STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN ASSOCIATION OF HOME BUILDERS, ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, and MICHIGAN PLUMBING AND MECHANICAL CONTRACTOR ASSOCIATION, Plaintiffs-Appellants,	UNPUBLISHED March 13, 2014
v	No. 313688 Oakland Circuit Court
CITY OF TROY, Defendant-Appellee.	LC No. 2010-115620-CZ

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order denying their motion for summary disposition and dismissing their claim for lack of subject-matter jurisdiction. We affirm.

On July 1, 2010, defendant entered into a contract with Safe Built of Michigan, Inc., under which Safe Built performed construction code services previously performed by defendant's building department. Under the terms of the contract, defendant paid Safe Built 80 percent of the building department fees associated with Safe Built's services, and defendant retained the remaining 20 percent of the fees. The contract provided that if the fees totaled more than $1,000,000 for any fiscal year, then Safe Built's compensation would be reduced to 75 percent of the applicable fees and defendant would retain the remaining 25 percent. On December 15, 2010, plaintiffs filed a complaint with the trial court, claiming that defendant's building department fees violated Section 22 of the State Construction Code Act (CCA), MCL 125.1522, and the Headlee Amendment, Const 1963, Art IX, §§ 25 through 34. Plaintiffs contended that defendant's contract with Safe Built generated a revenue surplus that defendant was depositing in its general fund for general purposes contrary to MCL 125.1522(1) and that constituted an unlawful tax increase under the Headlee Amendment, Const 1963, Art IX, § 31.

Plaintiffs moved for summary disposition under MCR 2.116(C)(10). Defendant asserted, however, that the trial court lacked jurisdiction because plaintiffs had not exhausted their administrative remedies under the CCA. After a hearing on plaintiffs' motion, the trial court

determined that it lacked subject-matter jurisdiction and dismissed plaintiffs' case without addressing the merits.

On appeal, plaintiffs argue that the trial court erred by dismissing the case for lack of subject-matter jurisdiction. We disagree. "Whether the trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). Summary disposition for lack of jurisdiction may be appropriate if the plaintiff failed to exhaust the administrative remedies available. *Id.* Additionally, "[t]o the extent that resolution of these questions involves statutory interpretation, our review is also de novo." *Bruley v City of Birmingham*, 259 Mich App 619, 623; 675 NW2d 910 (2003). "The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent that may reasonably be inferred from the statutory language itself. If the plain and ordinary meaning of the statutory language is clear, then judicial construction is neither necessary nor permitted." *State Treasurer v Snyder*, 294 Mich App 641, 645; 823 NW2d 284 (2011) (quotation marks and citations omitted).

"Premised on the doctrine of separation of powers, it is well settled that where an administrative grievance procedure is provided, exhaustion of that remedy is required before the circuit court can review the case." *Mich Supervisors Union OPEIU Local 512 v Dep't of Civil Serv*, 209 Mich App 573, 576-577; 531 NW2d 790 (1995). This is true even where the case involves a constitutional issue:

> This Court has explained that when a constitutional issue is intermingled with issues properly before an administrative agency, exhaustion of administrative remedies is not excused:
>
> > [T]he 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-Scott v Dep't of Corrections*, 246 Mich App 70, 80-81; 630 NW2d 650 (2001), quoting *Mich Supervisors Union OPEIU Local 512*, 209 Mich App at 578.]

The CCA provides that a "governmental subdivision," such as defendant in the present case, "may by ordinance assume responsibility for administration and enforcement of this act within its political boundary." MCL 125.1508b(1). Section 9b of the CCA also provides that the director of the department of licensing and regulatory affairs may either "at the request of the local enforcing agency or upon receipt of a written complaint," conduct a performance

evaluation of the enforcing agency[1] "to assure that the administration and enforcement of this act and the [construction] code is being done." MCL 125.1509b(1); MCL 125.1502a(*l*), (q) and (r). "Upon completion of a performance evaluation, the director shall report the findings and any recommendations to the [state construction code] commission and the local enforcing agency." MCL 125.1509b(3); MCL 125.1502a(m). 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. MCL 125.1509b(3).

The CCA's plain language provided plaintiffs an administrative grievance procedure, i.e., submitting a written complaint to the director, by which they could have raised their claim that defendant's building permit fees violated Section 22 of the CCA. Plaintiffs do not contend that they exhausted the administrative procedures provided under MCL 125.1509b, but instead argue that that Section 9b only provides an administrative remedy only for the enforcing agency. This argument is unpersuasive in light of the plain language of Section 9b. Section 9b does not limit, in any way, those who may file a written complaint. Specifically, applying the general construction to MCL 125.1509b(1)'s use of the word "or" indicates that the written complaint contemplated under the statute is distinct from a request by the enforcing agency. See *In re Hill*, 221 Mich App 683, 694; 562 NW2d 254 (1997) (citation omitted) ("The term 'or' is generally construed as referring to an alternative or choice between two or more things."). This construction is supported by the statute's direction that "[i]f a performance evaluation is to be conducted upon the receipt of a written complaint, the director shall first refer the written complaint to the affected enforcing agency requesting a written response within 10 days." MCL 125.1509b(1). This directive logically implies that the enforcing agency will lack notice of the written complaint and is distinct from an entity that may submit the written complaint to the director.

Moreover, Section 9b goes on to describe the adverse administrative procedures that apply to the enforcing agency "[i]f a performance evaluation is to be conducted upon the receipt of a written complaint," which lend further support to the fact that Section 9b provides an administrative remedy to those other than the enforcing agency. MCL 125.1509b(1) through (5). If, after the performance evaluation, the commission seeks to withdraw the local enforcing agency's responsibility for the administration and enforcement of the CCA and the construction code, the commission may issue a notice of its intent. MCL 125.1509b(3). "The notice shall include the right to appeal within 30 business days after receipt of the notice of intent," and the enforcing agency's failure "to request a hearing within 30 business days after receipt of the notice . . . shall be considered to exhaust the enforcing agency's administrative remedies and the notice shall be considered a final order of the commission under the administrative procedures act." MCL 125.1509b(3). Plaintiffs rely on subsection 9b(3)'s language that the notice "shall be

[1] "'Enforcing agency' means the governmental agency that, in accordance with section 8a or 8b, is responsible for administration and enforcement of the code within a governmental subdivision." MCL 125.1502a(t).

considered to exhaust the enforcing agency's administrative remedies" to support their contention that 9b only provides an administrative remedy to defendant. However, reviewing the entirety of Section 9b demonstrates that the enforcing agency's administrative remedy in subsection 9b(3), i.e., the right to appeal the commission's notice of intent to withdraw the agency's responsibility, only arises after the complaining party has already filed a written complaint. See MCL 125.1509b(1). And, that provision itself applies to the appeal procedure for the enforcing agency—it does not limit or change other sections of the CCA. Therefore, it is clear that the statutory language provides an administrative remedy for a party seeking redress from an enforcing agency's alleged noncompliance with the CCA, and plaintiffs were required to exhaust this remedy before seeking review from the circuit court.

Additionally, although plaintiffs' complaint also alleged a constitutional violation, i.e., violation of the Headlee Amendment, this constitutional issue was "intermingled with issues properly before an administrative agency," and thus, plaintiffs were not excused from their requirement to exhaust their administrative remedies before the trial court could review their case. *Womack-Scott*, 246 Mich App at 80-81; *Mich Supervisors Union OPEIU Local 512*, 209 Mich App at 578. Therefore, the trial court correctly determined that it lacked subject-matter jurisdiction in this case.

Because the trial court lacked subject-matter jurisdiction, we need not address the merits of plaintiffs' other claims.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro