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 MOTION FOR RECONSIDERATION

Plaintiff Midwest Valve & Fitting Co. ("Plaintiff") hereby timely moves the Court, pursuant to MCR 7.215(I), for reconsideration of the Court's March 9, 2023 Opinion (the "Opinion") (Exhibit 1 hereto). For the reasons set forth below, the Court should reconsider its Opinion because the Court's ruling on Plaintiff's Headlee Amendment claims was contrary to established binding precedent. Among other errors, the Court failed to heed the long-standing limitation the Supreme Court has imposed on regulatory fees imposed by Michigan municipalities:

> 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. [*North Star Line, Inc. v. City of Grand Rapids*, 259 Mich. 654, 663, 244 N.W.2d 192 (1932) (emphasis added) (citing *Vernor v. Secretary of State*, 179 Mich. 157 (1915).]

In holding that the so-called "permit fees" in this case were not unlawful taxes, this Court failed to require the City to tether those fees to some cost the City allegedly incurred relating specifically to Plaintiff's property or business. By ignoring this important limitation on municipal power in its Opinion, this Court blasted a giant hole in the Headlee Amendment. When the Court properly applies the law, as expressed in *North Star Line* and other authority, a different result must obtain.[1] In support of this motion, Plaintiff states as follows:

1. In its March 27, 2023 publication request (Exhibit 2 hereto), the City contends that this Court's ruling that the Charges at issue are not taxes imposed in violation of the Headlee Amendment "is very significant for all municipalities in the state." The City alleges that the "opinion should be published because it involves a legal issue of significant public interest." *Id.* (citing MCR 7.215(B)(5)).

2. The City's publication request effectively argues that this Court's Headlee Amendment ruling imposes a new and unprecedented limitation on plaintiffs' rights under the Headlee Amendment.

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[1] MCR 7.215(I) states that "[m]otions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3)." MCR 2.119(F)(3) provides:

> Generally, *and without restricting the discretion of the court*, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion should result from the correction of the error. [Emphasis added.]

Courts have recognized that the rule "allows the court *considerable discretion* to correct mistakes, preserve judicial economy, and to minimize the costs to the parties," despite the "palpable error" language. *Kokx v. Bylenga*, 241 Mich App 655, 659 (2000) (emphasis added).

If the Court's Opinion merely applied existing precedent, surely the City would not need to request publication on the grounds that the Opinion "is very significant for all municipalities in the state." In Plaintiff's view, the Opinion, if published, will effectively invalidate Section 31 of the Headlee Amendment by judicial fiat. The Court effectively has authorized municipalities to impose unlimited charges on their citizens, which charges (1) need not be tethered to any specific service or benefit provided to, or costs incurred with respect to, those citizens, and (2) can be used for any purpose the municipality chooses, so long as the municipality grants the burdened citizens the right to operate their businesses in exchange for payment of the charges.

3. As an initial matter, this Court's Opinion reflects an unnecessary preoccupation with the label attached to the Charges. *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). The Court's Opinion here notes the following:

> There is no question of fact that the charges at issue here were for the acquisition of permits, not inspections. Although appellant took the position below that the charges were "fire inspection charges" or "fire inspection fees," it submitted no evidence to show that the charges were paid in consideration for receiving an inspection. Instead, the evidence showed that the charges were for obtaining occupancy permits. Thus, appellant's arguments that rely on the charges being fees for receiving inspection services are misplaced and are without merit. [Opinion at p. 4].

But at the end of the day, it does not matter what label is applied to the Charges because the Charges clearly are taxes even if they are "permit fees".

4. Significantly, the Court's analysis of the three *Bolt* factors was driven almost entirely by its conclusion that Plaintiff received a benefit from his payment of the Charges because in exchange for the payment it received a permit allowing it to operate its business. For example, the Court concluded that the Charges served a regulatory purpose, and not a revenue-raising purpose, because payment of the Charges provides a "primary benefit" to a property owner – namely, "a permit, allowing the owner

to operate on its premises." Opinion at p. 5. *See also Id.* (noting that Plaintiff "received a 'direct benefit' from paying the charge . . . by being allowed to operate its business in Detroit").

5. In reaching this conclusion, the Court relied on *Westlake Trans, Inc. v. Pub. Serv. Comm*, 255 Mich. App. 589, 613, 662 N.W.2d 784 (2003) and *Jackson Co. v. City of Jackson*, 302 Mich. App. 90, 108, 836 N.W.2d 903 (2013). The Court held that *Westlake* was "analogous to the circumstances before us" because "[l]ike the plaintiffs in *Westlake*, who received the right to operate trucks in Michigan, appellant in the instant case receives a benefit from being allowed to operate its business in Detroit." Opinion at p. 5. But the Court's Opinion fails to acknowledge that the challenged fees in *Westlake* did not confer **only** the right to operate trucks, they funded activities to help relieve traffic congestion, protect and conserve the highways, and provided a host of other specific benefits to the payers that this Court listed in its opinion. *Id.* at 612 (listing fourteen different benefits). Here, in contrast, the Charges paid by properties that do not receive the fire safety inspections financed by the Charges are a payment for the mere right to operate, and they therefore necessarily bear no relation to the cost of providing any service or benefit to Plaintiff, because simply allowing a business to operate costs the City nothing.[2]

6. The Court probably is correct that an incidental "public benefit" would not by itself make the Charges taxes, but the purported benefit here – fire safety – is **primarily** a public benefit. As

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[2] The Court's reliance upon *Jackson Co.* is even more curious. The Court cites *Jackson Co* for the proposition that "[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 . …" Opinion at p. 5. But the Opinion inexplicably truncates the referenced sentence of the *Jackson Co.* opinion, which states in full: "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**." *Jackson Co.*, 302 Mich. App. at 108 (emphasis added). The Charges here are not "designed to confer a particularized benefit on property owns who must pay the fee" if those property owners do not receive an inspection. *Jackson Co.* ultimately concluded that the stormwater charges in that case did not confer a particularized benefit on the payers of those fees because the charges financed the City's efforts to comply with federal environmental laws which conferred benefits primarily on the general public.

then-Judge Markman observed in his *Bolt* dissent in this Court that was adopted in substantial part by the Supreme Court majority:

> **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. … 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).]

7. 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 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.]

8. The Court here also tethered its proportionality analysis to the purported benefits of the "permits." The Court concluded that the Charges were "proportionate" because "those who paid the charge did receive a benefit distinct from someone who did not pay the fee – the right to occupy the premises as a business." Opinion at p. 5. *See also Id.* ("the main benefit of the city's charge was the receipt of a permit, not an inspection").

9. With all due respect, the Court's tax analysis was fatally flawed because the Court viewed the mere issuance of the permits as a sufficient justification for the imposition of the Charges. In doing so, the Court failed to apply the proper legal standard and ignored long-standing precedent that holds that the government cannot condition its grant of a license or permit on a citizen's payment of a fee that is not tethered to the costs the government incurs to regulate or supervise **that citizen's**

activities. Under the Court's rationale, municipalities will be free to finance any function of their governments through so-called "permit fees."

10. The Michigan Supreme Court has long recognized that license and permit fees could be abused by municipalities. The Court therefore has limited the amounts of such fees to the amounts necessary to reimburse municipalities for the cost of regulating the persons and entities subject to the fees. Indeed, the Michigan courts have long recognized that a purported "license" fee is a disguised tax where, as here, the government provides little or no particularized 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 a 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).]

11. 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 with the cost of an actual inspection, which the City did not perform. In exchange for Plaintiff's payment of the substantial annual "permit fee," all the City did was print and mail a single piece of paper to Plaintiff.

12. 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 of supervising the activity, if supervision is required.").

13. In its Brief on Appeal, Plaintiff addressed each of the foregoing cases. In its Opinion, however, the Court completely failed to consider these longstanding requirements and did not address any of the case law identified above. The Court simply assumed that the permit fees were primarily regulatory and "proportionate" simply because of the purported "benefit" to the payers – the ability to

operate their businesses in the City – which is not a sufficiently particularized benefit to support a regulatory fee.

14. The Court's failure to address these authorities is fatal to the Court's Opinion on the tax issue. 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, *e.g.*. the issuance of a building permit. To issue a building permit, at a minimum, a municipality has to review specific plans and determine applicable codes prior to issuing the building permit—all of which cost the municipality money. A reasonable permit fee is fully justified under those circumstances.

15. 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 Court's finding that the ability to operate a business in exchange for payment of the "permit fees" constitutes a specific benefit to Plaintiff is even more indefensible when one considers that, in addition to the Charges at issue in this case, Plaintiff is required to pay a variety of other annual fees to the City, including a separate fee to obtain a "business license" from the City. *See* Exhibit 3 hereto (Trial testimony of Plaintiff's principal) at pp. 114-115.

CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiff's Motion for Reconsideration and, upon reconsideration, hold that the Charges constitute unlawful taxes that have been imposed in violation of the Headlee Amendment. The Court should remand this action to the Circuit Court for further proceedings consistent with this Court's amended Opinion, including determining the remedy for the City's violation of the Headlee Amendment.

KICKHAM HANLEY PLLC

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Date: March 30, 2023 *Attorneys for Plaintiff/Appellant*

STATEMENT OF WORD COUNT

Pursuant to MCR 7.215(I)(1), Plaintiff's counsel states that Plaintiff's brief on appeal contains 2,815 "countable words" as defined under MCR 7.212(B). Counsel relies on the word count function of its word processing system, as permitted under MCR 7.212(B)(3).

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2023, I served the foregoing document on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets

EXHIBIT - 1

STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST VALVE & FITTING COMPANY, and all others similarly situated,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
March 9, 2023

No. 358868
Wayne Circuit Court
LC No. 18-014337-CZ

Before: RICK, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiff-appellant, Midwest Valve & Fitting Company, appeals as of right the trial court's order that, after a bench trial, dismissed its remaining claims related to the legality of certain fees charged by defendant, City of Detroit. The appeal also involves the trial court's earlier opinion and order granting summary disposition in favor of defendant on appellant's other claims.

This case involves appellant's challenge to the legality of certain annual charges that are imposed by defendant. The trial court determined that the charges are legal and dismissed appellant's claims, some in a pretrial motion for summary disposition and the remainder after a bench trial. Because its arguments have no merit, we affirm.

I. FACTS

Defendant imposes an annual charge on owners of commercial real property and multiunit residential real property located in Detroit. Although appellant initially claimed that the charges were "fire inspection charges," appellant on appeal has acquiesced to the trial court's and defendant's position that they are "permit fees."

Appellant received bills from defendant for these charges since at least 2013 and paid them. However, appellant maintained that it never received any fire safety inspection during this time.

Appellant filed a complaint, alleging numerous claims against defendant: Count I—violation of the Headlee Amendment, Count II—assumpsit/unreasonable charges, Count III—

unjust enrichment/unreasonable charges, Count IV—assumpsit/violation of MCL 141.91, Count V—unjust enrichment/violation of MCL 141.91, Count VI—assumpsit/violation of city ordinance, Count VII—unjust enrichment/violation of city ordinance, and Count VIII—violation of equal protection.

Appellant moved for summary disposition under MCR 2.116(C)(10) on Counts I, IV, and V. It argued that the charges constituted taxes, which were imposed in violation of § 31 of the Headlee Amendment[1] and MCL 141.91.[2] After analyzing the characteristics of the charges, the trial court ruled that the charges were fees, not taxes, and granted summary disposition in favor of defendant on Counts I, IV, and V.

The trial court conducted a one-day bench trial on the remaining counts. In support of its position that the charges at issue were inspection fees, appellant primarily relied on (1) a fire marshal web page indicating that inspections get scheduled after payment of the fee, and (2) some internal city documents[3] that used terminology, such as "safety inspection charges" or "fire permit safety inspection," while referencing these charges. But, Fire Marshal Shawn Battle testified that those representations were factually incorrect because the fees were exclusively for permits, which allow businesses to operate, and have no relation to inspections.[4] Although it was the department's goal to inspect every commercial property every year, Battle stated this was not feasible because of a lack of manpower. Battle also testified that his department did not utilize any of the documents appellant relied on and instead it used a system called MobileEyes, which identifies the charges as being for "permits." Further, the actual invoices and permits relating to these charges were admitted into evidence via stipulation. Those documents specifically reference "industrial/business/mercantile occupancy permit[s]," with no mention of inspections.

Although defendant was unable to verify that the city council had approved the charges any time before May 2021, the council later approved them retroactively back to 2013.

In its closing argument, appellant argued that even if the charges were "permit fees," they would be illegal because the city council never approved them, which was required by the city charter and ordinances. Appellant claimed that the city council's attempt to retroactively approve the charges was a legal nullity. Regarding its equal-protection claim, appellant argued that, with

[1] Const 1963, art 9, § 31.

[2] As will be discussed in greater detail below, § 31 of the Headlee Amendment "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 Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997), and MCL 141.91 prohibits cities from imposing taxes other than ad valorem property taxes.

[3] The parties stipulated that these documents were created by an unknown city employee at some unknown time.

[4] Battle also testified that 10 months before trial started, someone had put in a request to Detroit's Information Technology Department to have that information removed from the website, but apparently, the information was still present as of a few days before trial.

it not receiving any inspections, as opposed to other commercial property owners, it had not been treated objectively and reasonably.

The trial court found that the charges at issue are annual permit fees and not inspection fees. The trial court also noted that the burden was on appellant to prove that any fee or charge was unreasonable or otherwise unlawful. Further, the trial court ruled that Counts II and VI were not viable because Michigan does not recognize an independent cause of action for assumpsit.

