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# In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Elizabeth L. Gleicher, Colleen A. O'Brien, and Allie Greenleaf Maldonado

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 Nos. 361105, 361138

Ingham County Circuit Court

Trial Court Case No. 20-199-CZ

## AMICUS CURIAE BRIEF FOR THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF EAST LANSING

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August 8, 2024

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Municipal League (MML) is a nonprofit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund. MML operates the Legal Defense Fund through a board of directors that is broadly representative of its members. The purpose of the fund is to represent the member cities and villages in litigation of statewide significance.

This case presents questions about the applicable standards for challenging franchise fees that a utility provider negotiates and pays to a municipality in exchange for the use of public streets. The practice of charging utility franchise fees dates to at least the 1800s and was well recognized by 1908 when Michigan Constitution first guaranteed municipalities "reasonable control" of their highways, streets, and alleys. See Const 1908, art 8, § 28. The MML has a strong interest in protecting its members' rights to reasonable control and ensuring they are not subjected to undue liability when negotiating utility franchise ordinances.[1]

[1] In accordance with Michigan Court Rule 7.312(H)(5), no counsel for a party to this appeal authored this brief in whole or in part. No counsel or party to this appeal, nor any other person other than the amici curiae, their members, or their counsel, made a monetary contribution towards the preparation of this brief.

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## QUESTIONS PRESENTED

1. Should courts use the three-factor test that this Court articulated in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998), to determine whether a franchise fee that a utility provider negotiates and pays to a municipality is an unlawful tax?[2]

**Answers:**

The circuit court and plaintiff answer "yes" despite the Court of Appeals's prior decision in *Kowalski v Livonia*, 267 Mich App 517, 519-520 & n 2; 705 NW2d 161 (2005), which is directly on point and should have controlled the outcome of this case in the lower courts.

The Court of Appeals did not address the question because it determined that the plaintiff's claims were barred by a one-year statute of limitations.

The City and the MML answer "no" on the ground that franchise fees are contractual obligations that are inherently distinct from taxes and therefore do not — under any circumstance — violate MCL 141.91 or the Headlee Amendment. See Def's COA Br (10/12/22), p 26-27. That being said, the MML believes that courts can review claims for injunctive relief alleging that a franchise fee violates the "reasonable control" clause in Article 6, Section 29 of the Michigan Constitution.

2. Can a claim alleging that a franchise fee is an unlawful tax be filed by a utility customer more than one year after the municipality first imposed it by ordinance?

**Answers:**

The circuit court and plaintiff answer "yes."

The Court of Appeals, the City, and the MML answer "no."

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[2] The MML believes that this question is a restatement of — or at least derived from — the first issue that the Court asked the parties to address in its order dated April 25, 2024. The parties, however, appear to have interpreted that order differently, as neither party addressed the substantive merits of the plaintiff's claims in their supplemental briefs. Because of this, the answers summarized here are taken from the parties' briefs in the Court of Appeals.

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## INTRODUCTION

In 2017, the City of East Lansing adopted a franchise ordinance that requires a utility provider to make periodic payments to compensate the City for its use and occupation of public streets. Three years later, a utility customer filed a class-action lawsuit alleging that those payments constitute unlawful "taxes" because they result in net revenue for the City rather than merely offsetting its expenses. The Court of Appeals ruled in favor of the City on a statute-of-limitations defense, finding that the complaint was filed more than a year after the claim accrued.

That decision was correct — so far as it goes — but it could have gone further. As explained below, negotiated franchise fees are inherently distinct from taxes and therefore do not violate MCL 141.91 or the Headlee Amendment under any circumstance. The practice of charging franchise fees dates to at least the 1800s and was well recognized when the Michigan Constitution first guaranteed municipalities "reasonable control" of their highways, streets, and alleys. See Const 1908, art 8, § 28. Because the authority to charge franchise fees is necessarily implied from the text of the Constitution, this Court should affirm the appellate judgment on the grounds that the complaint fails to state a claim on which relief can be granted. Doing so would move the law in a positive direction that is more consistent with the constitutional status of the municipal-franchise power. It would also be in line with prior decisions of the Court of Appeals, the U.S. Supreme Court, and a variety of other courts throughout the country. See, e.g., *Kowalski v Livonia*, 267 Mich App 517, 519-520 & n 2; 705 NW2d 161 (2005) (citing *City of St Louis v Western Union Tel Co*, 148 US 92, 97-100; 13 S Ct 485; 37 L Ed 380 (1893)); see also cases cited *infra* p 19.

Alternatively, the Court could affirm the decision below based on the statute of limitations in MCL 600.308a(3) or could simply deny leave to appeal.

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## HISTORY OF THE MUNICIPAL-FRANCHISE POWER IN MICHIGAN

Utility franchises enjoy a lengthy heritage that traces back to English common law. Blackstone defined the term "franchise" as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." 2 Blackstone, Commentaries on the Laws of England, p *37. The practice of requiring franchises to conduct business on public property was imported from England to the new world, where states and municipalities exercised the power formally reserved to the king. See 2 Dillon on Municipal Corporations (2d ed), § 518, pp 621-623.

Although no longer dependent on the king's prerogative, the term "franchise" is still understood to be a special privilege granted by the government to an individual or corporation. See *Hamtramck Twp v Rapid R Co*, 122 Mich 472, 474; 81 NW 337 (1899). It refers specifically to a power of public concern that is "reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest." *California v Central Pac R Co*, 127 US 1, 41; 8 S Ct 1073, 32 L Ed 150 (1888). The term includes almost any grant of a right to conduct business in public streets, including grants "for railway tracks, motor busses operated for hire, gas pipes to supply gas for hire, water pipes to supply water, telegraph or telephone poles, electric light poles, etc." 12 McQuillin, Municipal Corporations (3d ed), § 34:6 (citations omitted).

When a franchise is granted, it is "in all respects a contract, with the exchange of consideration by each side." *Trs of Dartmouth Coll v Woodward*, 17 US (4 Wheat) 518, 643; 4 L Ed 629 (1819); accord *City of Niles v Mich Gas & Electric Co*, 273 Mich 255, 262; 262 NW 900 (1935). Franchise ordinances typically consist of two key components. On the one hand, the utility provider receives the right to occupy and conduct business for profit on public property, which is not ordinarily permitted. Garfield & Lovejoy,

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Public Utility Economics (1964), p 28. In exchange, the government negotiates for contractual terms and conditions that regulate the provider's operations. *Id.*

By at least the late 1800s, it was well established that the contractual terms of a franchise could include requirements relating to the provision of service, limitations on the rates that the utility provider is permitted to charge, see *id.*, and requirements that the provider make payments to the government to compensate it for the use of public property, see, e.g., *Western Union*, 148 US at 97 (1893). Payments of this type — referred to as "franchise fees" — are analogous to rent paid for the use of other types of real property. *Id.* The authority to contract for them is therefore inherent in the franchise power. See *TCG Detroit v City of Dearborn*, 261 Mich App 69, 94; 680 NW2d 24 (2004).

One rationale for charging franchise fees is that streets are a valuable public asset, and that the public should therefore derive some benefit when streets are used for reasons other than transportation. See, e.g., *Western Union*, 158 US at 99; *Erie Telecommunications v Erie*, 659 F Supp 580, 595 (WD Pa, 1987), aff'd on other grounds, 853 F2d 1084 (CA 3, 1988) ("[A]s a city holds the streets in trust for the public, it would be a dereliction of a city's fiduciary duty to grant franchise rights, particularly where the grant acts to exclude other members of the public, without receiving the fair market value for the property."). Based on this rationale, some jurisdictions historically required the payment of fees or even public bidding processes anytime a franchise was granted. See, e.g., *Daly v Georgia, S&F R Co*, 80 Ga 793; 7 SE 146, 148 (1888); *Power Co v City of Saginaw*, 193 F 1008, 1010-1011 (CC ED Mich, 1911).

The grant of a franchise is an exercise of the sovereign power of the state, which is initially vested in the Legislature. *Consumers Power Co v Michigan Consol Gas Co,* 213 Mich App 82, 87; 539 NW2d 550 (1995). In Michigan, the Legislature historically delegated the franchise power to municipalities. See *People ex rel Maybury v Mut Gas-Light*

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*Co*, 38 Mich 154, 155 (1878); see also 12 McQuillin, § 34:1 ("[T]he tendency of modern legislation is to delegate to the local authorities the exclusive dominion over the streets"). For example, an early statute regulating gas and electric providers authorized them to lay pipes under public streets, but only "with the consent of the municipal authorities of such cities, townships or villages through which the same are laid [and] under such reasonable regulations as they may prescribe." 1897 CL 7123.

After decades under a delegation-based regime, the framers of the 1908 Constitution proposed that the municipal-franchise power be constitutionally guaranteed. See Const 1908, art 8, § 28. This change went hand-in-hand with a general move toward local autonomy. Under the prior constitution, all Michigan cities existed under charters that were directly enacted by the Legislature. See 1 Clute, The Law of Modern Municipal Charters and the Organization of Cities on Commission, City Manager and Federal Plans (1920), § 241, pp. 394-395. A key innovation of the1908 Constitution was to establish local "home rule" by requiring the Legislature to grant "the electors of each city and village [the] power and authority to frame, adopt and amend its charter, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state." Const 1908, art 8, § 21. This provision "greatly extended the powers of cities to govern themselves," thereby altering the balance of state and local power. *Bowler v Nagel*, 228 Mich 434, 436; 200 NW 258 (1924).

Supporters of home rule argued that in order for it to succeed, municipalities would need to have control over local streets and the power to grant local utility franchises. See, e.g., 2 Proceedings and Debates of the Constitutional Convention of the State of Michigan 1907-1908 ("*1908 Convention Debates*"), pp 1051, 1406 (comments of Delegates Burt and Hally). As first proposed, the municipal-franchise power was

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limited to telephone franchises, *id.* at 1247, and it was intended to override recent legislation that gave phone companies an unfettered right to install telephone poles without local approval, *id.* at 1049, 1051, 1406. In debating the measure, the idea emerged that local control was desirable not only in the context of phone companies, but rather with respect to public utilities more broadly. See *id.* at 1053. The initial proposal was thus amended to provide:

> No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets , alleys or other public places of any city, village or township for wires, poles , pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the control of their streets, alleys and public places is hereby reserved to such cities, villages and townships. [*1908 Convention Debates*, p 1380].

Proponents of the municipal-franchise power argued that many aspects of public utilities were matters of local concern, and that municipalities were better situated to address them than the Legislature. As one delegate put it, anyone who "had any experience with telephone companies in the matter of trees and poles know that the cities and villages ought properly to have the right to regulate the manner in which these companies shall proceed to cut down trees and to take away portions of them and erect poles right in front of people's horse-blocks and front windows, and everything of that sort." *Id.* at 1050. Delegates expressed similar confidence that municipalities could effectively regulate utility rates through the terms of their franchise ordinances. See 1051-1052 (comments of Delegates Rockwell, Taylor, Adams, Sawyer). For example, one delegate alluded to the fact that elected municipal officials were more accountable to local citizens and argued that the proposal to require municipal franchises "ought to prevail, in order that the people may have a little say" regarding utility rates and other related issues. *Id.* at 1051.

