

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPLICATION FOR LEAVE TO APPEAL FROM THE  
MICHIGAN COURT OF APPEALS

JUDGES: Whitbeck, C.J., and Sawyer and Jansen, JJ.

ENGLISH GARDENS CONDOMINIUM,  
L.L.C., a ~~Michigan limited liability company,~~

Plaintiff/Appellee,

v

HOWELL TOWNSHIP, a ~~Michigan public body,~~  
MERRY BERING, ~~Howell Township Manager~~  
and ~~Zoning Administrator,~~ and LAWRENCE  
HAMMOND, ~~Howell Township Treasurer,~~

Defendants/Appellants.

Supreme Court Case

Court of Appeals  
No. 269213

Livingston Circuit Court  
No. 04-21040-AW

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**DEFENDANTS/APPELLANTS' APPLICATION FOR**  
**LEAVE TO APPEAL**

Dated: January 4, 2007

FILED

JAN - 4 2007

CORBIN R. DAVIS  
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MICHIGAN SUPREME COURT

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**STATEMENT IDENTIFYING JUDGMENT APPEALED FROM AND RELIEF  
SOUGHT**

Plaintiff English Gardens Condominium, L.L.C. ("Plaintiff" or "English Gardens") sued Defendants Howell Township, its Treasurer and its Zoning Administrator (collectively "Defendants"). The Livingston Circuit Court granted Defendants' motion for summary disposition, dismissing this case (Appendix 1). The Court of Appeals affirmed the Circuit Court's dismissal of Plaintiff's mandamus and breach-of-contract claims, but reversed the dismissal of Plaintiff's declaratory judgment claim, and remanded this case with directions for the Circuit Court to (1) declare that Defendant Howell Township acted contrary to one of its ordinances in drawing on a letter of credit, and (2) order Defendants to return the deposited security to Plaintiff. *English Gardens LLC v Howell Township*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2006) (Slip Opinion attached as Appendix 2).

Defendants request that this Court grant leave to appeal, or, in the alternative, issue a peremptory order under MCR 7.302(G)(1), that (1) vacates the Court of Appeals' letter of credit discussion; (2) reverses the Court of Appeals' directive that the Livingston County Circuit Court order Defendants to return the deposited security to Plaintiff; and (3) reinstates the Circuit Court's complete dismissal of Plaintiff's Complaint, or to the extent anything remains of this case, remands to the Circuit Court for further proceedings.

**COUNTER STATEMENT OF QUESTIONS PRESENTED**

- I. WERE THE TOWNSHIP DEFENDANTS ENTITLED TO CONVERT A LETTER OF CREDIT TO CASH IN ORDER TO PRESERVE THE TOWNSHIP'S SECURITY, WHERE PLAINTIFF DEVELOPER HAD NOT COMPLETED ITS DEVELOPMENT, WAS IN VIOLATION OF THE DEFENDANT TOWNSHIP'S ZONING ORDINANCE, AND REFUSED TO RENEW THE LETTER OF CREDIT?

Plaintiff/Appellee would answer:	“No”
Defendants/Appellants answer:	“Yes”
The Circuit Court answered:	“Yes”
The Court of Appeals answered:	"No"

- II. ASSUMING THAT THE COURT OF APPEALS PERMISSIBLY REVERSED THE CIRCUIT COURT'S COMPLETE DISMISSAL OF PLAINTIFF'S COMPLAINT, SHOULD THE COURT OF APPEALS HAVE REMANDED THIS CASE FOR FURTHER PROCEEDINGS INSTEAD OF ORDERING COMPLETE RELIEF IN FAVOR OF PLAINTIFF ON ITS DECLARATORY JUDGMENT CLAIM?

Plaintiff/Appellee would answer:	“No”
Defendants/Appellants answer:	“Yes”
The Circuit Court did not answer this question.	
The Court of Appeals answered:	"No"

## INTRODUCTION

This application concerns a published Court of Appeals opinion that is contrary to Michigan statutes and case law on letters of credit as vehicles for financial security. The Court of Appeals' opinion adversely affects Michigan jurisprudence because it creates new, binding law that makes the use of letters of credit unpredictable, and which therefore threatens their use as financial security. This application also explains that the Court of Appeals should not have ordered complete relief in the context of resurrecting a dismissed declaratory judgment claim. Instead, the Court of Appeals should have deferred to the Circuit Court's exercise of discretion.

Plaintiff English Gardens Condominium, L.L.C. ("English Gardens") is the developer of a condominium project. English Gardens provided a letter of credit as security for the completion of that project in accordance with its site plan, and as required by Defendant Howell Township's Zoning Ordinance. English Gardens failed to complete its development and refused to renew the letter of credit. Therefore, after numerous attempts to resolve this matter, Defendant Howell Township converted the letter of credit to cash in order to preserve its security.

