

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Kathleen Jansen, Presiding Judge

MICHIGAN ASSOCIATION OF HOME BUILDERS; ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN; and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION, ~~Michigan nonprofit corporations,~~

Plaintiffs/Appellants,

v

CITY OF TROY,
~~a Michigan Home Rule City,~~

Defendant/Appellee.

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Supreme Court No. _____ *Open 3-13-14*

Court of Appeals No. 313688

Lower Court No. 10-115620-CZ
On Demand S. Kumar

**APPLICATION FOR LEAVE TO APPEAL
ON BEHALF OF PLAINTIFFS/APPELLANTS
MICHIGAN ASSOCIATION OF HOME
BUILDERS, ASSOCIATED BUILDERS AND
CONTRACTORS OF MICHIGAN,
and MICHIGAN PLUMBING AND
MECHANICAL CONTRACTORS
ASSOCIATION**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

STATEMENT OF JURISDICTION vii

STATEMENT OF QUESTIONS PRESENTED viii

I. INTRODUCTION 1

II. GROUNDS FOR PEREMPTORY REVERSAL OR ACCEPTANCE OF APPLICATION
..... 3

III. STATEMENT OF FACTS 6

IV. ARGUMENT 11

A. Standard of Review 11

B. The Relevant Provisions Of The CCA 12

**C. The Circuit Court Has Original Subject Matter Jurisdiction Over This
Action That Cannot Be Abdicated** 14

**D. The Lower Courts’ Dismissal of the Builders’ Case, Based On Failure To
Exhaust Administrative Remedies Must Be Reversed** 17

**1. Existing, Published Case Law Of The Court Of Appeals Is
Directly Contrary To Its Opinion In This Case** 18

**2. There Is No Adequate Administrative Remedy Available To
The Builders Under The CCA** 19

**3. The CCA’s Administrative Procedural Provisions Do Not
Provide The Requisite Constitutionally Mandated Due
Process Protections** 22

**4. The CCA’s Administrative Procedural Provisions Are, At Best,
Ambiguous In Their Application To The Builders** 24

**5. Public Policy Considerations Support Reversal Of The Lower
Courts’ Decisions** 25

6.	The APA Does Not Require The Exhaustion Of Administrative Remedies	<u>26</u>
E.	There Is No Administrative Remedy For Headlee Amendment Violations; The Circuit Court Has Original Jurisdiction Over The Builders' Headlee Amendment Claims	<u>27</u>
V.	CONCLUSION AND RELIEF REQUESTED	<u>30</u>

INDEX OF AUTHORITIES

Cases	Page
<i>Attorney Gen v Blue Cross Blue Shield of Mich</i> , 291 Mich App 64; 810 NW2d 603 (2010)	<u>11</u>
<i>BCS Life Ins Co v Comm’r of Ins</i> , 152 Mich App 360; 393 NW2d 636 (1986)	<u>15</u>
<i>Bennett v Royal Oak School Dist</i> , 10 Mich App 265; 159 NW2d 245 (1968)	<u>19</u> , <u>20</u>
<i>Blackwood v Comm’r of Revenue</i> , 357 Mich 517; 98 NW2d 753 (1959)	<u>22</u>
<i>Browder v Int’l Fidelity Ins Co</i> , 413 Mich 603; 321 NW2d 668 (1982)	<u>20</u>
<i>Citizens for Common Sense in Gov’t v Attorney Gen</i> , 243 Mich App 43; 620 NW2d 546 (2000)	<u>19</u> , <u>20</u>
<i>Cofrode v Gartner</i> , 79 Mich 332; 44 NW 623 (1890)	<u>15</u>
<i>Devlin v Civil Service Comm</i> , unpublished opinion per curiam of the Court of Appeals, issued Feb 11, 2010 (Docket No. 287826); 2010 WL 480996	<u>26</u>
<i>Dressel v Ameribank</i> , 468 Mich 557; 664 NW2d 151 (2003)	<u>11</u>
<i>Durant v State</i> , 413 Mich 862; 317 NW2d 854 (1982), rev’g 110 Mich App 351; 313 NW2d 571 (1981)	<u>28</u>
<i>Harris v Vernier</i> , 242 Mich App 306; 617 NW2d 764 (2000)	<u>4</u>
<i>Hughes v Almena Twp</i> , 248 Mich App 50; 771 NW2d 453 (2009)	<u>22</u>
<i>In re Project Cost and Special Assessment Role for Chappel Damn</i> , 282 Mich App 142; 762 NW2d 192 (2009)	<u>22</u> , <u>24</u>
<i>McJunkin v Cellasto Plastic Corp</i> , 461 Mich 590; 608 NW2d 57 (2000)	<u>11</u>
<i>Merrelli v City of St Clair Shores</i> , 355 Mich 575; 96 NW2d 144 (1959)	<u>15</u>
<i>Mich Salt Works v Baird</i> , 173 Mich 655; 139 NW 1030 (1913)	<u>15</u>
<i>Mich Supervisors Union OPEIU Local 512 v Dep’t of Civil Service</i> , 209 Mich App 573; 531 NW2d 790 (1995)	<u>20</u> , <u>28</u>

<i>Mollett v City of Taylor</i> , 197 Mich App 328; 494 NW2d 832 (1992)	<u>26</u>
<i>Paley v Coca-Cola Co</i> , 389 Mich 583; 209 NW2d 232 (1973)	<u>16</u>
<i>Racing Comm’r v Wayne Circuit Judge</i> , 377 Mich 31; 138 NW2d 764 (1966)	<u>15</u>
<i>Schwall v City of Dearborn</i> , 31 Mich App 169; 187 NW2d 543 (1971)	<u>19</u>
<i>Sessa v State Treasurer</i> , 117 Mich App 46; 323 NW2d 586 (1982)	<u>15</u>
<i>Wayne City Chief Exec v Governor</i> , 230 Mich App 258; 583 NW2d 512 (1998)	<u>15</u> , <u>27</u>
<i>Westland Convalescent Center v Blue Cross and Blue Shield of Mich</i> , 414 Mich 247; 324 NW2d 851 (1982)	<u>22</u>
<i>Wickman v City of Novi</i> , 413 Mich 617; 322 NW2d 103 (1982)	<u>16</u>
<i>Winter Bldg Corp v City of Novi</i> , 119 Mich App 155; 326 NW2d 409 (1982)	<u>3</u> , <u>18</u>
<i>Womack-Scott v Dep’t of Corrections</i> , 246 Mich App 70; 630 NW2d 650 (2001)	<u>12</u> , <u>28</u>

Court Rules	Page
MCR 2.116(C)(10)	<u>2</u>
MCR 2.116(I)(2)	<u>2</u>
MCR 2.605	<u>15</u>
MCR 3.310	<u>15</u>
MCR 7.301(A)(2)	<u>vii</u>
MCR 7.302	<u>vii</u>
MCR 7.302(B)	<u>3</u>

Statutes	Page
Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328	<i>passim</i>
MCL 125.1509b	<u>14</u>
MCL 125.1509b(3)	<u>16, 25</u>
MCL 125.1514	<u>23</u>
MCL 125.1516	<u>23</u>
MCL 125.1518	<u>23</u>
MCL 125.1522(1)	<i>passim</i>
MCL 141.421, et seq	<u>2</u>
MCL 21.240	<u>28</u>
MCL 24.301	<u>26, 27</u>
MCL 600.308a(1)	<u>27</u>
MCL 600.601(3)	<u>15</u>
MCL 600.605	<u>15</u>
Michigan’s Campaign Finance Act, MCL 169.201, et seq	<u>16</u>
Other Authority	Page
Const 1963, Art IX, §32	<u>27</u>
Const 1963, Art VI, §13	<u>15</u>
Const 1963, Art VI, §28	<u>21</u>
Headlee Amendment, Const 1963, Art IX, §31	<i>passim</i>
Uniform Budgeting and Accounting Act, Const 1963, Art VII, §32	<u>2, 21</u>

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302, Plaintiff-Appellants, the Michigan Association of Homebuilders, the Associated Builders and Contractors of Michigan, and the Michigan Plumbing and Mechanical Contractors Association having timely filed their Application for Leave to Appeal from the March 13, 2014 Opinion of the Michigan Court of Appeals.

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THE CIRCUIT COURT AND THE COURT OF APPEALS ERRED BY CONCLUDING THAT THE CIRCUIT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS LAWSUIT?

The Court of Appeals answered, "No."

The Circuit Court answered, "No."

Appellants answer, "Yes."

Appellee answers, "No."

- II. WHETHER THE CIRCUIT COURT AND THE COURT OF APPEALS ERRED BY INTERPRETING THE STATE CONSTRUCTION CODE ACT TO REQUIRE APPELLANTS TO EXHAUST ADMINISTRATIVE REMEDIES WHERE:
- A. THE DECISION IS CONTRARY TO AN EXISTING PUBLISHED DECISION OF THE COURT OF APPEALS?
 - B. THE STATE CONSTRUCTION CODE ACT FAILS TO PROVIDE APPELLANTS WITH AN ADEQUATE REMEDY?
 - C. THE STATE CONSTRUCTION CODE ACT'S PROCEDURAL PROVISIONS FAIL TO PROVIDE APPELLANTS WITH CONSTITUTIONALLY MANDATED DUE PROCESS PROTECTIONS?
 - D. SECTION 9B OF THE STATE CONSTRUCTION CODE ACT'S PROCEDURAL PROVISIONS ARE, AT A MINIMUM, AMBIGUOUS IN THEIR ALLEGED APPLICATION TO APPELLANTS?
 - E. THE ADMINISTRATIVE PROCEDURES ACT DOES NOT REQUIRE EXHAUSTION?

The Court of Appeals answered, "No."

The Circuit Court answered, "No."

Appellants answer, "Yes."

Appellee answers, "No."

II. WHETHER THE CIRCUIT COURT AND THE COURT OF APPEALS ERRED BY DETERMINING THAT THE BUILDER'S CONSTITUTIONAL CLAIM UNDER THE HEADLEE AMENDMENT WAS SUBJECT TO THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES?

The Court of Appeals answered, "No."

The Circuit Court answered, "No."

Appellants answer, "Yes."

Appellee answers, "No."

I. INTRODUCTION

This lawsuit involves the unlawful effect of Defendant/Appellee, City of Troy's (the "City") privatization of its Building Department through its contract with Safe Built of Michigan, Inc. ("Safebuilt"). See, City of Troy Professional Services Agreement (the "Contract"), Ex. A. In the first Contract year, the City paid Safebuilt 80% and retained 20% of certain Building Department fees while retaining 100% of all other Building Department fees. *Id.* This ratio changed to a 75/25 split in the second Contract year. *Id.* In turn, this generated a substantial User Fee Surplus in 2010-11 which was not used to operate the Building Department but was instead deposited into the City's general fund for general use. See, City Payment Code Reports, Ex. B.

As a result, Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders") filed a three-count Verified Complaint on December 15, 2010, alleging violations of the State Construction Code Act (the "CCA") (Count I), the Headlee Amendment (Count II), and seeking declaratory and injunctive relief for these violations (Count III). More specifically, the Builders alleged that the City's deposit of User Fees into the general fund violated Section 22 of the CCA, which requires that fees be: (1) "reasonable;" (2) "bear a reasonable relation to the cost" of Building Department services; and (3) be used for "operation of" the Building Department only. MCL 125.1522(1). Further, use of the User Fee Surplus for general revenue purposes not only violates the CCA but also constitutes an unlawful tax that violates the Headlee Amendment. Const 1963, Art IX, §31. Thus, the Builders sought declaratory and injunctive relief to require that the City's Building Department funds be segregated and used solely for the Building Department, consistent with

Michigan's Constitution, the Uniform Budgeting and Accounting Act ("UBAA"), and Michigan Department of Treasury guidance documents. Const 1963, Art VII, §32; MCL 141.421, et seq. Among other things, the Builders also sought a refund by the City of all surplus Building Department funds previously deposited into the general fund into the proper account.

Following the close of discovery, the Builders moved for summary disposition pursuant to MCR 2.116(C)(10) on all counts. The City filed its opposition brief seeking summary disposition in its favor under MCR 2.116(I)(2). The Circuit Court held a hearing on November 16, 2011 and took what were essentially cross motions for summary disposition under advisement.

On November 13, 2012, the circuit issued its Opinion and Order denying the Builders' motion for summary disposition, granting summary disposition in favor of the City and dismissing the Builders' Complaint in its entirety based on the Builders' failure to exhaust their administrative remedies under Section 9b of the CCA before filing their Complaint. See, Circuit Court Opinion and Order ("Cir Ct Op"), Ex. C. The Builders filed a timely Claim of Appeal with the Court of Appeals which affirmed the decision of the Circuit Court in an unpublished opinion issued March 13, 2014. Court of Appeals Opinion, *per curiam*, March 13, 2014 ("COA Op"), Ex. D. The Builders now file this Application for Leave to Appeal with this Court (the "Application"). For the reasons discussed below, this Court should peremptorily reverse the March 13, 2014 Opinion of the Court of Appeals and remand this case to the Oakland County Circuit Court for a decision on the merits of the Builders' Motion for Summary Disposition or, alternatively, grant the Builders' Application for Leave to Appeal.

II. GROUNDS FOR PEREMPTORY REVERSAL OR ACCEPTANCE OF APPLICATION

As discussed in detail below, the issues raised in this Application are grounds upon which leave should be granted. MCR 7.302(B). First, the decision of the Court of Appeals in this case, that the Builders must exhaust their administrative remedies under the CCA, as to claims involving the City's collection and use of fees, is in direct conflict with the Court of Appeals' earlier, published decision of *Winter Bldg Corp v City of Novi*, 119 Mich App 155; 326 NW2d 409 (1982). In *Winter Bldg*, the Court of Appeals held that the CCA did not require plaintiff builders to exhaust their administrative remedies, stating:

Defendants first contend that plaintiffs should have been barred from obtaining relief in circuit court by their failure to exhaust available administrative remedies. In the lower court, defendants claimed that plaintiffs should have sought review of their claim by the State Construction Commission pursuant to MCL §125.1509a; MSA §5.2949(9a). **We agree with plaintiffs that this statutory provisions applies only to evaluation of an agency's performance in enforcing building codes, not to review of a city's substantive enactments.**

Winter Bldg, 119 Mich App at 156-157 (emphasis supplied).

Second, the issue of subject matter jurisdiction and, more specifically, the exhaustion of administrative remedies involves legal principles of major significance to this State's jurisprudence. Subject matter jurisdiction effects every lawsuit – whether administrative or judicial. Subject matter jurisdiction is the first topic in every lawyer's first year of law school in civil procedure 101. Subject matter jurisdiction may be raised at any time during the proceedings. Subject matter jurisdiction cannot be waived. And, subject matter jurisdiction cannot be granted by implied or express stipulation of the litigants. *Harris v Vernier*, 242 Mich App 306, 316; 617 NW2d 764 (2000). There can hardly be a more significant principle of law

in this State's jurisprudence. In short, litigants need clear direction on where, and with whom, to file their lawsuits. Absent this Court's intervention in this case, this State's jurisprudence on this issue will be conflicted.

Third, the decision of the Court of Appeals is clearly erroneous and will cause material injustice. Again, the Court of Appeals' decision conflicts with its own precedent. In addition, the decision is erroneous for the following reasons:

1. The Builders have no "adequate" remedy under the CCA;
2. The CCA's procedural provisions do not provide the constitutionally mandated due process protections;
3. The CCA's procedural provisions are, at best, ambiguous in their application to the Builders;
4. The policies behind the exhaustion of administrative remedies are furthered by NOT requiring exhaustion;
5. The Administrative Procedures Act ("APA") does not require the exhaustion of administrative remedies; and
6. The Headlee Amendment claim survives even a ruling that the Builders were required to exhaust their administrative remedies with regard to the CCA claims.

Finally, sound policy reasons exist for reversing the lower courts' opinions. Based on comments from the Court of Appeals' justices, an underlying concern that was swaying their decision was the perceived overall shortage of municipal funds and the disincentive to municipalities to find more cost efficient means to provide services, such as privatization, should the Builders prevail on their claims against the City. This "concern," however, is met with a

specific legislative limitation/policy – the legislative mandate in Section 22 of the CCA that a municipality “shall only use fees generated under this section” for Building Department services.

MCL 125.1522(1). More specifically, the CCA states:

Sec. 22. (1) The legislative body of a governmental subdivision shall establish **reasonable fees to be charged by the governmental subdivision** for acts and services performed by the enforcing agency or construction board of appeals under this act, which fees shall be intended **to bear a reasonable relation to the cost**, including overhead, to the governmental subdivision of the acts and services, including, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of appeals, hearing appeals in accordance with this act. The enforcing agency shall collect the fees established under this subsection. The legislative body of a governmental subdivision **shall only use fees generated under this section** for the operation of the enforcing agency or the construction board of appeals, or both, and **shall not use the fees for any other purpose**.

MCL 125.1522(1) (emphasis added). The public policy underlying these mandates is to eliminate overcharging the general public for municipal service fees by not allowing the deposit of funds into the general fund. The actions of the City in this case are directly contrary to this Section 22 of the CCA and the public policy behind its enactment.

For these reasons, this Court should peremptorily reverse the March 13, 2014 Opinion of the Court of Appeals and remand this case to the Oakland County Circuit Court for a decision on the merits of the Builders’ Motion for Summary Disposition or, alternatively, grant the Builders’ Application for Leave to Appeal.

III. STATEMENT OF FACTS

Privatization: On July 1, 2010, the City privatized its Building Department by hiring Safebuilt. Contract, Ex. A. Safebuilt performs the functions formerly performed by the City's Building Department. Contract, §2, p 2, Ex. A. Safebuilt provides a "turn-key" operation by doing all of the City's building permit and inspection work, except for the work of one "Building Code Official," Mr. Grusnick. Deposition Transcript of Mark Miller ("Miller Dep Tran"), pp 149-150, Ex. E. However, even Mr. Grusnick is not employed under the Building Department full-time. Instead, Mr. Grusnick allocates 60% of his time to the planning department and 40% to his Building Code Official duties. Miller Dep Tran, pp 67 and 169, Ex. E.

The Contract: Pursuant to the Contract, Safebuilt retained 80% of the "billable" fees listed in the Contract, and the City retained the 20% surplus. Deposition Transcript of John Lamerato ("Lamerato Dep Tran"), p 21, Ex. F. The City also retained 100% of other "non-billable" Building Department fees. Lamerato Dep Tran, p 122, Ex. F. Further as "billable" fees exceeded \$1,000,000 in the first Contract year, the City retained 25% of the "billable" fees, with 75% to Safebuilt, along with 100% of "non-billable" fees for the remaining Contract term. Contract, §3.2, p 2, Ex. A.

Building Department Revenue: In addition to the revenue the City's Building Department receives from building and other permits, the City receives payment from Safebuilt for its lease of its office space and for phone service. Contract, §6, pp 6-8, Ex. A. The City also receives payment for leasing its vehicles, computers and office equipment to Safebuilt and for Safebuilt's use of the City's wireless computer services. Contract, §§7-8, pp 8-12, Ex. A.

Safebuilt's payments to the City were designed to cover all Building Department indirect expenses – *i.e.*, the City's overhead. Lamerato Dep Tran, pp 10-11 and 30, Ex. F. Thus, Building Department gross revenue includes permit and other fees, Safebuilt lease payments, and Construction Board of Appeal fees. Lamerato Dep Tran, pp 25-26, 43 and 58, Ex. F. Total 2010-11 Building Department revenue was \$1,591,507.02. Tables, Ex. G.

Building Department Costs: Building Department costs included "direct" and "indirect" costs. Building Department direct costs historically included salaries, benefits, supply costs, vehicle rental, computer charges, and the like, as identified in the Department's budget. Miller Dep Tran, pp 21-22, Ex. E; Lamerato Dep Tran, p 15, Ex. F. By contrast, direct costs for the Building Department in the "Safebuilt Era" are simply those relating to the Contract and 40% of Mr. Grusnick's salary, being \$32,437.12. Miller Dep Tran, pp 29-30 and 32-33, Ex. E; Lamerato Dep Tran, pp 15 and 18, Ex. F. 2010-11 Contract payments to Safebuilt also included 80% of the "billable" fees and \$120,000 in costs for Safebuilt to "close out" previously opened (and paid for) permits. Contract, §3.2, p 2, Ex. A. All totaled, the "80%" payments to Safebuilt, permit closeout costs, and Mr. Grusnick's salary totaled \$1,134,198.90 in 2010-11 Department direct costs. Tables, Ex. G.

Beginning in 2001, when the CCA first required tracking of revenues and expenditures, the City's indirect costs were calculated by taking the Department's fixed budget and adding 8% as an estimate of indirect costs. Lamerato Dep Tran, pp 15-16, Ex. F. There are no documents that actually identify the components or amounts of any indirect costs. Rather, the City simply applied the 8%. Miller Dep Tran, pp 26, 29 and 38, Ex. E; Lamerato Dep Tran, p 17, Ex. F.

Around the time when the City contemplated entering into the Contract with Safebuilt, it sought to determine the true indirect cost of the Building Department. To do so, the City employed a "core services" analysis. Lamerato Dep Tran, pp 30-31 and 63-72, Ex. F. The City also sought to identify the departments that "would provide service to various other departments" or, in other terms, to identify and put a price on the services rendered by other departments (specifically the Manager, Accounting, Risk, Purchasing, City Attorney, and Human Resources) to the Building Department. Lamerato Dep Tran, p 66, Ex. F. As a result, the City determined that its 2010-11 "core services" cost as a result of privatization was \$25,271, and that the cost for physical space was \$17,389, which totaled \$42,660 in indirect costs. Lamerato Dep Tran, pp 68-69, Ex. F.

Through "core services," the City claims an expense for Building Department administration. However, under its public budgeting, the City does not charge the Building Department any administrative or oversight charges. Lamerato Dep Tran, p 13, Ex. F. Moreover, no other department budget shows any cost associated with rendering services to the Building Department. Lamerato Dep Tran, pp 63-65, Ex. F. As a result, the City simply has no budgetary mechanism to charge the Building Department for the costs incurred by other departments. Therefore, reliance on either the 8% estimate or the core services formula represents budgetary fiction.

The User Fee Surplus: The City's 2010-11 direct costs (payments to Safebuilt, permit closeout costs, and 40% of the Building Official's salary), plus indirect "core services" costs, total \$1,176,858.90. Yet, total revenue was \$1,591,507.02, resulting in a 2010-11 "User Fee Surplus" of \$414,648.12. Tables, Ex. G.

The User Fee Surplus is Not Used for Building Department Operation: The City did not use the User Fee Surplus for operation of the Building Department. Instead, the User Fee Surplus was deposited it into the general fund for unrestricted use. Miller Dep Tran, pp 98, 120 and 127, Ex. E; Lamerato Dep Tran, pp 37, 43 and 46, Ex. F.

The Litigation: The Builders filed a Verified Complaint alleging violations of Section 22 of the CCA, quoted supra, and the Headlee Amendment and seeking relief as follows:

- a. Declare that the Defendant has violated and is violating the Construction Code Act "Reasonable Fee," "Reasonable Relation to Costs," "Restriction Use of Funds" Provisions set forth under MCL 125.1522(1), and Mich Const 1963, Art IX, §31 (the "Violations");
- b. Declare that the Violations have harmed and will, if not redressed, continue to harm the Builders and their constituent members.
- c. Enter a preliminary and/or permanent injunction prohibiting Defendant from violating the Construction Code Act and **prohibiting Defendant from charging any permit, inspection, plan review, or other Building Department fees that are not reasonable and which do not bear reasonable relation to the cost of the services provided.**
- d. Enter a preliminary and/or permanent injunction prohibiting Defendant from violating the Construction Code Act and **prohibiting Defendant from using any funds derived from or representing Building Department fees for any purpose other than providing Building Department services and a construction board of appeals as mandated by MCL 125.1522(1).**
- e. Enter a preliminary and/or permanent injunction prohibiting Defendant from violating the Construction Code Act and prohibiting Defendant from using any funds derived from placing any fees generated through its Building Department into its general fund or any fund

other than a discrete fund dedicated to purposes allowable under the Construction Code Act consistent with MCL 125.1522(1).

- f. Enter a preliminary and/or permanent injunction prohibiting Defendant from violating the Construction Code Act and **requiring Defendant to return any surplus Building Department funds already deposited in Defendant's general accounts** into a discrete fund dedicated to the purposes allowable under the Construction Code Act consistent with MCL 125.1522(1).
- g. Enter a permanent injunction prohibiting Defendant from violating the Construction Code Act and requiring Defendant to adjust its Building Department fees downward, so that they bear a reasonable relation to the cost of providing Building Department services consistent with MCL 125.1522(1).
- h. Enter a permanent injunction **prohibiting Defendant from violating the Michigan Constitution and Headlee Amendment, Const 1963, Art IX, § 31, and requiring Defendant to adjust its Building Department fees downward**, so that they serve a regulatory purpose and bear the requisite reasonable relation to the costs of providing Building Department services.
- i. Award the Builders costs, attorney fees, and any further relief this Court deems appropriate under the circumstances.

Complaint, pp 12-14 (emphasis supplied).

The Circuit Court, ruling on cross-motions for summary disposition, dismissed the Builders' Complaint based on the failure of the Builders to exhaust their administrative remedies under the CCA before filing their Complaint. Cir Ct Op, Ex. C. The Court of Appeals affirmed finding that: (1) the relevant provisions of the CCA provide an administrative remedy; (2) the Builders were "required to exhaust their remedy before seeking review from the circuit court;"

and (3) the claim for violation of the Headlee Amendment was so “intermingled with issues properly before an administrative agency” that they too were correctly dismissed. COA Op, p 4, Ex. D. By implication, the Court of Appeals must have determined that the remedy provided under the CCA was “adequate” – since such a determination is required under Michigan law where claims are dismissed for failure to exhaust administrative remedies. It is with respect to all three rulings that the lower courts erred and upon which this Court should reverse.

IV. ARGUMENT

A. Standard of Review

This Court’s review of this matter is *de novo*. A decision to deny or grant summary disposition, issues of statutory interpretation and application, and questions of circuit court jurisdiction are all reviewed *de novo*. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000); *Attorney Gen v Blue Cross Blue Shield of Mich*, 291 Mich App 64, 76-77; 810 NW2d 603 (2010); *Womack-Scott v Dep’t of Corrections*, 246 Mich App 70, 74, n 2; 630 NW2d 650 (2001).

B. The Relevant Provisions Of The CCA

The applicable provisions of the CCA are not at issue.¹ Section 9b of the CCA provides in relevant part:

¹As discussed below, there are, of course, disputes over the application of these provisions to the Builders and, more importantly, whether the provisions satisfy the requirements of Michigan law for the exhaustion of administrative remedies.

