STATE OF MICHIGAN
IN THE COURT OF APPEALS

MIDWEST VALVE & FITTING COMPANY,
a Michigan corporation,
individually and on behalf of a
class of similarly situated persons
and entities,

Plaintiff/Appellant,

v.

CITY OF DETROIT, a municipal corporation,

Defendant/Appellee.

COA Case No. 358868
Circuit Court Case No. 18-014337-CZ
Hon. Edward Ewell

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PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to MCR 7.203(A)(1). This appeal of right is taken from the Circuit Court's Findings of Fact and Conclusions of Law (the "Circuit Court Judgment") dated October 1, 2021 (App. Ex. 1),[1] which resolved all of Plaintiff/Appellant Midwest Valve & Fitting Company's ("Plaintiff") then-pending claims. *See Id.*, p. 18 ("The Court therefore dismisses plaintiff's claims against the City. This decision moots Plaintiff's claim for class certification. This is a final order and closes the case.").

On October 11, 2021, pursuant to MCR 7.204(A)(1)(a), Plaintiff timely filed a Claim of Appeal from the Circuit Court Judgment within 21 days of its entry.[2] Thus, Plaintiff's Claim of Appeal is from a final order and is timely under the applicable court rules.

[1] Exhibits referenced herein are designated as "App. Ex." and are contained in an appendix that Plaintiff/Appellant submitted contemporaneously with this brief. Each of the documentary exhibits in the Appendix (except for the Circuit Court orders) was submitted to the Circuit Court in connection with the parties' dispositive motion practice and/or trial, so they are properly part of the record on appeal. The evidence Plaintiff submitted in support of summary disposition is cited as an exhibit to Plaintiff's dispositive motion, which Plaintiff has made part of its appendix on appeal (e.g., "Exhibit ___ to App. Ex. 1"). Other evidence, including the trial transcript and documentary evidence the Circuit Court admitted at trial, is cited as "App. Ex. ___."

[2] Plaintiff also appeals the Circuit Court's November 24, 2020 Amended Opinion denying Plaintiff's motion for partial summary disposition and granting the City's request for partial summary disposition under MCR 2.116(I)(2) (the "SD Opinion," App. Ex. 2). The issue of whether to grant partial summary disposition to Plaintiff was preserved for appeal because it was raised before, addressed, and decided by, the Circuit Court. *See Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich. App 679, 694-95; 950 NW2d 502 (2019).

STATEMENT OF QUESTIONS PRESENTED

1. This case pertains to annual charges (the "Charges") the Defendant/Appellant City of Detroit (the "City") imposes on owners of property other than single-family residential property, which Plaintiff characterizes in its Complaint as a "Fire Inspection Charge." During trial, the Circuit Court made a factual finding that the Charges are "permit fees" and not "inspection fees." In other words, the City collects the Charges from property owners in exchange for a permit to operate, not in exchange for an inspection of the subject premises. On appeal, Plaintiff does not dispute the Circuit Court's factual finding that the Charges are permit fees (although Plaintiff does challenge the legal effect of that factual finding). Notwithstanding the now-undisputed fact that the Charges are "permit fees," can the Charges also be taxes as a matter of law?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court stated: No.

This Court should state: Yes.

2. Are the Charges designed to raise revenue (a hallmark of taxes), rather than being exchanged for a service rendered or a benefit received, with some reasonable relationship existing between the amount of the fee and the value of the service or benefit (a hallmark of user fees)?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court stated: No.

This Court should state: Yes.

3. Do the Charges raise revenue for an activity that benefits the general public?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court stated: No.

This Court should state: Yes.

4. Does the City provide any particularized benefit to persons and properties who pay the Charges but who do not receive inspections?

Plaintiff/Appellant states: No.

Defendant/Appellee states: Yes.

The Circuit Court stated: Yes.

This Court should state: No.

5. Do the Charges have any regulatory component as applied to properties that are not actually inspected, such that the Charges channel or direct a person's behavior?

Plaintiff/Appellant states: No.

Defendant/Appellee states: Yes.

The Circuit Court stated: Yes.

This Court should state: No.

6. Are the Charges proportionate to the necessary cost of the service for which they are allegedly imposed, and are they paid in exchange for the voluntary receipt of a measured service?

Plaintiff/Appellant states: No.

Defendant/Appellee states: Yes.

The Circuit Court stated: Yes.

This Court should state: No.

7. Is payment of the Charges voluntary, given that failing to pay could subject Plaintiff to criminal liability, and that payment is necessary in order to conduct business in the City?

Plaintiff/Appellant states: No.

Defendant/Appellee states: Yes.

The Circuit Court stated: Yes.

This Court should state: No.

8. Has the City imposed the Charges in violation of its own charter and ordinances?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court stated: No.

This Court should state: Yes.

9. The City's Charter authorizes "service fees." As applied to Plaintiff and others who pay the Charges but do not receive inspections, are the permit fees paid for "services" rendered by the City?

Plaintiff/Appellant states: No.

Defendant/Appellee states: Yes.

The Circuit Court stated: Yes.

This Court should state: No.

10. Did the City violate its ordinances by collecting more money through the Charges than the cost of issuing permits (i.e., possibly the entire cost of the Fire Marshal's fire prevention program)?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court stated: No.

This Court should state: Yes.

11. Was the City's attempted retroactive approval of the Charges in 2021 effective?

Plaintiff/Appellant states: No.

Defendant/Appellee states: Yes.

The Circuit Court stated: Yes.

This Court should state: No.

12. Does the Charter prohibit charges for "permit" fees, such that the resolution purporting to retroactively approve the past charges was of no effect?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court stated: No.

This Court should state: Yes.

13. Even if the City Council could have approved the Charges through a resolution, was its attempt to retroactively impose the Charges void for other reasons, such as the fact that it impaired vested rights and the City's previous neglect was not a mere "procedural error"?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court stated: No.

This Court should state: Yes.

14. Because the City imposed the Charges in violation of its Charter and ordinances, does Plaintiff have an equitable right to cause the City to disgorge the money Plaintiff paid in connection with the Charges?

Plaintiff/Appellant states: Yes.

Defendant/Appellee states: No.

The Circuit Court did not reach this issue.

This Court should state: Yes.

15. During at least one year in the Class Period, Plaintiff paid the Charges but did not receive a fire safety inspection. Other property owners in the City paid the Charges and did receive inspections. Was there a rational basis for treating Plaintiff differently from other similarly-situated persons and entities?

Plaintiff/Appellant states: No.

Defendant/Appellee states: Yes.

The Circuit Court stated: Yes.

This Court should state: No.

STATEMENT OF FACTS

I. INTRODUCTION

This appeal primarily presents the following question: May a municipality finance a core public safety function that benefits the entire community – fire prevention – through "fees" imposed on a select few of its citizens? Well-established Michigan law prohibits this method of financing activities which confer a public benefit. Nonetheless, the Circuit Court authorized this impermissible funding mechanism, which requires reversal.

This case challenges annual charges (the "Charges") the Defendant City of Detroit (the "City") imposes on owners of property other than single-family residential property, which Plaintiff characterizes in its Complaint as a "Fire Inspection Charge." *See, e.g.,* Complaint, ¶ 1 (Exhibit A to Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4). Plaintiff alleged that City purportedly imposes the Charges to pay the cost of annual fire safety inspections which are supposed to be performed in exchange for the payment of the Charge. The City alleged that the Charges were fees for permits to operate, not payments for inspections. The Circuit Court ultimately agreed with the City's characterization of the Charges, and Plaintiff does not challenge that factual finding on appeal. **For the purpose of this appeal, the Court should consider the Charges to be labeled as "permit fees," not "inspection fees."** Plaintiff does, however, challenge the Circuit Court's rulings related to the legal impact of its finding that the Charges were "permit fees."

Plaintiff does not need to quibble over the label applied to the Charges because the Charges are unlawful regardless of what they are called. *See Lockwood v. Comm'r of Revenue*, 357 Mich. 517, 558, 98 N.W.2d 753 (1959) (courts must "look through forms and behind labels to substance") (citation omitted). It is undisputed that the City uses the revenue from the Charges to finance the fire prevention activities of the Fire Marshal Division of its Fire Department. It also is undisputed that the City does not actually inspect the vast majority of the properties which incur the Charge. Plaintiff's experts have determined that, between July 1, 2013 and June 30, 2018, the City billed properties in the

City for 57,380 inspections that it did not actually conduct. *See* Exhibit B to App. Ex. 4. Plaintiff sought to represent the class of persons and entities who/which have incurred and/or paid the Fire Inspection Charges but who/which did not receive fire safety inspections.

In its Complaint (Exhibit A to App. Ex. 4), Plaintiff pleaded the following claims:

Count I:	Violation of the Headlee Amendment;
Count II:	Assumpsit/Money Had and Received - Unreasonable Charges;
Count III:	Unjust Enrichment - Unreasonable Charges;
Count IV:	Assumpsit/Money Had and Received - Violation of MCL 141.91[3];
Count V:	Unjust Enrichment - Violation of MCL 141.91;
Count VI:	Assumpsit/Money Had and Received - Violation of City Ordinance Section 19-1-22, Subsection 1.4.1.1[4];
Count VII:	Unjust Enrichment - Violation of City Ordinance Section 19-1-22, Subsection 1.4.1.1; and
Count VIII:	Violation of Equal Protection Guarantees Stated in the Michigan Constitution of 1963, Article I, Section 2.

Counts I, IV, and V were dismissed on summary disposition and are part of this appeal. Prior to trial, Plaintiff agreed to withdraw its claims based on the argument that the City received more in revenue through the Charges than its costs, so that theory is not part of this appeal. *See* Joint Final Pretrial Order ("JFPO"), App. Ex. 5, p. 13. Counts II, III, VI, VII, and VIII proceeded to trial.

In deciding this appeal, this Court must consider two sets of facts: **(1)** the facts the Circuit Court considered in connection with Plaintiff's motion for summary disposition regarding Counts I, IV, and V and the City's request for judgment in its favor under MCR 2.116(I)(2); and **(2)** the facts the Court considered at trial when it decided Plaintiff's remaining claims in Counts II, VI, VII and VIII. This is necessary because the Circuit Court made its decisions at different times, and each decision was

[3] MCL 141.91 provides: "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."
[4] This section was recodified in late 2019 as Detroit City Code, Section 18-1-22, subpart 1.6.2. (See Defendant's proposed Trial Exhibit 106.)

based on a somewhat different universe of facts. The facts before the Circuit Court did not change between summary disposition and trial in the sense that undisputed facts became disputed, or that the parties agreed on undisputed facts at trial that conflicted with the undisputed facts as they existed at the time of summary disposition. The two sets of fact never competed or conflicted with one another; they are important to keep in mind only because this Court must put itself in the shoes of the Circuit Court. When deciding whether the Circuit Court erred in granting summary disposition, this Court must consider the undisputed facts, viewed in the light most favorable to the City, as those facts were presented to the Circuit Court on summary disposition. When deciding whether the Circuit Court made legal errors in its Judgment, this Court must consider the factual findings in the Judgment.

II. THE FACTS SUPPORTING SUMMARY DISPOSITION IN PLAINTIFF'S FAVOR ON THE TAX-BASED CLAIMS

The following undisputed facts were submitted to the Circuit Court in support of Plaintiff's motion for summary disposition on its Tax-Based Claims.

A. The Basis for the Charges

The City alleges in its discovery responses and its Second Amended Answer ("SAA") (Exhibit C to App. Ex. 4) that the Fire Inspection Charge is actually a "permit fee." In essence, the City claims that owners of nonresidential properties and some owners of residential properties must pay the "permit fee" each year in order to obtain a permit to operate from the Fire Marshal. The City further claims that the "permit fees" are "imposed in order to reimburse the City for all of the direct and indirect costs of the Fire Marshal's fire protection program" and that, therefore, the permit fees are properly charged to even those properties that do not receive fire inspections. City's Answers to Plaintiff's Third Set of Interrogatories, Interrogatory No. 5 (Exhibit D to App. Ex. 4). For the purpose of Plaintiff's unlawful tax claims and its Motion for Summary Disposition on those claims, the Charges violate Michigan law even if they are "permit fees."

Through its ordinances, the City has adopted an amended version of the National Fire

Protection Association's ("NFPA") Fire Code. City Ordinance § 18-1-22 (Exhibit E to App. Ex. 4) amends and adopts NFPA Code § 1.6.2 as follows:

> 1.6.2 In accordance with Section 9-507 of the Charter, the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of:
>
> (1) Inspection and consultation;
>
> (2) Issuance of permits and certificates . . .