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Although these arguments carried the day, some delegates were wary of placing local streets entirely under the control of municipal governments. *Id.* at 1405-1407. They worried, among other things, that the proposal quoted above gave municipalities too much power to block uses that were opposed by local residents but beneficial to the state as a whole. *Id.* To assuage these fears, a delegate moved to amend the proposal by adding the word "reasonable" before the word "control," so that the last sentence read as follows: "The right of all cities, villages and townships to the ***reasonable control*** of their streets, alleys and public places is hereby reserved to such cities, villages and townships." *Id.* at 1408 (emphasis added).

A review of the debate surrounding the reasonable-control clause reveals that the delegates understood it to have at least three effects. For one, Delegate Lawton Hemans, the delegate who introduced the amendment, explained that it would prevent municipal governments from excluding public utilities altogether, as opposed to merely negotiating the conditions for a public utilities' operations. *Id.* at 1408. As noted above, the possibility of exclusion was the principal worry of the delegates who initially proposed constitutionalizing the municipal-franchise power. See *id.* at 1407-1408.

In addition, several delegates noted that by limiting the extent of the "control" delegated to municipal governments, some degree of the control would remain vested in the Legislature. See, e.g., *id.* at 1405.[3] In other words, the Legislature would retain the power to adopt legislation to override unreasonable municipal ordinances. The

[3] Notably, when Mr. Hemans was asked whether his amendment would "relate in any manner to the rights granted" in the first sentence of the proposal — the sentence that gave municipalities the franchise power — he confusingly responded that it would not. *1908 Convention Debates*, p 1408. When viewed in context, it appears that this response is best understood to mean only that the Legislature would not be able to statutorily eliminate the municipal-franchise power altogether. As another delegate put it: "I understand the answer of the gentleman who makes the motion to be that he does not think the insertion of the word 'reasonable' would be a restriction upon the obligation of the public utility to obtain such franchise before it could do business." *Id.*

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Address to the People that was given at the close of the convention noted this rationale, explaining that "without the word 'reasonable' or a similar qualification the section would practically deprive the state itself of authority over its highways and public places." *Id.* at 1433.

Finally, the delegates discussed the likelihood that the word "reasonable" would be construed as creating a private cause of action allowing utility providers to challenge franchise conditions on the grounds that they were unreasonable. An opponent of an earlier proposal argued that if the word "reasonable" is added, "every franchise and every right that is granted by any municipality to any such institution will be a subject of litigation, because if a question is afforded in the slightest the public utility can go into the courts . . . and insist that the conditions of the franchise are not reasonable." *Id.* at 1407. While this argument was likely hyperbolic, no delegate questioned the proposition that courts could review the reasonableness of franchise conditions. See *id.*

After the addition of the reasonable-control clause, the previously controversial proposal was unanimously approved by the convention delegates and then ratified by the voters as Article 8, Section 28 of the 1908 Constitution. Its language now appears in nearly identical form in Article 7, Section 29 of the 1963 Constitution. See *City of Taylor v Detroit Edison Co*, 475 Mich 109, 116 n 13; 715 NW2d 28 (2006).

Acting pursuant to the constitutionally vested franchise power, municipalities today regularly negotiate and approve franchises for a wide range of public utilities, including heat, electricity, cable, and telephone service. Franchises are typically granted in the form of municipal ordinances that are signed by the utility provider, consistent with their contractual nature. See Bloom & Smith, *Understanding Township Franchises and Right-of-Way Consents*, Michigan Township News (June 2023)

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("*Understanding Township Franchises*"), p 13.[4] They address topics such as the size of the utility provider's service area, the process for relocating equipment to accommodate future uses of the right-of-way, regulations for tree-trimming and other maintenance, regulations for the blocking of traffic during maintenance work, etc. *Id.* It is less common for modern franchises to require the payment of franchise fees, because utility providers tend to resist such requirements during negotiations. *Id.* at 14; see also COA Op at 2 ("Consumers refused to pay a franchise fee . . . ."). Nevertheless, it remains well-established that the "right to the reasonable control of the streets carries with it the implied power to contract for [payment of] a fee for consent," *TCG Detroit*, 261 Mich App at 94 (2004), and many municipalities still do so.

## ARGUMENT

### A. When a utility provider negotiates and pays a franchise fee to a municipality in exchange for the occupation and use of public streets, that fee is not — under any circumstance — a "tax" that violates MCL 141.91 or the Headlee Amendment.

MCL 141.91 and the Headlee Amendment both limit municipalities' ability to levy new taxes. See MCL 141.91; Const 1963, art 9, § 31. Because those limits apply specifically to the taxing power, a plaintiff that brings a challenge based on either must prove that the charge at issue is a "tax" as opposed to some other type of exaction. See *Kowalski*, 267 Mich App at 519.

Drawing on this Court's seminal decision in *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998), the complaint in this case alleges that the defendant levied an unlawful tax by contractually requiring a utility provider to pay a portion of its revenue in exchange for the right to occupy and use city streets. See COA Op at 2.

[4] This article is over 20 years old but is still recognized as a comprehensive review of the considerations for negotiating franchises. Fisher et al., Michigan Municipal Law, (ICLE, July 2018 Update), § 11.31, p 450. A copy of the article is included in the appendix to this brief, along with the one unpublished cases cited herein.

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According to the plaintiff, the charge qualifies as a "tax" under *Bolt* because it is designed to raise revenue and is disproportionate to the cost of providing any good or service. AP's Supp Br (6/6/2024), p 3.

This argument is based on a mistaken premise. By its terms, the three-factor text established in *Bolt* is designed to distinguish a "tax" from a "user fee," which is a specific type of exaction through which a municipality recoups the costs associated with performing a particular function. *Bolt*, 459 Mich 160-169. Nothing in *Bolt* suggests that an exaction is a "tax" simply because it doesn't qualify as a "user fee." See *id.*. To the contrary, Michigan courts have recognized several types of lawful exactions, including "contract prices" that are imposed through franchise ordinances like the one at issue here. *Kowalski*, 267 Mich App at 519. Because an exaction of this type represents consideration for the right to occupy and use public streets, the Court of Appeals has held that it can "never qualify as a 'tax' even if the government sets the contract price high enough to glean a substantial profit and generate revenue." *Id.* at 520 n 2.

This principle dates to at least the late 1800s, before Michigan constitutionalized the municipal-franchise power. In *St Louis v Western Union Telegraph Company*, 148 US 92; 13 S Ct 485; 37 L Ed 380 (1893), a telecommunications provider challenged an ordinance that required it to pay five dollars per year for each utility pole it erected in the City of St. Louis. *Id.* at 95. Among other things, the provider argued that the Post Roads Act, US Rev Stats 5263 (1866), granted it a national franchise for its telegraph communications business, thereby prohibiting cities from levying additional charges for the right to do business. *Id.* The Supreme Court rejected that argument, holding that the charge imposed by the city was not merely for the right to do business (which had already been granted by Congress) but rather for the right to use and occupy city streets. *Id.* at 97. In doing so, it emphasized that the provider was not seeking to use

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the streets in the same manner as ordinary citizens, but rather to occupy them in a manner that is "permanent and exclusive" and that "effectually and permanently dispossesses the general public as if it had destroyed that amount of ground." *Id.* at 99. Because of this, the Court expressly disclaimed the notion that the dollar-per-pole charge was a "tax" on the provider's right to do business. *Id.* at 97. Instead, it was "in the nature of a charge for the use of property belonging to the city, that which may properly be called ***rental***." *Id.* at 97 (emphasis added). The Court then went on to state that the question of whether "the city has power to collect rental for the use of streets and public places, [and whether] the charge as here made is excessive, are . . . entirely distinct." *Id.* at 98. In other words, it rejected the contention that a permissible rental fee can become a tax simply by creating too much revenue for a city. See *id.*[5]

The reasoning in *Western Union* has been adopted by most courts that have considered challenges alleging that a utility franchise fee constitutes an unlawful tax. See, e.g., *Jacks v City of Santa Barbara*, 3 Cal 5th 248, 262, 267; 397 P3d 210 (2017); *King Co v King Co Water Districts Nos 20, 45, 49, 90, 111, 119, 125*, 194 Wash 2d 830, 841; 453 P3d 681 (2019); *Bruce v City of Colorado Springs*, 131 P3d 1187, 1192 (Colo App, 2005): *Qwest Corp v City of Santa Fe*, 224 F Supp 2d 1305, 1319-1322 (DNM 2002), aff'd in part, remanded in part, 380 F3d 1258 (CA 10, 2004); *City of Dallas v FCC*, 118 F3d 393, 397-398 (CA 5, 1997); *City of Little Rock v AT T*, 318 Ark 616, 620-621; 888 SW2d 290 (1994); *Alpert v Boise Water Corp*, 118 Idaho 136, 145; 795 P2d 298 (1990); but see, e.g., *Hawarden v US West Communications, Inc*, 590 NW2d 504, 509 (Iowa, 1999); *AT T v Arlington Hts*, 156 Ill 2d 399, 407-408; 620 NE2d 1040 (1993).

[5] The Court also discussed the reasonableness of the franchise fee under a framework that resembles substantive due process and remanded the case for factfinding on that issue. See *Western Union*, 148 US at 104-105; see also Wurman, *The Origins of Substantive Due Process*, 87 U Chi L Rev 815, 865-869 (2020) (discussing the emergence of substantive due process doctrine in the late 1880s).

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As noted above, the cases that follow *Western Union* include a published decision of the Court of Appeals. *Kowalski*, 267 Mich App at 519-520 & n 2. In that decision, the Court of Appeals initially applied the *Bolt* test to reject the plaintiff's claims under the Headlee Amendment. *Id.* at 519-521. Importantly, it also held, in the alternative, that a fee charged for the right to use and occupy a public street can "never qualify as a 'tax' even if the government sets the contract price high enough to glean a substantial profit and generate revenue." *Id.* at 520 n 2. This alternative holding is directly on point in this case and should have controlled the trial court's decision. See MCR 7.215(C)(2); see also *People v Ogilvie*, 341 Mich App 28, 40 n 8; 989 NW2d 250 (2022) ("[I]f a court intentionally addresses and decides an issue that is germane to the controversy in the case" its holding is precedential "even if the issue was not decisive.").

In the proceedings below, the Court of Appeals correctly reversed the trial court's decision by holding that the plaintiff's claims are time-barred. However, the Court's opinion does not mention *Kowalski* or address whether the claims were viable in the first place. Because the alternative holding in *Kowalski* so clearly precludes the plaintiff's sole theory of liability, this omission potentially could cast doubt on *Kowalski*'s precedential value. This is especially true given that the Court of Appeals has, in another unpublished opinion, misleadingly characterized *Kowalski* as an application of the *Bolt* test without explaining its alternative holding — that *Bolt* simply doesn't apply to franchise fees. See *Page v City of Wyandotte*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2018 (Docket No. 339008), pp 5-6.

