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STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff/Appellant,

v.

CITY OF EAST LANSING,

Defendant/Appellee.

Supreme Court No. 165763
Court of Appeals No. 361138
Consolidated with COA No. 361105

On appeal from:
Ingham County Circuit Court
Case No. 20-199-CZ

Hon. Wanda M. Stokes

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John J. Premo (P55393)
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(517) 371-8155
Counsel for Defendant/Appellee

INDEX OF EXHIBITS

DEFENDANT/APPELLEE CITY OF EAST LANSING'S SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO THE COURT'S APRIL 25, 2024 ORDER (ORAL ARGUMENT REQUESTED)

Exhibit Letter:

A: Franchise Ordinance

B: Affidavit of S. House

C: City of East Lansing's Financial Data

D: Court of Appeals Opinion – *Heos v City of East Lansing*, Docket Nos. 361105, 361138

E: *Brunet v City of Rochester Hills*, unpublished opinion of the Court of Appeals, issued December 2, 2021 (Docket No. 354110), 2021 WL 5750616

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EXHIBIT A

Attachment 1- East Lansing Electric Franchise

CITY OF EAST LANSING

ORDINANCE NO. 1411

LANSING BOARD OF WATER AND LIGHT ELECTRIC FRANCHISE ORDINANCE

AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years.

THE CITY OF EAST LANSING ORDAINS:

SECTION 1. GRANT, TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby affirms the right, power and authority to the Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference.

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 fiscal year for purposes of determining the annual franchise fee to commence on July 1, 2017, with the new fiscal years commencing on July 1st for each year thereafter, with the first

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franchise fee to be paid by the Grantee to the City of East Lansing on October 1, 2017, with the Grantee to pay the franchise fees to the City of East Lansing on a quarterly basis thereafter.

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.

SECTION 3. CONSIDERATION. In consideration of the rights, power and authority hereby affirmed, said Grantee shall faithfully perform all things required by the terms hereof.

SECTION 4. CONDITIONS. All of Grantee's towers, masts, and poles shall be so placed on either side of the highways, streets, alleys and bridges as not to unnecessarily interfere with the use thereof for highway, street, alley and bridge purposes. All of Grantee's wires carrying electricity shall be securely fastened so as not to endanger or injure persons or property in said highways, streets, alleys, and bridges. All work performed by said Grantee in said highways, street[s], alleys, and bridges shall be done so as to minimize interference with the use thereof, and when completed, the same shall be left in as good condition as when work was commenced. The Grantee shall have the right to cut or trim trees if necessary in the conducting of such business.

Said lines and appurtenances shall be constructed so as to interfere as little as possible with the proper lawful use of the streets, alleys, and public places. The installation of all poles, conduits, and appurtenances shall be according to industry standards and shall be subject to such reasonable regulations as shall be prescribed by said City from time to time.

SECTION 5. HOLD HARMLESS. Said Grantee shall at all times keep and save the City free and harmless from all loss, costs and expense to which it may be subject by reason of construction or maintenance. Provided, however, that Grantee's obligations under this Section 5 shall not apply to any loss, cost, damage or claims arising out of the negligence of the City, its employees or its contractors. Grantor shall indemnify, hold harmless and defend the Grantee from any and all claims, losses or litigation which result from the Grantee's compliance with this Ordinance. However, Grantor is not responsible for Grantee's negligent or intentional misconduct associated with the provision of utility services.

SECTION 6. EXTENSIONS. Said Grantee shall construct and extend its electric distribution system within the defined service are of said City, and shall furnish electric service to applicants residing in the defined service area in accordance with applicable laws, rules and regulations.

SECTION 7. NONEXCLUSIVE FRANCHISE . Certain rights, power and authority herein granted, are exclusive as to providing electricity and electric service in certain areas of the City of East Lansing as described in Exhibit A. Otherwise, with respect to jurisdiction of East Lansing, this remains a nonexclusive franchise.

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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. As such either party may terminate the exclusive right to serve upon 60 days prior written notice. Therefore, to the extent either shall cease, both ceases.

SECTION 8. RATES. The rates and Rules and Regulations governing the supply and use of electricity shall be the same as in the City of Lansing except that the rates shall be increased within the boundaries of the City by the amount of any taxes, license fees, franchise fees, or any other charges against the Grantee's property or its operations, or the production and/or sale of electrical energy, levied or imposed by the City or otherwise incurred by Grantee as a result of this Ordinance.

Section 10. SERVICE AREA. To the extent permitted by law, Grantee shall furnish electric service to all customers requesting such service within Grantee's service area or the non-exclusive area.

Section 11. FOOTE ACT FRANCHISE. Nothing herein shall be construed as either party rendering an opinion or position of the Grantee's vested franchise rights under the Foote Act, 1905 PA 264. The City does not waive any right to contest, and the Grantee does not relinquish any right to assert.

Section 12. GRANTEE RULES. The Grantee shall have authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable the Grantee to exercise its rights and perform its obligations under this franchise, and to assure uninterrupted service to each and all of its customers. Provided, however, that such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or of laws of the State of Michigan.

SECTION 13. EFFECTIVE DATE. This ordinance shall take effect upon the day after the date of publication thereof; provided, however, it shall cease and be of no effect after thirty days from its adoption unless within said period the Grantee shall accept the same in writing filed with the City Clerk. Upon acceptance and publication hereof, this ordinance shall constitute a contract between said City and said Grantee.

Section 14. PUBLICATION AND ADMINISTRATIVE COSTS. The City shall assume the cost of publication of this franchise. A BWL administrative charge of ½ percent (0.5%) of collected franchise fees for the quarterly billing will apply.

Section 15. SEVERABILITY. If any provision of this franchise is to any extent illegal, otherwise invalid, or incapable of being enforced, such provision shall be excluded to the extent of such invalidity or unenforceability; all other provisions hereof shall remain in full force and effect.

We certify that the foregoing Franchise Ordinance was duly enacted by the City Council on the 6 day of June, 2017.

Marie Wicks
City Clerk

June 16, 2017

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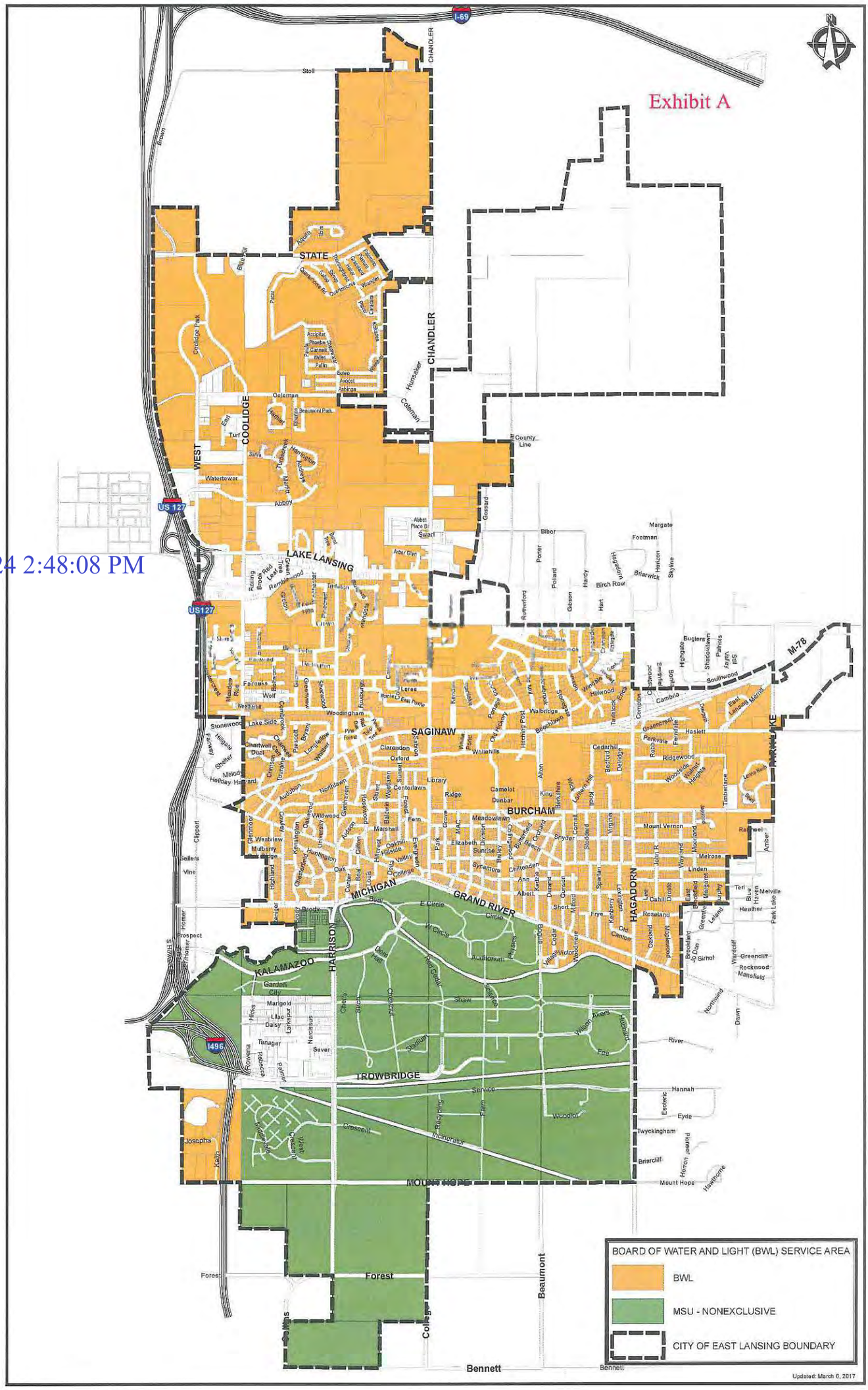

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EXHIBIT B

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STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM

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

Plaintiff,

v.

CITY OF EAST LANSING,

Defendant.

Case No.: 20-199-CZ

Hon. Wanda M. Stokes

Gregory D. Hanley (P51204)
John J. Premo (P55393)
Edward F. Kickham Jr. (P70332)
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313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
Counsel for Defendant

STATE OF MICHIGAN)
)ss.
COUNTY OF INGHAM)

AFFIDAVIT OF SCOTT HOUSE

Scott House, first being duly sworn, deposes and states the following:

1. I have personal knowledge of the matters set forth in this affidavit.

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2. I am the Director of Public Works for the City of East Lansing. I have held that position since October 20, 2014.

3. In my capacity as the Director of Public Works, I am familiar with the annual costs the City expends on maintaining its right of ways.

4. City residents receive electricity from one of two electric utility companies: the LBWL or Consumers Energy Company.

5. The LBWL's service area encompasses eighty-nine (89) percent of the City's total right of ways. Consumers' service area covers only eleven (11) percent of the City's right of ways. A map showing the respective service areas is attached as Exhibit 1.

6. The LBWL service area requires the City to expend on average between $1.4 and $1.9 million annually to maintain the right of ways. On the other hand, Consumers' service area only requires on average between $100,000 and $300,000. A spreadsheet attached as Exhibit 2 shows the City's annual breakdown of expenditures between 2015 and 2020 relating to its maintenance of the right of ways in both the LBWL and Consumers service areas.

7. The City expends significantly more effort, time, and resources in maintaining the LBWL service area than it does the Consumers service area.

8. The LBWL's service area covers about 76 total continuous miles of the City's right of ways and provides electricity to around 6,330 residential households (around 29,000 residents) and around 600 non-residential properties.

9. Consumers' service area covers about 10 total continuous miles of the City's right of ways and provides electricity to around 780 households (approximately 3,050 residents) and 143 non-residential properties.

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10. I have knowledge of the LBWL's collection and payment of franchise fees to the City in accordance with a franchise agreement entered in June, 2017 and City Ordinance 1411, enacted on June 6, 2017.

11. Based on financial bookkeeping obtained by the City, the LBWL began receiving franchise fees paid by LBWL customers in the City beginning in September, 2017.

12. The City received its first franchise fee payment from the LBWL on November 16, 2017.

13. The City has used the franchise fees it received to pay for its annual cost and maintenance of the right of ways, including, on average, payment of between $845,000 and $980,000 annually to the LBWL to provide electricity for lighting the right of ways for its residents' use.

14. If sworn as a witness, I can testify competently to the above matters.

Scott House

Subscribed and sworn to before me, a notary public, on the 3rd day of August, 2021, by Scott House.

GiVonna Stuart
NOTARY PUBLIC
REG. # 7703060
MY COMMISSION EXPIRES
6/30/2024
COMMONWEALTH OF VIRGINIA

GiVonna Sturt, Notary Public
Arlington County, Virginia
My commission expires: 30 June 2024
Acting in Arlington County, Virginia

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EXHIBIT C

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G/L Account Number	Account Description	2015 Actual Amount	2016 Actual Amount	2017 Actual Amount	2018 Actual Amount	2019 Actual Amount	2020 Actual Amount
Fund: 101 - General Fund							
REVENUES							
Department: 40 - Dept of Public Works							
Division: 4010 - Engineering							
550 - Licenses and Permits							
101.40.4010.5311	Engineering Permits and Inspections	72,370.8100	127,195.2000	165,889.9200	219,115.3100	239,658.0000	141,382.6000
	Account Classification Total: 550 - Licenses and Permits	$72,370.81	$127,195.20	$165,889.92	$219,115.31	$239,658.00	$141,382.60
590 - Charges for Services							
101.40.4010.5421	Charges for Services	(1,790.0000)	943.7500	1,885.0000	569.7000	0.0000	0.0000
	Account Classification Total: 590 - Charges for Services	($1,790.00)	$943.75	$1,885.00	$569.70	$0.00	$0.00
	Division Total: 4010 - Engineering	$70,580.81	$128,138.95	$167,774.92	$219,685.01	$239,658.00	$141,382.60
Division: 4020 - Downtown Maintenance							
590 - Charges for Services							
101.40.4020.5421	Charges for Services	6,500.0000	4,750.9900	2,833.8400	1,969.0000	0.0000	(393.2300)
101.40.4020.5416	Municipal Service Agreements	108,935.0000	123,380.0000	105,220.0000	120,335.0000	181,220.0000	248,525.2500
	Account Classification Total: 590 - Charges for Services	$115,435.00	$128,130.99	$108,053.84	$122,304.00	$181,220.00	$248,132.02
690 - Other Financing Sources							
101.40.4020.5962	Contribution from DDA	30,000.0000	30,000.0000	15,249.9600	0.0000	0.0000	0.0000
	Account Classification Total: 690 - Other Financing Sources	$30,000.00	$30,000.00	$15,249.96	$0.00	$0.00	$0.00
	Division Total: 4020 - Downtown Maintenance	$145,435.00	$158,130.99	$123,303.80	$122,304.00	$181,220.00	$248,132.02
Division: 4021 - Sidewalks							
570 - Intergovernmental Revenue							
101.40.4021.5161	Other Capital Grants	13,957.6600	129,463.9100	173,973.2500	32,470.5400	162,870.0800	83,795.9800
	Account Classification Total: 570 - Intergovernmental Revenue	$13,957.66	$129,463.91	$173,973.25	$32,470.54	$162,870.08	$83,795.98
590 - Charges for Services							
101.40.4021.5421	Charges for Services	43,705.5200	86,398.5200	149,446.1800	0.0000	37,663.1100	0.0000
	Account Classification Total: 590 - Charges for Services	$43,705.52	$86,398.52	$149,446.18	$0.00	$37,663.11	$0.00
610 - Community Support							
101.40.4021.5720	Capital Contributions	0.0000	0.0000	0.0000	0.0000	0.0000	30,000.0000
	Account Classification Total: 610 - Community Support	$0.00	$0.00	$0.00	$0.00	$0.00	$30,000.00
690 - Other Financing Sources							
101.40.4021.5915	Transfer from Income Tax	0.0000	0.0000	0.0000	0.0000	0.0000	17,000.0000
	Account Classification Total: 690 - Other Financing Sources	$0.00	$0.00	$0.00	$0.00	$0.00	$17,000.00
	Division Total: 4021 - Sidewalks	$57,663.18	$215,862.43	$323,419.43	$32,470.54	$200,533.19	$130,795.98
	Department Total: 40 - Dept of Public Works	$273,678.99	$502,132.37	$614,498.15	$374,459.55	$621,411.19	$520,310.60
	REVENUES Total	$273,678.99	$502,132.37	$614,498.15	$374,459.55	$621,411.19	$520,310.60
EXPENSES							
Department: 40 - Dept of Public Works							
Division: 4001 - Administration							
600 - Personnel Services							
101.40.4001.6001	Salaries and Wages Full Time	344,395.4000	74,710.2100	76,067.4300	81,424.0800	110,322.1800	113,047.7300
101.40.4001.6002	Wages - Part Time	37,762.2800	12,192.2100	12,247.2500	2,093.6600	0.0000	0.0000
101.40.4001.6005	Leave Time Payout	0.0000	0.0000	0.0000	0.0000	0.0000	178.6600
101.40.4001.6010	Overtime Wages	1,180.9400	0.0000	0.0000	16.9300	0.0000	0.0000
101.40.4001.6025	Car Allowance	1,200.0000	180.0000	180.0000	180.0000	180.0000	260.0000
101.40.4001.6079	S&W - Direct Charges Contra	(314,604.6000)	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4001.6089	Labor - Work Order Charges Contra	(376.6500)	(4,017.4500)	0.0000	0.0000	(8,391.2400)	0.0000
101.40.4001.6101	Health Insurance Waiver	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4001.6110	Health Insurance - Actives	39,946.6900	10,137.2100	10,436.7500	11,245.5000	17,661.2300	17,609.7500
101.40.4001.6111	Rx Insurance - Actives	12,542.4700	2,980.6400	2,951.6200	3,019.1600	4,957.7500	4,393.2100
101.40.4001.6150	Dental Insurance	5,327.9900	1,233.3000	1,221.4900	1,243.2400	1,723.4000	1,760.2600
101.40.4001.6158	Long Term Care Insurance	172.8100	21.7900	21.6600	21.5800	21.5800	21.7700
101.40.4001.6160	Long Term Disability Insurance	874.1100	255.5800	316.4800	340.1800	462.4400	446.2600
101.40.4001.6165	Life Insurance	1,558.3700	338.2200	341.8500	352.6300	500.0800	451.5000
101.40.4001.6130	Health Insurance - Retirees < 65	0.0000	(965.0000)	0.0000	0.0000	0.0000	0.0000

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G/L Account Number	Account Description	2015 Actual Amount	2016 Actual Amount	2017 Actual Amount	2018 Actual Amount	2019 Actual Amount	2020 Actual Amount
101.40.4001.6131	Rx Insurance - Retirees < 65	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4001.6132	Medicare - Retirees	32,747.1600	32,750.0400	32,224.0000	28,253.9800	29,362.9600	31,269.0400
101.40.4001.6201	Social Security	28,892.6400	6,453.0000	6,593.9100	6,288.7100	8,286.9000	8,480.6100
101.40.4001.6210	Retirement - DB	40,869.9600	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4001.6215	Retirement - DC	14,346.3300	2,221.6000	2,228.9100	1,151.9900	965.4000	1,001.7500
101.40.4001.6222	Retirement - Hybrid DB	18,768.4000	5,880.2900	5,776.3100	6,273.2000	8,447.1000	8,577.3500
101.40.4001.6224	Retirement - Hybrid DC	1,837.4500	715.2700	989.1300	1,100.6700	1,839.5500	1,985.5500
101.40.4001.6211	Retirement - DB Allocation	0.0000	41,715.0000	39,759.9600	48,410.0400	54,575.0400	60,545.0400
101.40.4001.6212	Retirement - DB Supplemental	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4001.6301	Workers Compensation	1,505.3900	225.6600	227.6000	371.6400	581.6700	603.3900
101.40.4001.6309	HCSP - City Match	2,103.0600	636.3300	628.5800	617.1300	824.3200	1,662.3200
101.40.4001.6349	Fringe Benefits - Direct Charges Contra	(117,174.9600)	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 600 - Personnel Services	$153,875.24	$187,663.90	$192,212.93	$192,404.32	$232,320.36	$252,294.19
700 - Operating Costs							
101.40.4001.7101	Office Supplies	3,548.0100	2,409.0800	2,565.3600	2,550.5900	3,535.3200	2,521.8500
101.40.4001.7206	Clothing/Shoe Reimbursement	0.0000	0.0000	0.0000	0.0000	(163.5000)	0.0000
101.40.4001.7401	Contract Services	755.3500	2,408.5600	87.4700	203.9300	45.0000	0.0000
101.40.4001.7440	Contracted Labor	0.0000	0.0000	0.0000	3,380.2200	0.0000	0.0000
101.40.4001.8001	Dues and Memberships	149.2500	535.7500	110.5000	368.0000	281.0000	15.2100
101.40.4001.8101	Employee Training & Travel	1,417.6400	587.5100	344.0000	403.1000	987.1100	516.9400
101.40.4001.8601	Miscellaneous	627.4000	98.1500	64.6400	134.9900	208.8500	0.0000
101.40.4001.8603	Postage and Shipping	115.7000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4001.8610	Cash Over/Short	0.0000	(36.8800)	0.0000	0.0000	0.0000	(78.5900)
101.40.4001.8801	General Government Indirect Charge Allocation	0.0000	0.0000	89,460.0000	89,460.0000	90,605.0400	83,514.9600
101.40.4001.8840	Garage Equipment Rental	9,110.0000	21,999.9600	21,999.9600	22,599.9600	3,270.0000	3,440.0400
101.40.4001.8850	Gas and Oil Fleet Charges	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 700 - Operating Costs	$15,723.35	$28,002.13	$114,631.93	$119,100.79	$98,768.82	$89,930.41
	Division Total: 4001 - Administration	$169,598.59	$215,666.03	$306,844.86	$311,505.11	$331,089.18	$342,224.60
Division: 4010 - Engineering							
600 - Personnel Services							
101.40.4010.6001	Salaries and Wages Full Time	358,165.4900	396,523.2800	427,058.2700	404,552.3900	475,955.8900	510,679.3900
101.40.4010.6003	Wages - Contingent	0.0000	0.0000	18,489.0000	3,168.0000	0.0000	0.0000
101.40.4010.6005	Leave Time Payout	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4010.6010	Overtime Wages	28,341.5000	23,524.1700	34,296.5900	22,547.7900	43,652.9800	31,292.7500
101.40.4010.6025	Car Allowance	0.0000	0.0000	0.0000	0.0000	1,200.0000	2,600.0000
101.40.4010.6079	S&W - Direct Charges Contra	(118,445.0400)	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4010.6089	Labor - Work Order Charges Contra	(173,400.9400)	(288,816.0500)	(349,824.1000)	(372,629.9600)	(536,934.7200)	(540,858.7500)
101.40.4010.6101	Health Insurance Waiver	600.0000	1,050.0000	0.0000	1,350.0000	3,255.0000	3,900.0000
101.40.4010.6110	Health Insurance - Actives	37,222.0400	39,148.3500	45,115.0600	32,860.8800	32,860.8600	33,101.5500
101.40.4010.6111	Rx Insurance - Actives	9,055.1700	10,460.5200	11,332.5800	7,293.2600	7,293.2600	7,346.3800
101.40.4010.6150	Dental Insurance	4,817.1200	5,765.4400	6,193.1600	5,819.7000	6,811.2300	7,020.5400
101.40.4010.6160	Long Term Disability Insurance	1,049.1200	1,372.9500	1,951.5100	1,809.8900	2,206.4400	2,166.6600
101.40.4010.6165	Life Insurance	997.1900	1,171.7000	1,348.0300	1,547.3700	1,734.7600	1,615.4800
101.40.4010.6130	Health Insurance - Retirees < 65	10,399.5600	3,786.9600	5,304.9600	5,405.0200	1,442.3200	0.0000
101.40.4010.6131	Rx Insurance - Retirees < 65	6,892.5600	3,444.9600	3,444.9600	2,985.0000	802.5000	0.0000
101.40.4010.6132	Medicare - Retirees	39,296.7600	39,294.9600	32,084.0000	29,659.9800	35,047.2100	37,524.0400
101.40.4010.6201	Social Security	29,196.3000	31,606.7300	35,846.0300	32,733.7900	39,406.0300	41,205.5300
101.40.4010.6210	Retirement - DB	38,964.9600	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4010.6215	Retirement - DC	31,014.7100	31,161.2600	25,152.2200	31,975.5700	33,162.0400	33,629.6700
101.40.4010.6222	Retirement - Hybrid DB	8,389.7200	11,086.6400	13,608.0500	10,588.5200	17,017.3500	18,507.2900
101.40.4010.6224	Retirement - Hybrid DC	727.3500	1,242.5600	2,197.6000	1,656.5600	3,364.3000	3,924.1300
101.40.4010.6211	Retirement - DB Allocation	0.0000	40,175.0400	39,759.9600	45,099.9600	53,595.0000	58,029.9600
101.40.4010.6212	Retirement - DB Supplemental	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4010.6301	Workers Compensation	3,745.9700	4,041.6300	4,378.3300	5,021.0100	6,392.5200	6,642.2000
101.40.4010.6309	HCSP - City Match	2,673.1900	2,876.8800	3,010.2800	2,884.5000	3,403.7100	7,054.7500

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G/L Account Number	Account Description	2015 Actual Amount	2016 Actual Amount	2017 Actual Amount	2018 Actual Amount	2019 Actual Amount	2020 Actual Amount
101.40.4010.6349	Fringe Benefits - Direct Charges Contra	(38,100.0000)	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4010.6359	Fringe Benefit - Work Order Contra pre Oct 2014	(6,492.4200)	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 600 - Personnel Services	$275,110.31	$358,917.98	$360,746.49	$276,329.23	$231,668.68	$265,381.57
700 - Operating Costs							
101.40.4010.7101	Office Supplies	1,463.8400	3,677.6100	3,319.5200	1,529.6400	1,083.1900	1,978.3200
101.40.4010.7201	Operating Supplies	538.5000	1,454.1700	742.6100	918.6300	1,653.0000	868.1200
101.40.4010.7206	Clothing/Shoe Reimbursement	231.7700	360.6100	169.7400	395.0000	553.6300	258.4200
101.40.4010.7225	Software	0.0000	3,502.8900	2,009.4300	3,600.0000	2,893.2300	607.6000
101.40.4010.7401	Contract Services	2,000.0000	60.8000	506.9600	820.6600	705.9100	0.0000
101.40.4010.7440	Contracted Labor	0.0000	0.0000	0.0000	82.6500	0.0000	0.0000
101.40.4010.7520	Architect/Engineer Services	(10,760.0000)	(240.0000)	6,861.4300	(157.0100)	2,368.0000	6,643.7700
101.40.4010.7530	Software Maintenance Agreement	3,500.9000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4010.7701	Communications - Telephone	4,863.0000	3,267.5500	3,731.3100	4,731.0200	5,506.9000	2,434.2900
101.40.4010.7715	Communications - Internet Connections	0.0000	0.0000	0.0000	0.0000	0.0000	1,024.5000
101.40.4010.8001	Dues and Memberships	372.5000	190.5000	505.5000	401.0000	215.0000	47.9700
101.40.4010.8101	Employee Training & Travel	2,400.5000	1,199.1300	831.6900	1,963.4000	1,367.9400	1,067.1500
101.40.4010.8501	Repairs and Maintenance	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4010.8601	Miscellaneous	1,025.3200	853.9300	1,344.9800	35.7200	12.7500	0.0000
101.40.4010.8605	Credit Card Fees	0.0000	3,708.7500	6,013.4700	6,176.4000	7,036.1000	5,750.9000
101.40.4010.8625	Permit, License and Assessment Fees	0.0000	175.0000	160.0000	80.0000	255.0000	95.0000
101.40.4010.8810	City Facility Rental	56,469.9600	57,000.0000	57,000.0000	52,100.0400	31,260.0000	32,825.0400
101.40.4010.8820	City Computer Rental	29,570.0400	37,455.0000	32,645.0400	44,880.0000	11,970.0000	11,730.0000
101.40.4010.8840	Garage Equipment Rental	24,000.0000	31,200.0000	31,200.0000	32,625.0000	8,199.9600	8,610.0000
101.40.4010.8850	Gas and Oil Fleet Charges	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 700 - Operating Costs	$115,676.33	$143,865.94	$147,041.68	$150,182.15	$75,080.61	$73,941.08
900 - Capital Outlay							
101.40.4010.9001	Capital Outlay	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 900 - Capital Outlay	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
	Division Total: 4010 - Engineering	$390,786.64	$502,783.92	$507,788.17	$426,511.38	$306,749.29	$339,322.65
Division: 4020 - Downtown Maintenance							
600 - Personnel Services							
101.40.4020.6080	Labor - Work Order Charges	102,995.9800	113,448.0800	107,557.1000	105,926.0300	126,472.1300	113,797.1700
101.40.4020.6350	Fringe Benefits - Work Order Charges pre Oct 2014	6,798.6400	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 600 - Personnel Services	$109,794.62	$113,448.08	$107,557.10	$105,926.03	$126,472.13	$113,797.17
700 - Operating Costs							
101.40.4020.7201	Operating Supplies	5,980.8000	7,510.7200	8,916.9700	14,822.2500	11,495.2400	13,167.1000
101.40.4020.7232	Minor Equipment	0.0000	0.0000	0.0000	0.0000	3,257.3400	99.8500
101.40.4020.7275	Materials and Chemicals	1,015.3400	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4020.7401	Contract Services	2,560.2000	3,620.0000	3,377.2000	7,615.4100	6,421.6800	7,508.1500
101.40.4020.8205	Utilities - Electric	2,211.2100	2,450.4100	2,600.9000	2,370.1400	2,022.4400	2,330.1600
101.40.4020.8210	Utilities - Gas	1,407.1100	1,148.6000	1,103.2200	2,250.0100	1,989.3500	1,379.3900
101.40.4020.8215	Utilities - Water and Sewer	1,284.8800	681.5300	135.7200	150.0800	768.3500	1,864.3800
101.40.4020.8840	Garage Equipment Rental	24,000.0000	31,500.0000	31,500.0000	32,445.0000	35,040.0000	36,800.0400
	Account Classification Total: 700 - Operating Costs	$38,459.54	$46,911.26	$47,634.01	$59,652.89	$60,994.40	$63,149.07
900 - Capital Outlay							
101.40.4020.9001	Capital Outlay	0.0000	527.2800	8,000.0000	0.0000	3,750.0000	0.0000
101.40.4020.9005	Construction Contractor	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 900 - Capital Outlay	$0.00	$527.28	$8,000.00	$0.00	$3,750.00	$0.00
	Division Total: 4020 - Downtown Maintenance	$148,254.16	$160,886.62	$163,191.11	$165,578.92	$191,216.53	$176,946.24
Division: 4021 - Sidewalks							
600 - Personnel Services							
101.40.4021.6080	Labor - Work Order Charges	63,950.9600	65,694.0400	47,510.7700	55,871.7600	50,497.4600	47,793.4000
101.40.4021.6350	Fringe Benefits - Work Order Charges pre Oct 2014	309.2300	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 600 - Personnel Services	$64,260.19	$65,694.04	$47,510.77	$55,871.76	$50,497.46	$47,793.40

