STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KELLY GOTTESMAN,
individually, and as representative of a class of similarly-situated persons and entities,

Plaintiff,

-v-

CITY OF HARPER WOODS,
a Michigan municipal corporation,

Defendant.

Case No. 17-014341-CZ

Hon. Susan L. Hubbard

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: 3/22/2018

PRESENT: SUSAN HUBBARD
Circuit Judge

This civil matter is before the Court on a motion for class certification filed by Plaintiff, Kelly Gottesman, against Defendant, City of Harper Woods ("the City"). For the reasons stated below, the Court grants the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The City operates a sewer system to provide a sanitary system to its inhabitants and to collect and treat rain and snow runoff. This system consists of two sets of pipes. One set of pipes collects and conveys sanitary sewage for treatment and another set of pipes collects stormwater, which drains into the Milk River Resevoir where it "commingles" with the sanitary sewage. The

combined collection is conveyed to a treatment plant after which it is sent into local waterways. The City establishes the rates for the stormwater charges through legislative action, and the revenues generated by stormwater charges are deposited into the City's Storm Drain Fund. Under the City Ordinance § 27-110, the City imposes stormwater charges on all property owners. The ordinance provides:

> All owners of real property within the city, other than the city itself, shall be charged for the use of the stormwater system based on the amount of impervious area which is estimated and determined to be contributory to the stormwater system. The impact of the stormwater from the property on the system shall be determined on the basis of the flat rates contained in this article.
>
> Except as provided hereinafter below, all real property shall be subject to the stormwater service charge regardless of whether privately or publicly owned. Publicly owned land open to the general public for recreation or operated for municipal purposes shall not be subject to stormwater service charges.

"The City charges residential and commercial property owners for stormwater management on the basis of Residential Equivalent Units ("REU"). City Ordinance § 27-100, defines "Residential Equivalent Unit" as follows: 'That area of residential property defined to be impervious to account for the dwelling unit, garage, storage buildings or sheds, driveways, walks, patios, one-half of the street frontage and other impervious areas as calculated to be an average by randomly sampling fifty (50) residential parcels that area being determined to be three thousand two hundred fifty (3,250) square feet.'" [Plaintiff's Complaint, p 4, ¶ 15]. The value of an REU is set by the City Council through the City's annual budget process. For Fiscal Year 2016-17 budget, the value of one REU is $210. Annually, the City bills for just under $2 million in stormwater charges.

Ordinance § 27-120 provides a calculation method of billing for stormwater system usage and is based on either square footage or land area. Ordinance § 27-125 provides the billing

method for vacant property and residential parcels with less than 3,500 square feet in total land area. Finally, billing for stormwater service charges are included as a user charge on tax bills issued for annual property taxes. Institutional and other properties that do not receive tax bills, receive special billings issued at the time of the annual property tax billing. Ordinance §27-130.

Plaintiff filed a complaint against the City for allegedly impermissibly imposing stormwater service charges on all City property owners. According to Plaintiff, the City has mischaracterized these charges as "user fees." Plaintiff asserts that the City began imposing these stormwater charges in 1992 without voter approval. He contends that these stormwater charges are, in reality, "taxes," which violate the Headlee amendment of the Michigan Constitution,[2] specifically Michigan Constitution of 1963, Article 9, Section 31.[3] In his complaint, Plaintiff alleges that, by imposing the stormwater charges, the City violated the Headlee Amendment, the

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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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> ***
>
> (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. ...

3 Michigan Constitution of 1963, Article 9, Section 31 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 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."

City violated MCL 141.91,[1] the stormwater charges are unreasonable, and the City violated City Ordinance Section 27-120. Plaintiff makes claims for money had and received and for unjust enrichment for these violations. Along with the complaint, Plaintiff filed the instant motion for class certification. Plaintiff and the City have agreed to class certification. The Court, however, will address the propriety of class certification and will do so without addressing the merits of Plaintiff's lawsuit. *Henry v Dow Chem Co*, 484 Mich 483, 503; 772 NW2d 301 (2009).

II. STANDARDS FOR CLASS CERTIFICATION

MCR 3.501 governs motions for class certification. Pursuant to MCR 3.501(A)(1), class certification is appropriate if all of the following circumstances exist:

> (a) the class is so numerous that joinder of all members is impracticable;
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> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
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> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
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> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
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> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

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[1] MCL 141.91 provides:

> Except 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.
>
> [Emphasis added].