- The director, as prescribed in this section, **may** conduct a performance evaluation of an enforcing agency to assure that the administration and enforcement of this act and the code is being done pursuant to either section 8a or 8b.
- A performance evaluation **may** only be conducted either at the request of the local enforcing agency or upon the receipt of a written complaint.
- **If** a performance evaluation is to be conducted upon the receipt of a written complaint, the director shall first refer the written complaint to the affected enforcing agency requesting a written response within 10 days.
- If the local enforcing agency fails to provide a written response, or if the response is considered inadequate, the director shall consult with the commission and request approval to conduct the performance evaluation.²
- This decision [to conduct a performance evaluation] shall be mailed **to the enforcing agency**³ 10 days in advance of conducting the performance evaluation.
- When conducting a performance evaluation of an enforcing agency, the director may request **that the local enforcing agency**⁴ accompany the director or other state inspectors on inspections.
- Upon completion of a performance evaluation, the director shall report the findings and any recommendations **to the commission and the local enforcing agency.**⁵

²Query – what happens if the enforcing agency provides an adequate response? There is no opportunity for any other party to respond?

³No mailing or other form of notice is required to be made to any other party.

⁴No participation in the investigation by any other party is permitted.

⁵Only the Commission and the enforcing agency are required to receive the Director's findings or recommendations – no one else.

- The commission may issue a **notice of intent to withdraw the responsibility for the administration and enforcement of this act and the code from a governmental subdivision**⁶ after receiving the results of a performance evaluation.
- The notice shall include the **right to appeal** within 30 business days **after receipt of the notice of intent to withdraw the responsibility.**⁷
- Failure **by the enforcing agency or the chief elected official of that governmental subdivision** to request a hearing within 30 business days after receipt of the notice of intent to withdraw the responsibility **shall be considered to exhaust the enforcing agency's administrative remedies** and the notice shall be considered a final order of the commission under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.⁸
- **If an enforcing agency or the chief elected official of the governmental subdivision transmits an appeal** of the notice of intent to withdraw the responsibility issued under subsection (3), the commission chairperson shall request appointment of a **hearings officer.**⁹
- The hearings officer shall conduct a hearing of the appeal pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, and issue a

⁶Withdrawal is the only possible remedy provided. None of the remedies requested here by the Builders are even possible under Section 9b's administrative remedy provisions.

⁷ The only right of appeal is from a decision to withdraw responsibility to administer and enforce the CCA from the governmental subdivision. There is no right of appeal from any decision to NOT withdraw responsibility. Therefore, there is no right of appeal for any party except the enforcing agency/governmental subdivision. There is no right of appeal for the Builders.

⁸Only the enforcing agency can achieve exhaustion of its administrative remedies. There is no means by which any other party can achieve exhaustion of its administrative remedies.

⁹The opportunity for a hearing is afforded only to the enforcing agency/governmental subdivision. Parties such as the Builders have no opportunity for a hearing.

proposed decision which shall be sent to the affected parties. The proposed decision shall become the final order issued by the commission, unless exceptions are filed by a party within 30 days after receipt of the proposed decision.

- Other than in a case of remand, the period for seeking judicial review of the commission's decision under section 104 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.304, shall begin to run upon receipt by the parties of the commission's written decision.¹⁰

MCL 125.1509b.

C. The Circuit Court Has Original Subject Matter Jurisdiction Over This Action That Cannot Be Abdicated

Fee reasonableness challenges have always been cognizable in the circuit courts. *Merrelli v City of St Clair Shores*, 355 Mich 575; 96 NW2d 144 (1959) (pre-Headlee Amendment fee reasonableness challenge). This is keeping with the maxim that “[c]ircuit courts are created by the state constitution with general and original jurisdiction over all matters not prohibited by law.” *Wayne City Chief Exec v Governor*, 230 Mich App 258, 272; 583 NW2d 512 (1998) (citing Const 1963, Art VI, §13; MCL 600.605); *BCS Life Ins Co v Comm’r of Ins*, 152 Mich App 360, 367; 393 NW2d 636 (1986) (also citing Const 1963, Art VI, §13). This, of course, includes jurisdiction to issue declaratory rulings and injunctive relief. *Citizens for Common Sense v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000)

¹⁰Because the only party that could appeal was the enforcing agency, and because the only decision that could be appealed was a decision to withdraw the enforcing agency's authority administer and enforce the CCA, the opportunity to seek judicial review is not available to parties such as the Builders.

(citing Const 1963, Art VI, §13; MCL 600.605); MCR 2.605 (authorizing declaratory relief and injunctive relief necessary to effectuate the declaration).

Circuit court jurisdiction to issue injunctions is also conferred under MCL 600.601(2) and court rule. MCL 600.601(3); MCR 3.310 (injunctions). It has also long been a maxim of Michigan jurisprudence that circuit courts have jurisdiction to enjoin state and local government units from performing unlawful acts. *Sessa v State Treasurer*, 117 Mich App 46, 53; 323 NW2d 586 (1982) (citing *Racing Comm'r v Wayne Circuit Judge*, 377 Mich 31, 36; 138 NW2d 764 (1966); *Mich Salt Works v Baird*, 173 Mich 655, 662; 139 NW 1030 (1913)).

Further, where a circuit court has subject matter jurisdiction, it cannot ordinarily refuse to exercise it. *Cofrode v Gartner*, 79 Mich 332; 44 NW 623 (1890). And, statutes divesting the circuit court of jurisdiction are strictly construed, since divestiture cannot be accomplished in the absence of a clear mandate with all doubts being resolved in favor of circuit court jurisdiction. *Paley v Coca-Cola Co*, 389 Mich 583; 209 NW2d 232 (1973); *Wickman v City of Novi*, 413 Mich 617, 645; 322 NW2d 103 (1982) (“[t]he divestiture of jurisdiction from the circuit court is an extreme undertaking. Statutes so doing so are to be strictly construed. Divestiture of jurisdiction cannot be accomplished except under clear mandate of the law”).

Section 9b of the CCA, the procedure it permits, and the remedy it affords (or, rather, fails to afford), cannot be construed to deprive the Circuit Court of jurisdiction over the Builders’ claims. This is particularly so in light of the strict construction that must be afforded to statutes that seek to deprive the circuit court of jurisdiction. See, *Wickman*, 413 Mich 617. None of these procedural provisions of Section 9b of the CCA are expressly exclusive. None of the procedural provisions are mandatory. And, the only reference to the exhaustion of

administrative remedies is with respect to the enforcing agency only – to the exclusion of parties such as the Builders. MCL 125.1509b(3). Simply put, nothing in the CCA demonstrates a clear legislative intent to divest the circuit court of jurisdiction.¹¹

In sum, the Circuit Court has original subject matter jurisdiction that it cannot abdicate here. There is no exclusive administrative remedy that the Builders must exhaust. Indeed, the procedural provisions of the CCA are wholly optional. Thus, the Circuit Court and the Court of Appeals must be reversed.

D. The Lower Courts’ Dismissal of the Builders’ Case, Based On Failure To Exhaust Administrative Remedies Must Be Reversed

There are at least six reasons why the lower courts erred in the dismissal of the Builders’ CCA claims based on their failure to exhaust administrative remedies:

1. Existing, published Court of Appeals’ case law is directly to the contrary of their current rulings¹²;
2. The Builders have no “adequate” remedy under the CCA¹³;

¹¹This is perhaps best illustrated by comparing the silence in the CCA against the clear legislative mandate in other Michigan statutes such as Michigan’s Campaign Finance Act (“MCFA”). MCL 169.201, et seq. The MCFA provides that “[t]here is no private right of action, either in law or equity, pursuant to this act,” and that “[t]he remedies provided in this act are the exclusive means by which this act may be enforced.” MCL 169.215(16). The MCFA also contains administrative remedies in express statutory provisions which include a detailed declaratory ruling procedure and an explicit whistle-blowing “complaint” feature that allows the “whistle blower” to plead and reply to respondent’s pleadings. MCL 169.215(2) and (5). By contrast, the CCA has no language making administrative remedies exclusive and no language specifying that the only means of redress for violations are the unspecified “complaint” and optional performance review in Section 9b of the CCA.

¹²Neither of the lower courts ruled on this issue.

¹³Neither of the lower courts expressly ruled on this issue.

3. The CCA's procedural provisions do not provide the constitutionally mandated due process protections¹⁴;
4. The CCA's procedural provisions do not apply to the Builders¹⁵;
5. The policies behind the exhaustion of administrative remedies are furthered by NOT requiring exhaustion¹⁶;
6. The APA does not require the exhaustion of administrative remedies.¹⁷

As a result, the lower courts' opinions should be peremptorily reversed.

1. Existing, Published Case Law Of The Court Of Appeals Is Directly Contrary To Its Opinion In This Case

The Opinion of the Court of Appeals is in direct conflict with its earlier precedent. Specifically, in *Winter Bldg, supra* at p 3, defendant city appealed the trial court ruling that local governments were preempted by the CCA from enacting ordinances governing the construction of curbs, approaches, sidewalks, driveways and other concrete exterior flatwork. On appeal, as here, the city claimed that plaintiffs, a group of Michigan residential builders, were barred from obtaining relief in the circuit court by their failure to exhaust available administrative remedies. More specifically, and again as in this case, the city in *Winter Bldg* argued that pursuant to Section 9a (now §9b) of the CCA, plaintiffs should have sought review of their

¹⁴Neither of the lower courts ruled on this issue.

¹⁵Both lower courts specifically held that the procedural provisions of the CCA do apply to the Builders. Cir Ct Op, p 4, Ex. C; COA Op, p 3, Ex. D.

¹⁶Neither of the lower courts ruled on this issue.

¹⁷The APA was relied upon only by the Circuit Court. The Court of Appeals did not rule on the application or relevancy of the APA.

claims by the Director and State Construction Commission. The Court of Appeals disagreed, stating:

Defendants first contend that plaintiffs should have been barred from obtaining relief in circuit court by their failure to exhaust available administrative remedies. In the lower court, defendants claimed that plaintiffs should have sought review of their claim by the State Construction Commission pursuant to MCL §125.1509a; MSA §5.2949(9a). We agree with plaintiffs that **this statutory provision applies only to evaluation of an agency's performance in enforcing building codes, not to review of a city's substantive enactments.**

Winter Bldg, 119 Mich App at 156-157 (emphasis supplied). And, although the *Winter Bldg* case was decided at such time as Section 9a, the predecessor to current Section 9b of the CCA, was in place, as relevant here, there are no substantive differences between former Section 9a and current Section 9b. A redlined copy of Section 9a showing the revisions made to become Section 9b is attached as Exhibit H.

Similarly, in this case, none of the Builders' claims relate to the City's "performance in enforcing building codes." To the contrary, the Builders claims relate to the City's substantive act of privatizing its Building Department. Accordingly, as a matter of Michigan law, the Builders were not required to pursue the CCA's administrative remedies before filing this lawsuit. Accordingly, this Court should reverse the decisions of the Circuit Court and the Court of Appeals.

2. There Is No Adequate Administrative Remedy Available To The Builders Under The CCA

The rule with regard to exhaustion of administrative remedies is that "[b]efore one can be required to exhaust his [or her] administrative remedies, [they] must have an administrative

remedy open to [them]." *Schwall v City of Dearborn*, 31 Mich App 169, 171; 187 NW2d 543 (1971). Not only must there be an available remedy, but the Legislature must have "expressed an intent to make an administrative tribunal's jurisdiction exclusive" in order for the circuit court to be deprived of jurisdiction "over those same areas." *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 50; 620 NW2d 546 (2000). The proper inquiry was explained in *Bennett v Royal Oak School Dist*, 10 Mich App 265; 159 NW2d 245 (1968) wherein the Court of Appeals stated:

A remedy is not 'inadequate' so as to authorize judicial intervention before exhaustion of the remedy merely because it is attended with delay, expense, annoyance, or even some hardship There must be something in the nature of the action or proceeding that indicates to the court that it will not be able to protect the rights of the litigants or afford them adequate redress otherwise than through the exercise of this extraordinary jurisdiction.

Bennett, 10 Mich App at 269 (citations omitted). Accordingly, where the administrative agency cannot provide an adequate remedy, exhaustion is not required. *Mich Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 577; 531 NW2d 790 (1995). That is, where the remedies sought are not available under the applicable statutory scheme, then the administrative tribunal lacks jurisdiction "over those areas." *Citizens for Common Sense*, 243 Mich App at 50.

In this case, the Builders do not have an adequate remedy available to them under the CCA. The only remedy available under the CCA is the potential and discretionary removal of the City's authority to enforce the CCA. This remedy does not address the concerns, claims or relief requested by the Builders and the fee payers they represent. Thus, the Director and

Commission have no jurisdiction over claims for the remedies sought by the Builders for at least three reasons.

First, an optional performance review, undertaken at the Director's discretion, is not a remedy for the Builders. MCL 125.1509b(1) ("the director . . . *may* conduct a performance evaluation of the enforcing agency") (emphasis added); *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982) ("may" means permissive; "shall" means mandatory). Simply put, there is no guarantee that any review whatsoever would be conducted and, without a review, there is no remedy. Thus, in many instances, Section 9a of the CCA provides no remedy at all.

Second, even if a performance review is undertaken, the only available remedy (removing the City's authority to enforce the CCA) is not even remotely related to the remedy the Builders have sought here. The Builders sought an injunction requiring the City to, among other things: establish a special revenue fund for building department fees; deposit the fiscal 2010-11 User Fee Surplus into that fund; deposit all department revenues into that fund thereafter; track revenue and expenditures as required by Section 22 of the CCA and Michigan's Uniform Budgeting and Accounting Act; and, if surpluses result, reduce future fees accordingly. There is no means in the CCA by which this relief can be granted.

