STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC. a Michigan non-profit corporation, and WOODVIEW CONDOMINIUM ASSOCIATION, a Michigan non-profit corporation, individually and as representatives of a class of similarly situated persons and entities,

Plaintiffs,

-v-

CITY OF WESTLAND a municipal corporation,

Defendant.

Case No. 15-006473-CZ

Hon. Craig S. Strong

OPINION

This certified class action is before the Court on four motions for summary disposition. Two motions for summary disposition were filed by Plaintiffs, Deerhust Condominium Owners Association, Inc. ("Deerhurst") and Woodview Condominium Association ("Woodview") against Defendant, City of Westland ("the City" or "Westland") and two motions for summary disposition were filed by Defendant. Also before the Court is Plaintiffs' motion to strike Defendant's expert opinions and testimony. For the reasons stated below, the Court will deny both of Plaintiffs' motions and will grant Defendant's motion as to the statute of limitations and deny its motion as to governmental immunity. The Court will also deny Plaintiffs' motion in limine.

I. FACTUAL AND PROCEDURAL BACKGROUND

Westland operates and maintains a water supply system to provide water to its residents and a sewer system. Plaintiffs, Deerhurst and Woodview, are condominium homeowners associations, which are Westland water consumers. The City of Detroit supplies water at wholesale rates to local governments, pursuant to MCL 123.141(1), while Wayne County provides sewer services to local governments. After purchasing water, the local governments are contractual customers of the City of Detroit. The municipalities then establish their own retail rates and directly bill to their inhabitants for water consumption.

Westland water customers are divided into three categories: (1) residential; (2) commercial (including commercial, apartment, and industrial properties); and (3) associations (condominium properties). Customers are billed according to the size of their meters. Larger water meters provide larger water volumes. According to Defendant, there are approximately 27,000 current water customers. These include 22,000 residential customers, 5,000 commercial customers, and 60 to 70 associations. Plaintiffs are association water accounts. Defendant asserts that, in response to the City of Detroit's increase in rates in March, 2013, Westland increased fixed costs for customers with certain sized meters, one of which was Deerhurst. Defendant claims that the increase allocated fixed costs to different customers based upon the quantity of water used. A two-inch meter provides four times the water that a one-inch meter provides. Deerhurst has a two-inch meter and, thus, receives four times the water volume of the water volume received by a customer with a one-inch meter.

Plaintiffs first filed a complaint and motion for class certification. Plaintiffs amended the complaint. The Court then granted the motion for class certification. Subsequently, Plaintiffs filed a second amended complaint in assumpsit for money had and received, alleging: (1) that

Westland violated MCL 123.141(3)[1] by selling water to Plaintiff at a retail rate in excess of the actual cost of providing water; (2) that the alleged water rate overcharges violate the Headlee Amendment of the Michigan Constitution,[2] specifically Michigan Constitution of 1963, Article 9, Section 31; (3) that by virtue of the City's inclusion of the General Fund Support Charge and the Rate Overcharges in the Rates, the water and sewer rates are unreasonable; and (4) that Westland has violated MCL 141.91 by imposing and collecting the General Fund Support Charges and Rate Overcharges. Plaintiffs then filed a motion for class certification, which the Court granted. The instant motions followed.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), MCR 2.116 (C)(8), AND MCR 2.116 (C)(10)

The parties bring their motions for summary disposition pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10). "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence

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1 MCL 123.141 provides in relevant part:

> (2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making. This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract. ...
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> (3) The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service.

2 MCL 600.308a provides that a claim for a Headlee Amendment violation may be brought in the court of appeals or in the circuit court:

> (1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.
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> ***
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> (4) The unit of government shall be named as defendant. An officer of any governmental unit shall be sued in his or her official capacity only and shall be described as a party by his or her official title and not by name. ...

filed or submitted by the parties." *Haliw v Sterling Heights*, 464 Mich 297, 301-302; 627 NW2d 581 (2001). When deciding a motion for summary disposition under MCR 2.116(C)(7), the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). "'If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.'" *Moraccini v Sterling Heights,* 296 Mich App 387, 391; 822 NW2d 799 (2012), quoting *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "But when a relevant factual dispute does exist, summary disposition is not appropriate." *Moraccini, supra.*

A motion for summary disposition on the basis of untimeliness is also governed by MCR 2.116(C)(7). Summary disposition is proper under MCR 2.116(C)(7) when a claim is barred by expiration of the statute of limitations. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). When reviewing such a motion, a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may consider only the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion

should be granted if no factual development could possibly justify recovery." *Beaudrie, supra* at 130.