"Ad valorem" is a Latin phrase meaning "according to the value" and, with respect to taxation, is defined as a tax "proportional to the value of the thing taxed." AD VALOREM, Black's Law Dictionary (10th ed. 2014).

These factors are often referred to as "numerosity," "commonality," "typicality," "adequacy," and "superiority." Strict adherence to the class certification requirements is required. *Henry, supra* at 499-500. "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Id* at 500.

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
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> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> >
> > (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
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> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
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> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

"If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503. However, the court must not assess the merits of a plaintiff's underlying claims and, pursuant to MCR 3.501(B)(3)(b), the court may permit discovery before ruling on class certification. *Id* at n 35.

III. ANALYSIS

As explained above, the Court must consider whether Plaintiff has established that he has satisfied the five factors of "numerosity," "commonality," "typicality," "adequacy," and "superiority" as required by MCR 3.501(A)(1).

A. Numerosity

"Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999).

For the claim that stormwater charges violate the Headlee Amendment, Plaintiff has defined the class "to include all persons or entities which have paid or incurred the stormwater charge at any time in the one year preceding the filing of this lawsuit and/or at any time during the pendency of this action (the "Headlee Class Period")." [Complaint, p 17]. Regarding the claims for money had and received and unjust enrichment for violation of MCL 141.91, unreasonable water and sewer rates, and violation of the city ordinance, Plaintiff has also defined the class to be all "persons or entities which have paid or incurred the Stormwater Charge at any time in the six years preceding the filing of this lawsuit and/or at any time during the pendency of this action." [Id, p 18].

Because water and sewer charges are charged against the property and not the payors, the class is ascertainable through the City's property records. However, the owner of each parcel of property is assessed stormwater charges annually and is included as a user charge on tax bills issued for the annual property taxes. Ordinance § 27-130. Hence, through tax billing, the class is ascertainable and, given the City's approximately 6600 properties, the class is ascertainable.

There is no minimum number of members that is required for class certification. As long as "the class is so numerous that joinder of all members is impracticable," MCR 3.501(A)(1)(a), and "as long as general knowledge and common sense indicate that the class is large," *Zine, supra*, the "numerosity" factor will be satisfied. Clearly, common sense dictates that approximately 6600 property owners,[2] [Plaintiff's Supplemental Brief, Exhibit 1, City Manager Randolph Skotarczyk, Deposition Transcript, p 50-51], comprise a large enough class of persons where joinder is impracticable such that it satisfies the "numerosity" requirement for class certification.

B. Commonality

Whether or not there are common questions of fact is a factor which must be satisfied for class certification to be proper. The true essence of the "commonality" factor was described in *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 563–64; 692 NW2d 58 (2004):

> The court in *Sprague* also stated, "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague, supra* at 397. A plaintiff seeking class-action certification must be able to demonstrate that "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class

[2] Approximately 5,377 are residential units. According to Mr. Skotarczyk, this number may vary from time to time because of demolition and construction.

> member.... [T]he question is ... whether 'the common issues [that] determine liability predominate.' " *A & M Supply Co v Microsoft Corp,* 252 Mich App 580, 600; 654 NW2d 572 (2002) (citations omitted).
>
> [Emphasis added].

Thus, to satisfy the "commonality" factor, the injury alleged must be demonstrated with generalized rather than individualized proof. Under the court rule, the "commonality" factor refers to "questions of law or fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). See also *Smith v Dept of Human Services Dir*, 297 Mich App 148; 822 NW2d 616 (2012) app gtd in part, decision vacated in part 493 Mich 926; 825 NW2d 65 (2013) and vacated in part, app dis in part sub nom. *Smith v Dept of Human Services*, 828 NW2d 18 (Mich 2013). Requiring the Court to determine the "commonality" factor helps to provide a practical approach to litigation by numerous parties. *Id.*

The questions involved in the instant action are whether the stormwater charges are taxes, which violate the Headlee Amendment and MCL 141.91, rather than user fees, and whether the charges are arbitrarily imposed and not based on usage of the stormwater system. These questions may be answered with generalized proof that the stormwater charges are imposed on all members of the class and that the common injury is taxation rather than user fees imposed on all class members. *Tinman, supra.* These questions are "questions of law and fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). Therefore, the "commonality" factor is satisfied.

