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

Dated: June 27, 2024

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF QUESTIONS PRESENTED

The City of East Lansing charges a franchise fee to its electric service provider, who passes along that cost to its customers, including Plaintiff. Nearly three years after the fee was approved, Plaintiff filed a class action lawsuit claiming that the fee is an unlawful tax under the Headlee Amendment and similar statutes.

The trial court granted summary disposition to Plaintiff on all claims except his equal protection claim. The Court of Appeals reversed, holding that Plaintiff's Headlee Amendment claim and related equitable claims were time-barred under MCL 600.308a(3), as interpreted by *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005).

This Court ordered oral argument on Plaintiff's application for leave to appeal and directed the parties to brief the following:

(1) the criteria for determining when a pass-through fee imposed by a local government on a business or utility should be considered a tax paid by a customer;

(2) whether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility;

(3) if so, what effect, if any, the availability of that challenge has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility;

(4) what authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91; and

(5) whether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there is any case law supporting a different period of limitations.

STATEMENT OF FACTS

This appeal centers on whether Plaintiff's class-action Headlee Amendment lawsuit is time-barred where it was filed more than one year after the disputed franchise fee was approved and where Plaintiff has no legal obligation to pay the franchise fee to the City of East Lansing, but instead pays the franchise fee to his utility provider.

The City incorporates by reference the Statement of Facts in its Answer to Plaintiff's Application for Leave to Appeal. Relevant to the questions presented by the Court, and in response to Plaintiff's biased[1] framing of the background, the City emphasizes the following material facts.

I. Timeline of Events

Because this appeal centers on whether Plaintiff's claims are time-barred, the timing of events is relevant and is summarized as follows:

- **June 6, 2017**: The City enacted Ordinance No. 1411, which is an electric service franchise agreement with the Lansing Board of Water and Light ("BWL"). Ordinance No. 1411 is attached in the Supplemental Brief Appendix as **Exhibit A.**

  The Ordinance gives BWL certain exclusive service territory, and in exchange, it provides that BWL "shall . . . 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."

- **September 2017:** BWL customers, including Plaintiff, began paying BWL bills that included a charge for the BWL's franchise fee obligation to the City. At no time did Plaintiff or the class members directly pay this franchise fee to the City, nor did the City send Plaintiff or the class members a bill for the fee or attempt to collect the fee from them.

- **April 13, 2020:** Plaintiff filed this class action lawsuit against the City. Plaintiff never filed any kind of legal action against BWL concerning the franchise fee.

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[1] Plaintiff represents, for example, that it is "undisputed or indisputable" that "the City decided to impose a new and unapproved tax on its own citizens." (Pl. Supplemental Brief, p. 3.) Of course, this allegation is the crux of the entire case and most certainly is disputed.

II. Nature of Franchise Fee

The Franchise Ordinance establishes the franchise required by Michigan law for BWL to use the City's rights-of-way to provide electric service within the City.[2] Section 1 of the Franchise Ordinance provides as follows:

> SECTION 1. GRANT TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby affirms the right, power and authority to 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 of the Franchise Ordinance establishes the fee that BWL must pay to the City in exchange for BWL's use of the rights-of-way:

> 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 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**.

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[2] See Argument I for further discussion of franchise requirements under the Michigan Constitution.

The Franchise Ordinance was approved by the BWL in May 2017. Collection of the Franchise Fee commenced in September 2017. (**Exhibit B**, S. House Affidavit, ¶ 11.)

Contrary to Plaintiff's narrative, the franchise fee was intended to (and did in fact) offset the enormous costs the City incurred in maintaining the rights-of-way for the BWL's use. Since the franchise fee was implemented, the City has received about $1.4 million annually from the BWL. This directly corresponds with the City's cost of maintaining the rights-of-way in the BWL service area. The City spends on average between $1.4 to $1.9 million annually in maintaining the BWL service area, which includes, among other things, lighting the rights-of-way, tree and tree branch trimming and removal, storm water drainage and drain maintenance, and general maintenance fees. **(Exhibit C**, City Financial Data.) Thus, the amount of the franchise fee is proportionate to the cost of maintaining the rights-of-way for BWL's use.

To be clear, BWL's customers do not have a contract with the City of East Lansing for electric service or electric franchise fees, nor does the Franchise Ordinance obligate BWL customers to pay a franchise fee to the City. The Franchise Ordinance requires the "Grantee" (BWL) to "collect and remit to the City a franchise fee . . . for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof." (Exhibit A.) The Franchise Ordinance obligates BWL "to pay the franchise fees to the City of East Lansing on a quarterly basis." *Id.* If BWL fails to do so, then the City has remedies solely against BWL – namely, the possible revocation of the franchise. The City has no legal recourse against BWL customers who fail to pay the franchise fee to BWL.

III. Relevant Procedural Background

BWL paid the franchise fee to the City without incident for nearly three years. In 2020, Plaintiff commenced the underlying class action lawsuit against the City, alleging violations of the

Headlee Amendment and MCL 141.91, among other things. Plaintiff did not name BWL as a defendant or file any legal action against BWL.

The circuit court granted summary disposition to Plaintiff on all claims except his equal protection claim, but the Court of Appeals reversed in its unpublished per curiam opinion dated April 13, 2023. **(Exhibit D,** Court of Appeals Opinion.) The Court of Appeals held that the trial court "erred by holding that plaintiff's Headlee claim was not barred by the statute of limitations" and further held 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." (Op. at 2.)

In his Supplemental Brief, Plaintiff speculates that the Court of Appeals did not decide the merits of Plaintiff's claims (i.e., whether the franchise fee is an unlawful tax) "because the Franchise Fees bear all of the relevant characteristics of a tax" and the Court of Appeals "found [a] way to deny [Plaintiff and the class] a refund of the unlawful Fees." (Pl. Supp. Brief, pp. 10-11.) This mischaracterizes the Court of Appeals' opinion. The Court of Appeals did not reach the merits because Plaintiff's claims are time-barred; no inference can be drawn as to whether the Court of Appeals believed the franchise fees ran afoul of the Headlee Amendment.[3] Likewise, the merits of Plaintiff's Headlee claim and related equitable claims need not be decided by this Court because the claims are time-barred, as discussed below.

[3] For the reasons extensively briefed by the City in the Court of Appeals, the franchise fee is not an unlawful tax.

SUMMARY OF ARGUMENT

The City interprets this Court's questions in its April 25, 2024 Order as relating to the threshold statute of limitations issue on which the Court of Appeals based its opinion (i.e., are Plaintiff's claims time-barred?) and not the substantive question of whether the franchise fee is an unlawful tax under *Bolt v City of Lansing*.[4] The City's answers to the Court's questions are summarized as follows.

Question 1: What are the criteria for determining whether a pass-through fee imposed by a local government on a business or utility is a tax[5] paid by a customer?

In light of *Taxpayers Allied for Constitutional Taxation [TACT] v Wayne Co*, 450 Mich 119; 537 NW2d 596 (1995), and *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005), *lv den* 474 Mich 1134, several criteria should be considered:

- Does the customer have a contract with the utility or with the local government?
- Does the customer pay the challenged fee directly to the utility or to the local government?
- Does the utility (rather than the customer) pay the charge to the local government?
- Does the local government place the challenged fee on the customer's bill, or does the utility?
- Is the customer liable to the utility for the challenged fee or to the local government?

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[4] The City understands that Plaintiff reads the Order the same way, as Plaintiff does not engage in a substantive *Bolt* analysis in his Supplemental Brief. To the extent it is instructive, the City's full analysis on the merits, including its *Bolt* and Headlee Amendment analysis, is included in its briefing in the Michigan Court of Appeals. *See* City's Brief on Appeal, COA No. 361138, filed October 12, 2022, pp. 26-35.

[5] In addressing this question, the City does not concede – and instead resolutely denies – that the franchise fee at issue is a "tax." Rather, the City's answer focuses on whether the customer or the utility is ultimately paying the franchise fee to the City.

- Does the local government have any recourse against the customer if the customer fails to pay the challenged fee to the utility?

In this case, Plaintiff and the class members have a contract with BWL, not the City. They pay the franchise fee to BWL, not the City. BWL, not the City, places the charge on the customers' bills, collects payments from its customers, and then pays the franchise fee to the City, as the BWL is obligated to do under the Franchise Ordinance. The Franchise Ordinance imposes no obligation on BWL's customers. Plaintiff and the class members have no liability to the City if they fail to pay the franchise fee to BWL; the City cannot collect from them, sue them, place a lien on their property, turn off their electricity, or take any other action against them. Only the BWL has recourse against the customers, and the City has no control over BWL's actions. Given these facts, the criteria above show the BWL's customers do not pay a franchise fee to the City, but rather pay BWL. Under *Morgan* and *TACT*, therefore, the statute of limitations on Plaintiff's claims began to run when the ordinance was adopted in June 2017, and Plaintiff's 2020 lawsuit was time-barred.

Question 2: In the context of a utility rate, may a utility customer challenge an improper pass-through fee as an improper rate in an action against the utility?

Yes. A municipally owned utility (like BWL) is not regulated by the Michigan Public Service Commission, so it may be sued by customers for unreasonable or unlawful charges.

Plaintiff claims that he cannot sue BWL because BWL is the City's collection agent, but Plaintiff's agency argument is fatally flawed. For BWL to be the City's collection agent, Plaintiff would have to owe an obligation to the City that BWL is collecting – but Plaintiff does not owe anything to the City. The City has no recourse against BWL customers if they fail to pay the franchise fee. It is BWL, not the customers, who are obligated to pay the franchise fee to the City. Further, the City exercises no control over BWL in terms of BWL's collection of the fee.

Question 3: If a utility customer may challenge a pass-through fee in an action against the utility, what effect does this have, if any, on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility?

If the customer can sue the utility (which it can, as discussed under Question 2), then the customer lacks standing or legal basis to sue the local government for the same fee, except as a member of the public under *TACT* and *Morgan*. That claim, however, is subject to the one-year statute of limitations that began to run when the ordinance was adopted in 2017.

Question 4: What authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91?

Plaintiff does not have standing to recover under MCL 141.91 because Plaintiff does not pay the challenged fee directly to the City. While the Headlee Amendment expressly gives standing to all taxpayers of the state, regardless of whether they pay the alleged tax directly, there is no such standing provision for claims under MCL 141.91.

Question 5: Is there case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and is there any case law supporting a different period of limitations?

No, the weight of case law does not support a six-year statute of limitations for equitable claims that are substantively the same as the Headlee Amendment claim, which is subject to a **one-**year statute of limitations.

The City's answers to the Court's questions support the outcome of the Court of Appeals' opinion, which is that Plaintiff's claims against the City must be dismissed because they are time-barred. The City therefore requests that this Court deny leave to appeal and allow the Court of Appeals' decision to stand.

ARGUMENT

I. A franchise fee is not "paid by a customer" to a local government where it is charged, collected, and enforced solely by the *utility*, not the local government.

This Court first asks what criteria should be considered when determining whether a "pass-through fee" imposed by a local government on a business or utility is a "tax" paid by the customer. Before identifying these criteria, it is worthwhile to discuss the nature and lawfulness of franchise fees under Michigan law.

A. Franchise fees are lawful.

The City construes the Court's use of the term "pass-through fee" to mean franchise fees that are charged by local governments to utilities and then "passed through" by utilities to customers. Franchise fees are not a novel concept in Michigan or elsewhere in the country.[6] The Michigan Constitution requires utilities like BWL to obtain a franchise from local governments like the City of East Lansing before using public rights-of-way to provide services. This is enshrined in the Michigan Constitution:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein **without first obtaining a franchise from the township, city or village**. Except as otherwise provided in this constitution the right of all counties,

[6] For treatment of utility franchise fees in other states, see *Mahon v City of San Diego*, 57 Cal App 5th 681, 708 (2020) (electric utility surcharge was a valid franchise fee, not a tax); *Zolly v City of Oakland*, 47 Cal App 5th 73 (2020) (*Zolly I*) and 13 Cal 5th 780 (2022) (*Zolly II*) (franchise fees are not considered taxes so long as the fee paid for the right to use a municipality's rights-of-way reflect a reasonable estimate of the value of the franchise); *Kragnes v City of Des Moines*, 714 NW2d 632 (Iowa, 2006) (electric franchise fee is not a tax where it is related to the cost necessary to regulate the activity); *City of Lakewood v Pierce County*, 106 Wash App 63, 75; 23 P3d 1 (2001) (franchise fee is not a tax if there the amount is related to the city's administrative and maintenance costs); and *King County v King County Water Districts Nos 20, 45, 49, 90, 111, 119, 125*, 194 Wash 2d 830, 835; 453 P3d 681 (2019) (county can charge a franchise fee for use of its rights of way for electric, gas, water, and sewer utilities).

> townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Const 1963, Art VII, § 29 (emphasis added). Charging the utility a fee for the use of the rights-of-way – that is, the franchise fee – is lawful in itself. As the City discusses at length in its Court of Appeals brief, the City incurs real and substantial costs in maintaining the rights-of-way that the BWL uses to deliver electric service to its customers, and the franchise fees that BWL pays to the City offset (but do not completely cover) those costs.[7]

In the context of regulated public utilities, the Michigan Legislature has recognized that the Michigan Public Service Commission cannot disturb prices for franchises set by local governments:

> The commission may establish by order rules and conditions of service that are just and reasonable. In determining the price, the commission shall consider and give due weight to all lawful elements necessary to determine the price to be fixed for supplying electricity, including cost, reasonable return on the fair value of all property used in the service, depreciation, obsolescence, risks of business, value of service to the consumer, the connected load, the hours of the day when used, and the quantity used each month. **However, the commission shall not change or alter the price fixed in or regulated by or under a franchise granted by a city, village, or township.**

MCL 460.557 (emphasis added). Although BWL is not regulated by the MPSC, this provision reinforces the propriety of franchise fees generally.

Thus, although Plaintiff describes the subject franchise fee with a tone of skepticism and suspicion, there is nothing unusual, unlawful, or improper about the City charging BWL a franchise fee for the use of its rights-of-way.

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[7] See the City's Court of Appeals brief for further analysis, including data supporting the proportionality between the amount generated by the franchise fee and the cost of maintaining the rights-of-way that BWL uses to provide service to its customers in the City. COA No. 361138, City's Brief on Appeal filed October 12, 2022, pp. 6-14, 26-35.

B. Plaintiff and the class paid the franchise fee to the BWL, not the City.

The City interprets the Court's first question as asking what criteria should be considered when determining whether the customer is paying the franchise fee to the utility or to the local government.[8] This is material to the statute of limitations because under *TACT* and *Morgan*, an individual who does not directly pay the fee to the local government must file suit within one year after the fee is initially approved, whereas an individual who directly pays the fee to the local government may file suit within one year after each assessment of the fee. *See TACT*, 450 Mich at 124-25, n 7; *see Morgan*, 267 Mich App at 515-16. That is, while both types of Headlee actions are governed by the one-year statute of limitations in MCL 600.308a(3) ("A taxpayer shall not bring or maintain an action under this section unless the action is commenced within 1 year after the cause of action accrued"), the "cause of action" accrues at different times depending on whether the plaintiff directly pays the fee to the local government, as summarized here:

Plaintiff pays alleged tax to local government.	**Plaintiff does *not* pay alleged tax to local government.**
Plaintiff may "sue for a refund within one year of the date the tax was assessed." *TACT*, 450 Mich at 125.	Plaintiff still has standing to sue under Const 1963, Art IX, § 32[9] but must file within one year after the enactment of the resolution or ordinance – "an action that is not continuing in nature." *TACT*, footnote 7; *see also Morgan*, 267 Mich App at 515-16.

