STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH RUMAN, DAVID J. PETERS,
and CYNTHIA A. PETERS,
individually and as representatives of a class
of similarly-situated persons and entities,

Plaintiffs,

v.

CITY OF WARREN, MICHIGAN,
a municipal corporation,

Defendant.

Court of Appeals Case No. 364537
Macomb County Circuit Court
Case No. 22-2396-CZ
Hon. Joseph Toia

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PLAINTIFFS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On January 5, 2023, the Circuit Court entered an Opinion and Order granting the motion for summary disposition filed by the City of Warren (the "City") and denying Plaintiff's cross-motion for summary disposition. The January 5, 2023 Opinion and Order adjudicated all claims for and against all parties and therefore constitutes a final order. *See* App. Ex. 1.[1] On January 12, 2023, Plaintiffs/Appellants filed a timely claim of appeal of right pursuant to MCR 7.203(A)(1), which conferred jurisdiction to this Court.

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[1] Exhibits referenced herein are designated as "App. Ex." and are contained in an appendix that Plaintiffs/Appellants are submitting contemporaneously with this brief. Each of the documentary exhibits in the Appendix (except for two of the Circuit Court's orders) were submitted to the Circuit Court in connection with the parties' dispositive motion practice in either this case or the case styled *Bate v. City of St. Clair Shores*, COA Case No. 364536, which was consolidated with this case in the Circuit Court and has been consolidated with this case by this Court for purposes of appeal. Therefore, they are properly part of the record on appeal.

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STATEMENT OF QUESTIONS PRESENTED

1. The Michigan Fire Fighters and Police Officers Retirement Act, MCL 38.551 et seq. ("Act 345") authorizes municipalities to establish police and fire pension plans and to impose taxes to fund their obligations under those plans. The authorized taxes are not subject to the voter approval requirements of the Headlee Amendment to the Michigan Constitution because they were "authorized by law" at the time Headlee was ratified in 1978. *See* Mich. Const. Art. 9, § 31. Are the taxes authorized by Act 345 limited to the amount necessary to fund a municipality's actual annual contributions to its Act 345 pension plan?

Plaintiff answers: Yes.
Defendant will likely answer: No.
The Circuit Court answered: No.
This Court should answer: Yes.

2. In addition to imposing taxes to fund its actual annual contribution to its Act 345 pension plan, the City of Warren (the "City") imposes taxes, purportedly pursuant to its Act 345 taxing authority, that generate revenues that far exceed the amount necessary to fund the City's actual annual contributions to its Act 345 pension plan and therefore those revenues are available to finance City expenses unrelated to the pension plan (the "Excess Taxes"). Does Act 345 authorize the Excess Taxes?

Plaintiff answers: No.
Defendant will likely answer: Yes.
The Circuit Court answered: Yes.
This Court should answer: No.

3. Art. 9, § 31 of the Michigan Constitution provides in pertinent part as follows:

> 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]

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Were the Excess Taxes "authorized by law or charter" as of the date the Headlee Amendment was ratified in 1978?

Plaintiff answers: No.
Defendant will likely answer: Yes.
The Circuit Court answered: Yes.
This Court should answer: No.

4. The Excess Taxes were not authorized by the City's voters. Do the Excess Taxes violate Section 31 of the Headlee Amendment?

Plaintiff answers: Yes.
Defendant will likely answer: No.
The Circuit Court answered: No.
The Court should Answer: Yes.

5. The City uses the Excess Taxes to fund its obligation to provide Other Post-Employment Benefits ("OPEB") (primarily health insurance) to retired police and firemen, which benefits are provided by a separate VEBA trust (the "OPEB Plan"). In order to find that the City's Police and Fire Pension Plan could provide OPEB and impose taxes under Act 345 to fund OPEB, the Circuit Court simply merged the City's Police and Fire Pension Plan with its separate OPEB Plan. See Opinion and Order at p. 4 ("while the respective boards are ostensibly separate legal entities, the degree of common control and joint purpose render them single entities under defendants' control"). Was the Circuit Court authorized to ignore the legal form, substance and defining characteristics of the City's Police and Fire Pension Plan in this manner?

Plaintiff answers: No.
Defendant will likely answer: Yes.
The Circuit Court answered: Yes.
The Court should answer: No.

6. MCL 38.559(2) of Act 345 provides that any tax imposed must **not** exceed the amount necessary to "meet the appropriations" actually made by the municipality under the Act and that the treasurer of the municipality must deposit the "appropriations into the retirement system." The

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Circuit Court concluded that the City was allowed to fund OPEB with Act 345 taxes without citing, much less interpreting, MCL 38.559(2). Did the Circuit Court err by failing to address MCL 38.559(2)?

Plaintiff answers: Yes.
Defendant will likely answer: No.
The Circuit Court answered: No.
The Court should answer: Yes.

7. It is undisputed that the City's OPEB contributions are not deposited into the Police and Fire Pension Plan and that such contributions never become "appropriations" of the Police and Fire Pension Plan. Under such circumstances, can the City's OPEB contributions be funded with Act 345 taxes?

Plaintiff answers: No.
Defendant will likely answer: Yes.
The Circuit Court answered: Yes.
The Court should answer: No.

8. MCL 38.556d provides that a municipality with an Act 345 pension plan "may adopt from time to time benefit programs providing for postretirement adjustments increasing retirement benefits." Is OPEB a "postretirement adjustment" within the meaning of MCL 38.556d?

Plaintiff answers: No.
Defendant will likely answer: Yes.
The Circuit Court answered: Yes.
The Court should answer: No.

9. If OPEB is a "postretirement adjustment" within the meaning of MCL 38.556d, can the City fund OPEB with Act 345 taxes if OPEB is not an obligation of the Police and Fire Pension Plan?

Plaintiff answers: No.
Defendant will likely answer: Yes.
The Circuit Court answered: Yes.
The Court should answer: No.

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10. The Circuit Court concluded that "Plaintiffs Ruman, David Peters and Cynthia Peters acknowledge the Warren Police and Fire Retirement Board of Trustees also serve as the Warren Police and Fire Retirement Health Benefits Plan and Trust Board of Trustees. Defendant St. Clair Shores appoints a majority of its Police and Fire Retirement Board as well as its Police and Fire Retiree Health Care Trust Board. *See also* MCL 38.553 (requiring city treasurer to be custodian of all retirement system funds). **Consequently, while the respective boards are ostensibly separate legal entities, the degree of common control and joint purpose render them single entities under defendants' control**." App. Ex. 1 at p. 4 (emphasis added). Did the Circuit Court err in merging the Police and Fire Pension Plan with the legally-separate OPEB Plan?

Plaintiff answers: Yes.
Defendant will likely answer: No.
The Circuit Court answered: No.
The Court should answer: Yes.

11. The City admits that its Act 345 taxes may not "exceed [the] authorized contribution." *See* App. Ex. 7 at p. 81. Do the City's Act 345 taxes "exceed [the] authorized contribution."?

Plaintiff answers: Yes.
Defendant will likely answer: No.
The Circuit Court answered: No.
The Court should answer: Yes.

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STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

I. INTRODUCTION

Plaintiffs challenge certain property taxes (the "Excess Taxes") imposed by the City that have not been authorized by the City's voters and therefore violate Art. 9, § 31 of the Michigan Constitution (the "Headlee Amendment"), which provides:

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

The City imposes the Excess Taxes under the purported authority of the Michigan Fire Fighters and Police Officers Retirement Act, MCL 38.551 et seq. ("Act 345"). *See* App. Ex. 2.

Act 345 authorizes a municipality to establish a police and fire employee pension plan and grants a municipality limited authority to impose new taxes to fund its obligations under the pension plan. Pursuant to Act 345, the City has established a police and fire pension plan (the "Police and Fire Pension Plan"). Plaintiff contends that under Act 345, a municipality may only impose taxes sufficient to fund the City's **actual annual contributions** to the Act 345 pension plan. *See* MCL 38.559(2).

It is undisputed that the City imposes taxes that generate millions of dollars more than is needed to fund the City's actual annual contributions to the City's Act 345 pension plan. The extra dollars generated by the Excess Taxes are not, in fact, contributed to the Police and Fire Pension Plan and are not used to fund the obligations of the Police and Fire Pension Plan. The City fully satisfies its obligations and has millions of dollars left over.

Given these undisputed facts, this case presents the following single dispositive legal issue: does Act 345 allow the City to impose property taxes which generate revenues **in excess of** the City's actual contributions to its Act 345 pension plan? If the answer is "no," Plaintiffs win because it is undisputed that the taxes the City actually imposes pursuant to its Act 345 taxing authority generate

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revenues that exceed the City's actual annual contributions to its Act 345 pension plan by millions of dollars.

The City's Answer to the Complaint claimed that the Excess Taxes are lawful because they are used by the City to partially fund its financial obligation to provide Other Post-Employment Benefits ("OPEB") – basically, health insurance – for retired police and firemen of the City, which are provided by a fund of the City separate from the Police and Fire Pension Plan. There are many reasons why Act 345 does not authorize taxes to fund OPEB, which are discussed at length in Sections I through V of the Argument section below. But a primary reason is that the City's OPEB obligation is not an obligation of the Police and Fire Pension Plan and therefore funds to cover that obligation are not part of the City's contributions to the Police and Fire Pension Plan, which are the only amounts that can be funded with Act 345 taxes.

In its six-page Opinion and Order, the Circuit Court held that the Excess Taxes did not violate Headlee because the City "may utilize Act 345 to fund [its] retirement health care benefits." App. Ex. 1 at p. 6. The Circuit Court reached this result without even citing, much less interpreting, the provision of Act 345 (MCL 38.559(2)) which specifically defines the limits of a municipality's taxing authority under the Act. Contrary to the Circuit Court's ruling, the Excess Taxes are new taxes that were not authorized by law or charter at the time the Headlee Amendment was ratified in 1978, and therefore violate Section 31 of the Headlee Amendment because they were not approved by the City's voters.

II. STATEMENT OF UNDISPUTED FACTS

A. THE RELEVANT PROVISIONS OF ACT 345

Any Michigan municipality with a paid or part-paid fire or police department can create a police and fire pension board (the "Pension Board") in order to come under Act 345, provided it

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obtains voter approval to adopt the provisions of Act 345. In this regard, MCL 38.561 provides in pertinent part as follows:

> At any time after this act shall become effective, any city, village or municipality having a paid or part paid fire or police department, may come under the provisions of this act and create a pension board hereunder by submitting the same to the electors of any such city, village or municipality at any regular or special election for adoption, in the manner provided by law for amending charters: Provided, that this act shall not become effective until the beginning of the next succeeding fiscal year after such adoption of the provisions of this act by any city, village or municipality. …

See Complaint (App. Ex. 3) and City's Answer (App. Ex. 4) at para. 12.

