

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 RESPONSE TO APPLICATION FOR
LEAVE TO APPEAL**

149150

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TABLE OF CONTENTS

	<u>Page No.</u>
Index of Authorities	ii
Jurisdictional Statement	iv
Counter-Statement of Questions Presented	v
Counter-Statement of Facts	1
Argument:	
Plaintiff-Appellant's application for leave to appeal should be denied because it has failed to establish grounds for granting the application as required by MCR 7.302(B)	7
A. Standard of Review.....	8
B. The issue raised in Plaintiffs-Appellants Application for Leave to Appeal does not involve legal principles of major significance to the state's jurisprudence.....	9
C. The Court of Appeals decision affirming the trial court decision that Plaintiffs failed to exhaust administrative remedies is not clearly erroneous and it does not conflict with a Supreme Court decision or another decision of the Court of Appeals.....	10
Relief Sought.....	19

TABLE OF CONTENTS

	<u>Page No.</u>
Index of Authorities	ii
Jurisdictional Statement	iv 1v
Counter-Statement of Questions Presented	iv
Counter-Statement of Facts	1
Argument:	
Plaintiff-Appellant's application for leave to appeal should be denied because it has failed to establish grounds for granting the application as required by MCR 7.302(B)	7
A. Standard of Review.....	8
B. The issue raised in Plaintiffs-Appellants Application for Leave to Appeal does not involve legal principles of major significance to the state's jurisprudence.....	9
C. The Court of Appeals decision affirming the trial court decision that Plaintiffs failed to exhaust administrative remedies is not clearly erroneous and it does not conflict with a Supreme Court decision or another decision of the Court of Appeals.....	10
Relief Sought.....	19

INDEX OF AUTHORITIES

Cases

<i>Bennett v Royal Oak School District</i> , 10 Mich App 265, 269; 159 NW2d 245 (1968)	15
<i>Bonneville v Michigan Corrections Organization, et al.</i> , 190 Mich App 473, 413-414; 476 NW2d 411 (1991).....	11
<i>Boyd v Civil Service Commission</i> , 220 Mich App 226, 234-235; 559 NW2d 342 (1996) .	8
<i>Hughes v Almena Township</i> , 284 Mich App 50, 69; 771 NW2d 453 (2009)	17
<i>IBM v Treasury Dep't</i> , 75 Mich App 604, 610; 255 NW2d 702 (1977)	13
MCL 125.1522 (1).....	3, 10
<i>Michigan Supervisors Union OPEIU Local 512 v Dep't of Civil Service</i> , 209 Mich App 573, 578; 531 NW2d 790 (1995).....	18
<i>O'Keefe v Department of Social Services</i> , 162 Mich App 498, 506; 413 NW2d 32 (1987)	12, 17
<i>People v Tyrer</i> , 385 Mich 484, 489-490; 189 NW2d 226 (1971).....	9
<i>Winter Building Corp v City of Novi</i> , 119 Mich App 155; 326 NW2d 409 (1982).....	13, 14
<i>Womack-Scott v Department of Corrections</i> , 246 Mich App 70; 630 NW 2d 650 (2001)	18

Statutes

MCL 125.1501	2
MCL 125.1507 (1)(b).....	12
MCL 125.1508a	12
MCL 125.1508b	2, 10, 11, 12
MCL 125.1508b(1).....	11
MCL 125.1508b(11).....	11
MCL 125.1509b	2, 10, 14, 17, 18
MCL 125.1509b(1).....	11, 12
MCL 125.1509b(3).....	12
MCL 125.1509b(5).....	15
MCL 125.1522	1, 2, 5, 12, 14, 18
MCL 15.261	17
MCL 24.201	15
MCL 24.301	12
MCL 436.1903	16
MCL 125.1509b	13

Other Authorities

Blacks Law Dictionary (5 th ed)	8
--	---

Rules

7.302(B)(3).....	8
MCR 7.302(B).....	i
MCR 7.302(B)(1) – (6)	8
MCR 7.302(B)(3)	8, 9, 10
MCR 7.302(B)(5)	8

Constitutional Provisions

Const 1963, art 9, § 317

JURISDICTIONAL STATEMENT

Defendant- Appellee concurs with Plaintiffs-Appellants' Statement of Jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DOES PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL RAISE AN ISSUE INVOLVING LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE?

