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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MICHIGAN MANUFACTURERS ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/APPELLANTS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT IDENTIFYING ORDER APPEALED FROM

The Michigan Manufacturers Association concurs in the Statement of Judgment Appealed From set forth in the Application for Leave to Appeal of Plaintiffs/Appellants Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (the "Associations").

QUESTIONS PRESENTED

The Court's Order of June 20, 2018 identified four issues on which the Court requested additional briefing: (1) whether the use of a fee surplus to pay for prior years' shortfalls violates the Construction Code Act; (2) whether the [Appellant] Associations have a private cause of action to enforce the Construction Code Act; (3) whether the [Appellant] Associations are taxpayers with standing to enforce the Headlee Amendment; and, (4) whether the challenged fees violate the Headlee Amendment. The Questions Presented in this Brief are:

1. Whether the Appellant Associations are taxpayers with standing to enforce the Headlee Amendment.

   Appellants answer "Yes."

   Appellee answers "No."

   Amicus Curiae Michigan Manufacturers Association ("MMA") answers "Yes."

   The Court of Appeals below did not address this issue.

2. Whether the challenged fees violate the Headlee Amendment.

   Appellants answer "Yes."

   Appellee answers "No."

   Amicus Curiae Michigan Manufacturers Association ("MMA") answers "Yes."

   The Court of Appeals below answered "No."

I. INTRODUCTION AND STATEMENT OF INTEREST OF THE AMICUS CURIAE

At issue in this case are two issues of great importance to the Michigan Manufacturers Association ("MMA"): (1) the standing of associations to bring lawsuits on behalf of their members to enforce the provisions of the Headlee Amendment, Const 1963, art 9, §§31-32; and, (2) whether it is a violation of the Headlee Amendment for a municipality to purposefully charge fees in excess of costs and deposit the surplus into its general fund. The MMA is an association of Michigan manufacturing businesses, organized and existing to promote the general business and economic climate of the State of Michigan and actively involved in advocating for the legal rights of its members. The MMA was organized, and exists, to promote the interests of both Michigan businesses and the public in the proper administration of laws, to study matters of general interest to its members, and otherwise to promote the general business and economic climate of the State of Michigan. A significant aspect of the MMA's activities involves representing its members' interests before the state and federal courts, legislatures, and administrative agencies. Through effective representation of its membership before the judicial, legislative, and executive branches of government on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan. The MMA appears before this Court as a representative of approximately 2,500 private business concerns, all potentially affected by the dispute in this case.

The issue of standing to enforce the Headlee Amendment raises the application of Const 1963, art 9, §32, which explicitly provides that "[a]ny taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of [the Headlee Amendment]." (Emphasis added). While the Amendment itself does not mention associations of taxpayers being able to sue, the general law of associational standing allows an association to bring suit if its members would have standing to do so. There are no reasons to deviate from this

general rule in the context of the Headlee Amendment and, indeed, there are policy reasons why the Court should allow associations to bring suit. For example, there may be instances in which individual taxpayers believe that challenging an unlawful municipal tax could result in retaliation from local units of government. Indeed, this case presents the potential for such concerns. A lone building contractor considering suing the City of Troy (the "City") might believe that the City's building department would retaliate against it. Such a contractor might also fear that, if it sued the City, potential customers might believe that the City would retaliate, leading potential customers to avoid using that contractor's services. In other cases, there may be instances in which a municipal tax is unlawful but no individual taxpayer has a large enough financial interest to justify fighting it. In such instances, associations of taxpayers are uniquely suited to vindicate taxpayer rights. Indeed, a contrary holding would result in the bizarre situation in which an individual taxpayer had standing to protest a law but an association of taxpayers would not.

The MMA also believes that, contrary to the holding of the majority opinion below, the City of Troy's challenged practice of overcharging for building permit and inspection fees and depositing the excess in its general fund violates the Headlee Amendment. In recent years, through the privatization[1] of its Building Department, the City has collected fees far in excess of the cost of operating its Building Department (the "Building Department Surplus"). The City accomplished this through a "kickback" contract, pursuant to which an independent third party operates the City's building department but "kicks back" a percentage of the fees generated by

[1] The MMA is not opposed to the privatization of municipal services and nothing in this Brief should be construed as such. Properly implemented, privatization can lead to increased efficiency. Indeed, in this case, the City apparently kept its Building Department fees constant and went from operating at a deficit to operating at a surplus solely as a result of privatization. The MMA believes, however, that it was a violation of the Headlee Amendment for the City to deposit the Building Department Surplus into its general fund. Rather, the City should have reduced its Building Department fees.

that operation to the local unit of government. The City has placed each year's Building Department Surplus into its general fund which it can then use for any purpose. In just seven years, the City deposited $2,733,140 of Building Department Surplus into its general fund. The City continues this practice today.