The City initially adopted Ordinance § 18-1-22 in 1984. *See* Exhibit E to App. Ex. 4, p. 8. *See also* City's Brief in Opposition to Plaintiff's Motion for Class Certification at p. 5 (Exhibit F to App. Ex. 4).

In its SAA, the City admits it does not impose the Charges on the public at large. Complaint at ¶ 22; SAA at ¶ 22. Instead, as the City further acknowledges, it pays the cost of its overall Fire Protection Program by imposing the Charges on owners of non-residential property and multi-family residential property. Complaint at ¶ 23; SAA at ¶ 23.

B. The Fire Prevention Activities Financed With the Charges

According to the City, the Charges are intended to finance "all of the direct and indirect costs of the Fire Marshall's fire protection programs." City's Answer to Plaintiff's Third Set of Interrogatories at p. 6 (Exhibit D to App. Ex. 4). The activities associated with these costs are described generally at p. 6 of Exhibit D to App. Ex. 4, and more particularly described by the City's Fire Marshal, Shawn Battle ("Battle Dep. II") (Exhibit G to App. Ex. 4), as follows:

1. Training

The Charges cover the cost of training fire inspectors, arson investigators and plan reviewers, which are the "section that reviews all new construction plans, renovations and – any plans submitted to the City that have to do with life safety or new construction." Battle Dep. II at pp. 9-10. Training extends to "anybody who works in for the fire marshal division in an inspection capacity." *Id.* at p. 10.

2. Public Education

Battle also confirmed that the Charges are used to finance the public education activities of the Fire Marshal Division: "Actually training of the public when businesses – it could be fire training at

businesses, it could be fire extinguishing training at businesses, it could be going out and speaking to different city entities, it could just be a public service announcement." *Id.* at p. 12.

3. Inspection Activities And Emergency Response Activities

The Charges also cover the costs of annual fire safety inspections and other activities conducted by fire safety inspectors employed by the Fire Marshall Division. The City admits that "it has employed between 12 and 15 full-time employees (Fire Prevention Inspectors and Fire Senior Fire Prevention Inspectors) to perform services related to its fire safety programs, which may include inspections of multi-family and non-residential properties in the City, but which also include numerous other functions, …" SAA, ¶ 12.

As suggested by the City's Answer, the responsibilities of the fire safety inspectors are broad and varied. The City describes those duties as including the following:

1. Inspects residential, assembly, educational, industrial and other occupancies.
2. Inspects premises where hazardous materials are stored, handled, used or sold.
3. Inspects and witness testing of fire protection/detection systems.
4. Maintains records and reports on conditions found.
5. Inspects fire escapes and other emergency exit passages.
6. Provides instructions and advice to owners and occupants of buildings.
7. Conducts inspections including but not limited to census tract district inspections, performing inspections for fire hazards, observing condition of fire extinguishers, fire hose and sprinkler systems, standpipe systems, fire alarm systems, clearance of aisles and exits, condition of fire escapes, fire doors and exits, and arrangement of materials and equipment.
8. Instructs schools, churches and other groups on fire prevention methods and hazards, as required.
9. Conducts post fire inspections and investigations.
10. Assists in the gathering of evidence in cases involving violations of law.
11. Testifies in court, as required [and]
12. As a sworn court officer, issues misdemeanor court citations to violators of the Fire Prevention Code [Exhibit H to App. Ex. 4].

4. General operations and maintenance expenses of the Fire Marshall Division's facility

Finally, the Charges cover "any cost incurred as far as the facility itself; it could be anything from utilities, cleaning, rearranging of the office areas." Battle Dep. II at p. 11. As Battle testified, "[i]t can cover a lot of different areas." *Id.*

C. The City Admits the Charges Provide a Public Benefit

In light of the activities and expenses described above, the City has repeatedly admitted that the Charges do not provide a particularized benefit only to the payers of the Charges, but rather benefit the public generally. **First**, the Mission Statement of the City's Fire Marshal Division makes clear that the activities of that Division are performed on behalf of the general public:

> The mission of the Detroit Fire Department Fire Marshall Division is to provide the **citizens and visitors** of Detroit with the highest level of fire prevention using standards and guidelines set forth by the Michigan Building Code, City Ordinance and NFPA for the purpose of fire prevention inspections, code enforcement, plan review, investigation and public education, all delivered with quality and outstanding customer service. [Exhibit I to App. Ex. 4 (emphasis added)].

In his second deposition, the City's Fire Marshal confirmed that the mission of his Division is to confer public benefits:

> Q. One of the things it says is: The mission is to provide citizens and visitors of Detroit with fire prevention. Do you see that?
> A. Yes, I do.
> Q. So you understand that the activities of the fire marshal division confer benefits on people who don't even pay taxes in the City of Detroit, correct?
> A. Correct [Battle Dep. II at p. 24]

See also Id. ("Our safety guidelines is to make sure citizens are safe when they're coming to public buildings or they're coming to partake in any kind of events or coming into the city or coming into this building for any type of business activities. Like I say, any special events that are going on in the city, that's what we are referring to when we want to keep people safe, **every citizen and visitor**") (emphasis added).

Second, Mr. Battle further admitted that the overall goal of the Fire Protection Program – *i.e.*, minimizing or diminishing the number of fires that occur – is one designed to benefit the entire community:

> Q. And would it be fair for me – this may be simplistic, but the overall goal of the Fire Protection Program is to minimize or diminish the number of fires that actually occur, correct?
> A. Correct.
> Q. And when a fire occurs, it can present dangers and possible harm

beyond the structure that it is actually in, correct?

A. Correct.

Q. **And so if you're preventing fires – if, for example, you had a thousand fires one year and you were able through your efforts to reduce that to 500 fires, that is something that benefits everybody, correct**?

A. **Yes, it does**, but when it comes to our fire safety program, ours is more focused on the business owner. We have another department or division that focuses on the city and civilians and single dwellings and things like that.

Q. Right

A. That falls under their purview.

Q. And I'm not really even talking –

A. Their safety program. Our safety program is more designed for the businesses **and for people coming to partake in what the businesses offer and events and everything that goes on in the city**. Our community relations, that division, they are the ones that focus on the individual homeowners and things like that.

Q. And again, maybe we are getting too down in the weeds about homeowners versus commercial. I'm talking about when you prevent a fire, if there's a fire in this building, people who are visiting here could get killed, right?

A. Correct.

Q. **So anytime you can reduce fire risk, you're providing a benefit not only to this building but also to the people who visit this building and people who may be affected if there is a fire in this building**?

A. **Correct**. [Battle Dep. II at pp. 21-22 (emphasis added).]

Third, the City again admitted in its Responses to Plaintiff's Third Interrogatories (Exhibit D to App. Ex. 4) that the Charges pay for services of a general public nature. In response to Interrogatory No. 3, the City said:

> More generally, all those who pay the Fire Marshal's annual permit fee receive the benefit of the fire protection program (training of staff, maintenance of Fire Marshal's physical facility, public education, provision of information related to properties subject to the Fire Marshal's programs, maintenance of information, capacity to continue provision of services, including but not limited to inspections, etc.) even if they do not receive a physical inspection in a given year. [*Id.*, Ans. to Int. No. 2 (emphasis added).]

Fourth, even if the City's fire inspection activities confer *some* benefit on the properties actually inspected, the City concedes that such benefits are **not** received by properties, like those owned by Plaintiff and the Class, that are not actually inspected. In this regard, Mr. Battle testified as follows:

Q. And when you inspect a property, do you feel that that is a benefit to the property owner?

A. Of course.

Q. And when you inspect the property – so if there's a property you don't inspect versus a property you do inspect, the owner of the property you do inspect

receives a benefit that isn't necessarily shared by someone who doesn't receive an inspection?

A. One part of that safety program, yes. [Battle Dep. II at p. 32].

Thus, the City's fire inspection activities and "fire protection program" provide a benefit to the general public and not to individual property owners, so a fee or permit-based method of financing those activities from a subset of the citizenry is impermissible. That is, where the government imposes a charge that forces one group of its citizens to finance an activity that benefits all citizens, the charge is a tax. *See, e.g.*, *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.") (emphasis added).

Given that the Charges constitute taxes, they are unlawful for at least two reasons. First, the Charges were not approved by the City's voters in violation of the Headlee Amendment to the Michigan Constitution. *See* Complaint, Exhibit A to App. Ex. 4, Count I. That constitutional provision, Art. 9, § 31, provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const. 1963, art. 9, § 31.]

Second, the Charges are not ad valorem taxes and were not being imposed by the City as of January 1, 1964 and therefore violate Michigan's Prohibited Taxes by Cities and Villages Act, MCL 141.91. That statute provides:

> Sec. 1. Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

The Headlee Amendment and MCL 141.91 provided the legal basis for Plaintiff's motion for summary disposition on its tax claims, as described below.

III. THE FACTS ADDUCED AT TRIAL

A. Background Facts

The parties stipulated to the following facts in the Joint Pretrial Order and/or at the beginning of trial:

1. The City imposes annual Charges on owners of non-residential real property, and did so prior to July 18, 2013. [JFPO, App. Ex. 5, p. 25.]
2. At some time, an unknown City of Detroit employee prepared Plaintiff's Trial Exhibit 1 (App. Ex. 20), which is entitled "Detroit Fire Department, Fire Marshall Division, 2013-2014" and which speaks for itself. [JFPO, p. 25.]
3. The City has collected Charges from thousands of property owners in the amounts set forth in the City's MobileEyes system. These amounts generally correspond to the figures contained in Plaintiff's Trial Exhibit 1. [*Id.*]
4. The City has collected Charges from thousands of property owners whose property **did not** receive an inspection in the year in which the City imposed the Charges. [*Id.*]
5. Since prior to July 18, 2013, the City's Fire Marshal Division has used a computerized database called MobileEyes to generate bills and track payments received. [*Id.*]
6. From 2013 to the present, the MobileEyes system has generated annual invoices to Plaintiff concerning the Charges which state on their face that they relate to an "Industrial/Bus/Merc Occupancy Permit." [*Id.*]
7. From 2013 to the present, the City's Finance Department has mailed out annual invoices to Plaintiff concerning the Charges which state on their face that they relate to an "Industrial/Bus/Merc Occupancy Permit." [*Id.*]
8. From 2013 to the present, for each year in which Plaintiff has paid the Charges, the City has issued Plaintiff a document entitled "Industrial/Business/Mercantile Occupancy Permit." [*Id.*]
9. The City was not able to locate any documents confirming that the City Council approved the Charges at any time prior to May 2021. [Trial Trans., App. Ex. 6, pp. 7-8.]

The most salient background facts are as follows. The City imposes an annual Charge on owners of property other than single-family residential property and did so prior to July 18, 2013. *See* Trial Trans., p. 6 (Stipulated Fact No. 1). The City has collected Charges from thousands of property owners whose property **did not** receive an inspection in the year in which the City imposed the Charge. *Id.*, p. 6 (Stip. Fact No. 4). The amounts of the Charges in 2012-13 and 2013-14 through the present are set forth on Plaintiff's Trial Exhibit 1. *Id.*, p. 6 (Stip. Fact No. 2, 3); pp. 25-28 (testifying that the schedule of Charges on Exhibit 1 is accurate and has remained in place since 2013-14). The amounts of the Charges are based on the "size and relative fire risk of the property, both of which affect the

time it takes to complete an inspection . . ." *Id.*, p. 40. The City bills the Charges through a computerized system called "MobileEyes." *Id.*, pp. 6-7 (Stip. Fact No. 3, 5, 6); p. 27 (Fire Marshal Shawn Battle testifying that "We use the MobileEyes System for our – for billing purposes."). Plaintiff's principal, Ron Fry, testified that his property did not receive a fire safety inspection at any time between 2013 and the date of trial. *Id.*, pp. 116-121; pp. 126-27. The City presented no evidence that Plaintiff's property received an inspection.

B. The City Council Did Not Authorize the Charges Before May 2021

The City's Charter and ordinances authorize the City to collect charges **only** if they are approved by the City Council. City Ordinance Section 19-1-22, Subsection 1.4.1.1, provides that the City's "Fire Commissioner is authorized to establish **necessary** fees, with the approval of the City Council, for the cost of (1) inspection and consultation . . ." (emphasis added). Fire Marshal Battle confirmed at trial that the Charges must be authorized by the City's Charter and must be approved by the City Council. Trial Tr., App. Ex. 6, p. 31. The City's own ordinances do not even purport to authorize the Charges for at least two reasons.

