STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

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DEFENDANT CITY OF NOVI'S
MOTION FOR RECONSIDERATION OF CLASS CERTIFICATION

Defendant, CITY OF NOVI, by and through its attorneys, ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C., respectfully moves this Honorable Court, pursuant to MCR 2.119(F)(3), for reconsideration of its July 21, 2021 Order Granting Plaintiff's Motion for Class Certification for the reasons stated in the following Brief in Support.

FEE

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION

FACTUAL AND PROCEDURAL BACKGROUND

The City incorporates into this Motion, by reference, the factual statements and exhibits from its Response in Opposition to Plaintiff's Motion for Class Certification filed February 26, 2021, a copy of which has been attached hereto as Exhibit A for the Court's ease of reference.

On March 24, 2021, the Court held a hearing on the motion. After establishing, through questions to Plaintiff's counsel, that this case involves a six-year period of quarterly water and sewer billings to Plaintiff and the putative class members, the Court indicated: "I'm letting you know I will sign an order certifying class once I see a copy of that check that shows that he's paid – *that he paid the bills*. . . . And once I – and once I get that, I will forthwith sign the appropriate orders." (Exhibit C, Hearing Trans. 03-24-21, p. 6-7, ln. 23-3 (emphasis added)).

Over three months later, Plaintiff filed a Motion for Entry of Order relative to its Class Certification Motion, to which he attached what appear to be computer screenshots—not "checks"— of what looks like a bank statement purportedly showing just two payments from a joint bank account to the City, as opposed to six years of quarterly payments by Plaintiff. Both of the purported payments were dated in 2020 (one just before and one *after* the date Plaintiff filed this lawsuit).

On July 21, 2021, over Defendant's objections and with no hearing, the Court entered Plaintiff's proposed order, verbatim, granting his Motion for Class Certification and designating Plaintiff as the Class Representative and the above-captioned law firms as Class Counsel. (Exhibit B).

STANDARD OF REVIEW

Michigan Court Rule MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

MCR 2.119(F)(3) "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga,* 241 Mich App 655, 659; 617 NW2d 368 (2000). The plain language of the court rule does not categorically prohibit a trial court from granting a motion for reconsideration even if the motion presents the same issues initially argued and decided. "If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion." *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 722-723; 394 NW2d 82 (1986); see also, *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002)(finding that MCR 2.119(F)(3) does not restrict a trial court's discretion in ruling on a motion for reconsideration).

ARGUMENTS

I. After the Motion Hearing, the Michigan Supreme Court Issued Three Separate Decisions Denying Leave to Appeal Court of Appeals Decisions in Municipal Water and Sewer Fee Challenge Cases, Solidifying the Lack of Any Injury to the Putative Class Members in this Case and Establishing Palpable Error in this Court's Order.

On July 6, 2021, after the parties had briefed the Court on Plaintiff's Motion for Class Certification and several months following the hearing on the Motion, the Michigan

Supreme Court released three decisions having a profound impact on the legal landscape relating to public water and sanitary sewer fee challenge cases. The decisions are in the cases of *Youmans v Charter Township of Bloomfield,* __ Mich ____; ____ NW2d ____ (2021) (Docket No. 162643); *Deerhurst Condominium Owners Association v City of Westland,* __ Mich ____; ____ NW2d ____ (2021) (Docket No. 159262); *and Bohn v City of Taylor,* __ Mich ____; ____ NW2d ____ (2021) (Docket No. 159271). These three Supreme Court decisions, together with the counterpart Court of Appeals decisions, are attached as Exhibits D, E and F.

The parties did not brief or argue the class certification motion in the context of these three decisions, and this Court may not have been aware of the rulings or the game-changing impact they have on the question of class certification in this case. The three Supreme Court's decisions serve to solidify the case law in Michigan supporting Defendant Novi's explanation to this Court that the claims and allegations contained in Plaintiff's Complaint do not address the elements necessary for a claim that Plaintiff or any other user of its public water and sewer systems has suffered an injury. (See Exhibit A). The Supreme Court's acceptance of the Michigan Court of Appeals rulings in *Youmans, Bohn,* and *Deerhurst* entrenches the applicable law and legal elements that are necessary in order to sustain the claims alleged in this case, and require proof that the water and sewer fees have been collected for an "illegal" purpose or an "improper" purpose that is "unrelated" to providing public water and/or sanitary sewer service to its system users.[1]

[1] *Youmans,* __ Mich App __; __ NW2d __ (2021), published per curiam opinion of the Court of Appeals, issued January 7, 2021, App'd for Publication March 2, 2021 (Docket No. 348614) at pp 28-30 (Exhibit D hereto); *Deerhurst,* unpublished per curiam opinion of the Court of Appeals, issued January 29, 2019 (Docket No. 339143), p 4 (Exhibit E, hereto); *Bohn v City of Taylor,* unpublished per curiam opinion of the Court of Appeals, issued January 29, 2019 (Docket No. 339306), p 3 (Exhibit F hereto); *see also, Trahey,*

A review of Plaintiff's Complaint reveals, while Plaintiff claims that the reserve funds are too high (in his opinion) and takes issue with internal temporary investments of reserves that are paid-back to the system with interest (i.e., making money on the invested reserves until they are expended for water and sewer system capital improvements), nowhere in his filings does Plaintiff say that having such reserve funds or internal investments with interest are illegal or will result in the amounts collected from being used for purposes of providing water and sewer services to the system users.[2] This is because every penny collected from the water and sewer customers has been and will continue to be used for the benefit of the water and sewer systems and benefits provided by those systems to Defendant's rate payors.

Also absent from Plaintiff's pleadings in this case are any claims that the water and sewer system funds, *as a whole*, are unreasonable. (See *Youmans, supra*, at p 30). Instead, as in *Youmans, Deerhurst,* and *Bohn, supra*, Plaintiff in this case picks out certain aspects, *or parts*, of the funding for the water and sewer systems to attack. The three Orders issued by the Supreme Court close the door on such claims as being insufficient for purposes of establishing damages or an injury to the system users.

Moreover, the City's Response to Motion and supporting documentation explain that, *as a whole*, the City of Novi's public water and sewer system funding is actually deficient. (Def's Response, pp 6-7 and pp 14-16). As such, Plaintiff and the putative class do not have an injury in this case and class certification was erroneous for failure to satisfy the

311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015); *Shaw v Dearborn,* 329 Mich App 640, 654;944 NW2d 153 (2019), p. 3.

[2] Plaintiff's Complaint claims that the fact that the City makes the investments is evidence that the amount of reserve funds must be too high, but that is not the legal test here. Plaintiff has to prove that the City has collected the money to use for an illegal purpose or a purpose that is unrelated to the water or sewer systems. For that to be the case, the City would not *have the invested funds returned to the water and sewer fund with interest* as is the case in Novi. The funds would just be used for the unrelated purpose and not returned.

requirement under MCR 3.501(A)(1)(e) and (2)(e),[3] which takes into consideration the injury or damages, "whether it is probable that the *amount which may be recovered* by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action." (Emphasis added). Applying the case law elements for a water and sewer fee challenge case discussed above and in the *Youmans, Bohn, and Deerhurst* cases, *supra*, it is highly "probable," if not certain, that there will be no "amount" recovered in this case, which causes this Court's July 21, 2021 Order Granting Class Certification to be palpably erroneous.

II. With Reference to the "Convenient Administration of Justice" or "Superiority" Element Under MCR 2.501(A)(1)(e) and (2)(e), it is Palpable Error for the Court to Certify this Case as a Class Action Because the Members of the Class Certified by this Court's Order Will Lose Money if Plaintiff Succeeds in Having a Jury or This Court Award the Relief He Has Requested.

Not only is there no amount of recovery for the putative class members in this case based on recent developments in Michigan case law, but the members of the class certified by this Court's Order will actually lose money if Plaintiff succeeds in having a jury or this Court award the relief he has requested. Plaintiff is seeking refunds to the system users in the tens of millions of dollars. In the unlikely event that there is any recovery granted by a jury or the Court in this case, it will be in the form of refunds depleting the water and sewer system funding to a substantial degree. This means that the City will no longer have those funds to undertake the massive amounts of water and sewer system infrastructure replacements, updates, and other improvements that are needed and have been planned

[3] These are known as the "superiority" or "convenient administration of justice" class certification requirements. *Dix v American Bankers Life Assurance Co. of Florida*, 429 Mich 410, 413-414; 415 NW2d 206 (1987).

to occur in the coming years. (See Exhibit A hereto, Def's Response in Opposition to Motion for Class Certification, Exhibits A and B).

Should there be a sizeable award of refunds from the systems' reserve funds, at least three things will happen:

(1) The City will have no choice but to impose future significant rate hikes on the system users in order to collect funds (being the same funds that had been refunded) to pay for the costs of completing those system improvements that are absolutely necessary to continue to provide them water and sewer services in a safe and healthy manner over the course of the next one to seven years, most likely at a higher cost due to the lost interest;[4]

(2) It is likely that the system users will no longer enjoy the current predictable and smooth rates from year-to-year, because such a court or jury ruling will send a message to the City that it cannot collect rates for improvements it knows it will have to undertake in future years, resulting in the City implementing sudden spikes in the rates as necessary to accommodate for the known necessary and also emergency capital improvement, repair and replacement projects, which will negatively impact many users' ability to pay, especially those on fixed incomes or in low income brackets who cannot absorb such spikes easily or plan for them; and

(3) It is anticipated that the Class Counsel approved in this Court's Order will retain a one-third or other substantial share of the refund amount, meaning that millions or even tens of millions of dollars will be used to pay the Class Counsel attorneys, instead of being used for the operation and maintenance of the water

[4] Hypothetically speaking, an alternative choice would be to not undertake those needed system improvements, but that's not a realistic option.

and sewer systems as it was previously paid, collected, and designated to be used for.

It is further noted that, in the forgoing circumstance, the amount paid to Plaintiff's attorneys is would no longer be spent on the operation, maintenance, repair, improvement and replacement of the systems, meaning the systems will have to charge the system users those millions of dollars to make up the difference in order to keep the water and sewer systems operating in a healthy and safe manner. In short, contrary to the spirit and intentions of a class action under MCR 2.310(A)(1)(e) and (2) (e), proceeding with this case as a class action will have a *negative* financial impact on every ratepayer and system user assuming, arguendo, that a jury or this Court grants the relief requested in Plaintiff's Complaint.

At the end of the day, this case is not suitable for a class action. The City of Novi is not a business. It is not a corporation obtaining profits from its actions. Its water and sewer systems operate on a revenue neutral basis, and it is uncontested that every penny paid by the ratepayers is used for the systems. It is not going into the pockets of shareholders, corporate executives with golden parachutes, or any other person or company with greedy or illegal intentions. If Plaintiff succeeds in this case, it will actually result in net losses to the class members, which is contrary to the "convenient administration of justice."

CONCLUSION

For all the above reasons, Defendant, CITY OF NOVI, respectfully requests that this Honorable Court reconsider its Order Granting Defendant's Motion for Class Certification and enter an order denying same.

ROSATI, SCHULTZ, JOPPICH &
AMTSBUECHLER, P.C.

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PROOF OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause to each of the attorneys/parties of record herein at their respective addresses disclosed on the pleadings on August 11, 2021.

BY: ☐ U.S. Mail ☐ Telefacsimile
☐ Hand Delivered ☐ Overnight courier
☐ Federal Express ☒ Other: ***E-file***

Signature:
/s/ Sharon L. Sleeker

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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RESPONSE IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

NOW COMES Defendant, CITY OF NOVI, by and through its attorneys, ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C. and for its Response in Opposition to Plaintiff's Motion for Class Certification states as follows:

1. Plaintiff's Motion for Class Certification should be denied because Plaintiff cannot even establish that he, on behalf of just himself, can maintain a cause of action, and also because he also cannot satisfy all of the factors required for certification of an entire class as enumerated in MCR 3.501(A)(1).

2. Plaintiff claims with no basis whatsoever that the reserve funds held by the City of Novi ("City") to pay for water and sanitary sewer infrastructure costs, maintenance, and daily operational costs, are improper. The truth is that the anticipated costs to maintain the systems, and to replace portions of the systems as and when necessary, *exceed* the amounts being held as reserves and charged as rates. **In addition, the City's Water and Sewer Proprietary Fund has had operating losses for every year as of June 30 going back to 2014 because the water and sanitary sewer rates charged by the City are insufficient to cover operating costs**. The City has been offsetting the losses with savings, the principal for which was accumulated before the start of the proposed class period.

3. Plaintiff fails to fully advise the Court of salient facts, including:

a. The horizontal assets of the City's water and sanitary sewer system include more than 361 miles of water mains and more than 289 miles of sanitary sewers. The City's vertical assets of the system include a 1.5 million gallon water storage tank and a 1 million gallon underground sewage retention basin. *See Aff. of B. Croy, Ex. A hereto.*

b. The total replacement cost of the horizontal water and sanitary sewer system exceeds $900 Million, and the total replacement cost of the City's vertical water and sanitary sewer system assets exceeds $50 Million. *See Aff. of B. Croy, Ex. A hereto.*

c. Estimated capital expenditures of $15 Million over the next 5 years will be required just to maintain the desired level of service. Over the next 10 years, that figure is estimated to be $20 Million, and over the next 20 years more than $26 Million in expenditures are expected to be required to maintain service levels. *See Aff. of B. Croy, Ex. A hereto.*

d. In addition to those maintenance needs, the City anticipates that within the next five (5) years it will need approximately $11.6 Million for water distribution capital replacements and $10.7 Million for sanitary sewer capital replacements, for an approximate

total of $22.3 Million—again in addition to maintenance needs. On top of that, the City already owes $18,500,000 from its reserves for capital projects that are in process (that is, under construction). *Ex. B, hereto, Aff. of C. Johnson.*

e. In addition to the required expenditures for maintenance and replacement, the City must ensure that some funds remain in reserve for other expenses related to daily operational costs. For the fiscal year 2020/2021, those necessary reserves equate to 21% of Total Water and Sewer Fund Expenses, plus Transfers-Out, less Depreciation, or $5 Million. *Ex. B hereto, Aff. of C. Johnson.*

f. When all these maintenance, replacement, and operating reserves are accounted for, it turns out that the reserves in the City's water and sewer fund do not amount to an unreasonable surplus as alleged by Plaintiff but are actually *insufficient* to cover anticipated near-term necessary costs. Here is what the descriptions above break down to:

Balance owed on existing projects	$18,500,000
5 Year Maintenance Requirements	$15,000,000
5 Year Capital Replacements	$22,300,000
Total	**$55,800,000**
Plus Working Capital Reserve Amount Estimate	$5,000,000
Total Required Working Capital to Provide Water & Sewer Service for the near term	**$60,800,000**
Amount held in reserves as of June 30, 2020*	$58,800,000
Total *Deficiency*	**$2,000,000**

**See Affidavit of C. Johnson, Ex. B hereto.*

g. The City's Water and Sewer Proprietary Fund has had operating losses for every single year as of June 30 going back to 2014 as follows:

2014 -$1,312,668
2015 -$2,919,253
2016 -$2,602,133
2017 -$1,376,493

2018 -$2,211,978
2019 -$1,348,032
2020 -$3,279,232

These losses have been offset by capital contributions from developers and investment value increases on prior savings (the market went up), which have allowed the City to maintain the same level of service and to continue engaging in capital improvements even though it was not actually charging—for any of the years relevant to this case—its rate payers enough in rates to cover the cost of operations. *Aff. of C. Johnson, Ex. B.*

h. And for this Court's purposes, it is going to prove to be impossible to identify all payers of the City's utility bills during those relevant years. Approximately 84% of the City's utility bills are addressed to "Occupant" and not to a named individual, and there is no specific data base from which a list of payers can be compiled, because the City does not track who pays utility bills. Each account, and each quarterly bill payment, would have to be reviewed to determine whether a payer can be identified. However, each one of these roughly 360,000 payments (the total over six years) would have to be checked, individually. Just to review payments made during 2020 and 2019 it is estimated that one person, fully dedicated, without any vacation, would need almost 14 years to reconstruct payments on each account (15,697 accounts multiplied by 1 hour and 50 minutes per account). *See Aff. of T. Glenn, Ex. D hereto.*

i. In fact, maybe the best example of the extent of the degree of difficulty here is Plaintiff himself. He has, perversely, refused to provide proof of payment of his own utility bills over the years, leaving the City to search for those on its own; the City has been unable to determine who made payments on the account associated with Plaintiff's address during the entire relevant time period. *See Plaintiffs Discovery Responses, Ex. C, hereto, and the Aff. of T. Glenn, Ex. D, hereto.* Basically, we do not even know that Plaintiff would get a refund

in this case.

j. It appears that Plaintiff is at this point asserting a $13 million aggregate overcharge (see page 2 of Plaintiff's motion). As explained above, Plaintiff will not be able to show *any* sort of overcharge, but even if he could, that breaks down to an extremely small amount for people like Plaintiff. Using Plaintiff's assumption of the number of payers (23,009, on page 19 of Plaintiff Brief in Support) but eliminating payments made by the top 100 payers (who make up 13.4% of all payers and who would receive on average $17,420 each from a $13 million refund to rate payers as shown in *Ex. D)*, the named Plaintiff and the residential customers who during 2020 represented 57.8% of the total average yearly billing actually would on average only receive $328 each (57.8% X $13 million divided by 22,900). And that is assuming they could prove they made payments for the entirety of the class period. But unfortunately for Plaintiff, the more likely provable scenario only includes the last two years of payments, because that is as far back as the City can go to try to ascertain who made payments (even if it would take 14 years to do so).

k. Again this is an exercise in futility, since according to the City's CFO, Carl Johnson, the amount charged by the City for water and sanitary sewer service as of June 30, 2014 has been insufficient to cover the costs of service. *See Ex. B hereto.* So, there has been no overcharge during any of the relevant period—in fact, there actually has not been *enough* of a charge to cover costs, and the proposed class would be entitled to no refund.

l. Finally, during the relevant time period, ownership of 7,154 real property parcels in the City has changed hands. *See Aff. of M. Lohmeier, Ex. F.* The City does not maintain forwarding address records of former real property owners who no longer pay utility bills. See *Ex. D.* As a result, a substantial portion of the proposed putative class quite possibly cannot be properly identified and/or located.

4. Plaintiff's Motion for Class Certification should be denied because:

a. Plaintiff has not shown or otherwise proven that he, himself, in fact paid the water and sewer bills complained of such that he is capable of maintaining the cause of action even for himself, so he is certainly not qualified to represent the proposed class;

b. Plaintiff will not fairly and adequately assert and protect the interests of the class where his claims are *de minimis* as compared to the top 100 commercial and industrial users that are much larger consumers, and *where his claims are contrary to the best interests of other rate payers who will be required to make the same contribution to the system again in addition to paying Plaintiff and his attorneys if Plaintiff is successful, given the anticipated deficit in the water and sewer fund following the expected and planned improvements*;

c. The class has not been sufficiently well-defined, and the members not sufficiently well-identified, such that a reasonable estimate of the number of members can be determined where Plaintiff has failed to demonstrate that non-owner utility customers (such as tenants, non-owner family members, and trusts) are capable of identification, or that the over 7000 former real property owners can be located; and

d. Plaintiff has not established that a sizeable number of class members have suffered an actual injury, as the rates being charged going back to 2014 have been insufficient to cover the operating expenses of the system, and therefore there has been no overcharge as alleged by Plaintiff. Nor are the City's current reserves, which Plaintiff seeks to have refunded, unreasonable given that the current replacement value of the City's water and sanitary sewer system is approximately $950 Million Dollars, and further given that over the next five years approximately $60.8 Million will be spent to maintain, improve, and run the systems, and the fund currently holds only $58 Million in cash and investments as explained above.

5. Essentially, Plaintiff's complaint amounts to nothing more than a difference of opinion with

the City as to how the City should plan and charge for capital improvements. That is not an actionable claim and is not properly before this Court. *See* opinions from similar cases where the dismissals were upheld by the Court of Appeals, attached as Ex. I hereto.

WHEREFORE, Defendant prays the Court will deny the Motion for Class Certification, and that the Court issue such other Orders as it deems necessary including a reasonable amount for attorney fees so wrongfully sustained in responding to Plaintiff's Motion.

BRIEF IN SUPPORT

Plaintiff spends a substantial portion of his Brief in Support defending the basis for his suit against the City. This is understandable, because if there is no valid underlying cause of action, then there is no basis on which to certify the class, and the motion for class certification should be denied. *Zine v Chrysler Corp,* 236 Mich App 261, 287; 600 NW2d 384 (1999). Also important is whether the objective criteria by which class membership is to be determined have been met by the evidence. *Michigan Ass'n of Chiropractors v Blue Care Network of Michigan, Inc.*, 300 Mich App 577, 590; 834 NW2d 138 (2013). In this case, not only is there no valid underlying cause of action, but Plaintiff himself is a prime example of the fact that there is no objective basis upon which class membership can be determined.

The City acknowledges that the "court should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings." *Henry v Dow Chemical Co.,* 484 Mich 483, 488; 772 NW2d 301 (2009). Therefore, the City will not waste the Court's time by responding, point by point, to the multitude of misstatements or misrepresentations of fact, or to the lack of full disclosure and candor to the Court contained in Plaintiff's Brief in Support, except as absolutely necessary. So, in the interest of saving time and for issue preservation purposes only, due to non-compliance with MCR 2.109(E)(5), the City requests the Court strike Plaintiff's motion and order such other sanctions as permitted by MCR

2.109(E)(6). The City also objects to the consideration of all of Plaintiff's factual assertions to the extent they are misstatements and/or taken out of context and/or present an inaccurate depiction of the facts and/or are improperly documented.

As to what the real issue before the Court, class certification, the City avers that Plaintiff's Motion for Class Certification should be denied because Plaintiff is not capable of maintaining the cause of action as an individual because there is no indication that he can prove *he* has paid the water or sewer bills that are the sole focus of the Complaint for the entirety of the class period. Further, as a residential property owner, his claim is *de minimis* as compared to the larger users of the system. Additionally, Plaintiff has no apparent plan or ability to identify members of the class who may or may not be property owners, which factors against his fitness to represent their interests.

These are all fundamental failings in Plaintiff's position before the Court even considers that Plaintiff's claims must eventually fail because there is no actual injury where the rates complained of are presumed valid, and where Plaintiff will not be able to prove otherwise—especially where the reserve amounts at issue are exceeded by needed capital improvements and maintenance. For the same reason, any claim by Plaintiff that the rates charged were in excess of the amounts required to operate the system will fail. This is not a case worthy of class certification, and Plaintiff's motion should be denied.

1. *Plaintiff is unqualified to represent the purported class, and therefore his motion for class certification must fail.*

Before getting to whether Plaintiff has met the applicable court rule requirements for maintaining a class action, the Court must consider whether or not Plaintiff, on his own, can maintain an individual cause of action. If he cannot, he is "unqualified to represent the purported class". *McGill v Automobile Ass'n of Michigan,* 207 Mich App 402, 408; 526 NW2d 12 (1994).

In this case, Plaintiff has failed to come forward, despite the City's quite reasonable

request that he do so (see Ex. C - Responses to Discovery Requests), with proof that he actually paid the utility fees about which he complains. The City's receipt records only go back two years. Without such proof, Plaintiff has no proof that potential recoverable damages for the entire proposed class period. Just like the *McGill* plaintiffs who claimed the potential for harm (but no actual harm) because they were "afraid" of being sued but had not actually been sued, Plaintiff here has not shown he has suffered an actual damage relating to the actual payment of the utility bills for the class period. Like the *McGill* Court, this Court should find that a plaintiff who cannot or will not establish his own injury is unqualified to represent the purported class and should deny his motion to certify the class.

The fact that Plaintiff cannot or will not prove that he himself has paid all the utility charges about which he complains is also a tell-tale sign of another problem with class certification in this case: the lack of evidence needed to satisfy the objective criteria by which the class is defined. Hypothetically speaking, and given Plaintiff's particular scenario, the class could extend to any third person or entity that has a legal interest in a form of payment (bank account, credit card) utilized by another person or entity to pay a utility bill—even where the third person or entity has no legal obligation to pay the utility bill and no legal interest in the property being served by the utility for which the bill was issued. Think, for example, of a **landlord** whose tenant is responsible for the utility bills, or the **mother/property owner** whose utility bills have been paid by the adult children who still live with her, or the adult child whose **parent's** name still appears as co-owner of the checking account from which utility bills have been paid even though the adult child is the only individual contributing to the account. Surely, the intent is not to include as a potential injured party and as a part of the class the landlord, mother/property owner, or parent who has not been specifically injured by paying a utility bill for water and sanitary sewer service. And yet, in this case, unfortunately, Plaintiff would have the Court do just that, expanding the class to

include those individuals and entities even if they cannot prove they paid a utility bill. This should not be permitted.

2. Class certification should be denied because Plaintiff will also not be able satisfy all of the enumerated MCR 3.501(A)(1) requirements.

Plaintiff also will not be able to satisfy all the requirements for class certification enumerated in MCR 3.501(A)(1). *A & M Supply Co. v Microsoft Corp.*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002). The five factors from MCR 3.501(A)(1) are:

> (a) The class is so numerous that joinder of all members is impracticable;
> (b) There are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) The representative parties will fairly and adequately assert and protect the interests of the class; **and**
> (e) The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [Emphasis added].

These conditions are often referred to as "numerosity, commonality, typicality, adequacy, and superiority." *Henry v Dow Chem. Co.*, 484 Mich 483, 488; 772 NW2d 301 (2009). Please note because of the use of the word "and", *all* the factors must be satisfied.

a. <u>Numerosity</u>

There is no particular number of members necessary, nor need the number be known with precision, "as long as general knowledge and common sense indicate that the class is large." *Zine v Chrysler Corp.,* 236 Mich App 261, 288; 600 NW2d 384 (1999). However, the class must be sufficiently well-defined and the members sufficiently well-identified that a reasonable estimate of the number of members can be determined. *Id.* **The plaintiff must also establish "that a sizeable number of class members have suffered an actual injury."** *Duskin v Department of Human Services*, 304 Mich App 645, 653; 848 NW2d 455 (2014).

This case deals with utility rate payers in the City. Obviously, there are a lot of those—

although, ironically, Plaintiff is being shy about proving that he is one of them—so the number is not the issue. The issue is the lack of any injury, since none of those rate payers have been paying a utility rate that is actually sufficient to cover yearly operational costs, and/or the expected maintenance and capital improvement costs, thereby obviating the claim that somehow the rate payers have been overcharged (or subject to an illegal tax). Because—regardless of their number—there can be no reasonable basis under these circumstances to suggest that the proposed class members have suffered an actual injury, the motion for class certification should be denied.

b. Commonality

The second factor, a common question of fact or law that applies to the entire class, does not require all issues in the litigation to be common; it merely requires the common issue or issues to predominate over those that require individual proof. *A & M Supply Co.*, *supra* at 599. This also relates to "the fifth factor [superiority] in that if individual questions of fact predominate over common questions, the case will be unmanageable as a class action." *Zine*, *supra* at 289. The amount of damage need not be uniform as long as the trial court has some basis for concluding "that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member." *A & M Supply Co.*, *supra* at 600.

In *Hill v City of Warren*, 276 Mich App 299, 302; 740 NW2d 706 (2007), a class action was initiated after the City planted silver maple trees that quickly began to encroach into plaintiffs' adjacent private property. The roots obstructed sewer pipes, made sidewalks uneven and dangerous, and destroyed the surface of plaintiffs' lawns. *Id.* When challenging class certification, defendant City asserted that the homeowners sustained a wide variety of damages to their properties and, therefore, there was no common question of fact or law. *Id.* at 311. The Court

disagreed, finding that class certification was appropriate, reasoning that the "individualized fact-finding would concern the *amount* of damage, not the *existence* of damage." *Id.* at 312. The Court further found that since the trees were the cause of the common injury, the amount of damage from that injury need not be uniform. *Id.*

This case is not like *Hill*, in that the existence of damage is very much individualized to each proposed class member. Plaintiff has suggested that the "common" fact is that the proposed class members have paid utility bills. But even as to payers who could prove that they have paid utility bills, there will be serious and varying issues of proof of any damage on an individual basis, given the fact that more than 7,000 properties in the City have changed ownership, and the City cannot go back farther than two years to determine who paid a bill. Just based upon the number of transfers of ownership, it should be expected that the amount of alleged overcharge can vary wildly. And if the claim is "everyone" was overcharged, no member of the proposed class is going to be able to show any sort of injury during the relevant time frame. During the last seven (7) years, the rates charged have been insufficient to cover on-going costs of the system, so every rate payer is going to have a problem showing the "*existence* of damage". For this reason, the class certification motion should be denied.

c. <u>Typicality</u>

Under the third factor, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." MCR 3.501(A)(1)(c). Factual differences between the class members' claims are not inherently fatal to certification, but their claims must share a legal theory and "core of allegation". *Neal v James*, 252 Mich App 12, 21, 651 NW2d 181 (2009), *rev'd on other grounds, Henry v Dow Chemical Co.*, 484 Mich 483 (2009). As explained in *Neal*, typicality:

> directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." While factual

> differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and ... [be] based on the same legal theory." In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation". [Citations omitted].

This case is much different from the *Hill v City of Warren*, *supra*. at 313, where the representative plaintiff and the class members all shared the same legal claims of trespass-nuisance, negligence, and governmental taking without due process. When looking at this third factor, the Court should first consider that the Plaintiff in this case is refusing to provide basic information to prove he has an actionable claim and presumably would not be a typical putative class claimant seeking redress. He does not have a "common 'core of allegation'" with the proposed class and is, therefore, not like the representative plaintiff in *Hill.* The proposed representative Plaintiff has a distinct and separate hurdle that he has to overcome—proving that he in fact has an actual injury.

The Court should also take notice that under the City's practice – with a bill being addressed to "Occupant" in most cases, and no obligation on the actual property owner to pay the utility bill – there are an unidentifiable number of persons and/or entities who are in Plaintiff's proposed class and who never actually paid a utility bill, and therefore cannot make the same core allegations as those non-owner persons or entities who did pay a utility bill. Plaintiff's motion to certify a class with an unknown number of non-typical litigants should fail.

d. <u>Adequacy</u>

The fourth factor requires the trial court to scrutinize whether the representative parties will fairly and adequately assert and protect the interests of the class. *A & M Supply Co., supra* at 601. To prove this factor, a plaintiff must show two components. First, the class representative must share common issues and interests with the unnamed members. *Northview Const. Co. v. City of St. Clair Shores*, 395 Mich 497, 509; 236 NW2d 396 (1975). Second, the court must be assured that the representative will vigorously prosecute and protect the rights of the class

through qualified counsel. *Id.* The adequacy of representation requirement is fulfilled by a representative who has an interest in a claim that is typical of the remaining class claims. *Id.*

In *Northview*, the Court found that the representative plaintiffs possessed claims typical of the class of those persons required to pay excess building permit fees under the illegal amendments to the City's Building Code. *Id.* at 509-510. The Court reasoned that each claim "raises a common issue concerning the legality of the building permit fees and each claim can be satisfied by a monetary refund." *Id.* at 510. The Court further held that "(a)fter the merits are resolved the court should be able to set up a simple procedure for determining the eligibility and individual amount of relief due each class member." *Id.*

In this case, however, there is an issue as to whether the Plaintiff can prove he has even paid a water or sewer bill. Because of this, his claims would not be typical of other class members, and the motion should be denied. Additionally, the Plaintiff has no factual evidence supporting his claim of adequacy of representation, except an erroneous, self-serving affidavit by the non-fact witness attorney of record in this case, which is of questionable propriety given MRPC 3.7. The attorney of record's alleged experience (per the affidavit) is based on non-binding, non-precedential trial court level decisions in other cases which are distinguishable because they do not address the issues in, problems with, and legal arguments regarding class certification being raised by the City *in this case.*

Further, attached as Exhibit J is a decision in the matter of *Greenfield v Farmington Hills,* where similar issues to the issues raised in this response were decided upon by the Court, with the Court *denying* class certification. The Plaintiff's position as a proper plaintiff is unproven, and he should not be deemed as even remotely acting in a manner that gives reasonable assurance that he will protect the interests of the class.

e. <u>Superiority</u>

The final factor asks "whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action," the primary concern being that of practicality and manageability. 3.501(A)(1)(e). Under MCR 3.501(A)(2), the trial court is explicitly required to consider a number of subfactors in making its determination regarding the fifth factor. The Michigan Supreme Court has explained that this fifth factor is "essentially the same" as the "convenient administration of justice" consideration required under former GCR 1963, 208, and it is essentially a practicability test. *Dix v American Bankers Life Assurance Co. of Florida*, 429 Mich 410, 413-414; 415 NW2d 206 (1987). Furthermore, because "almost all claims will involve disparate issues of law and fact to some degree, the relevant concern here is whether the issues are so disparate as to make a class action unmanageable." *Id.* at 419.