English Gardens sued Defendants Howell Township, its Treasurer and its Zoning Administrator (collectively, "Defendants") asserting counts of (1) mandamus, (2) breach of contract, and (3) declaratory judgment. The Livingston County Circuit Court granted Defendants' motion for summary disposition, dismissing this case (Appendix 1). The Court correctly recognized that the Defendants had the authority and discretion to convert the letter of credit to cash, due to English Gardens' failures with respect to its development.

The Court of Appeals affirmed the dismissal of Plaintiff's mandamus and breach-of-contract claims. *English Gardens, LLC v Howell Twp*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2006) (Appendix 2, Slip Opinion, pp 3, 7). Defendants do not ask this Court to review these matters. The problem is

that the Court of Appeals went on to reverse the dismissal of Plaintiff's declaratory judgment claim, and remand this case with directions for the Circuit Court to (1) declare that Defendant Howell Township acted contrary to one of its ordinances in converting the letter of credit to cash, and (2) order Defendants to return the deposited security to Plaintiff (Appendix 2, p 8).

There is no issue in this case regarding whether the bank properly honored the letter of credit - it did - since the bank provided the cash funds to Defendants in accordance with the letter of credit's terms as stated on its face, which the Court of Appeals recognized (Appendix 2, p 4, concluding: "Defendants thus satisfied the prerequisites for drawing on the letter of credit as specified by the letter itself.") Despite this finding, the Court then asserted (without any supporting authority) that the letter of credit was subject to one of the Defendant Township's ordinances, and declared that Defendants could not convert it to cash.

The Court of Appeals reversibly erred because Defendants properly converted the letter of credit to cash in accordance with well-established law, as codified in the Uniform Commercial Code ("UCC"), Michigan statutes and Michigan case law. The Court of Appeals did not even mention any of this authority in its opinion, nor does the Court appear to recognize that a letter of credit is a contract between a bank and the beneficiary of credit. As a matter of law, the letter of credit was effective and properly converted to cash, irrespective of the ordinance. Indeed, the letter of credit would have been effective even if there were no ordinance at all, since a letter of credit is a stand-alone financial instrument, which the Township had statutory authority to use.

The Court of Appeals also erred in usurping the Circuit Court's discretion. Pursuant to the Michigan Court Rules and established practice, trial courts have discretion whether to grant declaratory relief, and may also grant further relief depending on the circumstances. The Circuit Court, after lengthy exposure to the facts and English Garden's gamesmanship, decided that English

Gardens was not entitled to any relief, and dismissed its complaint. The Court of Appeals reversed (which was incorrect as indicated above). What further merits this Court's attention, however, is the Court of Appeals' directive that the Circuit Court "shall order defendants to return the deposited security to plaintiff" (Appendix 2, p 8). To the extent that the Court of Appeals properly resurrected this case at all, the Court should not have ordered complete relief in favor of English Gardens, but instead should have remanded this case for the usual "proceedings not inconsistent" with the Court's decision.

### **STATEMENT OF FACTS AND PROCEEDINGS<sup>1</sup>**

In 2002, English Gardens began developing a condominium project in Howell Township. The Township initially required \$560,000 as security for completion of the required improvements in accordance with the approved site plan, which English Gardens satisfied initially by providing a letter of credit (Appendix 3, Attachment A, Exhibit 1). As improvements to the project were completed, the Township permitted the amount of the letter of credit to be reduced. The last letter of credit was for \$60,000.00, and was set to expire on October 1, 2004 (Appendix 3, Attachment A, ¶ 8).

Although the Township granted zoning approval for individual buildings within the condominium development, the Township repeatedly reminded English Gardens of its failure to complete several improvements to the common areas of the condominium development, including:

1. Failure to complete landscaping in accordance with the approved landscape plan submitted to the Township;

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<sup>1</sup>Defendants supported their positions through Defendants' Motion and Brief for Summary Disposition (attached as Appendix 3), and Howell Township's Reply to Plaintiff's Brief on Motion for Summary Disposition (attached as Appendix 4), which Defendants provided to the Court of Appeals pursuant to Administrative Order 2004-5.

2. Failure to maintain and replace dead or unhealthy plant materials;
  3. Failure to correct a drainage problem near building #9, resulting from a down-spout extending onto a sidewalk.
  4. Defective and cracked sidewalks and damaged blacktop in parking areas.
  5. Failure to provide video tapes of sanitary sewer lines as required by the Township's engineers to verify proper completion of the sewer lines.
  6. Failure to provide as-built drawings to verify proper completion of the improvements.
- (Appendix 3, Attachment A).

The Township inspected English Gardens' condominium development on several occasions, and gave English Gardens written notices of deficiencies on June 25, 2003, July 9, 2003, November 13, 2003, January 6, 2004, January 19, 2004, September 1, 2004, and September 21, 2004 (Appendix 3, Attachment A at ¶¶ 4, 5, 6, 8 and Exhibits 1, 2, 3, 5 and 8).

In late September 2004, English Gardens refused to complete the remaining improvements required by the approved site plan, and refused to renew the letter of credit that was due to expire on October 1, 2004. As a result of English Gardens' refusals, the Township converted the letter of credit to cash to secure English Gardens' completion of the required improvements in accordance with the approved site plan (Appendix 3, Attachment A, ¶ 11, Exhibits 6, 7, 8).

On October 20, 2004, English Gardens filed this action for mandamus, declaratory judgment and breach of contract. English Gardens obtained an ex parte order requiring Defendants to show cause on October 28, 2004 why they should not return the \$60,000 proceeds from the letter of credit. Defendants promptly responded. English Gardens adjourned the hearing, and never re-noticed it.

On November 2, 2004, an independent consultant, Spicer Group Engineers, conducted a reinspection of the development on behalf of Howell Township. The reinspection report (Appendix

3, Attachment B) confirmed that English Gardens' development was still far from complete, and failed to comply with the site plan in numerous respects. English Gardens repeatedly failed and refused to fix long-existing problems and to provide necessary materials, despite repeated requests to do so (*see, for example*, Appendix 3, Attachment B, p 4 regarding street lights, sewer video tapes and drawings).

On January 21, 2005, Defendants filed a motion and brief for summary disposition (Appendix 3), along with a notice of hearing for March 1, 2005. English Gardens sought and received four adjournments of the motion hearing to discuss settlement, but no settlement was reached due to English Gardens' continuing refusal to comply with the Township's Zoning Ordinance. On June 28, 2005, English Gardens' first counsel withdrew from the case. At a September 12, 2005 status conference, English Gardens' second counsel represented to the Circuit Court that the parties had agreed in concept to a settlement, so the Court adjourned the mediation, pretrial and trial dates. The Township kept trying to get English Gardens to complete its project, but English Gardens developed a disagreement with its second counsel (as well as a series of engineers) and continued to refuse to complete its project.

The Circuit Court re-noticed Defendants' summary disposition motion for September 20, 2005, then October 25, 2005. Finally on November 1, 2005, the Court granted Defendants' summary disposition motion, finding that all of English Gardens' claims failed because the record "demonstrates the Plaintiff's project was not built in accordance with the site plan and was in violation of the zoning ordinance." (11/01/05 Tr 4).

On January 3, 2006, English Gardens moved for reconsideration, which the Circuit Court granted. The Court rescheduled Defendants' motion for summary disposition, and English Gardens' third counsel filed a response. On February 28, 2006, the Court reaffirmed its complete dismissal of

English Gardens' case. The Court explained that it "is clear that mandamus is inappropriate" because English Gardens had no clear legal right to the \$60,000, and the Township had no clear legal duty to return the \$60,000, since English Gardens' development did not comply with the site plan. Moreover, the Township Zoning Ordinance specifically required as-built drawings that English Gardens never provided (2/28/06 Tr 21-22, attached as Appendix 5). The Court also held that the Township's decision to draw on the letter of credit was discretionary, not ministerial (*Id* at 22).

The Court similarly dismissed English Gardens' declaratory judgment count, finding that English Gardens did not comply with the site plan, so Defendants were entitled to convert the letter of credit to cash (Appendix 5, 2/28/06 Tr 23). Finally, the Court dismissed English Gardens' breach of contract claim as unsupported, and further noted that the claim was backwards because "if anyone has breached any sort of a contractual duty, it would seem to me that the Plaintiff would be the one that had not fulfilled its obligations under the site plan." (Appendix 5, 2/28/06 Tr 23). On February 28, 2006, the Court entered an Order Granting Defendant's Motion for Summary Disposition (Appendix 1), in accordance with the Court's opinion from the bench.

The Court of Appeals affirmed the Circuit Court's dismissal of Plaintiff's mandamus and breach-of-contract claims, but reversed the dismissal of Plaintiff's declaratory judgment claim, and remanded this case with directions for the Circuit Court to (1) declare that Defendant Howell Township acted contrary to one of its ordinances, and (2) order Defendants to return the deposited security to Plaintiff. *English Gardens LLC v Howell Twp*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d (2006) (Slip Opinion attached as Appendix 2). Defendants now apply for leave to appeal to this Court.

## STANDARD OF REVIEW

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) (Appendix 3), and the Circuit Court granted that motion in its entirety (Appendix 1). This Court reviews *de novo* a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A grant of summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief can be granted. The motion must be granted if no factual development could justify the plaintiff's claim for relief. *Id.*

To survive the motion under MCR 2.116(C)(10), English Gardens was required to overcome the burden set forth in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), as quoted in *Smith v Globe Life Insurance Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

“In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.”

Unsubstantiated assertions are not evidence. Pursuant to *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999), a reviewing court should evaluate a motion under MCR 2.116(C)(10) by considering only substantively-admissible evidence actually proffered in opposition to the motion. Opinions, conclusionary denials, unsworn arguments, and inadmissible hearsay do not satisfy what is needed to oppose such a motion. *Marlo Beauty Supply Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 321; 575 NW2d 324 (1998).

Appellate courts review a lower court's interpretation of an ordinance de novo. *Ballman v Borges*, 226 Mich App 166, 168; 572 NW2d 47 (1998).

Declaratory relief is discretionary, and therefore is reviewed for an abuse of discretion. *City of Lake Angelus v Michigan Aeronautics Comm*, 260 Mich App 371, 377; 676 NW2d 642 (2004).

### ARGUMENT

#### **I. DEFENDANTS PROPERLY CONVERTED THE LETTER OF CREDIT TO CASH IN ORDER TO MAINTAIN THEIR SECURITY, SO THE CIRCUIT COURT CORRECTLY DISMISSED ENGLISH GARDENS' CLAIMS.**

English Garden's complaint alleged claims for mandamus, declaratory relief and breach of contract, and sought refund of the \$60,000 security. As the Circuit Court accurately recognized, English Gardens had no basis to complain about the Township, since English Gardens failed to comply with the site plan. Moreover, if any party had a basis to complain, it was the Township with respect to English Gardens (Appendix 5, 2/28/06 Tr 21-23). English Gardens controlled its own actions, and because of those actions, there was no lawful or credible way that English Gardens could force the Township to either give English Gardens an unjustified windfall in the form of returning the \$60,000 security, and/or agree to accept an incomplete development. Indeed, the whole point of the letter of credit was to protect the Township against exactly what English Gardens attempted to do (avoid Township requirements and its own representations for its proposed development). The Court of Appeals, however, issued a published opinion directing the Circuit Court to order Defendants to return the \$60,000 security to English Gardens - relief that is contrary to law, and unjustified by the facts.

The Court of Appeals started its analysis properly, by looking at the letter of credit's terms. There were a series of letters of credit in declining amounts. The final one is not available because Defendants provided it to the bank when they converted it to cash (Appendix 3, Attachment A,

Exhibit 1), but it is undisputed that it stated on its face that it was payable to Defendants in cash pursuant to a signed statement that English Gardens failed to honor its contractual agreement per site plan review, with Defendant Howell Township (e.g., Appendix 3, Attachment A, Exhibit 1). The Court of Appeals correctly found that Defendants "satisfied the prerequisites for drawing on the letter of credit as specified in the letter itself" (Appendix 2, p 4).

Instead of ending its analysis with this correct observation, the Court then stated: "However, necessarily governing the operation of the letter of credit are certain applicable statutes and ordinances" *Id.* The Court did not cite any authority for this proposition, and it is fundamentally wrong. The Court apparently did not recognize that a letter of credit is a contract between a bank and the beneficiary of the credit. *Osten Meat Co v First of America Bank*, 205 Mich App 686, 689; 517 NW2d 742 (1994). Under the Uniform Commercial Code ("UCC") as codified in Michigan statutes, a letter of credit stands alone and is enforceable, irrespective of any underlying contract. *Id.* See also, MCL 440.5103(4)("Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary"); MCL 440.5106(1) ("A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary.")

The Court of Appeals reversibly erred by changing the established law through a published opinion, which is binding under MCR 7.215(C)(2) and (J)(1), holding that letters of credit are not independent financial instruments, but instead their "operation" is "necessarily govern[ed] by" certain "applicable statutes and ordinances" (Appendix 2, p 4). The Court of Appeals' decision

effectively negates the advantages of using a letter of credit by making it unpredictable and subject to challenge based on extrinsic matters. See, for example, the discussion in *Ogden Meat Co, supra*, 205 Mich App at 686.

Even assuming that there are any "applicable statutes and ordinances," the Court of Appeals' analysis of them was also flawed. With respect to statutes, the Court cited only MCL 125.286f(2), which specifically authorizes townships to require security, including cash or a letter of credit, to ensure completion of required improvements:

"To insure compliance with a zoning ordinance and any conditions imposed thereunder, a township may require that a cash deposit, certified check, irrevocable bank letter of credit, or surety bond acceptable to the township covering the estimated cost of improvements associated with a project for which site plan approval is sought be deposited with the clerk of the township to insure faithful completion of the improvements . . . The township shall establish procedures whereby a rebate of any cash deposits in reasonable preparation to the ratio of work completed on the required improvements will be made as work progresses."<sup>2</sup>

