

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ASSOCIATED BUILDERS AND
CONTRACTORS, GREATER MICHIGAN
CHAPTER, a Michigan
Non-Profit Corporation,

Plaintiff,

Case No.: 12-406-CZ

-vs-

Honorable Clinton Canady III

CITY OF LANSING,

Defendant.

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**PLAINTIFF'S BRIEF IN SUPPORT OF ITS
MOTION FOR SUMMARY DISPOSITION**

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INTRODUCTION

Plaintiff, Associated Builders and Contractors, Greater Michigan Chapter (“ABC”), is a Michigan non-profit corporation comprising various employers operating in the construction industry. Defendant, the City of Lansing (“Lansing”) is a “body corporate” established pursuant to the Home Rule City Act, MCL § 117.1 *et seq.* (“Home Rule Act”). On behalf of its members, ABC is challenging Lansing’s Prevailing Wage and Benefit Standards Ordinance and Lansing’s Living Wage Ordinance on the basis that they unlawfully regulate the payment of wage and fringe benefit rates ABC contractors pay to their employees working on certain city construction projects. This case presents a pure question of Michigan law.

The basis for ABC’s legal challenge is longstanding Michigan Supreme Court precedent which holds that a municipality (such as Lansing) lacks authority to regulate the level of wages and benefits provided by private businesses to its employees, whether through an ordinance or otherwise. The Supreme Court has made it crystal clear that such regulation is a matter of state – not municipal – concern. Thus, by enacting its Prevailing Wage and Benefits Standards Ordinance and its Living Wage Ordinance, Lansing has exceeded its delegated home rule powers. Accordingly, ABC respectfully requests that this Honorable Court declare Lansing’s Prevailing Wage and Benefit Standards Ordinance and Lansing’s Living Wage Ordinance *ultra vires* and enjoin Lansing from further enforcement of the Ordinances.

STATEMENT OF FACTS

ABC is a trade association whose members are general contractors, subcontractors, builders, suppliers, and other businesses engaged in or associated with the construction industry. Its membership is comprised of over three hundred member companies, located in twenty three Michigan counties. ABC’s fundamental purpose is to foster the “merit shop” philosophy of free

enterprise and to encourage open competition and free market principles in the awarding and administering of public and private construction contracts. On behalf of its members, ABC is opposed to all legislation and laws which unjustly stifle free competition in the construction industry. Most ABC members deal individually with their employees regarding wages, hours, and other conditions of employment and generally are not parties to collective bargaining agreements with labor organizations. Many of ABC's members have performed, or have sought to perform, construction projects within Lansing and further remain interested in performing such construction projects.

Lansing has enacted ordinances which contradict ABC's free enterprise objectives and harm its members. Unlawfully exceeding its grant of authority under the Home Rule Act, Lansing has promulgated a Prevailing Wage and Benefit Standards Ordinance and a Living Wage Ordinance. The Prevailing Wage and Benefit Standard Ordinance states in relevant part:

Sec. 206.18. Prevailing wage and benefit standards prescribed.

(a) No contract, agreement or other arrangement for construction on behalf of the City and involving mechanics and laborers, including truck drivers of the contractor and/or subcontractors, employed directly upon the site of the work, shall be approved or executed by the City unless the contractor and his or her subcontractors furnish proof and agree that such mechanics and laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department.

(b) Any person, firm, corporation or business entity, upon being notified that it is in violation of this section and that an amount due to his, her or its employees, shall have 30 days from the date of the notice to pay the deficiency by paying such employee or employees, whichever is appropriate, the amounts due. If the person, firm, corporation or business entity fails to

pay within the 30-day period, he, she, or it shall be subject to the penalty provided in Section 206.99.¹

(c) The provisions of this section shall be inserted in all bid documents requiring the payment of prevailing wages.

(d) The enforcement agency for this section shall be as determined by the Mayor.

(Ex. A) The Living Wage Ordinance states in relevant part:

Sec. 206.24. Requiring employers that contract with the City or receive economic development assistance to pay their employees a sufficient living wage.

(a) *Purpose.* The purpose of this section is to improve the lives of working people and their families by requiring employers that contract with the City to pay their employees a wage sufficient to meet basic subsistence needs, and that they provide for the hiring of Lansing residents as employees when and where possible.

(b) *Applicability.*

(1) This section applies to any contractor who is a party to a contract for services, as defined herein.

(2) The minimum living wage requirement of this section applies to any part-time or full-time employee of a contractor who is employed at any job site covered by a contract for services or subsidized, in whole or in part, under a contract for services; and any part-time or full-time employee of a grantee.

(c) *Definitions.* As used in this section:

(12) "*Living wage*" means an hourly wage rate which is equivalent to 125 percent of the federal poverty line on an annual basis when calculated based on 40 hours per week, 50 weeks per year; provided however, that

¹ Section 206.99 provides that failure to abide by the Ordinance (1) is a misdemeanor offense; (2) results in an award of back wages plus interest; and (3) results in costs imposed against the employer.

costs paid by the employer for an employee health care benefits may be counted toward up to one-fifth of the hourly rate payable to the employee.

(d) *Minimum requirements.*

(1) At a minimum, a contractor or grantee shall provide its employees a living wage.

(o) *Payment for violation.* A contractor or grantee who is determined by the implementing department to be in violation of the living wage requirement shall be notified of the determination in writing by regular United States mail and in absence of the contractor or grantee taking an appeal within 21 days of the date of the letter, shall pay to each employee affected not later than 14 days from the date of the letter the amount of deficiency for each day of the violation.

(p) *Penalties and enforcement.*

(1) A violation of any provision of this section committed knowingly is a civil infraction punishable by a fine of \$250.00 for a first offense, and \$500.00 for each offense committed thereafter. The court may issue and enforce any judgment, writ, or order necessary to enforce this section, including payment to the employee or employees of the difference between wages actually paid and the living wage that should have been paid, interest, and other relief deemed appropriate.

(3) In addition to enforcement under this section, the City shall have the right to modify, terminate, and/or seek specific performance of any contract entered into in compliance with subsection d of this section with an employer or grantee, or to cancel, terminate or suspend the contract in whole or in part and/or to refuse any further payments under the contract;

(4) A contractor or grantee who is found responsible by the court for a violation of this section on three separate occasions within a two-year period shall be barred from bidding on or entering into any contract with the City for a period of three years from the date of the last violation. [A] violation for purposes of this subsection means one payroll, payday, or date of payment, regardless of the number of employees affected by each violation.

(Ex. B)

As a result of Lansing's Prevailing Wage and Benefit Standards Ordinance and Lansing's Living Wage Ordinance, contractors awarded construction contracts with Lansing are required to pay wage and fringe benefits to their employees at levels mandated by Lansing. Consequently, many of ABC's members seeking or doing business with Lansing are required to adjust their employee compensation agreements in order to comply with the Ordinances.

ARGUMENT

I. STANDARD OF REVIEW PURSUANT TO MCR § 2.116(C)(10).

The parties agree that only a legal question is in dispute.² A motion for summary disposition is proper when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). Because the aforementioned facts are not in dispute, this Honorable Court has before it a pure question of constitutional law under the Michigan Constitution which is properly addressed through summary disposition.

II. IT IS BLACK LETTER LAW UNDER MICHIGAN SUPREME COURT PRECEDENT THAT MUNICIPALITIES LACK AUTHORITY TO CREATE WAGE ORDINANCES AND, THEREFORE, LANSING'S PREVAILING WAGE AND BENEFIT STANDARDS ORDINANCE AND LANSING'S LIVING WAGE ORDINANCE MUST BE STRICKEN AS THEY UNQUESTIONABLY CONSTITUTE UNENFORCEABLE *ULTRA VIRES* ACTS.

Michigan's Constitution was adopted in 1963. Article IV, Section 1, of the Constitution provides that the Legislature possesses exclusive authority to make and pass laws. Thus, absent a specific delegation of such State power, a municipality does not possess the authority to make and pass laws. *Sinas v Lansing*, 382 Mich 407, 411; 170 NW2d 23 (1969). In regard to the

² Neither party engaged in any discovery.

framework for the delegation of State power to municipalities, the current Michigan Constitution states in pertinent part at Article VII, Section 22:

Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

The Michigan Home Rule Act was adopted in 1909. Under that statute, the State has delegated to municipalities the authority to pass ordinances limited to matters of “municipal concern.” This limited power is granted to municipalities pursuant to Section 4(j)(3) of the Home Rule Act, which states that a home rule city may, in its charter, provide:

[f]or the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants *and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.* MCL § 117.4(j)(3) (emphasis added).

Thus, the seminal issue in this case is whether Lansing’s Prevailing Wage and Benefit Standards Ordinance and Lansing’s Living Wage Ordinance constitute a proper exercise of the limited lawmaking authority delegated to Lansing from the State. More specifically, the question is whether Lansing’s Prevailing Wage and Benefit Standards Ordinance and Lansing’s Living Wage Ordinance, which regulate employee wage and benefit levels, address matters of “municipal concern” consistent with Section 4(j)(3) of the Home Rule Act.

According to the Michigan Supreme Court, the answer to this question is a resounding *no!* In *Attorney General, ex rel. Lennane v City of Detroit*, 225 Mich 631; 196 NW 391 (1923), the Michigan Supreme Court determined that a City of Detroit wage regulation (extremely

similar to Lansing's prevailing wage ordinance) exceeded the City of Detroit's authority to promulgate ordinances pursuant to the Home Rule Act. The Supreme Court specifically found that wage regulations are uniquely a matter of state concern to be regulated exclusively through the state's police power, if at all. According to the Supreme Court, because the City of Detroit exceeded its grant of Home Rule authority and intruded upon the exclusive authority of the State, the City's wage regulation constituted an *ultra vires* act.