First, the only "permit fees" authorized by the ordinance are fees to cover the "cost of the … **issuance** of permits and certificates." [emphasis added]. Thus, the ordinance provision limits the City's cost recovery to the administrative costs associated with issuing the permits. It most assuredly does not authorize the City to recover "all of the direct and indirect costs of the Fire Marshall's fire protection programs" (City's Answer to Plaintiff's Third Set of Interrogatories, App. Ex. 7, p. 6), through the so-called "permit fees." Fire Marshal Battle admitted at trial that there is nothing in the Ordinance that authorizes the Fire Commissioner to "establish necessary fees for the cost of the entire Fire Prevention Program of its Fire Marshal Division." Trial Tr., App. Ex. 6, p. 32. Battle further admitted that Ordinance "does not explicitly authorize the charging of permit fees to cover inspections." *Id.*

Second, the ordinance requires any fees to be imposed "in accordance with Section 9-507 of the [City's] Charter," which requires the City to actually render a service to the payer of any fee imposed by

the City. In this regard, Section 9-507, titled "Service Fees," provides: "Any agency of the City may, with the approval of the City Council, charge an admission or **service fee** to any facility operated, or **for any service provided**, by an agency. **The approval of the City Council shall also be required for any change in any such admission or service fee**." [emphasis added]

The Fire Inspection Charges were not authorized by the City Council during almost all of the class period, so they are ultra vires. The City was not able to locate any documents confirming that the City Council approved the Charges at any time prior to May 2021. Trial Trans., App. Ex. 6, pp. 7-8 (final stipulation of fact). During trial, Fire Marshal Battle confirmed that there is **no evidence** the City Council approved the Charges before May 2021:

> Q. All right. And I think you, you were here for the stipulation but you're – there's no – you don't have any evidence that the City Council approved the, the charges that are at issue here at any time prior to last month, correct?
>
> A. No, I don't. [*Id.*, p. 34.]

Section 3.5-102 of the City's Charter (App. Ex. 8) requires the City Clerk to "keep a record of all its ordinances, resolutions and other proceedings and perform other such duties as it may provide." Section 4-118 of the Charter (App. Ex. 9) further requires the Clerk to "authenticate by signature and record all ordinances and resolutions in a properly indexed book kept for that purpose." Notwithstanding these dictates, there was no evidence presented at trial that a record exists memorializing the City Council's approval of the Charges at any time prior to May 2021.

The Circuit Court incorrectly found that "[t]he Detroit City Council approved the Charges, described as permit fees, rather than inspection fees, on May 13, 2021, retroactive to January 1, 2013." For the reasons described below, the City Council's attempted approval of the Charges was ineffective, and the Charges were never properly authorized by the City Council at any time before May 2021. The Charges were thus ultra vires.

C. Plaintiff "Faithfully" Paid the Charges

Using the MobileEyes system, the City generated and mailed an invoice to Plaintiff in each year from 2013 to the present concerning the Charges. *Id.*, pp. 6-7 (Stip. Fact No. 6, 7). Plaintiff "faithfully" paid the Charges, at least through 2020. *Id.*, pp. 81-82 (admission by Battle). For each year in which Plaintiff paid the Charges, the City issued Plaintiff a document titled "Industrial/Business/Mercantile Occupancy Permit." *Id.* (Stip. Fact No. 8). Plaintiff has paid the Charges since at least 2013. Trial Trans., p. 113.

D. The City's Decision About Which Properties to Inspect Was Arbitrary and Capricious

In its Amended Answer, ¶ 24 (App. Ex. 10) and confirmed by the trial testimony of Fire Marshal Battle, the "City justified, at least in this Answer, varying charges based upon the size of the property and the relative fire risk, both of which affect the time it takes to complete an inspection." Trial Tr., p. 40. The City did not, however, assess relative fire risk when deciding which properties to inspect. *Id.*, pp. 43-44 (Fire Marshal Battle testifying: "Q. So it's kind of **serendipitous** as to who gets an inspection and not gets an inspection because you know you can only do so many per year and that's gonna leave out so many properties, and **so some properties get lucky and get one and some properties don't, correct? A. Correct**.") (emphasis added). The Circuit Court correctly found that the City's decisions about which properties to inspect and which not to inspect were arbitrary and capricious, as opposed to "intentional and deliberate." *See* Circuit Court Judgment, p. 5 ("Although the Fire Marshal did not inspect all commercial properties under its jurisdiction each year, this was because the Fire Marshal lacked the funding, staffing, and resources to do so, not because the fire Marshal made an **intentional and deliberate** decision to treat Plaintiff's property and others differently.") (emphasis added).

E. The City Generates a Large Amount of Revenue from the Charges

David Whitaker, Director of the City's Legislative Policy Division, reported in his memo to the City Council (App. Ex. 11) that in fiscal year 2016, the Fire Department "had $4.8 million of general

fund revenues for 'Fire Safety Inspections'" and testified that "[t]his was the highest amount of inspection revenue for the general fund." Trial Tr., p. 101. Whitaker informed the Council that "[t]he amount of revenue from Fire Safety Inspections have greatly increased since fiscal year 2010." *Id.* (referring to the City Council memo, App. Ex. 11).

F. Persons and Entities Who Receive Fire Safety Inspections Receive a Benefit that Persons and Entities Who DO NOT Receive a Fire Safety Inspections DO NOT Receive

Mr. Battle testified: "Q. Right. But the property that received the inspection, you would agree that they would receive a benefit from getting that inspection, correct? A. Yes." Trial Trans, App. Ex. 6, p. 28. He elaborated as follows:

> Q. All right. And the – when you, when you don't inspect a property and you have all of these hundreds of thousands of properties that don't receive inspections you're not in any way providing a service to those properties, are you?
>
> A. Well, they're still falling – if they're commercial properties and multi-residential properties they still are falling under our Life Safety Program, yeah.
>
> Q. No, I understand that they, that they're within your program but if they don't – we already, I think, established that there's a specific service that gets provided to a property that gets inspected, you said that, because there's a benefit and you can find things that were, you know, fire hazards, that sort of thing. Do you remember that testimony?
>
> A. Yes.
>
> Q. All right, there's not a similar specific service provided to somebody who pays a permit fee and doesn't receive an inspection, correct?
>
> A. Not that part of it, correct. [*Id.*, pp. 35-36.]

The Circuit Court incorrectly found that a person or entity who does not receive an inspection in a given year receives an equivalent benefit in the form of "numerous other services" such as "receiving a permit" and "the benefits of the Fire Protection Program." Circuit Court Judgment, pp. 4-5. The Trial Court ignored the fact that persons and entities who do receive inspections also received those same generalized benefits, plus the particular benefit of the inspection.

G. Plaintiff Did Not Receive a Fire Safety Inspection in ANY Year Between 2013 and the Present

Although Plaintiff's principal, Ron Fry, is in the office every weekday (and some employee is always present), and Plaintiff keeps strict control over entry onto its business premises, no employee of Plaintiff observed anyone from the City performing a fire safety inspection at any time between 2013 and the present. *Id.*, pp. 116-121; pp. 126-27. Fire Marshal Battle admitted that during at least some years, Plaintiff did not receive a fire safety inspection. *Id.*, p. 82. The Circuit Court did not apparently decide whether Plaintiff had ever received a fire safety inspection. *See generally* Circuit Court Judgment. However, the Circuit Court's rulings did not turn on whether Plaintiff received inspections.

H. The City Collects Far More Money From the Fire Inspection Charges than it Spends Performing Fire Inspections, in Violation of its Ordinances

As Plaintiff noted above, trial in this case addressed only liability, not damages. Nevertheless, the amount of revenue the City recovered through the Charges, compared to its overall fire protection costs, is relevant to Plaintiff's argument that the City's ordinances only authorize fees sufficient to cover the cost of issuing permits, not the entire cost of the Fire Marshal's fire prevention program. *See* Argument Section II(B) below. Mr. Whitaker confirmed that Plaintiff's Trial Exhibit 10, App. Ex. 11, p. 16, correctly states that the Fire Department had $4.8 million of general fund revenue from Fire Safety Inspections in FY 2016. *See* Trial Trans., p. 101. Mr. Whitaker issued his memo on July 7, 2017, which was before Plaintiff filed its Complaint in this action on November 5, 2018. Mr. Whitaker's memo is a highly reliable source about the revenue the Fire Inspection Charges generated, because it was created before this lawsuit and was not subject to the pressures of litigation.

Similarly, Plaintiff's Trial Exhibit 11, App. Ex. 12, a memo by Mr. Whitaker dated February 22, 2018 – again before Plaintiff filed this action – reflects "Safety Inspection Charges" of more than $4 million. *See* Trial Trans., pp. 104-05. The total of all "Licenses/Permits/Inspection Chgs" is the exact same amount as the "Safety Inspection Charges" - $4,019,432 (App. Ex. 12) – which strongly suggests that **all** of the revenue for both inspections **and** permits was derived from inspection fees,

notwithstanding Mr. Whitaker's attempts to avoid that conclusion. Indeed, Mr. Whitaker admitted that when he sent his memos.

The Circuit Court did not make any findings regarding the amount the City collected in Charges or whether that amount was reasonable. *See generally* Circuit Court Judgment. This Court should remand the case for fact finding on that issue, or in the alternative should find based on the trial record that the City collected more than $4 million per year in Fire Inspection Charges during FY 2017 and FY 2018. According to the City, no one has ever calculated the amount of revenue that would be necessary for the City to actually perform an annual inspection of every property that is subject to Fire Inspection Charges. *See* Trial Trans., p. 65 ("THE COURT: And if you were to inspect all of the properties how much would that cost? . . . So no one's ever done an analysis of how much you would need to do that? THE WITNESS: No, not that I know of.").

IV. THE PROCEEDINGS IN THE CIRCUIT COURT

A. Plaintiff's Motion for Partial Summary Disposition on Its Tax Claims

On July 14, 2020, Plaintiff filed a motion for partial summary disposition as to liability under MCR 2.116(C)(10) with respect to the unlawful tax claims set forth in Count I (Violation of Headlee Amendment) and Counts IV and V (Violation of MCL 141.91) of its Complaint (App. Ex. 4). The City responded and requested partial summary disposition in its favor on the same counts under MCR 2.116(I)(2) (App. Ex.). Plaintiff filed a reply brief in support of its motion (App. Ex. 14).

The Court denied Plaintiff's motion for partial summary disposition and granted the City's request for judgment in its favor under MCR 2.116(I)(2) as to Plaintiff's tax claims. The Circuit Court found that the Charges did not violate the Headlee Amendment because they served a regulatory purpose and were proportionate to the costs of service. SD Opinion, App. Ex. 2, pp. 6-9. As described below, these rulings were patently erroneous. The Court correctly found that the Charges were not voluntary, but found that the lack of volition alone was not enough to make the Charges a tax. *Id.*, p. 9. The Court further found that because Plaintiff had not established the *Bolt* factors under the

Headlee Amendment, Plaintiff could not as a matter of law prevail on its unlawful tax claim under MCL 141.91. *Id.*, p. 10.

B. Trial on Plaintiff's Claims Regarding Unreasonable Rates, Violation of the City's Charter, and Violation of Michigan State Equal Protection Guarantees

After dismissing Plaintiff's tax claims, the Court conducted a bench trial on Plaintiff's remaining claims set forth in Counts II and III (common law unreasonable rates), VI and VII (ordinance violation), and VIII (equal protection) of the Complaint.[5] The Court began its opinion by finding as a matter of fact that the Charges were annual permit fees, not inspection fees. Circuit Court Judgment, p. 1. Plaintiff does not dispute that finding in this appeal. Instead, Plaintiff disagrees with the legal conclusions the Circuit Court drew from its findings, as described below. The Circuit Court found as follows on Plaintiff's claims:

Count II, Unreasonable Charges, Assumpsit/Money Had and Received. There is no independent cause of action for assumpsit. *Id.*, p. 6. Assumpsit is a remedy for other independent causes of action. *Id.*, p. 7. Plaintiff did not succeed on any other independent causes of action, so it had no right to assumpsit. *Id.*

Count III, Unjust Enrichment, Unreasonable Charges. Plaintiff maintains that the City's ordinances only authorize the Fire Marshal to charge a fee for the cost of issuing permits, not the entire cost of his fire prevention program. But municipalities may charge permit fees "to recover all of their direct and indirect costs relating to the regulation of those who are charged the fee." *Id.*, p. 8. Here, the cost of issuing permits was the entire cost of the fire prevention program, so the fees were lawful. *Id.*, p. 9. In addition, Plaintiff's argument that the Charges were ultra vires fails because the City's retroactive legislation did not impair Plaintiff's vested rights, but merely corrected a procedural

[5] The Circuit Court bifurcated this case into a liability phase and a damages phase, and the June 2021 trial addressed only liability. *See* JFPO, p. 1 ("Because the Court has bifurcated the trial into separate phases for liability and damages, Plaintiff will address only its theories as to liability."). The Circuit Court Judgment found no liability, so the parties never reached the issue of damages.

violation relating to the authorization of the Charges, so the City had not been unjustly enriched. *Id.*, pp. 10-11. Further, the City's retroactive approval of the Charges "served a rational and legitimate purpose, because it allowed the City to recover permit fees which funded its needed fire protection programs, which were focused on those who paid the fee and received permits." *Id.*, p. 11. Another "rational purpose" for retroactive authorization was to avoid "a massive and unexpected shortfall in the Fire Marshal's budget" which would jeopardize future programs. *Id.* Forcing the City to disgorge millions of dollars that it collected through the Charges and spent on fire prevention programs would be inequitable to the City. *Id.*, p. 12.

