise it is conferred by valid legislation." Henkel v City of Detroit,* 49 Mich 249; 13 NW 611 (1882).

In this case, since the duties required of a legislative body of a governmental subdivision under Section 22(1) of the CCA are discretionary, the lack of a specific remedy in the statute does not give rise to a private cause of action to enforce such duties. Also, there are ramifications if a legislative body abuses its discretion in the performance of its duties. Section 23 of the CCA, MCL 125.1523, provides that a government official with responsibilities pertaining to permitting or inspections, who knowingly violates the CCA, is guilty of a criminal misdemeanor offense. "Enforcing Agency" includes government officials with responsibilities pertaining to the administration and enforcement of the CCA. MCL 125.1502a. Section 22(1) mandates "the enforcing agency shall collect the fees established under this subsection." Thus, an enforcing agency is subject to criminal sanctions for collecting fees that violate the fee provisions of Section 22(1). Therefore a private cause of action cannot be implied because the statute allows for the imposition of criminal penalties for an alleged violation of Section 22(1), which is clearly an adequate remedy.

The Supreme Court in *Lash v Traverse City,* 479 Mich. 180; 735 NW2d 628 (2007), determined that a Plaintiff could not pursue a civil action for money damages against his City employer based on an alleged violation of MCL 15.602, since there was no express statutory authorization permitting a private cause of action. *Lash,* 194. Plaintiffs rely on *Lash* to argue that private causes of action are allowable for injunctive or declaratory relief to enforce a statute. *Lash,* 196. However, another decision of this

Court makes it clear that equitable relief is also precluded unless there is language in the statute that allows such relief. In *Office Planning Group, Inc. v Baraga-Houghton – Keweenaw Child Development Board,* 472 Mich 479; 697 NW2d 871 (2005), plaintiff unsuccessfully sought to enforce of the federal Head Start Act (42 USC 9839(a)). The Court ruled there was no authority to initiate a private cause of action to enforce the statute. *Office Planning Group,* 504. According to the *Office Planning Group* case, courts must examine the text of the particular statute to determine if there is an explicit or implicit intent to provide for the initiation of a private cause of action. *Id.* In the *Office Planning* case, the Court concluded that the since the statute in that case did "*not provide for a private cause of action to enforce the disclosure requirement of § 9839(a), plaintiff has failed to state a cognizable claim.*" *Id.,* 505. As with the Head Start Act in *Office Planning Group,* the CCA does not expressly or implicitly allow a private cause of action against a legislative body for a violation of the Act.

If the decision in *Lash* is read in conjunction with Office *Planning Group,* a private cause of action is only allowed where there is specific enabling language in the statute. In *Lash,* the statutory language included specific provisions that implied the existence of an equitable remedy. In that case, the statute, MCL 15.602, clearly prohibits municipalities from requiring public employees to live within the municipal boundaries. The statute did not grant any discretionary duties to the public body. As a result, the Court had a bright line to determine if there was a statutory violation, which made injunctive or declaratory relief plausible. If there was a clear statutory violation, then the Court could provide the public employee with relief. This is distinguishable from those statutes that vest discretionary authority in legislative entities. For example, in *Office*

Planning, the statute in question required Head Start agencies to provide "reasonable public access" to information. *Office Planning,* 482. Similar to the CCA, the statute imposed a duty, but allowed discretion as to how the duty should be performed. If the courts could subsequently dictate the manner in which legislative bodies can perform discretionary tasks, this thwarts the statutory grant of discretionary authority. In *Office Planning*, the agency was responsible to provide "reasonable" public access, allowing the agency to determine what was "reasonable." By seeking Court intervention, the Plaintiffs in that case were asking for a court order divesting the agency of the ability to exercise its discretion. The Court appropriately determined the statute did not provide for a private cause of action, since it did not have the ability to direct the agency to exercise its statutory discretion in a particular way. *Id.,* 505. Likewise, in this case, the duty imposed upon a legislative body of a governmental subdivision by Section 22(1) of the CCA is a discretionary duty. The statute does not establish specific detailed criteria that would allow a Court to easily determine if the legislative duty was breached. Accordingly, a lawsuit seeking equitable or declaratory relief based on the language of Section 22(1) is not implied because a Court cannot order an entity to exercise its discretion in a particular way. Therefore, Section 22(1) of the CCA does not provide for a private cause of action to enforce its provisions.