Plaintiffs-Appellants Answer: Yes

Defendant-Appellee Answers: No

The Circuit Court and the Court of Appeals did not answer this question.

- II. WAS THE COURT OF APPEALS UNPUBLISHED DECISION AFFIRMING THE TRIAL COURT DECISION, FINDING THAT PLAINTIFFS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, CLEARLY ERRONEOUS OR DID IT CONFLICT WITH A SUPREME COURT DECISION OR ANOTHER DECISION OF THE COURT OF APPEALS?

Plaintiffs-Appellants Answer: Yes

Defendant-Appellee Answers: No

The Circuit Court and the Court of Appeals would Answer: No

COUNTER-STATEMENT OF FACTS

Plaintiffs-Appellants (hereafter "Plaintiffs") filed a complaint in the Oakland County Circuit Court, alleging that the City of Troy violated Section 22 (MCL 125.1522) of Michigan's Stille-DeRossett Hale Single State Construction Code Act (hereafter "Construction Code Act") by collecting fees for building department services that are not reasonably related to the cost of providing building department services. They alleged that the City of Troy illegally entered into a contract with Safe Built of Michigan, Inc. for building services that initially provides for an 80% - 20% division of permit fees between Safe Built of Michigan, Inc. and the City of Troy. Plaintiffs also alleged that the 20%, which is deposited with the City, is "surplus" used for general revenue purposes and not for services reasonably related to the cost of providing building department services.

Plaintiffs also alleged a violation of the Headlee Amendment of the Michigan Constitution, arguing that the 20% received by the City under the Safe Built contract is a disguised tax that was not approved by the voters. Plaintiffs sought a declaratory judgment and injunctive relief, including an order for the City to deposit the City's portion of building permit revenue into a segregated account, which could then be returned to the applicants. Plaintiffs also sought an order requiring the City to reduce its Building Department fees. Plaintiffs also requested costs and attorney fees.

At the conclusion of discovery, Plaintiffs filed a motion for summary disposition. The City filed a response, in which the City requested summary disposition in its favor. The City's response was supported by the following documents: 1) the City's Comprehensive Financial Reports (CAFR) that were attached as Exhibit A; 2) the deposition transcript of John Lamerato, the City's former Assistant City Manager for

Finance and Administration, which was attached as Exhibit B; 3) the deposition transcript of Mark Miller, the City's Director of Economic and Community Development, which was attached as Exhibit C; and the affidavit of Thomas Darling, CPA, the City's Interim Director of Financial and Administrative Services, which was attached as Exhibit D. These same documents are also attached to this response as Exhibits A, B, C, and D respectively. On November 13, 2012, the Circuit Court denied Plaintiffs' motion for summary disposition and granted summary disposition in favor of the City, based on Plaintiffs' failure to exhaust its administrative remedies. The Court ruled that Plaintiffs failed to first pursue their claims with the Michigan Department of Consumer and Industry Services (now Licensing and Regulatory Affairs) as required by MCL 125.1508b and MCL 125.1509b. Accordingly, the Circuit Court ruled it lacked subject matter jurisdiction and dismissed Plaintiffs' complaint without ruling on the merits of their claims.

Plaintiffs appealed the Circuit Court decision. On March 13, 2014, the Court of Appeals issued its unpublished opinion affirming the Circuit Court's order, dismissing Plaintiffs claim for lack of subject matter jurisdiction. Plaintiffs now seek relief from this decision.