Once approved by the municipality's voters, the Act allows a municipality to impose property taxes to finance its obligations under the Act. MCL 38.559(2) sets forth the conditions the municipality must comply with in order to impose such taxes:

> (2) **For the purpose of creating and maintaining a fund for the payment of the pensions and other benefits payable as provided in this act, the municipality, subject to the provisions of this act, shall appropriate, at the end of such regular intervals as may be adopted, quarterly, semiannually, or annually, an amount sufficient to maintain actuarially determined reserves covering pensions payable or that might be payable on account of service performed and to be performed by active members, and pensions being paid to retired members and beneficiaries**. The appropriations to be made by the municipality in any fiscal year shall be sufficient to pay all pensions due and payable in that fiscal year to all retired members and beneficiaries. The amount of the appropriation in a fiscal year shall not be less than 10% of the aggregate pay received during that fiscal year by members of the retirement system unless, by actuarial determination, it is satisfactorily established that a lesser percentage is needed. **All deductions and appropriations shall be payable to the treasurer of the municipality and he or she shall pay the deductions and appropriations into the retirement system.** Except in municipalities that are subject to the 15 mill tax limitation as provided by section 6 of article IX of the state constitution of 1963, **the amount required by taxation to meet the appropriations to be made by municipalities under this act shall be in addition to any tax limitation imposed upon tax rates in those municipalities by charter provisions or by state law subject to section 25 of article IX of the state constitution of 1963**. [Emphasis added.]

See Complaint and Answer at ¶ 13.

Act 345 further prescribes mandatory actions that must be taken by the Pension Board in order to utilize the taxing provisions of MCL 38.559(2). For example, MCL 38.552(4) requires the Pension Board to "certify to the governing body of the city, village, or municipality the amount to be

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contributed by the city, village, or municipality as provided in this act." MCL 38.552(8) further requires the Pension Board to "disburse the pensions and other benefits payable under this act." Thus, in order to be "benefits" under Act 345, the Pension Board must certify to the City's Council the amounts of the benefits to be contributed by the City and must further actually disburse the benefits.

Thus, while MCL 38.559 authorizes additional property taxes, those taxes are subject to the following strict limitations:

- Any tax imposed must **not** exceed the amount necessary to "meet the appropriations" actually made by the municipality under the Act;
- The municipality's "appropriations" must be **only** for "the payment of the pensions and other benefits payable as provided in this act;"
- MCL 38.552(4) requires the Pension Board to "certify to the governing body of the city, village, or municipality the amount to be contributed by the city, village, or municipality as provided in this act.";
- MCL 38.552(8) requires the Pension Board to "disburse the pensions and other benefits payable under this act."; and
- The treasurer of the municipality must deposit the "appropriations into the retirement system."

Given that Act 345 allows only taxes for "the payment of the pensions and other benefits payable as provided" in the Act, it is necessary to identify what those other benefits are. On this point, Section 6 of the Act, MCL 38.556, sets forth with great specificity the benefits that a municipality can provide under the Act. That section provides in pertinent part as follows:

> (1) Age and service retirement benefits payable under this act are as follows: …
>
> (e) **Upon retirement from service as provided in this subsection, a member shall receive a regular retirement pension payable throughout the member's life of 2% of the member's average final compensation multiplied by the first 25 years of service credited to the member, plus 1% of the member's average final compensation multiplied by the number of years, and fraction of a year, of service rendered by the member in excess of 25 years**. A municipality under this act, upon approval of the legislative body or the electors of the municipality, may increase the percentage of the payment from 2% up to a maximum of 2.5%. If an increase is approved, the increase shall not be reduced for members under the system at the time of the increase. The legislative body may also increase the percentage of employee contributions. **If a retired member dies before the total of regular pension payments received by the member equals the total of the member's contributions made to the retirement system, the difference between**

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the member's total contributions and the total of the member's regular retirement pension payments received shall be paid in a single sum to the person or persons the member nominates by written designation duly executed and filed with the retirement board. If there is not a person or persons surviving the retired member, the difference, if any, shall be paid to the retired member's legal representative or estate. [App. Ex. 2 (emphasis added).]

In addition to pension payments, Act 345 also authorizes certain death and disability payments to plan participants or surviving family members. *See, e.g.*, MCL 38.556(2). These death and disability payments are the only "other benefits payable as provided" in this Act. MCL 38.559(2). Thus, a municipality's "appropriations" under Act 345—*i.e.*, the amounts that can be paid through Act 345 taxes—are limited to the amounts necessary to fund pension, death and disability payments provided by the Act 345 pension plan.

B. THE CITY'S IMPOSITION OF EXCESS TAXES THAT ARE NOT AUTHORIZED BY ACT 345.

The City employs actuaries to determine the annual "appropriations" it must make to the Police and Fire Pension Plan. The City's consistent policy and practice since at least 2020 has been to make annual contributions to the Police and Fire Pension Plan in the precise amounts determined by the actuaries. *See* App. Ex. 5, the City's financial statements for the fiscal year ending June 30, 2021 at p. 82.

In the fiscal year ending June 30, 2021, the City made contributions to the Police and Fire Pension Plan in the amount of $11,884,923. *See* App. Ex. 5 at pp. 56 and 82. The City's adopted budget for the fiscal year ending June 30, 2022 provided for **$12,314,726** in contributions to the Plan. *See* App. Ex. 6 at pp. 117, 122 ($7,634,880 for police and $4,679,846 for fire). Assuming the "Retirement Fund" line items in the Police and Fire Budgets accurately set forth the City's appropriations to the Police and Fire Pension Plan, these amounts represent the maximum amounts necessary to "meet the appropriations" the City has made under Act 345, and therefore are the

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maximum amounts that the City may fund through taxes imposed pursuant to its Act 345 taxing authority.

The City admits that the Act 345 taxes may not "exceed [the] authorized contribution." *See* App. Ex. 7 at p. 81. In the fiscal year ending June 30, 2021, however, the City, purportedly relying upon its Act 345 taxing authority, imposed 4.9848 mills in property taxes in the total amount of $17,421,000, which taxes generated $5,136,274 in revenues beyond the limits provided by Act 345. *See* App. Ex. 5 at p. 32. The revenues of the total tax levy that exceed the Act 345 limits constitute Excess Taxes.

In the fiscal year ending June 30, 2022, the City, purportedly relying upon its Act 345 taxing authority, imposed 4.9848 mills in property taxes in the total amount of **$18,082,437**, which taxes generated **$5,767,711** in revenues beyond the limits provided by Act 345. *See* App. Ex. 8 at p. 18 and App. Ex. 9 (2021 Tax Rate Request). The revenues of the total tax levy that exceed the Act 345 limits constitute Excess Taxes.

The revenues generated by the Excess Taxes are not used to "meet the appropriations" required by Act 345 and therefore the Excess Taxes are not authorized by Act 345. Moreover, because the Excess Tax revenues were used by the City for expenses unrelated to the Police and Fire Pension Fund, the Excess Tax revenues did not become assets of the Police and Fire Pension Plan, as required by Act 345. *See* MCL 38.559 (requiring that "[a]ll deductions and appropriations shall be payable to the treasurer of the municipality and he or she shall pay the deductions and appropriations **into the retirement system**") (emphasis added).

The Excess Taxes are not authorized by the City's charter or by any other Michigan statute or law. As of July 1, 2021, the City was levying the maximum allowable millage levy for general operating purposes. *See* App. Ex. 9 (City's 2021 Tax Rate Request showing levy of "maximum allowable millage

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levy" of 8.4592 mills for general operating purposes). Therefore, the City cannot rely upon any other taxing authority to justify the Excess Taxes.

C. THE CITY'S USE OF ACT 345 TAX REVENUES TO FUND OPEB, WHICH IS NOT PROVIDED BY THE POLICE AND FIRE PENSION PLAN.

The City uses the Excess Taxes to fund OPEB. However, the City's actual Act 345 pension plan, the Police and Fire Pension Plan, does not **in fact** provide OPEB and therefore none of the City's "contributions" to the Police and Fire Pension Plan actually fund – or could even potentially fund – OPEB. The City states that the Police and Fire Pension Plan is "a single-employer defined benefit pension plan" that provides only "retirement, disability and death benefits." *See* App. Ex. 5 at p. 55. All of the benefits provided by the Fund are **payments** of either retirement pension, disability or death benefits. None of the benefits are OPEB – *i.e.*, health insurance benefits.

On the other hand, OPEB benefits are provided by a completely separate fund of the City:

> The City of Warren Police and Fire Retirement Health, Life and Disability Benefits Plan and Trust is a single-employer public employee voluntary employee benefit association trust administered by the City of Warren Police and Fire Retirement System.
> The trust is created for the exclusive purpose of funding health, life and disability benefits for substantially all police and fire retirees of the City. [App. Ex. 5 at p. 48.]

The OPEB Plan "provides health care and vision benefits for retirees and their dependents. Benefits are provided partially through a third-party insurer and partially through the City's self-insurance plan, and the full cost of the benefits is covered by the Plan and Trust." *See* App. Ex. 10 (2021 financial statements for the OPEB Fund) at p. 8.

The City admits that its OPEB Plan is separate from the Police and Fire Pension Plan. *See* App. Ex. 5 at p. 32. The OPEB Plan is separate from the Police and Fire Pension Plan for a good reason: **it is required by law to be separate**. In this regard, Act 345 mandates that **all** police and firemen be covered by the Police and Fire Pension Plan. *See* MCL 38.562(1) ("The membership of the retirement system created by a municipality affected by this act shall include **each police officer**

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and fire fighter employed by a municipality") (emphasis added). Given this requirement, in order for the OPEB Plan to be part of the Police and Fire Pension Plan, all police and firemen would have to be included in OPEB Plan, but that is not the case. The OPEB Plan "is closed to new hires" (*see* App. Ex. 11 at p. 5), and only includes policemen hired before July 1, 2005 and firemen hired before October 13, 2009. *Id.* at p. 6.

The City's OPEB obligations are paid in the first instance by the City's General Fund, which is then reimbursed by the OPEB Plan. *See* App. Ex. 10 at p. 8 (the "City processes the payments to the insurance company for medical benefits, and, as of December 31, 2021, the Plan and Trust reported benefits payable due to the City of $4,764,570"). Significantly, the City's Ordinances require the City's contributions to the OPEB Plan (which include the Excess Taxes) be deposited into the OPEB Plan and used exclusively to provide the OPEB benefits under the OPEB Plan. *See* City Ordinance Sec. 25-401(1) (requiring the City to pay to the OPEB Plan "an amount consistent with actuarial valuations and calculations), and Ordinance Section 25-403(a) (requiring that "[a]ll income, profits, contributions, forfeitures, recoveries and any and all monies, securities and properties of any kind at any time received or held by the board of trustees, shall become part of the trust when received, and shall be held for the use and purposes of the trust"). App. Ex. 12. Therefore, the OPEB benefits are not "payable from the funds of the retirement system," – *i.e.*, the Police and Fire Pension Plan – as required by MCL 38.559(5).

The Excess Taxes were not "authorized by law or charter" at the time the Headlee Amendment was ratified in December 1978, and they were not authorized by a majority vote of the City's citizens. *See* App. Ex. 9 (identifying no "date of election" for the Act 345 taxes). Therefore, the

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Excess Taxes have been imposed in violation of the Headlee Amendment.[2]

III. THE PROCEEDINGS IN THE CIRCUIT COURT

A. THE PROCEDURAL HISTORY

Plaintiffs filed their Complaint in the Circuit Court on June 30, 2022, which alleged a single count – that the Excess Taxes violated the Headlee Amendment. On August 29, 2022, Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10), which asked the Court to find and declare that the Excess Taxes violated Headlee. Plaintiff's motion did not ask the Court to determine the remedy for that violation.