For these reasons, the MML respectfully requests that this Court reinvigorate *Kowalski* and endorse its holding that a utility franchise fee does not qualify as a tax even if it is negotiated for the specific purpose of raising revenue. This would be consistent with the weight of authority from other jurisdictions, see cases cited *supra*

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p 19, as well as with the longstanding tradition of governments seeking to derive income from the use of their valuable assets. See, e.g., *Daly*, 7 SE at 148 (GA, 1888); *Saginaw Power*, 193 F at 1010-1011 (CC ED Mich, 1911). It would also preserve municipal resources by eliminating the need to defend franchise-fee challenges under the threat of the Headlee Amendment's robust remedial provisions. See *Durant v Michigan*, 456 Mich 175, 203, 216; 566 NW2d 272 (1997) (interpreting the Headlee Amendment to authorize damage awards and awards of attorney's fees).

### B. Even without suits based on MCL 141.91 or the Headlee Amendment, the Michigan Constitution and ordinary ratemaking principles sufficiently constrain municipal franchise fees.

The fact that franchise fees are inherently distinct from taxes does not insulate the terms of a municipal franchise ordinance from legal scrutiny. To the contrary, the reasonable-control clause in Article 7, Section 29 of the Michigan Constitution, as well as ordinary ratemaking principles, constrain the amount of fees that a municipality can request. These constraints operate in at least three ways, which are discussed below.

#### 1. The Legislature can cap franchise fees by statute.

During the debates at the 1908 Constitutional Convention, delegates proposed the reasonable-control clause as a means of preserving the Legislature's general oversight of public streets. See *1908 Convention Debates*, pp 1407-1407. Because of this, courts have long recognized that the Legislature has reserved power to regulate public streets to the extent its regulations do not infringe rights expressly granted to municipal governments under the Constitution. See, e.g., *Detroit, Wyandotte & Trenton Transit Co v Detroit*, 260 Mich 124, 128-129; 244 NW 424 (1932).

This principle first emerged in a series of cases involving utility-rate regulation. In an early case shortly after the ratification of the 1908 Constitution, a utility provider challenged the rates required under a negotiated franchise ordinance, arguing that

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Article 8, Section 28 did not give municipalities ratemaking authority. This Court rejected that argument, finding that the power to set rates by contract is administrative in nature and is implicit in the municipal-franchise power and the reasonable-control clause. See *Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146, 152-155; 166 NW 998 (1918); see also *City of Detroit v Pub Utilities Comm*, 288 Mich 267, 276-278; 286 NW 368 (1939). The Court distinguished this implied power from the power to unilaterally set rates, which it said was legislative in nature and might be beyond the scope of the constitutional grant. *Kalamazoo Circuit Judge*, 200 Mich at 155-161.

In a later case, the Court was called to address whether the Legislature can enact statutes that supersede a utility rate established in a municipal franchise ordinance. *Traverse City v Michigan R Comm*, 202 Mich 575; 168 NW 481 (1918). The specific statute at issue granted the state railroad commission the power to "make, alter, amend or abolish any rate or charge for any service" provided via telephone lines. *Id.* at 579 (quoting 1915 CL 6691). Returning to the distinction it had drawn in *Kalamazoo Circuit Judge*, the Court upheld the statute on the ground that it did not infringe any power expressly granted to municipalities. *Id.* at 587.[6] In other words, the Court concluded that the Legislature can supersede a municipality's exercise of permissive powers that are merely implied from the Constitution's text. See *id.*

More relevant here, the Court of Appeals has extended this principle into the

[6] In accord with the *Traverse City* decision, the Legislature has preempted municipal rate regulation in some modern statutes. See MCL 484.3303(8) (cable franchises). In other contexts, it has expressly preserved municipalities' authority to set rates through negotiated franchise ordinances, even with respect to utilities that are regulated by the Michigan Public Service Commission. See MCL 460.557(2) (electric franchises). In practice, however, municipalities rarely, if ever, contract for specific utility rates when granting franchises to Commission-regulated utilities. Cf. *Understanding Township Franchises*, p 13 (discussing common conditions in franchise ordinances without mentioning rate-regulation). The typical franchise ordinance for a regulated utility simply defers to the rates established by the Commission. See, e.g., City of East Lansing, Ordinance No. 1405 (2017), § 7.

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context of franchise fees. In *TCG Detroit*, a city challenged a provision of the Michigan Telecommunications Act, MCL 484.2101 *et seq.*, that prohibited a municipality from charging a franchise fee to a telecommunications provider to the extent the fee exceeds the "fixed and variable costs" that the municipality incurs in granting the franchise and maintaining the streets that the provider occupies. *TCG Detroit*, 261 Mich App at 72.[7] The Court of Appeals rejected that challenge, finding that the power to contract for franchise fees is — like the power to contract for specified utility rates — a permissive power that is implied from the text of the Michigan Constitution rather than an exclusive power granted to municipalities alone. *Id.* at 94-95.

Thus, under the reasoning of *TCG Detroit*, the Legislature can cap franchise fees by statute without infringing on a municipality's right to reasonably control its streets. *Id.* at 96-97. The Legislature has done so not only in the context of wired telecommunications facilities, but also in the context of cable television and small-cell wireless facilities. See MCL 484.3306(1)(b) (capping franchise fees for cable television providers at 5% of the provider's gross revenues, like the fees at issue here); MCL 460.1313(3)(b) (capping annual franchise fees for small-cell wireless providers at $125 per pole). If the Legislature were to determine that municipalities are unreasonably exercising the franchise power in other contexts, it could enact similar caps that apply across the board to all utilities or more targeted caps that apply to particular services.

[7] The Court of Appeals did not discuss it in these terms, but this cap could be described as a legislatively enacted *Bolt* test. Like *Bolt*, it essentially required the amount of the fee to be proportionate to the costs the municipality incurred. To the extent the Court's opinion in *TCG Detroit* suggests that this requirement derives from the Constitution, see *TCG Detroit*, 261 Mich App at 97, that suggestion is inconsistent with *Kowalski* and is based on an improper reading of this Court's decision in *North Star Line, Inc v City of Grand Rapids*, 259 Mich 654; 244 NW 192 (1932). Unlike the franchise fees at issue here, the licensing fee at issue in *North Star* pertained to a use (the operation of motor buses) that does not permanently and exclusively occupy the city's streets.

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**2. Utility providers can sue to enjoin municipalities from demanding franchise fees that are not reasonably related to the value of the rights conveyed.**

In addition to reserving power in the Legislature, the reasonable-control clause also authorizes judicial review of municipal actions pertaining to public streets. See, e.g., *Kalamazoo Circuit Judge*, 200 Mich at 154-155 ("[C]ourts may determine the question of whether conditions imposed are reasonable or not."); *Fenton Gravel Co v Village of Fenton*, 371 Mich 358, 366; 123 NW2d 763 (1963) (BLACK, J., concurring). In other words, regulated entities can sue to restrain the operation of unreasonable municipal ordinances. See *Fenton Gravel*, 371 Mich at 365. This principle is consistent with other cases in which this Court has implied a cause of action to seek injunctive relief for violations of the Michigan Constitution. See, e.g., *Sharp v City of Lansing*, 464 Mich 792, 806; 629 NW2d 873 (2001).

While Michigan courts have not developed a framework for evaluating the "reasonableness" of utility franchise fees for purposes of the reasonable-control clause, cases from other jurisdictions provide a good model for doing so. See, e.g., *Western Union*, 148 US at 104-105 (discussing reasonableness under a framework resembling substantive due process); *Mahon v City of San Diego,* 57 Cal App 5th 681, 718-719; 271 Cal Rptr 3d 716 (2020) (evaluating reasonableness under a framework developed in the California Supreme Court's *Jacks* decision to distinguish franchise fees from taxes[8]); *Qwest Corp v City of Santa Fe*, 380 F3d 1258, 1272-1273 (CA 10, 2004) (evaluating whether a franchise fee was "fair and reasonable" for purposes of 47 USC 253); *TCG Detroit v City of Dearborn*, 16 F Supp 2d 785, 789-791 (ED Mich, 1998), aff'd 206 F3d

[8] Although the MML believes that *Mahon* and *Jacks* provides instructive guidance for evaluating reasonableness, it disagrees with the California Supreme Court's conclusion that a franchise fee becomes a tax when it is not reasonably related to the value of the property interest conveyed. See *Jacks*, 3 Cal 5th at 254. *Western Union*, *Kowalski*, and the other cases described above persuasively establish that franchise fees are distinct from taxes in all circumstances. See discussion *supra* pp 18-21.

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618 (CA 6, 2000) (same). These cases reveal at least five considerations that are relevant to evaluating reasonableness, each of which is discussed in turn.

*First*, franchise ordinances must be presumed reasonable unless the plaintiff shows that the fees required under the ordinance are "so excessive as to make the ordinance unreasonable and void." See *Western Union*, 148 US at 104. This is consistent with the general principle that "ordinances are presumed constitutional." See *Gora v City of Ferndale*, 456 Mich 705, 711; 576 NW2d 141 (1998).

*Second*, the mere fact that a municipality "receives something which it may use as revenue does not determine the character of the charge." *Western Union*, 148 US at 97. In other words, a franchise fee may be deposited into a municipality's general fund and used for expenses unrelated to street maintenance or utility regulation without becoming unreasonable *per se*. See *Jacks*, 3 Cal 5th at 254-256. Thus, unlike a *Bolt* analysis, the focus of the "reasonableness" inquiry is not whether the fee is proportionate to the cost of providing a good or service, but rather whether the fee "bear[s] a reasonable relationship to the ***value of the property interest***." *Id.* at 213 (emphasis added); see also *Western Union*, 148 US at 101 (explaining that, because franchise fees are essentially rental payments, a municipality may reasonably charge "the value of the property thus appropriated"). Establishing that the fee is used predominately to maintain the streets where the utility provider's facilities are located is one way to establish such a relationship, but it is not the only way.

*Third*, because easement rights in public streets are a unique type of property interest, the best way to determine value under a comparative approach is to consider evidence of what other utility providers are willing to pay for similar rights. See *TCG Detroit*, 206 F3d 618, 625 (CA 6, 2000). If the franchise at issue is non-exclusive, evidence regarding the fees paid by other providers in the same industry and

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municipality would be highly relevant in evaluating reasonableness. See *TCG Detroit*, 16 F Supp 2d at 790. It may also be useful to compare the amounts that providers in other industries pay for occupying similar lengths of right-of-way, or to consider what providers in the same industry pay to occupy similar lengths of right-of-way in nearby communities. However, these inquiries are fact specific and other considerations may affect the strength of such evidence. See *Mahon*, 57 Cal App 5th at 722.

*Fourth*, courts can consider the potential impact of a franchise fee on the profitability of the utility provider. *Qwest Corp*, 380 F3d at 1272. Evidence relating to the utility's finances and profit margins can be considered. See *id*. Further, if the utility provider has a credible fear that it will be unable to recoup the fee from its customers — because of market conditions or otherwise — that would be a strong reason to find that the fee is unreasonable.

*Fifth*, the nature of the negotiations between the parties can be relevant to in determining whether the challenged fee is reasonable. *TCG Detroit*, 206 F3d at 625; *Jacks*, 3 Cal 5th at 254-256. Evidence that the provider has negotiated in good faith but has been unable to agree regarding appropriate compensation may support a claim that the municipality is demanding an unreasonable fee. See *Qwest Corp*, 380 F3d at 1263, 1272-1273 (finding that a proposed fee was unreasonable in a challenge brought by a provider that had withdrawn its lease application). By contrast, if the provider agrees to the proposed fee only to challenge it later, that cuts against a claim of unreasonableness. *TCG Detroit*, 206 F3d at 625. Indeed, some courts have held that providers are estopped from challenging the conditions of a franchise after voluntarily agreed to them. See, e.g., *City of Chicago v Chicago Fiber Optic Corp*, 287 Ill App 3d 566, 575-576; 678 NE2d 693 (1997); *Tri-State Elec Co-op v City of Blue Ridge*, 88 Ga App 717, 721-726; 77 SE2d 547 (1953).

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Drawing on these cases, Michigan courts can develop a workable standard for adjudicating challenges brought under the reasonable-control clause. In a situation where a municipality is demanding a truly unreasonable fee, a utility provider would be sufficiently motivated to bring such a suit. As courts have recognized, a utility provider — like any business — has an "incentive to minimize the total amount of money that its customers will be required to pay in exchange for its goods and services in order to maintain the goodwill of its customers." *Mahon,* 57 Cal App 5th at 721-722. Moreover, providers that are subject to state rate regulation would have even stronger incentives to resist the imposition of unreasonable costs, as discussed below.

**3. The Public Service Commission can reject proposed utility rates that pass unreasonable franchise fees onto customers.**

The Michigan Public Service Commission is vested with the power to set rates for most gas and electric providers. See MCL 460.6a(1).[9] As a general matter, the "ratemaking process requires the [Commission] to determine what utility costs and expenses are reasonable and prudent." See *Ford Motor Co v Pub Serv Comm*, 221 Mich App 370, 385; 562 NW2d 224 (1997). If the Commission determines that a proposed rate includes an expense that was unreasonably or imprudently incurred, it has the power to "disallow" the expense, thereby causing it to be borne by the utility provider's

[9] Municipally owned utilities are exempt from the Commission's regulatory jurisdiction, MCL 460.6(1), but make up a relatively small portion of the market. The Michigan Municipal Electric Association, the trade association that represents municipally owned utilities in Michigan, notes that its forty members meet approximately ten percent of the total electricity demand in the state. Michigan Municipal Electric Association, *About MMEA*, <https://mipublicpower.org/about-mmea> (accessed August 5, 2025). The Commission is also precluded from altering electric rates that are set by the terms of a negotiated franchise ordinance that regulates a privately-owned utility provider. MCL 460.557(2). As discussed above, however, municipal franchise ordinances rarely, if ever, set rates for such providers. See discussion *supra* p 22 n 6.

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shareholders rather than its ratepayers. *North Mich Land & Oil Corp v Pub Serv Comm*, 211 Mich App 424, 442; 536 NW2d 259 (1995).

Courts in other jurisdictions have found that the public service commissions in their states — which apply similar ratemaking principles — have the power and responsibility to disallow unreasonable franchise-fee payments. See, e.g., *State ex rel Pacific Tel & Tel Co v Dep't of Public Serv*, 19 Wash 2d 200, 279; 142 P2d 498 (1943) ("If the payments called for by a franchise appear excessive or out of proportion to the privilege accorded to the utility to use city property, the rate regulating authority would have power to fix the proper proportion of the payment to be allocated to operating expense."); *Jacks*, 3 Cal 5th at 286-287 (CHEN, J., dissenting) (explaining that the public utilities commission could disallow franchise-fee increases if it determined them to be unjust or unreasonable). Nothing in the Michigan Public Service Commission's governing statutes suggest that it is different in this regard. See MCL 460.1 *et seq.*; MCL 460.551 *et seq.* Accordingly, when a municipality asks a Commission-regulated utility provider to pay a franchise fee, the provider must carefully consider the reasonableness of the request and the likelihood that it will be able to recover the cost of the fee through its rate structure. If the proposed fee is not reasonably related to the value of the property the provider seeks to occupy, the provider is faced with only three options: (1) negotiating the fee downward; (2) pursuing legal action against the municipality; or (3) bearing the risk that the Commission will disallow the fee and prohibit it from being recovered through the provider's utility rates. This places yet another limitation on the amount of fees that municipalities can request during franchise negotiations.

In sum, even if this Court were to affirm *Kowalski*'s holding that a negotiated franchise fee can "never qualify as a 'tax,'" *Kowalski*, 267 Mich App at 520 n 2, municipalities would not have unfettered discretion to impose franchise fees.

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Legislative oversight, market forces, voter accountability, and the state ratemaking process would all continue to constrain the amount of fees municipalities could realistically request and obtain.

### C. In addition to the flaws in their underlying legal theory, plaintiff's claims are barred by a one-year statute of limitations.

Turning now to the statute of limitations, MCL 600.308a(3) provides that a "taxpayer shall not bring or maintain an action under [the Headlee Amendment or its implementing legislation] unless the action is commenced within 1 year after the cause of action accrued." In *Taxpayers Allied for Constitutional Taxation v Wayne County*, 450 Mich 119; 537 NW2d 596 (1995) ("*TACT*"), this Court extensively analyzed this limitations period and explained how it should apply in a wide variety of contexts. The Court's interpretation, as articulated in *TACT*, leads inevitably to the two key holdings of the Court of Appeals in this case.

#### 1. The one-year limitations period for Headlee claims applies by analogy to any equitable claim that seeks a refund on the theory that a municipal fee is an unlawful "tax."

To begin, with respect to the unjust-enrichment and assumpsit claims that the plaintiff brought for alleged violations of MCL 141.91, this Court determined in *TACT* that the one-year limitations period in MCL 600.308a(3) "may apply by analogy to equitable claims." *TACT*, 450 Mich at 119 n 9. As the Court explained, if it were otherwise, "a plaintiff could dodge the bar set up by a limitations statute simply by resorting to an alternative" equitable claim. *Id.* (cleaned up). In support of this proposition, the Court cited an earlier decision in which it held that the practice of applying limitations provisions by analogy is appropriate in "cases in which the law provides relief analogous to that awardable in chancery." *Lothian v Detroit*, 414 Mich 160, 169; 324 NW2d 9 (1982).

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In this case, the plaintiff seeks exactly the same relief on his equitable claims as he seeks on his legal claims under the Headlee Amendment's implementing legislation — namely, a refund of the portion of his electric-bill payments that are attributable to the City of East Lansing's franchise fee. COA Op at 2. Further, he does so based on exactly the same legal theory — that the fee constitutes an unlawful "tax" because it raises revenue for the City. *Id.* In light of this, the Court of Appeals correctly applied the guidance in *TACT* to hold that the one-year limitations period in MCL 600.308a(3) applies by analogy to the plaintiff's unjust-enrichment and assumpsit claims. *Id.* at 6.

**2. The plaintiff's claims accrued in 2017 when the City adopted the ordinance that imposed the franchise fee at issue in this case.**

The Court of Appeals was also correct in determining that, under *TACT*, the plaintiff's claims accrued in 2017 when the City adopted the ordinance that provides for the challenged franchise fee. See COA Op at 3-6. To understand why this is so, one must first understand *TACT*'s distinction between the various types of claims that can be brought under the Headlee Amendment and its implementing legislation.

The Headlee Amendment provides that "***[a]ny taxpayer*** of the state shall have standing to bring suit" to enforce its provisions. Const 1963, art 9, § 32 (emphasis added). According to the Court in *TACT*, one type of claim that can be brought under this broadly worded provision is a challenge to an exaction that the taxpayer has personally paid and has therefore been personally injured by. See *TACT*, 450 Mich at 123. The "wrong" that gives rise to this type of claim is the assessment of the exaction against the plaintiff. *Id.* at 123-124 (interpreting the term "wrong" as used in MCL 600.5827). As such, a claim of this type is potentially recurring in nature and accrues each time a new exaction is assessed. See *id.*

By contrast, a second type of claim under the Headlee Amendment is a claim that "any taxpayer" can bring on behalf of the public without necessarily showing that

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he or she has been personally injured. *Id.* at 125 n 7. In other words, this second type of claim is available even when the plaintiff is not responsible for, and has not paid, the exaction that he or she seeks to challenge. *Id.* Unlike the first type of claim, the "wrong" that gives rise to this second type of claim is creation of the exaction, as opposed to its assessment on any particular person. *Id.* This means that the wrong is not continuing in nature, and that a claim of this type must therefore be brought within one year of the date when the exaction is first enacted or otherwise imposed. *Id.*

With this framework in mind, the fundamental question in this case is whether the plaintiff (a utility customer) is ultimately responsible, and has actually paid, the City's franchise fee. If so, he has a claim of the first type described above that accrues each time he receives an electric bill that pass a portion of the franchise fee onto him. See *id.* at 123. If not, the only claim he can assert is one on behalf of the public, and that claim accrued when the ordinance was adopted in 2017. See *id.* at 125 n 7.

Put another way, the Court must decide who bears the "legal incidence" of the franchise fee, the utility customer or the utility provider. As the Michigan Attorney General has explained, the term "legal incidence" is synonymous with legal responsibility, and it is relevant to a broad range of legal issues such as: "(a) who has standing to contest a tax, (b) who may demand a refund for overpayment of taxes, and (c) who may claim constitutional or statutory exemptions from a tax." OAG 7062 (October 4, 2000). It is fundamentally a question of legislative intent, to be determined from the text of the relevant enactment and from the totality of the circumstances. See, e.g., *National Bank of Detroit v Dep't of Revenue,* 334 Mich 132, 138; 54 NW2d 278 (1952) (determining the legal incidence of a sales tax based on "the intention of the legislature" as expressed through the text of the statute); *First Agric Nat'l Bank of Berkshire City v State Tax Comm*, 392 US 339, 347-348; 88 S Ct 2173; 20 L Ed 2d 1138 (1968) (determining

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intent from the "clear wording of the statute" and deeming it "controlling"); *United States v City of Detroit*, 355 US 466, 469; 78 S Ct 474; 2 L Ed 2d 424 (1957) (explaining that courts may look "beyond the bare face of the taxing statute to consider all relevant circumstances").

The Court of Appeals in this case looked to its own prior precedent in *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005), to hold that the City of East Lansing's franchise fee is imposed solely on the utility provider rather than on individual utility customers. This holding is a straightforward application of the typical considerations for determining legal incidence. Perhaps the most important of those is the text of the franchise ordinance itself, see *National Bank of Detroit*, 334 Mich at 138, which states in relevant part:

> [T]he 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. [City of East Lansing, Ordinance No. 1411 (2017), § 2].

By its plain wording, the ordinance indicates that the obligations it imposes fall on the Grantee (*i.e.*, the utility provider) rather than on the utility provider's customers. This is evident from the fact that the "Grantee" is the only person or entity mentioned in the provision. *Id.* Further, the provision specifically indicates that the privilege on which the exaction is imposed is the "use of [the City's] streets, public places and other facilities." *Id.* Only the utility provider (not any utility customer) is authorized to engage in such use under the terms of the ordinance. *Id.*, § 1. In fact, by definition, a franchise fee is a charge "in the nature of rental" that is imposed on a utility provider "for the privilege of using the streets, alleys and public places." *Western Union*, 148 US at 97, 99. Accordingly, the City Council would not have had the authority to impose the

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franchise fee on the utility provider's customers even if it had wished to do so. See *TCG Detroit*, 261 Mich App at 94 (holding that a municipality's ability to contract for franchise fees is an implied power that derives from the reasonable-control clause).

In addition to the wording of the ordinance, the totality of the circumstances further support the conclusion that the utility provider bears the legal incidence of the City's franchise fee. As the Court of Appeals noted and the City aptly argues in its briefing, the following facts are relevant to this analysis:

- Each utility customer pays the entire amount that he or she owes for electric service to the utility provider, not to the City.
- The charges that the utility customer pays are imposed pursuant to the contract that he or she signs with the utility company.
- If the utility provider fails to pay the City an amount equal to five percent of the revenue it receives from the retail sale of electricity in the City, the City can pursue contractual remedies against the provider.
- The City has no recourse against a utility customer who refuses to pay the portion of the franchise fee that the utility provider passes onto the customer through the utility bill.
- The utility provider has recourse against a utility customer who refuses to pay (*e.g.*, shutting off the customer's electricity).

See COA Op at 4-6; AE's Supp Br (6/27/2024), pp 5-6.

In arguing for reversal, the plaintiff urges this Court to ignore the totality of the circumstances and adopt a *per se* rule that when an ordinance or statute includes a "mandatory pass-through" provision, the legal incidence of the exaction falls on the consumer rather than the supplier. AP's Supp Br (6/6/2024), p 14-19. The plaintiff derives this rule from a series of federal cases applying the doctrine of intergovernmental tax immunity, which addresses when federal and tribal governments are obligated to pay exactions levied by state governments. See *id.* (citing

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*United States v Delaware*, 958 F2d 555 (CA 3, 1992) and other cases). There are at least three reasons why this Court should decline to import and apply this rule here.

*First*, as the Third Circuit explained in *United States v Delaware* — the principal case on which the plaintiff relies — the doctrine of intergovernmental tax immunity draws bright line rules against direct taxation of the federal government in order to "prevent insults to federal sovereignty." *Delaware*, 958 F2d at 559 n 8. The rationale for doing so is that in the early days of the republic, the power to tax was thought to be "the power to destroy." See *id.*; see also *M'Culloch v Maryland*, 17 US (4 Wheat) 316, 431; 4 LEd 579 (1819). Thus, to protect the once fledgling national government, courts have drew prophylactic lines that may be "overbroad" in some contexts. See *Delaware*, 958 F2d at 559 n 8.

To state the obvious, a utility customer who seeks to bring a claim under the Headlee Amendment does not have the sovereignty interest as the parties who enjoy intergovernmental tax immunity. Accordingly, there is no need to displace the totality-of-the-circumstances test that is ordinarily used to determine legal incidence with an overbroad *per se* rule regarding "mandatory pass-through" provisions. In fact, the plaintiff has not cited any case, from any jurisdiction, that applies the rule outside the context of intergovernmental tax immunity. Given the broad range of issues that turn on the legal incidence of taxes, see OAG 7062 (October 4, 2000), the absence of such cases is telling.

*Second*, all the cases that the plaintiff cites in support of the *per se* rule involve exactions imposed by state governments, see AP's Supp Br (6/6/2024), p 14-19, which enjoy "the general power of taxation," see *Brown v Maryland*, 25 US 419, 439; 12 Wheat 419; 6 L Ed 678 (1827). This means that in each case the state could have, in theory, imposed the challenged exaction on either the supplier or the retailer. This case, by

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contrast, involves a municipal government that only has the power to impose exactions to the extent allowed by state law. See, e.g., *Hoffman v Otto*, 277 Mich 437, 440; 269 NW 225 (1936). State law, in turn, only allows municipalities to impose franchise fees ***on utility providers*** through mutually negotiated franchise ordinances. See discussion *supra* p 32-33. Thus, because the City of East Lansing lacks the power to impose franchise fees ***on utility customers***, it would be inappropriate to adopt a *per se* rule that assumes it did so when the totality of the circumstances suggest otherwise. Such a rule would be inconsistent with the general principle that "ordinances are presumed constitutional." See *Gora*, 456 Mich at 711.

*Third*, this Court should decline to apply the plaintiff's proposed *per se* rule because the City's ordinance does not actually contain a "mandatory pass-through" provision (or because the ordinance is at least ambiguous on the point). To recap, the ordinance provides that the "Grantee 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." City of East Lansing, Ordinance No. 1411 (2017), § 2. By its terms, this provision requires the Grantee to pay the City five percent of the revenue it makes from the sale of electricity to City residents. It also requires the provider to "collect" the money needed to do so ***from someone***. It does not, however, specify who that someone is.

In theory, the cost of paying the franchise fee could be deemed a general expense of the utility provider that can be spread systemwide to all the provider's customers — not just those in the City of East Lansing. See *Pacific Tel*, 19 Wash at 279 ("[F]ranchise payments, if considered as compensation for the use of the streets, would be properly classed as a general operating expense."). That possibility arguably informs the meaning of the next sentence of the ordinance, which reads: "Such fee will appear on

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the corresponding energy bills." While the plaintiff interprets this second sentence as requiring the utility provider to pass the full cost of the franchise fee onto its customers in the City of East Lansing, the sentence could just as plausibly be read as a mere acknowledgment that the provider intends to do so (rather than spreading the cost systemwide). In other words, the second sentence could be construed as a "permissive pass-through" provision as opposed to a "mandatory pass-through" provision. Under that construction, the *per se* rule that the plaintiff proposes is inapplicable on its own terms. See, e.g., *Delaware*, 958 F2d at 562-564 (distinguishing cases involving permissive provisions); *Matter of Brooklyn Union Gas Co v Comm'r of Taxation Fin*, 255 App Div 2d 80, 86; 687 NYS2d 478 (1999) (holding that the legal incidence of tax fell on the supplier in part because "the pass-through surcharge is merely permissible").

Accordingly, for all these reasons, the Court of Appeals correctly concluded that the utility provider bears the legal incidence of the City's franchise fee and that the plaintiff's claims were barred by the one-year statute of limitations.

## CONCLUSION

To conclude, the MML respectfully requests that this Court grant leave to appeal, endorse the Court of Appeals's alternative holding in *Kowalski*, and find that the plaintiff's challenges based on MCL 141.91 the Headlee Amendment fail to state a claim on which relief can be granted.[10] Alternatively, the Court should affirm the

[10] While the Court of Appeals did not address the underlying merits of the plaintiff's claims, the City argued in its briefing below that franchise fees are inherently distinct from taxes, Def's COA Br (10/12/22), p 26-27, and the record is sufficiently developed for this Court to decide the case on that basis. *Heydon v MediaOne*, 275 Mich App 267, 278; 739 NW2d 373 (2007) (explaining that an appellate court may review a question not ruled upon below "if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case.").

judgment below on statute-of-limitations grounds or deny leave to appeal, thereby leaving the Court of Appeals's well-reasoned decision in place.

Dated: August 8, 2024

Respectfully Submitted,

*/s/ C. Nicholas Curcio*

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## CERTIFICATE OF COMPLIANCE

I certify that the *Amicus Curiae Brief for the Michigan Municipal League in Support of the City of East Lansing* complies with the word-count and formatting requirements in MCR 7.212(B) and MCR 7.312(A). The brief contains 10,288 words.

Dated: August 8, 2024

Respectfully Submitted,

*/s/ C. Nicholas Curcio*

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# APPENDIX

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# Understanding Township Franchises & Right-of-Way Consents

By Clifford H. Bloom and Scott G. Smith, Attorneys, Law, Weathers & Richardson, P.C., Grand Rapids

hile, for the most part, townships do not own public roads within their boundaries, they do have significant authority over highways, roads, streets and other rights-of-way located within their boundaries. For example, applicable state constitutional and statutory provisions require most utilities to obtain a township's permission to locate lines or other facilities within those rights-of-way. Generally, if a utility desires to serve any property within a township, that utility *must* obtain from the township a franchise to provide that service.

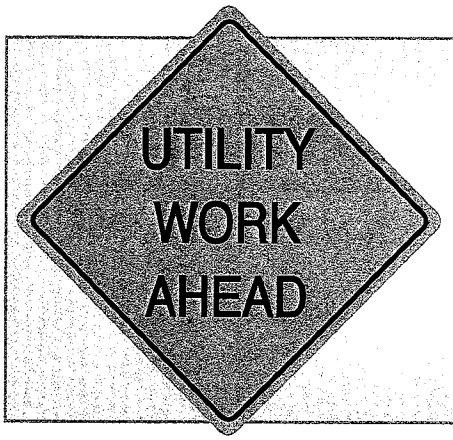
Some providers of utility services fail to obtain the necessary permits and franchises; others offer carefully drafted and largely one-sided proposed permit or franchise ordinances, resolutions and agreements for township consideration, while others are more forthright and solicitous. Questions often arise about what is legally provided for and what should be expected from such permits and franchises. This article provides answers to those questions.

continued

continued from page 11

## 1. What is a Township Franchise?

A municipal franchise is a right or privilege granted by a governmental unit pursuant to constitutional and legislative authority to conduct or operate a public utility or other business within a certain geographical area. Such a right or privilege in effect constitutes a contract inferring certain rights and imposing related duties.[1] Put another way, a municipal franchise is a special privilege of a public nature conferred by a governmental unit upon a person or entity.[2]




**A municipal franchise is a special privilege of a public nature conferred by a governmental unit upon a person or entity.**

## 2. What are the Controlling Legal Requirements?

In relevant part, the 1963 Michigan Constitution provides:

"No person, partnership, association or corporation, public or private, operating a public utility shall have the right to use 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, 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."

Article 7, § 29 of the 1963 Constitution makes it clear that if a utility, regardless of ownership, proposes to serve customers within a township, it must first obtain a franchise from the township. It also makes it clear that a utility may not place facilities within any right-of-way within a township without the township's consent. The constitutional provision is further augmented by Section 1 of Public Act 266 of 1909, as amended,[3] which grants to townships the right to impose terms and conditions on such consents or franchises.

The statute provides:

"The township board of any township may grant to any person, partnership, association or corporation the right to use the highways, streets, alleys and other public places of the township to set poles, string wires, lay pipes or conduits or to lay tracks for railways and to operate and maintain the same and the right to transact a local business in such township, subject to such reasonable regulations as said board shall prescribe from time to time."

Other state constitutional provisions limit franchises. Article 7, § 19 requires a franchise granted by a township to be revocable at the will of the township unless it is approved by a majority of the township's electors. Article 7, § 30 limits a franchise granted by a township to no longer than 30 years. PA 266 establishes the requirements for an election to grant an irrevocable permit.[4]

## 3. What is a Right-of-Way Permit?

A right-of-way permit is one mechanism a township can use to permit use of public rights-of-way within the township by a utility. Permission can also be granted by a contract or even by a resolution. The form of the township's consent can be varied.

