TO: Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney LGB
Allan T. Motzny, Assistant City Attorney ATM
DATE: December 11, 2012
SUBJECT: Michigan Association of Home Builders, et. al. v. City of Troy

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In December 2010, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan and Michigan Plumbing and Mechanical Contractors Association filed a lawsuit against the City of Troy. Through this lawsuit, Plaintiffs were seeking Declaratory and Injunctive Relief from the Oakland County Circuit Court. This lawsuit was filed just after the City entered into a contract with Safe Built of Michigan. In the lawsuit, Plaintiff alleged that the building inspection fees charged by our private contractor, Safe Built, were not "reasonably related to the cost of providing building department services." Plaintiffs also attempted to assert a Headlee Amendment claim.

After the close of discovery and an unsuccessful facilitation, the Court entertained motions for summary disposition. On November 13, 2012, Oakland County Circuit Court Judge Shalina Kumar entered her order, granting the City's Motion for Summary Disposition. The Court agreed with the City's position that the Plaintiff's had failed to exhaust their administrative remedies before filling the lawsuit.

On December 3, 2012, Plaintiffs filed an appeal of this decision with the Michigan Court of Appeals. Our office plans to represent the City's interests in this appeal.

Please let us know if you have any questions about this case.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHIGAN ASSOCIATION OF HOME BUILDERS et al.,

Plaintiffs,

Case No. 10-115620-CZ
Hon. Shalina D. Kumar

v.

CITY OF TROY,

Defendant.
_____/

OPINION AND ORDER

At a session of said Court held in the Courthouse, City of Pontiac, Oakland County, Michigan, on NOV 13 2012

PRESENT: THE HON. SHALINA D. KUMAR, CIRCUIT COURT JUDGE

This matter is before the Court on Plaintiffs Michigan Association of Home Builders ("Home Builders"); Associated Builders and Contractors of Michigan ("Associated Builders"); and Michigan Plumbing and Mechanical Contractors Association ("Contractors") (collectively, "Plaintiffs") Motion for Summary Disposition. In its Response to Plaintiffs' Motion, Defendant City of Troy ("Defendant" or "City") asks the Court to deny Plaintiffs' Motion and enter judgment in favor of Defendant. On November 16, 2011, the Court heard oral argument regarding Plaintiffs' motion. The parties attempted to resolve their dispute through Facilitated Mediation. However, those efforts did not result in the settlement of the case.

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I. Facts

In their Complaint, Plaintiffs allege that Defendant has violated the Stille-DeRossett-Hale Single State Construction Code Act ("State Construction Code Act"), MCL 125.1522, and the Headlee Amendment, Michigan Constitution, Article 9, Section 31 ("Headlee Amendment"). More specifically, Plaintiffs claim that Defendant has violated the State Construction Code Act by using surplus fees that have been generated through Defendant's privatized Building Department to supplement its general fund instead of directing those funds to the operation of the Building Department, as required by the State Construction Code Act. Plaintiffs also maintain that Defendant's practice has resulted in unlawfully high fees. In addition, Plaintiffs contend that Defendant's conduct has resulted in an unlawful, disguised tax increase that violates the Headlee Amendment. In their motion, Plaintiffs seek summary disposition on the declaratory and injunctive claims contained within their Complaint. In response, Defendant contends that Plaintiffs' Complaint must be dismissed for lack of subject matter jurisdiction and summary disposition should be granted in Defendant's favor because Plaintiffs must first seek relief from the appropriate State of Michigan authorities.

II. Standards of Review

A. MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The Court should evaluate the motion by considering the substantively admissible evidence (pleadings, affidavits, depositions, admissions and other documentary evidence) actually proffered in opposition to the motion to determine if there are disputed material facts for trial. No material fact exists for trial if, in viewing

the record evidence, reasonable minds could not return a verdict in favor of the non-movant.[1] Where proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.[2] However, the Court shall review the submitted evidence in a light most favorable to the non-moving party, and grant the benefit of any reasonable doubt to that party.[3] A litigant's pledge to later establish an issue of fact at trial is insufficient to survive summary disposition under MCR 2.116(C)(10).[4]

B. MCR 2.116(I)(2)

"If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2); *see also Sherry v E Suburban Football League*, 292 Mich App 23, 34 (2011) ("The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.").