In the *Bate* case against St. Clair Shores (which also alleged that that city's Excess Taxes violated the Headlee Amendment), the parties filed cross-motions for summary disposition. The St. Clair Shores motion was based on MCR 2.116(C)(8), while Plaintiff's cross-motion was based on MCR 2.116(C)(10). By an order dated October 11, 2022, the Circuit Court consolidated the cases for purposes of a hearing and decision on all of the then-pending dispositive motions. *See* App. Ex. 13 hereto. The Court conducted an oral argument on all of the motions on November 2, 2022 and, at the conclusion of the hearing, took the motions under advisement.

B. THE CIRCUIT COURT'S JANUARY 5, 2023 OPINION AND ORDER

On January 5, 2023, the Circuit Court issued its Opinion and Order, which granted summary disposition in favor of the City in this case and in favor of St. Clair Shores in the consolidated *Bate* case pursuant to MCR 2.116(C)(10). The Opinion and Order granted the St. Clair Shores motion under (C)(10) even though that city brought its motion only under MCR 2.116(C)(8). The Court

[2] Notably, the City is among only a handful of municipalities with Act 345 pension plans that are abusing their taxing authority under Act 345. Many other municipalities with Act 345 pension plans comply with the dictates of the Act and impose only taxes that are sufficient to fund their annual contributions to their respective Act 345 pension plans. Included among the compliant municipalities are the cities of Sterling Heights, Oak Park, Trenton, Midland, Jackson and Traverse City.

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denied Plaintiff's motion for summary disposition in this case and in the *Bate* case.

First and foremost, **the Circuit Court's Opinion and Order did not address at all the scope of the Act 345 taxing authority established by MCL 38.559(2).** Instead, the Circuit Court relied upon other provisions of Act 345 to ultimately find that "defendants may utilize Act 345 to fund their retirement health care benefits." App. Ex. 1 at p. 6.

To reach this ultimate conclusion, the Circuit Court first merged each city's separate OPEB Plan into its Police and Fire Pension Plan:

> Plaintiffs Ruman, David Peters and Cynthia Peters acknowledge the Warren Police and Fire Retirement Board of Trustees also serve as the Warren Police and Fire Retirement Health Benefits Plan and Trust Board of Trustees. Defendant St. Clair Shores appoints a majority of its Police and Fire Retirement Board as well as its Police and Fire Retiree Health Care Trust Board. See also MCL 38.553 (requiring city treasurer to be custodian of all retirement system funds). **Consequently, while the respective boards are ostensibly separate legal entities, the degree of common control and joint purpose render them single entities under defendants' control**. Compare MCL 38.552(2) and 38.552(8) (allowing a retirement board to retain legal, clerical or other services to disburse pensions and other benefits). Indeed, plaintiffs Ruman, David Peters and Cynthia Peter (sic) recognize the Warren Police and Fire Pension Plan and Other Post-Employment Benefits Plan cover the full cost of the provided health care benefits. [*Id.* at p. 4 (emphasis added).]

The Circuit Court then held that OPEB was a retirement benefit both of the cities were allowed to provide under MCL 38.556d:

> MCL 38.556 provides for the payment of both age and service retirement benefits (i.e., traditional monetary compensation benefits) as well as disability/death benefits. MCL 38.556d also provides a municipality may provide retirement benefits "in any other method considered appropriate." (emphasis added). The provision of health care coverage would come within this plain language. *Id.* at p. 4.

In addition, the Court rejected Plaintiff's argument that the City's Police and Fire Pension Plan could not provide OPEB because Act 345 (MCL 38.562(1)) required the Pension Plan to include all full-time police and firemen in the Pension Plan but the City did not provide OPEB to all retired police and firemen. The Court based this decision on Plaintiffs' alleged failure "to proffer any authority for their argument" and because MCL 38.556e authorized the City to "collectively bargain

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for the closure of retirement health care without violating Act 345 as long as its Police and Fire Pension Plan still covers every police officer and firefighter." *Id.* at p. 5.

Finally, the Circuit Court held that "Act 345 was originally adopted in 1957 (sic) and permitted – without limitation – the imposition of taxes to fund police and fire pensions long before the Headlee Amendment was ratified. MCL 38.556d provides for the same type of tax rather than a new tax and does not change the Act 345's rate authorization." *Id.* at pp. 5-6.

This timely appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

The Circuit Court granted the City's Motion for Summary Disposition and denied the Plaintiff's Motion for Partial Summary Disposition under MCR 2.116(C)(10). When evaluating a motion for summary disposition under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *See Innovation Ventures v. Liquid Mfg.*, 499 Mich. 491, 507, 885 N.W.2d 861 (2016).

Moreover, MCR 2.116(G)(4) provides:

> When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

This Court reviews *de novo* a grant or denial of summary disposition under MCR 2.116(C)(10). *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 159, 934 N.W.2d 665 (2019).

II. SUMMARY OF ARGUMENT

Like all citizens who appreciate the risks and dangers faced by the police officers and fire

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fighters who protect their communities, Plaintiffs endorse the full taxpayer funding of the pension benefits the City has promised to those first responders, and thus have no quarrel with the City's levying of taxes to fund those pension benefits that are authorized by Act 345. Under MCL 38.559(2), however, a municipality may impose taxes in an "amount **required** … **to meet the appropriations** to be made" by the municipality under Act 345 (emphasis added). *See* App. Ex 2. That is why Plaintiff agrees that the City is authorized by Act 345 to impose taxes to finance the contributions that are required to fully fund the City's obligations to provide the generous pension, disability and death benefits to retired police and firefighters under the City's Act 345 "retirement system" (the "Police and Fire Pension Plan").

So why are we here? Because this City went too far. Unlike numerous other municipalities with Act 345 pension plans which faithfully adhere to the explicit tax limitations of Act 345, the City has exceeded its Act 345 taxing authority by imposing Act 345 taxes that generate millions of dollars ***more*** than is needed to fund the City's actual annual contributions—a/k/a "appropriations"–to the Police and Fire Pension Plan. The extra dollars generated by the Excess Taxes are then used to fund the City's financial obligations that are not obligations of the Police and Fire Pension Plan. Specifically, the extra dollars generated by the Excess Taxes are used to fund the financial obligations of a separate City fund to provide OPEB.

Despite the City's effort – which misled the Circuit Court – to complicate the legal analysis, in order to resolve this case, this Court need only determine whether the City's OPEB contributions constitute "appropriations" of the City's Police and Fire Pension Plan. **The Circuit Court did not address this issue, and it completely ignored any analysis of the specific tax limitations set forth in MCL 38.559(2)**. For the reasons discussed below, the OPEB contributions are not "appropriations" of the Police and Fire Pension Plan as a matter of law, and therefore those taxing limitations destroy each and every ground for upholding the Excess Taxes which is set forth in the

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Circuit Court January 5, 2023 Opinion and Order.

III. THE EXCESS TAXES VIOLATE THE HEADLEE AMENDMENT BECAUSE THE TAXES WERE NOT "AUTHORIZED BY LAW" IN 1978 AND WERE NOT SUBSEQUENTLY APPROVED BY A MAJORITY OF THE CITY'S VOTERS.

A. THE REQUIREMENTS OF THE HEADLEE AMENDMENT

"The Headlee Amendment added Sections 25 through 34 to Article 9 of the Michigan Constitution." *Michigan Ass'n of Home Builders v. Troy*, 504 Mich. 204, 208 n. 3, 934 N.W.2d 713 (2019). Section 25 of the Amendment dictates that "[p]roperty taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval." Mich. Const. Art. 9, Sec. 25. In *Waterford School Dist. v. State Bd. of Ed.*, 98 Mich. App. 658, 663, 296 NW2d 328 (1980), this Court observed that: "[t]he Headlee Amendment grew out of the spirit of 'tax revolt' and was designed to place specific limitations on state and local revenues. The ultimate purpose was to place public spending under direct popular control."

This case specifically concerns Art. 9, § 31 of the Michigan Constitution, which provides in pertinent part as follows:

> 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]

"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 that was not authorized by law or charter in December 1978 and is imposed without voter approval "unquestionably violates" § 31. *Bolt v. City of Lansing,* 459 Mich. 152, 158 (1998).

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B. Taxes Authorized By Act 345 Are Not Subject To The Voter Approval Requirement Of Headlee

The Headlee Amendment excludes from the voter approval requirement any tax "authorized by law or charter" at the time Headlee was ratified in December 1978. Therefore, any tax **authorized** by Act 345 is not subject to voter approval because the Act 345 taxing authority existed before December 1978.

The Supreme Court has held that "[t]he plain language of art 9, Sec. 31, excludes from its scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified." *American Axle & Mfg., Inc. v. Hamtramck*, 461 Mich. 352, 362, 604 N.W.2d 330 (2000). In *American Axle*, 461 Mich. at 357, the Supreme Court approved a line of Section 31 cases from this Court standing for the proposition "that the Headlee exemption of taxes authorized by law when the section was ratified permits the levying of previously authorized taxes even where they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date."

The Court of Appeals has observed that Act 345 "authorizes a municipality to collect property taxes … for the purpose of **supporting a firefighters and police officers pension system**." *Kinder Morgan Mich., LLC v. City of Jackson*, 277 Mich. App. 159, 161, 744 N.W.2d 184 (2007) (emphasis added). Therefore, the taxes the City imposes and collects **to cover its actual annual contributions to the Police and Fire Pension Plan** are lawful because they were "authorized by law" at the time the Headlee Amendment was ratified in December 1978.

The last amendment to MCL 38.559 prior to the 1978 ratification of Headlee occurred in 1951. *See* App. Ex. 14. At that time, the MCL 38.559 contained the following tax authorization:

> (2) … Except in cities that are subject to the 15 mill tax limitation as provided by article 10, section 21 of the state constitution, **the amount required by taxation to meet the appropriations to be made by cities, villages and municipalities under this act shall be in addition to any tax limitation imposed upon tax rates in such cities, villages**

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> **and municipalities by charter provisions or by state law**. [Exhibit 6 hereto (emphasis added)]

In *American Axle*, the concurring judge expressly recognized that the taxes authorized by Act 345 were the type of taxes that were exempt from Headlee because such taxes were "authorized by law or charter" in 1978. *See American Axle*, 461 Mich. at 372 (Corrigan, J, concurring) ("Legislature has also authorized a tax to fund **pensions** for police and firefighters, MCL 38.559(2); MSA 5.3375(9)(2), and provided that, except in municipalities subject to the fifteen-mill limitation under the constitution, the amount required by taxation to meet appropriations 'shall be in addition to any tax limitation imposed upon tax rates in those municipalities by charter provisions or by state law,' subject to Const. 1963, art 9, Sec. 25.") (emphasis added)

The Circuit Court erroneously concluded that because Act 345 authorized **some** taxes, the City had pre-Headlee authorization to impose the Excess Taxes. Opinion and Order at pp. 5-6. For the reasons discussed below, however, this authorization does not save the Excess Taxes, which constitute new taxes outside of the scope of the Act 345 taxing authority and which were not approved by the City's voters.

C. MCL 38.559(2) Must Be Read To Authorize Only Those Taxes "Required" to "Meet The Appropriations" The City Actually Makes To Its Police and Fire Pension Plan.[3]

Fortunately for this Court, the taxing authority is clearly defined by the clear and unambiguous terms of MCL 38.559(2). Again, the penultimate sentence of that provision authorizes **only** those taxes "required" to "meet the appropriations" the City makes to the Police and Fire Pension Plan.

