STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

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

Plaintiff,

-vs-

CITY OF LANSING,

Defendant.

Case No.: 12-406-CZ

Honorable Clinton Canady III

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**PLAINTIFF, ASSOCIATED BUILDERS AND CONTRACTOR'S REPLY BRIEF**

## INTRODUCTION

The brief filed by Defendant City of Lansing opposing Plaintiff ABC's Motion for Summary Disposition makes for interesting reading but, except for a single paragraph spanning pages 12-13, completely ignores the seminal issue before the Court. The question in this case is not whether the Michigan Constitution and/or the Home Rule Act should be interpreted in such a way as to provide a home rule city (like Lansing) the authority to regulate third party employee wages. As articulated in Plaintiff's Motion for Summary Disposition and supporting brief, that question has already been answered in the negative by the Michigan Supreme Court in *Attorney General, ex rel. Lennane v. City of Detroit*, 225 Mich 631; 196 NW 391 (1923). According to the Michigan Supreme Court, home rule cities such as Lansing lack authority to regulate third party wage rates because such regulations are a matter of state concern – not municipal concern. ***Thus, the central issue in this case is whether this Court may disturb the Michigan Supreme Court's holding in Lennane.*** Stare decisis answers that question with a resounding ***"no."***

In regard to this controlling issue, the City of Lansing advances an argument which runs counter to one of the core principles of our legal system. That is, the City of Lansing argues that the legal landscape has changed generally so that the decisions of superior courts yesterday are not binding on lower courts today. Said differently, the City claims that *Lennane* is no longer binding because it is old law. But this approach too easily dismisses the accepted principle that holdings of superior courts must be followed by inferior courts. Contrary to the casual and dismissive attitude exhibited by the City in its brief, the Michigan Supreme Court has pronounced that its decisions are binding on lower courts regardless of whether a lower court disagrees with its rationale or finds its decision to be antiquated or even obsolete. This is because it is the exclusive providence of the State's high court to overrule its own decisions.



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Because *Lennane* has not been overruled, this Court must follow its holding and rule the City of Lansing's ordinances regulating wages and benefits of third parties to be *ultra vires* and, thus, unenforceable.

## ARGUMENT

### I. THIS IS NOT A STATUTORY CONSTRUCTION CASE; THIS IS A CASE CONCERNING THE COURT'S OBLIGATION TO APPLY *LENNANE* UNDER THE DOCTRINE OF *STARE DECISIS*.

In its brief, the City of Lansing expends a great deal of energy explaining how the Michigan Constitution and the Home Rule Act should be interpreted to bestow upon a municipality the authority to regulate third party employee wages. Yet, the whole argument misses the point. The City of Lansing, like all municipalities, is limited in its regulatory authority to matters relating to "municipal concerns." Critically, those municipal concerns have already been determined by the Michigan Supreme Court as not including the power to regulate third party wage and benefit rates. *Lennane.* Thus, there is no call here to examine whether the City of Lansing should have the power to engage in such regulation. The matter is settled and must be followed until such time as *Lennane* might be overruled. Since a circuit court cannot overrule the Supreme Court, this honorable Court is obligated to adhere to the binding precedent expressed in *Lennane.*

In making its argument, the City has effectively ignored the stated limitation on municipal authority expressed in section 117.4j(3) of the Home Rule Act. The limitation is that a municipality has been delegated authority to pass laws and ordinances ***"relating to its municipal concerns."*** MCL 117.4j(3). For example, at page 10 of its brief, the City cites *Rental Property Owners Association of Kent County v. City of Grand Rapids*, 455 Mich 246; 566 NW2d 517 (1997) for proposition that municipalities enjoy the right to exercise the State's police power even absent an express delegation of that power to municipalities by the State. But the City has


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blown past critical language on which it bases its own argument. The Court stated quite specifically that "[t]he enactment and enforcement of ordinances related to ***municipal concerns*** is a valid exercise of municipal power as long as the ordinance does not conflict with the constitution or general laws." *Id.* at 253 (emphasis added) (internal citation omitted). This quotation from the Home Rule Act reveals an important limitation on municipal power – the enactment and enforcement of municipal regulations must be tied to a municipality's ***"municipal concerns."*** If the regulation is not related to a municipal concern, the regulation is not a valid exercise of municipal power; rather the regulation evidences an unlawful usurpation of power.

