

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,

Plaintiff/Appellee,

v

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

Defendants/Appellants.

Supreme Court Case
No. 132859

Court of Appeals
No. 269213

Livingston Circuit
No. 04-21040-AW

RICHARD W. PAIGE (P45199)
MOHEEB H. MURRAY (P63893)
Bush Seyferth 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

1 32859
SJP

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

FILED

JUL 13 2007

CORBIN H. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

INDEX OF AUTHORITIESii

STATEMENT OF QUESTIONS INVOLVEDiv

I. INTRODUCTION 1

II. ARGUMENT.....2

 A. The Court of Appeals’ Analysis Involves the Factbound
 Application Of Settled Law On The Use Of Letters Of Credit As
 Financial Security.2

 B. The Court of Appeals Correctly Held That The Rights And
 Obligations Of The Parties Pertaining To The Development,
 Including The Right To Appropriate Security For The
 Development’s Purported Non-Compliance With The Zoning
 Ordinance, Were Governed By The Zoning Ordinance.5

 C. The Circuit Court Erred By Denying Mandamus Despite Howell
 Township’s Clear Failure Comply With The Ordinance..... 8

 D. The Circuit Court Committed Clear Error in Ruling That There
 Are No Genuine Issues of Material Fact Regarding the
 Development Being Noncompliant With the Site Plan.9

 E. The Circuit Court Erred In Dismissing English Gardens’ Claim For
 Breach of Contract..... 11

III. RELIEF REQUESTED 12

INDEX OF AUTHORITIES

Cases

American Parts Co v American Arbitration Ass’n, 8 Mich App 156; 154 NW 2d 5 (1967)..... 13

Billis v Township of Grand Blanc, 59 Mich App 619; 229 NW2d 871 (1975)..... 11

CKB & Assocs, Inc v Moore McCormack Petroleum, Inc, 734 SW2d 653 (Tex 1987)..... 5

Ganz v Lyons Partnership, LP, 961 F Supp 981 (ND Tex 1997) 4

Gora v Ferndale, 456 Mich 704; 576 NW2d 141 (1998) 8

In re OneCast Media, Inc, 439 F3d 558 (CA 9 2006)..... 2, 3

Jackson Community College v Dep’t of Treasury, 241 Mich App 673; 621 NW2d 707 (2000)..... 8

Kenney v Read, 100 Wash App 467, 997 P2d 455 (2000) 3

MYGSA, S.A. DE C.V. v. Howard Indus., Inc., 879 F.Supp. 624 (S.D.Miss.1995)..... 4

Resolution Trust Corp v United Trust Fund, Inc, 57 F3d 1025 (CA 11 1995) 4

SAVA gumarska in kemijska industrija dd v Advanced Polymer Sciences, Inc, 128 SW3d 304 (Tex App 2004) 3, 5

Sun Marine Terminals, Inc v Artoc Bank & Trust Ltd, 797 SW2d 7 (Tex 1990) 3

Statutes

MCL 440.5102(1)(j) 2

MCL 440.5103(4) 3, 6

MCL 440.5108(1) 2

Other Authorities

1 RICHARD A LORD, WILLISTON ON CONTRACTS § 2:23 (4th ed 1999) 3

Howell Township Ordinance § 20.01 7

Howell Township Ordinance § 20.15 7

Howell Township Ordinance § 21.04(F)(2) 9

Howell Township Ordinance § 21.07 8, 9, 10

Rules

MCR 7.302(B)(3) 2

STATEMENT OF QUESTIONS INVOLVED

I.

Does the decision of the Court of Appeals' involve the factbound application of settled law on the use of letters of credit as financial instruments?

The Plaintiff/Appellee would answer: "Yes"

The Defendants/Appellants would answer: "No"

The Court of Appeals answered: "Yes"

The Trial Court did not answer this question.

II.

Did the Court of Appeals correctly hold that the Zoning Ordinance governed the rights and obligations of the parties pertaining to the condominium development, including the right to appropriate security for the development's purported non-compliance with the Zoning Ordinance?

The Plaintiff/Appellee would answer: "Yes"

The Defendants/Appellants would answer: "No"

The Court of Appeals would answer: "Yes"

The Trial Court did not answer this question.

III.

Did the Circuit Court commit clear error in granting the Township's motion for summary disposition?

The Plaintiff/Appellee would answer: "Yes"

The Defendants/Appellants would answer: "No"

The Court of Appeals answered: "Yes"

The Trial Court would answer: "No"

I. INTRODUCTION

The Court of Appeals' *per curiam* decision held that Howell Township¹ violated the requirements of its Zoning Ordinance when it preemptively appropriated funds under a letter of credit deposited by Plaintiff/Appellee, English Gardens, LLC ("English Gardens").

This supplemental brief primarily addresses the issue identified in this Court's June 1, 2007 Order of "whether the Court of Appeals erroneously treated Howell Township's ordinance provisions as governing the operation of the letter of credit." The Court of Appeals correctly recognized the settled principle that the right to make a demand for payment under a letter of credit is governed by the underlying contract or arrangement between the beneficiary of the letter of credit and the applicant. The beneficiary can always obtain payment from the bank, so long as it complies with the documentary requirements of the letter, but the beneficiary is liable to the applicant for repayment if the beneficiary obtains the funds in contravention of their underlying arrangement or contract. Here, the Court of Appeals properly held that the Township's right to seek payment from the bank was governed by the Township's independent obligations to English Gardens under the Township's Zoning Ordinance. Moreover, the Court of Appeals did not err in finding that the Township violated its Zoning Ordinance and remanding the case to the Circuit Court with instructions to order the return of funds to English Gardens. For these reasons, among others, this Court should deny Howell Township's application.

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."

II. ARGUMENT

A. **The Court of Appeals' Analysis Involves the Factbound Application Of Settled Law On The Use Of Letters Of Credit As Financial Security.**

The Court of Appeals' *per curiam* decision does not raise "legal principles of major significance to the state's jurisprudence" to warrant granting leave to appeal under MCR 7.302(B)(3). In reversing the Circuit Court's dismissal of English Gardens' claim for declaratory relief, the Court of Appeals correctly held that the Township owed a duty to comply with its Zoning Ordinance and found that it acted contrary to Ordinance § 20.15 in drawing the \$60,000 from the letter of credit. The letter of credit did not relieve the Township of this duty.

A letter of credit is an undertaking by an issuer to a beneficiary, at the request of an applicant, to honor a documentary presentation by payment or delivering an item of value. MCL 440.5102(1)(j). The issuer must honor a presentment that "appears on its face strictly to comply with the terms and conditions of the letter of credit." MCL 440.5108(1). Letter of credit transactions involve three relationships: that of the bank to its customer (the applicant) who purchases or funds the letter of credit; that of the bank to the beneficiary to whom it makes a promise to pay; and finally, that between the customer and the beneficiary. *In re OneCast Media, Inc*, 439 F3d 558, 564 (CA 9 2006), citing, *Kenney v Read*, 100 Wash App 467, 997 P2d 455, 458 (2000).

Under the so-called principle of independence, each of those three relationships must be treated separately. *In re OneCast Media, Inc*, 439 F3d at 564, citing, 1 RICHARD A LORD, WILLISTON ON CONTRACTS § 2:23 (4th ed 1999). In Michigan, this principle is codified in MCL 440.5103(4) of the Uniform Commercial Code, which provides that the "rights and obligations of an issuer to a beneficiary . . . 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 applicant and the beneficiary. MCL 440.5103(4). The purpose underlying the “independence principle” is to assure distribution on the letter of credit when its own conditions have been met, irrespective of disputes that may arise between the parties concerning performance or other agreements which comprise the underlying transaction. *SAVA gumarska in kemijska industrija dd v Advanced Polymer Sciences, Inc*, 128 SW3d 304, 320-21 (Tex App 2004), citing, *Sun Marine Terminals, Inc v Artoc Bank & Trust Ltd*, 797 SW2d 7, 10 (Tex 1990).

Few cases discuss the “independence principle,” presumably because of the clarity in the statute. The small number of cases discussing the doctrine in similar circumstances all hold that claims by an applicant against a beneficiary for funds wrongfully appropriated are controlled not by the letter of credit, but by terms governing the underlying contract or arrangement between the applicant and beneficiary.

In *Ganz v Lyons Partnership, LP*, 961 F Supp 981, 986-987 (ND Tex 1997), the United States District Court for the Northern District of Texas summarized the principle of independence in a case involving a letter of credit issued in connection with a contract for the sale of goods:

The financial institution upon which the credit is drawn must honor it only according to its terms; that is, upon timely presentation of the properly completed documents requested in the letter, the institution must pay the beneficiary, whether or not the contract for sale for which the letter has been opened is performed. The contract embodied in the letter is not controlled by the underlying performance of the contract for sale. Because of that, logically then also, the underlying contract should not be governed by the letter of credit transaction, unless there is evidence that the letter's amendment was intended to amend the contract for sale. *See MYGSA, S.A. DE C.V. v. Howard Indus., Inc.*, 879 F.Supp. 624 (S.D.Miss.1995) (reaching similar conclusion).

See also *Resolution Trust Corp v United Trust Fund, Inc*, 57 F3d 1025, 1034-35 (CA 11 1995), (“[o]nce the proceeds of a letter of credit have been drawn down, the underlying contracts become pertinent in determining which parties have a right to those proceeds. In other words, an irrevocable standby letter of credit *does not nullify the obligations set forth in the underlying contracts.*”) (emphasis added).

In *SAVA*, the applicant (“APS”) sought to enjoin the bank’s distribution of proceeds to SAVA under a letter of credit, arguing that SAVA had breached the underlying contract. *SAVA*, 128 SW3d at 320-21. The court refused to enjoin the bank’s distribution, finding that doing so would frustrate the purpose of a speedy distribution. The court also held, however, that SAVA’s breach of the underlying agreement or arrangement meant that SAVA was not entitled to keep the proceeds of the letter of credit as against APS. *SAVA*, 128 SW3d at 321 (“such a breach would only give APS the right to recover the proceeds of the letter of credit from SAVA after the letter of credit was paid; it would not be a basis to enjoin or void the letter of credit”).

Similarly, the Texas Supreme Court in *CKB & Assocs, Inc v Moore McCormack Petroleum, Inc*, 734 SW2d 653, 655 (Tex 1987), held that payment of a letter of credit does not determine the ultimate right to retain the funds as between the beneficiary and the applicant:

Contracting parties may use a letter of credit in order to make certain that contract disputes [between the applicant and beneficiary] wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the [applicant]. The beneficiary's immediate right of possession of the funds on payment of the letter of credit does not decide the dispute over who will ultimately retain those funds. Without this rule, the beneficiary of the letter of credit would be the ultimate arbiter of compliance with the underlying contract and the commercial viability of the letter of credit would be destroyed. Thus, the letter of credit determines the beneficiary's right to immediate possession of the funds on presentation of conforming documents to the issuer, but not the right to ultimately retain those funds.

Applying the “independence principle” to this case, as codified in MCL 440.5103(4), Union Bank issued the letter of credit and was obligated to pay to Howell Township the sum of \$60,000 from the account of English Gardens upon receiving Howell Township’s documentary presentation. This is not, and has never been, at issue in this case.

The rights and obligations between Union Bank and Howell Township under the letter of credit, however, are entirely independent of the rights and obligations between Howell Township and English Gardens under Howell Township’s Zoning Ordinance. Thus, while Howell Township undisputedly presented to the bank documents sufficient to draw down the letter of credit, thus entitling it to receive the funds from the bank, it does not follow that Howell Township thereby escapes liability for violating its separate and distinct duties to English Gardens. Indeed, the Township’s reasoning would almost always preclude letter-of-credit applicants from recovering wrongfully drawn funds from beneficiaries. In this case, for example, if there had been no dispute between English Gardens and Howell Township and the Township, through ministerial error or otherwise, drew down the letter of credit, English Gardens would still not be entitled to recover from the Township under the Township’s flawed analysis.

B. The Court of Appeals Correctly Held That The Rights And Obligations Of The Parties Pertaining To The Development, Including The Right To Appropriate Security For The Development’s Purported Non-Compliance With The Zoning Ordinance, Were Governed By The Zoning Ordinance.

The underlying contract or arrangement in this case relates to the development of the English Gardens condominium complex in the Township (“Development”). The Township cannot deny that the rights and obligations between the parties as to the Development are governed by the Zoning Ordinance. In fact, the sole basis for Howell Township’s appropriation was English Garden’s purported non-compliance with the Zoning Ordinance. Moreover, the

Township's authority to require security derives from the Zoning Ordinance. Indeed, Ordinance § 20.01 expressly states that the Zoning Ordinance establishes uniform procedural requirements governing the Township and developers for all developments in the Township:

The purpose of this Article is to establish uniform requirements of procedure for all developments in Howell Township so that the provisions of this Zoning Ordinance can be equitably and fairly applied to all persons seeking to add to the existing development; so that both those developing property and the responsible Township officials can be assured that compliance with the Zoning Ordinance is both possible and correct prior to the issuance of a Zoning Permit and the starting of construction.

Howell Township Ordinance § 20.01.

Howell Township enacted Ordinance § 20.15 as one of the “uniform procedural requirements” governing the Township, mandating the procedure for appropriating security under the Zoning Ordinance:

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).

