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

JUDY KISH and JOYCE BANNON,
Individually, and as representatives of a class
Of similarly-situated persons and entities,
Plaintiffs,

v.

CITY OF OAK PARK,
A Michigan municipal corporation,
Defendant.
/

Case No: 15-149751-CZ
Hon. Leo Bowman

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Proof of Service

The undersigned certifies that a copy of the within instrument was served upon the attorneys of record or the parties not represented by counsel in the above case at their respective addresses disclosed on the pleadings on the 18 day of January 2017, by:

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OPINION AND ORDER

At a session of said Court held in the Courthouse in Pontiac,
Oakland County, Michigan on 1/17/17

PRESENT: LEO BOWMAN, Circuit Judge

I. Introduction

This matter is before the Court on Defendant City of Oak Park's ("defendant") motion for

summary disposition filed on October 19, 2016.[1] Defendant is a municipality located in Oakland County (hereinafter "Oakland County" is referred to as the "County"). The named plaintiffs and class members (hereinafter collectively referred to as "plaintiffs") allegedly reside in the City of Oak Park. Defendant acknowledges that it maintains a combined sewer system (i.e., it contains both sanitary sewage and storm water runoff that flow into the same pipe) and the contents must be treated before being discharged into a fresh body of water. Defendant acknowledges that it charges its residents a fee for their use of its combined sewer system. Plaintiffs filed this lawsuit contending that two charges – the Kuhn Facility Debt Charge and the Stormwater Charge (hereinafter collectively referred to as the "Charges") – violate the Headlee Amendment of the Michigan Constitution because they are a tax and they violate several ordinances and statutes, which unjustly enriches defendant. Defendant brings this motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons stated more fully below, defendant's motion for summary disposition is DENIED.

II. Background

Defendant alleges that it contracts with the City of Detroit to provide fresh water to its residents. (Defendant's ***Exhibit B*** – Steve Lukasik's[2] Affidavit). Defendant also alleges that it contracts with the County for the treatment of the sewage and the County contracts with Detroit Water and Sewerage Department ("DWSD") for treatment of the sanitary sewage and ultimate discharge of the effluent. (Defendant's ***Exhibit A*** – Class Action Complaint at ¶ 12 and ***Exh. B***).

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[1] Upon review of the court record, this Court finds that it set an original hearing date for this motion of November 16, 2016. At the request of the moving party, this Court adjourned the hearing date to January 4, 2017. Due to a scheduling conflict, this Court subsequently adjourned the hearing date to January 11, 2017. On December 21, 2016, plaintiffs filed their response to the motion for summary disposition and filed their own motion for summary disposition. This Court's scheduling order provides that "[i]f the non-moving party wishes to file a cross motion, it should consult MCR 2.116(I)(1) or (2). There will be no cross motions scheduled at this time." As such, this Court set February 8, 2017 as the hearing date for plaintiffs' motion for summary disposition.

[2] According to Lukasik's affidavit, he is employed as defendant's Water Supervisor for the past four years and worked in

Defendant alleges that a majority[3] of its residents use the combined sewer system. (Defendant's ***Exhibit C***–Kevin Yee's[4] Deposition at 27). Defendant further alleges that the flow of the combined system leaves its infrastructure and goes into the County's interceptor and the County discharges it into the DWSD treatment plant. (*Id.* at 28). Defendant discusses the following allegations related to the George W. Kuhn Drainage District ("GWK"):

- GWK was designed to handle combined sewer overflow during a heavy rainfall and originally built in 1972. (Defendant's ***Exhibit D*** – GWK Retention Treatment Basin pamphlet).
- GWK serves 14 communities including defendant and consists of a 24,500 drainage district.
- GWK could no longer meet the more stringent environmental regulations passed by the federal government[5] so the Oakland County Water Resource Commissioners Office ("OCWRC") began plans to expand it in the late 1990s and completed construction in 2006. (Defendant's ***Exh. D***).
- All flow is routed to the DWSD during dry weather. During heavy rainfall or when the volumes of combined sewage exceed the outlet capacity to Detroit, the excess flow is diverted to the Kuhn Retention Treatment Basin to be stored, screened, and disinfected before its discharge into the Red Run Drain. (*Id.*).

Plaintiffs acknowledge that defendant has a combined sanitary and storm sewer system, which is a system that is designed to collect both (1) stormwater and (2) domestic sewage and industrial wastewater ("sanitary sewage"). (Plaintiff's ***Exhibit A*** – City's Admissions at No. 7). Plaintiffs further allege that a very large volume (i.e., hundreds of millions of gallons) of stormwater falls on the City and "runs off" into the combined system. (Plaintiffs' ***Exhibit L*** – GWK Pamphlet). Plaintiffs also acknowledge that the construction for the GWK improvements commenced in 2000

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the department for the past 14 years. (Defendant's ***Exh. B***).