In addition, there are other factors to consider which were set forth in *A & M Supply Co. v Microsoft Corp.,* 252 Mich App 580, 602–03; 654 NW2d 572 (2002):

> To determine whether a class action is a superior form of action, a trial court must consider:
> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> (ii) adjudication with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
> (c) whether the action will be manageable as a class action;
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions. [footnote omitted]

In this case, sub-factors (c), (e) and (f) should be especially considered.

Even if Plaintiff manages to show facts in support of an actual injury in this case, this Court should determine that *the potential injury to putative class members is not large enough in relation to the expense and effort of administering this case as a class action.* This is particularly true when, as in this case, the water and sewer system has been operating at a loss during the proposed class period and it is impossible to identify all payers of the City's public water and sanitary sewer bills.

In *A & M Supply Co. v Microsoft Corp.*, 252 Mich App at 641-642, the Court reversed the decision of the trial court to grant class certification, explained how variations between members of a class can make a class action inappropriate:

> The class, if certified, would likely be immense, numbering in the hundreds of thousands. While the size of the class and other factors certainly suggest that joinder would be impracticable and that a number of the factors favoring certification in MCR 3.501(A)(2) exist, the paradox we have discussed makes the many variations between class members problematic when it comes to proving actual damages. . . . MCR 3.501(A)(2)(c) suggests that *when a proposed class action is unmanageable, a trial court should deny class certification*. [Emphasis added].

The numbers of potential claims in this case are just as immense. City received 59,400 payments just during calendar year 2020. *See,* Aff. of T. Glenn, Ex. D. Assuming and multiplying similar numbers of payments for each of the six years claimed by Plaintiff, and then factoring in determinations of the identity of the actual payers on each account and the work necessary to determine what percentage, if any, each payer would be entitled to recover from any potential total award, the result is a staggering and unmanageable undertaking, and the associated cost is unjustifiable.

The *A & M Supply* Court also discussed the problems when the proposed class is "fluid" like the proposed class in the present case. Similar to the situation that Plaintiff proposes here,

where the class would be comprised of all rate payers in the City, the *A & M Supply* Court analyzed the unmanageability of a case where the proposed class would have included all residents in the State. This Court in *A & M Supply*, 252 Mich. App. at 623-624, astutely recognized and explained:

> First, the trial court found that the proposed class was a "fluid group," making it virtually impossible to determine who actually was in the class.[Footnote Omitted] For example, though the plaintiff claimed that proving and quantifying residency during the period defined for the class would be possible, the trial court questioned how the parties could account for people who had lived in the state but had moved, people who worked in this state but lived elsewhere, and the myriad other situations a proposed class of that size posed. [Footnote Omitted] As the trial court put it, dealing with the paperwork would be "staggering." [Footnote Omitted]
> . . .
>
> Consequently, the trial court denied the motion for class certification, resting its decision on the difficulty of defining the class and proving damages.

Ascertaining the group of water and sewer rate payers in the City over a six-year period would be just as difficult as accounting for everyone who lived in the State even though the City's population is less. This is because the proposed class is just as fluid, but with two less "guarantors" of proper identification. The City has experienced a substantial number of transfers of ownership of property since 2014, and even residency or property ownership does not or would not guarantee that *any particular person* paid a water or sanitary sewer bill. Plaintiff has made no proposal to ascertain and identify who paid each of the water and sewer bills each quarter during this time-period, because there is no real way to do so.

Even if there was a way to ascertain who sold and purchased property in the City during the six years at issue in this case, and where those who sold had moved to and are presently located, these efforts still will neither reveal who has *paid the bills* in situations where tenants or other parties did so for one reason or another, nor where those rate payers are currently located for purposes of class action notices and awards, if any.

This raises another issue because, even if there were a way to create a list of payers within a reasonable amount of time (keeping in mind it is estimated that it will take one person

14 years to go through two year's worth of bills per the T. Glenn Affidavit, Ex. D hereto), Plaintiff has not proposed or even suggested a methodology to mete out any recovery. This is another reason supporting this Court's denial of class certification in this case, as the Court explained in the *A & M Supply* case, when it wrote:

> Nevertheless, the flaw in the plaintiff's calculations boiled down to the variations in the behavior of the direct purchasers, that is, the infant formula retailers. With so many different retailers, each with individual economic constraints and interests, the plaintiff's expert learned that there was no consistent pass-on rate, even at the same retailer over time. Even if the expert could have calculated the pass-on rate for the individual retailers, that enormous task would have destroyed the efficiency a class action otherwise provides.

A & M Supply, 252 Mich App at 630.

In the present case, both the differences in how much one rate payer may have paid versus another based on the amount of usage (think elementary school vs. household on 2 acres with 5 teenagers vs. 90-year old widower in an apartment vs. 50 tenant office building vs. industrial property that uses water in its operations) and the potential differing time periods (ranging from 1 quarterly bill to 24 quarterly bills, and anywhere in between) significantly affect the amount of damages that would have to be calculated on an individual basis, and as such these factors give rise to the type of "enormous task [that] would . . . destroy [ ] the efficiency a class action otherwise provides" that the Court described in the *A & M Supply* case.

Also, while Plaintiff has alleged that the individual class members may be entitled to $565 per claim (before fees and costs) on page 19 of his Brief, this number is overly simplistic and demonstrably false. Even if one accepts the claimed amount of overcharge (which the City does not), Plaintiff bases this number on 23,009 rate payers,[1] which when accounting for the 100 largest rate payers means that the remaining 22,909 payers would receive substantially less than alleged, and also wrongly assumes that there has been absolutely no change in who has been

[1]$13,000,000 divided 23,009 equals $565.

paying the rates for each property over the claimed six-year period.

It also wrongly assumes that every rate payer has used the same amount of water and sanitary sewer capacity such that each rate payer's bill is exactly the same. Plaintiff's calculations essentially and falsely assume that once a person or business moves into the City, that person lives forever, the business never fails, and no one ever moves out, and also every user's bill has been the exact same amount as everyone else's bill for every quarter that they have lived or operated their business in the City. Further, while Plaintiff would have the Court believe that everyone will get something, the reality is that the larger users (e.g. the schools and large commercial/industrial property owners) would get the majority – making the time and money spent to calculate out the refund to an individual household owner (and the majority of claimants) ludicrous. In *A & M Supply*, 252 Mich App at 641-642, the Court concluded by holding:

> . . . the many variations between class members [is] problematic when it comes to proving actual damages. In short, this case has all the hallmarks of being unmanageable. . . . MCR 3.501(A)(2)(c) suggests that when a proposed class action is unmanageable, a trial court should deny class certification. Though the trial court was willing to accept the task of handling a case this large and complex, we are left with the definite feeling that it made a mistake when it concluded that the plaintiffs had a satisfactory method of demonstrating that a class action was the superior form of adjudicating this dispute.

Similarly, in this case, "the many variations between class members [is] problematic when it comes to proving actual damages." *Id.*

In short, Plaintiff's recovery calculations are based upon the false assumption that every rate payer has paid the same amount over the same amount of time, and never moves or dies. Moreover, as reflected in the T. Glenn Affidavit, it is estimated that it would take one person approximately 14 years to review the accounts for the last two years to ascertain which rate payers, and the City is without the ability to identify the payers before that. Even if identifying all the payers could be accomplished, Plaintiff has failed to address the expenses and unmanageability of ascertaining the differentials between rate payers based upon usage and

period of usage, and figuring out the amount of any award which should be delved out based upon those differentials.

CONCLUSION AND REQUEST FOR RELIEF

Plaintiff has failed to meet the requirements for certification of the proposed class. His claims are contrary to the known fact that the City's Water and Sewer proprietary fund has been operating at a loss since and including 2014. The City's utility rates are not taxes, they do not exceed the costs of operation of the system, and they have been established fairly and in order to pay for expected and necessary maintenance of the water and sanitary sewer systems and capital improvements thereto. And while Plaintiff has taken great pains to list *ad nauseam* a plethora of other class action cases where certification has been granted, those cases are dissimilar in nature to cases that have been recently held properly dismissed and most likely did not involve a proposed representative Plaintiff like this one, who refuses to provide proof he paid the utility bills during the class period.

Further, there is no reasonable ability to identify the proposed members of the class where the City's utility accounts are associated with addresses and over 7000 properties in the City have changed hands since 2014. The time and expense it would take to identify payers far outweighs any potential recovery. And while Plaintiff argues that only service addresses are necessary, this ignores the fact that a substantial number of rate payers no longer live in the City or own property in the City, or that the person who receives the notice at an address may not actually be the person who pays the utility bills. And all of this assumes that Plaintiff has a viable cause of action, which he does not. The Plaintiff's Motion for Class Certification should be denied.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

DATED: February 26, 2021

/s/ Stephanie Simon Morita
Attorney for Defendant
27555 Executive Drive, Ste. 250

Farmington Hills, MI 48331
(248) 489-4100
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(P53864)

PROOF OF SERVICE

I certify that on February 26, 2021, the foregoing document was served on all parties or their counsel of record through the Court's Efile system.

/s/ Dawn Hallman

EXHIBIT LIST

A. Affidavit of B. Croy

B. Affidavitt of C. Johnson

C. Plaintiff's Discovery Responses

D. Affidavit of T. Glenn

E. Top 100 Customers and Billed Usage

F. Affidavit of M. Lohmeier

G. *[Intentionally Omitted]*

H. *[Intentionally Omitted]*

I. Opinions from Court of Appeals

J. Order Denying Motion for Class Certification in *Greenfield v Farmington Hills*

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

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AFFIDAVIT OF BENJAMIN L. CROY

STATE OF MICHIGAN)
)
COUNTY OF Oakland)

I, Benjamin L. Croy, depose and state as follows:

1. I am a 1996 graduate of the University of Michigan, with a Bachelor of Science in Civil and Environmental Engineering.

2. Continuously since and including 2001, I have been a licensed Professional Engineer in the State of Michigan.
3. I have over nineteen years of experience in the water and sewer industry and am currently the City Engineer for the City of Novi.
4. In my position as the City Engineer, I am responsible for the sanitary sewer disposal systems and the water distribution system.
5. In my position, I am responsible for the asset management of City of Novi assets which the City owns or operates in the City of Novi, which includes horizontal assets (e.g., water mains and sanitary sewers) and vertical assets (e.g., water tower and sewage retention basin).
6. The horizontal assets located in the City of Novi consists of more than 361 miles of water mains, more than 289 miles of sanitary sewers.
7. The vertical assets located in the City of Novi includes a water storage tank with 1.5 million gallons of storage capacity and a one-million-gallon underground sewage retention basin.
8. That the total replacement value of the horizontal water and sanitary sewer system assets exceeds $900 Million.
9. That the total replacement value of the vertical water and sanitary sewer system assets exceeds $50 Million.
10. I estimate that the reserves needed just to maintain the both the sanitary sewer and water systems over the next 20 years at the desired level of service is more than $26 Million.
11. I estimate that the reserves needed just to maintain the both the sanitary sewer and water systems over the next 10 years at the desired level of service is more than $20 Million.
12. I estimate that the reserves needed just to maintain the both the sanitary sewer and water systems over the next 5 years at the desired level of service is more than $15 Million.

FURTHER, AFFIANT SAYETH NOT.

BENJAMIN L. CROY

Subscribed and sworn to before me on
this 23 day of February, 2021

Lisa De Meo

Notary Public, Wayne Co, MI
My Commission Expires: 1-10-2022

LISA DE MEO
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Jan 10, 2022
ACTING IN COUNTY OF Oakland

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

KICKHAM HANLEY PLLC
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(248) 489-4100

AFFIDAVIT OF CARL JOHNSON

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I, Carl Johnson, depose and state as follows:

1. The information in this Affidavit is based on my personal knowledge and review of materials. I am competent and able to testify regarding the information in this Affidavit. I declare

under the penalties of perjury that this Affidavit has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

2. I am a 1988 graduate of Michigan State University, with a Bachelor of Arts in Accounting.

3. Continuously since and including December 3, 1991, I have been a licensed Certified Public Accountant in the State of Michigan.

4. I have over 32 years' experience in governmental accounting and am currently the City of Novi CFO/Finance Director/Treasurer, a position I have held since January 2014.

5. In my position as the City of Novi CFO/Finance Director/Treasurer, I am responsible for preparing the City's budgets and capital improvement plans.

6. The City's Water and Sewer Proprietary Fund has had operating losses for every year as of June 30 going back to 2014 as follows:

2014	$1,312,668
2015	$2,919,253
2016	$2,602,133
2017	$1,376,493
2018	$2,211,978
2019	$1,348,032
2020	$3,279,232

The losses have been offset by capital contributions from developers and investment value increases (the market went up) which allowed the City to maintain the same level of service and continue its CIP even though it was not charging enough in rates to cover the cost of operations.

7. The water and sewer variable unit rates per 1,000 gallons charged by the City for the years (effective August 2) at issue were:

	Water	Sewer
2013	$3.86	$4.25
2014	$4.13	$4.30
2015	$3.05	$3.40
2016	$3.20	$3.60

2017	$3.20	$3.60
2018	$3.26	$3.89
2019	$3.33	$4.01
2020	$3.40	$4.29

8. According to the City's 2020/2021 Capital Improvement Plan, within the next five (5) years approximately $11.6 Million will be needed for water distribution capital replacements and $10.7 Million will be needed for sanitary sewer capital replacements, for an approximate total of $22.3 Million which is in addition to maintenance needs. In addition to the 22.3 million, there is another approximately $18.5 million (balance remaining on projects) of capital replacements budgeted in fiscal year 2019/2020 that were not completed and will be completed in 2020/2021.

9. The 2020/2021 Budget, and as it relates to Water and Sewer Fund Expenses, shows total 2020/2021 operating expenses of $23.9 million, transfers out of $0, Depreciation $0 and capital expenditures of $3.8 million (City of Novi budgets on cash flow basis which means capital expenditures are budgeted and depreciation is not). The cash-flow budget shows a net use of cash in the Water and Sewer Fund of $1.1 million.

10. For the 2020/2021 fiscal year, necessary reserves of 21% of Total Water and Sewer Fund Expenses plus Transfers-Out, less Depreciation equates to $5 million, and are held in reserves to fund daily operational costs according to governmental accounting standards.

11. The current historical cost of the City's Water and Sanitary Sewer Systems is more than $240 million dollars, and the systems are 43.1% depreciated, representing a roughly $98 million dollar overall potential need, and the reserves on June 30, 2020, in the City's Water and Sewer Fund only total $58.8 million (total cash and investments).

12. The unrestricted net position noted in the June 30, 2020 Comprehensive Annual Financial Report for the Water and Sewer Fund of $68,522,700 does not represent the amount of reserves available in number 9 above, it simply represents the balance of the total net position in the Water and Sewer Fund that is not associated with net historical capital assets.

13. Under the circumstances, the City of Novi reserves as of June 30, 2020 are insufficient to cover the cost of known capital improvement requirements over the next five years, along with required maintenance needs and necessary reserves to fund daily operational needs.

FURTHER, AFFIANT SAYETH NOT.

CARL JOHNSON

Subscribed and sworn to before me on
this 25 day of February, 2021

Lisa De Meo

Notary Public, Wayne Co, MI
My Commission Expires: 1-10-2022

LISA DE MEO
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Jan 10, 2022
ACTING IN COUNTY OF Oakland

EXHIBIT C

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

WILLIAM NOFAR, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF NOVI, MICHIGAN
a municipal corporation,

Defendant.

Case No. 2020-183155-CZ
Hon. Nanci Grant

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PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED TO PLAINTIFF WILLIAM NOFAR

Plaintiff, by his attorneys, Kickham Hanley PLLC, states as follows for his Responses to Defendant's First Set of Interrogatories and Request for Production of Documents Directed to Plaintiff William Nofar:

GENERAL OBJECTIONS

1. Plaintiff prepared his responses in accordance with the instructions contained in

loan would be "beneficial to both funds." The City's FY 2019 financial statements, p. 46, show that the W&S Fund made "Advances to other funds" in the amount of $3,000,000. Persons having knowledge of this allegation include, but are not limited to, the City's own elected and non-elected officials and employees, and Plaintiff's expert witnesses.

20. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 11 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact.

Subject to his objections, Plaintiff states that Paragraph 4 of the Complaint provides as follows:

> Plaintiff has received water service ("Water Service") from the City and paid the Water Rates imposed by the City. State building codes, incorporated into state and local law, require structures which have access to a municipal water supply system to utilize that system.

This allegation has two parts. The part related to Plaintiff having received Water Service and paid the Water Rates is based on documents including, but not limited to, the City's own billing and payment records and bank records. Persons having knowledge of this allegation include, but are not limited to, Plaintiff and the City's own elected and non-elected officials and employees. The part related to structures being required to utilize a municipal water supply system is based on state building codes, state statutes, and City ordinances, including, but not limited to, the following:

The City requires all dwellings to be connected to the public sewer system and, by virtue of that connection, to pay the City's charges for sewer services. As an initial matter, MCL 333.12753(1) provides that "Structures in which sanitary sewage originates lying within the limits of a city, village

or township shall be connected to an available public sanitary sewer in the city, village or township if required by the city, village or township." Pursuant to MCL 333.12753(1), the City requires Plaintiff to utilize the City's sewer system (see City Ordinance Section 34-127) and, by virtue of that connection, requires Plaintiff to pay the Sewer Rates imposed by the City. *See* City Ordinance Section 34-147 (regarding enforcement of payment for sewer service through liens).

The same is true for the City's water system. State law imposes a uniform construction code that applies throughout the State and incorporates the international residential code, the international building code, the international mechanical code, and the international plumbing code.. *See* MCL 125.1504; MCL 125.1508a. The Michigan Residential Code explicitly requires all residential structures to connect to an available public water supply and sanitary sewer system:

> P2602.1 General. The water-distribution and drainage system of any building or premises where plumbing fixtures are installed **shall be connected to a public water supply or sewer system, respectively, if available.** [emphasis added

See also City Ordinance Section 34-21 (regarding enforcement of payment for sewer service through liens).

The Court of Appeals has held that where a person is required to connect to a public sewer, payment of sewer-related charges is not voluntary for purposes of determining whether the charges are "taxes" under the Headlee Amendment. *See, e.g., Meadows Valley, LLC v. Village of Reese*, 2013 Mich. App. LEXIS 1009 (2013) ("We agree that the charge is not voluntary, to the extent that one may not own property in the Village of Reese and not connect to the public sewer system. The ordinance requires all owners of 'houses, buildings, or properties used for human occupancy . . . ' to connect to the public sewer system. There is '[a]bsolutely no element of volition" involved."'). As Justice (then Judge) Markman observed in his dissent that ultimately was adopted by the *Bolt* Supreme Court majority:

> **City ordinances mandate that all property owners connect to the sanitary sewer** and it does not seem unreasonable to assume that Ordinance 925 will

> eventually be amended to impose the same requirement with respect to the newly separated storm sewer system. **The use of such indispensable services cannot be considered a matter of choice when there is a municipal monopoly and mandate over them.** The property owner wishing not to use the service, or to use another service, has no alternatives. **The charge is effectively compulsory.** [221 Mich. App. at 97 (emphasis added)][1]

21. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 14 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact. Plaintiff further objects because under MCR 2.309(A)(2), "[e]ach separately represented party may serve no more than twenty interrogatories upon each party." The City has served more than 20 interrogatories, and Plaintiff declines to answer the City's excess interrogatories.

22. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 15 of the Complaint.

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[1] In *Shaw v. City of Dearborn*, the court held that the City of Dearborn's charges for water and sewer services were voluntary because "each user of the city's water and sewer system can control how much water they use." However, the *Shaw* court did not consider whether Dearborn had an ordinance mandating the use of its water and sewer system. Here, City Ordinance Section 34-127 mandates that property owners connect to the sewer system. Moreover, *Shaw*'s holding conflicts with the Michigan Supreme Court's binding decision in *Bolt*, where the court adopted Judge (now Justice) Markman's dissent, which the Supreme Court effectively adopted, that water and sewer are "indispensable" services and their use cannot be considered voluntary. *Bolt*, 221 Mich. App. at 97.

30. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 45 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact. Plaintiff further objects because under MCR 2.309(A)(2), "[e]ach separately represented party may serve no more than twenty interrogatories upon each party." The City has served more than 20 interrogatories, and Plaintiff declines to answer the City's excess interrogatories.

31. Please identify all documents supporting the allegations and all persons having knowledge of the allegations made in paragraph 63 of the Complaint.

Response:

Plaintiff objects to this interrogatory because discovery is ongoing and it is impossible to identify all relevant documents or all persons with knowledge of a particular fact. Plaintiff further objects because under MCR 2.309(A)(2), "[e]ach separately represented party may serve no more than twenty interrogatories upon each party." The City has served more than 20 interrogatories, and Plaintiff declines to answer the City's excess interrogatories.

REQUESTS TO PRODUCE

1. Please provide all documents identified in the responses to interrogatories 1 through 31 of Defendant's First Set of Interrogatories Directed to Plaintiff William Nofar.

Response:

Plaintiff objects to this request because it is overbroad, unduly burdensome, harassing (as to documents related to Plaintiff's ownership of property outside of the City of Novi and Plaintiff's involvement in past litigation), and seeks documents that were created by the City or its agents, are in the City's possession or control, or are of public record.

Plaintiff declines to produce documents related to harassing interrogatories. Plaintiff will make copies of water and sewer rate making manuals available for review at Plaintiff's counsel's office. Upon information and belief, other responsive documents were created by the City or its agents, or are in the City's possession or control.

2. Please provide copies of all bank records since January 2010 showing payment to Defendant for water service and sanitary sewer service charges by Plaintiff William Nofar.

Response:

Plaintiff objects to this request because it is overbroad, unduly burdensome, and harassing. Plaintiff further objects because records of Plaintiff's payment for water and sewer service are already in the City's possession, and are available from its BS&A software and/or the City's own bank records. Plaintiff declines to produce documents in response to this request.

As to objections and legal matters only,

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff

Date: February 18, 2021
KH166954

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2021 I electronically served the foregoing document using the court's electronic filing system.

/s/ Kim Plets
Kim Plets

VERIFICATION

I declare, under oath, that I have reviewed Plaintiffs' Responses to Interrogatories Nos. 2, 3, 5, 6, 7, 8, 9, 10, 14, 15, 16, and 17 of Defendant's First Set of Interrogatories, and that, based upon my own personal knowledge, the answers contained therein are true to the best of my knowledge, information and belief.

I further declare that my counsel has advised me that the information and statements in Plaintiff's Responses to the remainder of Defendant's First Set of Interrogatories are based upon documents authored by the City or its representatives, and are true and accurate. Many of these statements are of a highly technical nature. I do not represent that I have acquired expertise in water and sewer rate-making methodologies. Based upon the representations of counsel, I believe that the responses are true and accurate.

William Nofar

Dated: 2-17-21

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

KICKHAM HANLEY PLLC
GREGORY D. HANLEY (P 51204)
EDWARD F. KICKHAM, JR. (P 70332)
Attorneys for Plaintiff and the Class
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RANDAL TOMA & ASSOCIATES, PC
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ROSATI, SCHULTZ, JOPPICH
& AMTSBUECHLER, P.C.
THOMAS R. SCHULTZ (P 42111)
STEVEN P. JOPPICH (P 46097)
STEPHANIE SIMON MORITA (P 53864)
Attorneys for Defendant
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Farmington Hills, MI 48331-3550
(248) 489-4100

AFFIDAVIT OF TINA GLENN

State of Michigan)
)
County of Oakland)

Tina Glenn, being first duly sworn, deposes and says:

1. I am the Assistant Treasurer for the City of Novi.

2. The City had the following number of utility accounts (water and/or sanitary sewer) and number of payments on utility bills as follows:

Calendar Year	# of accounts	# of payments
2014	15,103	59,166
2015	15,279	60,618
2016	15,428	59,373
2017	15,563	59,248
2018	15,664	59,088
2019	15,488	59,294
2020	15,697	59,400

3. A utility billing account is associated with an address and not a person.

4. If there has been a transfer of ownership and/or a change in tenancy, the billing department is not notified and the transferor or former tenant does not provide the City's utility billing department with a forwarding address.

5. Similarly, the receipting department who processes payments on utility bills does not track who pays the bills, and can only state whether a bill has been paid on an account.

6. Eighty-four percent of the billings are addressed to "Occupant" and not to an individual.

7. The City does not track who pays utility bills.

8. The City does not have restrictions on who can pay a utility bill.

9. Additionally, payments are made on accounts by someone other than the owner, such as a tenant or a non-profit company on behalf of an occupant (in cases of charitable payments).

10. I tried to ascertain the billing history on the named Plaintiff's utility account, and after spending one (1) hour and 50 minutes researching the account, could only ascertain who made 9 payments of the relevant 28 payments.

11. Information as to who made a payment prior to two years ago is not electronically available.

12. Multiplied by 15,697 accounts, I estimate is would take one person 28,778 hours (or 13.8 years assuming a 40-hour work week with no vacation time) just to reconstruct and/or confirm who made the payments on the accounts for the last two years.

13. The top 100 users of the City's water and sanitary sewer system accounted for 13.7 percent of the utility billing for 2020, or $3,407,634.53 of $24,937,059.35.

14. Of the 15,697 current utility customers, 13,214 are residential customers who during the calendar year of 2020 paid $14,410,775.53.

Further deponent saith not.

Tina Glenn
TINA GLENN

Subscribed and sworn to before
me in this 25th day of February, 2021.

Patricia Deering
Patricia Deering, Notary Public
Wayne County, State of Michigan
My Commission expires: 4/5/2025

PATRICIA DEERING
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Apr 5, 2025
ACTING IN COUNTY OF Oakland

EXHIBIT E

Top 100 Billed Customers
Friday, February 12, 2021
Period 01/01/20 - 12/31/20

Account Number	Customer Name	Service Address	Amount Billed	%
0031-30005-00-0	FOX RUN	41100 FOX RUN RD	$402,887.83	1.6%
0030-62553-00-0	FS ISLAND OAKLAND GLENS PROPERTY LL	42000 CAROUSEL DR	$242,259.34	1.0%
0027-00001-00-0	NOVI MEADOWS	26250 VIRGINIA AVE	$196,585.32	0.8%
0024-50320-00-0	ASCENSION HEALTH ALLIANCE MS #2	47601 GRAND RIVER AVE	$104,118.23	0.4%
0027-00002-00-1	OLD DUTCH FARMS II LLC	27000 NAPIER RD	$103,967.67	0.4%
0024-50319-00-0	ASCENSION HEALTH ALLIANCE MS #2	47601 GRAND RIVER AVE	$93,100.33	0.4%
0012-50004-00-0	HIGHLAND HILLS MOBILE PK	25600 SEELEY RD	$66,567.83	0.3%
0032-00027-00-0	LIFETIME FITNESS INC SITE 113	40000 HIGH POINTE BLVD	$63,278.94	0.3%
0014-00144-00-0	12 OAKS MALL MNGT OFFICE	27500 NOVI RD	$59,038.83	0.2%
0032-00003-00-1	SHERATON NOVI	21111 HAGGERTY RD	$49,689.06	0.2%
0011-39001-00-0	WALTONWOOD OF NOVI	27475 HURON CIR	$47,395.97	0.2%
0011-20058-00-1	TRILOGY HEALTH SERVICES, MS#9	41795 TWELVE MILE RD	$43,234.67	0.2%
0024-50158-00-1	ASCENSION HEALTH ALLIANCE MS #2	47601 GRAND RIVER AVE	$40,913.46	0.2%
0030-62542-00-1	LINDSEY PROPERTIES LLC	45077 W PONTIAC TRL	$39,154.47	0.2%
0012-01011-00-0	GRANITE REIT AMERICA	39600 LEWIS DR	$38,786.83	0.2%
0012-00054-00-0	COUNTRY COUSINS MOBILE HOME	26855 HAGGERTY RD	$38,247.62	0.2%
0030-62568-00-1	BROOKDALE SENIOR LIVING #00784	45182 WEST PARK DR	$36,866.49	0.1%
0011-48000-00-1	NOVI OAKS HOTEL LLC	27000 S KAREVICH DR	$35,609.02	0.1%
0014-00043-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, S.E. 70018241	$35,189.34	0.1%
0014-00091-00-1	HOTEL BARONETTE	27790 NOVI RD	$34,958.07	0.1%
0011-20030-00-0	NOVI 39450 MEDICAL PROPERTIES LLC	39450 TWELVE MILE RD	$34,742.99	0.1%
0032-00015-00-0	ESA MANAGEMENT SITE #0680	21555 HAGGERTY RD	$34,532.28	0.1%
0013-00005-00-1	RHEMA NOVI INC	24500 MEADOWBROOK RD	$32,220.74	0.1%
0021-10088-00-1	MEDILODGE OF NOVI	48300 ELEVEN MILE RD	$31,564.80	0.1%
0012-03001-00-0	ITC TRANSMISSION	27175 ENERGY WAY	$31,448.60	0.1%
0013-00028-00-0	MEADOWBROOK MEDICAL BLDG LLC	25500 MEADOWBROOK RD	$31,397.49	0.1%
0011-20027-00-0	BCORE SELECT RAVEN 1 TRS LLC	27477 CABARET DR	$31,218.99	0.1%
0012-00031-00-0	RESEARCH PARK OF NOVI I LLC	27175 HAGGERTY RD	$31,062.20	0.1%
0012-01040-00-1	HCP LAND LLC	30001 CABOT DR	$30,155.66	0.1%
0031-30014-00-0	RYDER SCS	39550 THIRTEEN MILE RD	$29,689.73	0.1%
0022-22001-00-1	OCCIDENTAL DEVELOPMENT, LLC	47400 HERITAGE DR	$27,214.16	0.1%
0011-20062-00-1	A123 SYSTEMS, LLC	27101 CABARET DR DR	$26,773.80	0.1%
0014-50192-00-1	LUNA PROPERTIES NOVI LLC	42875 GRAND RIVER AVE	$26,745.72	0.1%
0011-45020-00-0	TWELVE MILE CROSSING, LLC	44325 TWELVE MILE RD	$26,325.55	0.1%
0032-00042-00-1	NOVI INN & SUITES	21625 HAGGERTY RD	$24,936.43	0.1%
0011-20033-00-0	GA HC REIT II KEYSTONE MEDICAL	46325 TWELVE MILE RD	$24,597.62	0.1%
0021-49030-00-1	DOUBLE TREE NOVI	42100 CRESCENT BLVD	$23,768.34	0.1%
0031-00063-00-0	NOVI COMMUNITY SCHOOL DIST	24062 TAFT RD	$23,623.10	0.1%
0014-00040-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, N.W. 8400-884	$23,615.95	0.1%
0032-25006-00-1	CRYSTAL GLEN OFFICE CENTER	39555 ORCHARD HILL PL	$23,477.45	0.1%
0014-00145-00-0	NORDSTROM INC 235	27640 NOVI RD	$22,970.43	0.1%
0032-00025-00-1	RSM DEVELOPMENT & MANAGEMENT	39500 HIGH POINTE BLVD	$22,792.87	0.1%

Account Number	Customer Name	Service Address	Amount Billed	%
0024-50305-00-1	BOCO ENTERPRISES INC	46100 GRAND RIVER AVE	$22,359.80	0.1%
0024-50185-00-1	VARSITY LINCOLN INC	49251 GRAND RIVER AVE	$22,027.55	0.1%
0011-53001-00-0	MEADOWBROOK COMMONS	25075 MEADOWBROOK RD	$21,914.16	0.1%
0011-20044-00-0	NOVI HOSPITALITY	39675 TWELVE MILE RD	$21,844.18	0.1%
0024-02001-00-0	MAINSTREET PARTNERSHIP LLC	43155 MAIN ST BLDG 200\300	$21,646.83	0.1%
0024-50315-00-0	JW HOTELS NOVI LLC	27000 PROVIDENCE PKWY	$21,341.02	0.1%
0034-00152-00-0	MAPLE MANOR REHABILITATION CENTER	31215 NOVI RD	$21,244.78	0.1%
0021-49070-00-1	STELLER HOSPITALITY NOVI, LLC	26150 TOWN CENTER DR	$21,007.82	0.1%
0011-45022-00-0	TWELVE MILE CROSSING, LLC	44175 TWELVE MILE RD	$20,880.50	0.1%
0026-50005-00-0	TARGET STORES T-1465	27100 WIXOM RD	$20,874.06	0.1%
0021-49040-00-1	DARDEN RESTAURANTS 1330	43300 CRESCENT BLVD	$20,384.76	0.1%
0012-00043-00-0	EBERSPAECHER NORTH AMERICA	29101 HAGGERTY RD	$20,354.42	0.1%
0011-20061-00-1	HINO	45501 TWELVE MILE RD	$19,706.53	0.1%
0014-00051-00-1	U-WASH, INC	26100 NOVI RD	$19,636.32	0.1%
0030-72001-00-1	SOUTH POINTE CONDO ASSOC	1127 SOUTH LAKE DR	$19,265.46	0.1%
0011-20063-00-1	OCCUPANT - Anthology of Novi Senior Housing	42400 TWELVE MILE RD	$18,967.51	0.1%
0012-01042-00-1	MAGNA SEATING OF AMERICA	30020 CABOT DR	$18,859.26	0.1%
0011-45016-00-0	TWELVE MILE CROSSING, LLC	44125 TWELVE MILE RD	$18,746.44	0.1%
0024-03002-00-1	SPORTS CLUB OF NOVI	42500 NICK LIDSTROM DR	$18,405.22	0.1%
0024-50265-00-0	WEST MARKET SQUARE	47840 GRAND RIVER AVE	$18,353.49	0.1%
0013-00060-00-1	ATI ELECTRONICS	26999 MEADOWBROOK RD	$18,313.15	0.1%
0032-25004-00-1	JFK INVESTMENT CO LLC	39500 ORCHARD HILL PL	$18,271.00	0.1%
0011-20043-00-0	BURTON ENERGY GROUP	27355 CABARET DR	$18,195.40	0.1%
0024-03001-00-1	CITY OF NOVI ICE ARENA	42400 NICK LIDSTROM DR	$17,849.01	0.1%
0034-00066-00-1	WASHME PROPERTIES	21510 NOVI RD	$17,837.55	0.1%
0026-50010-00-0	CATHOLIC CENTRAL HIGH SCHOOL	27225 WIXOM RD	$17,805.82	0.1%
0032-25008-00-0	ESA MANAGEMENT SITE #4058	39640 ORCHARD HILL PL	$17,503.99	0.1%
0011-45010-00-1	TWELVE MILE CROSSING, LLC	44225 TWELVE MILE RD	$17,486.33	0.1%
0014-50064-00-1	MARTY FELDMAN CHEVROLET	42355 GRAND RIVER AVE	$17,347.02	0.1%
0024-20009-00-1	HIROSAWA AUTOMOTIVE	43500 GEN-MAR	$17,309.65	0.1%
0032-17999-00-1	GATE HOUSE/LANDSCAPING WALL	25000 BROOKTOWN BLVD	$17,216.89	0.1%
0034-00064-00-1	GUERNSEY FARMS DAIRY	21300 NOVI RD	$16,843.58	0.1%
0032-16999-00-1	KTM47-13343	23938 RIDGEVIEW BLVD	$16,779.72	0.1%
0014-00041-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, N.E. 70018246	$16,634.91	0.1%
0011-45018-00-0	TWELVE MILE CROSSING, LLC	44375 TWELVE MILE RD	$16,468.31	0.1%
0032-04004-00-1	HCP LAND LLC	39675 MACKENZIE DR	$16,399.92	0.1%
0014-00042-00-0	12 OAKS MALL MNGT OFFICE	MALL METER, S.W. 84068156	$16,399.47	0.1%
0021-49002-00-1	JFK INVESTMENT CO LLC	26200 TOWN CENTER DR	$16,324.78	0.1%
0014-00070-00-1	RED LOBSTER HOSPITALITY LLC	27760 NOVI RD	$16,276.66	0.1%
0011-50022-00-1	OUTBACK STEAKHOUSE INC	43455 WEST OAKS DR	$16,200.52	0.1%
0021-49025-00-1	NOVI TOWN CENTER	26060 INGERSOL DR	$15,905.19	0.1%
0024-00116-00-1	CITY CENTER PLAZA LP	25875 NOVI RD	$15,764.59	0.1%
0014-00044-00-0	MACY'S / FEDERATED DEPT STORES	27550 NOVI RD	$15,660.60	0.1%
0010-23002-00-1	METRO GROUP MANAGEMENT	43000 TWELVE OAKS CRESCENT	$15,644.67	0.1%
0031-41003-00-1	MAPLE PLACE SHOPPING CENTER	31190 NOVI RD	$15,626.09	0.1%
0021-83999-00-1	LIBERTY PARK	DECLARATION & 12 MILE SPK	$15,300.38	0.1%

Account Number	Customer Name	Service Address	Amount Billed	%
0021-10056-00-0	MARRIOTT CFRST STORE 311QM	42700 ELEVEN MILE RD	$15,224.81	0.1%
0024-50310-00-0	WELLTOWER OM GROUP LLC	26750 PROVIDENCE PKWY	$15,102.35	0.1%
0032-04001-00-1	HCP LAND LLC	39525 MACKENZIE DR	$15,045.71	0.1%
0012-01005-00-0	HCP LAND LLC	28001 CABOT DR	$14,982.45	0.1%
0021-49044-00-1	BLUE RIBBON RESTAURANT NOVI	43350 CRESCENT BLVD	$14,751.54	0.1%
0026-50013-00-0	WAL-MART STORES E LP 6657	27300 WIXOM RD	$14,619.55	0.1%
0014-00057-00-1	CHICK-FIL-A, INC	27750 NOVI RD	$14,522.33	0.1%
0012-23999-00-1	OCCUPANT - Dunhill park irrigation	20735 DUNHILL DR	$14,508.31	0.1%
0031-00071-00-1	CITY OF NOVI FINANCE DEPT	45175 TEN MILE RD	$14,471.59	0.1%
0021-49063-00-0	WAL-MART STORES EAST LP #5893	26090 INGERSOL DR	$14,287.17	0.1%
0011-62003-00-1	MAIN STREET VILLAGE APT II	25393 PENNSYLVANIA AVE	$14,119.96	0.1%
0024-50309-00-0	HEALTHCARE TRUST OF AMERICA #146201	26850 PROVIDENCE PKWY	$14,089.23	0.1%
				13.7%
			$3,407,634.53	13.7%

Total Billed 01.01.20 to 12.31.20 $24,937,059.35

EXHIBIT F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM NOFAR, individually and as, representative of a class of similarly-situated persons and entities,

Plaintiff,

Case No. 2020-183155-CZ
Hon. Nanci J. Grant

-vs-

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.

KICKHAM HANLEY PLLC
GREGORY D. HANLEY (P 51204)
EDWARD F. KICKHAM, JR. (P 70332)
Attorneys for Plaintiff and the Class
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
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RANDAL TOMA & ASSOCIATES, PC
RANDAL S. TOMA (P 56166)
Attorney for Plaintiff and the Class
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ROSATI, SCHULTZ, JOPPICH
& AMTSBUECHLER, P.C.
THOMAS R. SCHULTZ (P 42111)
STEVEN P. JOPPICH (P 46097)
STEPHANIE SIMON MORITA (P 53864)
Attorneys for Defendant
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100

AFFIDAVIT OF MICHEAL LOHMEIER

State of Michigan)
)
County of Oakland)

Micheal Lohmeier, being first duly sworn, deposes and says:

1. I am the City of Novi Assessor.

2. As the City of Novi Assessor I am responsible for tracking transfers of ownership of real property parcels within the City of Novi.

3. The City has 19,334 real property parcels.

4. For the calendar year 2014 through 2020, there were 7154 transfers of ownership of real property parcels on record with the City of Novi.

Further deponent saith not.

MICHEAL LOHMEIER

Subscribed and sworn to before
me in this 22 day of February, 2021.

PATRICIA DEERING
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Apr 5, 2025
ACTING IN COUNTY OF Oakland

Patricia Deering, Notary Public
Wayne County, State of Michigan
My Commission expires: 4/5/2025

EXHIBIT I

STATE OF MICHIGAN

COURT OF APPEALS

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., and WOODVIEW CONDOMINIUM ASSOCIATION, Individually and as Representatives of a Class of Similarly Situated Persons and Entities,

Plaintiffs-Appellants,

v

CITY OF WESTLAND,

Defendant-Appellee.

UNPUBLISHED
January 29, 2019

No. 339143
Wayne Circuit Court
LC No. 15-006473-CZ

Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates violated several provisions of law including MCL 123.141(1) and Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition. For the reasons set forth below, we affirm.[1]

[1] Because the trial court considered materials outside the pleadings, we will review the trial court's grant of summary disposition to defendant under MCR 2.116(C)(10). A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the

II. BACKGROUND

Defendant City of Westland (the City) operates and maintains a water and sewer system. By law, the rates charged to users of the system must be based on the water and sewer department's (the department) actual costs of providing those services to its inhabitants. Among the department's expenses is the amount it transfers to the City's general fund to cover its proportional share of the City's administrative costs.[2] Plaintiffs agree that the City may make such transfers to the general fund in order to compensate the City's other departments for the goods and services they render to the water and sewer department. However, plaintiffs maintain that the City has "grossly inflated" the costs of those goods and services by allocating a disproportionate amount of the City's administrative costs to the department. Plaintiffs allege that doing so violates the Headlee Amendment as well as MCL 123.141(3), common law ratemaking rules, and the City's Charter. Accordingly, plaintiffs seek a refund of what they deem to be overcharges paid in the previous six years, in addition to declaratory and injunctive relief.

Plaintiffs' claim rests largely on the testimony of their expert witness, James R. Olson, an analyst for MGT of America Consulting Group. MGT specializes in "indirect cost allocation" and primarily works with municipalities to identify "overhead" costs that can be allocated to specific departments. Olson reviewed the City's cost allocation sheet, the deposition testimony of City officials, and the City's balance sheet and budget. He took issue with the City's allocation methodology, asserting that it is not based on "actual cost data." For example, he pointed out that the City allocates 30% of its annual attorney fees to the department, but could not provide documentary support for that allocation. Similarly, Olson opined that the City improperly allocates 50% of the rent for the City's DPS garage to the water and sewer department and that the allocation should instead be based on the building's depreciation expense.

The City responds that Olson's testimony, while criticizing some individual allocations, failed to address, let alone establish, that the final rate charged was inconsistent with the department's *total* expenses. The City points out that Olson conceded that he did not perform a "full cost allocation study," meaning that, while Olson looked at certain individual categories of the City's cost allocation, he did not perform a complete analysis of the goods, services, and facilities provided by the City's general departments to the water and sewer department. Thus, Olson did not have an opinion as to whether the total amount of administrative costs allocated to

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> moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

[2] For instance, the City transfers water and sewer funds to the City's general fund to pay for a percentage of the operation of the City's IT Department, which provides services to the department.

the water and sewer department was reasonable. Nor did Olson perform a "rate study," which would have required him to identify all the department's expenses and identify the revenue necessary to operate the utility in a sound financial manner. Thus, Olson did not express an opinion on whether the actual rates were unreasonable in relation to the necessary revenue. In addition, he conceded that a 10 to 15% variation between budgeted costs and actual costs is reasonable.

Plaintiffs also claim that the City's calculation of water and sewer rates is improper because it includes an expense of $500,000 per year for future capital improvements and repairs. Plaintiffs do not dispute that the department's budgeting must include amounts to finance *current* capital improvements, but they assert that it is improper for the City to include sums for future, as yet unspecified capital improvements in its revenue requirements.

In the trial court, the parties filed competing motions for summary disposition. The City filed a response to plaintiffs' motion for summary disposition in which the City first disclosed Mark Beauchamp, president of Utility Financial Solutions, as an expert witness. In an affidavit, Beauchamp echoed Olson's conclusion that a full cost allocation study was necessary to verify the reasonableness of the administrative costs the City allocated to water and sewer department. He further averred that he reviewed and approved a revised cost allocation study performed by Deborah Peck, the City's budget director, which concluded that the department's actual administrative costs were always within 10% of the budgeted administrative costs. Plaintiffs then filed a motion in limine to exclude Beauchamp's and Peck's proposed testimony arguing that the City failed to timely disclose Beauchamp as an expert witness and that Peck's testimony was inadmissible because her revised allocation study was not in the record.

In June 2017, the trial court issued an opinion and order granting the City's motion for summary disposition, denying plaintiffs' motions for summary disposition, and denying plaintiffs' motion in limine. The trial court determined that plaintiffs failed to overcome the presumption that the City's rates were reasonable. The trial court also rejected plaintiffs' argument that the City's rates constituted a tax that was imposed in violation of the Headlee Amendment and MCL 141.91. Further, the trial court ruled that plaintiffs' Headlee Amendment claim was barred by the one-year statute of limitations set forth in MCL 600.308a(3). In denying plaintiffs' motion for in limine, the court stated that plaintiffs could move for an order compelling production of Peck's analysis, which would be a more appropriate remedy than striking the evidence. The court also determined that Beauchamp's analysis was reliable and that his explanation of methods used by the City would assist the trier of fact. The court concluded that both Peck and Beauchamp could serve as rebuttal witnesses to Olson.

III. ANALYSIS

A. REASONABLENESS OF RATES

MCL 123.141, *et seq.*, governs the sale of water outside territorial limits. Because the City purchases its water from the Great Lakes Water Authority,[3] it is a "contractual customer" under MCL 123.141(2). Accordingly, the City's water ratemaking[4] must comply with MCL 123.141(3), which provides that "[t]he retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service." However,

> MCL 123.141 does not alter the general standard of reasonableness applied by courts when reviewing utility rates. Because of the difficulties inherent in ratemaking and the limitations on judicial review, the phrase "actual cost of providing the service" as used in the statute does not mean exactly equal to the actual costs of providing the service. Accordingly, while a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required. [*Trahey v Inkster*, 311 Mich App 582, 597; 876 NW2d 582 (2015) (citations omitted).]

"Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Id.* at 594. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi v Detroit*, 433 Mich 414, 427; 446 NW2d 118 (1989). "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Id.* at 431. "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich App at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

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[3] MCL 123.141(1) provides that "[a] municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants." The City has historically purchased its water from the city of Detroit; the GLWA was formed during the city of Detroit's bankruptcy proceedings.

[4] MCL 123.141 only applies to sale of water and therefore it does not govern the City's sewer ratemaking. However, the City's Charter requires reasonable sewer rates. Specifically, "[t]he City may fix and collect charges for such disposal services, tap-in fees and connection fees, the proceeds of which shall be exclusively used for the purpose of the sewage disposal system." Westland Charter, § 16.10. Further, "The Council shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public utility services as the City may provide." Westland Charter, § 17.3.

As noted, plaintiffs argue that the City allocated too great a portion of certain administrative costs to the water and sewer department. Viewing the evidence in a light most favorable to plaintiffs, we agree that there is a question of fact regarding those particular allocations. Indeed, the City effectively conceded that there were errors in its cost allocation when it presented proposed testimony regarding a revised cost allocation study.

We disagree with plaintiffs' contention, however, that questions regarding particular administrative costs, by themselves, precludes summary disposition. It is plaintiffs' burden to establish the unreasonableness of the City's rates, and they have failed to present evidence that the City's overall allocation of administrative costs to the water and sewer department is unreasonable. Specifically, Olson testified that he did not prepare a full cost allocation plan in analyzing the administrative expenses allocated to the water and sewer department. He also admitted that other municipal departments could have provided more services to the water and sewer department than reflected in the budget and that a full cost allocation plan could indicate that the cost allocation should be higher than the amount that the City allocated in its budget. Olson further acknowledged that rates are set prospectively, that such prospective budgeting cannot be conducted with mathematical certainty, and that it would be reasonable if the budgeted amount of a cost allocation was off by about 15%.[5]

Most significantly, plaintiffs failed to analyze the reasonableness of the City's overall rates by conducting a rate study. Olson agreed that if the rates cover the actual revenue requirements of the water and sewer department, then the rates are valid and customers will have suffered no damages. Yet Olson was not asked to review the overall expenditures of the water and sewer department, and he held no opinion overall concerning whether the total expenditures of the water and sewer department were reasonable. Thus, plaintiffs made no attempt to analyze the City's rates in lights of the department's revenue requirements. Nor have plaintiffs explained how incorrect or improper administrative cost allocations in and of themselves renders the City's water and sewer rates unreasonable.

In sum, plaintiffs argue that their claims may proceed solely on the basis of certain selected individual expense components that they have chosen to address without a broader evaluation of whether such allegedly improperly estimated expenses in the City's original budget (1) resulted in an unreasonable variance from the actual overall costs and (2) affected the reasonableness of the rates. Given the lack of a more universal analysis, plaintiffs have failed to provide an evidentiary basis from which to conclude that the amount of the department's administrative costs renders the City's water and sewer rates unreasonable.

Plaintiffs also fail to cite any authority to support what would be a form of active court oversight that would amount to an exacting level of judicial auditing of only those individual expenses of a municipal utility that a plaintiff chooses to challenge without respect to whether

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[5] This testimony is consistent with established legal principles, including that "ratemaking is a prospective operation," *Trahey*, 311 Mich App at 597, and that "mathematic precision is not required" when a court assesses whether a utility fee is "reasonably proportionate to the direct and indirect costs of providing the services for which the fee is charged," *id.*

the overall cost allocation is reasonably accurate and without respect to whether the actual water and sewer rates are reasonable. Plaintiffs' argument is at odds with the limited role of the judiciary in reviewing municipal utility rates. See *Novi*, 433 Mich at 425-426, 428, 430. Nor have plaintiffs cited any authority for their implicit contention that they are entitled to the correction of every expense allocated to the water and sewer department that was allegedly overestimated.

Plaintiffs also argue that the City's rates are unreasonable because the City uses a portion of its revenue to create a reserve fund for future unspecified infrastructure improvements to its water and sewer systems. Plaintiffs fail to provide any legal authority to establish that this is an improper ratemaking procedure. To the contrary, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson*, 302 Mich App 90, 111; 836 NW2d 903 (2013). According to the affidavit of Steven Smith, the City's finance director, the City's water and sewer systems are comprised of nearly 674 miles of infrastructure and have a replacement cost of approximately $674 million (i.e., it costs approximately $1 million to rebuild each mile of infrastructure). The City has existed for 50 years, its infrastructure has an expected life of 50 to 70 years, and it experiences an average of 160 water main breaks a year. Given this unrebutted evidence, plaintiffs do not overcome the presumption that a $500,000 annual addition to the City's cash reserves to fund future improvements to the water and sewer system is a reasonable ratemaking practice.

In affirming the trial court, we are not relying on the proposed testimony of Beauchamp or Peck regarding the City's revised allocation study. Even if the trial court properly considered those affidavits, the evidence must be viewed in a light most favorable to plaintiff, and there is clearly a question of fact regarding certain aspects of the City's administrative cost allocation. But Olson's own testimony establishes the necessity of an overarching analysis of the water and sewer department's revenue requirements. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that some improper expenses have caused the rates to become excessive or unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact regarding whether the City's rates were unreasonable. And because we do not rely on Beauchamp's or Peck's proposed testimony, we need not address whether the trial court erred in denying plaintiffs' motion in limine. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues.").

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const 1963, art 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co*, 302 Mich App at 99. However, a charge that constitutes a user fee is not subject to

the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich at 162.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. [*Bolt*, 459 Mich at 162, quoting *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954).]

Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich at 162 n 12. That said, plaintiffs have presented no evidence that the rates themselves are unreasonable given the deficiencies in their proofs discussed above, particularly Olson's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. See Westland Ordinances, § 102-61.[6] The trial court aptly noted: "Those who use water and sewer services

[6] Westland Ordinances, § 102-61 provides, in relevant part:

> The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user."

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's water and sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing water and sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich 152, contend that it is impermissible for the City to incorporate costs in its water and sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would most benefit from the construction. *Id.* Further, the cost of this project was $176 million over 30 years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. Here, the City's reserve fund will be used for future capital projects that will benefits all users of the water and sewer services. Those users contribute to wear and tear of the water and sewer system and, by including the cost of future capital projects into its rates, the City ensures that the users will pay a fee proportionate to the necessary costs of service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's water and sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's water and sewer services are not voluntary under statute and the City's ordinances. Even assuming that the water or sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666. We are unconvinced, in the absence of showing that the water and sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[7] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10). Given our ruling, we decline to address whether plaintiffs' claims are barred by the applicable statute of limitations.

Affirmed.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

[7] MCL 141.91 provides:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

STATE OF MICHIGAN

COURT OF APPEALS

LEONARD S. BOHN, Individually and as Representative of a Class of Similarly Situated Persons and Entities,

Plaintiff-Appellant,

v

CITY OF TAYLOR,

Defendant-Appellee.

UNPUBLISHED
January 29, 2019

No. 339306
Wayne Circuit Court
LC No. 15-013727-CZ

Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates were unreasonable and that they constituted disguised taxes in violation of the Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). For the reasons set forth below, we affirm.[1]

[1] A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.

I. BACKGROUND

Defendant City of Taylor (the City) operates and maintains a water and sewer system. Plaintiffs brought suit alleging numerous improprieties in the City's water and sewer ratemaking. On appeal, plaintiffs challenge only the computation of the City's sewer rates as well as the fact that the City no longer directly pays for public fire protection costs.

Specifically, plaintiffs raise two issues relating to the determination of the City's sewer rates. The parties agree that the first step of ratemaking is to determine the utility's revenue requirements. The parties also agree that, as a general matter, a utility may recover depreciation expenses through its rates. However, plaintiffs maintain through their expert, Kerry Heid, that it is improper for the City to include depreciation as an expense when it uses the cash-basis approach to determining its revenue requirements. The City admits that it is improper to include depreciation when calculating cash-basis revenue requirements. But the City, relying on its expert, Eric Rothstein, contends that the term "depreciation" was improperly used in its calculations and that the term was merely used as a "proxy" to provide funding to calculate its capital expenditures.

Plaintiffs also take issue with the accumulation of a reserve fund which will be used to fund maintenance, repairs, and improvements to the City's sewer system. Plaintiffs contend that the sewer reserve fund, which now totals over $10,000,000, shows that the City's sewer rates are in excess of the City's actual costs. Plaintiffs also maintain that it is improper for the City to use funds received from sewer rates to pay for future capital improvements to the sewer system. However, plaintiffs concede that it is appropriate for the City to maintain a reserve fund for the purposes of maintaining and repairing its sewer system, and the City argues that plaintiffs failed to establish that the amount in the City's fund is unreasonable. The City also contends that the reserve fund is properly maintained to address near-term needs and therefore does not raise concerns of "intergenerational inequity."

Lastly, plaintiffs claim that it is improper for the City to incorporate the cost of public fire protection into its service rates. Plaintiffs assert that the City should pay for those costs out of its general fund and that it is violating a City ordinance by failing to do so. Yet plaintiffs have not produced evidence that the City actually includes fire protection costs in its service rates. Further, the City contends that it is appropriate to pass the cost of public fire protection directly to consumers.

The parties filed competing motions for summary disposition. In a written opinion and order, the trial court determined that plaintiffs failed to establish a genuine issue of material fact as to whether the sewer rates constitute an unlawful tax and whether the rates were unreasonable. The trial court also determined that plaintiffs failed to establish that the City includes the cost of fire protection in its water rates.

[*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

II. ANALYSIS

A. REASONABLENESS OF SEWER RATES

The City's Charter provides that the city council "shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public services as the City may provide. . . ." Taylor Charter, § 17.3. The Charter does not provide any standards for determining "just and reasonable rates." But Taylor Ordinance, § 50-25(c), provides:

> The rates and charges hereby established shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide for debt service and for the expenses of operation, maintenance and replacement of the system as necessary to preserve the same in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

It is well established that municipal utility rates are presumptively reasonable. *Trahey v Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015). "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Novi v Detroit*, 433 Mich 414, 431; 446 NW2d 118 (1989). "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich App at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

Under the cash-basis method of utility ratemaking, a municipality first determines "the cash needs of the utility for a given period, *i.e.*, the dollars needed to pay the expense of operation, meet debt obligations, and make such capital improvements as would not require bond financing, *e.g.*, limited new plant construction, plus recurring replacements, renovation and extensions of existing plant." *Plymouth v Detroit*, 423 Mich 106, 115; 377 NW2d 689 (1985). Plaintiffs first argue that the City improperly includes depreciation when it calculates its expenses under the cash-basis method of ratemaking. Plaintiffs' expert, Heid, reached this conclusion by relying on ratemaking manuals which provide that depreciation is not to be included when determining cash-needs revenue requirements. The City's expert, Rothstein, agrees that depreciation, which is a non-cash expense, should not count as an expense under a cash-basis ratemaking approach. But Rothstein opined that the City had simply used the label of "depreciation expense" as a proxy for properly included costs, i.e., for investment in infrastructure renewal and rehabilitation.

To begin, we note that the City is not required by law or ordinance to adhere to any ratemaking approach. Nor must the City abide by any particular ratemaking manual or guideline. Thus, we decline to hold that the City's failure to strictly follow the cash-basis approach renders its rates unreasonable or that the inclusion of depreciation in its rates is illegal

or improper. To the contrary, it is common for utilities to set rates to cover the costs of depreciation. See 64 Am Jur 2d, Public Utilities, § 125, p 516. Further, it is permissible to include a capital investment component in utility rates. See *Bolt v Lansing*, 459 Mich 152, 160, 164-165; 587 NW2d 264 (1998).

That said, we agree with plaintiffs that the City should not be allowed to accomplish a "double recovery" by counting a single expense twice in determining its revenue requirements. However, plaintiffs have not provided evidence showing that the City has engaged in such a practice. While plaintiffs note that the City has included debt service payments as a budgeted expense in its sewer rates analysis, plaintiffs have not proffered any evidence that those payments are related to the depreciated items. Indeed, Heid admitted that he did not identify any specific items in defendant's budget that were funded through debt, that he did not identify any specific instances in which defendant collected for the same amount twice, and that he could not be aware of any such instances without going through each individual item of defendant's budget.

Thus, while plaintiffs argue that the City may have obtained a double recovery by including depreciated expenses in its sewer rates, they have failed to provide any supporting evidence on that matter. By contrast, Rothstein consulted with the City officials and determined that the City did not include depreciation expense and capital expenditure projections separately but rather used depreciation expense to inform its estimate of required capital expenditures. Heid also acknowledged that it is sometimes appropriate for utilities to use depreciation as a proxy for other expenses. Although the evidence must be viewed in a light most favorable to plaintiffs, they have failed to offer specific evidence that would give rise to a factual dispute regarding the depreciated expenses. Therefore, plaintiffs have failed to present clear evidence that the inclusion of depreciation costs in the City's sewer rates was improper or that this practice renders those rates unreasonable.

Next, plaintiffs challenge what they deem to be an excessive sewer reserve fund. Taylor Ordinances, § 50-24, provides that "[a]ll funds, including surplus funds, if any, shall be kept in separate accounts for the benefit of the bondholders, the operation and maintenance of the water and sewer divisions, and for no other purpose." Heid agreed that the City should be allowed to maintain a reserve fund for maintenance and repair of the sewer system. Indeed, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson*, 302 Mich App 90, 111; 836 NW2d 903 (2013). Plaintiffs have not proffered any evidence as to how much money should actually be in the City's sewer fund. Heid testified that he does not know what work needs to be done to the City's sewer system and does not know how much the City needs in reserves for sewer replacements. Accordingly, plaintiffs have not shown that the amount of the City's sewer reserve fund is unreasonable per se.

Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention. Setting that aside, we note that numerous witnesses testified that the City has undertaken or initiated actions and processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system. There

was also testimony that the City's reserves are insufficient to meet its infrastructure renewal needs.

Plaintiffs counter that this a "post-hoc" justification and the City did not accumulate the reserve pursuant to any kind of capital improvement plan. For purposes of this appeal, we assume that to be true. However, we do not see how the lack of a capital improvement plan renders the accumulation of a reserve fund improper. First, there can be no plan to address the City's *unexpected* maintenance and repairs costs, which is one of the purposes of the fund. Second, Heid opined that the size of the reserve fund is largely due to the City's inclusion of depreciated expenses in its rates. Thus, the reserve fund is inherently aimed toward the replacement and renewal of the sewer system. In other words, by including depreciation expenses in its rates, the City is saving for the day when the depreciated items will need to be replaced. This does not mean, however, that the City must at all times have a plan in place for infrastructure replacements. Presumably, large improvement projects are not continuously planned and executed. Rather, such projects occur periodically as the pipes and other infrastructure decays. The evidence shows that the City is currently inspecting its system and planning infrastructure improvements, for which it will use the reserve fund. Plaintiffs fail to explain why the City must constantly have a capital improvement plan to justify the accumulation of funds that will eventually be used to fund the renewal and replacement of the sewer system.

In sum, plaintiffs fail to establish that any of the City's ratemaking practices are improper or unreasonable. Nor have plaintiffs proffered any evidence that the City's sewer rates are unreasonable. Heid admitted that he does not know what a reasonable rate is without performing a full cost of service study and that he would not be testifying concerning the amount of a reasonable rate. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi*, 433 Mich at 427. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that the City's sewer rates are unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact on that matter, and the trial court correctly granted summary disposition under MCR 2.116(C)(10).

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const 1963, art 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co*, 302 Mich App at 99. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the

unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich at 162. Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich at 162 n 12. That said, as discussed above, plaintiffs have not presented evidence that the City's sewer rates themselves are unreasonable particularly in light of Heid's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the those rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the sewer systems. See Taylor Ordinances, § 50-25(c).

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich 152, contend that it is impermissible for the City to incorporate costs in its sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would benefit most from the construction. *Id.* Further, the cost of this project was $176 million over 30

years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. In this case, as discussed, the reserve fund is being used for maintenance and repairs of the existing system, and will be used to fund a large-scale project to replace and update much of that system which will benefit all users of the City's sewer services. Further, if one accepts the premise—as plaintiffs do—that the City may incorporate replacement costs into its rates, then we see no reason why surplus funds cannot be used to replace aging infrastructure. As for concerns that the City's ratepayers are funding improvements for future generations, we find Rothstein's reasoning on this point persuasive:

> The practical reality is that Taylor's current customers, like all utility customers, benefit from prior customers' investments that put in place a (depreciating) system to which they can connect and receive service. Equitably, current users are asked to pay to renew and replace these assets, as well as pay their share of system upgrades. Future users are asked to pay for their shares of system capacity and will likewise be responsible to pay for asserts renewals and replacements.

The users of the City's sewer system contribute to that system's wear and tear, an expense that the City recoups by including depreciation as a revenue requirement in its rate analysis. Accordingly, the users pay a fee proportionate to the necessary costs of the service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's sewer services are not voluntary under statute and the City's ordinances. Even assuming that the sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax; particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666. We are unconvinced, in the absence of showing that the sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[2] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10).

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[2] MCL 141.91 provides:

C. FIRE PROTECTION

Plaintiffs claim that the City violated an ordinance by incorporating the costs of public fire protection into its service rates. Specifically, the water department, in addition to its primary task of providing potable water, maintains equipment and operations sufficient to assure necessary pressure for the functioning of fire hydrants. The cost paid to the water department for this service is known as "fire hydrant rental." As a general matter, the experts agreed that it is appropriate for a municipality to recover this cost through water rates. Plaintiffs argue that this practice is nevertheless improper here because it violates Taylor Ordinance, § 50-25(g), which provides in relevant part:

> The reasonable cost and value of all water and sewer service rendered to the city and its various departments by the water and sewer system, including rentals for fire hydrant service for each fire hydrant connected to the system, during all or any part of the fiscal year, shall be charged against the city and will be paid for as the service accrues for the city's current funds, including the proceeds of taxes which will be levied in an amount sufficient for that purpose.

It is undisputed that the City no longer pays $44,000 a year in rental fees for all of the fire hydrants on public property as it did until 2010. However, plaintiffs have not provided any evidence that public fire protection costs are improperly passed on to plaintiffs through the City's water rates. Tellingly, Heid testified that "there is nothing to suggest that the customers are actually paying any amount for those public fire protection services." Nor could Heid determine the amount of such a charge in the absence of a rate study. Further, Heid agreed that, at the end of the day, residents will pay for public fire protection either on their water bills or on their tax bills. Given this testimony, plaintiffs have failed to produce evidence demonstrating a genuine issue of material fact concerning whether the costs for public fire protection are improperly included in defendant's water rates or the amount of any such charge. For the same reasons, plaintiffs fail to establish that the City is receiving "free service" from the water and sewer department in contravention of MCL 141.118(1)[3] by not paying for public fire protection costs.

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

[3] MCL 141.118(1) provides:

> Except as provided in subsection (2) [which is inapplicable here], free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the

Affirmed.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

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public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, and those charges, when so paid, shall be accounted for in the same manner as other revenues of the public improvement.

STATE OF MICHIGAN

COURT OF APPEALS

KICKHAM HANLEY PLLC, as Trustee for a Certified Class of Persons and All Others Similarly Situated,

Plaintiff-Appellant,

v

GEORGE W. KUHN DRAINAGE DISTRICT,

Defendant-Appellee.

UNPUBLISHED
January 14, 2021

No. 351317
Oakland Circuit Court
LC No. 2019-172077-CZ

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

PER CURIAM.

Plaintiff, assignee of the City of Oak Park and trustee for a certified class of persons defined in the final order approving a class settlement in Lower Court No. 15-149751-CZ, appeals as of right the trial court's opinion and order granting summary disposition in favor of defendant. We affirm.

I. BACKGROUND FACTS

Defendant is a drainage district, which is an independent corporate entity that has powers conferred upon it by law.[1] Drainage districts are governed by drainage boards.[2] Defendant maintains and operates the George W. Kuhn Drain (the drain), which operates in an area that includes Oak Park.

Oak Park has a combined sewer system that collects both sanitary sewage and stormwater. That sewer system flows to the system operated by defendant. Generally, defendant diverts all of the stormwater flow from Oak Park and the other communities within the operational area of the drain to two water treatment plants respectively operated by the Detroit Water and Sewerage

[1] See MCL 280.5.

[2] See MCL 280.464.

Department and the Great Lakes Water Authority. All of the subject stormwater flow travels through Detroit's Dequindre Interceptor, and there the flow is measured by a meter. Accordingly, the water treatment plants charge defendant an annual flat rate to dispose of stormwater based on the measured flow, and defendant allocates that charge among the communities within the operational area of the drain.

In February 2005, defendant's drainage board tentatively established an apportionment of the costs of the drain for stormwater disposal for the communities within the operational area of the drain. As part of the apportionment, the drainage board made an allocation on the basis of an assumption that all water purchased from the Detroit Water and Sewerage Department would be returned as sanitary flow, and so only the difference between the purchased water and the "Master Meter Charges" would be considered stormwater flow. Thus, under the apportionment, two rates would be charged to the communities within the drain's operational area, one for the cost of sanitary sewage flow into the drain, and the other for stormwater flow, which would be apportioned among the communities on the basis of an engineering study that determined each community's contribution of stormwater.

In April 2005, the drainage board resolved to adopt the tentative apportionment of costs it established in February 2005. On the same day, the drainage board entered a Final Order of Apportionment that provided an apportionment of costs between the communities within the operational areas of the drain.

In February 2019, in Lower Court No. 2015-149951-CZ, the trial court entered a final judgment and order approving a class settlement between the plaintiffs, two persons acting as individuals and as representatives of a class of similarly situated persons (the class action plaintiffs), and the defendant, Oak Park.[3] The instant trial court took specific notice of the assignment provisions of that settlement agreement according to which any claims Oak Park possessed against Oakland County or its agencies—including defendant—for storm water management services relating to overcharges for stormwater management services would be assigned to the class action plaintiffs "or for their benefit." Additionally, plaintiff was appointed trustee of a litigation trust to pursue the claims against defendant on behalf of the plaintiffs, and was also appointed counsel for the litigation trust.

The trial court also noted that the class action plaintiffs and other members of the class who did not ask to be excluded from the class would be deemed to have executed a release of all claims against Oak Park relating to the assessment and costs of water and sewer rates "from the beginning of time through the date" of the final judgment and a period of time thereafter. Subsequently, Oak Park executed an assignment of claims to plaintiff.

Plaintiff filed its complaint against defendant on the basis of the assignment of Oak Park's claims to plaintiff as a trustee for the class action plaintiffs. In its complaint, plaintiff alleged that defendant charged Oak Park approximately $3 million dollars per year for the disposal of storm-water. It further alleged that Oak Park "passe[d] on that cost to its sewer Customers by imposing stormwater charges in its sewer rates to recover the entire $3 million plus per year imposed upon

[3] These class action plaintiffs were legally represented by plaintiff.

the City by [defendant] on an annual basis." According to the complaint, the amount defendant charged Oak Park for stormwater disposal should have been the same amount defendant was charged by the water treatment plants for stormwater disposal.

Plaintiff alleged that defendant charged Oak Park "substantially more than the amount" charged by the water treatment plants for the disposal of Oak Park's stormwater since at least 2011. According to the complaint, defendant improperly reallocated the sanitary sewage disposal costs imposed by the water treatment plants to stormwater disposal costs, and as a result defendant overcharged Oak Park. Thus, plaintiff raised claims of breach of contract, assumpsit, and unjust enrichment against defendant. The trial court ultimately granted defendant's motion for summary disposition and dismissed plaintiff's claims.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition. We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). The trial court granted defendant's motion under MCR 2.116(C)(8). "A court may grant summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.' A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010) (alteration in original), quoting *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). "When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.*

"Generally, this Court reviews de novo '[t]he interpretation of statutes and court rules.' " *Simcor Constr, Inc v Trupp*, 322 Mich App 508, 513; 912 NW2d 216 (2018) (alteration in original), quoting *Estes v Titus*, 481 Mich 573, 578; 751 NW2d 493 (2008). "[T]he rules governing statutory interpretation apply with equal force to a municipal ordinance . . . ." *Bonner v City of Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014). The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). This Court reviews equity cases "de novo on the record on appeal." *Tkachik v Mandeville*, 487 Mich 38, 44-45; 790 NW2d 260 (2010). "Whether a claim for unjust enrichment can be maintained is a question of law that we review de novo." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 22; 831 NW2d 897 (2012).

B. BREACH OF CONTRACT

Plaintiff first argues that the trial court erred when it ruled that plaintiff failed to state a breach-of-contract claim. We disagree.

"A party claiming a breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn v Bennett*, 303 Mich App 767, 774; 846 NW2d 75 (2013) (quotation marks and citation omitted). "The party seeking to enforce a contract bears the burden of proving that the contract exists." *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015). "Michigan courts will not lightly presume the existence of an enforceable contract because, regardless of the equities in a case, the courts cannot make a contract for the parties when none exists." *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 508; 853 NW2d 481 (2014) (quotation marks and citation omitted). There is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). Thus, "absent an adequate expression of an actual intent of the State to bind itself, courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id.* at 662 (quotation marks and citations omitted).

The elements required to create a valid contract are "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). "In order for consideration to exist, there must be a bargained-for exchange—a benefit on one side, or a detriment suffered, or service done on the other." *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 101; 878 NW2d 816 (2016) (quotation marks and citation omitted). "Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, or the performance of a service in exchange for a promise." *AFT*, 497 Mich at 235-236 (citations omitted). " 'Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed.' " *Kloian*, 273 Mich App at 452, quoting *Pakideh v Franklin Commercial Mtg Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "A basic requirement of contract formation is that the parties mutually assent to be bound." *Rood v Gen Dynamics Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993). In other words, "the parties must have a 'meeting of the minds' on all the essential elements of the agreement." *Huntington*, 305 Mich App at 508. Courts determine if there was a meeting of the minds by reviewing objective evidence such as "the expressed words of the parties and their visible acts." *Id.* (quotation marks and citation omitted).

Plaintiff alleged in its complaint that the April 2005 resolution of the drainage board and the Final Order of Apportionment created a contract between defendant and Oak Park, and that defendant breached that contract when it overcharged Oak Park for stormwater disposal. The trial court ruled that those documents did not satisfy the elements of contract formation because they did not contain "any offer or promises or promises made by either party to the other that require[d] acceptance . . . ."

In its brief on appeal, plaintiff does not explain how the April 2005 resolution and the Final Order of Apportionment satisfied the elements of contract formation, and instead argues that the April 2005 resolution was binding on defendant whether or not it was a contract. However, in its reply brief, plaintiff addressed for the first time whether the Final Order of Apportionment and the April 2005 resolution satisfied the elements of contract formation, arguing that the consideration between Oak Park and defendant consisted of defendant's promise to charge Oak Park "a particular allocated percentage of the total cost of stormwater disposal."

"Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007). Further, "[a] party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, or give issues cursory treatment with little or no citation of supporting authority." *Wolfe v Wayne-Westland Community Sch*, 267 Mich App 130, 139; 703 NW2d 480 (2005) (quotation marks and citation omitted). "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *MOSES, Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006).

Plaintiff did not raise any challenges regarding the elements of contract formation in its brief on appeal, and may not do so in its reply brief. Given that plaintiff failed to adequately brief this argument, we deem it abandoned. And even if plaintiff had properly presented its arguments regarding consideration, plaintiff failed to address the other elements of contract formation therefore plaintiff would have otherwise failed to expose error on the part of the trial court.

Regardless, even if plaintiff had properly argued that the April 2005 resolution and the Final Order of Apportionment satisfied the elements of contract formation, a brief review of the relevant portions of the Drain Code reveals that such an argument would have been meritless. Plaintiff is the assignee of Oak Park, and Oak Park is a public corporation that benefits from the drain that is operated and maintained by defendant. Under MCL 280.468, the drainage board was required to apportion the costs for the drain on the basis of the benefits accrued to each benefiting public corporation, and under MCL 280.478(1) and MCL 280.478(2) the drainage board was required to make an apportionment of costs for any necessary expenses incurred in the operation and maintenance of the drain. As a benefiting public corporation, Oak Park had the opportunity to object to the drainage board's apportionment of costs. See MCL 280.469.

Plaintiff's complaint did not raise any claim that the drainage board failed to comply with the Drain Code when it entered the Final Order of Apportionment, MCL 280.460, and plaintiff explicitly abandoned any such challenge in its brief on appeal. Given the requirements set by the Drain Code, the drainage board was in no way engaged in bargaining with Oak Park or any of the other benefiting public corporations when it entered the Final Order of Apportionment pursuant to its statutory obligations. The drainage board made no offer to Oak Park, there was no bargained-for exchange, or meeting of the minds, between Oak Park and defendant before the Final Order of Apportionment was entered, and none was required. Therefore, plaintiff has failed to overcome the strong presumption that the Final Order of Apportionment did not create a contract. See *Studier*, 472 Mich at 661. And while the Drain Code authorizes a drainage board to enter into contracts with public corporations, MCL 280.471, plaintiff did not allege that Oak Park had a separate contract with defendant.

Plaintiff also briefly contends that municipal resolutions are enforceable by their beneficiaries, citing our Supreme Court's holding in *Hardaway v Wayne Co*, 494 Mich 423; 835 NW2d 336 (2013). In that decision, the Court held that this Court improperly applied the last antecedent rule when it interpreted a municipal resolution pertaining to the entitlement of retirement benefits, and reinstated the trial court's grant of summary disposition of the plaintiff's declaratory judgment claim in favor of the defendant. *Id.* at 425, 427-429. Given that *Hardaway* concerned a declaratory judgment claim disposed of by way of summary disposition, rather than a

breach-of-contract claim premised on a municipal resolution, it is unclear why plaintiff relies on *Hardaway*.

C. ASSUMPSIT & UNJUST ENRICHMENT

Plaintiff next asserts that the trial court erred when it ruled that plaintiff failed to allege any damages in support of its assumpsit and unjust enrichment claims. We disagree.

The Michigan Supreme Court explained actions of assumpsit as follows:

> "We understand the law to be well settled, that the action of *assumpsit* for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action." [*Trevor v Fuhrmann*, 338 Mich 219, 223-224; 61 NW2d 49 (1953), quoting *Moore v Mandlebaum*, 8 Mich 433, 448 (1860).]

"Assumpsit may be upon an express contract or promise, or for nonperformance of an oral or simple written contract, or it may be a general assumpsit upon a promise or contract implied by law." *Kristoffy v Iwanski*, 255 Mich 25, 28; 237 NW 33 (1931). "The right to bring this action exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential." *Hoyt v Paw Paw Grape Juice Co*, 158 Mich 619, 626; 123 NW 529 (1909). "The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citation omitted).

Unjust enrichment is "the equitable counterpart of a legal claim for breach of contract." *AFT Mich v Michigan*, 303 Mich App 651, 677; 846 NW2d 583 (2014). A party may raise a claim of unjust enrichment "only if there is no express contract covering the same subject matter." *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 734; 832 NW2d 401 (2013) (quotation marks and citation omitted). The complaining party must establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *Karaus*, 300 Mich App at 22-23. Unjust enrichment "describes the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." *Id.* at 23 (quotation marks and citation omitted).

In its complaint, plaintiff alleged that, even if there was no contract between Oak Park and defendant, defendant overcharged Oak Park for stormwater disposal by way of the Final Order of Apportionment. Plaintiff thus raised claims in assumpsit and unjust enrichment against defendant.

The trial court granted summary disposition of those claims because it ruled that plaintiff "failed to show that Oak Park suffered any damages." At the outset, plaintiff contends that the trial court erred when it dismissed plaintiff's claims in assumpsit and unjust enrichment, and it notes that those claims are essentially indistinguishable. We agree with the latter proposition and so will consider plaintiff's arguments regarding its unjust enrichment and assumpsit claims together.

Following its recitation of why it believes that claims of unjust enrichment and assumpsit against defendant were proper if there was no contract between defendant and Oak Park, plaintiff does not directly address the trial court's ruling that plaintiff failed to show that Oak Park was damaged by the stormwater disposal overcharges. Instead, plaintiff contends that Oak Park was the only entity that had standing to bring these claims against defendant, because the class action plaintiffs (i.e., Oak Park's ratepayers) did not directly pay the assessed stormwater disposal costs to defendant. However, the trial court did not reach the issue of plaintiff's standing by virtue of the assignment[4] it received from Oak Park, having disposed of the case on the ground that plaintiff failed to demonstrate that Oak Park was damaged by the stormwater disposal overcharges.

While the trial court did not explain the basis for its ruling, plaintiff alleged in its complaint that Oak Park "passe[d] on that cost to its sewer Customers by imposing stormwater charges in its sewer rates to recover the entire $3 million plus per year imposed upon the City by [defendant] on an annual basis." Plaintiff attached a copy of the final judgment of the class action lawsuit to its complaint, in which the trial court for that case noted that, per the settlement agreement between Oak Park and the class action plaintiffs, the class action plaintiffs were deemed to have executed a release of all claims against Oak Park relating to the assessment and costs of water and sewer rates "from the beginning of time through the date" of the final judgment, as well as a period of time for future claims. And plaintiff concedes in its reply brief that the class action plaintiffs released their claims against Oak Park.

Given the foregoing, we surmise that the trial court ruled that plaintiff failed to establish that Oak Park was harmed by the stormwater disposal overcharges because Oak Park directly passed on that cost to the class action plaintiffs, who in turn released any claims they had against Oak Park. Because the actual ratepayers of the alleged overcharge (i.e., the class action plaintiffs) released their claims against Oak Park, plaintiff cannot show that defendant either retained money that in "good conscience, belongs, or ought to be paid, to the plaintiff," *Trevor*, 338 Mich at 223 (quotation marks and citation omitted), or that Oak Park suffered an inequity, *Karaus*, 300 Mich App at 22-23, because the money at issue belonged to Oak Park's ratepayers as opposed to Oak Park itself.

Plaintiff argues that any ruling that Oak Park was not harmed by the stormwater disposal overcharges because it passed through the overcharges to the class action plaintiffs runs afoul of a general rejection of "pass-through" defenses in all jurisdictions where such a defense has been

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[4] "Under general contract law, rights can be assigned unless the assignment is clearly restricted," and an "assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004).

raised. In support of its argument, plaintiff relies on a miscellany of decisions from a number of different contexts.

The earliest decision upon which plaintiff relies, *Southern Pacific Co v Darnell-Taenzer Lumber Co*, 245 US 531, 533-535; 38 S Ct 186; 62 L Ed 451 (1918), arose from a judgment obtained against a number of railroad defendants (i.e., common carriers) after the Interstate Commerce Commission found that the rate they charged for transporting hardwood lumber was excessive, and where the United States Supreme Court held that the plaintiffs were permitted to collect a judgment against the defendants even if the plaintiffs may have passed on the excessive charge to their own customers. The Court explained that a common "carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum," because "of the endlessness and futility of the effort to follow every transaction to its ultimate result." *Id.* Thus, that holding pertained to proceedings involving a decision by the Interstate Commerce Commission, and commercial transactions where it would be difficult to ascertain how the excessive rate affected the prices paid by customers of the affected businesses. Given that plaintiff readily alleged in its complaint that Oak Park passed the overcharges on to its ratepayers, and has not shown that there would be any particular complexity in determining how the overcharge directly affected the fees paid by Oak Park's ratepayers, plaintiff's reliance on *Southern Pacific Co* is inapt.

Plaintiff also relies on decisions with similar holdings that pertain to claims based on federal antitrust violations: *Hanover Shoe, Inc v United Shoe Machinery Corp*, 392 US 481, 488-489, 493-494; 88 S Ct 2224; 20 L Ed 2d 1231 (1968) (rejecting a "passing-on" defense while recognizing that a buyer who was charged an illegally high price for materials used for the buyer's business had established a prima facie case under federal antitrust law); *Oakland Co v Detroit*, 866 F2d 839, 844-846 (CA 6, 1989)[5] (holding that the county plaintiffs would have standing to bring claims under federal antitrust and racketeering law and could demonstrate an injury even if they recouped the illegal overcharges by passing it on to their own customers). However, those decisions pertain to claims based on violations of specific federal statutes rather than claims in assumpsit or unjust enrichment. Because the rationale for their disavowal of a "pass-through" or "passing-on" defense is based on considerations directly related to the aforementioned federal statutes, those cases do not militate in favor of adopting those holdings in the wholly distinct context of claims in assumpsit or unjust enrichment. Moreover, plaintiff, by virtue of its representation of the class action plaintiffs, fully demonstrated that a class action claim could be brought against Oak Park by its ratepayers, even if that litigation ended with the class action plaintiffs agreeing to release their claims against Oak Park.

Plaintiff also cites *Northern Arizona Gas Serv, Inc v Petrolane Transp, Inc*, 145 Ariz 467, 476; 702 P2d 696 (Ariz App, 1984), where the Arizona Court of Appeals held that the plaintiff's "waiver of its claim for lost profits did not constitute an admission that none resulted from [the defendant's] activities," because "it was based on the complexity of issues of proof—the very reason for the supreme court's rejection of the passing-on defense in *Hanover Shoe*." And the

[5] "Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered persuasive." *People v Patton*, 325 Mich App 425, 435 n 1; 925 NW2d 901 (2018).

Arizona court also noted that the plaintiff was "the only party that can recover the overcharge from" the defendant. *Id.* Plaintiff has not shown that there is any complexity with issues of proof regarding the effect of the overcharges, and, as discussed above, Oak Park's rate-payers were entitled to recover the overcharges from Oak Park but they released those claims. Therefore, plaintiff's reliance on this decision is inapt.

For these reasons, plaintiff has failed to show that the trial court erred in concluding as a matter of law that Oak Park did not incur any damages in this matter.

Plaintiff also argues that the trial court erred when it granted defendant's motion for summary disposition because plaintiff's allegation that defendant charged Oak Park an unreasonable rate for stormwater disposal presented a question of fact. Again, we are not persuaded.

In its complaint, plaintiff supported its second claim in assumpsit and its claim of unjust enrichment by alleging that defendant's charge for stormwater disposal was unreasonable because it exceeded the costs set by the Final Order of Apportionment. The trial court did not specifically address that allegation in its ruling, having disposed of the case on the ground of the lack of damages suffered by Oak Park. Because we affirm the result below on that ground, we need not consider the question of reasonableness of the stormwater disposal charge.

Nonetheless, plaintiff fails to show that defendant was under some general duty of reasonableness in connection with its stormwater disposal charges. Plaintiff relies on *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412; 671 NW2d 572 (2003). The discussion of reasonableness in that decision was limited to whether a "tap-in fee" for connecting to a municipal water system was reasonable under the Revenue Bond Act of 1933, MCL 141.101 *et seq.*, where a municipality is permitted to set the rates for services falling under that act provided that those rates are reasonable. *Id.* at 417-418.[6] But plaintiff provides no argument or explanation regarding how the RBA might be applicable in this situation.

And plaintiff did not raise an independent claim in its complaint that defendant charged unreasonable rates; rather, its allegation that the rates were unreasonable merely supported a claim in assumpsit and a claim of unjust enrichment. Given that plaintiff has failed to cite legal authorities that establish defendant was required to charge a reasonable rate, or otherwise adequately brief how the trial court erred, plaintiff has abandoned this argument on appeal. See *MOSES, Inc*, 270 Mich App at, 417; *Wolfe*, 267 Mich App at 139.

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[6] Plaintiff also cites two other decisions that do not show that defendant was required to charge a reasonable rate. See *Trahey v Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015) (where the city defendant challenged the trial court's finding that its water and sewer rates were unreasonable under the defendant's own city charter, which required the defendant's city council to set "just and reasonable rates" for public utility services provided by the defendant); *Plymouth v Detroit*, 423 Mich 106, 111; 377 NW2d 689 (1985) (a breach of contract action where the municipal water contract between the parties required the defendant to set rates for the water that was reasonable in relation to the costs incurred by the defendant).

Plaintiff also briefly contends that defendant asserts that Oak Park released its claims against defendant during the class action suit. There is no indication that defendant actually raised this argument in the trial court. Because the trial court never considered any such contention, we decline to consider it.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Jonathan Tukel

STATE OF MICHIGAN

COURT OF APPEALS

KICKHAM HANLEY PLLC,

Plaintiff-Appellant,

v

OAKLAND COUNTY MICHIGAN,

Defendant,

and

GEORGE W. KUHN DRAINAGE DISTRICT,

Defendant-Appellee.

UNPUBLISHED
May 2, 2019

No. 341076
Oakland Circuit Court
LC No. 2017-159351-CZ

Before: MURRAY, C.J., and SAWYER and REDFORD, JJ.

PER CURIAM.

Plaintiff, Kickham Hanley PLLC, appeals as of right the trial court's order granting summary disposition of its claims under MCR 2.116(C)(7) and (8) and denying its motion for leave to amend its complaint. We affirm.

I. BACKGROUND

Plaintiff commenced this action against defendants[1] after the settlement of a class action lawsuit brought by a water and sewer ratepayer against Royal Oak, Michigan. The class representative alleged Headlee Amendment violations, Const 1963, art 9, § 31, and challenged Royal Oak's mandatory debt service charge and mandatory stormwater disposal charge to users of its water and sanitary disposal services. The circuit court in that action dismissed both counts of the complaint and the class representative moved for reconsideration. While that motion

[1] The trial court dismissed Oakland County based upon a stipulation of the parties.

pended, the parties settled. The circuit court approved the settlement and entered a final judgment.

During the class action litigation, the class representative came to believe that defendant, the George W. Kuhn Drainage District (GWKDD), inflated Detroit Water and Sewerage Department (DWSD) charges for stormwater disposal and overcharged for several years Royal Oak which passed on the charges to users. As part of the settlement in the class action lawsuit, Royal Oak paid a settlement to the class and assigned any claims it may have had for refund of the overcharges to plaintiff, as the trustee for a litigation trust. In its assignment, Royal Oak made no warranty or representation that it, in fact, imposed any overcharges or that any refunds were owed. The class members in turn released Royal Oak from any and all claims they had against Royal Oak concerning the city's rates and charges. The circuit court entered a final judgment and order approving the settlement and appointing plaintiff as the trustee of a litigation trust established for the benefit of the class members. The order authorized plaintiff to pursue a claim for refund of the GWKDD's alleged overcharges and ordered that any monetary recovery be distributed to the class members.

In its complaint, plaintiff alleged that Royal Oak's combined sewer system flows through the George W. Kuhn Drain, which is owned and maintained by Oakland County. The GWKDD is a component unit of Oakland County, comprised of several municipalities in the area, including Royal Oak, whose stormwater and sewerage flow into the Kuhn Drain. The GWKDD's stormwater flow is conveyed for ultimate disposal by Oakland County to a treatment plant operated by DWSD or the Great Lakes Water Authority (GLWA) for ultimate disposal. The DWSD charges the GWKDD a flat annual rate for stormwater disposal based on a formula tied to the amount of rainfall and the volume of surface water that enters the county's system for disposal. The GWKDD, in turn, proportionately allocates DWSD's stormwater charges among the municipalities in the district and charges each municipality that has a combined sewer system, including Royal Oak, a flat rate per month for stormwater disposal based on an apportionment formula stated in a resolution approved and adopted by the Drainage Board for the George W. Kuhn Drain at a public meeting held on April 19, 2005, and specified in the Drainage Board's Final Order of Apportionment issued April 19, 2005, pursuant to the board's resolution. The Final Order of Apportionment provided for the apportionment of the costs of administration, operations, and maintenance of the George W. Kuhn Drain. The Drainage Board allocated 29.7915% of the costs to Royal Oak.

Royal Oak, in turn, passed through the charges imposed by the GWKDD to its ratepayers by incorporating the charges into its water and sewer rates to recover the entire amount of the GWKDD's charge. The Drainage Board's Final Order of Apportionment provided that the charges to the municipalities, including Royal Oak, were comprised of two components: (1) the DWSD's charges to the George W. Kuhn Drain to treat the total stormwater flow and (2) the administrative costs of operating and maintaining the balance of the George W. Kuhn Drain System.

Plaintiff, as Royal Oak's assignee, filed a two count complaint against Oakland County and the GWKDD alleging a breach of contract claim and an equitable claim in assumpsit for money had and received. Plaintiff alleged that the GWKDD charged Royal Oak in excess of the amount DWSD charged for disposal of the stormwater and that the Drainage Board's resolution

contractually obligated the GWKDD to charge Royal Oak only its proportionate share of the DWSD's actual charges to the GWKDD. Plaintiff claimed that, by overcharging Royal Oak, the GWKDD breached the contract causing Royal Oak breach of contract damages. Alternatively, plaintiff alleged that, if no express contract existed, based on Royal Oak's assignment of its claims, plaintiff had entitlement to recover the GWKDD's overcharges through an action in assumpsit. The GWKDD, in lieu of filing an answer, moved for summary disposition under MCR 2.116(C)(7) and (8). The GWKDD asserted that the Drainage Board's resolution that formed the basis of plaintiff's breach of contract claim did not constitute a contract. The GWKDD also asserted that plaintiff's claims in actuality alleged tort liability from which the GWKDD had governmental immunity. Regarding the assumpsit count, the GWKDD asserted that plaintiff stood in the shoes of Royal Oak as its assignee and had no right to any damages from the alleged overcharges because the city passed through the overcharges to the ratepayers and suffered no compensable loss.

While the GWKDD's summary disposition motion pended, plaintiff filed an amended complaint that added an unjust enrichment claim. Defendant moved to strike plaintiff's amended complaint and the trial court granted the motion prompting plaintiff to file a motion for leave to amend. At the conclusion of a hearing on the parties' motions, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8), denied plaintiff's motion for leave to amend, and dismissed plaintiff's lawsuit with prejudice.

II. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

A. STANDARD OF REVIEW

We review de novo the trial court's grant of summary disposition under MCR 2.116(C)(8) to determine whether the opposing party failed to state a claim upon which relief can be granted. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). In *Dalley*, this Court explained:

> A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings. When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the moving party. A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. [*Id.* at 304-305 (quotation marks and citations omitted).

In a contract action the trial court may examine the contract attached to the complaint. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Further, whether an equitable claim can be maintained presents a question of law subject to de novo review. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

B. BREACH OF CONTRACT

Plaintiff first claims that the trial court erred by granting summary disposition of its breach of contract claim. We disagree.

The party claiming a breach of contract must establish by a preponderance of the evidence (1) the existence of a contract, (2) the other party's breach, and (3) damages to the party claiming breach. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). An express contract is "an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language either orally or in writing." *Benson v Dep't of Mgt and Budget*, 168 Mich App 302, 307; 424 NW2d 40 (1988) (quotation marks and citation omitted). In *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015), our Supreme Court summarized the principles of contract formation as follows:

> A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. The party seeking to enforce a contract bears the burden of proving that the contract exists. Contracts necessarily contain promises: a contract may consist of a mutual exchange of promises, or the performance of a service in exchange for a promise. [Citations omitted.]

Further, to create a contract, there must be an offer and acceptance by the parties signifying their unambiguous mutual assent or meeting of the minds on the essential terms. *Kloian*, 273 Mich App at 452-253 (citations omitted).

In this case, plaintiff alleged one count of breach of contract based on the resolution adopted by the Drainage Board. It argued to the trial court that the resolution coupled with the Drainage Board's Final Order of Apportionment constituted an express contract that the GWKDD breached. The record reflects that plaintiff attached the resolution and the Final Order of Apportionment to its complaint as exhibits making them part of its pleadings and relied on those documents to allege the existence of a contract between the GWKDD and Royal Oak. Therefore, the trial court could properly consider those documents for determination of defendant's summary disposition motion under MCR 2.116(C)(8). *Liggett*, 260 Mich App at 133.

Plaintiff argues as it did to the trial court that the resolution and the Final Order of Apportionment constituted a binding express contract between the GWKDD and Royal Oak that the GWKDD breached. We disagree.

The language of the Drainage Board's resolution and its Final Order of Apportionment plainly establish that these two documents neither individually, nor combined, constituted a binding contract between the GWKDD and Royal Oak. The documents expressed no offer or promises made by either party to the other that required acceptance. Nor did the documents express the five elements necessary for the creation of a valid contract in Michigan.

The Drainage Board's resolution and its Final Order of Apportionment expressed independent determinations made by the Drainage Board, as statutorily required under Chapter

20 of Michigan's drain code of 1956, MCL 280.461 *et seq*. which governs intracounty drains. The GWKDD is a drainage district, a governmental body with powers conferred upon it by law. See MCL 280.5. The drain code authorizes recovery of the costs of county drains necessary for the public health, MCL 280.462, and makes drainage boards responsible for the operation and maintenance of such drains, MCL 280.478.[2] Under the drain code, drainage boards must establish percentages to apportion the costs of operating and maintaining drains to the public corporations assessed for the costs of the drain, considering the benefits that accrue to each public corporation and the extent to which each public corporation contributes to the conditions which make the drain necessary. See MCL 280.468; MCL 280.469; MCL 280.478. Drainage boards are statutorily required to determine, after notice and a hearing, the apportionment of the costs and confirm their determinations by issuance of a final order of apportionment. See MCL 280.469; MCL 280.478. The drain code, however, nowhere provides that a final order of apportionment issued by a drainage board constitutes a contract with the municipal entities to which the order applies. Nor does the drain code grant a right of action to such entities for an alleged breach of a final order of apportionment.