Likewise, at pages 10-11, the City relies on *Detroit v. Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994) and *Dooley v. City of Detroit*, 370 Mich 194; 121 NW2d 724 (1963), for the proposition that the Home Rule Act grants general rights and powers, subject only to certain enumerated restrictions. In essence, the City maintains that municipal power need not have its origin in a delegation of power from the State and it would have this Court believe that because no specific law specifically prevents the City from regulating third party employee wages, it may do so. But again, the City's argument misses the point. Municipalities are empowered to regulate only on matters linked to a grant of authority from the State. See *Bivens v. City of Grand Rapids*, 443 Mich 391, 397; 505 NW2d 239 (1993) ("Municipal corporations have no inherent power. They are created by the state and derive their authority from the state. An ordinance enacted by the governing body of a home rule city is valid only if it is consistent with the powers conferred by the state in its constitution and statutes.") (internal citations omitted). In


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this case, the City of Lansing is authorized to regulate only in matters of municipal concern.[1] In short, the existence of a municipal concern is a threshold requirement for liberally construed municipal regulation.

Of course, whether wage rates of third parties doing business with a municipality constitute a matter of "municipal concern" has already been decided by the Michigan Supreme Court. The Michigan Supreme Court in *Lennane* unequivocally held that the level of wages paid to employees of a third party *is not* a matter of municipal concern. Based on *Lennane*, there is no dispute regarding whether the term "municipal concern" extends to third party employees' wage rates – it does not. Because of *Lennane's* binding holding, this Court is bound by *stare decisis* to rule that the City of Lansing's ordinance is *ultra vires*.[2]

## II. THE MICHIGAN SUPREME COURT'S *LENNANE* DECISION HAS NOT BEEN OVERRULED AND THEREFORE REMAINS BINDING PRECEDENT.

The only way the City of Lansing could effectively escape the Supreme Court's holding in *Lennane* would be to show that it has been overruled, either by the Supreme Court itself or through specific legislation. The City of Lansing has not made any attempt at arguing the Michigan Supreme Court's decision in *Lennane* has been overruled by a subsequent ruling of the Supreme Court. This is for good reason, as research reveals that there are no such cases. The City does, however, hint at an argument that the Michigan Constitution of 1963 effectively

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[1] In fact, *Detroit v. Walker, supra*, references this point. The Supreme Court specifically stated that municipal power continues to be limited in the same basic way as was true in *Lennane*, that is, "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." *Id.* at 690 (emphasis added). From this quote, an enumerated restriction certainly exists. Municipal power is limited to "local matters," a reference tantamount to "municipal concerns."

[2] See *Boys Market, Inc. v. Retail Clerks*, 398 US 235, 257-258 (1970) ("after a statute has been construed ... by this Court ... it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself").


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overruled the *Lennane* decision because the 1963 Constitution provides for liberal construction of municipal power to enact ordinances. This argument is easily rebutted.

The constitutional provision referenced by the City of Lansing does not grant any new substantive rights to municipalities beyond those in existence under the 1908 Constitution. The difference between the 1908 and 1963 constitutional provisions is that the latter merely broadened the interpretive lens through which the courts analyze the scope of municipal powers. Yet, the fact that Michigan courts today broadly interpret laws in favor of municipal power does not change the fact that the underlying power must exist within the confines of constitutional delegation in the first place. In this regard, municipalities may only pass regulations relating to their municipal concerns. The relevant provision of the Michigan Constitution reads:

> Under 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 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. Const 1963, Art 7, § 22 (emphasis added).

