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 No. 132859

Court of Appeals No. 269213

Livingston Circuit Court No. 04-21040-AW

Richard W. Paige (P45199)
Moheeb H. Murray (P63893)
Bush Seyfert Kethledge & Paige, PLLC
Attorneys for Plaintiff/Appellee
3001 W. Big Beaver Road, Suite 600
Troy, MI 48084
(248) 822-7800

William K. Fahey (P27745)
Richard L. Hillman (P40965)
Stephen J. Rhodes (P40112)
Foster, Swift, Collins & Smith, P.C.
Attorneys for Defendants/Appellants
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

/

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DEFENDANTS/APPELLANTS' SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED BY THIS COURT'S JUNE 1, 2007 ORDER

I. DID THE TRIAL COURT CORRECTLY GRANT THE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION IN ITS ENTIRETY?

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

II. DID THE COURT OF APPEALS ERRONEOUSLY TREAT AN ORDINANCE PROVISION AS GOVERNING THE OPERATION OF THE LETTER OF CREDIT?

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

INTRODUCTION

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

English Gardens sued Howell Township, its Treasurer and its Zoning Administrator, asserting counts of (1) mandamus, (2) breach of contract, and (3) declaratory judgment. After discovery, the Livingston County Circuit Court granted the Township's motion for summary disposition, dismissing this case (Appendix 1).[1] The Court of Appeals affirmed the dismissal of Plaintiff's mandamus and breach-of-contract claims. *English Gardens, LLC* v *Howell Twp*, 273 Mich App 69, 74, 81; 729 NW2d 242 (2006). The Court reversed and remanded with respect to Plaintiff's declaratory judgment claim, however, stating: "We reverse the dismissal of plaintiff's declaratory judgment claim and direct the trial court on remand to declare that defendants acted contrary to Howell Township Ordinance, §20.15 in drawing the $60,000 from the letter of credit. MCR 7.216(A)(7). The trial court shall order defendants to return the deposited security to plaintiff." 273 Mich App at 82.

The Township filed an application for leave to appeal to this Court, English Gardens filed an opposing brief, and the Township filed a reply. On June 1, 2007, this Court issued an Order

[1] Appendix references are to the Appendices accompanying Defendants' Application for Leave to Appeal and Reply Brief in Support of Their Application for Leave to Appeal.

directing the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. The Order also identified two questions that the parties are to address, namely:

1. Whether the trial court correctly granted the Township's Motion for Summary Disposition in its entirety?

2. Whether the Court of Appeals erroneously treated an ordinance provision as governing the operation of the letter of credit?

The Township submits this supplemental brief focusing on the issues identified in the Court's June 1, 2007 Order. These issues, and related matters, were also addressed in the Township's earlier filings, which the Township incorporates by reference to avoid duplication.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY GRANTED THE TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION IN ITS ENTIRETY.

When the Township moved for summary disposition pursuant to MCR 2.116(C)(10), English Gardens failed to respond with any showing to justify continuation of this case, so the Circuit Court properly dismissed it.[2] Defendants were entitled to dismissal of all counts, since the unrefuted evidence demonstrated that the Township's Zoning Administrator sent letters to English Gardens citing deficiencies and uncompleted improvements 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

[2] The Court of Appeals correctly observed that English Gardens provided no contract to support its breach-of-contract claim. 273 Mich App at 81, citing MCR 2.113(F).

October 1, 2004 (Appendix 3, Attachment A, ¶ 11). Based on the unrefuted record, the Circuit Court properly granted summary disposition dismissing English Gardens' complaint.

The Circuit Court granted summary disposition on November 1, 2005 (Tr 4) after repeated delays requested by English Gardens, and after English Gardens had been afforded substantial discovery. The Circuit Court later granted rehearing to give English Gardens another chance to support its case. English Gardens did not, and could not, do so. Therefore, the Circuit Court reaffirmed its decision. (Appendix 5, 2/28/06 Tr 21-23).