A review of the facts of *Lennane* shows it to be virtually indistinguishable from the present case. The relevant Constitutional provision at the time provided that:

[u]nder such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village, and, through its regularly constituted authority, to pass all laws and ordinances *relating to its municipal concerns*, subject to the Constitution and general laws of this State. Const 1908, Art VIII, §21

(Emphasis added). The applicable language of the Home Rule Act read virtually the same as the current statute. It allowed:

[f]or the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted *authority to pass all laws and ordinances relating to its municipal concerns subject to the Constitution and general laws of this State*. 1 Comp. Laws 1915, § 3307(t)

(Emphasis added). *Id.* at 638. Finally, the City of Detroit's charter, like Lansing's Prevailing Wage and Benefit Standards Ordinance, required contractors doing business with the City to pay construction workers at least an established *prevailing wage* as specified by the City. The applicable City of Detroit charter provision stated in relevant part:

No contract for any public work shall be let which shall not, as part of the specification on which contractors shall make their bids, require contractor or subcontractor to pay all persons in his employ doing common labor and engaged

in the public work contracted for not less than two dollars and twenty-five cents per diem, to pay all persons in his employ doing the work of a skilled mechanic and engaged on the public work the highest *prevailing wage* in that particular grade of work, and to require of such employees the same service day and service week required herein of all city employees. Any contractor who shall have entered into such contract with the city and shall have violated any provision of this section as made a part of his contract shall be debarred from any further contracts for public work, and any contract let to him contrary to this provision shall be void. Whenever it shall appear that any employee of any contractor for public work engaged thereon shall have received less than the compensation herein provided, the common council may cause to be paid to him such deficit as shall be due him and shall cause the amount so paid to be deducted from the balance due to the contractor from the city.

(Emphasis added). *Id.* at 634-635.³

The Attorney General, on behalf of numerous contractors, filed suit seeking to prohibit the City of Detroit from enforcing the charter provision. *Id.* at 633. The Attorney General argued that the provisions of the Charter violated both the Michigan and United States Constitution so that the City of Detroit lacked the authority to regulate contractor wage rates thus rendering the charter provisions *ultra vires* and, therefore, unenforceable. *Id.* at 635. The trial court agreed with the Attorney General's arguments and granted the relief sought. *Id.*

On direct appeal, the Michigan Supreme Court determined that the Charter constituted an *ultra vires* act because the City of Detroit had not been granted such power under either the State Constitution or the Home Rule Act. According to the Michigan Supreme Court, the City of Detroit, in enacting its minimum and prevailing wage requirements had "undertaken to exercise the police power not only over matters of municipal concern but also over matters of State concern." *Id.* In doing so, the City of Detroit attempted to "fix a public policy for its activities

³ The City of Detroit also maintained an ordinance which was nearly identical to the charter provision. Because the charter and ordinance language were nearly identical, the Court declined to quote the ordinance separately in its decision. *Lennane* at 633. Thus, for all intents and purposes, the Court used the word "charter" as encompassing both regulations.

which are purely local but also for its activities as an arm of the State.” *Id.* The Court determined that “[t]his power has not been given it either by the Constitution or the home-rule act.” (Emphasis added). *Id.*

In the present case, Lansing has likewise overstepped its authority under the Constitution and the Home Rule Act by enacting its Prevailing Wage and Benefit Standards Ordinance with striking similarity to the regulation struck down in *Lennane*. In fact, Lansing’s power grab extends far beyond that attempted by the City of Detroit in *Lennane*. In addition to regulating wages – a matter of state concern, the Lansing Prevailing Wage and Benefit Standards Ordinance also specifically requires that contractors provide certain fringe benefit rates to employees working on covered municipal contracts. Under *Lennane*, Lansing is without authority to regulate even a basic wage scheme, let alone offer complicated fringe benefit values. Simply put, the Michigan Supreme Court has settled the issue of whether the State’s police power to regulate wages (unquestionably a matter of general state concern) has been delegated to municipalities by either the Constitution or Home Rule Act. The Court has spoken plainly in the negative. Municipalities may *not* regulate wages or benefit rates of contractors or other businesses by way of ordinance or any other means. The black letter rule of law established by the Michigan Supreme Court in its 1923 *Lennane* decision remains true today. Only the State of Michigan has the authority to regulate wages and benefits, and any attempt by a municipality to enact an ordinance in this area constitutes an unenforceable *ultra vires* act.

III. THE MICHIGAN COURT OF APPEALS RECENTLY DETERMINED THAT *LENNANE* REMAINS BINDING PRECEDENT AND THAT, UNDER THE PRINCIPLE OF *STARE DECISIS*, MUNICIPAL WAGE ORDINANCES OF THE SORT AT ISSUE IN THIS CASE MUST BE HELD UNCONSTITUTIONAL.

The City of Lansing will undoubtedly contend that the Michigan Constitution of 1963 varies substantially from the Constitution of 1908, particularly in regard to delegation of State power to municipalities, **THUS MANDATING A DIFFERENT RESULT FROM THAT HELD BY THE Supreme Court on *Lennane***. Yet, whatever differences exist between the two Constitutions constitute nothing more than distinctions without a difference. This is because the Michigan Court of Appeals has recently ruled that *Lennane* remains binding precedent even under our current Constitution. In *Rudolph v Guardian Protective Servs.*, 2009 Mich App LEXIS 1989 (2009) (unpublished) (Ex. C), the Michigan Court of Appeals revisited *Lennane* in deciding a matter involving another municipal attempt at regulating wage rates. The Court of Appeals ruled that *Lennane* constituted binding precedent on the matter and that the Court had no alternative but to rule the ordinance *ultra vires* and, therefore, unenforceable. This Court in the present case should rule likewise.

In *Rudolph*, the City of Detroit promulgated yet another regulation requiring businesses contracting with the City of Detroit to pay wages at least equal to a proscribed "living wage." *Rudolph* at *2. When a contractor doing business with the City of Detroit decided not to pay the rates required under the ordinance, its employees sued. Because the ordinance provided the sole basis for the employees' suit, the trial court was called upon to examine its enforceability. Looking to *Lennane*, the Circuit Court determined that a home rule city was prevented from regulating wages and that it was bound by *stare decisis* to find the living wage ordinance invalid.

Id. Plaintiffs appealed the trial court's order granting summary disposition in favor of the contractor. *Id.*

On appeal, the Court of Appeals first addressed its obligation to the doctrine of *stare decisis*. The Court stated that *stare decisis* requires a court "to reach the same result when presented with the same or substantially similar issues in another case with different parties," citing *Topps-Toeller, Inc v City of Lansing*, 47 Mich App 720, 720, 209 NW2d 843 (1973). The Court of Appeals also referenced that *stare decisis* mandates that all lower courts are bound by a decision issued by a majority of the Michigan Supreme Court and that such courts "remain bound by our Supreme Court's precedent until such time as the Supreme Court overrules or modifies it." Citing *People v. Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987) and *State Treasurer v. Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009). The Court then framed the issue on appeal as "[w]hether Detroit's implementation of a wage ordinance constitutes a valid exercise of its police power or whether, in the alternative, such an ordinance is *ultra vires* and thus invalid." *Id.* In examining the issue, the Court found that the minimum wage ordinance struck down in *Lennane* and the living wage ordinance then at issue were virtually indistinguishable as "both [were] clearly intended to accomplish substantially similar goals and would entail exercise of the same power." *Id.* Consequently, the Court of Appeals held that a municipality "may not enact an ordinance regulating wages" and that *stare decisis* mandated the conclusion that the City of Detroit's living wage ordinance was unquestionably *ultra vires*. *Id.* at *4.

Here, the City of Lansing attempts to accomplish markedly comparable goals utilizing the same means as failed in *Lennane* and *Rudolph*. That is, Lansing is attempting to utilize its power under the Constitution and Home Rule Act to regulate the wages paid by businesses

contracting with the City. Yet, as correctly determined in *Rudolph*, *Lennane* makes clear that municipal power does not extend to regulation of wage rates. Importantly, the underlying considerations present at the time the Michigan Supreme Court decided *Lennane* remain true today. Indeed, the current Michigan Constitution still specifically provides that “[e]ach such city and village shall have power to adopt resolutions and ordinances relating to its *municipal concerns*, property and government, subject to the constitution and law.” Const 1963, Article VII, §22 (emphasis added). Similarly, the Home Rule Act still merely allows a municipality to pass “laws and ordinances relating to its *municipal concerns* subject to the constitution and general laws of this state.” MCL § 117.4j(3) (emphasis added). As the Michigan Constitution and the Home Rule Act remain fundamentally unchanged, municipal rulemaking authority continues to be limited. Thus, municipalities still may not regulate matters of statewide concern such as wage levels. As the Court of Appeals determined in *Rudolph*, *Lennane*’s holding remains direct binding precedent. *Rudolph* at 2. Indisputably then, *Lennane*’s holding continues to control, leaving no other conclusion than that Lansing acted without properly delegated authority when it enacted its Prevailing Wage and Benefit Standard Ordinance and its Living Wage Ordinance. Thus, Lansing’s Ordinances must be ruled *ultra vires* and unenforceable.

It might be noted that, while the Court of Appeals in *Rudolph* correctly followed its judicial obligations under the doctrine of *stare decisis*, it thereafter provided some meandering commentary about what it might consider in resolving the case if it were not bound by the Supreme Court precedent of *Lennane*. Essentially, the Court wondered aloud whether “liberal construction” of the current Home Rule Act might make a difference in the outcome. Yet, the fact remains that the Court of Appeals’ *dicta* in relation to *Lennane*’s analysis is of no import to the present matter. The “function of the court is to decide cases ... by applying the law to the

facts;” thus, pronouncements which have no bearing on a legal conclusion are *dicta* and lack precedential value. *Smith v Ginther*, 379 Mich 208, 215-16; 150 NW2d 798 (1967). The *dicta* of the *Rudolph* Court was not necessary to the resolution of the case and it, therefore, carries no weight.

Even if the *dicta* of the Court of Appeals in *Rudolph* were to be examined (which it should not be), it would have to be found faulty as it is clearly based on an unsupportable premise. The Court of Appeals focused on an essentially trivial difference existing between the 1908 and 1963 Michigan Constitutions relating to construction of its provisions covering municipalities, i.e., that the current Constitution should be liberally construed in those provisions. Besides this, the Court of Appeals referenced a quotation from a different Michigan Supreme Court case which was taken completely out of context.

