RECEIVED by MSC 6/15/2023 12:20:18 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES HEOS,
individually and as representative
of a class of similarly-situated
persons and entities,

Plaintiff/Appellee,

v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant/Appellant.

Supreme Court Case No. _____

Court of Appeals Case No: 361138
Ingham County Circuit Court Case
No. 20-199-CZ
Hon. Wanda M. Stokes

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

Andrew Abood (P43366)
Abood Law Firm
246 E Saginaw Street, Suite 100
East Lansing, MI 48823
(517) 332-5900
Counsel for Plaintiff/Appellee and the Class

Charles E. Barbieri (P31793)
Michael Homier (P60318)
Brandon M. H. Schumacher (P82930)
Foster Swift Collins & Smith, PC
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
Counsel for Defendant/Appellant

PLAINTIFF/APPELLEE'S APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 6/15/2023 12:20:18 PM

TABLE OF CONTENTS

TABLE OF CONTENTS ii
INDEX OF AUTHORITIES iv
STATEMENT IDENTIFYING THE ORDERS APPEALED FROM vi
STATEMENT OF QUESTIONS PRESENTED vii
STATEMENT OF FACTS 1
I. THE NATURE OF THE CASE 1
II. THE UNDISPUTED FACTS RELATING TO THE CITY'S "FRANCHISE FEES." 3
III. PERTINENT PROCEEDINGS IN THE CIRCUIT COURT 8
A. Plaintiff's Complaint *8*
B. Plaintiff's Motion for Summary Disposition *9*
C. The City's Motion for Summary Disposition *9*
D. The Circuit Court's Opinions and Orders on the Parties' Dispositive Motions. *10*
IV. THE COURT OF APPEALS' OPINION AND ORDER 11
A. Ruling on the Statute of Limitations Defense *11*
B. Ruling on the Plaintiff's Claims Under MCL 141.91 ..... *13*
ARGUMENT 13
I. LIKE *MIDWEST VALVE*, THIS IS ONE OF THE MOST IMPORTANT CASES THE COURT WILL CONSIDER THIS YEAR, AND IT MEETS EVERY CRITERIA FOR THIS COURT'S REVIEW. 13
II. THE COURT OF APPEALS' OPINION BLASTS A HOLE IN ESTABLISHED HEADLEE AMENDMENT JURISPRUDENCE BY AUTHORIZING MUNICIPALITIES TO CONTRACT AROUND FUNDAMENTAL HEADLEE PROHIBITIONS. 18
A. The Franchise Fees Are Imposed On Plaintiff And The Class And Therefore They Are The Proper Parties To Challenge The Franchise Fees. 19
1. Where As Here, An Entity Collects Taxes From End-Users On Behalf Of The Government, the End-Users Are The Payers Of The Taxes. 20
2. Under Prevailing Law, The Legal Incidence Of The Franchise Fees Falls On The City's Inhabitants Who Purchase Their Electricity From The LBWL. 22
3. Morgan Does Not Support A Finding That Plaintiff's Headlee Claims Are Barred By The One-Year Limitations Period Prescribed by MCL 600.308a 23
B. The Franchise Fees As A Matter Of Law Cannot Be Imposed On The LBWL *24*
C. Given That Plaintiff and the Class Bear The Legal Incidence Of The Franchise Fees, It Is Clear That Their Claims Are Not Barred By The Headlee Amendment Statute of Limitations. *27*
III. THE COURT OF APPEALS ERRED AS A MATTER OF LAW WHEN IT HELD THAT PLAINTIFF'S NON-HEADLEE TAX-BASED CLAIMS STATED IN COUNTS II & III ARE "ANALOGOUS" TO

PLAINTIFF'S HEADLEE AMENDMENT CLAIM AND TRUNCATED THE STATUTE OF LIMITATIONS PERIOD FOR THESE CLAIMS TO ONE YEAR UNDER MCL 600.308A. 29

IV. PLAINTIFF'S ASSUMPSIT CLAIMS STATED IN COUNTS II AND VI ARE A PROPER VEHICLE FOR OBTAINING A REFUND OF CHARGES PAID BY PLAINTIFF AND THE CLASS. 33

CONCLUSION AND REQUEST FOR RELIEF 35

RECEIVED by MSC 6/15/2023 12:20:18 PM

RECEIVED by MSC 6/15/2023 12:20:18 PM

INDEX OF AUTHORITIES

Cases

Belle Isle Grill Corp. v. City of Detroit, 256 Mich. App. 463, 471 (2003) ..... x, 29

Bernstein v. Seyburn, 2014 Mich. App. LEXIS 331 (2014) 30

Bolt v. City of Lansing, 238 Mich. App. 37, 54; 604 N.W.2d 745 (1999) ("*Bolt* II") 28

Bond v. Pub. Sch. of Ann Arbor Sch. Dist., 383 Mich. 693, 704; 178 N.W.2d 484 (1970) 34

Briggs Tax Serv. v. Detroit Pub. Schs., 2007 Mich. App. LEXIS 682, *26-28 (2007) 27

Burton v. Burton, 332 Mich. 326, 337; 51 N.W.2d 297 (1952) 21

Corey v. Wayne County, 2016 Mich. App. LEXIS 513 (2016) 34

Dennis De Long v. Palm Beach Polo Holdings, 2010 Mich. App. LEXIS 1178, *6-7 (2010) 30

Durant v. State Bd of Ed, 424 Mich. 364, 383, 381 N.W.2d 662 (1985) 14

First Agric. Nat'l Bank of Berkshire Cty v. State Tax Comm'n, 392 U.S. 339, 347, 88 S.Ct. 2173, 20 L. Ed. 2d 1138 (1968) 20

Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc., 494 Mich. 543, 564, 837 N.W.2d 244 (2013) 33

Gottesman v. City of Harper Woods, Case No. 344568; 2019 Mich. App. LEXIS 7657 (Dec. 2, 2019) ..30, 31

Joliet v. Pitoniak, 475 Mich. 30, 42-45; 715 N.W.2d 60 (2006) 31, 32

Lansing v. Michigan Power Co., 183 Mich. 400, 150 N.W. 250 (1914) 9, 25

Lockwood v. Comm'r of Revenue, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) ..... viii, 17, 22, 23

Lofgren Harborside, Inc. v. Paull, 2004 Mich. App. LEXIS 636, *5 (2004) 29

Ludowese v. Golen, 2008 Mich. App. LEXIS 2069 (2008) 29

Macomb Co. Taxpayers Ass'n v. L'Anse Creuse Pub. Sch, 455 Mich. 1, 7, 564 N.W.2d 457 (1997) 14

Mercy Services for the Aging v. City of Rochester Hills, 2010 Mich. App. Lexis 2044 (2010) 33

Metzen v Dep't of Revenue, 310 Mich. 622; 17 N.W.2d 860 (1945) 33

Michigan Bell Telephone Co. v. Dep't of Treasury, 229 Mich. App. 200; 581 N.W.2d 770 (1998) 22

PCA Minerals LLC v. Merit Energy Co. LLC, 725 Fed. Appx. 342, 349 (6th Cir. 2018) 32

Raby v. Bd. of Trs. of the Police & Fire Ret. Sys. of Detroit & Detroit, 2011 Mich. App. LEXIS 520, *9-10 (2011) 30

Service Coal Co v. Unemployment Compensation Comm, 333 Mich. 526, 530-531; 53 N.W.2d 362 (1952) 34

Sims v. Firestone Tire & Rubber Co., 397 Mich. 469, 474, 245 N.W.2d 13 (1976) 23

St Clair Intermediate Sch Dist v Intermediate Ed Assn/Michigan Ed Ass'n, 458 Mich 540, 556; 581 NW2d 707 (1998) 22

Stephens v. Delta Township, Eaton County Circuit Court Case No. 19-919-CZ 2

Taxpayers Allied for Constitutional Taxation [TACT] v. Wayne County, 450 Mich. 119, 124 (1995) .....passim

U.S. v. Mississippi Tax Comm'n, 421 U.S. 599 (1975) 19

Village of Constantine v Michigan Gas & Electric, 296 Mich. 719, 732; 296 NW 847 (1941) 25, 26

W. Bloomfield Twp. v. Detroit Edison, No. 222497, 2001 Mich. App. LEXIS 2305, at *5 (Nov. 13, 2001) . 25

Woodland Condos Homeowners Ass'n v. Fannie Mae, 2019 Mich. App. LEXIS 384 (2019) 34

Yellow Freight Sys, Inc v. Michigan, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds, 464 Mich. 21; 627 N.W.2d 236 (2001), rev'd, 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002) 34

Zervos Group v. Thompson Asphalt Prods., 2006 Mich. App. LEXIS 1520, *18 (2006) 29

Rules

MCR 2.116(C)(10) 9

MCR 7.302(B)(2) 18

MCR 7.302(B)(3) 18

MCR 7.302(B)(5) 18

MCR 7.305 (C)(2)(c) vii

Constitutional Provisions

Art. 9, § 31 of the Michigan Constitution 9

RECEIVED by MSC 6/15/2023 12:20:18 PM

RECEIVED by MSC 6/15/2023 12:20:18 PM

STATEMENT IDENTIFYING THE ORDERS APPEALED FROM

Plaintiff/Appellee James Heos seeks leave to appeal the unpublished Opinion of the Court of Appeals dated April 13, 2023 ("COA Opinion," Exhibit A hereto).[1] The appeal to the Michigan Court of Appeals was taken from two opinions and orders entered by the Ingham County Circuit Court relating to the parties' respective motions for summary disposition (the "Circuit Court Opinions") both dated March 31, 2022. *See* App.Ex. 1(A) and App.Ex. 1(B). On April 13, 2023, the Court of Appeals issued its Opinion and Order reversing the Circuit Court's Opinions. On April 19, 2023, Plaintiff/Appellee filed a timely motion for reconsideration of the Court of Appeals' April 13, 2023 Opinion. On May 11, 2023, the Court of Appeals denied Plaintiff/Appellee's motion for reconsideration. *See* Order Denying Plaintiff/Appellee's Motion for Reconsideration, Exhibit B hereto.

This Application for Leave to Appeal to this Court is timely because it has been filed within 42 days after the Court of Appeals' May 11, 2023 Order denying Plaintiff/Appellee's Motion for Reconsideration. *See* MCR 7.305 (C)(2)(c).

[1] Exhibits to this Application are cited as "Exhibit __ hereto" and are designated with letters. Exhibits that were part of Plaintiff's Appendix on Appeal are cited as "App.Ex. ___" and are designated with numbers. Exhibits that were part of Defendant's Appendix on Appeal are cited as "Appellant Appx. ___" and are also designated with numbers. The parties Appendices on Appeal were filed in the Court of Appeals and are thus part of the record in this case.

RECEIVED by MSC 6/15/2023 12:20:18 PM

STATEMENT OF QUESTIONS PRESENTED

This case alleges that a purported "Franchise Fee" imposed by the City of East Lansing (the "City") on citizens who receive electric service in the City from the Lansing Board of Water and Light ("LBWL") constitutes an unlawful tax that has been imposed in violation of the Headlee Amendment to the Michigan Constitution and a Michigan statute, MCL 141.91. The Circuit Court held that the Franchise Fees were unlawful taxes and that Plaintiff's claims were not barred by applicable statutes of limitation. The Court of Appeals did not disturb the Circuit Court's finding that the Fees were unlawful taxes but held that the tax-based claims of Plaintiff and the Class were all barred by the one-year statute applicable to Headlee Amendment claims because this lawsuit was not filed within one year of the City's enactment of the ordinance authorizing the Fees. The Court of Appeals' ruling raises the following questions of vital importance to Michigan citizens:

1. Can a municipality contract with a utility that provides essential services to the municipalities' citizens to impose a tax upon the municipality's citizens that the municipality could not otherwise directly impose without voter approval?

2. This Court has long recognized that "**[o]ne may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him**." *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) (emphasis added). Did Plaintiff and the Class bear the "legal incidence" of the Fees where the Franchise Agreement between the City and the LBWL (1) expressly appoints the LBWL as the City's agent to "collect and remit" the Fees to the City, (2) completely exonerates the LBWL from the obligation to pay the Fees if the Fees aren't actually collected from City residents and (3) even grants the LBWL monetary compensation for its role in collecting the Fees?

RECEIVED by MSC 6/15/2023 12:20:18 PM

3. If Plaintiff and the Class bear the legal incidence of the Fees, are their Headlee Amendment claims timely to the extent they seek to recover Fees they paid within one-year of the filing of this lawsuit?

4. Relying upon its decision in *Morgan v. City of Grand Rapids*, 267 Mich. App. 513; 705 N.W. 2d 387 (2007) ("*Morgan*"), the Court of Appeals concluded as a matter of law the Franchise Fees at issue in this case are legally imposed on the LBWL, a finding which drove the Court of Appeals' ultimate decision that Plaintiff's Headlee Amendment claims (and his separate, independent claims based upon MCL 141.91) were collectively barred by the one-year statute of limitations established by MCL 600.308a. Did the Court of Appeals err as a matter of law when it concluded that *Morgan* controlled the statute of limitations analysis in this case, where a clear distinction exists between (a) the franchise fees in *Morgan* which were, by federal law, legally imposed on the **cable companies**; and (b) the franchise fees in this matter, which are unlawfully imposed on the **end-users** of the LBWL and **merely collected by the LBWL** on behalf of the City?

5. Plaintiff sued on behalf of himself and a class of persons defined under MCR 3.501 (*i.e.* not "the public") for a refund of the improperly imposed and collected Franchise Fees they actually paid. In *Taxpayers Allied for Constitutional Taxation v. Wayne County*, 450 Mich. 119 (1995) ("*TACT*"), this Court held that "a cause of action for a refund of [a] tax **accrues at the time the tax is due**," and **not**, as the City alleged and the Court of Appeals found, at the time the tax was enacted. *TACT*, 450 Mich. at 123-24 (emphasis added).

   a. Did the Court of Appeals err as a matter of law, and expressly contravene this Court's decision in *TACT*, by finding that Plaintiff's Headlee Amendment Claims were barred because Plaintiff did not sue within one year of the enactment of the Franchise Fee ordinance?

   b. Must a Headlee Amendment claim brought by a person who actually paid and seeks a refund of a contested charge be brought within one year of the date the local government unit <u>enacted</u> the contested charge?

RECEIVED by MSC 6/15/2023 12:20:18 PM

6. It is well settled that under MCR 2.111(A)(2) a party may allege alternative or even inconsistent claims based on the same set of facts, "regardless of…whether they are based upon legal or equitable grounds or both." *See e.g. Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 471 (2003).

   a. When applying statutes of limitations to independent legal and equitable claims arising out the same wrong committed by a defendant, must a court analyze each separate substantive claim to ascertain the applicable statute of limitations?

   b. Does the Headlee Amendment's one-year limitations period apply "by analogy" to Plaintiff's separate, equitable claims under MCL 141.91, merely because those claims challenge an unlawful tax?

   c. Claims for restitution under theories of assumpsit and unjust enrichment for violation of MCL 141.91 are subject to a six-year statute of limitations. The City started imposing the Franchise Fees on July 1, 2017. Are Plaintiff's claims for unjust enrichment and assumpsit for violation of MCL 141.91 timely to the extent they seek refunds of Franchise Fees imposed on or after July 1, 2017?

   d. Did the Court of Appeals err as a matter of law by finding that Plaintiff's non-Headlee claims were subject to a one-year statute of limitations?

7. Is the equitable doctrine of assumpsit a proper vehicle for obtaining a refund remedy for the Franchise Fees paid by Plaintiff and the Class where: (1) the substantive remedies traditionally available under assumpsit have been preserved; and (2) Plaintiffs and the Class have demonstrated that the City obtained money in violation of the law?

RECEIVED by MSC 6/15/2023 12:20:18 PM

STATEMENT OF FACTS

I. THE NATURE OF THE CASE.

This Application for Leave to Appeal presents the following primary question: Can a municipality deputize a utility that provides essential services to impose and collect a tax that the municipality could not otherwise directly impose without voter approval? In other words, can a municipality avoid the Headlee Amendment to the Michigan Constitution by simply licensing a "tax farmer" to collect and remit a tax **that would be illegal if the municipality imposed it directly?** The Court of Appeals, reversing the well-reasoned opinion of the Circuit Court, answered that question in the affirmative and, by doing so, eviscerated the Headlee Amendment.

This Application seeks to vindicate the principles which underlie the Headlee Amendment—to wit: limit the taxation authority of local governmental units—and at the same time, remedy a gross injustice that the Court of Appeals has visited upon the citizens of the City. The Court of Appeals' Opinion in this matter is particularly pernicious because it has authorized the City of East Lansing (the "City") to avoid Headlee's requirements by contracting with the Lansing Board of Water and Light ("LBWL") to "collect and remit" a tax that the City admits it could not impose directly. Thus, the Court of Appeals' Opinion imparts a blow to tens of thousands of municipal rate payers who are being charged a tax without first being presented their constitutionally protected right to vote on that tax.

Plaintiff/Appellee ("Plaintiff") challenged the so-called "Franchise Fees" the City imposes on people who pay for electric service from the LBWL, a municipal utility owned by the City of Lansing, Michigan. It is undisputed that the Franchise Fees were imposed without the approval of a majority of the City's voters and therefore, if they are "taxes," as the Circuit Court ruled, they clearly violate Section 31 of the Headlee Amendment.

Since 2017, the City has extracted millions of dollars from the payers of the Franchise Fees, at a rate of about $1.4 million per year, and has used those revenues to finance the City's general governmental functions that are wholly unrelated to the LBWL's franchise. Indeed, the City has used

RECEIVED by MSC 6/15/2023 12:20:18 PM

the vast bulk of the Franchise Fee revenues to partially satisfy its underfunded public pension obligation which, according to the City, "could bankrupt us unless we begin to address it now." *See* App. Exh. 3.

While certain franchise fees imposed upon and collected from utility providers may be lawful under certain circumstances, the City's "franchise fees" are not "franchise fees" at all. A **lawful** franchise fee is one where the legal incidence of the fee falls upon the **utility** and the revenues are utilized to pay the costs a municipality incurs as a result of the utility's use of the municipality's infrastructure. **Here, however, as the Circuit Court properly found, the legal incidence of the tax falls upon East Lansing's electrical customers in the LBWL's service area (*i.e.*, Plaintiff and the Class)**[2] **and the revenues are utilized for purposes wholly unrelated to the LBWL's use of the City's infrastructure**. Indeed, as the undisputed facts demonstrate, the Franchise Fees were intentionally designed by the City and the LBWL to be imposed directly on some (not all) of the City's residents, with the LBWL acting as a mere collection agent—having no financial responsibility other than to "collect" the fees and "remit" them to the City. Simply, the City contracted with the LBWL to collect an additional, but unlawful, tax. The City did this even though it admits it "has no ability to impose Franchise Fees directly on its citizens." *See* App.Ex. 4, City's Response to RFA No. 18.[3]

---

[2] The City is serviced by two electric utilities, the LBWL and Consumers Energy, each of which holds the right to provide exclusive service to some parts of the City. Citizens in the areas of the City serviced by Consumers Energy do not incur the Franchise Fees, because the City's Franchise Agreement with Consumers Energy does not require payment of any Franchise Fees. *See* App.Ex. 4, City's Response to RTA No. 2. The City's argument on appeal, rejected by the Circuit Court but adopted by the Court of Appeals, that the legal incidence of the Franchise Fees falls on the LBWL not the residents, is meritless for the reasons discussed herein.

[3] The precise legal issues presented here were previously adjudicated in a similar case. In *Stephens v. Delta Township*, Eaton County Circuit Court Case No. 19-919-CZ, Judge John Maurer held that "franchise fees" imposed by Delta Township upon its electric customers under a "Franchise Agreement" that is virtually-identical to the one at issue here constituted unlawful taxes imposed in violation of the Headlee Amendment. *See infra*, at p. 26, 29- 30, 32; App.Ex. 21.

RECEIVED by MSC 6/15/2023 12:20:18 PM

II. THE UNDISPUTED FACTS RELATING TO THE CITY'S "FRANCHISE FEES."

A. The City's Financial Difficulties.

In 2016, the City was openly concerned about a growing "budgetary gap" primarily arising from the underfunding of the City's Pension and OPEB obligations. The City's Manager, George Lahanas, described the issue in a 2016 email:

> This year, unfortunately, presents our largest gap in my recollection at $1.6 million[.] This is obviously not completely unexpected, as our 5 year financial forecast indicated. When we first received a five year pension payment forecast from MERS about two years ago we knew that short of a significant increase in revenue, we would eventually need to reduce staffing across the City, and particularly in public safety. What is different now from two years ago, is the prospect for substantial increases to revenue from several fronts, including BWL franchise fees…. If these prospects were not forthcoming we would recommend significant reductions to maintain our reserves. [App.Ex. 5, emphasis added.]

In discovery, Mr. Lahanas acknowledged that the "gap" referenced in his email was between the City's proposed expenditures and proposed revenues. *See* App.Ex. 6 at pp. 11-12. Lahanas stated that a primary cause of the City's growing budgetary gap was "due to an underfunding situation" that would require the City to "ramp up" its pension payments over a twenty-year time frame—causing the City to seek additional revenue sources to fund these pension obligations. *Id.*, pp. 7-8.

In 2019, then-mayor Mark Meadows described the City's budget issues as a "financial challenge" and a "future problem that could bankrupt us unless we begin to address it now." *See* App.Ex. 3. Meadows further noted that: "It is the projected growth in annual required payments towards our unfunded legacy costs that are the danger. If we do not address the issue by increasing the voluntary payments we make today, within 10 years virtually all of our property tax revenues will have to be used to make payments on unfunded liability." *Id.* In his deposition, Mr. Meadows confirmed his concerns about the danger the City's unfunded legacy costs presented, stating that: "Our pension liability as projected was a significant problem for the city in my opinion." App.Ex. 7, p. 11. Meadows explained: "The annual requirement for funding (Pensions and OPEB) is set by MERS and forwarded to the city. We never had a problem making that amount. Our problem was, we could see down the

RECEIVED by MSC 6/15/2023 12:20:18 PM

road that that amount would continue to grow until such time as it may be—could even bankrupt the city in terms of its ability to provide services to its citizens." *Id.*, p. 12. Lahanas conceded that the pension and OPEB underfunding issue facing the City remained "a big problem." App.Ex. 6, p. 25.[4]

B. The City Hatches a Plan to Fill The Revenue Shortfalls.

Based upon the "significant problem" presented by its underfunded pension and OPEB obligations, the City determined it needed additional sources of revenue to balance its budget and meet its financial obligations while avoiding layoffs or use of its OPEB reserves. App.Ex. 6, pp. 9-10. Two primary revenue solutions presented readily to City officials in 2017. The first solution was to create revenue through a Franchise Fee via a new Franchise Agreement with the LBWL. The second solution was to implement a City income tax. Regarding the second solution, the City obtained voter approval for the new income tax and began implementing it in 2019. App.Ex. 6, pp. 10-11. The income tax, which generates approximately $14 million in annual revenue, was designed to offset a $5 million reduction in property taxes, and thus provides approximately $9 million in new revenue to the City. *Id.*

As for the prospect of imposing a Franchise Fee, City Manager Lahanas admitted it was "part of a solution to better match revenues with expenditures over long term." App.Ex. 6, p. 15. Both the "BWL franchise and the income tax" were deemed to be "long-term solutions" that would help alleviate the City's financial pressures. *Id.*, p. 15-16.

By early 2016, the City was in negotiations with the LBWL about a new franchise fee that City officials hoped would arrive "as expected" sometime in 2016. App.Ex. 5. By May 2016, the City's Mayor was stressing to the LBWL the importance of the franchise deal, and specifically how important the $1 million to $1.5 million in expected revenue was to the City. App.Ex. 9; App.Ex. 7, p. 22.

---

[4] The Michigan Department of Treasury also believed that the City's pension liability was a "big problem." In 2017, the City's underfunding of its pension obligations triggered State review, because it was "well below the amount of funding needed" to meet payment obligations. App.Ex. 8, March 5, 2018, East Lansing Info Article. The City made the State's review list because in 2017 its pension fund was only 50% funded and the City was contributing 13.7% of its annual revenues to the fund. *Id.*

RECEIVED by MSC 6/15/2023 12:20:18 PM

Notably, the LBWL staff flagged both the rate pass-through issue and its Headlee Amendment implications with the City. App.Ex. 10.

C. The LBWL Sounds the Alarm.

During the Franchise Agreement negotiations, the LBWL apparently knew, or at least suspected, that the Franchise Fees were unlawful. In its November 15, 2016 meeting minutes, the LBWL recorded the following:

> General Manager Peffley stated that there is **a concern that this fee could be illegal** and that the BWL has been put on notice. Should the Board choose to go forward with the Franchise Fee the **BWL would only be the collection agency for the City of E. Lansing.**[5] However, the **BWL does not want to get in the middle of a lawsuit**, therefore stipulations are being proposed for the commissioners to consider and have the Administration to negotiate on. The recommendations are:
>
> 1. East Lansing will need to provide the BWL a legal opinion confirming a franchise fee can be assessed;
>
> 2. BWL will need an Agreement with East Lansing to **reimburse the BWL for all costs for defending against a third-party claim** associated with a franchise fee;
>
> 3. East Lansing stated they will be requesting a franchise fee from Consumers Energy so the BWL requests that both agreements should start concurrently; and
>
> 4. BWL will require an opportunity to review the legal opinion confirming a franchise fee can be assessed before they will enter into the franchise agreement. [App.Ex. 12 at p. 13 (emphasis added).]

Similarly, the LBWL's May 23, 2017 meeting minutes state as follows:

> GM Peffley stated that at the November 8, 2016 Finance Committee a request was brought forth that was made by East Lansing to implement a franchise agreement. Four items emerged that needed to be accomplished: (1) East Lansing would provide the BWL with a legal opinion confirming a franchise fee can be assessed; **(2) BWL will need an agreement with East Lansing to reimburse the BWL for all costs for defending against a third party claim associated with the franchise fee;** (3) East Lansing will be requesting a franchise fee from Consumers Energy and requests that both agreements should start concurrently; (4) BWL will require an opportunity to review the legal opinion confirming a franchise fee can be assessed before they will enter into a franchise agreement with East Lansing. East Lansing has met (1), (2), and (4). Mr. Peffley said that he would like to offer an amendment. Through negotiations

[5] In his deposition (App.Ex. 11), General Manager Peffley testified that the LBWL's original position that it would only assume the responsibility of being a collection agent for the Franchise Fees has never changed. App.Ex. 11 at pp. 15-16.

RECEIVED by MSC 6/15/2023 12:20:18 PM

> with the East Lansing manager, George Lahanas, and his staff, in lieu of a Consumers Energy franchise fee, East Lansing has granted BWL an exclusive franchise fee for all future development in the BWL service territory. [App.Ex. 13 at pp. 12-13 (emphasis added).]

The LBWL understood that the Franchise Agreement could give rise to a cause of action by its customers, so the LBWL required the City to indemnify it against any such claims as a condition of entering into the Franchise Agreement—making certain that it would be protected against any fallout from its "devil's" bargain with the City. App.Ex. 13 at pp. 13, 14.

D. The Franchise Agreement Appoints the LBWL as a Collection Agent for Taxes Imposed on a Portion of East Lansing's Inhabitants.

In June 2017, the City contracted with the LBWL to impose the Franchise Fee. The LBWL voted to enter into the Franchise Agreement with the City on May 23, 2017. *See* App.Ex. 13 at pp. 12-16. The Franchise Agreement was approved by the City Council through its enactment of Ordinance No. 1411 on June 6, 2017. App.Ex. 14. **Ordinance No. 1411 was not approved by a majority of the voters of the City and remains unapproved today.** App.Ex. 4, City's Response to RTA No. 7.

Section 2 of the Franchise Agreement (App.Ex. 14) requires the LBWL as "Grantee" to ***collect*** the Franchise Fees from its electric customers in the City and ***remit*** the Fees to the City:

> SECTION 2. FRANCHISE FEE. During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the **Grantee shall**, upon acceptance of the City, **collect and remit** to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. **Such fee will appear on the corresponding energy bills**.
>
> ***
>
> **The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the collection and remittance of this franchise fee.**
>
> **Either party, upon sixty (60) days written notice by the party may terminate this Ordinance granted franchise, franchise fee collection and remittance. However, to the extent the Grantee is precluded from collecting such franchise fees remittance to City will cease**. [Emphasis added.]

RECEIVED by MSC 6/15/2023 12:20:18 PM

Thus, under the express terms of the Franchise Agreement, the Franchise Fees are **not** imposed on the LBWL. Instead, the Agreement appoints the LBWL as a mere collection agent with no responsibility to pay the Franchise Fees beyond the amount collected from its City customers. The Franchise Fees are imposed directly on the City's citizens who receive electric service from the LBWL.

Various provisions of the Agreement make clear that the Franchise Fees are imposed directly on the Plaintiff and the Class and not on the LBWL. For example, Section 2 states in pertinent part: "The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the **collection and remittance** of this franchise fee." (Emphasis added). Section 7 states in pertinent part: "The exclusive right to service certain areas of the City of East Lansing as described in Exhibit A is a condition concurrent to the **collection and remittance** of the Franchise Fee described in Section 2." (Emphasis added). Finally, and importantly, Section 14 allows the LBWL to charge the City a fee for collecting and remitting the Franchise Fees—"an administrative charge of ½ percent (0.5%) of collected franchise fees … ." *See* App.Ex. 14, p. 3.

Simply, the LBWL is required to **"collect and remit"** the fees to the City, **not "pay"** the fees to the City. The ordinance expressly requires the LBWL to include the fees on the "corresponding energy bills." Thus, **this is a total "pass-through" obligation**.

E. The Franchise Fees Are Completely Untethered from Any Costs the City Incurs Relating to LBWL's Franchise

The City does not incur any cost whatsoever in connection with providing electrical service to Plaintiff and the Class. The City admits that it has no cost study or other evidence that would support the 5% rate imposed under the Franchise Agreement. *See e.g.* App.Ex. 7, Meadows Tx., p. 32-33 ("this is a lease of property…so it would not have anything to do with the cost of actually providing any kind of service whatsoever. So it's not a regulatory fee, it would be a franchise fee…"). City officials acknowledge only that the 5% rate was based upon similar rates charged by other communities. *See* App.Ex. 4, Answer to Interrogatory No. 4.

RECEIVED by MSC 6/15/2023 12:20:18 PM

Accordingly, the Franchise Fees do not correspond to any cost associated with providing electrical service to Plaintiff and the Class or the costs associated with maintaining any City infrastructure the LBWL uses in providing electric service. They simply supplement the City's general revenues, adding to the funds the City garners from taxation. The City admits that the Franchise Fee is a "revenue generator" for the City and that, because the Franchise Fees are general fund revenues, they may be used for whatever general fund purpose the City deems appropriate—including making surplus payments to the City's Pension funds. *See* App.Ex. 15; App.Ex. 7, Meadows Tx. pp. 53-54.

F. The City Admittedly Diverts the Franchise Fee Revenue to Unrelated Purposes

The City uses the revenue from the Franchise Fee for general fund expenses—most specifically to make additional contributions to its underfunded Pension obligation. The City admits that the Franchise Fee revenues are deposited in the City's General Fund. App.Ex. 4, Response to RTA No. 17. Moreover, although the City claims its Department of Public Works incurs costs relating to the maintenance of infrastructure LBWL uses in providing electric service, Lahanas admits that franchise fee revenues are not allocated to the DPW. App.Ex. 6, p. 55. Finally, consider the public statements of the City's finance director, Jill Feldpauch, who expressed at a City Council meeting on April 30, 2020:

> So, as you can see over the last ten years, we have seen an increase in general fund revenues. The one thing I will point out here…we have diversified our revenue sources. So, with property taxes being the main source of revenue, it still is, but you can see that it's been diversified with our intergovernmental and then, of course, the income tax **and the franchise fees. So, a positive here, really this is what's allowed us to make supplemental pension payments**. [App.Ex. 22 (emphasis added).][6]

III. PERTINENT PROCEEDINGS IN THE CIRCUIT COURT

A. Plaintiff's Complaint

Plaintiff filed his Class Action Complaint on April 2, 2022. Counts I-III allege that the Franchise Fees constitute "taxes" that have not been authorized by the City's voters and therefore

---

6 *See also* App.Ex. 7, Meadows Tx., pp. 53-54.

RECEIVED by MSC 6/15/2023 12:20:18 PM

violate Art. 9, § 31 of the Michigan Constitution (the "Headlee Amendment") and MCL 141.91 (the "Tax-Based Claims").[7] Count IV alleges that the Franchise Fees violate equal protection guarantees of the Michigan Constitution (Mich. Constitution 1963, Article 1, § 2) because they are imposed only on City citizens who are located in those geographical areas of the City which receive electric service from the LBWL and are not imposed on City citizens who are located in different geographical areas of the City which receive their electric service from Consumers Energy. Counts V (unjust enrichment) and Count VI (assumpsit) allege that the Franchise Fees are unlawful governmental exactions because the City is prohibited by the Foote Act, 1905 PA 264, 1915 CL 4841 from imposing any fees as a condition of allowing the LBWL to provide electric service in the City. *See, e.g., Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914).

B. Plaintiff's Motion for Summary Disposition

On June 29, 2021, Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) on the Tax-Based Claims stated in Counts I-III of the Complaint. Plaintiff asserted that the Franchise Fees constituted unlawful taxes the City imposed on its citizens in violation of the Headlee Amendment because the Franchise Fees were not approved by the City's voters, as required by Section 31 of the Headlee Amendment. The Franchise Fees also violate the Prohibited Taxes by Cities and Villages Act, MCL 141.91, because they are taxes that are not ad valorem property taxes and were not being imposed on January 1, 1964.

C. The City's Motion for Summary Disposition

On July 21, 2021, the City filed a motion for summary disposition ("Def. MSD Brief") seeking dismissal of all of Plaintiff's claims. The City raised a number of grounds in support of its motion, the most pertinent to this Application are that Plaintiff's tax-based claims (stated in Counts I, II, and III of

[7] Count II states a claim for Assumpsit for Money had and Received for Violation of the Prohibited Taxes By Cities And Villages Act, MCL 141.91; Count III states a claim for Unjust Enrichment for Violation of the Prohibited Taxes By Cities And Villages Act, MCL 141.91.

RECEIVED by MSC 6/15/2023 12:20:18 PM

the complaint) are barred by the one-year statute of limitations applicable to Headlee Amendment claims and are untimely because the Complaint was not filed within one year of the City's "entry into the franchise agreement with the BWL, enactment of the Franchise Ordinance, and collection of the Franchise Fee…[which] *occurred in 2017*." *See* Def. MSD Brief at p. 10 (emphasis in original).

D. The Circuit Court's Opinions and Orders on the Parties' Dispositive Motions.

On March 31, 2022, the Circuit Court issued two Opinions on Plaintiff's and the City's Motions for Summary Disposition. In its Opinion and Order Regarding Plaintiff's Motion, this Court granted Plaintiff summary disposition as to the City's liability for Plaintiff's Tax-Based Claims in Counts I-III of Plaintiff's Complaint and denied the City's counter motion pursuant to MCR 2.116(I)(2). After analysis of the *Bolt* factors,[8] the Circuit Court expressly found that the "Franchise Fee collected by the LBWL constituted a tax as opposed to a permissible fee in violation of statute." App.Ex. 1(A) at p. 11. In reaching its decision, the Circuit Court observed:

- The Franchise Fees have a revenue raising purpose: "when asked to balance the regulatory-purpose with the revenue-raising purpose, the allocation of the fee into the general fund clearly provides that it serves a revenue-raising purpose." App.Ex. 1(A) at p. 7.
- The Franchise Fees raise revenue for a purpose that benefits the general public. *Id.*
- The amount charged by the Franchise Fees was not proportionate to the cost of the service provided because there was "no particularized benefit provided to this who pay the fee, and the City admits that the 5% fee was decided because other townships has settled on that amount." *Id.* p. 8.
- The Franchise Fee is effectively compulsory and not voluntary. Specifically, the Franchise Fee was "not at all tied to the amount of electricity used by the fee payers, and the fee payers choices are between either paying the franchise fee and not having electricity. The cold temperature in Michigan winters forecloses the option of living without electricity; and thus, submitting to the franchise fee is effectively compulsory." *Id.* p. 9; App.Ex. 1(B), pp. 7-10.

The Circuit Court denied the City's Motion for Summary Disposition as to all claims except for Count IV, Plaintiff's claim for Violation of State Equal Protection Guarantees. The Circuit Court expressly rejected the City's statute of limitations arguments, holding that the limitations period for

[8] *Bolt v. City of Lansing*, 459 Mich. 152, 161; 587 N.W.2d 264 (1998).

RECEIVED by MSC 6/15/2023 12:20:18 PM

Plaintiff's Headlee claims does not depend upon the date of adoption of the "Franchise Fee" ordinance but upon the time the fees were assessed, and that Plaintiff's claims for violation of MCL 141.91 "extend beyond" the one-year statute of limitations that governs the Headlee Amendment. App.Ex. 1(B) at p. 6. The Circuit Court also rejected the City's challenge to Plaintiff's assumpsit and unjust enrichment claims stated in Counts II, III, V, and VI, expressly holding that the substantive remedies available under assumpsit are preserved and that Plaintiff "may maintain an action of assumpsit to recover back the amount of an illegal exaction." App.Ex. 1(B) at p. 11.[9]

IV. THE COURT OF APPEALS' OPINION AND ORDER

The Court of Appeals reversed the well-reasoned opinions of the Circuit Court, stating that *Morgan v. Grand Rapids* controlled the statute of limitations issue on Plaintiff's Headlee Claim and that Plaintiff's 141.91 claims were "not distinct" from his Headlee claim. The Court of Appeals opined:

> Being bound by *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005), we conclude that the trial court erred by holding that plaintiff's Headlee claim was not barred by the statute of limitations. We further conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are not distinct from his Headlee claims, and are therefore likewise time-barred. Finally, we conclude that plaintiff is not a real party in interest for purposes of enforcing the Foote Act. Accordingly, we reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting summary disposition in favor of the City. [Exhibit A, p. 2.]

The Court of Appeals cited the following as "background" to its ruling:

> …the LBWL and the City came to an agreement in which the City granted the LBWL use of the City's rights of way, permission to conduct its business of distributing electricity within the City, and an exclusive right to service certain areas of the City. In exchange, the LBWL agreed to "collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the [LBWL] within the City," with the fee "appear[ing] on the corresponding energy bills." [*Id.*]

A. Ruling on the Statute of Limitations Defense

With regard to the City's statute of limitations defense, the Court of Appeals rejected Plaintiff's

[9] The Circuit Court rejected the City's governmental immunity defense recognizing that unjust enrichment is an independent cause of action and not a tort. App.Ex. 1(B) at pp. 11-12.

RECEIVED by MSC 6/15/2023 12:20:18 PM

argument, adopted by the Circuit Court, that under *TACT,* the Franchise Fee was a tax that accrued each time it became due, and instead, "dubiously distinguished" *TACT* on the basis that the Franchise Fee was not paid directly to the City, stating:

> The tax at issue in this case is slightly different than the one in *TACT*. In *TACT*, at issue was a one-time property transfer tax that was paid by the property owner directly to the governmental entity-defendant. Here, on the other hand, at issue is a recurring (alleged) tax on plaintiff's electricity bill that plaintiff paid to a third party—the LBWL—who remitted the alleged tax to the City. [*Id.* p. 4.]

The Court of Appeals then "agreed" with the City's argument that this case is "analogous to *Morgan,*" and held that Plaintiff's claim accrued "when the City entered the franchise agreement with the LBWL" (*id*):

> Analogously, here, the LBWL agreed to pay the franchise fee to the City as a condition of the City granting the LBWL a franchise. Plaintiff does not owe the franchise fee to the City; plaintiff's only liability for paying the franchise fee stems from his obligations to the LBWL. If plaintiff does not pay the fee to the LBWL, the City has no recourse against plaintiff. While the LBWL passed the franchise fee onto plaintiff and the class, this did not make them taxpayers. Thus, we conclude that, like in *Morgan*, plaintiff's only means of contesting the franchise fee as an allegedly unlawful tax under the Headlee Amendment was through a suit on behalf of the public as identified in *TACT*, 450 Mich at 124-125 n 7, which accrued when the franchise fee was passed by ordinance. See *Morgan*, 267 Mich App at 515-516. It follows that, because more than one year has passed since that time, plaintiff's Headlee claim is time-barred. [*Id.* p. 5.]

In rejecting Plaintiff's argument that *Morgan* is distinguishable because "the LBWL is not independently liable to the City for any amount of Franchise Fees; the LBWL merely adds the Franchise Fees to Plaintiff's bill…and gives the City whatever money the LBWL collects…" the Court of Appeals asserted that: "it appears that the LBWL *is* 'independently liable' to the City for the franchise fees. Ostensibly, if the LBWL did not pay the franchise fees to the City pursuant to their agreement, the City would have any number of remedies against the LBWL" such as filing a breach of contract action or rescinding the LBWL's franchise. *Id.* pp. 5-6 (emphasis in original). The Court of Appeals then noted:

> Plaintiff also argues that he "has standing to sue the City because the LBWL was a mere collection agent for the Franchise Fees…" Plaintiff, however, is rather flippant with his characterization of the LBWL as the City's agent. Agency is a legal doctrine, and plaintiff

RECEIVED by MSC 6/15/2023 12:20:18 PM

> makes no attempt to demonstrate how, as a matter of law, the LBWL was an "agent" of the City. [*Id.* p. 6.]

The Court of Appeals concluded that it was "bound by *Morgan*," and that Plaintiff's' "Headlee claim was time-barred." [*Id.*]

B. Ruling on the Plaintiff's Claims Under MCL 141.91

With regard to Plaintiff's MCL 141.91 tax-based claims, the Court of Appeals rejected Plaintiff's assertions (adopted by the Circuit Court) that these claims were distinct causes of action from his Headlee Amendment claim. The Court of Appeals noted that the "claims premised on MCL 141.91 rely on the same arguments and proofs as plaintiff's Headlee claim" and criticized that Plaintiff "never explains a difference between [the claims] except by noting that he is seeking 'a one-year refund under Headlee and a six-year refund under MCL 141.91.'" *Id.* Finally, the Court of Appeals opined that: "It is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on MCL 141.91 are identical to his Headlee claim." *Id.* The Court of Appeals held, citing *TACT*, that because a "statute of limitations may apply by analogy to equitable claims," plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are barred by analogy." *Id.* The Court of Appeals found that the Circuit Court erred and reversed its opinions and orders in their entirety. *Id.* pp. 8-9.

ARGUMENT

I. LIKE *MIDWEST VALVE*, THIS IS ONE OF THE MOST IMPORTANT CASES THE COURT WILL CONSIDER THIS YEAR, AND IT MEETS EVERY CRITERIA FOR THIS COURT'S REVIEW.

This Application, like the recently filed Application in *Midwest Valve & Fitting Co. v. City of Detroit*, Supreme Court Case No. 165726 (filed June 5, 2023) seeks to have this Court reaffirm its long-standing protections of the constitutional rights enshrined in the Headlee Amendment.

Since its ratification in December 1978, this Court has been a staunch defender of the Headlee Amendment to the Michigan Constitution. In the Court's seminal 1998 decision in *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998), the Court struck down certain stormwater utility charges imposed by the City of Lansing to finance a large infrastructure project that would separate

RECEIVED by MSC 6/15/2023 12:20:18 PM

portions of that city's "combined" sewer system. In doing so, the Court observed that the "Headlee Amendment 'grew out of the spirit of tax revolt and was designed to place specific limitations on state and local revenues." 459 Mich. at 160. Further, this Court explained:

> The Headlee Amendment was "part of a nationwide 'taxpayers revolt'…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." [459 Mich. at 161 (quoting *Airlines Parking, Inc. v. Wayne Co.*, 452 Mich. 527, 532, 550 N.W.2d 490 (1996)).]

In ratifying the Headlee Amendment, it was clear that voters "'were…concerned with ensuring control of local funding and taxation by the people most affected, the local taxpayers. **The Headlee Amendment is the voters' effort to link funding, taxes, and control**.'" *Macomb Co. Taxpayers Ass'n v. L'Anse Creuse Pub. Sch*, 455 Mich. 1, 7, 564 N.W.2d 457 (1997)(emphasis added), quoting *Durant v. State Bd of Ed*, 424 Mich. 364, 383, 381 N.W.2d 662 (1985). The Mackinac Center for Public Policy has aptly described the purpose of the Amendment as follows:

> "Local government exists to serve residents, not the other way around. **Popular control of local tax policy ensures that local government fiscal policies have voter support**. Local officials who want more revenue can get it if they convince their residents that what they want is worth it." [Michigan Capital Confidential, Report: Give Local Governments More Money, But Don't Ask Taxpayers (Exhibit C hereto) (emphasis added).]

In contrast to this Court, the Court of Appeals simply does not like the Headlee Amendment. In fact, one could say that, with limited exceptions, the Court of Appeals has been at open war with this vital constitutional provision since at least the time of this Court's *Bolt* decision. This case and *Midwest Valve* are the most recent examples, but there are many others.

Greater vigilance by this Court is clearly warranted because Michigan municipalities have been endlessly creative in their evasions of the tax limitations Headlee imposes upon them. In this case, the Court of Appeals authorized the City's transparent effort to impose a tax that contravenes *Bolt*. It did so in a way that guts vital Headlee protections and will embolden municipalities in Michigan to fashion other creative attempts to evade Headlee—indeed, under the Court of Appeals' ruling, a municipality

RECEIVED by MSC 6/15/2023 12:20:18 PM

can now completely evade Headlee and raise general purpose revenue/taxes by contracting with a third party doing business in the City to "collect" fees and charges from their City customers and "remit" the fees and charges to the City.

The relevant and material facts are either undisputed or indisputable.

1. In 2017, the City needed another revenue stream to help meet its ever-increasing financial obligations. It decided to impose a new and unapproved tax on its own citizens, but it thought it could disguise the tax by nominally imposing a "franchise fee" on the LBWL, which the LBWL would recoup from citizens in the City who received their electric service from the LBWL.
2. The LBWL initially balked at the scheme to deputize the LBWL as the City's revenue agent, but finally agreed to participate, but only if (1) the franchise agreement explicitly provided that the LBWL was acting only as the City's "collection agent" and (2) the LBWL obtained an exclusive service territory in the City. This latter condition provided the *quid pro quo* for this unholy alliance.
3. The Franchise Agreement that was implemented had a variety of provisions making clear the LBWL's special and limited role, including provisions: (1) making clear that the LBWL had an obligation only to "collect and remit" the Fees to the City, (2) completely exonerating the LBWL from the obligation to pay the Fees if the Fees weren't actually collected from City residents and (3) granting the LBWL monetary compensation for its role in collecting the Fees.

The Circuit Court saw this transparent scheme for what it was: the City had deputized the LBWL to impose the Franchise Fees on City residents in an effort to evade the Headlee tax limitations. In other words, by contracting with the LBWL to "collect and remit" the Franchise Fees, the City had indirectly imposed a tax that it could not directly impose. Unfortunately for the City's residents, the Court of Appeals inexplicably disregarded both the form and substance of the arrangement between the City and the LBWL when it held that the LBWL, and not Plaintiff and the certified class of City residents, were the payers of the Franchise Fees. This misapprehension could have far-reaching implications in Headlee Amendment cases.

Make no mistake, the Court of Appeals' core ruling in this case, while nominally based upon the Headlee one-year statute of limitations, is really about standing. This is because the Court of Appeals' ultimate ruling rests on its finding that the citizens of East Lansing are not the actual "payers" of the fees at issue.

RECEIVED by MSC 6/15/2023 12:20:18 PM

Once it decided Plaintiffs and the Class were not the actual "taxpayers," the Court of Appeals relegated them to mere members of the "public," who, under *TACT*, were required to bring their Headlee claim within one-year after the City approved the Franchise Agreement. This is because, under *TACT*, "**the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public,** as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax." 450 Mich. at 124 n.7 (emphasis added). *See also Id.* ("W**e** note that **where a plaintiff's only basis for invoking a court's jurisdiction is the plaintiff's status as a taxpayer seeking relief on behalf of the public,** the right to bring suit expires one year after the alleged Headlee violation) (emphasis added).

And the statute of limitations ruling is far broader and more pernicious than it might appear at first blush. By finding that the LBWL is legally obligated to pay the Fees, the Court of Appeals effectively ruled that the affected citizens cannot sue for a refund **regardless of the timing of the lawsuit**. This is because, if Plaintiffs and the Class are bringing claims "merely on behalf of the public," as opposed to persons who have been or is about to be subject to the tax," they cannot sue for refunds under any circumstances. *See TACT*, 450 Mich. at 12 n.7 ("Nor would such a plaintiff [suing merely on behalf of the public] suffer damages, the requisite for a damage action"). Under the Court of Appeals' reasoning, only the middleman, here the LBWL, could even theoretically sue for a refund. But the LBWL would not do so, and realistically could not do so, because it has suffered no financial loss by collecting and remitting the Fees to the City: ill-gotten gains retained all the way around.

The end result is that, for the time being at least, the City's clever but pernicious municipal financing scheme not only has received judicial approval, but it also has been insulated **forever** from any refund challenge mounted by the affected citizens. The City and the LBWL both received and continue to receive substantial financial benefits from this scheme. By using the LBWL as its collection agent and middleman, the City indirectly garners millions of dollars from its citizens that it could not procure directly, and the LBWL maintains an exclusive service territory in the City, where it is free to

RECEIVED by MSC 6/15/2023 12:20:18 PM

charge the City's citizens unlimited rates without concern about having to meet its competition, Consumers Energy. The only losers in this Headlee Amendment case are the citizens of the City who Headlee was designed to protect.

Apart from the financial harm visited upon Plaintiff and the Class in this specific case, it is not hard to envision how the Court of Appeals' rogue decision could be used to justify all sorts of additional financial shenanigans limited only by the imaginations of cash-strapped municipalities. For example, what would stop a city from garnering revenues from enacting a "license fee" facially imposed on supermarkets for the privilege of doing business in the City, but which the supermarkets are required to "collect and remit" to the City if and only if they can extract the fees from their customers? What about a "police protection fee" nominally "imposed" on coffee shops, but which the shops are required to "collect and remit" to the City only if they can extract the fees from their customers? This sort of "no-fault taxation" is not likely to receive much resistance from the affected "middlemen," who, under the Court of Appeals' reasoning, are the only parties who could even potentially seek refunds of the unlawful fees and charges. These tactics, if unchecked, would enable local governments to evade Headlee with impunity.

Fortunately, the Court of Appeals' palpable error can be easily corrected by applying prior published precedents instructing the lower courts how to identify the "real" taxpayers. Indeed, the Michigan courts have long recognized that "**[o]ne may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him**." *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) (emphasis added); *see also Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998) (applying *Lockwood*) and other authorities discussed in Section II, *infra*.

Moreover, everyone (except perhaps the Court of Appeals panel in this case) understands that a "collection agent" is not itself obligated to pay the underlying debt but is instead tasked with collecting the debt on behalf of its principal. As this Court has observed, "[a]s long as there have been debts,

RECEIVED by MSC 6/15/2023 12:20:18 PM

there have been people tasked with collecting them." *Badeen v. PAR, Inc.,* 496 Mich. 75, 853 N.W.2d 303 (2014). There is not a single provision of the Franchise Agreement that even remotely suggests that the LBWL is legally obligated to pay the Franchise Fees without regard to its ability to collect the Fees from its customers.

The outcome of this case will directly affect the rights of tens of thousands of Michigan citizens and will indirectly affect the rights of virtually every other Michigan citizen. It is worthy of this Court's review. Indeed, this case meets virtually every criteria warranting review by this Court, including: (1) the issue has significant public interest and is against a subdivision of the State, MCR 7.305(B)(2); (2) the issues presented involve "legal principles of major significance to the state's jurisprudence," MCR 7.305(B)(3), and (3) the Court of Appeals decision "is clearly erroneous and will cause material injustice" to tens of thousands of property owners in the City. MCR 7.305 (B)(5). For the reasons discussed more fully below, the Court should grant Plaintiff's Application for Leave to Appeal.

II. THE COURT OF APPEALS' OPINION BLASTS A HOLE IN ESTABLISHED HEADLEE AMENDMENT JURISPRUDENCE BY AUTHORIZING MUNICIPALITIES TO CONTRACT AROUND FUNDAMENTAL HEADLEE PROHIBITIONS.

The Court of Appeal's Opinion is based upon fundamental factual and legal mischaracterizations of the relationship between the City, the LBWL, and the City's residents as related to the Franchise Fees. It is legally erroneous for a number of reasons, including:

1. The LBWL—as a matter of law and fact—is not "independently liable" to the City for the Franchise Fees and the remedies purportedly available to the City that are referenced in the Court of Appeals' Opinion are not remedies for the LBWL's failure to pay the Franchise Fees but rather are remedies available to the City if the LBWL breaches its contractual obligation to act as collection agent on behalf of the City;
2. Not only did plaintiff "attempt to demonstrate how, as a matter of law, the LBWL was an 'agent' of the City" but Plaintiff conclusively proved that the Franchise Agreement by itself created the agency arrangement; and
3. *Morgan* does not control the statute of limitations analysis in this case because the franchise fees in *Morgan*, by federal law, were legally imposed on the cable companies but here they are imposed on the end-users of the LBWL.

RECEIVED by MSC 6/15/2023 12:20:18 PM

As discussed below, the Court of Appeals' core ruling – that the Franchise Fees are imposed on the LBWL and not Plaintiff and the certified class – is wrong as a matter of fact and law. This ruling has far-reaching negative implications regarding Headlee Amendment jurisprudence.

A. The Franchise Fees Are Imposed On Plaintiff And The Class And Therefore They Are The Proper Parties To Challenge The Franchise Fees.

There are only two possibilities as to who bears the "legal incidence" of the Franchise Fees: either (1) the Fees are imposed on end-users of the LBWL's electric service in the City and are merely collected by the LBWL, or (2) the Fees are imposed on the LBWL, which then chooses to incorporate those Fees into its overall electric charges. Under the evidence presented, it is clear that the "legal incidence" of the Franchise Fees falls on the end-users.

Initially, under the express terms of the written agreement between the City and the LBWL, the LBWL is **a mere collection agent for the City**.[10] The undisputed evidence shows that the LBWL is not obligated to pay the City any Franchise Fees for use of the City's right-of-ways, only to "collect and remit" the Franchise Fees from Plaintiff and the Class. The legal incidence of the Franchise Fees thus falls on those inhabitants of the City who are electric customers of LBWL. *See, e.g., U.S. v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975) ("where a state requires that its sales tax be passed on to the purchaser and collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser").

The U.S. Supreme Court has long recognized this basic principle of taxation and has held that a state tax statute that directs each vendor in the state to "add to the sales price and [to] collect from the purchaser the full amount of the tax imposed" is a statute that "imposes the legal incidence of the tax upon the purchaser," because the text of the statute indisputably provides that the tax "must be passed

---

[10] Indeed, the City **admits** that it lacks the power to impose franchise fees directly on its citizens. *See* App.Ex. 4, City's Response to RTA No. 18 ("The City has no ability to impose Franchise Fees directly on its citizens"); App.Ex. 7, Meadows Tx. at p. 39 ("Q: …it was an important component of the legal opinion that the fee be imposed legally on BWL itself and not on the electric customers in the City of East Lansing? A: Well, it wouldn't have been a franchise fee if it were otherwise").

RECEIVED by MSC 6/15/2023 12:20:18 PM

on to the purchaser." *First Agric. Nat'l Bank of Berkshire Cty v. State Tax Comm'n*, 392 U.S. 339, 347, 88 S.Ct. 2173, 20 L. Ed. 2d 1138 (1968) (citations omitted).

Further, as discussed below, other provisions of the Franchise Agreement make clear that the LBWL has no legal obligation to pay the Franchise Fees—as such, Plaintiff and other end-users of the LBWL's electric service are the actual "payers" of the Fees.

1. Where As Here, An Entity Collects Taxes From End-Users On Behalf Of The Government, the End-Users Are The Payers Of The Taxes.

The fundamental flaw in the Court of Appeals' Headlee statute of limitations analysis is its failure to acknowledge the "collection agent" relationship the LBWL has with the City and to properly apply the governing law that applies to such a relationship.

The Court of Appeals strangely concluded that Plaintiff made "no attempt to demonstrate how, as a matter of law, the LBWL was an 'agent' of the City." Exhibit A at p. 6. However, far from being "flippant" on the agency issue, Plaintiff submitted undisputed evidence conclusively establishing that that the LBWL was the City's "collection agent" for the Franchise Fees. Again, the Franchise Agreement is clear that the LBWL is not "independently liable" to pay the franchise fees. Section 2 of the Franchise Agreement requires the LBWL only to "collect and remit" the Franchise Fees. The "collect" language is critical because it confirms that the LBWL does not have "primary" or "independent" liability for the Franchise Fees. *See, e.g.,* Merriam Webster Dictionary (defining the transitive verb "collect" as "**to gather or exact from a number of persons or sources**" (emphasis added) and giving the following example: to "collect taxes."

Under the Franchise Agreement, the LBWL is obligated to "remit" only what it "collects." Simply, like any other collection agent, the LBWL cannot keep the principal's money for itself. This alone is dispositive of the "legal incidence" issue.[11]

[11] It is true that the City could terminate the Franchise Agreement if the LBWL simply did not collect any Franchise Fees from Plaintiff and the Class, or if the City deemed that the LBWL was not using its best efforts to collect the Franchise

RECEIVED by MSC 6/15/2023 12:20:18 PM

Further, in concluding that the Franchise Fees are imposed on the LBWL, the Court of Appeals failed to credit **undisputed** evidence that supported the Circuit Court's conclusion that the Fees were imposed upon end-users in the City:

First, during the Franchise Agreement negotiations, the LBWL insisted that the Franchise Agreement be structured so that the end-users of LBWL's electric service had the legal responsibility to pay the Franchise Fees. *See* November 15, 2016 LBWL Board meeting minutes, App.Ex. 12, p. 13:

> General Manager Peffley stated that there is a concern that this fee could be illegal and that the BWL has been put on notice. Should the Board choose to go forward with the Franchise Fee the BWL would only be the collection agency for the City of E. Lansing. However, the BWL does not want to get in the middle of a law suit, therefore stipulations are being proposed for the commissioners to consider and have the Administration to negotiate on. The recommendations are:

Second, consistent with the LBWL's dictates, the Franchise Agreement that was executed has at least five separate provisions which make clear that the LBWL has no independent legal or contractual responsibility to pay the Franchise Fees, but rather is obliged only to collect the Fees on behalf of the City, to wit:

1. The LBWL's obligation with respect to the Franchise Fees is only to "collect and remit" the Fees to the City [App.Ex. 14, Section 2];[12]
2. The City holds the LBWL harmless from any losses associated with the collection and remittance of the Franchise Fees [*Id.*];
3. The LBWL has no obligation to remit any Fees not collected from end-users [*Id.*];
4. The LBWL is required to include the Fees as a line item on its bills to end-users [*Id.*]; and
5. The City actually pays the LBWL a fee for collecting the Franchise Fees. [*Id.*, Section 14][13]

Fee (*e.g.*, by failing to turn off power to a customer who paid his or her base electric bill but refused to pay the Franchise Fee). However, this fact only reinforces the agency relationship because an agent must act in the interest of its principal. *See generally Burton v. Burton*, 332 Mich. 326, 337; 51 N.W.2d 297 (1952).

[12] There is a fundamental difference between a Franchise Agreement imposing upon the LBWL the obligation to "pay" the Franchise Fees to a municipality, and the obligation to "collect and remit" such Fees. Indeed, the LBWL has several Franchise Agreements with other municipalities which expressly require the LBWL to "pay" Franchise Fees instead of imposing the obligation to "collect and remit" from end-users that is found in the Franchise Agreement in this case. None of these other Franchise Agreements contain the "collect and remit" language, nor do any of these require the Franchise Fees to be set forth as a line item on the utility bills or allow the LBWL to recover a fee for collecting the Franchise Fees on behalf of the municipalities. Each of these other Franchise Agreements were submitted to the Circuit Court as Exhibits 16, 17, and 18 to the Brief in Support of Plaintiff's Motion for Partial Summary Disposition.

