STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Before Cooper. P.J., and Fort Hood and R.S. Gibbs, JJ.

JAMES D. AZZAR,

Plaintiff-Appellant, and

PROCESSING SOLUTIONS, LIMITED,

Plaintiff,

v

THE CITY OF GRAND RAPIDS,

Defendant-Appellee, and

BERNARD C. SCHAEFER and
ROBERT J. KRUIS,

Defendants.

SC No. 130310

CA No. 260438

Kent County No. 03-11760-NZ

BRIEF ON APPEAL - AMICUS CURIAE BRIEF OF MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN TOWNSHIPS ASSOCIATION

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STATEMENT OF QUESTION INVOLVED

IS THE GRAND RAPIDS BUILDING MAINTENANCE CODE PREEMPTED BY THE STILLE-DeROSSETT-HALE SINGLE STATE CONSTRUCTION CODE ACT, MCL 125.1501, AS AMENDED BY 1999 PA 245?

The Court of Appeals answered:	No.
The Trial Court answered:	No.
Plaintiff-Appellant answers:	Yes.
Defendant-Appellee answers:	No.
Amicus Curiae Michigan Municipal League and Michigan Townships Association answer:	No.

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INTRODUCTION

This Court invited the Michigan Municipal League and Michigan Townships Association, amongst others, to file briefs amicus curiae on the issue of whether the Stille-DeRossett-Hale Single State Construction Code Act, MCL 125.1501, as amended by 1999 PA 245, preempts local property maintenance regulations, specifically the Grand Rapids Building Maintenance Code. This brief is being submitted on behalf of the Michigan Municipal League and the Michigan Townships Association in response to that invitation in support of the position of Defendant-Appellee.

When property maintenance regulations and construction regulations are properly distinguished, as the legislatures and courts have historically done, it is clear that there was never an expressed or implied intent by the legislature to preempt local regulation of the maintenance of property and structures. Rather, the state legislature has properly left that area of regulation to be addressed by local authorities. Property maintenance concerns are, by their nature, local issues and there is neither the need nor demand for statewide regulation of this subject matter.

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STATEMENT OF FACTS

By order dated May 4, 2006, this Court granted the Application for Leave to Appeal the September 22, 2005 judgment of the Court of Appeals limited to the single issue of whether the Grand Rapids Building Maintenance Code is preempted by the Stille-DeRossett-Hale Single State Construction Code Act, MCL 125.1501, as amended by 1999 PA 245. In that same order, this Court invited the Michigan Municipal League and the Michigan Townships Association to file briefs amicus curiae.[1]

[1]For purposes of this issue, amicus curiae assume that it is a fact that the Grand Rapids Building Maintenance Code differs from the International Property Maintenance Code in relevant part as it would for many of the constituents of amicus curiae.

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ARGUMENT

MAINTENANCE CODES OF LOCAL JURISDICTIONS ARE NOT PREEMPTED BY THE SINGLE STATE CONSTRUCTION CODE ACT.

Applicable Standard of Review: The question of whether an ordinance is preempted by state law is a legal question which this Court would review *de novo*. *Frazer Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289; 715 NW2d 89 (2006).

A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with a state statutory scheme, or 2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enforce, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977). Plaintiff-Appellant makes no argument or suggestion that a direct conflict exists between the Grand Rapids Building Maintenance Code and any provisions of the State Construction Code. The only question is whether the state statutory scheme preempts local maintenance regulations.

In *Llewellyn, supra,* at p 323-324, this Court set forth the following guidelines to determine whether a particular ordinance or set of ordinances is preempted by state statute as follows:

> (1) when state law expressly provides that the state's authority is exclusive;
>
> (2) when preemption is implied in legislative history;
>
> (3) when the pervasiveness of the state regulatory scheme supports such a finding, although such factor is generally not sufficient by itself; and

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> (4) when the nature of the regulated subject matter demands exclusive state control to achieve the uniformity necessary to serve the purpose or interest of the state.

See also *Rental Property Owners' Assn of Kent County v City of Grand Rapids,* 455 Mich 246; 566 NW2d 514 (1997).