[3] The arguments in this Section III.C were preserved in Plaintiffs' Brief in Support of Plaintiffs' Motion for Summary Disposition submitted in Circuit Court Case No. 22-2396-CZ ("Plaintiff's Warren MSD Brief") at pp. 9-10 and in Plaintiffs' Reply Brief in Support of Plaintiff's Motion for Partial Summary Disposition (Plaintiff's Warren Reply Brief) at pp. 4-5.

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The transitive verb "meet" is commonly defined as[4] (1) "to conform to especially with exactitude and precision," (2) "to pay fully: SETTLE", and (3) "to provide for." The Michigan courts have held that an "appropriation" is "[t]he act by which the legislative department of government designates a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of government expenditures, or to some individual purchase or expense." *County Road Assn v. Board of State Canvassers*, 89 Mich. App. 299, 304, 279 N.W.2d 334 (1979) (quoting Black's Law Dictionary (4th Ed) p. 131). Collectively, then, the phrase "meet the appropriations" requires the taxes to be **equivalent to** – i.e., no less than and no more than – the amounts that the City has designated as contributions to the Police and Fire Pension Plan.

The Supreme Court's decision in *American Axle & Mfg., Inc. v. Hamtramck*, 461 Mich. 352, 362, 604 N.W.2d 330 (2000) – upon which the City relies to support its Headlee "preauthorization" argument – confirmed that taxes authorized by statutes are limited for Headlee Amendment purposes to those required to satisfy the financial obligations identified in the statute. In *American Axle*, the Supreme Court held that the Judgment Levy Act (MCL 600.6093(1)) (the "JLA") constituted Headlee pre-authorization for a tax the city imposed to pay a court judgment. Like MCL 38.559(2), however, the JLA contains a limitation on the amount of the tax that can be imposed – *i.e.,* the tax is limited to the amount needed to pay the underlying judgment. *See* MCL 600.6093(1). The Supreme Court recognized that MCL 600.6093(1) "**places a limit on the amount of the tax by requiring the addition of 'the total amount of the judgment' to existing taxes**." 461 Mich. at 359, n. 5 (emphasis added). In other words, the taxing authority of the JLA was limited to the amount required to satisfy

[4] Merriam-Webster Dictionary. https://www.merriam-webster.com/dictionary/meet Sections (4) (5) and (7). It is well-established that when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined. *People v. Perkins*, 473 Mich. 626, 639, 703 N.W.2d 448 (2005). A court's reliance on dictionary definitions assists the goal of construing undefined terms in accordance with their ordinary and generally accepted meanings. *People v. Morey*, 461 Mich. 325, 330-331, 603 N.W.2d 250 (1999).

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the underlying judgment. Accordingly, there is no doubt that, if the judgment *in American Axle* was $1 million but the City of Hamtramck imposed additional taxes in the amount of $2 million under the authority of the JLA, the amount above the judgment amount would be unlawful because it was not "authorized by law or charter."

Similarly, in this case, MCL 38.559(2) "places a limit on the amount of the tax" by requiring the tax to not exceed the amount required to "meet the appropriations" to the Police and Fire Pension Fund. Because the Excess Taxes are an amount of taxes the City imposes beyond the amount required to "meet the appropriations," the Excess Taxes are not authorized by law or charter. Stated simply, the tax imposed must be equivalent to the tax authorized, and the undisputed facts here show that the tax the City imposes is far in excess of the tax authorized by Act 345.

Consider the following alternate illustration of the taxing limitations. If, instead of limiting the Act 345 taxes to the amount required to meet the City's appropriations to the Police and Fire Pension Fund, the Legislature had simply said prior to 1978 that a "municipality is authorized to levy a property tax not to exceed 2 mills for purposes of funding the municipality's obligations under this Act," the municipality would be limited to a 2 mill property tax and could not, for example, levy 3 mills. If the municipality did levy 3 mills, the extra one mill (like the Excess Taxes here) would not be within the scope of the Act 345 tax authority and would be unlawful, even though the 2-mill portion of the property tax was "authorized by law" at the time Headlee was ratified in 1978. In short, the 2-mill limit in the illustration is legally no different than the "meet the appropriations" limit in MCL 38.559(2) – *i.e.,* both are a measure of the limits imposed on the **amount** of the authorized tax.

Having established the limits on the City's authority to tax under Act 345, we turn next to the issue of whether the taxes the City has imposed pursuant to its Act 345 taxing authority exceed those limits. For the reasons described in the next section, the Excess Taxes clearly exceed the City's Act 345 taxing authority because, among other things, none of the Excess Taxes are used to "meet" the

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City's actual "appropriations" to the Police and Fire Pension Plan.

D. THE EXCESS TAXES ARE NOT AUTHORIZED BY ACT 345 OR ANY OTHER LAW AND THEREFORE VIOLATE HEADLEE BECAUSE THEY WERE NOT APPROVED BY A MAJORITY OF THE CITY'S VOTERS.[5]

The City's use of its Act 345 taxing authority to finance obligations unrelated to its obligations under the Police and Fire Pension Plan constitutes a clear violation of Headlee. The checks provided by Headlee are particularly warranted here, where Act 345 allows a municipality to impose unlimited taxes, so long as those taxes are used to meet the municipality's actual annual "appropriations" to its Act 345 pension fund. The courts must be vigilant that this broad power is not used in an attempt to solve other municipal financing difficulties by establishing millage rates that allow a municipality to not only cover its actual "appropriations" to its Act 345 pension fund but also cover unrelated expenses. That is precisely what the City is doing here.

1. The Excess Taxes Are Not Within The City's Act 345 Taxing Authority Because They Are Not Used To Meet The City's "Appropriations" Under Act 345.

This case turns on whether the provisions of Act 345 limit the taxes authorized by the Act to those sufficient to "meet the appropriations" made to the Police and Fire Pension Plan. "The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself." *Book-Gilbert v. Greenleaf*, 302 Mich. App. 538, 541, 840 N.W.2d 743 (2013) (citation omitted). When doing so, courts are to "giv[e] each and every word its plain and ordinary meaning unless otherwise defined." *Id.* "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v. City of Burton*, 493 Mich. 303, 311, 831 N.W.2d 223 (2013).

[5] The arguments in this Section III.D.1 and D.2 were preserved in Plaintiff's Warren MSD Brief at pp. 10-14

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Here are the reasons the Excess Taxes are prohibited by the clear and unambiguous provisions of Act 345:

First and foremost, the only tax authorized by Act 345 is a tax that generates the "amount required … to meet **appropriations**" under the Act. MCL 38.559(2) (emphasis added). The City admits that the Act 345 taxes may not "exceed [the] authorized contribution." *See* App. Ex 7.

Second, the municipality's "appropriations" to the Act 345 pension plan must be **only** for "the payment of the pensions and other benefits payable as provided in this act" and the appropriations must be paid "into the retirement system." MCL 38.559(2). The Excess Taxes are **not** paid into the Police and Fire Pension Plan, a critical fact which we further address below.

Third, Act 345 requires a board of an Act 345 pension plan to "[c]ertify to the governing body of the city, village, or municipality the amount to be contributed by the city, village, or municipality as provided in this act" (MCL 38.552(4)) and to "[d]isburse the pensions and other benefits payable under this act." MCL 38.552(8). The board of the Police and Fire Pension Plan does not certify OPEB contributions or disburse the OPEB contributions.

Fourth, Act 345 specifically sets forth the methodology a retirement board must apply in order to determine the necessary "appropriations." Indeed, the Supreme Court has held that the "Legislature has established a standard for arriving at an appropriate sum to be paid to the retirement board" to fund a municipality's obligations under Act 345. *Shelby Township Police & Fire Retirement Bd. v. Shelby Township,* 438 Mich. 247, 256, 475 N.W.2d 249 (1991).

In *Shelby Township*, the Court held:

> The provisions [of Act 345] mandate that the board hire an actuary and then certify to the municipality an amount that covers current service costs as well as unfunded accrued liabilities. The express provisions of MCL 38.552(2), (4); MSA 5.3375(2)(2), (4), read in conjunction with MCL 38.559(2); MSA 5.3375(9)(2), clearly establish the authority and describe the methodology necessary for the board to make an actuarial determination of the funds needed to maintain the retirement system. [438 Mich. at 257-258.]

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The *Shelby Township* Court ultimately summarized the obligations of an Act 345 pension board to satisfy its funding obligations as follows:

> We conclude that MCL 38.559(2); MSA 5.3375(9)(2) mandates the township to annually contribute to the retirement system **an actuarially determined amount**, which will ensure that funds are available to cover pensions earned by active members for services to be performed (in the current year) earned by active members for services already performed, and actual pensions to be paid to retirees. [438 Mich. at p. 264 (emphasis added).]

Fifth, consistent with MCL 38.552 and MCL 38.559, the board of the Police and Fire Pension Plan has retained actuaries who determine the annual amounts the City must contribute to the Pension Plan in order to meet its obligations under Act 345. In its most recent financial statements, the City stated:

> Article 9, Section 24 of the State of Michigan Constitution requires that financial benefits arising on account of employee service rendered in each year to be funded during that year. Accordingly, the pension board retains an independent actuary to determine the annual contribution. The actuarially determined rate is the estimated amount necessary to finance the costs of benefits earned by plan members during the year with an additional amount to finance any unfunded accrued liability. … [App. Ex. 5 at p. 56.]

The retained actuaries "crunch the numbers" and calculate the amounts the City is required to contribute to "finance the costs of benefits earned by employees during the year, with an additional amount to finance any unfunded accrued liability."

Sixth, the City contributes to the Police and Fire Pension Plan the **exact amount** of the appropriations its actuaries determine are required under Act 345. *See* App. Ex. 5 at p. 82 (showing annual actual contributions equal to the "actuarially determined contribution" since 2020); *id* at p. 56 ("For the year ended June 30, 2021, the City contributed $11,884,923, which equals the actuarial determined calculation.")

Seventh, the City did not impose taxes solely to "meet the appropriations" it actually made to the Police and Fire Pension Plan. Instead, the City imposed taxes which generated millions of dollars more than the amounts required to meet those "appropriations."

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The City's budget for the fiscal year ending June 30, 2022 provided for **$12,314,726** in contributions to the Police and Fire Pension Plan. *See* App. Ex. 6 at pp. 117, 122 ($7,634,880 for police and $4,679,846 for fire). In the fiscal year ending June 30, 2022, however, the City, purportedly relying upon its Act 345 taxing authority, imposed 4.9848 mills in property taxes in the total amount of **$18,082,437**, which taxes generated **$5,767,711** in revenues beyond the limits provided by Act 345. *See* App. Ex. 8 at p. 18 and App. Ex. 9 (2021 Tax Rate Request). The revenues of the total tax levy that exceed the Act 345 limits constitute Excess Taxes.

The revenues generated by the Excess Taxes are not used to "meet the appropriations" required by Act 345 and therefore the Excess Taxes are not authorized by Act 345. Moreover, because the Excess Tax revenues were used by the City for expenses unrelated to the Police and Fire Pension Plan, the Excess Tax revenues did not become assets of the Police and Fire Pension Plan, as required by Act 345. *See* MCL 38.559 (requiring that "[a]ll deductions and appropriations shall be payable to the treasurer of the municipality and he or she shall pay the deductions and appropriations **into the retirement system**") (emphasis added).

2. The Excess Taxes Are Not Authorized By Act 345 Even If The City Is Using The Revenues To Fund Its OPEB Obligation

While it does not matter what activities and expenses of the City are funded by the Excess Taxes, the City claims that it has used the Excess Taxes to partially fund its obligation to provide something called Other Post-Employment Benefits ("OPEB") – basically, health insurance – to retired police and fire employees. *See* Answer (App. Ex. 4) at paras. 2, 5, 11, 17-18, 36-37. Even if this is the case, however, the Excess Taxes are still illegal.

First, Act 345 does not authorize an Act 345 pension plan to provide OPEB to members of the plan. *See* MCL 38.556. The "pensions and other benefits payable as provided in this act" consist solely of pensions (MCL 38.556(1)), disability (MCL 38.556(2)) and death benefit (*id.*) payments. Thus,

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a municipality's "appropriations" under Act 345 – *i.e.*, the amounts that can be paid through the taxes authorized by Act 345 -- necessarily do not include amounts to fund OPEB.

Second, the City's actual Act 345 pension plan, the Police and Fire Pension Plan, does not **in fact** provide OPEB and therefore none of the City's "contributions" to the Police and Fire Pension Plan actually fund – or could even potentially fund – OPEB. The City states that the Police and Fire Pension Plan is "a single-employer defined benefit pension plan" that provides only "retirement, disability and death benefits." *See* App. Ex. 5 at p. 55. All of the benefits provided by the Fund are **payments** of either retirement pension, disability or death benefits. None of the benefits are OPEB – *i.e.*, health insurance benefits.

On the other hand, OPEB benefits are provided by a completely separate fund of the City:

> The City of Warren Police and Fire Retirement Health, Life and Disability Benefits Plan and Trust is a single-employer public employee voluntary employee benefit association trust administered by the City of Warren Police and Fire Retirement System.
>
> The trust is created for the exclusive purpose of funding health, life and disability benefits for substantially all police and fire retirees of the City. [App. Ex. 5 at p. 48.]

The OPEB Plan "provides health care and vision benefits for retirees and their dependents. Benefits are provided partially through a third-party insurer and partially through the City's self-insurance plan, and the full cost of the benefits is covered by the Plan and Trust." *See* App. Ex. 10 (2021 financial statements for the OPEB Fund) at p. 8.

The City admits that its OPEB Plan is separate from the Police and Fire Pension Plan. *See* App. Ex. 5 at p. 32. The OPEB Plan is separate from the Police and Fire Pension Plan for a good reason: **it is required by law to be separate**. In this regard, Act 345 mandates that **all** police and firemen be covered by the Police and Fire Pension Plan. *See* MCL 38.562(1) ("The membership of the retirement system created by a municipality affected by this act shall include **each police officer and fire fighter employed by a municipality**") (emphasis added). Given this requirement, in order for the OPEB Plan to be part of the Police and Fire Pension Plan, all police and firemen would have

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to be included in OPEB Plan, but that is not the case. The OPEB Plan "is closed to new hires" (*see* App. Ex. 11 at p. 5), and only includes policemen hired before July 1, 2005 and firemen hired before October 13, 2009. *Id.* at p. 6.

The OPEB benefits provided by the City clearly **cannot** be the type of benefits that fall within Act 345. The OPEB benefits simply are not obligations of the Police and Fire Pension Fund, which are the only obligations that can be financed through "appropriations" under Act 345. Moreover, the OPEB benefits are not even paid to pension fund participants: they are paid by the City to third parties. *See* App. Ex. 11 at p. 8. Indeed, the City's ordinances prohibit the OPEB Plan from making payments to members of the Plan. *See* City Ordinance Sec. 25-403(c) (App. Ex. 12) (providing that "[n]o one participating in the plan shall be entitled to receive any part of the contributions made by the city or payments required to be made by the trust in lieu of benefits provided under the plan").

Third, the OPEB Benefits provided by the separate OPEB Plan cannot be deemed benefits provided by the Police and Fire Pension Plan because Act 345 mandates that all benefits provided by an Act 345 pension plan must be paid out of the Plan itself. In this regard, MCL 38.559(5) provides:

> (5) All pensions allowed and payable to retired members and beneficiaries under this act **shall become obligations of and be payable from the funds of the retirement system**. [emphasis added].

The City's OPEB obligations are paid in the first instance by the City's General Fund, which is then reimbursed by the OPEB Plan. *See* App. Ex. 10 at p. 8 (the "City processes the payments to the insurance company for medical benefits, and, as of December 31, 2021, the Plan and Trust reported benefits payable due to the City of $4,764,570"). Significantly, the City's Ordinances require the City's contributions to the OPEB Plan (which include the Excess Taxes) be deposited into the OPEB Plan and used exclusively to provide the OPEB benefits under the OPEB Plan. *See* City Ordinance Sec. 25-401(1) (requiring the City to pay to the OPEB Plan "an amount consistent with actuarial valuations and calculations), and Ordinance Section 25-403(a) (requiring that "[a]ll income,

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profits, contributions, forfeitures, recoveries and any and all monies, securities and properties of any kind at any time received or held by the board of trustees, shall become part of the trust when received, and shall be held for the use and purposes of the trust"). App. Ex. 12. Therefore, the OPEB benefits are not "payable from the funds of the retirement system," as required by MCL 38.559(5).

Fourth, MCL 38.559(2) requires that "[a]ll deductions and appropriations shall be payable to the treasurer of the municipality and he or she shall pay the deductions and appropriations **into the retirement system**" (emphasis added). Because the Excess Taxes which fund OPEB are not deposited into the Police and Fire Pension Plan, they obviously cannot be part of the "appropriations" of the Police and Fire Pension Plan. And since Act 345 authorizes taxes only to cover "appropriations," the Excess Taxes are not authorized by Act 345.

Finally, separate and apart from the clear and unambiguous language of Act 345, OPEB benefits are not "pension" benefits as a matter of law. *See, e.g., Studier v. Michigan Public Schools Employees Retirement Bd.*, 472 Mich. 642, 654-655, 698 N.W.2d 350 (2005) (distinguishing health care benefits from traditional pension benefits on the grounds that, among other things, health care benefits did not constitute "payments for past services" and, unlike pension payments, did not "increase or grow over time" based upon "the number of years of service"). *See also* MCL 38.2803(n) and (o) (distinguishing "Retirement Health Benefit" from "Retirement Pension Benefit").

3. The Michigan Legislature Rejected A Proposed Amendment To Act 345 That Would Have Authorized Taxes To Fund OPEB[6]

Because MCL 38.559(2) does not explicitly authorize an Act 345 pension plan to provide OPEB, much less fund its OPEB obligations through Act 345 taxes, the best the City can hope for is

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[6] The arguments in this Section III.D.3 were preserved in briefing submitted in the consolidated case against St. Clair Shores, Circuit Court Case No 22-002395-CZ. Specifically, this argument was preserved in plaintiff's Brief in Opposition to Defendant's Motion for Summary Disposition (the "SCS Opposition Brief") at pp. 6-9.

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that the Court deems the statute ambiguous on these points. If the Court reaches that conclusion, the Court may consider extrinsic evidence of the Legislature's intent, such as legislative history. The Michigan Supreme Court "has recognized the benefit of using legislative history when a statute is ambiguous and construction of [the] ambiguous provision becomes necessary." *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich. 109, 115 n.5, 659 N.W.2d 597 (2003).

Here is the City's problem: to the extent that the Court consults interpretive aids like legislative history to discern whether a municipality can provide OPEB through an Act 345 pension plan and fund its OPEB with the taxes authorized by MCL 38.559(2), the best indication of the Legislature's intent in this regard is provided by the Legislature's rejection of two bills introduced in 2017 which would have authorized an Act 345 pension plan to fund its OPEB obligations with Act 345 taxes. The Legislature's rejection of this proposed authorization confirms that the Legislature did not intend to extend the limited Act 345 taxing authority to include OPEB obligations.

Notably, both the House and the Senate bills contained the exact language which would have authorized Act 345 pension plans to fund OPEB with Act 345 taxes. The proposed revised language of MCL 38.559(2) was as follows:

> (2) For the purpose of creating and maintaining a fund for the payment of the pensions and other benefits payable as provided in this act, the municipality, subject to ~~the provisions of~~ this act, shall appropriate, at the end of such regular intervals as may be adopted, quarterly, semiannually, or annually, an amount sufficient to maintain actuarially determined reserves covering pensions payable or that might be payable ~~on account~~ **BECAUSE** of service performed or to be performed by active members, and pensions being paid to retired members and beneficiaries. The appropriations to be made by the municipality in any fiscal year ~~shall~~ MUST be sufficient to pay all pensions due and payable in that fiscal year to all retired members and beneficiaries **AND SUFFICIENT TO PAY THE NORMAL COSTS OF ANY RETIREMENT HEALTH BENEFITS PROVIDED BY THE RETIREMENT SYSTEM TO ITS MEMBERS, RETIRED MEMBERS, AND BENEFICIARIES IN THE AMOUNT REQUIRED UNDER SECTION 4(1)(E) OF THE PROTECTING LOCAL GOVERNMENT RETIREMENT AND BENEFITS ACT OR TO MAKE THE OTHER PAYMENTS REQUIRED FOR THE RETIREMENT SYSTEM IN A CORRECTIVE ACTION PLAN UNDER THE PROTECTING LOCAL GOVERNMENT AND RETIREMENT BENEFITS ACT**. The amount of the appropriation in a fiscal year shall **MUST** not be less than 10% of the aggregate pay received

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> during that fiscal year by members of the retirement system unless by actuarial determination, it is satisfactorily established that a lesser percentage is needed. All deductions and appropriations ~~shall~~ **MUST** be payable to the treasurer of the municipality and he or she shall pay the deductions and appropriations into the retirement system. Except in municipalities that are subject to the 15 mill tax limitation as provided by section 6 of article IX of the state constitution of 1963, the amount required by taxation to meet the appropriations to be made by the municipalities under this act ~~shall~~ **MUST** be in addition to any tax limitation imposed ~~upon~~ **ON** tax rates in those municipalities by charter provisions or by state law subject to section 25 of article IX of the state constitution of 1963. **A TAX LEVIED UNDER THIS SUBSECTION MUST BE USED ONLY BY THE MUNICIPALITY LEVYING THE TAX FOR PURPOSES AUTHORIZED UNDER THIS SUBSECTION AND MUST NOT BE ATTRIBUTED OR TRANSMITTED TO OR RETAINED OR CAPTURED BY ANY OTHER GOVERNMENTAL ENTITY FOR ANY OTHER PURPOSE**. [House Bill No. 5306 (November 30, 2017) (App. Ex. 15); Senate Bill 695 (November 30, 2017) (App. Ex. 16) (emphasis in original)]

Ultimately, however, the Legislature rejected the proposed changes to MCL 38.559(2), which included the expanded tax authorization and which would have become part of the Protecting Local Government Retirement and Benefits Act. *See* App. Ex. 17.[7]

Where a statute is unclear or unambiguous, the Michigan courts have recognized that this type of "legislative history" – *i.e.,* the Legislature's rejection of language in a statute that would have supported a party's proposed interpretation of the statute – unquestionably resolves the ambiguity in favor of the opposing party. For example, in *People v. Petrella*, 424 Mich. 221, 380 N.W.2d 11 (1985), the Court rejected an argument that a statute required the prosecution to establish that defendant inflicted "serious personal injury" or "extreme mental anguish," because the words "serious" and "extreme" were in earlier versions of the bill that became the statute but were removed by the Legislature before enacting the statute. The Court observed:

> The legislative intent of the present statute is apparent from its legislative history. The original Senate Bill (SB 1207) used the terms "serious personal injury" and "extreme mental

[7] The only part of the original bills that became law was the addition of Section 2a (MCL 38.552a) to Act 345 which merely provides that "[a] retirement board under this Act, a retirement system under this act, and a city, village or municipality that is the custodian of funds of a retirement system under this act shall comply with any applicable requirements under the protecting local government retirement and benefits act." *Id.*

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anguish." The initial House substitute for SB 1207 eliminated the adjective "serious" from personal injury and changed "extreme mental anguish" to "severe mental anguish." Later, the word "severe" was struck from the bill and an amendment to reinsert this term was defeated. Therefore, the clear legislative intent was that any personal injury or any mental anguish suffice. This is noted in *People v. Gorney, supra*, 207, fn. 5. *People v. Adamowski*, 340 Mich. 422, 429, 65 N.W.2d 753 (1954), holds that courts should not, without clear and cogent reason, give a statute a construction the Legislature plainly refused to give. [424 Mich 221, 243 n 1.]

