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 REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

AMENDED
(TO SEPARATE EXHIBITS ONLY)

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I. INTRODUCTION

At bottom, this case presents the following fundamental question: Can a municipality impose and collect a "permit" fee to fund a core governmental public safety function – fire prevention inspection activity – that provides no **individualized** benefit to a person forced to pay the fee? Throughout this case, the City has been maniacally fixated on establishing that the charges at issue are not "inspection fees" but rather are "permit fees." But the City's labeling of the charges is ultimately irrelevant because the City cannot credibly claim that any kind of "service" is provided to persons who pay the "permit" fees but whose properties do not receive an actual inspection. Any "benefit" to such persons from the fire inspection activity is thus the same as that conferred on the general public – *i.e.,* enhanced fire safety for the entire community. The City's Charter and ordinances, and the Headlee Amendment to the Michigan Constitution, prohibit the City from financing its fire inspection activities this way. Accordingly, the Court should invalidate the "permit" fees on each of the grounds Plaintiff has raised.

II. THE CITY DOES NOT ADDRESS THE FACT THAT ITS CHARTER DOES NOT AUTHORIZE THE CHARGES

We address the "tax-based" claims in Section V below. But even if the Charges are not "taxes" they still are unlawful because they have been imposed in violation of the City's Charter. If a city's charter does not authorize a type of exaction, that exaction is unlawful. *See Mkt. Place v. Ann Arbor*, 134 Mich. App. 567, 583-85; 351 N.W.2d 607 (1984).

In *Mkt. Place*, this Court held that Ann Arbor could not impose a "transient trader" license fee because the fee was an "excise tax" that its charter prohibited. In reaching this decision, the Court observed:

> We read the special charter authority and ordinance promulgated under it as limiting the city's authority to impose license fees on transient businesses only. The city council passed a transient trader ordinance imposing a fee on new businesses that intended to remain in Ann Arbor only *after* the city adopted a charter expressly

> precluding the power to impose such license fees or excise taxes. This expansion on the authority to tax businesses cannot be construed as "retained" authority pursuant to MCL 117.2; MSA 5.2072.
>
> Because the Ann Arbor voters adopted a home rule charter expressly precluding license fees or excise taxes under the city's powers to tax, and because the adoption in 1956 of the home rule charter acted to repeal the transient trader ordinance at issue in this case, the city no longer had the authority to impose such tax. [*Id.*]

Here, the City's Brief utterly ignores Section 9-507 of its Charter. Once again, Section 9-507 provides that "[a]ny 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 Charter thus **requires** City Council approval, which did not occur (see discussion below), and **allows** the imposition of fees for **admission to a facility** or for **providing a service.** *See* Trial Trans., App. Ex. 6, p. 97-98 (City's legislative policy director confirming that Charter Sec. 9-507 allows only two types of fees, for (a) admission to a facility and (b) providing a service). Obviously the Charges were not for "admission . . . to any facility operated . . . by an agency." The City effectively admits the Charges were not for "any service provided, by an agency."

There can be no doubt that Section 9-507 prohibits the "permit" fees at issue here. The ordinance provision the City contends authorizes the "permit fees" expressly provides that any "permit fees" are subject to Section 9-507. Indeed, City ordinance 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].

Plaintiff spent ten pages on this issue in its Brief on Appeal. *See* Pl. Br., pp. 35-46. The City skips over it entirely. This Court must not do the same. **It is not even necessary to address the City's case law or its other arguments, because the City neglected to respond to this dispositive**

point of Plaintiff's appeal. The City cannot lawfully go beyond the scope of authority its Charter allows; the lack of Charter authorization renders the Charges unlawful regardless of whether they are taxes or violate equal protection guarantees.

As Plaintiff discussed in detail in its Brief on Appeal, pp. 42-46, because the Charges are an unlawful exaction under the City's Charter, the City must disgorge the Charges and refund them to Plaintiff. *See, e.g., Bond v. Pub. Sch. of Ann Arbor Sch. Dist.*, 383 Mich. 693, 704; 178 N.W.2d 484 (1970) (holding 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.").

III. A LEGISLATIVE BODY CANNOT RETROACTIVELY AUTHORIZE *ULTRA VIRES* ACTIVITIES, AND THERE IS NO EVIDENCE THAT THE DETROIT CITY COUNCIL EVER INTENDED TO AUTHORIZE THE CHARGES AT ANY TIME PRIOR TO 2021

Downriver Plaza Group v. City of Southgate, 444 Mich. 656, 657; 513 N.W.2d 807 (1994) bears little relation to the present case. In *Downriver Plaza*, the city council had authorized fees, but had not set the amounts. The fees at issue were not truly *ultra vires* like the Charges here, because the **activity of imposing fees** had been authorized, but the **amount of the fees** had not been set. *See, e.g., Ross v. Consumers Power Co.*, 420 Mich. 567, 620 n.33; 363 N.W.2d 641 (1984) ("If the activities in which the governmental agency was engaged when the tort was committed were not expressly or impliedly mandated or authorized by constitution, statute, or other law (i.e., the activities were ultra vires), it cannot thereafter pass a law which would retroactively authorize the activities.").

Here, there is **no evidence** that the City Council ever intended to impose the Charges before May 13, 2021. Mr. Battle testified at trial that the City has been imposing the charges for 35 years. How could the current Council members know what the Council members in 1986 intended? The City's contention that the 1986 Council meant to authorize the Charges is pure speculation. And the failure to authorize **any Charges** is a far cry from authorizing the Charges but neglecting to set the

amounts. This is not the "neglect of some legal formality" as the court described in *Stott v. Stott Realty Co.*, 288 Mich. 35, 47-45; 284 N.W.635 (1939), which the City cites in its Brief, pp. 25 and 28. The present case shows an utter absence of any legal process. The City's May 2021 resolution did not "merely cure defects relating to acts" of the City Council, as the City alleges. Def. Br., p. 28. **There was no "act" that could have been defective. Before May 2021, the City had done nothing whatsoever with respect to the Charges.** For the Court to allow this retroactive authorization would open the door to wholesale retroactive enactment of ordinances across Michigan.

IV. THE CITY'S CITED AUTHORITY DOES NOT DEMONSTRATE THAT THE CHARGES ARE REGULATORY OR PROPORTIONATE UNDER *BOLT*

The City says Plaintiff claims "a charge designed to ensure compliance with a fire code cannot provide a service to a property owner paying such charge." Def. Br., p. 8. That is not Plaintiff's argument. Plaintiff **does** argue that if the City does not actually perform fire safety inspections, collecting the Charges in exchange for the right to do business does not encourage fire safety. If the Charges are fees for an operating permit, as Plaintiff concedes for the purpose of this appeal, then as to properties that do not receive inspections there is no more relationship between the Charges and fire safety than there is between parking meter fees and fire safety.

This Court recognized the principle in *Wheeler v. Charter Twp. of Shelby*, 265 Mich. App. 657, 667; 697 N.W.2d 180 (2005), when it found that the solid waste charge at issue "serves to encourage compliance with the township's waste disposal plan" and therefore "further[s] a permissible regulatory function." The City quotes that language from *Wheeler* in its Brief, p. 8, but it apparently missed this Court's point. Shelby Township's solid waste charges were lawful user fees **because** they influenced behavior, specifically "compliance with the township's waste disposal plan." *See Churchill v. Common Council*, 153 Mich. 93, 95 (1908) (explaining that regulation means "to direct by rule or restriction" the behavior of the people being regulated).