RECEIVED by MSC 6/15/2023 12:20:18 PM

2. Under Prevailing Law, The Legal Incidence Of The Franchise Fees Falls On The City's Inhabitants Who Purchase Their Electricity From The LBWL.

The Court of Appeals failed to properly apply Michigan law. Specifically, where a third party is required to collect the challenged charges from end-users and remit the charges to the government, the legal incidence of the charges falls on the end-users who incur the charges. For example, in *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich. App. 200; 581 N.W.2d 770 (1998), the Court recognized that Michigan's use tax is legally imposed on consumers, even though the applicable statute imposed upon retailers the burden to collect and remit the tax to the state. In reaching this result, the Court observed:

> Contrary to the Department of Treasury's argument, however, § 7 suggests that there is no joint tax liability. Rather, § 7 specifically provides that the appropriate use taxpayer is the consumer. Indeed, the Supreme Court in *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959), recognized that, **although the seller is required to collect the use tax on behalf of the state, the ultimate burden of paying the tax is on the consumer or purchaser, which is the party exercising the privilege of use, storage, or consumption**. We believe that this is an important concept, because it represents one of the primary distinctions between the use tax and the sales tax, the legal incidence of which falls upon the seller only in the case of the sales tax. MCL 205.52; MSA 7.522. As the Court in *Lockwood, supra* at 527, explained:
>
> > As a practical proposition [the use tax and the sales tax] are assessed on different privileges, and the legal incidence of the tax falls in one case on the retailer and in the other on the user, storer or consumer. **The fact that the seller of the goods designed for use, storage or consumption in Michigan is required by the statute to collect on behalf of the State the amount due from the purchaser does not alter the situation. The use tax is not imposed on such seller, but, rather, on the party exercising the privilege of use, storage, or consumption, as the case may be. <u>One may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him</u>**. [229 Mich. App. at 215-216 (emphasis added).]

---

[13] Given this evidence, at the very least there is a fact dispute as to whether the LBWL was the City's "collection agent," yet the Court made the "agency" determination as a matter of law. This was another error in the Court of Appeals' Opinion, because "[w]hen there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact…") *St Clair Intermediate Sch Dist v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 556; 581 NW2d 707 (1998).

RECEIVED by MSC 6/15/2023 12:20:18 PM

There is a fundamental legal difference between (1) a situation where the government requires a service provider to collect a tax from its customers and remit it to the government and (2) a situation where the government imposes the tax on the service provider but allows the service provider to recoup the amount paid from its customers. This has long been the law in Michigan. *See, e.g., Sims v. Firestone Tire & Rubber Co.*, 397 Mich. 469, 474, 245 N.W.2d 13 (1976) ("While retailers are considered to be the taxpayers, the law allows them to shift the economic burden of any tax levied to the shoulders of the consumers"); *Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 527, 98 N.W.2d 753 (1959) (recognizing that Michigan's use tax is imposed on ultimate purchasers and that the sellers' duty to collect the tax does not make the sellers primarily liable for the tax).

Here, Plaintiff and the Class bear **both** the legal incidence and the economic burden of the Franchise Fees. Accordingly, the Court of Appeals' ruling, which is based on its finding that Plaintiff and the Class are not the actual "taxpayers," is clearly erroneous.

3. *Morgan* Does Not Support A Finding That Plaintiff's Headlee Claims Are Barred By The One-Year Limitations Period Prescribed by MCL 600.308a.

Given the foregoing legal principles, it is clear that *Morgan* did not authorize the Court of Appeals to conclude that the Franchise Fees are legally imposed on the LBWL. Notably, the franchise fee in *Morgan* was "specifically permitted" by the federal Cable Communications Policy Act, 47 USC 521, et seq. *Morgan*, 267 Mich. App. at 514-515. That governing federal statute makes absolutely clear that the authorized franchise fee is imposed on cable providers and not end-users of cable services:

> **(a) Payment under terms of franchise.** Subject to the limitation of subsection (b), **any cable operator may be required under the terms of any franchise to pay a franchise fee**. [47 USC 542(a) (emphasis added)].

Given these facts, *Morgan* held that cable companies were the parties that were legally obligated to pay the franchise fees, even though they ultimately passed-through those charges to their customers. The court noted, "when the tax obligation falls primarily on the retailer, 'retailers are considered to be the taxpayers. *Sims, supra* at 474. In this case, Comcast, as the retailer, paid the charge and merely passed

RECEIVED by MSC 6/15/2023 12:20:18 PM

the charge's burden onto plaintiff's shoulders." *Morgan*, 267 Mich. App. at 515.

Morgan also makes clear that Plaintiff and the Class in this case are the payers of the Franchise Fees imposed by the City:

> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, **but the inclusion of the charge on the bill was Comcast's action, not defendant's**. **Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff**. [267 Mich. App. at 516 (emphasis added)].

Under the Franchise Agreement, the City required the LBWL to include the Franchise Fees "**on the corresponding energy bills."** Franchise Agreement, Section 2. Thus, "inclusion of the charge on the bill" was a requirement of **the City**, as opposed to a unilateral act by the LBWL. In contrast to *Morgan*, the City's collection of the Franchise Fees here would not be a wrong against the LBWL because the City and the LBWL **expressly agreed** that the LBWL – as collection agent for the City – would collect and remit the Franchise Fees to the City. Thus, *Morgan* is completely inapposite and should not have informed the Court of Appeals' resolution of any issue in this case.

B. The Franchise Fees As A Matter Of Law Cannot Be Imposed On The LBWL

Not only do the undisputed **facts** confirm that the LBWL is not the legal "payer" of the Fees at issue, but Michigan **law**—notably, the so-called Foote Act—precludes the City from collecting a Franchise Fee from the LBWL.

The LBWL has provided electrical service since 1892. *See* About BWL, App.Ex. 37 ("Our roots go back to 1885, when Lansing citizens approved building a water system. Electricity was added to our list of utility services in 1892 . . ."). The Foote Act, 1905 PA 264, 1915 CL 4841, conferred upon the LBWL the right to construct and maintain electrical service infrastructure without the City's permission, and thus without paying the City for the use of its streets and other property. The Act provided in pertinent part:

RECEIVED by MSC 6/15/2023 12:20:18 PM

> Any person, firm or corporation authorized by the laws of this State to conduct the business of producing and supplying electricity for purposes of lighting, heating and power, and which shall be engaged or which shall hereafter desire to engage in the business of the transmission of such electricity, shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along, or across any public streets, alleys and highways and over, under or across any of the waters of the State, and to construct and maintain in any such public streets, alleys or highways all such erections and appliances as shall be necessary to transform, convert and apply such electricity to the purposes of lighting, heating and power, and to distribute and deliver the same to the persons, firms and public or private corporations using the same: ….

The Foote Act was abrogated by Const. 1908, art 8, § 28, which provided:

> No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities or such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

In *City of Lansing v. Mich. Power Co.*, 183 Mich. 400; 150 N.W. 250 (1914), this Court held that even though § 28 had repealed the Foote Act, the grant of a state franchise to defendant's predecessor under that act created a vested property right "which cannot be impaired or destroyed by the Legislature, Constitution or court." *W. Bloomfield Twp. v. Detroit Edison*, No. 222497, 2001 Mich. App. LEXIS 2305, at *5 (Nov. 13, 2001) (App.Ex. 34). As the Court of Appeals explained in *Detroit Edison*:

> The Township argues that these two provisions conflict, in that Const 1908, art 8, § 28 requires a local franchise as a prerequisite for doing business, whereas the Act does not. The Township also contends that the framers of the 1908 Constitution intended to require local franchises and that the Township is entitled to require them under their police powers.
>
> However, as the trial court correctly observed, our Supreme Court has already interpreted the interplay between § 28 and the Act, ruling that, despite the repeal of the Act, the grant of a state franchise to defendant's predecessor under that act created a vested property right "which cannot be impaired or destroyed by the Legislature, Constitution or court." *City of Lansing v Michigan Power Co*, 183 Mich 400; 150 NW 250 (1914). *See also Village of Constantine v Michigan Gas & Electric*, 296 Mich 719, 732; 296 NW 847 (1941)(observing that the Court held in City of Lansing "that a State franchise was a contract which could not be impaired by abrogation of Act No. 264, Pub. Acts 1905, by the Constitution of 1908"). Thus, Edison's state franchise carries with it both the right and the duty to "'extend its distributing conduits so as to meet the reasonable

RECEIVED by MSC 6/15/2023 12:20:18 PM

> requirements of the community.'" *Traverse City v Consumers Power Co*, 340 Mich 85, 100; 64 NW2d 894 (1954)(quoting *Russell v Sebastian*, 233 U.S. 195, 209; 34 S Ct 517; 58 L Ed 912 (1914). Further, in light of the evidence that the Township's electrical service is currently provided through a power plant and many substations outside its borders, we are not persuaded by the Township's argument that Edison has no authority to build a substation that might also serve neighboring residents. …
>
> Having determined that the building of a substation was authorized by Edison's state franchise, we need not address the Township's claim that, in the absence of a state franchise, a local franchise is required.

See also Village of Constantine v Michigan Gas & Electric, 296 Mich. 719, 732; 296 NW 847 (1941) (observing that the *City of Lansing* court held "that a State franchise was a contract which could not be impaired by abrogation of Act No. 264, Pub. Acts 1905, by the Constitution of 1908").

The relevant facts here are related to the timeline of events. In 1892, the LBWL began providing electrical service. In 1905, the Legislature passed the Foote Act which conferred upon the LBWL the right to sell electrical service without seeking permission or paying a franchise fee. Between 1905 and 1908, the LBWL sold electrical service without paying a franchise fee. Notably, the City admits that the LBWL provided electrical service in the City before 1908. *See* App.Ex. 15 (email admission by former mayor Meadows to a City resident that the LBWL provided electrical service in the City before 1908).

In 1908, the Michigan Constitution was amended to permit municipalities to charge franchise fees for the privilege of providing electrical service. In 1914, this Court held that a utility that had operated between 1905 and 1908 had permanently gained the benefit of the Foote Act, such that its right to operate without permission from the City – and thus without paying franchise fees – continued notwithstanding the 1908 constitutional amendment.[14] Accordingly, the City cannot legally impose the "Franchise Fee" on the LBWL.

---

[14] Based upon the foregoing facts and law, the Circuit Court properly found that Plaintiff sufficiently pled a violation of the Foote Act. *See* App.Ex. 1(B) at p. 13-14.

RECEIVED by MSC 6/15/2023 12:20:18 PM

C. Given That Plaintiff and the Class Bear The Legal Incidence Of The Franchise Fees, It Is Clear That Their Claims Are Not Barred By The Headlee Amendment Statute of Limitations.

Plaintiff did not sue for injunctive or declaratory relief on behalf of the public at large to vindicate a public wrong or enforce a public right—which is the only type of Headlee claim that would accrue at the time the tax was enacted. *See e.g. TACT, supra* at 124. Instead, Plaintiff sought to disgorge as a refund the improperly imposed and collected Franchise Fees on behalf of a class of persons defined under MCR 3.501. In *TACT,* this Court expressly held that "a cause of action for a refund of [a] tax accrues at the time the tax is due," and not at the time the tax was enacted. *TACT*, 450 Mich. at 123 (emphasis added). Thus, the Court of Appeals erred when it determined that Plaintiff's claims accrued at the time the tax was enacted.

Indeed, *TACT* noted – ten years before the *Morgan* opinion – that under the facts of a case like *Morgan,* the taxpayer plaintiff's claim accrued when the tax was enacted, but that in cases where the plaintiff has direct standing, like this case, the claim would accrue when the tax is due: "[t]he claim for a refund could not have accrued at the time the ordinance was enacted because the wrong giving rise to the right to a refund had not yet occurred." *TACT*, 450 Mich. at 124. This Court then explained:

> **In fact, the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public, as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax.** . . . Nor, would such a plaintiff suffer damages, the requisite for a damage action. **Thus, while that plaintiff has been granted standing by § 32 of the Headlee Amendment, the only wrong that could give rise to a cause of action is the enactment of the resolution—an action that is not continuing in nature.**
>
> Accordingly, we note that **where a plaintiff's only basis for invoking a court's jurisdiction is the plaintiff's status as a taxpayer seeking relief on behalf of the public,** the right to bring suit expires one year after the alleged Headlee violation. [*TACT*, 450 Mich. at 124 n.7 (emphasis added).]

See also, Briggs Tax Serv. v. Detroit Pub. Schs., 2007 Mich. App. LEXIS 682, *26-28 (2007) (App.Ex. 17) affirming *TACT,* and holding that when a class representative seeks a refund or disgorgement of overcharges, his or her claim accrues **at the time the challenged tax is due**:

RECEIVED by MSC 6/15/2023 12:20:18 PM

> A Headlee Amendment claim must be brought within one-year after the cause of action accrued. MCL 600.308a(3); *Taxpayers Allied for Constitutional Taxation [TACT] v Wayne Co*, 450 Mich. 119, 124-125; 537 N.W.2d 596 (1995). In the case of an individual plaintiff bringing a Headlee Amendment claim, a cause of action **accrues on the date that the tax is due**. *Id.* at 123-124. A Headlee Amendment claim brought by a plaintiff on behalf of the public would accrue at the time the resolution implementing the tax is passed. *Id.* at 124 n 7.

Again, Plaintiff has not brought this case "merely on behalf of the public," but instead on behalf of himself and other rate payers who have been subject to, and have paid, the unlawful Franchise Fees. Accordingly, he has not filed "the only type of Headlee claim that would accrue at the time the resolution is passed" (i.e., a claim by the "public"), but has properly filed an MCR 3.501 class action—a claim which accrued when the tax at issue was due. Indeed, *Bolt v. City of Lansing*, 238 Mich. App. 37, 54; 604 N.W.2d 745 (1999) ("*Bolt* II") held that "***taxpayers may sue for a refund within one year of the date the tax was assessed***." (emphasis added)

This case is virtually identical to *Stephens v. Delta Twp.,* Eaton County Case 19-919-CZ, wherein Judge Maurer held that the plaintiff's class action Headlee Amendment claim was timely:

> Is plaintiff's complaint timely made? **As noted earlier, the Legislature imposed a one year statute of limitation for claims under the Headlee Amendment. For a refund claim, the time period of the statute of limitation begins at the time of the wrong which the claim is based was done regardless of the time when the damage results**. That's Taxpayers versus Wayne County, 450 Mich 119. **For further clarification, the claim for a refund could not have accrued at the time of the ordinance was enacted because the wrong giving rise to the right to the refund had not yet occurred**. Plaintiff would likely not be able to collect a refund back as far as 2018. Instead, **the claim under the Headlee Amendment will only reach back as far as one year prior to the filing of the claim**. **Even so**, the claim is not precluded…**the claim is not precluded entirely, the Township's motion under (C)(7) fails in respect to the Headlee Amendment**. [App.Ex. 21, pp. 38-39, emphasis added.]

Simply, Plaintiff does not rely on taxpayer standing—rendering the City's entire (C)(7) defense meritless and the Court of Appeals' Opinion erroneous. Correct interpretation and application of *TACT* principles requires reversal of the Court of Appeals Opinion.

RECEIVED by MSC 6/15/2023 12:20:18 PM

III. THE COURT OF APPEALS ERRED AS A MATTER OF LAW WHEN IT HELD THAT PLAINTIFF'S NON-HEADLEE TAX-BASED CLAIMS STATED IN COUNTS II & III ARE "ANALOGOUS" TO PLAINTIFF'S HEADLEE AMENDMENT CLAIM AND TRUNCATED THE STATUTE OF LIMITATIONS PERIOD FOR THESE CLAIMS TO ONE YEAR UNDER MCL 600.308a.

Plaintiff's Complaint alleged that, separate and apart from the Headlee violation, the City's Franchise Fees violated the Prohibited Taxes by Cities and Villages Act, MCL 141.91, which 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.

The Court of Appeals held that Plaintiff's claims based on MCL 141.91 were subject to Headlee's one-year statute of limitations because, among other things, such claims were "identical" to the Headlee claims. This was clear error.

As the Circuit Court properly held, the Headlee Amendment is not the only legal vehicle available to Plaintiff to challenge the Franchise Fee.[15] It is well settled that under MCR 2.111(A)(2), a party may allege alternative or even inconsistent claims based on the same set of facts, "regardless of…whether they are based upon legal or equitable grounds or both." *See e.g. Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 471 (2003); *Ludowese v. Golen*, 2008 Mich. App. LEXIS 2069 (2008) (App.Ex. 23) (a party may "state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or both"); *Zervos Group v. Thompson Asphalt Prods.*, 2006 Mich. App. LEXIS 1520, *18 (2006) (App.Ex. 24); *Lofgren Harborside, Inc. v. Paull*, 2004 Mich. App. LEXIS 636, *5 (2004) (App.Ex. 25).

Here, not only may Plaintiff assert multiple legal and equitable claims arising out the same wrong committed by a defendant, but a court applying statutes of limitations to those claims must

[15] MCL 600.308a provides: "A taxpayer shall not bring an action **under this section** unless the action is commenced within 1 year after the cause of action accrued." MCL 600.308a(3) (emphasis added).

RECEIVED by MSC 6/15/2023 12:20:18 PM

analyze each separate substantive claim.[16] Plaintiff's unjust enrichment and assumpsit claims are distinct causes of action from his Headlee Amendment claim; they do not arise from, and are not analogous to, Plaintiff's claim under the Headlee Amendment. When a plaintiff asserts two separate and distinct claims, different statutes of limitation may apply to those claims. *See, e.g. Bernstein v. Seyburn,* 2014 Mich. App. LEXIS 331 (2014) at *16 (App.Ex. 28) (holding that a malpractice claim and a breach of fiduciary duty claim are separate and distinct torts with separate statutes of limitations). *TACT*, *supra,* 450 Mich. at 127, supports Plaintiff's position that claims under the Headlee Amendment are not "analogous" to claims under MCL 141.91. This Court's relevant dicta in *TACT* states:

> [T]his Court has long recognized that statutes of limitation may apply by analogy to equitable claims. **If legal limitations periods did not apply to analogous equitable suits, "a plaintiff [could] dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity."** *Id.* at 169. To illustrate, § 308a(3) might apply by analogy where a plaintiff seeks to enjoin collection of a long-overdue tax bill on the basis that the tax was constitutionally invalid. [*TACT*, 450 Mich. at 119 n.9 (citation omitted, emphasis added).][17]

---

[16] *See Zervos Group, supra*, 2006 Mich. App. LEXIS at *17-19 (App.Ex. 24). In *Zervos Group,* the plaintiff alleged multiple claims under Michigan's Uniform Fraudulent Transfer Act ("UFTA"). This Court reversed a ruling dismissing all of plaintiff's fraudulent transfer claims stating:

> **Furthermore, it is well settled that a plaintiff may allege more than one theory of liability with regard to the same set of facts, *and may pursue all available remedies*, even if legally inconsistent. See MCR 2.111(A)(2)(b).** Given this fact, and considering that there is no dispute that plaintiff brought its cause of action under the UFTA within six years of the time its claim accrued, we find that the trial court erred in applying the one-year period of limitations set forth in § 9(b) to dismiss as time-barred plaintiff's claim that the transfer at issue here was fraudulent under §§ 4(1) and 5(1) of the act. [*Zervos Group*, *supra*, *17-19, footnotes omitted; emphasis added.]

This is true **even when the claims asserted by a plaintiff seek a remedy at law as well as equitable relief**. *See Raby v. Bd. of Trs. of the Police & Fire Ret. Sys. of Detroit & Detroit*, 2011 Mich. App. LEXIS 520, *9-10 (2011) (App.Ex. 26); *Tkachik v. Mandeville*, 487 Mich. 38, 790 N.W.2d 260 (2010); *Dennis De Long v. Palm Beach Polo Holdings*, 2010 Mich. App. LEXIS 1178, *6-7 (2010) (App.Ex. 27) (rejecting the contention that an equitable claim for unjust enrichment was not available when plaintiff also plead claims of breach of contract, constructive trust, and trespass).

[17] Interestingly, the Court of Appeals recently rejected the exact assertion that where a plaintiff brings equitable claims in addition to a claim under the Headlee Amendment, all claims are subject to the one-year statute of limitations governing Headlee claims. In *Gottesman v. City of Harper Woods*, Case No. 344568; 2019 Mich. App. LEXIS 7657 (Dec. 2, 2019) (App.Ex. 18), the Court of Appeals held that a Headlee plaintiff could also simultaneously pursue claims for equitable relief based upon the City's alleged violation of MCL 141.91. It recognized that the one-year Headlee statute of limitations applied only to the Headlee claim and specifically found that the Circuit Court had erred in dismissing Plaintiff's alternative claims based upon the City's violation of MCL 141.91. [App.Ex. 18 at pp. 13-14 (emphasis added).] *Gottesman* directly contradicts the Court of Appeals' finding in this case that Plaintiff's Headlee and MCL 141.91 tax claims are "analogous."

Gottesman was remanded by this Court for further consideration by the Court of Appeals because, among other reasons, this Court believed the Court of Appeals had erroneously concluded that Plaintiff's equitable claims were

RECEIVED by MSC 6/15/2023 12:20:18 PM

Here, Plaintiff is not seeking to "dodge the bar" of Headlee's limitations period. He brings separate claims under an entirely different legal theory with a longer statute of limitations. On this issue, this case is distinguishable from *TACT*, which involved a plaintiff who sought three different types of relief (a refund, an injunction, and a declaratory judgment), **all under the Headlee Amendment**. *Id.* at 123-129. Here, Plaintiff seeks a one-year refund under Headlee and a six-year refund under MCL 141.91. Unlike the plaintiff in *TACT*, Plaintiff here does not seek to expand Headlee's limitations period to cover six years. Plaintiff asserts a substantively different claim with a longer limitations period, and he is entitled to recover on that claim because he can satisfy all of the elements of that claim—this is not "dodging the bar," it is **meeting a different bar.**

Courts have consistently recognized that a plaintiff may maintain claims for more than one theory of liability without each claim being subject to the same statute of limitation. For example, in *Joliet v. Pitoniak*, 475 Mich. 30, 42-45; 715 N.W.2d 60 (2006), this Court separately analyzed the plaintiff's claims alleging violations of Michigan's Civil Rights Act, breach of contract, and misrepresentation to determine whether each was time barred. This Court found that all of the plaintiff's claims were time-barred, but the relevant point is that this Court independently analyzed each claim; it did not simply apply the shortest possible limitations period to all of the claims "by analogy."

---

necessarily governed by a six-year statute of limitations **without considering whether those claims should be subject to the one-year statute governing Headlee claims**:

> In addition, the Court of Appeals erred by holding that plaintiff's equitable claims could afford additional relief because "plaintiff would be entitled to recover for several more years under [his equitable claims] than under [the Headlee Amendment.]" *Gottesman*, unpub op at 14. As this Court has recognized, "statutes of limitations **may apply** by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127 n 9 (1995) (*TACT*). Thus, the fact that the six-year limitations period for plaintiff's equitable claims, MCL 600.5813, exceeds the one-year limitations period for the Headlee Amendment claim, MCL 600.308a(3), does not **necessarily mean** that the equitable claims may proceed. [App.Ex. 18 (emphasis added)].

Notably, however, this Court did not override the Court of Appeals' holding—though it was within its discretion to do so.

The Circuit Court here considered this Court's and the Court of Appeals' holdings in *Gottesman* when determining its Opinion, stating: "the underlying Court of Appeals decision in *Gottesman* confirms that where a Plaintiff brings equitable claims in addition to a Headlee amendment claim, not all claims are subject to the one-year statute of limitations that govern Headlee claims." App.Ex. 1(B) at pp. 6-7.

RECEIVED by MSC 6/15/2023 12:20:18 PM

In fact, this precise issue was recently addressed by the U.S. Court of Appeals for the Sixth Circuit in *PCA Minerals LLC v. Merit Energy Co.* LLC, 725 Fed. Appx. 342, 349 (6th Cir. 2018) (App.Ex. 35). There, the Court, citing *Joliet*, 475 Mich. at 42-45, recognized a distinction between duplicative claims that ignore "the true nature of the wrong alleged" by "recasting it as a claim subject to a longer statute," and claims which assert "multiple theories of liability that are legally viable and consistent with the facts". In recognizing that the latter type of claims are not subject to the same statutes of limitation, the Court observed:

> Michigan courts do, indeed, conduct a gravamen analysis when a plaintiff attempts to avoid the applicable statute of limitations by ignoring the true nature of the wrong alleged and recasting it as a claim subject to a longer statute. Michigan courts have made clear that a plaintiff may not plead a malpractice claim subject to a two-year statute of limitations as a general negligence claim subject to a three-year limitations period, see *Simmons v. Apex Drug Stores, Inc.*, 201 Mich. App. 250, 506 N.W.2d 562, 564 (1993), modified on other grounds, *Patterson v. Kleiman*, 447 Mich. 429, 526 N.W.2d 879 (Mich. 2004) ("A plaintiff may not evade the appropriate limitation period by artful drafting."), or as a breach-of-contract claim, see *Nicholson v. Han*, 12 Mich. App. 35, 162 N.W.2d 313, 317 (Mich. App. 1968) ("Count 1 does not allege two substantial causes of action. It is founded on allegations of breach of contract; but the gravamen of the action sounds in tort, that is, the substance of the allegations denominate a tort.")
>
> **On the other hand, nothing prohibits a plaintiff from pleading multiple claims when there are, in fact, multiple theories of liability that are legally viable and consistent with the facts; where a plaintiff has a contract claim, tort claim, and a claim for statutory violation, all may be pled**.
>
> ***
>
> And in discussing the very gravamen principles that Merit relies on, the Michigan Court of Appeals has recognized that the "applicable period of limitations depends upon the theory actually pled when the same set of facts can support either of two distinct causes of action." [Emphasis added.]

This distinction should guide this Court's review and analysis here. Plaintiff asserts "multiple theories of liability that are legally viable and consistent with the facts." There is no basis to apply the shorter Headlee Amendment statute of limitations to Plaintiff's separate equitable claims based upon the City's violation of MCL 141.91. The Circuit Court recognized this when it denied the City's motion

RECEIVED by MSC 6/15/2023 12:20:18 PM

for summary disposition pursuant to MCR 2.116(C)(7).[18]

The Court of Appeals further erred when it concluded that "[i]t is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on MCL 141.91 are identical to his Headlee claim." *Id.* To the contrary, there are numerous substantive differences between MCL 141.91 and Section 31 of the Headlee Amendment, to wit:

1. MCL 141.91 only applies to taxes that are not ad valorem property taxes, but Headlee applies to all taxes;
2. MCL 141.91 applies only to cities and villages, while Headlee applies to all local governments. *See* Mich. Const 1963, art IX, Sec. 33 (defining "local governments" to include any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government.");
3. Headlee does not apply to taxes authorized by a local government's charter when Headlee was ratified in 1978, but MCL 141.91 expressly invalidates any charter provision inconsistent with its terms; and
4. MCL 141.91 applies to taxes that were not being imposed as of January 1, 1964, but Headlee applies to new taxes imposed after Headlee's ratification in 1978.

The Court of Appeals erred when it reversed the Circuit Court's reasoned opinion holding that Plaintiff's MCL 141.91 claims were governed by a different statute of limitations than the Headlee claim.

IV. PLAINTIFF'S ASSUMPSIT CLAIMS STATED IN COUNTS II AND VI ARE A PROPER VEHICLE FOR OBTAINING A REFUND OF CHARGES PAID BY PLAINTIFF AND THE CLASS.

The Court of Appeals agreed with the City that assumpsit is no longer a viable cause of action in Michigan. This finding misconstrues and misrepresents the prevailing law. In *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 494 Mich. 543, 564, 837 N.W.2d 244 (2013), the Court observed that "[w]ith the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. **But**

[18] Indeed, Michigan courts have applied the six-year statute to claims seeking refunds of unlawful governmental exactions like the one at issue in this case and have required full disgorgement of such exactions for the entire six-year period. *See, e.g., Mercy Services for the Aging v. City of Rochester Hills*, 2010 Mich. App. Lexis 2044 (2010) (App.Ex. 29); *Metzen v Dep't of Revenue,* 310 Mich. 622; 17 N.W.2d 860 (1945) (assumpsit claim for sales tax refund subject to six-year statute of limitations).

RECEIVED by MSC 6/15/2023 12:20:18 PM

notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" *Id.* (emphasis added). Thus, where a plaintiff demonstrates that a defendant obtained money in violation of the law, that plaintiff properly invokes the equitable doctrine of assumpsit to obtain a remedy.

Here, Plaintiff's causes of action are based upon the City's violation of statutes which bind the City and require the City to comply with their edicts. Assumpsit merely provides the **substantive remedy** for the City's violation of statutory law. **Assumpsit is not the source of Plaintiff's substantive rights**.

It is well settled that when there has been an illegal or excessive collection of fees, a plaintiff may maintain an "action of assumpsit to recover back the amount of the illegal exaction." *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 704; 178 N.W.2d 484 (1970). Indeed, "an action seeking a refund of fees paid to [a governmental entity] is properly characterized as a claim in assumpsit for money had and received." *Service Coal Co v. Unemployment Compensation Comm*, 333 Mich. 526, 530-531; 53 N.W.2d 362 (1952); *Yellow Freight Sys, Inc v. Michigan*, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds, 464 Mich. 21; 627 N.W.2d 236 (2001), rev'd, 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002).

The Court of Appeals recently reaffirmed these principles in *Corey v. Wayne County*, 2016 Mich. App. LEXIS 513 (2016) (App.Ex. 36). There, the Court observed:

> **. . . we note that a claim to recover fees paid to the state in excess of the amount allowed under applicable law is properly filed as an action in assumpsit for money had and received.** *Yellow Freight Sys Inc v State of Mich,* 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds *Yellow Freight Sys, Inc v State,* 464 Mich 21; 627 NW2d 236 (2001), rev'd 537 U.S. 36 (2002). *See also Serv Coal Co v Mich Unemployment Comp Comm,* 333 Mich 526, 531; 53 NW2d 362 (1952). Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class "action of assumpsit to recover back the amount of the illegal exaction." *Bond v Pub Sch of Ann Arbor Sch Dist,* 383 Mich 693, 704; 178 NW2d 484 (1970). [App. Ex 36, 2016 Mich. App. LEXIS 513 at *19 n.7 (emphasis added)]

In *Woodland Condos Homeowners Ass'n v. Fannie Mae*, 2019 Mich. App. LEXIS 384 (2019)

RECEIVED by MSC 6/15/2023 12:20:18 PM

(App.Ex. 30), the Court of Appeals rejected the same argument the City advances here:

> Defendants argue that they were entitled to summary disposition of plaintiff's claim for assumpsit because assumpsit has been abolished as a form of action. In *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 494 Mich 543, 564, 837 N.W.2d 244 (2013), our Supreme Court recognized that "assumpsit as a form of action was abolished" with the adoption of the General Court Rules in 1963. The Court further stated, however, that "notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* **Consequently, plaintiff's use of the term "assumpsit" in labeling its claim does not warrant dismissal if plaintiff otherwise substantively pleaded a valid claim**. [emphasis added].