The resolution and Final Order of Apportionment at issue in this case, therefore, constituted a statutorily required determination that apportioned the costs of stormwater disposal and treatment by the DWSD, and allocated to the municipalities in the GWKDD their proportionate share. Neither the resolution nor the Final Order of Apportionment, nor those documents combined constituted contracts on which Royal Oak could base a breach of contract claim. Plaintiff, therefore, failed and could not meet its burden of establishing the existence of a contract. Accordingly, the trial court properly granted summary disposition of plaintiff's breach of contract claim under MCR 2.116(C)(8).[3]

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[2] MCL 280.462 provides: "County drains which are necessary for the public health may be located, established and constructed under the provisions of this chapter where the cost thereof is to be assessed wholly against public corporations." MCL 280.478 provides, in part: "Any necessary expenses incurred in the administration and in the operation and maintenance of the drain and not covered by contract shall be paid by the several public corporations assessed for the cost of the drain."

[3] Defendant also argues that, because plaintiff's claims were premised on the resolution and Final Order of Apportionment, the claims challenged the propriety of the Final Order of Apportionment and the legality of apportioning the costs to Royal Oak. Defendant contends that plaintiff's claims were barred by the limitations period prescribed under MCL 280.483 which governs challenges to orders of apportionment. We find no merit to defendant's argument because plaintiff's complaint plainly did not challenge the apportionment decision. Further, we decline to review this issue because it is not necessary for the disposition of this case. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549-550; 599 NW2d 489 (1999).

C. ASSUMPSIT

Plaintiff next argues that the trial court erred by granting defendant summary disposition because, in the absence of an express contract, it could recover the overcharges on equitable grounds in assumpsit for money had and received. We disagree.

A claim in assumpsit is "an equitable action, and can be maintained in all cases for money which in equity and good conscience belongs to the plaintiff." *Hoyt v Paw Paw Grape Juice Co*, 158 Mich 619, 626; 123 NW 529 (1909) (quotation marks and citation omitted). The right to bring an action in assumpsit "exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential." *Id.* at 626 (citation and emphasis omitted); see also *Trevor v Fuhrmann*, 338 Mich 219, 223-224; 61 NW2d 49 (1953). As our Supreme Court explained in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860):

> We understand the law to be well settled that an action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money, which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover; and that as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

"The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225.

In this case, plaintiff alleged a claim in assumpsit for money had and received on the ground that the GWKDD improperly overcharged Royal Oak contrary to the Drainage Board's resolution. Plaintiff based that alternative claim on its position as Royal Oak's assignee. Plaintiff did not dispute that Royal Oak passed through the alleged overcharges to its water and sewer ratepayers. The trial court ruled that plaintiff, as Royal Oak's assignee, could not maintain the assumpsit claim because Royal Oak suffered no recoverable loss. The trial court did not err in this regard.

Under Michigan law, an assignee stands in the shoes of the assignor and acquires only the same rights as the assignor and remains subject to the same defenses as the assignor. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mortg Ass'n*, 298 Mich App 252, 256-257; 827 NW2d 379 (2012). Therefore, as Royal Oak's assignee, plaintiff acquired no more rights than Royal Oak had at the time of the assignment and it remained subject to the same defenses as Royal Oak. In this case, plaintiff sought a refund of the alleged overcharges as Royal Oak's assignee. Royal Oak, however, passed through to its water and sewer ratepayers the GWKDD's charges by incorporating them into the water and sewer rates. Royal Oak suffered no loss because the funds it paid to the GWKDD were recovered from its ratepayers who paid their water and sewer bills. The record reflects that plaintiff conceded at the hearing that Royal Oak did nothing wrong and had authority to charge its ratepayers whatever amount the GWKDD charged Royal Oak,

including the alleged overcharges, because Royal Oak was "purely a pass-through." Thus, if the GWKDD overcharged and collected fees from Royal Oak for stormwater disposal, plaintiff can claim no right to recover from the GWKDD because Royal Oak suffered no loss from its payment of the alleged overcharges. Royal Oak passed on the charges and passed on the ratepayers' payments. Royal Oak recouped any excess payments from its water and sewer ratepayers. Royal Oak had no claim against the GWKDD that it had in its possession money which in equity and good conscience belonged to Royal Oak. Royal Oak, therefore, occasioned no compensable loss. *Trevor*, 338 Mich at 224-225; *Hoyt*, 158 Mich at 626. The trial court correctly discerned that Royal Oak had no claim in assumpsit. Consequently, plaintiff failed and could not state a claim in assumpsit.

Plaintiff argues that federal antitrust law principles articulated in the United States Court of Appeals for the Sixth Circuit's decision in *Oakland Co v Detroit*, 866 F2d 839 (CA 6, 1989) and the Supreme Court's decision in *Illinois Brick Co v Illinois*, 431 US 720; 97 S Ct 2061; 52 L Ed 2d 707 (1977) should be considered and applied in this case. Both of those cases, however, are distinguishable because in *Oakland Co*, the Sixth Circuit addressed whether counties had standing to bring a federal antitrust action and seek treble damages under the Racketeering Influence and Corrupt Organizations Act (RICO), and in *Illinois Brick*, the Supreme Court addressed who could seek recovery under the Clayton Act in an antitrust action. The courts considered who constituted an injured party within the meanings of RICO and the Clayton Act for federal antitrust violation claim purposes. The courts based their decisions on concerns that holding otherwise would lead to the filing of numerous antitrust actions and unmanageable antitrust class actions that presented enormous evidentiary complexities and uncertainties. We do not find the rationale for the courts' decisions applicable in this case. Further, neither case involved an equitable action in assumpsit. Accordingly, we decline to apply federal antitrust law principles in this case.

Although the ratepayers may have had viable claims against a government entity for the overcharges they allegedly paid,[4] the class members settled and released Royal Oak from any and all liability for refunds of their alleged overpayments. Under *Hoyt*, the right to bring an action for assumpsit must be held by the plaintiff who can establish that the defendant has in its possession money which, in equity and good conscience, belonged to the plaintiff. In this case, plaintiff sued as Royal Oak's assignee for recovery of money paid to the GWKDD. The money plaintiff sought did not belong to Royal Oak, its assignor, but to the ratepayers. Therefore, the

[4] See *Bond v Public Schools of Ann Arbor*, 383 Mich 693; 178 NW2d 484 (1970).

trial court did not err by granting the GWKDD summary disposition of plaintiff's claim in assumpsit.[5]

III. GOVERNMENTAL IMMUNITY

Defendant argues that, in the absence of a contract, plaintiff's claims constituted negligence claims subject to government immunity under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*. Plaintiff counters by asserting that the trial court correctly decided that government immunity did not apply in this case. We agree that the trial court correctly determined this issue.

Under MCR 2.116(C)(7), "[s]ummary disposition may be granted when, among other things, a claim is barred by governmental immunity." *Dybata v Wayne Co*, 287 Mich App 635, 637; 791 NW2d 499 (2010). "When considering a motion brought under subrule (C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition." *Id.* (citations omitted). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Id.* at 637. Further, this Court reviews de novo the application of governmental immunity. *Id.* at 638.

"The [GTLA] provides 'broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function.' " *Milot v DOT*, 318 Mich App 272, 276; 897 NW2d 248 (2016), quoting *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984). There is no dispute that the GWKDD, a unit of Oakland County, a political subdivision of the state of Michigan, is a governmental entity generally immune from tort liability under MCL 691.1407(1). *Milot*, 318 Mich App at 276. This Court explained in *Yellow Freight Sys, Inc v State of Michigan*, 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds 464 Mich 21 (2001), rev'd 537 US 36; 123 S Ct 371; 154 L Ed 2d 377 (2002), that "[a]n action in assumpsit for money had and received is not an action in tort." "Therefore, governmental immunity from tort liability under MCL 691.1407 . . . does not apply." *Id.* Accordingly, we find no merit to defendant's argument that, in the absence of a contract, plaintiff's assumpsit claim should have been construed as a negligence claim barred by governmental immunity. We hold that the trial court did not err in concluding that governmental immunity did not apply in this case.

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[5] Defendant also argues that this action improperly imposed against it a certified class from the earlier settled action despite the fact that defendant was not a party to that action. Although defendant raised this issue before the trial court, the trial court did not decide the issue. Therefore, the issue was not preserved for review by this Court and we decline to review it. Further, the issue is not necessary for the disposition of this case. *Fast Air, Inc*, 235 Mich App at 549-550.

IV. AMENDED COMPLAINT

Plaintiff also argues that the trial court erred by granting defendant's motion to strike its first amended complaint and by denying its motion for leave to amend under MCR 2.118(A)(2) based on futility. We disagree.

We review for an abuse of discretion a trial court's decision to strike a pleading. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). We also review for an abuse of discretion a trial court's decision regarding a motion for leave to file an amended complaint. *Kostadinovski v Harrington*, 321 Mich App 736, 742-743; 909 NW2d 907 (2017). An abuse of discretion occurs when the court's decision results in an outcome outside the range of principled outcomes. *Decker v Trux R US, Inc*, 307 Mich App 472, 478; 861 NW2d 59 (2014). A trial court abuses its discretion when it makes an error of law. *Kostadinovski*, 321 Mich App at 743. We review de novo a trial court's interpretation of a court rule. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 348; 852 NW2d 22 (2014). "[W]hether a claim for unjust enrichment can be maintained is a question of law" subject to de novo review. *Morris Pumps*, 273 Mich App at 193.

"The principles of statutory construction apply to the interpretation of the Michigan Court Rules." *Decker*, 307 Mich App at 479. We look to " 'the plain language of the court rule in order to ascertain its meaning' and the 'intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole.' " *Id.*, quoting *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). " 'If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written.' " *Decker*, 307 Mich App at 479, quoting *Jenson v Puste*, 290 Mich App 338, 342; 801 NW2d 639 (2010).

In this case, plaintiff filed the complaint on June 20, 2017. In lieu of answering, on August 18, 2017, the GWKDD moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). Before responding to the GWKDD's summary disposition motion, plaintiff filed an amended complaint. That prompted the GWKDD to move to strike plaintiff's amended complaint under MCR 2.115(B) on the ground that its filing of a motion for summary disposition precluded plaintiff from filing an amended complaint without first obtaining leave from the trial court under MCR 2.118(B)(2). At the hearing on the GWKDD's motion to strike, the trial court held in abeyance its ruling. Nevertheless, the trial court later entered an order granting the GWKDD's motion and striking plaintiff's amended complaint.

MCR 2.118 governs amendment of a party's pleadings. *Ligons v Crittenton Hosp*, 490 Mich 61, 80; 803 NW2d 271 (2011). MCR 2.118(A) provides, in pertinent part:

> (1) A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading.
>
> (2) Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

MCR 2.118(A)(1) permits a party to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party[.]" *Ligons*, 490 Mich at 80 (quotation marks and citation omitted). MCR 2.110(A) specifies that the term "pleading" includes only a complaint, a cross-complaint, a counterclaim, a third-party complaint, an answer, and a reply to an answer, and states that "[no] other pleading is allowed." "[W]hen a court rule specifically defines a given term, that definition alone controls." *Ligons*, 490 Mich at 81 (quotation marks and citation omitted). The GWKDD's motion for summary disposition, therefore, was not a responsive pleading. *Huntington Woods v Ajax Paving Indus, Inc*, 179 Mich App 600, 601; 446 NW2d 331 (1989). Accordingly, plaintiff's right as a matter of course to amend its complaint under MCR 2.118(A)(1) was not triggered by GWKDD filing of its motion for summary disposition of plaintiff's claims in its original complaint. Plaintiff's filing without leave to amend did not comport with the requirements of MCR 2.118(A)(1). The trial court, therefore, did not abuse its discretion by striking plaintiff's improperly filed amended complaint.

The record reflects that plaintiff then moved for leave to amend its complaint to state two claims in assumpsit and to assert a new count for unjust enrichment. Under MCR 2.118(A)(2), "[a] court should freely grant leave to amend a complaint when justice so requires." *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998). In *Lane*, this Court explained:

> Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment.
>
> * * *
>
> An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. [*Id.* at 697 (citations omitted).]

In this case, the record reflects that the trial court considered plaintiff's proposed amended complaint and determined that the amended allegations and proposed unjust enrichment claim failed to overcome plaintiff's original complaint's deficiencies and failed to state a claim upon which relief could be granted. The trial court concluded that plaintiff's new unjust enrichment claim was futile for the same reasons that plaintiff's assumpsit claim failed.

The equitable right of restitution exists when a person has been unjustly enriched at another person's expense. *Morris Pumps*, 273 Mich App at 193. The law will imply a contract "to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Id.* at 194; see also *Belle Isle Grill*, 256 Mich App at 478. To sustain a claim of unjust enrichment, "a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps*, 273 Mich App at 195. "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.*

In this case, plaintiff stood in the shoes of Royal Oak as its assignee. It alleged in its proposed amended complaint that the GWKDD was unjustly enriched by overcharging Royal Oak for the costs of stormwater disposal. Although plaintiff alleged that the GWKDD received a benefit and asserted that it would be unjust for the GWKDD to retain the alleged overcharges, plaintiff cannot establish any inequity resulting to Royal Oak from the GWKDD's retention of the overcharges because Royal Oak passed through to ratepayers the alleged overcharges and recouped from them the amount it allegedly overpaid. While the retention of the alleged overcharges collected by the GWKDD may have resulted in an inequity to the ratepayers, Royal Oak suffered no loss. The record reflects that plaintiff did not specifically allege in its proposed amended complaint that any inequity resulted to Royal Oak. Royal Oak could not state a claim for unjust enrichment under the circumstances presented in this case. Therefore, plaintiff, as Royal Oak's assignee, could not state a claim for unjust enrichment. Because Royal Oak admittedly passed through the charges to its water and sewer ratepayers, the GWKDD was not unjustly enriched at the expense of Royal Oak. *Id.* at 195. Accordingly, plaintiff's proposed unjust enrichment claim suffered from the same defect as its assumpsit claim and the trial court could properly deny plaintiff's motion to amend on the ground of futility. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend its complaint.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ James Robert Redford

EXHIBIT J

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOAN GREENFIELD, Individually and as Representative of a class of similarly situated Persons and entities,
Plaintiff,

v

Case No: 18-169707-CZ
Hon. Denise Langford Morris

FARMINGTON HILLS,
Defendant.
_____/

ORDER DENYING MOTION FOR CLASS CERTIFICATION

This matter was before the Court on Plaintiff's Motion for Class Certification. The Court heard oral arguments and took the matter under advisement. After careful review of the relevant law and pleadings, the Court rules as follows. Class certification must be denied because Plaintiff has failed to satisfy the five factors required pursuant to MCR 3.501(A)(1). Plaintiff has not shown that the proposed class members have suffered any actual injury. In addition, the Court finds that under the facts presented, it is not probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administrating the action to justify a class action.

IT IS HEREBY ORDERED that Plaintiff's Motion for Class Certification is DENIED.

IT IS SO ORDERED.

/s/ Denise Langford Morris

DATED: 12/6/2019

DENISE LANGFORD MORRIS CM
Circuit Court Judge

EXHIBIT B

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

WILLIAM NOFAR, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF NOVI, MICHIGAN
a municipal corporation,

Defendant.

Case No. 2020-183155-CZ
Hon. Judge Nanci Grant

Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class

Thomas R. Schultz (P42111)
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Attorneys for Defendant

Randal S. Toma (P56166)
Randal Toma & Associates PC
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Birmingham, MI 48009
(248) 948-1500
Attorneys for Plaintiff and the Class

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

At a session of the Oakland County Circuit Court
held in the City of Pontiac, State of Michigan
on this 21st day of July , 2021

PRESENT: Nanci J. Grant
Circuit Court Judge

This matter having come before the Court upon the motion of the Plaintiff, the Court having heard oral argument and considered Plaintiff's submission of additional evidence, and the Court being otherwise fully advised in the premises, **THE COURT FINDS:**

a. that the prerequisites for class certification under MCR 3.501 are satisfied in this case for the reasons set forth in Plaintiff's motion for class certification and brief in support and the Court therefore certifies the Class under MCR 3.501.

b. pursuant to MCR 3.501, that the Class as defined as all persons or entities who/which have incurred or paid charges for water and/or sanitary sewer service (the "Charges") imposed by the City of Novi (the "City") at any time since July 1, 2015 and/or who/which incur or pay the Charges during the pendency of this action is appropriate because (a) the class consisting of thousands of property owners in the City is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of this Class that predominate over questions affecting only individual members, including whether the Charges constitute "taxes" which violate MCR 141.91, whether the Charges are reasonable, and whether the Charges violate the City's Charter; (c) the claims or defenses of the representative party are typical of the claims or defenses of the class because the representative's claims arise from the same events or practices or course of conduct that gives rise to the claims of the other class members and are based on the same legal theories; (d) the representative party will fairly and adequately assert and protect the interests of the class because there are no conflicts of interest with the Class, and the Class is represented by experienced, competent counsel; and (e) the maintenance of this action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

IT IS HEREBY ORDERED:

A. That this action is certified as a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC and Randal Toma & Associates PC designated as Class Counsel.

B. With respect to all counts of the Complaint, the Class is defined to include all persons or entities who/which have incurred or paid the Charges at any time since July 1, 2015 and/or who/which incur or pay the Charges during the pendency of this action.

SO ORDERED.

/s/ Nanci J. Grant
July 21, 2021

/s/

Circuit Court Judge Nanci J. Grant P42865

KH168968

RDW

EXHIBIT C

STATE OF MICHIGAN

SIXTH JUDICIAL CIRCUIT COURT (OAKLAND COUNTY)

WILLIAM NOFAR, individually and as representative of a class of similarly-situated persons and entities,

Plaintiffs,

-vs- Case No. 20-183155-CZ

CITY OF NOVI, MICHIGAN, a municipal corporation,

Defendant.
_____/

MOTION

BEFORE THE HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

Pontiac, Michigan - Wednesday, March 24, 2021

APPEARANCES:

For the Plaintiffs: GREGORY D. HANLEY (P51204)
EDWARD F. KICKHAM, JR. (P70332)
32121 Woodward Avenue Suite 300
Royal Oak, Michigan 48073
(248) 544-1500

For the Defendant: STEPHANIE SIMON MORITA (P53864)
STEVEN P. JOPPICH (P46097)
27555 Executive Drive Suite 250
Farmington Hills, Michigan 48331
(248) 489-4100

TRANSCRIBED FROM VIDEOTAPE BY:
Marguerite H. Anderson, CER, CSR-2334
(248) 935-5190

TABLE OF CONTENTS

WITNESSES:

None Called.

EXHIBITS: RECEIVED:

None Marked.

Pontiac, Michigan

Wednesday, March 24, 2021 - 10:04 a.m.

THE CLERK: Now calling the case of Nofar versus Novi City. Case Number 2020-183155-CZ.

THE COURT: I need your appearances.

MR. HANLEY: Good morning, your Honor. My name is Greg Hanley and I represent the plaintiff.

MR. KICKHAM: Edward Kickham, on behalf of plaintiff, your Honor.

MS. MORITA: Good morning, your Honor. Stephanie Simon Morita, on behalf of the defendant, City of Novi.

MR. JOPPICH: Good morning, your Honor. Steve Joppich, on behalf of defendant as well.

THE COURT: Okay. I don't know if it's Mr. Kickham or Mr. Hanley, so either one: What is your response to the city's argument that your client failed to provide any evidence that he paid a water bill to the city, specifically because he's the -- he's the co-owner of the property at 50102 Drakes Bay Drive?

MR. HANLEY: Well, the answer is that he's submitted a sworn interrogatory answer that said he's the one who paid the bill. The city has

precise records as to the billing and payment history for his property.

I guess somebody could say well, where is the check and I guess that could be dug up and presented. But he has a sworn interrogatory answer that said he's the one who paid the -- the bills.

THE COURT: Mr. Hanley, how -- I mean, we're all in a digital age. So why can't he just get a digital copy of the check that shows that he paid? Why -- why do we have to go and get an affidavit -- why do you give an affidavit?

I mean, I can -- I can pick up my phone right now, go to my bank app and get all my -- and get all my digital -- get all my checks. So why is this an issue?

MR. HANLEY: Well, I -- I don't think it should be an issue but it's something that we can definitely do.

THE COURT: Well, I'm -- you know, I'm going to make it clear with you: I think it's an issue. I think it's an issue that you have been made aware of. So here we are, on an adjourned date -- I didn't adjourn it, it was

adjourned by someone else. You could have shown that to me today. So why -- why don't I have a copy of the check that shows you paid the bill?

MR. HANLEY: Well, all I can say, Judge, is that's something we certainly can provide. We didn't -- we did not think it was an issue, given his sworn interrogatory answers.

But this -- this is objective evidence we can obtain and I think the Court is right to ask us to provide it and we can provide it.

THE COURT: Can you -- can you state for the record the exact time period that you refer to as the class period? Your brief says that the class period begins on July 1, 2015 but does it extend then to the present date?

MR. HANLEY: Yes.

THE COURT: So your class period is -- is specifically what?

MR. HANLEY: Well, from July 1, 2015 through the pendency of this case, should the -- these overcharges continue. I mean, we can't predict the future.

So the definition that we're proposing is, is that they -- that it began on July 1, 2015 and extend during the pendency of this action.

THE COURT: Okay.

MR. HANLEY: I mean, subject to obvious proofs that show that the overcharges continued, you know, on or after today.

THE COURT: Anything else outside your pleadings?

MR. HANLEY: No, your Honor. Other than to say that there was a case addressed in their sur-reply, the A&M Supply case, and I think that that case really shows why certification is appropriate here, because it makes a distinction between a common injury and common damages.

And what the plaintiff needs to show is that is a common injury can be proven by common facts. And that's the -- why we've presented some facts, not to have the Court decide whether those facts prove, you know, the merits, but to show that ultimately the case will rise and fall on evidence that's common to the class.

And for that reason we think we've -- we've satisfied all of the elements.

THE COURT: Okay. Anyone else?

I -- I agree with that statement. Here's -- I guess for me, I want to have bells and suspenders, Mr. Hanley. So I -- I'm letting you

know I will sign an order certifying class once I see a copy of that check that shows that he's paid -- that he paid the bills.

MR. HANLEY: Okay. We'll do that forthwith.

THE COURT: And once I -- and once I get that, I will forthwith sign the appropriate orders.

MR. HANLEY: Okay. Thank you, your Honor.

THE COURT: Anything else?

Okay. Thank you very much. Thanks for waiting this morning.

MR. HANLEY: All right. Thank you.

MS. MORITA: Thank you, Judge.

THE COURT: Have a good day.

(At 10:08 a.m., proceedings concluded.)

- - -

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

I, Marguerite H. Anderson, CER, CSR-2334, do hereby certify that this transcript, consisting of 8 pages, is a complete, true and correct rendition of the videotape of the proceedings as recorded in this case on March 24, 2021.

/s/ Marguerite H. Anderson

Marguerite H. Anderson, CER, CSR-2334
78 Bobolink Street
Rochester Hills, Michigan 48309
(248) 935-5190

Dated: June 23, 2021.

EXHIBIT D

Order

Michigan Supreme Court
Lansing, Michigan

July 6, 2021

Bridget M. McCormack,
Chief Justice

162643

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

JAMILA YOUMANS, and all others similarly situated,
Plaintiff-Appellant,

v

SC: 162643
COA: 348614
Oakland CC: 2016-152613-CZ

CHARTER TOWNSHIP OF BLOOMFIELD,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the March 2, 2021 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 6, 2021

Clerk

b0628

STATE OF MICHIGAN

COURT OF APPEALS

JAMILA YOUMANS, and all others similarly situated,

Plaintiff-Appellee/Cross-Appellant,

v

CHARTER TOWNSHIP OF BLOOMFIELD,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
January 7, 2021
APPROVED FOR PUBLICATION
March 2, 2021
9:00 a.m.

No. 348614
Oakland Circuit Court
LC No. 2016-152613-CZ

Before: STEPHENS, P.J., and MURRAY, C.J. and SERVITTO, JJ.

PER CURIAM.

In this certified class action, plaintiff Jamila Youmans, who is the sole class representative, challenged certain municipal utility rates and ratemaking practices of defendant, Charter Township of Bloomfield ("the Township"). Defendant appeals as of right the trial court's amended judgment, entered after a bench trial, that awarded plaintiff and the plaintiff class permanent injunctive relief and more than $9 million in restitution. Plaintiff has filed a cross-appeal, challenging the trial court's refusal to award damages for certain components of the Township's water and sewer rates.[1] We affirm the trial court's ruling concerning plaintiff's claims based upon a violation of § 31 of the Headlee Amendment, Const 1963, art 9, § 31, reverse its judgment awarding monetary and equitable relief to plaintiff and the plaintiff class, and remand for entry of a judgment of no cause of action in favor of the Township.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] By leave of this Court, the Michigan Municipal League and the Michigan Townships Association have submitted an amicus brief that supports the Township's position. *Youmans v Charter Twp of Bloomfield*, unpublished order of the Court of Appeals, entered January 29, 2020 (Docket No. 348614).

This case arises out of plaintiff's challenge to various aspects of the Township's water and sewer rates and its related ratemaking methodology during the "class period," which commenced on April 21, 2010, for purposes of plaintiff's assumpsit claims (i.e., six years before plaintiff initiated this action) and on April 21, 2015, for purposes of plaintiff's Headlee claims (i.e., one year before plaintiff initiated this action). In October 2016, the trial court entered an order "certifying this case as a class action" and appointing plaintiff as the sole class representative. Plaintiff's amended complaint included six counts, the first of which asserted several claims for violation of § 31 of the Headlee Amendment, and the remainder of which asserted claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**" with regard to both certain specific components of the Township's water and sewer rates and the "arbitrary, capricious, and unreasonable" nature of those rates and the underlying ratemaking processes. After the trial court denied the parties' competing motions for summary disposition, the matter proceeded to a 10-day bench trial.

A. THE UTILITY SYSTEMS AND BASIC RATEMAKING METHODOLOGY

Wayne Domine, the director of the Township's "engineering and environmental services" department from 1991 until his retirement in May 2017, testified that the Township consists of approximately 18,000 parcels of realty, approximately 3,000 of which are not serviced by the Township's water utility. The water system provides treated, potable water to its municipal customers, but it is also used for firefighting capability, providing water to the Township's fire hydrants.

According to Domine, much of the Township's water system was privately constructed by real estate developers beginning in the 1920's. The infrastructure was originally a piecemeal collection of "several subdivision well water supply systems throughout the township." However,

> [i]n 1963, the township had decided that the existing well systems would not be adequate to provide the water quality and quantity required to maintain the projected future demands of the community. The connection to the City of Detroit system was found to be most dependable for the health and welfare of the township residents. Several miles of transmission mains were constructed. . . . Since then over 200 miles of lateral water mains have been extended into areas either by means of special assessments or developer funded projects.

Since 2004, the Township has been subject to an abatement order, which arose out of litigation with the Michigan Department of Environmental Quality (DEQ), to "dry out" the sewer system, i.e., prevent water infiltration into the system. After performing a long-term needs study, the Township approved a 20-year capital improvement program, which is funded by the inclusion of a "water debt charge" in the disputed utility rates.

Domine agreed that the Township's sewer system is a separated system, with "one set of pipes for sanitary sewage," and a separate storm-sewer system, which is "intended to collect storm water runoff or . . . water from the land" and discharges such water directly into a waterway. The

Township does not own its storm-sewer system, other than the storm drains that are on the property of the township. Rather, the storm-sewer system is owned and maintained, in concert, by several county and state entities. Oakland County bills the Township for the "sewer flow" that exits in the Township, as estimated by approximately 30 meters located in various areas, based on the Township's proportional contribution to the entire system. Conversely, the Township does not measure "sewer flow" in order to determine the rate that it charges its municipal sewage customers; it bases the overarching sewer rate on water usage, which is the common practice throughout Oakland County.

Domine was involved in the Township's annual budgeting (on a limited basis) and water and sewer ratemaking from before the class periods in this case commenced until his May 2017 retirement.[2] He also coauthored the "annual rate memorandum," which included an outline of recommended water and sewer rates and was presented to the Township "board" for approval each year. The "first" consideration in ratemaking was "to gather up all the expenses, and then determine a revenue that would cover those expenses." Put simply, the rates were intended to allow the Township to "[b]reak even," but the process is complex, generally taking place "over several months." By nature, the rates are predictive—intended to cover expenses that will be incurred after the rates are set—and thus they merely *estimate* the revenue that will be required. Accordingly, to provide a "margin of error," the rates were generally set to generate "a revenue stream slightly above" the projected expenses, but in some years during Domine's tenure, the "water and sewer fund" was operating at a deficit. Even so, and in at least one year, a midyear adjustment to the rates was required to prevent an excessive deficit. The ratemaking process employed by the Township did not focus on individual line items; it employed a holistic approach, focusing on generating sufficient overall annual revenue to cover the overall annual costs.

Jason Theis testified that he served as either the Township's finance director or deputy finance director at all times pertinent to this case, during which time he was also involved in the annual budgeting process for the Township's water and sewer fund. Theis is a certified "public finance officer," which is akin to being a certified public accountant, but with an exclusive focus on governmental, rather than private, finance and accounting. He indicated that, in setting the disputed utility rates, it was desirable to budget both revenues and expenses "conservatively," in hopes of ensuring sufficient revenue to cover expenses. As a result, with regard to individual line items in the budget, the actual amounts received or expended often varied considerably from the projections used in setting the rates. Over the ratemaking period of six months, the disputed rates would go "through many different iterations."

According to Domine and Theis, the water rate included a "variable rate" for consumption, which was intended to recover the Township's operating expenses, depreciation improvements, and the cost of the water purchased from the Southeastern Oakland County Water Authority, and

---

[2] Thomas Trice, the director of the Township's Department of Public Works (DPW), testified that he was also involved in the disputed ratemaking process during the pertinent timeframe.

the water rate also included a "fixed," "ready-to-serve" charge to cover extra operational expense. The fixed portion of the water rate generally represented about 80% of the utility's required revenue stream, and it was intended to help the Township cover its "steady stream of monthly expenses" despite fluctuating water use and revenue over time.

Similarly, Domine indicated that the sewer rate included a "variable rate," which was intended to recoup operating expenses (including treatment of raw sewage) and depreciation improvements, and the sewer rate also included a "fixed" charge that was intended to recover the remainder of the Township's operating expenses. In addition, both the sewer and water rates included debt service charges, which were assessed in amounts intended to pay the debt service on bonds or other obligations issued by the Township related to water and sewer.

The parties stipulated that some portion of the Township's utility ratepayers were not also on the "tax rolls" that fund the Township's general fund, citing examples including tax-exempt entities like churches. Domine indicated that about 80% of the Township's water customers are also sewer customers, with the remainder using septic-tank systems. A small portion of customers—about 3%—receive sewer services only; they are not water customers. Domine agreed that those "sewer only" customers are billed in one of two ways. The majority pay a fixed annual charge, while the remainder have elected to have a meter installed on their well-water line and are billed "for their sewer based upon actual water usage." Additionally, the water system permits homeowners to install a "secondary" water meter that measures water used outside the home (e.g., for lawn irrigation or swimming pools), and such water usage is not included when calculating the homeowner's sewer charges.

Because the Township has no way of determining the amount of "sewer" services a sewer-only customer uses, the "fixed annual charge" is determined by averaging the rate of the "sewer only" customers who have elected to have a water meter installed. Domine admitted that the sewer ratemaking methodology did not account for the sewer only customers explicitly. But Domine also indicated that, because the Township had been overestimating volume in an attempt to keep the sewer rate from excessively increasing, "a lot" of the time the Township did not collect enough "sewer revenue" to cover the associated costs fully.

According to Theis, the budgeting program for the water and sewer fund—which he sometimes referred to as the creation of a "projected income statement"—involved "a lot of back and forth" "looking at five year trends of all the different accounts within the water and sewer fund," establishing projected figures for "operational" overhead (including staffing expenses), and projecting the anticipated water costs. Of the 18 different Township funds for which annual budgets and projections are prepared, the water and sewer fund was the only "enterprise fund" (i.e., a proprietary, non-tax revenue, self-sustaining fund, which charges for services provided, is not supported by a millage, and falls outside the operating township budget), and it was the most difficult to budget for because it involved "more guess work" than the other funds, particularly with regard to commodity charges and tap sales. For instance, the revenue received during a "dry season" would vary by "millions of dollars" from the revenue received in "a wet season[.]" In

addition to the Township's 18 budgeted funds, Theis also oversees approximately another 10 that aren't budgeted. Most of the Township's utility customers were billed on a quarterly basis, while most of the "suppliers" billed the Township monthly. As a result, in calculating the necessary revenue flow to meet its utility expenses, the Township needed to plan to keep sufficient cash on hand from quarter to quarter.

As an expert witness, plaintiff called Kerry Heid, who is a "rate consultant specializing in the public utility field," ratemaking in particular, and has approximately 40 years of experience in that field. He agreed that the "first step" in utility ratemaking "is to determine the revenue requirement," i.e., the revenue that the utility will need to cover its expenses, and he also agreed that this involves cost projections regarding variable expenses that are generally unknown when the rates are set.

According to Heid, "almost industry-wide, the generally recognized standard to use for generally accepted cost of service and rate making practices for water utilities" was, at the time of trial, set forth in the seventh edition of "the American Water Works Association M1 Manual" (the "M1 Manual"). Heid's opinions in this case concerning the disputed water rates were based on those methodologies and principles. He indicated that there are "two generally accepted methods" by which a utility's revenue requirements are determined: (1) "the cash basis, or the cash method," and (2) "the utility basis." In Heid's opinion, the Township used the cash method in calculating the disputed rates. Under that method, a municipality determines "its cash needs" by considering expenses such as "debt service, which would include principal and interest on bonds or outstanding debt," "operating and maintenance expenses," taxes, "[a]nd any other cash needs that the utility would need in order to operate its utility." The total of such expenses constitutes the utility's "revenue requirement." In determining which expenses, precisely, are properly considered in ratemaking, a utility should only include an expense if it is "prudently incurred" and "necessary for the utility to operate."

According to Heid, after a utility has determined its anticipated revenue requirement, "[t]here are two different sources of funds that the utility needs to consider, such that the total of those fund sources would generate the needed revenue requirement": (1) rate revenue, and (2) "miscellaneous revenues," which are also known as "non-rate revenues." Non-rate revenue includes any "sources of revenue that the utility does receive over and above the actual rates that are developed by the utility." Before determining its rates, a utility should "net out the non-rate revenue from the total revenue requirement." For example, if a utility's initial revenue requirement was estimated to be $100,000, but it expected to generate non-rate revenue of $5,000, it should "design rates that would generate revenues of $95,000."

Heid indicated that, after determining its "net revenue requirement," the utility would determine what portion it "want[ed] to recover through a customer charge," such as the fixed portion of the Township's water rate, and how much the utility wanted to recover by way of "a volumetric charge" for water use. Although there is an element of "discretion" in deciding the proper ratio of the fixed customer charge and volumetric charge, Heid opined that the proper

method was to perform a "cost of service study," which is something that the Township had failed to do, instead relying on what Heid described as "an arbitrary allocation[.]" In any event, Heid indicated that after deducting the fixed charge from the revenue requirement, a utility should divide the remaining portion (i.e., the portion it wished to recover through a volumetric charge) by the expected "total usage," with the result of that equation equaling the appropriate utility rate. In Heid's view, it was "[a]bsolutely not" appropriate for a municipal utility to design its rates to "over-recover," i.e., to recover more than the utility's net revenue requirement.

The Township called Joe Heffernan as an expert witness. Heffernan is a certified public accountant and retired from Plante Moran with at least 30 years of experience in conducting "public sector" accounting audits and consultations. He indicated that municipalities are obliged to have such external audits performed under Michigan law. According to Heffernan, before he reviewed the financial statements in this case, the Township's independent auditing firm had "already looked at the underlying general ledger and tested the internal controls and looked for compliance with laws and regulations[.]" After doing so, the independent auditors issued an audit opinion indicating that the Township's "financial statements are fairly stated" and were "free of material misstatement," meaning that "they're reliable." Similarly, Heffernan discerned "nothing" in the financial statements that would have led him to suspect that the Township's water and sewer department was potentially failing to comply with any applicable regulatory law.

Heffernan testified that Plante Moran audits "125 communities in southeast Michigan." About "[a] third to half of them don't" issue rate memoranda or any other "formal written document" explaining their utility-ratemaking methodology. Nor was he aware of any "requirement" for municipalities to do so. In setting their utility rates, such municipalities "just look at two things, what do our cash reserves look like, do they seem too high or too low, what's the percentage increase that we're going to get from our supplier, and based on whether their cash is too high or too low they bump . . . up or bump . . . down" the rates. Such "simple" ratemaking was "really common," and it "seem[ed] to work," historically resulting in relatively proportional cash inflows and outflows for the utilities that employ it.

Heffernan agreed that it is "possible to reach a reasonable water and sewer rate using a flawed rate model" or no model at all, and he also agreed that "mathematical precision" in calculating rates is neither required nor possible because rate models are based on predictions, "[a]nd honestly, every single one of your individual projections will be wrong" to one degree or another. "[T]he numbers are so big . . . and can change by so much you really have to accept a certain amount of fluctuation and variation[.]"

The Township also called Bart Foster as an expert, with his expertise "in the area of municipal water and sewer service rate setting[.]" Foster has "30-plus years' experience" in "providing financial, management consulting, and rate consulting services to predominantly municipal water and waste water utilities." He has performed such services for "between 10 and 20" municipalities in Michigan, and he was "pretty much regularly engaged for over 30 years with the Detroit Water and Sewage Department until they transitioned into the Great Lakes Water

Authority" (GLWA). At the time of trial, he was employed as a consultant at the GLWA, and he indicated that he was familiar with Michigan regulatory law regarding municipal utilities.[3]

B. "LOST" WATER AND "CONSTRUCTION" WATER

According to Domine, one factor that was considered in setting the water rates was "non-metered water," which was, in essence, "lost" water that the Township purchased but never actually sold. This occurred for "a variety" of reasons, such as broken water mains, leaks, "[c]onstruction water" (i.e., water used in the construction and maintenance of the water system itself), "billing inaccuracies," "meter inaccuracies," and "lag time" in meter reading. During the relevant "class period" years, Domine had estimated the anticipated "lost" water, for ratemaking purposes, at between 5% and 7% of the Township's annual projected water purchase. Such "lost water" figures were included in setting the water rates, intended to offset the cost of the water that the Township had purchased but never sold to its metered customers.

According to Heffernan, "water loss" is something that he commonly encountered in auditing municipal utilities because one "key" metric in "every" such audit was a comparison between "the volume of water purchased and sold by the water and sewer fund[.]" On the other hand, Foster indicated that he disfavored the use of the phrase "lost water"—preferring to use the phrase "unaccounted-for water"—because "lost water" is an "unduly simplified" description. Terminological disputes aside, Foster agreed with Domine and Heffernan about the essential underlying concept, explaining that for a municipality like the Township, which has no water "production facilities" and instead "purchases water wholesale," unaccounted-for water "would simply be how much water is being purchased on a wholesale basis from the provider . . . compared to how much water [the municipality] sells to the customers[.]" Such unaccounted-for water was generally attributable to "the possibility of inaccurate meter reads, both on the purchase side and on the sales side," "natural leakage out of the pipes," and "uses of water for construction purposes that's unmetered[.]" Foster indicated that "the Township had an unaccounted-for water percentage of between 4 and 5 percent," which was "on the low" or "medium side" for municipalities in southeast Michigan. He opined that, because unaccounted-for water was "a cost of maintaining the system," "it is appropriate to recover that" cost in the corresponding utility rates, and it would be inappropriate for the water and sewer fund or the Township's general fund to bear such expense.

Domine indicated that "construction water" is used primarily in "the flushing and filling of the water mains that are being built," in "pressurizing the main," and also when "doing bacteria testing." In his opinion, the use of such unmetered construction water is "necessary . . . for the operation of the system itself[.]"

[3] In substance, Foster's relevant expert opinions were largely identical to those expressed by Heffernan.

C. WATER USED BY TOWNSHIP FACILITIES

In addition to "lost" water, Domine agreed that "the township's facilities use water, but there isn't a check written from the water and sewer fund to the general fund for the value of that water[.]" He explained that, rather than paying for such water with cash, the Township provides in-kind "services and value" to "the water and sewer fund," the value of which "exceeds the value" of the water used by the Township's facilities. Domine and Theis admitted that they were aware of no formal documentation of such in-kind remuneration. As an example of one such in-kind service, Domine indicated that Township firefighters performed inspection, "flushing, and some of the maintenance" on the Township's fire hydrants. As other examples, Theis indicated that his services and those of his staff (i.e., accounting, finance, and human resources services) are provided to the water and sewer fund at no charge, as are the services of the Township's "IT department," which spends approximately 10% of its resources servicing the water and sewer fund. That fund is also provided "maintenance" and "cleaning" services by Township employees.

Although some of the municipal buildings are equipped with water meters, readings were never taken, and thus there was no record of precisely how much water was used by the municipal facilities during the pertinent timeframe. As part of this litigation, however, Domine prepared an estimate of the water used by the Township's facilities, estimating a total annual use of approximately 3.8 million gallons. Based on that figure, he estimated that the combined water and sewer services provided to the Township facilities was worth approximately $35,000 annually,[4] while the water provided to the Township's fire hydrants was valued at $10 per hydrant, for a total of $31,000. Domine and Theis each estimated the value of the Township's in-kind remuneration for such services to be more than $100,000 annually.

Contrastingly, Heid indicated that any in-kind remuneration that the Township provided to the water and sewer fund was inadequate because, based on his estimations, the value of the "public fire protection" services rendered to the Township by the water utility "was in excess of a million dollars every year[.]" And with regard to fire hydrant water usage, Heid indicated that the $10 estimate per hydrant was "grossly inadequate and without any basis[.]"

According to Heffernan, most municipalities "typically" have water meters installed on municipal buildings, and their water and sewer departments typically bill the general fund for such water use. Foster agreed, indicating that he does not "normally see . . . the practice employed by [the] Township" of accepting in-kind remuneration for water from the general fund rather than directly billing the general fund for the water used by municipal facilities. But according to Heffernan, based on his experience with "other communities of a similar size," he estimated that the true value of the in-kind services provided to the water and sewer department by way of

[4] Heid indicated that the $35,000 estimate was facially reasonable.

"general fund" dollars was "in the neighborhood of" $700,000 or $800,000. On that basis, Heffernan opined that he would not consider the Township's facilities to be receiving "free water."

On the other hand, Foster indicated that the value of the water used by the Township facilities and the in-kind services provided to the water and sewer fund were "close to being a wash[.]" But he also indicated that the Township's in-kind remuneration strategy was "perfectly reasonable" and opined that the disputed utility rates would most likely go up, not down, if the Township were to undo the in-kind arrangement and, along with beginning to pay for water used by Township facilities, also begin to charge the water and sewer department for all of the services that it had previously received from the Township at no charge.

D. "NON-RATE" REVENUE

Domine indicated that he never employed the term "non-rate revenue" while working for the Township and had not heard that term before this litigation commenced; rather, he categorized such revenue as "other revenue." His testimony concerning the treatment of non-rate revenue in the ratemaking process was somewhat convoluted. He agreed that the annual rate memoranda "probably" contained no "discussion" of non-rate revenue—those memoranda "never" specified all of the "expenses" underlying the recommended rates—but he disagreed that non-rate revenue was "not factored into" the rate "model" for the disputed utilities, explaining that they were considered as part of the "revenue stream" for the Township's annual budget, but not as a source of revenue attributable to the disputed rates. Later, however, Domine testified that "non-rate revenue . . . is *not* included in the rate calculation. It's considered as extra revenue to pay towards the expenses." (Emphasis added.) Later still, when Domine was asked, "[Y]ou weren't recovering all of your budgeted expenses through the rate, but instead were leaving some of them off because you anticipated getting non-rate revenue[?]", he replied, "Yeah, that—that would be what I've been saying all along." He also indicated that non-rate revenue was "reflected in the numbers" in the annual rate memoranda, explaining that the total operating expenses listed in those documents were actually "the net expenses, after deducting the non-rate" revenue. Notably, Domine qualified his answers somewhat by stating that his memory of such issues was hazy, given that he had retired, and questions about non-rate revenue would be better directed to the Township's finance director, Theis. But Domine also indicated that he "kn[e]w for a fact" that he had deducted non-rate revenue from the total operating expenses before calculating the disputed rates. In effect, this benefited the utility customers, lowering rates.

When the trial court asked Domine whether the deduction of non-rate revenue from total operating expenses had "historically" been "manifest" in his "paperwork," he replied, "It—it just came up in the last couple years . . . you got to understand, for 20 some years, a lot of it, I just did it[.]" Historically, Domine had performed the calculations informally for his own use, using

"notepads and sticky notes," rather than documenting the process formally.[5] However, during his final two years working for the Township, he had created a detailed spreadsheet to explain to his replacement "how the process works[.]" The spreadsheet showed the same process by which Domine had deducted non-rate revenue from the total operating expenses "in the past."

Theis agreed that, with the exception of "the '16, '17 rate memo," the rate memos for the other fiscal years at issue here did not include any "calculation that deducts non-rate revenue before setting the rate." Like Domine, however, Theis disagreed with the contention that non-rate revenue had not been accounted for in calculating the disputed rates, indicating that it had been used to offset projected annual expenses in ratemaking. Theis indicated that certain informal spreadsheets, which he had prepared for his own use in prior years, documented that process of incorporating non-rate revenue into the rates. Theis considered a specific item of non-rate revenue to be attributable as revenue of the water and sewer department if it was "directly related" to those utility services.

On the other hand, Heid indicated that, other than the Township's "rate document for fiscal year 2016-17," in his review of the documents provided to him in this case, Heid had "absolutely not" seen "any evidence" that non-rate revenue was properly accounted for in calculating the disputed rates. On the contrary, after comparing the "operating expenses that were reflected in the budget" for each class-period year "to the operating expenses that were utilized in the" corresponding "rate making model" for that year, Heid opined that the numbers indicated that the Township had not duly "netted out" the non-rate revenue in any fiscal year other than the one beginning in 2016. Heid summarized: "My opinion . . . is that the utility's reasoning or explanation for the treatment of non-rate revenues does not hold water, that they did not net out the non-rate revenue from the operating expenses as reflected in the rate memos." The Township's failure to deduct non-rate revenue "was not a reasonable rate making practice" because it "is commonly accepted that the non-rate revenues should be deducted from the total revenue requirement when establishing rates," and in Heid's reckoning, "if the rate methodology is faulty," then it is not possible to determine whether "the rate is reasonably proportionate" to the underlying utility costs.

On cross-examination, Heid indicated that he had "solely derived" his opinions concerning whether non-rate revenue was duly incorporated into the disputed rates by reviewing the annual "rate memorandums." He had not reviewed any "underlying work papers."

Although Heffernan agreed that non-rate revenues should be accounted for in ratemaking, he indirectly criticized Heid's methodology, indicating that it was not useful to compare the numbers in the rate memoranda and those in the water and sewer fund's annual "budget" because such documents are prepared "at two different points in time," "for two different purposes," utilizing different accounting principles. Thus, inconsistencies between the two documents were

[5] Theis described the prior methodology as, for "lack of a better term," "back of a napkin" calculations, which were not performed "consistently" during the relevant timeframe.

to be expected. Heffernan explained that "quite often" the budget does not have "a great relationship to what actually happens" after the budget is set, and the same is true with regard to rate memoranda.

Heffernan further explained that his analysis of the issues in this case involved "looking through the financial statements, some of the other documents ancillary to the financial statements, and most importantly, having some open discussion with the finance director, [the Department of Public Works (DPW)] director, and talking through what's behind the numbers in order to come to a conclusion." He focused on the financial statements particularly, "because those are what actually happened," whereas the annual utility "budget" was "merely a plan of what you may expect to happen," intended to permit the Township board to grant its "permission" for the "the various department heads . . . to conduct business and spend up to certain amounts for certain purposes." Similarly, although "rate memos can help inform you as to" the thought process employed in ratemaking, they cannot demonstrate the results—"what really happened"—like financial statements do. For that reason, financial statements are vitally important in auditing municipal utilities. They permit an auditor to assess whether the revenues *actually* received by a utility are "proportional" to the *actually* incurred underlying expenses.

Foster's opinions in this case were also primarily founded on his review of the Township's financial statements, and he agreed with Heffernan that they are preferable to the water and sewer fund's budgets and rate memoranda because it was best to evaluate "the effect" of rates and charges "after the fact[.]" Foster added that having been independently audited, the "financial statements have a degree of review that is arguably more—more rigorous than a budget or a rate memoranda."

After reviewing the Township's relevant financial statements, Heffernan and Foster both opined that the Township had duly accounted for non-rate revenues during the pertinent timeframe, although its calculations concerning non-rate revenue were not set forth in the rate memoranda. As Heffernan put it, "The work just wasn't shown." Even so, Heffernan believed that the financial statements and the proportionality of the water and sewer fund's cash flows during the relevant timeframe "clearly" demonstrated that the Township had properly accounted for non-rate revenue in the disputed rates. Heffernan expounded, "That's the great thing about the financial statements, you can't hide. It's in there or else the auditor would be disclaiming their opinion and saying everything is wrong."

Additionally, Heffernan indicated that even assuming, for the sake of argument, that the Township had *not* duly accounted for non-rate revenue in setting the disputed rates, that failure, standing alone, was insufficient to render the rates "unreasonable[.]" Foster agreed, stating that "it wouldn't matter" because if the water and sewer fund had recovered too much in the disputed rates, it would have either adjusted its rates accordingly or taken the opportunity to prudently add to its reserve funds, and if it had recovered too little, "there would need to be rate increases in order to get the reserves at . . . the prudent level."

When asked, on cross-examination, whether failure to account for non-rate revenues would result in "an overcharge to the rate payers," Heffernan replied:

> Potentially. And the reason I say potentially is there's only an overcharge if in fact you have charged them more than their actual cost. And in the rates there are so many other things that could be inaccurate in your rate model and you don't know until you see what—and that's why I look at the financial statements, what were the costs, what was the revenue that came in, that tells you if you've overcharged.

E. THE COUNTY DRAIN CHARGES

Michael McMahon, who is an employee of the Oakland County Water Resources Commissioner's Office, testified that Oakland County assesses fees to its municipalities for maintenance of the county storm-sewer system. The charges for "chapter 4 drains" are generally "assessed . . . to individual property owners," although an "at large portion" is assessed to the municipality and some municipalities pay the "chapter 4" charges on behalf of their residents, while the charges for "chapter 20 drains" are "assessed to municipalities at large."[6] The county also charges municipalities a combined sewer overflow facility fee.

According to McMahon, in 2015, the Township was in arrears of approximately $346,560 with regard to its county drain charges because, before that time, the county "had sort of lapsed on some of [its] assessments." The same situation had occurred with multiple municipalities, and McMahon was tasked with getting all the drain funds out of deficit. Accordingly, he contacted Domine, seeking to establish a budgetary plan for the Township to satisfy its arrearage. Ultimately, it was agreed that the Township would do that over the course of a couple years so that they could budget for it.

Domine indicated that, as a result, in the fiscal year beginning April 1, 2015, the Township began including a line item in its water and sewer budget for "county storm drain maintenance" (the "drain charges"). Before that time, the Township's "chapter 20" drain fees had always been paid out of the Township's general fund with tax dollars, not included as an aspect of the disputed utility budgets. For example, in 2013, $23,000 was paid from the general fund to satisfy the drain charges. The first year after the switch, the new budgetary line item for drain charges was $200,000, which was included in calculating the disputed utility rates. An additional $200,000 was included in the same fashion the next year (i.e., in the fiscal year beginning April 1, 2016), and $75,000 was included for drain charges the year after that.

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[6] Domine indicated that, to his knowledge, the Township does not pass any of its "chapter 4 drain" charges onto its tax base or ratepayers.

Domine was unable to explain specifically why the drain charges were shifted from a general-fund obligation to a component of the disputed utility rates, but he recalled the Township's finance director indicating that he was closing the particular general fund from which the drain charges had previously been assessed and reallocating the line items that had been paid out of that fund "to other accounts . . . that would be more appropriate[.]" Domine agreed that one of the functions of the storm-sewer system is to collect water that runs off the road so it doesn't flood the roadways, and the system also prevents soil erosion. However, Domine also testified that the Township does not own any of the roads within it, indicating that they are all owned by the county, the state, or private entities, and the county and state, not the Township, therefore have sole responsibility for installing any new drains that are required to ensure proper drainage from roadways. Trice agreed with that sentiment. According to Domine and Trice, the storm-sewer system also benefits the Township's separate sanitary sewer system by preventing the "infiltration or inflow" that the Township was ordered to remedy in the litigation with DEQ; by lowering the water-treatment charges incurred by the Township (and thereby lowering the disputed utility rates); and by preventing the backflow of raw sewage into the ground, the sewer system, and sewer customers' homes. Trice explained that the county storm drains run parallel with the Township's sanitary sewers, and thus anytime the storm-sewer system floods as a result of improper maintenance, storm water would get into the sanitary sewer system and could wreak havoc (e.g., it could collapse Township pipes).

F. RENT CHARGES

According to Theis, in 2014, the Township began to charge the water and sewer department annual rent of $350,000, which was included as an expense in the disputed ratemaking process in the years that followed. Such rent was paid by the water and sewer fund—by way of a quarterly journal entry in the ledger—to the Township's general fund, for the use of the DPW facility. The DPW facility was constructed "probably" sometime between 2007 and 2009, and it was financed by a new debt millage. The water and sewer fund had occupied the DPW facility since sometime in 2009 or 2010. The Township's motor pool also occupied several automotive repair bays at the DPW facility, which were used to service all of the Township's different departments and funds.

Trice testified that he was the individual who established the amount of the disputed $350,000 rent charge. He calculated that figure by estimating that the water and sewer department was occupying about 30,000 square feet of the DPW facility's total 77,000 square feet, then applying an estimated annual rental rate of $12 per square foot. Trice established that estimated rental rate of $12 per square foot based on storage space that the Township was already renting out in the local district court building, and the figure was also approved of by the Township assessor. In setting the $350,000 annual rent, Trice opined that the Township had used the lowest number available. In his opinion, it would have yielded a much higher rental figure had the Township based the rent on an allocation of all of the actual costs associated with the DPW facility, such as insurance, accounting, IT, HR, administration, and consultants. Trice also indicated that the disputed rental figure was calculated only by reference to the space in the DPW facility actually

occupied by the water and sewer department, it did not include the areas occupied by other departments, such as the motor pool.

In Theis's estimation, the annual rent of $350,000 was reasonable, given the Township's related expenses for depreciation and bond interest with regard to the DPW facility, which were, in concert, over $400,000 a year. In addition, the Township incurred costs for ongoing maintenance, operation, and cleaning of the DPW facility, and it paid a share of the facility's utility bills for gas and electric. In a broader sense, Theis believed that it was appropriate for the water and sewer fund to pay rent for its office space because, "as an enterprise fund, they should be self-sustaining, and all costs and revenues should be coming from and to that base of customers, as opposed to taxpayer[s] in general."

With regard to the disputed rent charges, plaintiff called James Olson as an expert witness. Olson is the director of a company that specializes in preparing federally mandated cost allocation plans for governmental entities, including municipalities. Olson testified that, in his professional opinion, the $350,000 annual rent charge was not "appropriate because it's not based on cost," i.e., "the cost of the facility, . . . utilities, maintenance, insurance; anything that related to capital improvements on the building once it's built, [and] that kind of thing." To the extent that the rent was instead based on depreciation and the interest associated with debt for that facility, Olson viewed that methodology as improper because those expenses were already "paid for" by the special millage that had financed the DPW facility. Olson explained, "Well, if you're a taxpayer, you're paying for the building and its interest cost in a separate bill, so you're paying for that once. You wouldn't pay for it again in the rate that you pay for your water and sewer." In Olson's estimation, the amount of rent charged by the Township for the DPW facility bore no discernible relationship to the properly considered costs, it was instead improperly based on an estimated market rate. However, because of the limited information that had been provided to him, Olson had admittedly been unable to determine the Township's annual maintenance expense for the DPW facility, and he acknowledged that it was "possible that there's some maintenance expense that could properly be charged" to the water and sewer fund. Olson also indicated that his opinion concerning the propriety of the Township's methodology in calculating the disputed rental figure involved a philosophical "gray area" of accounting principles.

On cross-examination, Olson admitted that, as an enterprise fund, it was appropriate for the water and sewer fund to be funding its own office space somehow, and he was not of the opinion that it was *altogether* inappropriate for the Township to charge that fund some amount of rent. Additionally, Olson conceded that it would be appropriate for the Township to consider the central service costs related to the DPW facility—including accounting, financial, auditing, human resources, insurance, security, legal, and "IT" services—in determining the proper rental amount, along with "general administrative expenses[.]" Because plaintiff's counsel had not supplied Olson with the necessary information, Olson had been unable to prepare a full cost allocation plan for the water and sewer fund, and he was also unable to comment on how, precisely, the Township had calculated the disputed rental amount. Finally, Olson admitted that, although he was not aware of any federal funding related to the DPW facility, his opinions in this case were based exclusively

on federal regulations establishing guidelines for development of indirect costs for federal programs.

When asked to critique Olson's opinion concerning the rent charges, Heffernan indicated that Olson's reliance on federal regulations was inappropriate because those regulations do "not apply to any spending that's not of federal dollars," and although every township in Michigan receives at least "a little bit" of federal funding in the form of a community development block grant, only those specific federal funds must be spent in accordance with the federal regulations relied on by Olson. Heffernan also disagreed with Olson's ultimate opinion that the disputed rent charges were inappropriate. In Heffernan's view, there were "hundreds of activities" funded by the Township's general fund that impacted the water and sewer fund's finances, and the overarching concern was to ensure that the overall allocation of expenses was "fair" when viewed in the context of the "whole system." Indeed, after performing such a review in this case and learning about all of the services that the Township's general fund provides to the water and sewer department without compensation, Heffernan believed that the $350,000 annual rent for the DPW facility represented "undercharging," not an overcharge.

G. OPEB CHARGES

Domine confirmed that "OPEB" charges—i.e., charges for "[o]ther post-employment benefits"—were one budgetary line item that was factored into the disputed utility rates. According to Theis, "OPEB refers to benefits which are primarily health insurance expenses that the township is obligated . . . to pay on behalf of retirees," including both those already retired and current employees who will become retirees in the future. Aside from health-insurance expenses, which are by far the largest OPEB item, all expenses of retirees fall under the broad penumbra of "OPEB" expenses.

Heffernan testified that, unlike pension funds, which Michigan municipalities are constitutionally required to keep funded at actuarially determined levels, there is no such requirement with regard to OPEB funding, and thus many municipalities "really kind of ignored" OPEB funding "up until about 15 years ago[.]" Under accounting principles set forth by the Governmental Accounting Standards Board (GASB) somewhere between 2006 and 2008, however, a municipality is required to treat its unfunded OPEB obligations as a liability, which tends to incentivize it to begin the process of properly funding such obligations.[7] In doing so, there is generally an element of "catch up"—i.e., setting aside funds for the amortization of the unfunded actual accrued liability—while also setting aside funds to pay for the OPEB costs of one's current employees. It is "strongly" recommended for municipalities to be proactive about funding their OPEB obligations because it reduces the net present value cost of that benefit. Additionally,

[7] On cross-examination, Heffernan admitted that the GASB has no authority to *compel* municipalities to duly fund their OPEB obligations, only to direct them concerning how such obligations should be accounted for in financial documents.

Heffernan opined that municipalities have "a moral obligation" to do so, although there are still some communities that have not funded any of their OPEB obligations. He compared failing to fund OPEB requirements to not setting aside money for pension funds, which he viewed as "bonkers." He explained: "[T]o not pay today's cost for that really says I'm going to have employees provide me services and I'm going to tell them, in exchange for the services you provide me I'll give you a salary; I'll also give you this benefit that I'll ask your grandchildren to pay."

In Theis's view, OPEB entitlements were "earned" by employees during their work tenure, and the Township's obligation to fulfill those entitlements accrued at the same time. Heffernan agreed with Theis that employees "earned" their OPEB benefits during their working career with the Township, although such benefits are "paid for," primarily in the form of insurance premiums, after the employees retire. Theis indicated that the inclusion of OPEB charges in the disputed utility rates began in 2009, by way of a resolution passed by the Township board, and at some point, the Township also began to include OPEB charges in the fees charged by its cable studio and building inspection fund. The amount of the disputed OPEB charges included in the utility rates—which varied over the relevant years from about $200,000 to approximately $577,000—was based on a "very complicated calculation" that was, in turn, based on "a moving target" in the form of the latest actuarial reports concerning the Township's future OPEB obligations. Ultimately, during the fiscal year that began March 31, 2016, the Township transferred the $2.7 million in OPEB charges that had accrued in the water and sewer fund into a return-yielding retiree health care trust, which is "dedicated to . . . currently retired water and sewer employees as well as trying to save for the future retirees of the water and sewer fund."[8] Since then, smaller annual contributions of the accrued OPEB charges have been deposited to that trust. Such OPEB funds are partially intended as "catch up" to cover some of the past service cost, which was necessary "because all the prior administrations didn't set aside that money as the employees were earning it, which is what you should do." Theis indicated that the Township's "OPEB costs are jumping up exponentially each year" and are "some of the largest in the state," with current actuarial projections anticipating the future OPEB obligations of the Township at more than $160 million, more than $10 million of which is attributable to retirees or employees of the water and sewer fund.

According to Theis, by paying $2.7 million into the OPEB trust, the Township made an immediate impact on its current OPEB expenses. "[T]he OPEB line item expense immediately decreased the following year," which resulted in a corresponding decrease in the disputed utility rates, particularly in light of certain recently enacted GASB accounting practices for municipalities. In part, Theis admitted that the OPEB charges in the disputed rates were necessary because the Township can only collect so much in a millage and they get rolled back by Headlee and so forth. He indicated that, although he is aware of "nothing . . . that forces" the Township to

[8] In the Township's "main operating funds"—its "general fund, road fund, and public safety fund," which employ about 80% of the Township's employees—at the close of each fiscal year, any surplus funds are used to fund a similar OPEB trust for the employees of those funds.

proactively set aside funding for its OPEB expenses, the Township's goal is to fully fund its OPEB obligations in trust, thereby relieving the current operating budget and rate payers from that retiree expense. Theis hoped that it would actually accomplish that goal sometime during his career, but he had doubts, given that, at the time of trial, the Township was "only 3 percent funded." In his view, the disputed OPEB charges were something that was ultimately for the benefit of not just the Township, but the rate payers, given that new legislation was being contemplated that might force the Township to more aggressively fund its OPEB obligations, which could compel a more dramatic rate increase in the future. In Theis's opinion, it was prudent to be proactive, not reactive, with regard to such budgetary issues.

In Heffernan's view, there was nothing "improper" about the Township's transfer of $2.7 million to the OPEB trust. And Heffernan agreed that transfer will ultimately result in significant OPEB savings to the water and sewer fund because, once held in such a trust, up to 70% of the funds can be invested in "equities" with an expected annual return of 7% or more, whereas money held in the water and sewer fund is subject to certain regulations that has historically limited the annual return to under 1%.

H. PUBLIC FIRE PROTECTION (PFP) CHARGES

Domine indicated that, aside from delivering potable water to the Township's customer, the municipal water system is also is also used for "firefighting capability," providing water to the Township's fire hydrants. According to Trice, the Township's water customers receive a special benefit from the Township's fire hydrants because those hydrants are only placed along the course of the "public water system[.]"

Heid agreed that the provision of fire protection capabilities is one of the two fundamental functions of a municipal water supply utility, with the other being the provision of potable water to municipal customers. By nature, however, those functions fundamentally differ insofar as municipal customers use water on a relatively constant basis, whereas a fire hydrant generally serves in a standby capacity, being used only when there is a fire or "the utility needs to flush their system for periodic maintenance." Nevertheless, the PFP function of a water system carries "a very significant cost" because "[g]enerally, . . . all of the facilities have to be oversized. They have to be two or three times the size that they would be" otherwise. Also, to provide PFP capability, a water system must have a source of supply that provides more water, a greater amount of elevated storage, larger water mains, and either extra higher-powered booster pumping stations. Hence, "[t]ypically, public fire protection is considered a service because public fire protection does require the utility to overbill, if you will, because it needs to be able to meet those particular demands when you do have a fire." Professional standards would generally require that the value of such PFP services be paid for out of a municipality's general fund, not borne by the municipal water utility and its ratepayers.

Heid indicated that, in determining the portion of a utility's PFP expenses that is properly allocable to the municipality, there are two generally employed methods. The first, "preferable,"

and "most widespread method" is to per-form "a fully allocated cost of service study where the utility actually calculates the capacity requirements associated with providing public fire protection service and determining the cost of providing that service and what the rate should be for providing that service." The second is an antiquated method that was developed in Maine in 1961 (the "Maine Curve method"). Under the Maine Curve method, the peak day requirements of the utility are calculated by multiplying the estimated average daily water usage by an "average peak" factor of 2½, thereby estimating the "peak day" (or "peak hour demand") on the system's water usage. Subsequently, the utility's *overall* "peak day requirements" are compared to the calculated peak day requirements associated with providing public fire protection, as calculated by a formula that is based upon population that establishes the estimated need of fire flow. The ratio between those two figures is then charted on a graph of "the Maine Curve" to determine what percentage of the water utility's gross revenue should be recovered by PFP charges assessed to the given municipality's general fund.

Heid did not attempt to analyze the Township's PFP expenses under the preferable 'fully allocated cost of service study" method because he had inadequate information, and it is "virtually impossible" to do so in the adversarial setting of litigation because the process relies on the candid opinions of the given utility's staff members. Rather, for each year at issue in this case, Heid calculated the Township's public fire protection costs utilizing the Maine Curve methodology. In doing so, he estimated the Township's overall "peak day requirements" using the "average peak" factor of 2½, and he admitted that, if the Township's actual peak day requirements varied from that estimated figure, it would alter his analysis. Using the estimated figure, however, the results indicated that, during the relevant years, the Township's water and sewer fund should have recovered between 10% to 15% of its gross revenue by way of PFP charges paid by the Township's general fund. Indeed, under the Maine Curve method, the minimum appropriate charge to a municipality for PFP services is 6% of the water utility's gross revenues. Heid opined that the Township had acted improperly by failing to pay such expenses out of its general fund and instead recovering its PFP expenses in the disputed water rates, which effectively forced the water utility's "end use customers" to pay for PFP services that were provided to all of the Township.

On cross-examination, however, Heid admitted that the M1 Manual indicates that assessing PFP costs to the rate payers, rather than the municipal taxpayers, is one method for meeting any revenue requirement for the PFP costs. Moreover, it is a method that is, in Heid's experience, used "from time to time under certain circumstances," although he did not specify when or under what circumstances. Heid also reaffirmed that the M1 Manual embodies the generally accepted rate making principles for water utilities.

About 96% of Heffernan's auditing experience involved Michigan municipal and governmental entities, and he indicated that he had never before encountered a PFP challenge like the one at issue in this case. Indeed, as far as Heffernan knew, neither his direct clients nor any other client of Plante Moran had ever been subject to any kind of requirement to have a PFP charge like the one described by Heid, although Heffernan had encountered municipalities that did so voluntarily. Similarly, Foster testified that, "most" water distribution systems in Michigan don't

even identify what the PFP costs are, and those that *do* generally recover such costs through their water rates, not by charging the general fund. Foster was aware of only one Michigan municipality that ostensibly recovered (or had in the past recovered) PFP charges in the fashion suggested by Heid, and it did so only because a local ordinance explicitly mandated the practice. When Foster was asked whether the Maine Curve method is "widely recognized as a method of determining fire protection costs" in Michigan, he replied: "I don't believe so. In the few instances that I'm aware that an entity goes through the practice of allocating . . . public fire protection costs, other methods besides the Maine curve are used."

Heffernan explained that, for municipal utilities, it is difficult to accurately follow generally accepted accounting principles (GAAP) concerning "revenue recognition" and "expense recognition," which is somewhat similar to the non-GAAP concept that is commonly referred to as the "matching principle." Under GAAP, "[e]xpenses should be recognized at the time the transaction occurs that causes you to incur a cost, regardless of when the cash flow goes out," and the same principle generally applies to revenues, although there are exceptions. In the context of municipal utilities, however, following such principles is difficult because water meters are generally read on a quarterly basis, and thus a utility can only estimate how much water was used at any given time. Accordingly, the goal is to use such estimates to "get it materially right."

On cross-examination, when Heffernan was asked whether he was "aware of . . . any state or local laws that require" PFP charges "to be incorporated as part of a general fund obligation as opposed to a water and sewer" fund obligation, he replied that he could think of only one such law. He had reviewed one attorney-prepared "interpretation" of the Revenue Bond Act of 1933, MCL 141.101 *et seq.*, which suggested "that if you have a revenue bond, . . . it's better to have the general fund paying for" PFP charges.

I. CASH BALANCE OF THE TOWNSHIP'S WATER AND SEWER FUND

According to Theis, the Township's "water and sewer" fund was one of several Township "funds" with its "own set of books," separate from the "general fund." As an "enterprise" fund, the state did not require the Township to maintain an annual "budget" for the water and sewer fund, but the Township nevertheless did so in the interest of "transparency" and accurate ratemaking. From 2011 to 2017, the water and sewer fund had total "cash inflows of 156-ish million dollars, and cash outflows" of "151 point something million." Theis opined that this represented clearly proportionate cash outflows of 96% of the cash inflows.

Theis agreed that, as of March 31, 2010, the Township's water and sewer fund included "about $4 million dollars of cash and cash equivalents[.]" One year later, on March 31, 2011, the fund included approximately $6.6 million in cash and cash equivalents; on March 31, 2012, it contained about $11.5 million; on March 31, 2013, it contained roughly $14.5 million; on March 31, 2014, it contained "in excess of $18 million"; on March 31, 2015, following annual capital-asset purchases of $5.7 million, it contained about $12.5 million; on March 31, 2016, after the $2.7

million OPEB transfer, it contained approximately $7.8 million; and on March 31, 2017, it contained about $8 million.

After reviewing the water and sewer fund's cash flows over that same period and duly considering its non-rate revenues, Heffernan opined that those cash inflows and outflows, which were within 4 percent of one another over the course of the relevant timeframe, were "very proportional." If anything, Heffernan believed that the Township should have been "trying to increase their cash investment reserves a little bit" more. Put succinctly, his opinion was that from 2011 to 2017, the water and sewer fund's "total accumulation of cash, even though it varied from year to year, wasn't unreasonable[.]"

Foster agreed that the disputed rates and charges were both reasonable and proportional to the underlying utility costs, summarizing his opinion as follows:

> Based on my review of the water and sewer rates in place between 2010 and 2017, . . . the revenues generated by the water and sewer rates have been commensurate with the revenue requirements of the water and sewer enterprise fund to provide service to the customers of the Township. The amount of money recovered through those rates has been proportionate to the cost of providing the service to the residents and businesses in the Township.

On cross-examination, however, Foster conceded that, hypothetically speaking, even if the disputed rates were duly proportional to the underlying utility expenses, the water and sewer fund could nevertheless use the revenue *generated* by such rates for clearly improper purposes, such as purchasing an expensive vacation home for the Township's board members.

Theis confirmed that the Township's water and sewer fund operated at a net loss in four of the fiscal years from 2005 to 2010, which forced the Township to subsidize it with cash from other Township funds. In 2010, for example, the water and sewer fund ended "9 of the 12 months . . . with negative operating cash." Over the years, Theis implemented multiple changes aimed at remedying such shortfalls, and since 2012, the water and sewer fund had no negative balances at any month end, although there had been "low balances." One month in 2017, for example, the fund was left with only $1,800 in cash on hand. Theis also endeavored to build up a sufficient "emergency reserve" in the water and sewer fund to address emergent breaks and repairs of items such as water mains, which can cost "hundreds of thousands of dollars" or even "millions" to repair, along with operating reserves, debt reserves, and capital improvement reserves. According to Theis, such reserve funding is essential "for the prudent operation of a healthy water and sewer fund," and despite his best efforts, he believed that the water and sewer fund was "still not in a position to have proper reserves[.]" He further opined that having total reserves of about $13 or $14 million was a "pretty conservative, appropriate . . . target to get to."

Theis admitted that, in reviewing financial statements for the disputed years, he found one instance in 2015 where a $600,000 expense was mistakenly counted twice in setting the disputed utility rates, thereby raising the rates. But he highlighted this as proof of how important it is to

view the water and sewer fund as a whole, rather than focusing on individual line items, noting that despite including the $600,000 expense twice in setting the rates for 2015, those rates ultimately resulted in an overall loss for the water and sewer fund that year, raising insufficient revenue to cover the fund's annual expenses.

Heffernan indicated that although there's no exact science to determine how much a municipal utility should keep in reserves, the water and sewer fund's reserves of about $4 million in 2010 "felt a little bit low." There is a consensus among experts that it is appropriate to maintain reserves for two fundamental areas: operating expenses and capital expenses (including future capital projects). In practice, Heffernan generally recommended that his clients maintain operational reserves of about 25% of their annual operating revenue, while his recommendation concerning capital reserves was dependent on the capital expenses the client anticipated in the next two to three years. Although a municipality could instead fund its capital projects on a pay-as-you-go basis, that was a "somewhat riskier" approach that Heffernan would "probably" advise against. After reviewing the water and sewer fund's 20-year capital plan, Heffernan opined that in the neighborhood of $13.9 million was an appropriate reserve target, and he agreed that the reserve levels at the time of trial were still "well below" what was advisable.

Foster added that his review of the Township's financial records during the relevant timeframe demonstrated that "the amounts that were specifically identified on the rate memoranda as capital improvements, and the amounts that were actually, from the audited statements, spent on capital improvements over that time period are remarkably close." This supported his opinion that the rates and charges have generated revenues commensurate with the revenues required to operate and finance capital improvements to the system over the time in question.

In addition, Heffernan opined that a municipality's reserve level is an appropriate consideration in both municipal utility ratemaking and in determining the proportionality of disputed utility rates. In short, a utility should "be setting [its] rates in a manner that will get the reserves where they should be." If the reserves are too low, rates should be increased—even if this results in temporarily "disproportional" cash flows—and the converse is equally true. On cross-examination, Heffernan admitted that the Township did not have a written plan with regard to its target reserve figures, but he explained that, based on the other 125 cities and townships that he was familiar with as an auditor, it was "highly unusual" for a municipality to have such a written plan.

J. TRIAL COURT'S OPINION, JUDGMENT, AND AMENDED JUDGMENT

Following the parties' closing arguments, the trial court took the matter under advisement and, on July 12, 2018, it announced its opinion orally from the bench.[9] The court ruled in favor of the Township with regard to all of plaintiff's claims pursued under § 31 of the Headlee Amendment, entering a judgment of no cause of action with respect to those claims. Generally, the court reasoned that, under the test set forth in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), plaintiff failed to demonstrate that the disputed charges in this case constituted unlawful tax exactions.

Turning to plaintiff's common-law claims for assumpsit for money had and received, the trial court ruled partially in favor of both parties. With regard to non-rate revenue and revenue attributable to the Township's sewer-only customers ("sewer-only revenue"), the court ruled in plaintiff's favor despite repeatedly finding that in light of the Township's ratemaking methodology—which the court referred to as "abstruse, recondite methodology"—the court was unable to determine whether the disputed rates were proportional to the associated utility costs and, if not, what "damages" figure was warranted. The trial court also chided the Township for failing to "show its work," indicating that, based on the record before the court, it was "not evident that the rates are just and reasonable."

This was a common theme in the trial court's decision. The court recognized that both *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989), and *Trahey v Inkster*, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015), held that municipal utility rates are presumed to be reasonable and that the plaintiff bears the burden of rebutting that presumption when challenging such rates. But the trial court indirectly criticized *Trahey*'s reasoning, and it refused to rely on the presumption of reasonableness in deciding this case. The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied here; suggested that *Novi* and *Trahey* are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption[.]" In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption." In this instance, the trial court reasoned, the Township's unclear ratemaking methods had

> impeded the Court, and more importantly, [the] customer[s] and taxpayers from passing upon the question of whether the [Township's] rates are proportionate to its costs. This impediment, abstrusity . . . estops invocation of the presumptive reasonableness, the thoughtful thoughtfulness presumption of the rates. Short of

[9] It appears that the trial court had prepared some sort of written decision, which it read into the record rather than issuing a written opinion.

> blind deference to [the Township], . . . [the Township's] impediment . . . hamstrings the Court . . . from even being able to hear a claim of disproportion. In a word, if the presumption were to prevail here, the presumption is and evermore shall be . . . unrebuttable.

After ruling in plaintiff's favor on that basis regarding the non-rate revenue and sewer-only revenue, the trial court reserved its ruling concerning the proper "damages" figures. The court indicated that, if the parties were unable to settle concerning such figures, the Township would be permitted to "chime in" with regard to why, in light of the Township's failure to "show its work," the court should not simply accept plaintiff's related damage calculations. After subsequently considering the matter further, the trial court awarded a "refund to Plaintiff and the Class" of approximately $2.935 million with regard to the "non-rate revenue" claim and about $2.173 million with regard to the sewer-only revenue.

As to plaintiff's claim concerning "lost water," the trial court also ruled in plaintiff's favor. After construing Bloomfield Township Ordinance § 38-225 ("The township shall pay for all water *used* by it in accordance with the foregoing schedule of rates. . . .") (emphasis added) and § 38-226 ("All water service shall be charged on the basis of water *consumed* as determined by a meter installed on the premises of the user by the department.") (emphasis added), the court agreed with plaintiff that, under those provisions, "[i]f water is not consumed, as determined by a meter under [§ 28-226], then by process of elimination, or by default, [it] must be water used by the Township under [§ 38-225]." Put differently: "The cost for this truly lost water bucket per ordinance . . . was destined to be borne on the shoulders of the general fund taxpayers." The trial court also rejected any argument that the Township paid for such "truly lost water" by way of the in-kind services it provides to the water and sewer fund. Rather than ruling concerning the amount of "damages," the trial court instructed the parties "to crunch the numbers."

As to water "used" by the Township's municipal facilities, the trial court held that, although the Township's "rationalization" concerning in-kind remuneration was "obfuscated," plaintiff had failed to "overcome . . . the presumptive reasonableness of the Township's decision to pay" for such water with in-kind services. The trial court also rejected plaintiff's contention that the in-kind arrangement violated Bloomfield Township Ordinance § 38-225, reasoning that the ordinance "does not specify" that in-kind services cannot be used as a form of payment. Nevertheless, the trial court found "liability in Plaintiff's favor" and in favor of the plaintiff class. It awarded no monetary "refund" but ordered defendant to "henceforth" and "permanently" provide "explicit accounting . . . with explicit valuations" of the in-kind services that the Township provides as payment to the water and sewer fund, including payments for "construction water," "lost water," PFP charges, rent, and water used by municipal facilities.

On the other hand, with regard to "construction water," the trial court held that such water is "used" by both the Township and the ratepayers within the meaning of Bloomfield Township Ordinance § 38-225, and it rejected the argument that the Township paid for such water via the in-kind services it provides to the water and sewer fund. On that basis, the trial court ruled in

plaintiff's favor concerning the construction water, again reserving its ruling concerning the amount of "damages" and instructing the parties "to crunch the numbers." After further considering the matter, the trial court eventually entered an amended judgment ordering the Township to issue "a refund to Plaintiff and the Class in the amount of" approximately $3.69 million related to "the Township's own water use," which seemingly covered both "lost water" and "construction water."

With regard to plaintiff's non-Headlee claim concerning the disputed county drain charges, the trial court stated no reasoning in support of its holding. Rather, it simply stated: "Storm water drain, judgment, no cause of action."

As to the disputed rent charges, without explaining its reasoning, the trial court ruled in plaintiff's favor with regard to "[l]iability," but it refused to award any "damages[.]" However, as noted earlier, it issued a permanent injunction against the Township, ordering it to explicitly document any in-kind services used to pay such rent charges.

Similarly, with regard to OPEB charges, the trial court ruled in plaintiff's favor with regard to "liability," but it refused to award any "damages[.]" However, the trial court permanently enjoined the Township to "explicitly document the OPEB dollars in setting its water and sewer rates." The trial court reasoned that the Township's commingling of OPEB-charge revenues that had not yet been funded into the OPEB trust with "surplus" funds in the water and sewer fund was improper given that, until such OPEB funds were transferred to trust, they could be utilized by the water and sewer department "for whatever it deems appropriate."

Finally, as to PFP charges, without explaining its reasoning, the trial court ruled "no cause of action in part," and "liability in Plaintiff's favor in part," initially holding that plaintiff "prevail[ed] in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund." After considering the matter further, however, the trial court entered its amended judgment holding that plaintiff and the plaintiff class were entitled to no "refund" in that regard because the Township "already pays" for such water by way of in-kind services. But the trial court issued a permanent injunction ordering the Township to expressly document such in-kind services and their associated valuations, and it also ordered the Township provide "explicit accounting of water in fire hoses to be paid for by the general fund[.]"

Approximately two months after the trial court announced its decision, it held a hearing concerning the proper remedies in this case. While entertaining argument in that respect, the trial court asked plaintiff's counsel whether, in light of the Township's "abstruse, recondite" ratemaking, there was some "legal vehicle" by which the court might award plaintiff "damages" despite its having found both that it was unable to determine whether the disputed rates were actually disproportionate to the associated costs and that the amount of any disproportionality was impossible to determine based on the record evidence. The trial court indicated that it would keep that issue "on the backburner" and allow plaintiff to argue the issue further at a later date.

Less than two weeks later, however, the trial court entered its initial judgment in this case. That initial judgment explicitly indicated that it was not a final order and that the trial court retained jurisdiction "for all purposes[.]" But in a subsequently entered order, the trial court ruled: "[T]he inquiry to plaintiff was and remains this: 'Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?'."

Hence, about three months after the initial judgment was entered, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(f), requesting entry of an amended judgment on the basis that there were, in fact, several legal or equitable doctrine that would yield a judicial adjudication in plaintiff's favor because the Township had obscured proofs. At the ensuing motion hearing, the trial court indicated that plaintiff's motion was "inaptly titled" as a motion for relief from judgment and would, instead, be treated as a motion to "supplement" the initial judgment. The court acknowledged that it "remain[ed] unsure if the [Township] committed the singular wrong of passing a rate disproportionate to costs," explaining that, in the court's estimation, the "wrong" committed by the Township "was wont of clarity" in its "abstruse recondite rates[.]" Based on the caselaw cited by plaintiff, the trial court indicated that it was persuaded that "such wrong of unclarity itself . . . fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of nonrate revenue and sewer-only receipts[.]"

Thus, the trial court granted plaintiff most of her requested relief, entering an amended judgment awarding plaintiff and the plaintiff class, in sum, approximately $9.58 million (including prejudgment interest) in "refunds," along with the permanent injunctive relief described earlier. The instant appeals ensued.

II. ANALYSIS

A. STANDARDS OF REVIEW

On appeal, the parties raise several distinct claims of error, which we review under varying standards. "This Court . . . reviews de novo the proper interpretation of statutes and ordinances," *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013), and the legal question of whether a municipal utility charge constitutes an unlawful exaction under § 31 of the Headlee Amendment, *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). As a general rule, this Court also reviews equitable issues de novo, *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013), reviewing any related factual findings by the trial court for clear error, *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *In re AGD*, 327 Mich App 332, 338; 933 NW2d 751 (2019). In reviewing a trial court's factual findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

However, a trial court's decision to grant equitable relief in the form of an injunction is generally reviewed for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 33-34 & n 12; 896 NW2d 39 (2016). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 320; 900 NW2d 680 (2017) (*Planet Bingo*) (quotation marks and citation omitted).

B. PLAINTIFF'S ASSUMPSIT CLAIMS

The parties disagree whether the trial court's use of its equitable powers was proper here. As appellant, the Township argues that, having found that plaintiff had failed to demonstrate that the disputed rates were disproportionate to the underlying costs, the trial court erred by disregarding the presumption that those rates were reasonable. The Township also argues that the trial court erred by awarding plaintiff and the plaintiff class both the monetary award and permanent injunctive relief that it did. Contrastingly, by way of plaintiff's cross-appeal, she contends that the trial court should have awarded additional refunds related to the disputed OPEB, PFP, and rent charges. We agree with the Township that the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable harm.[10]

Aside from the claims that plaintiff asserted under the Headlee Amendment—which we analyze later in this opinion—plaintiff's claims in this action were all captioned as claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**[.]" As our Supreme Court long ago recognized in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860):

> [T]he action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

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[10] Our decision in this regard renders moot the Township's argument that the trial court erred or abused its discretion by amending its initial judgment to award additional "damages." Hence, we decline to decide that issue. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted).

Accord *Trevor v Fuhrmann*, 338 Mich 219, 224; 61 NW2d 49 (1953), citing *Moore*, 8 Mich at 448. At common law, assumpsit was a proper vehicle for recovering unlawful "fees," "charges," or "exaction[s]"—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law. See *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970) (quotation marks and citations omitted). Notably, such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citations omitted; emphasis added).

"With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Hence, an "assumpsit" claim is modernly treated as a claim arising under "quasi-contractual" principles, which represent "a subset of the law of unjust enrichment." *Wright v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019).

In contemporary municipal utility ratemaking cases, a similar focus on principles of "unjust enrichment" is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable. See generally *Novi*, 433 Mich at 428-429; *Trahey*, 311 Mich App at 594, 597-598. In *Novi*, 433 Mich at 417-418, 428, our Supreme Court was charged with deciding whether MCL 123.141 had abrogated "the longstanding principle of presumptive reasonableness of municipal utility rates," had impacted the applicable burden of proof, or had altered the traditionally circumspect scope of judicial review. Ruling in the context of a *municipality's* wholesale-rate challenge under MCL 123.141(2)—not a *ratepayer's* challenge under MCL 123.141(3)—the Supreme Court held that MCL 123.141 had not meaningfully altered the presumption of reasonableness, burden of proof, or scope of judicial review, reasoning, in part, as follows:

> Historically, this Court has accorded great deference to legislatively authorized rate-making authorities when reviewing the validity of municipal water rates. . . .
>
> * * *
>
> [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates.
>
> * * *
>
> Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates. As this Court noted in [*Plymouth v Detroit*, 423 Mich 106, 128-129; 377 NW2d 689 (1985)], the Court

in *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1944) stated:

> We held in [*Federal Power Commission v Natural Gas Pipeline Co*, 315 US 575, 62 S Ct 736, 86 L Ed 1037 (1942)] that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (Citations omitted.)

* * *

The Michigan Legislature's intention that courts refrain from strictly scrutinizing municipal utility rate-making is reflected in several statutory provisions. . . .

Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. The decision of the Court of Appeals, however, superimposes Michigan courts as ultimate rate-making authorities despite the absence of any express statutory language or legislative history that would support such a role in the rate-making process.

* * *

The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.

* * *

> For these reasons, we hold that 1981 PA 89 [i.e., the public act that last amended MCL 123.141,] did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2)[.] [*Novi*, 433 Mich at 425-433 (bracketed alterations added).]

Because *Novi* involved a rate challenge pursued by a municipality under MCL 123.141(2), not a ratepayer challenge pursued under MCL 123.141(3), *Novi*'s statutory analysis focused almost exclusively on MCL 123.141(2). However, in *Trahey*, 311 Mich App at 594, 597-598, this Court expanded the scope of *Novi*'s pertinent holdings, applying them in the context of a resident-ratepayer challenge under MCL 123.141(3). Thus, the presumption of reasonableness was extended to the rates a municipality charges its ratepayers. *Id.* at 594. The plaintiff bears the burden of rebutting the presumption of reasonableness "by a proper showing of evidence." *Id.* "Absent *clear evidence* of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Shaw v Dearborn*, 329 Mich App 640, 654; 944 NW2d 153 (2019),[11] quoting *Trahey*, 311 Mich App at 595 (emphasis in *Shaw*).

As authority for its position aside from *Trahey*, *Shaw*, and *Novi*, the Township relies on, among other things, two unpublished decisions of this Court that were decided together in 2019. Plaintiff argues that this Court should disregard those unpublished decisions because they are not binding and "were wrongly decided." Plaintiff is correct that unpublished decisions of this Court are not precedentially binding under MCR 7.215(C)(1), but she fails to recognize that they may nevertheless be considered as "persuasive or instructive" authority.[12] See *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support *Trahey*, 311 Mich App at 595 ("[a]bsent clear evidence of *illegal or improper expenses* included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable") (emphasis added),

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[11] The pending application for leave to appeal in *Shaw* has been held in abeyance pending our Supreme Court's decision in *Detroit Alliance Against Rain Tax v City of Detroit*, ___ Mich ___; 937 NW2d 120 (2020). *Shaw v Dearborn*, ___ Mich ___; 944 NW2d 720 (2020).

[12] In the context of similar challenges raised under the Headlee Amendment, this Court has recognized that it "presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]" *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005). But because the instant rate challenges are not pursued under the Headlee Amendment, such authority is not dispositive here.

plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does* present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition that, in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services.

In stark contrast, the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township.

In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." See *Wright*, 504 Mich at 417-418, 422-423. Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper. See *id.* at 419 ("Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position.") (emphasis added).

Plaintiff's strained interpretation of *Trahey* would permit an order of restitution in this case without any evidence or finding that the Township was enriched, let alone excessively compensated, by collecting and retaining the disputed utility charges. Moreover, even assuming, arguendo, that plaintiff is correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright*, or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be

ignored under the doctrine of vertical stare decisis. See *In re AGD*, 327 Mich at 339 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court does so, its former decisions remain binding on all lower courts); *Allen v Charlevoix Abstract & Engineering Co*, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of such principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated that, based on a review of the Township's audited financial statements, its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

In light of that finding, however, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of such funds, the trial court should not have ordered the refund that it did. See *Wright*, 504 Mich at 417-418, 422-423; *Trahey*, 311 Mich App at 594, 597-598.

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts in a specified fashion. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, *and there exists a real and imminent danger of irreparable injury*." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). See also *Royal Oak Sch Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is appropriate and necessary. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 3; 753 NW2d 595 (2008); *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939).

As noted, we find no basis to disturb the trial court's finding that plaintiff failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, one cannot tell whether plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let

alone an *irreparable* injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against the Township with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases such as this one. See *Dutch Cookie Machine Co*, 289 Mich at 280 (holding that the party seeking an injunction bears the burden of proving that its issuance is warranted); *Novi*, 433 Mich at 428, 431 (discussing "the difficulties inherent in the rate-making process," "the statutory and practical limitations on the scope of judicial review," and the general "policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates").

C. THE REVENUE BOND ACT OF 1933

As cross-appellant, plaintiff contends that the trial court erred by failing to recognize that the disputed PFP charges are unlawful under the Revenue Bond Act of 1933 (RBA), MCL 141.101 *et seq*. In particular, plaintiff argues that those charges are unlawful because they permit the Township to receive "free service" in contravention of MCL 141.118(1), which provides, in pertinent part:

> Except as provided in subsection (2),[13] free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both . . . .

Specifically, plaintiff argues that the Township receives "free" PFP services, in contravention of MCL 141.118(1), because the Township's water and sewer fund, not its general fund, pays for those services by incorporating the PFP expenses into the disputed utility rates.

Assuming, without deciding, that the RBA is applicable here, that plaintiff is entitled to pursue a private cause of action seeking damages for violation of the RBA (which is an issue that she has failed to brief), that such a private action constitutes a valid end-around of the presumption-of-reasonableness standard discussed in *Trahey* and *Novi*, and that plaintiff is correct that it *would* violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, plaintiff's argument is nevertheless unavailing. Plaintiff ignores the fact that, in the trial court's amended judgment, it expressly found that the Township did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund. In plaintiff's

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[13] The referenced subsection, MCL 141.118(2), is irrelevant here, given that it applies to "[a] public improvement that is a hospital or other health care facility . . . ."

brief as cross-appellant, she fails to explicitly argue that the trial court's finding in that regard was clearly erroneous, and we discern no basis for disturbing it.

There was extensive evidence at trial concerning the in-kind services the Township renders to its water and sewer fund, with Heffernan estimating their annual value at somewhere around $700,000 or $800,000. On the other hand, there was a relative dearth of evidence concerning the proper value for the trial court to ascribe to the PFP services. Plaintiff's own expert, Heid, admitted that the "preferable" method of assessing the value of such services was to perform "a fully allocated cost of service study" and that he had failed to do so, having instead used the "antiquated" Maine Curve methodology. Therefore, we are not persuaded that the trial court clearly erred when it found that the Township's provision of in-kind services constituted sufficient payment for the disputed PFP services. And in light of the finding that the Township *was* paying for those PFP services, we cannot conclude that the trial court erred by failing to hold that the Township was receiving "free" PFP services in contravention of MCL 141.118(1).

D. MCL 123.141(3)

Plaintiff also argues that the trial court erred by failing to recognize that the PFP charges are unlawful under MCL 123.141(3) ("The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed *the actual cost of providing the service*.") (emphasis added). But plaintiff fails to explain how even a *proven* violation MCL 123.141(3), standing alone, exempts her instant claim from the presumption-of-reasonableness standard set forth in *Trahey*, 311 Mich App at 594, 597-598, which regarded a rate challenge pursued under the same statute: MCL 123.141(3). In our estimation, the rule of law set forth in *Trahey* concerning the presumption of reasonableness is binding here and that presumption must be applied. See MCR 7.215(J)(1). And for the reasons explained in part II(B) of this opinion, we conclude that plaintiff's assumpsit claims under MCL 123.141(3) are not viable in light of the presumption of reasonableness discussed in *Trahey* and *Novi*. Hence, we reject plaintiff's instant claim of error.

E. PLAINTIFF'S CLAIMS UNDER HEADLEE § 31

Finally, plaintiff argues that the trial court erred or clearly erred by holding that the disputed OPEB, county drain, and PFP charges were not unlawful exactions under § 31 of the Headlee Amendment. We disagree.

"The Headlee Amendment was adopted by referendum effective December 23, 1978." *Shaw*, 329 Mich App at 652. It was "proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Durant v State Bd of Ed*, 424 Mich 364, 378; 381 NW2d 662 (1985). Such purposes "would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." *Shaw*, 329 Mich App at 643. As enacted, the Headlee Amendment "imposes on

state and local government a fairly complex system of revenue and tax limits." *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997).

Plaintiff's claims here are pursued under § 31 of the Headlee Amendment, which provides, in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. [Const 1963, art 9, § 31.]

As our Supreme Court observed in *Durant*, 456 Mich at 182-183, "Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." "Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not," and the party challenging a given municipal utility charge under § 31 "bears the burden of establishing the unconstitutionality of the charge at issue." *Shaw*, 329 Mich App at 653.

As authority in support of plaintiff's position, she primarily relies on *Bolt*, 459 Mich 152, which set forth a three-prong test for determining whether a municipal charge represents a permissible "user fee" or an impermissible "tax" under Headlee § 31. In *Shaw*, 329 Mich App at 653, this Court observed that in *Bolt*, our Supreme Court explained that

> "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (cleaned up).

Notably, the presumption of reasonableness regarding municipal utility rates is a "pertinent" consideration when considering the second *Bolt* factor. *Shaw*, 329 Mich App at 654.

In *Shaw*, 329 Mich App 650-652, 664-669, this Court recently employed the *Bolt* factors in considering a Headlee challenge somewhat similar to the one now at bar. The *Shaw* Court upheld the challenged water and sewer rates in that case, holding that they were permissible user fees. *Shaw*, 329 Mich App at 669. In part, this Court reasoned:

> [P]laintiff . . . posits that there are embedded taxes within her utility rates, arguing that a charge need not pay for infrastructure to qualify as a disguised tax. . . .
>
> * * *
>
> Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. *When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents.* [*Shaw*, 329 Mich App at 663-665 (emphasis added).]

Shaw's analysis of the *Bolt* factors strongly supports the propriety of the trial court's Headlee ruling in this case. Addressing the first factor, in *Shaw*, 329 Mich App at 666, this Court held that it was

> beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is

> in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, . . . the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.

Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first *Bolt* factor, which favors the determination that they are user fees rather than taxes.

In considering the second *Bolt* factor, in *Shaw*, 329 Mich App at 666-668, this Court reasoned, in pertinent part, that the disputed "water and sewer rates" in that case

> constitute[d] a valid user fee because users pa[id] their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage

> may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." *Bolt*, 459 Mich at 164-165 (cleaned up).
>
> * * *
>
> Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax. [Quotation marks and citations partially omitted.]