The City also cites *Wolf v. City of Detroit,* 287 Mich. App. 184; 786 N.W.2d 620 (2010) (Def. Br., p. 8), which is a bizarre strategy because the Supreme Court vacated this Court's opinion in *Wolf* and remanded the case for fact finding about the *Bolt* factors:

> On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we VACATE the January 21, 2010 opinion and order of the Court of Appeals. At this time, a material question of fact exists concerning the direct and indirect costs of the services for which the solid waste inspection fee is charged. **Such a finding is necessary to determine whether the City of Detroit's solid waste inspection fee is proportionate to the necessary costs of the inspection service, and may also impact whether the fee serves a revenue-raising or a regulatory purpose.** *See Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 N.W.2d 264 (1998). Accordingly, summary disposition in favor of the defendant was improper. We therefore REMAND this case to the Court of Appeals. Because substantial fact-finding may be necessary, the Court of Appeals should consider a further remand to the circuit court for this purpose. [*Wolf v. City of Detroit*, 489 Mich. 923, 797 N.W.2d 136 (2011) (emphasis added).]

No further appellate opinions issued in *Wolf* and it is improper for the City to rely on this Court's vacated opinion.

The City further argues that *North Star Line, Inc. v. City of Grand Rapids*, 259 Mich. 654; 244 N.W. 192 (1932) stands **only** for the proposition that it is impermissible for a city to charge a fee to regulate an activity that is wholly regulated by the state. Def. Br., p. 9. But that is not *North Star Line*'s only holding – the court also held, as Plaintiff pointed out on p. 24 of its Brief on Appeal – that "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** . . ." *North Star Line*, 259 Mich. at 663 (emphasis added). The City has incurred **zero** expense with respect to properties that did not receive inspections, and thus the Charges are **automatically and necessarily revenue-raising** as to the payers who did not receive inspections.

The City also confuses the cost of the entire fire safety program – "the City's major direct costs incurred in each year", Def. Br., p. 10 – with the cost of performing the inspections. The cost of the

inspections is the "expense involved" under *Vernor v. Sec. of State*, 179 Mich. 157, 164; 146 N.W. 338 (1914), and that is the cost that is "wholly out of proportion" to the aggregate amount of the Charges.

The City argues that the mere right to operate is consideration for the Charges. *See* Def. Br., pp. 11-12. But the permit fees at issue in *Westlake Transp. Inc. v. Pub. Serv. Comm'n*, 255 Mich. App. 589, 612-13; 662 N.W.2d 784 (2003) did not confer only the right to operate trucks, they paid to help relieve traffic congestion, protect and conserve the highways, and provide a host of other benefits to the payers that this Court listed in its opinion. *Id.* at 612 (listing fourteen different benefits). And if the Charges were a payment for the right to operate, they would necessarily bear no relation to the cost of providing any service, because simply allowing a business to operate costs the City nothing, and in fact generates money in the form of tax revenue.

The City is correct that an "incidental public benefit" would not make the Charges disproportionate (Def. Br., p. 12), but the purported benefit here – fire safety – is **primarily** a public benefit. As 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).][1]

[1] *In re Jenny Lynn Mining Co.*, 780 F.2d 585, 588-89 (6th Cir. 1986) (Def. Br., p. 13) is not only non-binding, its application here would eliminate any limits whatsoever on disguised taxes. If the charge at issue truly bestows only the "benefit" of a piece of paper conferring "the privilege of operating a surface mine", such that the benefit **is the piece of paper**, then the entire analysis becomes circular.

The City goes so far as to allege that property owners who pay the Charges are actually paying for fire protection by "funding on a year-by-year basis the regulatory operations of the Fire Prevention Section (which include many activities in addition to inspections) . . ." Def. Br., p. 15. Judge (later Justice) Markman rejected this type of use of funds in his dissent in Bolt in this Court:

> 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. [221 Mich. App. at 98].

The Supreme Court has already rejected the idea of funding the fire department through permit fees.

V. THE SUPREME COURT IN *BOLT* REJECTED THE CITY'S VOLUNTARINESS ARGUMENT

The City contends that the Charges are voluntary because a property owner could simply choose not to operate a business on his or her property, thereby avoiding the Charges. Def. Br., pp. 15-16. The Supreme Court in *Bolt* rejected a nearly identical argument. *Bolt*, 459 Mich. at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). This Court is bound by *Bolt* and must reject the City's argument about changing the use of property to avoid the Charges.

VI. THE CITY FAILED TO PRESERVE ITS GOVERNMENTAL IMMUNITY ARGUMENT

In its Brief, p. 2, the City suggests that this Court should review de novo "the applicability of governmental immunity". But the City did not plead governmental immunity as a defense in its Second Amended Answer dated March 3, 2020 (Exhibit A hereto), nor did the City raise governmental immunity in its Brief in Opposition to Plaintiff's Motion for Summary Disposition (App. Ex. 13) or its

Proposed Findings of Fact and Conclusions of Law (Exhibit B hereto). "A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal." *Napier v. Jacobs*, 429 Mich. 222, 227, 414 N.W.2d 862 (1987); *see also Shah v. State Farm Mut. Auto. Ins. Co.*, 324 Mich. App. 182, 194, 920 N.W.2d 148 (2018) (a party "may not remain silent in the trial court and then hope to obtain appellate relief on an issue that they did not call to the trial court's attention."). This Court should decline to address governmental immunity.[2]

VII. THE CITY FAILS TO REFUTE PLAINTIFF'S ARGUMENT THAT THE CHARGES VIOLATE THE CITY'S ORDINANCES

First, the City is not correct that Plaintiff "attempted to raise two new arguments" at trial. Plaintiff discussed those arguments in the Joint Final Pretrial Order, pp. 3-6, which framed the issues for trial. Second, Plaintiff does not quarrel with the City's contention that "the criterion, by which the reasonableness of the license fee charged is to be gauged, is the cost of investigation, regulation, and control of the business by the municipality." Def. Br., p. 22. The problem for the City is that the City does not incur **any** costs related to "investigation, regulation, and control" **of businesses that do not actually receive inspections.** In contrast to the facts of cases like *Fletcher Oil v. City of Bay City*, 247 Mich. 572, 576-77; 226 N.W. 248 (1929), where the court found that Bay City bore a burden related to "inspection" and "supervision" of gas stations, the City bears no particularized burden unless it actually inspects a property. It merely collects the Charges and goes about its public fire protection activities.

[2] Moreover, the Michigan Supreme Court's decision in *Wright v. Genesee Cty.*, 504 Mich. 410, 419-20; 934 N.W.2d 805 (2019) forestalls any claim of governmental immunity: "Unjust enrichment, by contrast, doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position. . . . Beyond the differences in remedy, unjust enrichment is a cause of action independent of tort and contract liability. Therefore, the plaintiff's claim for unjust enrichment is not a tort action seeking compensatory damages."

Finally, the City cannot change the clear language of the ordinance based on Fire Marshall Battle's opinion of what it means. *See* Def. Br., p. 24. City Ordinance Section 18-1-22, Subsection 1.6.2, allows the Fire Commissioner to "establish necessary fees, with the approval of the City Council, for the cost of . . . (2) issuance of permits and certificates . . ." It is immaterial whether Mr. Battle believes the "cost of issuance of permits" means the **entire cost of the Fire Marshal's Fire Prevention Program**, or indeed whether the Fire Marshal has applied that interpretation for more than 35 years, because the ordinance plainly refers to the **cost of issuing permits**. "A statute that is clear and unambiguous on its face should be enforced as written." *Adler v. Dormio*, 309 Mich. App. 702, 706; 872 N.W.2d 721 (2015).

CONCLUSION

Nothing in the City's Brief on Appeal successfully refutes Plaintiff's arguments in its Brief. In particular, the City ignores the lack of Charter authorization for the Charges, which by itself makes them unlawful. This Court should reverse the Circuit Court's decisions on summary disposition and following trial.

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Date: June 10, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2022, I served the foregoing document on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets

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