III. Subject Matter Jurisdiction

As set forth in MCL 125.1508b(11), Defendant is authorized to serve as the enforcing agency for the State Construction Code Act. Moreover, the State Construction Code Act "does not limit or restrict existing powers or authority of governmental subdivisions, and th[e] act shall be enforced by governmental subdivisions in the manner prescribed by local law or ordinance." MCL 125.1508b(11).

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[1] *Skinner v Square D Co*, 445 Mich 153, 174-175 (1994).
[2] *Maiden v Rozwood*, 461 Mich 109 (1999); *Keliin v Petrucelli*, 198 Mich App 426, 430 (1993); MCR 2.116(C)(10), (G)(4).
[3] *Spiek v Dept of Transportation*, 456 Mich 331 (1998); *Singer v American States Ins*, 245 Mich App 370 (2001).
[4] *Maiden*, *supra*.

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However, Defendant's powers with respect to the Act are not limitless, as the State Construction Code Act also provides that "[e]xcept as otherwise provided in this section, the [D]irector [of Consumer and Industry Services] is responsible for administration and enforcement of th[e] act and the code." MCL 125.1508b(1). For example, "[t]he director . . . may conduct a performance evaluation of an enforcing agency to assure that the administration and enforcement of th[e] act and the code is being done pursuant to either section 8a or 8b." MCL 125.1509b(1). "Upon completion of a performance evaluation, the director shall report the findings and any recommendations to the commission and the local enforcing agency." MCL 125.1509b(3). Furthermore, "[t]he commission may issue a notice of intent to withdraw the responsibility for the administration and enforcement of th[e] act and the code from a governmental subdivision after receiving the results of a performance evaluation." *Id.* If a notice of intent to withdraw is issued, it must "include the right to appeal within 30 business days after receipt of the notice." *Id.*

As Plaintiffs are challenging Defendant's enforcement of the State Construction Code Act, they must pursue their claims with the State authorities that have ultimate enforcement authority with respect to the State Construction Code Act. *See id*; MCL 24.301. In sum, Plaintiffs must exhaust their administrative remedies prior to pursuing their Complaint in this Court. *See Chippewa County Bd of Rd Comm'rs v Dep't of Natural Res & Env't*, 2012 Mich App LEXIS 1956, *4-5 (Mich Ct App October 9, 2012) (holding that the "circuit court has subject matter jurisdiction to review the case if the party has exhausted its remedies"). "The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must

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seek such relief before petitioning the [C]ourt." *Cummins v Robinson Twp*, 283 Mich App 677, 691 (2009). "Where a plaintiff has not exhausted [its] administrative remedies, the plaintiff's claim is not ripe for review." *Aquatic Mgmt Servs v Dep't of Envtl Quality*, 2010 Mich App LEXIS 2449, *17 (Mich Ct App December 21, 2010). As Plaintiffs have not pursued their claims with the State of Michigan, Plaintiffs' Complaint must be dismissed. *See Macebe v Cnty of Wayne*, 1997 Mich App LEXIS 2763, *11 (Mich Ct App April 8, 1997) (holding that "[t]he circuit court properly dismissed plaintiff's claims for failure to exhaust administrative remedies"); *see also Oak Constr Co v State*, 33 Mich App 561, 565 (1971) (holding that "one must avail oneself of all administrative remedies before one seeks redress in the courts. Should one fail to do so, . . . one will have his action dismissed as being premature.").

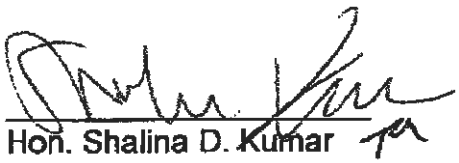
WHEREFORE IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Disposition is **DENIED** pursuant to MCR 2.116(C)(10).

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition is **GRANTED** pursuant to MCR 2.116(I)(2).

IT IS SO ORDERED.

THIS ORDER RESOLVES THE LAST PENDING CLAIM IN THIS MATTER AND CLOSES THE CASE.

Dated: NOV 13 2012



Hon. Shalina D. Kumar

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Proof of Service

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by **EFILING** it to their addresses as disclosed on the 14th day of November, 2012.

/s/ Jenice R. McGruder