The cases cited by Plaintiffs clearly demonstrate that equitable relief to enforce a statute is only available if the statutory provisions impose specific duties as opposed to discretionary ones. In *South Haven v Van Buren Co Bd of Comm'rs,* 478 Mich 518; 734 NW2d 533 (2007), for example, the Court described the availability of injunctive relief to enforce a statute and stated the 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." Id., 531. Thus, injunctive relief is only available to enforce a statute if the statute requires a specific formula to be followed by a legislative body. In such cases, equitable relief may be available since a court could easily determine whether or not the legislative body complied with the specifics set forth in the statute. Since Section 22(1) of the CCA does not require the City to establish a specific fee amount, its provisions cannot be enforced by a court order. If, on the other hand, Section 22(1) provided that instead of establishing fees that were reasonably related to the costs of services, the legislative body was required to set all permit fees at $25 for every $1,000 of the estimated value of the project, then equitable relief to enforce such a provision could be implied. If the statute required the establishment of the specific fee mentioned in the preceding sentence, and if a local unit of government instead established a permit fee of $35 for every $1,000 of estimated value, there would be a clear violation of the statute and injunctive relief may be appropriate. However, when the statutory duty sought to be enforced is a discretionary duty, as in the present case, injunctive relief is not available.

Thomson v Dearborn, 347 Mich 365; 79 NW2d 841 (1956), is cited by Plaintiffs. In that case, the Court allowed a taxpayer to bring a lawsuit to compel the City to place funds from fines and penalties imposed for violation of a city parking meter ordinance into the general fund rather than a special fund. The Thompson Court reasoned that the revenue bond act in effect limited the City as to where the funds could be placed and did not allow the City discretion to place those funds in a special fund. *Id.,* 374. However, the Court noted that in those cases where the amount of a charge or fee

rested in the sound discretion of the municipality, the Court should not interfere. *Id.,* 373.

Plaintiffs also cite *City of Jackson v Comm'r of Revenue,* 316 Mich 694; 26 NW2d 569 (1947). In the Jackson case, the Court determined that a writ of mandamus could issue, requiring the auditor general and the State treasurer to distribute one cent of the sales tax collected on each dollar of sales of tangible personal property in accordance with an amendment to the State Constitution. *Id.,* 701-702. The Court allowed for writ of mandamus, since the constitutional amendment was self-executing, and not discretionary. *Id.,* 719. This ruling is consistent with the general law that allows a private cause of action for mandamus only when a statutory provision requires performance of a specific and clear duty, as opposed to a discretionary duty. A writ of mandamus is only proper where 1) the party seeking the writ has a clear legal right to performance of the specific duty sought, 2) the defendant has the clear legal duty to perform the act requested, 3) the act is ministerial and involves no exercise of discretion of judgment, and 4) no other remedy exists, legal or equitable, that might achieve the same result. *Tuggle v Department of State Police,* 269 Mich App 657, 668; 712 NW2d 750 (2005). In *City of Jackson,* mandamus was an appropriate remedy because the amendment to the State Constitution provided a specific formula for the distribution of funds, without allowing the exercise of discretion. Section 22(1) of the CCA, on the other hand, does not contain a specific formula. Instead, the statute mandates local legislative bodies exercise discretion. Accordingly, a private cause of action seeking mandamus or any other type of relief to enforce the provisions of Section 22(1) is not appropriate or allowed.

As explained in the City's initial answer to the application for leave to appeal, allowing a private cause of action to enforce the provisions of Section 22(1) of the CCA is contrary to the concept of the separation of powers. Whenever a statute confers legislative authority, the judiciary is precluded from reviewing the discretionary action of the legislative body. *Warda v City Council of the City of Flushing,* 472 Mich. 326, 332 – 333 and n3; 696 NW2d 671 (2005). As long as the legislative body acts within its discretion, the courts may not interpose. *Manufacturer's Freight Forwarding Co v Michigan Public Utilities,* 294 Mich 57, 65; 292 NW 678 (1940), quoting from *Louisville & Nashville R Co v Garrett,* 231 US 298; 34 S Ct 48, 54; 58 L Ed 229 (1913). When a statute assigns specific duties to a public official or to the executive or legislative branch of government, the Court "cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated…" *Straus v Governor,* 459 Mich 526, 531; 592 NW2d 53 (1999). Absent peculiar circumstances, a court may not supervise a public official's contemplated performance of his or her duties without violating the principles of separation of powers. *Beaman v Montante,* 377 Mich 31, 36; 138 NW2d 764 (1966).

Since MCL 125.1522 (1) expressly defers to the municipal legislative body to set reasonable fees, and this task is premised on an analysis of the unique costs of the enforcing agency, the statute does not authorize judicial review of the City's exercise of that discretion. The Plaintiffs do not have a private cause of action against the City for enforcement of the statute. Accordingly, summary disposition in favor of the City was

proper and the decisions of the Circuit Court and the Court of Appeals should be affirmed.

III. PLAINTIFFS-APPELLANTS ARE NOT "TAXPAYERS" THAT HAVE STANDING TO FILE SUIT PURSUANT TO THE HEADLEE AMENDMENT, CONST. 1963, ART. 9, § 32

Summary disposition in favor of the City in this case was proper because Plaintiffs lacked standing to challenge the City's building permit fees on the basis the fees violated Article IX, Section 31 of the Michigan Constitution. The issue of whether a party has standing is a question of law that is reviewed de novo. *Lee v Macomb Co. Bd of Comm'rs,* 464 Mich 726, 734; 629 NW2d 900 (2001). The issue of standing may be raised at any time, even sua sponte by an appellate court. *County Road Association of Michigan v Governor,* 287 Mich App 95, 110; 782 NW2d 784 (2010), *Kallman v Sunseekers Property Owners Ass'n, LLC,* 480 Mich 1099; 745 NW2d 122 (2008). A party may not bring a cause of action under Section 31 of the Headlee Amendment, unless the party establishes standing as described in Section 32:

> *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.

In *Waterford Schools v State Board of Education,* 98 Mich App 658, 664; 296 NW2d 328 (1980), the Court of Appeals held that circuit courts have concurrent jurisdiction over suits based on the Headlee Amendment. Thus, a Headlee Amendment challenge may be filed in the circuit court. However, in any taxpayer suit, a taxpayer must identify a threat that he will "*sustain substantial injury, loss, or damage as a taxpayer through increased taxation and its consequences*." *Gross Ile Comm for Legal*

Taxation v Grosse Ile Twp, 129 Mich App 477, 487-488; 342 NW2d 582 (1983). "*Some special grievance must be shown." Id.* In the *Gross Ile* case, the Plaintiff described itself as "*an assumed name for residents of the Township of Gross Ile, residing in Wayne County State of Michigan." Id.,* 483. The Court determined that although some individual members of the committee may have had standing if they were named parties, the committee itself did not have standing. Likewise, in the present case, the Plaintiffs do not have standing because the associations described as the Plaintiffs in this case are entities that do not pay permit fees to the City of Troy. Although Plaintiffs allege in paragraph 5 of their complaint that its members obtain permits from the City of Troy, there is no allegation that the Plaintiff associations themselves pay permit fees to the City. Plaintiffs Apx, 27a. Thus, the individual associations that are the Plaintiffs in this case will not sustain substantial injury as a result of any increase in the City's permit fees. Therefore, the Plaintiffs are not taxpayers that have standing to file suit pursuant to the Headlee Amendment, Const. 1963, Art. 9, § 32.

