

STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
(Judges: Whitbeck, C.J., and Sawyer and James, JJ)

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

Supreme Court Case
No. 132859

Plaintiff/Appellee,

v

Court of Appeals
No. 269213

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

Livingston Circuit
No. 04-21040-AW

Defendants/Appellants.

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PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANTS/APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL

FILED

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

Should the Supreme Court deny Defendants/Appellees' Application for Leave to Appeal when it (1) raises new arguments and issues for the first time on this appeal that contradict Defendants/Appellees' arguments to the lower court and (2) fails to present issues regarding legal principles of major significance to the state's jurisprudence?

The Plaintiff/Appellee would answer: "Yes"

The Defendants/Appellants would answer: "No"

The Trial Court did not answer this question.

The Court of Appeals did not answer this Question.

II.

Is Plaintiff/Appellee entitled to a judgment: (1) declaring that Defendants/Appellees violated Howell Township's ordinance's prerequisites for appropriating funds from a deposited security for a real estate development and (2) ordering Defendants/Appellees to return the wrongfully appropriated funds to Plaintiff/Appellee?

The Plaintiff/Appellee would answer: "Yes"

The Defendants/Appellants would answer: "No"

The Trial Court answered: "No"

The Court of Appeals answered: "Yes"

I. INTRODUCTION

The Court of Appeals' *per curiam* decision from which Defendants/Appellants¹ seek leave to appeal held that Howell Township violated the plain language of its own zoning ordinance when it preemptively appropriated funds under a letter of credit deposited by Plaintiff/Appellee, English Gardens, LLC ("English Gardens"). The Court of Appeals remanded the case and directed the circuit court to enter an order: (a) declaring that Howell Township acted contrary to its ordinance in drawing the \$60,000 from the letter of credit; and (b) ordering Howell Township to return the deposited funds to English Gardens.

Howell Township's application for leave to appeal should be denied for several independent reasons. First, the application is based on new arguments the Township did not raise before the Circuit Court or the Court of Appeals. Specifically, Howell Township now – for the first time – argues it did not "appropriate" the letter-of-credit funds. It also argues that the letter of credit was "a stand alone financial instrument" and, therefore, the Township's non-compliance with the ordinance. It is well-established that Howell Township cannot raise new issues and arguments such as this for the first time on appeal to the Supreme Court.

Further, the arguments in the Township's application are not only new, they directly contradict the Township's prior arguments to the Circuit Court and the Court of Appeals. In its arguments and briefs to those courts, the Township argued that its authority to draw of the letter of credit arose from the ordinance itself. Indeed, it repeatedly stated that it appropriated the funds under the letter of credit pursuant to the authority granted under § 20.15 of the Township's

¹ Because Merry Bering and Lawrence Hammond are included in this case in their capacities as representatives of Howell Township, Defendants/Appellants are collectively referred to as "Howell Township" or "the Township."

ordinance. Thus, the Court should disregard the new and contradictory arguments raised for the first time and deny Howell Township's application for leave to appeal.

In addition, the Court of Appeals' decision does not raise "legal principles of major significance to the state's jurisprudence" so as to justify an appeal to the Supreme Court under MCR 7.302(B)(3). The *per curiam* decision merely applies general principles of statutory interpretation to the specific facts at issue in this case. Contrary to Howell Township's exaggerated and dubious assertions, the Court of Appeals' opinion will have no negative impact on the general enforceability of letters of credit in Michigan because the court never addressed that issue, which was not raised by either party.

Moreover, the Court of Appeals properly reversed the Circuit Court's dismissal of English Gardens' declaratory judgment claim. The facts indisputably demonstrate that the Township appropriated English Gardens' funds in violation of the plain language of the ordinance. Thus, the Township lacked any legal authority to draw the funds from the letter of credit.

Finally, Howell Township has failed to establish that the Court of Appeals abused its discretion in remanding the case to the Circuit Court for entry of an order requiring the Township to return the funds to English Gardens. To the contrary, the Court of Appeals' decision was entirely within its discretion and was within the general powers and authority granted to it under MCR 7.216(A)(7) to order such relief on appeal as it found just. And given the Court of Appeals' ruling that Howell Township misappropriated the funds by preemptively seizing them in contravention of its own ordinance, instructing the Circuit Court to enter an order compelling the Township to return the funds to English Gardens is a reasonable and just outcome, not an abuse of discretion.

For each of the foregoing reasons, the Supreme Court should deny Howell Township's application for leave to appeal.

II. COUNTER-STATEMENT OF FACTS

A. **The Development**

English Gardens developed the English Gardens condominium complex in Howell Township, Michigan ("the Development"). The Development was the first condominium project constructed in Howell Township. Exhibit 8, to Appendix 1. Before commencing construction, English Gardens sought and was granted final site-plan approval, without contingencies, by Howell Township in April 2002. Appendix 2, Supplemental Affidavit of Joseph Colyer ("Supplemental Colyer Aff.") at ¶6. The officially approved site plan did not contain a landscaping plan. Exhibit 2 to Appendix 1, Affidavit of Joseph Colyer ("Colyer Aff."), ¶ 5. Later, however, English Gardens submitted a separate proposed landscaping plan, which Howell Township never incorporated into the final approved site plan. *Id.*; Exhibit 3 to Appendix 1, Bering Dep., pp. 40-41.

After Howell Township approved the site plan, English Gardens began building the Development. The Development consists of ten buildings and approximately 120 individual condominiums. Cmpl. at ¶ 8. As requested by Howell Township under §20.15 of its Ordinance, English Gardens posted security for completing the Development's construction in the form of a letter of credit in the amount of \$300,000, which amounted to \$30,000 for each of the ten buildings in the Development. Exhibit 2 to Appendix 1, Colyer Aff., ¶7. Under the Ordinance, Howell Township could appropriate the funds only if they were needed to bring the Development into compliance with the final site plan or the ordinance, and even then, the

Township could only draw funds to *reimburse* itself after having improvements completed to remedy any zoning noncompliance:

Bonds or other acceptable forms of security may be required of the applicant after a final site plan is approved 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 that the applicant shall fail to provide improvements according to the approved final site plan, the Township Board shall have the authority to have such work completed, and to *reimburse* itself for costs of such work by appropriating funds from the deposited security

Howell Township Ordinance §20.15 (Exhibit 1 to Appendix 3) (emphasis added).

B. The Township Certified That the Completed Construction Complied with Its Ordinance, But Subsequently Changed Its Position

Under Ordinance §21.04A(4)(F), the Township issues a Certificate of Compliance “upon determination of all construction in accordance with the final approved site plan and to all requirements of the provision of the Zoning Ordinance and all other requirements of officials, boards and agencies of the Township or other levels of government[.]” Prior to issuing a Certificate of Compliance, the Township must conduct two inspections:

Inspection. The construction or usage affected by Zoning Permit shall be subject to the following inspections:

- 1) *At time of staking out a building foundation or location of structure.*
- 2) *Upon completion of the construction authorized by the permit.*

(Exhibit 2 to Appendix 3).²

² The remainder of Ordinance §21.04(E) reads:

- 3) It shall be the duty of the holder of every permit to notify the Zoning Administrator when construction is ready for inspection. Upon receipt of such notification for the first inspection, the Zoning Administrator shall determine whether the location of the proposed building, as indicated by corner

By the end of October 2003, eight of the ten buildings were completed and Howell Township had issued corresponding Certificates of Compliance based upon the “[f]inal inspection upon completion [o]f construction” contemplated under 21.04(E)(2), stating:

I, the (Deputy) Zoning Administrator have personally inspected the premises stated herein . . . and hereby certify that *the project and/or construction is in compliance with the Howell Township Zoning Ordinance* and that the Livingston County Building Department upon their final inspection and approval can issue a Certificate of Occupancy to the applicant.

See Exhibit 2 to Appendix 1, Colyer Aff. (emphasis added).

stakes, is in accordance with yard setbacks and other requirements of the Ordinance. The Zoning Administrator shall issue his written approval at the time of the inspection if the building or proposed construction meets the requirements of this Ordinance.

- 4) Should the Zoning Administrator determine that the building or structure is not located according to the site and construction plans filed, or is in violation of any provision of this Ordinance, or any other applicable law, he shall so notify the holder of the permit or his agent. Further construction shall be stayed until correction of the defects set forth has been accomplished and approved upon notice and request for reinspection by the applicant and those inspections completed and compliance certified by the Zoning Administrator.
- 5) Should a Zoning Permit Holder fail to comply with the requirements of the Zoning Administrator at any inspection stage, the Zoning Administrator shall cause notice of permit cancellation to be securely and conspicuously posted upon or affixed to the construction not conforming to the Ordinance Requirements and such posting shall be considered as service upon the notice to the permit holder of cancellation thereof and no further work upon said construction shall be undertaken or permitted until such time as the requirements of this Ordinance have been met. Failure of the permit holder to make proper notification of the time for inspection shall automatically cancel the permit, requiring issuance of a new permit before construction may proceed.

These Certificates were issued in accordance with the Zoning Administrator's obligation under Ordinance §21.03(A) to issue the Certificates of Compliance "*when the use and development of properties are completed* and in compliance with the provisions of this ordinance, including any required provisions resulting from site plan review procedures." Howell Township Ordinance §21.03(A) (Exhibit 3 to Appendix 3) (emphasis added). Howell Township did not indicate that the Certificates of Compliance the Zoning Administrator issued excluded each building's surrounding landscaping or that a final "overall" re-approval was going to be required. Exhibit 2 to Appendix 1, Colyer Aff. at ¶ 8; Exhibit 8 to Appendix 1, Bering Dep. at pp. 62-63.

After the Certificates of Compliance for the eight buildings were issued, English Gardens requested that the letter of credit be reduced. See Exhibit 10 to Appendix 1, November 13, 2003 Letter from Merry Bering to Joseph Colyer. Upon receiving that request, on November 13, 2003, Merry Bering, Howell Township's Zoning Administrator, agreed in principle to reduce the letter of credit, but suddenly raised new issues regarding the fencing and landscaping for the buildings that had already been completed and certified as compliant. *Id.* In that letter, however, Merry Bering expressly stated that, with the exception of the "dead plant materials" and "fencing," "*Everything else covered by the current letter of credit has been completed.*" *Id.* (emphasis added). She further acknowledged that "the reduced letter of credit will be for buildings 7 & 8." *Id.*

English Gardens responded to Merry Bering's letter by explaining that the landscaping on the already-completed-and-certified buildings was a maintenance issue that was the Condominium Association's responsibility. Exhibit 2 to Appendix 1, Colyer Aff., ¶12. On December 12, 2003, the Condominium Association itself confirmed that the landscaping for the

existing buildings was its responsibility. Exhibit 9 to Appendix 1, December 12, 2003 Kramer-Triad Letter. Notably, no formal notice alleging English Gardens had violated the ordinance ever followed Ms. Bering's November 13, 2003 letter.

Subsequently, on or about January 6, 2004, Howell Township, through its Engineering Firm, Spicer Group, suddenly added a new requirement as a condition for approval after approval of Buildings 7 & 8 – not mentioned in Merry Bering's earlier letter – demanding that English Gardens provide videotaped sanitary sewer line inspections for Building 4 (which had already received a Certificate of Compliance) and make other corrections to certain manholes. Merry Bering Affidavit (“Bering Aff.”) at ¶5, attached as Exhibit A to Defendants' Motion and Brief for Summary Disposition, Appendix 3 to Defendants/Appellants' Application for Leave to Appeal. By the time Howell Township made this new demand, it had already been six months since Spicer Group had inspected the sewer and sent its final certification to Howell Township. Exhibit 2 to Appendix 1, Colyer Aff., ¶10. Further, Howell Township never pointed to any section of the ordinance requiring the videotape inspection, because no such section exists. Again, this request was never followed by any formal notice from Howell Township stating that English Gardens' construction or failure to provide the tape had violated the ordinance.

On January 19, 2004, Merry Bering sent another letter to English Gardens – again arbitrarily changing her position – stating that the letter of credit “covers the entire project,” including “utilities, hard surfacing, etc[.]” Exhibit 10 to Appendix 1, January 19, 2004 Letter from Merry Bering to Joseph Colyer. She further stated that the letter of credit should be extended and maintained at \$150,000. *Id.* Both of these requirements were unsubstantiated and in direct contradiction to her November 13, 2003 correspondence. Two weeks later, however, on February 2, 2004, Howell Township allowed the letter of credit to be reduced to \$60,000, which

was equal to \$30,000 for each of the remaining two uncompleted buildings. Exhibit 12 to Appendix 1, February 2, 2004 Letter of Credit.

Through Spring 2004, despite the fact that Howell Township had already finally certified that the eight completed buildings complied with the ordinance and the letter of credit had been reduced proportionately, Merry Bering, on behalf of Howell Township, continued her demands that English Gardens complete maintenance activities for the landscaping and pavement of those buildings, including replacing dead plants and maintaining cracked concrete. See Exhibit A to Appendix 3 of Defendants/Appellants' Application for Leave to Appeal. In response to those concerns, English Gardens repeatedly informed Ms. Bering that according to the Condominium Association's bylaws, maintenance on landscaping and pavement for the buildings that were completed (and that had already been certified by the Township and Livingston County) was solely the Association's responsibility. Exhibit 2 to Appendix 1, Colyer Aff., ¶ 12. Once more, Howell Township never followed up with any formal notice of a zoning ordinance violation.

C. September 2004

On September 1, 2004, Merry Bering sent yet another letter to English Gardens adding new, nonspecific areas of work that she asserted still needed to be completed on the Development before the letter of credit expired on October 1, 2004, including unspecified landscaping and pavement work.³ Exhibit 11 to Appendix 1, September 1, 2004 Letter from Merry Bering to Joseph Colyer. Because the letter was vague and Howell Township had been continually changing its position as to what it claimed was required, English Gardens once more requested that Howell Township specify its demands. Exhibit 2 to Appendix 1, Colyer Aff., ¶14. Once again, however, Howell Township did not clarify its concerns or issue a formal notice

³ Notably, this letter did not reference the need for as-built drawings or any issue regarding streetlights.

stating how or why it believed English Gardens had not complied with the ordinance or site plan prior to taking adverse action.