[3] Defendant alleges that approximately seventy (70) acres in its southwest corner has a separate system.

[4] According to his deposition, Yee is defendant's Assistant City Manager, Director of Public Works and City Engineer. (Defendant's ***Exh. C***).

[5] The Federal Government allegedly developed a nationwide combined sewer overflow ("CSO") control policy and required local communities to implement interim and long-term control plans for combined sewer overflow events.

and they do not dispute the scope of the improvements. Plaintiffs allege that the County initially financed the improvements through various debt obligations and subsequently contracted with the 14 communities to pay their pro-rata share (based on contribution flow). (Plaintiffs' ***Exh. A*** at No. 46; ***Exhibits O*** – Lukasik's Affidavit at ¶ 9 and ***P*** – Drainage Board Meeting Minutes at 4).

Defendant discusses the Charges and alleges as follows:

- **Kuhn Facility Debt Charge**: Defendant alleges that the GWK Drainage Board established apportionments of its cost to be borne by the 14 communities that it serves. (Defendant's ***Exhibit E*** – June 27, 2000 Meeting Minutes). Defendant alleges that its allocation of costs for the Kuhn Facility Debt Charge is approximately $15.6 million, which consisted of 12.8161% of the total cost for constructing the GWK.

- **Stormwater Charge**: Defendant alleges that the GWK Drainage Board adopted a Final Order of Apportionment of Costs of Administration, Operations and Maintenance ("Final Order of Apportionment"). (Defendant's ***Exhibit F*** – April 19, 2005 Final Order of Apportionment). Defendant alleges that the Final Order of Apportionment set forth the monthly "stormwater charge" for each community, which covers "Sewage Disposal Services" and the "Pollution Control Services." (*Id.*). Further, defendant alleges that "Pollution Control Services" includes two categories: (1) DWSD's charges to the GWK to treat the total stormwater flow and (2) the cost of operating and maintaining the balance of the GWK system. (*Id.*). Defendant acknowledges that its allocation of costs for the Stormwater Charge consists of 13.6383% of the total costs of administration, operations and maintenance for that portion of the GWK. (*Id.*). Defendant alleges that it is undisputed that it is liable to pay the Stormwater Charges pursuant to the Michigan Drain Code ("MDC") and the terms of its contract with OCWRC. (Defendant's ***Exhibit G*** – Invoices).

Defendants allege that the GWK is a regulated, mandated facility pursuant to the Federal Clean Water Act 33 USC § 1342, which requires all municipal, industrial, and commercial facilities that discharge waste water or storm water directly from a point source into a water of the United States (e.g., lake, river, or ocean) to obtain an National Pollutant Discharge Elimination System ("NPDES") permit to ensure that receiving waters will achieve their water quality standards.

(Class Action Complaint at ¶ 21 (citing the passage of the Federal Clean Water Act, 33 USC § 1342.)).

Plaintiffs also acknowledge that defendant imposed the Kuhn Facility Debt Charge to cover its share of the costs of certain capital improvements to GWK; imposed the Stormwater Charge to cover its costs to treat and dispose of storm water (i.e., rainfall and snowmelt) that enters its combined sewer system from the surface of the land and ultimately makes its way to the Detroit wastewater treatment plant; and incorporates these charges in its Water and Sewage Disposal Rates and/or Sanitary Sewer Rates. (Plaintiffs' ***Exh. A*** at Nos. 28 and 44 and ***Exhibit I*** – County Invoices). Plaintiffs allege that there are two principal determinates of the Stormwater Disposal Charge attributable to any particular property: (1) the size to the property and (2) the proportion of the property that has "impervious" surfaces (i.e., surfaces that do not absorb rain). (Plaintiffs' ***Exhibit G*** – John Damico's (Plaintiffs' Expert) Affidavit at ¶¶ 9-10). Plaintiffs allege that no relationship exists between tap water usage and the volume of stormwater that enters the combined sewer system from the land's surface; yet, plaintiffs allege that defendant imposes a charge that is only paid by its water and sanitary sewage disposal customers and bases it on their tap water usage. (*Id.* at ¶ 38; *see also* Plaintiffs' ***Exhibits J*** – DWSD Document (discussing sewer rates) at 31; ***L*** – OCWRC Fact Sheet (describing how the County allocates the flat rate stormwater charges among the various communities); ***M*** – Susan Coffee's (County Representative) Deposition at 40 (confirming that the County charges municipalities for stormwater disposal based on the approximate volume of stormwater that enters its system; the land area; and the type of surface)). Further, plaintiffs allege that the County's charges to defendant for stormwater disposal have no connection to defendant's tap water usage. (Plaintiffs' ***Exh. M*** at 40). Plaintiffs then allege that the City merely incorporates the County's charges into its sewer rates (based upon tap water usage by its customers) even though the County charges it for stormwater disposal based upon an estimate of the actual volume of stormwater runoff. (Plaintiffs' ***Exhs. L*** at 9 and ***O*** at ¶ 9). Further, plaintiffs allege that defendant disposes of

stormwater that falls on many acres of public lands and road without charging itself any fee for the disposal service. (Plaintiffs' ***Exh. A*** at No. 12 (admitting that it has 83 miles of street and roads (impervious material) comprises of 17.5% of its total area as well as municipally-owned properties (City offices, parking lots, parking spaces) that comprise of 20% of its total land area) and ***Exhibit Q*** – Answers to Interrogatories at 2).

Defendants allege that the OCWRC submitted the NPDES permit application for GWK to the Michigan Department of Natural Resources and Environment ("DNRE") on April 1, 2010. (Defendant's ***Exhibit H*** – GWK NPDES Permit). Defendant further alleges that the District undertook several[6] major improvements to the GWK to ensure its treatment process complied with the Federal Clean Water Act. Defendant alleges that the Kuhn Facility Debt Charge funded the improvements and costs.

Defendant alleges that the State of Michigan Department of Environmental Quality ("DEQ") approved OCWRC's application for NPDES permit and issued NPDES Permit No. MI026115. (Defendant's ***Exhibit I*** – NPDES Permit). Defendant alleges that NPDES Permit required OCWRC to monitor its retention basin by sampling influent and effluent. (*Id.*). Further, defendant alleges that OCWRC must test the affected waters each time a combined sewer overflow discharge occurs and it tests for escherichia coli to assess to risk the public health; provides the results to the affected local county health departments; treats the water for fecal coliform bacteria; and minimizes its discharge

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[6] Specifically, defendant alleges that the OCWRC undertook the following improvements:

- Construction of a new 90-foot weir wall, which increased the length of the inlet weir to 473 feet;
- Construction of a new 2,000 foot long intermediate weir structure, which added more than 30 million gallons of basin storage;
- Construction of a new dewatering pump station that discharges to the 12 Mile Road Interceptor;
- Construction of a new disinfection system;
- Construction of a sodium hypochlorite storage building;
- Construction of a fine screen system for the new 2,000 foot long inlet weir structure; and
- Construction of a new automatic flushing system.

(Defendant's ***Exh. H***).

of the total residual chlorine. (*Id.*). Defendant alleges that the class action complaint acknowledges that the GWK provided significant environmental benefits to the public. (Class Action Complaint at ¶ 30). Plaintiffs acknowledge that the GWK's improvements provide a public benefit (significant environmental improvement) that complied with the DEQ. (Plaintiffs' ***Exhs. G*** at ¶ 18 and ***L***).

Defendant alleges that the class action complaint relates to the Charges that OCWRC assesses it. Defendant acknowledges that it includes the two charges when calculating a water and sewer rate to cover its expenses pursuant to its contractual obligations with OCWRC. (Defendant's ***Exh. B***). Defendant alleges that

- It was obligated to pay approximately $10 million in principal plus interest to the County for its GWK debt as of June 30, 2014;
- The County charges it in excess of $3 million per year for the Stormwater Charges;
- It includes the Charges when it calculates the water and sewage disposal rates for its users to cover its expenses incurred pursuant to its contractual obligations to OCWRC;
- It proportionately allocates these expenses to its customers using the customer's amount of metered water use to calculate the Charges; and
- It assesses the water and sewage disposal fee for each user and it includes the user's proportionate share of the Charges (merely passes on the charges) and it denies that it increases the costs of these services before it assesses the Charges.

(Defendant's ***Exh. B*** and ***Exhibit J*** – City of Oak Park Bond Obligation).

On October 22, 2015, plaintiffs filed a class action complaint against defendant alleging (1) violation of the Headlee Amendment, Michigan Const. 1963, art. 9, § 31 (Count I); (2) unjust enrichment – prohibited taxes by cities and villages, MCL § 141.91 (Count II); (3) unjust enrichment – County Public Improvement Act, MCL § 46.171 *et seq.* ("CPIA") (Count III); (4) unjust enrichment – MDC, MCL § 280.1 *et seq.* (Count IV); (5) unjust enrichment – City Charter violation,

City Charter § 14.3 (Count V); (6) unjust enrichment – violation of City Ordinance, Ordinance § 82-312 (Count VI); and (7) unjust enrichment – unreasonable sewer rates (Count VII). On November 24, 2015, defendant filed an answer, which denies the allegations of liability as untrue and states affirmative defenses. On January 15, 2016, this Court entered the parties' stipulated order regarding discovery and class certification. On October 19, 2016, defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10). On December 5, 2016, this Court entered an Amended Brief Scheduling Order pursuant to MCR 2.119(G), which stated that "[t]he responding party's responsive brief shall be filed and received by the Court and opposing counsel on or before **December 21, 2016** by 4:30 p.m."[7] Plaintiffs filed a timely response.[8]

III. Standard of Review

Under MCR 2.116(C)(10), the court will grant a motion for summary disposition if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). In determining a motion for summary disposition under MCR 2.116(C)(10), the court must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Richie-Gamester v City of Berkley*, 461 Mich 73, 76 (1999). Additionally, a party opposing a motion for summary disposition pursuant to MCR 2.116(C)(10) has the burden of showing that a genuine issue of disputed fact exists. The party opposing such a motion must produce documentary evidence to set forth specific facts demonstrating that there is a genuine issue for trial. *Patterson v Kleiman*, 447 Mich 429, 432 (1994).