The Court of Appeals quoted this statute (Appendix 2, pp 4-5), but did not analyze this statute or any other statute that the Court apparently thought was "applicable" to the letter of credit. Although the Court's reasoning is unstated, the Court implicitly held that MCL 125.286f(2) "govern[ed] the operation of the letter of credit," and thereby limited the Township's ability to convert the letter of credit to cash. There is no basis for the Court's re-writing of the statute, and that re-writing is contrary to principles that this Court has repeatedly made clear. It is axiomatic that courts may not, under the guise of statutory interpretation, either add words to a statute, or rewrite a statute. *Hansen v Mecosta Co Bd of Comm'rs*, 465 Mich 492, 504; 638 NW2d 321 (2002). Where, as here, the statutory provisions are unambiguous, they must be enforced as written; judicial

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<sup>2</sup> MCL 125.286f was repealed effective July 1, 2006. MCL 125.3702(1)(c). Essentially the same provisions, now applicable to local units of government, are set forth in MCL 125.3505(1).

construction is neither required nor permitted. *Frankenmuth Mut Ins Co v Marlette Homes, Inc.*, 456 Mich 511, 515; 573 NW2d 611 (1998); *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

MCL 125.286f(2) plainly does not say that a township is precluded from converting a letter of credit to cash, nor does it set forth any requirements for such a conversion. It does not limit the operation of a letter of credit as the Court of Appeals held, but instead authorizes the Township to require various forms of security, including a letter of credit or a cash deposit. By converting on the letter of credit to cash, the Township now has cash to ensure that English Gardens completes its development. Thus, to the extent that MCL 125.286f(2) is "applicable," the Township acted lawfully by requiring and then converting the \$60,000 letter of credit to cash security. The Township also acted reasonably and necessarily to maintain its security, since English Gardens had not completed items that were required under the Zoning Ordinance, and expressly refused to complete the items or renew the letter of credit (Appendix 3, Attachment A, ¶ 11). The Township was in danger of losing the security that it was entitled to maintain under MCL 125.286f(2). Any further delay would have likely resulted in irreparable injury to the residents of English Gardens' project, since the improvements were not completed and the letter of credit was due to expire.

After quoting, but not analyzing, the "applicable" statute, the Court of Appeals then quoted Howell Township Ordinance §20.15, which states:

“In the event the applicant shall fail to provide improvements according to the approved final site plan, the Township Board shall have authority to have such work completed, and to reimburse itself for costs of such work by appropriating funds from the deposited security, or may require performance by the bonding company.”  
(quoted at Appendix 2, p 5).<sup>3</sup>

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<sup>3</sup> Section 20.16 similarly provides that it is a violation for the developer to fail to construct a project in accordance with the site plan:

The Court of Appeals accurately recognized that the rules of statutory construction also apply to the construction of ordinances (Appendix 2, p 5, citing *Ballman, supra*, 226 Mich App at 167). The Court of Appeals then focused on the sequence of wording in §20.15 and the word "reimburse," and concluded that "the ordinance authorizes the after-the-fact reimbursement 'for costs of such work,' not the raiding of deposited security as general compensation for inconvenience or potential future expenditures." (Appendix 2, p 5).

The Court's characterization of Defendants' position is inaccurate. Defendants do not dispute the meaning of "reimburse." Nor do Defendants dispute that they have authority to complete English Gardens' development and "reimburse" themselves. Defendants simply sought, and continue to seek, the maintenance of their security while they look to English Gardens to complete its development. Defendants have not "appropriated" any funds to "reimburse" themselves for anything. Instead, they only preserved the security by converting the letter of credit to cash.

The statutory discussion above also applies here. The Court of Appeals reversibly erred in holding that an ordinance "govern[s] the operation of a letter of credit." The Court apparently reasoned that because §20.15 authorizes the Township to "appropriate" the security and "reimburse" itself, that is the only thing that the Township is authorized to do, and all other authority is superseded by the ordinance. To the contrary, irrespective of the Township's §20.15 authority to complete work and obtain reimbursement, the Township had statutory authority under MCL 125.286f(2) to maintain its security and compel English Gardens to complete its project. Even if

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“The approved final site plan shall regulate development of the property. Any violation of this Article, including any improvement not in conformance with an approved final site plan, shall be deemed a violation of this Article, and shall be subject to the penalties of this Ordinance.”

§20.15 did not exist at all, the Township would be authorized to protect its security. Also, irrespective of any statute or ordinance, the letter of credit was a stand-alone financial instrument that the Township properly converted to cash in accordance with the letter of credit's terms. *Osdan Meat Co, supra*; MCL 440.5103(4); MCL 440.5106(1).

Moreover, the Court of Appeals essentially held that §20.15 gives rise to a cause of action pursuant to which developers can recover damages. The ordinance plainly is designed to protect the Township, not provide a means for developers to avoid their responsibilities and leave the Township without security. *See, Ballman, supra*, 226 Mich App at 169. The Court of Appeals' opinion, including this new cause of action, threatens to transform the uniform law on letters of credit into a patchwork that depends on a case-by-case evaluation of various "applicable" municipal ordinances. This Court should correct the Court of Appeals' opinion before it unravels the fabric of the law on letters of credit in Michigan.