Plaintiffs maintain, however, they have standing as a taxpayer in their representative capacity. However, the cases they cite in support of this position are easily distinguished. In *Saginaw County v Buena Vista School District,* 196 Mich App 363; 493 NW2d 437 (1992), the county brought an action against the school district alleging the school district's action of raising its property tax rate without voter approval violated the Headlee Amendment. The defendant school district argued, among other things, that the county lacked standing. In rejecting that claim, the Court noted the county itself alleged that it stood to lose over a million dollars in tax revenue as a result of the school district's increased property tax rate. *Id.,* 366. Thus, since the county

itself would lose tax revenue, it was clear it would suffer substantial injury as a result of the tax increase and therefore had standing as a taxpayer under the Headlee Amendment. In the present case, there is no taxpayer standing because the individual Plaintiff associations themselves are not affected by the City's building permit fees.

Plaintiffs reliance on *Wayne County Chief Executive v Governor,* 230 Mich App 258; 53 NW2d 512 (1998) is also misplaced. That case involved a challenge to legislation that imposed new requirements for the county probate court. The plaintiffs, Wayne County and its chief executive, alleged the new legislation was an unfunded mandate in violation of Section 29 of the Headlee Amendment. Section 29 provides:

> *A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.* Const. 1963, Art. 9, § 29.

The Court determined the plaintiffs had standing because they were effectively representing the interest of the taxpayer *Id.,* 271. The Court noted several cases have held that in claims made under Section 29 of the Headlee Amendment, both the entity and individual taxpayer should be treated similarly. *Id.,* 271. This holding makes sense because Section 29 specifically involves services and activities imposed upon local units of government. Thus, in Section 29 cases, the local unit of government has standing because such entities themselves would suffer substantial financial injury if new legislation imposed new duties upon the local unit of government without state funding.

The present case differs from the *Wayne County Chief Executive* case because it does not involve a claim made under Section 29 of the Headlee Amendment. Rather,

this case involves a claim made under Section 31, which deals with taxes imposed by local units of government. The Plaintiff entities do not have standing because they do not pay taxes to the City, nor do they pay any permit fees. The permit fees in question in this case have no direct effect on the Plaintiff associations. As such, the Plaintiffs will not suffer any substantial injury based on any increase in the amount of the fees. Accordingly, Plaintiffs are not taxpayers with standing to file suit pursuant to Section 32 of the Headlee Amendment.

Plaintiffs also rely on *Taxpayer Allied for Constitutional Taxation v Wayne County,* 203 Mich App 537; 513 NW2d (1994) in support of their claim that associations have standing to pursue Headlee Amendment claims on behalf of their members. However, the issue that was analyzed by the Court of Appeals in that case was not the issue of an association's standing on behalf of its members. Instead, the issue was whether any "affected" taxpayer had standing to file a claim under Section 31 of the Headlee Amendment when the case was not filed within one year of the effective date of the increased tax. The Plaintiffs, which included an unincorporated association and one individual taxpayer – David Pochmara – argued that the case was filed within the one year statute of limitation provided in MCL 600.308a(3) because the cause of action accrued when the tax was paid, regardless of the effective date. *Id.,* 542. The Court of Appeals disagreed and determined the circuit properly dismissed the case because it was not filed within one year of the effective date of the tax increase. Thus, contrary to Plaintiffs allegations, the case does not hold that an association has standing to represent its members in a Headlee Amendment case. This becomes clearer upon a review of this Court's decision to reverse the Court of Appeals in *Taxpayers Allied for*

Constitutional Taxation v Wayne County, 450 Mich 119; 537 NW2d 596 (1995). On appeal, this Court reversed the Court of Appeals because it determined the individual taxpayer, David Pochmara, was not time barred from pursuing his claim for injunctive relief. *Id.,* 127. In making its ruling, this Court pointed out:

> *Throughout the opinion, we refer to "plaintiff" in the singular because the only identified plaintiff is David Pochmara. The proposed class has not been certified, and the record contains no information about the unincorporated association. Id.,* 120, n 1.