Indeed, under the Howell Township Ordinance, the Zoning Administrator is required to very specifically document alleged ordinance violations and the Township must follow very specific procedures when enforcing the ordinance:

Section 21.07 ENFORCEMENT PROCEDURE.

In addition to the enforcement actions provided in Section 21.04E, 1-5⁴, the following additional enforcement procedures may be applicable in the instances of violations of 1) provisions of this Zoning Ordinance . . . [or] 4) approved site plans . . . :

* * *

A. Initial action to be taken on zoning violations:

1) The Zoning Administrator makes a preliminary visit to the owners and/or occupants to identify the zoning violation(s). In the event a zoning violation is reported by a non-township official, the Zoning Administrator shall contact that person and solicit the information needed to factually establish whether or not a zoning violation does exist.

2) If the Zoning Administrator finds a violation, he *shall* document the same stating the Sections of the Ordinance violated. Supporting documentation should include photographs of the violation. Each photograph shall have endorsed on the back the date, time, place, signed by the person taking the photograph and witnessed by the Zoning Administrator.

3) The Zoning Administrator shall attempt to meet with or contact the owner(s) and/or occupants to accomplish the following objectives:

- a) Explain the zoning violation, and state the Section(s) of the Ordinance violated.
- b) The remedial measures needed to correct each violation.

⁴ Exhibit 2 to Appendix 3, discussed *supra*.

- B. **First notice of zoning violation.** If a violation is determined by the Zoning Administrator from A. above, it *shall* be the Zoning Administrator's responsibility to issue a "Notice of Zoning Ordinance Violation" to the owner(s) and occupant(s) of the lot or parcel upon which the zoning violation has occurred. This notice *shall* be issued on a *special form for this purpose* and *shall* at least include the following information:
- 1) Date and location of each violation observed by the Zoning Administrator.
 - 2) Name(s) and addresses of owner(s) and occupant(s).
 - 3) Specific section(s) of the Zoning Ordinance or portions of and approved . . . site plan . . . which has been violated. * * *
 - 4) State that the violation(s) shall be corrected within thirty (30) days before further prosecution of the violation(s) will proceed.
- C. **Second notice of zoning violation.** Failing compliance by owner(s) and occupant(s) within the thirty (30) day period specified in B. above, the Zoning Administrator *shall* issue a "Second Notice of Zoning Violation" stating that the violation(s) shall be corrected within the next additional fifteen (15) days before further prosecution of the violation(s) will proceed.
- D. **Notice of show-cause hearing.** Failure to comply after the procedures outlined in B. and C. above may then upon recommendation of the Zoning Administrator result in the issuance of a "Notice of Show-Cause Hearing" *by the Township Board* and the holding of a *special hearing* by the Township Board for those parties interested in the violation(s).
- E. **Show-cause hearing finding and order.** Failure to comply following the "Show-Cause Hearing" may then result in the issuance of a "Finding and Order" by the Township Board. The "Finding and Order" form shall indicate the findings of fact about the violation(s) *by the Township Board*, the *Board's* conclusions and *its* order for compliance with the zoning requirement(s) with respect to each violation.

Howell Township Ordinance §21.07(A)-(E). Exhibit 4 to Appendix 3 (emphasis added).

Buildings 7 and 8 were completed in approximately mid-September 2004. On September 21, 2004, Merry Bering, on behalf of Howell Township, visited the site to make a final inspection of the Development. Cmpl. at ¶20. During that inspection, Ms. Bering once again mentioned various items that she believed needed to be completed on the Development. (Exhibit A to Appendix 3 attached to Defendants/Appellants' Application for Leave to Appeal, Bering Aff., ¶10. With regard to some of the conditions, such as landscaping the storm water detention/retention pond, some concrete work on Building 7, and some final landscaping on Buildings 7 and 8, English Gardens told Ms. Bering that that it would be completing that work shortly so as to comply with the ordinance. Exhibit 2 to Appendix 1, Colyer Aff., ¶16. Ms. Bering found that acceptable and therefore issued the Certificates of Compliance for Buildings 7 and 8, indicating that the buildings were compliant with the ordinance, except for the additional work specifically noted on the Certificates, which Ms. Bering said English Gardens would have time to complete. Exhibit 13 to Appendix 1, Certificates of Compliance for Buildings 7 and 8.

