

STATE OF MICHIGAN  
IN THE SUPREME COURT

MICHIGAN ASSOCIATION OF HOME  
BUILDERS; ASSOCIATED BUILDERS AND  
CONTRACTORS OF MICHIGAN; AND  
MICHIGAN PLUMBING AND MECHANICAL  
CONTRACTORS ASSOCIATION, Michigan  
Non-Profit Corporations,

Supreme Court No. 149150  
Court of Appeals Case No. 313688  
Circuit Court Case No. 10-115620-CZ

Plaintiffs-Appellants

V

CITY OF TROY, a Michigan  
Municipal Corporation,

Defendant-Appellee

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**DEFENDANT-APPELLEE CITY OF TROY'S SUPPLEMENTAL RESPONSE IN  
OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL**

**FILED**

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## INTRODUCTION

On September 17, 2014 this Court entered an order directing the Clerk to schedule oral argument on whether to grant Plaintiffs-Appellants' application for leave to appeal. The Court also permitted the parties to file supplemental briefs, as long as the parties were not submitting mere restatements of their application pleadings. This supplemental brief responds to matters set forth in Plaintiffs-Appellants' reply brief and supplemental authority that was filed with the Court.

## ARGUMENT

**I. SINCE PLAINTIFF-APPELLANT'S CAUSE OF ACTION IS AN AS APPLIED CHALLENGE TO AN ORDINANCE, THEY ARE NOT EXCUSED FROM THE REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES**

Plaintiffs-Appellants erroneously argue there is no requirement to exhaust administrative remedies in a case involving the Construction Code Act, MCL 125.1501 *et seq*, since they wrongfully seek to broaden the limited holding in *Winter Building Corp v City of Novi*, 119 Mich App 155; 326 NW2d 409 (1982) to extend to alleged unlawful ordinance enforcement claims, or ordinance as applied claims. *Winter* involves a facial challenge to the validity of a local ordinance, based on the alleged preemptive effect of the State Construction Code Act. Consistent with Michigan case law, the *Winter* Court did not require exhaustion of administrative remedies in a facial challenge to the ordinance. There would be no need to go through an administrative fact finding process if the only issue was whether or not the ordinance was pre-empted. This holding was followed in *Bruley v City of Birmingham*, 259 Mich App 619; 675 NW2d 910 (2003), where a property owner brought an action against the city, alleging the unconstitutionality of its historic district ordinance. *Bruley* decided whether the City's

ordinance was invalid, based on the provisions of the state's Local Historic District Act, MCL 399.201 *et seq.* As in *Winter*, Plaintiffs in *Bruley* did not challenge the execution or enforcement of the City's historic district ordinance, but instead challenged the validity of the ordinance on its face. *Bruley*, 621, 626. In such a case, which was decided based solely on the constitutionality of the ordinance, there was no requirement to exhaust administrative remedies. *Bruley*, 626. Likewise, in *Diggs v State Board of Embalmers and Funeral Directors*, 321 Mich 508; 32 NW2d 728 (1948), the dispositive issue was the constitutionality of a licensing statute, even though Plaintiff raised both a facial and an as applied challenge. The *Diggs* Court recognized that there is no requirement to first pursue administrative remedies when the statute creating those remedies itself is under attack. *Diggs*, 518.

In the present case, the Plaintiffs-Appellants have not raised a facial challenge to an ordinance or challenging the validity of the Construction Code Act. Instead, Plaintiffs are challenging the Defendant-Appellee City's application and administration of the Construction Code Act. In such "as applied" challenges, a factual record must be developed in order for the Court to make a determination. In this case, Plaintiffs-Appellants include their version of the very complicated factual pattern to support their requested relief. It is these factually intense types of cases where an administrative tribunal's expertise is particularly helpful to a reviewing Court, and therefore there is a requirement to exhaust administrative remedies. *Bruley*, 626.

Since the Plaintiffs-Appellants' cause of action does not raise a facial challenge to the State Construction Code Act, which is strictly a legal issue, they required to exhaust administrative remedies before proceeding with litigation in the circuit court.

Accordingly, summary disposition was properly granted and there is no basis for reversing the Court of Appeals decision affirming the the trial court.

**II. THE DIRECTOR OF LICENSING AND REGULATORY AFFAIRS HAS EXCLUSIVE AUTHORITY TO ENFORCE SECTION 22 OF THE CONSTRUCTION CODE ACT**

Section 8(b) of the Construction Code Act, MCL 125.1508b(1), provides: "*Except as otherwise provided in this section, the director is responsible for administration and enforcement of this act and the code.*" This statutory language makes it clear- the Director is responsible for enforcement of the act, unless there is an express provision in the statute that somehow limits this exclusive authority. Although Plaintiffs-Appellants argue that the Director's exclusive authority is somehow limited as to his enforcement of Section 22, MCL 125.1522, there is no such express limitation contained in the Construction Code Act. Although Plaintiffs-Appellants urge this Court to limit the Director's exclusive authority by noting that Section 22 is not expressly recited in Section 9(b) of the Construction Code Act (MCL 125.1509(b)), an omission, even if intentional, does not qualify as an express statutory limitation on the Director's exclusive authority, as required by the "except as otherwise provided in this section" language of MCL 125.1508(b). Additionally, there is no statutory language expressly conferring jurisdiction of the enforcement of Section 22 (MCL 125.1522) upon the court or any other person or entity, which could serve as an express limitation on the Director's otherwise exclusive jurisdiction. Thus, Plaintiffs argument that there is no "express intent by the Legislature to make the jurisdiction of the Director exclusive" must fail.

Whether an administrative agency has exclusive jurisdiction over the issues presented in a case is determined by interpreting the applicable statute. *Papas v*

*Michigan Gaming Control Board*, 257 Mich App 647, 658; 669 NW2d 326 (2003). If the legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, then the circuit court cannot exercise jurisdiction over the same area. *Huron Valley Schools v Secretary of State*, 266 Mich App 638, 646; 702 NW2d 862 (2005). The exact phrase "exclusive jurisdiction" does not have to appear in a statutory provision in order for a Court to find that jurisdiction has been vested exclusively in an administrative agency. *Papas*, 657. To determine legislative intent, the Court first reviews the language of the statute itself. *Papas*, 658, *Dodak, House Speaker v State Administrative Board*, 441 Mich 547, 567; 495 NW2d 539 (1993). "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Papas*, 658, quoting from *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). In this case, there is no ambiguity in the phrase "*Except as otherwise provided in this section, the director is responsible for administration and enforcement of this act and the code.*" MCL 125.1508b(1). This provision clearly reveals the legislature's intent to vest the Director of Licensing and Regulatory Affairs with exclusive jurisdiction to enforce the Construction Code Act unless there is an explicit and express limitation. There is no explicit and express limitation as to Section 22 of the Construction Code Act. The only explicit and express statutory limitation in the Construction Code Act is MCL 125.1509(b), which recognizes that governmental subdivisions may be willing to assume some of the responsibilities under the Construction Code Act. This section allows for the Director to delegate some of his responsibilities to these governmental subdivisions. It does not expressly excuse the Director from supervision over the governmental subdivision's performance under

the Construction Code Act, as required by Section 22 (MCL 125.1522). Accordingly, the Director has exclusive jurisdiction over Plaintiffs claim in this case.

Plaintiffs-Appellants argue in their Reply that there “are no provisions for injunctive relief or declaratory relief, an accounting, sanctions, monetary fines and penalties or the disgorgement of unlawfully obtained revenues,” and that this somehow entitles them to initiate a private action in the circuit court against a local governmental entity that has assumed some responsibility under the Construction Code Act. In contrast, the omission of explicit remedies for alleged violations of Section 22 is further evidence of the intended grant of exclusive jurisdiction to the Director of Licensing and Regulatory Affairs for the fashioning of an appropriate remedy. The allowance of a private cause of action for an alleged statutory violation is solely a matter of legislative intent. *Office Planning Group, Inc v Baraga-Houghton –Keweenaw Child Development Board*, 472 Mich 479, 496; 697 NW2d 871 (2005). Specifically, the reviewing Court must determine if the text of the statutory act demonstrates an implicit intent to provide for the initiation of a private cause of action to enforce an violation. *Office Planning Group*, 504. The Construction Code Act does not expressly or implicitly allow a private cause of action for a violation of the Act. As such, the legislature did not intend to allow private parties to initiate civil litigation to enforce Section 22 or any other provision of the Act.