Finally, the unavailability of an adequate remedy at the administration level is not rectified by any alleged availability of an adequate remedy from the circuit court after exhaustion of the administrative process and remedies. Any proceedings before the circuit court following the completion of administrative proceedings would be in the nature of an appeal, with the record limited to that made in the administrative level, and the reviewing

circuit court limited to an inquiry of whether the decision of the administrative body is authorized by law and supported by competent, material and substantial evidence on the whole record. Const 1963, Art VI, §28. This appellate review is not an “adequate” remedy.

In sum, the Builders did not have to exhaust administrative remedies that they did not have or could not possibly have. And, any alleged exclusive jurisdiction of the Director and/or Commission and the correlating need to exhaust administrative remedies is limited to cases in which the relief sought is the withdrawal of the municipality’s authority to administer and enforce the CCA. The lower courts erred in finding otherwise. This Court should reverse the decisions of the lower courts.

3. The CCA’s Administrative Procedural Provisions Do Not Provide The Requisite Constitutionally Mandated Due Process Protections

Critical to the fulfillment of due process requirements for an administrative proceeding is an opportunity for a party to present arguments and evidence in support of its position before a decision is rendered and a chance to respond before final action is taken. *Hughes v Alma Twp*, 248 Mich App 50, 69; 771 NW2d 453 (2009). While the concept of due process is a flexible one and its analysis is conducted with consideration of the particular circumstances presented in a given situation, there are still minimum protections that must be afforded. *In re Project Cost and Special Assessment Role for Chappel Damn*, 282 Mich App 142, 150; 762 NW2d 192 (2009), citing *Westland Convalescent Center v Blue Cross and Blue Shield of Mich*, 414 Mich 247; 324 NW2d 851 (1982). And, the guarantee of due process is to be construed liberally in favor of the citizen. *Blackwood v Comm’r of Revenue*, 357 Mich 517, 557; 98 NW2d 753 (1959).

Section 9b of the CCA is woefully deficient in its protections of due process rights. For example, there is no right to a hearing and, in fact, no right for anyone to even request a hearing other than the enforcing agency. There is no right to submit evidence other than perhaps with the filing of an initial complaint. There is no right to develop a record, no opportunity to examine and cross-examine witnesses, no chance to offer exhibits and no occasion to make legal arguments. Rather, the Director is the sole decision-maker in determining whether to even conduct a performance evaluation. Thereafter, it is the enforcing agency and the enforcing agency alone that is granted the authority to request a hearing. The Director alone determines if the local enforcing agency's written response to a complaint is adequate or inadequate – the party filing the complaint has no opportunity to respond prior to the director's decision. Even then, assuming the Director determines to proceed with a performance evaluation, the sole remedy available is the withdrawal of the responsibility for the administration and enforcement of the CCA from the governmental subdivision. And, the only right to appeal is from a decision to withdraw the responsibility for the administration and the enforcement of the CCA. There is no appeal from a decision to not withdraw that responsibility. As a result, any appeal rights are limited to the governmental subdivision to the exclusion of all other parties.¹⁸

¹⁸By comparison, it is clear that the Michigan Legislature, when it so desires, can draft legislation with due process protections and a mandatory exhaustion of remedies requirement. For example, in the statutory scheme for appeals to the construction board of appeals, on issues involving building permits and the like, any "interested person" may file an appeal. That "interested person" is then entitled to a hearing, may examine and cross-examine witnesses and can submit evidence. MCL 125.1514. The decision of the board of appeals is appealable by any "interested party" to the commission. MCL 125.1516. Decisions of the commission are appealable to the Ingham County Circuit Court or Court of Appeals. MCL 125.1518.

The CCA's deficiencies discussed above are contrary to constitutional due process guarantees. The exhaustion of administrative remedies should not be required where the procedure for exhaustion fails to satisfy even the minimal due process requirements. This Court should reverse the opinions of the lower courts.

4. The CCA's Administrative Procedural Provisions Are, At Best, Ambiguous In Their Application To The Builders

The Court of Appeals discussed at length, the procedural provisions of Section 9b of the CCA. COA Op, p 3, Ex. C. The Court of Appeals, however, failed to discuss the ambiguity of the application of these procedural provisions to the Builders.

Under Michigan law,

[s]tatutory language can be rendered ambiguous by its interaction with other statutes. *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 562; 710 NW2d 59 (2005). Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law. *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007). The object of the *in pari materia* rule is to effectuate the legislative purpose as found in harmonious statutes. *People v Shakur*, 280 Mich App 203, 209-210; 760 NW2d 272 (2008). If two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.*

In re Project Cost, 282 Mich App at 147-148.

In this case, the statutory interpretation that avoids conflict is one in which there is no requirement that the Builders exhaust administrative remedies. Section 9b of the CCA plainly sets forth a grievance procedure. And, Section 9b(1) is not expressly limited as to who may file a complaint. However, nowhere in this procedure is there any specific reference to the use of that procedure by anyone other than the "enforcing agency" or the "chief elected official of the

governmental subdivision.” Indeed, there is no method by which anyone other than the “enforcing agency” or the “chief elected official of the governmental subdivision” could request a hearing or be deemed to have successfully exhausted their administrative remedies. The CCA provides:

Failure by the **enforcing agency** or the **chief elected official of that governmental subdivision** to request a hearing within 30 business days after receipt of the notice of intent to withdraw the responsibility shall be considered to exhaust the enforcing agency’s administrative remedies and the notice shall be considered a final order of the commission under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

MCL 125.1509b(3) (emphasis supplied).

In sum, the vast majority of the provisions of Section 9b of the CCA pertain solely to the “enforcing agency” or the “chief elected official of the governmental subdivision.” Only the provision regarding the filing of a complaint is not so limited. And, even that provision is not expressly made applicable to parties such as the Builders. Accordingly, the CCA’s procedural provisions are, at best, ambiguous in their applications to the Builders. Such ambiguity should be resolved in favor of creating the least amount of conflict which, in this case, is in favor of the Builders. The opinions of the lower courts should be reversed.

5. Public Policy Considerations Support Reversal Of The Lower Courts’ Decisions

The policies served by the exhaustion of administrative remedies would be upheld here should this Court reverse the decisions of the lower courts.

The doctrine of exhaustion of administrative remedies is premised on the following maxims: (1) an untimely resort to the courts may result in delay and disruption of an administrative scheme; (2) any

type of appellate review is best made after the agency has developed a full record; (3) resolution of the issues may require the technical competence of the agency; and (4) the administrative agency's settlement of the dispute may render a judicial resolution unnecessary.

Devlin v Civil Service Comm, unpublished opinion per curiam of the Court of Appeals, issued Feb 11, 2010 (Docket No. 287826); 2010 WL 480996, citing *Mollett v City of Taylor*, 197 Mich App 328, 337; 494 NW2d 832 (1992).

In this case, there is no cohesive administrative scheme regarding investigations into a municipality's use of fees which would be disrupted should exhaustion not be required. Nor does Section 9b of the CCA provide for a means by which the Builders could develop a full factual record prior to judicial review – they may not submit evidence, may not examine/cross-examine witnesses and may not submit briefs offering legal theories and precedent. Further, there does not appear to be any “technical competence” possessed by the Director or Commission in the field of municipal accounting which weighs in favor of addressing the Builders' issues to these administrative personnel. And, finally, there could be no “successful agency settlement” which would render judicial resolution unnecessary since neither the Director nor the Commission have the authority to grant the Builders any of the relief they have requested. To the contrary, the only possible relief that can be granted under the CCA is to withdraw the municipality's authority to administer and enforce the CCA. In this case, the City has already abdicated that authority in favor of a private entity. In sum, the policies underlying the exhaustion of administrative remedies doctrine weigh against requiring exhaustion on the facts of this case.

6. The APA Does Not Require The Exhaustion Of Administrative Remedies

The City and the Circuit Court cited Section 301 of the APA in support of their respective exhaustion arguments and holding. Cir Ct Op, p 4, Ex. C. MCL 24.301, however, does not mandate resort to any administrative remedy. Instead, MCL 24.301 merely allows for court review of administrative orders affecting parties that participated in an administrative process that was imposed by operation of some other law. The Circuit Court's reliance on the APA as authority requiring the Builders to exhaust administrative remedies was reversible error.

E. There Is No Administrative Remedy For Headlee Amendment Violations; The Circuit Court Has Original Jurisdiction Over The Builders' Headlee Amendment Claims

The Circuit Court gave no mention of, and failed to provide, any analysis on whether the Builders' Headlee Amendment claim was subject to an exhaustion requirement, yet it dismissed the entire case nonetheless. Cir Ct Op, pp 4-5, Ex. C. The Court of Appeals affirmed but for the reason that the Headlee Amendment claims were so "intermingled" with the CCA claims that must be brought before the administrative agency that the constitutional claims must also be dismissed as a result of the Builders' failure to exhaust administrative remedies. COA Op, p 4, Ex. D. This is incorrect. Headlee Amendment claims may be commenced directly in a circuit court, MCL 600.308a(1), or "at the option of the party commencing the action," in the Court of Appeals. *Id.*; Const 1963, Art IX, §32; e.g., *Wayne Cty Chief Exec v Governor*, 230 Mich App at 269-270 (noting that the Circuit Court and Court of Appeals have concurrent jurisdiction over Headlee Amendment claims). Thus, the lower courts erred in dismissing the Builders' Headlee Amendment claims under an exhaustion theory.

Indeed, no Michigan case has required a Headlee Amendment claimant to exhaust administrative remedies. To the contrary, in the one Court of Appeals opinion that affirmed dismissal of a Headlee Amendment claim for failure to exhaust an express administrative remedy, this Court reversed, even though the remedy was specifically applicable to the plaintiff (and not some other party). *Durant v State*, 413 Mich 862; 317 NW2d 854 (1982) (plaintiffs “not required to exhaust administrative remedies before local government review board” prior to court resolution of issues), rev’g 110 Mich App 351; 313 NW2d 571 (1981) (incorrectly dismissing mandamus action based on Headlee Amendment violation in favor of administrative remedy under MCL 21.240 before local government claims review board).

By contrast, the cases relied on by the Court of Appeals did not involve Headlee Amendment claims and are not applicable. The Court of Appeals relied upon *Womack-Scott v Dep’t of Corrections*, 246 Mich App 70; 630 NW2d 650 (2001) for the proposition that exhaustion still applies “when there are allegations of constitutional violations.” COA Op, p 4, Ex. D. In *Womack-Scott*, the Court of Appeals held that “when a constitutional issue is intermingled with issues *properly* before an administrative agency, exhaustion . . . is not excused.” *Womack-Scott*, 246 Mich App at 80 (emphasis supplied, citing *Mich Supervisors*, 209 Mich App at 578. This principle, however, does not apply here because the issues (fee reasonableness, Section 22 of the CCA and Headlee Amendment) are not “properly before an administrative agency” in the manner that the employment grievances of state employees were in *Womack-Scott*. The *Womack-Scott* plaintiffs were admittedly subject to the constitutionally required Civil Service Commission (“CSC”) grievance procedures. *Womack-Scott*, 246 Mich App at 78. In *Womack-Scott*, the plaintiff exhausted her

administrative grievance procedure but, instead of appealing as required, she brought an original circuit court statutory and common law wrongful discharge claim that “suggested” constitutional issues. *Womack-Scott*, 246 Mich App at 73, 78 and 80. In affirming dismissal of that claim, the Court of Appeals held that constitutional issues, if any, could have been raised in a circuit court appeal of the CSC administrative determination. *Womack-Scott*, 246 Mich App at 81. Accordingly, it was plaintiff’s failure to timely appeal the administrative determination that was fatal to her position.

Similarly, in *Mich Supervisors*, also relied upon by the Court of Appeals, the plaintiff was a union representing state classified civil service employees who were also subject to a clear and undisputed grievance procedure. *Mich Supervisors*, 209 Mich App at 573-574 and 576. Therein, Plaintiff admitted to “at least two administrative avenues for the resolution of its primary grievance.” Plaintiff did not claim that the administrative remedy was inadequate. *Mich Supervisors*, 209 Mich App at 576 and 579. Further, plaintiff’s brief admitted that “the constitutional problem might be avoided” as a result of the CSC grievance procedure. *Mich Supervisors*, 209 Mich App at 579. No such admissions are made in this case.

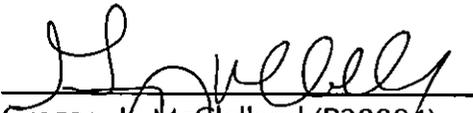
Thus, in both cases relied upon by the Court of Appeals to affirm dismissal of the Builders’ Headlee Amendment claim, there were clear cut constitutionally mandated administrative procedures which, if followed to their required conclusion, could moot an expressly pleaded constitutional claim or resolve even an arguably implied constitutional issue. Claims couched in constitutional terms may only be subject to exhaustion under these circumstances. However, such circumstances are simply not present here – there is no undisputedly applicable and constitutionally enshrined administrative procedure that the

Builders failed to exhaust. Therefore, the Court of Appeals reversibly erred in its reliance upon these cases.

V. CONCLUSION AND RELIEF REQUESTED

The lower courts were wrong in their application of the exhaustion of administrative remedies doctrine. Accordingly, this Court should peremptorily reverse the March 13, 2014 Opinion of the Court of Appeals and remand this case to the Oakland County Circuit Court for a decision on the merits of the Builders' Motion for Summary Disposition or, alternatively, grant the Builders' Application for Leave to Appeal.

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