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G/L Account Number	Account Description	2015 Actual Amount	2016 Actual Amount	2017 Actual Amount	2018 Actual Amount	2019 Actual Amount	2020 Actual Amount
700 - Operating Costs							
101.40.4021.7201	Operating Supplies	0.0000	225.2800	59.9700	0.0000	0.0000	0.0000
101.40.4021.7288	Road Maintenance Materials	1,105.3800	961.3900	897.7500	852.7200	1,096.5300	1,912.0300
101.40.4021.7401	Contract Services	(2,482.7500)	30,177.4500	4,500.0000	134,330.0300	211.2000	0.0000
101.40.4021.8501	Repairs and Maintenance	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4021.8840	Garage Equipment Rental	17,400.0000	23,400.0000	23,400.0000	28,920.0000	18,500.0400	20,600.0400
	Account Classification Total: 700 - Operating Costs	$16,022.63	$54,764.12	$28,857.72	$164,102.75	$19,807.77	$22,512.07
900 - Capital Outlay							
101.40.4021.9001	Capital Outlay	132,605.6200	331,164.8200	263,361.2700	23,029.3400	98,556.6300	5,599.5900
101.40.4021.9012	Capital Outlay - CDBG Funded	0.0000	129,589.1900	176,084.3200	36,078.3800	166,368.7500	81,540.4100
	Account Classification Total: 900 - Capital Outlay	$132,605.62	$460,754.01	$439,445.59	$59,107.72	$264,925.38	$0.00
	Division Total: 4021 - Sidewalks	$212,888.44	$581,212.17	$515,814.08	$279,082.23	$335,230.61	$0.00
Division: 4023 - Drains							
600 - Personnel Services							
101.40.4023.6080	Labor - Work Order Charges	10,862.0700	15,580.1900	23,699.3900	8,338.6100	13,043.7100	10,979.1500
101.40.4023.6350	Fringe Benefits - Work Order Charges pre Oct 2014	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 600 - Personnel Services	$10,862.07	$15,580.19	$23,699.39	$8,338.61	$13,043.71	$10,979.15
700 - Operating Costs							
101.40.4023.7201	Operating Supplies	68.7500	295.4400	4,885.5800	527.2200	1,038.3900	660.0000
101.40.4023.7401	Contract Services	0.0000	1,750.0000	19,220.0000	400.0000	280.0000	2,080.0000
101.40.4023.8501	Repairs and Maintenance	0.0000	312.5000	0.0000	0.0000	0.0000	0.0000
101.40.4023.8625	Permit, License and Assessment Fees	105,280.5700	135,108.2200	111,083.2600	107,136.0000	142,802.4700	128,074.1100
101.40.4023.8840	Garage Equipment Rental	5,250.0000	5,250.0000	5,250.0000	6,500.0400	6,699.9600	7,029.9600
	Account Classification Total: 700 - Operating Costs	$110,599.32	$142,716.16	$140,438.84	$114,563.26	$150,820.82	$137,844.07
900 - Capital Outlay							
101.40.4023.9001	Capital Outlay	0.0000	36,201.4300	6,745.2800	0.0000	0.0000	0.0000
	Account Classification Total: 900 - Capital Outlay	$0.00	$36,201.43	$6,745.28	$0.00	$0.00	$0.00
	Division Total: 4023 - Drains	$30,365.35	$48,624.45	$42,720.88	$30,725.47	$40,966.13	$37,205.81
Division: 4025 - Alley & Private Road Maintenance							
600 - Personnel Services							
101.40.4025.6080	Labor - Work Order Charges	3,350.5000	7,651.0500	10,931.4800	8,499.5200	13,889.8300	5,956.1800
101.40.4025.6350	Fringe Benefits - Work Order Charges pre Oct 2014	227.7500	0.0000	0.0000	0.0000	0.0000	0.0000
	Account Classification Total: 600 - Personnel Services	$3,578.25	$7,651.05	$10,931.48	$8,499.52	$13,889.83	$5,956.18
700 - Operating Costs							
101.40.4025.7288	Road Maintenance Materials	2,403.1200	2,373.6100	2,141.0900	15,445.0400	11,169.2700	3,383.5200
101.40.4025.7401	Contract Services	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4025.8520	Repairs and Maintenance - Street	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
101.40.4025.8840	Garage Equipment Rental	6,300.0000	6,300.0000	6,300.0000	11,640.0000	12,000.0000	12,600.0000
	Account Classification Total: 700 - Operating Costs	$8,703.12	$8,673.61	$8,441.09	$27,085.04	$23,169.27	$15,983.52
	Division Total: 4025 - Alley & Private Road Maintenance	$12,281.37	$16,324.66	$19,372.57	$35,584.56	$37,059.10	$21,939.70
Division: 4030 - Street Lighting							
700 - Operating Costs							
101.40.4030.7401	Contract Services	0.0000	0.0000	0.0000	0.0000	302.0000	0.0000
101.40.4030.8205	Utilities - Electric	845,696.8700	869,821.2700	865,727.1700	903,039.7300	966,430.3000	978,110.4700
	Account Classification Total: 700 - Operating Costs	$845,696.87	$869,821.27	$865,727.17	$903,039.73	$966,732.30	$978,110.47
	Division Total: 4030 - Street Lighting	$845,696.87	$869,821.27	$865,727.17	$903,039.73	$966,732.30	$978,110.47
	Department Total: 40 - Dept of Public Works	$1,809,871.42	$2,395,319.12	$2,421,458.84	$2,152,027.40	$2,209,043.14	$1,895,749.47
	EXPENSES Total	$1,809,871.42	$2,395,319.12	$2,421,458.84	$2,152,027.40	$2,209,043.14	$1,895,749.47
	Fund REVENUE Total: 101 - General Fund	$273,678.99	$502,132.37	$614,498.15	$374,459.55	$621,411.19	$520,310.60
	Fund EXPENSE Total: 101 - General Fund	$1,809,871.42	$2,395,319.12	$2,421,458.84	$2,152,027.40	$2,209,043.14	$1,895,749.47
	Fund Total: 101 - General Fund	($1,536,192.43)	($1,893,186.75)	($1,806,960.69)	($1,777,567.85)	($1,587,631.95)	($1,375,438.87)

25% ROW

Fund: 202 - Major Street Fund

REVENUES

Department: 40 - Dept of Public Works

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G/L Account Number	Account Description	2015 Actual Amount	2016 Actual Amount	2017 Actual Amount	2018 Actual Amount	2019 Actual Amount	2020 Actual Amount
Division: 0000 - Unclassified							
690 - Other Financing Sources							
202.40.0000.5901	Transfer from General Fund	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
202.40.0000.5915	Transfer from Income Tax	0.0000	0.0000	0.0000	0.0000	0.0000	100,000.0000
	Account Classification Total: 690 - Other Financing Sources	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	Division Total: 0000 - Unclassified	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	Department Total: 40 - Dept of Public Works	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	REVENUES Total	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
EXPENSES							
Department: 40 - Dept of Public Works							
Division: 9040 - Street Projects							
600 - Personnel Services							
202.40.9040.9005	Construction Contractor (GF correction)	0.0000	0.0000	0.0000	0.0000	0.0000	100,000.0000
	Account Classification Total: 900 - Capital Outlay	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	Division Total: 9040 - Street Projects	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	Department Total: 40 - Dept of Public Works	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	EXPENSES Total	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	Fund REVENUE Total: 202 - Major Street Fund	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	Fund EXPENSE Total: 202 - Major Street Fund	$0.00	$0.00	$0.00	$0.00	$0.00	$100,000.00
	Fund Total: 202 - Major Street Fund	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Fund: 203 - Local Street Fund							
REVENUES							
Department: 40 - Dept of Public Works							
Division: 0000 - Unclassified							
203.40.0000.5901	Transfer from General Fund	600,000.0000	0.0000	0.0000	0.0000	0.0000	0.0000
203.40.0000.5915	Transfer from Income Tax	0.0000	0.0000	0.0000	0.0000	0.0000	379,942.3600
	Account Classification Total: 690 - Other Financing Sources	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	Division Total: 0000 - Unclassified	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	Department Total: 40 - Dept of Public Works	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	REVENUES Total	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
EXPENSES							
Department: 40 - Dept of Public Works							
Division: 9040 - Street Projects							
203.40.9040.9005	Construction Contractor (GF correction)	600,000.0000	0.0000	0.0000	0.0000	0.0000	379,942.3600
	Account Classification Total: 900 - Capital Outlay	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	Division Total: 9040 - Street Projects	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	Department Total: 40 - Dept of Public Works	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	EXPENSES Total	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	Fund REVENUE Total: 203 - Local Street Fund	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	Fund EXPENSE Total: 203 - Local Street Fund	$600,000.00	$0.00	$0.00	$0.00	$0.00	$379,942.36
	Fund Total: 203 - Local Street Fund	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
	REVENUE GRAND Totals:	$873,678.99	$502,132.37	$614,498.15	$374,459.55	$621,411.19	$1,000,252.96
	EXPENSE GRAND Totals:	$2,409,871.42	$2,395,319.12	$2,421,458.84	$2,152,027.40	$2,209,043.14	$2,375,691.83
	Grand Totals:	($1,536,192.43)	($1,893,186.75)	($1,806,960.69)	($1,777,567.85)	($1,587,631.95)	($1,375,438.87)
Income Tax Expense - Major and Local Streets, Sidewalks		$0.00	$0.00	$0.00	$0.00	$0.00	$496,942.36
General Fund Expense-Major and Local Streets		$600,000.00	$0.00	$0.00	$0.00	$0.00	$0.00
	Revised Total	($2,136,192.43)	($1,893,186.75)	($1,806,960.69)	($1,777,567.85)	($1,587,631.95)	($1,872,381.23)
	BWL Service Area (89%) Correction	($1,901,211.26)	($1,684,936.20)	($1,608,195.01)	($1,582,035.38)	($1,412,992.44)	($1,666,419.29)