[8] The question of what criteria should be considered when determining whether a particular charge is a user fee or a tax is already answered in *Bolt v City of Lansing*, 459 Mich 152 (1998).

[9] "Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article [the Headlee Amendment] and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit."

The Court of Appeals correctly held that because Plaintiff and the class members do not directly pay the franchise fee to the City, their claims had to be filed within one year after the franchise fee was initially approved, but they failed to do so, and thus their claims are time-barred.

Based on the analyses in *TACT* and *Morgan*, the City submits the following as the appropriate criteria for determining whether the customer is paying the franchise fee to the utility or to the local government:

1. Does the customer have a contract with the utility or with the local government?

   This criterion is derived from *Morgan*, wherein the Court of Appeals placed weight on the fact that "plaintiff paid her entire bill according to her **contractual obligation to Comcast**." *Morgan*, 267 Mich App at 515 (emphasis added). The franchise fee in *Morgan*, like the franchise fee here, was a contractual obligation between the utility and its customer, and not with the local government.

2. Does the customer pay the challenged fee directly to the utility or to the local government?

   TACT and *Morgan* distinguish between plaintiffs who pay the fee directly to the local government and those who do not in determining when a Headlee cause of action accrues. *Morgan*, 267 Mich App at 515; *TACT*, 450 Mich at 124 n 7.

3. Does the utility (rather than the customer) pay the charge to the local government?

   Morgan notes that "Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders." *Morgan*, 267 Mich App at 515. This, along with other factors, led to the *Morgan* court's conclusion that the customer did not directly pay the charge to the local government and thus was required to file suit within one year after the franchise fee was approved.

4. Does the local government place the challenged fee on the customer's bill, or does the utility?

   Again, *Morgan* recognized that "the mere listing of the [franchise fee] on a separate line does not render plaintiff the charge's payer. . . . [Comcast] paid the charge to defendant according to the franchise agreement." *Morgan*, 267 Mich App at 515.

5. Is the customer liable to the utility for the challenged fee or to the local government?

   This criterion is derived from *Morgan*, which recognized that "Defendant had no recourse against plaintiff for any unpaid portion of her bill." *Morgan*, 267 Mich App at 515. A customer who does not directly pay the fee to the local government has no liability to the local government for failure to pay.

6. Does the local government have any recourse against the customer if the customer fails to pay the challenged fee to the utility?

   As with the criterion above, the fact that the local government has no recourse or remedy against a utility's customer for failure to pay shows that the customer's legal obligation is to the utility, not the local government.

These criteria lead to the heart of the issue: whether the customers are legally obligated to pay the franchise fee *to the local government* (such that their one-year statute of limitations effectively "restarts" each time they are billed by the City) or whether their only obligation is *to the utility* (such that their remedy is against the utility, discussed below, and any claim against the City is as a member of the public pursuant to this Court's footnote 7 in *TACT*[10]).

In this case, the criteria definitively establish that Plaintiff and the class members owe the fee to BWL, not the City. Plaintiff and the class members contract with BWL, not the City, for

[10] *TACT*, 450 Mich at 124 n 7.

electric service and contractually agree to pay BWL's charges, including the franchise fee. BWL, not the City, places the charge on the customers' bills. Customers pay the franchise fee to the BWL – never to the City. Plaintiff and the class members have zero liability to the City if they fail to pay the franchise fee to BWL; the City cannot collect from them, sue them, place a lien on their property, turn off their electricity, or take any other action. Only the BWL has recourse against the customers. Plaintiff's counsel conceded as much during oral argument in the Court of Appeals:

> **Judge Gleicher**: Okay, so what happens if your client says "I'm not paying the 5% of my bill. I'm just not paying it."
>
> **Counsel**: Then the Board of Water and Light would shut their electric off.
>
> **Judge Gleicher**: Right, exactly.[11]

Thus, the BWL would have recourse against its customers; the City would not.

Curiously, Plaintiff claims in his brief that "the City makes sure that it has 'recourse' against customers who do not pay the Franchise Fees." (Pl. Supp. Brief, p. 19.) But this is fundamentally untrue. As "support," Plaintiff points to the *BWL's* available remedies, such as disconnecting the customer's electric service. *Id.* But the City does not disconnect any BWL customers' electricity or direct BWL to do so, nor would the City have the authority to do so. The City exercises no control over the BWL's contractual remedies with BWL's customers.

Consequently, under the criteria that was material to the decisions in *TACT* and *Morgan*, Plaintiff and the class members' sole legal obligation is to the BWL, not the City. Any claim against the City is as a member of the public under Const 1963, Art IX, § 32, and the statute of

[11] Link to oral argument video: https://www.youtube.com/watch?v=IetRU1y-10Q (Timestamp: 34:30-35:00.)

limitations for that claim expired one year after the Franchise Ordinance was approved pursuant to *TACT* and *Morgan.* Because Plaintiff waited three years to file suit, his claims are time-barred.

C. Plaintiff's "single criterion" argument based on agency law fails.

In response to the Court's first question, Plaintiff proposes only a single criterion: whether the customer bears the "legal incidence of the tax," a theory that Plaintiff bases on agency law.

Plaintiff relied on the concept of "legal incidence" in the Court of Appeals, but it is not a standard discussed in *TACT*, *Morgan*, or any other Headlee Amendment case law. Regardless, while Plaintiff argues that BWL's customers bear the "legal incidence" of the franchise fee, this Court's case law answers differently.

The concept of the "legal incidence of the tax" typically arises in the context of a sales or use tax and refers to the entity upon which a tax is legally imposed, regardless of who actually bears the economic burden of that tax. *See Fed Reserve Bank of Chicago v Dept of Revenue of State*, 339 Mich 587, 597; 64 NW2d 639 (1954). In *Federal Reserve Bank*, for example, this Court noted that the "legal incidence" of a sales tax "falls upon the retailer, [because] he alone is required by law to pay the tax, and he passes on the burden to plaintiff." *Id.* at 597. This Court continued:

> Here, as there, the burden on plaintiff is only such as it chooses to assume in doing business with retailers. The State collects no tax from plaintiff and the latter is required to pay no tax to the State.

Id. at 597.

The same is true here: the franchise fee is "legally imposed" on BWL under the Franchise Ordinance, "regardless of who actually bears the economic burden" of the franchise fee. *See Federal Reserve Bank*, 339 Mich at 587. BWL alone is required to remit the franchise fee to the City, not BWL's customers. The burden is on a BWL customer "only such as it chooses to assume in doing business with [BWL]." *Id.* If Plaintiff wishes to avoid paying the franchise fee, he can choose an alternative energy source, such as solar energy, rather than contracting with BWL for

traditional electric service. The City "collects no tax from plaintiff and the latter is required to pay no tax to the [City]." *Id.* Thus, under Plaintiff's own theory of "legal incidence," it is BWL – not Plaintiff and the class – who owes the obligation to BWL and is the "taxpayer."

Nonetheless, Plaintiff advances its "legal incidence" argument based on its theory that the BWL was a "mere collection agent" for the City. (Pl. Supp. Brief, p. 10.) Plaintiff contends that under agency law principles, the City and BWL share a single "legal identity." *Id.* Plaintiff goes so far as to proclaim that "[u]nder agency law, the LBWL is the City" and that the City and BWL "are one and the same entity for purposes of their dealings with third parties." *Id.* Plaintiff identifies *no cases* where an independent utility provider was found to be a "collection agent" of a local government. His theory fails as a matter of law.

The fatal flaw in Plaintiff's agency theory is that there is no obligation (contractual or otherwise) between the City and Plaintiff for payment of the franchise fee. Plaintiff's Supplemental Brief repeatedly refers to the BWL as a "collection agent" for the City. (Pl. Supp. Brief, pp. 2, 5, 9, 10, 18, 19, 20.) But for there to be a "collection" agency relationship, there must be a debtor who owes a debt to the principal. "The characteristic of an agent is that he is a business representative. His function is to bring about, modify, accept performance of, or terminate ***contractual obligations between his principal and third persons***." *St Clair Intermediate School District v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 557; 581 NW2d 707 (1998), *quoting Saums v Parfet*, 270 Mich 165, 172; 258 NW 235 (1935) (emphasis added). A principal also must have the right to control the conduct of the agent with regard to the subject of the agency. *Id.* Moreover, "agency agreements do not create rights in third parties." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 449; 678 NW2d 638 (2004).

Here, BWL is not a "collection agent" because Plaintiff and the class members owe no debt or contractual obligation to the City, as discussed under Question 1. There is no "contractual

obligation between the principal [the City] and third persons [BWL's customers]." *St Clair, supra.* Plaintiff has not shown how the City is purportedly in "control" of BWL. Nor can any so-called agency agreement between the City and BWL create rights or obligations in third parties, such as Plaintiff. Plaintiff's agency theory therefore fails, as the Court of Appeals correctly recognized:

> 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. . . . Rather, the LBWL and the City were two independent parties with contractual obligations to one another.

(Exhibit D, Op at 5.) The City therefore urges this Court to reject Plaintiff's single-criterion "legal incidence/collection agent" test and instead apply the factors proposed by the City above.

II. A utility customer may bring a legal action against a municipal utility for an unlawful or reasonable fee.

This Court's second question is whether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility. The answer is yes.

Without question, the customers of a municipally owned utility (like BWL) can sue to challenge an allegedly unlawful or unreasonable charge. That was the procedural posture of *Bolt v City of Lansing*, where this Court established the three-prong test for a Headlee Amendment claim in a customer's lawsuit against the City of Lansing based on the charges for its municipally owned water system. *Bolt v City of Lansing*, 459 Mich 152, 154; 587 NW2d 264 (1998). *See also, Mackinaw Area Tourist Bureau, Inc v Vill of Mackinaw City*, -- Mich App --, No. 361625, 2024 WL 2484550, (Mich Ct App, May 23, 2024) (water and sewer customer sued village, claiming

increased rates were an unlawful tax); *Shaw v City of Dearborn*, 329 Mich App 640, 645; 944 NW2d 153 (2019) (customers sued city over rates for city-provided utilities).

The same is true for challenges to electric rates imposed by municipally owned utilities like BWL. "Municipally-owned utilities are exempt from regulation by the Public Service Commission [MCL 460.6], but rates fixed for service rendered by such utilities are reviewable by the courts." *Chocolay Charter Tp v City of Marquette*, 138 Mich App 79, 83; 358 NW2d 636 (1984). Municipal utility rates (including electric rates, which were at issue in *Chocolay*) must be "reasonable and equitable." *Id., citing Preston v Bd of Water Comm'rs of Detroit*, 117 Mich 589, 597; 76 NW 92 (1898). Specifically, courts may examine the "rationale and elements underlying the assessed rates." *Id., citing Detroit v Highland Park*, 326 Mich 78, 99; 39 NW2d 325 (1949), and *Meridian Twp v City of East Lansing*, 342 Mich 734, 746–751; 71 NW2d 234 (1955).

Consequently, if BWL customers believe the franchise fee is unlawful or unreasonable, they may bring a legal action against BWL, just as they could challenge any other rate or fee charged by BWL. *See Chocolay*, *supra.*

Plaintiff responds that it could not sue the BWL because the franchise fees are not part of its "rates," and a utility rate is "intended to recover a utility's . . . costs of service." (Pl. Supp. Brief, p. 20.) Plaintiff's attempt to distinguish "rates" from the "franchise fee" is irrelevant here. Although *Chocolay* and other utility cases generally address rates, nothing in those cases bars a customer from challenging the lawfulness of other utility charges or fees. Plaintiff offers no legal authority as to why this distinction (rates versus other utility charges) is legally significant.

Plaintiff further argues that "a collection agent does not obtain ownership of collected funds, which, by operation of law, become the property of the principal at the moment they are collected." (Pl. Supp. Brief, p. 20.) But as discussed under Question 1, there is no contractual obligation between the City and Plaintiff. The City is not a "principal" with respect to any debt

owed to it by Plaintiff because Plaintiff has no legal obligation to pay the franchise fees to the City. Plaintiff's "collection agent" theory does not work under these facts because the City did not hire BWL to collect a debt that a customer owed *to the City*. BWL's customers owe the franchise fee *to the BWL*, and thus any claim that the fee is unlawful or unreasonable can be made against BWL.

III. The availability of a legal action against a utility defeats a claim against the local government for recovery of the same fee.

This Court next asks what effect, if any, the availability of that challenge (a customer's suit against the utility) has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility.

The answer is that the availability of that legal action means the customer does not have a direct "taxpayer" claim against the local government. Because Plaintiff and the class owe a legal obligation to the BWL (not the City) to pay the franchise fees, and because Michigan law allows customers to sue a municipally owned utility to challenge utility charges, there is no legal avenue for Plaintiff and the class members to sue the City under the Headlee Amendment, *except* as members of the public within one year after the franchise fee was initially approved. *See TACT*, 450 Mich at 124-25, n 7; *see Morgan*, 267 Mich App at 515-16; *see* Const 1963, Art IX, § 32.

Headlee Amendment claims are generally made in cases where the plaintiff is paying the alleged tax directly to the local government. *See, e.g., Bolt*, 459 Mich at 152 (plaintiff paid stormwater charge directly to city); *TACT*, 450 Mich at 119 (plaintiffs paid real property transfer taxes directly to county); *Midwest Valve & Fitting Co v City of Detroit*, -- Mich App --, No. 358868, 2023 WL 3766730 (Mich Ct App, March 9, 2023) (pending MOAA in this Court) (plaintiffs paid annual permit fees directly to city).

That is not the case here, and the difference is dispositive as to when the Headlee Amendment's one-year statute of limitations begins to run. As discussed above, if a customer is

legally obligated to pay the franchise fee to the local government, then the customer's one-year statute of limitations effectively "restarts" each time they receive a bill from the local government. But if the customer's only obligation is *to the utility*, then the customer's remedy is against the utility, and any claim against the local government is as a member of the public pursuant to Article IX, § 32 of the Constitution as described by this Court in *TACT*[12].

Plaintiff and the class members fall in the latter category: they do not pay the alleged tax to the local government. Their claim, if a claim exists at all, is against the person with whom they contracted: BWL. Plaintiff's statute of limitations could not possibly run from "the date the tax was assessed" because the City *never assessed* Plaintiff or the class members. The "starting point for the limitations period" is when the *defendant* – here, the City – did the alleged wrong. *Morgan*, 267 Mich App at 516. Because the City did not send any electric bills, the bills themselves cannot start the clock on the statute of limitations. Rather, Plaintiff was required to file his claim within one year after the Franchise Ordinance was approved, but he failed to do so, and the Court of Appeals' decision should be upheld.

IV. Plaintiff does not have standing to recover under MCL 141.91.

This Court next asks what authority provides Plaintiff with standing to pursue recovery of an improper tax under MCL 141.91. The answer is none.

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

[12] *TACT*, 450 Mich at 124 n 7.

As this Court knows, the standing inquiry focuses on whether a litigant "is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010). If there is a private cause of action under MCL 141.91, the proper plaintiff would be a person against whom a tax was imposed, levied, or collected in violation of the statute.

Here, as discussed above, the City has not imposed, levied, or collected a franchise fee against Plaintiff or the class. Rather, the only entity required to pay the franchise fee to the City is BWL, and BWL has not challenged the franchise fee. Plaintiff and the class therefore lack standing to assert any kind of claim under MCL 141.91.[13,14]

Notably, the Michigan Constitution gives standing for *Headlee Amendment* claims to members of the public who do not directly pay the tax[15]:

> **Any taxpayer of the state shall have standing** to bring suit in the Michigan State Court of Appeals **to enforce the provisions of Sections 25 through 31, inclusive, of this Article** and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

Const 1963, Art IX, § 32 (emphasis added). But there is no analogous provision for claims under MCL 141.91. That is, there is no constitutional provision, statute, or other authority that gives

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[13] Although standing was explicitly addressed in the lower courts, standing can be raised at any time, including for the first time on appeal. *T & V Assoc, Inc v Dir of Health & Human Servs*, No. 361727, 2023 WL 4277882, at *4 (Mich Ct App, June 29, 2023).

[14] The City interprets this Court's question as focusing solely on standing and not whether Plaintiff's substantive claims under MCL 141.91 are meritorious. The City's position is that the claims are time-barred, so this Court need not reach the merits. For that reason, the City is not responding to Plaintiff's arguments on pages 24-28 of his Supplemental Brief, which go to the substance of his claims. If this Court is inclined to consider the substance, the City has briefed those issues in the Court of Appeals.

[15] Subject to the one-year limitations period in MCL 600.308a(3), as described in footnote 7 of *TACT*.

standing to a member of the public who does not directly pay the contested charge to bring a private cause of action under MCL 141.91. This omission must be construed as intentional. *See, e.g., People v Lewis*, 503 Mich 162, 165–66; 926 NW2d 796 (2018) ("when the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional"). Because the Legislature has not given standing to the public for claims under MCL 141.91, Plaintiff and the class lack standing to pursue claims under MCL 141.91.

V. The weight of case law supports the City's position that Plaintiff's MCL 141.91 claims are subject to the same one-year statute of limitations as his Headlee claim.

This Court's final question is "whether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there any case law supporting a different period of limitations." A large body of Michigan case law supports the Court of Appeals' opinion that the one-year statute of limitations in MCL 600.308a, which governs Headlee Amendment claims, applies to plaintiff's equitable claims.

As discussed above, MCL 141.91 provides that "[e]xcept as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

This statutory language covers the same substance as the Headlee Amendment. In fact, courts use *Bolt*'s Headlee Amendment test to evaluate claims brought under MCL 141.91. *See Brunet v City of Rochester Hills*, unpublished opinion of the Court of Appeals, issued December 2, 2021 (Docket No. 354110), 2021 WL 5750616, p *4 **(Exhibit E)**. Substantively, a claim under MCL 141.91 requires the same proofs as a Headlee Amendment claim. Both the Headlee Amendment and MCL 141.91 require the City look to constitutional or statutory authority to impose a tax, although the Headlee Amendment is more stringent (as it requires a vote of the

electorate to approve the tax). The overlap between these two provisions is fatal to Plaintiff's claims under MCL 141.91 because it means that the statute is subject to the one-year statute of limitations in MCL 600.308a(3). Plaintiff's counts under MCL 141.91 are derivative of his Headlee Amendment claim and cannot be used to subvert the one-year statute of limitations that applies to Headlee Amendment claims.

This Court "has long recognized" that a statute of limitations "may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. This is a longstanding proposition that applies in many contexts where common law or equitable doctrines intersect with the modern statutory scheme. *See McDermott v Alger*, 186 Mich 278, 280-281; 152 NW 991 (1915) (explaining that if a statute of limitations is applied to a mandamus proceeding, it must be applied by analogy).

To resolve Counts II and III of Plaintiff's complaint, the circuit court necessarily needed to reach the merits of Plaintiff's Headlee Amendment claim: it had to analyze the *Bolt* factors and decide whether the franchise fee is an appropriate user fee or alleged tax. Counts II and III are derivative of the Headlee Amendment claim and thus are subsumed by it, meaning the Headlee Amendment provides the sole remedy where an unlawful tax is alleged to have been assessed.

Plaintiff's "equitable claims" are artful pleadings that attempt to revive Plaintiff's time-barred Headlee Amendment claim by bootstrapping it to specious equitable theories claiming violations of a statute (MCL 141.91) that is coextensive with the Headlee Amendment. By doing so, Plaintiff sought to avoid the statute of limitations and "reach back" to capture damages no longer available. This is contrary to Michigan law. The statutory scheme the Legislature enacted is comprehensive and exclusive. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 390; 738 NW2d 664 (2007). This is nothing more than a novel method of trying to create a non-statutorily based exception to the Legislature's statutory scheme.

Plaintiff relies on a 2019 unpublished decision in *Gottesman v City of Harper Woods*, in which the Court of Appeals suggested that claims under MCL 141.91 offer a different remedy than the Headlee Amendment because they allow a longer period of recovery. (Application, p. 30, n 17.) But importantly, as Plaintiff acknowledges[16], this Court vacated the Court of Appeals' decision in *Gottesman* and remanded the case for the Court of Appeals to decide "whether plaintiff may seek equitable remedies for the alleged violation of MCL 141.91 beyond the one-year limitations period governing the Headlee Amendment claim." *Gottesman v City of Harper Woods*, 964 NW2d 365 (Mem). And this Court went further, stating that "the fact that the six-year limitations period for plaintiff's equitable claims, MCL 600.5813, exceeds the one-year limitations period for the Headlee Amendment claim, MCL 600.38a(3), **does not necessarily mean that the equitable claims may proceed**." *Id*. at 366 (emphasis added). The parties subsequently settled the case and stipulated to dismiss the appeal.

Plaintiff's citation to *Gottesman* for the proposition that claims under MCL 141.91 are entitled to a longer limitations period is curious. This Court's Order in *Gottesman* found error in the Court of Appeals' decision that a longer limitations period for equitable claims means the equitable claims are distinct from the Headlee claims. This supports the City's position, not Plaintiff's position.

More importantly, *TACT* supports the imposition of a one-year statute of limitations on Plaintiff's equitable claims. The *TACT* Court held that a statute of limitations "may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. *TACT* cited *Lothian v City of Detroit*, 414 Mich 160; 324 NW2d 9 (1982), in which this Court observed as follows:

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[16] (Pl. Supp. Brief, p. 36.)

> Equity follows the analogies of the law in all cases where an analogous relief is sought upon a similar claim. . . . The reason underlying this "by analogy" technique is self-evident. **This approach plugs the gap which might otherwise allow a plaintiff to dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity.**
>
> If [a claim is held] barred at law, it must be held barred in equity also. The policy of the statute cannot be evaded by the party electing one forum rather than another for litigating the rights which he disputes; but equity by analogy will apply the limitation to his case.

Id. at 169-70 (internal citations and quotation marks omitted) (emphasis added).

This is what Plaintiff attempts to do here: he wishes to "dodge the bar set up by a limitations statute" (the one-year statute of limitations for Headlee claims) "by resorting to an alternate form of relief provided by equity" (claims under MCL 141.91). *Id.* But because his claim is barred at law, "it must be held barred in equity also." *Id.* The one-year limitations period for the Headlee claim must apply by analogy to Plaintiff's "equitable" claims under MCL 141.91, as the Court of Appeals correctly held.

Plaintiff's attempt to distinguish *TACT* is unpersuasive. Plaintiff claims that *TACT* involved a party seeking "three different types of relief" under the Headlee Amendment. But plaintiff admits that he seeks the same type of relief in Counts I, II, and III – he just wants additional years of refunds under his equitable claims that he is barred from recovering under the Headlee Amendment. (Pl. Supp. Brief, p. 37.) In other words, plaintiff's equitable claims attempt to recover precisely what MCL 600.308a prevents him from recovering.

Plaintiff cites other cases for the proposition that the six-year statute of limitations applies to assumptive and unjust enrichment actions, but these cases do not support Plaintiff's argument. *Dixon-Brown v Covenant Cemetery Services*, unpublished opinion of the Court of Appeals, issued February 10, 2022 (Docket No. 355476), slip op at 3, held that a six-year statute applies to promissory estoppel and unjust enrichment actions because those actions are "dependent on the

existence of contract or contract principles." *Dixon-Brown* was a case about contract principles, not claims analogous to time-barred Headlee claims. See *id*., slip at 1-2. The same is true for *Ganson v Detroit Pub Schs*, unpublished opinion of the Court of Appeals, issued January 21, 2021 (Docket No. 351276), and *Carey v Foley & Lardner, LLP*, unpublished opinion of the Court of Appeals, issued August 9, 2016 (Docket No. 321207). None of these cases are instructive here.

Plaintiff's interpretation of MCL 141.91's legislative history does not advance his argument, and it ignores that the 1964 statutory scheme was modified by the Headlee Amendment 14 years later. The purported "distinctions" between MCL 141.91 and the Headlee Amendment are explained by the fact that MCL 141.91 was enacted pursuant to the original language of the Michigan Constitution, but the Headlee Amendment amended those sections and effectively subsumed MCL 141.91.

Simply put, Plaintiff filed his class action lawsuit too late, and he cannot dodge the one-year statute of limitations through creative pleading. This result is not unduly harsh and does not deprive Plaintiff of a remedy. Although Plaintiff complains that "the Court of Appeals effectively ruled that the affected citizens cannot sue for a refund regardless of the timing of the lawsuit," this is not the case. Plaintiff could have filed suit within one year after the Franchise Ordinance was adopted, but he did not do so. In the words of this Court:

> The one-year limitation is not in the class of limitation periods that are "so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." . . . It is a reasonable restriction designed to protect the fiscal integrity of governmental units who might otherwise face the prospect of losing several years' revenue from a tax that had previously been thought to comply with Headlee restrictions.

TACT, 450 Mich at 125-26. This Court should therefore uphold the decision of the Court of Appeals.

CONCLUSION

For these reasons, the City of East Lansing requests that this Court deny Plaintiff's Application for Leave to Appeal.

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WORD COUNT CERTIFICATION

This brief contains 8,862 countable words, in compliance with MCR 7.212(B).

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