Troy's decision to contract building department services with Safe Built was intended to bring more efficiency to the City's enforcement of the Construction Code Act, MCL 125.1501, *et seq.* Thanks to a statutory amendment in 1999, Public Act No. 245 of 1999, Section 22 of the Construction Code Act, (MCL 125.1522), Troy had been recording and measuring the revenue and costs incurred in the enforcement of the Building Code since 2000, since this amendment forced all Michigan municipalities

handling building inspection processes to utilize a new accounting process. Through this new mandated process, the Defendant City of Troy started separately reporting City revenue that was generated by building permits. The City also separately kept track of all expenditures required by the enforcement of the State Construction Code. These changes were recorded in the City's Comprehensive Annual Financial Reports (CAFR). The relevant excerpts from the lengthy annual CAFR reports from 2004 to 2010 were attached as Exhibit A to the City's response to the summary disposition motion and this response. The CAFR is an official financial report which is required to be submitted to the Michigan Department of Treasury. The CAFR is a public record which is also disseminated to the residents of the City of Troy, and a copy of this report could also be obtained from the Department of Treasury or the City of Troy. The Department of Treasury is charged with the oversight of municipal financial reporting, and therefore has the ability to demand corrections should there be any inaccurate reporting in the CAFR report or in the City's financial records. This has never been an issue with the City, which has consistently received financial excellence awards for its CAFR reports.

MCL 125.1522 (1) requires the City Council to establish reasonable fees which are intended to "*bear a reasonable relation to the cost, including overhead...*" Since these fees are required to be set in advance, they are necessarily estimates. As required by state statute, the City separately keeps track of the building permit fees received, and at the end of the fiscal year, there is a mandatory evaluation of the costs versus the revenue. In addition to separately recording the City's construction code financial activity records from the general fund financial records in each CAFR document, this accounting would also be reviewed in City Council's exercise in

modifying any building permit fees. If the City is not covering its costs, including overhead, for each year, then the City could potentially increase the building permit fees. If there was a large surplus, then the City could potentially reduce the building permit fees. Since the statute requires building permit fees to be used only for construction code enforcement activities, the City keeps a cumulative total of the financial performance for each year. In addition to the City's record of the building permit revenue against the amount of expenses (including overhead costs) for each year, the City also records and publishes in its CAFR any cumulative shortfall generated since July 1, 2001.

For several years prior to the City's contract with Safe Built, an internal building inspections department performed all functions required by the Construction Code Act in the City of Troy, as allowed by the State of Michigan and the statute. According to the CAFR documents (Exhibit A), the City's internal building inspections department's recorded cost of enforcement of the Construction Code Act exceeded the amount of revenue generated by building permits. The only function of the City's building inspections department was the administration and enforcement of the Construction Code Act. According to John Lamerato, the City's retired Assistant City Manager of Finance and Administration, he prepared all of the annual CAFR reports from 2004 to 2010. He testified that in completing each of these statutorily required building inspections calculations for the annual CAFR, he first determined the actual costs each year to operate the City's internal Building Inspections Department. (See deposition transcript of John Lamerato, pp. 14-15, which was attached to the City's response as Exhibit B) He was able to keep track of these departmental expenditures through the

City's financial software. These internal department expenditures are recorded on each annual CAFR as the "direct costs," and this number ties directly to the actual expenses of the City's Building Inspection Department, which is also recorded on the City's annual financial reports, which are required to be audited each year. Since there are also indirect costs in enforcing the Construction Code Act, MCL 125.1522 expressly allows for the inclusion of these costs as well. Unfortunately, the City does not have financial software that separates these indirect costs. Lamerato testified in his deposition that he calculated these indirect costs by using an 8% overhead figure, which he multiplied by the direct costs for each year. He explained:

Walsh College and graduate students performed the study for the City a number of years ago, and they came up with a – normal, I would say, for cities is around 10 % for direct and over administrative costs, and they came up with a figure of 8% as a number, and that's what we've been using since it was done by an outside firm and outside agency. (See Exh. B, p. 16)

According to the annual CAFR reports (Exhibit A), the City has used this 8% formula to calculate the overhead or indirect expenses since at least 2004. As required by the Construction Code Act, the annual CAFR reports (Exh. A) show the City's cumulative short fall between building permit revenue and the City's actual direct and estimated indirect costs, as follows:

<u>Yearly net shortfall</u>	<u>Cumulative shortfall</u>
\$1,027, 685; 2001- July 1, 2003	\$1,027,685
\$ 545,735 as of July 1, 2004	\$1,573,420
\$ 571,992 as of July 1, 2005	\$2,145,412
\$ 577,839 as of July 1, 2006	\$2,723,251
\$ 825,047 as of July 1, 2007	\$3,548,298
\$ 972,349 as of July 1, 2008	\$4,520,647
\$1,141,888 as of July 1, 2009	\$5,662,535
\$1,042,911 as of July 1, 2010	\$6,659,862
\$ 47,354 as of July 1, 2011	\$6,707,216

As is evident from the above chart, the costs of operating an internal City Building Department continued to escalate. This is due, in part, to legacy costs that are inherent in most municipal government employee contracts. However, the City was concerned that raising building permit fees to cover its increasing costs would discourage new development, and therefore the City intentionally decided not to increase the building permit fees. As a result, the City still charges the same fees for building permits as it charged in 2009. (See deposition transcript of Mark Miller attached as Exhibit C to the City's response, p. 173).

In 2010, the Defendant City, facing unprecedented economic times with continually decreasing revenues, solicited bids for building inspection services. As a result of this competitive bid process, the City approved a contract with Safe Built, Inc., and terminated or transferred all City employees in the Troy building inspections department. (Exh. C, p. 76) Under the Safe Built contract, as of July 1, 2010, a large portion of the building inspection responsibilities were transferred from an internal building inspections department staffed by City employees to Safe Built, an independent contractor. This contract is the only thing that has changed with respect to the City's enforcement of the Construction Code Act, and it is this contract that predicated Plaintiffs' lawsuit.

Under the contract, Safe Built performs a large portion of the construction code services. For this work, Safe Built is paid 80% of the building permit fees collected by the City. Since the building permit fees exceeded \$1,000,000 for 2010-2011, this amount is reduced to 75% of the building permit fees for subsequent years. (Exh. C, p. 79)

Through the filing of this lawsuit, Plaintiffs seek to deprive the City of its contractually negotiated payment to recoup the estimated City expenses that fall outside the scope of the City's contract with Safe Built. These expenses are incurred through the City's enforcement of the Construction Code Act, and the City's building permit fees are set so that these expenses would also be covered, in addition to the amounts contractually owed to Safe Built. Additionally, Plaintiffs also seek to deprive the City of any means of applying any potential surplus against the substantial cumulative shortfall incurred by the City, as allowed by the Construction Code Act and as reflected in the annual CAFR reports. Since the annual building permit fees are set by estimating the expected costs of enforcing the Construction Code Act, it is possible that there would be a resulting surplus at the end of the fiscal year, if the City's actual expenses are less than the building permit revenue each year. Through its complaint, Plaintiffs seek an order requiring the City to disperse these funds, rather than pay back the City for the costs it advanced in previous years in enforcing the Construction Code Act. Finally, Plaintiffs assert that the building permit fees, which have not increased since 2009, are too high, and therefore at least some portion of the building permit fees constitute an allegedly an impermissible tax under the Michigan Constitution, Article 9, Section 31 (Headlee provisions). Const 1963, art 9, § 31. Plaintiffs are seeking Court intervention, instead of first pursuing this matter with the Michigan Department of Licensing and Regulatory Affairs (previously Consumer and Industry Services), the State's administrative body that is charged with enforcing the Construction Code Act.

ARGUMENT

I. PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL SHOULD BE DENIED BECAUSE IT HAS FAILED TO ESTABLISH GROUNDS FOR GRANTING THE APPLICATION AS REQUIRED BY MCR 7.302(B)

A. Standard of Review

Before this Court exercises its unfettered discretion in deciding whether to grant an application for leave to appeal, Plaintiffs are required to demonstrate that the case meets one of the six different grounds set forth in MCR 7.302(B)(1) – (6). In this case, Plaintiffs rely on MCR 7.302(B)(3) and MCR 7.302(B)(5) as the basis for its request. Under MCR 7.302(B)(3), Plaintiffs must establish that the issue in the case “involves legal principles of major significance to the state’s jurisprudence”. Under MCR 7.302(B)(5), Plaintiffs must establish that the Court of Appeals decision “is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.” A finding is clearly erroneous when, on review of the whole record, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Boyd v Civil Service Commission*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).. “Material injustice” is not defined in Michigan appellate decisions. However, an “injustice” is the withholding or denial of justice. *Blacks Law Dictionary* (5th ed). The term “material” has been defined to include “important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.” *Id.* Thus, a material injustice occurs if someone is denied justice and that denial affects the merits of a case. As set forth below, Plaintiffs have failed to establish either of these criteria, and therefore this case is not worthy of the Court’s consideration, and the application should be denied.

B. The Issue Raised in Plaintiffs-Appellants' Application for Leave to Appeal Does Not Involve Legal Principles of Major Significance to the State's Jurisprudence

Plaintiffs assert that subject matter jurisdiction and the exhaustion of administrative remedies are the “legal principles of major significance to the State’s jurisprudence” that justify the Court’s grant of the application for leave to appeal pursuant to MCR 7.302 (B)(3). In this case, the Court of Appeals agreed in its opinion that Plaintiffs failed to exhaust its administrative remedies, and therefore concluded that the Court lacked subject matter jurisdiction. However, this case does not delve into the fundamental principles of the exhaustion of administrative remedies. Instead, this unpublished opinion is the result of the Court of Appeals panel’s unanimous application of the law to the unique aspects of this case. In cases where the law is well settled and the Court’s decision merely entails an application of the law to the facts, this does not qualify as an issue of major significance to the jurisprudence of this State, as required by MCR 7.302(B)(3). *People v Tyrer*, 385 Mich 484, 489-490; 189 NW2d 226 (1971). In *Tyrer*, this Court initially granted leave to appeal, in order to decide whether evidence as to malice in a second-degree murder prosecution was sufficient to be considered by a jury. On reconsideration, this Court determined that leave to appeal was improvidently granted, since malice questions usually involve an application of the law to specific facts. *Id.*, 490-491. In dismissing the appeal, this Court noted that the law of malice, though intricate, is fairly well settled in history, and therefore this was not a question of first impression that justified the Court’s review of the case. *Id.* at 490.

Likewise, in this case, the law regarding subject matter jurisdiction and the exhaustion of administrative remedies is well settled. Plaintiffs are not asking this Court

to change that law. Instead, Plaintiffs' application for leave to appeal has limited application, since the only issue to be decided is whether Plaintiffs were required to exhaust administrative remedies based on the specific facts in this case. Accordingly, Plaintiffs have not shown the issue involves legal principles of major significance to the state's jurisprudence as required by MCR 7.302(B)(3), and the application for leave to appeal should be denied.

C. The Court of Appeals Decision Affirming the Trial Court Decision that Plaintiffs Failed to Exhaust Administrative Remedies is Not Clearly Erroneous and it Does Not Conflict with a Supreme Court Decision or Another Decision of the Court of Appeals

Plaintiffs main claim in this case is that the City's building permit fees, which had not been raised since 2009 and are among one of the lowest in the State of Michigan, were somehow too high, and therefore in violation of Section 22 of the Construction Code Act. Troy's building permit fees are approved by the Troy City Council. The statute (MCL 125.1522 (1)) requires the fees to be reasonable, and "*bear a reasonable relation to the cost, including overhead, to the governmental subdivision.*" According to MCL 125.1508b, the Director of the Michigan Department of Licensing and Regulatory Affairs "*is responsible for administration and enforcement of this act and the code.*" As noted by the Court of Appeals, the plain language of Section 9b of the Act, MCL 125.1509b, provided Plaintiffs an administrative grievance procedure in which to pursue its claim. Since Plaintiffs did not pursue that procedure by filing a written complaint with the Director of Licensing and Regulatory Affairs (Consumer and Industry Services at the time), they failed to properly exhaust their administrative remedy before seeking review from the Circuit Court. Accordingly, the Court of Appeals properly affirmed the Circuit

Court decision to dismiss the case for lack of subject matter jurisdiction. *Bonneville v Michigan Corrections Organization, et al.*, 190 Mich App 473, 413-414; 476 NW2d 411 (1991).

