

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
No. 132859

Court of Appeals
No. 269213

Livingston Circuit Court
No. 04-21040-AW

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DEFENDANTS/APPELLANTS' REPLY BRIEF IN
SUPPORT OF THEIR APPLICATION FOR
LEAVE TO APPEAL

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INTRODUCTION

Defendants Howell Township, its Treasurer and its Zoning Administrator (collectively, "the Township") offer the following reply to Plaintiff English Gardens Condominium, L.L.C.'s ("Plaintiff" or "English Gardens") brief opposing Defendants' Application for Leave to Appeal. The Township relies on its Application, which focused on the relevant issues. The Township's avoidance of repetition and failure to specifically address any of English Gardens' arguments in this reply should not be deemed to constitute an acceptance of any of those arguments.

ARGUMENT

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

The Township previously explained that the Court of Appeals reached erroneous decisions in this case based, at least in part, on the Court's apparent misperception that the Township took the deposited security for itself (e.g., Application, p 13, n 4). English Gardens responds by claiming that the Township is attempting to raise new arguments that contradict its prior positions (e.g., brief, 15). English Gardens' response lacks merit, but does perhaps offer some explanation for the Court of Appeals' error.

Specifically, English Gardens focuses on the verb "appropriate" to indicate that the Township drew on the letter of credit to keep the money for itself, which is inaccurate. Instead, the Township drew on the letter of credit to maintain security for English Gardens to complete its project. The Circuit Court recognized that the Township was properly maintaining its security. The Circuit Court stated, for example:

"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.**" (2/28/06 Tr 23, attached as Appendix 5 to Application, emphasis added).

The Township has consistently maintained that it acted to preserve its security and thereby ensure English Gardens' completion of its project. For example, Defendants' Motion and Brief for Summary Disposition (attached as Appendix 3 to Defendants' Application), states:

"As a result of Plaintiff's conduct, the Township was forced to draw on the letter of credit **to secure Plaintiff's completion of the required improvements in accordance with the approved site plan** (Attachment A, Exhibits 5, 6, 7, 8)." (Appendix 3, p 3, emphasis added).

* * *

"The Township's authority to draw upon Plaintiff's letter of credit could not be more plain. Both the Township Zoning Act and the Howell Township Zoning Ordinance specifically authorize the Township to appropriate the \$60,000 in this case. The Township had a clear legal right to draw upon the letter of credit **to ensure completion of improvements in accordance with the site plan.**

"Similarly, Howell Township has no duty to return the \$60,000, since Plaintiff failed to bring the property into compliance with the site plan (Attachment B). Rather, the Township had a clear right to appropriate the funds **to ensure completion of the project.**" (Appendix 3, p 8, emphasis added).

* * *

"**The Township was in danger of losing the security** provided for under the Act if the letter of credit was not drawn against prior to October 1." (Appendix 3, p 10, emphasis added).

* * *

"When a development is not completed in accordance with the approved site plan, the Township Zoning Act and the Zoning Ordinance provide that the Township has a clear legal right to appropriate the funds provided for security by the developer **to ensure completion.**" (Appendix 3, p 11, emphasis added).

Similarly, Defendants' Brief on Appeal in the Court of Appeals (attached to this reply brief as

Appendix 7) states:

"As a result of English Gardens' refusals, the Township was forced to draw on the letter of credit **to secure English Garden's completion of the required improvements in accordance with the approved site plan** (Appendix 1, Attachment A, ¶ 11, Exhibits 6, 7, 8)." (Appendix 7, p 3, emphasis added).

* * *

"**The Township was in danger of losing the security** provided for under the Township Zoning Act if the letter of credit was not drawn against prior to October 1." (Appendix 7, p 8, emphasis added).

* * *

"The Township had authority to draw upon English Gardens' letter of credit, since both the Township Zoning Act and the Howell Township Zoning Ordinance specifically authorized the Township to appropriate the \$60,000 **to ensure completion of improvements in accordance with the site plan.**" (Appendix 7, p 8-9, emphasis added).

* * *

"Instead, the Township simply enforced a letter of credit due to 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.**" (Appendix 7, p 12, emphasis added).

* * *

"Howell Township and the general public have a right to ensure that real estate developments are completed in accordance with site plans approved by the Township under its Zoning Ordinance. The Zoning Ordinance and the Township Zoning Act specifically authorize townships to require deposits, including irrevocable bank letters of credit, **to ensure completion of required improvements.** Where, as here, a developer does not complete improvements in accordance with the approved site plans, and refuses to renew the letter of credit, the Township Zoning Act and the Zoning Ordinance further authorize

the actions that Defendants took.” (Appendix 7, p 17, emphasis added).

To the extent that English Gardens suggests that the Township relied only on an ordinance to support its actions, that suggestion is inaccurate, as demonstrated by the references to the Township Zoning Act in the brief excerpts quoted above, as well as throughout the remainder of the Township's briefs in the Circuit Court and Court of Appeals (Appendices 3 and 7). English Gardens acknowledges that the Township Zoning Act "grants to the Township the authority to require security 'to insure compliance with a zoning ordinance and any conditions imposed thereunder'" (brief, p 18, quoting MCL 125.286f). English Gardens further acknowledges that Howell Township Ordinance § 20.15 "authorizes the township to require 'acceptable forms of security' from an applicant in connection with an approved site plan" (brief, p 19, quoting Ordinance § 20.15).

Thus, the Township's ability to require security for English Gardens' completion of its project should be beyond credible dispute. Regardless, English Gardens does dispute the matter by contending (as it apparently misled the Court of Appeals) that the Township improperly seized the security to "reimburse" itself, and that the Township "could not point to any evidence showing that it has expended any of its own money or even any part of the \$60,000 it seized to have improvements completed on the Development." (brief, p 21). Of course there is no evidence, since the Township has not attempted to complete English Gardens' project, nor has the Township claimed any part of the \$60,000 as "reimbursement." The Township is authorized to obtain reimbursement in the event that different circumstances may arise in the future, but that possibility is irrelevant in this case at

this time. The Township is simply attempting to maintain security for English Gardens to complete its project.¹

English Gardens further suggests that the Township is improperly raising a new argument that the Court of Appeals' decision is contrary to the Uniform Commercial Code ("UCC"). English Gardens' suggestion fails because the Court of Appeals first created the UCC error in its opinion. The Township could not anticipate that the Court of Appeals would do so. Previously, the UCC was involved in this case only because the case involved a UCC letter of credit and the Township drew on the letter of credit in accordance with the UCC, which was beyond dispute. As the Township previously explained (e.g., Application, p 20, n 9), 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 of Appeals erred when it went on to change established law to address the Court's apparent misunderstanding of this case.

II. THE COURT OF APPEALS SHOULD NOT HAVE ORDERED COMPLETE RELIEF IN THE FORM OF A "REFUND" TO ENGLISH GARDENS.

The Township previously explained that 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 inappropriate because that directive will produce unjust results (Application, pp 17-19). English Gardens responds (e.g., brief, p 24) that the Court of Appeals reasonably ordered the Township to "return" the funds that it "wrongfully seized." English Gardens' response lacks merit because it is based on false premises as discussed above.

Further, to "return" something to English Gardens, English Gardens must have had it in the first place. Here, the \$60,000 at issue was security that English Gardens posted for the completion

¹ Defendants previously sought to recover attorney fees and costs, and maintain their rights to seek relief for matters including English Gardens' litigation tactics.

of its project. That security existed in the form of a letter of credit, which the Township possessed and converted into cash in order to maintain its security. The Township did not take anything from English Gardens, and should not be required to "return" a windfall to English Gardens where English Gardens failed to complete its project and refused to renew the letter of credit.

Similarly, the Township did not "wrongfully seize" anything. The Township simply seeks to maintain the status quo, which is \$60,000 of security pending English Gardens' completion of its project. Finally, there is no merit in English Gardens' attempts to convince this Court that it did complete its project, and/or it is not responsible for continuing deficiencies (particularly in the brief's counter-statement of facts). These attempts are irrelevant to the issues presented in the Application, and are unsupported by the record. The Circuit Court accurately saw no merit in English Gardens' attempts to evade its responsibilities (Appendix 5, 2/28/06 Tr 21-23, see also, Appendix 7, discussing the record support for the Circuit Court's rulings, and demonstrating the lack of merit in English Gardens' contrary assertions).

CONCLUSION AND RELIEF REQUESTED

There is a saying that "bad facts make bad law." This case involves facts that English Gardens has misstated, and which the Court of Appeals apparently misunderstood. The result is an opinion that is factually unfounded and which results in the unjust "refund" of security to English Gardens, despite English Gardens' failure to complete its project and refusal to renew the letter of credit that English Gardens had posted as security for that completion. Moreover, the Court of Appeals' opinion is published, so it is binding precedent that adversely changes the established law on the use of letters of credit as financial security, and invites future litigation.

Therefore, and for the reasons further discussed above and in its Application, the Township respectfully requests 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 (2) reverses the Court of Appeals' directive that the Livingston County Circuit Court order the Township 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: February 20, 2007

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² 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."