Thus, based on the specific issues addressed in *Taxpayers Allied for Constitutional Taxation*, the case does not support Plaintiffs claim that it has standing in this case.

Plaintiffs also incorrectly rely on *Oakland County v Michigan,* 456 Mich 144; 566 NW2d 616 (1997) to support of their claim that they qualify as taxpayers with standing to initiate a Headlee Amendment challenge. This case held that local units of government have standing to sue on behalf of the public they represent in claims based on Section 29 of Headlee Amendment. *Id.,* 167. As previously discussed, whether an entity has standing to assert a Section 29 claim has no bearing on whether an entity can pursue a Section 31 claim. Local units of government, such as Oakland County, may have standing to pursue a Section 29 claim because the governmental entity itself is subject to substantial injury as the result of an unfunded state mandate. The Plaintiffs in this case, however, will not suffer any injury as entity as a result of the City of Troy permit fees. Accordingly, Plaintiffs cannot pursue their claim alleging a violation of Section 31 of the Headlee Amendment because they are not taxpayers with standing to file a lawsuit pursuant to Section 32 of the Headlee Amendment.

Plaintiffs also argue that Section 32 is not the exclusive means by which a party can have standing to bring a claim under the Headlee Amendment. They assert standing in this case based on Michigan's general standing laws. They cite no authority to support this position. In fact, Plaintiffs acknowledge on pages 22 and 23 of their supplemental brief that in the absence of Section 32 of the Headlee Amendment, 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 School District,* 662-663. Since the Plaintiff associations do not pay fees to the City for building permits, they do not have a threatened injury that is different than that to taxpayers generally. Therefore, Plaintiffs do not have standing in this case.

According to Plaintiffs, they have standing in this case because they meet the criteria set forth in *Lansing Schools Education Association v Lansing Board of Education,* 487 Mich 349; 792 NW2d 686 (2010). In that case, this Court described the proper approach to standing as follows:

> *Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. Lansing Schools,* 372

Plaintiffs do not meet the first criteria set forth in the *Lansing Schools* case because they do not have a legal cause of action. As discussed, they have no cause of action because they do not qualify as taxpayers under Section 32 of the Headlee Amendment. Additionally, the Plaintiffs do not meet the third criteria because they have

not shown they have a special injury or a substantial interest that will be detrimentally affected in a manner different from the citizenry at large if the City's permit fees are increased. Plaintiffs also fail to meet the second criteria because they do not meet the requirements of MCR 2.605. MCR 2.605(A) provides:

> *(A) Power to Enter Declaratory Judgment.*
>
> *(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.*

A condition precedent to the invocation of declaratory relief under MCR 2.605(A)(1) is the existence of an actual controversy. *Lansing Schools Education Association, MEA/NEA v Lansing Board of Education (on remand),* 293 Mich App 506, 515; 810 NW2d 95 (2011). An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve plaintiff's legal rights. *Id.* In the absence of an actual controversy, the trial court lacks subject matter jurisdiction to enter a declaratory judgment. *Id.*

In this case, Plaintiffs allege in paragraph 8 of their complaint that their injuries can be fully redressed through the declaratory judgment. Plaintiffs Apx, 28a. However, Plaintiffs fail to allege any specific facts in support of this conclusion. Furthermore, Plaintiffs do not assert anywhere in the complaint that declaratory relief is needed to guide their future conduct in order to preserve their legal rights, as required by *Lansing Schools Education Association,* 293 Mich App 506, 515. It would be disingenuous for Plaintiffs to make such an assertion in any event, since the requested declaration determining whether the City's permit fees are reasonable would have no effect whatsoever on Plaintiffs future rights.