Defendants further note that the Court of Appeals was apparently persuaded that English Gardens was entitled to a "chance of vindicating its position that defendants improperly drew funds from the letter of credit." (Appendix 2, p 8).<sup>4</sup> The Court of Appeals' apparent misperceptions are unfounded and do not justify its radical change in the law, as discussed above. The Court's disposition of this appeal is also particularly inappropriate in this MCR 2.116(C)(10) context, since the record demonstrates that English Gardens failed to complete its project in accordance with the approved site plan, and that the project violated the Township's Zoning Ordinance. The Circuit

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<sup>4</sup> The Court's language in this instance, as well as its inaccurate assertion about "raiding of deposited security" (Appendix 2, p 5) indicate that the Court misperceived this case as involving the Township taking the deposited security for itself. To the contrary, the Township is simply maintaining its security, which is now in cash. The Township has already reduced Plaintiff's required security from \$560,000 to \$60,000, but the Township needs to maintain this \$60,000 to ensure that Plaintiff completes its project.

Court found this on November 1, 2005 (Tr 4) after repeated delays due to English Gardens' gamesmanship. The Court then granted rehearing to give English Gardens another chance to support its case. English Gardens did not, and could not, do so. Therefore, the Court reaffirmed its decision:

“The project was not in compliance with the site plan as shown in the Spicer report. \* \* \* Neither the zoning ordinances nor the statute provide for a clear legal duty to return the letter of credit funds when the project is not in compliance with the site plan.” (2/28/06 Tr 21-22).

The record demonstrates that the Circuit Court was correct. For example, English Gardens' site plan required 26 street lights, but only 8 were actually installed (2/28/06 Tr 7). There was no genuine issue regarding the fact that English Gardens never completed the required improvements to its project. The Affidavit of the Zoning Administrator and the Spicer report (Appendix 3, Attachments A and B) demonstrated that the project violated of the Zoning Ordinance. The Township Manager and Zoning Administrator, Merry Bering, testified at her deposition that English Gardens failed to comply with several requirements under the site plan, including landscaping not completed, retention pond not landscaped, grass not placed along Henderson Road, the entryway sign was not landscaped, blacktop not installed, and sidewalks and driveways were defective (Appendix 4, Attachment A, pp 44-45). Mrs. Bering further testified that, although the Township issued certificates of compliance for particular buildings within the development, the Township does a separate final site plan inspection that includes common areas and site improvements in the development before issuing a Certificate of Compliance for the entire project's compliance with the approved site plan under Section 20.13 of the Zoning Ordinance (Id., pp 48-49). Thus, the record established that the Township requires a final site plan inspection, and English Gardens never passed that inspection. English Gardens did not, and could not, produce any evidence to show that the sidewalks, driveways, landscaping, sewers and other common elements that were noncompliant were

actually completed as required under the Zoning Ordinance at the time the Township converted the letter of credit to cash in order to maintain security for English Gardens' completion of its project.

Moreover, Howell Township never received complete as-built drawings from English Gardens (Appendix 3, Exhibit A).<sup>5</sup> Completed drawings are necessary so that the Township can verify that English Garden actually carries out all of the items that the Township initially approved and required. English Gardens did not, and could not, provide proof that as-built drawings were submitted and approved as required under Section 20.11. English Gardens essentially conceded its site plan violations and failure to complete its development, asserting that the Township was not entitled to take action “regardless of whether site plan violations existed” and “even if the Development was not in compliance” (English Gardens initial brief in the Court of Appeals, p 19).

English Gardens primarily brought a mandamus claim in an attempt to recover the \$60,000 and leave the Township without security (Appendix 6, Complaint). The Circuit Court rejected the mandamus claim, and also properly dismissed Count 2 (Declaratory Judgment) and Count 3 (Breach of Contract) of the Complaint, which merely reformulated the inaccurate and unsupported allegations of the mandamus claim. The Circuit Court explained that English Gardens failed to

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<sup>5</sup> Section 20.11 of the Zoning Ordinance requires as-built drawings from the developer:

“The Applicant upon completion of all construction, and prior to receiving a Certificate of Compliance, shall as the project was finally built, have prepared a set of as-built site plan drawings by a State of Michigan registered/licensed professional architect, civil engineer or land surveyor who shall upon preparing such a set of as-built plans present a written statement certifying the set of plans accurately represent the completed construction of the project as actually and finally constructed as-built on the site. The “as-built site plan” shall be submitted to the Township in the form of one (1) Mylar as-built tracing and three (3) sets of as-built prints acceptable to the Township. The as-built site plan shall show the exact location of all improvements, including building locations, elevations, grades, paved areas, sewer lines or on site wastewater disposal systems, water mains or onsite water supply systems, manholes, drain inlets, fire hydrants, signs, outdoor lighting, utility locations for electric power, gas, telephone and cable television, landscaping, property lines, easements and any other improvement located above, on or below ground grade.”