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EXHIBIT D

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

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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).

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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

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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

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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.

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> 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

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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).

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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.

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"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

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EXHIBIT E

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2021 WL 5750616
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Daniel BRUNET, Individually and as Representative of a Class of Similarly Situated Persons and Entities, Plaintiff-Appellant,
v.
CITY OF ROCHESTER HILLS, Defendant-Appellee.

No. 354110
|
December 2, 2021

Oakland Circuit Court, LC No. 18-164764-CZ

Before: Murray, C.J., and Jansen and Riordan, JJ.

Opinion

Per Curiam.

***1** Plaintiff Daniel Brunet, individually and as class representative, appeals as of right the trial court's opinion and order granting defendant City of Rochester Hills's motion for summary disposition and denying his motion for partial summary disposition. This case concerns charges imposed by defendant for municipal water and sewer services. Defendant asserts that these charges are unlawfully excessive, unreasonable, and in violation of MCL 141.91 and a now-amended municipal ordinance. We affirm.

I. FACTS AND PROCEEDINGS

Defendant operates a municipal water supply system, of which plaintiff is a customer.[1] The water system has two central purposes: (a) supply treated or "potable" water to municipal water customers, and (b) provide excess capacity for public fire protection. In March 2018, plaintiff filed a 10-count complaint against defendant, generally alleging that the water charges imposed by defendant on its customers since 2012 have been unlawful for the following two principal reasons. First, defendant accumulated surplus funds to allegedly pay for future capital improvements to its water system, and these surplus funds are unnecessary to provide service to the *present* water customers. According to plaintiff, defendant may only charge its water customers for the present costs of supplying water. Second, defendant charges its water customers for the fire protection component of its water system. However, because fire protection operates for the benefit of the general public, not only the water customers themselves, the general public should be charged for the fire protection.[2] Plaintiff also noted that defendant had an ordinance providing that the fire protection component would be paid by defendant itself from its general fund. Plaintiff requested that the trial court certify the instant action as a class action with plaintiff himself as the class representative of all persons or entities who paid the water charges at any time in the preceding six years. He further requested that defendant disgorge the excess funds that it had received to the putative class in equity and that the trial court declare that the water charges are unlawfully excessive to the extent outlined in the complaint.

In March 2019, the trial court certified the class, which it defined as "all persons and entities who/which have paid the City for water and/or sewage disposal service at any time since March 30, 2012 or who/which pay the City for water and/or sewage disposal service during the pendency of this action."

***2** In December 2019, plaintiff moved for partial summary disposition, arguing that the water charges were unreasonable as a matter of law until November 2018 because defendant had the following ordinance in effect concerning the cost of fire protection services:

> (b) Fire Service Fee. As a fire service fee for providing a water system with extra capacity available for fighting fires and protecting property in the city, the city shall be charged based on a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes. The fire service fee shall be required and adjusted annually to reflect actual versus budgeted revenue requirement for the water fund for the previous year.
>
> (c) Quarterly billing. Charges against the City shall be payable in quarterly installments from the current city's fire fund or from the proceeds of taxes which the city, within constitutional limitations, is authorized and required to levy in an amount sufficient for this purpose. [Rochester Hills Ordinance, § 102-124.]

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Plaintiff argued that although Rochester Hills Ordinance, § 102-124 essentially required that the fire protection component be paid for by defendant itself, defendant violated the ordinance during the class period until November 2018 by charging its water customers for this service. [3] Thus, plaintiff argued, he and the class were entitled to a refund for monies paid for the fire protection component.

Defendant moved for summary disposition of the entire complaint. [4] Defendant acknowledged that the fund for its water system had accumulated a substantial surplus of about $46 million in recent years. However, defendant asserted, the majority of the water system will need to be replaced in the upcoming five to 10 years, and it will likely use substantially all of its surplus funds to do so. Defendant explained that it always has intended to use the surplus funds for these upcoming capital improvement projects and that paying for the projects with cash is more fiscally responsible than doing so with bonds. Defendant argued that it was authorized by MCL 141.121 to charge its customers for these future capital improvement projects and that its water charges were reasonable in all respects. Defendant also argued that a municipal regulation passed in 1999 authorized charging its water customers for the fire protection component, so its water charges were not unlawful to that extent.

The parties presented competing evidence concerning the reasonableness of the water charges, with plaintiff's experts opining that the water charges were unreasonably excessive, and defendant's experts opining that the charges were reasonable. The trial court discussed this evidence in a 37-page opinion and ultimately granted summary disposition in favor of defendant. In relevant part, the trial court reasoned that the water charges did not violate MCL 141.91 because they were "user fees," not "taxes," under *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998); that the water charges were reasonable because plaintiff "has submitted no evidence of anything illegal or improper" and otherwise failed to overcome the presumption of reasonableness; and that plaintiff was not entitled to equitable relief with respect to the fire protection component of the water charges because his "sole evidence" in that regard was "an ordinance that was mistakenly left on the books and was arguably already overridden by lawful resolution." [5] Plaintiff now appeals.

II. MCL 141.91

***3** Plaintiff first argues that the water charges are an unlawful tax in violation of MCL 141.91. We disagree.

We review de novo whether a municipal charge is a "tax." See *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich.App. 412, 413-414, 671 N.W.2d 572 (2003). We also review de novo questions of statutory interpretation. *PNC Nat'l Bank Ass'n v. Dep't of Treas.*, 285 Mich.App. 504, 505, 778 N.W.2d 282 (2009). Finally, "[t]his Court reviews de novo a trial court's ruling on a motion for summary disposition." *Hartfiel v. City of Eastpointe*, 333 Mich.App. 438, 444, 960 N.W.2d 174 (2020).

It is initially noted that plaintiff brought alternative claims for assumpsit and unjust enrichment. [6] "At common law, assumpsit was a proper vehicle for recovering unlawful fees, charges, or exactions—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law." *Youmans v. Charter Twp. of Bloomfield*, —— Mich.App. ——, ——, —— N.W.2d ——, 2021 WL 67885 (2021) (Docket No. 348614); slip op. at 27 (cleaned up). "With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* (cleaned up). "Hence, an assumpsit claim is modernly treated as a claim arising under quasi-contractual principles, which represent a subset of the law of unjust enrichment." *Id.* (quotation marks and citations omitted). "Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another." *Wright v. Genesee Co.*, 504 Mich. 410, 417, 934 N.W.2d 805 (2019). Consequently, if plaintiff is correct that the water charges violated MCL 141.91 (or any other law), he and the class would arguably be entitled to equitable relief to recover the charges unlawfully paid.

MCL 141.91 provides as follows:

> 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

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> being imposed by the city or village on January 1, 1964.

MCL 141.121 provides, in relevant part, as follows:

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:
>
> (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
>
> * * *
>
> (d) Other expenditures and funds for the public improvement as the ordinance may require.
>
> (2) The rates shall be fixed and revised by the governing body of the borrower so as to produce the amount described in subsection (1).... [7]

***4** MCL 141.121 places "the amount of the charge within the sound discretion of the city officials, especially when considered in relation to the objectives of the program in maintaining the system and paying off the bonds in the manner required by statute." *Yurek v. City of Sterling Heights*, 37 Mich.App. 386, 390, 194 N.W.2d 474 (1971) (cleaned up).

In *Bolt v. City of Lansing*, 459 Mich. 152, 587 N.W.2d 264 (1998), our Supreme Court considered whether a "storm water service charge" was either a valid user fee or a tax that violated the Headlee Amendment, Const. 1963, art. 9, § 31, which generally prohibits the imposition of new municipal "taxes" that are not ratified by the voters. The charge was imposed on "each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel's storm water runoff," and it was intended to fund the separation of combined sanitary and storm sewers within the city that had not already been separated. *Id.* at 155, 587 N.W.2d 264. In its analysis, the Court first observed that "a 'fee' is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A 'tax,' on the other hand, is designed to raise revenue." *Id.* at 161, 587 N.W.2d 264 (cleaned up). The Court then identified the following three factors to distinguish between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," (2) "user fees must be proportionate to the necessary costs of the service," and (3) user fees contain an element of "voluntariness." *Id.* at 161-162, 587 N.W.2d 264. The Court ultimately ruled that application of the three-factor test compelled the conclusion that the charge at issue was a tax for the purposes of the Headlee Amendment. *Id.* at 169, 587 N.W.2d 264.

In this case, plaintiff acknowledges in his brief on appeal that he is not maintaining a Headlee claim, but he argues that *Bolt* is persuasive authority for the proposition that the water charges at issue are unlawful "taxes" under MCL 141.91. In other words, because MCL 141.91 generally prohibits municipal taxes that are not otherwise authorized by law, and because application of the *Bolt* test indicates that the water charges here are "taxes," it necessarily follows that the water charges violate MCL 141.91. However, plaintiff simply fails to address defendant's argument that the water charges are authorized because they are fully consistent with MCL 141.121(1)(a) and (d). "An appellant's failure to properly address the merits of an argument constitutes the abandonment of an issue." *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich.App. 204, 214, 874 N.W.2d 398 (2015). Thus, this issue is abandoned. [8]

Regardless, plaintiff's argument is meritless. In essence, plaintiff argues that because a municipality generally may not charge current ratepayers for future capital improvements—as recognized by older cases such as *Wolgamood v. Village of Constantine*, 302 Mich. 384, 4 N.W.2d 697 (1942), and newer cases such as *Bolt*—it follows that the water charges here are not permissible "rates" or "fees" but are instead "taxes" because defendant acknowledges that the cash reserve will be used for future capital improvements. In our view, plaintiff overstates the principle derived from such cases.

***5** In *Wolgamood*, our Supreme Court explained as follows:

> A municipally owned utility is built and operated, not for a corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens of the municipality, who are generally identical with the customers. For a municipally owned light plant to charge rates which will, in addition to the necessary expenses of construction and operation, build up a reserve for

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> depreciation equaling the replacement cost of the plant, is to require the citizens and customers not only to pay for construction of their own utility but also to provide the capital for the construction of a new plant to serve future users. [*Wolgamood*, 302 Mich. at 404-405, 4 N.W.2d 697.]

In other words, a municipality may not charge current ratepayers for the costs of constructing the original municipal utility (typically though bonds that must be paid over time) *and* the future costs of replacing that same utility. Doing so "is to ask the consumers to pay off the capital investment twice, once as a debt service and again in the establishment of a depreciation reserve." *Id.* at 405, 4 N.W.2d 697 (quotation marks and citation omitted). Of course, there is nothing in *Wolgamood*, or any other case of which we are aware, to suggest that a municipality may not charge current ratepayers *once* for the cost of the municipal utility. Thus, there is no question that current ratepayers may be charged for the cost of servicing bonds that were issued years ago to pay for the costs of constructing the original municipal utility. It follows that if the municipality originally constructed its utility through cash and intends to replace the utility in a similar manner, then current ratepayers may properly be charged for accumulating that cash reserve. That is, there is no conceptual difference between requiring ratepayers to service bonds and requiring ratepayers to contribute to a cash reserve that will be used for future capital improvements to the utility.

Accumulating such a cash reserve by charging ratepayers based on depreciation is an appropriate way to do so. In *City of Detroit v. City of Highland Park*, 326 Mich. 78, 39 N.W.2d 325 (1949), Highland Park argued that the water and sewage rates charged by Detroit were unreasonable because, among other reasons, Detroit included depreciation in its rates, and "to charge depreciation sufficient to amortize the cost over the service life of the system is to charge this generation for improvements to be used by the next generation." *Id.* at 95, 39 N.W.2d 325. Our Supreme Court rejected that argument, explaining that Detroit advanced "huge sums ... as an investment in a utility on which Detroit may earn a reasonable return." *Id.* Although Detroit issued bonds as well, "the bonds so issued were only for a small part of the total cost." *Id.* "[O]n a utility basis where the city is not recovering its capital as part of the expense, depreciation charges sufficient to rebuild and restore the system over its service are proper items of expense in determining the rate to be charged." *Id.* at 98, 39 N.W.2d 325. "It is incumbent on the city of Detroit, the owner, to keep up, repair or rebuild the system to the extent that it becomes necessary through depreciation in order to protect its large investment, the advance of almost $12,000,000 in cash besides the issuance of the bonds." *Id.* Simply put, our Supreme Court approved of depreciation charges "sufficient to rebuild and restore the system" because Detroit was entitled to "protect its large investment."

***6** *Bolt* presented the same concern as *Wolgamood*. In *Bolt*, the Court reasoned that the charge at issue was a "tax" because, in relevant part, "[a]t the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter.... The revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax." *Bolt*, 459 Mich. at 163, 587 N.W.2d 264. Thus, in *Bolt*, the ratepayers were expected to pay for the benefits of the improved system that they would enjoy *and* pay for the benefits of the improved system that future ratepayers, who would not pay the charge at issue, would enjoy. This constituted a similar "double charge" as in *Wolgamood*.

Accordingly, it is not enough for plaintiff to simply show that the water charges at issue are funding a reserve to pay for future capital improvements. Our Supreme Court approved of such a practice in *Highland Park*. Rather, at a minimum, plaintiff must also show that current ratepayers are being "double charged" for the water system, contrary to cases such as *Wolgamood* and *Bolt*. We consider that issue below.

III. REASONABLENESS

Plaintiff argues that the water charges are unreasonable. We disagree. We review de novo whether a municipal charge is reasonable. See *Mapleview Estates, Inc.*, 258 Mich.App. at 413-414, 671 N.W.2d 572.

It is a longstanding principle that municipal utility rates are presumed to be reasonable. See *Highland Park*, 326 Mich. at 100-101, 39 N.W.2d 325 ("The rate lawfully established by the plaintiff is assumed to be reasonable in absence of a showing to the contrary or a showing of fraud or bad faith or that it is capricious, arbitrary or unreasonable, and the

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burden of proof is on the defendant to show that the rate is unreasonable."). In *Meridian Twp. v. City of East Lansing*, 342 Mich. 734, 71 N.W.2d 234 (1955), Meridian Township challenged the water rates set by East Lansing, arguing that East Lansing violated a provision of the contract between the parties stating that "such rates shall always be reasonable in relation to the costs incurred by the City for the supply of water." *Id.* at 748, 71 N.W.2d 234. Our Supreme Court explained that the question before it was whether the water rates were "reasonable" as defined by the contract:

> We are asked by the appellant to find that the rate charged is not reasonable as above prescribed. It will be noted that the clause under examination does not equate rates to costs. Identity is not required. Obviously there is elbow-room for adjustment. The requirement merely is that they shall be 'reasonable' in relation to costs. *The word 'reasonable' with respect to rates charged by utilities is a word of the most universal employment. It may be provided by ordinance, statute, or constitution, that rates shall be 'reasonable,' or 'fair and reasonable.'* Moreover, should the question of rate arise on a contract implied in law, the judicial requirement is that the rate to be paid shall be 'reasonable.' It may also be employed (as in the case at bar) in a contract. The determination of its meaning, in any case, is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use. Here it is related to the costs incurred by the city in the supply of water. [*Id.* at 749, 71 N.W.2d 234 (internal citations omitted; emphasis added).]

Ultimately, our Supreme Court ruled in favor of East Lansing, stating that Meridian Township failed "to show that the rates charged were, in fact, unreasonable with relation to costs." *Id.* at 753, 71 N.W.2d 234.

In *City of Plymouth v. City of Detroit*, 423 Mich. 106, 377 N.W.2d 689 (1985), Detroit increased water rates it imposed on suburban Detroit municipalities by 39 percent. *Id.* at 109, 377 N.W.2d 689. Plymouth sued Detroit, alleging that the increase was unreasonable. *Id.* Detroit argued that the increase was necessarily reasonable under the version of MCL 123.141 in effect at the time, which essentially provided that "the city may charge its outlying customers not more than twice what it charges its own users." *Id.* at 123, 377 N.W.2d 689. According to Detroit, because it did not charge the suburban municipalities more than twice what it charged its own customers, and because MCL 123.141 "represents the only applicable standard of reasonableness," it logically followed that the 39-percent increase was reasonable. *Id.* Plymouth responded that a contractual provision between the parties stated that "rates shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *Id.* at 111, 377 N.W.2d 689. Thus, Plymouth argued, "the statute only provides for a statutory floor and ceiling of reasonableness and that the specific provisions of the contracts between the parties govern their relationship." *Id.* at 124, 377 N.W.2d 689. In resolving the dispute, our Supreme Court agreed with our conclusion that "the statute does not render reasonable as a matter of law rates within its maximum and minimum provisions in the face of a contractual provision which states that rates shall be reasonable in relation to costs. Regardless of how the statute reads, [Detroit] has limited its discretion in setting rates by agreeing to the contractual provision." *Id.* at 124-125, 377 N.W.2d 689 (quotation marks and citation omitted). Ultimately, however, the Supreme Court ruled in favor of Detroit, concluding that Plymouth failed to sustain its burden of showing that the water rates were unreasonable in violation of the contract:

> ***7** The plaintiff had ample opportunity to substantiate its claim on the theory with which it had chosen to prove that the rates in question were violative of the contract between the parties. The trial court concluded that the rates charged had not been shown to be unreasonable. We find no error in the trial court's conclusion.... [*Id.* at 137, 377 N.W.2d 689.]

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In *City of Novi v. City of Detroit*, 433 Mich. 414, 446 N.W.2d 118 (1989), Novi challenged the water rates set by Detroit, arguing that they violated the newly enacted MCL 123.141(2), see 1981 PA 89, which provided, in relevant part, as follows:

> The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of ratemaking....

The trial court ruled in favor of Detroit, but we reversed, explaining that MCL 123.141(2) established the standard that water rates must "reflect the actual cost of providing the service," and as a result, the concept of reasonableness was no longer relevant. *Id.* at 427-428, 446 N.W.2d 118 (quotation marks and citation omitted). Our Supreme Court reversed this Court, stating as follows:

> We acknowledge that the Legislature intended that municipal water rates more accurately reflect the actual cost of service when it eliminated the artificial limits imposed by the previous version of MCL 123.141. However, the Legislature's use of the phrase "based on the actual cost of service as determined under the utility basis of rate-making" cannot be construed to mean "exactly equal to the actual cost of service," in light of the difficulties inherent in the rate-making process and the statutory and practical limitations on the scope of judicial review. The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.
>
> * * *
>
> For these reasons, we hold that 1981 PA 89 did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2). [*Id.* at 430-433, 446 N.W.2d 118 (cleaned up).]

Our Supreme Court ultimately concluded that "the plaintiff City of Novi did not meet its burden of proving that the City of Detroit Water and Sewerage Department's rate-making method, or the resulting rates charged, did not comply with the utility basis of rate-making." *Id.* at 438, 446 N.W.2d 118.

More recently, in *Trahey v. City of Inkster*, 311 Mich.App. 582, 876 N.W.2d 582 (2015), this Court summarized the following pertinent principles concerning the presumption of reasonableness:

> The determination of reasonableness is generally considered by courts to be a question of fact. Michigan courts have long recognized the principle that municipal utility rates are presumptively reasonable. This presumption exists because courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. However, the presumption of reasonableness may be overcome by a proper showing of evidence. The burden of proof is on the plaintiff to show that any given rate or ratemaking practice is unreasonable. [*Id.* at 594, 876 N.W.2d 582 (cleaned up).]

***8** Here, plaintiff argues that the water charges imposed by defendant are unreasonable for the following reasons: (1) "the City has charged far more than necessary to operate its water and sewer systems," i.e., that "the City has been operating its Water and Sewer Fund for a profit because its revenues have consistently exceeded its expenses"; (2) his experts opined that the water charges were unreasonable because, among other things, "[b]y including depreciation in setting its rates, the City's rates double count certain capital expenses"; and (3) defendant did not accumulate the surplus *with the intent* of funding future capital improvements.

Plaintiff, however, does not identify the standard or authority for "reasonableness." In other words, plaintiff does not identify a statute, contractual provision, or ordinance establishing the underlying basis for "reasonableness." In

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Meridian Twp, for example, the basis for "reasonableness" was a contractual provision stating that water rates must be "reasonable in relation to the costs incurred by the City for the supply of water." *Meridian Twp.*, 342 Mich. at 748, 71 N.W.2d 234. In *City of Plymouth*, the basis for "reasonableness" was a contractual provision stating that water rates "shall always be reasonable in relation to the costs incurred by the Board for the supply of water." *City of Plymouth*, 423 Mich. at 111, 377 N.W.2d 689. In *City of Novi*, the basis for "reasonableness" was a statute stating that "[t]he price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making." *City of Novi*, 433 Mich. at 419, 446 N.W.2d 118. [9] And in *Trahey*, the basis for "reasonableness" was a municipal ordinance stating that water rates must be "just and reasonable." *Trahey*, 311 Mich.App. at 594, 876 N.W.2d 582.

Plaintiff apparently is attempting to maintain a freestanding claim of "reasonableness" that is not grounded in any specific law nor in any type of cogent reasoning. A bald assertion of some type of unknown reasonableness standard is not consistent with the caselaw discussed above, in which "reasonableness" was linked to a statute, contractual provision, ordinance, or other source of authority. Of course, plaintiff is nominally correct that municipal utility rates must be "reasonable," but he overlooks the fact that the standard for "reasonableness" is often uniquely determined by reference to the specific law, cost basis, or contract at issue. In one case, a "reasonable" water rate had to simply reflect the costs of supplying water, whereas in another case, a "reasonable" water rate had to reflect the costs of supplying water as determined under the utility basis of rate-making. Yet, in other cases, as in *Trahey*, the concept of "reasonableness" was that referred to by ordinance. Thus, in light of plaintiff's failure to identify a basis for "reasonableness" here, we could consider this issue abandoned. See *In re Application of Detroit Edison Co. for 2012 Cost Recovery Plan*, 311 Mich.App. at 214, 874 N.W.2d 398.

Regardless, most of plaintiff's arguments in regard to his understanding of reasonableness are meritless and we dispose of them quite briefly. First, plaintiff argues that the mere fact that defendant accumulated a reserve of about $50 million shows that the water charges were unreasonable. [10] However, as explained previously, our Supreme Court in *Highland Park* approved of such accumulated reserves to pay cash for future capital improvements. Second, plaintiff argues that his experts' opinion created a genuine issue of material fact as to whether the water charges were unreasonable, given that they opined that defendant "collected more than $24 million in excess of the amounts it was entitled to collect." However, one of those experts acknowledged during his deposition that he was unaware of the particular depreciating nature of defendant's water system, the critical justification offered by defendant in support of its reserve. [11] Such a lack of knowledge fundamentally undermines the opinion of plaintiff's experts. A plaintiff cannot proceed to trial simply because his or her expert was unaware of the pertinent facts. Compare *Pete v. Iron Co.*, 192 Mich.App. 687, 689, 481 N.W.2d 731 (1991) (concluding that summary disposition was properly granted to the defendant in a slip-and-fall case because, in relevant part, "[p]laintiff's expert testified during deposition that he did not know what caused plaintiff's fall, but opined that she may have 'misstepped' "). In other words, where defendant argues that it accumulated its reserve to pay for substantial capital improvements in the upcoming five to 10 years and that its water charges are therefore reasonable, plaintiff's experts cannot ignore that fact but nonetheless conclude that the water charges are unreasonable. Third, plaintiff argues that there is a question of fact as to whether defendant had a specific plan to use its reserve to fund future capital improvements before the instant action was filed. However, notwithstanding the testimony of defendant's officers that defendant did have a specific plan for its reserve, and notwithstanding that plaintiff does not dispute that the reserve will actually be used to fund future capital improvements, plaintiff provides no authority for the proposition that defendant was obligated to have a specific plan for its reserve before the instant action was filed. See *Bohn v City of Taylor*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2019 (Docket No. 339306, 2019 WL 360730) ("Instead, plaintiffs contend that the City must have a specific plan for capital improvements equivalent to the amount in the reserve fund and that without such a plan, the fund's existence is evidence that the rates are excessive. Plaintiffs do not provide any authority (legal or otherwise) to support this contention."). [12]

***9** Plaintiff's best argument for reversal is that defendant "double counted" both debt service and depreciation for six particular assets, such that water customers were charged for both the original construction of those assets (funded through bonds) and anticipated future construction (funded through depreciation as a proxy for anticipated costs). However, the trial court did not address this argument. In his lower court brief discussing this position, plaintiff summarily directed the trial court to the three particular exhibits:

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[FN 14]: *See* Exhibit 23 hereto (City's Objections and Responses to Plaintiff's Fourth Interrogatories and Fourth Requests for Production of Documents).

[FN 15]: See Exhibit 24 hereto (excerpts from City's annual financial statements showing principal debt expense for the assets listed below). See also Budget documents (Exhibit 20 hereto).

With this glaring lack of analysis and citation to the record, the trial court cannot be reasonably faulted for its failure to consider plaintiff's "double counting" argument. Plaintiff submitted dozens of pages of detailed accounting statements and responses to interrogatories, but he did not inform the trial court how it should consider these documents or where the pertinent facts relating to plaintiff's argument could be found. While true that MCR 2.116(G)(5) provides that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)," this subrule does not mean that a party may submit hundreds of pages of documents to the trial court and expect that court to parse through the documents to find the relevant facts establishing a genuine issue of material fact. Rather, this Court has explained that a trial court is "not obligated under MCR 2.116(G)(5) to scour the record to determine whether there exists a genuine issue of fact to preclude summary disposition." *Barnard Mfg. Co., Inc. v. Gates Performance Engineering, Inc*, 285 Mich.App. 362, 381, 775 N.W.2d 618 (2009) (quotation marks and citation omitted). "It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence." *Id.* at 379, 775 N.W.2d 618 (citation omitted).

Similarly, MCR 7.212(C)(7), which concerns briefs filed in this Court, provides, in relevant part, that "[f]acts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." Thus, the mere citation to a multipage exhibit is insufficient. See *Derderian v. Genesys Health Care Sys.*, 263 Mich.App. 364, 388, 689 N.W.2d 145 (2004) ("In support of this claim, plaintiffs provide general citations from Dr. Derderian's deposition, testimony from the profusionist in one patient's case, and one patient's medical records. Such general citations are insufficient."). Accordingly, because plaintiff failed to cite supporting documentary evidence for his assertion that defendant engaged in improper "double counting," both in the trial court and in this Court, he is not entitled to relief on this basis.

IV. VIOLATION OF ORDINANCE

Finally, plaintiff argues that the water charges were unreasonable as a matter of law before November 2018 to the extent that defendant included a component for fire protection, contrary to former Rochester Hills Ordinance, § 102-124.

Initially, we note that plaintiff appears to be arguing only that the violation of former Rochester Hills Ordinance, § 102-124 resulted in the water charges being unreasonable. See *Trahey*, 311 Mich.App. at 595, 876 N.W.2d 582 ("Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable."). While plaintiff cites multiple cases for the basic proposition that a municipality is bound by its own ordinances, see, e.g., *Taber v. City of Benton Harbor*, 280 Mich. 522, 526, 274 N.W. 324 (1937), he does not challenge the basis for the trial court's dismissal of the counts of the complaint seeking relief for a violation of former Rochester Hills Ordinance, § 102-124 alone. [13] To the extent that plaintiff intended to challenge that dismissal, his argument is waived. See *Houghton ex rel Johnson v. Keller*, 256 Mich.App. 336, 339-340, 662 N.W.2d 854 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."). Thus, we need only address the argument that the alleged violation of the November 2009 version of Ordinance § 102-124 resulted in the water charges being unreasonable.

***10** "This Court must presume the amount of the [municipal utility] fee to be reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence." *Jackson Co. v. City of Jackson*, 302 Mich.App. 90, 109, 836 N.W.2d 903 (2013) (cleaned up). Here, the fire protection component of the water charges was substantively a component for "excess capacity" of the water system, i.e., water capacity that was beyond that necessary to service the ordinary needs of the water customers. In *Novi*, our Supreme Court explained that "excess capacity is includable in the rate base where it is reasonably necessary to fulfill contractual obligations." *Novi*, 433 Mich. at 435, 446 N.W.2d 118. Moreover, the Court suggested that when "facilities that are arguably excess capacity are constantly in use," the excess capacity is properly includable for that additional reason as

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well. See *id.* ("In the instant case, because the DWSD system is integrated, the facilities that are arguably excess capacity are constantly in use.").

Assuming that plaintiff is correct that the language of former Rochester Hills Ordinance, § 102-124 resulted in the water charges including an illegal component for excess capacity and thereby rebutting the presumption of reasonableness, the trial court correctly held that plaintiff is not entitled to equitable relief. In *Youmans*, another case involving a claim for equitable relief for allegedly inflated water charges, this Court explained that "[w]hether the Township would receive an unjust 'benefit' from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were 'excessive,' not on whether some aspect of the Township's ratemaking methodology was improper." *Youmans*, —— Mich App at ——, —— N.W.2d ——, slip op. at 30. Thus, this Court rejected the plaintiff's argument that "in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services." *Id.* (emphasis in original).

The same is true here. It would not be inequitable to allow defendant to retain the money for excess capacity because that excess capacity, i.e., the "fire service fee," provided exclusive benefits to water customers. The fire service fee under former Rochester Hills Ordinance, § 102-124 was determined by "a base-extra capacity approach attributing to fire protection the difference between total system capacity and capacity required by other customer classes." Simply, this means that the fire service fee was the difference between the capacity *required* by water customers and the overall water system capacity. This excess-capacity difference supported the fire protection services, which admittedly benefitted the general public, but also the water customers themselves. Defendant's public utilities engineering manager explained the benefits of the excess capacity in an affidavit as follows:

> 4. One benefit of the water system's capacity is that it ensures that the City will have sufficient water flow to fight fires. The system's capacity also provides numerous benefits to ratepayers who purchase and use City water, including meeting customers' minimum needs for average daily water flow.
>
> 5. The system's capacity also allows the City to provide service under emergency conditions, maintain service during an event that causes failure, and quickly recover from these events.
>
> 6. In addition, extra water system capacity allows system users to access sufficient water flow to irrigate their lawns. Many of the City's water ratepayers take advantage of this benefit and use sprinkler systems to irrigate their lawns in summer months.

Thus, the excess-capacity costs that plaintiff attributes entirely to the costs of fire protection services actually provide unique benefits to water customers alone. Similarly, for example, our Supreme Court in *Novi* explained that the "base-extra capacity method" in that case required separating "base costs," which were "[t]hose costs associated with furnishing water at average annual rates of use," with other costs, such as "[t]hose additional costs associated with meeting water demands on the day or days of maximum use" and "[t]hose additional costs associated with meeting demands during the peak hour of use." *Novi*, 433 Mich. at 421-422, 446 N.W.2d 118. In *Novi*, as in this case, charging water customers for excess capacity provided exclusive benefits to those customers.

***11** It is impossible to disentwine the "fire protection" aspect of excess capacity with the "potable water" aspect of excess capacity. As noted, excess capacity is necessary to provide potable water during times of heightened demand or emergencies.[14] Moreover, even when excess capacity is used to provide fire protection, i.e., the water supply is used to fight a fire, that excess capacity still benefits water customers because those customers are (typically) able to maintain ordinary water use. If the water system had no excess capacity, then fighting a fire would result in water customers not having access to the ordinary water supply. Essentially, "fire protection" is but one example of heightened demand or emergency. If water customers may properly be charged for excess capacity to protect against heightened demand during a hot summer day—as plaintiff does not seem to dispute—it follows that they may also be charged for excess capacity to protect against fighting a large fire.

At a minimum, even if plaintiff is correct that the "fire protection" aspect of excess capacity exclusively benefits the general public and does not provide any unique benefits to water customers themselves, which would perhaps raise *Bolt*-type concerns, it is apparent that "fire protection" is so intertwined with the concept of excess capacity itself that the two cannot be disentangled by this Court, at least

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where plaintiff has simplistically equated "fire protection" with excess capacity. Under these circumstances, equity does not entitle plaintiff and the class to relief.

V. CONCLUSION

The trial court correctly granted summary disposition in favor of defendant because plaintiff did not show that the water charges violated MCL 141.91 or were "unreasonable," or that he was entitled to equitable relief for the alleged violation of former Rochester Hills Ordinance, § 102-124. Therefore, we affirm.

Jansen, J. (concurring).
I concur in the result only.

All Citations

Not Reported in N.W. Rptr., 2021 WL 5750616

Footnotes

1 To be precise, this case involves the water and sewer system, water and sewer customers, and water and sewer charges. For ease of discussion, we simply refer to the "water system," "water customers," and "water charges," respectively.

2 Plaintiff refers to the future capital improvement component of the water charges as the "Reserve Charge" and the fire protection component as the "Fire Service Charge." To be clear, however, defendant does not separately itemize or charge its water customers for these components. These terms are created by plaintiff for the purposes of this litigation.

3 Rochester Hills Ordinance, § 102-124 was amended in November 2018 to remove such language.

4 The trial court dismissed two counts of the complaint months earlier, so defendant's motion concerned the remaining eight counts.

5 The trial court also ruled in favor of defendant on other issues that plaintiff does not challenge on appeal.

6 Plaintiff also sought declaratory relief in his "Prayer for Relief."

7 MCL 141.121 is part of the Revenue Bond Act of 1933, MCL 141.101 *et seq.* Although MCL 141.121 seems to contemplate only those situations in which bonds are issued, MCL 141.104 provides that "[t]he powers in this act granted may be exercised notwithstanding that no bonds are issued hereunder." Thus, the parties do not dispute that MCL 141.121 may apply in this case, notwithstanding that defendant apparently does not intend to exclusively issue bonds to fund the future capital improvements. See *Seltzer v. Sterling Twp*, 371 Mich. 214, 219, 123 N.W.2d 722 (1963) ("It was clearly the intention of the legislature to give townships the power and authority under the Revenue Bond Act of 1933 to purchase, acquire, construct, improve, enlarge, extend or repair a water supply system and a sewage disposal system, and to own, operate and maintain the same, notwithstanding no bonds are issued in connection therewith.").

8 Recently, our Supreme Court noted in different circumstances that merely because a particular "charge" is a "tax" for the purposes of the Headlee Amendment does not necessarily render it unlawful. See *Gottesman v. City of Harper Woods*, 964 N.W.2d 365 (2021).

9 Although the statute did not expressly include the word "reasonable," our Supreme Court explained that the concept must nonetheless be imposed within the statute. See *id.* at 433, 446 N.W.2d 118.

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10 Plaintiff relies on *Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 934 N.W.2d 713 (2019), for the proposition that a municipal utility charge that consistently returns a profit is evidence (perhaps conclusive) that the charge is unreasonable. In that case, our Supreme Court favorably cited the dissenting opinion of Judge Jansen, who explained that consistent annual profits generated by the city's building fees was evidence that the fees were unauthorized by statute. See *id.* at 220, 934 N.W.2d 713. According to plaintiff, the same reasoning should apply here. Plaintiff's argument misses the mark because the statute at issue in that case provided that the building fees "shall be intended to bear a reasonable relation to the cost, including overhead." MCL 125.1522(1)-(2). Thus, as Judge Jansen observed, consistent annual profits indicated that the building fees were not, in fact, intended to bear a reasonable relation to the cost of operating the regulatory scheme. Here, in contrast, plaintiff does not ground his argument of "unreasonableness" in a similarly worded statute.

We also note that municipal utilities are not necessarily precluded from generating a reasonable profit. See *Chocolay Charter Twp. v. City of Marquette*, 138 Mich.App. 79, 84, 358 N.W.2d 636 (1984) ("A municipality is not required to furnish utility services at cost, but may charge a rate which will yield a profit."); McQuillin: The Law of Municipal Corporations, § 35:60 ("While in theory, water from a municipally owned plant should come to the consumer without profit to the municipality, this does not exclude the idea of profit in operation. A city is entitled to a reasonable profit and it may even use that profit for other valid municipal purposes.").

11 Although the expert only testified in the first person, the most reasonable inference is that neither expert was aware of the particular depreciating nature of defendant's water system. Tellingly, there is nothing in the experts' 27-page written opinion to suggest otherwise.

12 "Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1), they may, however, be considered instructive or persuasive." *Adam v. Bell*, 311 Mich.App. 528, 533 n.1, 879 N.W.2d 879 (2015) (quotation marks and citation omitted).

In any event, the law is contrary to plaintiff's argument that charges by a municipal utility are unreasonable if the municipality does not have a specific plan for use of its reserve before a lawsuit is filed. "A city has no duty to justify or explain its actions in setting rates until the party contesting their validity shows their invalidity by competent evidence." McQuillin: The Law of Municipal Corporations, § 35:57. In other words, a party contesting the validity of municipal charges (i.e., rates) must *first* produce evidence that the charges are unreasonable, and *then* the municipality must justify its actions in setting those charges. As applied here, defendant does not have to justify its actions in setting the water charges at issue—its alleged lack of a preexisting specific plan for use of the reserve—unless plaintiff first shows that the charges are unreasonable. Plaintiff cannot simply demand a justification for the water charges and subsequently argue that the purported insufficiency of the justification establishes that the water charges are unreasonable.

Moreover, plaintiff's argument is illogical for the simple reason that "[m]unicipal utility rates may include a profit margin," and "[t]he profit may be transferred to the general fund and used for purposes other than supplying the utility service." *Id.* Thus, so long as the charges are reasonable, the municipality may use accumulating reserves from those charges (i.e., profit) for any municipal purpose whatsoever. See *id.* It therefore cannot be the case that defendant is obligated to have a specific plan providing that accumulated reserves from its water charges must be used for one particular municipal purpose, or future capital improvements, rather than for some other lawfully allowed purpose.

13 The trial court ruled that Rochester Hills's ordinances are only enforceable by certain government officials and entities. Plaintiff does not argue otherwise on appeal.

14 Compare *In re Reliability of Electric Utilities for 2017-2021*, 505 Mich. 97, 103 n 1, 949 N.W.2d 73 (2020) ("Regulators overseeing capacity calculate peak demand using the hottest days of the year and add a

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'reserve margin'—that is, some *extra* capacity—to ensure that suppliers meet even unexpectedly high spikes of demand.") (emphasis in original).

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