

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

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

Plaintiff,

2017 - 003018 - CZ

Case No.  
Hon.

-CZ

JENNIFER FAUNCE

v.

CITY OF ST. CLAIR SHORES,  
a Michigan municipal corporation,

Defendant.

RECEIVED

AUG 15 2017

KAREN A. SPRANGER  
MACOMB COUNTY CLERK

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**PLAINTIFF'S CLASS ACTION COMPLAINT**

Plaintiff Brad M. Patrick ("Plaintiff"), by his attorneys, Kickham Hanley PLLC, individually and on behalf of a class of similarly situated persons and entities, state as follows for their Complaint against Defendant City of St. Clair Shores (the "City"):

**INTRODUCTION**

1. "When virtually every person in a community is a 'user' of a public improvement, a municipal government's tactic of augmenting its budget by purporting to charge a 'fee' for the

'service' rendered should be seen for what it is; a subterfuge to evade constitutional limitations on its power to raise taxes." *Bolt v. City of Lansing*, 459 Mich. 152, 166, 587 N.W.2d 264 (1998).

2. This is an action challenging the City's creative yet impermissible financing of its stormwater management obligations through purported "user fees" foisted upon a particularized subset of its citizenry. Plaintiff challenges a mandatory stormwater service charge (the "Stormwater Charge") imposed by the City on all property owners in the City. The City persists in the exaction of these charges even though "the nature of a stormwater management system, which benefits the public without providing any individualized, measurable benefit to individual property owners, does not lend itself to a system of funding based on user fees." *Dekalb County v. U.S.*, 108 Fed. Cl. 681 (U.S. Court of Claims 2013).

3. The Stormwater Charge – totaling approximately \$1 million per year – constitutes an unlawful tax under the *Bolt* decision because it imposes upon one subset of residents – property owners – the financial burden of a governmental activity – stormwater management – which benefits the community at large. Indeed, through payment of the Stormwater Charges, Plaintiff and the Class are paying the City's entire cost of stormwater management.

4. The Stormwater Charge is motivated by a revenue-raising and not a regulatory purpose, the charges to Plaintiff and the Class are not proportionate to the City's actual costs of providing to Plaintiff and the Class the purported benefits for which the charges are purportedly imposed, and payment of the charges is not voluntary.

5. As a tax, the Stormwater Charge is unlawful because the Charge violates Article 9, Section 31 of the Headlee Amendment to the Michigan Constitution and the Prohibited Taxes By Cities and Villages Act (MCL 141.91).

6. Plaintiff, individually and on behalf of a class of similarly situated persons and entities, seeks, among other remedies, a refund of all Stormwater Charges received by the City in the

six years preceding the filing of this action and all such charges collected during the pendency of this action.

### **JURISDICTION AND VENUE**

7. Plaintiff owns improved real property situated in the City of St. Clair Shores, Macomb County, Michigan, have paid the charges at issue in this case, and seeks to act as a class representative for all similarly situated persons.

8. Defendant City of St. Clair Shores (the "City") is a municipality located in Macomb County, Michigan.

9. Venue and jurisdiction are proper with this Court because all parties are present here and the actions which give rise to Plaintiff's claims occurred in this County. Venue and jurisdiction also are proper with this Court under Article 9, § 31 of the Michigan Constitution of 1963, and MCL 600.308a.

### **GENERAL ALLEGATIONS**

10. Pursuant to its statutory authority, MCL 141.104, the City maintains and operates a sewer system (the "Sewer System") to provide sanitary sewage treatment and disposal services to inhabitants of the City and to collect surface runoff from snowmelt and rainwater ("stormwater"). The City has a "separated" sewer system – i.e., the City has one set of sewer pipes which collects and conveys sanitary sewage for ultimate treatment and another separate set of pipes (i.e., storm drains) that collect stormwater, which is conveyed without treatment to waterways. The Stormwater Charges are imposed to collect funds to repair, maintain and replace the City's storm drain infrastructure.

11. Plaintiff, at all relevant times, have paid the Stormwater Charges imposed by the City. Plaintiff is required by the City's ordinances to pay the Stormwater Charges. The City collects in excess of \$1 million in Stormwater Charges annually.

12. The City establishes the Rates for the Stormwater Charges from time to time through legislative action, and revenues generated by Stormwater Charge are deposited into the City's Water and Sewer Fund. A copy of the City's Stormwater Utility Ordinance (the "Ordinance") is attached hereto as **Exhibit A** and incorporated herein by reference.

13. Pursuant to the Ordinance, the Stormwater Charges for each residential property is a fixed fee per quarter, regardless of the size of the property or the amount of impervious surfaces. The current Stormwater Charge rates for residential properties are as follows:

Single-family residential -- \$8.52 per quarter per home

Single-family residential located on waterfront or canal -- \$4.26 per quarter per home

Duplex -- \$4.26 per quarter per unit

Condominium -- \$6.09 per quarter per unit

Apartments -- \$3.65 per quarter per unit

14. Pursuant to the Ordinance, the Stormwater Charges for all other properties are also fixed fees per quarter, but are based upon each property's purported Effective Hydraulic Area ("EHA"). The quarterly Charges for each property is determined by multiplying \$121.71 per EHA times .20 for pervious area and .95 for impervious area.

15. The Stormwater Charges are being used to fund costs for services which provide a benefit to the City and all its citizens. The revenues being derived from the Stormwater Charges are clearly in excess of the direct and indirect costs of the current "use" of the stormwater disposal services by the persons paying those exactions.

16. The City's stormwater charges do not correspond to the benefits conferred for at least two reasons. First, stormwater disposal services do not confer a unique benefit upon Plaintiff or the Class based upon their status as property owners. Stormwater collects on land, roads and other physical surfaces, and the runoff enters the combined sewer system through catch-basins and

other collection devices. Indeed, the storm waters collected in a combined sewer system are not “used” in any meaningful sense by any particular landowner or user.

17. Any “benefit” of stormwater disposal conferred on the City’s water and sanitary sewage disposal customers is no different than the benefit conferred on the general public. Storm water systems help prevent erosion, collect contaminated water for cleansing, keep roadways from flooding, and prevent the formation of standing pools of stagnant water. The benefits resulting from this management are shared by nearly every member of the public.

18. The City’s use of the revenues generated by the Stormwater Charges to pay for stormwater disposal has the effect of forcing one subset of the citizenry, property owners, to bear all of the costs of a public service, even though there are other “users” of those services and even though the services benefit the general public. Accordingly, the Stormwater Charges do not reflect the actual costs of stormwater disposal services, metered with relative precision in accordance with available technology and including an appropriate capital investment component.

19. Second, imposing the stormwater disposal costs only on property owners also allows other “users” of those facilities and services, including more intensive “users,” to receive the benefit of those facilities and services without cost, including the City itself. In fact, the City’s method of financing these costs fails to distinguish at all between those responsible for greater and lesser levels of runoff, which determine the volume of stormwater which enters the storm sewer system. The City’s method of financing these costs also fails to take into account the high volumes of rainwater run-off generated by public and private road surfaces. In addition, there is no “end-of-pipe” treatment of the stormwater, which is merely discharged into adjacent waterways. For these reasons, “the actual use of [stormwater disposal services] by each [water and sanitary sewage disposal user] is not accounted for with the requisite level of precision necessary to support a conclusion that the

charge is proportionate to the costs of the services provided.” *See County of Jackson v. City of Jackson*, 302 Mich. App. 90, 111; 836 N.W.2d 903 (2013).

20. The Stormwater Charge does not reflect the actual costs of use of the City’s storm sewer system, metered with relative precision in accordance with available technology and including an appropriate capital investment component.

21. Moreover, the aggregate amount of the Stormwater Charges collected by the City far exceeds the City’s actual expenses of stormwater management. For example, for the fiscal year ending June 30, 2015, the City collected \$1,154,513 in Stormwater Charges but only incurred \$713,201 in stormwater-related expenses. Because the City deposits the amounts received for Stormwater Charges into the City’s Water and Sewer Fund, these excess amounts are commingled with water and sanitary sewer monies and thus are available for the City to use to supports its water and sanitary sewer activities.

#### **PAYMENT OF THE CHARGES IS MANDATED BY THE CITY’S ORDINANCES**

22. Payment of the Stormwater Charges are not voluntary because Plaintiff and the Class are required by the Ordinance to pay the charges at issue in this case. *See* City Ordinance §25.112 (“All owners of real property in the City of St. Clair Shores shall be charged for the use of stormwater system ...); City Ordinance §25.115 (“Except as provided in this section, all real property shall be subject to the stormwater service charges regardless of whether privately or publicly owned.”)

23. City Ordinance § 25.117 provides:

Unpaid stormwater service charges shall constitute a lien against the property affected. Charges which have remained unpaid for a period of six (6) months prior to March 31 of any year may, after notice to the owner, by resolution of the City Council, be certified to the City Assessor, who shall place the charges on the next tax roll. In the alternative, the City Council may direct the City Attorney to file suit and to collect unpaid charges.

## CLASS ALLEGATIONS

24. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of all persons or entities which have paid or incurred the Stormwater Charges during the relevant class periods.

25. The members of the Class are so numerous that joinder of all members is impracticable.

26. Plaintiff's claims are typical of the claims of members of the Class. Plaintiff is a member of the Class he seeks to represent, and Plaintiff was injured by the same wrongful conduct that injured the other members of the Class.

27. The City has acted wrongfully in the same basic manner as to the entire class.

28. There are questions of law and fact common to all Class Members that predominate over any questions, which, if they exist, affect only individual Class Members, including:

- a. whether the Stormwater Charges imposed by the City are taxes;
- b. whether the Stormwater Charges imposed by the City violate the Headlee Amendment;
- c. whether the Stormwater Charges have a revenue-raising purpose;
- d. whether the Stormwater Charges are disproportionate to the benefits conferred upon the payers of those charges;
- e. Whether the Stormwater Charges are voluntary; and
- f. Whether the Stormwater Charges are prohibited by MCL 141.91.

29. Plaintiff will fairly and adequately protect the interests of the Class, and Plaintiff has no interests antagonistic to those of the Class. Plaintiff is committed to the vigorous prosecution of this action, and has retained competent and experienced counsel to prosecute this action.

30. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. The prosecution of separate actions would create a risk of inconsistent or varying adjudications. Furthermore, the prosecution of separate actions would substantially impair and impede the ability of individual class members to protect their interests. In addition, since individual refunds may be relatively small for most members of the class, the burden and expense of prosecuting litigation of this nature makes it unlikely that members of the class would prosecute individual actions. Plaintiff anticipates no difficulty in the management of this action as a class action.

**COUNT I  
VIOLATION OF THE HEADLEE AMENDMENT**

31. Plaintiff incorporates each of the preceding allegations as if fully set forth herein.

32. The City is bound by the Michigan Constitution of 1963, including those portions commonly known as the Headlee Amendment.

33. In particular, the City may not disguise a tax as a fee under Article 9, § 31 of the Michigan Constitution of 1963, which provides:

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.]

34. The Stormwater Charges are disguised taxes and intended to avoid the obligations of the Headlee Amendment, including the requirement that the Stormwater Charges, as taxes, be approved by a majority of the electorate.

35. The Stormwater Charges have all relevant indicia of a tax:

- a. They have no relation to any service or benefit actually received by the taxpayer;



- b. The amount of the Stormwater Charges is disproportionate to the cost incurred by the City in providing water and sewage disposal services;
- c. The Stormwater Charges are designed to generate revenue;
- d. The payers of the Stormwater Charges benefit in no manner distinct from any other taxpayer or the general public;
- e. Payment of the Stormwater Charges are not discretionary, but actually or effectively mandatory;
- f. Various other indicia of a tax described in *Bolt v. City of Lansing* are present.<sup>1</sup>

36. As a direct and proximate result of the City's implementation of the Stormwater Charges, Plaintiff and the Class have been harmed.

37. Plaintiff seeks his attorneys' fees and costs as allowed by Article 9, § 32 of the Michigan Constitution of 1963 and MCL 600.308a.

38. Plaintiff seeks damages in the form of a refund of all amounts to which he and the Class are entitled, including all Stormwater Charges they paid to the City during the Headlee Class Period, as defined below.

**COUNT II  
ASSUMPSIT FOR MONEY HAD AND RECEIVED –  
VIOLATION OF THE PROHIBITED TAXES BY  
CITIES AND VILLAGES ACT, MCL 141.91**

39. Plaintiff incorporates each of the preceding allegations as if fully set forth herein.

40. The Prohibited Taxes by Cities and Villages Act, MCL 141.91, provides: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not

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<sup>1</sup> Pursuant to MCR 2.1112(M), Plaintiff identifies subparts (a) through (f) of Paragraph 35 as "factual questions that are anticipated to require resolution by the Court."

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.”

41. The City did not impose the Stormwater Charges on or before January 1, 1964.

42. In fact, the City did not begin to impose the Stormwater Charges until 1993.

43. The Stormwater Charges are not ad valorem property taxes.

44. Because the Stormwater Charges were not being imposed on January 1, 1964, they are unlawful under MCL 141.91.

45. As a direct and proximate result of the City’s unlawful and improper conduct in collecting the Stormwater Charges, the City has collected millions of dollars to which it is not entitled.

46. A claim to recover amounts paid to a governmental unit in excess of the amount allowed under law is properly filed as an equitable action in assumpsit for money had and received.

47. By virtue of the City’s imposition of the Stormwater Charges, the City has collected amounts in excess of the amounts it was legally entitled to collect. Therefore, Plaintiff is entitled to maintain an equitable action of assumpsit to recover back the amount of the illegal exaction. *See, e.g., Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 704, 178 N.W.2d 484 (1970).

48. As a direct and proximate result of the City’s improper conduct, the City has collected millions of dollars to which it is not entitled. By paying the Charges, Plaintiff and the Class have conferred a benefit upon on the City.

49. Under equitable principles, the City should be required to disgorge the amounts it unlawfully collected.

#### **PRAYER FOR RELIEF**

Plaintiff request that the Court grant the following relief:

A. Certify this action to be a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC designated Class Counsel;

B. With respect to Count I, define 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");

C. With respect to Count I, enter judgment in favor of Plaintiff and the Class and against the City, and order and direct the City to disgorge and refund all Stormwater Charges collected during the Headlee Class Period, and order the City to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of Stormwater Charges to which Plaintiff and the Class are entitled;

D. With respect to Count II, define 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 "Assumpsit Class Period");

E. With respect to Count II, enter judgment in favor of Plaintiff and the Class and against the City, and order and direct the City to disgorge and refund all Stormwater Charges collected during the Assumpsit Class Period, and order the City to pay into a common fund for the benefit of Plaintiff and all other members of the Class the total amount of Stormwater Charges to which Plaintiff and the Class are entitled;

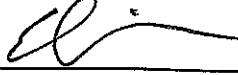
F. Appoint a Trustee to seize, manage and distribute in an orderly manner the common fund thus established;

G. Find and declare that the Stormwater Charges violate the Headlee Amendment and the Prohibited Taxes By Cities and Villages Act;

H. Award Plaintiff and the Class the costs and expenses incurred in this action, including reasonable attorneys', accountants', and experts' fees; and


I. Grant any other appropriate relief.

KICKHAM HANLEY PLLC

By: 

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Date: August 15, 2017  
KH151639

# EXHIBIT A

25.110 - STORM WATER UTILITY ORDINANCE Ord. Effective: July 27, 1993

25.111 - Definitions.

Sec. 1. Unless the context specifically indicates otherwise, the following terms and phrases, as used in this Ordinance, shall have the meaning hereinafter ascribed to them:

- (1) *Impervious area.* Land area covered by buildings, pavement or other material that prevents stormwater from penetrating the soil.
- (2) *Pervious area.* All land area that is not impervious.
- (3) *Stormwater.* Atmospheric precipitation, surface water or cooling water.
- (4) *Stormwater system.* Public sewers, drains, ditches, retention ponds, dams, river impoundments and flood control facilities used for collecting and transporting stormwater.
- (5) *EHA.* Effective hydraulic area.

(ord. eff. July 27, 1993)

25.112 - Stormwater service charge.

Sec. 2. 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. The impact of the stormwater from the property on the system shall be determined on the basis of the flat rates or the measurements contained in this chapter.

(ord. eff. July 27, 1993)

25.113 - Flat rate charges.

Sec. 3. The quarterly charges for the following properties shall be:

	CHARGE	BASIS
Single-family residential	\$8.52	Per home
Single-family residential located on waterfront or canal	4.26	Per home
Duplex	4.26	Per unit

Condominium	6.09	Per unit
Apartments	3.65	Per unit

(ord. eff. July 27, 1993; amend. eff. July 1, 1995; further amend. eff. July 1, 1996; July 7, 1998; June 22, 1999; July 13, 2005; June 7, 2006; June 15, 2007; June 16, 2008; June 29, 2010; July 13, 2011; June 6, 2012; July 5, 2013; June 6, 2014)

25.114 - Charges based on land area.

Sec. 4. The quarterly charges for properties other than described above shall be computed in the following manner: \$121.71 per EHA multiplied by the following factors for the acreage of the following types of land area:

0.20 for pervious area

0.95 for impervious area

The minimum quarterly fee per parcel is \$3.65.

(ord. eff. July 27, 1993; amend. eff. July 1, 1995; further amend. eff. July 1, 1995; July 7, 1998; July 13, 2005; June 7, 2006; June 15, 2007; June 16, 2008; June 29, 2010; Aug. 19, 2010; July 13, 2011; June 6, 2012; July 5, 2013; June 6, 2014)

25.114A - Appeals.

The mayor shall appoint, upon confirmation of council, and the council shall confirm a Stormwater Charge Review Board ("Board") to consider appeals by owners of real property upon which a stormwater service charge is imposed. The Board shall meet annually during the month of January. Appeals to the Board shall be limited to the issue of the Equivalent Hydraulic Acreage ("EHA") for the real property which is the subject of the appeal as said EHA has been established by city staff. The Board shall recommend to the City Council the action to be taken in regard to each appeal. The City Council shall then take final action on each appeal.

The Board shall consist of five (5) members including the Director of Community Services or his designee, the Chief Building Official, the City Engineer and two (2) residents of the City of St. Clair Shores. A quorum shall consist of the Director of Community Services or his designee or at least two other Board members.

The factors the Board may consider in evaluating the EHA for the subject property include, but are not limited to, whether downspouts are connected to the sanitary system, whether other measures have been taken by the property owner to eliminate or reduce stormwater from entering the sewer and/or drains on the real property, and whether other information exists indicating that the imperviousness of the property has been incorrectly estimated. However, if information is presented during the appeal which indicates that the subject real property's EHA should be increased instead of decreased, the Board, at its discretion, may recommend that the property's EHA be increased.

A real property owner shall commence an appeal with a written submission to the Director of Community Services setting forth the detailed basis for the appeal, including the EHA which the real property owner claims should apply to the subject property. The Director of Community Services may establish written procedures which address non-substantive procedural aspects of the appeal process. The Director of Community Services shall prepare a written evaluation of the appeal, provide the property owner with a copy and forward the appeal and the evaluation to the Board. The Board, in its discretion, may consider and decide the appeal based on the written submission or may permit an oral presentation. The Board shall maintain a written record with regard to the action taken on each appeal and the basis therefor.

(ord. eff. June 22, 1999)

#### 25.115 - Property affected.

Sec. 5. Except as provided in this section, all real property shall be subject to the stormwater service charges regardless of whether privately or publicly owned. Public streets shall not be subject to stormwater service charges. Nonpublic land having its own private storm sewer which discharges all stormwater directly to Lake St. Clair shall not be subject to stormwater service charges.

(ord. eff. July 27, 1993)

#### 25.116 - Billing.

Sec. 6. The billing for stormwater service will be combined with the billing for other water services. The stormwater charge will appear as an entry on the quarterly water bill. The basis for stormwater service shall be computed by the Director of Community Services.

(ord. eff. July 27, 1993)

#### 25.117 - Collection.

Sec. 7. Unpaid stormwater service charges shall constitute a lien against the property affected. Charges which have remained unpaid for a period of six (6) months prior to March 31 of any year may, after notice to the owner, by resolution of the City Council, be certified to the City Assessor, who shall place the charges on



the next tax roll. In the alternative, the City Council may direct the City Attorney to file suit and to collect unpaid charges.

(ord. eff. July 27, 1993)

#### 25.118 - Use of funds.

Sec. 8. All funds collected for stormwater service shall be placed in an Enterprise Fund.

(ord. eff. July 27, 1993)

#### 25.119 - Use of stormwater system.

Sec. 9. No person shall place or cause to be placed any substance into the stormwater system other than stormwater.

(ord. eff. July 27, 1993)

#### 25.120 - Regulations.

Sec. 10. The City Manager may promulgate regulations for the operation, management and maintenance of the stormwater system and for connections to that system. The regulations shall take effect upon approval by the City Council.

(ord. eff. July 27, 1993)

#### 25.121 - Severability clause.

Sec. 11. If any portion of this Ordinance or the application thereof to any person or circumstances shall be found to be invalid, such invalidity shall not affect the remaining portions or applications of the Ordinance which can be given effect without the invalid portion or application, provided such remaining portions are not determined to be inoperable, and to this end the Ordinance is declared to be severable.

(ord. eff. July 27, 1993)