The City of Troy, as a Michigan municipality, is specifically empowered to serve as the enforcing agency for the Construction Code Act, MCL 125.1508b. This power is broad, as set forth in MCL 125.1508b(11), which states, in pertinent part: “. . . *this act does not limit or restrict existing powers or authority of governmental subdivisions, and this act shall be enforced by governmental subdivisions in the manner prescribed by local law or ordinance.*” The Defendant City's powers are not unlimited, however. The State of Michigan's Director of the Department of Licensing and Regulatory Affairs (Director) has supervisory authority. MCL 125.1508b(1). As set forth in MCL 125.1508b(1): “*Except as otherwise provided in this section, the director is responsible for administration and enforcement of this act and the code.*” Upon receipt of a written complaint, the Director is authorized to conduct a performance evaluation to “. . . assure that the administration and enforcement of this act and the code is being done. . . .” pursuant to the state statute. MCL 125.1509b(1). In addition to reviewing the construction code activities for all local agencies that do their own enforcement, the Director is also responsible for the enforcement responsibilities in those areas where the local government has not qualified to do the enforcement or is otherwise not able to handle the construction code enforcement responsibilities for the community. The Director, with approval of the Construction Code Commission, is empowered to “*appoint or use experts, consultants, technical advisers, and advisory committees for assistance and recommendations. . . to assist the commission and the director in carrying out this*

act.” MCL 125.1507 (1)(b). If the Director finds that there is non-compliance with the statute after an investigation, then he/she transmits this information to the State of Michigan Construction Code Commission. MCL 125.1509b(3). The Commission can revoke a municipality’s power to enforce the State Construction Code, which is subject to a right of appeal. *Id.*

In this case, the Plaintiffs are challenging the Defendant City of Troy’s administration and enforcement of the Construction Code Act. However, the Act does not authorize a private cause of action to challenge whether a municipality is properly carrying out its provisions. Rather, the State of Michigan’s Director of the Department of Licensing and Regulatory Affairs is given exclusive jurisdiction under MCL 125.1509b(1) to conduct a performance evaluation of an enforcing agency to determine if the agency is properly administering and enforcing the act under MCL 125.1508a or MCL 125.1508b. Proper administration and enforcement of the Construction Code Act would necessarily require compliance with all provisions of the Act, including Section 22 (MCL 125.1522), the provision that Plaintiffs now claim has been violated by the City. Thus, Plaintiff’s remedy for an alleged violation of Section 22 of the Act is to pursue a complaint with the authorities at the State of Michigan, who have ultimate enforcement authority and the unique subject matter expertise to make an appropriate determination as to whether there has been a violation.

The Administrative Procedures Act, and specifically MCL 24.301, requires exhaustion of all administrative remedies with State agencies prior to seeking Court intervention. As discussed in *O’Keefe v Department of Social Services*, 162 Mich App 498, 506; 413 NW2d 32 (1987), citing *IBM v Treasury Dep’t*, 75 Mich App 604, 610; 255

NW2d 702 (1977), the requirement that a person or entity exhaust administrative remedies serves several policies:

(1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary.

Since Plaintiffs did not file a complaint with Michigan's Director of the Department of Consumer and Industry Services (now Licensing and Regulatory Affairs), they failed to exhaust their administrative remedies. Accordingly, summary disposition in favor of the City of Troy was properly granted.

In the application for leave to appeal, Plaintiffs contend the Court of Appeals decision conflicts with the decision in *Winter Building Corp v City of Novi*, 119 Mich App 155; 326 NW2d 409 (1982). First, it should be noted that the *Winter* case was decided in 1982, and the Construction Code Act was substantially revised in 1999 by 1999 PA 245. Specifically, the statute was amended in 1999 to add the current version of MCL125.1509b, which is the provision for administrative review of a municipality's administration and enforcement of the Construction Code Act. For this reason alone, the applicability of the *Winter Building* case is limited. Additionally, *Winter* discussed whether a city's ordinance provisions governing the construction of curbs, approaches, sidewalks, driveways, and other concrete exterior flatwork were preempted by the Construction Code Act. For such a substantive ordinance amendment, which pivoted on the issue of pre-emption, the *Winter* Court found that there was no requirement to first exhaust administrative remedies. Plaintiffs, in their application, attempt to characterize the City's contract with Safe Built as the "substantive enactment" similar to

