

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

LAURENCE WOLF,
Individually and as Representative of
A Class of Similarly-Situated Personal
And Entities,

Case No.: 2014-141608-CZ
HONORABLE D. O'BRIEN

Plaintiff

v.

CITY OF BIRMINGHAM,
A Michigan Municipal Corporation

Defendant.

KICKHAM HANLEY, PLLC
By: Gregory D. Hanley (P51204)
 Jamie K. Warrow (P61521)
Attorneys for Plaintiff
32121 Woodward Avenue, Suite #300
Royal Oak, MI 48073
(248) 544-1500

BEIER HOWLETT, P.C.
By: Michael P. Salhaney (P43701)
 Timothy J. Currier (P28939)
Attorneys for Defendant
200 E. Long Lake Rd., Suite #110
Bloomfield Hills, MI 48304
(248) 645-9400
msalhaney@bhlaw.us.com
tcourrier@bhlaw.us.com

ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES

NOW COMES Defendant, **CITY OF BIRMINGHAM**, a Michigan Municipal Corporation, by and through its attorneys, **BEIER HOWLETT, P.C.**, and for its Answer to Plaintiff's Complaint, states as follows:

INTRODUCTION

1. Defendant neither admits not denies the statement in paragraph 1 for the reason that it is not a factual allegation.

2. In answer to paragraph 2, Defendant denies the statement that the City engages in impermissible financing of its stormwater management system for the reason that it is not true.

3. In answer to paragraph 3, Defendant denies the narrative contained therein for the reason that all of the statements contained therein are untrue.

4. In answer to paragraph 4, Defendant denies the allegations contained therein for the reason they are untrue.

5. In answer to paragraph 5, Defendant denies the allegations contained therein for the reason they are untrue.

6. In answer to paragraph 6, the Defendant neither admits nor denies the statement contained therein as to what Plaintiff is seeking as a result of this lawsuit, and leaves Plaintiff to his proofs.

JURISDICTION AND VENUE

7. In answer to paragraph 7, the Defendant neither admits nor denies the allegation contained therein and leaves Plaintiff to his proofs.

8. In answer to paragraph 8, the Defendant admits.

9. In answer to paragraph 9, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

GENERAL ALLEGATIONS

10. There is no paragraph 10 in which to respond to.

11. In answer to paragraph 11, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

12. In answer to paragraph 12, the Defendant neither admits nor denies and leaves Plaintiff to this proofs.

13. In answer to paragraph 13, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

14. In answer to paragraph 14, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

15. In answer to paragraph 15, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

16. In answer to paragraph 16, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

**THE CRITICAL DISTINCTION BETWEEN
SANITARY SEWAGE AND STORMWATER**

17. In answer to paragraph 17, no response is necessary.

18. In answer to paragraph 18, no response is necessary.

19. In answer to paragraph 19, the Defendant denies the allegations contained therein for the reason that they are untrue.

20. In answer to paragraph 20, the Defendant neither admits nor denies the narrative statement, and leaves Plaintiff to his proofs.

**THE CITY FORCES WATER AND SEWER CUSTOMERS TO FINANCE THE
CITY'S ENTIRE COST OF STORMWATER MANAGEMENT AND DISPOSAL**

21. In answer to paragraph 21, the Defendant neither admits nor denies the allegation contained therein for the reason it is not a factual statement.

22. In answer to paragraph 22, the Defendant denies the allegation contained therein for the reason it is untrue.

23. In answer to paragraph 23, the Defendant neither admits nor denies the allegations contained therein and leave Plaintiff to his proofs.

24. In answer to paragraph 24, the Defendant admits that Stormwater Charges are being used to fund costs for services which provide a benefit to the City and all of its citizens. In further answer, the Defendant denies that revenues being derived from the Stormwater Charges are in excess of the direct and indirect costs of the current “use” of the stormwater disposal services by the persons paying those extractions for the reason that it is untrue.

25. In answer to paragraph 25, the Defendant denies the allegation contained therein for the reason that it is untrue.

26. In answer to paragraph 26, the Defendant denies the allegation contained therein for the reason that it is untrue.

27. In answer to paragraph 27, the Defendant denies the allegation contained therein for the reason that it is untrue.

28. In answer to paragraph 28, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

29. In answer to paragraph 29, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

30. In answer to paragraph 30, the Defendant denies the allegation contained therein for the reason that it is untrue.

31. In answer to paragraph 31, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

32. In answer to paragraph 32, the Defendant neither admits nor denies the allegations contained therein and leaves Plaintiff to his proofs.

33. In answer to paragraph 33, the Defendant admits that City Ordinance 114-151 says what it says and speaks for itself.

34. In answer to paragraph 34 the Defendant admits that City Ordinance 114-303 speaks for itself.

CLASS ALLEGATIONS

35. In answer to paragraph 35, the Defendant neither admits nor denies and leaves Plaintiff to his proofs.

36. In answer to paragraph 36, the Defendant denies the allegation contained therein for the reason that it is untrue.

37. In answer to paragraph 37, the Defendant denies the allegation contained therein for the reason that it is untrue.

38. In answer to paragraph 38, the Defendant denies the allegation contained therein for the reason that it is untrue.

39. In answer to paragraph 39, the Defendant neither admits nor denies the allegation contained therein and leaves Plaintiff to his proofs.

40. In answer to paragraph 40, the Defendant neither admits nor denies the allegation contained therein and leaves Plaintiff to his proofs.

41. In answer to paragraph 41, the Defendant denies the allegations contained therein for the reason they are untrue.

COUNT I

VIOLATION OF THE HEADLEE AMENDMENT

42. In answer to paragraph 42, the Defendant incorporates all of the above answers as if set forth here, paragraph by paragraph.

43. In answer to paragraph 43, the Defendant admits.

44. In answer to paragraph 44, the Defendant denies that it is disguising a tax as a fee for the reason that it is untrue.

45. In answer to paragraph 45, the Defendant denies the allegation contained therein for the reason that it is untrue.

46. a-f. In answer to paragraphs 46a-f, the Defendant denies the allegations contained therein for the reason that they are untrue.

47. In answer to paragraph 47, the Defendant denies the allegation contained therein for the reason that it is untrue.

48. In answer to paragraph 48, the Defendant neither admit nor denies the allegation contained therein and leaves Plaintiff to his proofs.

49. In answer to paragraph 49, the Defendant neither admits nor denies the allegation contained therein and leaves Plaintiff to his proofs.

PRAYER FOR RELIEF

The Defendant prays unto this Honorable Court as follows:

- A. That Plaintiff be denied certification of class action.
- B. That any "Class" be denied to include all persons or entities which have paid the City for sewer service at any time in the one year preceding the filing of this lawsuit and/or at any time during the pendency of this action.
- C. Deny judgment in favor of Plaintiff and deny that City is to disgorge and refund all Stormwater Charges billed or collected during the Headlee Class Period, and further deny that the City pay into a common fund for the benefit of Plaintiff and all other members of a Class.
- D. Deny any appointment of a Trustee.

- E. Declare that the Stormwater Charges do not violate the Headlee Amendment.
- F. Dismiss the within cause in favor of Defendant including costs and attorneys' fees.
- G. Grant any other relief that this Honorable Court deem just.

BEIER HOWLETT, P.C.

By: /s/ Michael P. Salhaney
Michael P. Salhaney (P43701)
Timothy J. Currier (P28939)
Attorneys for Defendant
200 E. Long Lake Rd., Suite #110
Bloomfield Hills, MI 48304
(248) 645-9400
msalhaney@bhlaw.us.com
tcurrier@bhlaw.us.com

Dated: August 19, 2014

DEFENDANT, CITY OF BIRMINGHAM'S AFFIRMATIVE DEFENSES

NOW COMES Defendant, City of Birmingham, a Michigan Municipal Corporation, by and through its attorneys, **BEIER HOWLETT, P.C.**, and for its Affirmative Defenses, state as follows:

1. Plaintiff's Complaint fails to state an actionable claim against Defendant, City of Birmingham ("City") upon which the relief requested in Plaintiff's Complaint can be granted.
2. Plaintiff's claim and causes of action alleged in his Complaint are barred in whole or in part by the applicable Statute of Limitations, including, but not limited to MCL §600.308a.
3. Plaintiff's claims and causes of action set forth in Plaintiff's Complaint are barred in whole or in part by the equitable doctrines of laches, estoppel and/or unclean hands.

4. Defendant's stormwater disposal rates/charges are reasonably reflected and are reasonably proportionate to the actual cost of providing stormwater disposal.

5. Defendant's stormwater disposal rates constitute valid regulatory service user charges for stormwater disposal services that are reasonable proportionate to the cost of providing a municipal water and sewer service.

6. The claims, causes of action and remedies alleged in Plaintiff's Complaint present issues of first impression that, if granted, would work an undue hardship on Defendant, therefore, warranting only prospective application of any relief granted by this Court.

7. Plaintiff, as a customer and payer of the Defendant's stormwater disposal rates/fees indirectly benefits from Defendant's provision of stormwater disposal services to the Plaintiff.

8. Defendant's stormwater disposal rates/charges constitute a valid user fee, not a tax subject to the requirements of the Headlee Amendment, Constitution 1963, Article 9, Sections 25-31, as amended.

9. Plaintiff's claims are barred in whole or in part due to Plaintiff's failure to exhaust available administrative remedies.

10. The allegations set forth in Plaintiff's Complaint misstate and misrepresent Defendant's actual costs, expenditures, projects and revenue relative to providing stormwater disposal service to Defendant's water and sewer customers, Plaintiff in particular.

11. Members of Plaintiff's class either individually and/ or collectively, have suffered no actual harm or damages as alleged in Plaintiff's Complaint.

12. The infrastructure projects, work, improvements and repairs alleged as improperly funded with stormwater disposal revenues were reasonable related to stormwater disposal projects that are part of the actual cost of providing stormwater disposal services.

13. Plaintiff's claims, causes of action and/or remedies are barred in whole or in part by the doctrines of governmental and/or sovereign immunity.

14. Defendant is a governmental agency and, therefore, immune from tort liability and resulting monetary relief and damages as alleged in Plaintiff's Complaint pursuant to the Michigan Governmental Tort Liability Act, MCL §591.1407, et. seq.

15. Plaintiff's Complaint fails to plead facts in avoidance of governmental immunity and otherwise fails to state a claim falling within the scope of a recognized exception to governmental immunity under the Governmental Tort Liability Act, MCL §691.1407, et seq.

16. All of the alleged stormwater disposal charges and/or assessments collected by Defendant deemed as taxes under the Headlee Amendment, if any, are within limits provided by law and/or Charter and have otherwise received proper voter approval as required by the Headlee Amendment, Constitution 1963, Article 9, Sections 25-31.

17. Plaintiff's claims are frivolous and/or interposed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

18. Plaintiff's cause of action is barred in total, or at least in part, because Plaintiff's lack of standing to assert a cause of action.

19. Plaintiff's cause of action is barred in total, or at least in part, by one or more of the affirmative defenses set forth MCR 2.116(C)(7), and any and all documents evidencing the same are in the possession of Plaintiffs.

20. Plaintiff's cause of action is barred in total, or at least in part, because no class exists that are capable of ascertainment.

21. Plaintiff's cause of action is barred in total, or at least in part, because the class representatives are not members of the class as defined in the Complaint.

22. Plaintiff's cause of action is barred in total, or at least in part, because the class is not so numerous that joinder of all members is impracticable.

23. Plaintiff's cause of action is barred in total, or at least in part, because there are no common questions of law and fact.

24. Plaintiff's cause of action is barred in total, or at least in part, because the claims of the class representatives are not typical of those of the class.

25. Plaintiff's cause of action is barred in total, or at least in part, because the class representatives and class counsel will not adequately represent the interests of the absent or unnamed class members.

26. Plaintiff's cause of action is barred in total, or at least in part, because the prosecution of separate actions by individual members of the putative class would not create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

27. Plaintiff's cause of action is barred in total, or at least in part, because the questions of law or fact common to members of the putative class do not predominate over any question affecting any individual members of the putative class.

28. Plaintiff's cause of action is barred in total, or at least in part, because Plaintiffs have failed to satisfy the requirements of MCR 3.501.

29. Plaintiff's cause of action is barred in total, or at least in part, because the maintenance of the action as a class action will not be superior to other available methods of adjudication in promoting the convenient administration of justice.

30. At all relevant times, Defendant's stormwater disposal rates were lawfully established by properly adopted and duly noticed ordinances following public hearing, without objection by Plaintiffs.

31. Plaintiff's claims and/or remedies are barred in whole or in part by the doctrine of water and or acquiescence.

32. Capital improvements to Defendant's stormwater disposal systems including improvements necessitated by state and federal regulations, constitute a part of the actual cost of providing stormwater disposal services to Plaintiffs.

33. Plaintiff's claims for a refund fail where Plaintiffs, as taxpayers, will ultimately fund any refunds thereby creating an inequitable undue hardship to Defendant without a corresponding benefit to Plaintiff's case.

34. At all relevant times, Defendant's stormwater disposal rates are reasonable and appropriate as compared to surrounding communities in southeast Michigan.

35. Defendant's municipal stormwater disposal rates constitute a permissible exaction of a price paid for a governmentally owned commodity that neither qualifies as a tax nor a user fee.

36. Any past, present or future surplus in the City's water and/or sewer funds in any given year, if any, either have been or will be permissibly used for operation, repairs, maintenance and/or improvements reasonably related to the City stormwater disposal.

37. At all relevant times, the City either in whole or in part, has been served by a combined shared sewer system whereby the same infrastructure services both sanitary and stormwater discharge. Therefore, any expenditure for operation, repairs, maintenance, or improvements to the combined shared sewer system including, but not limited to, separation insures to the benefit of the sanitary sewer users regardless of the impetus for any given operation, repair, maintenance or improvement.

38. The form of Plaintiff's Complaint is improper due to lack of compliances with MCR 2.113.

39. Defendant, City, reserves the right to assert additional defenses based upon facts and circumstances that are presently unknown to Defendant.

BEIER HOWLETT, P.C.

Dated: August 19, 2014

By: /s/Michael P. Salhaney
Michael P. Salhaney (P43701)
Timothy J. Currier (P28939)
Attorneys for Defendant
200 E. Long Lake Road, Suite #110
Bloomfield Hills, MI 48304
(248) 645-9400
msalhaney@bhlaw.us.com
tcurrier@bhlaw.us.com

Proof of Service

The undersigned does hereby state that the above documents were served on counsel of record *electronically through the Court's Wiznet system* on August 19, 2014.

Dated: August 19, 2014

/s/Janine A. Cochran
Print Name: