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

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## I. INTRODUCTION

This Supplemental Reply Brief is filed by Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders"), in accordance with the Court's June 20, 2018 Order and in response to the Supplemental Brief filed by Defendant/Appellee, City of Troy (the "City").

## II. CORRECTION OF FACTS

Throughout its "Argument" section of its Supplemental Brief, the City discusses multiple factual claims and issues, without reference to its Appendix. Many of these unsubstantiated claims bear correction.

For example, the City claims to have met all three limitations on the authority and discretion of a municipality to set fees imposed by Section 22(1) of the Construction Code Act ("CCA"), stating:

> 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.
>
> * * *
>
> However, the City's receipt of unexpected annual surpluses is not an abuse of City Council's discretion.

City's Supplemental Brief, pp 3 and 4 (emphasis supplied). There are two inaccuracies and at least one omission with respect to this statement.

First, the User Fee Surplus, generated by the City over the last seven years, was anything but "unexpected." As demonstrated by the City's own City Council Action Reports from 2010, prior to contracting with SafeBuilt of Michigan, Inc ("SafeBuilt") to privatize its Building Department, the City knew the following:

> By privatizing Building Department services, the estimated savings for the first year of operation will be $424,507.00 or at least 36%.

City Council Action Reports, March and May 2010, Builders' Supplemental Appendix, pp 73a and 75a.[1] In fact, the contract between SafeBuilt and the City is *intended* to provide a minimum annual 20-25% surplus to the City – a surplus the City receives regardless of whether its Building Department operated at a deficit in years prior – and, regardless of whether the City uses the surplus to repay prior shortfalls. "Safe Built Contract," Builders' Appendix, p 5a.

Second, there is no detailed accounting of the City's general fund that verifies either the creation or repayment of any alleged deficit. 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 simply report a deficit; they do not prove that one actually exists. COA Op, Dissent, p 3, Builders' Appendix, p 64a.

Third, the City fails to mention that, prior to 2008, the City's Building Department was purposefully and knowingly operated at a deficit, and fees were deliberately set low, to encourage development. As stated by the City in its briefing to the lower courts:

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[1] Further, even giving the City the benefit of any purported doubt, a surplus is no longer "unexpected" when it recurs for seven straight years.

> [T]he City was concerned that raising building permit fees to cover its increasing costs would discourage new development, and therefore the City intentionally decided not to increase the building permit fees.

City's Supplemental Brief for Summary Disposition on Remand, p 5, Builders' Supplemental Appendix, p 90a. The City *chose* this manner of operations and *continued* this manner of operations for several years.

Another example of potentially misleading "facts" is the City's statement that "[c]ontrary to Plaintiffs' assertions, the Troy City Council has not deliberately increased its building permit fees to offset shortfalls from past years." City's Supplemental Brief, p 4 (emphasis supplied). First, this has never been the Builders' assertion or argument. Simply put, it is irrelevant to the legal analyses at issue here whether the User Fee Surplus was created deliberately, accidentally or somewhere in between. There is no intent or *mens rea* component to violating §22(1) of the CCA or the Headlee Amendment. Second, however, the City *did* raise its fees in both 2008 and 2009, which, with privatization, resulted in the 2010 anticipated annual surplus of "$424,507.00 or at least 36%" discussed above. City's Appendix, pp 46b-52b; Builders' Supplemental Appendix, pp 73a and 75a. And, at no time in seven plus years of collecting the User Fee Surplus, has the City reduced its fees to coincide with the diminished cost of operating its Building Department. Instead, the City continues to generate revenue at a substantial profit from the operation of its Building Department.

## III. ARGUMENT AND LAW

### A. The City Has and Continues to Violate Section 22(1) of the CCA

The City claims that it can continue to generate a surplus if it restricts the use of that surplus to repay prior shortfalls in the operation of the building department which were covered with monies taken from the general fund. This is untrue for the following, non-exhaustive list of reasons.

1. Because §22(1) of the CCA codifies the common law on the reasonableness of fees in which the analysis engaged in by the Michigan courts is whether the fee amounts being charged at the time of the lawsuit are proportionate to the operational costs incurred at the time of the lawsuit and disallowing the collection of any surplus beyond incidental.

2. Because there is nothing in §22(1) of the CCA to indicate any intent on the part of the legislature to require Michigan courts to engage in an historical analysis and determine the reasonableness of fees over the course of years/decades.[2]

3. Because the City's current practice undermines the purpose of §22(1), which is to ensure a direct and reasonable relationship between the services provided and the cost paid for that service by each individual served.

4. Because allowing municipalities to charge and collect more than an incidental surplus invites the use of fees as a subterfuge for revenue-raising measures and "creative" budgeting.

5. Because §22(1) of the CCA imposes upon municipalities a use of fees limitation – for the operation of the building department and for no other purpose.

6. Because the Michigan Department of Treasury permits a municipality to make an appropriation from the general fund to a separate special revenue fund (such as a building department fund), but not vice-versa. Updated numbered letter (2000-6), Builders' Supplemental Appendix, p 70a.

7. Because the Michigan Department of Treasury requires that <u>all</u> building department fees collected must be included in the balance of a separate fund for the building department – not the balance of the general fund. *Id.*

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[2] For example, if a municipality operates its building department at a deficit for years A, B and C and then generates a revenue surplus from the operation of its building department for years X, Y and Z, on its face, in each of these six years, the fees being charged do not reasonably relate to the cost of providing the service and violate Section 22(1). There is nothing in the statute to suggest that the Legislature envisioned the use of mathematical gymnastics, such as averaging the fee amounts versus operating costs to determine reasonable relation and, ultimately, cure the six years of violations. Further still, there is nothing in Section 22(1) to suggest that the Legislature envisioned achieving the same result as "averaging" several years of fees and costs through the artificial creation of a fee surplus in years X, Y and Z used to cover the deficit from years A, B and C.

### B. The Builders May Sue the City for Violations of Section 22(1)

The City claims at page 14 of its Supplemental Brief that enforcement of Section 22(1) lies solely with the Director of Licensing and Regulatory Affairs, thereby prohibiting a private cause of action. This claim was disposed of three years ago by this Court, stating:

> The plain language of MCL 125.1509b provides that the director may conduct a "performance evaluation" of the *enforcing agency* – here, the City of Troy Building Inspection Department–to assure that the "administration and enforcement of this act and the code is being done pursuant to either [MCL 125.1508a or 125.1508b]." The administrative proceeding articulated in MCL 125.1509b is simply inapplicable to the entity identified in MCL 125.1522(1) as being responsible for establishing the fees to be charged for building department services –the "*legislative body*" of the city of Troy.
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> * * *
>
> Had the Legislature intended to permit the director to conduct a performance evaluation of the Troy City Council, it surely could have said so. We presume that the Legislature intended the meaning of the words used in the statute, and we may not substitute alternative language for that used by the Legislature.

*Mich Ass'n of Home Builders v City of Troy*, 497 Mich 281, 288; 871 NW2d 1 (2015).

The City also claims that a private cause of action to enforce the provisions of Section 22(1) cannot be inferred. Notably, the City does not take issue with the precise claims made by the Builders at pages 16-18 of their Supplemental Brief that the remedies and means of enforcement relating to fees, provided for in the CCA, are inadequate, if not non-existent. Rather, citing the 1882 case of *Henkel v City of Detroit*, 49 Mich 249; 13 NW 611 (1882), the City claims that there is no remedy or means of enforcement for its violations of Section 22(1) because the setting of fee amounts is a discretionary legislative function over which there is no judicial review. City's Supplemental

Brief, pp 15-16. Even *Henkel*, however, does not allow municipalities to operate in contravention of express statutory limitations on their decision-making authority and discretion.

For example, in *Warda v Flushing City Council*, 472 Mich 326; 696 NW2d 671 (2005), this Court considered whether a city's discretionary decision to refuse to pay the attorney fees of a former police officer was subject to court review under the statute in question. The statute at issue provided that when a criminal prosecution is brought against a public employee based on conduct in the course of employment "the government agency may pay for . . . an attorney" for that person. *Warda,* 472 Mich at 331. Justice Markman, writing for the majority, noted that "may" connotes a discretionary activity and that "the statute does not limit or qualify the word 'may' (with, for instance, a requirement of reasonableness) or provide any other standards." For these reasons, this Court concluded that the question was not justiciable. *Id.* at 332 and 333. In so doing, however, this Court "stress[ed] that its opinion only precludes the judiciary from reviewing the discretionary decision-making of legislative and executive agencies. Where decision-making falls outside the scope of such discretion, such decision-making would be subject to judicial review." *Id.,* n 3. This Court observed that, if a municipality paid the attorney fees of a non-employee or officer under this statute (i.e., violated the statute), the discretion provided in the statute "would not preclude the courts from reviewing such a decision." *Id.* In other words, there is no unchecked discretion for cities to break the law.

As applied here, the *Warda* case supports the Builders' right to sue the City. Section 22, unlike that statute at issue in *Warda*, does not say that the City "may" establish reasonable fees, that "may" bear reasonable relation to costs and "may" be used for the operation of its Building Department. Rather, Section 22 provides that the City "shall" establish reasonable fees that

"shall" bear "reasonable relation" to costs, and that the City "shall" use these fees only for Building Department purposes. MCL 125.1522(1) (emphasis added). This language does not invite discretion and, to the extent there is some discretion in setting fees initially, the requirement that they be reasonable and reasonably relate to the cost of service provides the exact judicial review guidepost this Court found lacking in *Warda*. In sum, the City is incorrect and a private cause of action to enforce Section 22(1) exists by inference within the CCA.[3]

Similarly, the City's conclusion that there is no private cause of action to enforce Section 22(1) by seeking declaratory and injunctive relief is erroneous. In this regard, the City continues to claim that a private cause of action, for any form of relief, is only permitted where there is specific enabling language in the statute. City's Supplemental Brief, p 17. However, not only does this statement ignore an entire line of Michigan case law providing for "implied" statutory causes of action,[4] as well as this Court's own precedent,[5] but it is not supported by the very case law relied upon by the City.

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[3] Moreover, the "deductive reasoning" engaged in by the City at page 16 of its Supplemental Brief as support for its conclusion that the City is subject to criminal sanctions for violating Section 22(1) is fatally flawed. First, Section 23 of the CCA pertains only to permitting and inspections – not fees. Second, nowhere in Section 23 of the CCA does it discuss "Enforcing Agency." Therefore, the City's attempt to "bootstrap" Section 22 to Section 23 to create penalties for violating Section 22(1) is illogical.

[4] *General Aviation, Inc v Capital Region Airport Authority,* 224 Mich App 710, 715; 569 NW2d 883 (1997), lv den, 458 Mich 864 (1998) (Courts may infer a private cause of action where the act in question "provides no adequate means of enforcement" or of the remedies in the statute are "plainly inadequate.").

[5] *Lash v City of Travers City*, 479 Mich 180, 198; 735 NW2d 628 (2007) ("Moreover, plaintiff's claim that private cause of action for monetary damages is the only mechanism by which the statute can be enforced is incorrect. Plaintiff could enforce the statute by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)(1).").

Specifically, in *Office Planning Grp, Inc v Baraga-Houghton-Keweenaw CDB,* 472 Mich 479; 697 NW2d 871 (2005), 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." *Id.* at 498. By contrast, Section 22(1) expressly makes it unlawful for the City to exact fees in amounts that are not reasonably related to the cost of service or use fee dollars for "any other purpose" beyond "operation" of the Building Department. MCL 125.1522(1). The *Office Planning* case does not support the City's argument.[6]

### C. The Builders Have Standing

Section 32 of the Headlee Amendment includes representative based standing.

> Initially, we find 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. Several cases of this Court have found that both entities and persons bringing a claim for relief under §29 should be treated similarly. See [also], *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); *East Jackson Public Schools v Michigan,* 133 Mich App 132, 138; 348 NW2d 303 (1984); *Durant v Dep't of Ed,* 110 Mich App 351, 353; 313 NW2d 571 (1981), rev'd on other grounds 413 Mich 862; 317 NW2d 854 (1982)[; *Oakland Co v State of Mich,* 456 Mich 144; 566 NW2d 616 (1997)] (plurality opinion)

*Wayne Co Chief Exec v Governor*, 230 Mich App 258; 583 NW2d 512 (1998).

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[6] Likewise, the City's claim that injunctive relief is only available if the statute requires a legislative body to follow a "specific formula" is wholly unsupported by Michigan law. No Michigan case even discusses a "specific formula" much less applies such a concept in its ruling.

The City attempts to distinguish the *Wayne County* case and much of the Builders' other case law arguing that those cases involved Section 29 of the Headlee Amendment, not Section 31 which is at issue here. City's Supplemental Brief, pp 24-26. The City posits no rationale for the relevancy of this distinction in terms of standing. That is because Section 32 applies to both Section 29 and Section 31 equally and any differences between Section 29 and Section 31, in terms of standing, are irrelevant. *Taxpayers Allied for Constitutional Taxation v Wayne Co,* 203 Mich App 537, 545-546; 513 NW2d 202 (1994).[7]

Moreover, the Builders have standing under *Lansing Sch Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349; 792 NW2d 686 (2010). The *Lansing Schools* Court enumerated four bases for standing, *id.* at 372, which the Builders meet. First, the City has a cause of action under law – under the common law, the CCA and the Headlee Amendment. As a result, standing is "not an issue." *Id.* at 359. Second, the Builders have met the requirements of MCR 2.605 – an actual controversy exists – the Builders' members have a statutory and constitutional right to not be overcharged with respect to the fees they pay and a declaratory ruling is needed to preserve those

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[7] In fact, the Court of Appeals recently found this same distinction to be without a difference, stating:

> The County and Township argue that *Wayne Co Chief Executive* is inapplicable because it involved a §29 action based on unfunded mandates and not a §31 action based on illegal taxes. The trial court agreed. However, we conclude that this is a distinction without a difference. The statute clearly groups §§25-31 together and does not parse out the different sections. In light of the *Saginaw Co* and *Wayne Co* cases, we conclude that GBCS had standing to bring this action.

*Grand Blanc Community Sch v Wright,* unpublished opinion per curiam of the Court of Appeals, issued March 19, 2013 (Docket No. 296389); 2013 WL 1137120, *7, Builders' Supplemental Appendix, p 82a.

legal rights and guide their future conduct in paying or not paying fees – in building or not building. Third, assuming but denying the lack of a cause of action at law, the Builders have substantial interests, different from the public at large, that are detrimentally affected by the City's current fee amounts and uses in that they are disproportionately affected by higher fees. And, fourth, as discussed above, the CCA supports the implication that the Legislature intended to confer standing on those affected by violations of Section 22(1). The Builders have standing.

### D. The City's Fees Violate the Headlee Amendment

The City continues to argue that its fees are voluntary (because a property owner only pays a fee if he/she chooses to build on their property) and, therefore, do not violate the Headlee Amendment. City's Supplemental Brief, p 31. However, having to choose between paying a fee or leaving one's property idle, obsolete or in a state of disrepair is not a choice under this Court's precedent. *Bolt v City of Lansing*, 459 Mich 152, 168; 587 NW2d 264 (1998). The City has violated the Headlee Amendment.

## 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 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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Date: August 30, 2018

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