the one that was discussed in *Winter*. Even if this Court finds *Winter*, as persuasive authority after the significant amendments to the Construction Code Act, the City's contract with Safe Built does not in and of itself constitute a violation of MCL 125.1522. The complaint alleges that the City is wrongfully administering and enforcing the Construction Code Act by charging too much for its building permits. This allegation is precisely the type of an administrative and enforcement investigation that is within the jurisdiction of the Director under MCL 125.1509b. Under this statutory provision, Plaintiffs should have filed a written complaint with the Director of the Department of Consumer and Industry Services (now Licensing and Regulatory Affairs) before filing a lawsuit in Circuit Court. As a result, the Court of Appeals decision in this case does not conflict with the decision in the *Winter Building* case.

Plaintiffs also claim they have no adequate remedy under the Construction Code Act. This claim also lacks merit. Plaintiffs can detail its allegations, and provide information to the Director. As noted by the Court of Appeals, "if the director finds 'that the enforcing agency of that governmental subdivision has failed to follow the duties recognized under this act, the code, or its ordinance,' the commission may seek to withdraw the local enforcing agency's responsibility for the administration and enforcement of the CCA and the construction code." The Director is implicitly charged under the statute with reviewing the information pertaining to the allegation. If the Director needs clarification or additional information, then Plaintiffs would likely be called upon as primary sources of information. The Director could also obtain clarification and additional information from his own experts, or from others, such as the Michigan Department of Treasury. If, after an investigation, the Director found any substance to

the allegations of unreasonable fees, then the next step is to refer the matter to the Construction Code Commission, where Troy would have thirty days to request an opportunity to present its justifications as to the fees in a hearing under the Administrative Procedures Act, MCL 24.201 to 24.328. An independent hearing officer would be appointed and preside over any such hearing, and would review the information gathered as part of the record, which would certainly include the original complaint and any information supplied by Plaintiffs. After the hearing, the hearing officer makes a recommendation to the Construction Code Commission, which can affirm, modify, reverse, or remand. (MCL 125.1509b(5)) If the Commission determines that the City should be stripped of its delegation to enforce and administer the Construction Code Act, then the building permit fees being challenged by the Plaintiff would no longer be in effect. This is essentially the remedy the Plaintiffs are seeking in their Circuit Court complaint.

Plaintiffs maintain that they do not have an adequate administrative remedy because the Director and the Commission cannot give them the precise remedy being sought in their Circuit Court complaint. However, there is no authority that would deem an administrative remedy inadequate just because it is not the exact same remedy that would be sought in a judicial proceeding. 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. *Bennett v Royal Oak School District*, 10 Mich App 265, 269; 159 NW2d 245 (1968). In this case, Plaintiffs merely complain that the administrative remedy would not grant them the specific relief set forth in their complaint. This does not mean the available remedy is

inadequate. Moreover, as noted above, the Construction Code Act does not authorize a private cause of action that would allow Plaintiff to seek the specific relief requested in the Circuit Court complaint.

The remedy available to Plaintiffs in this case is the same remedy available to all members of the public if it were determined by an administrative agency that the City's building permit fees were improper. The situation in this case is analogous to cases involving licenses issued by the State. For example, if an individual believes that an establishment holding a liquor license is violating the provisions of the Liquor Control Code, then an administrative procedure may be initiated to suspend or revoke the liquor license pursuant to MCL 436.1903. The remedy available to the individual initiating the complaint is that the licensee would no longer be in a position to violate the Liquor Control Code if the liquor license was revoked. The fact that the individual initiating the complaint may not receive any personal benefit or actively participate in the proceedings does not render the remedy inadequate.

Since Plaintiffs cannot demonstrate the available administrative remedy is inadequate, they have failed to show the Court of Appeals decision is clearly erroneous and will result in material injustice. Therefore, the application for leave to appeal should be denied.

In the application for leave to appeal, Plaintiffs also argue that the Court of Appeals decision is clearly erroneous because the administrative procedure set forth in MCL 125.1509b fails to comport with the mandates of procedural due process. The essentials of procedural due process are adequate notice, an opportunity to be heard, and a fair and impartial tribunal. *Hughes v Almena Township*, 284 Mich App 50, 69; 771

NW2d 453 (2009). MCL 125.1509b specifically provides that any performance evaluation requires the Director to provide "reasonable notice" of the commission meeting and that any decision to proceed with a performance evaluation shall be made at a public meeting. Especially with the Open Meetings Act, MCL 15.261 et. seq. and the possibility of a public hearing, it is expected that Plaintiffs would be afforded the opportunity to be heard should a performance evaluation of the City's administration and enforcement of the Construction Code Act be conducted. Additionally, although the Court is divested of subject matter jurisdiction because of the failure to exhaust administrative remedies, this is not a complete preclusion of Plaintiff's due process arguments.

Plaintiffs next argue the application for leave to appeal should be granted because the provisions of the Construction Code Act are ambiguous as there is no provision specifically requiring Plaintiffs to exhaust their administrative remedies. However, Plaintiffs fail to cite any authority that would authorize their private cause of action in Circuit Court for an alleged violation of the Construction Code Act, unless they first exhaust administrative remedies. In the absence of such authority, there is no basis for Plaintiffs claim that the Court of Appeals decision is clearly erroneous.

Plaintiffs also contend that public policy considerations support reversal of the Court of Appeals decision. They argue the policies underlying the exhaustion of administrative remedies weigh against exhaustion in this case. However, as noted above, judicial review is best made after a full factual record is made by the agency with the technical knowledge to adequately determine if there is a violation. *O'Keefe*, 506. In this case, the Construction Code Commission is the agency with the technical

knowledge needed to determine whether the City's building permit fees violate the provisions of the Construction Code Act. Thus, the underlying policy of requiring exhaustion of administrative remedies would be best served if Plaintiffs pursued a written complaint as allowed by MCL 125.1509b.

Plaintiffs' final argument in support of their application for leave to appeal is their contention the Circuit Court erred in dismissing the case because the alleged Headlee Amendment violation excused the requirement to exhaust administrative remedies. However, the law is clear that a case is subject to dismissal for failure to exhaust administrative remedies even when there are allegations of constitutional violations. *Womack-Scott v Department of Corrections*, 246 Mich App 70; 630 NW 2d 650 (2001). The Court in *Womack* noted:

The exhaustion requirement is displaced only when there are no issues in controversy other than the constitutional challenge. The mere presence of a constitutional issue is not the decisive factor in avoiding the exhaustion requirement. If there are factual issues for the agency to resolve, the presence of a constitutional issue, or the presence of an argument couched in constitutional terms, does not excuse the exhaustion requirement even if the administrative agency would not be able to provide all the relief requested." Womack, 80-81, quoting from Michigan Supervisors Union OPEIU Local 512 v Dep't of Civil Service, 209 Mich App 573, 578; 531 NW2d 790 (1995).

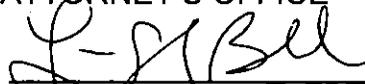
The alleged violation of the Headlee Amendment is not the only issue in controversy in this case. Since Plaintiffs are claiming the City of Troy violated Section 22 of the State Construction Code Act in addition to the State Constitution, there are factual issues that can be resolved by the Construction Code Commission. As long as those issues remain, the Plaintiffs are required to exhaust administrative remedies before pursuing a remedy in the Circuit Court. Furthermore, the requirement to exhaust administrative remedies is not excused just because Plaintiffs are seeking remedies in

their Circuit Court complaint that cannot be provided by the administrative agency. Therefore, the Court of Appeals decision affirming the Circuit Court decision granting summary disposition in favor of the City of Troy is not clearly erroneous.

RELIEF SOUGHT

Defendant-Appellee City of Troy requests that this Court deny Plaintiffs application for leave to appeal

CITY OF TROY
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