As the Court of Appeals correctly found, the “deposited security” was the letter of credit deposited with the Township. The plain language of the Ordinance states that the Township Board shall have the authority to appropriate funds from the letter of credit to reimburse itself for the costs of completing work to bring the Development into compliance. Here, the Zoning Administrator unilaterally appropriated the funds from the letter of credit without any action by the Township Board and without doing any work for which it could even seek reimbursement. Howell Township failed to follow the “procedural requirements” in appropriating the funds.

Additionally, the Court of Appeals' decision is consistent with all of the relevant sections of the Zoning Ordinance taken together. As this Court has held, ordinances are to be interpreted under the same rules of construction applicable to statutes. *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). Under those rules of interpretation, ordinances that relate to the same subject must be read together, even if they contain no reference to one another and were enacted on different dates. *Jackson Community College v Dep't of Treasury*, 241 Mich App 673, 681; 621 NW2d 707 (2000). Further, if the ordinances lend themselves to a construction that avoids conflict, that construction should control. *Id.*

Here, Ordinance § 20.15 states that funds may only be appropriated from a deposited security such as a letter of credit if the Township Board has determined that the improvements do not comply with the final site plan. This is wholly consistent with Ordinance §§ 21.07 and 21.04(F)(2), both of which also relate to ordinance violations. (Exhibits 1, 2 and 4 to Appendix 3).

Ordinance § 21.04(F)(2) states:

If the Site Plan accompanying the Application for a Zoning Permit is required to be approved by either the Planning Commission or Zoning Administrator, and it is determined by either that the completed construction is found to be in noncompliance with the requirements of the Zoning Ordinance, the Zoning Administrator shall notify the property owner and/or contractor/developer to either remove or bring the noncomplying construction into compliance with the requirements of the Zoning Ordinance, or *the provisions of §21.07 'Enforcement Procedure' of this Zoning Ordinance shall be initiated to gain compliance.*

Howell Township Ordinance § 21.04(F)(2) (Exhibit 3 to Appendix 3) (emphasis added).

Ordinance § 21.07 contains the Ordinance's enforcement procedures regarding alleged violations. In cases where the Township has identified a possible Ordinance violation, the Ordinance § 21.07 establishes clear requirements that the Township must follow before imposing

a penalty, one of which is the requirement that the matter be presented to the Township Board at a hearing where the Township Board can decide to order compliance and impose a penalty. See Howell Township Ordinance § 21.07(D), (E) (Exhibit 4 to Appendix 3). Thus, according to the Ordinance's plain language in § 21.07 and § 21.04(F)(2), once the Zoning Administrator believes a developer has violated the ordinance or the approved site plan, she must document the purported violation and provide a formal violation notice. The alleged violator must then be given up to forty-five days to comply, and the alleged violator must be given a hearing before the Township Board after the forty-five days have expired. Only then can *the Township Board* choose to penalize the alleged violation. See Howell Township Ordinance § 21.07 (Exhibit 4 to Appendix 3).

The obvious purpose of Ordinance § 21.07 is to require Howell Township to clearly provide notice as to the nature of alleged zoning violations. That requirement prevents the Zoning Administrator from giving an alleged violator a constantly moving target against which to defend when it has been accused of violating the ordinance. That, however, is precisely what happened in this case. Rather than following the Ordinance's enforcement procedures, the Township's Zoning Administrator made a series of informal, non-specific, and constantly changing demands on English Gardens regarding alleged site-plan violations and other issues, such as videotaping already-inspected and approved sewer lines. She never followed those demands with formal violation notices, and English Gardens never had the opportunity to be heard by the Township Board before the Zoning Administrator appropriated the funds.

C. The Circuit Court Erred By Denying Mandamus Despite Howell Township's Clear Failure Comply With The Ordinance.

The circuit court's February 28, 2006 decision granting Howell Township's motion for summary disposition on English Gardens' claim for mandamus was erroneous based on the

court's incorrect interpretation and application of the Ordinance's plain language. Mandamus is appropriate to compel Howell Township to adhere to the mandates of its Ordinance. Courts grant mandamus where: (1) a plaintiff has "a clear legal right to the performance of the specific act sought to be compelled and (2) the defendant [has] a clear legal duty to perform such ministerial act, which is prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Billis v Township of Grand Blanc*, 59 Mich App 619, 622; 229 NW2d 871 (1975). The circuit court erred by focusing on whether the Township's ultimate decision to draw on the letter of credit or return the funds was discretionary. Transcript at p. 22. In focusing on that argument, the circuit court ignored the threshold issue of the Township's failure to abide by the Ordinance and that by doing so, it lacked authority to appropriate, much less keep, English Gardens' funds.

D. The Circuit Court Committed Clear Error in Ruling That There Are No Genuine Issues of Material Fact Regarding the Development Being Noncompliant With the Site Plan.

The circuit clearly erred in finding that there was no issue of material fact about landscaping being non-compliant with the site plan and using that conclusion as the basis for denying English Gardens' claims. Contrary to the circuit court's statement that there was no dispute that the landscaping did not comply with the approved site plan, English Gardens presented evidence showing that landscaping was *not even included* in the approved site plan. (Appendix 2). Because the landscaping was not part of the approved site plan, the only issue is whether the landscaping complied with Howell Township's general landscaping ordinance, not the site plan. Howell Township never presented any evidence to the circuit court showing that the landscaping did not comply with the landscaping ordinance. Thus, there is a factual issue

regarding ordinance compliance, which should have precluded the circuit court's granting Howell Township's motion for summary disposition.

Further, Howell Township may argue, as it did to the circuit court and Court of Appeals, that summary disposition was proper because there is allegedly no issue of material fact regarding the number of streetlights not being compliant with the site plan. Transcript at p. 7. That argument is, however, irrelevant because it arises out of an allegation of noncompliance made by Howell Township's engineering firm, Spicer Group, *after* Howell Township took the money. November 10, 2004 Letter from Spicer Group (attached as Exhibit B to Defendants' Motion and Brief for Summary Disposition). The issue of the streetlights being noncompliant with the site plan was never raised by the Township prior to Spicer Group's November 10, 2004 letter. Such an after-the-fact justification cannot reasonably serve as a basis for drawing the funds in September 2004, nor does it excuse Howell Township's failure to follow its own ordinance. Therefore, it is immaterial to the issues in this case and was not a proper basis upon which the circuit court could grant Howell Township's motion for summary disposition.²

Additionally, the circuit court should have rejected Howell Township's argument that the lack of final "as-built" drawings is a basis for taking and retaining the funds for various reasons. Transcript at pp. 9-10. First, Howell Township did not request final as-built drawings from English Gardens until only two days before it seized the funds. See Bering Aff., at Exhibit 7. Second, Howell Township itself has never, either before or after taking the funds, taken any steps to have as-built drawings completed, nor did it produce any evidence showing how much such drawings would cost. Thus, Howell Township has not had to reimburse itself for having as-built

² Nevertheless, the streetlights did comply with the plan for the Development. Colyer Aff. at ¶ 6 (Exhibit 2 to Appendix 1). The fact that the streetlights were not consistent with site plan is explained by the fact that Merry Bering and English Gardens had agreed that the location of the lighting could be changed, which was permitted by the Zoning Ordinance.

drawings completed. As a result, the factual issue of whether English Gardens provided as-built drawings is irrelevant to the issue of whether Howell Township established a basis for taking the funds.

E. The Circuit Court Erred In Dismissing English Gardens' Claim For Breach of Contract.

English Gardens stated a claim for breach of contract. The letter of credit only allowed the Township to appropriate the funds if Howell Township presented a document alleging that “English Gardens failed to honor [its] contractual agreement with Howell Township.” As set forth above, the rights and obligations of Howell Township and English Gardens under their contractual agreement were governed by the requirements of the Zoning Ordinance. In the Complaint, English Gardens alleges that there was a contract between the parties, that Howell Township breached that contract by improperly drawing the funds against the letter of credit, and that Howell Township was damaged as a result. Cmpl. at ¶¶ 41-43. Taking English Gardens’ allegations in the Complaint as true, English Gardens has adequately stated a claim for breach of contract. See *American Parts Co v American Arbitration Ass’n*, 8 Mich App 156, 166; 154 NW 2d 5 (1967) (holding that the elements of a breach-of-contract cause of action are that a contract existed between the parties and that a breach of one or more of the contractual terms occurred).

However, because there is no factual issue that Howell Township failed to comply with its obligations under the contractual agreement, there was no genuine issue of material fact that *Howell Township* breached the parties’ contract by taking and holding the funds without authority to do so. English Gardens therefore should have been granted summary disposition in its favor on its breach-of-contract claim.

III. RELIEF REQUESTED

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

BUSH SEYFERTH KETHLEDGE & PAIGE PLLC
Counsel for Plaintiff/Appellee

By: _____

Richard W. Paige (P45199)
Moheeb H. Murray (P63893)
3001 W. Big Beaver Rd., Ste. 600
Troy, MI 48084
(248) 822-7800

Dated: July 13, 2007