In *Lennane,* the Michigan Supreme Court determined that the wage levels of third party employees were not included within the definition of "municipal concern." *Lennane* at 641. Because the current Michigan Constitution retains the mandate that municipal regulations must exist within a "municipal concern," and because our current 1963 Constitution does not broaden the definition of "municipal concern" to include regulation of third party wage rates, it cannot reasonably be concluded that adoption of the 1963 Michigan Constitution overruled *Lennane*.

Not only is there no evidence that adoption of the 1963 Constitution changed the meaning of what does and does not constitute "municipal concern," but the *Lennane* court effectively

analyzed the regulatory wage rate ordinance before it under the same kind of "liberal construction" as exists under the current Constitutional language and struck it down. It assumed for purposes of that case that municipalities were delegated greatly enlarged police powers. The court stated:

> [i]f we assume, ***as we have for the purposes of the case,*** without deciding the question, that the city possesses such of the police power of the State as may be necessary to permit it to legislate upon matters of municipal concern, it does not follow that it possesses all the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of State concern."

*Lennane* at 641 (emphasis added). Yet even in premising its decision through liberal construction of the Home Rule Act in favor of municipal power, the Court could not find that municipalities possessed the power to regulate third party wage levels. To the contrary, the Supreme Court ruled that such regulations do not fall within the gambit of municipal concerns. Therefore, even assuming *arguendo* that the 1963 Michigan Constitution could have affected *Lennane's* continued viability (which it did not), because the *Lennane* court analyzed the matter of municipal regulation of third party wage levels the same way that Michigan courts would today, *Lennane* cannot logically or reasonably be said to have been overruled by adoption of the 1963 Michigan Constitution.

While not argued by the City of Lansing in its brief, the Court may wish to take note that the Home Rule Act has likewise ***not*** been amended in a manner which might possibly lead to the conclusion that *Lennane* has been overruled. The Home Rule Act states in relevant part:

> For 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).

This language is verbatim to that which existed when the Court determined *Lennane* in 1923. See *Lennane* at 638. This disposes of any argument the City of Lansing might advance at oral argument alleging that the legislature has statutorily overruled *Lennane.* "It is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law." *Ford Motor Co. v. City of Woodhaven,* 475 Mich 425, 439-440; 716 NW2d 247 (2006). Furthermore, the Legislature has amended various provisions of the Home Rule Act since *Lennane* was decided. Because the Legislature has refrained from amending the provision at issue, this Court should view that "silence or acquiescence [as] an indication that the Legislature agreed with the accuracy of [the *Lennane* Court's] interpretation" of the Home Rule Act. *Wikman v. Novi*, 413 Mich 617, 638; 322 NW2d 103 (1982) citing *Magreta v. Ambassador Steel Co (On Rehearing)*, 380 Mich 513; 158 NW2d 473 (1968), *In re Clayton Estate*, 343 Mich 101; 72 NW2d 1 (1955). Accordingly, in regard to municipal concerns, the City of Lansing enjoys only that regulatory authority as prescribed by the Supreme Court in *Lennane,* and that authority does not extend to regulating third party wage and benefit rates.

## III. THE MICHIGAN SUPREME COURT'S *LENNANE* DECISION REMAINS BINDING PRECEDENT DESPITE THE CITY'S CONTENTION THAT IT IS OBSOLETE.

The binding effect of *Lennane* must be applied despite the City's contention that the Supreme Court's holding is obsolete. Indeed, "[i]f a precedent of [the Michigan Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [or trial courts] should follow the case which directly controls, leaving to [the Michigan Supreme Court] the prerogative of overruling its own decisions." *Rodreiguez de Quijas v Shearson/American Express, Inc.*, 490 US 477, 484 (1989). Thus, even


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if this Court were inclined to agree with the City's underlying position on what the law *should be* in regard to the scope of municipal concerns, the Court is nevertheless bound as a matter of law to follow *Lennane's* unambiguous holding.