In *Groves v Department of Corrections,* 295 Mich App 1; 811 NW2d 563 (2011), a disappointed bidder challenged the bidding process for a public contract. Plaintiff sought, among other forms of relief, a declaratory judgment that the bidding process was invalid. The Court determined that since the contract had already been awarded to another bidder, there was no actual controversy because a judgment was not needed to guide plaintiff's future conduct. *Id.,* at 10. In *Groves*, there was no basis for a declaratory judgment because plaintiff did not suffer a cognizable injury and would not suffer such an injury in the future. *Id.* Likewise, in the present case, the Plaintiffs have not suffered any injury as a result of the City's permit fees, especially in light of the fact the fees have not been increased since 2009. Also, the Plaintiffs are not likely to suffer any future injury related to the City's permit fees since the group of nonprofit associations that constitute the Plaintiffs in this case do not pay any fees to the City. Accordingly, Plaintiffs have not alleged, nor can they prove the existence of an actual controversy that would allow this Court to enter a declaratory judgment. Therefore, Plaintiffs do not have standing in this case.

IV. THE CITY OF TROY'S PERMIT FEES DO NOT VIOLATE THE HEADLEE AMENDMENT, CONST. 1963, ART. 9, § 31

The Plaintiffs supplemental brief incorporates by reference its initial arguments as to whether the City's building permit fees violate the Headlee Amendment. Thus, to avoid submitting a restatement of the answer to the application for leave to appeal, the City also incorporates by reference its arguments on this issue as set forth in its answer to the application for leave to appeal. Apx 39b - 44b. The City provides the following summary.

The Plaintiffs bear the burden of establishing the unconstitutionality of a municipal fee. *Jackson County v City of Jackson,* 302 Mich App 90, 98; 836 NW2d 903 (2013. Thus, to establish a Headlee Amendment violation, the Plaintiffs must prove the City's fees constitute a tax imposed without voter approval. *Bolt v City of Lansing,* 459 Mich 152, 158; 587 NW2d 264 (1998). To determine whether the Plaintiffs have met their burden, the Court must examine the following three criteria: 1) " user fee must serve a regulatory purpose rather than a revenue raising purpose"; 2) a user fee "must be proportionate to the necessary costs of the service"; 3) and a user fee is voluntary. *Id.* at 161-162. As discussed in detail in the City's answer to the application for leave to appeal, an analysis of the three criteria reveals the Plaintiffs have failed to establish the City's fees violate the Headlee Amendment.

The building permit fees charged by the City, which have not been increased since 2009, were not established for the purpose of raising revenue. Instead, the fees are used to insure that any new or improved construction is sound and in accordance with the safety measures required by the State of Michigan and the building codes. Thus, Troy's primary purpose of charging building permit fees is regulatory, as opposed to revenue generation.

Additionally, the City's fees are proportionate to the necessary costs of the services provided. Plaintiff has failed to present any evidence that the revenue from the City's CCA activities is used for anything other than services related to the enforcement of the CCA. The Court must presume the City's fees are reasonable "unless the contrary appears on the face of the law itself or is established by proper evidence…" *Graham v Kochville Township,* 236 Mich App 141, 154-155; 599 NW2d 793 (1999),

quoting from *Vernor v Secretary of State,* 168. In this case, Plaintiffs have failed to cite any law or present evidence sufficient to rebut the presumption that the City's fees are reasonably related to the costs of services provided.

Finally, the City's permit fees are only imposed on those persons who intend to build or renovate their property, and therefore these charges are voluntary. As such, the permit fees are permissible "user fees", and are not "illegal taxes" prohibited by Article 9, Section 31 of the Michigan constitution of 1963. *Bolt; Wheeler v Charter Township of* Shelby, 265 Mich App 657; 697 NW2d 180 (2005; *Lapeer County Abstract & Title Co. v Lapeer County Register of Deeds, 264 Mich App 167; 691 NW2d 11 (2004).* Although Plaintiffs claim the permit fees benefit more people than just the people paying the fee, they fail to articulate just who those people are.

Since Plaintiffs failed to produce evidence showing that the City's building permit fees were a tax as opposed to a valid use fee, the Court of Appeals decision affirming the Circuit Court decision granting summary disposition in favor of the City of Troy should be affirmed.

RELIEF SOUGHT

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

Dated: August 17, 2018

CITY OF TROY
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