Much of Plaintiff-Appellant's argument is based on the errant assumption that the State Construction Code, both historically and currently, also concerns itself with the maintenance of existing structures. From this basis, Plaintiff-Appellant asserts that even prior to the adoption of the Stille-DeRossett-Hale Single State Construction Code, local authorities could not have their own maintenance provisions other than to adopt a nationally recognized code. On the basis of this same errant assumption, Plaintiff-Appellant asserts that the current construction code expressly preempts all local property maintenance provisions.

Property maintenance provisions and construction provisions are decidedly different, however, and the distinctions have long been recognized and treated as such by both the state legislature and the courts of this state.

Construction provisions are just that, requirements that a building be constructed in a particular manner at the time the structure is being constructed. The buildings are inspected when they are constructed and not thereafter. There is no requirement, when construction requirements change, that buildings be reconstructed in accordance with the newly-changed requirements. The legislature dealt with this issue as early as 1917 in the Housing Law of Michigan, 1917 PA 167, by distinguishing construction regulations from maintenance regulations by making construction regulations applicable to buildings and dwellings "hereafter erected." As such, those provisions then contained in Article II were held not to apply to existing structures and owners were not obligated

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to bring their structures into conformity with them. *Welsh v Ohanesian,* 378 Mich 24; 142 NW2d 690 (1966). (Ruling that the requirement of handrails on both sides of a stairway in the Housing Law of Michigan applied only to buildings erected after the statute was enacted.)

On the other hand, maintenance requirements are just that. They constitute the manner in which a building is to be maintained after it has been constructed. When there is a change in a maintenance provision, existing structures must comply with the new maintenance provision. As such, no statement in the form of "for dwellings hereafter erected" preceded the maintenance provisions of the Housing Law of Michigan. See 1917 PA 167. Those maintenance provisions were thus held to be constitutionally applicable to buildings constructed before their adoption as a proper exercise of police power in *Wayne Co Jail Inmates v Wayne Co Sheriff,* 391 Mich 359, 367; 216 NW2d 910 (1974), citing *Queenside Hills Realty v Saxl,* 328 US 80; 66 S Ct 850; 50 L Ed 1096 (1996).

When properly analyzed with this distinction in mind, all of the *Llewellyn* guidelines lead to the conclusion that neither the Grand Rapids Building Maintenance Code nor any of the building maintenance codes of other local jurisdictions throughout this state are preempted by the State's adoption of the Single State Construction Code.

A. An examination of the legislative history does not imply state preemption of property maintenance regulations.

While it was clearly the intent of the state legislature to adopt a single uniform construction code throughout the state and preclude local governmental subdivisions from administering and enforcing other construction codes or different construction code provisions, MCL 125.1508a, as stated previously, both the state legislature and the courts have long recognized the distinction

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between construction code provisions and property maintenance provisions. As such, the adoption of a single statewide construction code and the expressed intent to preempt the field of construction regulations does not include with it an intent to preempt the field of building maintenance code provisions.

Plaintiff-Appellant's review of the legislative history of construction provisions is incomplete and neglects to discuss the Housing Law of Michigan. In 1917, the Housing Law of Michigan was originally enacted by 1917 PA 167 and originally contained various construction provisions which concerned buildings and dwellings "hereafter erected." Those were generally found under Article II with the heading "Dwellings Hereafter Erected" and Article III, "Alterations." See 1917 PA 167. When the Single State Construction Code was adopted by 1972 PA 230, that act also repealed the construction code provisions that were in the Housing Law of Michigan. 1972 PA 230, § 28. The property maintenance provisions, however, were kept in the Housing Law of Michigan and left unaffected by the adoption of the Single State Construction Code Act of 1972.[2] Likewise, when the Single State Construction Code Act was adopted by 1999 PA 245, none of the property maintenance provisions in the Housing Law of Michigan (MCL 125.465 through MCL 125.488) were repealed. In fact, since adoption of the Single State Construction Code Act, many of the provisions of the Housing Law of Michigan have been amended. See, for example, 2004 PA 65 and 2003 PA 55.

These facts are just opposite of those in *Walsh v River Rouge,* 358 Mich 623; 189 NW2d 318 (1970) where the legislative history implied preemption. In this case, the legislative history does not

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[2]1972 PA 230, § 28, repealed sections 3 through 6, 10a, 11 through 64, and 122 and 112 of 1917 PA 167, being sections MCL 125.403 through 125.406, 125.410a, 125.411 through 125.464, and 125.521 and 125.522. Left in place were all of the provisions of Article IV entitled maintenance currently sections 65 through 88, being MCL 125.465 through 125.488.

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imply preemption of local property maintenance regulations. To the contrary, as discussed *infra*, the legislature, through the Housing Law of Michigan, specifically authorized local authorities to adopt different property maintenance regulations.

B. There is no express preemption of the field of property maintenance regulations.

With respect to the issue of whether state law expressly provides that the state's authority is exclusive, in the context of property maintenance provisions, the legislature has expressly provided that local ordinances are not preempted. The Housing Law of Michigan, which contains the property maintenance provisions, states at MCL 125.408:

> The provisions of the act shall be held to be the minimum requirements adopted for the protection of the health, welfare and safety of the community. Nothing herein contained shall be deemed to invalidate existing ordinances or regulations of any city or organized village or the board of health of any such city or village imposing requirements higher than the minimum requirements laid down in this act relative to light, ventilation, sanitation, fire prevention, egress occupancy, maintenance and uses for dwellings; **nor be deemed to prevent any city or organized village or the board of health of any such city or village from enacting and putting in force from time to time ordinances and regulations imposing requirements higher than the minimum requirements laid down in this act;** nor shall anything herein contained be deemed to prevent such cities or organized villages or the board of health of any such city or village from prescribing for the enforcement of such ordinances and regulations, remedies and penalties similar to those prescribed herein. And every such city and organized village or the board of health of any such city or village is empowered to enact such ordinances and regulations and to prescribe for their enforcement . . . . (emphasis added.)

This stated lack of preemption with regard to property maintenance regulations coincides with the legislative decision not to include the International Property Maintenance Code ("IPMC") as one of the codes that make up the Single State Construction Code. Pursuant to MCL 125.1504(2), the

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Single State Construction Code consists of (1) the international residential code, (2) the international building code, (3) the international mechanical code, and (4) the international plumbing code as published by the International Code Council ("ICC") as well as the national electrical code, published by the National Fire Prevention Association, and the Michigan uniform energy code. Conspicuously absent from the list of codes that comprise the Single State Construction Code is the ICC's property maintenance code known as the International Property Maintenance Code.

As such, Plaintiff-Appellant's reliance on one of the general purposes of the Act as being to insure adequate maintenance of buildings and structures, MCL 125.1504(3)(a), is entirely misplaced where the legislature did not include the code specifically dealing with property maintenance regulations in the list of codes it was adopting as the Single State Construction Code. The rules of statutory construction would prohibit a construction to the contrary. The appropriate rule is "*expressio unius est exclusio alterius*" (the expression of one thing is the exclusion of all others). *Adrian School Dist v Michigan Public School Employees,* 458 Mich 326, 334; 582 NW2d 767 (1998). By listing certain international codes, the legislature has necessarily excluded those not on the list. The reference to "maintenance" simply refers to those maintenance situations where a building permit would be required.

Likewise, Plaintiff-Appellant's reliance on the fact that the Michigan Building Code[3] incorporates by reference the provisions of the IPMC at section 101.4.5 to assert that the legislature intended that the IPMC would be part of the Single State Construction Code and thus preempt any local regulation of property maintenance is also misplaced.

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[3]The Michigan Building Code is the International Building Code adopted pursuant to 2004 MR 4, R 408.30401, with the exception of various sections, appendices, and additions as modified by the director.