The decision the *Petrella* Court relied upon, *People v. Adamowski*, 340 Mich. 422, 429, 65 N.W.2d 753 (1954), applied this principle more emphatically as follows:

> **When the legislature affirmatively rejected the statutory language which would have supported the State's present view, it thereby made its intention crystal clear.** We should not, without a clear and cogent reason to the contrary, give a statute a construction which the legislature itself plainly refused to give. This Court said in Wayne County v. Auditor General, 250 Mich. 227, 235, in construing an act for the distribution of highway funds, that:
> "The legislative history of the 1927 act reveals the fact that while it was pending in the legislature, a proposed amendment was rejected which, if embodied in the act, would have rendered it subject to plaintiff's interpretation and not to that of the defendant. * * * Surely this gives rise to the inference that the legislature did not intend the act should be subject to the interpretation now urged by plaintiff." [*Adamowski*, 340 Mich. at 429 (emphasis added)].[8]

This legislative history is devastating to the City's core defense. Simply, if Act 345 already authorized an Act 345 pension plan to provide OPEB and fund its OPEB liabilities through Act 345 taxes, there would have been no need to amend MCL 38.559(2) to provide that authorization. Because

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[8] More recently, in *In re Certified Question*, *supra*, 468 Mich. at 115 n 5, the Michigan Supreme Court observed:

> **Clearly of the highest quality is legislative history that relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent with respect to an ambiguous statutory provision. Examples of legitimate legislative history include** actions of the Legislature intended to repudiate the judicial construction of a statute, see, e.g., *Detroit v. Walker*, 445 Mich. 682, 697, 520 N.W.2d 135 (1994), or **actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted**. *See, e.g., Miles ex rel. Kamferbeek v. Fortney*, 223 Mich. 552, 558, 194 N.W.605 (1923). From the former, a court may be able to draw reasonable inferences about the Legislature's intent, even when the Legislature has failed to unambiguously express that intent. **From the latter, by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted**. [emphasis added].

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both the Senate and House proposed bills that would have authorized municipalities to use Act 345 tax dollars to fund OPEB, it is clear that both the Senate and House believed that the version of Act 345 that existed in 2017 (and still exists today) prohibited the use of Act 345 tax dollars for that purpose. Because the Legislature "affirmatively rejected the statutory language which would have supported" the City's current interpretation, the Court may not give MCL 38.559(2) "a construction which the legislature itself plainly refused to give." *Adamowski*, 340 Mich. at 429.

IV. THE CIRCUIT COURT ERRED IN MERGING THE LEGAL SEPARATE POLICE AND FIRE PENSION PLAN WITH THE OPEB PLAN.[9]

Recognizing that OPEB contributions cannot be deemed part of the "appropriations" that can be covered by Act 345 taxes if the contributions are not made to the Police and Fire Pension Plan, the City contends that its Act 345 taxes "fund the activities" of a single board – the "Police and Fire Retirement Commission" – which administers all "retirement benefits earned by the City's first responders." City's Br. at pp. 2-3. The Circuit Court accepted this argument, concluding that "while the respective boards are ostensibly separate legal entities, the degree of common control and joint purpose render them single entities under defendants' common control." By simply merging the two plans, however, the Circuit Court's Opinion and Order lawlessly ignores the legal form, substance and defining characteristics of the Police and Fire Pension Plan and the clear and unambiguous language of Act 345.

For the reasons discussed below, Act 345 and the City's own actions and conduct prohibit the Court from combining the Pension Plan and the OPEB Plan in order to authorize Act 345 taxes to fund OPEB.

[9] The arguments in this Section IV.A and B were preserved in Plaintiff's Warren Reply Brief at pp. 2-4.

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A. **THE CITY'S SINGLE "COMMISSION" ARGUMENT IS LEGALLY IRRELEVANT TO WHETHER THE EXCESS TAXES ARE AUTHORIZED BY ACT 345.**

First, the single "Commission" argument accepted by the Circuit Court is essentially based upon the assertion that the same six board members who administer the Pension Plan also administer the OPEB Plan. But this common board membership is legally irrelevant because, as the City's own ordinances make clear, there are two separate plans administered by two distinct "Boards," one for the Police and Fire Pension Plan and one for the OPEB Plan (a/k/a the "VEBA Trust"):

> The police and fire retirement board of trustees authorized by sec. 16.1 of the City Charter and as composed pursuant to Public Act 345 of 1937, as amended, is hereby authorized to serve as the board of trustees for the VEBA trust entitled the City of Warren Police and Fire Retirement Health Benefits Plan and Trust. [City Ordinance Sec. 25-411(b).[10] *See also*, App. Ex. 19, Financial Report for the City's Police and Fire Retirement System and App. Ex. 20, Financial Report for the City's Police and Fire Retirement Health Benefits Plan.]

The Circuit Court clearly erred by concluding that the Police and Fire Pension Plan and the OPEB Plan were a "single entit[y]" simply because the same people were on the two boards. The Circuit Court cited no law in support of its novel conclusion. To the contrary, it is a well-established principle of law that separate legal entities must be respected as such, even where they have the same owners or boards. *See, e.g., Carol J. Lockhart Revocable Trust v. Paramount Enters. Land, LLC,* 2022 Mich. App. LEXIS 2850 at **15-16 (2022) (App. Ex. 22) ("Intervening plaintiffs are correct that PED and PEL are distinct entities that cannot be treated as interchangeable merely because they have common ownership").

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[10] Not only is the City's single "Commission" argument an irrelevancy, but admissions by the City confirm that, in fact, there is not a "single commission" which administers both the Pension Plan and the OPEB Plan, but instead two separate "commissions." In this regard, on April 29, 2022, Jennifer Essenmacher, a "Police and Fire Administrator" of the City, sent a memo to the Warren City Council "on behalf of the Police & Fire Retirement Commission and the Police & Fire Health Trust Commission." *See* App. Ex. 21. Ms. Essenmacher's memo confirms that the "Police & Fire Retirement Commission" administers the Police and Fire Pension Plan and that the separate "Police & Fire Health Trust Commission" administers the OPEB Plan.

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B. Even If The Same "Commission" Administers Both Plans, That Fact Cannot Save The Excess Taxes

In any event, the legality of the Excess Taxes is in no way dependent upon whether the City has a single "Commission" to administer both the Pension Plan and the OPEB Plan. This is true at least the following reasons, which have been addressed in this Brief:

1. The City has created a separate legal entity – a VEBA trust – to provide OPEB and the City's argument would require the Court to ignore that separation; *see infra* at p. 35.
2. Act 345 requires the City treasurer to pay all "appropriations" into the Police and Fire Pension Plan (MCL 38.559(2)), but it is undisputed that the OPEB contributions never become assets of the Police and Fire Pension Plan; *supra* pp. 8-9; 22-23 and *infra* pp. 44-46.
3. The City's own Ordinances confirm that the OPEB contributions cannot be part of the Act 345 "appropriations" because those contributions are deemed trust funds of the separate OPEB Plan. *See, e.g.,* City Ordinance Sec. 25-403(a) (providing that "[a]ll income, profits, contributions, forfeitures, recoveries and any and all monies, securities and properties of all kind at any time received or held by the board of trustees, shall become part of the trust when received, and shall be held for the use and purposes of the trust"). Indeed, Ordinance Section 25-403(b) mandates that "the trust assets shall not be used for or diverted to purposes other than to provide the health, life and disability benefits contemplated under the plan." *See supra* at pp. 24-28.
4. The OPEB Benefits provided by the separate OPEB Plan cannot be deemed benefits provided by the Police and Fire Pension Plan because Act 345 mandates that all benefits provided by an Act 345 pension plan must be paid out of the Plan itself. See MCL 38.559(5) ("All pensions allowed and payable to retired members and beneficiaries under this act **shall become obligations of and be payable from the funds of the retirement system**.") (emphasis added). *See supra* p. 27.[11]
5. The "appropriations" must be **"[f]or the purpose of creating and maintaining a fund for the payment of the pensions and other benefits payable as provided in"** Act 345 (MCL 38.559(2) (emphasis added), but Act 345 does not authorize the Police and Fire Pension Plan to provide OPEB and the Police and Fire Pension Plan does not in fact provide OPEB; *supra* p. 26.
6. The board of the Pension Fund must "disburse the pensions and other benefits payable under this act" (MCL 38.552(8)) and it is undisputed that the Pension Fund board does not disburse OPEB benefits. *See supra* p. 23.

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[11] The City acknowledges and understands that the separate Police and Fire Pension Plan cannot fund OPEB. *See* App. Ex. 23 (Police and Fire Retirement System Annual Report dated December 30, 2020, which provides: "The only disbursements from this trust are to members who are retired or disabled, beneficiaries of members, members who receive contribution refunds and for Retirement System expenses.") Clearly, the Police and Fire Retirement System cannot properly fund OPEB because OPEB payments are made to third-parties and not members of the Pension Plan.

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7. Act 345 mandates that the Plans be separately maintained because MCL 38.562(1) requires that "[t]he membership of the retirement system created by a municipality affected by this act shall include **each police officer and fire fighter** employed by a municipality." [Emphasis added.] Given this requirement, the City's OPEB Plan cannot be considered part of the Pension Plan because the OPEB Plan does not include "each police officer and fire fighter employed" by the City; *supra* p. 26-27.
8. The City's obligation to contribute to the Pension Plan is created by Act 345, but the City's obligation to contribute to the OPEB Plan was created by City Ordinance. *See supra,* pp. 25-28.

C. Catastrophic Consequences Would Occur If The Police and Fire Pension Plan Were Deemed To Be Providing OPEB Because, Under Such Circumstances Both Plans Would Lose Their Tax-Exempt Status.[12]

While Plaintiff does not bear the burden to demonstrate why the City maintains this separation, it is clear that the Plans must be legally separate in order to allow each Plan to be "qualified" under the Internal Revenue Code and thereby enable the City and Plan participants to receive certain tax benefits. This is made clear by the provisions of the Code (and associated regulations) governing VEBAs and pension plans which are summarized in Plaintiffs' Supplemental Initial Disclosures (App. Ex. 24).