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[7] A trial court may order the parties to meet scheduling deadlines when the court "concludes that such an order would facilitate the progress of the case[.]" MCR 2.401(B)(2)(a). Also, MCR 2.401(B)(2) provides trial courts with the discretion to decline to consider motions a party files after the ordered deadline. *Velez v Tuma*, 283 Mich App 396, 409 (2009), *rev'd in part* on other grounds 492 Mich 1 (2012). This court rule "promotes the efficient management of the trial court's docket[.]" *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 350 (2005).

[8] Plaintiffs request that this Court grant their summary disposition; however, they fail to direct this Court's attention to any court rule, statute, or case law to support their request. Recognizing that plaintiffs filed their own motion for summary disposition that is set for a future hearing date, this Court finds that plaintiffs are referring to their own motion

IV. Analysis

Plaintiffs filed a class action complaint against defendant alleging (1) violation of the Headlee Amendment, Michigan Const. 1963, art. 9, § 31 (Count I); (2) unjust enrichment – prohibited taxes by cities and villages, MCL § 141.91 (Count II); (3) unjust enrichment – CPIA. (Count III); (4) unjust enrichment –MDC (Count IV); (5) unjust enrichment – City Charter violation, City Charter § 14.3 (Count V); (6) unjust enrichment – violation of City Ordinance, Ordinance § 82-312 (Count VI); and (7) unjust enrichment – unreasonable sewer rates (Count VII). Defendant argues that Count I must be dismissed because the Charges are user fees such that they are constitutional under Headlee or – in the alternative – the class action complaint fails because the City Charter authorized the Charges before the enactment of the Headlee Amendment. Defendant also argues that it is entitled to summary disposition on the remaining counts. In reply, plaintiffs argue that (1) the Charges are taxes which have not been approved by defendant's voters such that they violate the Headlee Amendment;[9] (2) the City's Charter does not exempt the Charges from the the Headlee Amendment's requirements; and (3) defendant was unjustly enriched by its violation of several statutes, ordinances and City Charter.

According to Count I in the class action complaint, plaintiff alleges that the Charges are taxes such that they violate Section 31 of the Headlee Amendment in the Michigan Constitution, which provides as follows:

> Units of Local Government are hereby prohibiting 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.

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for summary disposition not currently before this Court.

[9] Plaintiffs expressly state that they are incorporating by reference their arguments in Sections IV and V of their motion for summary disposition, which it filed contemporaneously with their response but is not currently before this Court. *See* notes 1 and 11 as well as pages 13-14.

Const 1963, art 9, § 31. A municipality may charge a user fee without violating Section 31 of the Headlee Amendment. *Bolt v City of Lansing*, 459 Mich 152, 159 (1998) (evaluating whether a charge imposed on real property was a tax or a user fee) ("*Bolt*"). Further, the *Bolt* Court identified the following three criteria for the courts to consider when determining whether an assessment is a user fee as opposed to a tax, which cannot be imposed without voter approval:

- User fees must serve a regulatory purpose rather than a revenue-raising purpose.
- User fees must be proportionate to the necessary costs of the service.
- Voluntariness (e.g., whether the property owner has a choice regarding whether to use the service and is unable to control the extent to which the service is used).

Id. at 161-168. In *Bolt v City of Lansing*, 238 Mich App 37, 49 (1999) ("*Bolt II*"), the Court of Appeals held that the Supreme Court's ruling in *Bolt* became the law of this state effective on December 28, 1998 such that "all municipalities were put on notice that charges such as the storm water service charge are taxes, subject to the requirements of the Headlee Amendment."

As to Counts II – VII, plaintiff alleges unjust enrichment (also known as quantum meruit)[10] based on several Michigan statutes, City Charter, and ordinances. Unjust enrichment is based on the theory that the law will imply a contract in order to prevent the unjust enrichment of another party. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478 (2003). As the Court of Appeals observed in *Belle Isle Grill Corp, supra* at 478, a claim for unjust enrichment requires that the plaintiff establish:

(1) The receipt of a benefit by defendant from plaintiff and

(2) An inequity resulting to plaintiff because of the retention of the benefit by defendant.

[10] *See Spartan Distributions v Golf Coast International*, unpublished per curiam of the Court of Appeals, issued May 17, 2011 (Docket No. 295408) (stating that "the elements of unjust enrichment or quantum meruit are: '(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant'" *quoting Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478 (2003)).