fulfill its obligations, and that Defendants were entitled to convert the letter of credit to cash to ensure English Gardens' compliance:

“Plaintiff is not entitled to a declaratory judgment in their favor because it seems clear the **Defendants are entitled to draw on the \$60,000 letter of credit in order to ensure compliance.** Furthermore, Plaintiff offers no real support for a breach of contract claim. And besides, if anyone has breached any sort of a contractual duty, it would seem to me that the **Plaintiff** would be the one that **had not fulfilled its obligations under the site plan.** I do grant the Defendant’s motion for summary disposition on all counts.” (Appendix 5, 2/28/06 Tr 23, emphasis added).<sup>6</sup>

Defendants were entitled to dismissal of all counts, since the evidence demonstrates that the Township's Zoning Administrator sent letters to English Gardens citing deficiencies on June 25, 2003, July 9, 2003, November 13, 2003, January 6, 2004, January 19, 2004, September 1, 2004 and September 21, 2004 (Appendix 3, Attachment A, at ¶¶4, 5, 6, 8 and Exhibits 1, 2, 3, 5 and 8). Despite the repeated notifications from the Township, English Gardens did not complete the improvements as required by the site plan (Appendix 3, Attachment B) and refused to renew the letter of credit, which was set to expire on October 1, 2004 (Appendix 3, Attachment A, ¶ 11). English Gardens is not entitled to any relief. Based on the record and the controlling law, the Circuit Court properly granted summary disposition dismissing English Gardens' complaint.

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<sup>6</sup>English Gardens also attempted to extinguish its responsibilities to complete the project, and instead burden the homeowners with the completion costs. They could not do so, since Zoning Ordinance Section 20.15 places the responsibility on the English Gardens, as the “applicant,” to complete the entire development under the site plan as approved by the Township. Thus, the Circuit Court correctly determined that English Gardens could not pass off its responsibility for compliance with the Zoning Ordinance to the Condominium Association:

“The zoning ordinance makes a provision for the applicant as responsible for compliance, not transferees of the applicant.” (Appendix 5, 2/28/06 Tr 21-22).

The Court of Appeals reversibly erred in holding that the Township was required to hire a contractor and complete the improvements to English Gardens' project before drawing on the letter of credit, particularly since the letter of credit was about to expire. There is no sound basis to force a municipality to let a letter of credit expire, or require the municipality to take over as general contractor and pay construction costs for a private development. The Township simply converted the letter of credit to cash in order to preserve the security, due to English Gardens' continuing violations that are established beyond any credible dispute, and where English Gardens refused to renew the letter of credit to provide security against its failure to fix those violations. English Gardens had ample notice and opportunities to be heard, and has never presented any sound basis for a different outcome in this case.

**II. ASSUMING THAT THE COURT OF APPEALS PERMISSIBLY REVERSED THE CIRCUIT COURT'S COMPLETE DISMISSAL OF PLAINTIFF'S COMPLAINT, THE COURT OF APPEALS SHOULD HAVE REMANDED THIS CASE FOR FURTHER PROCEEDINGS INSTEAD OF ORDERING COMPLETE RELIEF IN FAVOR OF PLAINTIFF.**

In addition to the discussion of the law and record above, the Court of Appeals' directive that the Circuit Court "shall order defendants to return the deposited security to plaintiff" (Appendix 2, p 8), is particularly appropriate because the Court of Appeals issued that directive in the context of reversing the dismissal of English Gardens' declaratory judgment claim (Appendix 6, Complaint, pp 7-8). The Circuit Court properly exercised its discretion in rejecting that claim due, in part, to the unjust results that Plaintiff sought (Appendix 5, 2/28/06 Tr 23). In *City of Lake Angelus, supra*, the Court explained:

"The language of MCR 2.605 is permissive rather than mandatory, stating that the courts *may* declare the rights . . . of an interested party seeking a declaratory judgment. It therefore rests with the sound discretion of the court whether to grant declaratory relief. It is always the duty of the court to strike a proper balance between the

needs of the plaintiff and the consequences of giving declaratory relief." 260 Mich App at 377, n7

Even assuming that English Gardens is entitled to any declaratory relief (which Defendants deny for the reasons set forth above), English Gardens is not entitled to recover the \$60,000 and leave the Township without security as the Court of Appeals ordered. MCR 2.605(F) states:

"Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment."

Giving English Gardens a windfall and effectively releasing it from responsibility to complete its development is not "necessary or proper." The Circuit Court appropriately exercised its discretion in denying relief to English Gardens and dismissing its complaint. To the extent that the Court of Appeals permissibly reversed the Circuit Court at all (which Defendants deny), the proper remedy is to remand this case to the Circuit Court for further "proceedings not inconsistent" with the appellate decision. *See, for example, Triangle Excavating Co v Covert Twp*, 475 Mich 855; 713 NW2d 767 (2006); *Winkler v Carey*, 274 Mich 1118; 712 NW2d 451 (2006).