Because the Complaint alleges that the City imposed Franchise Fees in violation of statutes, Plaintiff has properly asserted assumpsit claims in order to provide a substantive remedy.

CONCLUSION AND REQUEST FOR RELIEF

For all of the foregoing reasons, this Court should grant Plaintiff's Application for Leave to Appeal and hold further proceedings in this matter.

Alternatively, in lieu of granting this Application, Plaintiff requests that the Court summarily reverse the Court of Appeals and uphold/reinstate the Circuit Court's Opinions. Plaintiff requests that this Court: (a) find that the "Franchise Fees" are taxes and further hold that summary disposition is proper in favor of Plaintiff on its tax-based claims, as determined by the Circuit Court; (b) find that the legal incidence of the tax falls on Plaintiff and the Class and that they have standing to pursue a refund of the improperly imposed tax; (c) find that Plaintiff's MCL 141.91 claims are not "analogous" to Plaintiff's Headlee Amendment claims and hold that Plaintiff's claims under MCL 141.91 are subject to a six-year statute of limitations; and (d) remand this case to the Circuit Court for further proceedings consistent with this Court's rulings.

Plaintiff further requests all other relief that this Court deems appropriate and just in this matter.

RECEIVED by MSC 6/15/2023 12:20:18 PM

KICKHAM HANLEY PLLC
By*: /s/ Gregory D. Hanley*
Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073s
(248) 544-1500
Counsel for Plaintiff/Appellee and the Class

ABOOD LAW FIRM

By*: /s/ Andrew Abood*
Andrew Abood (P43366)
246 E Saginaw Street, Suite 100
East Lansing, MI 48823
(517) 332-5900

Dated: June 15, 2023

RECEIVED by MSC 6/15/2023 12:20:18 PM

STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's brief on appeal contains 14,753 "countable words" as defined under MCR 7.212(B). Counsel relies on the word count function of its word processing system, as permitted under MCR 7.212(B)(3).

RECEIVED by MSC 6/15/2023 12:20:18 PM

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2023, I electronically served the foregoing pleadings on all counsel of record using the court's electronic filing system.

/s/ Kim Plets
Kim Plets

RECEIVED by MSC 6/15/2023 12:20:18 PM

EXHIBIT A

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 6/15/2023 12:20:18 PM

STATE OF MICHIGAN

COURT OF APPEALS

JAMES HEOS, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v

CITY OF EAST LANSING,

Defendant-Appellant.

UNPUBLISHED
April 13, 2023

No. 361105, 361138
Ingham Circuit Court
LC No. 20-000199-CZ

Before: GLEICHER, C.J., and O'BRIEN and MALDONADO, JJ.

PER CURIAM.

In these consolidated appeals, defendant, the City of East Lansing (the City), appeals the trial court's opinions and orders partially denying the City's motion for summary disposition and granting partial summary disposition to plaintiff[1] on his competing motion for summary disposition.

At issue is a "franchise fee" that the Lansing Board of Water and Light (LBWL), a public utility provider, charged its customers (plaintiff and the class). The LBWL collected the fees and remitted them to the City pursuant to a franchise agreement between the LBWL and the City. Plaintiff brought this class action challenging the franchise fee as an unlawful tax imposed in violation of the Headlee Amendment,[2] MCL 141.91, and the Foote Act, 264 PA 1905. In partially denying the City's motion for summary disposition, the trial court reasoned that plaintiff's Headlee claim was not barred by the statute of limitations. The trial court further reasoned that plaintiff's claims for unjust enrichment and assumpsit premised on MCL 141.91 were distinct from his

[1] The trial court granted plaintiff's request for class certification.

[2] More precisely, plaintiff claims that the "franchise fee" was a new local tax levied without voter approval contrary to Const 1963, art 9, § 31. "The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121; 537 NW2d 596 (1995).

RECEIVED by MSC 6/15/2023 12:20:18 PM

Headlee Claim. As to plaintiff's claims based on the Foote Act, the trial court denied the City's motion for summary disposition.

Being bound by *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005), we conclude that the trial court erred by holding that plaintiff's Headlee claim was not barred by the statute of limitations. We further conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are not distinct from his Headlee claims, and are therefore likewise time-barred. Finally, we conclude that plaintiff is not a real party in interest for purposes of enforcing the Foote Act. Accordingly, we reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting summary disposition in favor of the City.

I. BACKGROUND

The City is serviced by two electric utility providers—the LBWL and Consumers Energy. The LBWL provides service to a significantly larger portion of the City; its service area encompasses about 89% of the City's total rights of way, while Consumers services the rest.

In 2015 or 2016, the City approached the LBWL and Consumers about charging them a franchise fee to continue operating within the City. Consumers refused to pay a franchise fee, while the LBWL was amenable to paying one. Eventually, the LBWL and the City came to an agreement in which the City granted the LBWL use of the City's rights of way, permission to conduct its business of distributing electricity within the City, and an exclusive right to service certain areas of the City. In exchange, the LBWL agreed to "collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the [LBWL] within the City," with the fee "appear[ing] on the corresponding energy bills." The franchise agreement further provided that it should not be construed as the LBWL relinquishing any rights it had under the Foote Act, nor as the City waiving its ability to contest the LBWL's assertion of such rights. The City began receiving franchise fees from the LBWL pursuant to their franchise agreement in September 2017.

In April 2020, plaintiff filed the six-count complaint giving rise to this case. Counts I, II, and III alleged that the franchise fee was an impermissible tax and requested a refund of the franchise fees paid. Count I alleged a Headlee claim, while Counts II and III were based on alleged violations of MCL 141.91, which prohibits the collection of taxes not authorized by law. Count IV alleged that the franchise fee violated the Equal Protection Clause of the Michigan Constitution, Const 1963, art I, § 2, because it applied only to customers of the LBWL, not customers of Consumers. Counts V and VI alleged that the franchise fee was prohibited by the Foote Act, and requested a return of the franchise fees paid.

The parties eventually filed competing motions for summary disposition. The City argued that it was entitled to summary disposition on all counts. As to Count I, the City argued that plaintiff's Headlee claim was barred by the statute of limitations. The City argued that Counts II and III were likewise barred by the statute of limitations because those counts were indistinct from Count I. For Count IV, the City argued that plaintiff could not request money damages for an equal-protection violation. For plaintiff's claims premised on the Foote Act, the City argued that plaintiff was not a real party in interest and could therefore not enforce the act. The trial court

RECEIVED by MSC 6/15/2023 12:20:18 PM

granted the City's motion for summary disposition as to plaintiff's equal-protection claim, but otherwise denied the motion.

In his competing motion, plaintiff asked the trial court to grant plaintiff and the class summary disposition on Counts I, II, and III of the complaint. In granting the motion, the trial court held that the franchise fee could be a tax on plaintiff and the class because, under the terms of the franchise agreement, plaintiff and the class were "responsible for paying the franchise fee." The trial court then applied the criteria from *Bolt v Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998) to the franchise fee to determine whether it was a "user fee" or a "tax," and concluded that the franchise fee was a tax. As the tax had not been approved by a majority of voters and was not otherwise authorized by law, the trial court held that plaintiff was entitled to summary disposition on Counts I, II, and III.

This appeal followed.

II. STATUTE OF LIMITATIONS

On appeal, the City argues that the trial court erred when it ruled that plaintiff's Headlee claim in Count I was not barred by the statute of limitations. The City further argues that plaintiff's equitable claims premised on MCL 141.91 in Counts II and III are likewise time-barred because they are identical to plaintiff's Headlee claim in Count I. We agree.

A. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 211; 934 NW2d 713 (2019). An argument that a claim is barred by the statute of limitations is properly brought under MCR 2.116(C)(7). See *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 222; 779 NW2d 304 (2009). As explained in *Dextrom v Wexford County*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

B. HEADLEE CLAIM

"The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121 n 2; 537 NW2d 596 (1995) (*TACT*). As pertinent to this case, Const 1963, art 9, § 31 provides that a local governmental unit is "prohibited from levying any tax not authorized by law or charter" unless a majority of

RECEIVED by MSC 6/15/2023 12:20:18 PM

voters have approved the levying of the new tax. See also *Shaw v City of Dearborn*, 329 Mich App 640, 652; 944 NW2d 153 (2019). Const 1963, art 9, § 32 provides that "[a]ny taxpayer of the state shall have standing to bring suit . . . to enforce the provisions of" the Headlee Amendment. MCL 600.308a(1) provides in which courts an action "under section 32 of article 9 of the state constitution of 1963 may be commenced," and subsection (3) provides that such an action must be "commenced within 1 year after the cause of action accrued."

Our Supreme Court has held that when a plaintiff is seeking a refund of an unlawful tax under the Headlee Amendment, the claim "accrues at the time the tax is due." *TACT*, 450 Mich at 123. The tax at issue in this case is slightly different than the one in *TACT*. In *TACT*, at issue was a one-time property transfer tax that was paid by the property owner directly to the governmental entity-defendant. Here, on the other hand, at issue is a recurring (alleged) tax on plaintiff's electricity bill that plaintiff paid to a third party—the LBWL—who remitted the alleged tax to the City. The parties dispute what effect this has on when plaintiff's claim accrued. Plaintiff argues that these differences do not affect the analysis, and that a Headlee claim accrued each time the alleged tax was due. The City, on the other hand, argues that this case is analogous to *Morgan*, 267 Mich App 513, and that, like in *Morgan*, plaintiff's claim accrued when the City entered into the franchise agreement with the LBWL.

We agree with the City that this case is analogous to *Morgan*. At issue in *Morgan* was a franchise fee charged by Comcast pursuant to a franchise agreement it had entered into with the City of Grand Rapids on July 10, 2001. *Id*. at 514. The plaintiff brought a proposed class action on behalf of Comcast cable subscribers to recoup the franchise fees, arguing that the fees constituted an unlawful tax in violation of the Headlee Amendment. *Id*. This Court held that the plaintiff's action was untimely, explaining:

> Comcast paid defendant a "franchise fee" consisting of five percent of its gross revenues. The five percent fee is specifically permitted by the federal Cable Communications Policy Act, 47 USC 521, *et seq*, which also allows cable providers to list separately in their billing statements the amount representing the subscriber's portion of the franchise fee. 47 USC 542. However, the mere listing of the charge on a separate line does not render plaintiff the charge's payer. Rather, plaintiff paid her entire bill according to her contractual obligation to Comcast, which paid the charge to defendant according to the franchise agreement. Defendant had no recourse against plaintiff for any unpaid portion of her bill, so this case is analogous to a sales tax scenario in which the seller passes on the sales tax obligation to the buyer but remains primarily liable to pay the tax. *World Book, Inc v. Dep't of Treasury*, 459 Mich 403, 407-408; 590 NW2d 293 (1999); *Sims v Firestone Tire & Rubber Co*, 397 Mich 469, 474; 245 NW2d 13 (1976). In those situations, courts have generally held that the sellers must challenge the illegal taxes directly, and the consumers have no standing to pursue tax relief unless the tax burden potentially interferes with a federal right. See *Nat'l Bank of Detroit v Dep't of Revenue*, 334 Mich 132, 141-142; 54 NW2d 278 (1952), and the cases cited therein. In short, when the tax obligation falls primarily on the retailer, "retailers are considered to be the taxpayers." *Sims*, 397 Mich at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders.

RECEIVED by MSC 6/15/2023 12:20:18 PM

> In *Taxpayers Allied for Constitutional Taxation* [*TACT*] *v Wayne Co*, 450 Mich 119, 124-125 n 7; 537 NW2d 596 (1995), our Supreme Court held that individuals who do not pay a tax directly may still challenge whether the tax violates the Headlee Amendment. Const 1963, art 9, § 32. However, the Court noted that the one-year statute of limitations, MCL 600.308a(3), would apply to such a plaintiff and would begin running at the time the offending tax resolution was enacted. *TACT*, 450 Mich at 125 n 7. The Court reasoned that "the only wrong that could give rise to a cause of action is the enactment of the resolution—an action that is not continuing in nature." *Id*. at 124-125 n 7.
>
> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, but the inclusion of the charge on the bill was Comcast's action, not defendant's. Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff. Following the example in *TACT*, plaintiff's Headlee claim accrued when defendant first imposed the "franchise fee" on Comcast—July 10, 2001. Because plaintiff failed to bring her Headlee claim within one year from that date, the trial court correctly granted defendant's motion for summary disposition. [*Morgan*, 267 Mich App at 514-516.]

The crux of *Morgan*'s holding relies on the fact that Comcast agreed to pay the franchise fee to the defendant as a condition of the defendant granting Comcast a franchise. The plaintiff did not owe the franchise fee to the defendant; the plaintiff paid the franchise fee to Comcast pursuant to the plaintiff's contractual obligation to Comcast, and if the plaintiff did not pay the charge, the defendant had no recourse against the plaintiff. While Comcast passed the franchise fee onto consumers, *Morgan* held that this did not make the plaintiff a taxpayer, similar to how a consumer is not a taxpayer if the retailer passes the burden of sales tax onto the consumer.

Analogously, here, the LBWL agreed to pay the franchise fee to the City as a condition of the City granting the LBWL a franchise. Plaintiff does not owe the franchise fee to the City; plaintiff's only liability for paying the franchise fee stems from his obligations to the LBWL. If plaintiff does not pay the fee to the LBWL, the City has no recourse against plaintiff. While the LBWL passed the franchise fee onto plaintiff and the class, this did not make them taxpayers. Thus, we conclude that, like in *Morgan*, plaintiff's only means of contesting the franchise fee as an allegedly unlawful tax under the Headlee Amendment was through a suit on behalf of the public as identified in *TACT*, 450 Mich at 124-125 n 7, which accrued when the franchise fee was passed by ordinance. See *Morgan*, 267 Mich App at 515-516. It follows that, because more than one year has passed since that time, plaintiff's Headlee claim is time-barred.

Plaintiff attempts to distinguish *Morgan*, but his arguments are unpersuasive. Plaintiff argues that this case is distinguishable from *Morgan* because "the LBWL is not independently liable to the City for any amount of Franchise Fees; the LBWL merely adds the Franchise Fees to Plaintiff's bill (and the bills of all class members) and gives the City whatever money the LBWL collects . . . ." Here, however, it appears that the LBWL *is* "independently liable" to the City for the franchise fees. Ostensibly, if the LBWL did not pay the franchise fees to the City pursuant to their agreement, the City would have any number of remedies against the LBWL, including not

RECEIVED by MSC 6/15/2023 12:20:18 PM

only bringing a breach-of-contract claim to recover the fees from the LBWL but revoking the LBWL's franchise.