In this case, on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual finding. Because plaintiff did not carry her burden of demonstrating disproportionality, it necessarily follows that the second *Bolt* factor militates in favor of the Township's position. See *Shaw*, 329 Mich App at 653 (observing that "the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue").

With regard to the final factor, this Court in *Shaw* ruled as follows:

> The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); *Mapleview Estates, Inc*[, 258 Mich App at 417] (holding that an increased fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use. [*Shaw*, 329 Mich App at 669.]

The instant case is distinguishable from *Shaw* with respect to the third *Bolt* factor. In this case, the parties agree that the disputed water and sewer rates were each comprised of both a

variable rate, which was based on metered water usage, and a fixed rate. Indeed, Theis testified that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. Contrastingly, in *Shaw*, it was "uncontested that Dearborn determine[d] its water and sewer rates based on metered-water usage" alone. *Id.* at 667-668 (distinguishing *Bolt* on the basis that the disputed rates in *Bolt* were "flat rates," not variable rates based on "metered-water usage").

On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the *variable* portion of the disputed rates by refusing to use any water. But the *fixed* portions of those rates constitute flat-rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. See *id.* at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third *Bolt* factor weighs in favor of plaintiff's position.

On balance, plaintiff has failed to carry her burden of demonstrating that the disputed rates are impermissible taxes, rather than user fees, for purposes of Headlee § 31. The first and second *Bolt* factors clearly favor the conclusion that the disputed charges are proper user fees, and with regard to the third factor, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." See *Wheeler*, 265 Mich App at 666. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment of no cause of action in the Township's favor. We do not retain jurisdiction.

/s/ Cynthia Diane Stevens
/s/ Christopher M. Murray
/s/ Deborah A. Servitto

EXHIBIT E

Order

Michigan Supreme Court
Lansing, Michigan

July 6, 2021

Bridget M. McCormack,
Chief Justice

159262

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., and WOODVIEW CONDOMINIUM ASSOCIATION, Individually and as Representatives of a Class of Similarly Situated Persons and Entities,
Plaintiffs-Appellants,

v

SC: 159262
COA: 339143
Wayne CC: 15-006473-CZ

CITY OF WESTLAND,
Defendant-Appellee.

_____/

By order of September 8, 2020, the application for leave to appeal the January 29, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *DAART v City of Detroit* (Docket No. 158852). On order of the Court, the case having been decided on December 11, 2020, 506 Mich 996 (2020), the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

b0628

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 6, 2021

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC., and WOODVIEW CONDOMINIUM ASSOCIATION, Individually and as Representatives of a Class of Similarly Situated Persons and Entities,

Plaintiffs-Appellants,

v

CITY OF WESTLAND,

Defendant-Appellee.

UNPUBLISHED
January 29, 2019

No. 339143
Wayne Circuit Court
LC No. 15-006473-CZ

Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates violated several provisions of law including MCL 123.141(1) and Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition. For the reasons set forth below, we affirm.[1]

[1] Because the trial court considered materials outside the pleadings, we will review the trial court's grant of summary disposition to defendant under MCR 2.116(C)(10). A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the

II. BACKGROUND

Defendant City of Westland (the City) operates and maintains a water and sewer system. By law, the rates charged to users of the system must be based on the water and sewer department's (the department) actual costs of providing those services to its inhabitants. Among the department's expenses is the amount it transfers to the City's general fund to cover its proportional share of the City's administrative costs.[2] Plaintiffs agree that the City may make such transfers to the general fund in order to compensate the City's other departments for the goods and services they render to the water and sewer department. However, plaintiffs maintain that the City has "grossly inflated" the costs of those goods and services by allocating a disproportionate amount of the City's administrative costs to the department. Plaintiffs allege that doing so violates the Headlee Amendment as well as MCL 123.141(3), common law ratemaking rules, and the City's Charter. Accordingly, plaintiffs seek a refund of what they deem to be overcharges paid in the previous six years, in addition to declaratory and injunctive relief.

Plaintiffs' claim rests largely on the testimony of their expert witness, James R. Olson, an analyst for MGT of America Consulting Group. MGT specializes in "indirect cost allocation" and primarily works with municipalities to identify "overhead" costs that can be allocated to specific departments. Olson reviewed the City's cost allocation sheet, the deposition testimony of City officials, and the City's balance sheet and budget. He took issue with the City's allocation methodology, asserting that it is not based on "actual cost data." For example, he pointed out that the City allocates 30% of its annual attorney fees to the department, but could not provide documentary support for that allocation. Similarly, Olson opined that the City improperly allocates 50% of the rent for the City's DPS garage to the water and sewer department and that the allocation should instead be based on the building's depreciation expense.

The City responds that Olson's testimony, while criticizing some individual allocations, failed to address, let alone establish, that the final rate charged was inconsistent with the department's *total* expenses. The City points out that Olson conceded that he did not perform a "full cost allocation study," meaning that, while Olson looked at certain individual categories of the City's cost allocation, he did not perform a complete analysis of the goods, services, and facilities provided by the City's general departments to the water and sewer department. Thus, Olson did not have an opinion as to whether the total amount of administrative costs allocated to

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> moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

[2] For instance, the City transfers water and sewer funds to the City's general fund to pay for a percentage of the operation of the City's IT Department, which provides services to the department.

the water and sewer department was reasonable. Nor did Olson perform a "rate study," which would have required him to identify all the department's expenses and identify the revenue necessary to operate the utility in a sound financial manner. Thus, Olson did not express an opinion on whether the actual rates were unreasonable in relation to the necessary revenue. In addition, he conceded that a 10 to 15% variation between budgeted costs and actual costs is reasonable.

Plaintiffs also claim that the City's calculation of water and sewer rates is improper because it includes an expense of $500,000 per year for future capital improvements and repairs. Plaintiffs do not dispute that the department's budgeting must include amounts to finance *current* capital improvements, but they assert that it is improper for the City to include sums for future, as yet unspecified capital improvements in its revenue requirements.

In the trial court, the parties filed competing motions for summary disposition. The City filed a response to plaintiffs' motion for summary disposition in which the City first disclosed Mark Beauchamp, president of Utility Financial Solutions, as an expert witness. In an affidavit, Beauchamp echoed Olson's conclusion that a full cost allocation study was necessary to verify the reasonableness of the administrative costs the City allocated to water and sewer department. He further averred that he reviewed and approved a revised cost allocation study performed by Deborah Peck, the City's budget director, which concluded that the department's actual administrative costs were always within 10% of the budgeted administrative costs. Plaintiffs then filed a motion in limine to exclude Beauchamp's and Peck's proposed testimony arguing that the City failed to timely disclose Beauchamp as an expert witness and that Peck's testimony was inadmissible because her revised allocation study was not in the record.

In June 2017, the trial court issued an opinion and order granting the City's motion for summary disposition, denying plaintiffs' motions for summary disposition, and denying plaintiffs' motion in limine. The trial court determined that plaintiffs failed to overcome the presumption that the City's rates were reasonable. The trial court also rejected plaintiffs' argument that the City's rates constituted a tax that was imposed in violation of the Headlee Amendment and MCL 141.91. Further, the trial court ruled that plaintiffs' Headlee Amendment claim was barred by the one-year statute of limitations set forth in MCL 600.308a(3). In denying plaintiffs' motion for in limine, the court stated that plaintiffs could move for an order compelling production of Peck's analysis, which would be a more appropriate remedy than striking the evidence. The court also determined that Beauchamp's analysis was reliable and that his explanation of methods used by the City would assist the trier of fact. The court concluded that both Peck and Beauchamp could serve as rebuttal witnesses to Olson.

III. ANALYSIS

A. REASONABLENESS OF RATES

MCL 123.141, *et seq.*, governs the sale of water outside territorial limits. Because the City purchases its water from the Great Lakes Water Authority,[3] it is a "contractual customer" under MCL 123.141(2). Accordingly, the City's water ratemaking[4] must comply with MCL 123.141(3), which provides that "[t]he retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service." However,

> MCL 123.141 does not alter the general standard of reasonableness applied by courts when reviewing utility rates. Because of the difficulties inherent in ratemaking and the limitations on judicial review, the phrase "actual cost of providing the service" as used in the statute does not mean exactly equal to the actual costs of providing the service. Accordingly, while a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required. [*Trahey v Inkster*, 311 Mich App 582, 597; 876 NW2d 582 (2015) (citations omitted).]

"Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable." *Id.* at 594. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi v Detroit*, 433 Mich 414, 427; 446 NW2d 118 (1989). "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Id.* at 431. "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich App at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

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[3] MCL 123.141(1) provides that "[a] municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants." The City has historically purchased its water from the city of Detroit; the GLWA was formed during the city of Detroit's bankruptcy proceedings.

[4] MCL 123.141 only applies to sale of water and therefore it does not govern the City's sewer ratemaking. However, the City's Charter requires reasonable sewer rates. Specifically, "[t]he City may fix and collect charges for such disposal services, tap-in fees and connection fees, the proceeds of which shall be exclusively used for the purpose of the sewage disposal system." Westland Charter, § 16.10. Further, "The Council shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public utility services as the City may provide." Westland Charter, § 17.3.

As noted, plaintiffs argue that the City allocated too great a portion of certain administrative costs to the water and sewer department. Viewing the evidence in a light most favorable to plaintiffs, we agree that there is a question of fact regarding those particular allocations. Indeed, the City effectively conceded that there were errors in its cost allocation when it presented proposed testimony regarding a revised cost allocation study.

We disagree with plaintiffs' contention, however, that questions regarding particular administrative costs, by themselves, precludes summary disposition. It is plaintiffs' burden to establish the unreasonableness of the City's rates, and they have failed to present evidence that the City's overall allocation of administrative costs to the water and sewer department is unreasonable. Specifically, Olson testified that he did not prepare a full cost allocation plan in analyzing the administrative expenses allocated to the water and sewer department. He also admitted that other municipal departments could have provided more services to the water and sewer department than reflected in the budget and that a full cost allocation plan could indicate that the cost allocation should be higher than the amount that the City allocated in its budget. Olson further acknowledged that rates are set prospectively, that such prospective budgeting cannot be conducted with mathematical certainty, and that it would be reasonable if the budgeted amount of a cost allocation was off by about 15%.[5]

Most significantly, plaintiffs failed to analyze the reasonableness of the City's overall rates by conducting a rate study. Olson agreed that if the rates cover the actual revenue requirements of the water and sewer department, then the rates are valid and customers will have suffered no damages. Yet Olson was not asked to review the overall expenditures of the water and sewer department, and he held no opinion overall concerning whether the total expenditures of the water and sewer department were reasonable. Thus, plaintiffs made no attempt to analyze the City's rates in lights of the department's revenue requirements. Nor have plaintiffs explained how incorrect or improper administrative cost allocations in and of themselves renders the City's water and sewer rates unreasonable.

In sum, plaintiffs argue that their claims may proceed solely on the basis of certain selected individual expense components that they have chosen to address without a broader evaluation of whether such allegedly improperly estimated expenses in the City's original budget (1) resulted in an unreasonable variance from the actual overall costs and (2) affected the reasonableness of the rates. Given the lack of a more universal analysis, plaintiffs have failed to provide an evidentiary basis from which to conclude that the amount of the department's administrative costs renders the City's water and sewer rates unreasonable.

Plaintiffs also fail to cite any authority to support what would be a form of active court oversight that would amount to an exacting level of judicial auditing of only those individual expenses of a municipal utility that a plaintiff chooses to challenge without respect to whether

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[5] This testimony is consistent with established legal principles, including that "ratemaking is a prospective operation," *Trahey*, 311 Mich App at 597, and that "mathematic precision is not required" when a court assesses whether a utility fee is "reasonably proportionate to the direct and indirect costs of providing the services for which the fee is charged," *id.*

the overall cost allocation is reasonably accurate and without respect to whether the actual water and sewer rates are reasonable. Plaintiffs' argument is at odds with the limited role of the judiciary in reviewing municipal utility rates. See *Novi*, 433 Mich at 425-426, 428, 430. Nor have plaintiffs cited any authority for their implicit contention that they are entitled to the correction of every expense allocated to the water and sewer department that was allegedly overestimated.

Plaintiffs also argue that the City's rates are unreasonable because the City uses a portion of its revenue to create a reserve fund for future unspecified infrastructure improvements to its water and sewer systems. Plaintiffs fail to provide any legal authority to establish that this is an improper ratemaking procedure. To the contrary, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson*, 302 Mich App 90, 111; 836 NW2d 903 (2013). According to the affidavit of Steven Smith, the City's finance director, the City's water and sewer systems are comprised of nearly 674 miles of infrastructure and have a replacement cost of approximately $674 million (i.e., it costs approximately $1 million to rebuild each mile of infrastructure). The City has existed for 50 years, its infrastructure has an expected life of 50 to 70 years, and it experiences an average of 160 water main breaks a year. Given this unrebutted evidence, plaintiffs do not overcome the presumption that a $500,000 annual addition to the City's cash reserves to fund future improvements to the water and sewer system is a reasonable ratemaking practice.

In affirming the trial court, we are not relying on the proposed testimony of Beauchamp or Peck regarding the City's revised allocation study. Even if the trial court properly considered those affidavits, the evidence must be viewed in a light most favorable to plaintiff, and there is clearly a question of fact regarding certain aspects of the City's administrative cost allocation. But Olson's own testimony establishes the necessity of an overarching analysis of the water and sewer department's revenue requirements. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that some improper expenses have caused the rates to become excessive or unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact regarding whether the City's rates were unreasonable. And because we do not rely on Beauchamp's or Peck's proposed testimony, we need not address whether the trial court erred in denying plaintiffs' motion in limine. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues.").

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const 1963, art 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co*, 302 Mich App at 99. However, a charge that constitutes a user fee is not subject to

the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich at 162.

> The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. [*Bolt*, 459 Mich at 162, quoting *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954).]

Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich at 162 n 12. That said, plaintiffs have presented no evidence that the rates themselves are unreasonable given the deficiencies in their proofs discussed above, particularly Olson's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. See Westland Ordinances, § 102-61.[6] The trial court aptly noted: "Those who use water and sewer services

[6] Westland Ordinances, § 102-61 provides, in relevant part:

> The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user."

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's water and sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing water and sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich 152, contend that it is impermissible for the City to incorporate costs in its water and sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would most benefit from the construction. *Id.* Further, the cost of this project was $176 million over 30 years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. Here, the City's reserve fund will be used for future capital projects that will benefits all users of the water and sewer services. Those users contribute to wear and tear of the water and sewer system and, by including the cost of future capital projects into its rates, the City ensures that the users will pay a fee proportionate to the necessary costs of service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's water and sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's water and sewer services are not voluntary under statute and the City's ordinances. Even assuming that the water or sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666. We are unconvinced, in the absence of showing that the water and sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[7] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10). Given our ruling, we decline to address whether plaintiffs' claims are barred by the applicable statute of limitations.

Affirmed.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

[7] MCL 141.91 provides:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

EXHIBIT F

Order

Michigan Supreme Court
Lansing, Michigan

July 6, 2021

Bridget M. McCormack,
Chief Justice

159271

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

LEONARD S. BOHN, Individually and as Representative of a Class of Similarly Situated Persons and Entities,
Plaintiff-Appellant,

v

SC: 159271
COA: 339306
Wayne CC: 15-013727-CZ

CITY OF TAYLOR,
Defendant-Appellee.

_____/

By order of September 8, 2020, the application for leave to appeal the January 29, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *DAART v City of Detroit* (Docket No. 158852). On order of the Court, the case having been decided on December 11, 2020, 506 Mich 996 (2020), the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

b0628

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 6, 2021

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

LEONARD S. BOHN, Individually and as Representative of a Class of Similarly Situated Persons and Entities,

Plaintiff-Appellant,

v

CITY OF TAYLOR,

Defendant-Appellee.

UNPUBLISHED
January 29, 2019

No. 339306
Wayne Circuit Court
LC No. 15-013727-CZ

Before: MURRAY, C.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs brought suit alleging that defendant's water and sewer rates were unreasonable and that they constituted disguised taxes in violation of the Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment. Plaintiffs appeal the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). For the reasons set forth below, we affirm.[1]

[1] A trial court's decision whether to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.

I. BACKGROUND

Defendant City of Taylor (the City) operates and maintains a water and sewer system. Plaintiffs brought suit alleging numerous improprieties in the City's water and sewer ratemaking. On appeal, plaintiffs challenge only the computation of the City's sewer rates as well as the fact that the City no longer directly pays for public fire protection costs.

Specifically, plaintiffs raise two issues relating to the determination of the City's sewer rates. The parties agree that the first step of ratemaking is to determine the utility's revenue requirements. The parties also agree that, as a general matter, a utility may recover depreciation expenses through its rates. However, plaintiffs maintain through their expert, Kerry Heid, that it is improper for the City to include depreciation as an expense when it uses the cash-basis approach to determining its revenue requirements. The City admits that it is improper to include depreciation when calculating cash-basis revenue requirements. But the City, relying on its expert, Eric Rothstein, contends that the term "depreciation" was improperly used in its calculations and that the term was merely used as a "proxy" to provide funding to calculate its capital expenditures.

Plaintiffs also take issue with the accumulation of a reserve fund which will be used to fund maintenance, repairs, and improvements to the City's sewer system. Plaintiffs contend that the sewer reserve fund, which now totals over $10,000,000, shows that the City's sewer rates are in excess of the City's actual costs. Plaintiffs also maintain that it is improper for the City to use funds received from sewer rates to pay for future capital improvements to the sewer system. However, plaintiffs concede that it is appropriate for the City to maintain a reserve fund for the purposes of maintaining and repairing its sewer system, and the City argues that plaintiffs failed to establish that the amount in the City's fund is unreasonable. The City also contends that the reserve fund is properly maintained to address near-term needs and therefore does not raise concerns of "intergenerational inequity."

Lastly, plaintiffs claim that it is improper for the City to incorporate the cost of public fire protection into its service rates. Plaintiffs assert that the City should pay for those costs out of its general fund and that it is violating a City ordinance by failing to do so. Yet plaintiffs have not produced evidence that the City actually includes fire protection costs in its service rates. Further, the City contends that it is appropriate to pass the cost of public fire protection directly to consumers.

The parties filed competing motions for summary disposition. In a written opinion and order, the trial court determined that plaintiffs failed to establish a genuine issue of material fact as to whether the sewer rates constitute an unlawful tax and whether the rates were unreasonable. The trial court also determined that plaintiffs failed to establish that the City includes the cost of fire protection in its water rates.

[*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

II. ANALYSIS

A. REASONABLENESS OF SEWER RATES

The City's Charter provides that the city council "shall have the power to fix from time to time such just and reasonable rates and other charges as may be deemed advisable for supplying the inhabitants of the City and others with such public services as the City may provide. . . ." Taylor Charter, § 17.3. The Charter does not provide any standards for determining "just and reasonable rates." But Taylor Ordinance, § 50-25(c), provides:

> The rates and charges hereby established shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide for debt service and for the expenses of operation, maintenance and replacement of the system as necessary to preserve the same in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.

It is well established that municipal utility rates are presumptively reasonable. *Trahey v Inkster*, 311 Mich App 582, 594; 876 NW2d 582 (2015). "The determination of 'reasonableness' is generally considered by courts to be a question of fact." *Novi v Detroit*, 433 Mich 414, 431; 446 NW2d 118 (1989). "[T]he presumption of reasonableness may be overcome by a proper showing of evidence." *Trahey*, 311 Mich App at 594. It is a plaintiff's burden "to show that any given rate or ratemaking practice is unreasonable." *Id.* "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Id.* at 595.

Under the cash-basis method of utility ratemaking, a municipality first determines "the cash needs of the utility for a given period, *i.e.*, the dollars needed to pay the expense of operation, meet debt obligations, and make such capital improvements as would not require bond financing, *e.g.*, limited new plant construction, plus recurring replacements, renovation and extensions of existing plant." *Plymouth v Detroit*, 423 Mich 106, 115; 377 NW2d 689 (1985). Plaintiffs first argue that the City improperly includes depreciation when it calculates its expenses under the cash-basis method of ratemaking. Plaintiffs' expert, Heid, reached this conclusion by relying on ratemaking manuals which provide that depreciation is not to be included when determining cash-needs revenue requirements. The City's expert, Rothstein, agrees that depreciation, which is a non-cash expense, should not count as an expense under a cash-basis ratemaking approach. But Rothstein opined that the City had simply used the label of "depreciation expense" as a proxy for properly included costs, i.e., for investment in infrastructure renewal and rehabilitation.

To begin, we note that the City is not required by law or ordinance to adhere to any ratemaking approach. Nor must the City abide by any particular ratemaking manual or guideline. Thus, we decline to hold that the City's failure to strictly follow the cash-basis approach renders its rates unreasonable or that the inclusion of depreciation in its rates is illegal

or improper. To the contrary, it is common for utilities to set rates to cover the costs of depreciation. See 64 Am Jur 2d, Public Utilities, § 125, p 516. Further, it is permissible to include a capital investment component in utility rates. See *Bolt v Lansing*, 459 Mich 152, 160, 164-165; 587 NW2d 264 (1998).

That said, we agree with plaintiffs that the City should not be allowed to accomplish a "double recovery" by counting a single expense twice in determining its revenue requirements. However, plaintiffs have not provided evidence showing that the City has engaged in such a practice. While plaintiffs note that the City has included debt service payments as a budgeted expense in its sewer rates analysis, plaintiffs have not proffered any evidence that those payments are related to the depreciated items. Indeed, Heid admitted that he did not identify any specific items in defendant's budget that were funded through debt, that he did not identify any specific instances in which defendant collected for the same amount twice, and that he could not be aware of any such instances without going through each individual item of defendant's budget.

Thus, while plaintiffs argue that the City may have obtained a double recovery by including depreciated expenses in its sewer rates, they have failed to provide any supporting evidence on that matter. By contrast, Rothstein consulted with the City officials and determined that the City did not include depreciation expense and capital expenditure projections separately but rather used depreciation expense to inform its estimate of required capital expenditures. Heid also acknowledged that it is sometimes appropriate for utilities to use depreciation as a proxy for other expenses. Although the evidence must be viewed in a light most favorable to plaintiffs, they have failed to offer specific evidence that would give rise to a factual dispute regarding the depreciated expenses. Therefore, plaintiffs have failed to present clear evidence that the inclusion of depreciation costs in the City's sewer rates was improper or that this practice renders those rates unreasonable.

Next, plaintiffs challenge what they deem to be an excessive sewer reserve fund. Taylor Ordinances, § 50-24, provides that "[a]ll funds, including surplus funds, if any, shall be kept in separate accounts for the benefit of the bondholders, the operation and maintenance of the water and sewer divisions, and for no other purpose." Heid agreed that the City should be allowed to maintain a reserve fund for maintenance and repair of the sewer system. Indeed, rate-based public utilities commonly maintain a capital reserve to provide fiscal stability. *Jackson Co v City of Jackson*, 302 Mich App 90, 111; 836 NW2d 903 (2013). Plaintiffs have not proffered any evidence as to how much money should actually be in the City's sewer fund. Heid testified that he does not know what work needs to be done to the City's sewer system and does not know how much the City needs in reserves for sewer replacements. Accordingly, plaintiffs have not shown that the amount of the City's sewer reserve fund is unreasonable per se.

Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention. Setting that aside, we note that numerous witnesses testified that the City has undertaken or initiated actions and processes to assess its aging sewer system and to prepare and pursue a plan to repair and rehabilitate that system. There

was also testimony that the City's reserves are insufficient to meet its infrastructure renewal needs.

Plaintiffs counter that this a "post-hoc" justification and the City did not accumulate the reserve pursuant to any kind of capital improvement plan. For purposes of this appeal, we assume that to be true. However, we do not see how the lack of a capital improvement plan renders the accumulation of a reserve fund improper. First, there can be no plan to address the City's *unexpected* maintenance and repairs costs, which is one of the purposes of the fund. Second, Heid opined that the size of the reserve fund is largely due to the City's inclusion of depreciated expenses in its rates. Thus, the reserve fund is inherently aimed toward the replacement and renewal of the sewer system. In other words, by including depreciation expenses in its rates, the City is saving for the day when the depreciated items will need to be replaced. This does not mean, however, that the City must at all times have a plan in place for infrastructure replacements. Presumably, large improvement projects are not continuously planned and executed. Rather, such projects occur periodically as the pipes and other infrastructure decays. The evidence shows that the City is currently inspecting its system and planning infrastructure improvements, for which it will use the reserve fund. Plaintiffs fail to explain why the City must constantly have a capital improvement plan to justify the accumulation of funds that will eventually be used to fund the renewal and replacement of the sewer system.

In sum, plaintiffs fail to establish that any of the City's ratemaking practices are improper or unreasonable. Nor have plaintiffs proffered any evidence that the City's sewer rates are unreasonable. Heid admitted that he does not know what a reasonable rate is without performing a full cost of service study and that he would not be testifying concerning the amount of a reasonable rate. In general, "rate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates." *Novi*, 433 Mich at 427. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Id.* at 430. In the absence of a complete study of the rate structure and all of its components, it is speculative to suggest that the City's sewer rates are unreasonable. Accordingly, plaintiffs have failed to demonstrate a genuine issue of material fact on that matter, and the trial court correctly granted summary disposition under MCR 2.116(C)(10).

B. THE HEADLEE AMENDMENT

The pertinent provision of the Headlee Amendment, Const 1963, art 9, § 31, states:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

The levying of a new tax without voter approval violates this section of the Headlee Amendment. *Jackson Co*, 302 Mich App at 99. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Id.* The plaintiff bears the burden of establishing the

unconstitutionality of the charge at issue. *Id.* at 98. A court decides, as a question of law, whether a charge is a permissible fee or an illegal tax. *Westlake Transp, Inc v Public Serv Comm*, 255 Mich App 589, 611; 662 NW2d 784 (2003).

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161 (quotation marks and citations omitted). In *Bolt*, our Supreme Court identified three key criteria to use in distinguishing between a user fee and a tax: (1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service. *Id.* at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (brackets, quotation marks, and citations omitted).

Water and sewer rates are generally considered user fees rather than taxes because they represent a fee paid in exchange for a service. See *Bolt*, 459 Mich at 162. Water and sewer rates are not always considered user fees, however, because they must be proportionate to the cost of the service. See *Bolt*, 338 Mich at 162 n 12. That said, as discussed above, plaintiffs have not presented evidence that the City's sewer rates themselves are unreasonable particularly in light of Heid's concession that he had not performed a rate study and that he held no opinion concerning the reasonableness of the rates. Considering that plaintiffs fail to overcome the presumption that the City's rates are reasonable, we find no basis from which to conclude that the those rates are not proportionate to the cost of service. Instead, the rates constitute a valid user fee because users pay their proportionate share of the expenses associated with the operation and maintenance of the sewer systems. See Taylor Ordinances, § 50-25(c).

Consideration of the other *Bolt* criteria does not alter the conclusion that the City's sewer rates constitute a user fee rather than a tax. The first *Bolt* factor indicates that the rates comprise a valid user fee because the rates serve a regulatory purpose of providing sewer services to the City's residents. Although the rates generate funds to pay for the operation and maintenance of the sewer system, this by itself does not establish that the rates serve a primary revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

Plaintiffs, relying on *Bolt*, 459 Mich 152, contend that it is impermissible for the City to incorporate costs in its sewer rates which will be used to fund future capital improvements. In *Bolt*, the City of Lansing imposed a "storm water service charge" on property owners to fund the separation of the remaining portion of its combined sanitary and storm systems. *Id.* at 155. The Supreme Court determined that the storm water service charge failed to satisfy the first and second criteria because the charge did not correspond to the benefits conferred. *Id.* at 165. 75% of the property owners in Lansing were already served by a separate storm and sanitary sewer system, but those property owners would be charged the same amount as the 25% who would benefit most from the construction. *Id.* Further, the cost of this project was $176 million over 30

years. *Id.* at 155. The Court noted that the charge was "an investment in infrastructure that will substantially outlast the current 'mortgage' that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter." *Id.* at 164 (citation omitted).

Bolt is primarily distinguishable because it involved a rate increase to fund a completely new alteration to the existing sewer system that benefitted only 25% of the property owners. In this case, as discussed, the reserve fund is being used for maintenance and repairs of the existing system, and will be used to fund a large-scale project to replace and update much of that system which will benefit all users of the City's sewer services. Further, if one accepts the premise—as plaintiffs do—that the City may incorporate replacement costs into its rates, then we see no reason why surplus funds cannot be used to replace aging infrastructure. As for concerns that the City's ratepayers are funding improvements for future generations, we find Rothstein's reasoning on this point persuasive:

> The practical reality is that Taylor's current customers, like all utility customers, benefit from prior customers' investments that put in place a (depreciating) system to which they can connect and receive service. Equitably, current users are asked to pay to renew and replace these assets, as well as pay their share of system upgrades. Future users are asked to pay for their shares of system capacity and will likewise be responsible to pay for asserts renewals and replacements.

The users of the City's sewer system contribute to that system's wear and tear, an expense that the City recoups by including depreciation as a revenue requirement in its rate analysis. Accordingly, the users pay a fee proportionate to the necessary costs of the service. And in order for the sewer system to serve its regulatory purpose, it must be maintained and periodically replaced and updated. For those reasons, we conclude that the first two *Bolt* criteria establish that the City's sewer rates constitute a user fee rather than a tax.

As for the third *Bolt* factor, plaintiffs contend that the City's sewer services are not voluntary under statute and the City's ordinances. Even assuming that the sewer charges were deemed effectively compulsory in this case, "the lack of volition does not render a charge a tax; particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666. We are unconvinced, in the absence of showing that the sewer rates are unreasonable, that those rates should be considered a tax as opposed to a user fee. Considering the *Bolt* criteria in totality, we conclude that plaintiffs have not established that the City has imposed an unconstitutional tax.

Accordingly, plaintiffs have not demonstrated a genuine issue of material fact in support of their claims alleging violations of the Headlee Amendment and MCL 141.91.[2] Therefore, the trial court properly granted summary disposition to the City pursuant to MCR 2.116(C)(10).

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[2] MCL 141.91 provides:

C. FIRE PROTECTION

Plaintiffs claim that the City violated an ordinance by incorporating the costs of public fire protection into its service rates. Specifically, the water department, in addition to its primary task of providing potable water, maintains equipment and operations sufficient to assure necessary pressure for the functioning of fire hydrants. The cost paid to the water department for this service is known as "fire hydrant rental." As a general matter, the experts agreed that it is appropriate for a municipality to recover this cost through water rates. Plaintiffs argue that this practice is nevertheless improper here because it violates Taylor Ordinance, § 50-25(g), which provides in relevant part:

> The reasonable cost and value of all water and sewer service rendered to the city and its various departments by the water and sewer system, including rentals for fire hydrant service for each fire hydrant connected to the system, during all or any part of the fiscal year, shall be charged against the city and will be paid for as the service accrues for the city's current funds, including the proceeds of taxes which will be levied in an amount sufficient for that purpose.

It is undisputed that the City no longer pays $44,000 a year in rental fees for all of the fire hydrants on public property as it did until 2010. However, plaintiffs have not provided any evidence that public fire protection costs are improperly passed on to plaintiffs through the City's water rates. Tellingly, Heid testified that "there is nothing to suggest that the customers are actually paying any amount for those public fire protection services." Nor could Heid determine the amount of such a charge in the absence of a rate study. Further, Heid agreed that, at the end of the day, residents will pay for public fire protection either on their water bills or on their tax bills. Given this testimony, plaintiffs have failed to produce evidence demonstrating a genuine issue of material fact concerning whether the costs for public fire protection are improperly included in defendant's water rates or the amount of any such charge. For the same reasons, plaintiffs fail to establish that the City is receiving "free service" from the water and sewer department in contravention of MCL 141.118(1)[3] by not paying for public fire protection costs.

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

[3] MCL 141.118(1) provides:

> Except as provided in subsection (2) [which is inapplicable here], free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the

Affirmed.

/s/ Christopher M. Murray
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

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public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, and those charges, when so paid, shall be accounted for in the same manner as other revenues of the public improvement.