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

Melissa A. Hagen (P42868)
McCLELLAND & ANDERSON, LLP
Attorneys for Plaintiffs/Appellants
1305 S. Washington Avenue, Suite 102
Lansing, MI 48910
(517) 482-4890

Lori Grigg Bluhm (P46908)
Allan T. Motzny (P37580)
Attorneys for Defendant/Appellee
500 W. Big Beaver Road
Troy, MI 48084
(248) 524-3320

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MICHIGAN REALTORS®' AMICUS CURIAE SUPPLEMENTAL BRIEF IN SUPPORT OF THE POSITION OF PLAINTIFFS/APPELLANTS

Melissa A. Hagen (P42868)
McCLELLAND & ANDERSON, LLP
Attorneys for Amicus Curiae,
Michigan Realtors®
1305 S. Washington Ave, Suite 102
Lansing, MI 48910
(517) 482-4890

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authority

SUPPLEMENTAL STATEMENT OF QUESTIONS PRESENTED

I. WHETHER PUBLIC POLICY CONSIDERATIONS FAVOR REVERSING THE DECISION OF THE COURT OF APPEALS AFFIRMING THE CIRCUIT COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF THE CITY AND DENIAL OF SUMMARY DISPOSITION IN FAVOR OF THE BUILDERS ON THE BUILDERS' CLAIMS UNDER SECTION 22 OF THE CCA AND/OR THE HEADLEE AMENDMENT TO THE MICHIGAN CONSTITUTION?

The Court of Appeals answered: "No."

The Circuit Court answered: "No."

Plaintiffs/Appellants answer: "Yes."

Defendant/Appellee answers: "No."

Amicus Curiae answers: "Yes."

II. 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."

Amicus Curiae answers: "Yes."

III. WHETHER APPELLANTS HAVE STANDING TO BRING A CLAIM UNDER THE HEADLEE AMENDMENT?

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."

Amicus Curiae answers: "Yes."

I. INTRODUCTION/STATEMENT OF INTEREST

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

One of the issues in this appeal is the permissible amounts, and uses, of fees charged to residential builders and others by local units of government for building permits, inspections, certificates of occupancy and other costs associated with residential construction. Section 22(1) of the CCA restricts both the amount and the uses of such fees as follows:

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

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

In recent years, through the privatization of its Building Department, the City of Troy (the "City") has collected fees in amounts far in excess of the cost of operating its Building Department (the "User Fee Surplus"). The City has placed each year's User Fee Surplus into its general fund which it can then use for any purpose. **In just seven years, the User Fee Surplus which the City deposited into its general fund totaled 2,733,140.** The City continues this practice today.

The City claims that this practice is permitted under Section 22(1) of the CCA and the Headlee Amendment because, in years prior to the User Fee Surplus, the City operated its Building Department at a deficit, which it chose to cover with money allocated from the general fund. The Court of Appeals upheld the City's practice. However, in doing so, the Court of Appeals ignored the legislative history and policy behind Section 22(1) as well as the plain language of Section 22(1) limiting fee amount and fee uses. The correct analysis is reflected in the Court of Appeals' dissenting Opinion of Judge Kathleen Jansen:

> I believe that on its face, MCL 125.1522(1) reflects intent to limit building department fees imposed to the cost, within reason but

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[1] In particular, claims made under the Headlee Amendment are reviewed by Michigan Courts under a 3-part test announced by this Court in *Bolt v Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998). The three primary criteria to be considered when distinguishing between a tax and a fee are: (1) whether the fee serves a "regulatory purpose rather than a revenue-raising purpose;" (2) whether there is proportionality between the amount of the fee and the cost of the service; and (3) whether the fee is voluntary and can be avoided through the payer declining the fee-funded service. *Id.*

> as closely as possible, to the department of providing those particular services. The statute allows the building department to cover the cost of providing the acts and services mandated under the CCA, consistent with the long-established principle that a fee must be related to the cost of the actual goods or services provided. The statute is intended to provide a mechanism through which a city may fully fund its building department, but not to generate additional revenue.
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> * * *
>
> The statute does not allow defendant to charge current payers and permit applicants more than what is reasonable in order to make up for losses it chose to incur by failing to charge previous permit applicants appropriately under the statute. To hold that under MCL 125.1522(1), a city may engage in such creative budgeting would create a poor precedent. Under the majority's interpretation of the statute, a city might permissibly choose to create a shortfall in any given year and unfairly charge unreasonable rates in subsequent years, completely defeating the goal of ensuring that each individual fee-payer pays for the acts and services he or she is provided.