A decision from the Michigan Supreme Court makes this point abundantly clear. In *Boyd v. W.G. Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), an Illinois resident, Willie Boyd, entered into an employment contract in Michigan, but executed his job duties out of state. While working in Indiana, Boyd suffered a personal injury and died. Boyd's widow filed for workers' compensation benefits in Michigan, but her claim was denied because Boyd was not a Michigan resident. The Workers' Compensation Appellate Commission (WCAC) based its decision on the plain language of Section 845 of the Workers' Compensation Act which stated:

> The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a *resident of this state* at the time of injury and the contract of hire was made in this state. *Id.* at 517 (emphasis added).

The Court of Appeals denied leave to appeal. In denying the widow benefits, both the WCAC and the Court of Appeals effectively ignored precedent from the Michigan Supreme Court in *Roberts v. IXL Glass*, 259 Mich 644; 244 NW 188 (1932). In that underlying case, the Michigan Supreme Court interpreted the predecessor Workers' Compensation Act to provide coverage to injured employees regardless of whether they were a Michigan resident so long as the contract of employment was entered into in Michigan. *Boyd* at 517-519.

On appeal, the Supreme Court noted that various decisions of the Court of Appeals had "begun to interpret Section 845 in contravention of *Roberts*," and that although the relevant portion of the Act dealing with the residency requirement (Section 845) remained unchanged, these decisions were based on the fact that the overall Workers' Compensation Act had been amended in various, substantial ways after *Roberts* was decided. *Id.* at 521-523. The Michigan


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Supreme Court characterized the various Court of Appeals' decisions as taking the position that *Roberts* was "no longer valid precedent because it [was] 'too old.'" *Id.* at 522-523. The Supreme Court then rebuked the Court of Appeals attempt at overruling *Roberts*:

> ***[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority. While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it. Because this Court has never overruled Roberts, it remains valid precedent.*** The rule of law regarding extraterritorial jurisdiction as expressed by *Roberts* should have been applied by the bureau in the present case. *Id.* (internal citations omitted) (emphasis added).[3]

In the present case, the City of Lansing attempts to goad this Court into following the same path as condemned by *Boyd*. Indeed, Defendants advance an argument similar to the one struck down by the *Boyd* court. The City argues that, although the relevant language of the Home Rule Act (Section 117.4j(3)) has remained unchanged since *Lennane*, the legal framework surrounding the Home Rule Act has evolved thereby providing this Court the discretion to disregard the Michigan Supreme Court's holding that the regulation of third party wage rates is ***not*** a municipal concern. Yet, as the Supreme Court articulated in *Boyd*, it is the ***Supreme Court's*** obligation – not the Court of Appeals' prerogative – to "overrule or modify case law if it becomes obsolete." Just as the *Roberts* case holding had to be followed by the lower courts in *Boyd*, the *Lennane* case holding must be followed by this honorable Court, whether it agrees with the *Lennane* decision or not. In short, even if this Court were to believe that evolution of the Michigan Constitution and Home Rule Act have negated the continued viability of *Lennane*, the Court is nonetheless bound to follow *Lennane* under the doctrine of *stare decisis*.

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[3]In a display of *stare decisis* in action, the Michigan Supreme Court in *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28; 732 NW2d 56 (2007) overruled *Boyd's* underlying holding and changed the law in Michigan to require an employee to be a Michigan resident to recover workers' compensation benefits. Juxtaposing *Karaczewski* to *Boyd* reveals the proper way the law develops in Michigan.

## IV. THE CASE OF *RUDOLPH V GUARDIAN PROTECTIVE SERVICES INC.*, CONSTITUTES CLEAR PERSUASIVE AUTHORITY IN THIS CASE SO THAT IT SHOULD NOT BE IGNORED AS THE CITY OF LANSING SUGGESTS.

The City of Lansing correctly states at page 12 of its brief that because *Rudolph v Guardian Protective Services, Inc.*, 2009 Mich App LEXIS 1989, *leave denied* 486 Mich 868 (2010) is not a published decision, the opinion is not binding on this Court. However, this fact does not negate the obvious persuasive value of the decision. In fact, *Rudolph's* holding is highly persuasive support because the factual and legal issues inherent in *Rudolph* constitute the mirror image of this case. See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n.3; 783 NW2d 133 (2010) (2010) (factually similar unpublished caselaw "provides instructive and persuasive value"); *People v Green*, 260 Mich App 710, 720 n. 5; 680 NW2d 477 (2004) (unpublished decision properly viewed as persuasive in light of the limited caselaw in a specific area); *Steele v Dep't of Corrections,* 215 Mich App 710, 714 n. 2; 546 NW2d 725 (1996) (a court is entitled to conclude that the reasoning of an unpublished decision is persuasive). Thus, this Court should find *Rudolph's* holding to be strongly persuasive guidance in this matter and rule as the Court of Appeals did in *Rudolph* that the Supreme Court's decision in *Lennane* has not been overruled and remains binding precedent for the fact that municipal concerns of municipalities do ***not*** include regulating wage and/or benefit rates of third parties within their jurisdictions.

## V. THE CITY'S LIVING WAGE ORDINANCE, WHETHER CURRENTLY EFFECTIVE OR NOT, SHOULD BE RULED TO BE UNENFORCEABLE.

In an effort to evade a decision on its "living wage" Ordinance, 206.24, the City of Lansing has produced an affidavit of its City Clerk demonstrating that the Ordinance was never effectuated. The reason for the Ordinance's lack of effect appears to be that the City has never administratively certified that all employees of the City of Lansing are receiving a living wage (see, last page to Exhibit 2 of ABC's Brief in Support of Motion for Summary Disposition). However, this does not mean that the City could not, at any time, certify that its employees are receiving a living wage. Thus, the only thing standing in the way of the Ordinance being effectuated is an administrative task.

While the City of Lansing has effectively raised a "mootness" issue with respect to ABC's attack on the City's living wage Ordinance, ABC contends that a real controversy does exist upon which this Court should rule. The test for mootness is a stringent one. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Moreover, both federal courts and Michigan courts have indicated that voluntary forbearance by a municipality in regard to an *ultra vires* regulation does not remove the case from judicial scrutiny. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 US 283 (1982) ("The city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated [for mootness]."); *Dep't of Social Services v. Emmanuel Baptist Preschool*, 434 Mich 380 (1990) ("voluntary cessation of allegedly illegal conduct does not moot a case."); *Southern Pacific Terminal Co. v ICC*; 219 U.S. 498 (1911) ("Due to the 'necessity ... of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter,' the issue was not moot simply for the fact that the underlying body of law expired.");


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*Michigan Bell v. Public Service Commission*, 85 Mich App 163, 166 (1978) (Granting a rate increase sufficient to cover alleged impermissible shortages falls into the category of cases "where the issues involved are of continuing public interest, capable of repetition, yet also evading review.").

ABC submits that the City of Lansing has set forth an illegal scheme for the regulation of third party wage rates under its living wage Ordinance. The Ordinance is not currently in effect due to a condition solely within the City's administrative power to resolve. Should the Court fail to inform the City that its Ordinance is *ultra vires* and therefore unenforceable, the City could at any point hereafter simply certify the requirements listed in the Ordinance and begin enforcing the Ordinance. In order to avoid the parties coming back to the Court a second time on the very same constitutional issues raised in this case, the Court should "guide the municipal body" with a ruling now.

## CONCLUSION

As articulated in Plaintiff's Brief in Support of its Motion for Summary Disposition, and incorporated here by reference, the Michigan Court of Appeals in *Rudolph* recently analyzed the dispositive issue in *Lennane* and applied the Supreme Court's ruling as binding precedent to virtually identical facts and circumstances in the case before. The Court of Appeals was correct to do so and this honorable Court should follow that persuasive authority because the facts and circumstances before this Court are virtually identical to those in both *Rudolph* and *Lennane*. To be sure, this Court is not required to adhere to *Rudolph*. But this Court is required by stare decisis to apply Lennane's holding. Because the Michigan Supreme Court has ruled that municipal concerns of municipalities do not include the regulation of third party wage and


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benefit rates, the City of Lansing's two ordinances aiming to do precisely that must be struck down as *ultra vires* acts.

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