Plaintiffs-Appellants also argued in their Reply Brief in the Court of Appeals that the Director’s exclusive authority to enforce Section 22 of the Construction Code Act is somehow limited. There was a common law challenge to the reasonableness of a fee in *Merrelli v City of St. Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959). Plaintiff-

Appellants argue that this case, decided prior to the legislature's enactment of the Construction Code Act, preserves the right to raise a fee challenge by an independent circuit court action, even after the passage of a comprehensive legislative enactment that does not expressly provide for that relief.

It is a general rule in this State that when a statute creates a new right or imposes a new duty, having no counterpart in the common law, the remedies provided in the statute for its violation are exclusive and not cumulative. *Pompey v General Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971), *Shuttleworth v Riverside Osteopathic Hospital*, 191 Mich App 25, 27; 477 NW2d 453 (1991). Although Plaintiffs-Appellants correctly note that there was at least one fee reasonableness challenge prior to the enactment of the Construction Code Act, they have not established that governmental subdivisions were subject to common law duties that were comparable to those imposed by Section 22. Since Plaintiffs-Appellants have not established that the local governmental entities common law responsibilities were incorporated into the new legislation, there is no common law counterpart to Section 22. Without this, Plaintiffs-Appellants' assertion that there was a preserved common law right to an independent cause of action is incorrect, since the remedies set forth in the statute are deemed exclusive. Plaintiffs-Appellants are precluded from initiating a private cause of action without first exhausting administrative remedies.

**III. PLAINTIFFS-APPELLANTS HAVE NOT DEMONSTRATED THAT THEY WILL BE DENIED PROCEDURAL DUE PROCESS BY THE REQUIRED PURSUIT OF ADMINISTRATIVE REMEDIES**

Plaintiffs-Appellants unsuccessfully attempt to raise a procedural due process claim, contending the Construction Code Act does not allow private parties' adequate

notice or opportunity to be heard on the issue of whether a municipality's permit fees are reasonable. Accordingly, Plaintiffs argue they will be denied procedural due process if they are required to pursue administrative remedies. However, the right to due process is a flexible concept that must be analyzed by considering the particular circumstances presented in a given situation. *In re Project Cost and Special Assessment Roll for Chappell Dam*, 282 Mich App 142, 150; 762 NW2d 192 (2009). The guarantee of due process does not necessarily require an adversary proceeding, as long as there is an opportunity to present pertinent information to an authority. *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan*, 414 Mich 247, 269; 324 NW2d 851 (1982). The United States Supreme Court has emphasized the flexible nature of procedural due process and has held that an evidentiary hearing is only required when the property interest involved is the potential deprivation of the financial means by which to live. *Id.* at 270-271, *Matthews v Eldridge*, 424 US 319, 334-335; 96 S Ct 893; 47 L Ed 2d 18 (1976), *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970). The Plaintiffs-Appellants' interest in this case is the amount of money they may have to pay for a building permit, and it does not necessarily rise to a deprivation of their livelihood, which is discussed in *Matthews*. In this case, if the Construction Code Commission determines the fees charged by the City of Troy are reasonable, then Plaintiffs will continue to pay the same fees. If the Commission determines the fees do not comport with Section 22, then the City may be stripped of its delegation to enforce and administer the Construction Code Act, and the fees charged by the City would no longer be in effect. Pursuant to Section 9b(1) of the Construction Code Act, the Plaintiffs-Appellants have a right to file a complaint seeking a