1. The OPEB Plan Cannot Provide Pension Benefits

The OPEB Plan is a VEBA Trust established by the City under Section 501(c)(9) of the Internal Revenue Code. In its Ordinances, the City: (1) states that "[t]he Internal Revenue Code, section 501(c)(9) exempts from taxation voluntary employees' beneficiary associations (VEBA) which provide health, life and accident benefits to its members," (2) establishes the OPEB Plan as a VEBA trust, and (3) declares that the OPEB Plan "shall be irrevocable and shall conform to all applicable provisions of the Internal Revenue Code." City Ordinance Section 25-400. App. Ex. 12.

Section 501(c)(9) of the Internal Revenue Code creates a tax exemption for VEBAs which satisfy each of the following requirements:

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[12] The arguments in this Section IV.C were preserved in Plaintiffs' Warren Reply Brief at p. 4 and Exhibit 2 thereto. discussion at pp. 20-32 (Plaintiffs' Supplemental Initial Disclosures).

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(9) Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual. For purposes of providing for the payment of sick and accident benefits to members of such an association and their dependents, the term "dependent" shall include any individual who is a child (as defined in section 152(f)(1) [26 USCS Sec. 152(f)(1)] of a member who as of the end of the calendar year has not attained age 27.

Under IRS regulations and prevailing case law, <u>a VEBA is **not** tax-exempt if it provides pension benefits or pension-like benefits</u>. In this regard, 26 CFR 1.501(c)(9)-3 provides that "other benefits" authorized by Section 501(c)(9) include "only benefits that are similar to life, sick or accident benefits." The regulation provides in pertinent part:

(d) Other benefits. **The term other benefits includes only benefits that are similar to life, sick, or accident benefits**. A benefit is similar to a life, sick, or accident benefit if:

(1) It is intended to safeguard or improve the health of a member or a member's dependents, or

(2) It protects against a contingency that interrupts or impairs a member's earning power. …

(f) Examples of nonqualifying benefits. **Benefits that are not described in paragraphs (d) or (e) of this section are not other benefits**. Thus, other benefits do not include the payment of commuting expenses, such as bridge tolls or train fares, the provision of accident or homeowner's insurance benefits for damage to property, the provision of malpractice insurance, or the provision of loans to members except in times of distress (as permitted by § 1.501(c)(9)-3(e)). Other benefits also do not include the provision of savings facilities for members. **The term other benefits does not include any benefit that is similar to a pension or annuity payable at the time of mandatory or voluntary retirement, or a benefit that is similar to the benefit provided under a stock bonus or profit-sharing plan. For purposes of section 501(c)(9) [**26 USCS § 501(c)(9)**] and these regulations, a benefit will be considered similar to that provided under a pension, annuity, stock bonus or profit-sharing plan if it provides for deferred compensation that becomes payable by reason of the passage of time, rather than as the result of an unanticipated event**. Thus, for example, supplemental unemployment benefits, which generally become payable by reason of unanticipated layoff, are not, for purposes of these regulations, considered similar to the benefit provided under a pension, annuity, stock bonus or profit-sharing plan. [Emphasis added.]

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Relying upon this regulation, at least two courts have held that a VEBA is not entitled to a 501(c)(9) tax exemption where the VEBA provided "pension-like" benefits. In *Lima Surgical Assoc., Inc. VEBA Trust v. United States*, 20 Cl. Ct. 674 (U.S. Court of Claims 1990), the Court held that, because the VEBA paid benefits that were a form of deferred compensation akin to non-qualifying pension benefits, the VEBA was not tax-exempt under Section 501(c)(9):

> The statute, echoed by the regulations, specifies that a VEBA may provide for the "payment of life, sick, accident, or other benefits" to its members. 26 U.S.C. Sec. 501(c)(9); 26 C.F.R. Sec. 1.501(c)(9)-1(c). Lima Trust's Plan provides that its benefits are payable upon an employee's "termination of employment with the Employer for any reason," unless the termination results from the employee's death or discharge for certain causes. While this provision is referred to as "severance," Lima Trust acknowledges that it is payable upon an employee's retirement as well as termination for other reasons. In the tax year in question, Ms. Gertrude Goodwine, one of the four support staff employees, retired. She received benefit payments from Lima Trust the following year.
>
> **No argument has been made that the severance payments provided under the Plan qualify as life, sick, or accident benefits. The dispute, then, turns on whether they qualify as "other benefits."** The Commissioner in his regulations, 26 C.F.R. Sec. 1.501(c)(9)-3(d), states that the term "includes only benefits that are similar to life, sick, or accident benefits. A benefit is similar to a life, sick, or accident benefit if…it is intended to safeguard or improve the health of a member or a member's dependents, or… it protects against a contingency that interrupts or impairs a member's earning power." He gives various examples of qualifying benefits, such as vacation benefits, subsidizing athletic programs and child care.
>
> The Commissioner also spells out examples of what does not qualify – examples include commuting expenses and malpractice insurance. Prominent in the list of nonqualifiers is "any benefit that is similar to a pension or annuity payable at the time of mandatory or voluntary retirement. …" Further says the Commissioner, "a benefit will be considered similar to that provided under a pension [or] annuity . . . plan if it provides for deferred compensation that becomes payable by reason of the passage of time, rather than as a result of an unanticipated event." The reason for this position is understandable. Another part of the tax law, subchapter D, section 401 *et seq.* of title 26, provides in detail for deferred compensation plans, and includes extensive restrictions governing vesting, nondiscrimination, and other aspects of qualified retirement plans. These restrictions are not applicable to a VEBA.
>
> The Commissioner supports this policy by reference to the legislative history of VEBAs, going back to the Revenue Act of 1928, ch. 852, § 103, 45 Stat. 791, 812. He argues that the Treasury Regulations' exclusion of retirement benefits from the definition of permissible "other benefits" represents a reasonable construction of the statute, one that has been sustained by the courts. … He notes that this construction

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> is consistent with the principle of *ejusdem generis*, and is supported by the Congress' elaborate scheme for deferred compensation and retirement plans.
>
> In this case, the taxpayer acknowledges that retirement is one of the several types of terminations that will trigger benefits under the Plan. The trial judge found that one of the important purposes of the Plan is to pay benefits to eligible members upon their retirement. **As in a pension or annuity plan, the benefits are computed based on the employee's salary and length of service. The record reflects that the only participant to obtain benefits under the Plan did so upon retirement. And it is not irrelevant that when the Plan was adopted and the trust created pursuant thereto, the Employer ended its previously-existing pension plan. We agree with the trial judge that "the Plan in issue here, by paying retirement benefits as part and parcel of its alleged severance pay plan, is *both* organized and operated to provide nonqualifying benefits**." *Lima Surgical*, 20 Cl. Ct. at 685. [emphasis added].

The Court reached the same conclusion in *Bricklayers Ben. Plans, Inc. v. Commissioner*, 81 T. C. 735 (U.S. Tax Ct. 1983). There, the Court gave the following rationale for concluding that a plan providing pension benefits could not qualify as a tax-exempt VEBA under Section 501(c)(9):

> The regulations define "other benefits" to include benefits which either safeguard or improve the health of an employee or protect him in case of an unexpected interruption in his ability to work. Sec. 1.501(c)(9)-3(d), Income Tax Regs. Assuming, as the parties agree, that "other benefits" include only benefits that are similar to life, sick, or accident benefits, this strikes us as a reasonable interpretation of the statute.
>
> **Consistent with this interpretation, section 1.501(c)(9)-3(f), as well as section 1.501(c)(9)-3(b), Income Tax Regs., excludes associations providing for the payment of pension benefits from the coverage of section 501(c)(9) since pension benefits do not safeguard or improve an employee's health or provide protection against unexpected events. Pension benefits become payable by reason of the passage of time, not as the result of an unanticipated event. Their receipt after retirement is an expected occurrence, and they are not intended to safeguard or protect against interruptions in an employee's ability to earn a living. On this basis, we conclude that the regulations reasonably exclude associations providing for the payment of pension benefits from qualifying for tax-exempt status under section 501(c)(9).**
>
> This conclusion is certainly consistent with the fact that Congress has specifically provided tax-exempt status for qualified pension trust funds under section 401(a). Although three of petitioner's member funds were qualified pension trust funds under section 401(a), petitioner is an association of pension and welfare funds, not a qualified pension fund. We doubt Congress intended that such an association providing pension benefits which could not achieve tax-exempt status under section 401(a) could nevertheless qualify for tax-exempt status under the far less stringent requirements of section 501(c)(9). To hold otherwise would effectively undermine

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> congressional efforts in this area to ensure that pension plans do not discriminate against any group of employees. [emphasis added].

If the City's OPEB Plan were deemed to be part of the Pension Plan, the OPEB Plan would forfeit its tax exemption under Section 501(c)(9). Under such circumstances, the financial consequences would be catastrophic. Fortunately, the City's OPEB Plan does **not** provide pension benefits and the City has expressly required that the OPEB Plan "shall conform to all applicable provisions of the Internal Revenue Code." City Ordinance Sec. 25-400. Indeed, Section 25-414 of the City's Ordinance provides in pertinent part as follows:

> The plan and trust shall be tax exempt and shall qualify under the Internal Revenue Code, Section 501(c)(9), and any amendments of the Code applicable to plans of this type. **The trustees shall take no action nor make any determination inconsistent with any qualification or ruling of the Internal Revenue Service, an arbitrator or the courts with respect to the trust**. The trustees shall have the continuing duty to propose to the city amendments to this article to the extent it becomes necessary to qualify said plan and trust under the Internal Revenue Code and to continue the tax exempt status of the trust. [Emphasis added.]

2. The Pension Plan Cannot Provide OPEB

Similarly, if the City's Pension Plan actually provided OPEB, the Pension Plan would become "unqualified" under the Internal Revenue Code, and therefore not be entitled to the tax exemptions and other benefits of a "qualified" pension plan.

26 U.S.C. Sec. 401(a) ("Section 401(a)") authorizes and states the requirements for tax-exempt trusts created for the exclusive purpose of providing pension and other benefits for retired employees. The associated federal regulation, 26 C.F.R. Sec. 1.401-1(a)(2)(i), states that Section 401(a) "prescribes the requirements which must be met for qualification [as a tax-exempt entity] of a trust forming part of a pension . . . plan." [Emphasis added.]

Municipal pension plans are made subject to the Section 401 qualification requirements by virtue of Section 414(d), which provides in pertinent part:

> **(d) Governmental plan**

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> For purposes of this part, the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing….

A "qualified" pension plan is entitled to significant tax benefits. In this regard, IRC Section 501(a) provides that "[a]n organization described in subsection (c) or (d) of Section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503." Moreover, the contributions an employer makes to a "qualified" pension plan on behalf of its employees are not part of its employees' taxable income.