Such a remand would also allow the "reasonable notice and hearing" under MCR 2.605(F). This step is not only appropriate as a matter of due process,<sup>7</sup> it is also appropriate because the Court of Appeals should not have ordered complete relief that is unsupported by the record on MCR 2.116(C)(10) review. To the extent that there already has been a hearing, it demonstrated that English Gardens is not entitled to recover the \$60,000 and thereby leave the Township without security for English Gardens' failure to complete its development, as discussed above. Further guidance by comparison is provided by *Durant v State of Michigan*, 456 Mich 175, 209-10 566 NW2d 272 (1997), where this Court determined that damages were "necessary or proper" under

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<sup>7</sup> U.S. Const, Am XIV; Const 1963, art 1, §17.

MCR 2.605(F), in the context of prolonged proceedings (in contrast to these summary disposition proceedings) and based on a developed record (in contrast to this case, where the Court of Appeals dismissed English Gardens' contract claim without prejudice due to English Gardens' failure to support its position (Appendix 2, p 7)).<sup>8</sup>

### **III. THE COURT SHOULD GRANT RELIEF.**

This application involves the ability of municipalities to use letters of credit as security to ensure that real estate developers properly complete developments in their communities. This application also concerns the deference that appellate courts should show to trial courts that exercise their discretion in declaratory judgment actions in order to achieve just results. These are legal principles of major significance to Michigan jurisprudence. MCR 7.302(B)(3). The Court of Appeals' order of complete, and improper, relief is also clearly erroneous, will cause material injustice, and is contrary to established case law. MCR 7.302(B)(5).

Moreover, the Court of Appeals' published opinion is binding precedent (MCR 7.215(C)(2) and (J)(1)) that invites developers across Michigan to seek to evade their obligations to properly complete their developments, and maintain appropriate financial security to do so. Due to this newly-created uncertainty and risk, letters of credit will lose their advantages as financial security. The resulting shift to other forms of security, particularly cash, may have additional negative repercussions, particularly in the present real estate development market.

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<sup>8</sup> This dismissal without prejudice is another example of the Court of Appeals' apparent belief that English Gardens is entitled to another chance to vindicate its position. English Gardens already had plenty of chances. It did not, and cannot, prove that it did things that it did not do, and which it continues to refuse to do. That is why the Circuit Court dismissed its complaint.

## CONCLUSION AND RELIEF REQUESTED

Howell Township and its citizens have a right to ensure that real estate developments are completed in accordance with site plans approved by the Township. Michigan law specifically authorizes townships to require deposits, including cash or irrevocable letters of credit, to ensure completion of required improvements. A letter of credit is enforceable pursuant to its own terms, and without regard to any underlying transaction. Where, as here, a developer does not complete improvements in accordance with the approved site plan, and refuses to renew the letter of credit, a township is entitled to convert the letter of credit to cash in order to preserve its security.

The Court of Appeals should have affirmed the Circuit Court's February 28, 2006 Order Granting Defendants' Motion for Summary Disposition (Appendix 1) in its entirety. The Court of Appeals reversibly erred in issuing a published opinion (Appendix 2) that is contrary to the UCC as codified in Michigan statutes, and which undermines the previously-existing advantages of using a letter of credit as security. The Court of Appeals also should have deferred to the Circuit Court's exercise of discretion. To the extent that the Court of Appeals permissibly reversed the Circuit Court's complete dismissal of this case at all (which Defendants deny), the proper remedy is to remand this case to the Circuit Court for further "proceedings not inconsistent" with the appellate decision.

Accordingly, Defendants respectfully request that this Court grant leave to appeal, or, in the alternative, issue a peremptory order under MCR 7.302(G)(1), that (1) vacates the Court of Appeals' letter of credit discussion;<sup>9</sup> (2) reverses the Court of Appeals' directive that the Livingston County

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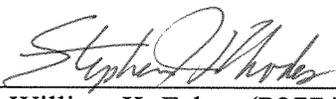
<sup>9</sup> More specifically, the Court of Appeals was correct up to the point where it stated: "Defendants thus satisfied the prerequisites for drawing on the letter of credit as specified by the letter itself" (Appendix 2, p 4). The Court erred when it continued: "However, necessarily governing the operation of the letter of credit are certain applicable statutes and ordinances."

Circuit Court order Defendants to return the deposited security to English Gardens; and (3) either reinstates the Circuit Court's complete dismissal of English Gardens' complaint, or the extent anything remains of this case, remands to the Circuit Court for further proceedings.

Respectfully submitted,

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Dated: January 4, 2007

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