However, a contract to prevent unjust enrichment will be implied "only if there is no express contract covering the same subject matter." *Id.* When there is an express contract covering the same subject matter, summary disposition of the unjust enrichment claim is properly granted. *Id.* at 479.

Defendant argues that Count I must be dismissed because the Charges are user fees such that they are constitutional pursuant to *Bolt*. To support its argument, defendant directs this Court's attention to the pertinent portions of Section 31 in the Headlee Amendment as well as *Bolt,* which distinguished a user fee from a tax and outlined the primary criteria to determine if a charge is a fee or a tax, and *Graham v Kochville Twp,* 236 Mich App 141, 151 (1999), which recognized that the municipality does not need to establish all three criteria to find that the assessment is a fee not a tax. Defendant concludes that its application of the *Bolt* criteria to the Charges supports that they are constitutional because they are a user fee not a tax. Specifically, defendant analyzes the *Bolt* criteria as follows:

- **A user fee must serve a regulatory purpose rather than a revenue-raising purpose**: Defendant alleges that the GWK was established pursuant to the MDC, which permits the construction of a county drain when it is necessary for public health. MCL § 280.463(2). Defendant further alleges that both the Charges are the result of compliance with federal and state environmental laws regarding the treatment of combined sewage overflow before the water is discharged into a fresh body of water and failure to comply with the NPDES permit is a violation of Michigan and Federal law. (Defendant's ***Exh. I***). As such, defendant concludes that the fees associated with the treatment and disposal of combined sewage are valid regulatory fees. Defendant also discusses the major improvements undertaken so that the GWK could comply with the more stringent environmental regulations and alleges that the costs associated with completing those improvements is incorporated into the Kuhn Facility Debt Charge. (Defendant's ***Exhs. A*** (alleging that the improvements were made to comply with the conditions of various wasterwater and discharge permits issued by the MDEQ), ***D*** and ***H***). Next, defendant discusses the Stormwater Charges assessed on a monthly basis by the County mandated by the DEQ (includes the treatment of stormwater flow and cost of operating and maintaining the GWK) and alleges that it is required to monitor, test, and treat the stormwater pursuant to NPDES permit as mandated by the DEQ. (Defendant's ***Exhs. F*** and ***I***). As

such, defendant concludes that the Kuhn Drain Debt and Stormwater Charges are regulatory fees. Next, defendant anticipates that plaintiffs will rely on *Bolt* and *County of Jackson v City of Jackson*, 302 Mich App 90 (2013), which both found that stormwater fees did not encompass sewage treatment and disposal were unconstitutional taxes; however, defendant argues that they are materially distinguishable as follows:

- *Bolt*: The City of Lansing charged 100% of its residents to separate its storm and sanitary sewer system when only 25% of those residents would benefit from it. Also, the City of Lansing did not treat contaminated storm and surface water runoff and merely allowed it to be discharged into the Grand River. As such, the *Bolt* Court found that the stormwater fee was not a fee designed to defreay the costs of a regulatory activity because it lacked a significant element of regulation.

- *Jackson*: The City of Jackson also had a separated – not a combined – system and its fees did not incorporate the cost for treatment and disposal and merely allowed the untreated storm water to be discharged into the Grand River.

Defendant argues that the Charges do not lack a significant element of regulation because the fees are a result of complying with federal and state regulatory law and they incorporate the treatment of the water before it is discharged into navigable waters.

- **User fees must be proportionate to the necessary costs of the service**: To support its analysis, defendant discusses *Bolt's* recognition that the fee must be exchanged for a service rendered or a benefit conferred such that there is a reasonable relationship between the amount of the fee and the value of the service. As such, defendant concludes that the calculation of the fee does not require a mathematical precision and only requires a reasonable relationship to exist between the amount of the fee and the value of the service or benefit. Defendant alleges that it proportionately allocates these expenses to its customers using their amount of metered water use to gauge the property owners' use of the sewer system. (Defendant's ***Exh. B***). Then, defendant concludes that a reasonable relationship exists between the charge (linked to usage as shown by the water meter) and the service/benefit (disposal and treatment of combined sewage overflow, which includes storm water and raw sewage). Further, defendant concludes that it is valid pursuant to CPIA (authorizes a municipality to assess charges for sewage and sewage disposal services in accordance with the amount of water used as measured by water meter readings); the City Ordinance, § 82-312 (mandates that "all sewage disposal service shall be charged for on the basis of water consumed and pollutants discharged into the sewage system"); *Ripperger v Grand Rapids*, 338 Mich 682 (1954) (holding that a sewage service charge based on the

water metered was a valid charge); and *Bolt* (holding that usage-based charges are permissible provided that those charged are the ones receiving the benefit). As such, defendant concludes that it assess the Charges against the property owners who benefit from the GWK so the second prong of *Bolt* weighs against a finding that the fees violate the Headlee Amendment.