performance evaluation of the City if it contends the City is in violation of Section 22. MCL 125.1509b(1). This procedure allows Plaintiffs the opportunity to present arguments in support of their position before a decision is rendered. It is presumed, and there is no evidence to the contrary, that Plaintiffs will have an opportunity to present additional evidence at the public meeting that is required under Section 9b(1) of the Construction Code Act, and will also be able to respond to information submitted by the City through that process. If the Commission ultimately determines that the City violated Section 22, and issues a notice of intent to withdraw the City's responsibility to enforce the State Construction Code under MCL 125.1509b(3), and the City appeals, it is presumed that Plaintiffs will have the opportunity to present evidence at the hearing required under Section 9(b)(4) (MCL 125.1509b(4) of the Construction Code Act, and there is nothing in the Construction Code Act that would preclude Plaintiffs from making such a presentation. Additionally, if Plaintiffs are concerned they will not be afforded an opportunity to participate in the hearing process, they can seek to intervene in the administrative proceeding. *Wayne County Prosecutor v Parole Board*, 232 Mich App 482, 487; 591 NW2d 359 (1999). If the Plaintiffs can demonstrate they qualify as a "party" as defined by MCL 24.205(4), the administrative agency has no discretion except to allow intervention. *Wayne County Prosecutor*, 487. Since there is ample opportunity for Plaintiffs to present information in support of their argument and to protect their interests should they pursue the available administrative remedies under Section 9(b)(1), the Plaintiffs would not be denied procedural due process.

**IV. THE CIRCUIT COURT PROPERLY DETERMINED IT LACKED SUBJECT MATTER JURISDICTION AND DEFERRED TO THE ADMINISTRATIVE AGENCY AND THE EXPERTISE OF ITS ADMINISTRATORS**

Plaintiffs-Appellants argue in their reply that there is no evidence the Director or the Commission has the expertise needed to review their claim in this case. They contend there is no benefit to pursuing the administrative remedy available to them because the lack of expertise denies the Plaintiffs the opportunity to make a factual record. Thus, Plaintiffs contend the policies underlying the exhaustion of administrative remedies doctrine weigh against requiring exhaustion in this case. However, despite these assertions, the Circuit Court did not have subject matter jurisdiction because Plaintiffs failed to demonstrate they were excused from pursuing administrative remedies. Moreover, the facts in this case also suggest the Circuit Court's decision to defer to the administrative agency comports with the doctrine of primary jurisdiction.

Pursuant to Section 5 of the Construction Code Act, MCL 125.1505, the Commission has all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the act. Subsection 7, MCL 125.1505(7) authorizes the Commission to "*take testimony and hold hearings relating to any aspect or matter relative to the administration or enforcement of this act.*" (Emphasis added).

Additionally, like all similarly situated agencies, the composition of its members contains levels of expertise far beyond any circuit court judge, e.g. industrial managers, architects, engineers, building contractors, building inspectors, licensed builders etc. (See MCL 125.1503a(1)). The statute amply demonstrates that the Commission possesses the expertise and competence to precisely address complaints raised under the Construction Code Act. As such, this is required before a circuit court may exercise powers of review. Plaintiffs-Appellants have not shown otherwise.

In *Winter Building Corp*, the Court of Appeals acknowledged the State Construction Code Commission has the requisite expertise to decide an issue involving the Construction Code Act. Although the Court found in that case the plaintiffs were not required to exhaust administrative remedies, the Court opined that this was a case where the trial court could have deferred to the particular expertise of the Construction Code Commission. The Court stated: "the present case does present a factual situation in which the doctrine of primary jurisdiction could profitably have been invoked by the trial judge." *Winter Building Corp*, 157. The doctrine of primary jurisdiction is grounded in the principles of separation of powers. *Traveler's Insurance Company v Detroit Edison Company*, 465 Mich 185, 196; 631 NW2d 733 (2001). The doctrine has been compared to the exhaustion doctrine, a concept which is also rooted in separation of powers principles. *Id.* The doctrine is recognition that governmental agencies established to administer certain legislative schemes are possessed with the authority and expertise to provide uniform and consistent treatment of the particular matter at issue. *Traveler's Insurance Company*, 198 -200. The doctrine of primary jurisdiction is distinguished from the doctrine of exhaustion of administrative remedies in that the latter applies when a claim is cognizable in the first instance by an administrative agency alone, while primary jurisdiction applies where a claim may be originally cognizable in the courts, but comes into play whenever enforcement of the claim requires the resolution of issues that have been placed within the special competence of an administrative body. *Id.*, 197-198. "A question of 'primary jurisdiction' arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required." *Id.*, 197, quoting from *Columbia v*

*Thompson*, 570 A2d 277, 288 (DC App, 1990). The doctrine cannot be waived and it does not have to be raised in the first responsive pleading. *Travelers Insurance Company*, 210 -211.

The Construction Code Act adequately supports the application of the primary jurisdiction doctrine in this case. The Commission's composition, and its powers, duties and reviewing authority as outlined above, all point to the need for precise control over administration of the Act. See *Warren v State Construction Code Commission*, 66 Mich App 493; 239 NW2d 640 (1976), which recognized that the Legislature delegated significant and considerable powers to the State Construction Code Commission and it was entitled to significant and considerable deference in administering the Code. Accordingly, not only did the Circuit Court properly dismiss the Plaintiffs-Appellants' complaint for lack of subject matter jurisdiction for failure to exhaust administrative remedies, the Plaintiffs' cause of action was also precluded based on the doctrine of primary jurisdiction.

**V. PLAINTIFFS-APPELLANTS' ASSERTION OF AN ALLEGED HEADLEE AMENDMENT VIOLATION DOES NOT EXCUSE THE REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES**

Plaintiffs-Appellants argue there are no Michigan cases that require a Headlee Amendment claimant to exhaust administrative remedies. However, as noted in City's initial response, if a Plaintiff alleges a constitutional violation, such as an alleged Headlee violation, the Plaintiff is still required to exhaust administrative remedies if there are factual issues for an agency to resolve. *Womack-Scott v Department of Corrections*, 246 Mich App 70, 80-81; 630 NW2d 650 (2001). Plaintiffs fail to explain why a Headlee Amendment violation is treated any differently than any other alleged

constitutional violation. Plaintiffs reliance on *Durant v Department of Education*, 413 Mich 862; 317 NW2d 854 (1982) is misplaced. In *Durant*, the Court did hold the plaintiffs in that particular case were not required to exhaust administrative remedies before filing a lawsuit. However, what Plaintiffs fail to mention is that the “only” claim made by the plaintiffs in *Durant*, as noted in the Court of Appeals opinion that was reversed by this Court, was the claim the Department of Education failed to comport with the Headlee Amendment. *Durant v State*, 110 Mich App 351, 352; 313 NW2d 571 (1981). Unlike the facts in *Durant*, the Plaintiffs-Appellants in this case have made claims the City violated the provisions of a statute in addition to their Headlee violation claim. If Plaintiffs-Appellants chose to dismiss all their claims except the alleged Headlee Amendment violation, then the Circuit Court would have jurisdiction to rule on the merits of the Headlee claim. The City contends it would prevail on that claim, as explained in its trial court brief, since there is no tax. Since Plaintiffs main claim in this case is that the City violated Section 22 of the Construction Code Act, the Plaintiffs were required to exhaust their administrative remedies before pursuing a cause of action in Circuit Court.

**VI. PLAINTIFFS SUPPLEMENTAL AUTHORITY DOES NOT SUPPORT THEIR ARGUMENT**

Subsequent to filing a reply, the Plaintiffs-Appellants filed supplemental authority with this Court. In the supplemental authority, they claim the City deposited “user fees” into the general fund and imply that doing so violates Section 22 of the Construction Code Act. It is the City’s contention that Section 22 does not prohibit the City from using the general fund for construction code activities, as set forth in the previous pleadings. Moreover, Plaintiffs-Appellants’ arguments rely heavily on the factual

nuances of the fee system, which demonstrates the technical nature of their claims, and why it was proper for the Circuit Court to dismiss the case and defer to the State Construction Code Commission. Whether or not the City's fees are 1) "reasonable;" 2) "bear a reasonable relation to the cost" of Building Department services; and 3) are used for "operation of the Building Department only as required by Section 22 are issues that are best resolved by the agency that enforces the Construction Code Act.

**RELIEF SOUGHT**

Defendant-Appellee City of Troy requests that this Court deny Plaintiffs application for leave to appeal, or alternatively that this Court enter a final order affirming the Circuit Court and the Court of Appeals.

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