Plaintiff also argues that he "has standing to sue the City because the LBWL was a mere collection agent for the Franchise Fees . . . ." Plaintiff, however, is rather flippant with his characterization of the LBWL as the City's agent. Agency is a legal doctrine, and plaintiff makes no attempt to demonstrate how, as a matter of law, the LBWL was an "agent" of the City. Cursorily reviewing relevant caselaw, it is not apparent that the LBWL was even arguably an agent of the City because it is unclear that the City had any right to control the conduct of the LBWL, or that the LBWL had actual or apparent authority to act on the City's behalf. See *St Clair Intermediate Sch Distt v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). Rather, the LBWL and the City were two independent parties with contractual obligations to one another.

Accordingly, because we are bound by *Morgan*, we conclude that plaintiff's Headlee claim was time-barred.

C. MCL 141.91

In *TACT*, our Supreme Court stated that it "has long recognized that statutes of limitation may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. Both parties agree on appeal that plaintiff's claims premised on MCL 141.91 are equitable in nature, and so we accept that as true for purposes of this opinion. Plaintiff's claims premised on MCL 141.91 rely on the same arguments and proofs as plaintiff's Headlee claim; plaintiff did not even present distinct arguments for his Headlee claim and his MCL 141.91-related claims when arguing that he was entitled to summary disposition. For all three claims, plaintiff argued that the franchise fee was a tax because plaintiff and the class bore the "legal incidence" of the fee, and then argued that the *Bolt* criteria should be applied to the fee to determine whether it was a tax or a user fee. According to plaintiff, applying the *Bolt* criteria made clear that the fee was actually a tax, which entitled plaintiff to summary disposition on both his Headlee claim and his MCL 141.91-related claims.

It is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on MCL 141.91 are identical to his Headlee claim. As the "statute of limitations may apply by analogy to equitable claims," *TACT*, 450 Mich at 127 n 9, we conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are barred by analogy.

Plaintiff asserts that his claims premised on MCL 141.91 "are distinct causes of action from his Headlee Amendment claim," but he never explains a difference between them except by noting that he is seeking "a one-year refund under Headlee and a six-year refund under MCL 141.91." This, however, is what our Supreme Court sought to avoid with its guidance in *TACT*: "If legal limitations periods did not apply to analogous equitable suits, a plaintiff could dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity." *TACT*, 450 Mich at 127 n 9 (quotation marks, citation, and alteration omitted).

RECEIVED by MSC 6/15/2023 12:20:18 PM

III. FOOTE ACT

The City also argues that the trial court erred by not dismissing plaintiff's Counts V and VI, which are premised on the Foote Act. The Foote Act provided in relevant part:

> Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity for purposes of lighting, heating and power, and which shall be engaged or which shall hereafter desire to engage in the business of the transmission of such electricity, shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along or across any public streets, alleys and highways and over, under or across any of the waters of this state, and to construct and maintain in any such public streets, alleys or highways all such erections and appliances as shall be necessary to transform, convert and apply such electricity to the purposes of lighting, heating and power, and to distribute and deliver the same to the persons, firms and public or private corporations using the same: Provided, that the same shall not injuriously interfere with other public uses of such streets, alleys or highways, or with the navigation of said waters, and that the designation and location of all lines of poles and wires shall be subject to the regulation, direction and approval of the common council of cities, the village council of villages, and the township board of townships, as the case may be: Provided, that this act shall not apply to the county of Wayne: Provided further, that nothing herein shall deprive cities, villages or townships of the power and control over their streets and highways, which they have by the general laws of this state. [264 PA 1905. See also *Lansing v Mich Power Co*, 183 Mich 400, 404; 150 NW 250 (1914).]

The Foote Act was abrogated by Const 1908, art 8, § 28. But, in *Lansing*, 183 Mich at 410-411, our Supreme Court held that Const 1908, art 8, § 28 could not impair a state franchise that had already vested under the Foote Act before the 1908 Constitution's enactment. The Court explained, in pertinent part:

> The [Foote Act] tendered a franchise to defendant; such franchise was accepted by defendant by way of installing its service equipment in the public streets and providing a service of a public utility; and this tender and acceptance constitute a contract between the state and defendant beyond the power of the Legislature, the Constitution, or of this court to impair by destroying the contract right to remain in the streets. [*Lansing*, 183 Mich at 410-411.]

See also *Traverse City v Consumers Power Co*, 340 Mich 85, 103; 64 NW2d 894 (1954) ("This Court has held that rights acquired under the 1905 act are vested rights . . . .")

Plaintiff's complaint alleged that the LBWL operated in the City prior to 1908, and so the Foote Act prohibited the City from imposing any fees as a condition of allowing the LBWL to provide electric service to the City. The City argues that plaintiff cannot assert such claims because the Foote Act applies only to electric utility providers, and, thus, plaintiff is not a real party in interest. We agree.

RECEIVED by MSC 6/15/2023 12:20:18 PM

"Whether an individual is the real party in interest is a question of law that we review de novo." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

As explained by this Court in *Beatrice Rottenberg Living Trust*:

> [A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts. See *Kent v Northern Cal Regional Office of American Friends Serv Comm*, 497 F2d 1325, 1329 (CA 9, 1974). The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. *Miller v Allstate Ins Co*, 481 Mich 601, 608-612; 751 NW2d 463 (2008). In contrast, the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another. See, e.g., *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 12; 124 S Ct 2301; 159 L Ed 2d 98 (2004); *Zurich Ins Co v Logitrans, Inc*, 297 F3d 528, 532 (CA 6, 2002).
>
> "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The real-party-in-interest rule " 'requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted . . . .' " *Rite-Way Refuse Disposal, Inc v VanderPloeg*, 161 Mich App 274, 278; 409 NW2d 804 (1987) (citation omitted). [*Beatrice Rottenberg Living Trust*, 300 Mich App at 355-356.]

"A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013).

The Foote Act plainly applies only to electric utility providers. See 264 PA 1905 ("Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity . . . shall have the right . . . ."). Thus, the entity here with a potential "vested right" is the LBWL; plaintiff and the class have no rights or interests stemming from the Foote Act. Accordingly, plaintiff and the class cannot assert a cause of action stemming from a violation of the Foote Act because they are not a real party in interest.[3]

IV. CONCLUSION

For the reasons explained, the trial court erred by denying the City's motion for summary disposition as to Counts I, II, III, V, and VI of plaintiff's complaint, and granting summary

[3] We further note that nothing in the Foote Act or subsequent cases interpreting the act prevents electric utility providers from relinquishing their vested rights under the act, or—as is the case here—from agreeing to reserve but not pursue their rights under the act. While this may also go to the merits of plaintiff's claim (i.e., there was no Foote Act violation), it tangentially relates to whether plaintiff is a real party in interest—the LBWL holds any vested rights under the Foote Act, and it is the only entity that can decide whether and how it wishes to enforce those rights.

disposition to plaintiff on Counts I, II, and III of plaintiff's complaint. We therefore reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting the City's motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien
/s/ Allie Greenleaf Maldonado

RECEIVED by MSC 6/15/2023 12:20:18 PM

RECEIVED by MSC 6/15/2023 12:20:18 PM

EXHIBIT B

RECEIVED by MSC 6/15/2023 12:20:18 PM

Court of Appeals, State of Michigan

ORDER

James Heos v City of East Lansing

Docket No. 361138

LC No. 20-000199-CZ

Elizabeth L. Gleicher
Presiding Judge

Colleen A. O'Brien

Allie Greenleaf Maldonado

Judges

The motion for reconsideration is DENIED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

May 11, 2023
Date

Chief Clerk

RECEIVED by MSC 6/15/2023 12:20:18 PM

EXHIBIT C

RECEIVED by MSC 6/15/2023 12:20:18 PM

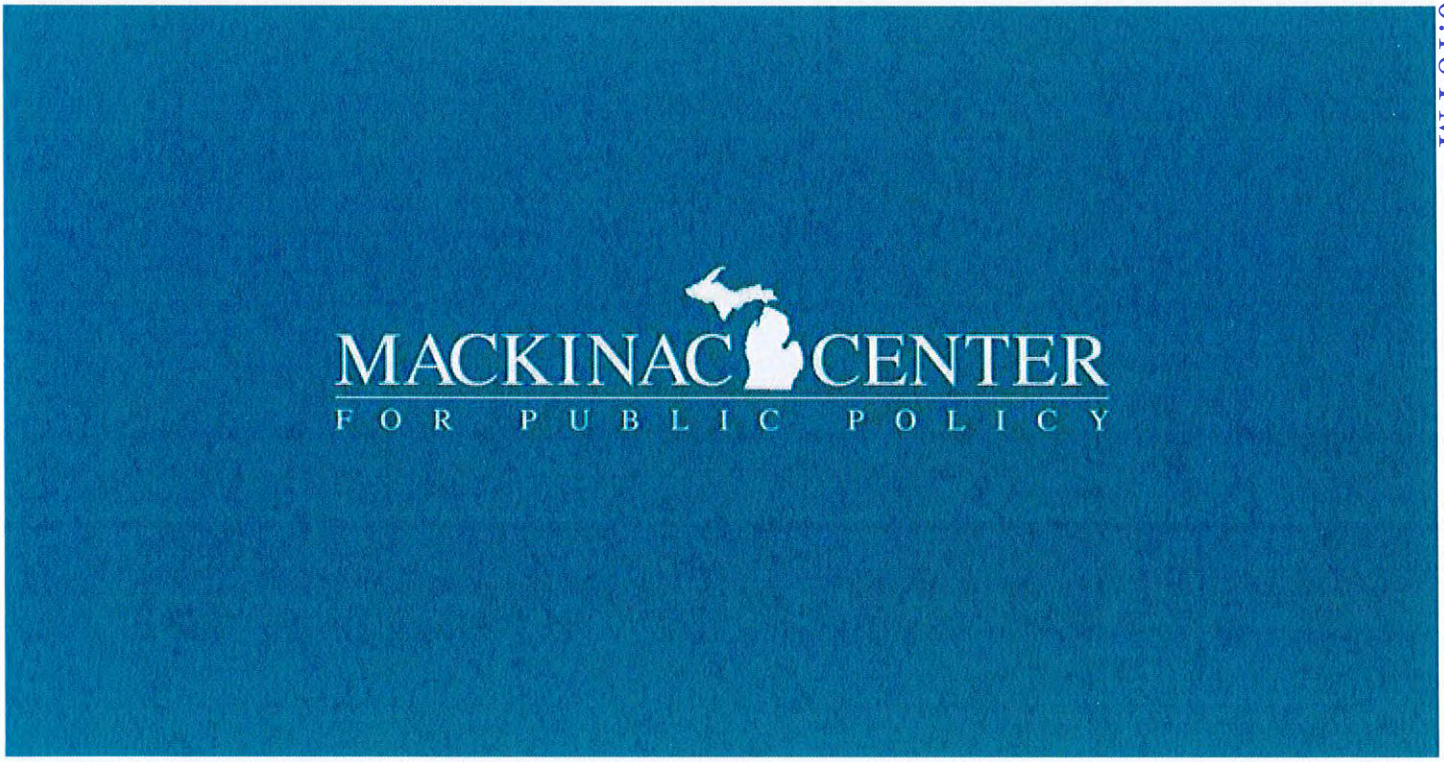
MICHIGAN'S WATCHDOG
CAPITOL CON

Commentary

Report: Give Local Governments More Money, But Don't Ask Taxpayers

That's the gist of a new study on local government finance in Michigan

By Jarrett Skorup and James M. Hohman | November 11, 2020



Listen to this article now

00:00

A new report on local government financing in Michigan recommends giving local governments more money from taxpayers. But it is misleading, incomplete and never gets around to addressing the most important problems facing local governments.

The report, "Towards Fiscally Healthy Michigan Local Governments," was published by the Lincoln Institute of Land Policy. It contains several overt errors and misleads by glossing over significant issues facing local governments in Michigan.

RECEIVED by MSC 6/15/2023 12:20:18 PM

The basic problem with the report is that it says local governments should be given more money, but never explains why. It never demonstrates that a need exists or shows that the benefits of giving locals more money exceed the costs for taxpayers. One should expect a reasoned argument along these lines in a report ostensibly about how local governments need more money.

But it has other problems, as well.

The report criticizes Michigan's Headlee Amendment, a constitutional provision that requires voter approval for local governments to retain increases in property tax collections that exceed the inflation rate (excluding property tax gains from new construction) and to enact new tax levies. The effect of this law, the report says, is to "severely curb local governments' ability to raise revenues necessary for critical local services such as road upkeep, fire protection and public education." (Local governments, it should be noted, do not pay for public education in Michigan.)

Amusingly, the report suggests the Headlee limitations prevent "greater local control of the property tax." That is an Orwellian way to describe a law that requires governments to get voter approval of local tax policies.

Local government exists to serve residents, not the other way around. Popular control of local tax policy ensures that local government fiscal policies have voter support. Local officials who want more revenue can get it if they convince their residents that what they want is worth it. If the report wishes to call for removing voters' control over property taxes, it ought to argue why these governments should have the power to authorize unpopular taxes on their own.

But the report never explains why municipalities shouldn't have to get popular approval or why local tax policy should be beyond voter control.

The report also complains that Michigan lacks "revenue diversity" for its local governments. To the extent that that's true, it's because alternative revenue sources are unpopular with voters. For example, state law gives cities the ability to levy an income tax, with voter approval. But only 21 out of Michigan 312 cities levy them, and in the past 25 years, only one new city has started to levy one.

And while Michigan doesn't allow local governments to assess sales taxes, it does give local governments a share of the state's sales tax collections. The state constitution requires 10% of sales tax revenues be sent to cities, villages and townships already, distributed to them based on population. This provides "diversification" of local government resources even if it doesn't let local governments assess their own taxes.

Local governments also receive portions of the state's fuel and vehicle registration taxes, to take care of local roads. And Detroit has been authorized to levy a handful of other taxes unique to the city.

There may be reasons why the report wants even further diversification of state revenue, but it leaves the case unstated.

In its "key recommendations" section, the report suggests Michigan "create a special state fund to distribute state aid to local governments." That already exists: 10% of state sales tax revenue goes to municipalities. The report even mentions this fund, it but doesn't specify how a new special fund would be different. The reasoning simply seems to be: Local governments should get more revenue.

The report includes a section where authors argue that local governments can save some money through consolidating services and contracting out, which is a fine standalone recommendation. There's also gains to be had in pension reform, because local government officials have racked up over $10 billion in debt to their own employees and retirees. But the report completely ignores that issue.

And that's really the core problem with the report. It focuses almost exclusively on finding ways to increase taxes and revenue for local governments without showing the need for it. Worse, perhaps, the report fails to wrestle with local spending problems. A study ostensibly working "towards fiscally healthy Michigan local governments" should not be taken seriously if it doesn't consider the most fundamental problems of local governments' finances.

Michigan Capitol Confidential is the news source produced by the Mackinac Center for Public Policy. Michigan Capitol Confidential reports with a free-market news perspective.

Donate

Enjoying CapCon?

Make sure you aren't missing anything! Sign up for our daily or weekly emails and get the quarterly print edition mailed to your home. **All free!**

Get CapCon emails! **Get CapCon print!**

No thanks, I prefer to visit the CapCon website!

RECEIVED by MSC 6/15/2023 12:20:18 PM