Court of Appeals Opinion, Dissent, September 28, 2017 ("COA Op, Dissent"), pp 2-3, Exhibit B to Application.

One of the primary goals of the Association is to provide the opportunity for its members to facilitate the ownership of affordable housing by Michigan residents. To promote this goal and others, the Association seeks to oppose laws and court decisions which delay, restrict, or otherwise impede the ability of the Association's members to sell affordable housing. The City's huge overcharges for its building department services, are directly contrary to Michigan law and the Association's goals.

In addition, this case now involves the issue of association or representative standing. The Association, through its Legal Action Committee, receives and responds to requests for assistance with litigation in which its members are involved or wish to become involved.

The Association may also initiate litigation in its own name on behalf of its members. Accordingly, another primary goal of the Association is to provide financial backing, legal research and analysis, and proactive legal assistance to, and on behalf of, its members. Accordingly, it is important, vital in fact, that the Association have standing to represent its members before the Courts of this State, not only as an amicus curiae participant, but as a party plaintiff.

II. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On July 1, 2010, the City privatized its Building Department by hiring SafeBuilt of Michigan, Inc. ("SafeBuilt") to perform most of the functions of its Building Department, such as inspections and plan reviews. City of Troy Professional Services Agreement (the "Contract"), §2, p 2, Exhibit C to Application. Pursuant to the Contract, SafeBuilt retained 80% of the "billable" fees listed in the Contract, and the City retained the 20% surplus. Deposition Transcript of John Lamerato ("Lamerato Dep Tran"), p 21, Exhibit D to Application. The City also retained 100% of other "non-billable" Building Department fees. *Id.*, p 21-22; Deposition Transcript of Mark Miller ("Miller Dep Tran"), pp 122-124, Exhibit E to Application. Further, as "billable" fees exceeded $1,000,000 in the first Contract year, the City retained 25% of the "billable" fees, with 75% to SafeBuilt, along with 100% of "non-billable" fees for the remaining Contract term. Contract, §3.2, p 2, Exhibit C to Application. After the first year of the Contract, the "billable" fee arrangement remained at 75% for SafeBuilt and 25% kicked back to the City. *Id.*

The City has never used this User Fee Surplus for operation of the Building Department. Instead, for the last 8+ years, the City has deposited the User Fee Surplus into its general fund for unrestricted use for general, non-Building Department items. City Attorney Letter, Exhibit H to Application; Miller Dep Tran, pp 98, 120 and 127, Exhibit E to Application; Lamerato Dep Tran,

pp 37, 43 and 46, Exhibit D to Application. **It is uncontested that there is no separate Building Department fund or "special revenue fund" into which the User Fee Surplus is deposited.** Lamerato Dep Tran, pp 84-85, Exhibit D to Application. It is further uncontested that revenues contained in the general fund are not segregated by department. Deposition Transcript of Thomas E. Darling ("Darling Dep Tran"), p 86, Exhibit I to Application.

The City claims that, historically, the Building Department had annual shortfalls which were covered by the City with appropriations from its general fund. The City thus justifies its deposit of the User Fee Surplus into the general fund by claiming that it is only repaying these historical shortfalls. City Attorney Letter, Exhibit H to Application; Szerlag/Lamerato email, Exhibit J to Application; Lamerato Dep Tran, p 75, Exhibit D to Application. However, and as noted by the Court of Appeals Opinion dissent, the alleged shortfalls did not just happen by accident. Rather,

> Defendant concedes that it made a management decision to subsidize its building department during the period of alleged deficit with general funds and keep building department fees low during that time period. Perhaps defendant's choice was pragmatic, but it was a choice. It clearly chose *not* to charge fees reasonably related to the cost of performing services during those years, and it now attempts to shuffle funds back into its general account through the back door of operational "surplus." The statute does not allow defendant to charge current payers and permit applicants more than what is reasonable in order to make up for losses it chose to incur by failing to charge previous permit applicants appropriately under the statute. To hold that under MCL 125.1522(1), a city may engage in such creative budgeting would create a poor precedent. Under the majority's interpretation of the statute, a city might permissibly choose to create a shortfall in any given year and unfairly charge unreasonable rates in subsequent years, completely defeating the goal of ensuring that each individual fee-payer pays for the acts and services he or she is provided.