At *3-4, the *Rudolph* Court quoted *Detroit v. Walker*, 445 Mich App 682, 690; 520 NW2d 135 (1994), stating that “the relationship between state and local governments ‘has matured to one of general grant of rights and powers, subject only to certain enumerated restricts instead of the earlier method of granting enumerated rights and powers definitely specified.’” What the Court of Appeals selectively omitted was that the Supreme Court went on to say that “cities are empowered to form for themselves a plan of government suited to their unique needs and, *upon local matters*, exercise the treasured right of self-governance.” (Emphasis added).⁴ *Id.* Thus, the very support which the *Rudolph* Court based its *dicta* is fully at odds with its own argument. That is, while the powers of a municipality might be liberally construed, they are and always have been limited to their *local* or *municipal* concerns under the plain and unambiguous

⁴ Furthermore, *Detroit v Walker* involved the collection of delinquent property taxes, a matter which could not be tied more closely to a municipality’s concerns as taxes are the lifeblood of any governmental entity; as opposed to wages, a matter of general state concern.

language of the Constitution and the Home Rule Act. On the other hand, the Supreme Court in *Lennane* firmly held that both minimum and prevailing wages were a matter of *state* concern. Thus, even under the most generous grant of powers available for a municipality to receive, a city like Lansing still does not have the power to enact ordinances establishing minimum wages, prevailing wages, or living wages because such issues are not a matter of “municipal concern.”

Although the clear-cut fact that the authority cited in *Rudolph's dicta* firmly discredits the Court's analysis, even greater support suggests the complete error on which it is founded. This is because the Court of Appeals' wish was granted; *Rudolph* was appealed to the Supreme Court. The Supreme Court obviously understood the insecure premise on which *Rudolph's dicta* was based because it ignored the unpersuasive plea that it reconsider *Lennane* and denied leave to appeal. *Rudolph v Guardian Protective Servs.*, 486 Mich 868; 780 NW2d 571 (2010). The Court's unequivocal answer in denying leave only leads to one reasonable conclusion; wages continue to be a matter of general State concern, a matter over which all municipalities are precluded from regulating. Accordingly, this Honorable Court must follow the directive of the Supreme Court and take no action other than to rule Lansing's Prevailing Wage and Benefit Standard Ordinance and Lansing's Living Wage Ordinance *ultra vires* and unenforceable pursuant to existing, binding case precedent.

CONCLUSION

As a result of the legal argument articulated herein, Plaintiff respectfully urges this Honorable court grant its Motion for Summary Disposition in its totality.

Dated this 21st day of August 2012.

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EXHIBIT A

206.18. - Prevailing wage and benefit standards prescribed.

- (a) No contract, agreement or other arrangement for construction on behalf of the City and involving mechanics and laborers, including truck drivers of the contractor and/or subcontractors, employed directly upon the site of the work, shall be approved or executed by the City unless the contractor and his or her subcontractors furnish proof and agree that such mechanics and laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department.
- (b) Any person, firm, corporation or business entity, upon being notified that it is in violation of this section and that an amount is due to his, her or its employees, shall have 30 days from the date of the notice to pay the deficiency by paying such employee or employees, whichever is appropriate, the amounts due. If the person, firm, corporation or business entity fails to pay within the 30-day period, he, she or it shall be subject to the penalty provided in Section 206.99
- (c) The provisions of this section shall be inserted in all bid documents requiring the payment of prevailing wages.
- (d) The enforcement agency for this section shall be as determined by the Mayor.

(Ord. No. 855, 8-31-92)

EXHIBIT B

206.24. - Requiring employers that contract with the City or receive economic development assistance to pay their employees a sufficient living wage.

(a)

Purpose. The purpose of this section is to improve the lives of working people and their families by requiring employers that contract with the City to pay their employees a wage sufficient to meet basic subsistence needs, and that they provide for the hiring of Lansing residents as employees when and where possible.

(b)

Applicability.

(1)

This section applies to any contractor who is a party to a contract for services, as defined herein.

(2)

The minimum living wage requirement of this section applies to any part-time or full-time employee of a contractor who is employed at any job site covered by a contract for services or subsidized, in whole or in part, under a contract for services; and any part-time or full-time employee of a grantee.

(c)

Definitions. As used in this section:

(1)

"*Classified City employee*" means an employee of the City who occupies a position which is defined by a classification specification and is acknowledged in the annual budget.

(2)

"*Contract for services*" means a contract, or combination of contracts, between a contractor and the City of Lansing primarily for the furnishing of services for which the total expenditure, including all subcontracts, exceeds \$50,000.00 annually, on a fiscal year basis, and does not include a contract to purchase or lease goods or property.

(3)

"*Contractor*" means a person who enters into a contract for services with the City having five or more employees, including any subcontractors.

(4)

"*I.F.T. certificate*" means any industrial facilities tax abatement certificate issued pursuant to Public Act 198 of 1974, as amended.

(5)

"*Employer*" means a person who engages employees to provide labor in exchange for the payment of wages or a salary.

(6)

"Employee" means any individual who is paid to work for an employer.

(7)

"Federal poverty guideline" means the official poverty guideline for a family of four published and updated annually in the federal register by the United States Department of Health and Human Services under authority of 42 U.S.C. 9902(2).

(8)

"Full-time employee" means an employee who is employed for not less than 40 hours in a calendar week.

(9)

"Grantee" means a recipient of an I.F.T certificate.

(10)

"Health care benefits" means the right or rights granted to an employee under a contract, certificate or policy of insurance to have payment made by a health care insurer or health care corporation for specified medical or health care services for the employee and the employee's dependents.

(11)

"Implementing department" means the Human Relations and Community Services Department of the City of Lansing.

(12)

"Living wage" means an hourly wage rate which is equivalent to 125 percent of the federal poverty line on an annual basis when calculated based on 40 hours per week, 50 weeks per year; provided however, that costs paid by the employer for an employee health care benefits may be counted toward up to one-fifth of the hourly rate payable to the employee.

(13)

"Part-time employee" means an employee who is not a full-time employee.

(14)

"Person" means any firm, joint venture, partnership, limited liability company, corporation, club, association or organization, either incorporated or unincorporated, however operating or named, whether acting directly or by a servant, agent or fiduciary, and including all legal representatives, heirs, successors and assigns thereof.

(d)

Minimum requirements.

(1)

At a minimum, a contractor or grantee shall provide its employees a living wage.

(2)

The implementing department shall calculate and publish an annual bulletin stating the minimum living wage rates within 30 days of the publication of the federal poverty guideline in the federal register. The implementing department shall, with the assistance of the purchasing division of the finance department, notify each contractor or grantee of such changes in writing by regular United States mail. Such adjustment shall become immediately effective upon publication of the annual bulletin for new contracts and become effective at the time of contract renewal for existing contracts.

(e)

Equal employment opportunity. To the greatest extent feasible, a contractor or grantee shall make good faith efforts to fill all new positions created as a result of a contract for services or economic development assistance by providing equal employment opportunities to residents of the City of Lansing. The contractor or grantee shall furnish documentation of these good faith efforts as required by the implementing department. The foregoing shall not be interpreted as a residency requirement nor shall it cause any contractor or grantee to terminate, transfer, or lay off any employee who is on the payroll at the time this section becomes applicable and effective for that contractor or grantee.

(f)

Required language in subcontracts. Each contractor shall include a clause in all subcontracts related to the contractor's contract for services with the City that requires the subcontractor to comply with this section. Failure of a subcontractor to comply with the provisions of this section shall be considered a violation of the section by the contractor.

(g)

Required language in contracts. Each City contract for services, including contracts required with local units of government pursuant to 1974 Public Act 198 for an I.F.T. certificate, shall require, as part of all bids and applicable contract documents, a copy of this section and compliance with this section. Each such contract shall provide that willful or repeated violation of this section will entitle the City to terminate the contract.

(h)

Posting requirements of the living wage. A contractor or grantee shall post in a conspicuous place on each job-site subject to this section, a copy of the living wage bulletin, and all bulletin adjustments published under subsection (d)(2). A contractor or grantee is required to post and implement any change in the living wage within 30 days of City notification as provided in subsection (d)(2).

(i)

Wage and hour violation. This section shall not be construed to limit an employee's right to bring legal action for violations of any minimum compensation or wage and hour law.

(j)

Exemption from application. The following are exempt from the provisions of this section:

(1)

Any governmental entity;

(2)

Any private corporation that has received 501(C)(3) IRS designation and has 20 employees or less, working on the program funded by the City;

(3)

Contractors or grantees with an applicable collective bargaining agreement in effect;

(4)

Contractors or grantees required by federal, state or local law to pay a prevailing wage; and

(5)

Employees enrolled in a job-training or summer youth employment program.

(6)

For any contract for services or required for an I.F.T. certificate, the City Council may grant a partial or complete exemption from the requirements of this section if the City Council determines one of the following:

a.

To avoid any application of this section that would violate Federal, State or local law; or

b.

The application of this section would cause demonstrated economic harm to an otherwise covered employer that is a non-profit organization, and the City Council finds that said harm outweighs the benefits of this section; provided further that the otherwise covered non-profit employer shall provide a written plan to fully comply with this section within a reasonable period of time, not to exceed three years, and the City Council then agrees that granting a partial or complete exemption is necessary to ameliorate the harm and permit the non-profit organization sufficient time to reach full compliance with this section.

(k)

Living Wage Advisory Committee. The Living Wage Advisory Committee is established to review the effectiveness of this section to create and retain living wage jobs in Lansing and to promote access to living wage jobs for low and moderate income residents of Lansing; review the implementation and enforcement of this section; and make recommendations from time to time in connection with the purpose and applicability of this section.

(l)

Composition of Advisory Committee. The Living Wage Advisory Committee shall consist of six members, each of whom shall serve for a period of three years. The Mayor shall appoint the committee members, subject to confirmation by Council, as follows:

(1)

One labor union member selected by the Mayor from a list of three nominees recommended by the President of the Greater Lansing Labor Council AFL-CIO.

(2)

One labor union member selected by the Mayor from a list of three nominees recommended by the president capital area UAW/CAP Council.

(3)

One community-based organization member from an organization operating solely within the City of Lansing.

(4)

One greater Lansing Chamber of Commerce Member selected by the Mayor from a list of three nominees recommended by the chamber.

(5)

One at-large member from the community.

(6)

One City Council member selected by the Council President.

No member of the committee shall participate in any review or recommendation concerning a contractor or grantee if the member, or his or her immediate family, has a direct or indirect financial interest in the outcome of such review or recommendation.

(m)

Earned income credit notification. Contractors and grantees shall inform employees earning less than \$12.00 per hour, or such other amount as determined by the implementing department of their possible eligibility for the state and/or federal earned income credit.

(n)

Complaint. Anyone with knowledge of a violation of this section may file a complaint with the implementing department, which will have 90 days to investigate and make a determination regarding the complaint. The implementing department shall provide any contractor or grantee, alleged to be in violation of this section, the opportunity to present appropriate documentation to demonstrate its compliance. A contractor or grantee determined by the implementing department to be in violation of this section shall have the right to appeal accorded by law.

(o)

Payment for violation. A contractor or grantee who is determined by the implementing department to be in violation of the living wage requirement shall be notified of the determination in writing by regular United States mail and in absence of the contractor or grantee taking an appeal within 21 days of the date of the letter, shall pay to each employee affected not later than 14 days from the date of the letter the amount of deficiency for each day of the violation.

(p)

Penalties and enforcement.

(1)

A violation of any provision of this section committed knowingly is a civil infraction punishable by a fine of \$250.00 for a first offense, and \$500.00 for each offense committed thereafter. The court may issue and enforce any judgment, writ, or order necessary to enforce this section, including payment to the employee or employees of the difference between wages actually paid and the living wage that should have been paid, interest, and other relief deemed appropriate.

(2)

Each pay date upon which a violation occurs shall constitute a separate and single violation regardless of the number of employees affected.

(3)

In addition to enforcement under this section, the City shall have the right to modify, terminate, and/or seek specific performance of any contract entered into in compliance with subsection d of this section with an employer or grantee, or to cancel, terminate or suspend the contract in whole or in part and/or to refuse any further payments under the contract;

(4)

A contractor or grantee who is found responsible by the court for a violation of this section on three separate occasions within a two-year period shall be barred from bidding on or entering into any contract with the City for a period of three years from the date of the last violation. a violation for purposes of this subsection means one payroll, payday, or date of payment, regardless of the number of employees affected by each violation.

(5)

Nothing contained in this section shall be construed to limit in any way the remedies, legal or equitable, which are available to the City or any other person for the correction of violations of this chapter.

(q)

Severability. If a court of competent jurisdiction declares any portion of this section invalid or unenforceable, then the remaining provisions shall remain in full force and effect.

(r)

Effective date.

(1)

This section shall not become effective until the implementing department issues a certification meeting the requirements of subsection (r)(2) and provides notice of certification issuance to the City Council.

(2)

The certification shall contain a finding that all classified City employees are receiving a living wage.

(3)

This section shall apply to contracts entered into or renewed after this section becomes effective as set forth above. The extension of a contract for a period beyond its original term shall be considered entering a contract for purposes of this section.

(s)

Sunset. This ordinance shall automatically expire three years from when it takes effect unless re-enacted or extended.

(Ord. No. 1086, 6-6-05)

EXHIBIT C



Caution

As of: Aug 16, 2012

**RICHARD RUDOLPH, DAN GRIFFIN, CHRIS WELLS, and CAROLYN ALLEN,
Plaintiffs-Appellants, v GUARDIAN PROTECTIVE SERVICES, INC., a/k/a
GUARDIAN SECURITY SERVICES, INC., and GUARDIAN BONDED SECURI-
TY, Defendant-Appellees, and SERVICE EMPLOYEES INTERNATIONAL UN-
ION LOCAL 3, a/k/a SEIU MICHIGAN STATE COUNCIL, METROPOLITAN
DETROIT AFL-CIO COUNCIL, MAURICE and JANE SUGAR LAW CENTER
FOR ECONOMIC and SOCIAL JUSTICE, INTERFAITH WORKERS JUSTICE,
MICHIGAN ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR RE-
FORM NOW, CENTRO OBRERO/LATINO WORKERS CENTER, and ASSO-
CIATED BUILDERS & CONTRACTORS OF MICHIGAN, Amici curiae.**

No. 279433

COURT OF APPEALS OF MICHIGAN

2009 Mich. App. LEXIS 1989

September 22, 2009, Decided

NOTICE: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: Leave to appeal denied by *Rudolph v. Guardian Protective Servs., Inc.*, 2010 Mich. LEXIS 685 (Mich., Apr. 7, 2010)

PRIOR HISTORY: [*1]
Wayne Circuit Court. LC No. 06-622199-CZ.

JUDGES: Before: Borrello, P.J., and Murray and Davis, JJ.

OPINION

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant ¹ pursuant to *MCR 2.116(C)(8)*. The trial court found that *Attorney General, ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923) precluded a home rule city from enacting a living wage ordinance, so it was bound by the doctrine of stare

decisis to find the Detroit Living Wage Ordinance (DLWO) invalid. ² Because the trial court correctly applied *Lennane* and because we are also constrained by stare decisis, we affirm. However, because it appears that subsequent constitutional and legal developments in Michigan have rendered *Lennane* obsolete, we respectfully urge the Supreme Court to revisit and reconsider the issue.

1 Because plaintiff's complaint identified a single defendant, which included the named defendants in this case, and because defendant's appellate brief refers to a singular defendant, this opinion will also refer to defendant in the singular.

2 Defendant's motion for summary disposition raised other arguments in support, but the trial court did not consider those other arguments in light [*2] of its decision.

The doctrine of stare decisis "requires courts to reach the same result when presented with the same or substantially similar issues in another case with different parties." *Topps-Toeller, Inc v City of Lansing*, 47 Mich App 720, 729; 209 NW2d 843 (1973). A decision of the

majority of the justices of our Supreme Court is binding on all lower courts. *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987). This Court may properly arrive at the conclusion that a decision of our Supreme Court is obsolete. *Id.* at 370. However, this and all other lower courts remain bound by our Supreme Court's precedent until such time as the Supreme Court overrules or modifies it. *State Treasurer v Sprague*, Mich App ; NW2d (Docket No. 281961, June 4, 2009), slip op at pp 4-5. *Lennane* has not been overruled by our Supreme Court, so it remains binding precedent under the doctrine of stare decisis.

The issue in *Lennane* was directly on point with the instant case. In *Lennane*, our Supreme Court considered the constitutionality of "minimum wage" provisions in Detroit's city charter, and a matching ordinance containing a penal provision, governing workdays, working hours, and wages [*3] for city employees and individuals employed by city contractors. *Lennane, supra* at 633-634. The DLWO applies to certain contractors who contract with Detroit and requires those contractors to pay their employees "wages which are at least equal to a living wage," as further defined in the DLWO. It also contains enforcement provisions. Even though the DLWO is a "living wage" ordinance instead of a "minimum wage" ordinance, both are clearly intended to accomplish substantially similar goals and would entail exercise of the same power. Thus, *Lennane* and the instant case share the same issue: whether Detroit's implementation of a wage ordinance constitutes a valid exercise of its police power or whether, in the alternative, such an ordinance is ultra vires and thus invalid. Under the binding precedent of *Lennane*, the DLWO is the latter.

However, we are of the view that *Lennane* is obsolete and that the Court would not necessarily arrive at the same result if the issue was one of first impression today. *Lennane* was decided in 1923 on the basis of the Constitution of 1908; in particular, Sections 20 and 21 of Article 8 of the Constitution of 1908. *Lennane, supra* at 637-638. At the time, those [*4] sections provided as follows:

Sec. 20. The legislature shall provide by a general law for the incorporation of cities and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

Sec. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and

amend its charter, and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state.

The *Lennane* Court observed that the state was the sovereign, and although municipalities presumably had the power "to legislate upon matters of municipal concern," they were merely agents of the state; and the wage ordinance at issue would exercise police power over a state concern in the absence of an explicit delegation of the power to do so. *Lennane, supra* at 638-641.

But the foundations for the *Lennane* Court's holding [*5] have not remained static. Forty years later, the Constitution of 1963 was adopted. At that time, Const 1908, art 8, § 21 became *Const 1963, art 7, § 22*, mostly with minor changes but in significant part adding the requirement that "[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." More significantly, the Constitution of 1963 added an entirely new provision to the local government provisions, at Section 34 of Article 7:

The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

The convention comment to this section supports the plain language thereof, that under our present constitution, the courts should "give a liberal or broad construction to statutes and constitutional provisions concerning all local governments."

Our Supreme Court has recognized as much. In the context of township ordinances, the Court observed that "[a]t common law, we narrowly [*6] construed township ordinances enacted pursuant to the delegated police power in the township ordinance act," but *Const 1963, art 7, § 34* "replaced the common-law rule of strict construction by constitutionally requiring courts to liberally construe all legislative and constitutional powers conferred upon townships." *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310, 319; 471 NW2d 321 (1991). Our Supreme Court subsequently observed

that home rule cities now enjoy powers not expressly denied, rather than only those specifically granted, and that the relationship between state and local governments "has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified." *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994). The approach taken by the *Lennane* Court appears to have been forsaken.

We believe that *Lennane* is obsolete. Even though the provisions of the home rule act have not materially changed since the time *Lennane* was decided -- for example, *Lennane* cited Comp. Laws 1915, § 3307(t), which is now MCL 117.4j(3) -- we believe the [*7] interpretation thereof, in light of the significant changes to our constitution and in our other case precedent, would be different. Under *Lennane*, the test was whether

a city's powers were expressly and unmistakably granted; today, the test would be whether they had been restricted.

Lennane is binding precedent and we must follow it. We hold, as we must, that Detroit may not enact an ordinance regulating wages, and we therefore need not consider the parties' other arguments on appeal. However, in light of the changes in Michigan's legal landscape since 1923 pertaining to municipalities' police powers, we respectfully urge our Supreme Court to revisit *Lennane* and reconsider whether the rule therein continues to have a place in today's jurisprudence.

Affirmed.

/s/ Stephen L. Borrello

/s/ Christopher M. Murray

/s/ Alton T. Davis