The record demonstrates that the Circuit Court was correct. For example, English Gardens' site plan required 26 street lights, but it was undisputed that 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 the site plan. The Township Zoning Administrator testified on 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). The Zoning Administrator 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 required sidewalks, driveways, landscaping, sewers and other common elements were actually completed as required under the site plan at the time the Township converted the letter of credit to cash in order to maintain security for English Gardens' completion of its project.

English Gardens' complaint alleged claims for mandamus, declaratory relief, and breach of contract, and sought refund of the $60,000 letter of credit (Appendix 6). The Court of Appeals affirmed the dismissal of English Gardens' mandamus and breach-of-contract claims. 273 Mich App at 74, 81. The Township does not ask this Court to review these matters, but some discussion of them seems necessary to address the first question presented by this Court's June 1, 2007 Order.

A writ of mandamus is governed by MCR 3.305. Issuance of a writ of mandamus is proper only where:

(1) the plaintiff has a clear legal right to performance of a specific duty sought to be compelled;

(2) the defendant has the clear legal duty to perform such act;

(3) the act is ministerial;

(4) the plaintiff has no adequate remedy at law; and

(5) the burden of proof is on the plaintiff.

Carlson v Troy, 90 Mich App 543; 282 NW2d 387 (1979); *McKeighan v Grass Lake Twp Supervisor*, 234 Mich App 194; 593 NW2d 605, 614 (1999).

The Circuit Court properly determined that English Gardens had no "clear legal right" to obtain a refund of the $60,000 letter of credit:

> "And this case is clear that mandamus is inappropriate because the Plaintiff has no clear legal right to return to the $60,000. The project was not in compliance with the site plan as shown in the Spicer

report. There are indications that the development was not in compliance with the site plan, and while the developer conveyed management of the property through the association, does that mean that there is a clear right to return $60,000? The zoning ordinance makes a provision for the applicant as being responsible for compliance, not transferees of the applicant. This is not a clear legal right to return of the letter of credit funds." (Appendix 5, 2/28/06 Tr 21-22)[3]

The Circuit Court also properly determined that the Township did not have a corresponding "clear legal duty" to provide a $60,000 refund to English Gardens:

> "Furthermore, because the project was not in compliance, defendant had no legal duty to return the $60,000. 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 an compliance with the site plan. While plaintiff argues that certificates of compliance cover the whole development, it's clear that they cover only the buildings.
>
> "Furthermore, the fact that the ordinance 20.11 specifically provides that as built drawings must be provided upon completion and before a certificate of compliance can be issued, shows that the Township has not finally approved the whole development. And therefore, Defendants did not have a clear legal duty to return of the funds." (Appendix 5, 2/28/06 Tr 22).[4]

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[3]English Gardens attempted to extinguish its responsibilities to complete the project, and instead burden the homeowners with the completion costs. This attempt was contrary to Ordinance §20.15 (quoted below), which places the responsibility on English Gardens, as the "applicant," to complete the entire development in accordance with the site plan approved by the Township. Thus, the Circuit Court correctly determined that English Gardens could not transfer its responsibility for compliance with the Ordinance to the homeowners or their association.

[4] Howell Township never received complete as-built drawings from English Gardens (Appendix 3, Exhibit A). Completed drawings are necessary so that the Township can verify that English Garden actually carried 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 Ordinance §20.11, which provides:

"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

Mandamus is not an appropriate remedy to compel a township official to carry out a discretionary act. *Bills v Grand Blanc Twp*, 59 Mich App 619; 229 NW2d 871 (1979); *Faucher v Sherwood*, 321 Mich 193; 32 NW2d 193 (1948). The decision to convert the letter of credit to cash in order to maintain the security was a discretionary act, so mandamus is not a viable cause of action. The Circuit Court correctly determined that English Gardens failed to state a claim for mandamus:

> "Finally, the decision whether to draw on the letter of credit or whether to return the funds . . .[was a] discretionary decision and not ministerial. Ordinance 20.15 requires the Township to determine whether additional improvements are needed to bring a project into compliance with the site plan. If this isn't discretionary judgment, I don't know what it would be." (Appendix 5, 2/28/06 Tr 22).

The Circuit Court also properly dismissed Count 2 (Declaratory Judgment) and Count 3 (Breach of Contract) of the Complaint, which merely reformulated the allegations of English Gardens' mandamus claim. The motion for summary disposition was before the Circuit Court under MCR 2.116(C)(10) (no issue as to any material fact). The Circuit Court was well informed on the record by the parties' affidavits, exhibits, depositions and briefs. The Court explained that English Gardens unquestionably failed to fulfill its obligations to either complete the improvements or maintain the letter of credit, and that the Township was entitled to convert the letter of credit to cash to ensure English Gardens' compliance:

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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."

> "The declaratory judgment and breach of contract counts in Plaintiff's compliant should also be dismissed because, as the Defendants argue in their brief and as a review of the file shows, Plaintiff did not comply with the site plan and therefore Defendants were entitled under Section 20.15 of the zoning ordinance to withdraw the $60,000. 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).

The decision to grant declaratory judgment relief rests with the sound discretion of the trial court. *City of Lake Angelus* v *Michigan Aeronautics Comm*, 260 Mich App 371, 377, n 7; 676 NW2d 642 (2004). The Circuit Court correctly exercised its discretion in ruling that English Gardens was not entitled to the return of its security, since English Gardens had not completed the project for which the Township held that security.

By converting the letter of credit to cash before its expiration, in accordance with its terms, the Township did what it was authorized and required to do to preserve the security. It was fundamentally wrong for the Court of Appeals to essentially hold that, since the Court thought that English Gardens should have a "chance of vindicating its position," the Circuit Court must order complete relief in favor of English Gardens by "order[ing] defendants to return the deposited security to plaintiff." 273 Mich App at 82. The Township holds the security to guarantee completion of the improvements, and it was clearly erroneous for the Court of Appeals to order return of the security without any showing that the improvements were completed. See also the discussion in Argument II of Defendants' Application for Leave to Appeal and Reply Brief.

English Gardens still has not completed its project. If it does so, then the Township would be agreeable to returning the security.[5] The Court of Appeals apparently was under the mistaken belief that the Township had already taken the security for itself, which is not the case. The Township simply converted the letter of credit to cash in order to maintain the security for English Gardens to complete the project. While the project remains incomplete, however, the Township must retain the security due to the possibility that the Township may end up having to complete the project and reimburse itself from the security.

II. THE COURT OF APPEALS ERRONEOUSLY TREATED AN ORDINANCE PROVISION AS GOVERNING THE LETTER OF CREDIT.

The Court of Appeals started its analysis properly, by looking at the letter of credit's terms. Over the construction of the project, English Gardens provided a series of letters of credit in declining amounts. Each successive letter of credit stated on its face[6] that it was payable to the Township in cash pursuant to a signed statement that English Gardens failed to honor its contractual agreement per site plan review with the Township (e.g., Appendix 3, Attachment A, Exhibit 1). The Court of Appeals correctly found that the Township "satisfied the prerequisites for drawing on the letter of credit as specified in the letter itself." 273 Mich App at 76. Since the conditions for drawing on the letter of credit were satisfied, there was no basis for the Court of Appeals to discuss the issue any further.

The Court of Appeals, however, went on to limit (or retract) the letter of credit's operation, stating: **"However, necessarily governing the operation of the letter of credit are certain**

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[5] The Township maintains its rights to seek relief for other matters, including the costs of this litigation, which it has been required to defend to preserve the security.

[6] 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),

applicable statutes and ordinances." 273 Mich App at 76 (emphasis added). The Court did not cite any authority for this proposition, and it is fundamentally wrong. 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.* MCL 440.5103(4) provides:

> "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." (emphasis added).

MCL 440.5106(1) also provides:

> "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." (emphasis added).

The Court of Appeals did not recognize that a letter of credit is an independent financial instrument, "enforceable according to its terms" and "independent of. . . a contract or arrangement out of which the letter of credit arises." Instead, the Court incorrectly stated that its "**operation**" is "**necessarily govern[ed] by**" certain "applicable statutes and **ordinances.**" 273 Mich App at 76 (emphasis added). The Court's reasoning for this misstatement is unclear, but the Court's published opinion containing such a misstatement of the law threatens repercussions in future cases that are bound to follow precedent.