The Headlee Amendment prohibits local units of government from taxing their citizens under the guise of charging fees.[2] The Court of Appeals majority below erroneously held that the City's excessive building permit and inspection fees did not violate the Headlee Amendment. In reaching this conclusion, the Court of Appeals reasoned that the fees imposed were "voluntary" because they were imposed "only by those who want – or need – the services of the building department." Slip Op. at 10. This holding uniquely impacts the MMA's members. Manufacturers operating in Michigan must operate in buildings used to house their manufacturing operations. Thus, MMA members do not view building permit and inspection fees as voluntary but, instead, as a necessary part of doing business in the State.

In addition, the majority opinion is based on an unsubstantiated – and incorrect – belief that the City of Troy was somehow using the surplus funds to repay a debt. The opinion states that "defendant has established that the additional funds available after payment of the contractor's services go towards a debt incurred by the building department for past services." The majority opinion uses the word "debt" three times[3] in discussing the Headlee Amendment.

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[2] Headlee Amendment claims are analyzed using the 3-part test announced by the 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.*

[3] See Slip Op at 9 (stating "Indeed, the only difference now is that the costs have declined, resulting in some additional funds available to reduce building department debt. . . ." and "And there is no evidence that any of those additional funds are used for anything other than to pay down the debt incurred by the department in years past.")

However, there is no evidence of any "debt." In fact, a witness for the City testified in his deposition that there was no debt owed.[4] It is true that, in previous years, the City deliberately used its discretionary authority to subsidize the building fee program from the general fund. However, this did not create a "debt." There was no obligation to reimburse the general fund. The money was spent; the books for those years were duly closed; and that was that. Later, the City raised the fees far above the cost of the program and placed the surplus in the general fund. This did not repay a debt, because there was none. Instead, the City simply created a new income stream. And rather than reserve this income for the building permit program, the City made it available for discretionary spending. In other words, the City used its so-called "fees" to produce revenue for general purposes.

The MMA is also concerned about the issue involved in this case due to the recently prevalent practice of using "kickback" contracts specifically designed to generate a surplus, such as the one at issue in this case. The City of Troy's challenged contract with Safebuilt was the first such contract in the State but, as pointed out in the amicus curiae brief of the Michigan Realtors, this type of contract has since spread to at least 16 other Michigan communities who have contracted with SafeBuilt, many of which employ "kickback" contracts like the one at issue here. See Michigan Realtors' Amicus Curiae Supplemental Brief in Support of the Position of Plaintiffs/Appellants at 9-10.

The MMA is concerned about the spread of the practice at issue in this case and its potential impact upon manufacturers operating in Michigan. The issues before the Court are extremely important issues for Michigan businesses, including the MMA's members. The MMA's members' activities require them to obtain permits and inspections from local building

[4] See Deposition of John A. Lamerato (Exhibit D to the Associations' Application for Leave to Appeal) at 19.

departments and will be directly affected by the majority Opinion below. The MMA also has a significant interest in ensuring that the constitutional restrictions on taxation are correctly applied.

The interests of manufacturers are coextensive with the interests of the citizens of Michigan. Simply put, manufacturing is the backbone of Michigan's economy. Manufacturing generates 19.1 percent of the gross state product, comprises 13.8 percent of total nonfarm employment, and employs 604,500 people in Michigan. Michigan manufacturing employment is growing. From June 2009 through April 2016, employment in Michigan's manufacturing sector rose by 169,600 jobs (39.2 percent), and 34.4 percent of nonfarm jobs added in Michigan since the recession ended have been in the manufacturing sector. Michigan has been the national leader in new manufacturing job creation since the recession ended, outpacing the next closest states by more than 10 percent.

Manufacturing has always contributed substantially to Michigan job growth and economic output, and the promotion of a thriving manufacturing sector in Michigan is of the utmost importance to the future economic survival of this state. The issues in this case, therefore, substantially affect not only the manufacturing sector, but also the economy of the State of Michigan as a whole, including employment levels, economic growth, and the ability of Michigan industries to compete in the regional, national, and global marketplaces.

In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), the Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The MMA, therefore, respectfully requests that this Court grant its Motion for Leave to File Amicus Curiae in support of the position of Plaintiffs/Appellants.

II. STATEMENT OF FACTS

The MMA relies upon and accepts the Statement of Material Proceedings and Facts set forth by Plaintiffs/Appellants, Michigan Association of Home Builders; Associated Builders and Contractors of Michigan; and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Associations") in their Application For Leave To Appeal and Supplemental Brief.

III. ARGUMENT

A. An Association of Taxpayers Has Standing to Enforce the Headlee Amendment.

1. Under the General Law of Associational Standing, an Association Has Standing if its Members Have Standing.

Under well-established Michigan law, an association has standing if its members have standing. For example, in *Mich Citizens for Water Conservation v Nestle Waters of North America, Inc*, 479 Mich 280; 737 NW2d 447 (2007), a group of environmental plaintiffs sought to bring suit against a company that was bottling water. One of the plaintiffs was the Michigan Citizens for Water Conservation, which the Court described as a "non-profit corporation of approximately 1,300 members that formed to protect and conserve water resources in Michigan, particularly in Mecosta County." *Id*. at 289. In that case, the Court held:

> A nonprofit organization has standing to bring suit in the interest of its members if its members would have standing as individual plaintiffs. *Id*. at 296.

Although another portion of the Court's holding in *Mich Citizens for Water Conservation* was overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the above-quoted portion of the Court's holding was undisturbed.[5] See

[5] In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the Court overturned the test that had been used in *Mich Citizens for Water Conservation* for determining the existence of standing for an individual plaintiff. The Court, however, did not disturb its prior

also *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 629; 684 NW2d 800 (2004).

Similarly, numerous cases decided by the Court of Appeals have also embraced this principle. In *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262; 177 NW2d 473 (1970), the plaintiff association sued to abate a nuisance allegedly caused by defendants' discharge of pollutants into White Lake. Although the association owned no property abutting the lake, some of its members were riparian landowners on the lake and the Court of Appeals held that the association had standing. *Id*. at 272-273.

Similarly, in *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 29; 755 NW2d 553 (2008), the Court of Appeals held:

> There is no dispute that a nonprofit organization has "standing to bring suit in the interest of its members if its members would have standing as individual plaintiffs."

See also *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 115; 782 NW2d 784 (2010) (holding that "[n]onprofit organizations . . . have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs."); *Muskegon Bldg and Constr Trades v Muskegon Area Intermediate Sch Dist*, 130 Mich App 420; 343 NW2d 579 (1984). Similarly, in *Civic Ass'n of Hammond Lake v Hammond Lake Estates No 3 Lots 126-135*, 271 Mich App 130, 135; 721 NW2d 801 (2006), the Court of Appeals held:

> 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 . . . ."

Here, the Associations are statewide associations whose members develop and build single and multi-family homes throughout Michigan. The Associations are associations

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holding that, once standing is established for individual members of an association, the association has standing.

comprised of taxpayers – many of whom have paid the challenged "fees" at issue in this lawsuit. Thus, the Associations have standing.

2. There Are no Policy Reasons for Deviating From the General Law of Associational Standing in the Context of the Headlee Amendment and, Indeed, There Are Strong Policy Reasons for Allowing an Association to Represent its Taxpayer Members.

The Court's Order of June 20, 2018 requested additional briefing on the issue of whether the Appellant Associations are taxpayers with standing to enforce the Headlee Amendment. The Court is presumably concerned that Const 1963, art 9, §32 explicitly provides that "[a]ny taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of [the Headlee Amendment]." (Emphasis added). There is, however, nothing in the language of the Headlee Amendment, its status as an initiated constitutional amendment, or any policy considerations, that requires deviation from the general law allowing an association to bring suit on behalf of its members.

This Court has held that the Headlee Amendment was "part of a nationwide 'taxpayers revolt'... to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Durant v State Bd. of Ed*., 424 Mich 364, 378; 381 NW2d 662 (1985). In order to determine the proper interpretation of any term contained in this constitutional amendment, the Court must ascertain the intent of the voters who passed the Headlee Amendment. *Id*. at 379. As the Court held in *Bolt*:

> The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."