In order to be a "qualified" pension plan, the City's Police and Fire Pension Plan cannot provide OPEB to retired police and fire fighters. This is made clear by the federal regulations which implement Section 401. The applicable regulation, 26 U.S.C. Sec. 1.401-1, provides in pertinent part as follows:

> **§ 1.401-1 Qualified pension, profit-sharing, and stock bonus plans.**
>
> **(a)** ***Introduction.***
>
> **(1)** Sections 401 through 405 relate to pension, profit- sharing, stock bonus, and annuity plans, compensation paid under a deferred-payment plan, and bond purchase plans. Section 401(a) prescribes the requirements which must be met for qualification of a trust forming part of a pension, profit-sharing, or stock bonus plan.
>
> **(b)** ***General rules.*** (1)(i) A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. … **However, a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses (except medical benefits described in section 401(h) as defined in paragraph (a) of Sec. 1.401-14)**. [Emphasis added]

Under Section 401 of the Internal Revenue Code, if the City's Police and Fire Pension Plan provided OPEB benefits, the Plan would not be a "qualified" plan unless the Plan satisfied the requirements of Section 401(h). Section 401(h) of the Code permits a pension plan to provide for the payment of benefits for medical expenses of retired employees, their spouses, and their dependents,

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but <u>only</u> if certain provisions are met. Section 401(h) of the Code provides in pertinent part:

> **(h) MEDICAL, ETC., BENEFITS FOR RETIRED EMPLOYEES AND THEIR SPOUSES AND DEPENDENTS.** Under regulations prescribed by the Secretary, and subject to the provisions of section 420, a pension or annuity plan may provide for the payment of benefits for sickness, accident, hospitalization, and medical expenses of retired employees, their spouses and their dependents, but only if—
> **(1) such benefits are subordinate to the retirement benefits provided by the plan**, … [emphasis added].

26 CFR 1.401-14 further defines the requirements that a pension plan must meet in order to provide OPEB to plan participants, including the "subordination" requirement. That regulation provides in pertinent part as follows:

> **(c)** Requirements. The requirements which must be met for a qualified pension or annuity plan to provide medical benefits described in section 401(h) [26 USCS Sec. 401(h)] are set forth in subparagraphs (1) through (5) of this paragraph.
> **(1) Benefits.**
> **(i)** The plan must specify the medical benefits described in section 401(h) [26 USCS Sec. 401(h)] which will be available and must contain provisions for determining the amount which will be paid. Such benefits, when added to any life insurance protection provided for under the plan, must be subordinate to the retirement benefits provided by such plan. … **The medical benefits described in section 401(h) [26 USCS Sec. 401(h)] are considered subordinate to the retirement benefits if at all times the aggregate of contributions (made after the date on which the plan first includes such medical benefits) to provide such medical benefits and any life insurance protection does not exceed 25 percent of the aggregate contributions (made after such date) other than contributions to fund past service credits.** [emphasis added]**.**

Here, if the City's Police and Fire Pension Plan actually provided OPEB benefits, the Pension Plan could not be a qualified plan under Section 401(h) because the OPEB benefits are clearly not "subordinate" to the "retirement benefits." Indeed, the City's financial statements for FY 2004 (when the OPEB Plan was adopted) through FY 2021 confirm that the City's historical OPEB contributions have been more than **50%** of the total contributions. *See* App. Ex. 24 at p. 31.

The bottom line is this: if the City's Police and Fire Pension Plan provided OPEB benefits, the Plan would not be a "qualified" plan under Section 401(a) of the Code. If the Plan were not a "qualified" plan under Section 401(a), it would not be tax-exempt under Section 501(a) of the Code.

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One of several consequences of the Plan losing its qualified status is set forth in Section 402(b) of the Code, which provides in pertinent part as follows:

> **(b) TAXABILITY OF BENEFICIARY OF NONEXEMPT TRUST**
>
> **(1) CONTRIBUTIONS**
>
> **Contributions to an employees' trust made by an employer during a taxable year of the employer which ends with or within a taxable year of the trust for which the trust is not exempt from tax under section 501(a) shall be included in the gross income of the employee in accordance with section 83** (relating to property transferred in connection with performance of services), except that the value of the employees' interest in the trust shall be substituted for the fair market value of the property for purposes of applying such section. [Emphasis added]

In other words, if the Pension Plan were not "qualified," all of the contributions the City has made to the Pension Plan on behalf of the members of the Plan would be taxable to those members. Fortunately for the City, the Pension Plan does not provide OPEB Benefits, and therefore the Plan is not in jeopardy of losing its qualified status under Section 401(a) on this basis. Unfortunately for the City, because the Pension Plan does not provide OPEB, the City cannot finance its OPEB obligations through Act 345 taxes.

V. THE CIRCUIT COURT ERRED BY CONCLUDING THAT THE CITY COULD PROVIDE OPEB UNDER MCL 38.556d AND FINANCE THAT OBLIGATION THROUGH ACT 345 TAXES[13]

The City's Answer (App. Ex. 4) focused its defense of this case on MCL 38.556d, which provides as follows:

> Sec. 6d. A municipality, by ordinance or in another manner provided by law, may adopt from time to time benefit programs providing for postretirement adjustments increasing retirement benefits. Such benefit programs may provide for 1-time post retirement percentage increases in retirement benefits; annual or other periodic postretirement percentage increases in retirement benefits; lump sum postretirement distributions, or any other method considered appropriate by the municipality. The retirement benefit payable after making an adjustment pursuant to the benefit program adopted shall be the new retirement benefit payable until the next adjustment, if any, is made.

[13] The arguments made in this Section V were preserved in Plaintiffs' Warren MSD Brief at pp. 17-20.

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The City claims that the Excess Taxes are lawful because the OPEB benefits constitute "postretirement adjustments increasing retirement benefits" within the meaning of MCL 38.556d and therefore the City can impose unlimited property taxes to fund those increased benefits. *See* Answer at paras. 16-18; 36-37. The Circuit Court erroneously concluded that that "the provision of health care coverage would come within this plain language." Opinion and Order at p. 4.

This Court should reject the Circuit Court's finding for at least **five** independently-dispositive reasons, each of which is discussed below.

A. THE EXCESS TAXES ARE NOT AUTHORIZED BECAUSE THEY ARE NOT PAID INTO THE POLICE AND FIRE PENSION PLAN BUT INSTEAD ARE DEPOSITED INTO THE SEPARATE VEBA TRUST (A/K/A THE OPEB PLAN), WHICH IS NOT SUBJECT TO ACT 345.

First and foremost, Act 345 prohibits the Excess Taxes because they are not used to finance "appropriations" into the Police and Fire Pension Fund. Again, in this regard, MCL 38.559(2) provides in pertinent part that: "All deductions and appropriations shall be payable to the treasurer of the municipality and he or she **shall pay** the deductions and **appropriations** into the retirement system."

It is undisputed that the City's OPEB contributions that are funded by the Excess Taxes are **not** deposited into the Police and Fire Pension Fund. Instead, as the City's Ordinance Section 25.403 (App. Ex. 12) confirms, the OPEB contributions funded substantially with the Excess Taxes are required to be deposited into the OPEB Fund, and, once deposited, the funds cannot be used for any other purpose.

B. OPEB IS NOT A "RETIREMENT BENEFIT" WITHIN THE MEANING OF MCL 38.556d.

Further, any "postretirement adjustments" under MCL 38.556d must increase the "retirement benefits" authorized by Act 345. But there is nothing in Act 345 that authorizes an Act 345 pension

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plan to provide OPEB as a "retirement benefit." Indeed, as noted above, the only "retirement benefits" identified in Act 345 are "retirement, death and disability" benefits.

Moreover, the additional retirement benefits authorized by Act 345 must be paid to the member of the Pension Plan. *See* MCL 38.556d ("The retirement benefit **payable** after making an adjustment pursuant to the benefit program adopted shall be the new retirement benefit **payable** until the next adjustment, if any, is made.") Here, the City pays the funds contributed to the OPEB Plan to third party insurers. *See* Exhibit 11 hereto at p. 8. Indeed, as noted above, the City's Ordinances prohibit the City from paying money to any member of the OPEB Plan. City Ordinance Sec. 25-403©. Indeed, this is one of the characteristics of OPEB benefits that separates those benefits from "pension" benefits. *Studier*, *supra*, 472 Mich. at 654-55.

C. THE CITY'S POLICE AND FIRE PENSION FUND DOES NOT PROVIDE OPEB.

Further, even if "postretirement adjustments" to "retirement benefits" could legally become the obligation of an Act 345 pension plan, it is undisputed that the OPEB obligation in fact is not an obligation of the City's Police and Fire Pension Plan but instead is an obligation of the OPEB Plan, a separate VEBA trust.

D. OPEB IS NOT A "PENSION" BENEFIT AND ACT 345 ALLOWS THE CITY TO IMPOSE PROPERTY TAXES ONLY TO FUND THE CITY'S CONTRIBUTIONS FOR "PENSION" BENEFITS.

Further, even if the OPEB benefits constituted a "postretirement adjustment increasing retirement benefits" within the meaning of MCL 38.556d, the City is still precluded from financing those benefits through the Act 345 taxes because MCL 38.559 specifically authorizes municipalities to impose property taxes only to finance "pension" contributions. In this regard, the statute makes a distinction between "pensions" and "other benefits payable" under the Act:

> (2) For the purpose of creating and maintaining a fund for the payment of the **pensions and other benefits** payable as provided in this act, the municipality, subject to the provisions of this act, shall appropriate, at the end of such regular intervals as may be adopted, quarterly, semiannually, or annually, an amount sufficient to maintain actuarially determined reserves

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covering **pensions payable or that might be payable on account of service performed and to be performed by active members, and pensions being paid to retired members and beneficiaries**. The appropriations to be made by the municipality in any fiscal year shall be sufficient to pay **all pensions due and payable** in that fiscal year to all retired members and beneficiaries. [MCL 38.559(2) (Emphasis added.)]

E. THE EXCESS TAXES CANNOT BE JUSTIFIED UNDER MCL 38.556D, BECAUSE THAT STATUTORY PROVISION WAS ENACTED AFTER THE HEADLEE AMENDMENT WAS RATIFIED.

Finally, MCL 38.556d cannot justify the Excess Taxes under any circumstances because MCL 38.556d was enacted in 1987, after Headlee was ratified in 1978. *See* App. Ex. 2. Therefore, to the extent that MCL 38.556d could be construed to authorize municipalities to impose taxes which cover "retirement benefits" like OPEB that were not authorized in 1978, those taxes were not "authorized by law or charter" at the time Headlee was ratified.

It is well-established that the Michigan Legislature cannot authorize a "local" tax after Headlee because, as a constitutional amendment, Headlee trumps the Legislature's authority to do so. *See Airlines Parking v. Wayne County*, 452 Mich. 527, 550 N.W.2d 490 (1996). The Excess Taxes clearly are "local" taxes because they are "collected by local government, administered directly by that local entity, and spent by the local government according to local fiscal policy." *Id.* at 536-537. *See also Id.* at p. 544 ("The Headlee Amendment makes the crucial inquiry, for purposes of analyzing tax limitations, the entity responsible for levying the tax").

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CONCLUSION

The Court should reverse the Circuit Court's grant of summary disposition in favor of the City. The Court should remand this matter to the Circuit Court and instruct the Circuit Court to grant Plaintiffs' Motion for Partial Summary Disposition and conduct further proceedings consistent with this Court's ruling.

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STATEMENT OF WORD COUNT

Pursuant to MCR 7.212(B)(3), Plaintiff's counsel states that Plaintiff's brief on appeal contains 15,861 "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).

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2023, 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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