Count VI, Assumpsit/Money Had and Received, Ordinance Violation. The Court dismissed this claim for the same reason as Count II, described above. *See* Circuit Court Judgment, p. 12.

Count VII, Unjust Enrichment, Violation of Ordinance. Retroactive approval of the Charges was lawful for the same reasons described in connection with Count III. *Id.*, pp. 12-13.

Count VIII, Violation of Equal Protection Guarantees. Plaintiff has not met any of the requirements under the rational basis standard. The City "did not single out Plaintiff or others based on certain characteristics or as part of some identifiable group." *Id.*, p. 15. The City "did not ***intentionally or purposefully*** choose to treat Plaintiff (or other commercial property owners in a disparate manner." *Id.*, p. 16 (emphasis in original). In other words, the City did not enact a discriminatory ordinance, so the Fire Marshal's arbitrary and capricious enforcement of the ordinance was immaterial. According to the Court, the Fire Marshal's random and "serendipitous" choice to inspect certain properties due to "lack of funding and resources" – without any consideration of which properties had the greatest need of an inspection – did not mean that the City had "knowingly and purposefully established a system which treated different categories of property owners differently". The Court therefore dismissed Plaintiff's equal protection claim.

ARGUMENT

I. THE CHARGES ARE UNLAWFUL TAXES REGARDLESS OF WHETHER THEY CONSTITUTE "PERMIT FEES" OR "INSPECTION FEES"[6]

For the purpose of Plaintiff's unlawful tax claims and the motion for summary disposition on those claims, Plaintiff asked the Circuit Court to assume that the Charges were "permit fees," and argued that the Charges violate Michigan law even if they are "permit fees." The City's fire inspection activities and "fire protection program" funded with the Charges provide a **benefit to the general public and not to individual property owners,** so a fee or permit-based method of financing those activities from a subset of the citizenry is impermissible. Where the government imposes a charge that forces **one group of its citizens** to finance an activity that **benefits all citizens**, the charge is a tax. *See, e.g.*, *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.") (emphasis added).

Given that the Charges constitute taxes, they are unlawful for at least two reasons. First, the Charges were not approved by the City's voters in violation of the Headlee Amendment to the Michigan Constitution. *See* Complaint, Count I. That constitutional provision, Art. 9, § 31, provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const. 1963, art. 9, § 31.]

Second, the Charges are not ad valorem taxes and were not being imposed by the City as of January 1, 1964 and therefore violate Michigan's Prohibited Taxes by Cities and Villages Act, MCL 141.91. That statute provides:

> Sec. 1. Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

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[6] Preserved in Plaintiff's Motion for Partial Summary Disposition (App. Ex. 4), pp. 8-20, and Plaintiff's Reply in Support of Motion for Partial Summary Disposition (App. Ex. 14), pp. 1-3.

Given that Plaintiff asked the Circuit Court to assume (for purposes of the dispositive motion only) that the Charges were "permit fees," there were no material questions of fact in dispute with respect to the tax-based claims. Plaintiff and the putative Class were entitled to judgment in their favor as a matter of law. For the reasons discussed below, the Circuit Court erred in denying Plaintiff's Motion for Summary Disposition on the tax-based claims and in granting the City's request for summary disposition in its favor.

In this appeal, Plaintiff requests that the Court reverse the Circuit Court's Order concerning the tax-based claims, find that the Circuit Court erred in denying Plaintiff's Motion, find that the Charges are taxes in violation of the Headlee Amendment and MCL 141.91, and order that the City must refund the Charges it wrongfully collected during the relevant Class periods.

A. The Tax vs. User Fee Distinction Made Under the Headlee Amendment.[7]

Headlee is a constitutional amendment that was "part of a nationwide 'taxpayers revolt' . . . to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Airlines Parking, Inc. v. Wayne Co.*, 452 Mich. 527, 532; 550 N.W.2d 490 (1996).

An application of § 31 of Headlee is triggered by the levying of a tax. *Bolt,* 459 Mich. at 158-159. "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 v. City of Lansing,* 459 Mich 152, 158 (1998). However, a charge that is a user fee "is not affected by the Headlee Amendment." *Id.* at 159.

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id.* at 160. "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 (quotation marks and citations omitted).

B. The "Bolt Factors"[8]

In *Bolt,* the Court, in enforcing the Headlee Amendment, 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. User fees must be proportionate to the necessary costs of the service; and
3. Payment of the fee is voluntary. [*Bolt*, 459 Mich. at pp. 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 Charges constitute taxes in violation of the Headlee Amendment to the Michigan Constitution and MCL 141.91.

C. As Applied To Plaintiff and the Class, the Charges Are Motivated By A Revenue Raising Purpose, Which Substantially Outweighs Any Regulatory Purpose.[9]

With respect to the first *Bolt* factor, the Charges have a revenue-raising purpose which substantially outweighs any regulatory purpose. This is true for at least three reasons, each of which is discussed below.

1. The Charges Raise Revenue For An Activity That Benefits The General Public.[10]

First, the 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

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[7] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, p. 9.
[8] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, pp. 9-10.
[9] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, pp. 10-15.
[10] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, pp. 10-12.

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).]

On summary disposition, the Circuit Court found that the Charges had a regulatory purpose because "in exchange for the fees, property owners receive the annual permit required to allow the property owner to use the property for a particular purpose. Property owners also receive the benefit of the fire prevention program including, but not limited to, training of staff, maintenance of the required facilities, and public education. . . . Although the fees paid by Midwest may provide a benefit to the general public, a regulatory fee can have dual purposes." SD Opinion, pp. 7-8. That is exactly Plaintiff's point – the Charges do not only inure to the benefit of the persons or group assessed but instead "inure to the benefit of all." Everyone who pays the Charges (and even citizens who do not own property that is subject to the Charges) benefits from additional training, fire facility maintenance, and so on. While a benefit to the public at large does not always negate the regulatory character of a charge, "Although a regulatory fee may confer a benefit on both the general public and the particular individuals who pay the fee and still maintain its regulatory character, a charge is not a regulatory fee in the first instance unless it is designed to confer a particularized benefit on the property owners who must pay the fee." *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 108; 836 N.W.2d 903 (2013).

Indeed, under Michigan law, fire prevention activities of a municipal fire department are performed pursuant to a duty owed solely to the general public, and not to individual landowners. *See, e.g., Jones v. Wilcox*, 190 Mich. App. 564, 476 N.W.2d 473 (Mich. App. 1991). As the *Jones* Court recognized in in defining the duty of municipal employees in this context:

> In sum, we hold that the duties placed upon the individual city employee defendants either to inspect buildings for code violations, to inspect fire hydrants, or combat fires are duties owed to the general public and not the individual plaintiffs. [*Id.* at 569.]

When it comes to fire safety inspections, the Courts and distinguished commentators agree that such inspections are not a "service" provided to any particular citizen or property owner, but rather constitute activities that provide a general public benefit through enhanced fire prevention. "Building codes, building permits and building inspections are devices for the protection of the general public and are not for the specific benefit of an individual." *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220, 199 N.W.2d 158 (1972) (Exhibit J to App. Ex. 4). As McQuillin, the foremost authority on municipal law, observes:

> 'Indeed, since the general purpose of building codes, building permits and building inspections is to protect the public, a building inspector is held to act exclusively for the benefit of the public. [McQuillin, Municipal Corporations (3rd Ed. 1993), 53.112 (Exhibit K to App. Ex. 4).] [11]

At least one Court has held that fees that finance fire inspection activities are taxes even if the persons who must pay those fees actually receive inspections. In *Building Owners & Managers Ass'n v. City of Kansas City*, 231 S.W. 208 (Mo. App. 2007) (Exhibit L to App. Ex. 4), the Court addressed the legality of a city's fire inspection fees under Missouri's Hancock Amendment, which is a constitutional

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[11] *See also Duran v. Tucson*, 20 Ariz. App. 22, 509 P.2d 1059 (Ariz. App. 1973) ("The inspections mandated by the fire code are not a service to the owner or occupier of the premises."); *Cracraft v. St. Louis Park*, 279 N.W.2d 801, 805 (Minn. 1979) ("such inspections are required for the purpose of protecting the interests of the municipality as a whole against the fire hazards of the person inspected"); *Parks v. Klamath Falls*, 82 Ore. App. 576, 728 P.2d 934 (Or. App. 1986) ("The public benefit from administrative inspections for fire hazards is obvious. Their purpose is to prevent loss of life and property from unsafe conditions that might cause or exacerbate a fire").

amendment analogous to the Headlee Amendment and which forbids a municipality from imposing any new taxes without voter approval. Kansas City had imposed fire inspection fees "as a means of enforcing the fire code." *Id.* at 213. The city had at first charged a fee of up to $100, based on the square footage of the building being inspected, for a "Certificate of Compliance." *Id.* at 210-11. The city later eliminated "Certificates of Compliance" and "instead, *required* businesses and multifamily dwellings to obtain an annual 'fire inspection certificate' at a fee not to exceed $100." *Id.* at 211 The new ordinance "allowed the building owners to retain private engineers to conduct the annual inspection. If that alternative was exercised, building owners would pay the City $10.00 for the fire inspection certificate." *Id.* In concluding that the fees were unlawful taxes, the *Building Owners* court relied heavily on its finding that the inspections did not constitute a service provided to any landowners:

> The circuit court determined that this factor [whether the city was providing a service or good] favored the Plaintiffs because the City did not provide fire inspections as a service to businesses and multifamily dwellings, but rather as a means to enforce the fire code. We agree . . .
>
> * * *
>
> The history of the fire inspection program indicates the City was not delivering a good or service when it took steps to enforce the fire code. With the passage of the three ordinances, the City sought to convert this enforcement activity into a service by requiring annual inspections and charging a fee for an inspection certificate. **These revenue-driven policy changes did not alter the fundamental purpose of the inspection program and the nature of the City's duty to ensure compliance with the fire code. Because the inspection program does not constitute a service to property owners, the fees related thereto are likely a violation of the Hancock Amendment.** [*Building Owners*, 231 S.W.2d at 214 (emphasis added).]

See also Lowenberg v. City of Dallas, 261 S.W.3d 54, 59 (Tex. 2008) (finding a "fire registration fee" to be an unlawful tax where "the City acknowledges that the fee was also intended to raise enough revenue to cover all costs of fire prevention in commercial buildings, shifting that burden off the taxpayers. Further, as noted above, the City concedes that the fee was to benefit the general public by improving fire protection for everyone.").

Like the inspection program in *Building Owners*, the City's fire inspection activities are designed

to ensure compliance with the Fire Code. *See* Battle Dep. II, p. 23 (acknowledging Fire Marshal's mission statement to use "standards and guidelines set forth by the Michigan Building Code"). But unlike the property owners in *Building Owners*, Plaintiff did not receive an inspection in exchange for its payment of the Charges. Like the registration fee program in *Lowenberg*, the Charges are intended to pay the pay the entire cost of the Fire Marshal's prevention program. *Building Owners* and *Lowenberg* are not binding, but this Court should find them very persuasive.

2. The Charges Also Have A Revenue-Raising Purpose Because The City Provides No Particularized Benefit To Persons and Properties Who Pay The Charges But Do Not Receive Inspections.[12]

A permit fee is functionally indistinguishable from a license fee because both constitute an authorization to perform a regulated activity. The Michigan courts have long recognized that a purported "license" fee is a disguised tax where, as here, the government provides no service or benefit in exchange for the fee. This principle was plainly stated by the Michigan Supreme Court in *North Star Line, Inc. v. City of Grand Rapids*, 259 Mich. 654, 244 N.W. 192 (1932), where the Court observed the following concerning license fee imposed by the city on certain busses operating in the city:

> As has been held, **the amount of such fee must be gauged by the expenses incurred by the municipality incident to issuing the license and supervising the business the licensee carries on thereunder**, if supervision is required. A license fee may not be imposed as a tax measure in disguise. [259 Mich. at 663 (emphasis added) (citing *Vernor v. Secretary of State*, 179 Mich. 157 (1915).]

In *North Star Line*, the Court invalidated a $15 license fee imposed upon certain common carriers because the municipality provided "almost negligible" supervision. *Id.* As a result, the $15 fee was a disguised tax because only a "practically nominal" fee would be proper, and in 1932, $15 was more than "nominal." *Id.* at 665. Here, with respect to members of the Class (i.e., property owners who incurred the Permit Fees but did not actually receive an inspection), the City has incurred no expense "supervising the business the licensee carries on thereunder" because the only conceivable

expense would be that associated with an actual inspection, which the City did not perform. In exchange for Plaintiff's payment of the "permit fee," all the City did was print and mail a single piece of paper to Plaintiff.

Numerous other Michigan cases recognize that license fees must be based upon the necessary expenses associated with the governmental activity for which the fees are charged. The most-cited of these cases is *Vernor v. Secretary of State*, 179 Mich. 157, 146 N.W.338 (1914). In *Vernor*, plaintiffs challenged certain vehicle license fees on the grounds that the fees were excessive because they were disproportionate to the costs of issuing the licenses and enforcing applicable regulations. In invalidating the license fees, the Supreme Court recognized that the costs incurred for which a license fee is charged must relate directly to the regulation of the person or property on which it is imposed:

> To be sustained, the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate **to the cost of issuing the license, and the regulation of the business to which it applies**. …
>
> Anything in excess of an amount which will defray such necessary expense cannot be imposed under the police power, because it then becomes a revenue measure. [179 Mich. at 167 (citations omitted).]

See also Fletcher Oil Co. v. Bay City, 247 Mich. 572, 576-577, 226 N.W. 248 (1929) ("The imposition of license fees as a condition to issuing a license, when plainly intended as police regulations, will be upheld if the revenue derived therefrom is not disproportionate **to the cost of issuing the license and the regulation of the business licensed**. … If upon investigation the fee is found to be only sufficient to pay the expense that may reasonably be presumed to arise in the supervision and regulation **of the business licensed**, its disposition should not have the effect of converting it into a tax") (emphasis added); *TCG Detroit v. Dearborn*, 261 Mich. App. 69, 93-94, 680 N.W.2d 24 (2004) (observing that, "if the city charges a fee, that fee must be based on the expense to the city of issuing a license and

[12] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, pp. 12-14; Reply Brief in

of supervising the activity, if supervision is required"); *Lowenberg*, 261 S.W.3d at 58 ("But even if the fee was intended to be used only for fire protection of commercial buildings, the revenue generated greatly exceeded any regulatory cost. We have little trouble concluding that the fee was a tax.").

What these authorities confirm is that a permit or license must be issued in exchange for a service provided directly to the payer of the associated fee. A permit involves a government entity having to actually do something (i.e., incur some cost) relating to the permit itself, *i.e.* the issuance of a building permit. For example, to issue a building permit, at a minimum, a city has to review specific plans and determine applicable codes prior to issuing the building permit—all of which cost the city money. A reasonable permit fee is fully justified under those circumstances.

Here, to the extent the City collects a "permit" fee and does not actually conduct a fire inspection of the subject property, what has the City done that is directly related to the fee? The beefed-up fire department benefits everyone, including single-family homeowners and even visitors to the City, who are safer because of the City's use of the Charges to fund its general fire prevention efforts. The Charges therefore are unlawful taxes as applied to Plaintiff and the Class.

3. The Charges Have No Regulatory Component As Applied To Properties Which Are Not Actually Inspected.[13]

Finally, there is no corresponding element of regulation here. There can be no doubt that the conduct of fire inspections constitutes a regulatory activity, but that is beside the point. The regulatory purpose factor is concerned with whether the method of charging serves a regulatory purpose, not whether the activity being financed is itself "regulatory." *Bolt*, 459 Mich. at 164 ("The dissent makes much of the fact that the ordinance does not raise revenue for the general revenue fund. However, this does not preclude us from determining that the purpose of the storm water charge is to generate revenue."). In other words, is the City's manner of financing this regulatory activity serving a regulatory

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Support of Summary Disposition, App. Ex. 14, pp. 3-5.

purpose? The answer is unequivocally: No. Indeed, in *Bolt* and *County of Jackson*, it was clear that the charges at issue were imposed to finance compliance with regulatory requirements, yet both courts found that the charges had a revenue-raising purpose and not a regulatory purpose.

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 (Mich. 1908) (emphasis added). Here, as applied to Plaintiff and the Class, the Charges do not serve a regulatory purpose because, as to properties it does not actually inspect, the City is not "regulating" anything.

D. The Charges Are Not "Proportionate"[14]

The Charges also fail the "proportionality" requirement of *Bolt*. 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.") (emphasis added) (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) (emphasis added). 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**

[13] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, pp. 14-15.
[14] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, pp. 15-18; Reply Brief in Support of Summary Disposition, App. Ex. 14, pp. 3-5.

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 (emphasis added).

The Circuit Court found that the Charges are proportionate because Plaintiff "does receive a benefit from its payment of the fees. In exchange for the payment of the fees, Midwest receives a permit allowing it to use its property for its intended commercial use. The fees also fund the regulatory operations of the Fire Prevention unit, which is focused solely on commercial and multi-residential properties such as Midwest's commercial property." SD Opinion, App. Ex. 2, p. 9. The Circuit Court's analysis misses the mark because it does not apply the correct standard, as set forth below.

First and foremost, the Charges as a matter of law are not "proportionate to the necessary costs of the service," because no "service" is being provided directly to Plaintiff and the Class. Again, the City contends that the Charges are "imposed to pay the costs of the City's entire fire inspection program, including all direct costs (which include, but are not limited to, in-person physical inspections of properties) and all indirect costs associated with the program." Exhibit M to App. Ex. 4, Ans. to Int. No. 1. Significantly, however, Plaintiff and the Class paid the Charges but did not receive that "service." The Charges are not made in exchange for the "voluntary receipt of a measured service." Accordingly, the Charges fail to satisfy the proportionality factor.

Second, the City can fare no better by contending that Plaintiff and the Class receive a general benefit from the Fire Marshall's inspection program, because that benefit is no different from that conferred on the "general public" or "even a portion of the public [i.e., residential properties] who do not pay the fee." *Graham*, 236 Mich. App. at 151.

The Michigan courts repeatedly have held that governmental charges lack the required proportionality when those charges finance a governmental activity that provides a benefit to the general public. For example, in *Bolt*, the Court further concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service on the basis of the following two "related failings" of the ordinance:

> First, the charges imposed do not correspond to the benefits conferred. Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary sewer system. In fact, many of them have paid for such separation through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction. Moreover, the charge applies to all property owners, rather than only to those who actually benefit. **A true "fee," however, is not designed to confer benefits to the general public, but rather to benefit the particular person on whom it is imposed**. *Bray [v Dep't of State,* 418 Mich. 149, 162; 341 N.W.2d 92 (1983); *Nat'l Cable Television Ass'n v United States & Federal Communications Comm*, 415 U.S. 336, 340-342; 94 S Ct 1146; 39 L Ed 2d 370 (1974)]. …
>
> **In this case, the lack of correspondence between the charges and the benefits conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public**.
>
> This conclusion is buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. **Improved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the City, not only property owners**. [459 Mich. at 164-66 (emphasis added)]

Similarly, in In *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013), the Court held that a city ordinance establishing a storm water utility and imposing a stormwater management charge on all property owners within the City established an unconstitutional tax. In reaching this conclusion, the Court relied heavily on the fact that the charges at issue there did not correspond to any particularized benefit conferred upon the payers of the charges:

> Likewise, the lack of a correspondence between the charge imposed and any particularized benefit conferred by the charge supports a conclusion that the charge is a tax and not a utility user fee. A true fee confers a benefit upon the particular person on whom it is imposed, whereas a tax confers a benefit on the general public. *Id.* at 165. …
>
> **We do not doubt that a well-maintained storm water management system provides such benefits. Nevertheless, these concerns addressed by the city's ordinance, like the environmental concerns addressed by Lansing's ordinance in *Bolt*, benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for recreational purposes downriver from the city, and everyone in the Grand River watershed. This lack of a correspondence between the management charge and a particularized benefit**

> **conferred to the parcels supports our conclusion that the management charge is a tax**. *Bolt,* 459 Mich at 166. [302 Mich. App. at pp. 108-109 (emphasis added)].

More recently, in *People v. Cameron*, 319 Mich. App. 215, 900 N.W.2d 658 (2017), the Court held that certain court costs imposed by a state statute upon criminal defendants constituted taxes. In reaching that result, the *Cameron* court reiterated that charges which finance activities that benefit the general public fail to satisfy the proportionality factor:

> **Defendant further argues that the costs are "not proportionate to the 'service,' because the courts confer benefit[s] to the public (justice, fairness, order) not the particular person on whom the costs are imposed." This argument has merit**. …
>
> We find the reasoning in [*State v Medeiros*, 89 Hawaii 361, 370; 973 P2d 736 (1999)] persuasive and conclude that, **although the court costs at issue comport with the requirements of MCL 769.1k(1)(b)(iii) and Konopka, they nevertheless are not proportionate to the service provided because any service rendered by the trial court's role in the prosecution of defendant benefits primarily the public, not defendant**. [319 Mich. App. at 226-27 (emphasis added)]

Here, the City admits that the Fire Inspection Charge provides a general public benefit because it helps reduce the risk of fire in the City generally. Battle Dep. II, p. 22 ("Q. So any time you can reduce fire risk, you're providing a benefit not only to this building but also to the people who visit this building and people who may be affected if there is a fire in this building? A. Correct."). Such a public safety "charge" that concerns fire inspection services is typically a tax in disguise. As then Judge, later Justice Markman, further warned in his dissenting opinion in the Court of Appeals in *Bolt*, which the Michigan Supreme Court later adopted in substantial part in its controlling opinion:

> **What properly characterizes most public safety functions, such as core police and fire services, as being beyond the purview of governmental activity that might be subject to a user fee is that the benefits derived from these functions benefit the entire community generally.** Not coincidentally, that is also what insulates public safety officials from potential tort liability under the gross negligence exception of the government immunity act, MCL 691.1407(2)(c); MSA 3.996(107)(2)(c); the negligent acts of public safety officials are considered to violate their duty to the public at large, rather than any duty to a particular individual. *White v. Beasley*, 453 Mich. 308, 552 N.W.2d 1 (1996) (discussing the public-duty doctrine). … **The preservation of public safety is a quintessential function that government provides to the community as a whole**. [*Bolt v. City of Lansing*, 221 Mich. App. 79, 98-99, 561 N.W.2d 423, 431-32 (1997) (Judge Markman, *dissenting* (emphasis added).]

Judge Markman went on to warn that financing public safety functions through "user fees" was a clear attempt to circumvent the tax limitations imposed by the Headlee Amendment:

> Finally, I note a troubling logical implication of the majority opinion. **Nothing in the majority's reasoning would prevent municipalities from supplementing existing tax revenues with police, fire, or a myriad of other "fees" on the ground that such services are disproportionately utilized by property owners**. Such a characterization of new taxes as police "fees" or **fire "fees**" or park "fees" could erode altogether the Headlee Amendment. Cf. *United States v City of Huntington West Virginia,* 999 F.2d 71, 74 (CA 4, 1993). During oral argument, counsel for the Lansing Regional Chamber of Commerce, which supported the ordinance, acknowledged that, if this charge passes constitutional muster, nothing would bar a local government unit from redefining any discrete--and previously tax-supported--government activity as a "service" for which a "fee" may be charged. This would effectively abrogate all Headlee limits on the power of taxation and, concomitantly, on government spending. While a system in which user "fees" are substituted for taxes may well be worth public consideration and debate, it is an issue that cannot be considered without reference to the constitutional requirements of the Headlee Amendment. [*Id.* at pp. 98-99 (emphasis added).]

Applying the foregoing standard, it is clear that the Charges, when imposed upon businesses but not upon owners of single-family residential property, are not proportionate to the necessary costs of the services provided by the City. By paying the Charges, Plaintiff and the Class have conferred a benefit upon everyone in the City who does not pay the Charges, because the City uses the Charges to help prevent fires that could start on (or at least spread to) any property. There can be no proportionality between an imposed "user charge" and the "service provided" when the "user" gets no particularized benefit and in fact pays for services that benefit the community as a whole.

E. As In *Bolt*, the Charges Are Not Voluntary, But Rather Are "Effectively Compulsory."[15]

Finally, the Court must determine whether payment of the Charges is "voluntary." This inquiry focuses on whether, as a practical matter, payment of the Charges is "effectively compulsory." *Bolt*, 459 Mich. at 167. A tax is compulsory by law, whereas user fees are compulsory only "for those who use

[15] Preserved in Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, pp. 18-20.

the service, have the ability to choose how much of the service to use, and whether to use it at all." *Id.* The Circuit Court correctly found that the Charges were not voluntary. SD Opinion, p. 9.

Here, payment of the Charges is not voluntary for at least two reasons. First, the failure to pay the Charges could subject Class members to criminal liability. In this regard, City Ordinance Section 1-16.1 provides:

> 1-16.16. The authority having jurisdiction shall be authorized to conduct inspections, and to issue permits for the following operations within the jurisdiction, which may be a condition for the issuance and maintenance of City licenses under Chapter 30 of the 1984 Detroit City Code, provided that the **required, non-refundable fee, and any outstanding fee for the same service, shall be paid prior to the service being rendered**: [Exhibit E hereto (emphasis added)].[16]

The City's Ordinances provide that a failure to pay the "required, non-refundable" fee constitutes a "misdemeanor violation:"

> 1-19.5. Any person who violates **any provision** of this article or fails to comply therewith, … shall be issued a misdemeanor violation. [Exhibit E hereto (emphasis added)].

Ordinance Section 1-19.6 provides that the misdemeanor violation prescribed by Section 1-19.5 is "punishable by a fine of not less than two hundred fifty dollars ($250.00) or more than five hundred dollars ($500.00), or by imprisonment of not more than ninety (90) days, or by both, in the discretion of the Court."

The Court of Appeals has recognized that payment of a governmental charge is not voluntary where criminal liability could result from nonpayment. As the Court recognized in *Wheeler v. Charter Township of Shelby*, 265 Mich. App. 657, 697 N.W.2d 180 (2005):

> With regard to the third criterion [voluntariness], the ordinance clearly mandates participation in the residential collection and disposal program and payment for that service. Absolutely no element of volition is involved because the ordinance makes failure to comply with the mandated service a misdemeanor subject to punishment by

[16] The "following operations" include property uses which incur the Charges that are the subject of this action: i.e., "Assembly Occupancy, Business Occupancy, Cutting and Welding, Educational Occupancy, Flammable and Combustible Liquids, Industrial Occupancy, Mercantile Occupancy, and Residential Occupancy. *Id.*

> up to ninety days in jail, a fine of up to $ 500, or both. The ordinance also authorizes the township to collect delinquent charges by adding them to the tax bills and by imposing liens against the properties of the delinquent residents. [*Wheeler,* 265 Mich. App. at 666.]

See also Lowenberg 261 S.W.3d at 59 (concerning a fire inspection fee with a criminal penalty, where the defendant argued that the payments were voluntary, "the City cannot extract millions in unlawful fees and fines, decide the whole thing was a mistake, keep the money, and insist the whole matter is moot" on the grounds of voluntary payment).

Second, Plaintiff and the Class are required to pay the Charges in order to conduct business within the City. *See* Battle Dep. I (Exhibit N to App. Ex. 4) at pp. 8-9 ("It allows the business -- it authorizes the business to operate in the City of Detroit legally."). For example, Chapter 30 of the Detroit Code of Ordinances requires all businesses to obtain a business license prior to operating or even advertising a business. *See* City Ordinance Sec. 30-1-4. Many members of the Class are businesses and must obtain business licenses. Business licenses must be renewed annually. *See* City Ordinance Sec. 30-1-9. City Ordinance Section 30-1-14 provides that "[a] license issued under this article shall not be issued to, or renewed for, any applicant owing any assessments, fees, or taxes to the City." Thus, anyone who does not timely pay the Charges is barred from obtaining a business license from the City, without which the person or entity cannot operate a business. *See* Exhibit N hereto, at p. 58. Thus, payment of the Charges is not voluntary but is effectively compulsory, and Plaintiff has satisfied the *Bolt* factors for finding that a purported user fee is a disguised tax.

The City concedes that thousands of properties who incur and or pay the so-called "Permit Fees" – i.e., the Charges -- did not actually receive fire inspections. While the City contends that the Charges still are justified because they finance the costs of the City's overall Fire Protection program, the City does not identify any particular service rendered directly to properties that it **does not inspect.** This failure is fatal to the City's argument that the Charges are not unlawful taxes.

Under the City's flawed analysis, the City can recover the cost of a governmental activity – fire prevention -- that provides a general public benefit through charges imposed only upon a particular subset of the citizenry, based solely upon its argument that payment of the Charge entitles the payer to a "permit." In a true "permit fee" situation, however, the government provides a specific service to, or act of regulation directed toward, the payer of the "permit fee." The classic example is a building permit fee. A municipality employs persons to review building plans in order to, among other things, ensure that the proposed construction complies with applicable codes and ordinances. A municipality incurs costs related to a particular building project that are properly recovered though a reasonable "permit fee" imposed on that building project. Here, in contrast, with respect to properties that **do not receive fire inspections**, the City provides no particularized service in exchange for the Charges. Indeed, the City's "service" consists solely of issuing a piece of paper (i.e., the permit), ostensibly for the payers to display on their premises.

At the end of the day, the only potential benefit conferred by the Fire Marshal's Fire Prevention Program upon properties that **are not inspected** is the general benefit of enhanced fire safety and prevention throughout the City.[17] But that benefit is not sufficient to transform the Charges into proper "fees" because (1) that benefit is one shared by everyone in the community, including visitors, and (2) that benefit is also shared by owners of single family residential properties, who do not pay "permit fees." That is, where the government imposes a charge that forces one group of its citizens to finance an activity that benefits all citizens, the charge is a tax. *See, e.g.*, *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**

[17] In his September 3, 2020 affidavit attached as Exhibit G to the City's Brief in Opposition to Plaintiff's Motion for Partial Summary Disposition, App. Ex. 4, ¶¶ 20-21, Fire Marshal Shawn Battle alleges that the City's "Fire Prevention Section" prevents fires at only **non**-single family residential properties and thus provides zero benefit to single family residential properties. In addition to defying common sense, Mr. Battle's affidavit contradicts his July 2, 2020 deposition (Exhibit G to Pl. SD Br.,

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.") (emphasis added). 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 (emphasis added).

In sum, because the Charges are completely untethered from any specific service provided to Plaintiff and the Class, they cannot be proper "permit fees" but rather must be characterized as unlawful taxes.

II. EVEN IF THE CHARGES ARE NOT TAXES, THEY ARE STILL UNLAWFUL BECAUSE THEY HAVE BEEN IMPOSED IN VIOLATION OF THE CITY'S CHARTER AND ORDINANCES[18]

Separate and apart from the analysis of whether the Charges constitute taxes, the Court must determine whether the Charges were prohibited by the City's Charter and/or ordinances. This is one of the legal arguments Plaintiff presented – and the Circuit Court rejected – at trial. We start with the Ordinance relied upon by the City to justify the Charges. The relevant section (18-1-22) provides in pertinent part as follows:

> 1.6.2 **In accordance with Section 9-507 of the Charter**, the Fire Commissioner is authorized to establish **necessary** fees, **with the approval of the City Council**, for the **cost of**:
>
> (1) **Inspection and consultation**;
>
> (2) **Issuance** of permits and certificates . . . [emphasis added].

This provision establishes four important limitations on the Fire Commissioner's power to impose charges on the Detroit citizenry:

1. The fees **must** be imposed "in accordance with Section 9-507 of the Charter;"

App. Ex. 4), p. 12:16-24, wherein he described various benefits to single family residential properties from the City's "Fire Protection Program."

[18] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, attached without exhibits as App. Ex. 15, pp. 11-17.

2. The fees **must** be "necessary;"
3. The Fire Commissioner may impose fees for the costs of "inspections and consultations," and
4. The Fire Commissioner may impose fees for the costs of **only** the "issuance of permits and certificates."

The Ordinance – as it must – expressly provides that any fees imposed under the Ordinance must comply with the Section 9-507 of the City's Charter. In this regard, Section 9-507, titled "Service Fees," simply provides:

> Any agency of the City may, with the approval of the City Council, charge an admission or **service fee** to any facility operated, or **for any service provided**, by an agency. **The approval of the City Council shall also be required for any change in any such admission or service fee**. [emphasis added]

For the reasons set forth below, as applied to property owners who, like Plaintiff, did not actually receive fire safety inspections, the Charges (1) are not the **type** of charges authorized by the City's Charter and/or ordinances and (2) even if they were, the Charges still are *ultra vires* because they were **not properly or timely approved** by the City Council.

A. The Charter Only Authorizes "Service Fees," But, As Applied To Plaintiff And Other Property Owners Who Do Not Receive Fire Safety Inspections, The Permit Fees Are Not For Any "Services" Rendered By The City[19]

Even a cursory examination of the Ordinance relied upon by the City and the associated Charter Provision makes clear that the Charges, to the extent they constitute "permit fees" and not "inspection fees," are not legally authorized. Given the clear and unambiguous provisions of both the Ordinance and the Charter, the Circuit Court's finding that the Charges are "permit fees" and not "inspection charges" actually dooms the Charges. Although under the City's Ordinance, the City **is** authorized to impose fees to cover the costs of "inspections," and an **actual inspection** would theoretically constitute a "service" fee under Section 9-507 of the Charter, it is undisputed that Plaintiff did **not** receive inspections. As a result, the Charge imposed upon Plaintiff – **whatever its label** – cannot be characterized as a fee for "services provided." *See, e.g.,* Def. Sec. of JFPO, pp. 19-20 (City

arguing that "Michigan courts have repeatedly recognized that 'We must look past the labels and grasp the substance.' *Durant v. State*, 251 Mich. App. 297, 309-10; 650 N.W.2d 380,386 (2002).").

Notably, the City has never cited any other provision of its Charter which purports to authorize the Fire Marshal Division to impose "permit fees". Even if there were such an alternative provision, the Ordinance authorizing any fees and charges by the Fire Marshal Division expressly requires **all** such fees and charges to be authorized by Section 9-507 of the Charter. Because the type of "permit fee" the City imposes here is in no sense a fee for any "service provided" by the Fire Marshal Division, the Charges at issue are illegal because they are prohibited by the clear and unambiguous provisions of the City Charter.

B. The City's Ordinances Authorize Fees Only To Cover The Costs Of Issuing Permits, Not The Entire Cost Of The Fire Marshal's Fire Prevention Program[20]

Further, the only "permit fees" authorized by the Ordinance are fees to cover the "cost of the … **issuance** of permits and certificates." [emphasis added]. Thus, the ordinance provision limits the City's cost recovery to the administrative costs associated with issuing the permits. It most assuredly does not authorize the City to recover "all of the direct and indirect costs of the Fire Marshall's fire protection programs" (City's Answer to Plaintiff's Third Set of Interrogatories, Plaintiff's Trial Exhibit 22, App. Ex. 7, p. 6), through the so-called "permit fees."

Fire Marshal Battle admitted at trial that there is nothing in the Ordinance that authorizes the Fire Commissioner to "establish necessary fees for the cost of the entire Fire Prevention Program of its Fire Marshal Division." Trial Tr., p. 32. Battle further admitted that Ordinance "does not explicitly authorize the charging of permit fees to cover inspections." *Id.* Thus, this is another independent reason why the Charges are not authorized by the City's Charter or the Ordinance.

C. The City Council's Retroactive Approval Of The Charges In 2021 Was A Nullity[21]

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[19] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, App. Ex. 15, pp. 20-22.
[20] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, App. Ex. 15, pp. 20-22.

Even if the City's Charter and ordinance theoretically authorized the **type** of Charges imposed here, the City's Charter and ordinances authorize the City to collect the Charges **only** if they are approved by the City Council. *See* Charter Section 9-507 ("Any agency of the City may, **with the approval of the City Council**, charge an admission or service fee to any facility operated, or for any service provided, by an agency") (emphasis added); City Ordinance Section 19-1-22, Subsection 1.4.1.1 (the City's "Fire Commissioner is authorized to establish necessary fees, **with the approval of the City Council**, for the cost of (1) inspection and consultation . . ." (emphasis added)).