- **Voluntariness**: To support its analysis, defendant directs this Court's attention to *Bolt II*, which relied on *Ripperger* to discuss the voluntariness of water rates and finding that it was a commodity not a tax with a price fixed by the board. Defendant argues that its customers have a choice of whether to use its water and sewage services and that the charge is based on the customers' proportionate share of such services. Further, defendant notes that it is not required to establish all three *Bolt* criteria for a finding that the Charges are a use fee not a tax.

Therefore, defendant concludes that the Charges do not violate the Headlee Amendment because they are regulatory fees that are proportionately related to the benefit conferred and voluntary.

In reply, plaintiffs argue that the Charges are taxes which have not been approved by defendant's voters such that they violate the Headlee Amendment. Plaintiffs expressly state that they are incorporating by reference their arguments in Sections IV and V of their motion for summary disposition, which was filed contemporaneously with their response (starts on page 2 and concludes on 18 (approximately 15+ pages)). On December 21, 2016, plaintiffs filed their response to the motion for summary disposition (20 page motion and brief) and filed their own motion for summary disposition (20 page motion and brief). This Court's scheduling order (emphasis added) clearly stated that "[i]f the non-moving party wishes to file a cross motion, it should consult MCR 2.116(I)(1) or (2). ***There will be no cross motions scheduled at this time***" and all motions and briefs must conform to the 20-page limit set forth in MCR 2.119(A)(2). Even though plaintiffs knew that this Court would not allow a cross motion, they relied on arguments contained in a motion for summary disposition that they contemporaneously filed. When this Court accepted plaintiffs' motion for summary disposition, it clearly noted that it would treat plaintiffs' motion for summary disposition as a separate (not a cross motion) and set it for a different hearing date (February 8,

2017). Contrary to plaintiffs' request, this Court ***will not consider*** any arguments incorporated by reference that are not properly before it. Further, this Court finds that plaintiffs' attempt to incorporate arguments clearly violates the page limit set forth in MCR 2.119(A)(2).[11] With that stated, this Court did consider plaintiffs' arguments in Section IV that address this argument in its analysis paragraph.

In the alternative, defendant argues that the class action complaint fails because the City Charter authorized the Charges before the Headlee Amendment's enactment. To support its argument, defendant directs this Court's attention to *Am Axl & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 357 (2000) (holding that Headlee Amendment does not apply if the authority for charges that predate the Headlee Amendment). Then, defendant directs this Court's attention to its Charter (enacted September 22, 1953), which authorized it to acquire – either within or without its corporate limits – public utilities for supplying water and sewage treatment facilities and provided it with the authority to assess such reasonable charges upon its inhabitants for such public services. (Defendant's ***Exhibit K*** – City Charter at Section 14.1 and 14.3). Further, defendant alleges that it enacted its Charter approximately 25 years before the Headlee Amendment such that its charges are exempt under it. Then, defendant notes that it is *undisputed* that the Charges are used to cover the cost of treating and disposing of the combined sewage generated by its customers and concludes that it falls under "other charges" for supplying its inhabitants with public utility services such as sewage treatment, which predates the Headlee Amendment and falls squarely within the Charter.

In reply, plaintiffs argue that the City's Charter does not exempt the Charges from the

[11] Upon a cursory glance at plaintiffs' motion for summary disposition, this Court notes that plaintiffs incorporated by reference Sections I (Introduction), II (Background), and III (Standard of Review) from their response, which allowed them to file a 20 page motion and brief for summary disposition when it would have added 9 pages (Section I was 1-5; Section II was 5-9; and there was no Standard of Review in the response). As such, this Court finds that plaintiffs filed their response and motion for summary disposition contemporaneously with the express intent of circumventing the page

requirements of the Headlee Amendment. Specifically, plaintiffs argue as follows:

- **The City's Charter expressly provides that its water and sewer charges must be "just and reasonable."** To support their argument, plaintiffs direct this Court's attention to the actual language of the provision. Then, plaintiffs acknowledge that the Charter allows the city to impose "rates and other charges as may be deemed advisable for supplying the inhabitants of the city and others" with water and sewer services and requires that such rates and other charges be "just and reasonable." (Charter § 41.3). Plaintiffs conclude that they attached documentation that raises a question of fact as to whether the Charges are reasonable or just.

- **A general charter authorization to impose a charge for a service does not constitute a "tax authorized by law or charter."** Even if the Charter did not provide an express limitation on the City's power to impose storm-water charges, plaintiffs argue that the Charges are still subject to the Headlee Amendment. Plaintiffs acknowledge that Michigan statutes provide municipalities with the power to undertake a variety of governmental functions including the operation of public utilities. Plaintiffs note that defendant failed to direct this Court's attention to any case law holding that charter provisions enacted pre-Headlee authorize municipalities to provide services and to charge for those services exempt from the resulting charges from the Headlee Amendment. Then, plaintiffs direct this Court's attention to *Bolt*, which held that the defendant city was not allowed to finance its sewer system through unlawful taxes.

- **The Kuhn Facility Debt Charge is subject to the Headlee Amendment because it was not "authorized by law or charter" at the time Headlee was ratified in 1978.** Plaintiffs request that this Court evaluate all of the legal limitations placed on the Stormwater Charges as of November 1978. Then, plaintiffs direct this court's attention to MCL § 141.91 (limits municipal taxing power and pre-dates the 1978 Headlee Amendment). Further, plaintiffs argue that defendant must concede that the Charges are a tax to advance this argument. Further, plaintiffs argue that the Charges violate MCL § 141.91 because it was imposed after June 27, 2000, which is after Headlee was ratified. Next, plaintiffs argue that the MDC prohibits the Kuhn Facility Debt Charge. Specifically, plaintiffs argue that the MDC (predates Headlee Amendment) mandates that the municipalities finance their shares through general ad valorem property taxes and forbids it from including those costs in its sewer rates. Plaintiffs direct this Court's attention to defendant's motion to support that the County undertook the Kuhn Facility Infrastructure Improvements pursuant to its authority in the MDC.[12]

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limit set forth in MCR 2.119(A)(2).

[12] Plaintiffs allege that the relevant portions set forth as follows: (1) the authority of the drainage board to construct, improve, and expand RTFs like the GWK; (2) the authority of the drainage board to recover the costs of constructing FTs

(Defendant's Brief at 9 and Plaintiffs' ***Exhibit R*** – Relevant Portions of MDC). Further, plaintiffs acknowledge that the County drainage board must recover the costs of drain construction projects from the municipalities that benefit from those projects and it is allowed them to prepare a special assessment roll to assess the actual costs of the improvements against the municipalities and dictates that the assessed municipalities finance their respective shares of the improvements through an ad valorem property taxes. Plaintiffs also argue that MCL §§ 280.473 and 280.474 prohibits a benefitted municipality from financing its share of the costs of drain construction projects through "user fees" or any method other than general property taxes or additional charges imposed upon water and sewer customers based upon tap water usage. Further, plaintiffs note that the MDC went into effect in 1956 and was last amended in 1976 such that it prohibited a municipality from recovering its costs associated with infrastructure improvements through charges incorporated into its water and sewer rates before the Headlee Amendment.

- **The Stormwater Charge is not authorized by law or by the City's Charter.** Specifically, plaintiffs argue that the Charter provision does not authorize this particular charge and would be null and void as violating the CPIA. To support their argument, plaintiffs direct this Court's attention to the Charter, which sets forth that the sewer charges must be "just and reasonable" and provides that there shall be no discrimination in such rates. (Charter, § 14.3). Additionally, plaintiffs direct this Court's attention to the Charter, § 14.6, which requires that charges for all service furnished to or rendered by other city departments or agencies to be recorded. Plaintiffs argue that these charter provisions prohibit the Stormwater Charge because it fails to reflect the service furnished (e.g., removal of the stormwater from the public property). Plaintiffs also argue that the CPIA prohibited (at the time the Headlee Amendment was ratified) and still prohibits defendant from charging for stormwater disposal based on tap water usage. To support their argument, plaintiffs direct this Court's attention to what the CPIA authorizes and notes that it does not authorize stormwater disposal charges based on tap water usage because it expressly defines "sewage" to exclude "stormwater." MCL § 47.161(2)(a). Finally, plaintiffs argue that the Headlee Amendment prohibited taxes not authorized by the voters and prohibited the municipalities from increasing the rate of an existing tax above that rate authorized by law or charter. Then, plaintiffs direct this Court's attention to ***Exhibit T***, which shows that defendant increased its water rate from $32.66 per cubic feet in 2012-13 to $38.54 in 2015-16 and increased its sewer rate from $60.79 per cubic feet in 2012-13 to $87.12 in 2015-16.

Therefore, plaintiffs conclude that a genuine issue of material fact exists regarding whether the

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from municipalities that benefit from those facilities; and (3) the limitations on the methods municipalities may use to

Charges are a tax and the Charter does not exempt the charges from the requirements of the Headlee Amendment.

Defendant also argues that plaintiff cannot show it violated any of the various statues and ordinances and concludes that it is entitled to summary disposition on Counts II to VII. Specifically, defendant argues as follows for each of the remaining counts:

- **Unjust enrichment – prohibited taxes by cities and villages, MCL § 141.91 (Count II)**: Defendant acknowledges that plaintiffs allege that Kuhn Facility Debt Charge violates the MCL § 141.91 of the Prohibited Taxes by Cities and Villages Act. Then, defendant concludes that it did not violate MCL § 141.91 because it is a regulatory fee not a tax.

- **Unjust enrichment – CPIA (Count III)**: Defendant acknowledges that plaintiffs allege that it violated the CPIA because it does not authorize stormwater disposal charges based upon tap water usage. Then, defendant argues that it did not violate the CPIA because it explicitly allows for a municipality to assess charges for sewage and sewage disposal services in accordance with the amount of water used measured by water meter readings. Further, defendant argues that (1) the Stormwater Charge includes both sewage disposal services and pollution control services including the cost of operating the GWK and (2) the CPIA does not define "sewage" as not including stormwater. Then, defendant concludes that it did not violate CPIA such that it was not unjustly enriched.

- **Unjust enrichment – MDC (Count IV)**: Defendant acknowledges that plaintiffs contend that the MDC mandates that a municipality finance its share of the GWK through general ad valorem property taxes; however, defendant disagrees that MDC mandates such an assessment. Instead, defendant argues that the MDC only provides that the County drainage board shall fix the date that the municipality must pay their share. MCL § 280.473. Then, defendant concludes that it did not violate MDC such that it was not unjustly enriched.

- **Unjust enrichment – Violation of City Charter § 14.3 (Count V)**: Defendant acknowledges that plaintiffs contend that it violated § 14.3 of its Charter by exceeding its authority when it calculated the stormwater disposal rates. Defendant directs this Court's attention to its alternative argument, which states that its Charter authorized the fees. Then, defendant concludes that it did not violate its Charter such that it was not unjustly enriched.

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recover the municipalities' respective costs of those facilities from their citizens.

- **Unjust enrichment – Violation of City Ordinance § 82-312 (Count VI)**: Defendant acknowledges that plaintiffs contend that it violated Ordinance § 82.312 because that ordinance did not authorize it to collect the Charges. Then, defendant directs this Court's attention to the language of § 82.312, which provides that "[a]ll water service shall be charged for on the basis of water consumed as determined by the meter installed in the premises of water or sewage disposal service customers by department. All sewage disposal services shall be charged for on the basis of water consumed and pollutants discharged into the sewage system. No free water service or sewage disposal shall be furnished to anyone." Then, defendant notes that both the Charges encompass sewage disposal services and removal of pollutants. Then, defendant concludes that it is authorized to access charges pursuant to the Ordinance such that it was not unjustly enriched.

- **Unjust enrichment – Unreasonable Sewer Rates (Count VII)**: Defendant acknowledges that plaintiffs generally alleged that the fees are unreasonable without providing any allegation as to why they are unreasonable. Then, defendant concludes that it does not charge unreasonable sewer rates because the fees it assesses for the Charges covers its costs for these services. As such, defendant concludes that it was not unjustly enriched.

Therefore, defendant concludes that it is entitled to summary disposition on those motions.

In reply, plaintiffs argue that defendant was unjustly enriched by its violation of several statutes, ordinances and City Charter. Specifically, plaintiffs argue as follows for each of the remaining counts:

- **Unjust enrichment – prohibited taxes by cities and villages, MCL § 141.91 (Count II)**: Plaintiffs direct this Court's attention to their arguments on pages 11-12 and request that it declines to grant defendant's motion because it violated MCL § 141.91.

- **Unjust enrichment – CPIA (Count III)**: Plaintiffs direct this Court's attention to their arguments on pages 15-17 and request that it declines to grant defendant's motion because it violated CPIA.

- **Unjust enrichment – MDC (Count IV)**: Plaintiffs direct this Court's attention to their arguments on pages 12-14 and request that it declines to grant defendant's motion because it violated MDC.

- **Unjust enrichment – Violation of City Charter (Count V)**: Plaintiffs direct this Court's attention to their arguments on pages 8-10 and request that it declines to grant defendant's motion because it violated the City Charter.

- **Unjust enrichment – Violation of City Ordinance § 82-312 (Count VI)**: Plaintiffs failed to address this argument.

- **Unjust enrichment – Unreasonable Sewer Rates (Count VII)**: Plaintiffs direct this Court's attention to their arguments on pages 3-4 and request that it declines to grant defendant's motion because it charges unreasonable sewer rates.

Therefore, plaintiffs request that this Court deny defendant's motion for summary disposition.

Viewing the evidence in the light most favorable to the non-moving party, the Court finds that there is a genuine issue of material fact as to (1) whether the Charges are a user fee or a tax; (2) whether the Charter exempts the charges from the requirements of the Headlee Amendment; and (3) whether defendant violated any statute, ordinance or provision in the Charter by imposing the Charges on the residence based on their tap water usage such that it was unjustly enriched. Summary disposition pursuant to MCR 2.116(C)(10) is, therefore, inappropriate.

Accordingly, defendant's motion for summary disposition is DENIED. *This Order is not a final Order so it does not resolve the last pending claim and does not close the case.*

IT IS SO ORDERED.

Hon. Leo Bowman

1-17-17

Date

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