COA Op, Dissent, p 3 (emphasis supplied), Exhibit B to Application.

Further, noticeably absent from the City's proofs is even a single budget, appropriation or expense document to demonstrate that the User Fee Surplus is actually used to repay alleged "shortfalls" from prior years. Darling Dep Tran, pp 21, 45, 52, 54, 105-106 and 128-130, Exhibit I to Application. Instead, the only place where the City records the alleged "shortfall" amounts is a cumulative number recorded in the City's CAFRs – which are not, as implied by the City, audited or approved by Treasury. *Id.*, pp 45 and 105-106.[2] 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. As proof that it suffered a deficit, defendant relies solely on past Comprehensive Annual Financial Reports (CAFRs) which, in describing defendant's general revenue and expenses, list a total amount for "[c]urrent year building permit revenue" and a total amount of "[r]elated expenses" before reporting the building department's yearly net shortfall. As their name implies, these CAFRs simply *report* a building department deficit, they do not prove that one actually existed. Defendant processes all of its financial transactions through one general fund. Without a specific building department budget, it is not clear whether and how defendant incurred such massive deficits.

[2] Specifically, the CAFRs in which the alleged "shortfalls" are recorded are simply received by Treasury and made available on its website for public inspections. MCL 141.429. The State Treasurer does not approve the CAFRs. The State Treasurer does not audit the CAFRs. Therefore, contrary to the City's claims, the State Treasurer has not approved the City's use of the User Fee Surplus to offset historical shortfalls in the Building Department budget or the correlating annual transfers of the User Fee Surplus to the City's general fund. The CAFRs simply report an alleged deficit; they do not prove that one actually exists.

> And although the majority suggests, in a footnote, that there is no evidence to "contradict testimony elicited on behalf of defendant regarding *its methods of accounting* and asserting the accurate representation of the fees and service costs collected and expenditures incurred in the operation of the Building Department," it conspicuously fails to mention that the record contains no such representation of fees and expenditures.

COA Op, Dissent, p 3, Exhibit B to Application (emphasis supplied).

Overall, the annual User Fee Surplus amounts disclosed by the City are:

2011	-	$414,648
2012	-	$269,483
2013	-	$488,922
2014	-	$325,512
Total		$1,498,565

Id.; 2011 Calculations, Exhibit F to Application. In addition, per public documents filed by the City with the Michigan Department of Treasury, the User Fee Surplus amounts after 2014 continued to accrue in large amounts and were, again, deposited into the City's general fund:

2015	-	$443,036
2016	-	$384,460
2017	-	$407,079[3]

Adding these amounts to the 2011-2014 User Fee Surplus Amounts yields a 7-year total of $2,733,140. Again, as stated in the dissenting opinion of Judge Kathleen Jansen:

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[3] The 2015 City of Troy CAFR is publically available at: https://troymi.gov/Departments/City%20Manager/Financial%20Services/Financial%20Documents/CAFR/CAFR%202015.pdf; Fee Surplus reported at p 61 (of report), p 70/187 (of pdf). The 2016 City of Troy CAFR is publically available at: https://troymi.gov/Departments/City%20Manager/Financial%20Services/Financial%20Documents/CAFR/CAFR%202016.pdf; Fee Surplus reported at p 61 (of report), p 70/189 (of pdf). The 2017 City of Troy CAFR is publically available at: http://cms6.revize.com/revize/troymi/Departments/City%20Manager/Financial%20Services/Financial%20Documents/CAFR/2017-06-30%20City%20of%20Troy%20CAFR%20(Final).pdf; Fee Surplus reported at p 61 (of report), p 70/183 (of pdf). Judicial notice can be taken at any stage of the proceeding. MRE 201(e).

> Although defendant concedes that it has retained SAFEbuilt to provide the acts and services of its building department, it charges fees to cover the cost of compensating SAFEbuilt with an intentional 20-25% surplus. Defendant claims that some of these funds are then used to cover indirect costs of operating the building department, such as covering 40% of the building code official's salary and maintaining the building it leases to SAFEbuilt. However, I believe that a 20-25% surplus is unreasonable on its face. Indeed, defendant used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 deposited directly into defendant's general fund over the course of only three years. This "surplus" is not negligible. Common sense indicates that it is not incidental. The amount of surplus generated, on its own, indicates that defendant is engaged in a revenue-raising venture. Regardless of whether it is raising the revenue to cover alleged prior shortfalls, or any other cost of operating the building department, such an endeavor violates the clear meaning of MCL 125.1522(1).

COA Op, Dissent, p 2 (emphasis supplied), Exhibit B to Application.

In the end, Building Department users are paying far in excess of the actual costs for Building Department services and are subsidizing other municipal expenses, departments and services. And, even if you assume that the User Fee Surplus is truly being used to repay the general fund for prior years' allocations of funds to the building department, the result remains the same – the building department users are still paying far in excess of the actual costs for building department services and are subsidizing other municipal expenses, departments and services. Having the "sons pay for the sins of the fathers" is precisely the type of financial manipulation sought to be prevented by Section 22(1) of the CCA and the Headlee Amendment. Allowing local units of government to sustain such practices creates numerous instances of manifest injustice upon the public.

For these reasons, this Court should peremptorily reverse the Court of Appeals 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.

III. THE GRAVITY OF THE PROBLEM

Almost eight years ago, when this lawsuit was filed, the Troy/SafeBuilt Contract was the only "kickback" contract of its kind; that is, the only contract pursuant to which an independent third party operates the building department of a local unit of government but "kicks back" a percentage of the fees generated by that operation to the local unit of government. Today, however, there are numerous "kickback" arrangements between private inspection companies and local units of government. And, in the vast majority of these instances, the local government does not, as here, have the "fig leaf" of repayment of an alleged shortfall to hide behind. Accordingly, and unfortunately, this case does not present an isolated instance of municipal finance manipulation in contradiction of Michigan statutory and constitutional law. Rather, this case impacts upon many instances of municipal finance manipulation. In turn, municipal finance manipulation, as is occurring here, negatively impacts upon the construction and sale of affordable new housing as well as repair and maintenance of older housing.

In particular, according to Amicus Curiae, The Michigan Municipal League, *et al*, there are at least "16 other communities" who have contracted with SafeBuilt – many of which employ "kickback" contracts like the one at issue here. For example, similar to the City's arrangement with SafeBuilt, the City of Muskegon pays 80% of certain building department fees to SafeBuilt and retains 20% of those fees. When this fee structure is coupled with SafeBuilt's performance of all the work associated with those fees, including paying all costs associated with the Building Official, a fee

overcharge and surplus results. As discussed below, this structural 20% profit margin for the City of Muskegon renders the fees unreasonable and in violation of Section 22(1) of the CCA and the Headlee Amendment. A copy of the "Muskegon/SafeBuilt Contract" is attached as Exhibit I to the Michigan Realtors® Amicus Curiae Brief in Support of the Application for Leave to Appeal ("Amicus Brief").

Similarly, in Genoa Township, SafeBuilt retains 85% of certain fees collected and "kicks back" 15% to the Township. See, "Genoa Township/SafeBuilt Contract," Exhibit J to Amicus Brief. The City of Harper Woods and the City of Muskegon Heights SafeBuilt both receive a 20% "kickback," with SafeBuilt retaining 80% of the fees, while the City of Norton Shores takes a 25% "kickback," allowing SafeBuilt to keep only 75% of the fees collected. Copies of the "Harper Woods/SafeBuilt Contract," "Muskegon Heights/SafeBuilt Contract," and "Norton Shores/SafeBuilt Contract" are attached as Exhibits K, L and M to Amicus Brief. Again, these 15-25% profit margins result from overcharges for services – a practice which violates the CCA and the Headlee Amendment. In short, "kickback" arrangements, similar to that initiated by the City over eight years ago, are growing, and continue to grow. Left unchecked, the pervasive and ubiquitous overcharging of construction fees will noticeably and negatively impact residential and other construction and the attendant sales and purchases thereof.[4] This outcome is contrary to public policy.

[4] Consider that the City's User Fee Surplus is now $2,733,140 and growing. With at least 16 other building departments being operated under similar contractual "kickback" arrangements, the surplus revenue being generated by local units of government, statewide, could be reaching amounts of close to $45,000,000.

Moreover, requiring local units of government to adhere to the requirements of Section 22(1) of the CCA and the Headlee Amendment will not, as prognosticated by the City and Amicus Curiae, deal a "death blow" to the privatization of building services. Rather, as demonstrated by SafeBuilt contracts with the City of Owosso (Exhibit N to Amicus Brief) and the Charter Township of Mundy (Exhibit O to Amicus Brief), privatization is possible using flat rates and/or per hour rates, as opposed to percentages. Flat rate and/or per hour rate contracts based on actual operating costs would not violate Section 22(1) but would allow the municipality to operate its building department without incurring a deficit. At a minimum, flat and hourly rate contracts, such as the Owosso and Mundy contracts, have no apparent sizeable "kickback" profit margins built right into the express terms of the contracts and, therefore, do not violate Section 22(1) on their face.

IV. ARGUMENT

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.

1. The Relevant Rules of Statutory Interpretation

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

Initially, the court examines the most reliable evidence of the Legislature's intent – the language of the statute itself. *Whitman v City of Burton,* 493 Mich 303, 311; 831 NW2d 223 (2013). "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd,* 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931); *Johnson v Recca,* 492 Mich 169, 177; 821 NW2d 520 (2012). And, "[a] necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

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

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

This is the second time that this case is before this Court on an issue of statutory interpretation. The issue previously before this Court was whether Section 9b of the CCA, MCL 125.1509b, required the Builders to exhaust administrative remedies before filing this lawsuit. Following oral argument on whether to grant plaintiffs' application for leave to appeal or take other

peremptory action, this Court, in a unanimous Memorandum Opinion, reversed the judgments of the Circuit Court and Court of Appeals and held that exhaustion of administrative remedies was not required under the CCA. *Michigan Ass'n of Home Builders v City of Troy,* 497 Mich 281; 871 NW2d 1 (2015), Exhibit G to Amicus Brief. This Court's decision in 2015 turned on its interpretation of the "plain language" of the applicable CCA provision. Disagreeing with the interpretation advanced by the City and the lower Courts, this Court stated:

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

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

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

The first sentence of Section 22(1) of the CCA establishes two of three limitations placed on those local units of government which elect to assume responsibility for administering and enforcing the CCA – limitations on the amount of fees charged – as follows:

> **(1) The legislative body of a governmental subdivision *shall* establish reasonable fees to be charged by the governmental subdivision for acts and services performed by the enforcing agency or construction board of appeals under this act, which fees *shall* be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of appeals, hearing appeals in accordance with this act.**

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

The Court of Appeals' initial point of analysis and application of the Amount Provision was to note that the "existence of a surplus does not automatically result in a determination that the fees charged are unreasonable and, therefore, [does] not satisfy the dictates of MCL 125.1522(1)." Court of Appeals Opinion, September 28, 2017 ("COA Op"), p 5, Exhibit A to Application. The Court of Appeals majority then engaged in supposition and an analysis of hypothetical facts not before the Court:

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

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

First, Section 22(1) requires no such analysis. The plain and unambiguous language of Section 22(1) requires an analysis of the amount of "fees" (plural) versus the "cost . . . to the governmental subdivision of the acts" (plural) "and services" (plural). There is simply nothing in the statute that requires a line-by-line, item-by-item analysis of the type mandated by the Court of Appeals majority. The Court of Appeals majority invented its own "burden of proof" in contradiction to the applicable statutory language.

Second, "reasonableness," as defined in Section 22(1), requires simply that the fees charged for Building Department services bear a "reasonable relation" to the cost of providing said services.

The Court of Appeals majority, however, engaged in no such analysis and never compared the total overall fee revenue to the total overall cost of providing services. Therefore, the majority never undertook the specific analysis required by the Legislature through its enactment of Section 22(1) of the CCA. Accordingly, because the Court of Appeals majority incorrectly required a level of analysis/burden of proof not required, or even permitted, by Section 22(1) and failed to engage in the analysis actually required by Section 22(1), the Court of Appeals majority should be reversed.

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

> Plaintiffs have not come forward, however, with any evidence to demonstrate that, in deriving the fees to be charged, an amount has been included to compensate for prior shortfalls in defendant's calculation.

COA Op, p 6, Exhibit A to Application. However, again, this inquiry is "off the mark" from what is required under Section 22(1). The City's fees must be "reasonably related" to the cost of providing building department services. Under this "reasonably related" statutory definition of what is "reasonable," it is simply not enough to say that the statute is not violated because the City did not "purposefully" increase the amount of its fees in order to obtain a surplus. Moreover, as the City must admit, this alleged lack of intent to create a surplus is simply untrue – it entered into the Contract with SafeBuilt which, on its face, generates revenue to the City in an amount of 25% above cost. Again, the majority of the Court of Appeals engaged in an improper analysis under

Section 22(1) and/or failed to engage in the analysis actually required by Section 22(1) and its opinion should be reversed.

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

> I believe that on its face, MCL 125.1522(1) reflects intent to limit building department fees imposed to the cost, within reason but as closely as possible, to the department of providing those particular services. The statute allows the building department to cover the cost of providing the acts and services mandated under the CCA, consistent with the long-established principle that a fee must be related to the cost of the actual goods or services provided. The statute is intended to provide a mechanism through which a city may fully fund its building department, but not to generate additional revenue.

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

> . . . I believe that a 20-25% surplus is unreasonable on its face. Indeed, defendant used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 deposited directly into defendant's general fund over the course of only three years. This "surplus" is not negligible. Common sense indicates that it is not incidental. The amount of surplus generated, on its own, indicates that defendant is engaged in a revenue-raising venture. Regardless of whether it is raising the revenue to cover alleged prior shortfalls, or any other cost of operating the building department, such an endeavor violates the clear meaning of MCL 125.1522(1).

COA Op, Dissent, pp 2-3, Exhibit B to Application. This Court should peremptorily reverse the majority opinion of the Court of Appeals for the reasons stated in the Court of Appeals dissent.

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

The last sentence of Section 22(1) of the CCA establishes the last of the three limitations placed on those local units of government which elect to assume responsibility for administering and enforcing the CCA – a limitation on the use of the fees charged – as follows:

> The legislative body of a governmental subdivision *shall* only use fees generated under this section for the operation of the enforcing agency or the construction board of appeals, or both, and *shall* not use the fees for any other purpose.

MCL 125.1522(1) (emphasis supplied) (the "Use Provision"). The Use Provision, like the Amount Provision, is mandatory and affords no discretion. As a matter of law, the word "shall" is unambiguous and requires mandatory rather than discretionary action. *Roberts*, 466 Mich at 65. The word "only" is also unambiguous and means "[s]olely; merely; for no other purpose; at no other time; in no otherwise; of or by itself; without anything more; exclusive; nothing else or more." *Black's Law Dictionary* (5th ed), p 982. Accordingly, based solely on the first phrase of the Use Provision of Section 22(1), there is only one use to which fees may be put and that use is non-discretionary – the operation of the enforcing agency – here, the City's Building Department.

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

of the Legislature to prohibit the use of the fees for all purposes other than the operation of the enforcing agency.

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

> 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.

COA Op, Dissent, p 2, Exhibit B to Application. The decision of the Court of Appeals should be summarily reversed.

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

The City argues that its practice of charging fees in amounts 25% in excess of costs and depositing the User Fee Surplus to the general fund is permitted under Section 22(1), in which, the City claims, the Legislature intended to give local units of government discretion, "without limitation." In particular, the City states: ". . . describing what may be considered by the governmental subdivision in establishing the fees, the statute is "*without limitation*" in deciding the costs of enforcement of the CCA." City's Brief, p 24. This is untrue for at least four reasons.

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

Second, the City's reliance on Section 34 of Article VII of the Michigan Constitution as support for its claimed unrestrained discretion in setting and using fees is misplaced. Section 34 of Article VII of the Michigan Constitution provides: "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const 1963, art 7, §34. However, liberal construction is not paramount to enforcing the intent of the Legislature which, in this case, is to make the building departments of units of local government

self-funded while maintaining affordable services, thereby promoting growth, development and uniformity. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 44; 761 NW2d 269 (2008). Again, the City's authority fails to support its claim.

Third, the City's claim of "lawful" discretionary use of the User Fee Surplus – to repay past shortfalls in the operating budget previously absorbed by the general fund – is also prohibited by Michigan law on statutory interpretation. A court may not add words or language to a statute even if it believes that the additional language is prudent. *Kirkaldy v Rim,* 478 Mich 581, 587; 734 NW2d 201 (2007) (J. Cavanaugh, concurring). Here, in order to validate the City's interpretation, the Court would need to modify the phrase "operation of the enforcing agency" by adding the phrase "past and current" to the Use of Fees Provision (sentence #2) of Section 22. Michigan law prohibits such an interpretation.

Finally, the discretion, if any, afforded to the City by the Legislature as to the amount and use of fees does not extend to determining that any cost savings resulting from greater efficiencies should be used to subsidize non-building department services or costs. Rather, in Section 22(1), the Legislature stressed that fees "shall" be used to operate the enforcing agency and "shall" not be used for any other purpose. If the City has experienced a decline in the cost of providing building department services, that cost savings should be passed on to the users of those services, including home builders and the purchasers of new homes, repairs and renovations. Again, this Court should peremptorily reverse the majority opinion of the Court of Appeals and remand this case to the Oakland County Circuit Court with instructions to grant summary disposition in favor of the Builders.

B. The Builders Have Standing

The standing doctrine, under Michigan law, has fluctuated in recent history. For many years, standing in Michigan was based on a prudential standard – if a party had a cause of action under the law, then standing was not an issue. Similarly, where a party was seeking declaratory relief, Michigan Courts repeatedly held that meeting the requirements of the court rule governing declaratory actions was sufficient to establish standing. *House Speaker v Governor*, 443 Mich 560, 572-573; 506 NW2d 190 (1993); *Allstate Ins Co v Hayes*, 442 Mich 56, 69-70; 499 NW2d 743 (1993); *Sloan v Madison Hts*, 425 Mich 288, 294-295; 389 NW2d 418 (1986). And, even where a cause of action was not provided and the claims were not limited to declaratory relief, the courts engaged in a discretionary analysis summarized as follows:

> 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 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.

Lansing Sch Ed Ass'n v Lansing Bd of Ed, 487 Mich 349, 359; 792 NW2d 686 (2010). This form of standing granted courts great discretion with respect to deciding issues of standing, under which associations were liberally afforded standing to represent their members. *Id.* at 356-357.

For example, in *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262; 177 NW2d 473 (1920), the Court of Appeals found that the plaintiff association had standing, stating:

> The plaintiff, White Lake Improvement Association, is a nonprofit membership corporation organized under the laws of this State in 1951. There are approximately 414 members of the association, many of whom own land bordering White Lake. The association itself owns no land. The stated purpose of the association is to

> prevent the pollution of White Lake, to promote cleanliness and good sanitary conditions around the lake and the public welfare of the area.
>
> The complaint seeks the abatement of the nuisance caused by the materials the defendants dump and injunctive relief. The trial judge granted accelerated judgments dismissing the action on the ground that the association had no standing to complain.
>
> * * *
>
> Where a private nuisance affects water, a riparian landowner may commence an action for its abatement. True, the plaintiff association owns no land, but its sole purpose is to represent the interest of its members, many of whom are riparian landowners, in preventing the pollution of White Lake.

Id. at 268 and 272 (footnotes omitted). The Court of Appeals similarly concluded in *Muskegon Bldg and Constr Trades v Muskegon Area Intermediate Sch Dist*, 130 Mich App 420; 343 NW2d 579 (1984), stating:

> 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).

This approach to standing changed with this Court's opinion in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 726 (2001), overruled by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), in which Michigan adopted the federal requirements for standing, consistent with the United States Supreme Court opinion in *Lujan v Defenders of*

Wildlife, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). Thus, beginning July 17, 2001, standing required:

> 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.'

Lee, 464 Mich at 739, quoting *Lujan,* 504 US at 560-561.

The *Lee* opinion itself did not discuss or analyze associational or representative standing. However, other decisions from this Court and the Michigan Court of Appeals which followed and relied on *Lee* generally held in favor of association standing as follows:

> Plaintiffs seek injunctive relief on behalf of their members. Nonprofit organizations, such as plaintiffs, have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs. See generally *Trout Unlimited, Muskegon White River Chapter v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992); *Karrip v Cannon Twp*, 115 Mich App 726, 733; 321 NW2d 690 (1982). Thus, plaintiffs must allege that their members suffered either an actual injury or an "imminent" injury. *Lee, supra*, at 739-740, 629 NW2d 900, citing *Lujan, supra.*

Nat'l Wildlife Federation v Cleveland Cliffs Iron Co, 471 Mich 608, 629; 684 NW2d 800 (2004), overruled by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

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

Mich Citizens for Water Conservation v Nestle Waters of North America, Inc, 479 Mich 280, 296; 737 NW2d 447 (2007), overruled by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010).

> 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. *White Lake Improvement Ass'n v. Whitehall,* 22 Mich App 262, 272-274; 177 NW2d 473 (1970). See also, *Trout Unlimited, Muskegon-White River Chapter v. White Cloud,* 195 Mich App 343, 348; 489 NW2d 188 (1992).

Civic Ass'n of Hammond Lake Estates v Hammond Lake Estates No 3 Lots 126-135, 271 Mich App 130, 135; 721 NW2d 801 (2006).

In 2010, with this Court's opinion in *Lansing Schools*, Michigan returned to a prudential standard for standing.

> [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. As a result, from all that appears, the current standing doctrine for associations is the law as it existed prior to *Lee*. In fact, in one of the first appellate decisions to discuss association standing in the wake of this Court's decision to overrule *Lee*, the Court of Appeals stated:

> Homeowner associations that actively represent the interests of landowners are allowed to enforce deed restrictions. *Civic Ass'n of Hammond Lake v Hammond Lake Estates No. 3 Lots 126-135,* 271 Mich App 130, 135-136; 721 NW2d 801 (2006). This Court has stated that a "voluntary association whose 'sole purpose is to represent the interest of its members,' . . . may bring suit to effectuate that purpose, regardless of whether the association itself owns

> any land." *Id.* at 135, quoting *White Lake Improvement Ass'n v Whitehall,* 22 Mich App 262, 272-274; 177 NW2d 473 (1970). Here, HWSHA was active in representing the interests of the subdivision landowners. In fact, the purpose listed in HWSHA's articles of incorporation is "[t]o protect and exercise the rights provided in the building and use restrictions of Helman Woods Subdivision."

Franklin Commons, LLC v Helman Woods Subdivision, unpublished opinion per curiam of the Court of Appeals, issued Nov 4, 2010 (Docket No. 292952); 2010 WL 4365877. A copy of the *Franklin Commons* decision is attached hereto as Exhibit A. Therefore, under the prevailing law in Michigan, associations have standing "if their purpose is to represent their members."[5]

Here, 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. Thus, the Builders have standing.

V. CONCLUSION/RELIEF REQUESTED

For all the foregoing reasons, the Association respectfully requests that this Court reverse the granting of the City's Motion for Summary Disposition and the denial of the Builders' Motion for

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[5] The case law post-*Lee* but pre-*Lansing Schools* is, nonetheless, still instructive. Under those cases, associations have standing "if any one of their members have standing individually" – an unambiguous and imminently workable standard. In all events, what becomes clear from reviewing the entire spectrum of case law, applying both the prudential and the constitution tests, is that the standing of associations to represent their members has been acknowledged and granted routinely and consistently under Michigan law.

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

McCLELLAND & ANDERSON, LLP
Attorneys for Amicus Curiae,
Michigan REALTORS®

By: */s/ Melissa A. Hagen*
Melissa A. Hagen (P42868)
Business Address:
1305 S. Washington Ave, Suite 102
Lansing, MI 48910
Telephone: 517-482-4890

Date: September 6, 2018

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EXHIBIT
TO MICHIGAN REALTORS®' AMICUS CURIAE SUPPLEMENTAL BRIEF
IN SUPPORT OF THE POSITION OF PLAINTIFFS/APPELLANTS

A. *Franklin Commons, LLC v Helman Woods Subdivision*, unpublished opinion per curiam of the Court of Appeals, issued Nov 4, 2010 (Docket No. 292952); 2010 WL 4365877