Technically, a right-of-way permit issued by a township is narrower than a township-issued franchise. A right-of-way permit only grants the right to use streets, alleys and other public places of a township for the installation, maintenance, and use of items such as poles, wires, pipes and similar items. A franchise not only encompasses such privileges, but also grants to the utility or other business involved the right to transact business within the municipality. Since most utilities today pursue the grant of a municipal franchise and rarely seek only a simple right-of-way permit, the remainder of this article will concentrate on franchises.[5]

## 4. Why Does a Township Have the Right to Permit Use of Rights-of-Way that are Owned and Controlled by the County Road Commission?

The principle is one of allowing a municipality to control how streets and other rights-of-way within its border are used and to determine whether and how its residents receive utility services. In doing so, it can prevent needless duplication of services. Therefore, a township can prevent several different providers of the same utility service from serving the same areas of the township with each utility placing its own separate poles, wires, pipes or other facilities within rights-of-way.

Franchising authority also provides a mechanism for local governments to be compensated under certain circumstances when someone uses a publicly owned right-of-way for profit. The utility or telecommunications company is receiving a special benefit from a publicly owned asset, much in the same way that a person who affixes a radio tower on township-owned property would be expected to enter into a lease and pay for the privilege.

## 5. Can a Township Consent to the Use of County Roads Even If the County Road Commission Objects?

Yes, the township can so consent. However, since the township and the coun-



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ty road commission have concurrent jurisdiction over this area, the road commission's permission is also needed when a utility or communications company needs to disturb the roadway through construction or excavation. So, for the use of county roads in these circumstances, both the township's and the road commission's permission is needed.

### 6. Who Must Obtain a Franchise or Consent?

Any utility or other person or entity wishing to use rights-of-way in a township to set poles, wires, pipes, conduits or other facilities must obtain a township's consent. Any utility desiring to serve customers within a township must obtain a franchise. This covers governmentally owned as well as privately owned utilities.

### 7. Would Consent to Use Rights-of-Way Ever Be Sought Without a Formal Franchise?

Yes. For example, a city may own a well field in a township and desire to pipe water from the well field to the city limits within rights-of-way without serving customers in the township. In that situation, the city would still need to obtain at least a right-of-way permit from the township since it would be utilizing a public right-of-way located within the township.

In another situation, we know of a circumstance where a utility authority needed to cross a portion of a nonmember township to serve customers in an adjoining member township. Would the township have to consent in that situation? It depends upon whether or not utility lines will cross or be located within public rights-of-way within the township. If the utility lines will not be located within a public right-of-way and will not serve customers within the township, the township's consent would normally not be required (unless there are zoning regulations or other local ordinance provisions which apply). However, if the proposed utility line or lines will cross or be located within a public road right-of-way, township consent will be required.

### 8. Can Conditions and Requirements Be Included in a Township Franchise?

Yes, reasonable conditions may be imposed. Common conditions and requirements include:

- a provision allowing other utilities to use the poles or conduits being placed in the rights-of-way;
- what part or parts of the township are to be served under the franchise;
- a requirement that lines be relocated at the utility's expense if required due to changes in township-owned utilities or changes in the right-of-way;
- an indemnification and hold-harmless clause which will protect the township from losses due to the location of the utility facilities within the rights-of-way;
- limitations on trimming trees within the rights-of-way;
- a requirement to submit plans and specifications to the township for review and approval prior to any construction;
- limitations on the times when traffic can be blocked or detoured when facilities are being installed or maintained, as well as traffic control requirements;
- restoration requirements for areas where work has occurred;
- requiring notification of the owners and occupants of any property affected by utility work;
- a designation of which specific rights-of-way may be used;
- a provision requiring the franchisee to accept the franchise by signing the consent;
- compliance with the township's zoning and other ordinances;
- an indication whether the franchise is exclusive or nonexclusive;
- a clause stating whether the franchise is revocable or irrevocable;
- the term of years (usually 0-30 years);
- a provision requiring the franchisee to pay the township's costs incurred in reviewing and approving the franchise.

### 9. How Does a Township Grant a Franchise?

A township can establish a franchise via contract, resolution or ordinance. Most often, an ordinance executed by the requesting utility is used. If an ordinance is used, the township should follow the same general procedures as for any general township ordinance.

*continued*

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continued from page 13

### 10. What Is the Difference Between a Revocable and an Irrevocable Franchise?

A revocable franchise can be terminated at the will of the township board involved. An irrevocable franchise stays in effect for its entire stated term, and requires township voter approval.

However, even revocable franchises will often limit the conditions under which revocation will occur, requiring notice to the utility and an opportunity to be heard before the township board acts on revocation. Irrevocable franchises are also usually deemed revocable for cause after notice and opportunity for a hearing.

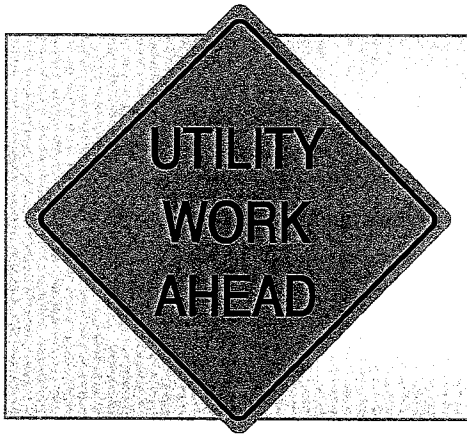
As a practical matter, franchises are seldom, if ever, revoked because township residents need the utility services. This is especially true for utility services regulated by the Michigan Public Service Commission (MPSC). However, where utility service is provided by another municipality such as an adjoining city, the township may revoke the franchise if an alternative service provider exists. Moreover, in these days of competition among various utility providers, townships may desire to consider revocation when a given utility provides less than satisfactory service.

There are also general legal constraints on the ability of a township to revoke even an expressly revocable franchise. Why? A franchise is generally held to constitute a contract between the municipality and the business that obtained the franchise. Even if a franchise is revoked or expires by its own terms, absent poor performance on the part of the utility or duplication of existing services, it is highly unlikely that the Michigan courts would require that essential utilities services cease.

### 11. Can a Township Grant More Than One Franchise for the Same Utility Service?

Yes. Theoretically, utility franchises can be exclusive or non-exclusive. An exclusive franchise would prevent other utilities from providing the same service within the franchise's service area.

However, exclusive franchises may be of questionable legality under various state and federal laws and regulations, including those governing antitrust activities. While in some circumstances there may be a reason for an exclusive franchise to avoid needless service duplication as well as the duplication of wires, pipes or other facilities, in the last few years there has been increased sharing of facilities with different utilities offering differing rates for services provided using the same lines, conduits, pipes and other facilities. So, there may not in many circumstances be a legitimate public purpose for granting an exclusive franchise.




**If a utility, regardless of ownership, proposes to serve customers within a township, it must first obtain a franchise from the township.**

### 12. Can Townships Charge a Franchise Fee to Utilities?

Except as noted below, most public utilities refuse to pay franchise fees or a percentage of their revenue to the township involved. However, some have agreed to include a provision requiring such payments to the township to the extent such fees are paid by the utility to any other Michigan municipality. It is also fairly common for a utility to pay the township's reasonable attorney fees and costs in preparing and adopting the franchise document.

### 13. Are There Legal Limits on the Ability of a Township to Withhold Consent to a Franchise?

A township's authority regarding franchises is not absolute. Michigan courts have made it clear that a township cannot unreasonably withhold consent from a utility that desires to operate within a township and utilize its streets and public places.

### 14. Isn't There a New Michigan Statute that Could Affect Telecommunications Franchises?

Yes. The Metropolitan Extension Tele-

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communication Rights-of-Way Oversight (Metro) Act (PA 48 of 2002), went into effect November 1, 2002. In summary, the Metro Act requires that all telecommunications providers now apply for and obtain a permit (on a form approved by the MPSC) to operate within the rights-of-way. One significant benefit related to the Metro Act is that it requires all telecommunications providers (even incumbents) to pay an annual permit fee, which will be distributed to those communities that have affirmatively acted to "opt in" to the Metro Act process. The deadline to opt in is December 31, 2003. *(For more on the Metro Act, turn to the "Capitol Report" article on page 4.)*

### 15. Has Federal Legislation Altered the Authority of Townships Regarding Franchises?

Under the supremacy clause of the United States Constitution, federal law can "trump" state laws, including even state constitutional provisions. Federal statutes can severely limit the authority for the control of local franchises by municipalities in the areas of telecommunications and cable television.

For example, cable television companies seeking to install and operate cable lines and equipment in the public rights-of-way are required under federal law to obtain a franchise from the local government (the "franchising authority"). Federal legislation does impose some constraints upon what conditions municipalities can place upon cable television franchises.[6] However, unlike most franchises in Michigan, the franchising authority is entitled to receive a franchise fee for the use of rights-of-way within its jurisdiction up to 5 percent of the applicable gross revenues.

It is usually prudent for a township to consult with its legal counsel prior to entering into any type of franchise or right-of-way permit. This is particularly true with regard to any matter involving the Metro Act and any federal statute regarding cable television and telecommunications. The laws and procedures regarding franchises and right-of-way consents are becoming increasingly complex. ■

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1 *Traverse City* vs *Consumers Power Co*, 340 Mich 85 (1954); *City of Detroit* vs *Public Utilities Commission*, 288 Mich 267 (1939); *Michigan Civil Jurisprudence* (Vol. 10 - 2002 revisions), page 194.

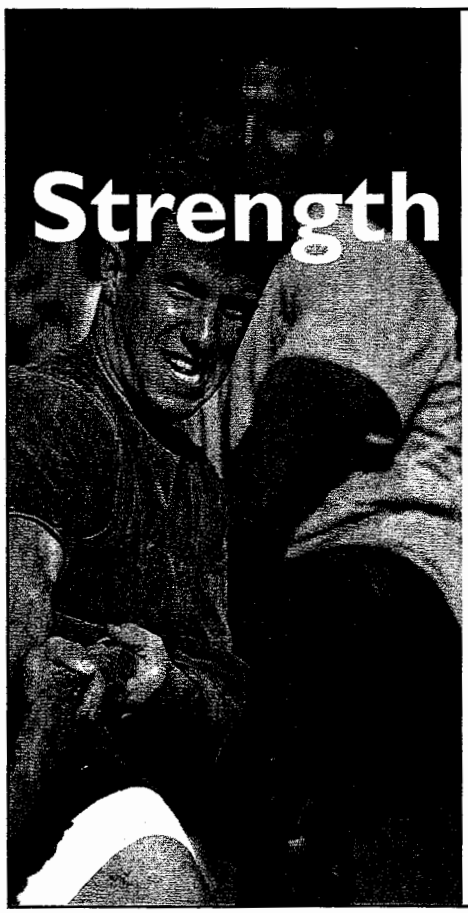
2 *Lansing Twp* vs *City of Lansing*, 356 Mich 338 (1959); *Michigan Civil Jurisprudence* (Vol. 10 - 2002 revisions), pages 194-195.

3 MCL 460.601.

4 Sections 2-3a: MCL 460.602-603a.

5 Of course, individual townships may still require a franchisee to apply for an administrative right-of-way permit after a franchise has been granted with regard to the opening of a particular street or right-of-way as a means of monitoring construction or installation work.

6 See the Cable Communications Policy Act of 1984 and Cable Television Consumer Protection and Competition Act of 1992.

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# STATE OF MICHIGAN

# COURT OF APPEALS

JAMES P. PAGE and RUSSELL DAVIS LEWIS,

Plaintiffs-Appellants,

v

CITY OF WYANDOTTE, MAYOR OF THE CITY OF WYANDOTTE, and CITY COUNCIL OF THE CITY OF WYANDOTTE,

Defendants-Appellees.

UNPUBLISHED
December 4, 2018

No. 339008
Wayne Circuit Court
LC No. 15-000669-CZ

Before: JANSEN, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

In this taxpayer action involving challenges to charges for water and cable utilities, plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants and denying plaintiffs' motion for partial summary disposition. We affirm.

Plaintiffs are current and former residents of the City of Wyandotte (the City). The City provides utility services to its residents, including water, cable television as well as Internet, and electric services. Consumers who receive utility services from the City sign a service agreement with the City. Wyandotte Municipal Services (WMS), which is a City department created by the City Charter, is charged with the management, supervision, and control of the City's utilities, including water and cable services. Under the City Charter and Ordinances, the WMS Commission is empowered to set the water and cable rates for the utilities, and the rates must be sufficient to cover each utility's operating, administrative, and maintenance expenses.

At issue in this case are WMS's expenditures related to providing utility services that specifically include reimbursement of the City's general fund for services provided by the City that benefit the utilities. These expenditures include things like police and fire protection, maintenance of the roads by the department of public works, use of City owned buildings, and the services provided to the WMS by other City departments, including the finance department, information technology, engineering, safety personnel, the City attorney, the City treasurer, payroll, accounts payable, and human resources. Defendants refer to these transfers as a form of "enterprise fund accounting," and plaintiffs appear to agree that, in theory, municipal enterprise funds are a legitimate system of accounting between municipal utilities and city governments. However, plaintiffs disagree that the transfers at issue in this case are enterprise fund transfers to

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reimburse the City for services provided to the WMS. Put another way, plaintiffs claim that the City is improperly using its utilities to generate revenue for the City's general fund to cover City expenses unrelated to the utilities in question.

Particularly in dispute are two transfers to the City's general fund, (1) the water franchise fee (WFF), and (2) the cable franchise fee (CFF). Beginning in 2008, the WMS began transferring a $200,000 flat-rate payment to the City based on a calculation of the reasonable costs the City incurred that are attributable to the water utility; this transfer is known as the WFF. The WFF is not a separate charge to customers, and it is not itemized on the customers' water bills. Indeed, following the implementation of the WFF transfer, consumers' payments for water did not change. In comparison to the WFF, the CFF is payable to the City as a percentage "of the gross revenue of the Cable Television Fund." Like the other fees paid by WMS, the CFF is intended as an administrative fee to reimburse the City for services; it is analogous to the franchise fee that a private company would pay to the City to provide cable services in the City. The WMS has paid the CFF since the inception of the City's cable system in the early 1980s, but it was not until 2011 that the WMS began itemizing the CFF on customers' cable bills as a specific charge. Typically, the rate of the CFF has been 5%, but the City briefly raised the rate to 8% in 2005. The rate returned to 5% in 2007, when the City and WMS signed a franchise agreement relating to the provision of cable services.

Plaintiffs challenged the WFF and the CFF in the trial court on a number of grounds. Relevant to the parties' argument on appeal, plaintiffs claimed that (1) the charges constituted a tax in violation of the Headlee Amendment, Const 1963, art 9, § 31, (2) the City's imposition of the charges breached an implied covenant of good faith and fair dealing in the customer utility service agreements, (3) the charges amounted to an unconstitutional taking, and (4) the charges violated plaintiffs' substantive due-process rights. Defendants filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10), and plaintiffs filed a cross-motion for partial summary disposition. Following a hearing, the trial court granted defendants' motion for summary disposition and denied plaintiffs' motion for summary disposition. Plaintiffs later filed a motion to amend their complaint to add an express breach of contract claim, but the trial court denied this motion as futile and unduly delayed. Plaintiffs now appeal as of right.

## I. STANDARDS OF REVIEW

This Court will review de novo a trial court's decision regarding a motion for summary disposition. *Kelsey v Lint*, 322 Mich App 364, 370; 912 NW2d 862 (2017). We also review de novo questions of law, including constitutional issues. *Aguirre v Dep't of Corrections*, 307 Mich App 315, 320; 859 NW2d 267 (2014). "A trial court's decision on a motion to amend a complaint is reviewed for an abuse of discretion." *Long v Liquor Control Comm*, 322 Mich App 60, 67; 910 NW2d 674 (2017).

Defendants moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). Under MCR 2.117(C)(7), summary disposition is appropriate when, among other reasons, a claim is barred by a statute of limitations. *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 323; 869 NW2d 635 (2015). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Hanlin v Saugatuck Twp*, 299 Mich App 233, 239; 829 NW2d 335 (2013).

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> All well-pleaded allegations must be accepted as true and construed in the light most favorable to the nonmoving party. Only when no factual development could possibly justify recovery should the motion be granted. [*Id.* (citations omitted)]

In comparison, "[w]hen reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact." *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

## II. HEADLEE

On appeal, plaintiffs argue that the trial court erred by granting defendants' motion for summary disposition and denying summary disposition to plaintiffs regarding plaintiffs' Headlee claim. According to plaintiffs, the undisputed facts demonstrate that the City violated Headlee by levying taxes, in the form of the WFF and the CFF, to raise revenue for the City's general fund. We disagree.

> In relevant part, the Headlee Amendment states:
>
> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . . [Const 1963, art 9, § 31.]

This constitutional provision "invalidates the levying of any new tax not already authorized by law at the time of the ratification of the Headlee Amendment unless voter approval of that tax is secured." *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 664; 697 NW2d 180 (2005). Application of the Headlee Amendment is "triggered by the levying of a tax." *Jackson Co v City of Jackson*, 302 Mich App 90, 98; 836 NW2d 903 (2013). In contrast, because a "user fee" is not a "tax," a user fee will not implicate the Headlee Amendment. *Id.* at 99.

> Generally, 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. [*Bolt v Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998) (quotation marks and citation omitted).]

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Whether a charge is a tax or a user fee presents a question of law.[1] *Id*. at 158. The party challenging a charge on Headlee grounds bears the burden of establishing the unconstitutionality of the charge. *Jackson*, 302 Mich App at 98. "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. However, in *Bolt*, the Court identified three criteria for distinguishing a fee from a tax. *Id*. at 161. Specifically, under *Bolt*, a court should consider:

> (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. [*Westlake Transp, Inc v Mich Pub Serv Comm*, 255 Mich App 589, 612; 662 NW2d 784 (2003).]

"[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler*, 265 Mich App at 665 (quotation marks and citation omitted).

A. THE WFF

As a preliminary matter, water rates are considered voluntary as property owners can limit, if not refuse, the use of the commodity. See *Bolt*, 459 Mich at 162, quoting *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954).

> "The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water." *Bolt*, 459 Mich at 162, quoting *Ripperger*, 338 Mich at 686.

Of course, this does not mean that any charge for municipal water utilities, no matter how excessive, *always* constitute a user fee as opposed to a tax. See *Bolt*, 459 Mich at 163 n 12.

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[1] We note that defendants removed this case to federal court, but it was returned to state court after the Sixth Circuit concluded that the federal courts lacked jurisdiction under the Tax Injunction Act, 28 USC 1341. On appeal, plaintiffs' assertions that the CFF and the WFF constitute taxes are based in part on the Sixth Circuit's finding that the WFF and the CFF constituted a "tax" for purposes of the Tax Injunction Act. See *Page v City of Wyandotte*, 666 F Appx 390, 393-394 (CA 6, 2016). However, the Sixth Circuit's decision makes clear that it was not addressing whether the CFF and the WFF constitute a "tax" for purposes of state law. See *id*. at 392 ("Whether or not the fees are taxes under Michigan law, the definition of the term 'tax' in the Tax Injunction Act is a question of federal law.") (quotation marks and citation omitted). Indeed, the Sixth Circuit's analysis could not control this tax versus fee determination because the Headlee question is a matter of state law, and "this Court is not bound by a federal court decision construing Michigan law[.]" *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997).

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Specifically, "[f]ees charged by a municipality must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged." *Kircher v Ypsilanti*, 269 Mich App 224, 231-232; 712 NW2d 738 (2005). However, "[t]his Court presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]" *Wheeler*, 265 Mich App at 665-666 (quotation marks and citation omitted).

In this case, plaintiffs have simply failed to address whether the amount they pay for water services—as a commodity provided by the City—is reasonably proportionate to the services they receive. Indeed, plaintiffs provide no analysis of the overall charge customers pay for water, and they offer no assertion that the overall charge for water services is disproportionate in relation to the commodity customers receive. To the contrary, the record evidence suggests that the City's charges for water are competitive and, in some cases, lower than other neighboring communities. This Court presumes the amount of a fee to be reasonable, and by failing to address the proportionality of the charge paid for water, plaintiffs have failed to present sufficient evidence to rebut the presumption that the fees charged for water services are reasonable. See *Kircher*, 269 Mich App at 231-232 (recognizing that a fee is "presumed reasonable unless it is facially or evidentially" established to be "wholly out of proportion" to the expense at issue). Absent evidence that the WMS charges an amount that is disproportionate to the direct and indirect costs of providing water, plaintiffs have not shown the levying of a tax as opposed to the collection of a reasonable fee for utility services, and they cannot trigger the application of the Headlee Amendment. See *Wheeler*, 265 Mich App at 665-666; *Kircher*, 269 Mich App at 231-232. Accordingly, plaintiffs have failed to establish a material question of fact on a key element of a Headlee challenge, and consequently the trial court did not err by granting summary disposition to defendants.

B. THE CFF

Generally speaking, the parties appear to agree that a *private* cable provider can be lawfully subjected to a 5% cable franchise fee, which the cable provider can then pass through to consumers as an itemized charge on the customers' bills. See MCL 484.3306(1)(b); MCL 484.3307(3); see also *Morgan v Grand Rapids*, 267 Mich App 513, 515-516; 705 NW2d 387 (2005); 47 USC 542(b) and (f). As defendants emphasize on appeal, this Court has previously concluded that this type of cable franchise fee does not constitute a "disguised tax," but is instead a payment of a fee in exchange for valuable services. See *Kowalski v City of Livonia*, 267 Mich App 517, 518-521; 705 NW2d 161 (2005). Specifically, applying the *Bolt* criteria, *Kowalski* considered a 5% cable franchise fee and reasoned that, from the perspective of a cable provider, the fee was voluntarily paid as a condition of providing cable in the city and that, from the prospective of cable customers, the fee was paid for the privilege of receiving cable programming. *Id*. Because there was no evidence that the cable franchise fee was excessive when compared with the expenses associated with cable services, this Court also determined that the plaintiff had failed to demonstrate that the franchise fee was disproportionate. *Id*. at 520-521. Under such circumstances, this Court concluded that the plaintiffs could not establish a Headlee violation. *Id*. at 518-521.

In this case, the CFF at issue is also a 5% charge imposed in connection with cable services. However, plaintiffs contend that the CFF at issue in this case is not a true cable

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franchise fee—and that *Kowalski* is distinguishable—because the cable provider in this case is WMS, a City department. In other words, plaintiffs argue that there is no reason for the WMS to pay for the right to provide cable or to pay any type of rent for use of rights-of-way in the City because the City already owns these rights and could exercise these rights for free. The distinction plaintiffs seek to draw is unavailing. While it is true that the City owns the public rights-of-way over which the cable system is constructed, *plaintiffs* have no intrinsic right to receive cable services via these rights-of-way without paying a fee for that privilege. See *id*. at 519-520. Indeed, plaintiffs concede as a general proposition that WMS may charge consumers a fee reasonably proportionate to cover its direct and indirect costs of providing services, which according to plaintiffs' expert include things like the costs associated with using municipally-owned property and equipment. This Court has previously likened cable franchise fees to a form of rent, i.e., the price paid for use of a public right-of-way. See *id*. at 520 n 2. And as persons receiving the benefit of the WMS's utilization of these rights-of-way, plaintiffs offer no principled reason why they should not pay a fee for this benefit. Indeed, cable is a commodity, and by accepting services, plaintiffs—like customers paying for private cable services—pay to receive cable programming and, with regard to the CFF in particular, pay for the privilege of receiving cable programming via public rights-of-way. See *Kowalski*, 267 Mich App at 519-520; see also *Bolt*, 459 Mich at 162 ("The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water.") (quotation marks and citation omitted). Accordingly, in general terms, the CFF is simply a user fee, voluntarily paid by those who wish to receive cable.

Plaintiffs assert on appeal that the CFF is not a true franchise fee, and in support of this proposition, plaintiffs note that the City Administrator testified at his deposition that the term "franchise fee" was not an accurate descriptor for the CFF. However, the City Administrator also described the CFF as "loosely . . . the same thing" as the cable franchise fee charged to private companies. In any event, regardless of the City Administrator's interpretation of the CFF, the franchise agreement between the City and the WMS clearly described a fee relating to use of the rights-of-way and other incidents to cable operations in a municipality that would apply to a private cable company. Notwithstanding plaintiffs' claims to the contrary, the CFF is analogous to private cable franchise fees.

With regard to the amount of the CFF, plaintiffs have not shown that the CFF in this case is disproportionate. To the contrary, the evidence indicates that the CFF is consistent with the industry standard for cable franchise fees, and that, if anything, the CFF in this case provides more benefit than the average cable franchise fee because it includes services from the City—such as shared personnel and other administrative services—that a private cable company would not enjoy in exchange for a cable franchise fee. In sum, under *Bolt*, the voluntary payment of the CFF in exchange for the privilege of receiving valuable cable services by way of public rights-of-way is a reasonably proportionate user fee, not a tax. See *Kowalski*, 267 Mich App at 518-

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520. Accordingly, the trial court did not err by granting defendants' motion for summary disposition.[2]

## III. BREACH OF CONTRACT

Plaintiffs next argue that the trial court erred by granting summary disposition to defendants and denying plaintiffs' motion for summary disposition relating to plaintiffs' claim alleging breach of an implied covenant of good faith and fair dealing. This argument is without merit because the trial court correctly concluded that Michigan does not recognize a cause of action for a breach of the implied covenant of good faith and fair dealing. See *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 133-134; 839 NW2d 223 (2013); *In re Leix Estate*, 289 Mich App 574, 591; 797 NW2d 673 (2010). Accordingly, plaintiffs failed to state a claim on which relief can be granted, and the trial court did not err by granting summary disposition to defendant.

Alternatively, plaintiffs argue that the trial court abused its discretion by denying their motion to amend to add a claim for a breach of express contract terms. Because plaintiffs failed to include this issue in their statement of the questions presented, we need not consider it. See *River Investment Group v Casab*, 289 Mich App 353, 360; 797 NW2d 1 (2010) (recognizing that an issue is waived where the plaintiff failed to state it in the statement of questions presented in its brief on appeal). However, even considering this issue on the merits, we conclude the trial court did not abuse its discretion by denying plaintiffs' motion to add a futile express contract claim.

"An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Plaintiffs' proposed express contract claim is premised on the assertion that the City had a contractual right to raise cable "rates," but not to charge the fees itemized on the customers' bills, which include the CFF and a "retransmission fee." However, as commonly understood, the term "rate" refers to "a charge, payment, or price fixed according to a ratio, scale, or standard," such as a charge per unit of a public-service commodity. *Merriam-Webster's Collegiate Dictionary* (11th ed). This common understanding of "rates" encompasses all the costs for cable services, including the CFF and retransmission fee. Indeed, by law, in the cable industry in particular, the "rate" for cable ordinarily includes *all* costs and fees. See 47 CFR 76.946 ("Cable operators that advertise rates for basic service and cable programming service tiers shall be required to advertise rates that include all costs and fees."); see also *Morgan*, 267 Mich App at 514 (noting that private cable providers charged customers "an additional rate" to recoup cable franchise fee paid to city pursuant to agreement). Consistent with the practice of private cable providers, see MCL 484.3307(3); 47 USC 542(b), (f); 47 CFR 76.946, the WMS itemized the CFF and retransmission charges on its bills—not because these

[2] On appeal, defendants argue that plaintiffs' Headlee claims are barred by the statute of limitations. The trial court did not address this issue, and given our conclusion that plaintiffs' Headlee claims fail as a matter of law, it is not necessary to review this unpreserved claim. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

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were separate charges unrelated to the charges for cable services—but to simply provide consumers with an itemized bill that could be compared to bills from private cable companies. Plaintiffs' claim that the CFF and retransmission fee are not a part of their cable rate—subject to adjustment by the City under the terms of the utility service agreements—is not persuasive, and the trial court correctly recognized that an amendment to the complaint to allow for this claim would be futile. See *Lane*, 231 Mich App at 697.

## IV. TAKINGS CLAUSE

Next, plaintiffs assert that the trial court erred by granting summary disposition to defendants and denying plaintiffs' motion summary disposition relating to plaintiffs' takings claim. We disagree.

"The Fifth Amendment of the United States Constitution and Article 10 of the Michigan Constitution both prohibit the taking of private property for public use without just compensation." *Dorman v Twp of Clinton*, 269 Mich App 638, 645; 714 NW2d 350 (2006). "The term 'taking' can encompass governmental interference with rights to both tangible and intangible property." *AFT Mich v Michigan*, 497 Mich 197, 218; 866 NW2d 782 (2015). For example, a taking that requires compensation may occur when the government "asserts control over a discrete and identifiable fund of money, such as a deposit account." *Id*. However, "[t]his does not occur if the property in question is voluntarily relinquished to the government." *Id*.

Moreover, "[i]t is beyond dispute that [t]axes and user fees . . . are not takings." *Koontz v St Johns River Water Mgt Dist*, 570 US 595, 615; 133 S Ct 2586; 186 L Ed 2d 697 (2013) (quotation marks and citation omitted). To constitute a "user fee" for purposes of the Takings Clause, the fee must be a "fair approximation of the cost of benefits supplied." *United States v Sperry Corp*, 493 US 52, 60; 110 S Ct 387; 107 L Ed 2d 290 (1989) (quotation marks and citation omitted). However, there is no requirement that "a user fee must be precisely calibrated to the use that a party makes of Government services." *Id*. And the government is not required "to record invoices and billable hours to justify the cost of its services." *Id*.

In this case, as discussed earlier, the CFF is a valid user fee, conferring on cable customers the privilege of receiving cable services via public rights-of-way. The CFF is in line with cable industry rates, and plaintiffs cannot show that the fee is disproportionate. In terms of the WFF, as discussed, this is not a distinct charge paid by customers, rather the WMS transfers the WFF to the City's general fund to reimburse the City for services provided by the City's other departments. The fee customers pay for water utilities was not affected by the creation of the WFF, and plaintiffs have failed to address the proportionality of the overall fee consumers pay for water. Indeed, the evidence indicates that the City's water rates are competitive with, if not lower than, the rates in neighboring communities. By focusing solely on the WFF and failing to address the service fee customers actually pay for water services, plaintiffs have not shown that the fee paid by the customers is disproportionate to the services received, and they cannot show that their payment for water services is anything other than a valid user fee. Accordingly, their takings claim premised on the voluntary payment of user fees fails as a matter of law, and the trial court did not err by granting summary disposition to defendants.

## V. SUBSTANTIVE DUE PROCESS

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Finally, plaintiffs argue that the trial court erred by granting summary disposition to defendants and denying plaintiffs' motion for summary disposition relating to plaintiffs' claim alleging a violation of substantive due process. We disagree.

"[B]oth the Fourteenth Amendment of the United States Constitution and Const. 1963, art. 1, § 17 guarantee that no state shall deprive any person of life, liberty or property, without due process of law." *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 264; 792 NW2d 781 (2010). At issue in this case is substantive due-process which "protects against the arbitrary exercise of governmental power[.]" *Bonner v Brighton*, 495 Mich 209, 224; 848 NW2d 380 (2014). "In disputes over municipal actions, the focus is on whether there was egregious or arbitrary governmental conduct." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). Under this standard, to establish a substantive due-process violation, "the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Cummins v Robinson Twp*, 283 Mich App 677, 701; 770 NW2d 421 (2009) (quotation marks and citation omitted). A plaintiff must show more than an ill-advised or incorrect governmental decision; "[t]hat is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Mettler Walloon, LLC*, 281 Mich App at 205 (quotation marks and citation omitted).

Here, plaintiffs argue that the City's imposition of the CFF and the WFF violate substantive due process. However, plaintiffs' argument is conclusory, and the exact nature of the property right at issue is frankly unclear from plaintiffs' briefing. See *Bonner*, 495 Mich at 226-227 ("Substantive due-process analysis must begin with a careful description of the asserted right.") (quotation marks and citation omitted). In any event, plaintiffs fail to identify a fundamental right, and they have not shown governmental conduct so arbitrary and capricious as to shock the conscience. As discussed, the City charges the CFF—at a rate comparable to industry standards—as a franchise fee and to reimburse the City for services provided to the WMS in relation to the provision of cable services. With regard to water, the WFF is not a specific fee paid by consumers; rather plaintiffs pay a fee for water services, and the WFF is a budget transfer that did not affect the rate consumers pay for water. Plaintiffs have not shown that the CFF and the amount paid for water services are disproportionate or anything other than valid user fees in exchange for the City's provision of valuable commodities. Further, plaintiffs have not shown that the user fees are not reasonably related to the City's legitimate interest in operating public utilities and maintaining the solvency of the City by ensuring that the City is reimbursed for its expenditures that benefit the WMS. Stated differently, there is nothing that shocks the conscience about charging reasonable user fees for municipal utilities, and plaintiffs' substantive due-process claim fails as a matter of law. See *Trantham v State Disbursement Unit*, 313 Mich App 157, 174; 882 NW2d 170 (2015), vacated in part on other grounds by 500 Mich 872 (2016) (holding that imposition of valid user fee did not violate substantive due process). Accordingly, the trial court did not err by granting summary disposition to defendants with regard to plaintiffs' substantive due-process claim.

Affirmed. Defendants, as the prevailing parties may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello

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