English Gardens disagreed with Merry Bering's assessment regarding other aspects of the Development being noncompliant with the site plan, and it also once again explained that her remaining concerns were maintenance issues for which the Association was responsible, not English Gardens. Exhibit 7 to Exhibit A of Appendix 3 attached to Defendants/Appellants' Application for Leave to Appeal. At the conclusion of this inspection, Merry Bering did not provide English Gardens with a detailed list of her alleged concerns with the Development, nor did she issue a formal violation notice. Instead, on September 23, 2004, only two days after Ms. Bering's final inspection wherein she stated that English Gardens would have at least until October 1, 2004 to address her alleged concerns, Merry Bering and Howell Township Treasurer

Lawrence Hammond traveled to Lake Odessa, Michigan and drew the full \$60,000 under the letter of credit based on alleged site-plan and ordinance violations. Exhibit 14 to Appendix 1, September 23 Letter from Lawrence Hammond to Union Bank. All of this was done without any prior notice to English Gardens and before Howell Township even attempted to determine how much the alleged remaining work might cost. Cmpl. at ¶¶22-23; Exhibit 15 to Appendix 1, Bering Dep. at p. 185.

Indisputably, at no time prior to (or since) seizing English Gardens' funds did Howell Township issue any official "Notice of Zoning Ordinance Violation" to English Gardens as required under §21.07(B) of the Howell Township Ordinance. Indeed, Howell Township did not follow any of the ordinance's enforcement requirements under §21.07 before penalizing English Gardens for alleged site-plan violations, despite the fact that Ordinance §20.16 specifically states that any site-plan noncompliance is treated like an ordinance violation:

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.

Howell Township Ordinance §20.16 (Exhibit 5 to Appendix 3) (emphasis added).

In response to the foregoing, English Gardens sued Howell Township on October 20, 2004, stating claims for mandamus, declaratory judgment, and breach of contract. Howell Township later moved for summary disposition on each count. In its response, English Gardens moved for summary disposition pursuant to MCR 2.116(I)(2), as there was no genuine issue of material fact that the Township failed to comply with the zoning ordinance in seizing English Gardens' funds. The circuit court granted Howell Township's motion in its entirety, concluding that the Township's act of seizing the funds was discretionary and that there was no issue of

material fact that the Development did not comply with the site plan. Appendix 1 to Defendants/Appellants' Application for Leave to Appeal, February 28, 2006 Order Granting Defendants' Motion for Summary Disposition.

English Gardens appealed the circuit court's ruling on the grounds that the circuit court erred by: (1) denying English Gardens' request for mandamus and declaratory relief despite the undisputed evidence that Howell Township failed to follow its own ordinance's enforcement procedures before seizing its funds; and (2) erroneously determining that there were no genuine issues of material fact as to whether the Development complied with the site plan. See Appendix 3. On November 28, 2006, the Court of Appeals issued an opinion reversing the trial court's dismissal of English Gardens' declaratory judgment claim and affirming the dismissal of the breach of contract and mandamus claims. Appendix 4. The Court of Appeals remanded the case to the Circuit Court for entry of an order: (a) declaring that Howell Township failed to follow its own ordinance; and (b) ordering the Township to return the wrongfully appropriated \$60,000 to English Gardens. *Id.*

Howell Township has now filed an application for leave to appeal that decision to this Court. But for the reasons stated below that application should be denied.

III. ARGUMENT

A. Standard of Review

A party's motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion to determine if a party is entitled to judgment as a

matter of law. *Id.* at 118, 120. The court properly grants summary disposition when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.* However, if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

Moreover, “issues raised for the first time on appeal are not ordinarily subject to review.” *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234, 507 NW2d 422 (1993). Indeed, the Supreme Court “has repeatedly declined to consider arguments not raised at a lower level” and “only deviate[s] from that rule in the face of exceptional circumstances.” *Id.*, n 23 (citations omitted).

B. Howell Township’s Application Fails To Present Reviewable Issues For This Court

1. The Township’s Application Presents Issues Raised For The First Time On Appeal That Are Not Subject To Review

In its Application for Leave to Appeal, Howell Township – for the first time – argues that its actions in appropriating the letter of credit funds are not subject to the Howell Township Ordinance, but are instead governed only by the UCC provisions regarding letters of credit. *See Application for Leave to Appeal*, p. 9. Not only does this argument lack merit, it also directly contradicts Howell Township’s earlier arguments and raises a new issue for the first time on appeal. This issue is therefore not subject to review by this Court. Indeed, “issues raised for the first time on appeal are not ordinarily subject to review.” *Booth Newspapers, Inc*, 444 Mich at

234. The Court “only deviate[s] from that rule in the face of exceptional circumstances.” *Id.*, n 23 (citations omitted).