The trial court dismissed appellant's unjust enrichment claims in Counts III and VII. The court noted that Count III was premised on the allegation that the charges were for fire inspections when no inspections had taken place. The trial court rejected this claim because the charges are not for inspections, but are for permits. The trial court also ruled two additional arguments appellant raised relating to the claims of unjust enrichment were unpersuasive. First, the trial court rejected appellant's contention that the charges were in violation of the city ordinance because they were in excess of the cost of the "issuance" of permits. The trial court noted that cities are allowed to recover all of their direct and indirect costs related to the regulation of those who are charged the fee and that courts are to give deference to a city's interpretation of its own ordinances. Second, the court rejected appellant's contention that defendant was unjustly enriched because the charges were never approved by the city council. The trial court then ruled that the city council's retroactive approval of the charges was permissible as a matter of law.

Finally, the trial court ruled that appellant failed to prove any of the essential elements of its equal-protection claim, including that defendant made a classification identifying a particular group, that defendant intentionally or purposefully treated that group differently from similarly situated individuals, and that there is no rational basis for defendant's disparate treatment.

II. HEADLEE AMENDMENT AND MCL 141.91

Appellant argues that the trial court erred when it granted summary disposition in favor of defendant on Counts I, IV, and V of its complaint. We disagree.

Whether a municipal charge is a "tax" is a question of law, which this Court reviews de novo. *Mapleview Estates, Inc v Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). This Court also reviews a trial court's decision on a motion for summary disposition de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion under (C)(10) is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

In Counts I, IV, and V, appellant alleges violations of § 31 of the Headlee Amendment and MCL 141.91. Section 31 of the Headlee Amendment states, in pertinent part:

> Units of Local Government are hereby prohibited from levying any *tax* not 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 (emphasis added).]

This section "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 Mich*, 456 Mich 175, 183; 566 NW2d 272 (1997).

MCL 141.91 states:

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

In concert, these provisions restrain a local government's ability to assess taxes. If the charges levied are not taxes, the Headlee Amendment is not implicated and appellant's claims here, based on violations of the Headlee Amendment and MCL 141.91, would necessarily fail. See *Bolt v City of Lansing*, 459 Mich 152, 158-159; 587 NW2d 264 (1998) (stating that user fees are not taxes and are not affected by the Headlee Amendment).[5]

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id*. at 160. Three primary factors are considered in determining whether a charge is a fee or a tax. "The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose." *Id*. at 161. "A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service." *Id*. at 161-162. A third criterion is voluntariness: fees generally are voluntary, while taxes are not. *Id*. at 162. "[T]hese 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 NW2d 793 (1999).

There is no question of fact that the charges at issue here were for the acquisition of permits, not inspections. Although appellant took the position below that the charges were "fire inspection charges" or "fire inspection fees," it submitted no evidence to show that the charges were paid in consideration for receiving an inspection. Instead, the evidence showed that the charges were for obtaining occupancy permits. Thus, appellant's arguments that rely on the charges being fees for receiving inspection services are misplaced and are without merit.

Considering the first *Bolt* factor, whether the charge serves a regulatory purpose rather than a revenue-raising purpose, it is understood that a fee can raise money as long as it is in support of the underlying purpose. *Merrilli v St Clair Shores*, 355 Mich 575, 583; 96 NW2d 144 (1959). Indeed, in *Merrilli*, our Supreme Court held that permit fees, as opposed to taxes, are regulatory in nature. *Id*. at 582. Fire Marshal Battle testified in his deposition that the charge at issue provides

[5] Although *Bolt* only concerned whether a particular charge was a "tax" for the purposes of the Headlee Amendment, we find it equally relevant for determining whether a particular charge is a "tax" for the purposes of MCL 141.91 as well.

the property owner with a permit, which allows the owner to operate in Detroit. Further, in a response to appellant's third set of interrogatories, defendant averred that those who pay the charge, and who do not receive an inspection, still receive the benefit of defendant's Fire Protection Program, which includes the "training of [the fire marshal] 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."

Appellant argues that the Fire Protection Program serves a public purpose, but ignores the primary benefit to a property owner who pays the charge—a permit, allowing the owner to operate on its premises. Undoubtedly, the public also benefits from the Fire Protection Program, but as this Court recognized in *Westlake Trans, Inc v Pub Serv Comm*, 255 Mich App 589, 613; 662 NW2d 784 (2003), fees that benefit the general public still can maintain their regulatory nature.

In *Westlake*, the plaintiffs argued, in part, that fees assessed to trucking companies were an impermissible tax. *Id*. at 611. This Court stated:

> [I]n exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, and use benefit the general public. [*Id*. at 613 (citation omitted).]

The situation in *Westlake* is analogous to the circumstances before us. Like the plaintiffs in *Westlake*, who received the right to operate trucks in Michigan, appellant in the instant case receives a benefit by being allowed to operate its business in Detroit. Thus, appellant received "a direct benefit" from paying the charge. The fact that the general public also benefits from the Fire Protection Program does not negate the charge's regulatory nature. See also *Jackson Co v City of Jackson*, 302 Mich App 90, 108; 836 NW2d 903 (2013) ("[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 . . . ."). Therefore, the first of the factors we must consider weighs in favor of the charge being a fee and not a tax.

Secondly, the city's charge appears to be proportionate to the necessary costs of the service it is providing. Courts are to presume that the amount of the fee is reasonable. *Id.* at 109. Appellant's position is that the costs are not proportionate because, by not receiving any inspections, appellant received nothing different from anyone else in the city who was not required to pay the charges. We disagree with this argument because the main benefit of the city's charge was the receipt of a permit, not an inspection. Thus, those who paid the charge did receive a benefit distinct from someone who did not pay the fee—the right to occupy the premises as a business. Furthermore, these charges funded the year-to-year operations of the Fire Marshal Department. This is an important distinction from *Bolt*, in which our Supreme Court noted that the purpose of the charge, which it found to be a tax, was to finance a multiyear construction of a large

infrastructure project. There, the benefit gained—new infrastructure—would substantially outlast the time period for which the charge was to be in place. *Bolt*, 459 Mich at 163-164. Further, the amounts collected from the charges in the case before us historically were significantly less than the program's costs. Consequently, the charge is reasonably proportional.

As to the third factor, we must consider whether the city's charge was voluntary. The trial court did not explicitly rule on this factor and instead simply assumed that the charge was not voluntary. We agree that the charge was not voluntary. Although, while technically, the charge is voluntary because a business could decline to pay and simply opt to not operate in Detroit, that option is highly impractical for a business. Indeed, our Supreme Court in *Bolt* rejected the argument that a charge was voluntary because property owners could relinquish their rights of ownership. *Id.* at 168.

After weighing these same factors, the trial court ruled the charge was a fee, not a tax. We agree with the trial court's analysis and find it did not err. Significantly, this Court has recognized that "the lack of volition does not render the charge a tax, particular where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler v Shelby Twp*, 265 Mich App 657, 666; 697 NW2d 180 (2005). Thus, even with the charge at issue being involuntary, that fact alone is not sufficient to overcome the other two factors that appellant received a benefit and that the fee is proportional.

Because the charge at issue is a fee, not a tax, appellant is precluded from succeeding on its claims alleging violations of the Headlee Amendment and MCL 141.91. As a result, the trial court properly granted summary disposition in favor of defendant on Counts I, IV, and V.

III. VIOLATION OF CITY CHARTER AND ORDINANCES

Appellant argues that the trial court erred by finding no cause of action for its claims related to the violation of the city charter and ordinances. We disagree.

A trial court's findings of fact in a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id*. A trial court's interpretation of a municipal charter is a question of law that this Court reviews de novo. *Save Our Downtown v Traverse City*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 359536); slip op at 5.

Initially, it should be recognized that after the trial court's grant of summary disposition in favor of defendant on some of appellant's counts, trial proceeded with respect to only Counts II, III, VI, VII, and VIII. The trial court dismissed Counts II and VI, which alleges independent causes of action of assumpsit. This was not erroneous because Michigan no longer recognizes an

independent cause of action for assumpsit.[6] *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Notably, appellant does not challenge the dismissal of those counts. Instead, appellant focuses on its allegations that the charges were unlawful because they were imposed in violation of the city charter and ordinances. Thus, only appellant's claims pertaining to the alleged violations of the city charter and ordinances are before this Court.[7]

In Count VII, appellant asserted a claim of unjust enrichment premised on a violation of Detroit Ordinances, § 19-1-22, Subsection 1.4.11, which stated at the time, in pertinent part:[8]

> In accordance with Section 9-507 of the 1997 Detroit City 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;
>
> (3) Administrative appeals;
>
> (4) Issuance of reports; and
>
> (5) Copying of records.

Appellant alleges in its complaint that this ordinance was violated because the charges could not be considered "necessary" when a property owner does not receive a fire inspection. This position again is premised on the assertion that the charges were paid in consideration for

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[6] Although no independent cause of action for assumpsit exists, "the substantive remedies traditionally available under assumpsit were preserved." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). In this instance, appellant's counts of assumpsit essentially were covered by its claims of unjust enrichment.

[7] In Count III, appellant alleges that defendant unjustly enriched itself by collecting charges pertaining to fire inspections, while not providing such fire inspections. However, the trial court found that the charges at issue were fees for permits, not inspections. That finding, precluding unjust enrichment, is not clearly erroneous. Fire Marshal Battle testified at trial that the fees were for the issuance of permits, not inspections. Indeed, even the invoices that appellant received stated that the charges were for "permits," with no mention of "inspections." While there were some internal city documents that used terms such as "fire inspection fee," those documents could not be authenticated, and the trial court gave them little to no weight. The author of those documents is not known, and there is no evidence that defendant relied on them. Accordingly, the trial court did not err by finding no cause of action for that aspect of Count III.

[8] The Detroit City Code was later recodified in December 2019. The content in this quoted portion was moved to Detroit Ordinances, § 18-1-22, Subsection 1.6.2. Although there are some minor modifications to the 2019 recodification, the content is substantially the same.

receiving fire inspections, but as already explained, that is not the case. The charges are a fee paid to obtain occupancy permits.

Although appellant's complaint only alleges that the ordinances were violated in this one respect in its proposed conclusions of law, appellant asserted that the charges were unlawful for two other reasons: (1) the city council never approved the charges, and (2) the charter provision cited in the ordinance does not allow for permit fees. The trial court rejected the former argument, but did not address the latter.

Regarding the former, the parties stipulated that there was no evidence of the city council approving the charges any time before May 2021. But the city council later retroactively approved the charges. Appellant argues that the retroactive approval is a nullity.

There is no per se prohibition on retroactive application of legislation. See *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Bd of Trustees v City of Pontiac (On Remand)*, 317 Mich App 570, 578-579; 895 NW2d 206 (2016). However,

> retrospective application of a law is improper where the law takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. [*In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*, 416 Mich 558, 572; 331 NW2d 456 (1982) (quotation marks and citation omitted); see also *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 39; 852 NW2d 78 (2014).]

Appellant essentially argues that it had a vested right to not pay any of the charges until the city council approved them in May 2021. According to appellant, the retroactive imposition of those charges affected its vested right. Appellant's position is not persuasive. "Retroactive statutes curing defects in acts done, or authorizing or confirming the exercise of powers, are valid where the legislature originally had authority to confer the power or authorize the acts, except where it is attempted to impair vested rights." *Stott v Stott Realty Co*, 288 Mich 35, 45; 284 NW 635 (1939). As discussed below, the city council at all relevant times had the power or authority to approve the charges, making its retroactive authorization permissible. Notably, appellant during the preceding years thought that the charges were legally due and paid them to defendant. This is significant because the reason vested rights are not to be affected by retroactive legislation is that "it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine*, 496 Mich at 38 (quotation marks and citations omitted). Because appellant had no expectation to be free from paying the permit fee, the retroactive authorization of that very same permit fee did not affect appellant. In other words, the retroactive imposition of the charge did not affect appellant as it incurred no new obligations to defendant after the passing of the resolution.

Additionally, a retroactive application must be a rational means of achieving a city's legitimate objective. *Downriver Plaza Group v Southgate*, 444 Mich 656, 667; 513 NW2d 807 (1994). In this case, the retroactive ratification of the charges was a rational means to further a legitimate legislative purpose. The purpose was to maintain the Fire Protection Program, which

certainly is a legitimate purpose, and the means to accomplish that was to simply authorize charges that property owners had already paid, which was reasonable.[9]

Appellant's latter argument not contained in its complaint was that the city council lacked the authority to approve the charges because they violate § 9-507 of the city charter. Section 9-507 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.

This section allows for the imposition of a charge for (1) admission to an agency-operated facility or (2) a service provided by a city agency. Only the second clause is pertinent in this case. While appellant concedes that if the charge was for a fire inspection, then the charge would be for a service, it argues that if the charge is truly a "permit fee," then it is not a charge for a service. We disagree.

The city charter is to be interpreted according to the rules of statutory construction. *Save Our Downtown*, ___ Mich App at ___; slip op at 5. "The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Court apply unambiguous statutes as written." *Id*. (quotation marks and citation omitted). When a term is not defined in a statute, courts may consult dictionary definitions to determine the plain and ordinary meaning of the term. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 578; 609 NW2d 593 (2000). As evidenced by the 27 different definitions of the noun "service" in the dictionary, the term is defined broadly. See *Random House Webster's College Dictionary* (1995). However, one of those definitions is most pertinent: "the duty or work of public servants." *Id*. Although the work provided in this instance is not the provision of a fire inspection, it nonetheless still is a service because it is providing a permit. Consequently, the city's imposition of a charge to a property owner to obtain a permit does not run afoul of the city charter.

Appellant also contends that it is improper for the charges to fund "all of the direct and indirect costs" of the Fire Prevention Program. Appellant avers that the ordinance only allows for defendant to recover the administrative costs associated with issuing the permits. Appellant provides no authority for this argument and merely quotes the applicable provision in the city code: "the Fire Commissioner is authorized to establish necessary fees, with the approval of the City Council, for the cost of . . . [i]ssuance of permits and certificates." Detroit Ordinances, § 19-1-22, Subsection 1.4.11. Appellant focuses on the word "issuance" for its position. "Issuance" is defined as "the act of publishing or officially giving out or making available." *Merriam-Webster's Collegiate Dictionary* (11th ed).

[9] The only reason the charges had not been authorized earlier is that the Fire Marshal Department had thought that an authorization already was in place.

The strictly literal interpretation of this provision lends support to the suggestion that a charge is allowable only for the "act" of "giving out" the permit. However, the concept of a "permit" encompasses much more than a physical piece of paper. The more reasonable interpretation is that the cost of the issuance of a permit includes all the work involved with a particular program which that permit represents.

When interpreting an ordinance, courts are to give some deference to a municipality's interpretation. See *Macenas v Village of Michiana*, 433 Mich 380, 398; 446 NW2d 102 (1989). Battle testified that the Fire Marshal Department has been issuing the permit in the same manner since at least 1996, and that it would not be possible to issue these permits if all of the Fire Marshal's related programs were not funded.[10] Thus, the Fire Marshal Department has been interpreting the term "issuance" within the ordinance as encompassing the costs of the Fire Prevention Program, as well as the cost of physically issuing the permit itself. We defer to the Fire Marshal's interpretation of the ordinance and similarly conclude that the ordinance allows for the recovery of the costs of the Fire Prevention Program in the issuance of the permits.

Therefore, given the above analysis, we hold that the trial court did not err by finding no cause of action on appellant's claims related to any alleged violations of city charter or ordinances.

IV. EQUAL PROTECTION

Appellant also argues that the trial court erred by finding no cause of action for its equal-protection claim. We disagree.

A trial court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed de novo. *Walters*, 239 Mich App at 456.

"The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010), citing Const 1963, art 1, § 2 and US Const, Am XIV. "Michigan's equal protection provision is coextensive with the Equal Protection Clause of the federal constitution." *Grimes v Van Hook-Williams*, 302 Mich App 521, 532-533; 839 NW2d 237 (2013) (cleaned up). "The essence of the Equal Protection Clauses is that government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Id*. at 533 (quotation marks and citation omitted). Thus, the relevant inquiry is whether there has been discriminatory intent or purposeful discrimination. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 308; 553 NW2d 377 (1996).

Appellant claims that its "group" has been discriminated against because it did not receive fire inspections, while others who paid the charges at issue did. Because no suspect classification is involved, such as race, national origin, ethnicity, gender, or illegitimacy, the proper level of review is rational basis. See *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004).

[10] These also are findings of fact that the trial court made, which appellant does not challenge on appeal.

"The rational basis test considers whether the classification itself is rationally related to a legitimate governmental interest." *Id*. (quotation marks and citations omitted).

Fire Marshal Battle testified that the goal of his department is to inspect every property, but that the lack of funding and manpower makes it impossible to do so. Thus, while some properties in a given year received inspections, some did not, even though both inspected and uninspected properties pay the same charge. It is beyond dispute that a legitimate governmental interest is to provide fire inspections. It also is rationally related to only perform as many inspections as is economically feasible. Knowing that it is impossible to inspect every property, defendant was left with two choices: (1) conduct as many inspections as it could, or (2) conduct zero inspections so everyone was treated equally. Defendant's choice to proceed with the first option is eminently rational.

Therefore, the trial court did not err by finding no cause of action for appellant's equal-protection claim.

V. CONCLUSION

The trial court correctly ruled in favor of defendant on all counts. We affirm.

/s/ Michelle M. Rick
/s/ Michael J. Kelly
/s/ Michael J. Riordan

EXHIBIT - 2

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March 27, 2023

Mr. Jerome W. Zimmer, Jr., Chief Clerk
Michigan Court of Appeals
Hall of Justice
925 W. Ottawa St.
P.O. Box 30022
Lansing, MI 48909-7522

Re: Midwest Valve & Fitting Co v City of Detroit
COA Docket No. 358868
Request for Publication

Dear Mr. Zimmer:

Pursuant to MCR 7.215(D), I am writing to request publication of the Court's opinion in this case. We feel that this opinion should be published because it involves a legal issue of significant public interest (MCR 7.215(B)(5)) – the Headlee Amendment, MCL 141.91 and, specifically, whether the City's permit fee constitutes a "tax." The Court's holding that it does not is very significant for all municipalities in the state. Further, the Court's opinion provides important guidance that will help trial courts analyze these issues.

For these reasons, the City requests publication of this opinion. A copy of the opinion is attached.

Very truly yours,

/s/Sheri L. Whyte

SHERI L. WHYTE
Senior Assistant Corporation Counsel
Attorney for Defendant-Appellee City of Detroit

SLW:hs

cc: Gregory D. Handley
Eric B. Gaabo
Michigan Court of Appeals

EXHIBIT - 3

a living?
A. I operate a company called Midwest Valve and Fitting Company.
Q. And what kind of company is it?
A. We're a wholesale distributor of piping supplies.
Q. Where is Midwest Valve's business premises located?
A. We're located at 2501 Fenkell Street in Detroit.
Q. How long have you been operating Midwest Valve?
A. Myself as general manager about 15 years.
Q. Are you the person in charge of paying Midwest's bills?
A. Yes.
Q. And have you been for the last 15 years?
A. Yes.
Q. Does that include Midwest's bills from the City of Detroit?
A. Yes.
Q. Have you paid invoices from the Detroit Fire Department's Fire Marshal Division?
A. Yes.
Q. How long have you been paying those invoices?
A. As long as we've been receiving 'um.
Q. So at least since the, the -- have you been paying them at least since the City came out of bankruptcy in 2013?
A. Yes.
Q. Are the Fire Marshal's invoices the only fees you paid in

the City of Detroit?
A. No.
Q. Are there a lot of other fees?
A. There are other various fees, charges that the City imposes on some business, yes.
Q. Okay, can you tell us what some of those are and how much they are?
A. Okay, we of course get property tax every year but that's sort of separate. We get a water bill every year. That -- or every month, excuse me. That's sort of separate. We get fees from the Building and Safety Engineering Department typically every year. Sometimes they miss and then they catch up by sending you two invoices.

We also get -- the Plumbing Department will come in and check the plumbing, cross-check the plumbing. We'll get a fee or a bill from them. And there may be one other department. I can't recall at this moment. They did some other type of inspection. It was not the Fire Department or the Building and Safety Engineering. This happened once over the last 15 years. I'm not exactly sure what it was for but, you know, whatever the, whatever the invoice was, whatever the fee was we would pay it.
Q. Just speaking to the ones that are recurring, the Building and Safety Engineering and the plumbing inspection, how

much are those every year or two?
A. Plumbing inspection I think is roughly -- it's a couple hundred bucks. The Building and Safety Engineering Department is a similar fee, you know, 2 to 300 hundred or 350 max. I don't know exactly the amounts 'cause I don't have those documents in front of me but right around those, those amounts.
Q. All right, do you pay anything for a business license?
A. I believe we pay an annual business license also, yes.
Q. Do you know how much that is?
A. At this moment I do not.
Q. Can you think of any other fees you pay to the City of Detroit?
A. We do pay -- we have a couple of trucks so, so there's a -- we have a bigger truck we have to pay a fee to the City for that truck. I think that's like $29 or $39 a year and periodically name send us a bill for the two signs we have on our building. We haven't seen that bill in a couple years. I don't know if that was a one time thing or biannually. I haven't seen that one in awhile.
And then every now and then we'll get a bill for our rooftop heating and ventilation units. Again, I haven't seen that bill in a few years so I'm not sure if that's one every-other year or every third year. And I think that's about it other than what appears on our

tax bill, our property tax bill.
Q. When you talk about the sign and the rooftop heating and ventilation are those purported to be fees for inspections, are they permit fees? Do you have any idea?
A. No, those are permit fees, sign permit fee and mechanical rooftop unit permit fee or five-ton AC unit permit fees. Yes, there's definitely permits.
Q. Going back to the Fire Marshal's invoices, do you get any paperwork in exchange for paying those invoices?
A. Typically I would say no but I think once in awhile we would get some type of receipt or document that indicated that an inspection may have been done but oftentimes we would not get anything back other than the canceled check, really.
Q. Can you turn to Plaintiff's Exhibit 16 if you have the binder in front of you?
A. Yep, I'm looking at it.
Q. Okay, this is a document that says Industrial/Business Mercantile Occupancy Permit. Is this an example of some paperwork you might get in exchange for paying the Fire Marshal's invoices?
A. We have received something similar at one point but I, I don't recall seeing anything exactly like this, no.
Q. Okay. Are you in Midwest Valve's offices every weekday?
A. Yes.