Bolt, 459 Mich at 160 (internal citation omitted).

In this case, the Court must ask itself whether, given the language of the Headlee Amendment, an average voter would believe that only a single individual taxpayer could challenge an unlawful tax but a group of taxpayers could not. The MMA respectfully submits that the average voter would have thought the question absurd and believed that an association of taxpayers would have standing to enforce the Headlee Amendment.

There are also no policy reasons to deviate from the general rule of associational standing and there are policy reasons supporting the proposition that associations representing taxpayers should be allowed to bring suit. For example, individual taxpayers might believe that challenging an unlawful municipal tax could result in retaliation from local units of government. In short, associations may act where individual businesses fear to tread. A sole building contractor that was considering suing the City of Troy over its building inspection and permit fees might fear that it would fail its inspections or that its permit applications would be rejected due to the lawsuit. Such a building contractor might also believe that potential customers would not use its services due to a fear of ill will from the City or its employees. Furthermore, there may be instances in which a tax is unlawful but no individual taxpayer has a large enough financial interest to justify fighting it.[6] In instances such as those described, associations of taxpayers are uniquely suited to vindicate taxpayer rights.

When Justice Levin was on the Court of Appeals, he authored the opinion in *White Lake Improvement Ass'n*, which held:

[6] The Headlee Amendment allows taxpayers who successfully challenge an unlawful tax to receive the "costs incurred in maintaining such suit." Const 1963, Art. 9, §32. This abrogation of the common law clearly shows that voters sought to relieve the financial stress of litigation from taxpayers who challenged unlawful taxes. Allowing associations of taxpayers to challenge unlawful taxes is completely consistent with this policy.

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

White Lake, 22 Mich App at 272-273.

These policy considerations regarding judicial efficiency are similarly applicable in the context of the Headlee Amendment. No constructive purpose would be served by requiring the individual taxpayers to be substituted in as plaintiffs in this case.[7]

B. The City of Troy's Practice of Overcharging for Permit and Inspection Fees and Depositing the Surplus in its General Fund Violates the Headlee Amendment.

The seminal case for determining whether a purported "fee" is actually a tax is this Court's decision in *Bolt v Lansing*, 459 Mich 152; 587 NW2d 264 (1998). In *Bolt*, the City of Lansing imposed a "storm water service charge" in order to pay for a storm water separation project. This Court held the charge was actually an unlawful tax under the Headlee Amendment. In doing so, the Court announced three primary criteria that are used to determine whether a charge is a "fee" or a "tax": (1) whether the charge serves a "regulatory purpose rather than a revenue-raising purpose;" (2) whether there is proportionality between the amount of the charge

[7] If the Court held that the Associations did not have standing, the obvious solution would be to allow some of its members to merely be substituted as plaintiffs, rather than dismissing the case. Such action is unnecessary given that the fundamental purpose of standing is to "ensure sincere and vigorous advocacy by litigants." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 358, 372; 792 NW2d 686 (2010). The Associations have vigorously advocated the taxpayers' position as demonstrated by, among other things, their Application for Leave to Appeal to this Court.

and the necessary cost of the service; and (3) whether the fee is voluntary and can be avoided through the payer declining the fee-funded service. *Bolt*, 459 Mich at 161-162. These three factors have some flexibility and are viewed in totality; that is, the strength or weakness on one factor will not necessarily decide the issue. *Id*. at 167, n 16; *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

1. The Building Department Fees Are Structured to Raise Revenue and Are Not Proportionate to the Necessary Costs of Providing the Service.

With regard to the first two *Bolt* criteria, one of the primary problems with the storm water service charge in *Bolt* was the fact that it was "frontloaded." That is, current payers of the challenged fee were not just paying for the cost of their current services but were instead paying mostly for long-lived capital improvements that would be enjoyed by future generations. Thus, the charges at issue in *Bolt* were held to be structured to raise revenue and were not proportionate to the necessary costs of providing the service. As the Court explained:

> In instituting the storm water service charge, the city of Lansing has sought to fund fifty percent of the $176 million dollar cost of implementing the CSO control program over the next thirty years. A major portion of this cost (approximately sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity. Consequently, the ordinance fails both the first and second criteria. We find the analysis of the dissenting Court of Appeals judge on this point persuasive:
>
> > [N]o effort has been made to allocate even that portion of the capital costs that will have a useful life in excess of thirty years to the general fund. This is an investment in infrastructure that will substantially outlast the current "mortgage" that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter. Accordingly, the "fee" is not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens.

Bolt, 459 Mich at 163 (emphasis added). Indeed, the fact that the charges in *Bolt* were used to pay for long-lived capital assets was the majority's primary response to the *Bolt* dissent's assertion that the monies collected were not being put into the city's general fund and therefore were not a tax. *Id*. at 163, n. 14.

This case presents the mirror image of *Bolt*. In *Bolt*, a city imposed excessive present charges on a frontloaded basis to purchase long-lived assets that could be used long into the future. In this case, the City of Troy has imposed excessive present charges on a backloaded basis because (it claims) it did not charge enough in prior years. In both cases, the analysis should focus primarily on the observation that the present charges are admittedly excessive when compared to the actual costs of providing the services rendered. Indeed, the City's "defense" is essentially an admission that it has structured its fees to raise revenues in violation of the Headlee Amendment.

In some ways, the instant case is more egregious than the excessive charges in *Bolt* because the monies collected in *Bolt* were at least earmarked for the storm water separation project. In this case, the surplus monies collected are merely deposited into the City of Troy's general fund, which the City has complete discretion to spend and which benefit all taxpayers in the City.

This is not to say that every inadvertent charge that exceeds costs would violate the Headlee Amendment. Thus, for example, it would presubably not violate the Headlee Amendment if a city in good faith set charges for services at an amount that it believed would be equal to the costs of the services but mid-year determined that its charges were either too high or too low and promptly adjusted them to more properly reflect costs. In *Bolt*, the Court was careful to state that user fees must be "proportionate" to the necessary costs of the service, rather than requiring that the fees be exactly equal to the necessary costs of the service.

In this case, however, the fees charged by the City of Troy are not proportionate to the necessary costs of the services rendered. Rather, they are designed to produce a surplus, which is deposited into the City's general fund. The City's "defense" to its admitted overcharging is that, allegedly, its Building Department operated at a deficit for years that it claims grew larger and larger and it is now overcharging (to the tune of millions of dollars) to make up that shortfall that occurred in the past. This was not, however, an inadvertent yearly shortfall. Rather, as Judge Jansen noted in her dissent below:

> 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."

COA Op, Dissent, p 3 (Exhibit B to the Associations' Application for Leave to Appeal).

Judge Jansen's dissent is clearly supported by the record. The City chose to absorb the Building Department's prior deficits with appropriations from the general fund year after year. Darling Dep Tr. (Exhibit I to the Associations' Application for Leave to Appeal) at 50-51; Miller Dep Tr., Exhibit E to the Associations' Application for Leave to Appeal at 74-75; Lamerato Dep Tr., Exhibit D to the Associations' Application for Leave to Appeal) at 19. The MMA also notes that the City's choice was clearly intentional given that MCL 141.424 expressly requires annual audits for municipalities. See also Exhibit L to the Associations' Application for Leave to Appeal at 2 (noting the requirement for an annual audit of building department fees). Thus, the City knew for years that it was operating its Building Department at a deficit but nonetheless chose to do so and cover the deficit from its general fund. The City cannot now, years later, attempt to burden current builders and property owners with the consequences of the decisions it intentionally made years ago.

2. The Building Department Fees are Not "Voluntary."

Under *Bolt*, the third factor to be considered is whether a fee is voluntary. *Bolt*, 459 Mich at 162. A true fee is voluntary whereas a tax is not. *Id*. Here, the Court of Appeals found that the building fees are voluntary in that they are only paid "by those who want – or need – the services of the building department." COA Op, p 10, Exhibit A to the Associations' Application for Leave to Appeal.

This holding uniquely impacts the MMA's members. Manufacturers operating in Michigan must operate in buildings used to house their manufacturing operations. Thus, MMA members do not view building permit and inspection fees as voluntary but, instead, as a necessary part of doing business in the State. Furthermore, the Court rejected this very theory in *Bolt*, holding:

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

Bolt, 459 Mich at 168.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons discussed above, the majority Opinion below is erroneous. The MMA respectfully requests that the Court grant Appellants' Application for Leave to Appeal and reverse the Opinion 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 Associations' Motion for Summary Disposition.

Respectfully submitted,
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