Here, there are no exceptional circumstances. Howell Township has not shown why it could not have raised the arguments in its application to either the trial court or the Court of Appeals. Indeed, the record shows that its arguments to both courts was contradictory to its argument now. For instance, in its application, Howell Township argues that it seized the funds only for “maintenance of [its] security[,]” that “Defendants have not ‘appropriated’ any funds to ‘reimburse’ themselves for anything[,]” and that “the Court of Appeals reversibly erred in holding that an ordinance ‘govern[s] the operation of a letter of credit.’” Application for Leave to Appeal, p. 12. But in its briefs to the Circuit Court and the Court of Appeals, Howell Township expressly acknowledged that it indeed “appropriated” the funds by drawing them pursuant to the ordinance:

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. Appendix 3 to Defendants/Appellants’ Application for Leave to Appeal, Defendants’ Motion and Brief for Summary Disposition, p 8.

Similarly, Howell Township had no duty to return the \$60,000 Rather, the Township had a clear right to appropriate the funds to ensure completion of the project. Id.

The Township has specific authority under Section 20.15 of the Zoning Ordinance to appropriate funds where the developer has not completed necessary work. Id., p. 9.

Any further delay in appropriation of the funds would have likely resulted in irreparable injury to the residents of Plaintiff’s project Id., p. 10.

Any further delay in appropriation of the funds would have likely resulted in irreparable injury to the residents of English Gardens’ project Appendix 5, Appellees’ Brief on Appeal, p. 8.

Section 20.15 specifically authorizes Howell Township to draw upon a letter of credit provide by a developer when a project is not completed in accordance with the site plan [.] Id.

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[.] Id.

Thus, this argument is not only new, it contradicts Howell Township's arguments to the lower courts, and the Court should therefore decline the application.

Moreover, if the Court were to accept this appeal, it would see that, upon scrutiny, Howell Township's argument lacks merit. The provisions of the UCC that the Township cites apply to the Township's ability to force the bank to comply with the letter of credit. Both of those statutes refer to the enforceability against the "issuer," – *i.e.*, the bank. *See* MCL 440.5103(4); MCL 440.5106. They would be applicable against the bank had the bank refused to disburse the funds to Howell Township and had the bank been a party to this lawsuit. But they have no bearing on this case, where the issue is whether Howell Township had the authority under § 20.15 to penalize English Gardens by demanding the funds from the bank without first having incurred expenses to complete the project. Thus, aside from being raised for the first time here, the argument is irrelevant and the Court should decline to review it.

2. *Howell Township's Application Does Not Present An Issue That Merits Review*

Howell Township's Application for Leave to Appeal to this Court cannot be granted unless it is based on one of the enumerated grounds stated in MCR 7.302(B). Under that rule, an application must set forth one of the following bases for the appeal:

(B) Grounds. The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals,

a) delay in final adjudication is likely to cause substantial harm, or

(b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

MCR 7.302(B).

None of those grounds exists here. The decision appealed from here involves Howell Township's failure to follow its own ordinance before drawing on a letter of credit deposited by English Gardens as security for completing the condominium development. The Court of Appeals ruled that the Township failed to follow the ordinance and therefore had to return the wrongfully appropriated funds to English Gardens. Thus, the decision at issue addresses the interpretation and application a particular ordinance of a particular township given the particular facts in issue regarding the condominium development. The Court of Appeals' *per curiam*

opinion does not establish any new law or change any existing law; it merely interprets and applies the Howell Township Ordinance to the facts of this case under well-established rules of statutory construction. It does not involve any “legal principles of major significance to the state's jurisprudence” so as to justify an appeal to the Supreme Court under MCR 7.302(B)(3). Thus, Howell Township’s application should be denied.

C. The Court of Appeals Correctly Held That Howell Township Violated Its Own Ordinance In Drawing On The Funds Provided As Security And That The Township Should Return The Wrongfully Appropriated Funds

The scope of Howell Township’s powers with regard to administering the ordinance and drawing on funds deposited as security for completing a project are derived from and controlled by Michigan statute and Howell Township Ordinance. Specifically, MCL 125.286f⁵ is the enabling statute giving a township the right to request a performance guarantee such as the letter of credit “insure compliance with a zoning ordinance.”

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 proportion to the ratio of work completed on the required improvements will be made as work progresses.

MCL 125.286f(2).

Howell Township argues, again for the first time in its application, that it properly “converted” the letter of credit under MCL 125.286f. This statute, however, only grants to the Township the authority to require security “to insure compliance with a zoning ordinance and any conditions imposed thereunder.” The statute does not provide the procedure for

⁵ MCL 125.286f was repealed effective July 1, 2006, but was in effect at all times relevant to this case.

“converting” or appropriating the funds deposited. In recognition of this fact, Howell Township enacted its own ordinance, Ordinance §20.15, which authorizes the township to require “acceptable forms of security” from an applicant in connection with an approved site plan, and further provides:

Bonds or other acceptable forms of security may be required of the applicant after a final site plan is approved 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 that the applicant shall fail to provide improvements according to the approved final site plan, the *Township Board* shall have the authority to have such work completed, and to *reimburse* itself for costs of such work by appropriating funds from the deposited security

Howell Township Ordinance §20.15 (Exhibit 1 to Appendix 3) (emphasis added).

Ordinances are subject to the same rules of interpretation as statutes. *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). “If the plain and ordinary language is clear, then judicial construction is normally neither necessary nor permitted.” *Id.* Ordinances should be read with the presumption that every word has some meaning. See *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439, 457; 553 NW2d 7 (1996). Unlike other governmental units, “[L]ocal governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the state constitution or state statutes or which are necessarily implied therefrom.” *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168, 187; 351 NW2d 544 (1984), citing, *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972). Thus, if a township acts contrary to the plain and ordinary language of its own ordinance, courts will apply the doctrine of *ultra vires* to preclude or invalidate such conduct. *Parker v West Bloomfield Tp*, 60 Mich App 583, 595; 231 NW2d 424 (1975)(“The doctrine of

[u]ltra vires will be applied to preclude a city from engaging in a course of conduct where it specifically lacks the authority to do so.”).

Under the plain language of the Ordinance, in the event an applicant fails to provide improvements according to an approved final site plan, the Township Board shall have the authority to have such work completed and may then appropriate funds from the deposited security to reimburse itself for costs of such work. Here, Howell Township acted beyond its authority because: (a) the Township Board was not involved in the decision appropriate the funds, and (b) the funds were not appropriated to reimburse the Township for anything because the Township did not do any work.

1. *The Court of Appeals Correctly Found That Howell Township Acted Beyond Its Authority Under Section 20.15 By Preemptively Appropriating the Deposited Security Before Work Was Completed*

In the Court of Appeals, Howell Township argued that “Section 20.15 specifically authorizes Howell Township to draw upon a letter of credit provided by a developer when a project is not completed in accordance with the site plan.” (Appellees’ Brief on Appeal, p 8). Howell Township, however, failed to establish an entitlement to draw the \$60,000 remaining on the letter of credit because the funds were not appropriated to reimburse the Township for completing work to bring the project into compliance with the site plan. The Township did not do any work. Therefore, even if the Development were not in compliance, Howell Township never established a basis for drawing the \$60,000, and it has acted *ultra vires* by doing so.

Here, Ordinance §20.15 plainly states that Howell Township only has the right to draw funds under a letter of credit to reimburse itself for having improvements completed to bring a project into compliance with the site plan:

In the event that the applicant shall fail to provide improvements according to the approved final site plan, the Township Board shall

have the authority to *have such work completed*, and to *reimburse itself for costs of such work* by appropriating funds from the deposited security

(emphasis added). “Reimburse” is not defined in the ordinance, but it is commonly defined to mean “to pay back to someone” or “to make restoration or payment of an equivalent to.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 986 (10th ed 1998). Thus, the Township could only take the funds to repay itself for payments it already made. And considering that Howell Township presented no evidence to the Circuit Court that it “reimbursed” itself for any costs before drawing the funds, the Circuit Court had no basis for determining that Howell Township was justified in drawing any of the funds, much less the entire \$60,000. In fact, even at the time of the hearing before the Circuit Court on its motion, Howell Township still 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.

Howell Township has argued that it had no choice but to seize the funds on September 23, 2004 because the letter of credit was due to expire on October 1, 2004. But such an argument is unavailing for several reasons. First, this Development was constructed over two years. During that time, Howell Township had ample opportunities to inspect the site and to commence enforcement procedures under Section 21.07. It never did.

In addition, Howell Township’s argument would require the court to read a nonexistent exception into the ordinance. In interpreting a statute, or in this case an ordinance, “[t]he Legislature is presumed to have intended the meaning it plainly expressed. Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself.” *Polkton Twp v Pellegrum*, 265 Mich App 88, 103; 693 NW2d 170 (2005). There is nothing in the ordinance giving Howell Township any right to appropriate

English Gardens' funds without first having paid to have work done. There is no stated exception to that rule, even when the letter of credit is set to expire. Howell Township's solution of seizing the funds just because the letter of credit is near expiration is nothing more than a "shoot-first-ask-questions-later approach" that is not contemplated by the ordinance. Indeed, regardless of the circumstances, the Township is "entitled neither to rewrite the ordinance to authorize preemptive seizure of security, nor to read into the ordinance license to draw funds simply because those funds might soon become unavailable." Appendix 4, Slip Op, p. 6. Consequently, Howell Township cannot establish a basis for taking any of \$60,000 based on this argument, and the Court of Appeals properly held that it should be compelled to return the money to English Gardens.

