STATE OF MICHIGAN
IN THE COURT OF APPEALS

JAMES HEOS,
individually and as representative
of a class of similarly-situated
persons and entities,

Plaintiff/Appellee,

v.

CITY OF EAST LANSING,
a municipal corporation,

Defendant/Appellant.

Court of Appeals Case No: 361138

Ingham County Circuit Court Case
No. 20-199-CZ
Hon. Wanda M. Stokes

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PLAINTIFF/APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Plaintiff's Headlee Amendment claims are governed by the one-year statute of limitations set forth in MCL 600.308a. The Circuit Court held that Plaintiff's Headlee claim was timely to the extent it sought recovery of Franchise Fees paid within one year of the filing of this action on March 31, 2020. Did the Circuit Court err?

Plaintiff states: No

Defendant states: Yes

The Circuit Court stated: No

This Court should hold: No

2. Must a Headlee Amendment claim brought by a person who actually paid and seeks a refund of a contested charge be brought within one year of the date the local government unit enacted the contested charge?

Plaintiff states: No

Defendant states: Yes

The Circuit Court stated: No

This Court should hold: No

3. Claims for restitution under theories of assumpsit and unjust enrichment for violation of MCL 141.91 are subject to a six-year statute of limitations. The City started imposing the Franchise

Fees on July 1, 2017. Are Plaintiff's claims for unjust enrichment and assumpsit for violation of MCL 141.91 timely to the extent they seek refunds of Franchise Fees imposed on or after July 1, 2017?

Plaintiff states: Yes

Defendant states: No

The Circuit Court stated: Yes

This Court should hold: Yes

4. Does the Headlee Amendment's one-year limitations period apply "by analogy" to equitable claims under MCL 141.91, merely because those claims challenge an unlawful tax?

Plaintiff states: No

Defendant states: Yes

The Circuit Court stated: No

This Court should hold: No

5. As a matter of law, are the Franchise Fees taxes that were imposed without voter approval in violation of the Headlee Amendment and MCL 141.91?

Plaintiff states: Yes

Defendant states: No

The Circuit Court stated: Yes

This Court should hold: Yes

6. Is Plaintiff entitled to recover an unlawful exaction under a theory of assumpsit?

Plaintiff states: Yes

Defendant states: No

The Circuit Court stated: Yes

This Court should hold: Yes

7. Does Plaintiff have a private right of action under the Foote Act?

Plaintiff states: Yes

Defendant states: No

The Circuit Court stated: Yes

This Court should hold: Yes

8. Is the Franchise Fee a user fee for the "lease" of the City's right of ways and therefore not an unlawful tax?

Plaintiff states: No

Defendant states: Yes

The Circuit Court stated: No

This Court should hold: No

COUNTER-STATEMENT OF BASIS OF JURISDICTION

Plaintiff agrees with the City's statement of the basis of jurisdiction.

APPELLEE'S COUNTER-STATEMENT OF FACTS

I. THE NATURE OF THE CASE.

This is a certified class action challenging the "Franchise Fees" imposed by the City of East Lansing (the "City") on citizens whose properties receive electric service from the Lansing Board of Water and Light ("LBWL"), a municipal utility owned by the City of Lansing, Michigan. Since 2017, the City has extracted millions of dollars from the payers of the Franchise Fees, at a rate of about $1.4 million per year, and has used those revenues to finance the City's general governmental functions that are wholly unrelated to the LBWL's franchise. Indeed, the City has used the vast bulk of the Franchise Fee revenues to partially satisfy its underfunded public pension obligation which, according to the City, "could bankrupt us unless we begin to address it now." *See* App.Exh. 3.[1] As former Mayor Mark Meadows wrote to a City resident:

> It is the projected growth in annual required payments towards our unfunded legacy costs that are the danger. **If we do not address the issue by increasing the voluntary payments we make today, within ten years virtually all of our property tax revenues will have to be used to make payments on the unfunded liability**. …
>
> Our objective is to make a minimum of an additional $5 million dollar payment to the pension fund every year. $3 million is to come from the income tax, **$1.3 million from the BWL franchise fee** and $700,000 from other cuts in the budget that we enacted last May. [App.Exh. 3 (emphasis added)].

While certain franchise fees imposed upon and collected from utility providers may be lawful under certain circumstances, the City's "franchise fees" are in fact not "franchise fees" at all. A **lawful** franchise fee is one where the legal incidence of the fee falls upon the **utility** and the revenues are utilized to pay the costs a municipality incurs as a result of the utility's use of the municipality's infrastructure. **Here, however, as the Circuit Court properly found, the legal incidence of the tax falls upon the East Lansing electrical customers in the LBWL's service area (i.e., Plaintiff and**

[1] The documentary evidence supporting Plaintiff's Brief on Appeal appears in Plaintiff's Appendix, referred to as "App.Exh." This evidence was submitted to the Circuit Court in connection with the motions for summary disposition and therefore is properly part of the record on appeal.

the Class)[2] **and the revenues are utilized for purposes wholly unrelated to the LBWL's use of the City's infrastructure**. Indeed, as the undisputed facts demonstrate, the franchise fees were designed by the City and the LBWL to be imposed directly on some but not all of the City's residents, with the LBWL acting as a mere collection agent, having no financial responsibility other than to collect the fees and remit them to the City. In essence, the City contracted with the LBWL to collect an additional, but unlawful, tax on its citizenry. The City did this even though the City admits it "has no ability to impose Franchise Fees directly on its citizens." *See* App.Exh. 4, City's Response to Request to Admit No. 18.[3]

Many of the City's arguments on appeal would require the Court to conclude that the legal incidence of the Franchise Fees falls on the LBWL, not the residents. As discussed in detail below, that argument is meritless.

Plaintiff filed his Class Action Complaint on April 2, 2022. Counts I-III allege that the Franchise Fees constitute "taxes" that have not been authorized by the City's voters and therefore violate Art. 9, § 31 of the Michigan Constitution (the "Headlee Amendment") and MCL 141.91 (the "Tax-Based Claims").[4] Count IV alleges that the Franchise Fees violate equal protection guarantees of the Michigan Constitution (*see* Mich. Constitution 1963, Article 1, § 2) because they are imposed only

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[2] The City is serviced by two electric utilities, the LBWL and Consumers Energy, each of which holds the right to provide exclusive service to some parts of the City. Citizens in the areas of the City serviced by Consumers Energy do not incur the Franchise Fees, because the City's Franchise Agreement with Consumers Energy does not require payment of any Franchise Fees. *See* App.Exh. 4, City's Response to RTA No. 2.

[3] Notably, the legal issues presented here were previously adjudicated in a similar case. In *Stephens v. Delta Township*, Eaton County Circuit Court Case No. 19-919-CZ, Judge John Maurer held that "franchise fees" imposed by Delta Township upon its electric customers pursuant to a "Franchise Agreement" that is virtually-identical to the one at issue here constituted unlawful taxes imposed in violation of the Headlee Amendment. *See* discussion, *infra*, at p. 19, 34, 36-38.

[4] Count II states a claim for Assumpsit for Money had and Received for Violation of the Prohibited Taxes By Cities And Villages Act, MCL 141.91; Count III states a claim for Unjust Enrichment for Violation of the Prohibited Taxes By Cities And Villages Act, MCL 141.91.

on City citizens who are located in those geographical areas of the City which receive electric service from the LBWL and are not imposed on City citizens who are located in different geographical areas of the City which receive their electric service from Consumers Energy. Plaintiff asserted that no rational basis exists for imposing the Franchise Fees only upon one subset of the citizenry based upon their physical location in the City.

Finally, Counts V (unjust enrichment) and Count VI (assumpsit) allege that the Franchise Fees are unlawful governmental exactions because the City is prohibited by Michigan law (the Foote Act, 1905 PA 264, 1915 CL 4841) from imposing **any** fees as a condition of allowing the LBWL to provide electric service in the City. *See, e.g., Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914).

On June 29, 2021, Plaintiff filed a motion for partial summary disposition on the Tax-Based Claims stated in Counts I-III of the Complaint. On July 21, 2021, the City filed a motion for summary disposition as to all of Plaintiff's claims. The Court heard argument on the parties' motions on August 12, 2021. *See* Transcript (App.Exh. 2).

On March 31, 2022, the Court issued its Opinions and Orders on Plaintiff's and the City's respective dispositive motions. In its Opinion and Order Regarding Plaintiff's Motion (App.Exh. 1(A)), the Circuit Court granted Plaintiff's request for summary disposition as to the City's liability for the Tax-Based Claims stated in Counts I-III of Plaintiff's Complaint. The Circuit Court expressly found that the Franchise Fees are unlawful taxes that violate the Headlee Amendment and MCL 141.91. With regard to the City's dispositive motion, the Circuit Court granted the City's Motion for Summary Disposition as to Count IV of Plaintiff's Complaint, Violation of State Equal Protection Guarantees. All other requests by the City for dispositive relief were denied. (App.Exh. 1(B)). The Circuit Court's rulings left the City's liability under the Foote Act (Counts V and VI of the Complaint) for trial.

This Court granted the City's application for leave to appeal the Circuit Court's March 31, 2022 Opinions on an interlocutory basis. The Court should affirm the Circuit Court's decision on summary disposition and remand the case for trial on the question of the City's liability under the Foote Act.

II. THE UNDISPUTED FACTS RELATING TO THE CITY'S "FRANCHISE FEES."

A. The City's Financial Difficulties

In 2016, the City was openly concerned about a growing "budgetary gap" primarily arising from the underfunding of the City's Pension and OPEB obligations. The City's Manager, George Lahanas, described the issue in an email:

> This year, unfortunately, presents our largest gap in my recollection at $1.6 million[.] This is obviously not completely unexpected, as our 5 year financial forecast indicated. When we first received a five year pension payment forecast from MERS about two years ago we knew that short of a significant increase in revenue, we would eventually need to reduce staffing across the City, and particularly in public safety. What is different now from two years ago, is the prospect for substantial increases to revenue from several fronts, including BWL franchise fees…. If these prospects were not forthcoming we would recommend significant reductions to maintain our reserves. [App.Exh. 5, March 15, 2016 email from George Lahanas to City leadership.]

In his deposition, Mr. Lahanas acknowledged that the "gap" referenced in his email was between the City's proposed expenditures and proposed revenues. *See* App.Exh. 6, Lahanas Tx, pp. 11-12. Lahanas stated that a primary cause of the City's growing budgetary gap was "due to an underfunding situation" that would require the City to "ramp up" its pension payments over a twenty-year time frame. This circumstance caused the City to seek additional revenue sources to fund the pension obligations. *Id.*, pp. 7-8.

In 2019, then-mayor Mark Meadows described the City's budget issues as a "financial challenge" and a "future problem that could bankrupt us unless we begin to address it now." *See* App.Exh. 3, February 18, 2019 email. Meadows further noted that: "It is the projected growth in annual required payments towards our unfunded legacy costs that are the danger. If we do not address the issue by increasing the voluntary payments we make today, within 10 years virtually all of our property tax revenues will have to be used to make payments on unfunded liability." *Id.* Mr. Meadows reconfirmed his concerns about the danger the City's unfunded legacy costs presented in his deposition, stating that: "Our pension liability as projected was a significant problem for the city in my opinion." *See* App.Exh. 7, p. 11. Meadows explained: "The annual requirement for funding (Pensions and

OPEB) is set by MERS and forwarded to the city. We never had a problem making that amount. Our problem was, we could see down the road that that amount would continue to grow until such time as it may be—could even bankrupt the city in terms of its ability to provide services to its citizens." *Id.*, p. 12. Lahanas conceded that the pension and OPEB underfunding issue facing the City remained "a big problem." App.Exh. 6, p. 25.[5]

B. The City Hatches a Plan to Fill The Revenue Shortfalls

Based upon the "significant problem" presented by its underfunded pension and OPEB obligations, the City determined it needed additional sources of revenue to balance its budget and meet its financial obligations while avoiding layoffs or use of its OPEB reserves. Lahanas Tx., App.Exh. 6, pp. 9-10. Two primary revenue solutions presented readily to City officials in 2017. The first solution was to create revenue through a Franchise Fee via a new Franchise Agreement with the LBWL. The second solution was to implement a City income tax. Regarding the second solution, the City obtained voter approval for the new income tax and began implementing it in 2019. App.Exh. 6, pp. 10-11. The income tax, which generates approximately $14 million in annual revenue, was designed to offset a $5 million reduction in property taxes, and thus provides approximately $9 million in new revenue to the City. *Id.*

As for the prospect of imposing a Franchise Fee, City Manager Lahanas admitted it was "part of a solution to better match revenues with expenditures over long term." App.Exh. 6, p. 15. Both the "BWL franchise and the income tax" were deemed to be "long-term solutions" that would help alleviate the City's financial pressures. *Id.*, p. 15-16.

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[5] The Michigan Department of Treasury also believed that the City's pension liability was a "big problem." In 2017, the City's underfunding of its pension obligations triggered State review, because it was "well below the amount of funding needed" to meet payment obligations. App.Exh. 8, March 5, 2018, East Lansing Info Article. The City made the State's review list because in 2017 its pension fund was only 50% funded and the City was contributing 13.7% of its annual revenues to the fund. *Id.*

By early 2016, the City was in active negotiations with the LBWL about a new franchise fee that City officials hoped would arrive "as expected" by sometime in 2016. *See* App.Exh. 5. By May 2016, the City's Mayor was stressing to the LBWL the importance of the franchise deal, and specifically how important the $1 million to $1.5 million in expected revenue was to the City. *See* App.Exh. 9, May 21, 2016 email from Meadows to Lahanas; App.Exh. 7, Meadows Tx., p. 22. Notably, however, as described below, the LBWL staff raised both the rate pass-through issue and its Headlee Amendment implications with the City. *See* App.Exh. 10, Email dated July 26, 2016.

C. The LBWL Sounds the Alarm

During the Franchise Agreement negotiations, the LBWL apparently knew, or at least suspected, that the Franchise Fees were unlawful. In its November 15, 2016 meeting minutes, the LBWL recorded the following:

> General Manager Peffley stated that there is **a concern that this fee could be illegal** and that the BWL has been put on notice. Should the Board choose to go forward with the Franchise Fee the **BWL would only be the collection agency for the City of E. Lansing.**[6] However, the **BWL does not want to get in the middle of a law suit**, therefore stipulations are being proposed for the commissioners to consider and have the Administration to negotiate on. The recommendations are:
>
> 1. East Lansing will need to provide the BWL a legal opinion confirming a franchise fee can be assessed;
>
> 2. BWL will need an Agreement with East Lansing to **reimburse the BWL for all costs for defending against a third-party claim** associated with a franchise fee;
>
> 3. East Lansing stated they will be requesting a franchise fee from Consumers Energy so the BWL requests that both agreements should start concurrently; and
>
> 4. BWL will require an opportunity to review the legal opinion confirming a franchise fee can be assessed before they will enter into the franchise agreement. [LBWL Meeting Minutes for November 15, 2016, App.Exh. 12 at p. 13 (emphasis added).]

Similarly, the LBWL's May 23, 2017 meeting minutes state as follows:

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[6] In his deposition (App.Exh. 11), General Manager Peffley testified that the LBWL's original position that it would only assume the responsibility of being a collection agent for the Franchise Fees has never changed. App.Exh. 11 at pp. 15-16.

> GM Peffley stated that at the November 8, 2016 Finance Committee a request was brought forth that was made by East Lansing to implement a franchise agreement. Four items emerged that needed to be accomplished: (1) East Lansing would provide the BWL with a legal opinion confirming a franchise fee can be assessed; **(2) BWL will need an agreement with East Lansing to reimburse the BWL for all costs for defending against a third party claim associated with the franchise fee;** (3) East Lansing will be requesting a franchise fee from Consumers Energy and requests that both agreements should start concurrently; (4) BWL will require an opportunity to review the legal opinion confirming a franchise fee can be assessed before they will enter into a franchise agreement with East Lansing. East Lansing has met (1), (2), and (4). Mr. Peffley said that he would like to offer an amendment. Through negotiations with the East Lansing manager, George Lahanas, and his staff, in lieu of a Consumers Energy franchise fee, East Lansing has granted BWL an exclusive franchise fee for all future development in the BWL service territory. [App.Exh. 13 at pp. 12-13 (emphasis added).]

The LBWL thus understood that the Franchise Agreement could give rise to a cause of action by its customers, so the LBWL required the City to indemnify it against any such claims as a condition of entering into the Franchise Agreement. App.Exh. 13 at pp. 13, 14. The LBWL thus made certain that it would be protected against any fallout from its devil's bargain with the City.

D. The Franchise Agreement Appoints the LBWL as a Collection Agent for Taxes Imposed on a Portion of East Lansing's Inhabitants.

In June 2017, the City entered into a Franchise Agreement with the LBWL which imposed a Franchise Fee. The LBWL voted to enter into the Franchise Agreement on May 23, 2017. *See* App.Exh. 13 at pp. 12-16 (minutes reflecting the LBWL's adoption of the Franchise Agreement during its May 23, 2017 meeting). The Franchise Agreement was approved by the City Council through its enactment of Ordinance No. 1411 on June 6, 2017. *See* Ordinance No. 1411, App.Exh. 14. **Ordinance No. 1411 was not approved by a majority of the voters of the City and remains so unapproved today.** *See* City's Response to RTA No. 7 (App.Exh. 4).

Section 2 of the Franchise Agreement (App.Exh. 14) requires the LBWL to collect the Franchise Fees from its electric customers in the City and remit the Fees to the City:

> SECTION 2. FRANCHISE FEE. During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the Grantee shall, upon acceptance of the City, **collect and remit** to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax,

> from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. **Such fee will appear on the corresponding energy bills**.
>
> ***
>
> **The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the collection and remittance of this franchise fee.**
>
> **Either party, upon sixty (60) days written notice by the party may terminate this Ordinance granted franchise, franchise fee collection and remittance. However, to the extent the Grantee is precluded from collecting such franchise fees remittance to City will cease**. [Emphasis added.]

Thus, under the express terms of the Franchise Agreement, the Franchise Fees are **not** imposed on the LBWL. Instead, the Agreement appoints the LBWL as a mere collection agent which bears no responsibility to pay the Franchise Fees beyond the amount collected from its City customers. The Franchise Fees are imposed directly on the City's citizens who receive electric service from the LBWL.

Various provisions of the Agreement make clear that the Franchise Fees are imposed directly on the Plaintiff and the Class and not on the LBWL. For example, Section 2 states in pertinent part: "The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the **collection and remittance** of this franchise fee." (Emphasis added). Section 7 states in pertinent part: "The exclusive right to service certain areas of the City of East Lansing as described in Exhibit A is a condition concurrent to the **collection and remittance** of the Franchise Fee described in Section 2." (Emphasis added). Finally, and importantly, Section 14 allows the LBWL to charge the City a fee for collecting and remitting the Franchise Fees. That section provides that the LBWL will receive "an administrative charge of ½ percent (0.5%) of collected franchise fees … ." *See* App.Exh. 14, p. 3.

In sum, the LBWL is required to **"collect and remit"** the fees to the City, **not "pay"** the fees to the City. The ordinance expressly requires the LBWL to include the fees on the "corresponding energy bills." Thus, this is a total "pass-through" obligation.

E. The Franchise Fees Are Completely Untethered from Any Costs the City Incurs Relating to LBWL's Franchise

The City does not incur any cost whatsoever in connection with providing electrical service to Plaintiff and the Class. Indeed, the City admits that it has no cost study or other evidence that would support the 5% rate imposed under the Franchise Agreement. *See e.g.* App.Exh. 7, Meadows Tx., p. 32-33 ("this is a lease of property…so it would not have anything to do with the cost of actually providing any kind of service whatsoever. So it's not a regulatory fee, it would be a franchise fee…"). City officials acknowledge only that the 5% rate was based upon similar rates charged by other communities. *See* App.Exh. 4, Answer to Interrogatory No. 4.

Accordingly, the Franchise Fees do not correspond to any cost associated with providing electrical service to Plaintiff and the Class or the costs associated with maintaining any City infrastructure the LBWL uses in providing electric service. They simply supplement the City's general revenues, adding to the funds the City garners from taxation. Indeed, the City admits that the Franchise Fee is a "revenue generator" for the City and that, because the Franchise Fees are general fund revenues, they may be used for whatever general fund purpose the City deems appropriate—including making surplus payments to the City's Pension funds. *See* App.Exh. 15, March 25, 2017 Email; App.Exh. 7, Meadows Tx. pp. 53-54.

F. The City Admittedly Diverts the Franchise Fee Revenue to Unrelated Purposes

The City uses the revenue from the Franchise Fee for general fund expense obligations—most specifically to make additional contributions to its underfunded Pension obligation. The City admits that the Franchise Fee revenues are deposited in the City's General Fund. *See* Response to RTA No. 17 (App.Exh. 4).

Although the City claims its Department of Public Works incurs costs relating to the maintenance of infrastructure LBWL uses in providing electric service, Lahanas admits that franchise fee revenues are not allocated to the DPW. App.Exh. 6, Lahanas Tx., p. 55.

Finally, to conclusively resolve this issue, the Court need only consider the public statements of the City's finance director, Jill Feldpauch, who told the world at a City Council meeting on April 30, 2020:

> So, this was a graph that I again would have been excited to share. So, as you can see over the last ten years, we have seen an increase in general fund revenues. The one thing I will point out here, though, is it does show that we have diversified our revenue sources. So, with property taxes being the main source of revenue, it still is, but you can see that it's been diversified with our intergovernmental and then, of course, the income tax **and the franchise fees. So, a positive here, really this is what's allowed us to make supplemental pension payments**. [App.Exh. 22 (emphasis added)][7]

III. THE PARTIES' DISPOSITIVE MOTIONS

A. Plaintiff's Motion for Summary Disposition

On June 29, 2021, Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) on the Tax-Based Claims stated in Counts I-III of the Complaint. Plaintiff asserted that the Franchise Fees constituted unlawful taxes the City imposed on its citizens in violation of the Headlee Amendment because the Franchise Fees were not approved by the City's voters, as required by Section 31 of the Headlee Amendment. The Franchise Fees also violate the Prohibited Taxes by Cities and Villages Act, MCL 141.91, because they are taxes that are not ad valorem property taxes and were not being imposed on January 1, 1964.

B. The City's Motion for Summary Disposition

On July 21, 2021, the City filed a motion for summary disposition ("Def. MSD Brief") seeking dismissal of all of Plaintiff's claims. The asserted grounds for the City's motion for summary disposition were as follows:

> 1. All of Plaintiff's tax-based claims (stated in Counts I, II, and III of the complaint) are barred by the one-year statute of limitations applicable to Headlee Amendment claims and are untimely because the Complaint was not filed within one year of the City's "entry into the franchise agreement with the BWL, enactment of the Franchise Ordinance, and collection of the

[7] *See also* App.Exh. 7, Meadows Tx., pp. 53-54.

Franchise Fee…[which] *occurred in 2017*." Def. MSD Brief at p. 10 (emphasis in original; full discussion pp. 8-13).

2. Even if the tax claims are timely, Counts I, II, and III fail because the Franchise Fee is a user fee and not a tax because the Franchise Fee is "a lease of the City's right of ways." Def. MSD Brief at p. 14. The City only provided a "sneak peek" of this defense without any factual or legal support, promising to back it up it in its response to Plaintiff's motion for summary disposition. Def. MSD Brief at pp. 13-14.

3. Plaintiff's Assumpsit claims (Count II and Count VI) must fail because Assumpsit is no longer a recognized cause of action in Michigan and/or is "redundant" of Plaintiff's unjust enrichment claims. Def. MSD Brief at pp. 14-16.

4. Plaintiff's claim for violation of 141.91 and request for disgorgement of unlawfully collected funds under the equitable theory of unjust enrichment must fail because the "gravamen of Count III sounds in tort" and is thus barred by governmental immunity. Def. MSD Brief at p. 17 (full discussion pp. 16-22).[8]

5. Plaintiff's equal protection claim (Count IV) must fail because imposition of the Franchise Fee on the LBWL is rationally related to a legitimate governmental interest. Def. MSD Brief at p. 22-25.

6. The Foote Act does not prohibit the City from imposing the Franchise Fees and does not provide for a private cause of action. Def. MSD Brief at p. 25-27.

C. The Circuit Court's Opinions and Orders on the Parties' Dispositive Motions.

On March 31, 2022, the Court issued two Opinions on Plaintiff's and the City's Motions for Summary Disposition. In its Opinion and Order Regarding Plaintiff's Motion, this Court granted Plaintiff summary disposition as to the City's liability for Plaintiff's Tax-Based Claims in Counts I-III of Plaintiff's Complaint and denied the City's counter motion pursuant to MCR 2.116(I)(2).[9] After analysis of the *Bolt v. City of Lansing*, 459 Mich. 152, 161; 587 N.W.2d 264 (1998) factors, the Court expressly found that the "Franchise Fee collected by the LBWL constitutes a tax as opposed to a permissible fee in violation of statute." App.Exh. 1(A), March 31, 2022 Opinion and Order Regarding Plaintiff's Motion for Summary Disposition at p. 11. In reaching its decision, the Court observed:

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[8] The City filed a separate claim of appeal as of right on April 20, 2022 regarding the City's claim of governmental immunity.

[9] The remaining issue for trial is contained in Counts V and VI of the Complaint, violation of the Foote Act.

- The Franchise Fees have a revenue raising purpose. Specifically, "when asked to balance the regulatory-purpose with the revenue-raising purpose, the allocation of the fee into the general fund clearly provides that it serves a revenue-raising purpose." App.Exh. 1(A), Opinion at p. 7.
- The Franchise Fees raise revenue for a purpose that benefits the general public. *Id.*
- The amount charged by the Franchise Fees was not proportionate to the cost of the service provided because there was "no particularized benefit provided to this who pay the fee, and the City admits that the 5% fee was decided because other townships has settled on that amount. *Id.* p. 8.
- The Franchise Fee is effectively compulsory and not voluntary. Specifically, the Court determined that the Franchise Fee was "not at all tied to the amount of electricity used by the fee payers, and the fee payers choices are between either paying the franchise fee and not having electricity. The cold temperature in Michigan winters forecloses the option of living without electricity; and thus, submitting to the franchise fee is effectively compulsory." *Id.* p. 9; *see also* App.Exh. 1(B), pp. 7-10.

The Circuit Court denied the City's Motion for Summary Disposition as to all claims except for Count IV, Plaintiff's claim for Violation of State Equal Protection Guarantees. The Circuit Court expressly rejected the City's statute of limitations arguments, holding that the limitations period for Plaintiff's Headlee claims does not depend upon the date of adoption of the "Franchise Fee" but upon the time the fees were assessed, and that Plaintiff's claims for violation of MCL 141.91 "extend beyond" the one-year statute of limitations that governs the Headlee Amendment. App.Exh. 1(B) at p. 6. The Circuit Court also rejected the City's challenge to Plaintiff's assumpsit and unjust enrichment claims stated in Counts II, III, V, and VI, expressly holding that the substantive remedies available under assumpsit are preserved and that Plaintiff "may maintain an action of assumpsit to recover back the amount of an illegal exaction." App.Exh. 1(B) at p. 11.[10]

The City now reasserts most of these failed arguments on appeal, despite the fact that ***all*** of these arguments have been previously considered and rejected by Michigan courts. For example, in arguing that Plaintiff's Headlee Amendment claim is time-barred, the City relies upon non-Headlee

[10] The Circuit Court rejected the City's governmental immunity defense expressly recognizing that unjust enrichment is an independent cause of action and not a tort. App.Exh. 1(B) at pp. 11-12.

statute of limitations cases. The City fails to cite, much less address, published and binding Michigan authorities which make clear that Plaintiff's Headlee Amendment claim is timely to the extent it seeks refunds for Franchise Fees imposed within one year of the filing of this case. Other examples of the City's failure to meaningfully address directly applicable authority abound and will be discussed below.[11]

ARGUMENT

I. THE CITY'S STATUTE OF LIMITATIONS ARGUMENTS ARE MERITLESS.

A. The Circuit Court Properly Found That the Limitations Period for Plaintiff's Headlee Claim Is Not Dependent Upon the Date the Contested Franchise Fees Were Adopted but Instead Begins to Run at the Time the Fees Were Assessed.

The City argued below, and reasserts here, that the limitation period for Headlee actions begins to run when the disputed Franchise Fee was enacted, rendering Plaintiff's claims untimely. The City asserts that Plaintiff's Headlee claim is time barred because Plaintiff did not bring this action by September 2018—within a year after the City adopted its Franchise Fees.[12] The City is wrong.

In this action, Plaintiff is not suing for injunctive or declaratory relief on behalf of the public at large to vindicate a public wrong or enforce a public right—which is the only type of Headlee claim that would accrue at the time the tax was enacted. *See Taxpayers Allied for Constitutional Taxation [TACT] v. Wayne County*, 450 Mich. 119, 124 (1995). Instead, Plaintiff seeks to disgorge as a refund the improperly imposed and collected Franchise Fees on behalf of a class of persons defined under MCR 3.501 and specifically identified in Plaintiff's complaint. In *TACT,* the Michigan Supreme Court

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[11] It is also notable that the City also failed to even address the recently decided and virtually identical case against Delta Township, wherein Eaton County Circuit Court Judge John Maurer found that the franchise "fee" imposed by Delta Township upon its electric customers, using the Lansing BWL as the collection agent, was in fact an illicit tax imposed in violation of the Headlee Amendment. *See* App.Exh. 21, Maurer Opinion in *Stephens.*

[12] MCL 600.308a governs the time periods for filing a Headlee Amendment claim. That section provides: "A taxpayer shall not bring an action **under this section** unless the action is commenced within 1 year after the cause of action accrued." MCL 600.308a(3) (emphasis added).

expressly held that "a cause of action for a refund of [a] tax **accrues at the time the tax is due**," and **not**, as the City alleges in this case, at the time the tax was enacted. *TACT*, 450 Mich. at 123 (emphasis added).

Briggs Tax Serv. v. Detroit Pub. Schs., 2007 Mich. App. LEXIS 682, *26-28 (2007) (App.Exh. 17) affirmed *TACT,* holding that when a class representative seeks a refund or disgorgement of overcharges, his or her claim accrues **at the time the challenged tax is due**:

> A Headlee Amendment claim must be brought within one-year after the cause of action accrued. MCL 600.308a(3); *Taxpayers Allied for Constitutional Taxation [TACT] v Wayne Co*, 450 Mich. 119, 124-125; 537 N.W.2d 596 (1995). In the case of an individual plaintiff bringing a Headlee Amendment claim, a cause of action **accrues on the date that the tax is due**. *Id.* at 123-124. A Headlee Amendment claim brought by a plaintiff on behalf of the public would accrue at the time the resolution implementing the tax is passed. *Id.* at 124 n 7.

TACT itself makes clear that a plaintiff who paid the tax at issue and brings a refund action, as Plaintiff did in this case, does not sue on behalf of the "public":

> In fact, **the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public, as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax**. Such a plaintiff does not confront a danger of irreparable harm, which is typically a requirement for injunctive relief. … **Nor would such a plaintiff suffer damages, the requisite for a damages action**. Thus, while that plaintiff has been granted standing by Sec. 32 of the Headlee Amendment, the only wrong that could give rise to a cause of action is the enactment of the resolution – an action that is not continuing in nature. [450 Mich. at 124 (emphasis added)].

Plaintiff has not brought this case "merely on behalf of the public," but instead on behalf of himself and other rate payers who have been subject to, and have paid, the unlawful Franchise Fees. Accordingly, he has not filed "the only type of Headlee claim that would accrue at the time the resolution is passed" (i.e., a claim by the "public"), but has properly filed an MCR 3.501 class action—a claim which accrued when the tax at issue was due. Indeed, *Bolt v. City of Lansing*, 238 Mich. App. 37, 54; 604 N.W.2d 745 (1999) ("*Bolt* II") held that "***taxpayers may sue for a refund within one year of the date the tax was assessed***. (Even if taxpayers cannot obtain refunds for past tax payments exceeding the constitutional limit because they did not dispute them within one year of the date the

taxes were assessed…)"

Indeed, in a case that is virtually identical to this one, *Stephens v. Delta Twp.,* Eaton County Case 19-919-CZ, Judge Maurer held that the plaintiff's class action Headlee Amendment claim was timely:

> Is plaintiff's complaint timely made? **As noted earlier, the Legislature imposed a one year statute of limitation for claims under the Headlee Amendment. For a refund claim, the time period of the statute of limitation begins at the time of the wrong which the claim is based was done regardless of the time when the damage results**. That's Taxpayers versus Wayne County, 450 Mich 119. **For further clarification, the claim for a refund could not have accrued at the time of the ordinance was enacted because the wrong giving rise to the right to the refund had not yet occurred**. Plaintiff would likely not be able to collect a refund back as far as 2018. Instead, **the claim under the Headlee Amendment will only reach back as far as one year prior to the filing of the claim**. **Even so**, the claim is not precluded en-- since the, so **the claim is not precluded entirely**, **the Township's motion under (C)(7) fails in respect to the Headlee Amendment**. [App.Exh. 21, Transcript of Judge Maurer's Opinion, pp. 38-39, emphasis added.]

Simply, the City's arguments regarding "discovery of harm," "tolling," "continuation of harm," and its reliance upon such cases as *Trentadue v Gorton*, 479 Mich 378; 738 NW2d 664 (2007) and *Garg v Macomb Co Community Mental Health Servs,* 472 Mich 263; 696 NW2d 646 (2005) are at best misplaced as these cases and arguments are wholly inapplicable to the statute of limitations issue in this case.

The City correctly states that under *Trentadue*, 479 Mich. at 388, "the wrong is done when the plaintiff is harmed rather than when the defendant acted." Def. Br., p. 18. That holding is consistent with Plaintiff's allegations because Plaintiff sued within one year of when he incurred and/or paid the franchise fees – i.e., when the Plaintiff was harmed. The date when the City implemented the policy that harmed Plaintiff is irrelevant.

Similarly, *Garg*'s rejection of the "continuing violations doctrine" is entirely consistent with Plaintiff's position in this case. In *Garg*, 472 Mich. at 277, the plaintiff filed a union grievance in 1987 alleging racial discrimination, then filed suit in 1995 alleging that her employer had retaliated against her for the 1987 grievance. The court held that "there is insufficient evidence to allow a reasonable juror to find a causal link between the 1987 grievance and the discriminatory acts falling within the limitations period." Here, by contrast, Plaintiff alleges that the City imposed Franchise Fees during the applicable

limitations period (whether that is one year under the Headlee Amendment or six years under Plaintiff's equitable claims), and that Plaintiff paid the Franchise Fees during the limitations period. Under *TACT*, Plaintiff's claims accrued when he incurred and/or paid the Franchise Fees, so his claims are timely.

The City also relies on *Morgan v. City of Grand Rapids*, 267 Mich. App. 513; 705 N.W. 2d 387. *See* Def. Br., pp. 22-23. Unlike Plaintiff in the present case, who has standing to sue the City because the LBWL was a mere collection agent for the Franchise Fees, the plaintiff in *Morgan* was forced to rely on mere "taxpayer standing." As the court noted, the City of Grand Rapids "had no recourse against plaintiff for any unpaid portion of her bill, so this case is analogous to a sales tax scenario in which the seller passes on the sales tax obligation to the buyer but remains primarily liable to pay the tax. . . . In short, when the tax obligation falls primarily on the retailer, 'retailers are considered to be the taxpayers. *Sims, supra* at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders." *Morgan*, 267 Mich. App. at 515. In the present case, the LBWL is not independently liable to the City for any amount of Franchise Fees; the LBWL merely adds the Franchise Fees to Plaintiff's bill (and the bills of all class members) and gives the City whatever money the LBWL collects, minus the LBWL's cut for serving as collection agent.

TACT noted – ten years before the *Morgan* opinion – that under the facts of a case like *Morgan,* the taxpayer plaintiff's claim accrued when the tax was enacted, but that in cases where the plaintiff has direct standing, like this case, his or her claim would accrue when the tax is due. The *TACT* court first noted that "[t]he claim for a refund could not have accrued at the time the ordinance was enacted because the wrong giving rise to the right to a refund had not yet occurred." *TACT*, 450 Mich. at 124. The court then explained in detail:

> **In fact, the only type of Headlee claim that would accrue at the time the resolution is passed is a claim brought merely on behalf of the public, as opposed to a claim brought by a taxpayer who has been or is about to be subject to the tax.** . . . Nor, would such a plaintiff suffer damages, the requisite for a damage action. **Thus, while that plaintiff has been granted standing by § 32 of the**

> **Headlee Amendment, the only wrong that could give rise to a cause of action is the enactment of the resolution--an action that is not continuing in nature.**
>
> Accordingly, we note that **where a plaintiff's only basis for invoking a court's jurisdiction is the plaintiff's status as a taxpayer seeking relief on behalf of the public,** the right to bring suit expires one year after the alleged Headlee violation. [*TACT*, 450 Mich. at 124 n.7 (emphasis added).]

The fact that *TACT* predates *Morgan* weighs in favor of Plaintiff, because *TACT* **addressed and distinguished** the facts of *Morgan*. The *TACT* court anticipated that a case like *Morgan* might come along, and such a case did in fact come along ten years later. But this case is not like *Morgan*. Here, Plaintiff has established that he does not rely on taxpayer standing because the LBWL was a mere collection agent for the City, so the City's reliance on *Trentadue*, *Garg*, and *Morgan* – as well as its entire (C)(7) argument – is meritless.

B. The Circuit Court Properly Held That Plaintiff's Non-Headlee Tax-Based Claims Stated in Counts II & III Are Not Subject to a One-Year Statute of Limitations.

The City further argued below, and reasserts here, that the one-year statute of limitations governing Headlee Amendment claims also applies to Plaintiff's equitable claims based upon a violation of MCL 141.91. Def. Br., p. 8. The Circuit Court again properly rejected this argument. Once again, the City has misconstrued the law. The Headlee Amendment is not the only legal vehicle available to Plaintiff to challenge the Franchise Fee. It is well settled that under MCR 2.111(A)(2), a party may allege alternative or even inconsistent claims based on the same set of facts, "regardless of…whether they are based upon legal or equitable grounds or both." *See e.g. Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 471 (2003); *Ludowese v. Golen*, 2008 Mich. App. LEXIS 2069 (2008) (App.Exh. 23) (a party may "state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or both"); *Zervos Group v. Thompson Asphalt Prods.*, 2006 Mich. App. LEXIS 1520, *18 (2006) (App.Exh. 24); *Lofgren Harborside, Inc. v. Paull*, 2004 Mich. App. LEXIS 636, *5 (2004) (App.Exh. 25).

Here, not only may Plaintiff assert multiple legal and equitable claims arising out the same

wrong committed by a defendant, but a court applying statutes of limitations to those claims must analyze each separate substantive claim.[13] Plaintiff's unjust enrichment and assumpsit claims are distinct causes of action from his Headlee Amendment claim; they do not arise from, and are not analogous to, Plaintiff's claim under the Headlee Amendment. When a plaintiff asserts two separate and distinct claims, different statutes of limitation may apply to those claims. *See, e.g. Bernstein v. Seyburn,* 2014 Mich. App. LEXIS 331 (2014) at *16 (App.Exh. 28) (holding that a malpractice claim and a breach of fiduciary duty claim are separate and distinct torts with separate statutes of limitations).

Indeed, *TACT*, *supra,* 450 Mich. at 127, the opinion the City would like all courts to ignore, supports Plaintiff's position. Simply, claims under the Headlee Amendment are not "analogous" to claims under MCL 141.91. The Supreme Court's relevant dicta in *TACT* states:

> This is not to say that the limitation period will never bar actions for injunctive relief under any circumstances. To the contrary, this Court has long recognized that statutes of limitation may apply by analogy to equitable claims. *See, e.g., Smith v Davidson*, 40 Mich. 632, 633 (1879); *Lothian v Detroit*, 414 Mich. 160, 168-170; 324 N.W.2d 9 (1982). **If legal limitations periods did not apply to analogous equitable suits, "a plaintiff [could] dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity."** *Id.* at 169. To illustrate, § 308a(3) might apply by analogy where a plaintiff seeks to enjoin collection of a long-overdue tax

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[13] *See Zervos Group, supra*, 2006 Mich. App. LEXIS at *17-19 (App.Exh. 24). In *Zervos Group,* the plaintiff alleged multiple claims under Michigan's Uniform Fraudulent Transfer Act ("UFTA"). This Court reversed a ruling dismissing all of plaintiff's fraudulent transfer claims stating:

> **Furthermore, it is well settled that a plaintiff may allege more than one theory of liability with regard to the same set of facts, *and may pursue all available remedies*, even if legally inconsistent. See MCR 2.111(A)(2)(b).** Given this fact, and considering that there is no dispute that plaintiff brought its cause of action under the UFTA within six years of the time its claim accrued, we find that the trial court erred in applying the one-year period of limitations set forth in § 9(b) to dismiss as time-barred plaintiff's claim that the transfer at issue here was fraudulent under §§ 4(1) and 5(1) of the act. [*Zervos Group*, *supra*, *17-19, footnotes omitted; emphasis added.]

This is true **even when the claims asserted by a plaintiff seek a remedy at law as well as equitable relief**. *See Raby v. Bd. of Trs. of the Police & Fire Ret. Sys. of Detroit & Detroit*, 2011 Mich. App. LEXIS 520, *9-10 (2011) (App.Exh. 26); *Tkachik v. Mandeville*, 487 Mich. 38, 790 N.W.2d 260 (2010); *Dennis De Long v. Palm Beach Polo Holdings*, 2010 Mich. App. LEXIS 1178, *6-7 (2010) (App.Exh. 27) (rejecting the contention that an equitable claim for unjust enrichment was not available when plaintiff also plead claims of breach of contract, constructive trust, and trespass).

> bill on the basis that the tax was constitutionally invalid. [*TACT*, 450 Mich. at 119 n.9 (emphasis added).][14]

Here, Plaintiff is not seeking to "dodge the bar" of Headlee's limitations period. He brings separate claims under an entirely different legal theory with a longer statute of limitations. This case is thus distinguishable from *TACT*, which involved a plaintiff who sought three different types of relief (a refund, an injunction, and a declaratory judgment), **all under the Headlee Amendment**. *Id.* at 123-

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[14] Notably, this Court recently rejected the assertion that where a plaintiff brings equitable claims in addition to a claim under the Headlee Amendment, all claims are subject to the one-year statute of limitations governing Headlee claims.

In *Gottesman v. City of Harper Woods*, Case No. 344568; 2019 Mich. App. LEXIS 7657 (Dec. 2, 2019) (App.Exh. 18), this Court held that a Headlee plaintiff could also simultaneously pursue claims for equitable relief based upon the City's alleged violation of MCL 141.91. There, this Court recognized that the one-year Headlee statute of limitations applied only to the Headlee claim and specifically found that the Circuit Court had erred in dismissing Plaintiff's alternative claims based upon the City's violation of MCL 141.91. [App.Exh. 18 at pp. 13-14 (emphasis added).] *Gottesman* directly contradicts the City's argument that the "overlap" between Plaintiff's Headlee and MCL 141.91 tax claims "is fatal" to these claims (Def. Appeal Br., p. 24).

Gottesman was remanded by the Michigan Supreme Court for further consideration by this Court because, among other reasons, the Supreme Court believed this Court had erroneously concluded that Plaintiff's equitable claims were **necessarily** governed by a six-year statute of limitations **without considering whether those claims should be subject to the one-year statute governing Headlee claims**:

> In addition, the Court of Appeals erred by holding that plaintiff's equitable claims could afford additional relief because "plaintiff would be entitled to recover for several more years under [his equitable claims] than under [the Headlee Amendment.]" *Gottesman*, unpub op at 14. As this Court has recognized, "statutes of limitations **may apply** by analogy to equitable claims." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 127 n 9 (1995) (*TACT*). Thus, the fact that the six-year limitations period for plaintiff's equitable claims, MCL 600.5813, exceeds the one-year limitations period for the Headlee Amendment claim, MCL 600.308a(3), does not **necessarily mean** that the equitable claims may proceed. [App.Exh. 18].

To date, this Court has not considered the issue framed by the Supreme Court. Notably, however, the Supreme Court did not override this Court's holding by stating a contrary holding—though it was well within its discretion to do so.

The Circuit Court considered this Court's and the Supreme Court's holdings in *Gottesman* when determining its Opinion, stating: "the underlying Court of Appeals decision in *Gottesman* confirms that where a Plaintiff brings equitable claims in addition to a Headlee amendment claim, not all claims are subject to the one-year statute of limitations that govern Headlee claims." App.Exh. 1(B) at pp. 6-7.

129. Simply, Plaintiff seeks a one-year refund under Headlee and a six-year refund under MCL 141.91. Unlike the plaintiff in *TACT*, Plaintiff does not seek to expand Headlee's limitations period to cover six years; Plaintiff asserts a substantively different claim with a longer limitations period, and he is entitled to recover on that claim because he can satisfy all of the elements of that claim. This is not "dodging the bar," it is **meeting a different bar.**

Courts have consistently recognized that a plaintiff may maintain claims for more than one theory of liability without each claim being subject to the same statute of limitation. For example, in *Joliet v. Pitoniak*, 475 Mich. 30, 42-45; 715 N.W.2d 60 (2006), the Michigan Supreme Court separately analyzed the plaintiff's claims alleging violations of Michigan's Civil Rights Act, breach of contract, and misrepresentation to determine whether each was time barred. The court found that all of the plaintiff's claims were time-barred, but the relevant point is that the court independently analyzed each claim; it did not simply apply the shortest possible limitations period to all of the claims "by analogy."

In fact, this precise issue was recently addressed by the U.S. Court of Appeals for the Sixth Circuit in *PCA Minerals LLC v. Merit Energy Co.* LLC, 725 Fed. Appx. 342, 349 (6th Cir. 2018) (App.Exh. 35). There, the Court, citing *Joliet*, 475 Mich. at 42-45, recognized a distinction between duplicative claims that ignore "the true nature of the wrong alleged" by "recasting it as a claim subject to a longer statute," and claims which assert "multiple theories of liability that are legally viable and consistent with the facts". In recognizing that the latter type of claims are not subject to the same statutes of limitation, the Court observed:

> Michigan courts do, indeed, conduct a gravamen analysis when a plaintiff attempts to avoid the applicable statute of limitations by ignoring the true nature of the wrong alleged and recasting it as a claim subject to a longer statute. Michigan courts have made clear that a plaintiff may not plead a malpractice claim subject to a two-year statute of limitations as a general negligence claim subject to a three-year limitations period, see *Simmons v. Apex Drug Stores, Inc.*, 201 Mich. App. 250, 506 N.W.2d 562, 564 (1993), modified on other grounds, *Patterson v. Kleiman*, 447 Mich. 429, 526 N.W.2d 879 (Mich. 2004) ("A plaintiff may not evade the appropriate limitation period by artful drafting."), or as a breach-of-contract claim, see *Nicholson v. Han*, 12 Mich. App. 35, 162 N.W.2d 313, 317 (Mich. App. 1968) ("Count 1 does not allege two substantial causes of

> action. It is founded on allegations of breach of contract; but the gravamen of the action sounds in tort, that is, the substance of the allegations denominate a tort.")
>
> **On the other hand, nothing prohibits a plaintiff from pleading multiple claims when there are, in fact, multiple theories of liability that are legally viable and consistent with the facts; where a plaintiff has a contract claim, tort claim, and a claim for statutory violation, all may be pled**.
>
> ***
>
> And in discussing the very gravamen principles that Merit relies on, the Michigan Court of Appeals has recognized that the "applicable period of limitations depends upon the theory actually pled when the same set of facts can support either of two distinct causes of action." [emphasis added].

This distinction should guide the Court's analysis here. Plaintiff asserts "multiple theories of liability that are legally viable and consistent with the facts." There is no basis to apply the shorter Headlee Amendment statute of limitations to Plaintiff's separate equitable claims based upon the City's violation of MCL 141.91. The Circuit Court recognized this when it denied the City's motion for summary disposition pursuant to MCR 2.116(C)(7).[15]

II. PLAINTIFF'S ASSUMPSIT CLAIMS STATED IN COUNTS II AND VI ARE A PROPER VEHICLE FOR OBTAINING A REFUND OF CHARGES PAID BY PLAINTIFF AND THE CLASS.

The City claimed below, and reargues now, that assumpsit is no longer a viable cause of action in Michigan. City's MSD Br. at p. 14; Appeal Br. at pp. 35-37. Once again, the City misconstrues and misrepresents the prevailing law. In *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 494 Mich. 543, 564, 837 N.W.2d 244 (2013), the Court observed that "[w]ith the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. **But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved**[.]" *Id.* (emphasis added). Thus, where a plaintiff demonstrates that a defendant obtained money in violation of the law,

[15] Indeed, the Michigan courts have applied the six-year statute to claims seeking refunds of unlawful governmental exactions like the one at issue in this case and have required full disgorgement of such exactions for the entire six-year period. *See, e.g., Mercy Services for the Aging v. City of Rochester Hills*, 2010 Mich. App. Lexis 2044 (2010) (App.Exh. 29); *Metzen v Dep't of Revenue,* 310 Mich. 622; 17 N.W.2d 860 (1945) (assumpsit claim for sales tax refund subject to six-year statute of limitations).

that plaintiff properly invokes the equitable doctrine of assumpsit to obtain a remedy.

Here, Plaintiff's causes of action are based upon the City's violation of statutes—MCL 141.91 and the Foote Act—which bind the City and require the City to comply with their edicts. Assumpsit merely provides the **substantive remedy** for the City's violation of statutory law. **Assumpsit is not the source of Plaintiff's substantive rights**.

It is well settled that when there has been an illegal or excessive collection of fees, a plaintiff may maintain an "action of assumpsit to recover back the amount of the illegal exaction." *Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 704; 178 N.W.2d 484 (1970). Indeed, "an action seeking a refund of fees paid to [a governmental entity] is properly characterized as a claim in assumpsit for money had and received." *Service Coal Co v. Unemployment Compensation Comm*, 333 Mich. 526, 530-531; 53 N.W.2d 362 (1952); *Yellow Freight Sys, Inc v. Michigan*, 231 Mich. App. 194, 203; 585 N.W.2d 762 (1998), rev'd on other grounds, 464 Mich. 21; 627 N.W.2d 236 (2001), rev'd, 537 U.S. 36, 123 S. Ct. 371, 154 L. Ed. 2d 377 (2002).

The Court of Appeals recently reaffirmed these principles in *Corey v. Wayne County*, 2016 Mich. App. LEXIS 513 (2016) (App.Exh. 36). There, the Court observed:

> **. . . we note that a claim to recover fees paid to the state in excess of the amount allowed under applicable law is properly filed as an action in assumpsit for money had and received.** *Yellow Freight Sys Inc v State of Mich,* 231 Mich App 194, 203; 585 NW2d 762 (1998), rev'd on other grounds *Yellow Freight Sys, Inc v State,* 464 Mich 21; 627 NW2d 236 (2001), rev'd 537 U.S. 36 (2002). *See also Serv Coal Co v Mich Unemployment Comp Comm,* 333 Mich 526, 531; 53 NW2d 362 (1952). Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class "action of assumpsit to recover back the amount of the illegal exaction." *Bond v Pub Sch of Ann Arbor Sch Dist,* 383 Mich 693, 704; 178 NW2d 484 (1970). [2016 Mich. App. LEXIS 513 at *19 n.7 (emphasis added)]

In *Woodland Condos Homeowners Ass'n v. Fannie Mae*, 2019 Mich. App. LEXIS 384 (2019) (App.Exh. 30), the Court of Appeals rejected the same argument the City advances here:

> Defendants argue that they were entitled to summary disposition of plaintiff's claim for assumpsit because assumpsit has been abolished as a form of action. In *Fisher Sand & Gravel Co. v. Neal A. Sweebe, Inc.*, 494 Mich 543, 564, 837 N.W.2d 244 (2013), our Supreme Court recognized that "assumpsit as a form of action was abolished" with the

> adoption of the General Court Rules in 1963. The Court further stated, however, that "notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved." *Id.* **Consequently, plaintiff's use of the term "assumpsit" in labeling its claim does not warrant dismissal if plaintiff otherwise substantively pleaded a valid claim**. [emphasis added].

The City's motion for summary disposition as to the assumpsit claims in Count II and VI was based upon MCR 2.116(C)(8), so the allegations of Plaintiff's Complaint concerning the Franchise Fees must be taken as true for purposes of the motion. Because the Complaint alleges that the City imposed Franchise Fees in violation of statutes, Plaintiff has properly asserted assumpsit claims in order to provide a substantive remedy.

III. THE CIRCUIT COURT PROPERLY DENIED THE CITY'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS UNDER THE FOOTE ACT.

The LBWL has provided electrical service since 1892. *See* About BWL, App.Exh. 37 ("Our roots go back to 1885, when Lansing citizens approved building a water system. Electricity was added to our list of utility services in 1892 . . ."). The Foote Act, 1905 PA 264, 1915 CL 4841, conferred upon the LBWL the right to construct and maintain electrical service infrastructure without the City's permission, and thus without paying the City for the use of its streets and other property. The Act provided in pertinent part:

> Any person, firm or corporation authorized by the laws of this State to conduct the business of producing and supplying electricity for purposes of lighting, heating and power, and which shall be engaged or which shall hereafter desire to engage in the business of the transmission of such electricity, shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along, or across any public streets, alleys and highways and over, under or across any of the waters of the State, and to construct and maintain in any such public streets, alleys or highways all such erections and appliances as shall be necessary to transform, convert and apply such electricity to the purposes of lighting, heating and power, and to distribute and deliver the same to the persons, firms and public or private corporations using the same: ….

The Foote Act was abrogated by Const. 1908, art 8, § 28, which provided:

> No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities or such city, village or township; nor to transact a local

> business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

However, the City misunderstands § 28's effect. In *City of Lansing v. Mich. Power Co.*, 183 Mich. 400; 150 N.W. 250 (1914), the Michigan Supreme Court held that even though § 28 had repealed the Foote Act, the grant of a state franchise to defendant's predecessor under that act created a vested property right "which cannot be impaired or destroyed by the Legislature, Constitution or court." *W. Bloomfield Twp. v. Detroit Edison*, No. 222497, 2001 Mich. App. LEXIS 2305, at *5 (Nov. 13, 2001) (App.Exh. 34). As the Court explained in *Detroit Edison*:

> The Township argues that these two provisions conflict, in that Const 1908, art 8, § 28 requires a local franchise as a prerequisite for doing business, whereas the Act does not. The Township also contends that the framers of the 1908 Constitution intended to require local franchises and that the Township is entitled to require them under their police powers.
>
> However, as the trial court correctly observed, our Supreme Court has already interpreted the interplay between § 28 and the Act, ruling that, despite the repeal of the Act, the grant of a state franchise to defendant's predecessor under that act created a vested property right "which cannot be impaired or destroyed by the Legislature, Constitution or court." *City of Lansing v Michigan Power Co*, 183 Mich 400; 150 NW 250 (1914). *See also Village of Constantine v Michigan Gas & Electric*, 296 Mich 719, 732; 296 NW 847 (1941)(observing that the Court held in City of Lansing "that a State franchise was a contract which could not be impaired by abrogation of Act No. 264, Pub. Acts 1905, by the Constitution of 1908"). Thus, Edison's state franchise carries with it both the right and the duty to "'extend its distributing conduits so as to meet the reasonable requirements of the community.'" *Traverse City v Consumers Power Co*, 340 Mich 85, 100; 64 NW2d 894 (1954)(quoting *Russell v Sebastian*, 233 U.S. 195, 209; 34 S Ct 517; 58 L Ed 912 (1914). Further, in light of the evidence that the Township's electrical service is currently provided through a power plant and many substations outside its borders, we are not persuaded by the Township's argument that Edison has no authority to build a substation that might also serve neighboring residents. …
>
> Having determined that the building of a substation was authorized by Edison's state franchise, we need not address the Township's claim that, in the absence of a state franchise, a local franchise is required.

See also Village of Constantine v Michigan Gas & Electric, 296 Mich. 719, 732; 296 NW 847 (1941) (observing that the *City of Lansing* court held "that a State franchise was a contract which could not be impaired by abrogation of Act No. 264, Pub. Acts 1905, by the Constitution of 1908").

The relevant facts here are related to the timeline of events. In 1892, the LBWL began providing electrical service. In 1905, the Legislature passed the Foote Act which conferred upon the LBWL the right to sell electrical service without seeking permission or paying a franchise fee. Between 1905 and 1908, the LBWL sold electrical service without paying a franchise fee. Notably, the City admits that the LBWL provided electrical service in the City before 1908. *See* App.Exh. 15 (email admission by former mayor Meadows to a City resident that the LBWL provided electrical service in the City before 1908).

In 1908, the Michigan Constitution was amended to permit municipalities to charge franchise fees for the privilege of providing electrical service. In 1914, the Michigan Supreme Court held that a utility that had operated between 1905 and 1908 had permanently gained the benefit of the Foote Act, such that its right to operate without permission from the City – and thus without paying franchise fees – continued notwithstanding the 1908 constitutional amendment.

Based upon the foregoing facts and law, the Circuit Court properly found that Plaintiff sufficiently pled a violation of the Foote Act. *See* App.Exh. 1(B) at p. 13-14. The Circuit Court stated:

> Defendant argues that the Foote Act's abrogation, along with the fact that Plaintiff is not a utility company bars Plaintiff's claims under the Foote Act. This Court disagrees. In *City of Lansing v. Mich. Power Co.*, 183 Mich. 400; 150 N.W. 250 (1914), the Michigan Supreme Court held that despite the abrogation of the Act, the granting of a state franchise under that act created a vested property right. "which cannot be impaired or destroyed by the Legislature, Constitution or court." Here, LBWL provided electrical service starting in 1892. In 1905, the legislature passed the Foote Act which provided the LBWL the right to sell electrical service without seeking permission or paying a franchise fee. LBWL sold electrical service between 1905 and 1908, when the Foote Act was repealed. In 1914, the Michigan Supreme Court in *City of Lansing v. Michigan Power Co,* held that a utility operating under the Foote Act in 1905 and 1908 had permanently gained the benefit of the act which remained, without paying franchise fees, continued regardless of the 1908 constitutional amendment. Therefore, [the City] is not entitled to summary disposition regarding [Plaintiff's] Foote Act Claim. [App.Exh. 1(B) at p. 13-14.]

By imposing a franchise fee on the LBWL's customers, the City violated the Foote Act. Plaintiff and the Class are entitled to pursue disgorgement of all funds illegally collected pursuant to the Foote Act.

IV. THE CIRCUIT COURT PROPERLY HELD THAT THE FRANCHISE FEES ARE UNLAWFUL TAXES IMPOSED BY THE CITY UPON END-USERS OF THE LBWL'S ELECTRICAL SERVICE

A. The Franchise Fee Is a Tax

The City argued below, and reasserts here, that the Franchise Fee is not a tax but a user fee for "a lease of the City's right of ways." Def. MSD Brief at p. 14; Def. Appeal Br., pp. 26-29. The Circuit Court properly rejected the City's unsustainable argument.

Here, initially, the City admits ***both*** that a proper franchise fee is "**paid by a company that uses a municipality's right of ways"** (FN 3 of the City's MSD Brief, p. 3) ***and*** that the LBWL ***does not actually pay the Franchise Fee***—which is in fact paid by the City's electric customers. *See* City's admission on p. 22 of its MSD Brief. Indeed, under the express terms of the written agreement between the City and the LBWL, the LBWL is **a mere collection agent for the City**.[16] The LBWL is not obligated to pay the City any Franchise Fees for use of the City's right-of-ways, only to "collect and remit" the Franchise Fees from Plaintiff and the Class. The legal incidence of the Franchise Fees thus falls on those inhabitants of the City who are electric customers of LBWL. *See, e.g., U.S. v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975) ("where a state requires that its sales tax be passed on to the purchaser and collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser"). The U.S. Supreme Court has long recognized this basic principle of taxation, and has held that a state tax statute that directs each vendor in the state to "add to the sales price and [to] collect from the purchaser the full amount of the tax imposed" is a statute that "imposes the legal incidence of the tax upon the purchaser", because the text of the statute indisputably provides that the tax "must be passed on to the purchaser." *First Agric. Nat'l Bank of Berkshire Cty v. State Tax*

[16] Indeed, the City **admits** that it lacks the power to impose franchise fees directly on its citizens. *See* App.Exh. 4, City's Response to RTA No. 18 ("The City has no ability to impose Franchise Fees directly on its citizens"); App.Exh. 7, Meadows Tx. at p. 39 ("Q: …it was an important component of the legal opinion that the fee be imposed legally on BWL itself and not on the electric customers in the City of East Lansing? A: Well, it wouldn't have been a franchise fee if it were otherwise").

Comm'n, 392 U.S. 339, 347, 88 S.Ct. 2173, 20 L. Ed. 2d 1138 (1968) (citations omitted). Clearly, even under the City's definition of a proper user fee, its argument must fail. For the reasons discussed below, the Circuit Court correctly held that the Franchise Fee is a tax imposed in violation of the Headlee Amendment and MCL 141.91.

B. The Franchise Fee is Not Analogous to a Lease Payment by the LBWL to the City

The City argues that the Franchise Fee "is effectively a lease payment for the BWL's use of the City's rights of way." Def Br., pp. 26-28. This argument, however, is factually inaccurate and legally impossible.

The City contends that it "spends on average between $1.4 million and $1.9 million annually in maintaining the BWL service area," but the Franchise Fees only total about $1.4 million per year. City Br. at p. 5. However, the issue is **not** how much the City spends in total to maintain its right-of-ways. The issue (at best for the City) is how much the City spends **relating to the LBWL's use of the City's right-of-ways.** Notably, however, the City makes no attempt to quantify this amount, much less tie it to the amount of revenues it receives from the Franchise Agreement.

Again, the City's sworn interrogatory answers admit that it chose the 5% number because that is what **other municipalities** charge the LBWL in their Franchise Agreements. *See* App.Exh. 4, Response to Interrogatory No. 4. As Judge Maurer observed in invalidating the identical franchise fees imposed by Delta Township through its franchise agreement with the LBWL, "What's more, the franchise fee is five percent of revenues, apparently without regard to how much it costs the Township to maintain, improve or supervise these spaces. In fact, the affidavit from Brian Reed, Township Manager, makes clear that the cost of a franchise to the Township wasn't even considered when deciding on the franchise fee rate." [Exhibit 17 to initial Brief at pp. 33-35]. The same is obviously true here.

Moreover, the City manager, Mr. Lahanas, admitted in his deposition that the LBWL is merely one beneficiary of the City's right-of-ways. *See generally*, Lahanas Dep. (Exhibit 3 hereto) at pp. 53-67.

As a result, it proves nothing that the City's overall costs relating to its right-of-ways exceeds the amount of the Franchise Fee revenues.

Significantly, Lahanas acknowledged that maintenance of the public right-of-ways benefits not only the LBWL but also the general public.[17] Yet Lahanas admitted that the Franchise Fees essentially cover **all** of the General Fund expenses of the City's Department of Public Works that are not covered by other revenue sources:

> Q: And going back to my question, if you've got 2.3 million dollars of expenses for the Department of Public Works, and we know from the analysis on Exhibit 13 that at least the DPW person has said 1.666 million is attributable to the BWL service area, then the unrecovered costs of the DPW are being covered almost entirely by the franchise fees, correct? …
>
> A: Yeah. In the general fund, this would be covering the expenses that the City absorbs in the general fund to cover right-of-way expenses, yes. [Lahanas Dep. (Exhibit 3 hereto) at pp. 66-67].

In sum, even if the City were in fact devoting the Franchise Fee revenues to the maintenance and improvement of its public right-of-ways (it is not), the Franchise Fees still are not proportionate to any costs the City incurs relating to the LBWL's use of those right-of-ways. The City has not even attempted to "part out" the right-of-way expenses it incurs that are attributable to the LBWL's use of those public right-of-ways. The Franchise Fees thus flunk the proportionality test of *Bolt*.

C. When One Considers That the Franchise Fees Are Imposed Upon Plaintiff and Other End-Users of the LBWL's Electrical Services, it Is Clear That the Franchise Fees Constitute Unlawful Taxes

"Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v Michigan,* 456 Mich. 175, 183; 566 NW2d 272 (1997). Thus, a tax imposed without voter approval "unquestionably violates" § 31. *Bolt*, 459 Mich. at 158. However, a charge that is a user fee "is not affected by the

[17] *See, e.g.*, Lahanas Dep. at p. 64 (admitting that expenses for "downtown maintenance and sidewalks" which are included in the general fund DPW budget "benefit everybody" and provide no "specific benefit" to the LBWL); *Id.* at p. 66 (acknowledging that street lighting "is a benefit to more than just" the LBWL.

Headlee Amendment." *Id.* at 159. "Generally, a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id.* at 161.

D. The "Bolt Factors" Enunciated by the Supreme Court

In *Bolt*, 459 Mich. at 161, the court identified "three primary criteria to be considered when distinguishing between a fee and a tax":

1. "[A] user fee must serve a regulatory purpose rather than a revenue-raising purpose";
2. "[U]ser fees must be proportionate to the necessary costs of the service"; and
3. Payment of a user fee is voluntary. [*Bolt*, 459 Mich. at 161-62].

"These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Graham v. Kochville Twp.*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999). Under this standard, the Franchise Fees constitute taxes in violation of the Headlee Amendment and MCL 141.91.

1. The Franchise Fees Have a Revenue-Raising Purpose Because They "Generate New Revenue to Alleviate Budgetary Pressures."

In *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013), the Court's finding that the Charges were motivated primarily by a revenue-raising purpose was based upon the fact that the Charges were instituted in order to relieve other City funds – which were supported by tax dollars – of the obligation to finance expenditures relating to the City's storm drainage system. This shifting of financial responsibility allowed the other City funds to devote monies that otherwise would be spent on stormwater management to other City activities. There, the Court observed:

> In the present cases, the documents provided this Court reveal that the management charge serves a dual purpose. The charge furthers a regulatory purpose by financing a portion of the means by which the city protects local waterways, including the Grand River, from solid pollutants carried in storm and surface water runoff discharged from properties within the city, as required by state and federal regulations. **The charge also serves a general revenue-raising purpose by shifting the funding of certain preexisting government activities from the city's declining general and street fund revenues to a charge-based method of revenue generation. This latter method of revenue generation raises revenue for general public purposes by augmenting the city's general and street funds in an amount equal to the**

> **revenue previously used to fund the activities once provided by the city's Engineering and Public Work Departments and now bundled together and assigned to the storm water utility**. Because the ordinance and the management charge serve competing purposes, the question becomes which purpose outweighs the other. *Id.* at 165-167, 169. **We conclude that the minimal regulatory purpose served by the ordinance and the related management charge is convincingly outweighed by the revenue-raising purpose of the ordinance.** [*Jackson*, 302 Mich. App. at 105-106 (emphasis added)]

The Court's finding that the charges there were motivated by a revenue-raising purpose was further supported by documentary admissions by the City and its consultants, which the Court summarized as follows:

> **The fact that the impetus for creating the storm water utility and for imposing the charge was the need to generate new revenue to alleviate the budgetary pressures associated with the city's declining general fund and street fund revenues, and the fact that the city's activities were previously paid for by these other funds are factors that support a conclusion that the management charge has an overriding revenue-generating purpose that outweighs the minimal regulatory purpose of the charge and, therefore, that the charge is a tax, not a utility user fee.** [*Id.* at 106-107 (emphasis added).]

As in *Jackson*, "the documents generated by and behalf of the City" and the City's admissions confirm the City's intent to "generate new revenue to alleviate the budgetary pressures" associated with the City's need to keep up with the funding of its pension obligations. Here, as in *Jackson*, the first *Bolt* factor is clearly satisfied.[18]

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[18] In *Stephens*, addressing the "first criteria," the Circuit Court, relying upon the Township's own budget recommendations, observed:

> As to the issue of regulatory rather than revenue raisings. For purposes of this motion, on its face, the franchise fee could appear to have revenue-raising purposes, not a regulatory purpose. The Township even refers to this money as revenue.
>
> In the finance director and Township manager's 2020 budget recommendation they write, 'In January 2018 the Township entered into a franchise agreement with the Lansing Board of Water and Light. With a full year of history to review, we are able to project the 2020 revenue with more confidence than we did in 2019. We anticipate that the 2020 Lansing Board of Water and Light franchise fees to total 2.2 million. That is $500,000 more than anticipated for 2019. This budget utilizes the additional review for equipment and future capital improvements consistent with previous discussions. That's plaintiff's brief in opposition, exhibit A titled '2020 Delta Township Budget Recommendation, page two. [App.Exh. 21, p. 33]

2. The Charges Raise Revenue for an Activity That Benefits the General Public.

Further, as the Circuit Court expressly found, the revenues generated by the Franchise Fees do not confer any special benefit upon Plaintiff and the Class but instead are used primarily to fund general City obligations. This is a general benefit to the public. As the Circuit Court reasoned when it rejected the City's assertion that the Franchise Fee was imposed for a regulatory purpose:

> Here, like in *Jackson,* the Franchise Fee is allocated into the general fund. The City admits that the fees are general fund revenues and may be used for whatever general fund purpose deemed appropriate by the City. Notwithstanding this fact, the City argues that the Franchise Fees still go towards the rent for use of the right-of-ways used by the BWL. However, when asked to balance the regulatory-purpose with the revenue-raising purpose, the allocation of the fee into the general fund provides that it serves a revenue-raising purpose. [App. Exh 1(B) at p. 9.]

Indeed, Michigan courts hold that a governmental fee is motivated by a revenue-raising purpose where the revenues from the fee confer benefits on the general public or citizens who were not subject to the fee. For example, in *Bray v. Department of State*, 418 Mich. 149, 341 N.W.2d 92 (1983), the Supreme Court held that a license fee that financed compensation payments to persons injured by uninsured motorist constituted a tax. In reaching that result, the Court observed:

> We find the fee paid by plaintiffs to be in the nature of a tax.
>
> A tax is designed to raise revenue. *Merrelli v. St. Clair Shores*, 355 Mich. 575, 96 N.W.2d 144 (1959). As we explained in *Dukesherer Farms, Inc. v. Dep't of Agriculture (After Remand)*, 405 Mich 1, 15-16; 273 NW2d 877 (1979):
>
> "Exactions which are imposed primarily for public rather than private purposes are taxes. *See People ex rel the Detroit & H R Co., v. Salem Twp. Board*, 20 Mich. 452, 474, 4 Am Rep. 400 (1870). **Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed**. *Knott v. Flint*, 363 Mich. 483, 499, 109 N.W.2d 908 (1961); *Fluckey v. Plymouth*, 358 Mich. 477, 451, 100 N.W.2d 486 (1960)."
>
> **The MVACA was obviously designed to raise revenue. As we have previously explained, the revenue raised by the MVACA did not inure to the benefit of the group assessed**. The fund existed for the public purpose of providing certain compensation to all those persons injured by uninsured motorists. [418 Mich. at 162 (emphasis added).]

The Circuit Court adopted *Bray* in its Opinion, expressly stating that in this case "the fee does not provide a particular benefit to those customers with the fee imposed on them. Since the fee is part of the general fund, it would benefit any financial expense of the City. Therefore, *Bray* supports the contention that the fee has a revenue raising purpose." *See* App.Exh. 1(B) at p. 9.

3. The Franchise Fees Do Not "Regulate" Anything.

Finally, the Franchise Fees also lack a significant element of regulation. Regulation, by definition, concerns affecting, channeling and/or directing a person's behavior. The power to regulate has been defined as meaning: "To adjust by rule, method or established mode; to direct by rule or restriction; to subject to governing principles or laws…the very essence of regulation is the existence of something to be regulated." *Churchill v. Common Council*, 153 Mich. 93, 95 (1908). As applied to Plaintiff and the Class, the Franchise Fees do not serve a regulatory purpose because the City is not "regulating" anything.

According to the City, the Franchise Fees' purported purpose is to compensate the City "for the use of its streets, public places and other facilities, as well as the maintenance, improvements, and supervision thereof" by the LBWL. App.Exh. 14, Sec. 2. But the Franchise Fees are actually imposed on the end users, not the LBWL, and an end user's consumption of electricity has no relationship to the amount of wear and tear the user causes to the City's streets and facilities. Further, even if the Franchise Fees were imposed on the LBWL **and** actually used as the City describes, the Foote Act prevents the City from imposing the Franchise Fees. *See* discussion *supra*, pp. 23-25.

The Circuit Court thus properly concluded that the Franchise Fees are motivated by a revenue-raising purpose that far outweighs any countervailing regulatory purpose.

4. The Franchise Fees Are Disproportionate to Any Benefits Conferred on the Payers of the Fees.

The Charges also fail *Bolt*'s "proportionality" requirement. The Michigan courts have repeatedly recognized that a charge is not "proportionate" unless the payors of the fee receive a

"particularized benefit" **and** those benefits do not extend to persons who do not pay the fee. *See Graham v. Township of Kochville*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999) (holding that a true user fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.") (citing *Bolt,* 459 Mich. at 164-165). Said another way, a true fee is "paid only by those who use the service in question." *A&E Parking v. Detroit Metropolitan Wayne County Airport Authority*, 271 Mich. App. 641, 644, 723 N.W.2d 223 (2006). Moreover, the *Bolt* Court quoted the Headlee Blue Ribbon Commission's definition of "user fee" as follows: "A "fee for service' or 'user fee' is a payment made for the voluntary receipt of a measured service, in which the revenue from the fees are [sic] used only for the service provided." *Bolt*, 459 Mich. at 168 n.16.

Here, the Franchise Fees cannot satisfy the "proportionality" test for at least four reasons:

First, the City has not even attempted to set the amount of the Franchise Fees to correlate the amounts collected with any actual costs the City incurs relating to the LBWL franchise. Instead, the City arbitrarily chose to base the Fees on 5% of the LBWL's revenues from electric users in the City merely because that is what other municipalities were charging. *See* App.Exh. 4, City's Response to Interrogatory No. 4. Again, even if the City devoted the Franchise Fee revenues to maintaining its right-of-ways (it does not), the "proportionality" requirement focuses on whether the charges at issue are reasonably proportionate to the costs the City allegedly incurs relating to the LBWL franchise. In *Stephens*, Judge Maurer relied upon the same arbitrary percentage (5%) imposed by Delta Township in finding that the Franchise Fees there were not "proportionate" to the Township's relevant costs:

> What's more, the franchise fee is five percent of revenues, apparently without regard to how much it costs the Township to maintain, improve or supervise these spaces. In fact, the affidavit from Brian Reed, Township Manager, makes clear that the cost of a franchise to the Township wasn't even considered when deciding on the franchise fee rate. Instead, Delta Township decided on a five percent franchise fee because the rate is commonly accepted across the board in other municipalities nearby. [App.Exh. 21 at pp. 33-35].

Second, the Franchise Fees cannot be proportionate because the City provides no services or other direct benefits to Plaintiff and the Class in exchange for payment of the Fees. As Judge Maurer observed in *Stephens*:

> Then the issue goes to user fees proportionate to the necess-- necess-- necessary costs of services. The fees do not appear to be proportionate to the necessary costs of services. The Township is not providing any services to the residents who purchase electricity from the Lansing Board of Water and Light, and instead purports to charge the franchise fee to the Board of Water and Light.
>
> It is curious that under the previous 1986 franchise, the Township never needed to collect these franchise fees; yet it asks the court to find that the 2018 it is suddenly needed to collect over two million dollars per year to compensate it for the costs of providing the franchise. A cost that the defendant never fully clarifies in it's briefing, instead referring to "the use of its streets, public places and other facilities, as well as the maintenance, improvement and supervision thereof".
>
> It isn't clear why the franchise itself creates the expenses for the Township. Presumably the, presumably the Township would maintain, improve and supervise its streets, public places and other facilities, even if the franchise fee did not exist. [App.Exh. 21 at pp. 33-34.]

On this point, this undisputed fact cannot be stressed enough: The pass-through obligation here is not optional, it is mandatory. Once it is understood that the Franchise Fees are legally imposed on the City's citizens, the City's "rent" analogy collapses of its own weight. Stated simply, the City has no authority to charge its own citizens rent for the LBWL's use of the City's right-of-ways. Indeed, the City has candidly admitted that it "has no ability to impose Franchise Fees directly on its citizens." *See* App.Exh. 4, Response to RTA No. 18.

Third, the Franchise Fees in fact are **not** used to cover the costs the City purportedly incurs relating to the LBWL's use of the City's infrastructure. Instead, the revenue from the Fees is diverted in substantial part to pay the City's general pension obligations.

Fourth, the Franchise Fees are paid only by those citizens inhabiting those areas of the City serviced by the LBWL even though, if the Franchise Fees provide any incidental benefit, that benefit is conferred upon all of the City's citizens, by defraying pension costs. Citizens in the areas of the City serviced by Consumers Energy do not incur the Franchise Fees, because the City's Franchise

Agreement with Consumers Energy does not require payment of any Franchise Fees. *See* Response to RTA No. 2 (App.Exh. 4). In *Stephens*, Judge Maurer found that this fact further supported his finding that the Delta Township Franchise Fees were unlawful taxes, noting the "benefit of the income from the five percent fee appears to be the benefit of the Township as a whole, not only the Board of Water and Light customers." *See* App.Exh. 21 at p. 35.

The Circuit Court adopted the foregoing argument in determining that the City's Franchise Fees failed the proportionality test of *Bolt*, expressly stating:

> Here, not only is there no particularized benefit provided to those who pay the fee, [but] the City admits that the 5% fee was decided because other townships had settled on that amount. Defendant argues that the LBWL customers do receive a particularized benefit because the franchise fee enables LBWL to have access to the right of ways, but fails to mention how those in the Consumers service area, who do not have the franchise fees, do not receive such a benefit.

5. Payment of the Franchise Fees Is Not Voluntary

Finally, the Charges are not voluntary because, at the very least they are "effectively compulsory" in that "the property owner has no choice whether to use the service and is unable to control the extent to which the service is used." *Bolt,* 459 Mich. at 167-168 (footnote omitted).

In *Jackson*, the Court found that the Charges there were not voluntary. There, the Court ruled:

> Finally, our conclusion that the city's management charge is a tax is bolstered by the fact that Ordinance 2011.02, like Lansing Ordinance 925, is effectively compulsory. Although Ordinance 2011.02 allows property owners to receive credits against the management charge for actions taken to reduce runoff from their respective properties, it does not guarantee all property owners will receive a 100 percent credit.
>
> ***
>
> More importantly, however, this system of credits effectively mandates that property owners pay the charge assessed or spend their own funds on improvements to their respective properties, as specified by the ordinance and the city, in order to receive the benefit of any credits. **In other words, property owners have no means by which to escape the financial demands of the ordinance. Additionally, the ordinance authorizes the administrator of the storm water utility to discontinue water service to any property owner delinquent in the payment of the fee, as well as to engage in various civil remedies, including the imposition of a lien and the**

> **filing of a civil action, to collect payment of past-due charges. All of these circumstances demonstrate an absence of volition. This lack of volition lends further support for our conclusion that the management charge is a tax**. *Bolt*, 459 Mich. At 168. [302 Mich. App. at 111-112 (emphasis added).]

Most recently, the Court of Appeals in a published decision held that flat-rate sewer charges are compulsory for purposes of the *Bolt* framework. In *Youmans v. Bloomfield Township*, 336 Mich. App. 161, 232, 969 N.W.2d 570 (2021), the Court observed:

> On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the Bolt inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the variable portion of the disputed rates by refusing to use any water. But the fixed portions of those rates constitute flat rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. *See id.* at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third Bolt factor weighs in favor of plaintiff's position.

Like water and sewer service, electrical service is not "generally obtainable on the open market" and thus cannot constitute a "commodity." *See Kowalski v. City of Livonia*, 267 Mich. App. 517, 520 n.2; 705 N.W.2d 161 (2005). And unlike the cable TV franchise fee at issue in *Kowalski*, which paid for a luxury, electricity is a basic necessity. The City's property owners in the LBWL's service area cannot escape the Franchise Fee unless they use candles or kerosene lamps to light their homes. There is no element of volition here. At a minimum, the Charges are "effectively compulsory" within the meaning of *Bolt*.

In addressing the voluntariness criterion in *Stephens*, the Court ultimately concluded that payment of the Franchise Fees was not voluntary given that electricity is a necessity:

> The franchise fee certainly appears to be voluntary and part of the Lansing Board of Water and Light. In any case, its competitors, its competitor, Consumers Power, was able to decline to pay the franchise fee, although it isn't reasonable to believe that the cost of the Lansing Board of Water and Light and franchises are significantly higher for the Township than the cost of the Consumers Energy franchise. **But the franchise fee is not voluntary for the majority of Delta Township residents living in the Board of Water and Light's exclusive territory. It's unreasonable to claim that the Lansing Board of Water and Light can simply choose not to use electricity**. Michigan winters are just, today it's just uninhabitable with pipes bursts and such like that. [App.Exh. 21 at p. 35, emphasis added].

Based upon the foregoing law, the Circuit Court also concluded that the City's Franchise Fees were not voluntary:

> Here, the Franchise fee is not at all tied to the amount of electricity used by the fee payers and he fee payers choices are between either paying the franchise fee or not having electricity. The cold temperature in Michigan winters forecloses the option of living without electricity; and thus, submitting to the franchise fee is effectively compulsory. *Bolt* 459 Mich *supra* 167-168. [App.Exh. 1(B) at p. 10-11.]

In light of all the above authority, this Court should affirm the Circuit Court's finding that the Franchise Fees are not voluntary.

V. THE CIRCUIT COURT PROPERLY FOUND THAT PLAINTIFF AND THE CLASS MAY RECOVER THE IMPROPER CHARGES UNDER THE THEORY OF UNJUST ENRICHMENT AS PLED IN COUNTS III AND V OF PLAINTIFF'S COMPLAINT.

Plaintiff already has addressed the City's meritless appeal of right on the governmental immunity issue in a separate Brief on Appeal dated August 1, 2022, which Plaintiff incorporates by reference. As to the City's arguments against Plaintiff's unjust enrichment claims based on grounds **other than** governmental immunity, the Court should follow *Wright v. Genesee County*, 504 Mich. 410, 417-18; 934 N.W.2d 805 (2019), in which the Michigan Supreme Court observed the following:

> Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. Restatement Restitution, 1st, Sec. 1, comment a, p 12. It is grounded in the idea that a party "shall not be allowed to profit or enrich himself inequitably at another's expense." *McCreary v. Shields*, 333 Mich. 290, 294, 52 N.W.2d 853 (1952) . . . A claim of unjust enrichment can arise when a party "has and retains money or benefits which in justice and equity belong to another." *Id.*
>
> The remedy for unjust enrichment is restitution. *See, e.g., Kammer Asphalt Paving Co., Inc. v. East China Twp. Sch.,* 443 Mich. 176, 185, 504 N.W.2d 635 (1993) ("[U]nder

> the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'"), quoting Restatement Restitution, . . . *City Nat'l Bank of Detroit v. Westland Towers Apartments*, 413 Mich. 938, 938, 320 N.W.2d 881 (1982) (discussing "equitable recovery on the claim of unjust enrichment"); 2 Restatement Restitution & Unjust Enrichment, 3d, § 49, p 176 ("A claimant entitled to restitution may obtain a judgment for money in the amount of the defendant's unjust enrichment."). [504 Mich. at 417-418.]

This Court has applied these well-established principles to require a municipality that illegally collected funds to return those funds to the payor. In *Mercy Services supra*, 2010 Mich. App. LEXIS 2044 at *12 (App.Exh. 29) plaintiff, a tax-exempt entity, challenged an annual service charge imposed by a city on the grounds that it violated a state statute prohibiting the imposition of taxes on tax-exempt entities. After finding that the charge was unlawful, the Court held that the plaintiff could recover the charges paid because the city would be unjustly enriched if it were not required to return the funds to the plaintiff. *See also Logan v. Township of West Bloomfield*, 2020 Mich. App. LEXIS 1247 (2020) (App.Exh. 32) (holding that where statute does not provide a private right of action, the court retains equitable power to require refunds under principles of unjust enrichment).

CONCLUSION

For all of the foregoing reasons, Plaintiff requests that the Court affirm the Circuit Court's decision granting partial summary disposition to Plaintiff and remand the case for trial on Plaintiff's Foote Act claims.

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Dated: November 16, 2022

STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's brief on appeal contains 15,998 "countable words" as defined under MCR 7.212(B). Counsel relies on the word count function of its word processing system, as permitted under MCR 7.212(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2022, I electronically served the foregoing pleadings on all counsel of record using the court's electronic filing system.

/s/ Kim Plets
Kim Plets

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