In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party ". . . may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. Id.; *Quinto, supra* at 363. Finally, a "reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden, supra* at 121.

III. ANALYSIS

A. Plaintiffs' Motions for Summary Disposition

Plaintiffs contend that they are entitled to summary disposition because the alleged rate overcharges violate the Headlee Amendment, Michigan Constitution of 1963, Article 9, Section 31, and MCL 141.91.

As an initial matter, before it can be determined whether the alleged overcharge is a tax, Plaintiffs must first establish that there is, in fact, a rate "overcharge." Municipal utility rates are presumptively reasonable. *Trahey v City of Inkster*, 311 Mich 582, 594; 876 NW2d 582 (2015). "This presumption exists because courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. *Id.* Plaintiffs have the burden of establishing that the sewer rate is unreasonable. *Id.*

The City's Finance Director, Steven Smith, testified in deposition that the City includes in its annual water and sewerage budget significant amounts to finance repairs and improvements to the water and sewer system in the ensuing fiscal year. These amounts are included in the water rates. [Plaintiffs' Motion on Rate Overcharges, Exhibit 1, p 142]. He also confirmed that water and sewer customers pay rates to generate revenue "for the current period capital improvements." [Id]. Mr. Smith also stated that the rates are intended to generate an additional $500,000 per year for future improvements to the system. [Id at p 135]. He said that as part of the rate structure the City included in its rate structure a projected $1.7 million in improvements for the 2016 fiscal year. [Id at p 142] [See also Exhibit 2]. He explained that repairs to the system or replacements of water mains are in the annual capital outlay budget and are incorporated into the water rate. [Id, Exhibit 3, p 126]. He said that the reserve fund, which includes the yearly

$500,000.00, is intended to pay for similar, but more expensive repairs or improvements to the system. [Id]. He also stated that he is aware of a plan for future improvements in the Capital Improvement Plan and that some improvements will be funded out of bond sales. In short, according to Mr. Smith, the plan is intended to set a rate that would add $500,000.00 per year, after expenses such as employee wages and benefits, to fund current capital improvements to the system.

Under MCL 123.141, "[t]he price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making..." and "[t]he retail rate ... shall not exceed the actual cost of providing the service." MCL 123.141(2) and (3).

Plaintiffs' expert, James Olsen is an analyst for MGT of America Consulting Group ("MGT"). MGT specializes in indirect cost allocation for cities, counties, agencies, or any state government that requires cost allocation analyses. Mr. Olsen testified that, because the City of Westland's Water and Sewer Fund has seen an increase over the last couple years, the water and sewer rates charged to the City's customers are excessive or above a reasonably determined actual cost of service. However, Mr. Olsen fails to take into account the expenses of maintenance and future capital improvements. In fact, he stated that he had no opinion as to the overall reasonableness of the Water and Sewer expenditures. [Defendant's Response to Plaintiffs' Motion for Claims Based on General Fund Support Charge, Exhibit 1, p 18]

Defendant's expert, Mark Beauchamp, is President of Utility Financial Solutions, which conducts cost of service studies, feasibility studies, financial rate analyses, load research analyses, and other financial projection studies for various utilities. He prepared an assessment of revenue requirements for the years between 2009 and 2015 for the water and wastewater

departments to identify if ratepayers were under or overcharged for the utility services provided by the City. [Defendant's Response to Motion Concerning Water and Sewer Fund Balance, Affidavit, Exhibit 4]. According to Mr. Beauchamp, the only way to determine if the water and sewer rates charged by the City were reasonably related to the actual cost of service is to first determine the revenue requirements of the Water and Sewer Department. Then one must determine if the revenues generated by the Water and Sewer Department meet those requirements. The only way to determine if the rates are reasonable or reasonably equate to the actual costs of service is to prepare a full revenue requirement analysis. Mr. Beauchamp concluded that, for fiscal years 2009 through 2016, the revenues generated by the City's Water and Sewer Department "fell below the revenue requirements." [Id]. Here, it should be noted that Plaintiffs have filed a motion in limine requesting the Court strike Mr. Beauchamp's expert testimony. The Court will fully address that motion below.

"Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." [Authority omitted] *Trahey v City of Inkster*, 311 Mich App 582, 595; 876 NW2d 582, 589 (2015). Plaintiffs have not shown any improper use of the reserved funds and have not demonstrated that it is unreasonable to anticipate costs for required maintenance and improvement to the system. Hence, they have not overcome the presumption that the City's rates are reasonable.

Next, Plaintiffs claim that the rate increases violate the Headlee Amendment. Michigan Constitution of 1963, Article 9, Section 31, also known as the Headlee Amendment, provides in relevant part:

> 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. ...

Under Article 9, Section 32, "[a]ny taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit." Hence, under the Headlee Amendment, taxpayers have standing to sue when the rate of existing taxes are increased without being approved by a majority of voters.

MCL 141.91 provides that, "[e]xcept as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964." This means that local governments have no power of taxation unless that power is given by the legislature. "Unless authority for the defendant township and cities to make the reassessments demanded by plaintiffs can be found in the statutes, it does not exist." *City of Berkley v Royal Oak Tp*, 320 Mich 597, 601; 31 NW2d 825 (1948).

Plaintiffs first argue that the overcharges are a violation of the Headlee Amendment because they constitute a tax as determined by the factors enunciated in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). In *Bolt*, *supra* at 154-155, the Court considered whether a particular storm water service charge, "imposed on each parcel of real property" located in Lansing, was a "user fee" as opposed to a "tax" levied in violation of the Headlee Amendment, Const 1963, art 9, § 31. Lansing enacted an ordinance for imposition of an "annual storm water service charge." The charge was to be imposed over thirty years to partially pay for a project to separate the city's combined storm and sanitary sewer lines. Lansing was seeking to limit the

polluting of local rivers that resulted when heavy precipitation caused the city's combined storm water and sanitary sewer systems to overflow and discharge into those rivers. *Id* at 154-155. The charge was imposed on each parcel of property located in the city using a formula that attempted to estimate each parcel's storm water runoff.

The question posed here is whether the alleged water and sewer overcharges charges are user fees or whether they constitute taxes. Because an increase in local taxes requires voter approval, analysis of the difference between a tax and a user fee must be conducted. There are three primary criteria enunciated in *Bolt* to be considered when distinguishing between user fees and taxes, for purposes of the Headlee Amendment analysis. The test of the difference between a user fee and tax includes the following: (1) A user fee must serve a regulatory purpose rather than a revenue-raising purpose; (2) user fees must be proportionate to the necessary costs of service; and (3) A user fee must be for a service voluntarily undertaken by the consumer. *Bolt, supra* at 161-162. "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." [Internal quotation marks and citations omitted] *Id* at 161.

The first two criteria are closely related and will be analyzed together. While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying purpose. *Merril v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959). A fee also confers benefits only on the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee. *Bolt, supra*, at 164-165. Thus, revenue derived from regulation, i.e., a fee, must be proportionate to the cost of the regulation, although it is presumed that the amount of the fee is reasonable unless the contrary is established. *Vernor*

Secretary of State, 179 Mich 157, 167; 146 NW 338 (1914). In contrast, a tax is designed to raise revenue for general public purposes. *Bray v Dep't of State*, 418 Mich 149, 162; 341 NW2d 92 (1983).

In *Bolt*, the Supreme Court found that the storm water service charge failed to satisfy the first and second criteria because the charges imposed did not correspond to the benefits conferred. *Bolt*, *supra* at 165. That is, seventy-five percent of the property owners in Lansing were already served by a separate storm and sanitary sewer system. Those property owners would be charged the same amount for storm water service as the twenty-five percent of property owners who would enjoy the full benefits of the new construction. *Id.* The Supreme Court further noted that the goal of the ordinance was improved water quality in two local rivers and avoidance of federal penalties for discharge violations. These goals benefit everyone in Lansing, not just property owners. *Id* at 166.

In the present case, Plaintiffs have failed to establish that any funds intended for repairs and upgrades to the sewer system would benefit the City in any other general way, and not just property owners who used the sewer system. Plaintiffs have also failed to establish that the reserve funds are used for anything other than the maintenance and operation of the system. Furthermore, the City's Water and Sewer Ordinance provides for such maintenance and operation. Section 102-61 provides in relevant part:

> (a) It is hereby declared to be the intent and purpose of the city council to maintain reasonable and uniform rates and charges applicable to various classifications of users of the water system and sewer system so as to provide funds to, as far as possible:
>
> (1) Operate and maintain the water system and sewer system in a reasonable, proper and efficient manner; and

> (2) Make the water contracts debt retirement payments and sewer contracts debt retirement payments as they become due.
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> (c) The rates and charges established under this article shall be based upon a methodology which complies with applicable federal and state statutes and regulations. The amount of the rates and charges shall be sufficient to provide for debt service and for the expenses of operation, maintenance and replacement of the system as necessary to preserve the system in good repair and working order. The amount of the rates and charges shall be reviewed annually and revised when necessary to ensure system expenses are met and that all users pay their proportionate share of operation, maintenance and equipment replacement expenses.
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> [Emphasis added].

Thus, water and sewer rates are intended for system operation, maintenance, and equipment replacement expenses and are intended to be reasonable in light of the costs associated with operation and maintenance. In addition, the ordinance also mandates that users, based on their usage, pay for their proportionate share for these expenses. As noted above, the City's Finance Director stated that repairs to the system or replacements of water mains are in the annual capital outlay budget and is incorporated into the water rate. This rate structure comports with the ordinance and is, therefore, presumptively reasonable.

Plaintiffs also argue that the sewer charge is not voluntary and, therefore, is a tax. However, there is no support for this assertion in the record. The City contends that it only charges residents for their actual use of the sewer system, and Plaintiffs have presented no evidence to the contrary.[1] Clearly, these rates confer a benefit of efficient operation of the water

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[1] In *Ripperger,* this Court articulated a third criterion: voluntariness. Quoting from *Jones v. Detroit Water Comm'rs,* 34 Mich. 273, 275 (1876), the *Ripperger* Court stated:

and sewer system to its users as contemplated by *Bolt* and not a tax which confers a benefit to the general public. "Taxes are designed to raise revenue for the general public, while a fee 'confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.'" *Westlake Transp, Inc v Pub Serv Com'n*, 255 Mich App 589, 613; 662 NW2d 784, 799–800 (2003). "Thus, there is a direct benefit to the one who pays the fees." *Id.* Those who use water and sewer services derive a benefit from paying the rates imposed. Moreover, the rates correlate directly with the amount and frequency of use by each particular user. Hence, the amount and frequency of usage is a choice and is voluntary. Therefore, in this Court's view, the City's water and sewerage rates are reasonable user fees and not taxes and do not violate the Headlee Amendment.

Plaintiffs also contend that the charges violate MCL 141.91 because they are not ad valorem property taxes. Because Plaintiffs cannot establish that the alleged rate overcharges are unlawful taxes, the City has not violated MCL 141.91. Accordingly, the Court will deny Plaintiffs' motion as to the alleged rate overcharges.

Plaintiffs' second motion for summary disposition is grounded in the notion that reasonable minds could not differ on the conclusion that the water rates' inclusion of a "General Fund Support Charge" does not comport with Michigan law. This motion is essentially the same as the first motion, but characterizes the water and sewer rates as a way to support the City's

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> "The water rates ...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. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness.... The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them."
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> *Bolt v City of Lansing*, 459 Mich 152, 162; 587 NW2d 264 (1998).

General Fund. Plaintiffs contend that it is improper for monies derived from the rates to be transferred to the General Fund. They claim that these monies were then used to finance other City expenses and services.

Defendant counters Plaintiffs by arguing that there is no evidence deeming the rates and expenditures as unreasonable. The City contends that, even if the rates are determined to be unreasonably high and the expenditures unreasonable, the relief sought should be a transfer of monies from the General Fund back to the Water and Sewer fund, and not money damages to Plaintiffs. As indicated above, the rates do not qualify as taxes and, as such, are presumptively reasonable. The court in *Kowalski v City of Livonia*, 267 Mich App 517, 520, fn 2; 705 NW2d 161 (2005) noted:

> We would hold that such a contract price for a governmentally owned commodity could never qualify as a "tax" even if the government sets the contract price high enough to glean a substantial profit and generate revenue to replenish its general fund or refund money to its citizenry.

In this case, Plaintiffs complain that funds generated by water and sewer rates were improperly transferred to the General Fund to support other expenses. For example, the Finance Director, Mr. Smith, testified that funds budgeted for Water and Sewer retiree healthcare expenses are transferred to the General Fund and then paid out to the insurers. [Plaintiffs' Motion, Exhibit 2, p 28-29]. He explained that some costs are allocated to Water and Sewer when an employee has worked in other departments and then later retires from the Water and Sewer department. These costs get charged to the General Fund and are allocated back to the Water and Sewer Fund. [Id]. Funds allocated for these expenses derive from the operation and maintenance of the system because those former employees maintained and operated the system. The transfers are made quarterly. [Id, Exhibit 3, p 54]. Plaintiffs present no evidence to support the notion that the rates, although charged to the General Fund, are for General Fund services. Therefore, water and sewer

rate funds are not being improperly transferred to the General Fund to support services to the public at large.

B. Defendant's Motions for Summary Disposition

In its first motion, the City argues that Plaintiffs' claim that the alleged rate overcharges violates the Headlee Amendment is barred by the statute of limitations. The City also contends that the statute of limitations should also apply to Plaintiffs' equitable claims. It asserts that Plaintiffs cannot overcome their burden to demonstrate that the rates are unreasonable. The City further states that the equitable claims should be dismissed because Plaintiffs received the benefit of City services in exchange for the rates paid and there is an adequate remedy at law.

Under MCL 600.308a(3), an action based on a Headlee Amendment violation must be "commenced within 1 year after the cause of action accrued." However, the statute of limitations "does not prevent a taxpayer from seeking to enjoin a governmental unit from imposing on him in the future taxes that violate the Headlee Amendment." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127; 537 NW2d 596, 600 (1995). Plaintiffs herein do not seek to enjoin the City, but instead seek money damages. "In the case of an individual plaintiff bringing a Headlee Amendment claim, a cause of action accrues on the date that the tax is due. A Headlee Amendment claim brought by a plaintiff on behalf of the public would accrue at the time the resolution implementing the tax is passed." *Briggs Tax Serv, LLC v Detroit Pub Sch*, No. 271631, 2007 WL 750338, at 9 (Mich Ct App March 13, 2007), citing *Taxpayers Allied for Constitutional Taxation* at 123-124, 124 n 7.

According to Plaintiffs, in March 2013 the City changed how it assessed these fixed charges, by creating different rates based upon the size of the water pipe that served each customer. Plaintiffs' condominium units are serviced by two inch pipes. Due to the dramatic

increases in the fixed charges, Plaintiffs' water bills "skyrocketed" in 2013. Hence, Plaintiffs' claims accrued in 2013, and the present action was filed on May 15, 2015, almost 2 years after the City changed the way it charged consumers. This is outside the statute of limitations.

Even if Plaintiffs' claims were made within the statute of limitations, as indicated above, Plaintiffs have not demonstrated that the water and sewer rates are unreasonable. No evidence has been presented which would establish appropriate rates for operation and maintenance of the system. Nor have Plaintiffs established that the funds from the Water and Sewer Fund were improperly transferred to the General Fund to fund other services for the public at large. Therefore, pursuant to MCR 2.116(C)(7) and (10), the Court will grant the City's motion as to all of Plaintiffs' claims.

Defendant's second motion is an amended motion for summary disposition as to alleged monetary damages. In that motion, Defendant argues that Plaintiffs' claim for monetary damages is barred by governmental immunity. Conversely, Plaintiffs argue that their claim for monetary damages is not based on tort, but is based on breaches of the statute, constitution, and ordinance. The Court agrees and where the public is empowered to make claims based upon constitutional breaches, no immunity exists. See *Durant v State*, 456 Mich 175, 205; 566 NW2d 272 (1997) [Footnotes omitted] ("We conclude that the people's directive "to enforce" § 29 was intended as a general directive, giving the Court the duty and authority to enforce § 29 in the way that would most effectuate the balances struck by the people in the Headlee Amendment. We have followed that directive in the past and now must apply it to the remedy in this case.") The Durant court also noted: "This grant of authority in the specific authorization of suits to enforce the provisions of art. 9, §§ 25 through 31 waives sovereign immunity." *Id* at 285, fn 31. Nevertheless, because this Court has already determined that the water rates are reasonable and

the water and sewer fund reserves have not been inappropriately transferred to the General Fund, it is of no consequence whether or not the City is entitled to immunity. Therefore, the City's motion as to governmental immunity will be denied.

C. Plaintiffs' Motion to Strike Defendant's Expert Opinion and Testimony

The last motion before the Court is Plaintiffs' request to have the opinions and testimony of City's experts excluded. They request that the Court strike the affidavits of Debra Peck and Mark Beauchamp because they allegedly used a new type of analysis and the City has refused to produce Ms. Peck's new analysis. Ms. Peck is the City's Budget Director and testified, not as an expert, but as a lay witness who was a participant in the budget process. They claim that Ms. Peck has not been qualified as an expert witness. Because she is a lay witness with first-hand knowledge of the City's budgetary needs, she need not be qualified as an expert. MRE 701.[2] She also testified in rebuttal as to her disagreement with Plaintiffs' expert, Mr. Olson, that the increase in the Water and Sewer Fund indicated that the rates were excessive and unreasonable. She stated:

> Rather, the only way to determine if the water and sewer rates are reasonable or reasonably equate to the actual costs of service is to prepare a full revenue requirement analysis.
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> For example, it was determined that certain unfunded OPEB (Other Post Employment Benefits) expenses for General Fund employees that provided services to the Water and Sewer Department had not been allocated to the Water and Sewer Department, but should have been allocated. For Fiscal Year 2015/16 alone, this resulted in an additional $185,658 that should

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> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.
>
> MRE 701.

> have been allocated to the Water and Sewer Department and paid to the General Fund.

In other words, Ms. Peck's affidavit states a disagreement with Mr. Olson and demonstrates that he had not accounted for all costs and expenses associated with the Water and Sewer Fund including costs that pass to retired employees after their service in the department. Therefore, the Court finds her affidavit sufficient and she may testify as a lay witness at trial, if necessary.

With respect to Mr. Beauchamp, Plaintiffs claim that his analysis is an unacceptable in the industry. His qualifications are extensive as can be seen on his curriculum vitae. An expert witness is qualified under MRE 702 if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. Plaintiffs' contention is that Mr. Beauchamp has not used reliable principles and methods.

The Court is the gatekeeper of the evidence presented and "it is within a trial court's discretion how to determine reliability." [Footnote omitted] *Elher v Misra*, 499 Mich 11, 25; 878 NW2d 790 (2016). In the Court's view, Mr. Beauchamp's analysis is reliable and his explanation of methods used by the City will assist the trier of fact. MRE 702. For example, Mr. Beauchamp supplied the following in his affidavit:

> Although the City of Westland has previously used the cash basis to determine its revenue requirements for the Water and Sewer Department, the cash basis is subjective and revenue requirements are difficult to defend without adjustments. The utility basis identifies revenue requirements on a consistent basis and helps ensure current ratepayers are paying their use of infrastructure. The cash basis determination does not appropriately identify revenue requirements due to the following: 1) Debt service payments are often over a 20 year period, the infrastructure may be in service for over 50 years. This results in current customers being overcharged for infrastructure installed and financed. 2) Revenue financed capital expenditures, (the amount of capital replacement included in rates) are not incurred consistently from one year to the next.

> Revenue requirements increase in years when capital expenditures are high and decrease when capital expenditures are low. A substantial amount of the charges are related to infrastructure investments and the cash basis does not consistently recognize a customer's use of the infrastructure.
>
> I disagree with and reject Mr. James Olson (sic) conclusion that because the City of Westland's Water and Sewer Fund has seen an increase over the last couple years that the water and sewer rates charged to City's customers are excessive or above a reasonably determined actual cost of service. Rather, the only way to determine if the water and sewer rates are reasonable or reasonably equate to the actual costs of service is to prepare a full revenue requirement analysis.

Thus, both Ms. Peck and Mr. Beauchamp averred their disagreement with Mr. Olson's analysis and can serve as rebuttal witnesses. Mr. Beauchamp used reliable accounting principles to express his opinion. Therefore, the Court will deny Plaintiffs' motion.

The Court notes also that, regarding Plaintiffs' contention that the City has refused to produce Ms. Peck's analysis, rather than striking the evidence, the more appropriate remedy would be a motion for an order compelling production.

IV. CONCLUSION

The City's water and sewerage rates are reasonable user fees and not taxes and do not violate the Headlee Amendment. Nor do they violate MCL 141.91 because they are not ad valorem property taxes. In addition, the water and sewer rate funds are not being improperly transferred to the General Fund to support services to the public at large. Accordingly, the Court will deny both of Plaintiffs' motions.

Plaintiffs' claims are outside the statute of limitations. Even if Plaintiffs' claims were made within the statute of limitations, as indicated above, Plaintiffs have not demonstrated that the water and sewer rates are unreasonable. Nor have Plaintiffs established that the funds from the Water and Sewer Fund were improperly transferred to the General Fund to fund other

services for the public at large. Therefore, pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10), the Court will grant the City's motion as to all of Plaintiffs' claims. The Court, however, will deny the City's motion as to governmental immunity as lacking a legal basis and as moot. Finally, the Court will also deny Plaintiffs' motion in limine to strike and exclude the City's expert opinions and testimony.

DATED: 6/28/2017

/s/ Craig Strong

Circuit Judge

Kim Plets

From: efilingmail@tylerhost.net
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