Howell Township also argues that it did not appropriate the "deposited security" (*i.e.* the letter of credit), but instead "converted" the security to cash, which it somehow continues to maintain as security. In addition to being a new argument, as discussed *supra*, this argument is unavailing because the Township presented no evidence that it continues to maintain the misappropriated funds as security. Moreover, the Township's new position is again contrary to the plain language of the Ordinance. The deposited security was the letter of credit. That deposited security no longer exists because the Township admits it took the cash and converted it. But the Ordinance provides a single procedure for taking funds from the deposited security, whether one calls it "conversion" or "appropriation," and that is for the Township Board to take the funds from the deposited security after the Township completes the allegedly deficient work itself for the sole purpose of reimbursing the Township for the cost of such work. This the Township never did.

2. *Howell Township Wrongfully Appropriated the Funds Without Board Action, As Required by Section 20.15*

The Township also acted beyond the scope of its authority because it appropriated the letter of credit without any Board action. Section 20.15 does not give Merry Bering, the Zoning Administrator, any authority to seize funds. Section 20.15 says that the “Township Board shall have authority” to appropriate funds from a deposited security to reimburse the Township. (Emphasis added).

The requirement for Board action is very important because “the business which the township board may perform shall be conducted at a public meeting of the board held in compliance with the [Open Meetings Act],” with “public notice of the time, date, and place of the meeting.” MCL 41.72. These procedural safeguards guarantee any developer, including English Gardens, the absolute right to notice and opportunity to be heard before funds can be seized by the Township. Here, Ms. Bering traveled to the bank without any prior notice to English Gardens and simply took the money without any Board action. This act was *ultra vires*. *Michigan Municipal Liability and Property Pool v. Muskegon Co Bd of Co Rod Comm’rs*, 235 Mich App 183, 190; 597 NW2d 187 (1999)(“local governments . . . possess only those limited powers conferred on them by the state constitution or state statutes or which are necessarily implied therefrom.”). Thus, the Court of Appeals correctly held that declaratory relief was appropriate.

D. The Court of Appeals Properly Exercised Its Discretion In Remanding The Case To The Circuit Court With Instructions To Declare That Howell Township Failed To Follow Its Own Ordinance To Order The Township To Return The Funds To English Gardens

As an additional basis for appeal, Howell Township argues that the Court of Appeals should have remanded the case for further proceedings rather than remanding it to the Circuit Court with instructions to order the Township to return the wrongfully appropriated funds to

English Gardens. Defendants/Appellants' Application for Leave to Appeal, p. 17. But under MCR 7.216(A), the Court of Appeals had full discretion to order such relief:

Rule 7.216 Miscellaneous Relief

(A) Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:

* * *

(7) enter any judgment or order or grant further or different relief as the case may require[.]

This Court has recently recognized that “[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. *When the . . . court selects one of these principled outcomes, the . . . court has not abused its discretion* and, thus, it is proper for the reviewing court to defer to the trial court's judgment.” *Maldonado v Ford Motor Co*, 476 Mich 372, 288; 719 NW2d 809, 817 (2006) (internal quotation marks, brackets and citations omitted) (emphasis added).

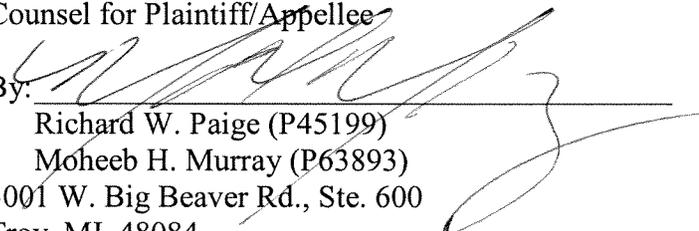
Here, the Court of Appeals did not abuse its discretion. The Court of Appeals ruled that Howell Township wrongfully appropriated English Gardens' funds without authorization under the ordinance. Appendix 4, Slip Op, p. 8. Thus, the Court of Appeals instructed the Circuit Court to order the Township to return the funds to English Gardens. *Id.* Given its conclusion that the Township wrongfully seized the funds, the return of the misappropriated funds to English Gardens is certainly one – if not the only – reasonable and principled outcome in this case. Indeed, it is only logical and equitable that the Township return what it has wrongfully taken. Thus, the Court of Appeals properly exercised its discretion, and Howell Township's

request for leave to appeal based on the Court of Appeals' alleged abuse of discretion should accordingly be denied.

IV. RELIEF REQUESTED

For the foregoing reasons, English Gardens respectfully requests that the Court deny Defendants/Appellants' Application for Leave to Appeal.

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