C. Typicality

"Typicality is concerned with whether the claims of the named representatives have the same essential characteristics of the claims of the class at large. As does commonality, typicality

requires that the class representatives share a common core of allegations with the class as a whole." *Duskin v Dept of Human Services,* 304 Mich App 645, 656-657; 848 NW2d 455, 464 (2014) [Internal quotation marks and footnote omitted].

The Court must determine if Plaintiff has the "same essential characteristics" as the other City property owners and whether he shares "a common core of allegations as the class." *Id.* Like all other property owners in the City, the named representative, Kelly Gottesman, is required to pay and has paid the stormwater charges imposed by the City. The allegations of the named representative share the same essential characteristics of the claims of the proposed class. All proposed class members are allegedly being charged for stormwater service. The charges allegedly amount to a "tax" on all members, which violates the Headlee amendment and MCL 141.91. These stormwater charges are allegedly calculated in a way similar to the calculation for ad valorem taxes and are not based on usage of the stormwater system. Finally, all proposed class members are being harmed by the City because it has allegedly been unjustly enriched by collecting the funds without voter approval. The core allegations and core legal issues are the same for all who have paid these stormwater charges because these charges are purported to be an unfair "tax" on all property owners who need a stormwater system and constitute a revenue raising mechanism. The core allegation of suffering harm as the result of the City's imposition of a "tax" through its stormwater charges in violation of the Headlee Amendment and MCL 141.91 is the same for the entire proposed class. Thus, the class representative "share[s] a common core of allegations with the class." *Id.* Therefore, the "typicality" requirement in MCR 3.501(A)(1) is satisfied.

D. <u>Adequacy</u>

"To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin, supra* at 657. Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certification in numerous cases. This includes eighteen cases cited by Plaintiff. [Plaintiff's Supplemental Brief, Exhibit 13]. Counsel also has litigated at least five cases in which it prosecuted class action Headlee Amendment claims. [Id, p 16]. Furthermore, there are no apparent "antagonistic or conflicting interests" among class members. *Id.* The Court is satisfied that counsel will adequately and vigorously pursue the action on behalf of the proposed class members.

E. Superiority

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;

> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

For purposes of the "superiority" factor, the trial court asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action. The primary concerns then are practicality and manageability. *Hill v City of Warren*, 276 Mich App 299; 740 NW2d 706 (2007). "The superiority and commonality requirements are related because "'if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.'" *Duskin, supra* at 658, quoting *Zine, supra* at 289 n 14. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503.

The Court finds that there are no individualized questions of fact except with regard to the various sizes of properties and types of properties, e.g., commercial, residential, and vacant. The common questions of fact and law are whether or not the City improperly and without voter approval imposed stormwater charges, whether the charges amount to a "tax" and act as a revenue source, and whether these stormwater charges violate the Headlee Amendment and MCL 141.91. If each individual property owner were to sue separately, the cost of litigation would be enormous. There is also a risk that individual suits would "be dispositive or "substantially impair or impede" the ability to protect the interests of others who are not parties

in a particular suit. MCR 3.501(A)(2). See also *Bolt v City of Lansing*, 238 Mich App 37, 59; 604 NW2d 745 (1999) (When a landowner brought an original action against the city, alleging that the city's stormwater service charges were disguised as a tax and alleged a violation of the Headlee Amendment, the Court of Appeals stated, "Indeed, this type of case is clearly the kind of litigation that should be pursued as a class action. This would not be burdensome. To the contrary, the principal legal issue in this case is especially suited for class treatment."). Therefore, in the Court's view, a class action lawsuit is a superior method of adjudication for Plaintiff's claims.

IV. CONCLUSION

Class certification is appropriate only when all factors in MCR 3.501(A)(1) are satisfied. *Henry, supra* at 500. Without addressing the merits of the instant lawsuit, the Court finds that Plaintiff has satisfied the five factors of "numerosity," "commonality," "typicality," "adequacy," and "superiority" as required by MCR 3.501(A)(1). Accordingly, certification of Plaintiff's proposed class is appropriate.

On the basis of the foregoing opinion;

IT IS ORDERED that Plaintiff's motion for class certification is hereby **GRANTED.**

IT IS SO ORDERED.

DATED: /s/ Susan Hubbard 3/22/2018

Circuit Judge

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