STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

BRAD M. PATRICK, individually, as a representative of a class of similarly-situated persons and entities,

Plaintiff,

vs.

Case No. 2017-003018-CZ

CITY OF ST. CLAIR SHORES,

Defendant.
_____/

OPINION AND ORDER

Plaintiff Brad M. Patrick, individually and as a representative of a class of similarly-situated persons and entities ("Plaintiff") has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Defendant City of St. Clair Shores (the "City") has filed a response in opposition to the motion and a counter motion for summary disposition pursuant to MCR 2.116(I)(2) and MCR 2.116(C)(7).

Factual and Procedural History

This action arises out of Plaintiff's claim challenging a mandatory stormwater service charge ("Stormwater Charge") imposed on property owners in the City. The City's charter became effective on January 15, 1951 and provides, in pertinent part:

> 10.331 – Sewers, drains; council, powers.
> Sec. 13.1. The council may acquire, maintain, operate, improve, enlarge and/or extend, either within or without the city, drains, sewers and facilities for the collection and treatment of stormwater and/or sanitary sewage. The council may contract with any other governmental unit or units for sewerage and drainage facilities for the treatment of sewage.
>
> 10.334 – Sewage disposal service; charges.

> Sec. 13.4. The city may fix and collect charges for sewage disposal services, the proceeds whereof shall be exclusively used for the purpose of its sewage disposal system, which charges may include a return on the fair value of the property devoted to such service, excluding from such valuations such portions of the system as may have been paid for by special assessment. Such charges may be made a lien upon the property served, and if not paid when due, may be collected in the same manner as other city taxes.

The City has a sewer system which includes a "separated" system, in which one set of pipes collects and conveys sanitary sewage for treatment and another set of pipes collects stormwater that either flows into the pipes for treatment or into Lake St. Clair without treatment. Prior to 1993, the City was utilizing gas and weight tax fund revenues and general funds, which were also used to repair the roads, to repair, maintain and replace storm drains. In 1992, the City considered establishing the Stormwater Charge to fund stormwater management. A Stormwater Utility Implementation Report (the "Report") was prepared to study the need of the Stormwater Charge and to provide recommendations if the City elected to implement the Stormwater Charge. The Report's stated purpose was to "increase the amount of money available for street reconstruction and to establish a dedicated funding source for stormwater management." *See* Plaintiff's motion, Exhibit G. The Report further stated that the purpose of the Stormwater Charge would be to generate revenue to fund both operation and maintenance expenses and capital improvements to the storm drainage system. *Id.*

Following the outcome of the Report, the City adopted its stormwater utility ordinance, effective July 27 1993, which was not approved by the City's voters prior to its implementation and requires all owners of real property in the City to pay the Stormwater Charge on a quarterly basis. The current stormwater utility ordinance is contained in sections 25.111 – 25.121 of the City's ordinances.

Relevant here, the ordinance states that "all owners of real property in the City of St. Clair Shores shall be charged for the use of a stormwater system based on the amount of stormwater and rate of flow of stormwater which is determined to be entering the stormwater system from the property. *See* Plaintiff's motion, Exhibit I at Section 25.112. The quarterly charges are $8.52 for single-family residential, $4.26 for single family residential located on waterfront or canal and duplex, $6.09 for condominium units, $3.65 for apartment units, and $121.71 per equivalent hydraulic area ("EHA") multiplied by .20 for pervious area and .95 for impervious area for all other properties. *Id.* at Section 25.113, 25.114. A Stormwater Charge Review Board must be appointed to consider owner appeals. *Id.* at Section 25.114A. Unpaid stormwater service charges shall constitute a lien against the property affected. Charges unpaid for a period of six months prior to March 31 of any year may be certified by the City Assessor and placed on the next tax roll or the City Attorney may file suit to collect the unpaid charges. *Id.* at Section 25.117.

In May 2017, the City received a $2,000,000 grant from the State of Michigan Stormwater, Asset Management, and Wastewater ("SAW") grant program through the Michigan Department of Environmental Quality to investigate the condition of its stormwater system. The SAW grant was used to evaluate and assess the condition of the City's stormwater system and create an asset management plan ("AMP"). The AMP made the following conclusions and recommendations: the cost to repair or replace any storm sewer line, structure, or pump station which warranted repair or replacement based on their condition is $20,905,000, a 5-10 year capital improvement plan to ensure the stormwater system continues to operate at the desired level of service to provide for current and future use will cost $2,417,400 annually, and the Stormwater Charge will generate an annual revenue of $1,677,629 for the fiscal year 2018.

On November 3, 2017, Plaintiff filed his first amended complaint in this action alleging count I – violation of Headlee Amendment, count II – assumpsit for money had and received, violation of MCL 141.19, count III – unjust enrichment, violation of MCL 141.19, and count IV – assumpsit for money had and received, unreasonable water and sewer rates. On January 29, 2018, Plaintiff filed this instant motion for partial summary disposition as to counts I, II and III. On March 26, 2018, the City filed its response in opposition to Plaintiff's motion and a counter motion for summary disposition. On April 17, 2018, Plaintiff filed his reply brief in support of his motion. On April 23, 2018, the Court held a hearing in connection with the motion and took the matter under advisement. On June 15, 2018, Plaintiff filed a supplemental brief in support of his motion.

Standard of Review

Pursuant to MCR 2.116(C)(7), a party may be entitled to summary disposition if a statute of limitations bars the claim. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). "In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). Furthermore, the trial court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 61-62.

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists when the record leaves

open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

Arguments

Plaintiff argues that the Stormwater Charge imposed on the property owners of the City is a tax and is in violation of the Headlee Amendment. Plaintiff further avers that the Headlee Amendment is applicable because the Stormwater Charge was not authorized by the City's charter. Lastly, Plaintiff avers that the Stormwater Charge constitutes an unlawful tax under MCL 141.91.

In response, the City contends that the Stormwater Charge is a lawful user fee, not a tax. The City also argues that even if the Stormwater Charge is a tax, Headlee analysis is not appropriate because it is authorized by its charter. Lastly, the City maintains that Plaintiff's claims are subject to a one-year statute of limitations.

Law and Analysis

Headlee Amendment Analysis

The relevant portion of the Headlee Amendment to the Michigan Constitution, which was ratified on November 7, 1978, states as follows:

> 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.

Plaintiff argues that the City's stormwater utility ordinance imposes a mandatory tax on property owners in violation of the Headlee Amendment. Whether the Stormwater Charge is a tax or user fee is a question of law. *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 209; 591 NW2d 52 (1998). "There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v City of Lansing*, 459 Mich 152, 160;

587 NW2d 265 (1998). However, the *Bolt* Court set forth three primary criteria to be considered when distinguishing between a fee and a tax. *Id.* at 161. First, "a user fee must serve a regulatory purpose rather than a revenue-raising purpose. *Id.* Second, "user fees must be proportionate to the necessary costs of the service". *Id.* at 161-162. Third, a user fee is voluntary. *Id.* at 162. It is undisputed that the Stormwater Charge is not voluntary.

Plaintiff relies on the case of *County of Jackson v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013) and contends that Defendant fails to distinguish this case from *Jackson*. In *Jackson*, property owners and the county brought an action against the city alleging violation of the Headlee Amendment. The Jackson city council adopted an ordinance in which the city created a stormwater utility and imposed a stormwater management charge on all property owners within the city to generate revenue to pay for the services provided by the utility. *Jackson*, 302 Mich at 93. In *Jackson*, the question posed was "whether the city, by shifting the method of funding certain preexisting government activities from tax revenues to a utility charge was in violation of the Headlee Amendment. *Id.* The *Jackson* Court held that the city's stormwater management charge was a tax, the imposition of which violated the Headlee Amendment because the city did not submit the ordinance to a vote. *Id.*

In this case, Plaintiff first argues that as to criteria one in *Bolt*, the Stormwater Charge is motivated by a revenue-raising purpose that far outweighs any regulatory purpose. Plaintiff argues that, as in *Jackson*, the City imposed the Stormwater Charges to relieve tax-supported funds of the obligation to finance stormwater management activities. *See* Plaintiff's motion, Exhibit E, Letter Regarding Stormwater Charge dated 9/16/1992. Further, Plaintiff argues that, as in *Jackson*, the feasibility study commissioned by the City prior to instituting the Stormwater Charge confirmed the City's "desire to devise a method of calculating a stormwater management charge of sufficient

amount to fund the preexisting services the City desired to delegate" to the stormwater utility. *See* Plaintiff's motion, Exhibit G, the Report.

Further, Plaintiff contends that, as in *Jackson*, the City's ordinance contains few provisions of regulation and no provisions that truly regulate the discharge of the storm and surface water runoff. Plaintiff contends that the Stormwater Charge does not take into consideration the presence of pollutants on each parcel that contributes to such runoff and contributes to the need for treatment before discharge into navigable water. *See* Plaintiff's Motion, Exhibit C, p. 54-55, Deposition transcript of Michael Smith. Plaintiff further argues that the City does not distinguish between those responsible for greater or lesser levels of runoff.

With regard to the method of imposing the Stormwater Charge, Plaintiff avers that the Stormwater Charge does not account for the actual use of the stormwater sewer system by each parcel with the requisite precision necessary. Plaintiff argues that the Stormwater Charge is even less proportionate than the charges at issue in *Jackson*. In *Jackson* all residential parcels two acres or less in size where assigned one EHA. *Jackson*, 32 Mich App at 96. However, in this case, all residential parcels are assigned one EHA, regardless of size. Further, like *Jackson*, a large percentage of the parcels in the City are residential and therefore charged a flat rate. *Id.* at 110. Also, like *Jackson*, the method of calculating the Stormwater Charge fails to consider property characteristics relevant to runoff generation. *Id.*

As to criteria two of *Bolt*, Plaintiff contends that the Stormwater Charge far exceeds the City's actual stormwater management expenses. Plaintiff presents evidence that the City's total stormwater system revenues during the six year period preceding this action, including the Stormwater Charge, grants and contributions, was $8,776,671. *See* Plaintiff's motion, Exhibit K, p. 2, the City's response to Plaintiff's first interrogatories. Of that amount, the Stormwater Charge

constituted $6,689.159. *Id.*; Plaintiff's motion, Exhibit R. Plaintiff further presents evidence that during that same time period, the total stormwater expenses were $5,349,797. *See* Plaintiff's motion, Exhibit C, p. 38-51, Deposition transcript of Michael Smith. Plaintiff argues that based on this evidence, the City maintains a working capital reserve of almost 400 percent of the total annual stormwater expended, which is far in excess of the 25-30 percent in *Jackson*. *Jackson*, 302 Mich App at 111.

In further support of its argument regarding criteria two of *Bolt*, Plaintiff argues that the Stormwater Charge is not proportional because it does not confer any particularized benefit on the persons paying the Stormwater Charge. Plaintiff argues that, like *Jackson*, any benefit that the City's stormwater management activities conferred on property owners is also a benefit conferred on the general public. *Id.* at 108. Lastly, Plaintiff argues that the Stormwater Charge is not proportionate to the cost of the stormwater system because the City is imposing the Stormwater Charge to finance future capital improvements before a plan for such improvements has even been made. *See* Plaintiff's motion, Exhibit D, Asset Management Plan.

In response, the City contends that the Stormwater Charge is user fee and does not violate the Headlee Amendment. As to the first *Bolt* criteria, the City maintains that the Stormwater Charge's purpose is to sustain, operate and maintain the stormwater system in order to protect real property from flooding and to ensure compliance with federal and state law concerning discharges from municipal stormwater systems. The City claims that the location and make-up of the City requires a complex system to regulate and prevent flooding of public and private property within the City for purposes of public health. *See* the City's response, Exhibit C, p. 19, Asset Management Plan.

The City further argues that it must maintain a stormwater permit in order to properly discharge stormwater to comply with the Clean Water Act and the Michigan Natural Resources and Environmental Protection Act. The City asserts that it is required to investigate and document actions to eliminate illicit discharges and/or connections to the City's stormwater system; develop a public education plan designated to encourage the public to reduce the discharge of pollutants in stormwater; and develop and implement a watershed management plan for the purpose of identifying and executing actions needed to resolve both water quality and water quantity concerns within the watershed. *See* the City's response, Exhibit D, p. 3-15, General Permit. The City further contends that the Stormwater Charge serves a regulatory purpose since the City must regularly inspect the stormwater system, clean and repair catch basins and storm sewers, perform street sweeping and inspect and eliminate illicit discharge connections. *See* the City's response, Exhibit E, NPDES Storm Water 2015-2017 Progress Report.

In regards to the second criteria of *Bolt*, the City avers that the Stormwater Charge is proportionate to the cost of the stormwater system. First, the City contends that the owners of real property are charged the Stormwater Charge based on the amount of stormwater and rate of flow of stormwater entering the stormwater system from the property. *See* the City's response, Exhibit H, p. 5, the Report. The City further argues that the flat rate charged to residential property owners pursuant to the stormwater utility ordinance was based on a study of typical residential lots within the City with varying frontage and an average area that is covered by a house, driveway and other obstacles to stormwater penetration. *Id.* The City states that City personnel undertook a detailed estimate of the number of flat rate customers and performed impervious/pervious area measurements for all properties requiring individual measurements. *Id.* at p. 5-6.

Additionally, in support of its argument that the Stormwater Charge is proportionate to the cost of the service, the City avers that maintaining a positive balance is necessary for emergency repairs, replacement reserve of the system, the probability of failure, and the consequence of failure of the various components of the stormwater system. *See* Plaintiff's response, Exhibit C, p. 4, 8, Asset Management Plan. Further, in order for the City to maintain the level of service of the stormwater it will need an estimated $20,905,000 over the next 5 to 20 year period. *Id.* at p. 29. The projected cost for the most critical stormwater assets needing rehabilitation and repair over the next 5 years will cost an estimated $7,702,000. *Id.* at p. 30. The AMP further concludes that the City would need to spend an estimated $2,417,400 annually for its capital improvement plan in order to ensure the stormwater system continues to operate at the desired level of service. *Id.* at p. 31. In fact, the City contends, that the revenue derived from the Stormwater Charge will be insufficient to maintain the level of service for the current and future use of the stormwater system. *Id.*

Based on the above, the Court finds that the City has failed to provide any evidence that differentiates this case from *Jackson*. First, both *Jackson* and *Bolt* specifically rejected the City's argument that the Stormwater Charge is justified because the storm drain system is necessary in order to regulate and prevent flooding of public and private property and to ensure compliance with federal and state laws. The *Jackson* Court held that: "these concerns…benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway across the city bridge…" *Jackson*, 302 Mich App at 108-109; *Bolt*, 459 Mich at 166. The Jackson Court went on to hold that "[t]his lack of correspondence between the management charge and a

particularized benefit conferred to the parcels support our conclusion that the management charge is a tax. *Id.*

Further, the Court finds that the Stormwater Charge is not proportionate to the cost of the service and is mandatory. The Court is convinced that the property owners paying the Stormwater Charge do not receive any particularized benefit that is not conferred on the general public. The Court is also convinced that the Stormwater Charge generates a profit for the city, and is therefore revenue raising. Lastly, the AMP specifically recommends that the revenue from the Stormwater Charge be used for a 5-10 year capital improvement plan. Thus, the Court finds that the Stormwater Charge is a tax, rather than a user fee. Therefore, since the Stormwater Charge was not approved by the majority of qualified electors of the City, the Stormwater Charge is in violation of the Headlee Amendment.

Applicability of the Headlee Amendement

The City claims that the Stormwater Charge is exempt from Headlee analysis because it was authorized by its charter prior to the ratification of the Headlee Amendment. The City states that its charter became effective on January 15, 1951, over twenty-seven years prior to the ratification of the Headlee Amendment. The City avers that section 13.4 of its charter authorizes it to fix and collect charges for sewage disposal services, which includes the Stormwater Charge. The City relies on the language of section 13.1 of its charter to argue that sewage disposal services includes stormwater management. Additionally, the City provides the definition of "sewage" as "the matter carried off by sewers or drains." *Webster's New World College Dictionary* (4th ed). The City contends that since stormwater is carried off by sewers and drains it is part of its sewage disposal services.

In response, Plaintiff argues that the City's 1951 charter does not authorize the Stormwater Charge. First, Plaintiff contends that the City's charter makes a distinction between "drains" and "sewers" and "stormwater" and "sanitary sewage" in section 10.331. Second, Plaintiff contends that the definitions contained in section 20.020 of the City's charter create a distinction between the "drainage system" and the "sewer system". Plaintiff argues that the only drainage water that is included in the definition of sewage is drainage water that unintentionally gets into the City's sanitary sewer system. Lastly, Plaintiff argues that the City's charter also differentiates between charges for "sewage disposal service provided by the wastewater system (section 25.060) and "stormwater service charges" "for the use of a stormwater system" (section 25.112). Plaintiff relies on the following definitions as set forth in the section 25.020 of the City's charter:

> Combination Sewer or Combined Sewer shall mean a sewer receiving both surface runoff and sewage.
>
> Drain or Storm Drain shall mean a watercourse, ditch, drainage swale, or pipe intended for the conveyance of a drainagewater.
>
> Drainage System shall mean any part, or all, of the property, structures, equipment, drains, watercourses, materials, and appurtenances used in conjunction with the collection and disposal of drainagewater.
>
> Drainagewater shall mean storm water, subsurface ground water, melting snow or ice, roof and/or other surface water runoff. (amend. ord. eff. May 1, 2015)
>
> Wastewater or Sewage shall mean spend water which may be in combination of the liquid and water-carried wastes from residences, commercial buildings, industrial plants, institutions, or other uses, including drainage water inadvertently present in said waste.

The Court is convinced that the City's charter makes a clear distinction between drainage water and sewage in sections 10.331, 25.020, and sections 25.060 and 25.112. The Court is further convinced that the City's charter also clearly states that the only drainage water that is included in wastewater and sewage is that which is inadvertently present. Therefore, the Court finds that

Headleee analysis is appropriate because the City's charter did not authorize the Stormwater Charge prior to the ratification of the Headlee Amendment and must grant summary disposition as to count I – violation of the Headlee Amendment.

Violation of MCL 141.91- Assumpsit for Money had and Received & Unjust Enrichment

Plaintiff avers that the Stormwater Charge is a tax, is not an ad valorem tax and was not being imposed by the City on January 1, 1964. Therefore, Plaintiff argues, the Stormwater Charge is in violation of MCL 141.91. In response, the City argues that it has not violated MCL 141.91 because the Stormwater Charge is not a tax.

MCL 141.91, provides:

> "Except as otherwise provided by law and not withstanding 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."

However, the Court finds that neither Plaintiff nor the City fully briefed the issue of assumpsit for money had and received or unjust enrichment. Therefore, the Court must deny summary disposition as to count II and count III.

Statute of Limitations

The City argues that Plaintiff's individual claim for refund prior to August 15, 2016 and his claim for refund on behalf of members of a purported class prior to June 6, 2017 are barred by the statute of limitations. The City relies on *Taxpayers Allied for Constitutional Taxation (TACT) v Wayne County*, 450 Mich 119 (1995). Per *TACT*, when an individual plaintiff brings a Headlee Amendment claim, the cause of action accrued on the date the tax is due. *Id.* at 124. However, when a representative plaintiff acting on behalf of the public, the one-year statute of limitations, provided in MCL 600.308a, begins running at the time the alleged tax was enacted by the local unit of government. *Id.* at n 7. The City also contends that the one year statute of limitations

applicable to the Headlee claim should also apply to Plaintiff's assumpsit claims contained in count II and count III of the amended complaint.

In response, Plaintiff contends that his Headlee Amendment claim properly seeks refunds for overcharges billed to him individually and the class after August 15, 2016. Plaintiff further asserts that his assumpsit claims are subject to a six-year statute of limitations and he therefore properly seeks refunds for Stormwater Charges billed to him individually and the class after August 15, 2010. Plaintiff argues that this case is differentiated from *TACT* because this certified class action is not brought on behalf of the "public." Lastly, Plaintiff asserts that his assumpsit claims are separate and independent causes of actions from his Headlee Amendment claim.

Here, the Court finds that Plaintiff brought this action on behalf of himself and on behalf of a certified class, rather than as a member of the public. Plaintiff is a taxpayer and also a representative of other taxpayers in the City, unlike the plaintiff is *TACT*. Therefore, the Court finds that Plaintiff properly seeks a refund one year back from the filing of this case on his Headlee Amendment claim. The Court is also convinced that Plaintiff's assumpsit claims are separate and independent from his Headlee Amendment claim. Therefore, the Court finds that Plaintiff properly seeks a refund for six years back from the filing of this case on his assumpsit claims.

Conclusion

For the reasons stated above, Plaintiff's motion for summary disposition is GRANTED as to count I- violation of the Headlee Amendment, and DENIED as to count II – assumpsit for money had and received, violation of MCL 141.19, and count III – unjust enrichment, violation of MCL 141.19. Defendant's motion for summary disposition is DENIED. Until all matters are resolved, this case remains OPEN. MCR. 2.602(A)(3). IT IS SO ORDERED.

DATED:

JENNIFER FAUNCE
CIRCUIT JUDGE

OCT 18 2018

A TRUE COPY
COUNTY CLERK
BY: Court Clerk

Jennifer M. Faunce
Circuit Judge

cc: Gregory D. Hanley, Attorney for Plaintiff
Randall S. Toma, Attorney for Plaintiff
Richard Albright, Attorney for Defendant
Ronald A. King, Attorney for Defendant