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First of all, the Michigan Building Code does not apply to one- and two-family dwellings and most townhouses (townhouses of three stories and under with separate entrances). Construction of those dwellings are governed by the Michigan Residential Code. See § 101.2 of the Michigan Building Code and § 101.2 of the Michigan Residential Code. The property maintenance provision of the Michigan Building Code relied on by Plaintiff-Appellant that "the provisions of the International Property Maintenance Code shall apply to existing structures and premises; . . ." at § 101.4.5 is not contained in the Michigan Residential Code. The Michigan Residential Code does reference the IPMC but only to state that the legal occupancy of structures existing on the date of adoption of the Code may continue without change except as is specifically covered by the Residential Code, the IPMC, or the International Fire Code. See § 102.7 of the Michigan Residential Code. There is no requirement in the Michigan Residential Code that properties be maintained in accordance with the IPMC. In that regard, if the IPMC is the state law with respect to property maintenance, it applies only to structures other than one- and two-family homes and most townhouses.

If the Michigan Building Code's inclusion of the IPMC by reference is construed to preempt all local regulation of property maintenance, property maintenance regulations of single- and two-family dwellings (and most townhouses) would necessarily be precluded altogether. While the IPMC is designed to apply to all structures, many of its provisions are clearly intended to apply to single- and two-family homes. It could not have been the legislative intent for the legislature to have adopted a property maintenance code to apply statewide, preempt all local regulation and then make it only applicable to a portion of the structures of a city.

Secondly, if the IPMC is now the exclusive state law with regard to property maintenance, then the Housing Law of Michigan would have been repealed by implication and would otherwise

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be obsolete due to its coverage of identical property maintenance topics to varying degrees with conflicting requirements in each. The identical topics include installation of smoke alarms in apartments buildings,[4] requirements for room lighting and ventilation,[5] required plumbing fixtures and maintenance,[6] the general maintenance and repair of structures,[7] general cleanliness,[8] and fire safety requirements[9].

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[4]Chapter 7 of the IPMC, section 704.2, establishes the number and location of smoke alarms in various types of residential occupancies, including group R-2 occupancies (apartments). The Housing Law of Michigan, section 82a, requires compliance with rules promulgated by the Director for Class A Occupancies (apartments) pursuant to MCL 125.1504c.

[5]Compare MCL 125.489 with sections 402 and 403 of the IPMC requiring different room sizes, ventilation and lighting.

[6]Compare MCL 125.466, MCL 125.467 and MCL 125.491 with Chapter 5 of the IPMC specifying the required plumbing facilities and maintenance.

[7] Likewise, MCL 125.471, requires that every dwelling and all the parts thereof, including plumbing, heating, ventilating and electrical wiring shall be kept in good repair by the owner. It requires the roof to be maintained so as not to leak and the rainwater shall be drained and conveyed therefrom through proper conduits into the sewage system in accordance with plumbing regulations so as to avoid dampness in the walls and ceilings and unsanitary conditions. Similar provisions of the IPMC require the exterior of structures to maintain in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare. Section 304.1. Likewise, the IPMC requires the interior structure and equipment therein to maintained in good repair and structurally sound and in a sanitary condition. Section 305.1. The IPMC also requires roofs and flashing to be sound and tight, not have defects that admit rain, and requires roof drainage to be adequate to prevent dampness or deterioration in the walls or interior portion of the structure. Section 304.7.

[8]Section 74 of the Housing Law of Michigan, MCL 125.474, has a general provision requiring cleanliness of dwellings, prohibiting the accumulation of dirt, filth, rubbish, garbage in or on structures or in yards, courts, passages, areas, or alleys connected therewith or belonging to the same. The IPMC has similar but differing provisions regarding the accumulation of rubbish or garbage. See section 305.1.

[9]There are differing provisions concerning fire safety requirements in the IPMC than in the housing code. See section 82, section 82a of the Housing Law of Michigan, and Chapter 7 of the IPMC.

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Some of the more serious conflicts between the two codes are in the area of unsafe or dangerous structures and the manner in which they are handled. Sections 108, 109, and 110 of the IPMC provide for the condemnation of unsafe structure and equipment. These provisions differ markedly from the recently amended administrative provisions of the Housing Law of Michigan which deal with dangerous buildings.[10] Arguably, the lesser standards of the IPMC would not suffice for procedural due process. *Geftos v Lincoln Park,* 39 Mich App 644; 198 NW2d 169 (1972).

Clearly the legislature did not intend to require different provisions as set forth in the IPMC for dealing with dangerous buildings than those specific procedures it had adopted and subsequently amended concerning dangerous buildings under the Housing Law of Michigan. The fact that the Housing Law of Michigan has been amended since adoption of the State Single Construction Code Act[11] is clear evidence of the legislature's intent that the IPMC was not intended to be adopted as state law and replace the housing law of Michigan. As such, it is evident that the IPMC was not intended to be the exclusive statewide provisions concerning property maintenance nor intended to repeal by implication the Housing Law of Michigan.

"Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary." *House Speaker v State Administrative Bd.* 441 Mich 547, 562; 495 NW2d 539 (1993), quoting *Attorney General ex rel Owen v Joyce,* 233

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[10]The Housing Law of Michigan sets forth very specific definitions, notice, and hearing provisions with specific timelines for each. MCL 125.538 through MCL 125.542. These provisions are significantly in conflict with sections 108, 109, and 110 of the IPMC.

[11]The Housing Law of Michigan was amended by 2004 PA 65 with respect to smoke alarms and as recently as 2003 with respect to dangerous building provisions by 2003 PA 55.

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Mich 619, 621; 207 NW 863 (1926). The question whether a statute is repealed by a subsequent statute relating to the same subject matter involves a determination of legislative intent, and where possible the former and subsequent statutes must be construed together and reconciled so as to give each force and effect. *Attorney General v Public Service Comm,* 161 Mich App 506, 513; 411 NW2d 469 (1987). [*Attorney General v Michigan Public Service Comm,* 249 Mich App 424, 432; 642 NW2d 691 (2002).]

Finally, section 102.2 of the Michigan Building Code expressly states that the provisions of the Building Code shall not be deemed to nullify any provisions of local, state, or federal law. Plaintiff-Appellant argues, however, that this is an "administrative rule" which by its nature cannot authorize cities to adopt a maintenance code in contravention of the legislature's expressed intent, or that if it does, it is void. Plaintiff-Appellant yet relies on another "administrative rule" in the same code, section 101.4.5, as the rule which adopts the IPMC and asserts that rule made it the only property maintenance provisions allowed throughout the state. It is incongruous indeed for Plaintiff-Appellant to attempt to rely on one provision of the Michigan Building Code as adopting by reference the property maintenance code and establishing it as the exclusive state law and on the other hand to attack another provision of the same code which preserves local codes as not being authoritative.

Plaintiff-Appellant's concept is correct, however, it is misapplied. An administrative rule is void to the extent that it conflicts with state law. Plaintiff-Appellant simply focuses on the wrong administrative rule as conflicting with state law. To the extent that section 101.4.5 can be read as adopting the IPMC by reference, that code conflicts with the Housing Law of Michigan as discussed previously. It is section 101.4.5 that is void if construed to be the state law with regard to property maintenance, not the provision which prevents that rule from nullifying other laws.

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C. The nature of the regulated subject matter does not demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

With respect to this fourth *Llewellyn* factor, the Court stated where the nature of the regulated subject matter calls for regulation adapted to local conditions, the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld. However, where the court has found that the nature of the subject matter regularly called for a uniform state regulatory scheme, supplementary local regulation has been held preempted. *Llewellyn, supra,* at p 324-325.

There are clear rational reasons why the construction provisions specifying the manner in which buildings are constructed need to be uniform throughout the state both with respect to ensuring the safety of the structures, while eliminating restrictive, obsolete, conflicting, and unnecessary regulations that would increase costs unnecessarily. See MCL 125.504(3). Uniform construction provisions also serve the interests of the builders who build in the various jurisdictions throughout the state. These reasons do not extend, however, to property maintenance provisions.

Persons owning a structure within the boundary of a local jurisdiction are and should be obligated to know the local laws pertaining to the structure with respect to property maintenance provisions in the same manner as an owner would be expected to know the local zoning restrictions, trash collection requirements, and any other local laws that pertain to the maintenance and use of the property. Different communities clearly have different standards for property maintenance as evidenced by casual observance of varying degrees of property maintenance in existence throughout the state. The IPMC, in fact, recognizes this under section 302.4 where it invites local jurisdiction to insert the height in inches in which it will tolerate weed and plant growth. See § 302.4, IPMC,

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2003 ed. Similarly, jurisdictions are asked to insert the dates that window screening would be required, § 304.14, IPMC, 2003 ed. The chief code official is authorized to make and enforce rules to "designate requirements applicable because of local climatic conditions," § 104.2, IPMC, 2003 Ed.

If the State does have an interest in achieving uniformity of property maintenance across the state, it has not been asserted by Plaintiff-Appellant and it is not readily apparently from a rational or practical point of view. There is no more of an interest in the state for uniformity in property maintenance than there would be for zoning regulations. The Legislature long ago recognized this in § 8 of the housing law, MCL 125.408, when it specifically authorized cities to enforce stricter provisions than the minimum standards it set forth.

There are also a number of legitimate reasons for local jurisdictions to vary from the provisions of the IPMC. For instance, section 103 would create a Department of Property Maintenance Inspection and every jurisdiction would require the appointment of a chief code official and make him dischargeable for cause only. See sections 103.1 and 103.2, IPMC, 2003 ed. Certainly many of the constituents of the Michigan Municipal League and Michigan Townships Association would desire the head of the department to be dischargeable at will in lieu of being dischargeable for cause only.

Likewise, the liability section set forth at section 103.4 establishes the liability of code officials and the code officials' officers different than the standards set forth in the Governmental Tort Liability Act, MCL 691.1407.[12]

Finally, with all due respect to the International Code Council and the persons who drafted

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[12]Pursuant to the provisions of the section 7 of the Governmental Liability Act, MCL 691.1407(2)(c), officers and employees are liable when grossly negligent. Pursuant to section 103.4 of the IPMC, officers are free from liability when acting in good faith and without malice.

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the provisions contained in the IPMC, some of the provisions would appear to confer a little too much authority and be a little too vague with respect to the laws of this state. For instance, the rulemaking authority of section 104.2 of the IPMC allows a code official to adopt and promulgate rules and procedures, to interpret and implement the provisions of this code, and to "designate requirements applicable because of local climate or other conditions." The only apparent restriction on the rules is they shall not have the effect of waiving structure or fire performance requirements specifically provided in the code or violating accepted engineering methods involving public safety. Even if this delegation of authority is not an improper delegation of legislative authority, it may be authority that the city councils and township boards would reserve for themselves.

D. There is not a pervasive state regulatory scheme that would support a finding of preemption.

Keeping in mind the distinction between property maintenance provisions and construction provisions, it is clear that there is not a pervasive state regulatory scheme with regard to property maintenance regulations. The Housing Law of Michigan has limited applicability based on cities' populations although smaller cities and townships are authorized to adopt its provisions. MCL 125.401. Further, as discussed previously, even if the IPMC was adopted as part of the Michigan Building Code, it is not applicable to one- and two-family dwellings and most townhouses (those under three stories with a separate means of egress). Section 101.2, Michigan Building Code. As such, there is not a pervasive state regulatory scheme that would support a finding of preemption.

The fact of the matter is, however, that there is no expressed intent to adopt the IPMC by the legislature. To the contrary, the legislature did not identify the property maintenance code as one of the codes comprising the Single State Construction Code. It is only referenced in the Michigan

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Building Code, the same code that states that the provisions of the code shall not be deemed to nullify any provisions of local, state or federal law.

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CONCLUSION

The adoption of the International Building Code and the delegated authority to the director to make amendments, additions, or deletions as the director determines appropriate to establish a Michigan-specific version of that Code does not operate as an adoption of the International Property Maintenance Code simply because it is referenced in the Building Code. To the contrary, the IPMC was not included in the list of codes that would constitute the State Construction Code.

The existing Housing Law of Michigan are the only statewide property maintenance provisions in effect and these were not repealed explicitly or implicitly by the adoption of the State Construction Code. To the contrary, code amendments to the Housing Law of Michigan after the adoption of the State Construction Code evidence a clear legislative intent that the IPMC is not the state law with regard to property maintenance regulations. As such, there is no preemption of local property maintenance regulations by adoption of the Stille-DeRossett-Hale Single State Construction Code Act.

Respectfully submitted,

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