Fire Marshal Battle confirmed at trial that the Charges must be authorized by the City's Charter and must be approved by the City Council. Trial Tr., p. 31. The Fire Inspection Charges were not authorized by the City Council during almost all of the class period, so they are *ultra vires*. The City was not able to locate any documents confirming that the City Council approved the Charges at any time prior to May 2021. *Id.*, pp. 7-8 (final stipulation of fact). During trial, Fire Marshal Battle confirmed that there is **no evidence** the City Council approved the Charges before May 2021:

> Q. All right. And I think you, you were here for the stipulation but you're -- there's no -- you don't have any evidence that the City Council approved the, the charges that are at issue here at any time prior to last month, correct?
>
> A. No, I don't. [*Id.*, p. 34.]

Section 3.5-102 of the City's Charter requires the City Clerk to "keep a record of all its ordinances, resolutions and other proceedings and perform other such duties as it may provide." See Plaintiff's Trial Exhibit 20. Section 4-118 of the Charter further requires the Clerk to "authenticate by signature and record all ordinances and resolutions in a properly indexed book kept for that purpose." See Plaintiff's Trial Exhibit 21. Notwithstanding these dictates, there was no evidence presented at trial that a record exists memorializing the City Council's approval of the Charges at any time prior to May 2021. In May 2021, the City purported to remedy this defect by having the City Council hastily

[21] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, App. Ex. 15, pp. 22-23.

approve a "resolution" which purported to retroactively apply all of the Charges back to 2013. For the reasons discussed below, however, the City Council's resolution was legally insufficient to retroactively authorize the Charges for at least two independently dispositive reasons.

1. The Charter Prohibits Charges For "Permit" Fees So The Resolution Purporting To Retroactively Approve The Past Charges Was Of No Effect[22]

First, as set forth in Section II above, the City's Charter does not authorize "permit" fees, but only fees for "services provided." As a result, the City Council was legally unable to retroactively authorize the "permit fees," as applied to Plaintiff and other property owners who did not receive fire safety inspections. It is beyond question that an ordinance or resolution cannot conflict with a city Charter provision and, if it does, it is a nullity. In *Bivens v. City of Grand Rapids*, 443 Mich. 391, 505 N.W.2d 431 (1993), the Supreme Court summarized these well-established legal principles as follows:

> **[A] city may not validly enact an ordinance that contradicts limitations expressly provided in the city's charter**. The charter of a city stands as its "constitution"; it is "the definition of [a city's] rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." *Jackson Common Council v. Harrington*, 160 Mich. 550, 552, 125 N.W.383 (1910); *see also Sykes v. Battle Creek*, 288 Mich. 660, 662-663; 286 N.W. 117 (1939). Moreover, once adopted by a vote of the electors, a city's charter may be amended only by a vote of the electors. In short,
>
> > **an ordinance must conform to, be subordinate to, not conflict with, and not exceed the charter**, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state. …
>
> To permit otherwise, and allow a city commission to enact an ordinance contrary to the charter, would enable the commission to effectively amend the charter without subjecting the amendment to the scrutiny and approval of the local electorate. *See, e.g., Thiesen, supra*, 320 Mich. 453. [443 Mich. at 400-401, quoting 5 McQuillin, Municipal Corporations (3d ed), § 15.19, p 98.]

The City here attempted to retroactively approve the Charges through a mere resolution. While *Bivens* dealt with an ordinance which conflicted with a municipal charter, it is clear that a resolution – an action by the City Council of even less legal significance than the enactment of an ordinance – was

similarly ineffective to "trump" the Charter provision. Accordingly, the Court should find that the City's retroactive attempt in May 2021 to authorize the Charges was a legal nullity.[23]

2. Even If The City Council Could Approve The Charges Through A Resolution, the City's Attempt To Retroactively Impose The Charges Must Fail[24]

The Court should further find that the City Council's attempt to retroactively approve the Charges must fail because the circumstances that must be present before legislation can be applied retroactively clearly have not been met here.

Recently, in *Buhl v. City of Oak Park*, No. 160355, 2021 Mich. LEXIS 1042, at *10 (June 9, 2021) (App. Ex. 16), the Michigan Supreme Court noted that "a statute or amendment may not be applied retroactively if doing so would 'take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation and impose[] a new duty, or attach[] a new disability with respect to transactions or considerations already past.' *In re Certified Questions*, 416 Mich at 571 (quotation marks and citation omitted)." The court declined to retroactively apply a statute that would have relieved the defendant of the legal duty it owed to the plaintiff at the time the injury occurred, because "the retroactive application of MCL 691.1402a(5) would effectively rewrite history as to the duty defendant owed plaintiff by absolving defendant of its duty to maintain public sidewalks in reasonable repair. This is precisely what the third factor disallows when it rejects laws that create new obligations, impose new duties, or attach new disabilities with respect to transactions or considerations already past." *Id.* at *11.

In the Circuit Court, the City relied upon the Supreme Court's decision in *Downriver Plaza Grp. v. City of Southgate,* 444 Mich. 656, 657; 513 N.W.2d 807 (1994), in which the Supreme Court upheld a

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[22] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, App. Ex. 15, pp. 20-22.

[23] The 2021 resolution is also a nullity because the Ordinance only authorizes the Fire Marshal's Division to recover the costs associated with the "issuance" of permits and not the entire cost of the Fire Marshal's fire prevention program. Yet the resolution impermissibly purports to retroactively approve fees which recovered all of those costs.

[24] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, App. Ex. 15, pp. 11-17, 22-23.

municipality's retroactive imposition of certain fees and charges under the Michigan Drain Code. The Circuit Court ultimately agreed with the City, applying *Downriver Plaza* to hold that the City's 2021 resolution was sufficient to retroactively impose the Charges back to 2013. Circuit Court Judgment, p. 10. However, *Downriver Plaza* is distinguishable from the situation in this case.

In *Downriver Plaza*, the City Council clearly authorized the fees at issue by resolution in 1988 (which provided that user charges would be levied on the next tax roll) but did not adopt a specific fee schedule until 1990. Plaintiffs were assessed charges on their 1987 and 1988 tax bills. When it adopted the fee schedule in 1990, the Council retroactively approved user charges for fiscal years 1987-1991. In holding that the retroactive application of the fee schedule was permissible, the Supreme Court viewed the City's failure to enact a specific fee schedule as a technical violation of the City's Charter that was made in "good faith." *See Downriver Plaza*, 444 Mich. at 664 (Section 162 of the City Charter "required the Southgate City Council to explicitly set forth the individual user rates in one of its resolutions. Undoubtedly, the Southgate City Council attempted in good faith to comply with Section 162's direction. Nonetheless, the efforts **technically fell short** because the individual formula, while repeatedly discussed, was never expressly incorporated into a resolution.") (emphasis added). *See also Id.* at 670 ("We also find that retroactive application of the January 3, 1990 resolution, **curing a procedural irregularity** regarding prior charges, comports with notions of due process.")

Further, it was important to the Supreme Court that the plaintiffs had no vested right to not pay the fees, because their "obligation to pay user fees had been in place since 1975." Here, in contrast, there is no "procedural irregularity." This is not a situation where the City can point to evidence that the City Council intended to approve "permit fees" but, due to a procedural irregularity, never took formal action to cement that approval. There is **no** evidence that the Detroit City Council ever intended to authorize the "permit fees" at issue.

Unlike the plaintiff in *Downriver Plaza*, this is not a situation where Plaintiff had an "obligation" to pay the "permit fees" that had been in place at any time prior to the City Council's retroactive

approval of the fee schedule in 2021. *See Buhl,* 2021 Mich. LEXIS 1042, at *10 ("a statute or amendment may not be applied retroactively if doing so would 'take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation and impose[] a new duty, or attach[] a new disability with respect to transactions or considerations already past"). The City's retroactive application of the resolution clearly impaired Plaintiff's vested rights under existing laws and created a new obligation that Plaintiff simply did not have prior to May 2021. Until May 2021, Plaintiff had no actual legal obligation to pay the Charges, even though the City imposed the Charges prior to that time. That is why, in assessing the application of *Downriver Plaza* to this case, the evidence of the city council's intent to impose fees all along in *Downriver Plaza* is absolutely crucial.

In sum, *Downriver Plaza* has no application here. Unlike the city in *Downriver Plaza*, there is no evidence that the City Council ever authorized *any* of the alleged "permit fees" imposed by the City here at any time prior to May 2021. This was not a mere clerical or procedural error, but a substantive failure to approve the subject Charges at all, as required by the Charter and Ordinances.

D. Because The City Imposed The Charges In Violation Of Its Charter and Ordinances, Plaintiff Have An Equitable Right To Disgorge The Monies They Paid For "Permit Fees"[25]

Because the Charges were imposed in violation of the Charter and ordinances, Plaintiff plainly has an equitable remedy (under both the doctrine of unjust enrichment and the doctrine of assumpsit) to compel the City to disgorge the Charges collected during the class period. 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." *See 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).

In addition, where a governmental entity collects funds to which it is not legally entitled, a plaintiff may obtain a refund of those charges pursuant to a claim for unjust enrichment. For example, in *Mercy Services for the Aging v. City of Rochester Hills*, 2010 Mich. App. Lexis 2044 at *12 (2010) (App. Ex. 17), 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. The *Mercy Services* court ultimately concluded that, "[w]here funds are unlawfully collected by a governmental entity, the circuit court is empowered to order a refund." *Id.* (citing *Romulus City Treasurer v. Wayne County Drain Com'r*, 413 Mich. 728, 746-47; 322 N.W.2d 152 (1982)).

On February 18, 2020, in *Logan v. Township of West Bloomfield*, COA No. 333452 (App. Ex. 18) the Plaintiff challenged certain fees imposed by a municipality's building division that allegedly were excessive and imposed in violation of the state construction code act ("CCA"), MCL 125.1501 et seq. Plaintiff brought claims for (1) statutory violation of the CCA, (2) violation of the Headlee Amendment and (3) unjust enrichment premised on the municipality's violation of the CCA. In an earlier opinion dated January 11, 2018, the Court of Appeals held that even though the plaintiff in *Logan* did not have a private right of action under the CCA, he still could seek a refund of the excessive fees under the equitable doctrine of unjust enrichment:

> Although the circuit court correctly recognized that the statute did "not expressly allow a private cause of action for recovery of fees collected in violation of its provisions," it failed to take the next, necessary step; the court did not ask whether any remedy was available to plaintiffs with regard to their claim that the township had violated MCL

[25] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, App. Ex. 15, pp. 11-17, 22-23.

> 125.1522(1). And plaintiffs did properly state an unjust enrichment claim. In their complaint, plaintiffs alleged that the township received a benefit from them in the form of payment of the challenged fees. Plaintiffs also alleged that the township was "not authorized by its ordinances or the [CCA] to impose or collect the excessive or otherwise unwarranted charges and fees mandated by its Building Division." When viewing all of the factual allegations raised by plaintiffs in their complaint in the light most favorable to plaintiffs, plaintiffs have stated a claim of unjust enrichment sufficiently to survive a (C)(8) motion and the court erred in dismissing this count.

The Court of Appeals vacated the circuit court order partially granting summary disposition in the township's favor. *Id.* The township applied for leave to appeal to the Supreme Court, which ultimately vacated the Court of Appeals' January 11, 2018 Opinion and remanded for reconsideration in light of *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204; 934 NW2d 713 (2019) ("*MAHB*"), and *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410; 934 NW2d 805 (2019). *Logan v West Bloomfield Charter Twp*, 505 Mich 863; 935 NW2d 42 (2019).

In *MAHB,* the Supreme Court held that the city of Troy violated MCL 125.1522(1) of the CCA by charging excessive fees for the city's Building Inspection Department's public services in order to generate a revenue to pay off the department's existing deficit. Just as the Court of Appeals found in Logan I, the Supreme Court determined in *MAHB* that MCL 125.1522(1) does not include an "express or implied monetary remedy" for its violation. *MAHB,* 504 Mich at 208. But the Supreme Court did not address the issue raised in *Logan* – namely, whether the plaintiff had an equitable claim for unjust enrichment to compel a refund of the excessive fees collected. In *Genesee Co*, the Court held that unjust enrichment claims against municipalities are not barred by governmental immunity because they are not tort or contract claims but rather seek the return of monies being unfairly retained by the government. On remand, the *Logan* Court affirmed its prior ruling, holding that "*MAHB* and *Genesee Co* further support our previous judgment and we again vacate the circuit court's partial summary disposition order."