The Court of Appeals apparently reasoned that the Township's ability to draw on the letter of credit was dependent on the Township first completing English Gardens' project so that the

Township could then obtain "reimbursement" from the letter of credit. 273 Mich App at 77. There was no such condition precedent in the letter of credit, and none can lawfully be added as the Court of Appeals suggests. MCL 440.5103(4); MCL 440.5106(1); see *Universal Savings Assoc* v *Killeen Savings & Loan Assoc*, 757 SW2d 72, 76 (Tex App, 1988).

The applicable statutes and case law recognize a fundamental "independence principle" under which a letter of credit is separate and distinct from the underlying contract or arrangement, and pursuant to which the issuing bank has an independent obligation to pay the beneficiary upon timely compliance with the conditions set forth in the letter of credit itself. *Amwest Surety Ins Co* v *Concord Bank*, 248 F Supp 2d 867, 876 (ED Mo, 2003). The Township satisfied the conditions for drawing on the letter of credit as set forth in the letter of credit. Nothing more was required as a matter of law, and as supported by sound public policy. See, for example, *West Virginia Housing Development Fund* v *Sroka*, 415 F Supp 1107, 1112 (DC Pa, 1976) ("Like negotiable instruments, the letter of credit is a means of facilitating commercial transactions"); *Amwest Surety Ins Co, supra*, 248 F Supp 2d at 876 (recognizing that the letter of credit would lose its commercial vitality if, before honoring drafts, the issuing banks were required to look beyond the terms of the letter of credit to the underlying controversy between its customer and the beneficiary).

The Court of Appeals compounded its error of holding that a letter of credit is governed by "certain applicable statutes and ordinances" by further misinterpreting and misapplying Howell Township Ordinance § 20.15. The Court of Appeals partially quoted Howell Township Ordinance §20.15, which states in its entirety:

> "**Bonds or other acceptable forms of security may be required of the applicant after a final site plan is approved and prior to issuance of a Zoning Permit for certain site improvements such as, but not limited to, roads or drives, parking lots, grading,**

> **landscaping, and buffers. A schedule for such security shall be established by resolution of the Township Board upon the recommendation of the Planning Commission, and shall be administered by the Township Treasurer and Clerk. Such security may be released in proportion to work completed and approved upon inspection as complying with the approved final site plan.** 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." (partially quoted at 273 Mich App 76-77, emphasis added to the part not quoted by the Court of Appeals).[7]

The Court of Appeals accurately recognized that the rules of statutory construction also apply to the construction of ordinances. 273 Mich App at 77. As indicated in the quote above, however, the Court ignored most of Ordinance §20.15's language. The Court of Appeals focused on 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." 273 Mich App at 77-78.

The Court's characterization of the Township's position is inaccurate. The Township does not dispute the meaning of "reimburse." Nor does the Township dispute that it has authority to complete English Gardens' development and "reimburse" itself. The Township simply sought, and continues to seek, the maintenance of its security while it looks to English Gardens to complete its development. The Township has not "appropriated" any funds to "reimburse" itself for anything.

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[7] 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 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."

Instead, it only preserved the security by converting the letter of credit to cash. The Township is authorized to require "acceptable forms of security" under Ordinance §20.15, not just reimburse itself from that security in the event that the Township has to complete the developer's work.

In holding that Ordinance §20.15 "govern[s] the operation of a letter of credit," the Court of Appeals apparently reasoned that because Ordinance §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 or nullified. To the contrary, Ordinance §20.15 provides, but the Court of Appeals ignored, that: "Bonds or other acceptable forms of security may be required of the applicant . . ." Irrespective of the Township's Ordinance §20.15 authority to complete work and obtain reimbursement, the Township also had authority to require "acceptable forms of security," as well as statutory authority under MCL 125.286f(2), to maintain its security and compel English Gardens to complete its project.[8] Even if Ordinance §20.15 did not exist at all, the Township would be authorized to protect its security.

The Court of Appeals' reading of Ordinance §20.15 effectively nullifies that Ordinance section, as well as the Township's statutory right to maintain security. The Township has to be able to require and maintain security in order to be in a position to later reimburse itself from that security, if necessary. The Circuit Court correctly recognized that the Township was entitled to maintain its security by converting the letter of credit to cash. The Township would never have needed to take that action, and this litigation would never have arisen, if English Gardens had simply renewed its letter of credit. (Appendix 3, Attachment A, ¶11, Exhibits 6, 7, 8). The Township has

[8] A statutory discussion is included in Defendants' Application for Leave to Appeal and Reply Brief, and incorporated by reference, since it is beyond the scope of the questions presented by this Court's June 1, 2007 Order.

have consistently maintained, and the Circuit Court correctly recognized, that the Township had to convert the letter of credit to cash in order to maintain security for English Gardens to complete its project. See Defendants' Reply Brief in Support of Their Application for Leave to Appeal, pp 1-4.

Further guidance is provided by *Universal Marine Ins, Ltd.* v *Beacon Ins Co*, 577 F Supp 829 (DCNY, 1984), in which the plaintiff did not provide a letter of credit to replace the one that was about to expire, and obtained a temporary restraining order preventing a defendant from drawing on the letter of credit. 577 F Supp at 831. The Court recognized the principles governing letters of credit, and that the inequity and irreparable harm to the defendant if it continued to be enjoined from drawing on the letter of credit outweighed the harm to the plaintiff if the restraining order were lifted. *Id* at 832-33. Therefore, the Court dissolved the temporary restraining order in time for the defendant to draw on the letter of credit. *Id* at 833. Similarly, where English Gardens refused to renew its letter of credit, the Township was entitled to protect its interests by maintaining its security.

The Court of Appeals essentially held that Ordinance §20.15 was sufficient to support English Gardens' declaratory judgment action, and to support the Court's order that English Gardens must recover its security, despite English Gardens' failure to complete its project. The Court's decision distorted the entire purpose of the Ordinance, which plainly is designed to protect the Township, not provide a means for developers to avoid their responsibilities and leave the Township without security. *Ballman* v *Borgess*, 226 Mich App 166, 169; 572 NW2d 47 (1998).

The Court of Appeals' decision that "necessarily governing the operation of a letter of credit are certain applicable statutes and ordinances" (273 Mich App 76), and requiring "defendants to return the deposited security to plaintiff" (*Id* at 82), 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 that are asserted by developers attempting to recover their security without completing their projects. No court should ever have to reach such an inquiry - - and no financial institution should need to conduct such an evaluation before honoring the draft of a letter of credit - - since a letter of credit is a stand-alone financial instrument that the holder can convert to cash in accordance with the letter of credit's terms. *Osden Meat Co, supra*; MCL 440.5103(4); MCL 440.5106(1). This time-honored and well-established utility of a letter of credit as security would be destroyed by the Court of Appeals' holding in this case.

The Court of Appeals' decision was apparently driven by the Court's belief that English Gardens was entitled to a "chance of vindicating its position that defendants improperly drew funds from the letter of credit." 273 Mich App at 82.[9] The Court of Appeals' apparent misperceptions are unfounded and do not justify its radical change in the law, as discussed above and the Township's earlier filings.

RELIEF REQUESTED

For the reasons discussed above and further explained in Defendants' Application for Leave to Appeal and Reply Brief in Support of Their Application for Leave to Appeal, 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;[10] (2)

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[9] The Court's language in this instance, as well as its inaccurate assertion about "raiding of deposited security" (273 Mich App at 78) 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 English Gardens' initial required security from $560,000 to $60,000, but the Township needs to maintain this $60,000 to ensure that English Gardens completes its project.

[10] 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" 273 Mich App at 76.

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,

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Defendants/Appellants

Dated: July 13, 2007

By :

William K. Fahey (P27745)
Richard L. Hillman (P40965)
Stephen J. Rhodes (P40112)
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

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The Court erred when it continued: "However, necessarily governing the operation of the letter of credit are certain applicable statutes and ordinances."