Even more recently, in *Kincaid v. City of Flint*, No. 337972, 2020 Mich. App. LEXIS 2948 (App. Ex. 19), the plaintiff challenged the City of Flint's water and sewer charges on various grounds,

including that certain rate increases violated the city's own ordinances. This Court held that **even where a private right of action does not exist under a city ordinance,** if a municipality has obtained money through an unlawful exaction in violation of the ordinance, the plaintiff has a common law equitable claim for a refund. The Court expressly recognized the distinction that Plaintiff asserts here – **namely, that there is a difference between a private cause of action for money damages (which is not at issue here) and an equitable claim to compel a refund of money obtained in violation of the law (which is at issue here)**:

> We first consider defendant's argument that the Flint Ordinances at issue here, Flint Ordinances, §§ 46-52.1 and 46-57.1, did not afford plaintiffs a private cause of action. We agree **only in part**.
>
> "[N]o cause of action can be inferred against a governmental defendant." *Myers v City of Portage*, 304 Mich App 637, 643; 848 NW2d 200 (2014). Absent "express legislative authorization, a cause of action cannot be created in contravention of the broad scope of governmental immunity[.]" *Lash*, 479 Mich at 194 (quotation marks and citations omitted; emphasis added). **Yet, it has long been recognized that "[t]he right to recover money illegally exacted does not depend upon the statute**." *Pingree v Mut Gas Co*, 107 Mich 156, 157; 65 NW 6 (1895**). Instead, a common-law action, i.e., an action not dependent upon a statute (or in this case an ordinance), is available to allow recovery for such unlawful exactions**. *See id. Hyde Park Co-op v City of Detroit*, 493 Mich 966 (2013); *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 705; 178 NW2d 484 (1970), citing *City of Detroit v Martin*, 34 Mich 170, 174 (1876) ("in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction."). Based on these principles, it is plain that plaintiffs cannot maintain a cause of action for money damages based on defendant's mere violation of a City Ordinance, *Lash*, 479 Mich at 194, **but it is equally clear that plaintiffs may maintain a cause of action for a refund of an unlawful exaction**. [*Kincaid*, 2020 Mich. App. LEXIS 2948 at *8 (emphasis added) (footnote omitted).]

The Court went on to find that the Circuit Court erred in dismissing the plaintiff's unjust enrichment claims because they were "premised on an unlawful exaction:"

> In Count IV (unjust enrichment), plaintiffs expressly identified the 22% increase to the water and sewer rates as the misconduct that resulted in plaintiffs' overpaying for water and sewer services. In *Kincaid II*, this Court concluded that some of the September 2011 rate increases violated the applicable ordinances. *Kincaid II*, 311 Mich App at 84. Given that the rate increase was in violation of the statute for the reasons stated in *Kincaid II*, Count IV properly sets forth a claim for unjust enrichment premised on an unlawful exaction. See *Pingree*, 107 Mich at 157. Moreover, as our Supreme Court made clear in *Wright*, a claim for

unjust enrichment is not barred by the GTLA. *Wright*, 504 Mich at 422, summary disposition of Count III was not appropriate under MCR 2.116(C)(7). [*Id.* at *8-9.]

Under Plaintiff's ordinance claim, Plaintiff can recover 100% of the Charges the City has collected during the class period from persons and entities whose property did not receive an inspection.

III. THE CHARGES VIOLATE THE MICHIGAN CONSTITUTION'S EQUAL PROTECTION GUARANTEE[26]

The City's imposition of the Charges is subject to judicial review as to equal protection under a "rational basis" standard. The Michigan Supreme Court in *Brittany Park Apartments v. Harrison Charter Twp.*, 432 Mich. 798, 803-05, 443 N.W.2d 161 (1989) described the operation of that standard as follows:

> The township is the sole source of water within the community and it is undisputed that the municipality has a right to charge for the services it provides to the community. Further it has the right to rationally impose classifications upon its users so long as all persons within the class are treated alike. *Rouge Parkway Associates v City of Wayne*, 423 Mich 411; 377 NW2d 748 (1985). The standard of review of the classification under an equal protection challenge is that the ordinance is presumed constitutional. The burden is upon the party challenging the legislation to show that the classification established is not rationally related to a legitimate state interest. *See, generally, Cook Coffee Co v Village of Flushing*, 267 Mich 131; 255 NW 177 (1934), and *Detroit v Highland Park*, 326 Mich 78; 39 NW2d 325 (1949). **Under the rational basis test there must be a showing that the ordinance is discriminatory and arbitrary, and that its classifications are without reasonable justification.**
>
> There is no dispute over the applicable test to be applied in this case. It is derived from this Court's decision in *Alexander v Detroit*, 392 Mich 30; 219 NW2d 41 (1974), wherein we enumerated a **two-part test to be applied in an equal protection challenge to a legislative enactment. The questions to be considered are:**
>
> > **(1) Are the enactment's classifications based on natural distinguishing characteristics and do they bear a reasonable relationship to the object of the legislation?**
> >
> > **(2) Are all persons of the same class included and affected alike or are immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind?** [Id. at 35-36. Citations omitted.]
>
> Reaffirmed in *Rouge Parkway Associates v City of Wayne, supra.*

[26] Preserved in Plaintiff's Proposed Findings of Fact and Conclusions of Law, App. Ex. 15, pp. 17-20.

> Uniformity among users is the ultimate goal strived for by the ordinance. The plaintiffs do not complain about the distinction between the separate classifications, but rather that the users classified as "residential" are not treated uniformly within their classification. **The standard of rationality requires that persons within a class be treated objectively and reasonably.** Reasonable, however, does not mean exact. "Perfect equality among users is not the standard of municipal duty in fixing sewer rates." 61 ALR3d, Municipalities -- Sewer use rates, § 3[d], p 1259.
>
> The word reasonable is "'not subject to mathematical computation with scientific exactitude but depends upon a **comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use**.'" *Land v City of Grandville*, 2 Mich App 681, 689; 141 NW2d 370 (1966), quoting *Meridian Twp v East Lansing*, 342 Mich 734; 71 NW2d 234 (1955). [*Brittany Park Apartments v. Harrison Charter Twp.*, 432 Mich. at 804-05 (emphasis added).]

The court in *Brittany Park* found that no equal protection violation had occurred because the apartment owners had not been treated differently from the single family residence owners to the detriment of the apartment owners:

> **Classifications utilized by this ordinance, residential, commercial, etc., are based not on the structure to which water is pumped, but on the type of occupant and the purpose and nature of its use.** Having built the residential rate structure on the classification of a single-family dwelling and "any structure or part thereof containing within its separate confines all necessary facilities for the use thereof as a dwelling place for human habitation," the billing of individual apartment units on the same basis and at the same rate as that of a single-family dwelling cannot be questioned. As a matter of fact, the city ordinance rate system is structured to provide the same billing and rate to each single-family unit within a multiple structure on the basis of the water usage metered to that unit as would apply to a single-family structure. This then is not the source of the dispute.
>
> Rather it is occasioned by the fact that plaintiff apartment owners have chosen not to individually meter their apartment units, claiming it would be an "architectural nightmare" to do so. The defendant has accommodated this reality by a variation which allows the apartment building owners to be billed by the use of a single meter, thus saving them the costs of the individual metering. Therefore, consistent with its single-family residential-family classification, as previously described, it charges the apartment owner an aggregate minimum fee based on the number of units served and the same declining rate for water in excess thereof.
>
> The apartment owners having been accommodated for the lack of individual meters in their apartment buildings by a plan that is intended to achieve the same result as though the units were individually metered, they now, for purposes of advancing their claim, inject themselves into the equation as a ratepayer and **posit that they are not being treated the same as individual residential units, which would entitle them in effect to have their entire apartment buildings classified as a single-family dwelling with only one minimum fee per building structure.** Having secured an exemption from the individual meter requirement for each residential unit

> within the apartment structure on the basis of the unique problems of individually metering apartment units, they now seek to stand in the shoes of an owner of a single-family residence and to have the township disregard the fundamental uniformity of its own classification for "single family homes."
>
> It is from this posture that the plaintiff apartment owners have produced figures showing that because of the aggregate fee they pay more for water service to their buildings than a homeowner would for the same amount of water. What they disregard, and convinced the Court of Appeals to disregard, is that this can only be demonstrated when the apartment owner is allowed to consider the composite of all of his apartment units as one dwelling unit. When seen in its true light, the apartment owner is paying as agent for all of the individual residential units within his building. **In light of this reality, he has the same standing and is paying at the same rate as the owner of a block of individual homes who has each home metered in his, the owner's, name.** [*Id.* at 805-07 (emphasis added).]

See also Foss v. Rochester, 65 N.Y.2d 247, 260; 480 N.E.2d 717 (1985) ("There must also be a rational reason for deliberately imposing the demonstrably different tax burdens on similar properties becuae of their different geographic locations. Because no rational demographic basis for such a difference is suggested or apparent, the statute is unconstitutional . . .").

In the present case, there is no question about different types of use or the furtherance of any municipal goal. The City might **wish** to inspect every property every year, but it admits it does not do so. Trial Trans., p. 6, Stipulated Fact No. 4. And as Mr. Battle admitted, whether a particular property receives an inspection in any given year depends on pure "serendipity" or "luck". *Id.*, pp. 43-44. The City's only goal is to collect money, and the only difference between property owners who receive inspections and those who do not is that some were randomly selected to receive inspections. Plaintiff has not been treated objectively and reasonably, and the City has extended privileges to property owners who received inspections arbitrarily, and without the existence of any distinguishing characteristics between them and the Plaintiff other than whether their property happens to have been chosen for an inspection.

Worse, the City has purportedly designed the amount of the fees based upon the time it would take to inspect each property. *See, e.g.,* Amended Answer, App. Ex. 10, ¶ 24 ("the City admits that the annual fire inspection fee is based on the size and relative fire risk of the property, both of which affect

the time required to complete an inspection.") (emphasis added); Second Amended Ans., Exhibit C to App. Ex. 4, ¶ 24 ("the City admits that the annual permit fee charged by its Fire Marshal Division takes into consideration the size and use of the property, both of which affect the fire risk and costs incurred by the City in maintaining its fire safety programs."). Generally, larger structures incur higher charges than smaller structures. But as applied to properties that are not inspected, a method of charging based upon the time it takes to inspect the properties is also arbitrary and capricious and therefore lacks a rational basis. In sum, the City's method of determining which properties receive inspections has no rational basis and the City's method of charging the properties that do not receive inspections has no rational basis.

As with Plaintiff's ordinance violation claims, under Plaintiff's equal protection theory, it can recover 100% of the fire inspection Charges the City has collected during the class period from persons and entities whose property did not actually receive an inspection in the year in which the Charges were imposed. Because the City admittedly performs very few inspections, that is almost the entire amount of the Charges.

The Circuit Court justified the disparate treatment of the "Disfavored Class" (i.e., Plaintiff and others who paid permit fees but did not receive inspections) compared to the "Favored Class" (i.e., those who paid permit fees and did receive inspections) by focusing on the City's limited resources. But that is not the test. In *Crego v. Coleman*, 463 Mich. 248, 258-59; 615 N.W.2d 218 (2000) the Supreme Court explained as follows: "The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment. . . . Conversely, the Equal Protection Clauses do not prohibit disparate treatment with respect to individuals on account of other, presumably more genuinely differentiating, characteristics." Disparate treatment must be justified by the **genuinely differentiating characteristics of the citizens** who are subject to the government's actions. The **unique problems and circumstances of the government** cannot justify disparate treatment. Here, the City's limited financial resources (which

allegedly impact its ability to inspect all properties that pay the "permit fees") does not provide a basis for the arbitrary distinctions between the Favored Class and the Disfavored Class. Again, the court described the relevant questions in *Brittany Park* and *Alexander* as follows:

> (1) Are the enactment's classifications based on natural distinguishing characteristics and do they bear a reasonable relationship to the object of the legislation?
>
> (2) Are all persons of the same class included and affected alike or are immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind? [*Brittany Park*, 432 Mich. at 805. (quoting *Alexander*, 392 Mich. at 35-36).]

And again, privileges (i.e., an in-person fire safety inspection by the Fire Marshal's trained personnel) are extended to some of those who pay the Charges, but not to all, including Plaintiff. The Charges **as imposed or applied** thus violate equal protection guarantees, notwithstanding the City's pretense of neutrality in its ordinances.

CONCLUSION

The Circuit Court erred when it granted summary disposition to the City on Plaintiff's tax claims, and it erred again after trial when it misapplied the law to its central finding of fact which placed a superficial label on the Charges and dismissed Plaintiff's remaining claims. This Court should reverse the Circuit Court's decisions on summary disposition and following trial.

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Date: February 7, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I served the foregoing document on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets